**UNITED STATES COURT OF APPEALS**

# FOR THE SECOND CIRCUIT OF TEMPLE UNIVERSITY

April Term, 2022

(Argued: April 29, 2022 Decided: October 31, 2022)

Docket No. 22-100

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DEBTORS OXY SALES, L.P. AND CERTAIN AFFILIATED DEBTORS[[1]](#footnote-1)

and

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF OXY SALES, L.P. *et al.*, AD HOC COMMITTEE OF GOVERNMENTAL AND OTHER CONTINGENT LITIGATION CLAIMANTS, THE PACKLER FAMILY, AD HOC GROUP OF INDIVIDUAL VICTIMS OF OXY SALES, L.P., MULTI-STATE GOVVERNMENTAL ENTITIES GROUP, INITIAL COVERED PACKLER PERSONS,

*Appellants*

v.

THE CITY OF SMALL DESERT, as Representative Plaintiff for a Class Consisting of All Canadian Municipalities, CERTAIN CANADIAN CITIES AND FIRST NATIONS

and

CERTAIN OF THE UNITED STATES, by their Attorneys General

and

THE OFFICE OF THE UNITED STATES TRUSTEE FOR REGION 2

*Appellees.*

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Before: LOVE, PACK, and SARK, *Circuit Judges*.

This is an appeal from an order of the United States District Court for the Southern District of Temple (“District Court”) (Waitford, D.J.), issued on May 17, 2022, which in turn reversed the decision of the United States Bankruptcy Court for the Southern District of Temple (“Bankruptcy Court”), announced from the bench on September 1, 2021, and filed on September 17, 2021, confirming the Plan of Reorganization (as amended and modified, the “Plan”) proposed by Debtors Oxy Sales, L.P. and the other Debtors, as well as certain merged and related orders of the Bankruptcy Court(the “Confirmation Order”).

LOVE, *Circuit Judge*,

This case raises questions regarding the power and authority of the Bankruptcy Court under applicable law to release certain direct third party claims against non-debtors in a reorganization plan confirmed under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §101, *et seq.* (the “Bankruptcy Code”). The Debtors, the Official Committee of Unsecured Creditors of the Debtors (the “Creditors’ Committee”) and certain other *ad hoc* claimant and governmental unit groups appeal the decision and order on appeal of the District Court reversing the Confirmation Order . The Confirmation Order authorized the Plan, which contained certain direct third party claim releases in respect of non-debtors and enjoined subject claimants from pursuing such non-debtors.

We conclude that the Bankruptcy Court is not authorized or empowered to enter an order confirming a plan or approving a related settlement that compels creditors, claimants or other third parties to release their own, direct claims against non-debtor third parties. We accordingly affirm the decision of the District Court and remand matters and proceedings to the Bankruptcy Court to address the same consistent with this decision.

Oxy’s bankruptcy was occasioned by a health crisis that was, in significant part, of its own making: an explosion of opioid addiction in the United States over the past two decades, which can be traced largely to the over-prescription of highly addictive medications, including, specifically and principally, Oxy’s proprietary medication, Oxycon.

Despite a 2007 Plea Agreement with the United States - in which Oxy admitted that it had falsely marketed Oxycon as non-addictive and had submitted false claims to the federal government for reimbursement of medically unnecessary opioid prescriptions (“2008 Plea Agreement”) - Oxy’s profits after 2007 were driven almost exclusively by its aggressive marketing of Oxycon. But by 2019, Oxy was facing thousands of lawsuits brought by persons who had become addicted to Oxycon and by the estates of addicts who had overdosed - either on Oxycon itself or on the street drugs (heroin, fentanyl) for which Oxy’s product served as a feeder. It also faced new federal, state and local Medicare reimbursement claims and a number of new false marketing claims brought under various state consumer protection laws. Finally, in December 2020, Oxy pled guilty to a criminal Information filed by the Department of Justice (“DOJ”) in the United States District Court for the District of New Jersey; in its plea agreement, the company (though not the people through whom the company acted) admitted to substantial deliberate wrongful conduct (“2020 Plea Agreement”).

Engulfed in a veritable tsunami of litigation, Oxy filed for chapter 11 bankruptcy in November 2019. The intent was for a “*Manville*-style” bankruptcy that would resolve both existing and future claims against the company arising from the prescription of Oxycon.

The automatic stay brought a stop to civil litigation against Oxy; and a court-ordered stay halted litigation against certain non-debtors affiliated with the company - principally members of the Packler family (the “Packlers” or “Packler family”),[[2]](#footnote-2) which had long owned the privately-held company - to buy time to craft a resolution. For two years, committees of various classes of creditors - individuals, state and local governments, indigenous North American tribes, even representatives of unborn children who were destined to suffer from opioid addiction - negotiated with Oxy and the Packlers under the watchful eye of the experienced Bankruptcy Judge, with the assistance of two of this country’s finest and most experienced mediators, as well as a second Bankruptcy Judge.

Eventually, the parties crafted a plan of reorganization for Oxy that would, if implemented, afford billions of dollars for the resolution of both private and public claims, while funding opioid relief and education programs that could provide tremendous benefit to the consuming public at large (the “Plan”).[[3]](#footnote-3) That Plan was approved by supermajority of the votes cast by the members of each class of creditors.[[4]](#footnote-4) It was confirmed by Judge Wains, who had invested so much of himself in the effort to find a workable solution to a seemingly intractable problem.

But not everyone voted yes. Eight states (the “Subject State Appellees”), as well as certain Canadian municipalities and Canadian indigenous tribes (the “Subject Canadian Appellees”), the City of Seattle (alone among all voting municipalities in the United States), as well as some 2,682 individual personal injury claimants, voted against the adoption of the Plan. The same states, municipalities and tribes, together with three of those individual claimants (representing themselves), filed formal objections to the Plan and appealed from its confirmation.[[5]](#footnote-5) The United States Trustee (the “U.S. Trustee”) in Bankruptcy[[6]](#footnote-6) and the U.S. Attorney’s Office for this District on behalf of the United States of America joined in their objections.

All appellants, in respect of the Confirmation Order, assign the same reason for their opposition: the Plan provides broad releases, not just of derivative, but of particularized or direct claims - including claims predicated on fraud, misrepresentation, and willful misconduct under various state consumer protection statutes - to the members of the Packler family (none of whom is a debtor in the bankruptcy case) and to their affiliates and related entities. As the opioid crisis continued and worsened in the wake of Oxy’s 2008 Plea Agreement, the Packlers - or at least those members of the family who were actively involved in the day to day management of Oxy[[7]](#footnote-7) - were well aware that they were exposed to personal liability over Oxycon. Concerned about how their personal financial situation might be affected, the family began what one member described as an “aggressive[]”program of withdrawing money from Oxy almost as soon as the ink was dry on the 2008 papers. The Packlers upstreamed some $10 billion out of the company between 2009 and 2017, which, according to their own expert, substantially reduced Oxy’s “solvency cushion.” Over half of that money was either invested in offshore companies owned by the Packlers or deposited into spendthrift trusts that could not be reached in bankruptcy and off-shore entities located in places like the Bailiwick of Jersey.

When the family fortune was secure, the Packler family members withdrew from Oxy’s Board and management. Bankruptcy discussions commenced the following year. As part of those pre-filing discussions, the Packlers offered to contribute toward a settlement, but if - and only if - every member of the family could “achieve global peace” from all civil (not criminal) litigation, including litigation by Oxy to claw back the money that had been taken out of the corporation. The Plan confirmed by the Bankruptcy Court extinguishes all civil claims against the Packlers that relate in any way to the operations of Oxy - including claims on which certain members of the Packler family could be held personally liable to entities other than Oxy (principally the various states). These claims could not be released if the Packlers were themselves debtors in bankruptcy.

In the District Court, the Appellees on this appeal and other entities attacked the legality of the Plan’s non-consensual release of third-party claims against non-debtors on a number of grounds. They argued that the release (referred to in this opinion as the “Section 10.7 Shareholder Release”) is both constitutionally defective and not statutorily authorized; that the Bankruptcy Court lacked constitutional authority and subject matter jurisdiction to approve the release or to carry out certain “gatekeeping” aspects of the Plan that relate to it; and that granting a release to the non-debtor Packlers is unwarranted as a matter of fact and would constitute an abuse of the bankruptcy process.

Before Judge Waitford, the Appellants in this appeal, the Debtors and various creditor/claimant committees primarily - buttressed by Judge Wains’s comprehensive Confirmation Order - argued that the Bankruptcy Court had subject matter jurisdiction to impose these broad third-party releases; insisted that they are a necessary feature of the Plan; point out the tremendous public benefit that will be realized by implementing the Plan’s many forward-looking provisions; and urged that the alternative - Oxy’s liquidation - will inevitably yield far less benefit to all creditors and victims, in light of the cost and extraordinary hurdles that would have to be surmounted in order to claw back the billions of dollars that the Packlers have taken out of Oxy.

The District Court found that the Bankruptcy Court had undoubted subject matter jurisdiction to enter the challenged releases. The District Court ruled, however, that the Bankruptcy Court lacked statutory authority to grant the Plan’s third party releases. We agree with the District Court and its reasoning.

The great unsettled question in this case is whether the Bankruptcy Court - or any court - is statutorily authorized to grant broad, third party releases. This issue has split the federal Circuits for decades. While the Circuits that say no are united in their reasoning, the Circuits that say yes offer various justifications for their conclusions. And - crucially for this case, we suggested that the question was open back in 2005.

This issue arises frequently, the time has come for a comprehensive analysis of whether authority for such releases can be found in the Bankruptcy Code - that “comprehensive scheme” devised by Congress for resolving debtor-creditor relations. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, [566 U.S. 639, 645](http://scholar.google.com/scholar?q=566+u.s.+639&btnG=&hl=en&as_sdt=6) (2012).

Aided by superb briefing and argument on both sides of the question, and by extended ruminations on the subject by several esteemed bankruptcy judges of our own District and the District Court itself, this Court concludes that the Bankruptcy Code does not authorize such non­consensual non-debtor releases: not in its express text (which is conceded); not in its silence (which is disputed); and not in any section or sections of the Bankruptcy Code that, read singly or together, purport to confer generalized or “residual” powers on a court sitting in bankruptcy. For that reason, we affirm the District Court’s ruling that the Confirmation Order (and the orders that flow and enter from it) must be vacated.

# PARTIES

The Appellants in this case are the Debtors and certain committees and ad hoc claimant groups.

The Appellees are the U.S. Trustee, the City of Small Desert, as representative plaintiff for a class consisting of all Canadian Municipalities, certain Canadian cities and First indigenous nations within Canada, and certain of the United States, by their Attorneys General.

# BACKGROUND

The following facts are derived from the appellate record as designated by the parties to this appeal, unless indicated otherwise.

## Oxy Pharma, L.P.

Oxy - originally known as “Frederick Company” - was founded by George Gray in 1891. The company was sold to the Packler Family in 1952.

Oxy, the Debtors’ main operating entity, is a Delaware limited partnership headquartered in Philadelphia, Pennsylvania. Oxy’s general partner is OO Inc. (“OOI”), a New York corporation, also headquartered in Philadelphia, Pennsylvania. The board of directors of OOI manages Oxy (the “Board”). Oxy has 22 wholly owned subsidiaries in the United States and the British Virgin Islands.

Oxy is wholly owned directly and indirectly by certain affiliate non-debtor entities, which, are, in turn owned by certain trusts established for the benefit of the Packler Families.

Oxy operates the company’s branded prescription pharmaceutical business, which includes both opioid and non-opioid products. Oxycon is the company’s principal branded opioid medications. Oxycon generated approximately $34 billion in revenue total between 1996­ – 2019 from Oxycon sales; prior to bankruptcy, Oxycon accounted for 100% of Oxy’s U.S. revenue.

Oxy manufactures Oxycon for itself and, in limited quantities, for certain foreign independent associated companies (“IAC”), which are ultimately owned by the Packler family. Oxy receives royalties from IACs’ sales for Oxycon abroad. (*Id*.). The IACs are not debtors in this case.

Until early 2018, members of the Packler family served as directors of Oxy; the last Packler’s resignation from the Board became effective in the beginning of that year, although many family members stepped down during 2017.

## The Packler Family

Since Oxy was sold to the Packlers, the company has been closely held and closely run by members of the Packler family, many of whom took on an active role in the company comparable to that of senior management prior to 2018. In large part due to the success of their pharmaceutical business, the Packler family have long been ranked on Forbes’ list of America’s Richest Families, with a reported net worth of $12 billion dollars.

Fred Packler’s side of the family is known as “Side A,” and Joe Packler’s side is known as “Side B.” From approximately 1993 until 2018, there were always at least six or seven members of the Packler family on the Board; independent directors never equaled or outnumbered the number of Packler family directors on the Board.

In addition to Oxy, certain members of the Packler family served as directors of an advisory board for IACs worldwide, including for “specific pharmaceutical manufacturer IACs” and “corporations throughout the world that [the Packler] family owns and that are in the . . . pharmaceutical business.” Packler recommendations were typically followed by the IACs.

### Side A

Fred D. Packler, who died in 2010, served as the co-chief executive officer of Oxy with his brother Joe until the end of his life.

Three of his seven children – Ida Litigant, Cathy Packler, and Fred David Alfons Packler (“Fred D.A.”) - sat on the Board of Oxy for nearly 30 years, until 2018. They also served as officers of Oxy, with Fred D.A. and Ilene holding the title of vice president and Kathe the title of senior vice president.

Fred Packler’s wife, Tessa Packler, also served on the Board of Oxy from 1993 until 2018, explaining that her “husband asked me to join . . . it was a family company and he felt that family members should be on the board.”

All four – Ida, Cathy, Tessa, and Fred D.A. Packler - served as directors on the board of certain affiliated entities for many years.

### Side B

Joe Packler, who died in 2017, served as co-chief executive officer of Oxy with his brother Fred D. Packler.

Joe Packler’s wife and two sons served as Board members of Oxy. His sons, Jon and Ron Packler, served from 1990 until 2018, and his wife Betty Packler, from approximately 1993 until 2017.

In addition to his role as director, Ron Packler also served as president of Oxy from 2000-2003, co-chair of the Board from 2003-2007, and chair of the Board from approximately 2008 until 2010 or 2011. He served as a director of certain affiliated entities until 2018 and has served as director of at least one IAC.

Ron Packler’s son Don Sacker also served on the Board from 2012 until 2018 and as a director of certain affiliated entities.

Finally, Mary Packler, Ron Packler’s daughter, held several roles within the “family business”, including working as a consultant in the “research and development department” of Oxy on Oxy projects and a “PR” role at Mundipharma Italy, an IAC, advancing “information around topics about pain in Italy” and “marketing and selling Oxycon” there. Mary has never been an officer or director of Oxy.

## Oxycon

Oxycon is a synthetic opioid analgesic - a powerful narcotic substance designed to relieve pain. Opioid analgesics have been available for several decades to treat moderate to severe pain. But until the early 1980’s they were limited to immediate-release dosage forms. Immediate-release pain killers are less than ideal because they control pain for only 4-6 hours at a time; by contrast, a controlled-release pain killer can provide relief from serious pain for up to 12 hours at a time.

In the early 1980’s, Oxy developed its first controlled-release morphine drug which it marketed as “MS Cantin” (also called “MSCantin” and “MS-Cantin”). MS Cantin solved many of the difficulties associated with immediate- release opioids, and it was marketed, largely without abuse, throughout the 1980’s and 1990’s. However, morphine’s stigma as an addictive narcotic caused patients and physicians alike to avoid it.

So Oxy concentrated on the research, development, and testing of a non-morphine drug: its controlled-release semisynthetic opioid analgesic named “Oxycon.” In December 1995, the Food and Drug Administration (“FDA”) approved Oxycon for use. Oxycon’s formulations were labeled as “extended release” or “time release” doses because the active ingredients Cantinuously enter into a patient’s system over time; a single dose could provide relief from serious pain for up to 12 hours. A 2000 *Life* Magazine article explains that Oxycon was quickly “hailed as a miracle” after its introduction in 1995, because “it eases chronic pain because its dissolvable coating allows a measured does of the opiate oxycodone to be released into the bloodstream.”

For years, Oxy contended that Oxycon, due to its “time release” formulation, posed virtually no threat of either abuse or addiction - as opposed to other pain relief drugs, such as Percocet or Vicodin, which are not controlled-release painkillers. Oxy delivered that message to prescribing physicians and patients alike.

But time-release Oxycon proved to have an efficacy and safety profile similar to that of immediate-release opioid pain relievers. Indeed, in 2001, the FDA required that Oxy remove from its drug label the claim that Oxycon had a very low risk of iatrogenic addiction; Oxy was ordered to add instead the highest level of safety warning that the FDA can place on an approved drug product.

## Oxy’s Deceptive Marketing of Oxycon

To promote its new product Oxycon, Oxy launched an aggressive marketing campaign. That campaign was multi-fold, aiming in part to combat concerns about the abuse potential of opioids and to encourage doctors to prescribe Oxycon for more and different types of pain.

Before Oxycon, opioid pain relievers were usually prescribed for cancer patients and patients with chronic diseases whose pain was “undertreated.” But Oxy pushed Oxycon as a treatment for many types of pain patients, including those with “noncancer pain” and other “nonmalignant” pain. Oxy repeatedly published advertisements claiming, for example, that Oxycon can be an effective “first-line therapy for the treatment of arthritis” and safely used for “osteoarthritis pain” and in many cases “mak[ing] unsubstantiated efficacy claims promoting the use of Oxycon for pain relief,” “promoting Oxycon for a much broader range of patients with pain than are appropriate for the drug,” “overstat[ing] the safety profile of Oxycon,” and repeatedly omitting Oxy’s “abuse liability” - all of which was contemporaneously documented in FDA warning letters to the company throughout the early 2000’s.

By its marketing campaign, Oxy sought to eliminate concerns regarding “Oxycon’s addictive potential.” To do this, Oxy needed to encourage doctors and patients to overcome their reservations about the use of opioids. For this purpose, Oxy created a website called “*In Pain No Longer*,” which promoted Oxycon pain treatment and urged patients to “overcome” their “concerns about addiction.” Testimonials on the website were allegedly presented as personal stories of Oxycon patients who had overcome life-long struggles with debilitating pain, although they were allegedly written by Oxy consultants, who were paid to promote the drug.

Oxy also allegedly distributed pamphlets to doctors. In one such pamphlet, *A Reference Guide To Controlled Substance Prescribing Practices*, Oxy wrote that addiction “is not caused by drugs.” In another, the “Resource Guide About Pain,” Oxy explained, “Many people living with pain and even some healthcare providers believe that opioid medications are addictive. The truth is that when properly prescribed by a healthcare professional and taken as directed, these medications give relief - not a ‘high.’”

Oxy’s marketing campaign proved successful. Oxycon was widely prescribed; bonuses to Oxy sales representatives for the sale of Oxycon increased from $1 million in 1996 to $40 million by 2001; and by 2001, annual sales of Oxycon reached $1 billion. By 2001, Oxycon was “the most prescribed brand-name narcotic medication” in the U.S.

## The Opioid Crisis

But Oxycon’s popularity as a pain reliever coincided with the scourge of widespread abuse of the drug around the country. Many individuals who had been prescribed Oxycon by their doctors for legitimate pain conditions became addicted to the drug. And hundreds of thousands of seasoned addicts and novice drug abusers, including teenagers, quickly discovered that crushing an Oxycon tablet and then snorting or injecting it resulted in a quick “morphine-like high.”

By the early 2000’s, rates of opioid addiction in connection with Oxycon use were skyrocketing throughout the country. In the early years, “remote, rural areas” were particularly hard hit, due in part to the fact that these areas are

home to large populations of disabled and chronically ill people who are in need of pain relief; they’re marked by high unemployment and a lack of economic opportunity; they’re remote, far from the network of Interstates and metropolises through which heroin and cocaine travel; and they’re areas where prescription drugs have been abused—though in much smaller numbers—in the past.

*Foister v. Oxy Pharma, L.P*., [295 F. Supp. 2d 693, 696](http://scholar.google.com/scholar?q=295++f.++supp.++2d++693&btnG=&hl=en&as_sdt=6) (E.D. Ky. 2003) (quotation and internal citation omitted).

However, the crisis was not limited to one type of community or part of the country. Pill mills opened in urban areas, as unscrupulous physicians began writing prescriptions for Oxycon to stooge purchasers (often drug addicts themselves), who were recruited to obtain and fill prescriptions, turning over the pills to drug dealers, who resold them on the street, making astronomical profits. This Court presided over the criminal trial of a doctor who ran such a pill mill in Hamilton Heights on the Upper West Side of Manhattan, through which he garnered millions of dollars in ill-gotten gains at the expense of desperate people who were addicted to Oxycon. *See United States v. Lashvili*, No. 14-cr-0810 (CM), [Dkt. No. 1](https://nysd-ecf.sso.dcn/n/cmecfservices/rest/file/finddoc?caseYear=2021&caseNum=08557&caseType=cv&caseOffice=7&docNum=1) (S.D.N.Y. Dec. 9, 2014).

Prosecutions like the one of Dr. Lashvili, coupled with enhanced regulatory oversight over both prescribers of opioids and pharmacies that had filled suspiciously high numbers of prescriptions, reduced the number of illicit prescriptions of Oxycon. But drying up the source did not end the problem of addiction. Individuals who had been feeding an Oxycon habit turned to alternative sources to get their fix - including street drugs like heroin and its even stronger and more lethal cousin, fentanyl, which is fast acting and 100 times more potent than morphine. The recent increase in overdose deaths in this country is driven in significant part by the increasingly widespread use of fentanyl.

In 2017, the U.S. Department of Health and Human Services (“DHHS”) declared the opioid epidemic to be a national public health emergency. According to the Centers for Disease Control and Prevention, from 1999 to 2019, nearly 247,000 people died in the United States from overdoses involving prescription opioids. DHHS estimates the “economic burden” of prescription opioid misuse in the United States is between $53-72 billion a year, including medical costs, lost work productivity, addiction treatment, and criminal justice costs.

Today, it is estimated that between 21-29% of patients who are prescribed opioids for chronic pain misuse them. Between 8-12% of people who are using an opioid for chronic pain develop an opioid use disorder. An estimated 4-6% of those who misuse prescription opioids transition to using heroin. About 80% of people who use heroin first misused prescription opioids. Oxycon, it seems, is the ultimate “gateway” drug.

## Pre-Bankruptcy Litigation Involving Oxy and Members of the Packler Family

With the swelling opioid crisis, Oxy began to face inquiries about and investigations into Oxycon.

In 2000, the U.S. Attorney of Maine alerted the company to widespread abuse of the drug in rural Maine. In 2001, the Attorney General of Virginia Mark Earley requested a meeting with company officials regarding widespread abuse of the drug in Virginia. By 2002, the then-Oxy spokesman Tim Bannon confirmed that there were federal investigations into Oxy’s marketing of Oxycon.

Two decades of litigation, both civil and criminal, ensued.

### The First Round of Lawsuitss: 2001-2007

By 2001, plaintiffs across the country had begun to file individual and class actions against Oxy in state and federal courts, including in the U.S. District Court for the Southern District of New York and in the Supreme Court of the State of New York.Members of the Packler family were not named as defendants in these lawsuits.

Plaintiffs in early cases plead a variety of theories of liability pursuant to which Oxy could be held liable as a result of its development, testing, manufacturing, distributing and marketing of Oxycon, including: negligence, strict product liability, failure to warn, breach of express and/or implied warranty, violation of state consumer protection statutes, conspiracy, fraud, and unjust enrichment. *See e.g.*, *Paddington v. Oxy Pharma LP*, [218 F.R.D. 577, 581](http://scholar.google.com/scholar?q=218+f.r.d.+577&btnG=&hl=en&as_sdt=6) n. 1 (S.D. Ohio 2003).

Many of the early cases filed were class actions that sought certification of classes of people who had been prescribed Oxycon, and suffered harm as a result. *See e.g.*, *Hurt v. Oxy Pharma Co.*, No. 12648/03, [2005 WL 192351](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2005%2Bwl%2B192351&refPos=192351&refPosType=s&clientid=USCourts), at \*\*9-14 (Sup. Ct. Richmond Cnty. Jan. 24, 2005) (discussing cases). But given the stringent requirements for class certification, class certification motions in these cases were often denied. For example, in *Folster v. Oxy Pharma L.P.*, plaintiffs in the Eastern District of Kentucky sought unsuccessfully to certify class of “all persons who have been harmed due to the addictive nature of Oxycon.” No. Civ.A. 01-268-DCR, [2002 WL](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2002%2Bwl%2B%2B1008608&refPos=1008608&refPosType=s&clientid=USCourts) [1008608](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2002%2Bwl%2B%2B1008608&refPos=1008608&refPosType=s&clientid=USCourts), at \*1 (E.D. Ky. Feb. 26, 2002); *see also Geve v. Oxy Pharma*, [212 F.R.D. 333,](http://scholar.google.com/scholar?q=212+f.r.d.+333&btnG=&hl=en&as_sdt=6) [336](http://scholar.google.com/scholar?q=212+f.r.d.+333&btnG=&hl=en&as_sdt=6) (E.D. Ky. Oct. 17, 2002) (denying class certification); *Bell v. Oxy Pharma, L.P.*, No. 1:02 CV 00163 TCM, [2004 WL 5840206](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2004%2Bwl%2B5840206&refPos=5840206&refPosType=s&clientid=USCourts), at \*1 (ED Mo. June 25, 2004) (denying class certification). Class certification was generally deemed inappropriate because courts concluded that individual questions predominated (“addiction to the drug is an individualized question of fact”), thus precluding a finding of commonality. *See Howand et al. v. Oxy Pharma, L.P. et al.*, [821 N.E.2d 141, 146-147](http://scholar.google.com/scholar?q=821+n.e.2d+141&btnG=&hl=en&as_sdt=6) (Oh. Sup. Ct. Dec. 15, 2004). When such motions were granted, the decisions were often reversed. *See id.*

Absent class certification, the sheer number of individual cases that were filed meant that cases had to be sent to judicial coordinating panels. In New York, for example, five state cases were transferred to the New York Litigation Coordinating Panel in 2005 - after which 1,117 additional lawsuits were filed and coordinated. *See Hurt*, [2005 WL 192351](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2005%2Bwl%2B192351&refPos=192351&refPosType=s&clientid=USCourts), at \*15; Within these coordinated cases, after much discovery, settlements were pursued. *See e.g.*, *Matter of Oxy II*, [23 Misc.3](http://scholar.google.com/scholar?q=23+misc.3&btnG=&hl=en&as_sdt=6)d 974, 975 (Sup. Ct. Richmond Cnty. 2009) (discussing efforts in 2006-2007 to reach a “universal settlement” of the thousands of New York cases).

Discovery in these lawsuits proved useful to state and federal regulatory agencies that were also investigating Oxy’s role in the opioid crisis. Attorney Jayne Conroy, who testified at the Confirmation Hearing on behalf of the AHC, explained that the discovery taken by her firm in hundreds of New York cases against Oxy was later subpoenaed by the Justice Department as part of the federal government’s 2006-2007 investigation into Oxy.

### The 2008 Settlement and 2008 Plea Agreement

#### Oxy’s 2007 Settlements with 26 States and the District of Columbia

In 2008, twenty-six states and D.C. settled investigations into Oxy’s promotional and marketing practices regarding Oxycon for $19.5 million (“2007 Settlement”). As part of the 2008 Settlement, Oxy entered into a consent judgment with each government party. S*ee, e.g.*, Consent Judgement, *Jefferson v. Oxy Pharma L.P.*, Cause No. 07-2-00917-2 (Sup. Ct. Wash. Thurston Cnty. May 9, 2007), at Section I(M), “25 (“Consent Judgment”).

