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2024

AUGUST 15, 2024

# Another Bankruptcy Judge Decided that Sub V Classes with No Votes Aren't Accepting

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> Bankruptcy Judge Paul Bonapfel differed with two judges in Houston by holding that a nonaccepting class in Subchapter V means that a plan must be confirmed in cramdown.

Because he writes a leading treatise on bankruptcy, the world listens when Bankruptcy Judge Paul W. Bonapfel speaks.

In an opinion on August 6, Judge Bonapfel, of Atlanta, ruled that a plan with classes of creditors having no votes must be confirmed as a nonconsensual plan.

The debtor proposed a plan with three classes of creditors. Only one class voted in favor of the plan. No one in the other two classes voted. In a class by itself, the Small Business Administration did not vote, and no one among unsecured creditors voted. Quoting Bankruptcy Judge Kesha L. Tanabe, Judge Bonapfel said this "is an example of what one court has rightly characterized as the 'apathetic creditor problem.'"

The debtor had two theories for confirming the plan as a consensual plan under Section 1191(a) despite the lack of votes in two classes.

First, the debtor wanted Judge Bonapfel to believe that a class accepts the plan when no

one votes. Second, the debtor wanted Judge Bonapfel to follow two bankruptcy courts in Texas by deciding that classes with no votes may be disregarded. *See In re Franco's Paving LLC*, 654 B.R. 107 (Bankr. S.D. Tex. 2023), and *In re Hot'z Power Wash, Inc.*, 655 B.R. 107 (Bankr. S.D. Tex. 2023)." To read ABI's reports on the two Texas cases, **click here** and **here**.

Citing the *Collier* treatise and *In re M.V.J. Auto World Inc.,* 2024 WL 3153327 (Bankr. S.D. Fla. June 21, 2024), Judge Bonapfel "decline[d] to accept either of these theories and conclude[d], as most courts do, that acceptance for purposes of § 1129(a)(8) requires affirmative acceptance by the class." To read ABI's report on *Auto World*, **click here**.

The debtor nonetheless prevailed, because no one objected to confirmation, and Judge Bonapfel could confirm the plan under Section 1191(b) as a so-called cramdown plan.

Judge Bonapfel made another noteworthy point. Utilizing Section 1194(b), the corporate debtor proposed making plan payments itself rather than through the Subchapter V trustee.

Section 1183(c) does not specify when a trustee is terminated following confirmation of a cramdown plan under Section 1191(b). Thus, the question arose as to whether the trustee's services could be terminated on substantial consummation.

In a consensual plan under Section 1191(a), the trustee's services are terminated on substantial consummation. Judge Bonapfel saw "nothing in subchapter V [that] limits the court's authority to similarly terminate the services of a trustee upon substantial consummation of a cramdown plan confirmed under § 1191(b) when a subchapter V trustee will not be making payments to creditors and will have no postconfirmation duties to perform."

Judge Bonapfel therefore decided that the trustee's services would terminate on substantial consummation, with the understanding the trustee would be reappointed were services required, for instance, if the debtor wanted to modify the plan or sell estate property.

## Opinion Link

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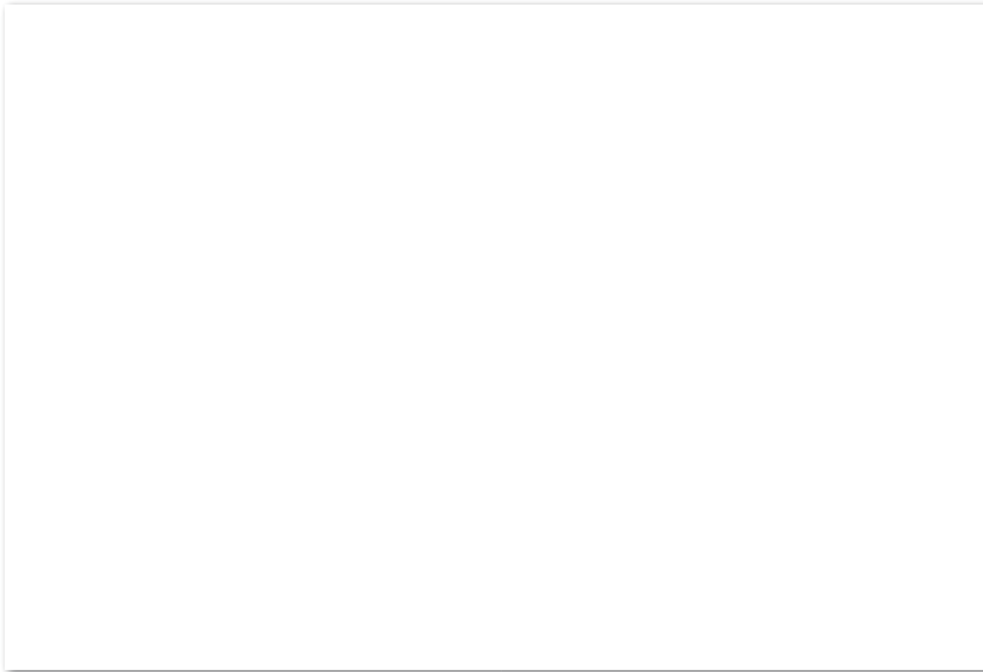

https://abi-opinions.s3.amazonaws.com/Florist+Atlanta.pdf

## Case Details

| | |
|---|---|
| **Case Citation** | In re Florist Atlanta Inc., 24-51980 (Bankr. N.D. Ga. Aug. 6, 2024) |
| **Case Name** | In re Florist Atlanta Inc. |
| **Case Type** | Business |
| **Court** | 11th Circuit Georgia Georgia Northern District |
| **Bankruptcy Tags** | Plan Confirmation Business Reorganization Small Business |

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**IT IS ORDERED as set forth below:**

**Date: August 6, 2024**

**Paul W. Bonapfel**
**U.S. Bankruptcy Court Judge**

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**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

| | | |
|---|---|---|
| **IN RE:** | : | |
| | : | **Case No. 24-51980-pwb** |
| **FLORIST ATLANTA, INC.,** | : | |
| **Debtor.** | : | **Chapter 11** |
| | : | |

**MEMORANDUM OPINION ON CONFIRMATION AND**
**TERMINATION OF APPOINTMENT OF SUBCHAPTER V TRUSTEE**

The Debtor seeks confirmation of its subchapter V plan, as modified, as a consensual plan under 11 U.S.C. § 1191(a). One of three impaired classes of creditors entitled to vote on the plan accepted it.[1] No other creditor objected to confirmation or voted on the plan. Counsel for the Small Business Administration, the Subchapter V Trustee, and counsel for the United States Trustee appeared at the confirmation hearing and had no objection to confirmation.

[1] One secured creditor in its own class accepted the plan. The Small Business Administration, also in its own class, did not vote. No one voted in the class of general unsecured creditors.

Although the plan is not confirmable under § 1191(a) because all impaired classes of creditors have not accepted it, the Court will confirm it under the "cramdown" provisions of 11 U.S.C. § 1191(b). In addition, the Court will order that the Debtor make plan payments under 11 U.S.C. § 1194(b) and that the services of the Subchapter V Trustee terminate upon (1) substantial consummation of the plan (*i.e.,* when the Debtor commences payments under the plan) and (2) the Subchapter V Trustee's filing of the final report of administration of this case.

**I. Confirmation**

One condition for confirmation under § 1191(a) is compliance with the requirement of 11 U.S.C. § 1129(a)(8) that all classes of impaired claims or accept the plan. The Debtor asserts two alternative theories to support § 1191(a) confirmation even though classes of impaired claims have not voted to accept it.[2]

First, the Debtor contends that, when no creditor in a class objects to confirmation or votes, that class is deemed to have accepted the plan.[3] Under this argument, all classes of claims have accepted the plan.

Alternatively, the Debtor contends that, when no creditors in a class vote, that class is disregarded for purposes of determining whether § 1129(a)(8) is satisfied.[4] The rationale is that 11 U.S.C. § 1126(c) requires determination of acceptance by dividing the number of acceptances by the total votes in the class. When no creditor in an impaired class votes, the computation requires division of zero by zero, which produces an indeterminate result that is absurd and could

[2] This case is an example of what one court has rightly characterized as the "apathetic creditor problem." When creditors fail to vote, subchapter V debtors are required to utilize § 1191(b), "even if there are no votes against the plan and no objections to confirmation. " *In re DynoTec Industries, Inc.,* 2024 WL 2003065 *3 n.3 (Bankr. D. Minn. 2024).