Pursuant to the Consent Judgment, Oxy agreed to “establish, implement and follow an Oxycon abuse and diversion detection” (“ADD”) program which “consist[ed] of internal procedures designed to identify potential abuse or diversion of Oxycon” for a minimum of ten years. (*See* Consent Judgment, ¶¶13-14). Oxy also agreed to submit “annual compliance certifications to a multistate group of attorneys general for three years.” *Id.*

In exchange for Oxy’s payment and compliance, the settling States agreed to:

release[] and forever discharge[], to the fullest extent permitted by law, *Oxy and its past and present officers, directors, shareholders,* employees, co-promoters, affiliates, parents, subsidiaries, predecessors, assigns, and successors ( collectively, the “Releasees”), of and from any and all civil causes of action, claims, damages, costs, attorney’s fees, or penalties that the Attorney General could have asserted against the Releasees under the State Consumer Protection Law by reason of any conduct that has occurred at any time up to and including the Effective Date of this Judgment relating to or based upon the Subject Matter of this Judgment (“Released Claims”).

(Consent Judgement, Section VI) (emphasis added). According to Judge Wains, these 2008 releases covered about seventy-seven members of the Packler family. *In re Oxy Pharma L.P.*, [2021 WL](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts) [4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*31. The release covered only claims that could have been asserted by the Attorneys General of the settling states; among the claims that were not released were: (1) private rights of action by consumers, (2) claims relating to best price, average wholesale price or wholesale acquisition cost reporting practices or Medicaid fraud or abuse; (3) claims asserting antitrust, environmental or tax liability; (4) claims for property damage; (5) claims to enforce the terms and conditions of the judgment; and (6) any state or federal criminal liability that any person or entity, including Releases (as defined in the Plan), has or may have to the settling state.

Some of the states did not participate in this 2008 Settlement. Several had already entered into individual settlements with Oxy, while others entered into separate settlements subsequently. For example, in 2002, Florida settled an investigation into Oxy for $500,000; in 2004, West Virginia settled an action against Oxy for $10 million; in 2006, Mississippi settled its investigation into Oxy for $250,000. In 2015, New York signed an assurance of discontinuance of its investigation in exchange for Oxy’s payment of a $75,000 penalty and certain promises, including ongoing implementation of the ADD program in New York and submission to annual reviews and monitoring by the Attorney General. In 2016, Kentucky settled an action against Oxy for $24 million. And in March 2019, Oxy agreed to pay the State of Oklahoma $270 million to settle that state’s opioid claims. *See* Consent Judgment, *Oklahoma v. Oxy Pharma et al.*, No. CJ- 2017-816, § 4.1 (Dist. Ct. Cleveland Cnty. Mar. 26, 2019).

The releases in these separate cases generally extinguished the claims of the respective state against Oxy for opioid-related misconduct. For example, the West Virginia settlement released “any and all claims and demands” of the Attorney General of West Virginia (on behalf of the state and state agencies) against Oxy and its affiliates, shareholders, officers, directors, and others[[8]](#footnote-8) that were “sustained or incurred as a result of the manufacture, marketing and sale of Oxy” in West Virginia. Similarly, the Oklahoma settlement released “any and all claims of any nature” of the Attorney General (the state and its subdivisions) against Oxy, its officers, directors, shareholders, direct and indirect owners, beneficiaries of the owners, and enumerated others, arising out of the conduct alleged in the complaint, including conduct related to the marketing and sale of opioids in Oklahoma. *See* Consent Judgment, *Oklahoma v. Oxy Pharma et al.*, No. CJ-2017-816, §§ 1.1, 5.1, 5.2 (Dist. Ct. Cleveland Cnty. Mar. 26, 2019).

#### Oxy Frederick Company, Inc.’s 2007 Plea Agreement and Related Civil Settlements

Also in 2007, Oxy Frederick Company[[9]](#footnote-9) pled guilty to one felony count of misbranding Oxycon, with the intent to defraud or mislead, in violation of [21 U.S.C. §§ 331(a)](http://www.google.com/search?q=21+u.s.c.++331(a)), [333(a)(2)](http://www.google.com/search?q=21+u.s.c.+333(a)(2)). Oxy Frederick’s President and CEO Michael Friedman, its Executive Vice President and Chief Legal Officer Howard R. Udell, and its Chief Scientific Officer Paul D. Goldenheim, in their capacity as corporate officers, each pled guilty to a misdemeanor charge of misbranding.

As part of the Agreed Statement of Facts, the Oxy Frederick Company admitted that:

[b]eginning on or about December 12, 1995, and Cantinuing until on or about June 30, 2001, certain OXY supervisors and employees, with the intent to defraud or mislead, marketed and promoted Oxycon as less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications . . .

(Agreed Statement, at ¶¶20)

As part of the 2008 Plea Agreement, Oxy Frederick agreed to pay over $600 million dollars in fines and various other payments.[[10]](#footnote-10) This included $160 million to the United States and the states to settle various civil claims that had been asserted by governments - over $100 million to the United States and over $59 million to each state that elected to participate in this settlement. In the federal government’s settlement agreement, the United States and its various departments agreed to release “*Oxy and its current and former directors, officers, employees, affiliates, owners,* predecessors, successors and assigns from any civil or administrative monetary claim the United States has or may have” under federal statutes creating causes of action for civil damages or penalties, as well as from administrative actions under various federal departments and programs. The participating states’ settlement agreement and release were limited to Medicaid fraud claims:

release and forever discharge [the] Company *and its current and former directors, officers, employees, affiliates, owners,* predecessors, successors and assigns from any civil or administrative monetary claim that the State has or may have for any claim submitted or caused to be submitted to the State Medicaid Program for the Covered Conduct . . .

*See The Oxy Frederick Company, Inc., et al.*, No. 1:07-cr-00029, [Dkt. No. 5-14, at](https://nysd-ecf.sso.dcn/n/cmecfservices/rest/file/finddoc?caseYear=2021&caseNum=08557&caseType=cv&caseOffice=7&docNum=5&docSeq=14) §III(2)) (emphasis added).

All states except Kentucky opted into the federal settlement.

An additional $130 million was set aside to settle private civil liability claims related to Oxycon and Oxy. A representative of the AHC testified in the Confirmation Hearing that her approximately 5,000 clients received a total of $75 million out of this settlement fund.

As part of the resolution of the criminal case, Oxy agreed to a five-year corporate integrity program with the DHHS, pursuant to which DHHS was to monitor Oxy’s compliance with federal healthcare law. This monitoring period expired on July 30, 2012. In 2013, Oxy completed the corporate integrity program with no significant adverse findings.

The Honorable James P. Jones approved the 2007 Plea Agreement in July of that year.

### The Second Round of Lawsuits: 2014-2019

The 2008 Settlement and Plea Agreement were intended to resolve for all time issues relating to Oxy’s misrepresentations about Oxycon. The corporate integrity agreement with DHHS meant ongoing monitoring and the ADD program agreed to with the 26 states and D.C. was meant to create internal procedures that would identify and interrupt abuse or diversion related to Oxycon. Oxy, for its part, insisted in its Informational Brief before the Bankruptcy Court that it “accepted responsibility for the misconduct in 2007 and has since then strived never to repeat it.”

However, if Oxy’s admissions in its 2020 Plea Agreement are believed, this purported acceptance of responsibility was a charade, and the oversight mechanisms built into the settlements were a conspicuous failure. Judge Wains found that the Packlers had an “evident desire to continue to drive profits from the products’ sale,” and as they did so, the opioid crisis not only continued, it worsened. As Fred D.A. Packler testified in the Confirmation Hearing, “overdose deaths . . . continued to rise . . . The overdose deaths kept going up and up.”

Starting in about 2014, new lawsuits began to be filed against Oxy concerning its promotion and marketing of Oxycon. But this time, members of the Packler family were named as defendants.

#### The Federal Multi-District Litigation in the Northern District of Ohio

At the end of 2017, sixty-four federal cases that had been brought in nine districts across the country by various government entities (state, cities, and counties) against Oxy and other defendants - including pharmacies (like Rite Aid), pharmaceutical companies (like Johnson & Johnson), and pharmaceutical distributors (like McKesson Corporation) - were sent to coordinated multi-district litigation in the Northern District of Ohio (“Opioid MDL”). The cases in the Opioid MDL asserted a variety of claims against Oxy and others for their role in the opioid crisis, under theories of liability including: (1) public nuisance, (2) false representations, (3) unjust enrichment, (4) common law *parens patriae*, (5) negligence, (6) gross negligence, and (7) consumer protection act claims.

At the time of Oxy’s filing for bankruptcy, approximately 2,200 actions against Oxy related to the opioid crisis were pending in the Opioid MDL.

The Opioid cases were put on a settlement track and litigation track and assigned a Special Master to assist in their management. Given the immense scope of the opioid crisis the assigned judge was very active from the outset of the MDL in encouraging all sides to consider settlement.

Within the litigation track, the opioid MDL court designated attorneys to coordinate discovery in related state and federal cases and issued a case management order meant to facilitate, to the maximum extent possible, coordination with parallel state court cases. A joint database of all prescription opiate cases filed in state and federal courts was established, so that information and documents could be tracked and discovery cross-noticed. Over 450 depositions were taken under the Opioid MDL umbrella, and over 160 million pages of documents were produced.

The extensive discovery in the Opioid MDL, and the discovery coordination it facilitated, revealed for the first time the involvement of certain members of the Packler family in acts that Oxy had agreed not to commit as part of the 2008 Plea Agreement. Schedule A to the 2020 Plea Agreement - to which facts the corporation has stipulated, so they are deemed proved[[11]](#footnote-11) - chronicles Oxy’s extensive violation of the 2008 Plea Agreement, which began almost from the time the ink was dry on the papers. Unable to deny what was apparent from the Opioid MDL discovery, the corporation admitted that Oxy had engaged in aggressive efforts to boost opioid sales, including: offering payments to induce health care providers to write more prescriptions of Oxy opioid products, offering “prescription savings cards” for health care providers to give patients to encourage them to fill prescriptions for opioids, and failing to maintain effective controls against diversion, which included failing to inform the United States Drug Enforcement Administration that health care providers flagged for abuse filled over 1.4 million Oxycon prescriptions.

Evidence produced in discovery also “subjected the Packlers to increasing scrutiny and pointed towards culpability of certain members of the family . . .” This evidence demonstrated that members of the Packler family were heavily involved in decisions on how to market and sell opioids. Certain Packlers aggressively set and pushed sales targets for Oxycon that were higher than those recommended by Oxy executives; accompanied sales representatives on “ride along” visits to health care providers to promote “the sale of Oxy’s opioids”; approved countless settlements related to Oxy’s culpable conduct; and oversaw sales and marketing budgets and corresponding upward trends in Oxy prescribing.

As discovery turned up evidence of the involvement of members of the Packler family in Oxy’s misconduct, those family members were added as defendants in a number of cases pending against Oxy.

#### State Multi-District Litigations

In addition to the Opioid MDL, over 390 parallel actions against Oxy proliferated in state courts, as well as in local courts in D.C., Puerto Rico, and Guam. ([Dkt. No. 91-4, at](https://nysd-ecf.sso.dcn/n/cmecfservices/rest/file/finddoc?caseYear=2021&caseNum=08557&caseType=cv&caseOffice=7&docNum=91&docSeq=4) App.1273). The causes of actions asserted in these various litigations included: (1) violations of state false claims acts; (2) violations of state consumer protection laws; (3) public nuisance; (4) fraud; (5) negligence; (6) unjust enrichment; (7) civil conspiracy; (8) violations of state controlled- substances acts; (9) fraudulent transfer; (10) strict products liability; and (11) wrongful death and loss of consortium.

While members of the Packler family were not originally named as defendants in these state court coordinated actions, once their role in the marketing of Oxycon post-2008 was revealed in the Opioid MDL discovery, complaints in many state litigations were amended to name members of the Packler family as defendants. In at least three of these cases, state courts denied the Packler defendants’ motions to dismiss the claims against them.

Thus, when Oxy filed for bankruptcy in September 2019, the threat of liability for at least some members of the Packler family was real and without the protections of bankruptcy, individual family members were at risk of substantial judgments against them. As explained by the UCC in the Confirmation Hearing, it was estimated that “. . . litigating against the Packlers could eventually lead to a judgment or multiple judgments greater than $4.275 billion.”

#### The Renewed Lawsuits Against Oxy and Members of the Packler Family by the Individual States

But private litigation was far from the only game in town. By the middle of 2019, forty- nine states’ Attorneys General had filed new or amended lawsuits against Oxy, all of which named specific members of the Packler family and/or Packler-related entities. The newly-asserted claims included claims for public nuisance, fraud, gross negligence, willful misconduct, unjust enrichment, fraudulent conveyances, violations of state finance laws and social services laws, and “repeated and persistent” fraud and illegality. Claims were asserted against Packler entities for unjust enrichment and fraudulent conveyance.

The Attorneys General of all of the State Appellees filed or amended complaints that include a range of charges against both Oxy and members of the Packler family.

The State Appellees’ asserted claims included:

• fraudulent transfer;

• fraud and fraudulent misrepresentation;

• unjust enrichment;

• negligence;

• public nuisance; and

• violation of state consumer protection statutes by deceptive and unfair acts and practices.

Washington State brought an action against Oxy, “Does 1 through 99,” and “Doe Corporations 1 through 99” for violating the Washington’s Consumer Protection Act (Wash. Rev. Code §19.86), for causing a public nuisance, and for breaching Washington’s common law of negligence. The Complaint sought abatement, restitution, and statutory penalties, among other relief.

Each State Appellees filed its claims before Oxy filed for bankruptcy in September 2019. None of the cases had been litigated to judgment. These cases were not subject to the automatic stay that stopped private litigation in its tracks once Oxy filed, but the Bankruptcy Court preliminarily enjoined all litigation against Oxy and the Packlers; that order was affirmed by this court. As a result, no activity has taken place in any of these lawsuits since shortly after Oxy’s filing.

#### Lawsuits in Canada

In Canada, a number of class actions were filed against certain of the Debtors with allegations similar to those made in the U.S. Prior to Oxy’s Chapter 11 filing, the lead plaintiffs in ten of the Canadian class actions settled their claims for $20 million, and Oxy Pharma (Canada) (“Oxy Canada”) placed that amount in trust pending approval of the settlement by the Ontario Superior Court of Justice, the Superior Court of Quebec, the Supreme Court of Nova Scotia and the Saskatchewan Court of Queen’s Bench (the “Canadian Settlement”). The Canadian Settlement, once approved and after funds are disbursed, “completely and unconditionally released, forever discharged, and acquitted [the Debtors] from any and all Settled Patient Claims against the Debtors and from any other Proof of Claim or portion thereof in respect of any Settled Patient Claim filed against any Debtor.” Under the Canadian Settlement, no member of the Canadian classes party to that settlement can recover from any source other than the Canadian Settlement trust, and every class member in a settling class bears the burden of proving in the U.S. bankruptcy that its claim was not released and discharged by the Canadian Settlement.

However, the Canadian Settlement did not cover the claims of the Canadian Appellees, which are Canadian municipalities and indigenous tribes. The Canadian Appellees’ lawsuits concerned sales and distribution of Oxycon in Canada, affecting Canadian communities, by Oxy Canada, which the Canadian Appellees assert was controlled by Packler family members. The Canadian Appellees’ lawsuits against Oxy Canada assert, *inter alia*, claims for conspiracy, public nuisance, negligence, fraud, and unjust enrichment. The Canadian Appellees also stated at oral argument that that they “were barred by the imposition of the stay and the stay-related orders” - the preliminary injunction described above - “from actually naming [certain] Competition Act claim[s] against the Packlers and the [Shareholder Released Parties],” which they would assert if given the opportunity.

The Canadian Appellees do not include the Canadian federal government or any Canadian province - all of whom seem to be content with the fact that the Plan excludes claims against Oxy Canada. Indeed, the ten Canadian provinces for their part seem to believe their claims are excluded and have decided to pursue their claims in Canada instead. For example, in press on the topic, Reidar Mogerman, counsel for the British Columbia government, explained that the provinces gave up their claims (worth US$67.4 billion) before the Bankruptcy Court in the U.S. to protect lawsuits they filed against Oxy’s Canadian entities.[[12]](#footnote-12) “We didn’t want to get swallowed in competition with the U.S. claims and lose our Canadian claims,” he explained to the press. *Id.* To date, in Canada, the various Canadian provinces have asked the Ontario Superior Court of Justice to Cantinue to pursue their separate class actions against Oxy Canada.

## Members of The Packler Family Insulate Themselves Against Creditors

As Judge Wains found, the evidence indicates members of the Packler family distributed significant sums of Oxy money to themselves in the years 2008-2016, during which time those Packler family members were closely involved in the operations of Oxy and aware of the opioid crisis and the litigation risk. As detailed below, this “aggressive” (to use Ron Packler’s word) pattern of distribution of earnings to shareholders represented a sharp departure from prior practice in two ways.

First, during the period 1996-2007, Oxy up-streamed on average 9% of its revenue per year to the Packlers; but during the period 2008-2016, Oxy up-streamed on average 53%, and as much as 70%, of its revenue to the Packlers.

Second, during the earlier period (1996-2007), the Packlers kept less than 10% of the money that was distributed by Oxy for themselves, while using over 90% of those distributions to pay taxes on Oxy’s earnings; but during the years between 2008-2016, the Packlers retained, in one form or another, 56% of those distributed earnings, while using just 44% to pay taxes.

The 2008-2016 distributions to shareholders also contrasted with the practices of Oxy’s peer pharmaceutical companies.

According to the Packlers’ own expert, this pattern of upstreaming corporate earnings substantially depleted Oxy’s treasury during that eight-year period.

### The Packlers Cause the Transfer of Billions of Dollars from Oxy to Themselves

In March 2007, Ron, Jon, Kathe, and Fred Packler exchanged emails noting that the “future course [for the business] is uncertain” and identified the “emergence of numerous new lawsuits” as a “risk[] . . . we’re not really braced for.” Just a few months later, in May, shortly after the 2007 guilty plea and settlement, David Packler emailed Jon Packler, Ron Packler, and their financial advisor, expressing concern about the family’s personal liability for the opioid crisis: “What do you think is going on in all of these courtrooms right now? We’re rich? For how long? Until suits get through to the family?” In his deposition, David Packler agreed that his May 17, 2007, email reflects “concern that the family would be sued in connection with Oxy’s sale of Oxycon.” Less than a week after David Packler sent his email, Ron and Jon Packler met with a bankruptcy attorney, though Oxy was not in debt, and not at risk of bankruptcy.

Thereafter, on July 26, 2007, a family financial advisor sent a confidential memorandum to Jon Packler, in which he advised that Oxy faced “[u]ncapped liabilities” that posed “a huge valuation question” for Oxy at that very moment - the moment when the Plea and settlements were ostensibly ending any illegal behavior and putting further corporate liability - and potential shareholder liability - in the rear view mirror. He added, “I presume the family has taken most of the appropriate defensive measures.” One such measure, proposed in a separate memorandum, was “to distribute more free cash flow so [the owners] can purchase diversifying assets.”

By January 2008, the anxiety over impending lawsuits was apparent; Ron Packler emailed Fred Packler that, “I’ve been told by Silbert that I will be [sued] and probably soon.” Fred Packler lamented in a later email in February 2008 that he wished to get out of the pharmaceutical business altogether “given the horrible risks, outlooks, difficulties, etc.” In this vein, in April 18, 2008, Ron Packler warned in a memo that the business posed a “dangerous concentration of risk” and proposed that the family either sell the company or “distribute more free cash flow” to themselves. The family chose the latter course.

Beginning in 2008, Oxy began to make significant cash distributions to and for the benefit of the Packlers. As noted above, about 44% of the money distributed went to pay taxes; a small fraction was invested in the IACs, which were owned by the Packlers; and the rest went to the Side A and B Packler family trusts.

In the years leading up to the 2008 Plea Agreement and Settlement, the Packler family had been content to leave most of Oxy’s earnings in the company, except as was necessary to pay taxes. In response to a question from this Court, Debtors acknowledged that, between January 1, 1995 and December 31, 2007, distributions to the Packlers totaled $1.322 billion, of which $1.192 billion (or 90.2%) was used to pay taxes. In the twelve years prior to 2008, the Packlers took personal distributions from Oxy that averaged 9% of Oxy’s revenue.

After 2007, Oxy went from distributing less than 15% of its revenue to distributing as much as 70% of revenue.[[13]](#footnote-13) It also jumped from distributing approximately 38% of its free cash flow in 2006 to distributing 167.4% of free cash flow in 2007 and continued to distribute free cash flow in the 90% range for the next decade. These distributions totaled approximately $10.4 Billion.

Approximately $4.6 billion of that amount was used to pay pass through taxes which attests to the tremendous profitability of Oxy’s Oxycon business during that same eleven-year period. In fact, the vast majority of Oxy’s earnings between 2008-2017 came from Oxycon sales.

According to the Packlers’ own expert, the change in distribution pattern drained Oxy’s total assets by 75% and Oxy’s “solvency cushion” by 82% between 2008 and 2016. Ron Packler later acknowledged in an email in 2014 that, “in the years when the business was producing massive amounts of cash, the shareholders departed from the practice of our industry peers and took the money out of the business.” In at least one email in 2014, Jon Packler referred to this distributing of cash flow from Oxycon as a “milking” program.

The obvious implication of this evidence was recognized by Judge Wains in his bankruptcy decision. In particular, Judge Wains noted, “I do have an extensive report and trial declarations as to the nature of the assertedly over $11 billion of avoidable transfers, when they occurred, what they comprised, and who they were made to,” and found, “the record suggest[s] that at least some of the Packlers were very aware of the risk of opioid-related litigation claims against Oxy and sought to shield themselves from the economic effect of such claims by causing Oxy to make billions of dollars of transfers to them and to shield their own assets, as well, from collection.” While he made no finding that these distributions qualified as fraudulent conveyances, or that they could be recouped by Oxy, Judge Wains also acknowledged that the estate had potential claims of “over $11 billon of assertedly avoidable transfers.”

As Judge Wains also acknowledged, the distribution of Oxy money to the Packler family occurred during a time when members of the Packler family, including those named in many pending cases, were closely involved in the operations of Oxy and well aware of the opioid crisis and the litigation risk. “The testimony that I heard from the Packlers tended to show, that as a closely held company Oxy was run differently than a public company and that its Board and shareholders took a major role in corporate decision-making, including Oxy’s practices regarding its opioid products that was more akin to the role of senior management.” As Ron Packler acknowledged in the Confirmation Hearing, he oversaw, as director, “many settlements,” stating, “I was director, and I cannot count up all the settlements that the company entered into while I was a director. But there were many settlements, both private and public.”

The Packlers vehemently deny any suggestion that any of these transfers would qualify as fraudulent transfers or conveyances. However, in Addendum A to the 2020 “Settlement Agreement” with the DOJ, the Government asserted its confidence that it could prove that: “From approximately 2008 to 2018, at the Named Packlers’ request, billions of dollars were transferred out of Oxy as cash distributions of profits and transfers of assets into Packler family holding companies and trusts. Certain of these distributions and transfers were made with the intent to hinder future creditors and/or were otherwise voidable as fraudulent transfers.”

The fact of these extensive transfers of money out of Oxy and into the family coffers is not contested. For example, during the Confirmation Hearing, when Ron Packler was asked if it were “true that during that time period generally [2008-2018] . . . the Oxy Board of Directors transferred out billions of dollars to Packler family trusts or holding companies,” he answered, “Yes . . . yes, that we did.” Only whether those transfers (or any of them) would qualify as fraudulent transfers or conveyances is in dispute.

At some point - certainly by 2018 - Oxy itself was in a precarious financial position in face of the lawsuits. At the time of the bankruptcy filing, Oxy represented that, while it had “no funded debt and no material past due trade obligations” - or even any “judgment creditors” - “the onslaught of lawsuits has proved unmanageable” and “will result only in the financial and operational destruction of the Debtors and the immense value they could otherwise provide. . . .”

### A Pre-Petition Settlement Framework Is Proposed That Would Release the Packler Family From Liability.

In the months before Oxy filed for bankruptcy, Oxy, the Packler family (now no longer represented on Oxy’s Board) and Packler relatedentities were engaged in discussions about a potential framework for settlement of all claims against Oxy and the Packlers with “the various parties in the MDL litigation” and certain “subgroups” of creditors and potential creditors. John Double, the Chairman of the Special Committee of the Board, testified in the Confirmation Hearing[[14]](#footnote-14) that the pre-petition settlement framework discussions involved the concept of third- party releases *and* the concept of using the bankruptcy process to release all claims against the Packlers in exchange for their contribution of funding to the settlement. Mr. Double explained:

[I]t was very clear from the . . . Packlers that if they were going to post up X amount of dollars - and I believe at the time, the settlement framework was somewhere around $3 billion or so - that they were going to seek broad third party releases, and releases from the Debtors, releases of all the estate claims, etc., so that they could be able to put all of that - all of the litigation behind them . . . *it was something that was a prerequisite or a condition to them posting the amount of money that was in the settlement framework* and then ultimately what is in the plan of organization we were seeking approval of.

So the Packlers made it clear well before the Debtors filed for chapter 11 bankruptcy that they would contribute toward Oxy’s bankruptcy estate only if they received blanket releases that would put “all of the litigation behind them.” This was reported heavily in the press at the time of the bankruptcy filing.

This pre-petition settlement framework was then imported into the bankruptcy process. As Mr. Double testified, once a pre-petition settlement framework was created, the plan was to “us[e] the Chapter 11 process to enable us to then organize all of the various claimants into one group under . . . the auspices of the Chapter 11 bankruptcy process.” He further explained that, “it was the framework that would help us continue to bring all of the various creditor groups towards a decision as to whether it was better to litigate against the Packlers or attempt to come up with a settlement that would be fair and equitable for all the creditors of the Debtor’s estates.” He testified that some 24 states “were supportive of us moving forward in the process of filing a Chapter 11 and using this [bankruptcy] as a means of coalescing all the parties into one organized spot to address the potential claims that the estates would have against the Packlers.”

Oxy’s bankruptcy was thus a critical part of a strategy to secure for the Packlers a release from any liability for past and even future opioid-related litigation without having to pursue personal bankruptcy. David Packler acknowledged as much in his testimony, “I don’t know of another forum that would allow this kind of global solution, this kind of equitable solution for all parties.”

## The Underlying Bankruptcy

Facing the mounting lawsuits against both Oxy and members of the Packler family in the U.S. and abroad, certain U.S. based Oxy entities (Debtors) filed for bankruptcy relief on September 15, 2019. Members of the Packler family and certain Packler entities did not file for bankruptcy, despite having been named as defendants in opioid-related lawsuits.

### Pending Actions Against Oxy and Members of the Packler Family Are Halted

Oxy quickly moved on September 18, 2019, before the Bankruptcy Court for an injunction halting all actions against Oxy as well as “against their current and former owners (including any trusts and their respective trustees and beneficiaries), officers, directors, employees, and associated entities.” This meant enjoining over 2,900 actions against Oxy and at least 400 civil suits against the Packlers.

Oxy argued that enjoining all litigation was necessary to facilitate the parties’ work towards a global settlement in a single forum - the Bankruptcy Court. After an evidentiary hearing, on October 11, 2019, the Bankruptcy Court temporarily halted all such litigation until November 6, 2019, at which point it granted Oxy’s motion enjoining all plaintiffs from Cantinuing or commencing any judicial, administrative, or investigative actions, as well as any other enforcement proceeding, against Oxy or the non-debtor related parties, including against members of the Packler family. The District Court affirmed the Bankruptcy Court’s grant of the preliminary injunction. The expiration date of the preliminary injunction was extended 18 times in the chapter 11 case, during which period the parties negotiated to come up with the Plan.

### The Creditor Constituencies in the Bankruptcy

On September 27, 2019, the U.S. Trustee appointed nine creditors to the UCC, an independent fiduciary to represent the interests of all unsecured creditors in the Oxy bankruptcy. The UCC also has several *ex-officio*, non-voting representatives, mostly governmental units.

Between September and November 2019, various other creditor groups were formed to represent creditor constituencies in the bankruptcy, including as follows:

• The AHC was formed in September 2019 and is comprised of ten States, six counties, cites, parishes, or municipalities, one federally recognized American Indian Tribe (the Muscogee (Creek) Nation), as well as the court-appointed Co-Lead Counsel on behalf of the Plaintiffs’ Executive Committee in the Opioid MDL;

• NAS Children was formed in September 2019 and is comprised of around 3,500 children, who born with “neonatal abstinence syndrome” due to exposure to opioids in utero, and/or their guardians;

• The PI Ad Hoc Group was formed in October 2019 and is comprised of 60,761 personal injury claimants, each holding “one or more unsecured, unliquidated, opioid-related personal injury claims against one or more of the Debtors”;

• MSGE was formed in October 2019 and is comprised of 1,317 entities: 1,245 cities, counties and other governmental entities, 9 tribal nations, 13 hospital districts, 16 independent public school districts, 32 medical groups, and 2 funds across 38 states and territories;

• The Ad Hoc Group of Non-Consenting States (“NCSG”) was formed in October 2019 and is comprised of 25 states that did not reach a pre-petition agreement with Oxy or the Packlers regarding “the general contours of a potential chapter 11 plan” to settle their claims;

• The Ratepayer Mediation Participants (“Ratepayers”) was formed in October 2019 and is comprised of “proposed representatives of classes of privately insured parties who are plaintiffs and proposed class representatives in their individual and representative capacities in suits brought against [Oxy]” in 25 actions in 25 states; and

• The Ad Hoc Group of Hospitals (“Hospitals”) was formed in November 2019 and is comprised of hundreds of hospitals that have treated and treat patients for conditions related to the use of opiates manufactured by Oxy.

Other groups that formed during the pendency of the bankruptcy proceedings include:

• The Third-Party Payor Group (“TPP Group”), comprised of certain holders of third- party payor claims;

• The Native American Tribes Group (“Tribes Group”), comprised of certain Tribes, an ex officio member of the Creditors’ Committee, and other Tribes represented by various counsel from the Tribal Leadership Committee and the Opioid MDL Plaintiffs’ Executive Committee; and

• The Public School District Claimants (“Public Schools”), comprised of over 60 public school districts in the United States.

Each of these groups was representative of certain creditor constituencies, whose “members” (there was no certified class) held similar types of claims against Oxy.

### The Court Sets A Bar Date for Filing of Proof of Claims

On January 3, 2020, Oxy filed a “Motion for Entry of an Order (I) Establishing Deadlines for Filing Proofs of Claim and Procedures Relating Thereto, (II) Approving the Proof of Claim Forms, and (III) Approving the Form and Manner of Notice Thereof” (the “Bar Date Motion”).” On February 3, 2020, the Bankruptcy Court approved the Bar Date Motion, setting June 30, 2020 as the deadline for all persons and entities holding a prepetition claim against Oxy, as defined in section 101(5) of the Bankruptcy Code (a “Claim”), to file a proof of claim. On June 3, 2020, the Bankruptcy Court entered an order extending the Bar Date to July 30, 2020.

During the five months while the window for filing proofs of claims was open, over 614,000 claimants did so. Just 10% of the claims so filed would give rise to over $140 trillion in aggregate liability - more than the whole world’s gross domestic product. The claimants included the federal government, states and political subdivisions, native american tribes, hospitals, third-party payors, ratepayers, public schools, NAS monitoring claims,[[15]](#footnote-15) more than 130,000 personal injury victims, and others.

### The Court Approves Mediation and Appoints Mediators to Facilitate Resolution

On February 20, 2020, Oxy filed an unopposed “Motion for Entry of an Order Appointing Mediators,” seeking the appointment of mediators and mandating that the various creditor constituencies participate in mediation. On March 2, 2020, the Bankruptcy Court approved Oxy’s motion and appointed The Honorable Lane Pillips (ret.) and Mr. Kenneth Estberg as co-mediators. Both are among the most experienced and respected mediators in the country.

## The Negotiation of the Bankruptcy Plan

Through mediation, Oxy and stakeholders worked to negotiate a complex settlement framework that would ultimately direct the Debtors’ assets and $4.275 billion from the Packler families towards abating the opioid crisis and restoring value to victims of the crisis.

The parties involved in the negotiations included the Debtors and non-debtor related parties (*i.e.*, members of the Packler family) and the various creditor constituencies. Together, as defined in the court’s mediation order, the participating “Mediation Parties” were the Debtors, the UCC, the AHC, the NCSG, the MSGE, the PI Ad Hoc Group, NAS Children, the Hospitals, the TPP group, and the Ratepayers. The Tribes Group, the Public Schools, the National Association for the Advancement of Colored People, and others also participated in mediation, although not as official Mediation Parties.

The mediation progressed in three phases, as follows:

### Phase 1: March 2020-September 2020

Phase one of the mediation addressed “the allocation of value/proceeds available from the Debtors’ Estates” as disputed between the “Non-Federal Public Claimants” (the states, federal districts and U.S. territories, political subdivisions, and Native American tribes) and “Private Claimants” (hospitals, private health insurance carriers and third-party payors, and individuals and estates asserting personal injury, including NAS Children). It proceeded with a “series of rigorous formal mediation sessions during the period from March 6, 2020 to September 11, 2020.”

The mediation resulted in certain resolutions the most critical of which included value allocation between and among the various parties, such as:

First, the Non-Federal Public Claimants agreed that all value received by them through the Chapter 11 Cases would be exclusively dedicated to programs designed to abate the opioid crisis . . .

Second, the Non-Federal Public Claimants addressed and resolved . . . value allocation for all Native American Tribes . . . and a default mechanism that, in the absence of a stand-alone agreement between a State or territory and its political subdivisions, provides a structure and process for applying funds to abate the opioid crisis . . .

Third, agreement was reached on written term sheets with certain individual Private Claimant groups that addressed allocation of estate value to each Private Claimant group. These agreements provided, among other things, that each class of Private Claimants will receive fixed cash distributions over time, the values and time periods varying for each class. Moreover, the Ad Hoc Group of Hospitals, the Third-Party Payors, and the NAS Committee (with regard to medical monitoring) each agreed to dedicate substantially all the distributions from their respective Private Creditor Trusts to abate the opioid crisis.

Ultimately, all participants except “the public school districts and the NAS children physical injury group” were able to achieve “agreement *inter se* as to their respective allocations as a result of the mediation process.”

Each of the term sheets with the private plaintiffs was conditioned on the confirmation of a plan of reorganization that includes participation by the Packler Families in the plan of reorganization.

However, not all issues were resolved. On September 23, 2020, while phase one of the mediation had reached “substantial completion”, the mediators’ report indicated that “there remain terms to be negotiated by the parties with respect to each of the term sheets in order to reach final agreements . . .” With several open terms and the estate claims still to be negotiated, on September 30, the Bankruptcy Court entered a Supplemental Mediation Order, authorizing further mediation to resolve the open issues and to mediate the estate claims (phase 2).

### Phase 2: October 2020-January 31, 2021

The Bankruptcy Court’s Supplemental Mediation Order authorized the mediators “to mediate any and all potential claims or causes of action that may be asserted by the estate or any of the Non-Federal Public Claimants” against the Packler families and entities “or that may otherwise become the subject of releases potentially granted to” members of the Packler families and entities (defined as the “Shareholder Claims”). This Order also “narrowed the number of mediating parties on the Shareholder Claims aspect of the mediation” to the Debtors, the UCC, the “Consenting Ad Hoc Committee,”[[16]](#footnote-16) the NCSG, the MSGE, and representatives of the Packlers.

In phase two, the mediators received presentations from the parties on their positions regarding the estate claims, including a presentation by the UCC of its “views and findings on its investigation of estate causes of action.”[[17]](#footnote-17) After the presentations, “numerical negotiation began,” with offers and counteroffers proposed. However, no “mutually agreed resolution” was reached among all constituencies before the end of the phase two on January 31, 2021.

### Phase 2 Negotiations Continue with the Packler families: January 2021 to March 2021

Although court-ordered mediation formally ended on January 31, 2021, settlement negotiations continued among the Packler families and entities, the Debtors, the NCSG, the UCC, the ACH, and the MSGE regarding the “Packler contribution” to the Debtors’ estate. Eight more offers and counteroffers were exchanged between the end of January 2021 and February 18, 2021.

Ultimately, the Packler families and entities, the Debtors, the AHC, the “Consenting Ad Hoc Committee,” and the MSGE reached an agreement in principle, which settled on a guaranteed amount that the Packler families would be required to contribute to the Debtors’ estate - $4.275 billion over nine years (or ten years if certain amounts were paid ahead of schedule in the first six years).[[18]](#footnote-18) The principal consideration for this payment was the “Shareholder Release” that was to be included in the Debtors’ plan of reorganization. That plan, along with the Debtors’ “Disclosure Statement” containing the “Packler Settlement Agreement Term Sheet” reached in negotiation, were filed with the Bankruptcy Court on March 15, 2021.

### Phase 3: May 7, 2021 - June 29, 2021

Phase three of the mediation involved a final push to resolve the dispute of the NCSG[[19]](#footnote-19) over the terms of the agreement reached in phase two of the mediation between and among the Packler families and entities, the Debtors, the AHC, the “Consenting Ad Hoc Committee,” and the MSGE. To that end, on May 7, 2021, the Bankruptcy Court asked his colleague, the Honorable Julia C. Chan, to preside over a mediation between the NCSG and the Packler Families with respect to the terms of the settlement. Between May 7 and June 29, 2021, Judge Chan conducted 145 telephone meetings and several in-person sessions between the NCSG and the Packler families and entities.

The result of the mediation was a modified shareholder settlement with the Packler families and entities, which was agreed to in principle by a fifteen of the twenty-five non-consenting states. Those states that reached agreement in principle also agreed to support and/or not object to the Plan.

The remaining non-consenting states - most of which are parties to this appeal - did not agree to the revised settlement.

The new terms of the settlement included additional payments of $50 million by the Packler families, and the acceleration of another $50 million in previously agreed settlement payments, resulting in total payments of $4.325 billion. In addition to the money, Judge Chapman induced the parties to agree to several non-monetary terms; specifically, a “material expansion of the scope of the public document repository” to be established under the Plan, and certain prohibitions on Packler family demands for naming rights in exchange for charitable contributions, together with a few other, minor concessions.[[20]](#footnote-20) The Shareholder Release was unchanged.

On July 7, 2021, Oxy filed the mediator’s report in the bankruptcy proceeding, informing Judge Wains of the result of the mediation.

## Confirmation of the Plan: Summary of the Order on Appeal

Oxy filed the first version of the Plan on March 15, 2021. It has subsequently filed twelve amendments to the Plan, the last of which was dictated by Judge Wains as a condition of confirmation.

On August 9, 2021, the Confirmation Hearing began before the Bankruptcy Court, a six-day event during which 41 witnesses testified (by declaration or otherwise), after which the parties engaged in extensive oral argument.

On September 1, 2021, the Bankruptcy Court rendered an oral ruling, stating it would confirm the proposed plan provided certain changes were made to it, the most relevant of which for purposes of this appeal was a modification of the Section 10.7 Shareholder Release:

I . . . require that the shareholder releases in paragraph 10.7(b) [the release of third- party claims against the shareholder released parties], by the releasing parties, be further qualified than they now are. To apply [only] where . . . a debtor’s conduct or the claims asserted against it [are] a legal cause or a legally relevant factor to the cause of action against the shareholder released party.

Oxy filed the final version of the Plan the next day, and on September 17, 2021, Judge Wains issued his edited written decision confirming the Plan.

The salient features of the Plan are as follows:

Trusts to Administer Abatement and Distribution. Under the Plan, the majority of Oxy’s current value will be distributed among nine “creditor trusts” that will fund opioid abatement efforts and compensate personal injury claimants, including the National Opioid Abatement Trust (“NOAT”), which will make distributions to qualified governmental entities. Most of the creditor trusts are abatement trusts and may only make distributions for the purpose of opioid abatement or to pay attorneys’ fees and associated costs. Two trusts - the “PI Trust” and “PI Futures Trust” - are the only exceptions: those creditor trusts will make distributions to qualifying personal injury claimants.

The Public Document Repository. Under the Plan the Debtors are required to create a public document repository of Oxy material available for public review. The AHC testified at the Confirmation Hearing that the establishment of this public document repository was among their highest priorities. (“[O]f all the aspects of . . . the injunctive relief part of [the Plan], [the public document repository] . . . is extremely important from the standpoint of, not only what it is that we developed in terms of evidence, [but also] lessons to be learned from the conduct that was uncovered and revealed.”). The public document repository will be hosted by an academic institution or library and will include more than 13,000,000 documents (consisting of more than 100,000,000 pages) produced in the chapter 11 case and tens of millions of additional documents, including certain documents currently subject to the attorney client privilege that would not have been produced in litigation. The Plan ensures that scholars and the public can have access to all of these materials.

Oxy Pharma Will Cease to Exist. Under the Plan, Oxy Pharma will cease to exist. Its current business operating assets will be transferred to and operated by a new entity, known as “NewCo” in the Plan, but to be named KNOA. NewCo will be governed by a board of five or seven disinterested and independent managers initially selected by the AHC and the MSGE, in consultation with the Debtors and UCC, subject to a right of observation by the DOJ. NewCo will manufacture products, including Betadine, Denokot, Colace, magnesium products, opioids and opioid-abatement medications, and oncology therapies. Additionally, NewCo will continue the Debtors’ development of opioid overdose reversal and addiction treatment medications, and it must deliver millions of doses of those medications at low or no cost when development is complete (these will be distributed to groups or entities to be determined post-emergence). NewCo will be subject to an “Operating Injunction” that prohibits it from, among other things, promoting opioid products and providing financial incentives to its sales and marketing employees that are “directly” (but not indirectly) based on sales volumes or sales quotas for opioid products. It also is subject to “Governance Covenants” that ensure that NewCo provides all its products in a “safe manner,” complies with settlement obligations, pursues public health initiatives, and follows pharmaceutical best practices. The Plan provides for the appointment of a monitor to ensure that NewCo complies with the Operating Injunction and Governance Covenants; the monitor will provide the public with regular updates and seek relief from the Bankruptcy Court to the extent necessary to carry out the monitor’s obligations. Above all, NewCo is not intended to operate indefinitely: The Plan instruct the managers to use reasonable best efforts to sell the assets of NewCo by December 21, 2024.

Shareholder Settlement Agreement. The Plan incorporates the “Shareholder Settlement Agreement” and the transactions contemplated therein whereby, in exchange for the release of third-party claims against over 1,000 individuals and entities related to the Packler family (“Shareholder Released Parties”), the Packler family will give at least $4.325 billion toward the Oxy estate.

Section 10.7(b) of the Plan sets out the terms of the release that the Packlers, from the inception of the bankruptcy and earlier, insisted on in exchange for contributing funds to Oxy’s estate. The Plan “releases and discharges” certain claims that third parties (including states and personal injury claimants) have asserted or might in the future assert against the Shareholder Released Parties. The release of claims against the Shareholder Released Parties permanently enjoins third parties from pursuing their current claims against the Shareholder Released Parties and precludes the commencement of future litigation against any of the Packlers and their related entities, as long as: (1) those claims are “based on or related to the Debtors, their estates, or the chapter 11 cases,” and (2) the “conduct, omission or liability of any Debtor or any Estate is the legal cause or is otherwise a legally relevant factor.” (Plan § 10.7(b)). The third-party releases under the Plan are non-consensual; they bind the objecting parties as well as the parties who consented. All present and potential claims connected with Oxycon and other opioids would be covered by the Section 10.7 Shareholder Release.

Channeling Injunction. Under the Plan, all enjoined claims against the Debtors and those against the Shareholder Released Parties are to be channeled to the nine creditor trusts for treatment according to the trust documents of each respective trust (“Channeling Injunction”). However - as the U.S. Trustee points out, and the Debtors do not contest, the claims against the Shareholder Released Parties are effectively being extinguished for nothing, even though they are described as being “channeled.” The U.S. Trustee explains that the Plan documents expressly prohibit value being paid based on causes of action (whether pre-or post-petition) against the Packler family or other non-debtors for opioid-related claims. And to assert any third-party claim against the trust, the claimant must have filed a proof of claim in the bankruptcy prior to the bar dates, but each of the bar dates passed by the time anyone was notified of the claims’ extinguishment. And to get an exception for an untimely filing, a party must proceed through multiple steps, after which the Bankruptcy Court - which serves as a gatekeeper - determines, in its discretion, that the untimely claim qualified under the Plan and granted leave to assert the claim.

Debtors sidestepped the Plan’s effective extinguishment of purportedly channeled third- party claims in its brief by not addressing the U.S. Trustee’s points; they made no effort to clarify this in oral argument for the Court.

## Objections to the Plan

On June 3, 2021, the Bankruptcy Court approved Oxy’s disclosure statement.

On July 19, 2021, the U.S. Trustee objected to confirmation of the Plan, arguing that the Section 10.7 Shareholder Release was unconstitutional, violates the Bankruptcy Code, and is inconsistent with Second Circuit law. Eight states all filed objections, as did the City of Seattle, four Canadian municipalities, two Canadian First Nations and three *pro se* plaintiffs. The U.S. Attorney’s Office for this District on behalf of the United States of America filed a statement of interest supporting these objections to the Section 10.7 Shareholder Release.

The objectors argued, *inter alia* and as applicable to them, that the Section 10.7 Shareholder Release (1) violates the third-party claimants’ rights to due process, (2) violates the objecting states’ sovereignty and police power, (3) is not permitted under the Bankruptcy Code, and (4) the Bankruptcy Court lacks constitutional, statutory, and equitable authority to approve the Section 10.7 Shareholder Release.

## Judge Wains’s Decision to Confirm the Plan

Judge Wains’s opinion is a judicial *tour de force* - delivered from the bench only days after the end of a lengthy trial, it included extensive findings of fact and addressed every conceivable legal argument in great detail. Sixteen days later, on September 17, the learned bankruptcy judge filed a written version of that oral decision, running to 54 pages on Westlaw, which is the version summarized here.

Judge Wains began by describing the highly unusual and complex nature of the situation before him - a “massive public health crisis,” with a potential creditor body that included “every person in the range of the Debtors’ opioid products sold throughout the United States” - individuals, local, state and territorial governments, Indian tribes, hospitals, first responders, and the United States itself. He noted that over 618,000 claims, in an amount exceeding two trillion dollars, had been filed in the bankruptcy. And he commended the parties for working in “unique and trailblazing ways to address the public health crisis that underlies those claims.”

In his opening remarks, Judge Wains also addressed the elephant in the room:

These cases are complex also because the Debtors’ assets include enormous claims against their controlling shareholders, and in some instances directors and officers, who are members of the Packler family, whose aggregate net worth, though greater than the Debtors’, also may well be insufficient to satisfy the Debtors’ claims against them and other very closely related claims that are separately asserted by third parties who are also creditors of the Debtors.

*Id.*

Judge Wains then announced the ultimate result:

First, he concluded that there existed no other reasonably conceivable means to achieve the result that would be accomplished by the Plan in addressing the problems presented by this case. Second, he found that well-established precedent - which he described as “Congress in the Bankruptcy Code and the courts interpreting it” - authorized him to confirm the Plan. *Id*. Insofar as is relevant to this appeal, Judge Wains reached the following conclusions.

### The Section 10.7 Shareholder Release and Settlement with the Packlers

The meat of this case, both before Judge Wains and on this appeal, is the Bankruptcy Court’s approval of the broad releases that the Plan affords to all members of the Packler family and to their related entities, including businesses and trusts.

The Plan includes two settlements with every member of the Packler family - whether or not that individual had anything to do with the management of Oxy or personally exercised any control over Oxy - and with a variety of entities related to the Packlers, including various trusts, businesses, and IACs. Taken together these individuals and entities (not all of whom have been or apparently can be identified) are known as the “Shareholder Released Parties.” *Id.* at \*24.

The first settlement disposed of claims that the Debtors could assert against the Shareholder Released Parties for the benefit its creditors. *Id.* These included claims for: (1) breach of fiduciary duty against those members of the Packler family who were involved in - indeed, who drove - the business decisions that were the basis for Oxy’s criminal and civil liability, and (2) fraudulent conveyance or transfer arising out of the Packler family’s removal of nearly $11 billion from the Debtor corporations over the course of a decade. *See Id.* at \*31-32.

The second settlement disposed of certain third-party claims that could not be asserted by the Debtors against the Shareholder Released Parties, but were particularized to others. Chief among these claims are claims asserted by the states - both the consenting states and the objecting states - arising under various unfair trade practices and consumer protection laws that make officers, directors and managers who are responsible for corporate misconduct personally liable for their actions. Judge Wains did not review on a state-by-state basis the various state laws applicable to these objector claims, including laws that might forbid insurance coverage or indemnification and contribution claims by those individuals, such that their personal assets are very much at risk. *Id.* at \*48.

In exchange for these releases, the Shareholder Released Parties agreed to contribute $4.325 billion[[21]](#footnote-21) to a fund that would be used to resolve both public and private civil claims as well as both civil and criminal settlements with the federal government. *Id.* at \*25. The Packlers also agreed to the dedication of two charities worth at least $175 million for abatement purposes; to a resolution that barred them from insisting on naming rights in exchange for charitable contributions; to refrain from engaging in any business with NewCo and to dispose of their interest in the non-U.S. Oxy entities within seven years; to certain “snap back” provisions that were designed to ensure the collectability of their settlement payments; and to the creation of an extensive document repository that would archive in a comprehensive manner the history of the Debtors and their involvement in the development, production and sale of opioids. *Id.*

Judge Wains made three fundamental findings relating to these settlements: that the Packler Settlements were necessary to the Plan; that they were fair and reasonable; and that it was necessary and appropriate for him to approve the non-consensual release of certain third-party claims against the Packlers, even though they are not debtors.

### The Packler Settlements Were Necessary

Judge Wains concluded that these settlements were necessary to the Plan. He noted that a variety of other settlements that were essential components of the Plan - including agreed-upon allocations of the pot of money to be created by the Debtors’ estate and the Packler contribution - would unravel for lack of funding if the Packlers did not make their $4.325 billion contribution.

And he found that they would not make that contribution unless they obtained broad releases from past and future liability. *Id.* at \*46-47.

#### The Packler Settlements Were Fair and Reasonable in Amount

Judge Wains evaluated the fairness of the settlement in light of the factors laid out by the Second Circuit in *Motorola Inc. v. Official Committee of Unsecured Creditors & JP Morgan Chase Bank, N.A. (In re Iridium Operating LLC)*, [478 F.3d 452, 464-66](http://scholar.google.com/scholar?q=478+f.+3d+452&btnG=&hl=en&as_sdt=6) (2d Cir. 2007), which is controlling law in this Circuit on the questions. He made the following findings:[[22]](#footnote-22)

(a) The Packler settlements were the product of arms-length bargaining conducted by able counsel in two separate mediations presided over by three outstanding mediators and preceded by what he described as the “most extensive discovery process not only I have seen after practicing bankruptcy law since 1984 and being on the bench since 2002, but I believe any court in bankruptcy has ever seen.” That process led to the production of almost 100 million pages of documents, through which all interested parties could learn “anything suggesting a claim against the shareholder released parties.”

(b) The settlements were negotiated by exceedingly competent counsel who were, as a result of the discovery process described above, well-informed about both the claims they might bring against the Shareholder Released Parties and the difficulties they would have in pursuing those claims.

(c) Oxy’s creditors overwhelmingly supported the settlement. Some 120,000 votes were cast on the Plan - a number far exceeding the voting in any other bankruptcy case. Over 95% of those voting in the aggregate favored the Plan: over 79% of the states and territories supported the Plan; over 96% of other governmental entities and tribes; and over 96% of the personal injury claimants; together with a supermajority of all other claimants.

(d) The failure to approve the settlement was likely to result in complex and protracted litigation, with attendant cost and delay, while the settlement offered significant and immediate benefits to the estate and its creditors.

(e) Judge Wains focused particularly on the difficulty of collecting any judgments that might be obtained against the Packlers. Ordinarily this factor would rest on things like the paucity of assets available to satisfy judgments. But in this case the problems with collection were the result of what the Packlers did with the money that they admittedly took out of the corporations between 2008-2016. The assets of family members are held principally in purportedly spendthrift trusts located in the United States and offshore - many of them on the Bailiwick of Jersey - and many of those assets cannot readily be liquidated. As Judge Wains correctly observed, spendthrift trusts can and often do insulate assets from the bankruptcy process. And while generally applicable law governing U.S. trusts allows those trusts to be invaded when they are funded by fraudulent conveyances, there is a substantial question whether the same is true under Jersey law. Additionally, he noted that many Packler family members live abroad, raising a barrier to an American court’s acquiring personal jurisdiction over them. Although the learned bankruptcy judge did not reach any final conclusion about these complicated issues, he readily drew the conclusion that collectability presented a significant concern, one that was obviated by the settlement.

(f) Judge Wains also noted that the cost and delay attendant to the pursuit of the Packlers - which was in and of itself substantial - would be compounded by the unraveling of the other settlements that were baked into the Plan. Judge Wains concluded that the unraveling of the Plan would inevitably result in the liquidation of Debtors under Chapter 7, which would in turn lead to no recovery for the unsecured creditors (including the personal injury plaintiffs), and no money for any abatement programs. This conclusion was reinforced by the fact that, absent confirmation of the Plan, the United States would have a superpriority administrative expense claim in an amount ($2 billion) that would wipe out the value of Oxy’s business as a going concern ($1.8 billion).

(g) Finally, Judge Wains considered the legal risks of the estates’ pursuit of claims against the Packlers against the benefits of settlement.

Judge Wains first chronicled the problems Oxy would have in proving that the admitted conveyances qualified as fraudulent. He noted that over 40% of the purportedly avoidable transfers were used to pay federal and states taxes associated with Oxy, none of which was going to be refunded. He identified various technical defenses that the Packlers could assert to fraudulent conveyance claims, including statutes of limitations and the impact of prior settlements. And while admitting that at least some of the Packlers appeared to have been very much aware of the risk of opioid litigation to Oxy’s solvency and their own, he also pointed to evidence that Oxy may not have been “insolvent, unable to pay its debts when due, or left with unreasonably small capital” - which would be necessary to make a conveyance fraudulent - until as late as 2017 or 2018, by which time most or all of the conveyances had been made.

As for alter ego, veil-piercing and breach of fiduciary duty claims, Judge Wains noted that most of the Packler family members had nothing to do with Oxy’s operations, and that no one had identified any action taken by any of them in their capacity as passive shareholders that would make them liable on such claims. He also identified the extensive government oversight of Oxy after its 2007 Plea Agreement and Settlement with the federal government and certain states, and the fact that neither DHHS nor various state reviews ever identified any improper actions.[[23]](#footnote-23)

Judge Wains made no findings about the actual merit of any of the estates’ claims against any member of the Packler family. But weighing these difficulties against the benefits that would be derived from the settlement, he concluded:

I believe that in a vacuum the ultimate judgments that could be achieved on the estates’ claims . . . might well be higher than the amount that the Packlers are contributing. But I do not believe that recoveries on such judgments would be higher after taking into account the catastrophic effects on recoveries that would result from pursuing those claims and unravelling the plan’s intricate settlements. And as I said at the beginning of this analysis, there is also the serious issue of problems that would be faced in collection that the plan settlements materially reduce.

Judge Wains ended his discussion of the *Iridium* factors by reflecting that he had “expected a higher settlement,” he said:

This is a bitter result. B-I-T-T-E-R. It is incredibly frustrating that the law recognizes, albeit with some exceptions, although fairly narrow ones, the enforceability of spendthrift trusts. It is incredibly frustrating that people can send their money offshore in a way that might frustrate U.S. law. It is frustrating, although a long-established principle of U.S. law, that it is so difficult to hold board members and controlling shareholders liable for their corporation’s conduct.

It is incredibly frustrating that the vast size of the claims against the Debtors and the vast number of claimants creates the need for this plan’s intricate settlements. But those things are all facts that anyone who is a fiduciary for the creditor body would have to recognize, and that I recognize.

Ultimately, however, the Bankruptcy Court decided that the perfect was the enemy of the good:

I am not prepared, given the record before me, to risk [the parties’] agreement. I do not have the ability to impose what I would like on the parties.

And so, albeit with obvious reluctance, he concluded that the settlement was reasonable as that term is understood at law.

#### The Section 10.7 Shareholder Release Was In all Respects Legal

Having concluded that the settlements were fair and reasonable in amount, Judge Wains went on to address a number of challenges to his legal authority to impose the most controversial element of those settlements: The Section 10.7 Shareholder Release. He rejected each such challenge.