[3] *E.g., In re Ruti-Sweetwater, Inc.,* 836 F.2d 1263, 1267-68 (10th Cir. 1988); *In re Jaramillo*, 2022 WL 4389292 (Bankr. D.N.M. 2022).

[4] *In re Hot'z Power Wash, Inc.*, 655 B.R. 107 (Bankr. S. D. Tex. 2023); *In re Franco's Paving LLC*, 654 B.R. 107, 110 (Bankr. S.D. Tex. 2023).

not have been intended by Congress. The conclusion is that, where no votes are cast and the resulting calculation produces an absurd result, the class should not be counted for purposes of § 1129(a)(8).

The Court declines to accept either of these theories and concludes, as most courts do, that acceptance for purposes of § 1129(a)(8) requires affirmative acceptance by the class.[5]

Because all impaired classes have not affirmatively accepted the plan as § 1129(a)(8) requires, the court cannot confirm the plan under § 1191(a).

The court determined at the confirmation hearing that the plan, as modified, satisfies all requirements for cramdown confirmation under § 1191(b). No one objected to § 1191(b) confirmation. The court will, therefore, confirm the plan under § 1191(b).

**II. Payments to Creditors Under the Plan**

Section 1194(b) of the Bankruptcy Code provides for the subchapter V trustee to make payments to creditors under a plan confirmed under § 1191(b) unless the plan or the order confirming the plan provides otherwise. The Debtor's plan provides for the Debtor to make plan payments.

No one at the confirmation hearing objected to inclusion in the confirmation order of a provision for the Debtor, rather than the Subchapter V Trustee, to make payments under the plan. Accordingly, the confirmation order will provide for the Debtor to make payments to creditors under the plan.

[5] *E.g., In re M.V.J. Auto World, Inc.,* 2024 WL 3153327 (Bankr. S.D. Fla. 2024); *In re Creason,* 2023 WL 2190623 (Bankr. W.D. Mich. 2023); *see* COLLIER ON BANKRUPTCY ¶¶ 1126.04, 1129.02[8], 1191.02.

### III. Termination of Subchapter V Trustee's Services

When the Debtor makes its first payment under the plan, substantial consummation of the plan will occur under 11 U.S.C. § 1102(1).[6] When a debtor is to make plan payments after substantial consummation of a plan confirmed under § 1191(b), the only postconfirmation duties of a subchapter V trustee are: (1) to make a final report and file a final account of the administration of the estate;[7] (2) to file postconfirmation reports as are necessary or as the court orders;[8] (3) to appear and be heard at any hearing that concerns postconfirmation modification of a plan[9] or the sale of property of the estate;[10] and (4) to perform certain duties if the debtor is removed as debtor in possession.[11]

The Debtor's plan does not contemplate that the Subchapter V Trustee perform any duties after its substantial consummation, and no one has requested that the Trustee file any postconfirmation reports. Parties at the confirmation hearing agreed that no need exists in this case for the Subchapter V Trustee to provide any postconfirmation services.

Because the Debtor will make plan payments in this case, the Subchapter V Trustee will have nothing to do after filing the final report, subject to the possible occurrence of future events that would require trustee services. In these circumstances, it is appropriate to consider

[6] "Substantial consummation" under § 1101(2) also requires: (1) transfer of all or substantially all of the property proposed to be transferred, § 1101(2)(A), and (2) assumption by the debtor or the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan. § 1101(2)(B). The plan does not provide for transfer of any property, and the Debtor will manage and operate the business under the plan.
[7] 11 U.S.C. § 1183(b)(1), incorporating 11 U.S.C. § 704(a)(7).
[8] 11 U.S.C. § 1183(b)(2), incorporating 11 U.S.C. § 1106(a)(7). The subchapter V trustee must perform this duty only if the court, for cause and on request of a party in interest, requires it. The duties in § 1106(a)(3) and (4) that § 1183(b)(2) also references generally contemplate preconfirmation investigation and reporting.
[9] 11 U.S.C. § 1183(a)(3)(C).
[10] 11 U.S.C. § 1183(a)(3)(D).
[11] 11 U.S.C. § 1183(a)(5).

termination of the Subchapter V Trustee's services upon substantial consummation and the filing of the Trustee's final report.

Section 1183(c)(1) of the Bankruptcy Code provides for termination of the service of a subchapter V trustee upon substantial consummation of a consensual plan confirmed under § 1191(a). Subchapter V has no provision for termination of a subchapter V trustee's services after cramdown confirmation under § 1191(b). But nothing in subchapter V limits the court's authority to similarly terminate the services of a trustee upon substantial consummation of a cramdown plan confirmed under § 1191(b) when a subchapter V trustee will not be making payments to creditors and will have no postconfirmation duties to perform. None of the parties at the confirmation hearing objected to such termination of the Subchapter V Trustee's services in this case.

In these circumstances, it is appropriate for the Court to order the termination of the services of the Subchapter V Trustee upon substantial consummation of the plan (which will occur when the debtor commences plan payments) and the filing of the Subchapter V Trustee's final report.[12] *See In re DynoTec Industries, Inc.,* 2024 WL 2003065 (Bankr. D. Minn. 2024).

The Court recognizes that the services of a subchapter V trustee will be necessary if the Debtor seeks postconfirmation modification of the plan, wants to sell property of the estate, or is removed from possession due to postconfirmation default.[13] The termination of the trustee's services, therefore, will be without prejudice to the reappointment of the Subchapter V Trustee (or another subchapter V trustee, if appropriate) if any of these potential events occurs.

[12] 11 U.S.C. § 1183(b)(1), incorporating 11 U.S.C. § 704(a)(7).
[13] 11 U.S.C. § 1185(a).

It is, therefore, hereby **Ordered** as follows:

1. The Court will enter a separate order confirming the Debtor's plan, as modified, under 11 U.S.C. § 1191(b). The confirmation order will provide for the Debtor, rather than the Subchapter V Trustee, to make payments to creditors under the plan.

2. Within 14 days of substantial consummation of the plan, the Debtor shall file, and serve on the United States Trustee, the Subchapter V Trustee, and counsel for the Small Business Administration, a report of substantial consummation and a motion for termination of the services of the Subchapter V Trustee.

3. Within 14 days after the filing of the Debtor's report of substantial consummation, the Subchapter V Trustee shall file the final report that 11 U.S.C. § 1183(b)(1) (incorporating 11 U.S.C. § 704(a)(9)) requires.

4. Counsel for the Debtor shall (1) schedule a hearing on the motion for termination of the Trustee's services in accordance with the Court's self-calendaring procedures for a time not earlier than 21 days after filing of its report of substantial consummation and such motion; and (2) serve notice of such hearing on all parties in interest in this case.

**[End of Order]**

Distribution List

The Clerk is directed to serve a copy of this Order on the Debtor, the United States Trustee, the Subchapter V Trustee, counsel for the Small Business Administration, and all creditors in this case.

News at 11

By Colin West and Ashley Chase[1]

# Venue: Is a Scintilla of a Connection Enough?

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The issue of venue in bankruptcy is a familiar source of controversy. Some observers argue that the rules give debtors too much flexibility to choose what they perceive to be a favorable venue. Others argue that such flexibility is beneficial to stakeholders as a whole and that the existing rules provide bankruptcy courts with adequate tools to prevent abuse. Congressional attempts to reform the venue rules to reduce such flexibility have consistently failed.

A recent dispute in *In re Sorrento Therapeutics Inc*. has generated renewed interest in the subject. In this case, which tested the limits of acceptable venue-shopping measures, Sorrento used a dormant, nonoperating subsidiary with zero assets — the aptly named Scintilla Pharmaceuticals — to establish minimal connections with the Southern District of Texas days before filing a chapter 11 petition in that district. Using the affiliate venue rule, Sorrento then filed its own large chapter 11 case in the same district. As discussed in this article, the bankruptcy court's denial of a venue challenge in *Sorrento* provides important lessons for both a debtor pursuing its preferred venue and objectors challenging a debtor's choice of venue.

## Venue Basics

The starting point for determining the proper venue for a debtor seeking chapter 11 relief is 28 U.S.C. § 1408. Under § 1408(1), venue is proper in the federal district where — during the 180 days prior to the petition (or for a greater portion of such 180 days than any other district) — the debtor is domiciled, has its principal place of business or maintains its principal assets.[2]

A debtor seeking chapter 11 relief with one or more of its affiliates often has more flexibility in choosing venue. Specifically, a debtor can file a petition in any district where its affiliate already has a pending bankruptcy case, irrespective of the former's own domicile, principal place of business or the location of its principal assets.[3] Because § 1408(2) does not mandate a minimum time that an existing case must have been pending before an affiliate can tag along, corporate debtors can strategically sequence filing their chapter 11 petitions so that an affiliate first files in the preferred venue, presumably complying with § 1408(1), and the rest of the corporate family then immediately files their own petitions in the same district pursuant to § 1408(2).