**Subject matter jurisdiction.** First, Judge Wains concluded that he had subject matter jurisdiction to impose the third-party releases and injunctions. Citing *Celotex Corp. v. Edwards*, [514 U.S. 300, 307-08](http://scholar.google.com/scholar?q=514+u.s.+300&btnG=&hl=en&as_sdt=6) (1995) and *SPV OSUS, Ltd. v. UBS AG*, [882 F. 3d 333, 339-40](http://scholar.google.com/scholar?q=882+f.+3d+333&btnG=&hl=en&as_sdt=6) (2d Cir. 2018), he held that he had the undoubted power to enjoin the claims of third parties that had “any conceivable effect” on the Debtors’ estates as part of a Bankruptcy Court’s “related to” jurisdiction, conferred by Congress in [28 U.S.C. § 1334(b)](http://www.google.com/search?q=28+u.s.c.++1334(b)). *In re Oxy Pharma L.P.*, [2021 WL](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts) [4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*36-38. He concluded that the third-party claims covered by the Section 10.7 Shareholder Release would directly affect the *res* of the Debtors’ estates in three different ways: insurance rights, the Shareholder Released Parties’ right to indemnification and contribution, and the Debtors’ ability to pursue its own overlapping claims against the Packlers. He concluded by saying, “Depending on the kinds of third-party claims covered by a plan’s release and injunction of such claims, *I conclude, therefore, that the Court has jurisdiction to impose such relief, based upon the effect of the claims on the estate rather than on whether the claims are ‘derivative . . .*’” *Id.* at \*38 (emphasis added).

**Due process.** Next, Judge Wains concluded that the Section 10.7 Shareholder Release did not violate the third-party claimants’ right to due process. *Id.* at \*38-39. He rejected the argument that a release constitutes a *de facto* adjudication of the claim, holding that such a release “is part of the settlement of the claim that channels settlement funds to the estate.” *Id.* at 38. And he held that claimants had been provided with constitutionally sufficient notice of the proposed releases. Uncontroverted testimony that Judge Wains found credible established that messages tailored to reach persons who may have been harmed by Debtors’ products had reached roughly 98% of the adult population of the United States and 86% of the adult population of Canada, with supplemental notice reaching an estimated 87% of all U.S. adults and 82% of Canadian adults, as well as audiences in 39 countries, with billions of hits on the internet and social media in addition to notice delivered by TV, radio, publications, billboards and outreach to victim advocate and abatement-centered groups. While references contained in the notices sent readers to complex lawyerly descriptions of the release provisions, the notices themselves were written in plain English and specifically mentioned that the Plan contemplated a broad release of civil (not criminal) claims against the members of the Packler family and related entities.

**Constitutional authority.** Judge Wains next concluded that he had constitutional power to issue a final order confirming a plan that contains a third-party claims release. *Id.* at \*40. He determined that a proceeding to determine whether a chapter 11 plan containing such a release was a “core” proceeding, so ordering the non-debtor releases and enjoining the prosecution of third- party claims against non-the Packlers qualified as “constitutionally core” under *Stern v. Marshall*, [546 U.S. 462](http://scholar.google.com/scholar?q=546+u.s.+462&btnG=&hl=en&as_sdt=6) (2011) and its progeny.

**Statutory authority.** Finally, Judge Wains concluded that he had statutory power to confirm and enter the third-party releases. *In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*40- 43. He started from the proposition that the Second Circuit, in *Deutsche Bank A.G. v. Metromedia Fiber Network, Inc., (In re Metromedia Fiber Network, Inc.)*, [416 F. 3d 136, 141](http://scholar.google.com/scholar?q=416+f.+3d+136&btnG=&hl=en&as_sdt=6) (2d Cir. 2005), had indicated that non-consensual third-party releases of claims against non-debtors could be approved, albeit only in “appropriate, narrow circumstances.” *In re Oxy Pharma L.P.*, [2021](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2B%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts) [WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2B%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*40. He noted that most of the Circuits were of that view and rejected the reasoning of those courts of appeal that held otherwise. Indeed, he asserted that the view of those Circuits (the Fifth, Ninth, and Tenth Circuits) - which is that Section 524(e) of the Bankruptcy Code precluded the grant of any such release in the context of a settlement - “has been effectively refuted.” *Id.* at \*41. He analogized the enjoining of third-party claims against non-debtors to his undoubted power to impose a preliminary injunction against the temporary prosecution of third- party claims in order to facilitate the reorganization process. And he asked rhetorically why such a stay could not become permanent if it was crucial to a reorganization process involving massive numbers of overlapping estate and third-party claims. *Id.* at \*42.

Having concluded that Section 524(e) was not a statutory impediment to a Bankruptcy Court’s approval of third-party releases, the Bankruptcy Judge then addressed the question of exactly what provision or provisions in the Bankruptcy Code conferred the necessary authority over claims against non-debtors on him. *Id.* at \*42-43. He found such authority in the “necessary or appropriate” power in Section 105(a) of the Bankruptcy Code coupled with Section 1123(b)(6)’s grant of power to “include any other appropriate provision not inconsistent with the applicable provisions of this title” - what the Seventh Circuit referred to in *In re Airadigm Communications, Inc*., [519 F. 3d 640, 657](http://scholar.google.com/scholar?q=519+f.+3d+640&btnG=&hl=en&as_sdt=6) (7th Cir. 2008) as a bankruptcy court’s “residual authority.” *In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*43. He also cited Sections 1123(b)(5) and 1129 of the Bankruptcy Code.

Judge Wains carefully noted that the release in this case extended beyond so-called “derivative” claims - claims that the Debtors could bring against the Packlers- which claims could assuredly be released by a bankruptcy court exercising *in rem* jurisdiction over the *res* of the estate. But he concluded - largely in reliance on *In re Quigley Co., Inc.*, [676 F.3d 45, 59-60](http://scholar.google.com/scholar?q=676+f.3d+45&btnG=&hl=en&as_sdt=6) (2d Cir. 2012) - that he had statutory authority to authorize the release of non-derivative - direct or particularized - claims, because the third party claims to be released in this case were “premised as a legal matter on a meaningful overlap with the debtor’s conduct.” *In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*43-47. Such a claim - one that “essentially dovetail[s] with the facts of the claimants’ third- party claims against the Debtors” - was, in Judge Wains’s view, “sufficiently close to the claims against the debtor to be subject to settlement under the debtor’s plan if enough other considerations support the settlement.” *Id.* at \*45-46.

As noted above, Judge Wains did insist that the Section 10.7 Shareholder Release be modified so that it covered only third-party claims in which “a Debtor’s conduct, or a claim asserted against the Debtor, must be a legal cause of the released claim, or a legally relevant factor to the third-party cause of action against the shareholder released party.” *Id.* at \*45. In other words, he insisted that there be substantial factual overlap between the released particularized claims and the derivative claims that no one disputes he had the power to release, such that the released non­derivative claims were “sufficiently close to the claims against the debtor.”

***Metromedia* analysis.** Having disposed of all constitutional, jurisdictional, and statutory challenges to his authority to enter the Section 10.7 Shareholder Release (as modified), Judge Wains turned finally to whether this was the “unique” case in which it would be was appropriate to impose them. *Id.* at \*46. He concluded that it was.

In this regard, he reviewed the law in the various circuits on the subject, viewing with special interest the Third Circuit’s conclusion that:

“To grant non-consensual releases a court must assess ‘fairness, necessity to the reorganization’ and make specific actual findings to support these conclusions.” *In re Cont’l Airlines*, [203 F. 3d 203, 214](http://scholar.google.com/scholar?q=203++f.++3d++203&btnG=&hl=en&as_sdt=6) (3d Cir. 2001). Relevant consideration might include whether the non-consensual release is necessary to the success of the reorganization; whether the releasees have provided a critical financial contribution to the debtor’s plan and whether that financial contribution is necessary to make the plan feasible; and whether the non-consenting creditors received reasonable compensation in exchange for the release, such that the release is fair.” *In re Spansion, Inc.*, [426 B.R. 114, 144](http://scholar.google.com/scholar?q=426++b.r.++114&btnG=&hl=en&as_sdt=6) (Bankr. D. Del 2010).

*In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*46.

Judge Wains also cited with approval the Seventh Circuit’s practice of engaging in a fact- based inquiry into such matters as whether the release is “narrowly tailored, not blanket” (unlike the Section 10.7 Shareholder Release, which releases all types of conduct, including fraud and willful misconduct); whether the release is an essential component of the plan; and whether it was achieved by the exchange of good and valuable consideration that will enable unsecured creditors to realize distributions (which is in fact going to happen in this case). *Id.* at \*47.

Judge Wains also noted that the Fourth, Sixth and Eleventh Circuits apply a multi-factor test in deciding when it is appropriate to impose a non-consensual release of third-party claims. (*Id.* at \*46).

Then, while recognizing that “this is not a matter of factors or prongs” (*Id.* citing *Metromedia*, [416 F.3d at 142](http://scholar.google.com/scholar?q=416+f.+3d+136&btnG=&hl=en&as_sdt=6)), Judge Wains made a long list of findings about why this was the “rare” and “unique” case in which a nonconsensual third-party claims release was appropriate. *Id.* at \*46-49. These include the following: (1) the Oxy bankruptcy was exceedingly complex; (2) the Plan has overwhelming creditor support; (3) without the Packler payment the settlements would unravel; (4) while not every Packler would be making a specific payment toward the settlement,[[24]](#footnote-24) the aggregate settlement payment hinged on each member of the family’s being released; (5) the settlement amount was substantial; (6) the release “is narrowly tailored;”[[25]](#footnote-25) (7) the settlement was fundamentally fair to the third parties; and (8) for the reasons discussed at length *supra*, the cost and likelihood of success on the third party claims against the Packlers - including both the merits and the impediments to collection of any judgment - was outweighed by the immediate and definite benefits of the settlement.

**“Best interests” analysis.** Section 1129 of the Bankruptcy Code requires that a plan of reorganization may be confirmed only if a litany of requirements is met. One such requirement is found in Subsection (a)(7) of Section 1129, which provides that, for any impaired creditor or class of creditors, if all members of the class do not approve the plan, each member of the class “will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.” *In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*50.

Judge Wains applied this so-called “best interests” test to conclude that the holders of claims against non-debtor third parties would receive, on account of the Plan (and taking into account their claims against the Debtors as well as the third parties), materially more than they would receive in a hypothetical chapter 7 liquidation.[[26]](#footnote-26) *Id.* at \*50-51.

**State police powers.** Judge Wains concluded that his ordering of the non-debtor releases did not violate state sovereignty or any state police power. *Id.* at \*51-53. He concluded that actions exempted from the automatic stay by virtue of Section 362(b)(4) were nonetheless subject to court- ordered (*i.e.*, not automatic) injunctive relief, and that Congress’ express power under the bankruptcy clause of the Constitution to enact uniform bankruptcy laws overrode any state regulatory or sovereignty argument.

**The classification of the Canadians**. Finally, Judge Wains addressed whether that the Canadian creditor’s classification as Class 11(c) creditors, rather than as Class 4 and 5 creditors, was impermissible. Certain Canadian creditor groups objected to the confirmation of the Plan, arguing that they should be classified with the U.S. unsecured creditor groups in Classes 4 and 5 to participate in the opioid abatement trusts created under the Plan for those classes, rather than receiving their pro rata share of the cash payment to Class 11(c). But Judge Wains concluded that, because there were legitimate reasons for separately classifying the Canadian unsecured creditors from there domestic counterparts, the classification was perfectly permissible. First, the Canadian creditors operate under “different regulatory regimes . . . with regard to opioids and abatement” than their domestic counterparts. *In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*12. And second, “the allocation mediation conducted by Messrs. Feinberg and Phillips that resulted in the plan’s division of the Debtors’ assets . . . involved only *U.S.-based* public claimants with their own regulatory interests and characteristics.” *Id.* (emphasis added).

## The Appeal to the District Court and its Decision

The U.S. Trustee, eight states, D.C., certain Canadian municipalities and First Nation groups, and five *pro se* individuals filed notices of appeal of Judge Wains’s Confirmation Order in September 2021.

Among those who did not appeal the Plan were the UCC, the ACH, MSGE, the PI Ad Hoc Group, and other creditors supporting the Plan.

The District Court had appellate jurisdiction to review the Confirmation Order under 28 U.S.C. §158(a)(1).

The District Court, in a carefully crafted opinion, reversed the Bankruptcy Court, vacating the Confirmation Order. It did so because Judge Waitford found that the Bankruptcy Court lacked specific statutory authority under the Bankruptcy Code to order the release of direct claims of creditors, claimants and other entities against the Packlers and related entities, non-Debtor third parties.

Each Appellant timely filed notices of appeal from the District Court’s order vacating the Confirmation Order and moved the District Court to certify its order so vacating, as necessary to this Court for interlocutory appeal under 28 U.S.C. §1292(b). The District Court granted this motion and Oxy (and the other Appellants in connection with related motion practice) timely petitioned this Court for permission to appeal. This Court granted such petitions.

# ISSUES ON APPEAL AND CONCLUSIONS OF LAW

This Court’s answers to the questions that are being decided on appeal are summarized as follows:

1. Does the Bankruptcy Court have constitutional authority and subject matter jurisdiction to impose a release of non- Debtor claims?

Yes. Under the law of this Circuit, as most recently set forth in *SPV OSUS Ltd. v. UBS*, [882 F.3d 333](http://scholar.google.com/scholar?q=882+f.3d+333&btnG=&hl=en&as_sdt=6) (2d Cir. 2018), the Bankruptcy Court has broad “related to” jurisdiction over any civil proceedings that “might have any conceivable effect” on the estate. *Id.* 339-340. Because the civil proceedings asserted against the non-debtor Packler family members *might have* a conceivable impact on the estate, the Bankruptcy Court has subject matter jurisdiction to approve the Section 10.7 Shareholder Release and release the claims against the non-debtor Shareholder Released Parties.

2. Does the Bankruptcy Court have statutory authority to approve the non-debtor releases?

No. The Bankruptcy Code does not authorize a bankruptcy court to order the non­consensual release of third-party claims against non-debtors in connection with the confirmation of a chapter 11 bankruptcy plan. The Confirmation Order fails to identify any provision of the Bankruptcy Code that provides such authority. Contrary to the bankruptcy judge’s conclusion, Sections 105(a) and 1123(a)(5) and (b)(6), whether read individually or together, do not provide a bankruptcy court with such authority; and there is no such thing as “equitable authority” or “residual authority” in a bankruptcy court untethered to some specific, substantive grant of authority in the Bankruptcy Code. Second Circuit law is not to the contrary; indeed, the Second Circuit has not yet taken a position on this question.

# STANDARD OF REVIEW

The Court has jurisdiction to hear bankruptcy appeals pursuant to [28 U.S.C. § 158(a)](http://www.google.com/search?q=28++u.s.c.++++158(a)).

This Court “review[s] the Bankruptcy Court decision independently accepting its factual findings unless clearly erroneous, but reviewing its conclusions of law *de novo*.” *Midland Cogeneration Venture Ltd. Partnership v. Enron Corp. (In re Enron Corp.)*, 419 F. 3d 115, 128 (2d Cir. 2005) (*quoting,* *In re AroChem* Corp, 176 F.3d 610, 620, (2d Cir. 1999). Conclusions of law reviewed *de novo* include “rulings as to the bankruptcy court’s jurisdiction” and “interpretations of the Constitution.” *In re Motors Liquidation Co.*, [829 F.3d 135, 152](http://scholar.google.com/scholar?q=829+f.3d+135&btnG=&hl=en&as_sdt=6), [158](http://scholar.google.com/scholar?q=829+f.3d+135&btnG=&hl=en&as_sdt=6) (2d Cir. 2016). As to findings of fact, the “clear error standard is a deferential one.” *Id.* at 158. A finding of fact is clearly erroneous only if this Court is “left with the definite and firm conviction that a mistake has been committed.” *In re Lehman Bros. 3 Holdings Inc.*, [855 F.3d 459, 469](http://scholar.google.com/scholar?q=855+f.3d+459&btnG=&hl=en&as_sdt=6) (2d Cir. 2017).

The standard of review of findings of fact is far less deferential if a bankruptcy court is presented with something it cannot adjudicate to final judgment as a constitutional matter unless the parties consent. *Stern v. Marshall*, [564 U.S. 462](http://scholar.google.com/scholar?q=564+u.s.+462&btnG=&hl=en&as_sdt=6) (2011). In such a circumstance, a bankruptcy judge has authority only to “hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment.” *Exec. Benefits Ins. Agency v. Arkison*, [573 U.S. 25, 34-36](http://scholar.google.com/scholar?q=573+u.s.+25&btnG=&hl=en&as_sdt=6) (2014). In that case, the findings of fact are reviewed *de novo* as well. If a bankruptcy court issues a final order in the mistaken belief that it has constitutional authority to do so, the district court can treat a bankruptcy court’s order as a report and recommendation, but it “must review the proceeding *de novo* and enter final judgment.” *Id.* at 34.

In this case, the Bankruptcy Court concluded that it had constitutional authority under *Stern* to enter a final order granting the release, because the issue arose in the context of confirming a plan of reorganization - the most “core” of bankruptcy proceedings. *In re Oxy Pharma L.P.*,[2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*40. Appellees urge that Judge Wains misread *Stern* and argue that he lacked authority to give final approval to those releases, even though they were incorporated into a plan of reorganization.

We agree with Appellees.

In [28 U.S.C. §157(a)](http://www.google.com/search?q=28+u.s.c.+157(a)), Congress divided bankruptcy proceedings into three types: (1) those that “arise under” title 11; (2) those that “arise in” a title 11 case; (3) and those that are “related to” a title 11 case. Cases that “arise under” or “arise in” a title 11 matter are known as core bankruptcy proceedings, while “related to” proceedings are non-core. [28 U.S.C. § 157(b)(1)-](http://www.google.com/search?q=28+u.s.c.++157(b)(1)) [(2)(C)](http://www.google.com/search?q=28+u.s.c.++157(b)(1)). Every proceeding pending before a bankruptcy court is either core or non-core.[[27]](#footnote-27)

The core vs. non-core distinction is critical when assessing a bankruptcy court’s constitutional authority to enter a final judgment disposing of that proceeding.[[28]](#footnote-28) In particular, a bankruptcy court lacks the constitutional authority to enter a final judgment in a proceeding over which it has only “related to” subject matter jurisdiction unless all parties consent. Any doubt on that score was put to rest by the United States Supreme Court in *Stern v. Marshall*, [564 U.S. 462](http://scholar.google.com/scholar?q=564+u.s.+462&btnG=&hl=en&as_sdt=6) (2011). In that case, the Supreme Court held that a bankruptcy court lacked constitutional power to adjudicate and enter judgment on a counterclaim asserted by a debtor, Vickie Marshall (aka Anna Nicole Smith) in an adversary proceeding that a creditor (her stepson) had filed against her. The counterclaim (for tortious interference with an *inter vivos* gift from the debtor Marshall’s late husband, who was also the creditor’s father) did not arise under title 11, nor did it arise in a title 11 case. Even though the claim was asserted in the context of a bankruptcy proceeding, it existed prior to and was independent of debtor Marshall’s bankruptcy case.

The Supreme Court ruled that Congress could not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or in admiralty.” *Murray’s Lessee v. Hoboken Land & Improvement Co*., [59 U.S. 272, 284](http://scholar.google.com/scholar?q=59+u.s.+272&btnG=&hl=en&as_sdt=6) (1855). Because Marshall’s counterclaim for tortious interference was just such a claim, it could only be adjudicated to final judgment by an Article III court; and Congress had no power to alter that simply because the counterclaim might have “some bearing on a bankruptcy case.” *Stern*, [564 U.S. at 499](http://scholar.google.com/scholar?q=564+u.s.+499&btnG=&hl=en&as_sdt=6).

In this case, the Bankruptcy Court improperly merged his authority to confirm a plan of reorganization (a core function of a bankruptcy court) with his authority to finally dispose of claims that were non-consensually extinguished pursuant to that plan over which - as he himself recognized - he has only “related to” jurisdiction over the third-party claims against the non-debtor Packlers. *In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*36-38. *Stern* itself illustrates that not every issue that is litigated under the umbrella of a core proceeding is, to use Judge Wains’s phrase, “constitutionally core.” The stepson-creditor’s claim against Marshall’s estate was properly litigated to judgment by the bankruptcy court in a claims allowance adversary proceeding - a core proceeding - but because the debtor’s counterclaim was not a “core” claim, it could not be adjudicated to final judgment by the Bankruptcy Court, even though it would impact how much the creditor was ultimately owed.

Judge Wains reasoned that the non-consensual third-party releases that he was approving were “constitutionally core” under *Stern* because plan confirmation is a “fundamentally central aspect of a Chapter 11 case’s adjustment of the debtor/creditor relationship.” *Id.* at \*40. But nothing in *Stern* or any other case suggests that a party otherwise entitled to have a matter adjudicated by an Article III court forfeits that constitutional right if the matter is disposed of as part of a plan of reorganization in bankruptcy. Were it otherwise, then parties could manufacture a bankruptcy court’s *Stern* authority simply by inserting the resolution of some otherwise non-core matter into a plan.

The Bankruptcy Court relied on the Third Circuit’s recent decision in *In re Millennium Lab Holdings II, LLC*., [945 F.3d 126, 139](http://scholar.google.com/scholar?q=945+f.3d+126&btnG=&hl=en&as_sdt=6) (3d Cir. 2019), *cert. denied sub nom*. *ISL Loan Tr. v. Millennium Lab Holdings II, LLC*, [140 S. Ct. 2805](http://scholar.google.com/scholar?q=140+s.+ct.+2805&btnG=&hl=en&as_sdt=6) (2020). In *Millennium*, the court, like Judge Wains in this case, concluded that the “operative proceeding” for purposes of *Stern* analysis was the confirmation proceeding, not the underlying third-party claim against a non­debtor that was being released pursuant to the plan. *In re Millennium Lab Holdings II, LLC*, [591](http://scholar.google.com/scholar?q=591++b.r.+559&btnG=&hl=en&as_sdt=6) [B.R. 559, 574](http://scholar.google.com/scholar?q=591++b.r.+559&btnG=&hl=en&as_sdt=6) (D. Del. 2018), *aff’d sub nom. In re Millennium Lab Holdings II, LLC*., [945 F.3d](http://scholar.google.com/scholar?q=945+f.3d++126&btnG=&hl=en&as_sdt=6) [126](http://scholar.google.com/scholar?q=945+f.3d++126&btnG=&hl=en&as_sdt=6) (3d Cir. 2019). The Third Circuit read *Stern* to allow a bankruptcy court to confirm a plan containing such releases “because the existence of the releases and injunctions” are “‘integral to the restructuring of the debtor-creditor relationship.’” *Millennium Lab Holdings II, LLC*., [945 F.3d](http://scholar.google.com/scholar?q=945+f.3d+126&btnG=&hl=en&as_sdt=6) [at 129](http://scholar.google.com/scholar?q=945+f.3d+126&btnG=&hl=en&as_sdt=6) (quoting *Stern*, [564 U.S. at 497](http://scholar.google.com/scholar?q=564+u.s.+497&btnG=&hl=en&as_sdt=6)).

Perhaps they are, but that is beside the point. In *Stern*, the Supreme Court held that bankruptcy courts have the power to enter a final judgment only in proceedings that “stem[] from the bankruptcy itself or would necessarily be resolved in the claims allowance process.” *Stern*, [564](http://scholar.google.com/scholar?q=564++u.s.+499&btnG=&hl=en&as_sdt=6) [U.S. at 499](http://scholar.google.com/scholar?q=564++u.s.+499&btnG=&hl=en&as_sdt=6). It did not say that a bankruptcy court could finally dispose of non-core proceedings as long as they were “integral to the restructuring of the debtor-creditor relationship.” The counterclaim in the lawsuit between debtor Marshall and her stepson-creditor was integral to the restructuring of their debtor-creditor relationship, but it was not a core proceeding, so the bankruptcy court could not finally adjudicate it. The correct constitutional question, and the question on which the Bankruptcy Court should have focused in this case, is whether the third- party claims released and enjoined by the Bankruptcy Court either stem from the bankruptcy itself or would necessarily be resolved in the claims allowance process - not whether the release and injunction are “integral to the restructuring of the debtor-creditor relationship.”

The third-party claims at issue neither stem from Oxy’s bankruptcy nor can they be resolved in the claims allowance process. Yet those claims are being finally disposed of pursuant to the Plan; they are being released and extinguished, without the claimants’ consent and without any payment, and the claimants are being enjoined from prosecuting them. Debtors and their affiliated non-debtor parties cannot manufacture constitutional authority to resolve a non-core claim by the artifice of including a release of that claim in a plan of reorganization. As Bankruptcy Judge Bernstein made clear in *In re SunEdison, Inc*., [576 B.R. 453, 461](http://scholar.google.com/scholar?q=576+b.r.+453&btnG=&hl=en&as_sdt=6) (Bankr. S.D.N.Y. 2017), “In assessing a court’s jurisdiction to enjoin a third party dispute under a plan, the question is not whether the court has jurisdiction over the settlement that incorporates the third party release, but whether it has jurisdiction over the attempts to enjoin the creditors’ unasserted claims against the third party.” That proposition applies with equal force to a bankruptcy court’s *Stern* authority.

Appellees’ argument that *Stern* only limits a bankruptcy court’s authority to *adjudicate* claims - not its authority to enter judgments that terminate claims without adjudicating them on the merits - is also flawed. As the U.S. Trustee correctly points out, *Stern’s* holding is to the contrary: “The Bankruptcy Court in this case exercised the judicial power of the United States by *entering a final judgment* on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection.” *Stern*, [564 U.S. at 469](http://scholar.google.com/scholar?q=564+u.s.+469&btnG=&hl=en&as_sdt=6) (emphasis added). A bankruptcy court’s order extinguishing a non-core claim and enjoining its prosecution without an adjudication on the merits “finally determines” that claim. It is equivalent to entering a judgment dismissing the claim. It bars the claim under principles of former adjudication. Therefore, Congress may not allow a bankruptcy court to enter such an order absent the parties’ consent - and consent is lacking here. *See Stern* at 484.

There really can be no dispute that the release of a claim “finally determines” that claim. It does so by extinguishing the claim, so that it cannot be adjudicated on the merits. A nonconsensual third-party release is essentially a final judgment against the claimant, in favor of the non-debtor, entered “without any hearing on the merits.” *In re Aegean Marine Petroleum Network Inc*., [599](http://scholar.google.com/scholar?q=599++b.r.+717&btnG=&hl=en&as_sdt=6) [B.R. 717, 725](http://scholar.google.com/scholar?q=599++b.r.+717&btnG=&hl=en&as_sdt=6) (Bankr. S.D.N.Y. 2019) (citing *In re Digital Impact*, [223 B.R. 1, 13](http://scholar.google.com/scholar?q=223+b.r.+1&btnG=&hl=en&as_sdt=6) n. 6 (Bankr. N.D. Okla. 1998)) (noting that a third-party release has “the effect of a judgment - a judgment against the claimant and in favor of the non-debtor, accomplished without due process.”). The fact that the releases are being ordered in the overall context of a plan confirmation that “settles” many disputed matters (against the Debtors, not against non-debtors) does not alter this. The Appellants in this case do not want to settle their claims against the non-debtors - at least, not on the terms set forth in the Plan. This “settlement” is non-consensual - which means that, under *Stern*, a bankruptcy court cannot enter the order that finally disposes of their claims against those non-debtors.

Nor is there any doubt that the entry of an order releasing a claim has formal adjudication effects, which is a key attribute of a final judgment. The Supreme Court has twice held that non-consensual third-party releases confirmed by final order are entitled to *res judicata* claim preclusion barring any subsequent action bringing a released claim: First in *Stoll v. Gottlieb*, [305](http://scholar.google.com/scholar?q=305++u.s.+165&btnG=&hl=en&as_sdt=6) [U.S. 165, 171](http://scholar.google.com/scholar?q=305++u.s.+165&btnG=&hl=en&as_sdt=6) (1938), and again in *Travelers Indemnity Co. v. Bailey*, [557 U.S. 137, 155](http://scholar.google.com/scholar?q=557+u.s.+137&btnG=&hl=en&as_sdt=6) (2009).[[29]](#footnote-29)

Because the non-consensual releases and injunction are the equivalent of a final judgment for *Stern* purposes, Judge Wains did not have the power to enter an order finally approving them.

To the extent of his approval of the Section 10.7 Shareholder Releases, the Bankruptcy Court’s opinion should have been tendered as proposed findings of fact and conclusions of law, both of which this court could review *de novo*. [11 U.S.C. § 157(c)(1)](http://www.google.com/search?q=11+u.s.c.++157(c)(1)). *Stern*, [564 U.S. at 475](http://scholar.google.com/scholar?q=564+u.s.+475&btnG=&hl=en&as_sdt=6). If approved by the District Court, those releases would have been incorporated into the Plan; of course, the District Court appropriately reversed.

# DISCUSSION

## The Bankruptcy Court Has Subject Matter Jurisdiction Over Third-Party Claims Against Non-Debtors That Might Have Any Conceivable Effect on the Debtors’ Estate.

A bankruptcy court is a creature of statute. *See Celotex Corp. v. Edwards*, [514 U.S. 300](http://scholar.google.com/scholar?q=514++u.s.++300&btnG=&hl=en&as_sdt=6), 307 (1995). Its subject matter jurisdiction is *in rem* and is limited to the *res* of the estate. *Central Virginia Community College v. Katz*, [546 U.S. 356, 362](http://scholar.google.com/scholar?q=546+u.s.+356&btnG=&hl=en&as_sdt=6) (2006) (“Bankruptcy jurisdiction, at its core, is *in rem*.”). Its jurisdiction is limited to “civil proceedings arising under title 11, or arising in or related to cases under title 11.” [28 U.S.C. § 1334(b)](http://www.google.com/search?q=28+u.s.c.++1334(b)).

A proceeding “arises under” title 11 if the claims “invoke substantive rights created by” that title. *See In re Housecraft Industries USA, Inc.*, [310 F.3d 64, 70](http://scholar.google.com/scholar?q=310+f.3d+64&btnG=&hl=en&as_sdt=6) (2d Cir. 2002). A proceeding “arises in” a title 11 case if for example “Parties . . . , by their conduct, submit themselves to the bankruptcy court’s jurisdiction” by litigating proofs of claim without contesting personal jurisdiction. *In re Millenium Seacarriers, Inc.*, [419 F.3d 83, 98](http://scholar.google.com/scholar?q=419+f.3d+83&btnG=&hl=en&as_sdt=6) (2d Cir. 2005); *see In re S.G. Phillips Constructors, Inc.*, [45 F.3d 702, 706](http://scholar.google.com/scholar?q=45+f.3d+702&btnG=&hl=en&as_sdt=6) (2d Cir. 1995) (“*a claim filed against the estate . . . could arise only in the context of bankruptcy*”) (emphasis in original) (quotation omitted). And a proceeding is “related to” a title 11 proceeding if its “outcome might have any conceivable effect on the bankrupt estate.” *In re Cuyahoga Equip. Corp.*, [980 F.2d 110, 114](http://scholar.google.com/scholar?q=980+f.2d+110&btnG=&hl=en&as_sdt=6) (2d Cir.1992) *Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, [639 F.3d 572, 579](http://scholar.google.com/scholar?q=639+f.3d+572&btnG=&hl=en&as_sdt=6) (2d Cir. 2011); *SPV OSUS Ltd. v. UBS*, [882 F.3d 333, 339-340](http://scholar.google.com/scholar?q=882+f.3d+333&btnG=&hl=en&as_sdt=6) (2d Cir. 2018).

The release of most third-party claims against a non-debtor touches the outer limit of the Bankruptcy Court’s jurisdiction. *See In re Johns-Manville Corp*., [517 F.3d 52, 55](http://scholar.google.com/scholar?q=517+f.3d+52&btnG=&hl=en&as_sdt=6) (2d Cir. 2008) (“*Manville III*”), *rev’d and remanded on other grounds sub nom. Travelers Indem. Co. v. Bailey*, [557 U.S. 137](http://scholar.google.com/scholar?q=557+u.s.+137&btnG=&hl=en&as_sdt=6) (2009). But the Second Circuit defines that limit quite broadly. *See SPV OSUS Ltd.*, [882 F.3d at 339-340](http://scholar.google.com/scholar?q=882+f.+3d+333&btnG=&hl=en&as_sdt=6). The standard is not that an action’s outcome will certainly have, or even that it is likely to have, an effect on the *res* of the estate, as is the case in some other Circuits. It is, rather, whether it *might have any conceivable impact* on the estate. *Id.*

Bound to adhere to this broad standard, which has been consistently followed in this Circuit for almost three decades and was applied most recently in *SPV Osus*, I agree with the Debtors that the Bankruptcy Court had subject matter jurisdiction over the direct (non-derivative) third party claims against the Packlers, under the “related to” prong of bankruptcy jurisdiction.

### Governing Law

Decades ago, the Second Circuit concluded that the outer limit of a bankruptcy court’s *in rem* jurisdiction was defined by whether the outcome of a proceeding asserting a particular claim “might have any conceivable effect” on the *res* of the estate. *See In re Cuyahoga Equipment Corp.*, [980 F.2d at 114](http://scholar.google.com/scholar?q=980+f.2d+110&btnG=&hl=en&as_sdt=6). In that case, a liquor distillery and its site of operation containing hazardous wastes was sold to a purchaser that subsequently went bankrupt; the bankruptcy court was asked to resolve not only the proceedings in bankruptcy but approve a settlement that released a creditor bank from claims related to separate environmental cleanup litigation (brought by the creditor Environmental Protection Agency (the “EPA”)). *Id.* at 111-112. The original owner of the liquor distillery site - a non-debtor third party and defendant in the environmental cleanup litigation - objected and appealed arguing, *inter alia*, that the court lacked jurisdiction to approve the settlement. The Second Circuit found that the court had related to jurisdiction because the bank’s and the EPA’s claims against the estate “bring into question the very distribution of the estate’s property.” *Id.* at 114. “[Section] 1334(b) undoubtedly vested the district court with the power to approve the agreement between the parties at least to the extent it compromised the bankruptcy claims asserted by the bank and the government.” *Id.* at 115.

In *Celotex Corp. v. Edwards*, [514 U.S. 300](http://scholar.google.com/scholar?q=514+u.s.+300&btnG=&hl=en&as_sdt=6) (1995), the United States Supreme Court decreed that “related to” jurisdiction was “a grant of some breadth” and that “jurisdiction of bankruptcy courts may extend . . . broadly” in “reorganization under Chapter 11.” *Id.* at 308. And while some courts of appeal have circumscribed the scope of “related to” jurisdiction in their circuits, *see e.g.*, *In re W.R. Grace & Co.*, [900 F.3d 126](http://scholar.google.com/scholar?q=900+f.3d+126&btnG=&hl=en&as_sdt=6) (3d Cir. 2018), the Second Circuit has never backed away from its broad reading of “related to” jurisdiction. *See, e.g*., *In re Ampal- American Israel Corporation*, [677 Fed. Appx. 5, 6](http://scholar.google.com/scholar?q=677+fed.appx.+5&btnG=&hl=en&as_sdt=6) (2d Cir. 2017) (summary order).

Our Circuit’s most recent discussion of the subject can be found in *SPV OSUS Ltd. v. UBS AG*, [882 F.3d 333](http://scholar.google.com/scholar?q=882+f.3d+333&btnG=&hl=en&as_sdt=6) (2d Cir. 2018). SPV Osus Ltd. (“SPV”) had sued UBS AG (“UBS”) (among others) in the New York State Supreme Court for aiding and abetting Bernie Madoff (“Madoff”) and Bernard L. Madoff Investment Securities LLC (“BLMIS”) in perpetrating their massive Ponzi scheme. *Id.* at 337-338. If UBS was indeed a joint tortfeasor with Madoff, it had a Cantingent claim for contribution against the Madoff estate. *Id.* at 340. However, it had not yet asserted such a claim (it was not yet ripe), and the unwaivable bar date for filing claims against the Madoff estate under the Securities Investor Protection Act (“SIPA”) had already passed. *Id.* Moreover, there was no realistic possibility that there would be any money available at the end of the day to fund a claim for contribution. *Id.* SPV argued that these facts meant there was no possibility that the outcome of UBS’ contribution case “might have any conceivable effect” on the *res* of the Madoff estate. *Id.* It is indeed hard to quarrel with that factual analysis.

But Judge Pooler, writing for a unanimous panel, concluded that UBS’s Cantingent claim for joint tortfeasor contribution against the Madoff estate “might” have an effect on the Madoff estate if there were any “reasonable legal basis” for its assertion. *Id.* at 340-41 (quotation omitted). She explained that the broad jurisdictional standard reflects Congress’ intent “‘to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.’” *Id.* at 340 (quoting *Celotex*, [514 U.S. at 308](http://scholar.google.com/scholar?q=514+u.s.+300&btnG=&hl=en&as_sdt=6)). While recognizing that “‘related to’ jurisdiction is not ‘limitless,’” Judge Pooler indicated that “it is fairly capacious.” *Id.* And she said, “‘An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.’” *Id.* (quoting *Celotex*, [514 U.S. at 308](http://scholar.google.com/scholar?q=514+u.s.+300&btnG=&hl=en&as_sdt=6), n. 6).

The fact that UBS and the debtor (Madoff) were alleged to be joint tortfeasors - who, as a matter of state law, have a right of contribution against one another - provided a “reasonable legal basis” why UBS might someday be able to assert its Cantingent claim. And while Judge Pooler recognized that “. . . a payout by the estate to defendants may be improbable, it is not impossible.” *Id.* at 342. Since “any claim by defendants potentially alters that distribution of assets among the estates’ creditors,” *id.*, that was all it took to make the Cantingent claim “conceivably related” to the Madoff bankruptcy.

Finally - and of particular importance for the case at bar - Judge Pooler found that the “high degree of interconnectedness between this action and the Madoff bankruptcies” supported a finding of “related to” jurisdiction. *Id.* She explained that, “SPV can only proceed on [its claims against UBS] if it establishes that the Madoff fraud occurred” and “it is difficult to imagine a scenario wherein SPV would not also sue Madoff and BLMIS, given that SPV alleges that UBS aided and abetted in their fraud.” *Id.*

So in this Circuit, it is well settled that the only question a court need ask is whether “the action’s outcome *might have* any conceivable effect on the bankrupt estate.” *Id.* (emphasis added). If the answer to that question is yes, then related to jurisdiction exists - no matter how implausible it is that the action’s outcome actually will have an effect on the estate.

### Application of the Law to the Facts

Under the broad standard set forth in *SPV Osus*, I find that the Bankruptcy Court had “related to” subject matter jurisdiction to approve the release of direct, non-derivative third-party claims against the Packlers. There is absolutely no question that the answer to the question of whether the third-party claims *might have* any conceivable impact on the res of the debtors’ estate is yes. Moreover, the intertwining of direct and derivative claims against certain members of the Packler family, as well as the congruence between the only claim that anyone has identified against the other Packlers and Oxy’s own claim for fraudulent conveyance, justifies the assertion of “related to” jurisdiction under *SPV Osus*’s “interconnectedness” test.

**First,** the non-derivative third-party claims that are being or might be asserted against the Packlers are, as in *In re Cuyahoga Equipment Corp.*, the type of claims that “bring into question the very distribution of the estate’s property.” [980 F.2d at 114](http://scholar.google.com/scholar?q=980+f.2d+110&btnG=&hl=en&as_sdt=6). As the Debtors pointed out in oral argument, and as Judge Wains recognized in his opinion, pursuit of the third-party claims threatens to “unravel[] the plan’s intricate settlements” and “recoveries on . . . judgments” against the Packlers would have a “catastrophic effect” on all parties’ possible recovery under the Plan. *See In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*33; (Oral Arg. Tr., Nov. 30, 2021, at 124:14- 16 (“continued litigation against the Packlers destroys all of the interlocking intercreditor settlements enshrined in the plan.”)).

**Second,** as in *SPV Osus*, the claims raised against the Packlers might have a conceivable impact on the estate, in that they threaten to alter “the liabilities of the estate” and “change” “the amount available for distribution to other creditors.” *SPV Osus*, [882 F.3d 341](http://scholar.google.com/scholar?q=882+f.3d+341&btnG=&hl=en&as_sdt=6). This “is sufficient to find that litigation among non-debtors is related to the bankruptcy proceeding.” *Id.*

Here, the non-derivative litigation against the Packlers *might* alter the liabilities and change the amount available for distribution. If, for example, the Appellees were successful in their related claims against the Packlers, the findings could alter, or even determine, Oxy’s own liability on similar claims, as well as the amount owed to Appellees as creditors. Further, as the Debtors explained at oral argument, there also is the threat that the Appellees’ claims could affect “the debtors’ ability to pursue the estate’s own closely related, indeed, fundamentally overlapping claims against the Packlers”; this is so because, if the related third-party claims were litigated poorly, the Debtors’ estates might be less likely to recover on its own claims against the Packlers, which are worth billions.

Judge Wains pointed out the conceivable effect that the potential alteration of liabilities and ultimate amounts owed creditors and the estate would have on the *res* in his opinion. *See In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*37. We agree that these potential effects support a finding of “related to” jurisdiction.

**Third,** as in *SPV Osus*, all the claims in this case have a high degree of interconnectedness with the lawsuits against the Debtors and against the Packlers - especially those members of the family who can be sued derivatively as well as directly.

As the *SPV Osus* Court explained, “‘The existence of strong interconnections between the third-party action and the bankruptcy has been cited frequently by courts in concluding that the third-party litigation is related to the bankruptcy proceeding.’” *SPV OSUS*, [882 F.3d at 342](http://scholar.google.com/scholar?q=882+f.3d+341&btnG=&hl=en&as_sdt=6) (quoting *In re WorldCom, Inc. Sec. Litig.*, [293 B.R. 308, 321](http://scholar.google.com/scholar?q=293+b.r.+308&btnG=&hl=en&as_sdt=6) (S.D.N.Y. 2003)). Here, the Section 10.7 Shareholder Release only extends to those claims where the “debtor’s conduct or the claims asserted against it [are] a legal cause or a legally relevant factor.”  *See In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*45; Plan, at § 10.7(b)). This limitation alone supports a conclusion that any claim that could fall within the scope of the release would necessarily have a high degree of interconnectedness with the Debtors’ conduct.

Looking at the claims of the Appellees themselves, the interconnectedness of the claims against the Packlers with those against the Debtors is patent. In fact, the direct and derivative claims against the “insider” or “managerial” Packlers are essentially congruent. The Appellees have asserted claims in multiple instances against both Oxy and the Packlers, and in every case they rely on detailed and virtually identical sets of facts to make the claims. Because various state statutes authorize the assertion of direct claims against certain managerial personnel of a corporation who can be held independently liable for the same conduct that subjects the corporation to liability (and them to liability to the corporation for faithless service in their corporate roles), a determination in one of the Appellees’ cases would likely have preclusive impact on a case alleging derivative liability against the same people - a case over which the Bankruptcy Court has undoubted jurisdiction. As the Debtor pointed out at oral argument, there is an obvious inconsistency in bringing “lawsuits against the Packler[s] alleging that they controlled Oxy, and that Oxy did terrible things, and 500,000 people’s lives were maybe snuffed out by Oxy’s conduct” yet arguing that those suits “will [not] affect the debtors in any conceivable way.” The acts of the Packlers that could form the basis of any released claim “are deeply connected with, if not entirely identical to, Oxy’s alleged misconduct.”

In so holding, we acknowledge that in *In re Johns-Manville Corp*., [517 F.3d 52](http://scholar.google.com/scholar?q=517+f.3d+52&btnG=&hl=en&as_sdt=6) (2d Cir. 2008) (“*Manville III*”), *rev’d and remanded on other grounds sub nom. Travelers Indem. Co. v. Bailey*, [557 U.S. 137](http://scholar.google.com/scholar?q=557+u.s.+137&btnG=&hl=en&as_sdt=6) (2009) and *In re Johns-Manville Corporation v. Chubb Insurance*, [600 F.3d 135](http://scholar.google.com/scholar?q=600+f.+3d+135&btnG=&hl=en&as_sdt=6) (2d Cir. 2010) (“*Manville IV*”), this Circuit said that the existence of shared facts between claims against the debtor and claims against the non-debtor arising out of an independent legal duty that was owed by the non-debtor to a third party was not sufficient to confer “related to” subject matter jurisdiction over the claims against the non-debtors. *Manville III*, [517 F.3d at 6465](http://scholar.google.com/scholar?q=517+f.3d+52&btnG=&hl=en&as_sdt=6). As a result, the Court of Appeals held that the bankruptcy court lacked jurisdiction to enjoin the prosecution of claims asserted by third parties against Travelers, Manville’s erstwhile insurer, that arose out of Travelers’ alleged failure to alert those third parties to the harmful properties of asbestos, about which Travelers had allegedly learned during its long relationship with Manville. *Id.* at 65. However, while there was a substantial factual overlap between defective product claims against Manville and the failure to disclose claims asserted against its insurer Travelers that were discussed in *Manville III*, there was absolutely no basis for asserting that there could be any impact on the res of Manville’s bankruptcy estate if the third party claims were not enjoined. For that reason, *Manville III/IV* is not inconsistent with *SPV/OSUS*.

The fact that the release extends to members of the Packler family who played no role in running the affairs of the company does not alter the analysis. At the present time, the Court is not aware of any lawsuits that have been brought against any of those individuals; and no one can identify any claim against them that would be released by the Section 10.7 Shareholder Release, other than as the recipients of money taken out of Oxy and up­-streamed to the family trusts. But any claims relating to those transfers rightfully belong to the Debtors, whose claims against the world either “arise under” or “arise in” the bankruptcy. And those claims are not implicated by the Section 10.7 Shareholder Release.

**Fourth**, it is more than conceivable that Oxy’s litigation of the question of its indemnification, contribution, or insurance obligations to the director/officer/manager Packlers could burden the assets of the estate.

Appellees insist that their claims lie beyond the “related to” jurisdiction of the Bankruptcy Court in part because their laws bar indemnification, contribution, or insurance coverage for actions like those of the Packlers, and so the claims cannot be extinguished by that the Bankruptcy Court. Without viable claims for indemnification, contribution, or insurance claims, the Appellees argue that their claims against the Packlers will not have any conceivable effect on the Debtors’ estate, thereby depriving the Bankruptcy Court of subject matter jurisdiction.

We begin by noting that this is precisely the type of reasoning that Judge Pooler rejected in *SPV Osus* - a case, we submit, in which the actual possibility that a contingent contribution claim would have any impact on the *res* of the Madoff estate was far less likely than it is in this case.

The issue is not whether, at the end of the day, the Packlers would lose on their contingent claims; it is whether they have a reasonable legal basis for asserting them.

And the Packlers do have a reasonable legal basis to assert those claims. The Packlers named in the certain of the Appellees’ suits served as officers, directors or managers of Oxy. As a result, they have claims against Oxy for indemnification and contribution, as well as a call on any D&O insurance proceeds that cover Oxy’s officer and directors. As the District Court noted almost two years ago in *Dunaway*, Oxy’s current and former directors and officers of the company are covered by various limited partnership agreements (“LPA”), which provide that Oxy shall indemnify these directors and officers “so long as the Indemnitee shall be subject to any possible Proceeding by reason of the fact that the Indemnitee is or was . . . a director, officer or Agent of [the Oxy entities].”

The various state unfair trade practices laws that have been cited to this court all subject the Packlers to the potential for liability because of their status as officers, directors or managers of the corporation - even though that liability is direct, not derivative. Moreover, the LPAs are governed by Delaware law, which allows for indemnification, and the states as a general matter look to the state of incorporation for the availability of indemnity.

Similarly, the Oxy insurance policies that cover the Packler former directors could be depleted, *inter alia*, if a Packler former director prevailed in litigation or a plaintiff prevailed in litigation on a non-fraud claim. Under various state laws, the Packlers parties can also seek an advance against defense costs; even if those costs are ultimately recouped, those defense funds will, for at least some time, leave the estate. *See* CT Gen Stat § 33-776; 8 Del. C. § 145. The law governing insurance coverage is generally the law governing the policy - not the law of the objecting state. Only one state has an exception to that - California, whose law specifically prohibits indemnity or insurance coverage for losses resulting from a violation of its false advertising law or unfair competition law, and under which law an insurer has no duty to defend or advance costs. *See* [Cal. Ins. Code § 533.5](http://www.google.com/search?q=ca+ins+s+533.5); *Adir International, LLC v. Starr Indemnity and Liability Co.*, [994 F.3d 1032, 1045](http://scholar.google.com/scholar?q=994+f.3d+1032&btnG=&hl=en&as_sdt=6) (9th Cir. 2021).

There is no doubt that the Shareholder Released Parties’ right to indemnification, contribution, and/or insurance will be vigorously litigated, as Judge Wains rightly pointed out below. *See In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*38. That litigation will cost money. And so it very well *might have* an impact on the estate; in fact, it likely *will have* such an impact.

Given the breadth of the Second Circuit law under *SPV Osus*, we find that the claims asserted against the Shareholder Released Parties *might have* some conceivable effect on the estate of a debtor, for each of the foregoing reasons, and thus fall within the “related to” jurisdiction of the Bankruptcy Court.

**II. The Bankruptcy Court Does Not Have Statutory Power to Release Particularized Third- Party Claims Against Non-Debtors.**

Appellees argue that the Bankruptcy Court has no statutory authority to approve a release of third-party claims against non-debtors.

There is a long-standing conflict among the Circuits that have ruled on the question, which gives rise to the anomaly that whether a bankruptcy court can bar third parties from asserting non­derivative claim against a non-debtor- a matter that surely ought to be uniform throughout the country - is entirely a function of where the debtor files for bankruptcy.

And while the Second Circuit long ago identified as questionable a court’s statutory authority to do this outside of asbestos cases, *In re Metromedia Fiber Network, Inc*., [416 F.3d 136](http://scholar.google.com/scholar?q=416+f.3d+136&btnG=&hl=en&as_sdt=6) (2d Cir. 2005), it has not yet been required to identify any source for such authority.

Lacking definitive guidance from our own Court of Appeals, Judge Wains consulted the law in every Circuit. He concluded that he was statutorily authorized to approve the Section 10.7 Shareholder Release because it is “subject to 11 U.S.C. 1129(a)(1), 1123(a)(5) and (b)(6), 105, and 524(e).” *In re Oxy Pharma L.P*., [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*43. “In other words,” he stated, “those releases flow from a federal statutory scheme.” *Id*.

We appreciate that the District Court has, on a prior occasion, said exactly the same thing, using exactly the same language - albeit in the context of affirming a plan that contained an easily distinguishable injunction that barred third parties (one in particular) from bringing one specific type of claim against non-debtors (his former partners) in order to protect the integrity of bankruptcy court orders. *In re Kirwan Offices S.a.R.L.*, [592 B.R. 489, 511](http://scholar.google.com/scholar?q=592+b.r.+489&btnG=&hl=en&as_sdt=6) (S.D.N.Y. *2018), aff’d sub nom. In re Kirwan Offices S.a.R.L*., [792 F. App’x 99](http://scholar.google.com/scholar?q=792+f.+app%c3%bd%c3%bd%c3%bdx+99&btnG=&hl=en&as_sdt=6) (2d Cir. 2019). But the *Kirwan* Court did not analyze whether there was a statutory (as opposed to a jurisdictional or constitutional) basis for the injunction that was at issue in that case. Indeed, no statutory argument was made.

In this case, however, Appellees - most particularly, the U.S. Trustee - have attacked the Bankruptcy Court’s statutory authority to release third-party claims against non-debtors in connection with someone else’s bankruptcy.

With the benefit of full briefing and extensive argument from experienced counsel, it is possible to decide whether a court adjudicating a bankruptcy case has the power to release third- party claims against non-debtors. Moreover, it is necessary to reach a conclusion on this subject before delving into constitutional issues that need not be reached if Appellees are correct.

We conclude that the sections of the Code on which the Bankruptcy Court explicitly relied, whether read separately or together, do not confer on any court the power to approve the release of non-derivative third-party claims against non-debtors, including specifically the Section 10.7 Shareholder Release at issue on this appeal.

As no party has pointed to any other section of the Bankruptcy Code that confers such authority, we conclude that such approval is not authorized by statute.

**A Caveat and Some Definitions**: We begin this discussion with a caveat. The topic under discussion is a bankruptcy court’s power to release, on a non-consensual basis, *direct/particularized* claims asserted *by third parties* against *non-debtors* pursuant to the Section 10.7 Shareholder Release. This speaks to a very narrow range of claims that might be asserted against the Packlers.

For these purposes, by derivative claims, we mean claims that would render the Packlers liable because of Oxy’s actions (which conduct may or may not have been committed because of the Packlers). “Derivative” claims are those seek to recover from the estate indirectly “on the basis of [the debtor’s] conduct,” as opposed to the non-debtor’s own conduct. *Manville III*, [517](http://scholar.google.com/scholar?q=517+f.3d+52&btnG=&hl=en&as_sdt=6) [F.3d at 62](http://scholar.google.com/scholar?q=517+f.3d+52&btnG=&hl=en&as_sdt=6) (quoting *MacArthur Co. v. Johns-Manville Corp*., [837 F.2d 89](http://scholar.google.com/scholar?q=837+f.2d+89&btnG=&hl=en&as_sdt=6) (2d Cir. 1988)). Derivative claims in every sense relate to the adjustment of the debtor-creditor relationship, because they are claims that relate to injury to the corporation itself. If the creditor’s claim is one that a bankruptcy trustee could bring on behalf of the estate, then it is derivative. *Madoff*, [40 F.3d](http://scholar.google.com/scholar?q=40+f.3d++90&btnG=&hl=en&as_sdt=6) [at 90](http://scholar.google.com/scholar?q=40+f.3d++90&btnG=&hl=en&as_sdt=6).

By direct claims, we mean claims that are not derivative of Oxy’s liability, but are based on the Packlers’ own individual liability, predicated on their own alleged misconduct and the breach of duties owed to claimants other than Oxy. “Direct” claims are based upon a “particularized” injury to a third party that can be directly traced to a non-debtor’s conduct. *Id*.

The release of claims against the Packlers that are derivative of the estate’s claims them is effected by Section 10.6(b) of the Plan, which is not challenged as being beyond the power of the Bankruptcy Court.

The Section 10.7 Shareholder Release under attack is different. It releases all members of the Packler families, as well as a variety of trusts, partnerships and corporations associated with the family and the people who run and advise those entities,[[30]](#footnote-30) from liability for claims that have been brought against them personally by third parties - claims that are not derivative, but as to which Oxy’s conduct is a legally relevant factor. By way of example, nearly all of the State Appellees have a law under which individuals who serve in certain capacities in a corporation are individually and personally liable for their personal participation in certain unfair trade practices.

As Judge Wains recognized (*see In re Oxy Pharma L.P*., [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*44), the liability imposed by these statutes is not derivative; the claims arise out of a separate and independent duty that is imposed by statute on individuals who, by virtue of their positions, personally participated in acts of corporate fraud, misrepresentation and/or willful misconduct. Liability under those laws is limited to persons who occupied the roles of officer, manager or director of a corporation - which means that there is considerable *factual* overlap, perhaps even complete congruence, between those claims and the derivative claims against the same individuals that Judge Wains had undoubted authority to release and enjoin. But it is undisputed that these laws impose liability, and even penalties, on such persons independent of any corporate liability (or lack of same), and independent of any claim the corporation could assert against them for faithless service as a result of those same acts.[[31]](#footnote-31)

The discussion that follows, then, applies only to direct (non-derivative) claims - sometimes referred to as “particularized” claims - that arise out of the Packlers’ own conduct (*In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*45), and that either have been or could be asserted against the non-debtor members of the Packler family and their affiliates (the Shareholder Released Parties) by parties other than the Debtors’ estates.

# The Text of the Bankruptcy Code

As one always should when assessing statutory authority, we turn first to the text of the statute.