While a large corporation contemplating bankruptcy may face practical challenges moving its own assets or principal place of business to the preferred venue, it might be considerably easier to direct a subsidiary with little to no assets or operations to do so. The relative ease of relocating a subsidiary or its assets, combined with § 1408(2), has invited maneuvering that some observers have criticized. To take one high-profile example, in *Purdue Pharma*, the Connecticut-based company was able to file chapter 11 petitions for 24 related entities in White Plains, N.Y., by relocating one of its affiliates there prior to commencing the cases.[4]

Guardrails still exist. Even where venue is technically proper, a court may exercise its discretion to transfer the proceeding to a different district "based on an individualized case-by-case analysis of convenience and fairness."[5] Even though a case was properly commenced in a certain district, courts have occasionally invoked "the interest of justice" to transfer a pending case.[6] However, under Rule 1014(a) of the Federal Rules of Bankruptcy Procedure, a motion by a party-in-interest to transfer a chapter 11 petition to another venue must be "timely," regardless of whether venue in the pending district is proper or improper.[7] The rule does not define "timely," leaving bankruptcy courts to determine timeliness based on the facts and circumstances.

## The Venue Dispute in *Sorrento*

At the time it filed for bankruptcy, *Sorrento* was a San Diego-based pharmaceutical company with an

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1 This article represents the views of the authors, and such views should not necessarily be imputed to White & Case LLP. The authors also thank White & Case associate Taylor Heywood for her contributions to this article.

2 28 U.S.C. § 1408(1).

3 28 U.S.C. § 1408(2).

4 *See In re Purdue Pharma LP*, No. 19-23649 (ECF 1); Alex Wolf, "Purdue Pharma Bankruptcy Spotlights Venue Shopping Battle," Bloomberg Law (July 30, 2021) ("The company filed [for] bankruptcy just six months after changing the corporate address for one of its units to White Plains."). For more details on this case, purchase *The Purdue Papers: Amicus Briefs and Commentaries Related to Purdue Pharma LP, et al.*, *available at* store.abi.org.

5 *In re Caesars Ent. Operating Co. Inc.*, No. 15-10047 (KG), 2015 WL 495259, at *5 (Bankr. D. Del. Feb. 2, 2015) (quoting *In re Enron Corp.*, 274 B.R. 327, 342 (Bankr. S.D.N.Y. 2002) (citing cases)); *see also* Fed. R. Bankr. P. 1014(a)(1) ("If a petition is filed in the proper district, the court, on the timely motion of a party in interest or on its own motion, and after hearing on notice to the petitioners ... may transfer the case to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.").

6 *See, e.g., In re Crosby Nat'l Golf Club LLC*, 534 B.R. 888, 890 (Bankr. N.D. Tex. 2015) (finding venue proper but transferring case in interest of justice because case involved real property in California and operative documents were governed by California law).

7 *See* Fed. R. Bankr. P. 1014(a)(1)-(2).

estimated $1 billion in assets.[8] Nearly a year later and after a plan had been confirmed, on Feb. 9, 2024, an individual equityholder, Timothy Culberson, filed a *pro se* emergency motion to dismiss or transfer venue based on his own investigation into the debtors' venue choice of the Southern District of Texas.

The thrust of Culberson's motion was that the venue selection was "fraudulent" because the Sorrento affiliate that filed the first chapter 11 petition, Scintilla Pharmaceuticals, identified its principal place of business as a post office (P.O.) box located in a Houston suburb — one that had been opened just hours before the petition was filed.[9] Culberson argued that a mere P.O. box, especially one only open for a period of hours, could not be the principal place of business under the standard set forth in *Hertz v. Friend*.[10] A week after Culberson filed his motion, the U.S. Trustee filed its own motion making similar arguments regarding the P.O. box, although the U.S. Trustee did not characterize the petition as "fraudulent."[11]

Both motions argued that because venue in the Southern District of Texas was improper for Scintilla, the same was true for Sorrento, which only established venue based on Scintilla's pending case under § 1408(2).[12] The U.S. Trustee further argued that where venue is improper, dismissal or transfer is mandatory.[13]

The briefing and evidentiary presentations that followed established other relevant undisputed facts, including that Scintilla was a nonoperating subsidiary of Sorrento. Other than the events in the days preceding its petition, Scintilla had been dormant, with zero assets, since 2019.[14] Scintilla was incorporated in Delaware and, prior to the bankruptcy filing, had elsewhere listed San Diego as its "principal office."[15]

On Feb. 10, 2023 (three days before it filed for bankruptcy), Scintilla opened a bank account, the location of which was disputed.[16] Sorrento immediately wired $60,000 to the account, which became Scintilla's only asset.[17] Two days later, an attorney for the debtors rented a P.O. box in Scintilla's name at a UPS Store in The Woodlands, Texas.[18]

Scintilla filed its chapter 11 petition the next morning, listing the Texas P.O. box as its principal place of business. Sorrento's petition — filed later that same day — used Scintilla's pending case as its basis for establishing venue under § 1408(2).[19]

The debtors opposed the motions on three principal grounds. First, the debtors argued that the Signature Bank account containing $60,000 was located in Houston. According to the debtors, this was sufficient to establish not only that Scintilla's principal assets were located in the Southern District of Texas, but also that its principal place of business also was there. Second, the debtors argued that both movants had waived their right to challenge venue because the motions had not been timely filed, as required by Bankruptcy Rule 1014, having been filed a year into the cases and after plan confirmation. Third, the debtors argued that Rule 1014(a)'s use of the word "may" granted the court discretion to decide not to transfer or dismiss — even if venue was improper — and that transfer would be disruptive to the case given Hon. **Christopher M. Lopez**'s familiarity with the issues. While acknowledging a split of authority on the issue, the debtors also argued that § 1406 — with its seemingly mandatory "shall dismiss or ... transfer" language — does not apply in bankruptcy cases.[20]

Notably, the debtors did not dispute that they had engaged in "venue-shopping," arguing that § 1408 "is flexible and permits th[e] measures" that the debtors employed to file in the Southern District of Texas. As counsel for the debtors stated at the hearing, preventing debtors from taking such measures "is Congress's determination to make and they haven't made it."[21]

Judge Lopez first denied Culberson's motion for sanctions at a Feb. 26, 2024, hearing, finding that he did not have "any evidence" of fraud in connection with the debtors' efforts to establish venue in the Southern District of Texas.[22] Following a March 11, 2024, evidentiary hearing (largely focused on the factual dispute regarding the location of the bank account), Judge Lopez then issued a bench ruling denying both transfer motions. As the primary basis for his ruling, Judge Lopez determined that the motions were untimely under either § 1014(a) or (b).[23]

Therefore, regardless of whether venue in the Southern District of Texas was proper, the movants had waived their right to challenge venue. To support his finding of untimeliness, Judge Lopez cited the passage of time since the petition date and all the major events that had occurred in the case during that time, including plan confirmation.

The court also found that sufficient information had been disclosed in the petition and early in the case — including the § 341 meeting of creditors — to place interested parties on inquiry notice of Scintilla's basis for filing in the Southern District of Texas. Such information included the petition's listing of the P.O. box itself, the disclosure of the bank account and answers provided at the § 341 meeting.[24] While careful not to find any fault with the U.S. Trustee, the court implicitly rejected the U.S. Trustee's argument that the limited information provided in the petition was