All parties agree that one and only one section of the Bankruptcy Code expressly authorizes a bankruptcy court to enjoin third party claims against non-debtors without the consent of those third parties. That section is [11 U.S.C. § 524(g)](http://www.google.com/search?q=11+u.s.c.++524(g)), which was passed by Congress in 1994. It provides for such an injunction solely and exclusively in cases involving injuries arising from the manufacture and sale of asbestos. And it sets out a host of conditions that must be satisfied before any such injunction can be entered, including all of the following:

(i) the injunction is to be implemented in connection with a trust that is to be funded in whole or in part, by the securities of the debtor and that the debtor will make future payments, including dividends, to that trust, 11 U.S.C. § 524(g)(2)(B)(i)(I);

(ii) the extent of such alleged liability of a third party arises by reason of one of four enumerated relationships between the debtor and third party (11 U.S.C. § 524(g)(4)(A)(ii));

(iii) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind (11 U.S.C. § 524(g)(4)(B)(i)); and

(iv) the court determines the injunction is fair and equitable to persons that might subsequently assert such demands, and, in light of the benefits provided to such trust on behalf of such third parties. 11 U.S.C. § 524(g)(4)(B)(ii)).

Section 524(g) injunctions barring third party claims against non-debtors cannot be entered in favor of just any non-debtor. They are limited to enjoin actions against a specific set of non- debtors: those who have a particular relationship to the debtor, including owners, managers, officers, directors, employees, insurers, and financiers. [11 U.S.C. § 524(g)(4)(A)](http://www.google.com/search?q=11+u.s.c.++524(g)(4)(a)).

The language of the statute plainly indicates that Congress believed that Section 524(g) created an exception to what would otherwise be the applicable rule of law. Subsection 524(g)(4)(A)(ii) says: “Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor.” [11 U.S.C. § 524(g)(4)(A)(ii)](http://www.google.com/search?q=11+u.s.c.++524(g)(4)(a)(ii)). Section 524(e) provides: “Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.” [11 U.S.C. § 524(e)](http://www.google.com/search?q=11+u.s.c.++524(e)). The word “notwithstanding,” suggests that the type of injunction Congress was authorizing in § 524(g) would be barred by § 524(e) in the absence of the statute.

### Legislative History of the Statute

Section 524(g) was passed after the United States Court of Appeals for the Second Circuit had affirmed the entry of an unprecedented injunction barring claims against certain non-debtors in connection with the bankruptcy of the nation’s leading manufacturer of asbestos, the Johns Manville Corporation. *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, [837](http://scholar.google.com/scholar?q=837++f.2d+89&btnG=&hl=en&as_sdt=6) [F.2d 89, 91](http://scholar.google.com/scholar?q=837++f.2d+89&btnG=&hl=en&as_sdt=6) (2d Cir. 1988) (“*Manville I*”). The permanent injunction in that case extended to actions against Manville’s insurers, all of whom had dedicated the entire proceeds of their policies - proceeds on which parties other than Manville were additional insureds and had a call - to a settlement fund into which the claims of asbestos victims would be channeled, valued, and resolved. The Second Circuit concluded that the bankruptcy court could permanently enjoin and channel lawsuits against a debtor’s insurer relating to those insurance policies because those policies were “property of the debtor’s estate.” *Id.* at 90. The Court of Appeals did not cite to a single section of the Bankruptcy Code as authorizing entry of the injunction.

Despite our affirmance of the *Manville I* injunction, questions continue to be raised about its legality. Congress passed Sections 524(g) and (h) of the Bankruptcy Code to remove any doubt that those injunctions were authorized. *See* H.R. Rep. 103-835 at \*41 (noting that Subsection (g) was added to Section 524 “in order to strengthen the Manville and UNR trust/injunction mechanisms and to offer similar certitude to other asbestos trust/injunction mechanisms that meet the same kind of high standard with respect to regard for the rights of claimants, present and future, as displayed in the two pioneering cases”).

That Section 524(g) applies only to asbestos cases is clear. The statute explicitly states than the trust that “is to assume the liabilities of a debtor” be set up in connection with “actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos- containing products” ([11 U.S.C. § 524(g)(B)(i)(I))](http://www.google.com/search?q=11+u.s.c.++524(g)(b)(i)(i))). If that were not clear enough, Congress passed another section to provide that injunctions that had previously been entered *in asbestos cases* - not in any other kind of case - would automatically be deemed statutorily compliant, even if those injunctions did not have all the features required by § 524(g). *See*, [11 U.S.C. § 524(h)](http://www.google.com/search?q=11+u.s.c.++524(h)) (“Application to Existing Injunctions”). The limitation of § 524(h) to asbestos injunctions is important because, prior to the statute’s passage, injunctions releasing third party claims against non-debtors had been entered by a few courts in cases involving other industries. *See, e.g*., *In re Drexel Burnham Lambert Grp*., Inc., [960 F.2d 285](http://scholar.google.com/scholar?q=960+f.+2d+285&btnG=&hl=en&as_sdt=6) (2d Cir. 1992) (securities); *In re A.H. Robins Co., Inc*., [880 F.2d 694](http://scholar.google.com/scholar?q=880+f.2d+694&btnG=&hl=en&as_sdt=6) (4th Cir. 1989) (medical devices). The revisions to the Bankruptcy Code neither extend to those injunctions nor deem them to be statutorily compliant.

At the same Congress passed Sections 524(g) and (h), it passed Public Law 111, which provided a rule of construction for Section 524(g). It states that nothing in the 1994 amendments to the Bankruptcy Code, including 524(g), “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.” Pub. L. 103-394 § 111(b) (uncodified). Congress made this statement because the parties in non-asbestos bankruptcy cases took the position that Sections 524(g) and (h) were unnecessary, in that bankruptcy courts already authorized the entry of such injunctions and corresponding approval of non-debtor releases - viz, *Robins* and *Drexel*. But the passage of Public Law 111 did not mean that Congress agreed with that position. As the House Committee on the Judiciary noted in the legislative history of these new provisions:

Section 111(b) . . . make[s] clear that the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts *may* already have to issue injunctions in connection with a plan [of] reorganization. Indeed, [asbestos suppliers] Johns-Manville and UNR firmly believe that the court in their cases had full authority to approve the trust/injunction mechanism. And other debtors in other industries are reportedly beginning to experiment with similar mechanisms. *The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind.*

Vol. E., *Collier on Bankruptcy*, at App. Pt. 9-78 (reprinting legislative history pertaining to the 1994 Code amendments) (emphasis added). P.L. 111 was not incorporated into the Bankruptcy Code.

Congress’ used of the word “may” indicates that a bankruptcy court’s authority to enter such an injunction was at best uncertain. And in light of the last sentence - in which the Committee made it clear that Congress expressed no opinion on that subject - one cannot read this tidbit of legislative history as indicating that Congress had concluded that a bankruptcy court already had such authority under its “traditional equitable powers.”

During the course of this appeal, it has been suggested that P.L. 111 expresses Congress’ intent to pass a limited law and then allow the courts to work out the contours of whether and how to extend § 524(g)-style authority outside the asbestos context.[[32]](#footnote-32) The very next sentence from that statute’s legislative history reveals that nothing could be further from the truth. “**The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved. How the new statutory mechanism works *in the asbestos area* may help the bankruptcy judge determine whether the concept should be extended *into other areas***.” *Id.* (Emphasis added)

Plainly, Congress made a decision to limit the scope of the experimenting that was “reportedly” to be happening (and that was in fact happening) in other industries. And it left to itself, not the courts, the task of determining whether and how to extend a rule permitting non­debtor releases “notwithstanding the provisions of section 524(e)” into other areas.

Since 1994, Congress has been silent on this subject.

### Survey of the Relevant Case Law

#### Supreme Court Law

The United States Supreme Court has never specifically considered whether the non­consensual release of non-derivative claims asserted by third parties against non-debtors can be approved in the context of a debtor’s bankruptcy. Indeed, on *certiorari* to the Second Circuit from one of its orders in the ongoing *Manville* saga, the High Court announced that its opinion did “not resolve whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor’s wrongdoing.” *Travelers Indem. Co. v. Bailey*, [557 U.S. at 155](http://scholar.google.com/scholar?q=557+u.s.+137&btnG=&hl=en&as_sdt=6).

The Court has, however, spoken on several occasions about issues that are germane to the consideration of that question.

For one thing, the Court has indicated that the Bankruptcy Code was intended to be “comprehensive.” *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, [566 U.S. 639, 645](http://scholar.google.com/scholar?q=566+u.s.+639&btnG=&hl=en&as_sdt=6) (2012) (“Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions”) (*quoting, Varity Corp. v. Howe*, [516 U.S. 489, 519](http://scholar.google.com/scholar?q=516+u.s.+489&btnG=&hl=en&as_sdt=6) (1996) (Thomas, J., dissenting)).

For another, it has held that the “traditional equitable power” of a bankruptcy court “can only be exercised within the confines of the Bankruptcy Code.” *Norwest Bank Worthington v. Ahlers*, [485 U.S. 197, 206](http://scholar.google.com/scholar?q=485+u.s.+197&btnG=&hl=en&as_sdt=6) (1988).

And in two recent cases, the Supreme Court has held, albeit in contexts different from the one at bar, that a bankruptcy court lacks the power to award relief that varies or exceeds the protections contained in the Bankruptcy Code - not even in “rare” cases, and not even when those orders would help facilitate a particular reorganization.

For example, in *Law v. Siegel*, [571 U.S. 415](http://scholar.google.com/scholar?q=571+u.s.+415&btnG=&hl=en&as_sdt=6) (2014), the Supreme Court unanimously held the bankruptcy court does not have “a general, equitable power” to order that a debtor’s statutorily exempt assets be made available to cover attorney’s fees incurred by an estate’s trustee in the course of the chapter 7 bankruptcy case. Section 522 of the Bankruptcy Code, by reference to applicable state law, entitled the debtor in that case to exempt equity in his home from the bankruptcy estate. *See* [11 U.S.C. § 522(b)(3)(A)](http://www.google.com/search?q=11+u.s.c.++522(b)(3)(a)). A dispute arose between the debtor and the trustee of the estate, causing the trustee to incur substantial legal fees, purportedly as a result of the debtor’s “abusive litigation practices.” *Law v. Siegel*, [571 U.S. at 415-16](http://scholar.google.com/scholar?q=571+u.s.+415&btnG=&hl=en&as_sdt=6). Seeking to recoup the cost of resolving the dispute with the debtor, the trustee asked the bankruptcy court to order that the otherwise exempt assets be made available to cover his attorney’s fees. He argued that such an order was authorized by the “inherent power” of the Bankruptcy Court and by Section 105(a) of the Bankruptcy Code, which provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

[11 U.S.C. § 105(a)](http://www.google.com/search?q=11++u.s.c.++++105(a)).

The High Court disagreed, stating flatly, “A bankruptcy court may not exercise its authority to ‘carry out’ the provisions of the Code” by taking an action inconsistent with its other provisions. *Law v. Siegel*, [571 U.S. at 425](http://scholar.google.com/scholar?q=571+u.s.+415&btnG=&hl=en&as_sdt=6). It announced that there is “no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code,” because the Bankruptcy Code was intended to be a *comprehensive* statement of the rights and procedures applicable in bankruptcy. *Id.* at 416. The Code explicitly exempts certain debtor assets from the bankruptcy estate and provides a finite number of exceptions and limitations to those asset exemptions. *See* [11 U.S.C. §](http://www.google.com/search?q=11+u.s.c.+++522) [522](http://www.google.com/search?q=11+u.s.c.+++522). To the Supreme Court, “comprehensive” means precisely that: “The Code’s meticulous – not to say mind-numbingly detailed - enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions.” *Law v. Siegel*, [571 U.S. at](http://scholar.google.com/scholar?q=571+u.s.+415&btnG=&hl=en&as_sdt=6) [424](http://scholar.google.com/scholar?q=571+u.s.+415&btnG=&hl=en&as_sdt=6).

More recently, in *Czyzewski v. Jevic Holdings Corp.*, [137 S. Ct. 973](http://scholar.google.com/scholar?q=137+s.+ct.+973&btnG=&hl=en&as_sdt=6) (2017), the Court held that the protections explicitly afforded by the Bankruptcy Code could not be overridden in a “rare” case, even if doing so would carry out certain bankruptcy objectives. In chapter 11 bankruptcies, a plan that does not follow normal priority rules in connection with final plan/case distributions cannot be confirmed over the objection of an impaired class of creditors. 11 U.S.C § 1129(b). Notwithstanding that, the bankruptcy court in *Jevic* approved the structured dismissal[[33]](#footnote-33) of a chapter 11 case in which unsecured creditors were prioritized over non-consenting judgment creditors - a violation of ordinary priority rules. The bankruptcy court and the proponents of the structured dismissal argued that the Bankruptcy Code did not specifically state whether normal priority rules had to be followed in chapter 11 (as opposed to chapter 7) cases - that is, the statute was “silent” on the subject - so the court could exercise such authority in “rare” cases in which there were “sufficient reasons” to disregard priority. But the Supreme Court disagreed that any such power existed. It observed that the priority system applicable to those distributions had long been considered fundamental to the Bankruptcy Code’s purposes and held that the “importance of the priority system leads us to expect more than simply statutory silence if, and when, Congress were to intend a major departure.” *Jevic Holding Corp*., [137 S. Ct. at 984](http://scholar.google.com/scholar?q=137+s.+ct.+973&btnG=&hl=en&as_sdt=6). To the argument that a bankruptcy court could disregard priority if there were “sufficient reasons” to do so, Justice Breyer aptly noted: “It is difficult to give precise content to the concept ‘sufficient reasons.’ That fact threatens to turn a ‘rare case’ exception into a more general rule.” *Id.* at 986.

It is with these holdings in mind that we examine the law in the various Circuits on the subject of non-consensual release of third-party claims against non-debtors.

We begin, of course, with our own.

#### Second Circuit Law

**Manville I**: The relevant law in the Second Circuit begins with *Manville I,* which has already been discussed. *Manville’s I*’s injunction was subsequently codified in Bankruptcy Code §§ 524(g) and (h)[[34]](#footnote-34) - which, as noted above, are plainly in the Bankruptcy Code, and are limited to the asbestos context, and have never been extended by Congress to other areas of endeavor. It is, moreover, significant that the injunction authorized by the Second Circuit in *Manville I* extended only to claims against parties (insurance companies) holding property that was indisputably part of the *res* of the debtor’s estate (policies covering Manville for the manufacture and sale of asbestos). As will be seen when we get to *Manville III/IV*, when the non-debtor was seeking a release in exchange for contributing property to the debtor’s estate - as opposed to surrendering property that already was part of the debtor’s estate - the result, even in a statutorily authorized asbestos case, was different.

**Drexel**: The debtor in *In re Drexel Burnham Lambert Grp.,* Inc., [960 F.2d 285](http://scholar.google.com/scholar?q=960+f.+2d+285&btnG=&hl=en&as_sdt=6) (2d Cir. 1992) was the investment bank Drexel Burnham Lambert Group (“DBL”), which filed for bankruptcy in 1990. DBL’s principal creditor was the Securities and Exchange Commission, which was owed $150 million pursuant to a prior settlement. But over 15,000 creditors filed proof of claims against the estate, alleging fraud in connection with four different types of securities transactions.

Judge Milton Pollack of this district withdrew all of these securities claims from the bankruptcy court pursuant to [28 U.S.C. § 157(d)](http://www.google.com/search?q=28+u.s.c.++157(d)) in order to facilitate their settlement. The parties negotiated a settlement that had as its key feature the certification of all the securities claimants into a single, mandatory, non-opt-out class (Rule 23(b)(1)(B)), which was itself divided into two subclasses: A and B. The members of Subclass B - comprised of securities fraud class action plaintiffs - were, as part of the settlement, enjoined from bringing any future actions against the former officers and directors of DBL; while not themselves debtors, those individuals had contributed to DBL’s estate.

The District Court certified the classes and approved the settlement over the objections of 8 of the 850 proposed class members. Three of the objectors filed appeals, contending in relevant part that the district court had erred by approving the settlement with it the mandatory injunction against the pursuit of third-party claims by non-consenting plaintiffs.

The Second Circuit affirmed the settlement of the securities fraud cases. It noted in passing that, “In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided this injunction plays an important part in the debtor’s reorganization plan.” *Drexel*, [960 F.2d at 293](http://scholar.google.com/scholar?q=960+f.+2d+285&btnG=&hl=en&as_sdt=6) (citing *In re A.H. Robins Co*., 880 F.2d 694, 701 (4th Cir.)). But it cited no section of the Bankruptcy Code that authorized this proposition. In its brief discussion of the objectors’ challenge to the provision in the settlement agreement that barred members of subclass B from bringing or maintaining suits against DBL’s officers and directors, the Court of Appeals, reasoning tautologically, said this:

The Settlement Agreement is unquestionably an essential element of Drexel’s reorganization. In turn, the injunction is a key component of the Settlement Agreement. As the district court noted, the injunction limits the number of lawsuits that may be brought against Drexel’s former directors and officers. This enables the directors and officers to settle those suits without fear that future suits will be filed. Without the injunction, the directors and officers would be less likely to settle. Thus, we hold that the district court did not abuse its discretion in approving the injunction.

*In re Drexel Burnham Lambert Grp., Inc*., [960 F.2d at 293](http://scholar.google.com/scholar?q=960+f.+2d+285&btnG=&hl=en&as_sdt=6). In other words, the Circuit held that the District Court had discretion to approve non-debtor releases as part of the settlement of numerous securities fraud class actions in the context of a bankruptcy, simply and solely because funds were being funneled to the estate that would not otherwise be contributed.

There are numerous reasons why *Drexel* does not answer the question about a court’s statutory authority under the Bankruptcy Code to release non-debtors over the objection of third parties who have direct claims against them. Two, however, are dispositive.

First and foremost, the Second Circuit simply did not address this question in *Drexel*. *Drexel* mentioned in passing something about a bankruptcy court’s power to enjoin claims but did not identify any source of that power in the Bankruptcy Code. It appears to have assumed *sub silentio* that such authority existed.

Second, *Drexel* was decided two years before Congress passed Bankruptcy Code §§524(g) and (h). The opinion’s passing mention of a bankruptcy court’s power to enjoin a creditor from suing a non-debtor became far less persuasive after Congress: (1) amended the Bankruptcy Code to authorize such injunctions, but only in asbestos cases; (2) expressed agnosticism about whether any such authority existed outside of its new legislation; and (3) indicated its intent to consider at some later time whether to extend this authority to industries that were “reportedly experimenting” with such injunctions - which it never has.[[35]](#footnote-35)

There are other reasons to question the continuing relevance of *Drexel* in the instant context. Seven years after the Second Circuit’s opinion in *Drexel*, the Supreme Court expressed doubt about whether the Rule 23(b)(1)(B) “limited fund class action” device that was employed in *Drexel* could ever be employed in the mass tort context like this one, *Ortiz v. Fibreboard Corp*., [527 U.S. 815](http://scholar.google.com/scholar?q=527+u.s.+815&btnG=&hl=en&as_sdt=6) (1999).

Subsequent to *Ortiz*, courts have consistently rejected attempts to apply the limited fund mandatory class action device to mass torts. *See, e.g*., *In re Simon II Litig*., [407 F.3d 125, 137-38](http://scholar.google.com/scholar?q=407+f.3d+125&btnG=&hl=en&as_sdt=6) (2d Cir. 2005) (tobacco punitive damages litigation); *Doe v. Karadzic*, [192 F.R.D. 133, 140-44](http://scholar.google.com/scholar?q=192+f.r.d.+133&btnG=&hl=en&as_sdt=6) (S.D.N.Y. 2000) (actions by victims of war crimes committed by Bosnia-Herzegovina brought under the Alien Tort Claims Act).

Moreover, the Supreme Court also said in *Ortiz* that a fund which is “limited” only because the contributing party keeps a large portion of its wealth (*a la* the Packlers) is “irreconcilable with the justification of necessity in denying any opportunity for withdrawal of class members whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed.” *Ortiz v. Fibreboard Corp*., [527 U.S. at 860](http://scholar.google.com/scholar?q=527+u.s.+815&btnG=&hl=en&as_sdt=6). The exact same thing could be said of the third parties whose claims are being extinguished as part of the Plan.

Subsequent Second Circuit law in the *Manville* cases also casts doubt on a bankruptcy court’s subject matter jurisdiction to authorize the release of third-party claims against the officers and directors of DBL simply because they would not otherwise have made a contribution to the debtor’s estate. *Manville III*, [517 F.3d at 66](http://scholar.google.com/scholar?q=517+f.3d+52&btnG=&hl=en&as_sdt=6). In *Manville III/IV*, this Court concluded that “a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate,” and held that claims asserted against non-debtors that sought “to recover directly from [the] debtor’s insurer for the insurer’s own independent wrongdoing” did not have such impact. *Manville III*, [517 F.3d at 65-66](http://scholar.google.com/scholar?q=517+f.3d+52&btnG=&hl=en&as_sdt=6). In so ruling we held it of no moment for jurisdictional purposes that the non-debtor was making made a financial contribution to a debtor’s estate (*id.*), saying: “It was inappropriate for the bankruptcy court to enjoin claims brought against a third-party non-debtor *solely on the basis of that third-party’s financial contribution to a debtor’s estate*.” *Id.* (Emphasis added) For this proposition, the *Manville III* panel cited with approval the Third Circuit’s warning from *In re Combustion Engineering*, where the court had observed that:

a debtor could create subject matter jurisdiction over any on-debtor third-party [simply] by structuring a plan in such a way that it depended upon third party contribution. As we have made clear, subject matter jurisdiction cannot be conferred by consent of the parties. Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization.

*In re Combustion Engineering*, [391 F.3d 190, 228](http://scholar.google.com/scholar?q=391++f.++3d++190&btnG=&hl=en&as_sdt=6) (3d Cir. 2004).

Finally, changes in class action law since *Drexel* was decided have rendered its facile analysis of the Rule 23(a) factors, especially commonality and typicality, highly suspect. *Amchem Products, Inc., v. Windsor*, [521 U.S. 591](http://scholar.google.com/scholar?q=521+u.s.+591&btnG=&hl=en&as_sdt=6) (1997); *Ortiz v. Fibreboard Corp*., [527 U.S. 815](http://scholar.google.com/scholar?q=527+u.s.+815&btnG=&hl=en&as_sdt=6) (1999).

But one thing is clear: *Drexel* sheds no light whatsoever on the issue of whether releases like the one at bar are authorized *by the Bankruptcy Code*. That statute was never mentioned.

**New England Dairies/Metromedia**: In *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc., (In re Dairy Mart Conveniences Stores)*, [351 F.3d 86, 92](http://scholar.google.com/scholar?q=351+f.+3d+86&btnG=&hl=en&as_sdt=6) (2d Cir. 2003), we rejected the argument that §105(a) of the Bankruptcy Code (*see supra*, at p. 101-102) could “create substantive rights that are otherwise unavailable under applicable law.” As the author of the opinion (Judge Jacobs) recognized:

The equitable power conferred on the bankruptcy court by section 105(a) is the power to exercise equity in carrying out the *provisions* of the Bankruptcy Code, rather than to further the purposes of the Bankruptcy Code generally, or otherwise to do the right thing. This language “suggests that an exercise of section 105 power be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective.” 2 *Collier on Bankruptcy* 105.01[1].[[36]](#footnote-36)

*In re Dairy Mart Conveniences Stores*, [351 F.3d at 92](http://scholar.google.com/scholar?q=351+f.+3d+86&btnG=&hl=en&as_sdt=6).

*In re Dairy Mart* did not involve the confirmation of a plan containing non-debtor releases of third-party claims, so technically it did not speak to the question pending before this Court. But two years later, Judge Jacobs authored *In re Metromedia Fiber Network, Inc*., [416 F.3d 136](http://scholar.google.com/scholar?q=416+f.3d+136&btnG=&hl=en&as_sdt=6) (2d Cir. 2005), which did.

Metromedia Fiber Network, Inc. and its subsidiaries declared bankruptcy. *See Metromedia,* [416 F.3d 136, 138](http://scholar.google.com/scholar?q=416+f.3d+136&btnG=&hl=en&as_sdt=6) (2d. Cir. 2005). The company’s founder, John W. Kluge, did not. However, as part of the plan of reorganization, Kluge, as grantor, established the “Kluge Trust.” *Id.* at 141 n.4. Under the plan of reorganization proposed in the bankruptcy court, the Kluge Trust was to make “a ‘material contribution’ to the estate” in the bankruptcy, (*Id.* at 143), by “[i] forgiv[ing] approximately $150 million in unsecured claims against Metromedia; [ii] convert[ing] $15.7 million in senior secured claims to equity in the Reorganized Debtors; [iii] invest[ing] approximately $12.1 million in the Reorganized Debtors; and [iv] purchas[ing] up to $25 million of unsold common stock in the Reorganized Debtors’ planned stock offering.” *Id.* at 141. Metromedia itself would continue to exist after its reorganization - albeit under a new name, AboveNET - and to engage in the business of providing high bandwidth telecommunications circuits, which was its historic business model.

In exchange for the Kluge Trust’s contributions, the Kluge Trust and certain “Kluge Insiders” were to receive 10.8% of the Reorganized Debtors’ common stock and something called the “Kluge Comprehensive Release.” *Id.* The Kluge Comprehensive Release provided: the Kluge Trust and each of the Kluge Insider shall receive a full and complete release, waiver and discharge from . . . any holder of a claim of any nature . . . of any and all claims, obligations, rights, causes of action and liabilities arising out of or in connection with any matter related to [Metromedia] or one or more subsidiaries . . . based in whole or in part upon any act or omission or transaction taking place on or before the Effective Date.

*Id.*

The release was broad and did not carve out any exception - even for claims that could not be discharged against a debtor in bankruptcy, such as those predicated on fraud or willful misconduct.

Following confirmation of the plan, appellant creditors Deutsche Bank AG (London Branch) and Bear, Stearns & Co., Inc. challenged the “largely implemented” plan of reorganization and argued that the releases in the plan of reorganization “improperly shield certain nondebtors from suit by the creditors.” *Id.* at 138. On appeal, the district court both affirmed the plan of reorganization and ruled that the relief sought by the two banks was not “barred by the doctrine of equitable mootness because effective relief could have been afforded without ‘unraveling the plan.’” *Id.* at 139.

We vacated the district court’s affirmance of the plan, on the ground that the bankruptcy court had failed to make certain findings necessary to a determination that the non­consensual third-party releases should be approved. *Id.* at 143. But the plan had been substantially consummated by the time the appeal was heard, so we concluded that the matter was indeed equitably moot. As a result, we declined to remand so that a lower court could make the missing findings and reconsider the propriety of the releases. *Id.* at 145.

Before reaching this result, the panel discussed whether non-debtor releases were available in connection with someone else’s bankruptcy. We identified “two considerations that justify . . . reluctance to approve non-debtor releases.” *Id.* at 141. We noted that such releases were not specifically authorized outside of the asbestos context:

[T]he only explicit authorization in the Bankruptcy Code for nondebtor releases is [11 U.S.C. § 524(g)](http://www.google.com/search?q=11++u.s.c.++++524(g)), which authorizes releases in asbestos cases when specified conditions are satisfied, including the creation of a trust to satisfy future claims . . .

*Metromedia Fiber Network, Inc*., [416 F.3d at 142](http://scholar.google.com/scholar?q=416+f.+3d+136&btnG=&hl=en&as_sdt=6). And we held, consistent with *In re Dairy Mart*, that Section 105(a) of the Bankruptcy Code did not authorize the approval of such releases:

True, [11 U.S.C. § 105(a)](http://www.google.com/search?q=11+u.s.c.++105(a)) authorizes the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]”; but section 105(a) does not allow the bankruptcy court “to create substantive rights that are otherwise unavailable under applicable law.” *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.)*, [351 F.3d 86, 92](http://scholar.google.com/scholar?q=351++f.3d++86&btnG=&hl=en&as_sdt=6) (2d Cir.2003) (quotations and citation omitted). Any “power that a judge enjoys under § 105 must derive ultimately from some other provision of the Bankruptcy Code.” Douglas G. Baird, Elements of Bankruptcy 6 (3d ed.2001); accord *Dairy Mart*, [351 F.3d at 92](http://scholar.google.com/scholar?q=351+f.+3d+86&btnG=&hl=en&as_sdt=6) (“Because no provision of the Bankruptcy Code may be successfully invoked in this case, section 105(a) affords [appellant] no independent relief.”).

*Metromedia*, [416 F.3d at 142](http://scholar.google.com/scholar?q=416+f.+3d+136&btnG=&hl=en&as_sdt=6).

The panel also cautioned that courts should be careful about approving a non-consensual non-debtor release because the device “lends itself to abuse.” *Id.* One particular form of abuse identified by the panel manifests when the release, in effect, “operate[s] as a bankruptcy discharge arrange without a filing and without the safeguards of the Bankruptcy Code.” *Id.* Indeed, “[t]he potential for abuse is heightened when releases afford blanket immunity.” *Id*.

After observing that, “[n]o case has tolerated nondebtor releases absent a finding of circumstances that may be characterized as unique.” *Id.*, the panel listed circumstances in which such releases had been authorized in the past, and identified factors that a court should consider when evaluating such releases in the future: (1) the release is important to the plan, (2) the enjoined claims would be channeled to a settlement fund rather than extinguished, (3) the estate receives substantial consideration in return, (4) the released claims would otherwise indirectly impact the debtors’ reorganization by way of indemnity or contribution, and (5) the plan otherwise provided for the full payment of the enjoined claims. *Id.* at 141-42. However, we insisted that the ultimate decision about whether to authorize such releases was “not a matter of factors and prongs.” *Id.* 142.

Having said all that, the *Metromedia* Court did not rule on whether any or all of the factors it had identified were satisfied in the particular case before it. Nor did it conclude that a non-debtor release should be approved if the factors were satisfied, or consider whether, in the case before it, there might be other reasons why the proposed non-debtor releases should not be approved.

Instead, as noted above, we vacated approval of the plan and declined to remand for further consideration because the matter had become equitably moot, thereby, guaranteeing that those open questions - including the question about whether there was statutory authority for such releases - would not be answered.

No third-party releases were approved in *Metromedia.* This Court did not conclude that such releases were consistent with or authorized by the Bankruptcy Code. We did not conclude that the *Metromedia* case was one of the “unique” instances in which a court’s reluctance to approve such releases might (assuming they were authorized) be overcome. And we did not decide whether the Kluge releases measured up to the level that might justify approving them if the case qualified as “unique.” *In re Metromedia Fiber Network*, [416 F.3d at](http://scholar.google.com/scholar?q=416+f.+3d+136&btnG=&hl=en&as_sdt=6) [142](http://scholar.google.com/scholar?q=416+f.+3d+136&btnG=&hl=en&as_sdt=6)-143.

In other words, while *Metromedia* said a great deal, the case did not hold much of anything.[[37]](#footnote-37) Its relevance, for present purposes, is that Judge Jacobs cautioned that statutory authority for non-consensual non-debtor releases outside of the asbestos context was at best uncertain - and then disposed of the case on other grounds, without identifying what section or sections of the Bankruptcy Code might actually authorize such relief in non-asbestos bankruptcy.[[38]](#footnote-38)

No subsequent Second Circuit case has filled in the blank.

**Manville III/IV and In re Quigley**:[[39]](#footnote-39) These were asbestos cases, in which a court’s statutory authority to impose such non-debtor injunctions is undoubted, as long as all the conditions listed in § 524(g) are met.

As discussed above, in *Manville III/IV*, we concluded that the bankruptcy court lacked subject matter jurisdiction over third party claims against Manville’s non-debtor insurer that arose out of an alleged independent duty owed by the insurer to those third parties, rather than out of its contractual relationship as Manville’s insurer. We did not discuss any issue of statutory authority.

And in *Quigley*, this Court held that certain claims against the debtor’s parent—claims based on the use of the parent’s name on the debtors’ asbestos products—could not be enjoined pursuant to § 524(g) because the alleged liability was not “by reason of” any of the four “statutory relationships” identified in that section. *Quigley*, [676 F.3d at 49](http://scholar.google.com/scholar?q=676+f.3d+45&btnG=&hl=en&as_sdt=6), [60-61](http://scholar.google.com/scholar?q=676+f.3d+45&btnG=&hl=en&as_sdt=6). Had the proposed injunction fallen within one of the express statutory relationships, it would have been authorized because the case involved asbestos.

**Madoff**: *In re Bernard L. Madoff Inv. Securities LLC*, [740 F.3d 81](http://scholar.google.com/scholar?q=740+f.3d+81&btnG=&hl=en&as_sdt=6) (2d Cir. 2014) involved a chapter 7 liquidation under the Securities Investor Protection Act (SIPA). The debtor, Bernie L. Madoff Investment Securities (“BLMIS”), was an investment enterprise created to effect the Ponzi scheme of its principal, Bernie Madoff. The bankruptcy estate settled its claims against the estate of Jeffry M. Picower, an alleged Madoff co-conspirator, releasing its claims in exchange for a $5 billion dollar contribution to Madoff bankruptcy estate. In addition to approving that settlement and release, the Bankruptcy Court permanently enjoined two of the debtor’s customers from pursuing putative state tort law class actions against the estate of Jeffry M. Picower in the United States District Court for the Southern District of Florida, to the extent those claims arose from or related to the Madoff Ponzi scheme.

We affirmed the non-debtor injunction because the customer’s complaints were predicated on secondary harms flowing from to them from BLMIS, and so were derivative claims that a bankruptcy court had power to discharge pursuant to Section 105(a). The *Madoff* court explained that the Florida plaintiffs had not alleged any direct claim against Picower’s estate, because they failed to allege that Picower took any actions aimed at BLMIS customers (such as making misrepresentations to them) that caused particularized injury to those customers. *Id.* at 93.

However, we were careful to note that factual congruence between an estate’s claim and an individual creditor’s claim against the same non-debtor was not what rendered the asserted claims derivative. It held that, “there is nothing illogical or contradictory” about factual overlap between the allegations asserted in direct claim and a derivative claim; a non-debtor “might have inflected direct injuries on both the [estate’s creditors] and [the debtor estate] during the course of dealings that form the backdrop of both sets of claims.” *Id.* at 91 (quoting *In re Seven Seas Petroleum, Inc.*, [522 F.3d 575, 587](http://scholar.google.com/scholar?q=522+f.3d+575&btnG=&hl=en&as_sdt=6) (5th Cir. 2008)). A creditor could, therefore, bring a direct claim against a non-debtor, even though the debtor might have suffered an identical injury - provided the creditor was not seeking to recover for injuries suffered by the debtor, but for injuries it suffered *directly*. *Id*.

Significantly for our purposes, the *Madoff* Court did not simply sweep away the Florida class actions; it permitted the creditors to amend their Florida complaints to assert direct claims if they could identify some direct injury that Picower caused them, as there was “conceivably some particularized claim” that the customers could assert against the non-debtor that could not also be asserted or released by the estate. *Id.* at 94.

**Tronox**: *In re Tronox, Inc*., [855 F.3d 84](http://scholar.google.com/scholar?q=855+f.3d+84&btnG=&hl=en&as_sdt=6) (2d Cir. 2017) was not an asbestos case, and it adds nothing to the above discussion, for two reasons. First and foremost, we dismissed the appeal for lack of appellate jurisdiction. Second, in that case, the claims asserted against the non-debtors by the third party were again derivative, not direct, claims (*e.g*., alter ego, piercing the corporate veil, and successor liability) - as in *Madoff*, the plaintiff alleged “no particularized injury” to the claimant. *Id.* Because success on a derivative claim benefits all creditors of the estate, the Circuit held that the bankruptcy “trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee’s action.” *In re Tronox Inc*., [855 F.3d at 103](http://scholar.google.com/scholar?q=855+f.3d+84&btnG=&hl=en&as_sdt=6) (internal quotation omitted).

But the court went on to say that, “when creditors have a claim for injury that is particularized as to them, they are exclusively entitled to pursue that claim, and the bankruptcy estate is precluded from doing so.” *Id.* at 99 (internal citation omitted). There was no discussion of enjoining such particularized claims, let alone any discussion of statutory authority for doing so.

**Kirwan (Lynch v. Lapidem)**: In *Lynch v. Lapidem (In re Kirwan Offs. S.a.R.L.)* [792 Fed. Appx. 99](http://scholar.google.com/scholar?q=792+fed.+appx.+99&btnG=&hl=en&as_sdt=6) (2d Cir. 2019) (“*Kirwan*”), we affirmed a bankruptcy court injunction that was included in a plan of reorganization in order to prevent collateral attacks on prior orders of that court. The appellant in *Kirwan* (Lynch) was one of three shareholders in the bankrupt enterprise. He challenged the *bona fides* of the bankruptcy filed by his former partners but lost after trial. The dissident shareholder then absented himself from the hearing on the plan of reorganization, of which he had notice. He did so in the (mistaken) belief that he could avoid any *res judicata* effect of the bankruptcy court’s orders as long as he did not participate. *See In re Kirwan Offs. S.a.RL.*,[592 B.R. 489, 501](http://scholar.google.com/scholar?q=592+b.r.+489&btnG=&hl=en&as_sdt=6) (S.D.N.Y. 2018), *aff’d sub nom. In re Kirwan Offs. S.a.RL.,* [792 F. App’x 99](http://scholar.google.com/scholar?q=792+f.+app%c3%bd%c3%bd%c3%bdx+99&btnG=&hl=en&as_sdt=6) (2d Cir. 2019).

Anticipating that the dissident shareholder would try to mount a collateral attack on the bankruptcy court’s order confirming the plan, the other two shareholders had included therein a provision enjoining any person, including Lynch, from suing anyone in any forum on a claim arising out of the bankruptcy proceeding and the court-approved reorganization. Judge Wains confirmed the plan containing that provision. At the time he entered the order confirming the plan, the Bankruptcy Judge made it clear that Lynch’s “opposition to any reasonable restructuring . . . scurried, if not crossed the line, over into bad faith” (*Kirwan,* [592 B.R. at 499](http://scholar.google.com/scholar?q=592+b.r.+489&btnG=&hl=en&as_sdt=6)), and said it was “in that context . . . that I am prepared to approve the exculpation and injunction provisions of the plan.” *Id.* He specifically found that the provision was narrowly tailored and necessary in order to forestall “back-door attacks and collateral litigation for their activities related to those things,” which would impact the reorganized debtor as well the non-debtors who had proceeded in good faith throughout the bankruptcy. *Id*.

In short, the injunction affirmed in *Kirwan* was plainly one designed to preserve and protect the authority of the bankruptcy court and the integrity of its actions *vis a vis* the debtor’s estate. Unlike the third-party claims in this case, Lynch’s claims against his erstwhile partnership inherently involved the property of the estate - the relief sought would have redistributed the estate *post hoc* following the bankruptcy court’s confirmation of the plan.

As noted earlier (*see* footnote 56), Lynch did not argue, either in this Court or in the Second Circuit, that the injunction was not statutorily authorized by the Bankruptcy Code. The grounds asserted and decided were jurisdictional and constitutional, not statutory. Neither this Court nor the Second Circuit analyzed the question of statutory authority, even in the context of the very limited and specially targeted injunction that was included in the debtor’s plan.

**Summary of Second Circuit Law**: The only fair characterization of the law on the subject of statutory authority to release and enjoin the prosecution of third-party claims against non-debtors in a bankruptcy case is that the question is unsettled, except in asbestos cases, where statutory authority is clear. Because the Court of Appeals has decided every other case on non-statutory grounds, its only clear statement is that Bankruptcy Code §105(a), standing alone, does not confer such authority on the bankruptcy court outside the asbestos context.

#### The Law in Other Circuits

All but three of the other Circuits have spoken directly to the issue of statutory authority. They have reached conflicting results - a most unfortunate circumstance when dealing with a supposedly uniform and comprehensive nationwide scheme to adjust debtor-creditor relations.

Three of the eleven Circuits - the Fifth, Ninth, and Tenth - reject entirely the notion that a court can authorize non-debtor releases outside the asbestos context. *See In re Pacific Lumber Co*., [584 F.3d 229, 252](http://scholar.google.com/scholar?q=584+f.3d+229&btnG=&hl=en&as_sdt=6) (5th Cir. 2009); *In re Lowenschuss*, [67 F.3d 1394, 1401-02](http://scholar.google.com/scholar?q=67+f.3d+1394&btnG=&hl=en&as_sdt=6) (9th Cir. 1995); *In re W. Real Estate Fund*, [922 F.2d 592, 600](http://scholar.google.com/scholar?q=922+f.2d+592&btnG=&hl=en&as_sdt=6) (10th Cir. 1990). Those courts read § 524(e) as barring the granting of such relief - put otherwise, they understand Congress’ use of the phrase “Notwithstanding the provisions of §524(e)” in § 524(g) as creating an exception to an otherwise applicable rule.

The Third Circuit also has not identified any section of the Bankruptcy Code that authorizes such non-debtor releases. Judge Wains points to *In re Millennium Lab Holdings II, LLC*, [945 F.3d](http://scholar.google.com/scholar?q=945+f.3d++126&btnG=&hl=en&as_sdt=6) [126, 133-40](http://scholar.google.com/scholar?q=945+f.3d++126&btnG=&hl=en&as_sdt=6) (3d Cir. 2019) (*In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*40), but as in the Second Circuit cases like *Manville III/IV* and *Tronox*, the Third Circuit does not discuss statutory authority in that case. Instead, the *Millennium* court concluded that the bankruptcy court had *constitutional* authority to extinguish certain third-party claims by confirming a chapter 11 plan. *In re Millennium Lab Holdings II, LLC*, [945 F.3d 139-40](http://scholar.google.com/scholar?q=945+f.3d+139&btnG=&hl=en&as_sdt=6).

On those occasions when the Third Circuit did address a bankruptcy court’s *statutory* authority to impose non-debtor releases, it overturned bankruptcy court orders granting them. For example, in *In re Cantinental Airlines*, [203 F.3d 203](http://scholar.google.com/scholar?q=203+f.3d+203&btnG=&hl=en&as_sdt=6) (3d Cir. 2000), the Court of Appeals *rejected as extra-statutory* the provision in a plan of reorganization that released claims against current and former directors of Cantinental, and that permanently enjoined shareholder actions against them, finding that the Bankruptcy Code “does not explicitly authorize the release and permanent injunction of claims against non-debtors, except in one instance not applicable here” - that being asbestos cases. *Id.* at 211; [11 U.S.C. § 524(g)](http://www.google.com/search?q=11+u.s.c.++524(g)). And in *In re Combustion Engineering, Inc.*, [391](http://scholar.google.com/scholar?q=391++f.3d+190&btnG=&hl=en&as_sdt=6) [F.3d 190](http://scholar.google.com/scholar?q=391++f.3d+190&btnG=&hl=en&as_sdt=6) (3d Cir. 2004), the Third Circuit, like the Second Circuit in *Metromedia*, held that Section 105(a) does not give the court the power to create substantive rights that would otherwise be unavailable under the Bankruptcy Code, and vacated the channeling injunction. *Id.* at 238. Neither *Cantinental Airlines* nor *Combustion Engineering* has ever been overruled by the Third Circuit.

The First, Eighth, and D.C. Circuits have yet to weigh in on the question of whether statutory authority to impose non-debtor releases exists. Judge Wains contends that the First Circuit did decide that issue in *Monarch Life Ins. Co. v. Ropes & Gray*, [65 F.3d 973](http://scholar.google.com/scholar?q=65+f.+3d+973&btnG=&hl=en&as_sdt=6) (1st Cir 1995), but again, the First Circuit did not identify any statutory authority to impose non-debtor releases in that case. It declined to decide whether Section 105(a) authorized the imposition of a non-debtor release; and it did not cite any other section of the Bankruptcy Code as conferring that authority. *Id.* at 983-94.

Judge Wains cited *In re AOV Indus., Inc*., [792 F.2d 1140, 1153](http://scholar.google.com/scholar?q=792+f.2d+1140&btnG=&hl=en&as_sdt=6) (D.C. Cir. 1986) for the proposition that the D.C. Circuit has approved the non-consensual release of third-party claims against non-debtors. But that is wrong. The *AOV Industries* court did not say a word about whether such relief was authorized by statute. The court simply found that the issue before it - whether the bankruptcy court had *constitutional* authority to enter an order releasing non-debtor claims - was equitably moot. *Id*.

The Fourth and Eleventh Circuits have concluded that Section 105(a), without more, authorizes such releases. *See Nat’l Heritage Found., Inc. v. Highbourne Found., Inc*., [760 F.3d](http://scholar.google.com/scholar?q=760+f.3d++344&btnG=&hl=en&as_sdt=6) [344, 350](http://scholar.google.com/scholar?q=760+f.3d++344&btnG=&hl=en&as_sdt=6) (4th Cir. 2014); *In re Seaside Eng’g & Surveying*, [780 F.3d 1070, 1076-79](http://scholar.google.com/scholar?q=780+f.3d+1070&btnG=&hl=en&as_sdt=6) (11th Cir. 2015). After *In re Dairy Mart* and *Metromedia,* we know that is not the law in the Second Circuit. So Fourth and Eleventh Circuit law contradict Second Circuit law, and cannot be relied on as authority for the proposition that such releases are statutorily authorized.

That leaves the Sixth and Seventh Circuits, both of which have concluded that Sections 105(a) and 1123(b)(6) of the Bankruptcy Code, read together, codify something that they call a bankruptcy court’s “residual authority,” and hold that a bankruptcy court can impose non­consensual releases of third-party claims against non-debtors in connection with a chapter 11 plan pursuant to that “residual authority.”[[40]](#footnote-40) As discussed in my summary of his opinion, Judge Wains adopted the reasoning of these courts, and added two other sections of the Bankruptcy Code to buttress the analysis.

**Summary of Extra-Circuit Law**: A majority of the Circuits that have spoken to the statutory authority question either dismiss the idea that such authority exists or, as with the Second Circuit: (1) reject the notion that such authority can be found by looking solely to Section 105(a), and then (2) fail to answer the question of where such authority can be found. Two Circuits rely solely on Section 105(a), and so have law that conflicts with the Second Circuit’s pronouncement.

### The Statutory Provisions Upon Which the Bankruptcy Court Relied

Judge Wains was quite explicit about the statutory provisions that he believed gave him authority to approve these releases as “necessary or appropriate” to carry out the provisions of the Bankruptcy Code: Sections 105(a), 1123(a)(5) and (b)(6), and 1129, taken together creating “residual authority” to approve the Packler releases. *In re Oxy Pharma L.P*., [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*43.

The question that arises is whether any of the sections other than Bankruptcy Code §105(a) confers some substantive right such that a release to enforce that right could be entered pursuant to Section 105(a).

We conclude that they do not.

Rather, each of the cited sections, like Section 105(a) of the Bankruptcy COde, confers on the Bankruptcy Court only the power to enter orders that carry out other, substantive provisions of the Bankruptcy Code. None of them creates any substantive right; neither do they create some sort of “residual authority” that authorizes the action taken by the Bankruptcy Court.

**Section 1123(b)(6)**: Subsections (a) and (b) of [11 U.S.C. § 1123](http://www.google.com/search?q=11+u.s.c.++1123), entitled “Contents of Plan,” lay out in considerable detail what a plan of reorganization *must* (subsection (a)) and *may* (subsection (b)) contain in order to be confirmed.

We can quickly dispense with the notion that Section 1123(b)(6) provides the substantive authority for a Section 105(a) injunction or approval of a release.

Section 1123(b)(6) provides that a plan may “include any other appropriate provision not inconsistent with the applicable provisions of this title.”  [11 U.S.C § 1123(b)(6)](http://www.google.com/search?q=11+u.s.c++1123(b)(6)). In form, Section 1123(b)(6) is substantively analogous to Section 105(a)’s authorization of “any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” [11 U.S.C. §](http://www.google.com/search?q=11+u.s.c.+++105(a)) [105(a)](http://www.google.com/search?q=11+u.s.c.+++105(a)). If the latter does not confer any substantive authority on the bankruptcy court - and that proposition is well settled, at least in this Circuit - then the former can in no way be read to do so.

That alone would be reason to conclude that Section 1123(b)(6) does not provide the statutory authorization we are seeking. But as Appellees point out, various aspects of the non­consensual Section 10.7 Shareholder Release are indeed inconsistent with certain other provisions of title 11.

First and foremost, the Section 10.7 Shareholder Release is inconsistent with the Bankruptcy Code because it discharges a non-debtor from debts that Congress specifically said could not be discharged by a debtor in bankruptcy. The Section 10.7 Shareholder Release does not carve out or exempt claims for fraud or willful and malicious conduct, liabilities from which Oxy cannot be discharged in its own bankruptcy. *See* [11 U.S.C. §§ 523(a)(2)](http://www.google.com/search?q=11+u.s.c.++523(a)(2)), [(4)](http://www.google.com/search?q=11+u.s.c.+523(4)), [(6)](http://www.google.com/search?q=11+u.s.c.+523(6)). Reading the Bankruptcy Code as authorizing a bankruptcy court to discharge a non-debtor from fraud liability - something it is strictly forbidden from doing for a debtor - cannot be squared with the fact that Congress intended that the Bankruptcy Code “ensure that all debts arising out of fraud are excepted from discharge no matter what their form.” *Archer v. Warner*, [538 U.S. 314, 321](http://scholar.google.com/scholar?q=538+u.s.+314&btnG=&hl=en&as_sdt=6) (2003) (internal citation omitted).

In other cases in which the releases at issue called for relief from suit that encompassed otherwise non-dischargeable claims, courts either ensured fraud claims were exempt from the releases before approving them, *In re Airadigm Commc’ns, Inc*., [519 F.3d 640,](http://scholar.google.com/scholar?q=519+f.3d+640&btnG=&hl=en&as_sdt=6) [657](http://scholar.google.com/scholar?q=519+f.3d+640&btnG=&hl=en&as_sdt=6) (7th Cir. 2008), or simply refused to approve the releases because they included otherwise non-dischargeable claims. *See e.g*., *In re Fusion Connect, Inc*., No. 20-05798, [2021 WL 3932346](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B3932346&refPos=3932346&refPosType=s&clientid=USCourts), at \*7 (S.D.N.Y. Sept. 2, 2021) (reversing the bankruptcy court’s decision to discharge a debtor from an outstanding civil penalty because liability “arising from fraud on consumers” and payable to a governmental entity is “nondischargeable” in a chapter 11 bankruptcy under Section 523(a)(2)). Aside from *Drexel* - which, for all the reasons discussed above, is probably no longer good law - the Second Circuit has never approved a non-consensual release of claims against non-debtors of this sort, nor has it ever explained what provision of the Bankruptcy Code authorizes a bankruptcy court to do so.

Second, as the Appellees point out, a debtor’s discharge cannot relieve him of “any debt . . . to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty. . .” [11 U.S.C. § 523(a)(7)](http://www.google.com/search?q=11+u.s.c.++523(a)(7)). At least some of the claims asserted by the Appellees seek relief in the nature of non-dischargeable civil penalties payable to and for the benefit of governmental units. Such claims could not be discharged if the Packlers had filed for personal bankruptcy.

Appellees also argue that the Section 10.7 Shareholder Release and corresponding injunctions are inconsistent with Section 524(e) of the Bankruptcy Code, which provides that “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.”  [11 U.S.C. § 524(e)](http://www.google.com/search?q=11+u.s.c.++524(e)). On the facts of this case, we cannot agree with that argument - but not because the Code is silent on the subject.

Section 524(e) says, in sum and substance, that releasing a debtor on a debt owed to a creditor does not affect the liability that a non-debtor may have for the same debt. But the claims that would be released by the Section 10.7 Shareholder Release are not claims on which the Packlers are jointly liable with Oxy. The various state statutes being invoked by Appellants give rise to Packler liability *independent* of Oxy’s liability - albeit for the very same violations of the very same laws - because those laws impose an independent duty on persons who occupy certain managerial positions in a corporation. We would not have this appeal if the Packler debts being eliminated by the Section 10.7 Shareholder Release were also debts owed by Oxy; we would be back in Section 10.6 land, dealing with derivative claims, where the Bankruptcy Court’s power is unchallenged.

It is true that, when passing Bankruptcy Code §524(g), Congress stated explicitly that the non-debtor releases therein authorized were being allowed “notwithstanding the provisions of section. 524(e).” [11 U.S.C. § 524(g)](http://www.google.com/search?q=11+u.s.c.++524(g)). It is hard to read that phrase and not conclude that Congress thought it was creating an exception to Section 524(e) by authorizing the release of third-party claims against non-debtors in certain limited circumstances.

However, back when Congress was considering Bankruptcy Code §524(g), it had before it a specific situation: the claims being released were against non-debtor insurance companies whose liability was premised on the conduct of their insureds that fell within the terms of the policies they had issued. Everything that was being released was part and parcel of the bankruptcy estate; the debts owed by Manville and its insurers were the same debts; Section 524(e) was obviously implicated. There is no indication, either in the text of the statute or in the legislative history, that Congress ever envisioned that a bankruptcy court could discharge the debts of non-debtors that were not also debts of the debtor. That being so, we cannot read the “notwithstanding” language to create an inconsistency on the facts of this case.

We are, therefore, constrained to conclude that the Section 10.7 Shareholder Release is not inconsistent with Section 524(e) of the Bankruptcy Code, because it contains the discharge of debts that are not contemplated by Section 524(e) of the Bankruptcy Code.

**Section 1123(a)(5)**: Section 1123(a)(5) of the Bankruptcy Code provides that a plan of reorganization must “provide adequate means for [its] implementation.” [11 U.S.C. § 1123(a)(5)](http://www.google.com/search?q=11+u.s.c.++1123(a)(5)). That section contains a laundry list of things that a plan can include in order to make sure that resources are available to implement the plan - any of which can be ordered by a bankruptcy court.

Injunctions against the prosecution of third-party claims against non-debtors, and the release of such claims, are nowhere to be found on that list. Every single example listed in Subsections 5(A) through (J) authorizes the court to do something with the *debtor’s assets* (retaining estate property; transfer of property; sale of property; satisfaction or modification of a lien; cancellation or modification of an indenture or similar instrument; curing or waiving defaults; extension of maturity dates; issuing securities; even amending the debtor’s charter). Since the Bankruptcy Court has *in rem* jurisdiction over the *res* of the debtor’s estate, none of that should be surprising. It is equally unsurprising that none of the types of relief listed in Section 1123(a)(5) involves disposing of property belonging to someone other than the debtor or a creditor of the debtor. That is because it is the debtor’s resources - not the resources of some third party - that are supposed to be used to implement a plan that will adjust the debtor’s relations with its creditors.

Of course, this is not the first case in which the resources of non-debtors are being used to implement a plan; and Bankruptcy Code §1123(a)(5) does not pretend to contain an exhaustive list of all ways that a plan can provide means for its implementation. 1123(a)(5) begins, after all, with the words “such as.” In this case, Debtors argue that the only way to get the resources necessary to implement a viable plan was to agree to the Packlers’ demand for broad releases in exchange for their contribution of money to the bankruptcy estate. They insist that the Section 10.7 Shareholder Release and corresponding injunctions carry out the requirements of Section 1123(a)(5) by ensuring that the Plan has the funding it needs - and if that funding was obtained from some third-party funder on condition of a release and an injunction, then those forms of relief are authorized because the money is needed to fund the Plan.

But the fact that Oxy needs the Packlers to give the dividends and transfers back does not mean that Bankruptcy Code §1123(a)(5) confers on the Debtors or the Packlers any right to have the non-debtors receive a release from non-derivative third-party claims in exchange for a contribution to Oxy’s estate.

The Appellant’s suggestion that Section 1123(a)(5) confers some substantive right is exactly the sort of circular reasoning that was rejected by Judge Jacobs where Section 105(a) of the Bankruptcy Code was concerned. *See In re Dairy Mart,* [351 F.3d at 92](http://scholar.google.com/scholar?q=351+f.+3d+86&btnG=&hl=en&as_sdt=6) (any such power conferred by Section 105(a) must “be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective”) (quoting 2 *Collier on Bankruptcy* 105.01[1]). Getting to a confirmable plan is the general bankruptcy objective, nothing more.