8 Declaration of Mohsin Meghji in Support of Chapter 11 Petitions, *In re Sorrento Therapeutics Inc.*, No. 23-90085 (Bankr. S.D. Tex. Feb. 13, 2023) (ECF 5), at 5.
9 In a separate motion, Culberson also sought sanctions against debtors' counsel based on the same theory that the Scintilla petition was "fraudulent." Timothy Culberson's Emergency Motion for Sanctions Against Jackson Walker LLP, and Latham & Watkins LLP and Emergency Motion for Immediate Stay of All Asset Sales, *Sorrento Therapeutics* (ECF 1887) at 2.
10 Timothy Culberson's Motion to Dismiss or Transfer Venue Pursuant to Rule 1014(a)(2) Due to Fraudulent Venue Selection by Debtors' Counsel and Motion for Reconsideration of Motion to Compel Discovery from Latham & Watkins LLP, *Sorrento Therapeutics* (ECF 1851) at 3-4. *See also Hertz v. Friend*, 559 U.S. 77 (2010).
11 The United States Trustee's Motion to Transfer Venue or Dismiss Pursuant to 28 U.S.C. § 1408 and Fed. R. Bankr. P. 1014(A)(2), *Sorrento Therapeutics* (ECF 1879) (hereinafter, "U.S. Trustee Motion to Transfer") at 7-8.
12 *See, e.g., id.* at 10.
13 *Id.* at 10-11 (citing 28 U.S.C. § 1406, which contains mandatory language but does not, on its face, apply to bankruptcy cases, and Bankruptcy Rule 1014(a)(2), arguing that in context, "may dismiss ... or transfer" only gave the bankruptcy court discretion to decide between dismissal or transfer).
14 Objection to (I) Motions to Dismiss or Transfer Venue and (II) Motion for Sanctions, *Sorrento Therapeutics* (ECF 1900) (hereinafter, "Objection to Motion to Transfer") at 4.
15 U.S. Trustee Motion to Transfer at 3, 8.
16 Transcript Regarding Motion to Transfer or Dismiss, *Sorrento Therapeutics* (ECF 2049) (hereinafter, "Motion to Transfer Transcript") at 85-86.
17 U.S. Trustee Motion to Transfer at 3.
18 *Id.*
19 *Id.* at 4-5.

20 Motion to Transfer Transcript at 185-86; *see generally* Objection to Motion to Transfer.
21 Motion to Transfer Transcript at 191.
22 Transcript Regarding Motion Hearing (Via Zoom) at 73, *Sorrento Therapeutics* (ECF 1973).
23 Motion to Transfer Transcript at 206-08. Judge Lopez did not squarely address whether § 1406 applied, as the U.S. Trustee argued, but noted that § 1406(b) would require a timely motion in any event.
24 *Id.* at 201-03, 208-10.

*continued on page 54*

## News at 11: Venue: Is a Scintilla of a Connection Enough?

*from page 17*

insufficient to place the U.S. Trustee on notice of the relevant venue facts.[25]

Notwithstanding the court's statement, the motions' untimeliness "ends the analysis," Judge Lopez went further, finding — in *dicta* — that venue was proper based on the evidence presented.[26] Judge Lopez found that while the issue was not free from doubt, the better evidence was that the $60,000 was in an account located in Houston.[27] Nevertheless, Judge Lopez noted that he was "aligned with bankruptcy judges across the country that disfavor these types of legal maneuvers to establish venue in a District."[28]

Judge Lopez determined that transfer or dismissal would not be a sound exercise of discretion under § 1014.[29] In a discussion closely related to his findings regarding timeliness, Judge Lopez found that there was no clear superior venue and that it would take another judge substantial time to get up to speed in light of all the events that had taken place in the complex case since it was commenced more than a year earlier. As Judge Lopez observed, "If somebody filed an emergency motion tomorrow," only he would have sufficient familiarity with the case to address it.[30]

### The Takeaway

The *Sorrento* court's finding that venue was proper provides further confirmation that § 1408, and especially the affiliate venue rule of § 1408(2), affords extraordinary flexibility to debtors, particularly those with at least one nonoperating subsidiary. However, *Sorrento* should also serve as a reminder that the discretion afforded to bankruptcy courts under Bankruptcy Rule 1014(a) can substantially mitigate venue-shopping concerns.

In his bench ruling, Judge Lopez suggested that he might have used his discretion to transfer the case had the motions been timely, notwithstanding his determination that venue was proper.[31] Of course, the clearest takeaway from *Sorrento* is that a party considering a venue challenge must investigate and raise issues as soon as possible or risk waiving the challenge under Rule 1014. abi

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25 *Id.* at 166.
26 *Id.* at 213-15.
27 *Id.* Without making express findings on this point, the court apparently accepted the debtors' argument that even though Scintilla only owned the $60,000 for the three days preceding its petition, Scintilla's "principal assets" were located in the Southern District of Texas for a greater portion of the 180 days preceding the petition than any other district because prior to receiving those funds from Sorrento, Scintilla had no assets at all.
28 *Id.* at 206.
29 *Id.* at 214-15. Judge Lopez also appeared to suggest, consistent with the debtors' argument, that he would have discretion to decide not to transfer or dismiss even if venue was improper and the motions had been timely filed. *Id.* at 204.
30 *Id.* at 212-13.
31 *Id.* at 211.

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# Claims Chat

By Patricia B. Tomasco and Joanna D. Caytas

# The Impaired Insider Paradox and the § 1191(b) Solution

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Under § 1129(a)(10), "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan" must accept the plan.[1] However, a class of insiders cannot serve as the single impaired accepting class.[2] Hence, if a plan leaves all noninsider creditors' classes unimpaired, but a class of insiders has agreed to accept less than 100 percent on account of their claims, the accepting insiders' willingness to make additional estate funds available to other classes results in a paradoxical impediment to the confirmation of a plan that pays all noninsiders in full.

This exact issue precluded confirmation of the plan proposed in *In re Ingleside Associates*, wherein the debtor proposed a plan that paid all noninsider classes in full, leaving them unimpaired and not entitled to vote to accept or reject the proposed plan.[3] The only impaired classes were comprised of insiders.[4] The court found that votes cast by insiders could not be considered under 11 U.S.C. § 1129(a)(10), and denied plan confirmation.[5] The court remarked that "the [d]ebtor's efforts to confirm a plan [that] impaired only insiders' claims *were an attempt to achieve the impossible*."[6] Absent an amendment by Congress resolving this arguably unintended glitch in the Bankruptcy Code, few practical solutions emerge to correct the legal impossibility built into § 1129(a)(10).

## At a Glance: Solutions to the § 1129(a)(10) Problem

### Artificial Impairment

The *Ingleside* court noted that a prior plan would have been confirmable because it impaired a noninsider class.[7] However, "artificial" impairment is prohibited in some circuits.[8] Those jurisdictions rejecting the construct of artificial impairment foreclose debtors from securing confirmation through an "exercise of discretion."[9]

### No-Voting Classes

A debtor could also sidestep the problem posed by § 1129(a)(10) by paying the insiders in full. This could be achieved through voluntary modification by settlement or other device. As a downside, this result may leave the insider class with less than acceptable payment rights upon plan confirmation.

### Insiders Abstaining from Voting

The U.S. Bankruptcy Court for the Southern District of Texas recently ruled in two separate subchapter V proceedings, *In re Franco's Paving* and *In re Hot'z Power Wash*, that a creditor class that casts no votes on a proposed plan would not be considered in determining whether the plan could be confirmed as consensual.[10] By disregarding a class that did not cast a vote, the court disagreed with the only circuit that has ruled on the issue.

The Tenth Circuit held in a controversial chapter 11 decision, *In re Ruti-Sweetwater*, that in situations where no votes were cast in a class, the nonvoting creditors had consented to the debtor's plan and that their inaction amounted to acceptance.[11] Several other courts have disagreed with the Tenth Circuit, including the Bankruptcy Appellate Panel for the Ninth Circuit.[12]

If disregarding an abstaining class for the purposes of plan confirmation can be extended to non-subchapter V chapter 11 cases, a plan could be confirmed as consensual in a proceeding where insiders are the only impaired class and decline to vote

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1 11 U.S.C. § 1129(a)(10).
2 *Id.* ("If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, *determined without including any acceptance of the plan by any insider.*") (emphasis added).
3 *In re Ingleside Assocs.*, 136 B.R. 955, 960 (Bankr. E.D. Pa. 1992); *see also* 11 U.S.C. § 1126(f) ("Notwithstanding any other provision of this section, *a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan*, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.") (emphasis added); *see further In re Union Meeting Partners*, 165 B.R. 553, 569 (Bankr. E.D. Pa. 1994), *subsequently aff'd*, 52 F.3d 317 (3d Cir. 1995) (denying confirmation of plan on multiple grounds, including that "it is questionable whether any of the impaired classes [that] have voted in favor of [the] Debtor's Plan are eligible to serve as the impaired accepting class required by § 1129(a)(10)" for purposes of cramdown); *In re Three Flint Hill Ltd. P'ship*, 213 B.R. 292 (D. Md. 1997) (confirming creditor's plan and holding that debtor's plan was unconfirmable, because it had not been accepted by at least one impaired class).
4 *Ingleside*, 136 B.R. at 960-62.
5 *Id.* at 961-62.
6 *Id.* at 962, n.4.
7 *Id.* at 962.
8 *Compare In re Windsor on the River Assocs. Ltd.*, 7 F.3d 127, 132 (8th Cir. 1993) ("[W]e hold that, for purposes of 11 U.S.C. § 1129(a)(10), a claim is not impaired if the alteration of rights in question arises solely from the debtor's exercise of discretion."), *with In re Vill. at Camp Bowie I LP*, 710 F.3d 239, 245 (5th Cir. 2013) ("[W]e expressly reject *Windsor* and join the Ninth Circuit in holding that § 1129(a)(10) does not distinguish between discretionary and economically driven impairment.").
9 *Windsor*, 7 F.3d at 132.
10 *In re Franco's Paving LLC*, 654 B.R. 107 (Bankr. S.D. Tex. 2023); *In re Hot'z Power Wash Inc.*, 655 B.R. 107 (Bankr. S.D. Tex. 2023).
11 *In re Ruti-Sweetwater Inc.*, 836 F.2d 1263, 1267-68 (10th Cir. 1988). This approach seems to adopt the principle of *qui tacet consentire videtur* ("whoever remains silent is deemed to agree").
12 *See, e.g., In re M. Long Arabians*, 103 B.R. 211 (B.A.P. 9th Cir. 1989); *In re Higgins Slacks Co.*, 178 B.R. 853, 857 (Bankr. N.D. Ala. 1995); *In re Townco Realty Inc.*, 81 B.R. 707, 708 (Bankr. S.D. Fla. 1987).

on the plan. However, this strategy would be more safely deployed in subchapter V cases.

### The § 1191(b) Solution

In a subset of chapter 11 cases, a creative bankruptcy professional may turn to subchapter V of chapter 11.[13] Subchapter V solutions typically are not on the radar of bankruptcy professionals involved in "complex" or "mega" cases (typically those cases where liabilities exceed seven figures), and for good reason: The most significant limitation of subchapter V is its availability solely to a "small business debtor," defined as a debtor with, at most, a few millions of dollars in liabilities.[14]

Of particular interest to bankruptcy professionals specializing in complex bankruptcies should be the fact that the subchapter V debt limit excludes debts owed to affiliates or insiders.[15] This renders subchapter V solutions uniquely suitable for portfolio companies of private investment funds and parent-financed operating affiliates in corporate groups where most funded debt comes from insiders. Because contingent and unliquidated liabilities are excluded, otherwise-financially stable operating companies that have little debt but are threatened with an existential risk of a lawsuit might also benefit from subchapter V proceedings, which are cheaper yet provide the protections of chapter 11.

Subchapter V provides to qualifying debtors valuable solutions allowing them to sidestep the paradox of § 1129(a)(10) with respect to impaired insiders' votes. Significantly, the cramdown provisions of § 1129(b) are not applicable in subchapter V cases. Instead, § 1191(b) provides requirements for cramdown confirmation that are more favorable to subchapter V debtors, which includes the elimination of the requirement that at least one impaired class of creditors — excluding insiders — accept the plan.

Notably, the absolute-priority rule under § 1129(b)(2)(B) with respect to classes of unsecured creditors and interests that have not accepted the plan is not applicable under § 1191(b),[16] "allow[ing] existing owners to retain their full ownership without giving any new value, but only if the plan provides for the debtor to distribute all of its projected disposable income over at least three years from the date the first payment is due under the plan (or property having a value of at least that amount)."[17]

To be clear, the § 1191(b) cramdown does not come without other limitations and costs that need to be carefully considered. A subchapter V debtor may confirm a plan despite not meeting the requirements of § 1129(a) in paragraphs (8) (providing that all classes vote to accept the plan or not be impaired by the plan) and (10) (requiring at least one impaired class to accept the plan). Instead, a confirmable subchapter V "plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."[18]

The standard of "fair and equitable with respect to each class of claims or interests" is defined in subchapter V: The plan needs to provide for a period of payments after the effective date, ranging from a minimum of three years to a maximum of five years, when all projected disposable income of the debtor is dedicated to payments, before the debtor can obtain a discharge.[19] This standard mimics chapter 13 proceedings available to individuals. A subchapter V debtor may prepay or pay in a lump sum the value of projected disposable income,[20] but the debtor is not required to make payments before confirmation. Thus, particularly for portfolio companies and bankrupt affiliates, subchapter V allows for the retention of equity and voting by insiders.[21]

In *In re Pearl Resources*, the bankruptcy court confirmed a nonconsensual subchapter V plan where, out of a total of 14 classes, 11 were impaired, and where three classes of claims and interests held by insiders voted to accept the plan (classes 2, 13 and 14); four classes of noninsider claims (three of which were impaired) voted to accept the plan (classes 3, 6, 8 and 9); three impaired classes of claims held by noninsiders voted against the plan (classes 4, 5, 7); one class (class 10) did not submit a ballot; and three classes had no claims associated with them and therefore did not submit a ballot, either (classes 1, 11 and 12).[22] The court found that it was required to confirm the plan when all confirmation standards were met except for those set out in paragraphs (8), (10) and (15) of § 1129(a), and under § 1191(b) cramdown rules the plan did not discriminate unfairly and was fair and equitable with respect to each impaired class that had not accepted it.[23]

Furthermore, in confirming the nonconsensual plan, *Pearl Resources* stripped pre-petition statutory liens on all assets valued at $35 million held by secured creditors whose total claims — if undisputed — totaled $1.2 million, leaving as collateral one piece of property valued at $7.4 million based on a finding that although the plan reduced the oversecured creditors' "29 to 1 value-to-debt equity cushion" to "6 to 1," the remaining collateral and the plan "provide[d] virtual certainty that Allowed Claims [would] be paid in full."[24]

## Conclusion

Because under subchapter V a plan can be confirmed in the absence of a consenting impaired class, this type of proceeding can provide a solution to the § 1129(a)(10) problem. Furthermore, the absence of the absolute-priority rule and other streamlined features of subchapter V turn it into a useful tool in the hands of a bankruptcy professional focusing on creative solutions for complex bankruptcy cases. abi

13 *See* Small Business Reorganization Act of 2019 (SBRA), Pub. L. No. 116-54 (Aug. 13, 2019), effective Feb. 19, 2020.
14 *Id.* at § 2(a), 1182(1). The statutory debt limit under subchapter V was initially set at $2,725,625. On April 1, 2022, SBRA § 104 adjusted the debt limit to $3,024,725. Later legislation contained in a variety of statutes temporarily increased the debt limit to $7.5 million until June 20, 2024, and unless that legislation is made permanent or extended, the debt limit will return to its previous level of $3,024,725 on June 21, 2024. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1113(a) (March 27, 2020); COVID-19 Bankruptcy Relief Extension Act of 2021, Pub. L. No. 117-5, § 2(a)(1) (March 27, 2021); Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. No. 117-151, §§ 2(a), (d), (i)(1)(B) (June 21, 2022). Congress is currently considering extending the enhanced debt limit.
15 11 U.S.C. § 1182(a)(1)(A).
16 *See generally* 8 *Collier on Bankruptcy* ¶ 1180.01.
17 *In re Pearl Res. LLC*, 622 B.R. 236, 265-66 (Bankr. S.D. Tex. 2020) (citing 11 U.S.C. § 1181(a)).
18 11 U.S.C. § 1191(b).
19 11 U.S.C. § 1191(c).
20 11 U.S.C. § 1191(c)(2)(B).
21 *Pearl Res.*, 622 B.R. at 267 (citing 11 U.S.C. § 1191(c)(2) and (3)).
22 *Id.* at 236, 250-51.
23 *Id.* at 274.
24 *Id.* at 249, 270-72.


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## Litigator's Perspective

By Marshall S. Huebner and Kate Somers

# Opting Into Opting Out: Due Process and Opt-Out Releases

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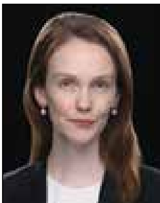

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Mass tort bankruptcies often involve complex and interrelated settlements where the primary payors — including insurers, former owners or co-tortfeasors — are not the debtors themselves. Finality and the resolution of litigation, including releases from third parties and the debtors, are often the only ways to achieve a value-maximizing (and invariably largely consensual) outcome for creditors.

Now that the U.S. Supreme Court has issued its ruling barring nonconsensual releases, there will — absent legislative change — be an even greater focus on (and need for) other types of releases with respect to third parties, including both opt-out and opt-in releases. Provided that factors are satisfied, opt-out releases (a mechanic on a ballot or notice of nonvoting status that allows claimants to check a box to opt out of nondebtor releases in a reorganization plan) will likely be the best available pathway for effectuating the will of — and providing the best available recovery to — creditors and victims.

For good reason, the overwhelming majority of courts that have considered the issue have held that opt-out releases are permissible in appropriate circumstances. These decisions focus on a small number of appropriate factors to ensure fairness and that due process has been satisfied.[1] Virtually all of the cases declining to approve opt-out releases did so because these same factors were not satisfied on the facts before them.

This also comports with Federal Rule of Civil Procedure 23(b)(3) class actions, where courts have agreed that "it seems fair for the silent to be considered as part of the class."[2] Appellate courts around the nation have expressed serious reservations regarding whether Civil Rule 23 permits certification of an *opt-in* class, and have recognized the benefit of opt-out settlements in class actions, in part because requiring "individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people — especially small claims held by small people — who for one reason or another ... will simply not take the affirmative step."[3]

Simply stated, due process (as well as care and concern for victims) weighs strongly in favor of opt-out over opt-in procedures. Creditors' rights are far better preserved by an opt-out mechanism that allows them to participate in the deal unless they expressly decline where (1) reorganization plans negotiated by multiple fiduciaries and creditor representatives provide enhanced recoveries to claimants in exchange for consenting to third-party releases; (2) the consideration provided in exchange for the release is substantial; (3) settlements result from fair, arm's-length negotiations; and (4) there is appropriate notice of the right to opt out. This is especially true for less sophisticated or not separately represented claimants: The notion that they were unable to timely opt out (a one-page form), but desire to prosecute a lawsuit in lieu of accepting their plan recovery, is illogical and unsupportable.

### Factors in Support of Opt-Out Releases in Appropriate Circumstances

Bankruptcy courts have focused on the following entirely sensible factors in deciding whether opt-out releases are appropriate on the facts before them:

1. adequate or meaningful recoveries for creditors;[4]
2. volume of opt-out elections actually received;[5]
3. adequate consideration provided in exchange for release;
4. clear and prominent notice of the release and the opportunity to opt out;[6]
5. highly publicized nature of the case and the third-party releases, including in cases "of great notoriety" where creditors "knew about the existence of the bankruptcy case [and] knew they would have to act";[7]
6. active creditor participation;[8]

1 Both Second Circuit opinions in *Purdue* suggest that opt-out releases are consensual. *See In re Purdue Pharma LP*, No. 22-110, at 83 (2d Cir. May 30, 2023) (ECF No. 978-1) ("[T]he Trustee also questions whether such a release, without an ability to opt out, can comply with due process because it effectively denies claimants their day in court."); *see also id.* at 87-88 (concurrence) ("Finally, the Release is nonconsensual; *it binds consenting and objecting parties, without providing an opt-out option to those who object.*") (emphasis added).

2 *Kern v. Siemens Corp.*, 393 F.3d 120, 124 (2d Cir. 2004) (citing Benjamin Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 *Harv. L. Rev.* 356, 397-98 (1967)); *see also Philipps Petroleum Co. v. Shutts*, 472 U.S. 797 at 813, n.4 (1985).

3 *Id.*

4 *In re LATAM Airlines Grp. SA*, No. 20-11254 (JLG), 2022 Bankr. LEXIS 1725, at 144 n.88 (Bankr. S.D.N.Y. June 18, 2022).

5 *Id.*

6 *Id.* at 144.

7 Hr'g Tr. at 110: 10-17, *In re Insys Therapeutics Inc.*, No. 19-11292 (KG) (Bankr. D. Del. Jan. 17, 2020) (ECF No. 1121).

8 Hr'g Tr. at 158:19-22, *In re Cumulus Media Inc.*, No. 17-13381 (Bankr. S.D.N.Y. May 1, 2018) (ECF No. 749).

7. whether creditors had adequate representation, including by official committees;[9] and
8. the unique nature of mass tort bankruptcies and/or integrated settlements that confer broad benefit to all stakeholders.

Many courts have found opt-out releases to be appropriate in the mass tort context.[10] Even the U.S. Trustee's Office has started coming around of late.[11]

Where these factors are satisfied, it defies reason to assume that creditor silence should be deemed a rejection, rather than an acceptance, of a negotiated settlement. Moreover, as the *Mallinckrodt* court explained, the notion of deemed consent by failure to act "is utilized throughout the judicial system."[12] The court continued, "in bankruptcy ... [d]ebtors send out bar date notices, and if claimants fail to file a proof of claim by a certain time, they lose the right to assert a claim," concluding that it would be reasonable to apply this principle "in the same manner to properly noticed releases within a plan of reorganization."[13] Several dozen bankruptcy courts around the nation have applied similar reasoning in approving opt-out releases.

Hon. **Mary F. Walrath** of the U.S. Bankruptcy Court for the District of Delaware, one of the only judges to have held opt-out releases to be categorically impermissible other than for creditors voting in favor of the plan (in 2011's *Washington Mutual* case),[14] recently has approved them at least twice. In *Clarus Therapeutics*, she approved opt-out releases for voting creditors "given [the] sufficient opportunity to opt out of any releases," finding that "the releases as to them are fair and consensual."[15] In *EYP Group*, Judge Walrath found releases consensual as to claimants that (1) voted to accept; (2) were deemed to accept and did not object to the releases; or (3) voted to reject and did not opt out.[16]

The two other cases (out of dozens that take the opposite view) most frequently cited as categorically opposing opt-out releases may well not be, for while the *Ascena* court so states, the majority of the decision examined the very aforementioned factors, suggesting that opt-out releases may have been denied for case-specific reasons.[17] In particular, the notice of the *Ascena* opt-out release provision was found to be wholly inadequate,[18] the releasing parties received "nothing more than illusory consideration" in exchange for providing the release,[19] the releasing parties lacked adequate representation, and negotiation of the release settlement was not done at arm's length.[20]

We do not believe that there are any other categorical rejection decisions. For example, *Chassix*, often mis-cited as one, expressly acknowledged that "[c]ircumstances may justify a different approach in different cases."[21] Hon. **Michael E. Wiles** of the U.S. Bankruptcy Court for the Southern District of New York noted that on the facts before him, "relatively small recoveries ... could easily have prompted an even higher-than-usual degree of inattentiveness or inaction."[22] More recent decisions have distinguished *Chassix* on this basis, noting that "projected meager recoveries" in that case made it "likely that unsecured creditors did not focus on the fact that the plan called for them to take action not to grant the nondebtor releases."[23]

## Civil Rule 23(b)(3)

In *Chassix*, Judge Wiles opined that while "in the class-action context there is a public policy that favors the consolidation of similar cases" and "justifies the imposition of a rule that binds class members who have not affirmatively opted out," no such policy exists "in favor of making third-party releases applicable to as many creditors as possible."[24] As an initial matter, his position seems inapposite to mass tort cases, which have tens of thousands of victims with similar claims. In these cases, opt-in procedures might not be feasible.

In *Mallinckrodt*, Hon. **John T. Dorsey** of the U.S. Bankruptcy Court for the District of Delaware distinguished cases that did not "involve mass tort bankruptcies like this one."[25] As he explained, "the sheer volume and complexity of the issues presented in cases like these require creative solutions which often build upon each other or depend on the success of each other in a way that unraveling one will cause all to fall apart."[26]

Justice Sonia Sotomayor's reasoning during oral arguments in *Purdue* further supports this position. Contemplating "thousands, if not hundreds of thousands, maybe millions of personal injury claims" in *Purdue*, she asked the U.S. Trustee what consent would look like "in a case like this."[27] Addressing the suggestion that an opt-in election evidencing affirmative consent should always be required, Justice Sotomayor replied, "So, basically, you're [saying] that there really is no way to do this in bankruptcy right now, because I don't know how an opt-in process ... would actually work."[28]

In *Ascena*, the court concluded that none of the protections of Civil Rule 23 existed in chapter 11, opining, *inter alia*, that "the absent releasing party does not enjoy counsel that will represent his best interests in his stead."[29] This is not so: Creditors in bankruptcy cases benefit from

9 Hr'g Tr. at 13:21-25; 14:1-7, *In re Clovis Oncology Inc.*, No. 22-11292 (JKS) (Bankr. D. Del. June 9, 2023) (ECF No. 875).
10 *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022); *In re Boy Scouts of Am. and Delaware BSA LLC*, 642 B.R. 504 (Bankr. D. Del. 2022).
11 U.S. Trustee Objection, *In re Amyris Inc.*, No. 23-11131 (Bankr. D. Del Jan. 18, 2024) (ECF No. 1154) (acknowledging *Mallinckrodt* and *Boy Scouts* and that "not all decisions from this District have required affirmative consent for third-party releases").
12 *Mallinckrodt*, 639 B.R. at 879.
13 *Id.*
14 *In re Wash. Mut. Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011).
15 Hr'g Tr. at 8:17-20, *In re Clarus Therapeutics Holdings Inc.*, No. 22-10845 (Bankr. D. Del. Feb. 8, 2023) (ECF No. 322).
16 Confirmation Order ¶ T, *In re EYP Grp. Holdings Inc.*, No. 22-10367 (Bankr. D. Del. Nov. 1, 2022) (ECF No. 568); *see also* Plan ¶¶ 1.1.122, 6.5.
17 *Patterson v. Mahwah Bergen Retail Grp. Inc.*, 636 B.R. 641 (E.D. Va. 2022) ("*Ascena*").
18 *Id.* at 659 (noting that bankruptcy court "did not order that any notice or opt-out forms be sent to all of the Releasing Parties" and ordered publication of "general notice of the confirmation hearing in *USA Today* and *The New York Times*" for one single day).
19 *Id.* at 687.
20 *Id.* at 686 (noting that bankruptcy court "expressly rejected the ability of certain absent releasing parties to have a party and counsel represent their best interests").

21 *In re Chassix Holdings Inc.*, 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015).
22 *Id.* at 80.
23 *In re LATAM Airlines Grp. SA*, No. 20-11254 (JLG), 2022 Bankr. LEXIS 1725, at *144 n.88 (Bankr. S.D.N.Y. June 18, 2022) (noting that in *LATAM*, releasing parties were "receiving exponentially greater recovery" than in *Chassix*).
24 *In re Chassix Holdings Inc.*, 533 B.R. at 78.
25 *Mallinckrodt*, 639 B.R. at 881.
26 *Id.*
27 Hr'g Tr. at 15:6-14, *William K. Harrington, U.S. Trustee v. Purdue Pharma LP*, No. 23-124 (U.S. Dec. 4, 2023).
28 *Id.* at 16:2-9, 12-13.
29 *Ascena*, 636 B.R. at 686-87.

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## Litigator's Perspective: Due Process and Opt-Out Releases

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a multitude of protections that collectively ensure that due process is satisfied, including representation by two statutory fiduciaries and other organized creditor groups, statutorily mandated notice under § 1125 of the Bankruptcy Code, opportunities to participate and be heard throughout a case, and the myriad protections of § 1129, including that the plan be in the best interests of *all* creditors, and that they receive more than they would in a liquidation.

Provided that the factors supporting opt-out releases are satisfied, opt-outs are far more protective of creditor interests than a mandatory opt-in. This is particularly true where creditors stand to receive increased recoveries in exchange for granting third-party releases. For example, the *Endo* plan featured different release mechanics for different classes: "sophisticated" creditors (including secured creditors and tribes) would be granted third-party releases if they declined to opt out, whereas general unsecured creditors and personal-injury victims would only be granted releases if they voted in favor of the plan or opted in.[30] Certain of these creditors received a four-times-the-recovery multiplier for granting the third-party release, either by opting in or declining to opt out, as applicable.[31]

Ironically, the U.S. Trustee in *Endo* did not object to opt-outs for "sophisticated" creditors and was seemingly a central participant in negotiating the releases.[32] However, barring the opt-out for smaller creditors was tragically detrimental to them. Counsel to the official committee of *Endo* opioid claimants explained:

> [T]he U.S. Trustee's position regarding the release provisions has the result of penalizing personal-injury victims who do not either vote in favor of the Plan or affirmatively "opt in" to the third-party releases by depriving them of a significant portion of their recovery (while not doing the same for political subdivisions or any other non-individual Opioid Claimants). The U.S. Trustee presumably took this position because it did not want to allow personal-injury victims to unwittingly grant third-party releases ... notwithstanding the outsized importance of Plan recoveries to such claimants relative to the potentially released claims against third-party defendants — claims [that] personal-injury victims likely would not bring if they did possess them in light of the costs of litigation relative to the speculative recoveries on such claims in this particular case.... The U.S. Trustee must believe that its position in this case (and others) is actually helping personal-injury victims; the [official committee of unsecured creditors] disagrees.[33]

As in Civil Rule 23(b)(3) class actions — which require opt-outs and likely bar opt-ins — the *Endo* victims would have been far better served with an opt-out provision, which would have quintupled their plan recoveries unless they opted out. Instead, because they had to opt in to get the multiplier, many victims inadvertently lost out on 80 percent of their plan recoveries — for nothing. This grievous harm is as avoidable as it is incomprehensible.

### Conclusion

Much is lost when silent creditors are denied plan recoveries in exchange for illusory rights to retain direct claims they will almost surely never bring. The irrational assumption that silence can constitute rejection but not acceptance of a fair deal harms creditors and victims. Due process, and justice itself, is far better served where — in appropriate cases — statutory fiduciaries overseen by courts can opt in to opt-outs, and opt out of using opt-ins. abi

30 Confirmation Brief, *In re Endo Int'l plc*, No. 22-22549 (JLG), at 120 (Bankr. S.D.N.Y. March 7, 2024) (ECF No. 3787).

31 Fourth Amended Joint Chapter 11 Plan, *Endo Int'l* (Bankr. S.D.N.Y. March 18, 2024) (ECF No. 3849), at Art. IV.

32 Confirmation Brief, *Endo Int'l* at 120 (Bankr. S.D.N.Y. March 7, 2024) (ECF No. 3787).

33 Statement of the Official Comm. of Opioid Claimants in Support of Confirmation, *Endo Int'l* ¶ 8, n.10 (Bankr. S.D.N.Y. March 7, 2024) (ECF No. 3785).

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# Faculty

**Hon. Martin R. Barash** is a U.S. Bankruptcy Judge for the Central District of California in Woodland Hills and Santa Barbara, sworn in on March 26, 2015. He brings more than 20 years of legal experience to the bench. Prior to his appointment, Judge Barash had been a partner at Klee, Tuchin, Bogdanoff & Stern LLP in Los Angeles since 2001, where he represented debtors and other parties in chapter 11 cases and bankruptcy litigation. He first joined the firm as an associate in 1999. Earlier in his career, Judge Barash worked as an associate of Stutman, Treister & Glatt P.C. in Los Angeles. He also has served as an adjunct professor of law at California State University, Northridge. Following law school, Judge Barash clerked for Hon. Procter R. Hug, Jr. of the U.S. Court of Appeals for the Ninth Circuit from 1992-93. He is a former ABI Board member, for which he served on its Education Committee and currently serves on its Committee for Diversity, Equity, and Inclusion, and he is a judicial advisor to ABI's annual Southwest Bankruptcy Conference and its Consumer Practice Extravaganza. Judge Barash is a former member of the Board of Governors of the Financial Lawyers Conference and currently serves a judicial director of the Los Angeles Bankruptcy Forum, where he is a member of its Committee on Diversity, Equity and Inclusion. He also is a volunteer for the Los Angeles chapter of Credit Abuse Resistance Education (CARE) and was recognized nationally as the CARE Volunteer of the Year for 2022. Judge Barash has served on numerous committees of the U.S. Bankruptcy Court for the Central District of California and currently serves as chair of its Education Committee, which is responsible for conducting educational programs for judges, law clerks and externs. He is a frequent panelist and lecturer on bankruptcy law and a co-author of the national edition of the *Rutter Group Practice Guide: Bankruptcy*. Judge Barash received his A.B. *magna cum laude* in 1989 from Princeton University and his J.D. in 1992 from the UCLA School of Law, where he served as member, editor, business manager and symposium editor of the *UCLA Law Review*.

**Hon. Hilary L. Barnes** is a U.S. Bankruptcy Judge for the District of Nevada in Reno, appointed on March 31, 2023. Previously, she was a member of Allen Barnes & Jones, PLC, a boutique bankruptcy firm, where her practice focused on bankruptcy and she represented various parties in chapter 7, 11 and 13 bankruptcy cases. From 2009-14, Judge Barnes was a partner at The Cavanagh Law Firm, P.A., where her practice focused on representing creditors in chapter 11 bankruptcy proceedings and bankruptcy-related litigation. From 2005-09, she was an associate and then partner at Quarles & Brady LLP, where she was involved in the representation of institutional lenders, large commercial debtors, the FDIC, buyers of distressed assets, trustees and other constituents in chapter 11 proceedings, receiverships, foreclosures and guaranty litigation. While at Quarles & Brady, she also devoted a significant amount of time to The Arizona Justice Project as a *pro bono* lawyer. Judge Barnes also was an associate at Stoel Rives LLP and Squire Sanders & Dempsey, LLP (now Squire Patton Boggs). She was a master of the bench in the Arizona Bankruptcy American Inn of Court and served as its president from 2018-19. In addition, she chaired the State Bar of Arizona's Bankruptcy Section from 2014-15, and she served as a Ninth Circuit Lawyer Representative from 2015-18. In that role, Judge Barnes had the honor of serving as the co-chair for the District of Arizona from 2016-17, and on the Lawyer Representatives Coordinating Committee for the Ninth Circuit Judicial Conference from 2017-18. Judge Barnes is a member of ABI and the Federal Bar Association. She received her B.A. in art history with honors from the University of Chicago in 1986 and her J.D. in 1999 from the

Arizona State University Sandra Day O'Connor College of Law, where she served as executive editor of *Jurimetrics, the Journal of Law, Science & Technology*.

**Hon. Daniel P. Collins** is a U.S. Bankruptcy Judge for the District of Arizona in Phoenix, appointed on Jan. 18, 2013. He served as chief judge from 2014-18 and is presently a conflicts judge in the Districts of Guam, Hawaii and Southern California. Previously, Judge Collins was a shareholder with the Collins, May, Potenza, Baran & Gillespie, P.C. in Phoenix, practicing primarily in the areas of bankruptcy, commercial litigation and commercial transactions. He is president of the National Conference of Bankruptcy Judges, is a Fellow in the American College of Bankruptcy, served on ABI's Board of Directors, is on the board of the Phoenix Chapter of the Federal Bar Association and is a member of the University of Arizona Law School's Board of Visitors. He also is a founding member of the Arizona Bankruptcy American Inn of Court. Judge Collins received both his B.S. in finance and accounting in 1980 and his J.D. in 1983 from the University of Arizona.

**Hon. Thomas M. Horan** is U.S. Bankruptcy Judge for the District of Delware in Wilmington, appointed in 2023. He previously practiced law in Wilmington for 18 years, focusing on financial restructuring and bankruptcy litigation. Most recently, Judge Horan had been a member of the Bankruptcy, Insolvency and Restructuring group at Cozen O'Connor, a national firm headquartered in Philadelphia with a Wilmington office. He joined Cozen in a group-wide 2020 defection from Fox Rothschild, for which he had worked since its own 2018 merger with Wilmington-based Shaw Fishman Glantz & Towbin. Judge Horan's national practice included representing debtors and official unsecured creditor committees in complex chapter 11 proceedings, and he represented secured creditors and other parties in litigation. He also frequently provided opinion letters on commercial transactions and represented parties before the state's Court of Chancery and Superior Court. Last year, Judge Horan was named to *Lawdragon*'s list of the Top 500 U.S. bankruptcy and restructuring lawyers. He also serves on ABI's Board of Directors. Judge Horan received his B.A. in 1989 and his M.A. in 1992 from Fordham University, and his J.D. *cum laude* from St. John's University School of Law in 2002, where he was executive notes and comments editor for the *ABI Law Review*.

**Hon. Michele J. Kim** is a Chief Judge for U.S. Bankruptcy Court for the Southern District of Georgia in Brunswick, initially appointed on June 23, 2017. She previously clerked for U.S. Bankruptcy Court Judge John S. Dalis and Hon. Anthony Alaimo, and worked for King & Spalding in its Atlanta office, where she specialized in financial restructuring and bankruptcy law. Judge Kim received her J.D. with honors in 2006 from the University of Georgia School of Law.

**Hon. August B. Landis** is Chief Judge of the U.S. Bankruptcy Court for the District of Nevada in Las Vegas, appointed on Nov. 27, 2013, and named Chief Judge on April 1, 2020. He currently chairs the Ninth Circuit Conference of Chief Bankruptcy Judges. Between 2005 and his appointment to the bench, Judge Landis served as an Assistant U.S. Trustee for the District of Nevada in Las Vegas, as the U.S. Trustee Program's first Acting Associate General Counsel for Chapter 11 Practice, and as the Acting U.S. Trustee for Region 17. Prior to joining the U.S. Trustee Program, he was an attorney in private practice with the Des Moines, Iowa, firms of Neiman, Neiman, Stone & Spellman (1987-90) and Whitfield & Eddy, P.L.C. (1990-2005), mostly representing trustees and advancing creditors' rights in commercial litigation, secured transactions and bankruptcy cases. Judge Landis is a member of the Iowa State Bar Association. He received his J.D. from Drake Law School in Des Moines.

**Hon. Brenda T. Rhoades** is Chief Judge of the U.S. Bankruptcy Court for the Eastern District of Texas in Plano. In 2003, she was appointed the first Asian American bankruptcy judge in the country. Since that time, she has presided over more than 100,000 cases and has served the judiciary in various capacities. A native of Seoul, Korea, Judge Rhoades immigrated to the U.S. as a child. Prior to taking the bench, she was in private practice at Akin, Gump, Strauss, Hauer & Feld, Weil Gotshal & Manges and Baker Botts. Judge Rhoades has been active in many organizations during her professional career, including having served as vice president of Membership for the National Asian Pacific American Bar Association, chair of the Asian Pacific Interest Section of the State Bar of Texas, co-chair of the Alaska Bar Association's Bankruptcy Section, a Dallas Bar Association board member, and president of the Dallas Asian American Bar Association. In addition, she served as a council member for the Council on Legal Education Opportunity in association with the ABA Fund for Justice and Education, as a master of the John C. Ford Inns of Court, as a Fellow of the Texas Bar Foundation, and as an advisory board member of the Korean American Coalition. Judge Rhoades received her B.S. in applied mathematics from Texas A&M University and her J.D. *magna cum laude* from Arizona State University College of Law, where she received the Sandra Day O'Connor Constitutional Law Award and the Outstanding Graduate Award.

**Hon. Madeleine C. Wanslee** is a U.S. Bankruptcy Judge for the District of Arizona in Phoenix, sworn in on March 17, 2014. She has been a member of the Ninth Circuit Conference Executive Committee since 2018 and currently chairs the 2024 Judicial Conference. Before joining the bench in 2014, Judge Wanslee practiced at Gust Rosenfeld, PLC, where she served on the firm's management committee and concentrated her practice on bankruptcy, creditors' rights and related appeals. She is Board Certified by the American Board of Certification, and while in private practice, she briefed and argued a bankruptcy case before the U.S. Supreme Court. Judge Wanslee is a former chair of the Ninth Circuit Bankruptcy Judges Education Committee, the Ninth Circuit Lawyer Representatives Coordinating Committee and the Arizona State Bar's Bankruptcy Section. She previously served on the American Board of Certification's Standards Committee and on the Arizona State Bar's Advisory Committee, which certify bankruptcy specialists. She helped to charter and is past president of the Arizona Bankruptcy American Inn of Court. Judge Wanslee began her legal career as a law clerk for Hon. Robert Clive Jones of the Ninth Circuit Bankruptcy Appellate Panel. She received her B.F.A. and B.A. from the University of Arizona and her J.D. from Gonzaga University School of Law, where she served as a writer and executive editor of the *Gonzaga Law Review*.

**Lindsi M. Weber** is an attorney with The Burgess Law Group in Phoenix, where she helps resolve bankruptcy and financial restructuring issues on behalf of chapter 11 debtors, committees, secured creditors or parties to bankruptcy litigation. Active in the bankruptcy community, she is a past board member of the Maricopa County Bar Association Bankruptcy Section and past president of the Next-Gen Emerging Leaders Board of the Turnaround Management Association's Arizona Chapter. She also participated as a member of the National Conference of Bankruptcy Judges' Next Generation program in 2017 and was a member of the 2019 class of ABI's "40 Under 40" In addition to her time in the bankruptcy courts, Ms. Weber also assists clients with complex, commercial, probate and business litigation matters in both state and federal courts. She has been a Fellow of the American Bar Foundation since 2020, is rated AV-Preeminent by Martindale-Hubbell, and is listed in *The Best Lawyers in America* for Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law (2019-21) and in *Southwest Super Lawyers* for 2020. In addition, she received the "Turnaround of the Year Award" by the Turnaround Management Association's Arizona Chapter in 2012 and the Mathe-

son Service Award in 2007, and she is on the *Pro Bono* Honor Roll with the U.S. Bankruptcy Court for the District of Arizona. Mr. Weber received her B.A. in business management with honors in 2001 from the University of Puget Sound and her J.D. *magna cum laude* from Arizona State University's Sandra Day O'Connor College of Law in 2007, where she was admitted to the Order of the Barristers and Order of the Coif, was a Pedrick Scholar, was a National Environmental Moot Court member and received the Editor's Award in 2007 for her work on the *Arizona State University Law Journal*.