Nor does Section 1123(a)(5) confer any special power on the Bankruptcy Court. A court does not propose the plan. The debtor and its creditors put the plan together and present it to the court, which cannot approve the plan unless it contains the required provisions and need not approve it even then. To the extent that any court order is contemplated by Section 1123(a), it is the Confirmation Order - not an injunction and release of claims against non-debtors in order to obtaining funding for a plan, which is essentially what Debtors are proposing.

Finally, and most important, Bankruptcy Code §1123(a)(5) does not authorize a court to give its imprimatur to something the Bankruptcy Code does not otherwise authorize, simply because doing so would ensure funding for a plan. Nothing in Section 1123(a)(5) suggests that a debtor has the right to secure sufficient funds for implementation by any means necessary. Section 1123(a)(5) would not, for example, authorize a court to enter an order enjoining a bank from suing a non-debtor employee who embezzled funds and then offered them to her bankrupt brother’s estate in exchange for a release of all claims a third party could assert against her. That example is silly, of course, but the point is simple: the mere fact that the money is being used to fund implementation of the plan does give a bankruptcy court statutory authority to enter an otherwise impermissible order in order to obtain that funding. As was the case with Section 1123(b)(6), Judge Wains’s reliance on Section 1123(a)(5) begs the ultimate question that must be answered: whether the court has some *independent* statutory authority to issue the non-debtor releases and enjoin third party claims against the Packlers, such that the Bankruptcy Court can enter a “necessary and appropriate” order to obtain the funding.

**Section 1129(a)(1)**: Finally, Section 1129(a)(1) does not provide the substantive authority for a Section 105(a) injunction or approval of a release. Section 1129 is entitled “Confirmation of plan,” and Subsection 1129(a)(1) provides that a bankruptcy court “shall confirm a plan only if . . . the plan complies with the applicable provisions of this title.”  [11 U.S.C.A. § 1129](http://www.google.com/search?q=11+u.s.c.a.++1129). Like the cited sections of §1123, §1129(a) confers no substantive right that could be used to undergird a § 105(a) injunction. One highly general provision simply does not confer substantive authority that is required to invoke another highly general provision.

**Lack of Any Statutory Prohibition**: Having exhausted the statutory provisions on which Judge Wains relied and finding that none of them confers any substantive right as required by *Metromedia,* our exercise should be at an end. But it is not. The Debtors argue that the Bankruptcy Court must be statutorily authorized to approve these releases because no provision of the Bankruptcy Code - including but not limited to § 524(e) - expressly prohibits them.

The notion that statutory authority can be inferred from Congressional silence is counterintuitive when, as with the Bankruptcy Code, Congress put together a “comprehensive scheme” designed to target “specific problems with specific solutions*.*”  *RadLAX Gateway Hotel*,[566 U.S. at 645](http://scholar.google.com/scholar?q=566+u.s.+639&btnG=&hl=en&as_sdt=6). In this particular case, a number of red flags suggest that Congressional silence (if indeed Congress was silent) was not intended to mean consent.

The first is that silence is inconsistent with comprehensiveness, and the Bankruptcy Code “provides a *comprehensive* federal system . . . to govern the orderly conduct of debtors’ affairs and creditors’ rights*.*” *E. Equip. & Servs. Corp. v. Factory Point Nat. Bank, Bennington*, [236 F.3d 117,](http://scholar.google.com/scholar?q=236+f.3d+117&btnG=&hl=en&as_sdt=6) [120](http://scholar.google.com/scholar?q=236+f.3d+117&btnG=&hl=en&as_sdt=6) (2d Cir. 2001) (emphasis added). “Comprehensive” means “complete, including all elements.” Reading elements that do not appear in the text of the Code into the Code is the antithesis of comprehensiveness.

Then-District Judge Sullivan recognized as much in *In re Lehman Bros. Holdings Inc*., [508](http://scholar.google.com/scholar?q=508++b.r.+283&btnG=&hl=en&as_sdt=6) [B.R. 283](http://scholar.google.com/scholar?q=508++b.r.+283&btnG=&hl=en&as_sdt=6) (S.D.N.Y. 2014). There, the bankruptcy court granted a certain creditor’s application for reimbursement of post-petition counsel fees over the U.S. Trustee’s objection that the Bankruptcy Code only permitted reimbursement of post-petition administrative expenses. On appeal, Judge Sullivan was not persuaded by appellees’ argument that reimbursement for professional fees was authorized by the Bankruptcy Code simply because nothing in the Bankruptcy Code expressly forbade it. He held that, “no such explicit prohibition is necessary” because the requested reimbursement clearly goes against the *purpose* of a reorganization - “Reorganization plans exist to pay claims . . . [the] professional fee expenses were all incurred post-petition, and thus cannot be treated as ‘claims.’” *Id.* at 293. He further noted that the federal bankruptcy scheme “cannot remain comprehensive if interested parties and bankruptcy courts in each case are free to tweak the law to fit their preferences.” *In re Lehman Bros. Holdings Inc*., [508 B.R. 283, 294](http://scholar.google.com/scholar?q=508+b.r.+283&btnG=&hl=en&as_sdt=6) (S.D.N.Y. 2014) (internal citations omitted).

As we noted above, Justice Breyer recently wrote when discussing the priority scheme set out in the Bankruptcy Code, the importance of certain critical aspects of the bankruptcy scheme “leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure.” *Jevic Holdings Corp*., [137 S. Ct. at 984](http://scholar.google.com/scholar?q=137+s.+ct.+973&btnG=&hl=en&as_sdt=6). Granting releases to non-debtors for claims that could not be released in favor of the debtors themselves is so far outside the scope of the Bankruptcy Code and the purposes of bankruptcy that the “silence does not necessarily mean consent” principle applies with equal force.

Second, it is hard to infer consent from silence in circumstances when one would not expect Congress to speak. The Code was intended “to free the debtor of his personal obligations *while ensuring that no one else reaps a similar benefit.*” *Green v. Welsh*, [956 F.2d 30, 33](http://scholar.google.com/scholar?q=956+f.2d+30&btnG=&hl=en&as_sdt=6) (2d Cir. 1992) (emphasis added). It is counterintuitive to imagine that Congress would have thought it necessary to include language specifically forbidding things that that ran counter to that purpose. As one of Judge Wains’s colleagues recently reminded us, the ordering of an involuntary release of third- party claims against non-debtors is “an extraordinary thing” that is “different . . . from what courts ordinarily do.” *In re Aegean Marine Petroleum Network Inc*., [599 B.R. 717, 723](http://scholar.google.com/scholar?q=599+b.r.+717&btnG=&hl=en&as_sdt=6) (S.D.N.Y. 2019).

That is especially true where, as is proposed here, we find ourselves in what Judge Tiles called “the odd situation where we are being asked to use an unwritten authority to release non-debtor officers and directors from claims when the Bankruptcy Code would bar us from giving similar relief to those persons if they were debtors in their own cases.” *Id.* at 726 (citing *Metromedia*, [416](http://scholar.google.com/scholar?q=416+f.+3d+136&btnG=&hl=en&as_sdt=6) [F.3d at 142](http://scholar.google.com/scholar?q=416+f.+3d+136&btnG=&hl=en&as_sdt=6)).

Third, Congress has in fact spoken on this subject, and what it has said suggests that it intended Sections 524(g) and (h) to preempt the field where non-debtor releases were concerned. I will not repeat the extensive discussion about the law and its legislative history that appears above, except to say that Congress in its wisdom elected to limit Code-based authority to release third party claims against non-debtors to asbestos litigation - and it declined either to agree with those who argued that bankruptcy courts already had a broader power to authorize such releases. Congress was not unaware that there were non-asbestos bankruptcies with thousands of claimants and nationwide implications in the early 1990s. Other mass tort bankruptcies with thousands upon thousands of potential claimants were pending (*i.e*., in *A.H. Robins/Dalkon Shield*), as was the highly publicized bankruptcy of a major investment bank (*Drexel*). The Judiciary Committee mentioned the “experimentation” with *Manville*-like relief that was beginning in other industries.

Yet Congress declined to make this extraordinary form of relief - relief that ran counter to the fundamental purpose of the Bankruptcy Code - available in circumstances other than asbestos bankruptcies. And it reserved for itself the right to change that.

So the silence that speaks volumes is not Congress’ failure to say, “And you can’t give involuntary non-debtor releases to anyone except in an asbestos case.” The silence that speaks volumes is the twenty-seven years of unbroken silence that have passed since Congress said, “We are limiting this to asbestos for now, and maybe, when we see how it works in that context, we will extend it later.”

Fourth, but by no means least, “it is a commonplace of statutory construction that the specific governs the general.” *RadLAXGateway Hotel*, [504 U.S. at 384](http://scholar.google.com/scholar?q=504+u.s.+384&btnG=&hl=en&as_sdt=6). The Supreme Court of the United States has relied on that principle on multiple occasions in refusing to allow generalized provisions of the Bankruptcy Code to override specific directives on a particular subject.

Take, for example, *RadLAX* itself. The plan proposed by the debtors in *RadLAX* provided for the sale of unencumbered assets securing a bank creditor’s claim free and clear of all liens. But, in contravention of the provision governing such a “cram down” plan under the Bankruptcy Code, the bid procedures proposed by the debtors precluded the bank holding the mortgage on the property from credit-bidding the amount of its claim, which the Bankruptcy Code specifically authorized the bank to do. [11 U.S.C. § 1129(b)(2)(A)(ii)](http://www.google.com/search?q=11+u.s.c.++1129(b)(2)(a)(ii)). Nonetheless, the bankruptcy court approved the plan. It agreed with the debtors that the bank did not need to be permitted to bid on the property as long as it was provided with the “indubitable equivalent” of its claim in some other fashion - in this particular case, the cash generated by the auction. [11 U.S.C. § 1129(b)(2)(A)(i)-](http://www.google.com/search?q=11+u.s.c.++1129(b)(2)(a)(i)) [(iii)](http://www.google.com/search?q=11+u.s.c.++1129(b)(2)(a)(i)).

The Supreme Court rejected the debtors’ justification, holding that the “indubitable equivalent” subclause (subclause iii) was a general subclause that could not be used to circumvent the specific requirement of subclause (ii) that the bank be permitted to credit-bid at the sale. The Court stated that the debtors’ reading of the statute - that clause (iii) permits precisely what clause (ii) proscribes - is “hyperliterally contrary to common sense.” *RadLAX Gateway Hotel*, [566 U.S.](http://scholar.google.com/scholar?q=566+u.s.+639&btnG=&hl=en&as_sdt=6) [at 640](http://scholar.google.com/scholar?q=566+u.s.+639&btnG=&hl=en&as_sdt=6). The Court called it “axiomatic” that specific statutory provisions control over general provisions and emphasized that the “general/specific canon” applies with particular force in bankruptcy, because “Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.” *Id*.

Where, as here, Congress has deliberately limited a specific targeted solution (the release of third-party claims against non-debtors) to a specific identified problem (asbestos bankruptcies) - and has even denominated that solution as an exception to the usual rule - *RadLAX* strongly suggests that the general/specific canon should apply with particular force.

*Ginsberg & Sons v. Popkin*, [285 U.S. 204](http://scholar.google.com/scholar?q=285+u.s.+204&btnG=&hl=en&as_sdt=6) (1932) is a pre-Code case, but it illustrates the same principle. There, petitioner argued that Clause 15 of Section 2 of the Bankruptcy Act empowered district court judges to issue orders directing the arrest of the former officers and directors of the debtor. Clause 15 provided, “The courts of bankruptcy are hereby invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . [t]o] make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title.” Section 2, 11 USCA s 11(15). The reader will immediately appreciate that Clause 15 is the Bankruptcy Act’s equivalent of Section 105(a) of the Bankruptcy Code - it was the “necessary and appropriate” clause in the old statutory scheme.

But Section 9(a) of the Bankruptcy Act specifically precluded “a court of bankruptcy” from directing the arrest of former directors and officers, except for contempt or disobedience of its lawful orders. And Section 9(b) prescribed in great detail the conditions to and procedures for invoking the exception under which the court could direct the arrest and detention of such former directors and officers who posed a flight risk.

The Supreme Court refused to read Clause 15 of Section 2 in a way that would render the specific prohibitions and procedures enumerated in Sections 9(a) and (b) superfluous: “In view of the general exemption of bankrupts from arrest under section 9a and the carefully guarded exception made by section 9b as to those about to leave the district to avoid examination, there is no support for petitioner’s contention that the general language of section 2(15) is a limitation upon section 9(b) or grants additional authority in respect of arrests of bankrupts.” *D. Ginsberg & Sons v. Popkin*, [285 U.S. at 207](http://scholar.google.com/scholar?q=285+u.s.+204&btnG=&hl=en&as_sdt=6)-08.

The Supreme Court’s holdings in these cases old and new are instructive in the present context. Here, Debtors and their allies seek to apply general provisions - Bankruptcy Code §§105(a) and 1123(a)(5) and (b)(6) - to justify expanding the express authority conferred by Congress under Section 524(g) into a situation that is manifestly not comprehended by that statute. Because the specific controls the general, that reliance is misplaced.

For all these reasons, I cannot conclude that Congressional “silence” should be deemed consent to an expansion of Section 524(g). In fact, I do not believe that Congress has been silent at all. But to the extent it has, its silence supports the Appellees’ position, not the Appellants’.

**Residual Authority**: Finally, I turn to the concept of “residual statutory authority.” In these circumstances, I conclude that such authority simply does not exist.

Judge Wains framed the question before him as, “whether the court has statutory *or other power* to confirm a plan with a third-party claim release,” and, if so, “what is the statutory *or other source of power* for such a release?” *In re Oxy Pharma L.P*., [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*40, \*43 (emphasis added). He identified the “other source of power” as the residual power of bankruptcy courts.

But such power, if it even exists, is of no help where, as here, it is being exercised in contravention of specific provisions of the Bankruptcy Code.

Debtors rely heavily on the Supreme Court’s decision in *In re Energy Resources Co*, [495](http://scholar.google.com/scholar?q=495u.s.+545&btnG=&hl=en&as_sdt=6) [U.S. 545](http://scholar.google.com/scholar?q=495u.s.+545&btnG=&hl=en&as_sdt=6) (1990) for the proposition that a bankruptcy court has “residual authority” to approve reorganization plans that includes all “necessary and appropriate” provisions, as long as those provisions are not inconsistent with title 11. In that case, the Court concluded that two bankruptcy courts - which were forbidden by the Bankruptcy Code from discharging a tax debt[[41]](#footnote-41) and required not to confirm a plan unless satisfied that the IRS would in all likelihood be able to collect taxes owed within six years[[42]](#footnote-42) - had not “transgressed one of the limitations on their equitable power” by directing in a plan of reorganization that certain tax payments be credited in the first instance to so-called “trust fund” tax debt, and only when that debt was satisfied to so-called “non-trust fund” tax debt. *In re Energy Resources Co*., [495 U.S. 499-50](http://scholar.google.com/scholar?q=495+u.s.+499&btnG=&hl=en&as_sdt=6). Trust fund tax debt is guaranteed by third parties; an order directing that the guaranteed debt be paid first meant that if there were any unpaid taxes at the end of the plan period, the IRS could probably not look to third parties for payment. The IRS argued that this provision of the plan was inconsistent with the Bankruptcy Code, because requiring the debtor to pay non-trust fund taxes first would give the IRS a greater chance of recovering 100 cents on the dollar.

But the Supreme Court ruled that the Bankruptcy Code did not expressly require that a plan of reorganization be structured so that the unsecured tax debt was paid first. The bankruptcy court had found (as required by the Bankruptcy Code) that the plan of reorganization proposed by the debtors was likely to succeed and was implemented properly. It further found that, if the plan did succeed, all taxes would be fully paid within six years. The Bankruptcy Code required nothing more. Therefore, the order directing that tax payments be credited first to back taxes secured by the trust fund, and then to unsecured back taxes, was not inconsistent with any applicable provision of title 11. All the substantive guarantees that the Bankruptcy Code afforded to the IRS were baked into the court’s approval of the plan.

*Energy Resources* did not authorize the Bankruptcy Court’s approval of the Section 10.7 Shareholder Release under any “residual power” theory. Just two years prior to the *In re Energy Resources* decision, the same Supreme Court - made up of the same nine justices - held that the bankruptcy court’s residual equitable authority was bounded by the provisions of the Bankruptcy Code. *Norwest Bank Worthington v. Ahlers*, [485 U.S. 197, 206](http://scholar.google.com/scholar?q=485+u.s.+197&btnG=&hl=en&as_sdt=6) (1988) (holding “whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code”).

*Energy Resources* is consistent with this principle. Where Congress legislated a particular right or scheme into the Bankruptcy Code, the Supreme Court has refused to allow lower courts to expand or contravene that express right or scheme. “Residual power” only authorizes action consistent with express rights and schemes found in the statute itself.

In this case, the Bankruptcy Code does permit third party releases of certain direct creditor claims against non-debtors in a specific context – asbestos cases. So there is no “residual power” that can authorize the Section 10.7 Shareholder Release in Oxy’s chapter 11 case, which has nothing to do with managing a mass asbestos exposure. The Bankruptcy Court is being asked to insert a right that does not appear in and is inconsistent with the express terms of the Bankruptcy Code in order to achieve a bankruptcy objective – value maximization for creditors and claimants. That is precisely what *In re Dairy Mart* and *Metromedia* prohibit.

The *Energy Resources* Court, echoing *Ahlers,* recognized that any residuary power enjoyed by a bankruptcy court must be exercised in a way that “is not inconsistent with the applicable provisions of this title.” As discussed above, Section 10.7 non-debtor releases are in fact inconsistent with applicable provisions of title 11 - with Sections 524 (g) and (h), with Section 523, and with Section 1141(d), and possibly even with Section 524(e). Therefore, no residual power can authorize such an order.

As a corollary to the “residual authority” argument, several Appellees argue the release of claims against the non-Debtor Packlers and their related entities are proper because the Bankruptcy Code, taken as a whole, creates a “special remedial scheme” in which certain legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process. They cite *Martin v. Wilks*, [490 U.S. 755](http://scholar.google.com/scholar?q=490+u.s.+755&btnG=&hl=en&as_sdt=6) (1989) for their proposition.

In *Martin v. Wilks*, the Supreme Court announced that, as a general rule, “[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.” It affirmed the Eleventh Circuit’s judgment allowing certain individuals, who were *not* parties to an original action, to challenge consent decrees entered in that original case. *Id.* at 762. But, in a footnote, the Court acknowledged an exception to the general rule exists “where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process.” *Id.* at 762, n. 2.

Judge Wains did not adopt this reasoning or rest his view about his statutory authority on the Bankruptcy Code’s “special remedial scheme” - and rightly so, because it is contrary to Second Circuit law. The “special remedial scheme” contemplated by the Bankruptcy Code addresses the rights of persons who have claims against a debtor in bankruptcy - not claims against other non-debtors. The Code lays out a claims allowance process so that creditors can file their claims against someone who has invoked the protection of the Bankruptcy Code; it provides a mechanism for those parties to litigate those claims against the debtor and to determine their value. In order to take advantage of this “special remedial scheme,” debtors have to declare bankruptcy, disclose their assets, and apply them - all of them, with *de minimis* exceptions - to the resolution of the claims of their creditors.

Non-debtors have no such obligations, and so do not have any rights at all under the “special remedial scheme” that is bankruptcy - certainly not the “right” to have claims that are being asserted against them outside the bankruptcy process released. As the Second Circuit held in *Manville III*, the “special remedial scheme” due process exception relating to *in rem* bankruptcy proceedings simply does not give a bankruptcy court subject matter jurisdiction to release *in personam* third-party claims against a non-debtor. *In re Johns-Manville Corp*., [600 F.3d 135, 158](http://scholar.google.com/scholar?q=600+f.+3d+135&btnG=&hl=en&as_sdt=6) (2d Cir. 2010).

**Conclusion: No Statutory Authority**. In *Metromedia*, we signaled that a Bankruptcy Code could not order the non-consensual release of third-party claims against non-debtors unless some provision of the Bankruptcy Code aside from Section 105(a) authorized it to do so. For the reasons stated above, we conclude that there is no such section, and so no such authority.

Because the Bankruptcy Code confers no such authority, the District Court’s ruling vacating the Confirmation Order and related orders permitting certain advances is affirmed.

This constitutes the decision and order of the Court. This is a written opinion.

Dated: October 31, 2022

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**Attachment B**

The District Court had appellate jurisdiction to review the Confirmation Order under 28 U.S.C. §158(a)(1).

The District Court, in a carefully reasoned opinion, reverse the Bankruptcy Court, vacating the Confirmation Order. It did so because it found that the Bankruptcy Court lacked specific statutory authority under the Bankruptcy Code to order the releases of certain entities of creditors against the Packler entities and non-Debtor third parties.

Each Appellant timely filed motions of appeal from the District Courts order vacating the Confirmation Order and moved the District Court to certify its order for interlocutory appeal to this Court under 28 U.S.C. §1292(b). The District Court granted this motion and Oxy and the other Appellants in connection with the related motion practice was timely in asking whether this Court can ??? to appeal and this court granted that and each other petition.

1. Oxy Sales, L.P. and those affiliated debtors referenced in a certain declaration in respect of “first day” relief filed in the Bankruptcy Court and defined together as “Oxy” or the “Debtors”. [↑](#footnote-ref-1)
2. The Packlers or Packler family in this opinion means the Mortimer D. Packler Family (also known as “Side A” of the Packler family) and the Joe Packler Family (also known as “Side B” of the Packler family). [↑](#footnote-ref-2)
3. The Plan refers to confirmed chapter 11 bankruptcy plan of reorganization. [↑](#footnote-ref-3)
4. It is true that many members of some creditor classes did not cast a vote, but the law provides that a plan must be approved, not by a supermajority of all eligible voters, but by a supermajority of all actual voters. [11 U.S.C. § 1126](http://www.google.com/search?q=11++u.s.c.++++1126). That being so, there is no merit to Appellants’ argument that the court should not deem the Plan approved by a supermajority of the affected creditor classes. [↑](#footnote-ref-4)
5. While the City of Seattle objected to the Plan before the Bankruptcy Court, it did not appeal. [↑](#footnote-ref-5)
6. The U.S. Trustee “is a DOJ official appointed by the Attorney General to supervise the administration of bankruptcy cases” and has standing under [11 U.S.C. § 307](http://www.google.com/search?q=11++u.s.c.++++307) to appear in bankruptcy cases and “comment on proposed disclosure statements and chapter 11 plans.” ([Dkt. No. 91, at 8](https://nysd-ecf.sso.dcn/n/cmecfservices/rest/file/finddoc?caseYear=2021&caseNum=08557&caseType=cv&caseOffice=7&docNum=91%23page=8) (citing [28](https://nysd-ecf.sso.dcn/n/cmecfservices/rest/file/finddoc?caseYear=2021&caseNum=08557&caseType=cv&caseOffice=7&docNum=91%23page=28) [U.S.C. §§](http://www.google.com/search?q=28++u.s.c.++++581) [581-589](https://nysd-ecf.sso.dcn/n/cmecfservices/rest/file/finddoc?caseYear=2021&caseNum=08557&caseType=cv&caseOffice=7&docNum=91%23page=581) and [28](https://nysd-ecf.sso.dcn/n/cmecfservices/rest/file/finddoc?caseYear=2021&caseNum=08557&caseType=cv&caseOffice=7&docNum=91%23page=28) [U.S.C. §](http://www.google.com/search?q=28++u.s.c.++++586(a)(3)(b))) [586](https://nysd-ecf.sso.dcn/n/cmecfservices/rest/file/finddoc?caseYear=2021&caseNum=08557&caseType=cv&caseOffice=7&docNum=91%23page=586)[(a)(3)(B))](http://www.google.com/search?q=28++u.s.c.++++586(a)(3)(b))). [↑](#footnote-ref-6)
7. Ida Litigant, Cathy Packler, Fred Packler, Tessa Packler, Dick Packler, Jon Packler, and Don Packler were at some or all relevant times directors of Oxy and its related enterprises. Mortimer D. Packler and Joe Packler had management roles at the company as co-chief executive officers; Ron Packler also served as president; and Mortimer D.A. Packler, Ilene Packler Lefcourt, and Kathe Packler held officer roles as vice presidents. Mariana Packler worked at Oxy in research and development. [↑](#footnote-ref-7)
8. “all . . . present, former, or future masters, insurers, principals, agents, assigns, officers, directors, shareholders, owners, employees, attorneys, representatives. subsidiaries, divisions, affiliates, associated companies, holding companies, partnerships, and joint ventures . . . “ [↑](#footnote-ref-8)
9. Oxy Frederick Company is an affiliate of Oxy that manufactures and distributes Oxycon. [↑](#footnote-ref-9)
10. The fine and payments include: approximately $276.1 million forfeited to the United States; approximately $160 million paid to federal and state government agencies to resolve liability for false claims made to Medicaid and other government healthcare programs; approximately $130 million set aside to resolve private civil claims; approximately $5.3 million paid to the Virginia Attorney General’s Medicaid Fraud Control Unit; approximately $20 million paid to fund the Virginia Prescription Monitoring Program; approximately $3 million to Federal and State Medicaid programs for improperly calculated Medicaid rebates; approximately $5 million in monitoring costs; and a $500,000 maximum statutory fine. [↑](#footnote-ref-10)
11. The Packlers do not concede the truth of Oxy’s admissions. [↑](#footnote-ref-11)
12. *Provinces plan legal push against Oxy Pharma in wake of U.S. opioid deal*, The Globe and Mail (Sept. 3, 2021), [https://www.theglobeandmail.com/canada/article-provinces-plan-legal-push-against-Oxy-pharma-in-wake-of-us-](https://www.theglobeandmail.com/canada/article-provinces-plan-legal-push-against-purdue-pharma-in-wake-of-us-)opioid. [↑](#footnote-ref-12)
13. The absolute amount of these distributions dwarfed distributions for the 1995-2007 period because concerns about the validity of Oxy’s Oxycon patent capped its earnings until 2008, when it was definitively held that the patent was valid. (*See* [Dkt. No. 241, at 6](https://nysd-ecf.sso.dcn/n/cmecfservices/rest/file/finddoc?caseYear=2021&caseNum=08557&caseType=cv&caseOffice=7&docNum=241%23page=6)). After that, Oxy’s earnings soared - as did both the amount owed in taxes and the amount that ended up in the Packler family trusts. [↑](#footnote-ref-13)
14. Mr. Double was appointed to the Board in July 2019 and chaired the Special Committee investigating the potential claims of Oxy or its estates against the Packlers. [↑](#footnote-ref-14)
15. NAS monitoring claims are those of legal guardians of children born with neonatal abstinence syndrome due to exposure to opioids *in utero*. [↑](#footnote-ref-15)
16. The Bankruptcy Court did not define what the “Consenting Ad Hoc Committee” was, but the mediators’ March 23, 2021 report lists “the Consenting States and the Ad Hoc Committee” as consisting of the AHC plus the various consenting states listed there - notably Texas, Tennessee, and Florida. This Court assumes this is what is meant by the “Consenting Ad Hoc Committee.” [↑](#footnote-ref-16)
17. Occurring contemporaneously with the mediation was a Special Committee’s “comprehensive investigation into potential claims that the Debtors may have against the Packler Families and Packler Entities,” led by attorneys from Davis Polk, who represent the Debtors in the bankruptcy. Throughout the mediation, the Special Committee was kept apprised of the “offers and counteroffers that had been communicated through the Mediators by the NCSG, on the one hand, and the Packler Families, on the other hand.” [↑](#footnote-ref-17)
18. Since the District Court rendered its decision, subsequent negotiations by and among Packler entities and stockholders has increased the settlement amount or offer to approximately $7 billion. [↑](#footnote-ref-18)
19. At that time, the non-consenting states included Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin. [↑](#footnote-ref-19)
20. The value of the “naming rights” concession is dubious, since institution after institution, both here and abroad, is taking the Packlers’ name off various endowed facilities, including the Louvre and the Metropolitan Museum of Art. *See Louvre Removes Packler Family Name From Its Walls*, The N.Y. Times (Jul. 17, 2019), [https://www.nytimes.com/2019/07/17/arts/design/Packler-family-louvre.html](https://www.nytimes.com/2019/07/17/arts/design/sackler-family-louvre.html); *Met Museum Removes Packler Name From Wing Over Opioid Ties*, The N.Y. Times (Dec. 9, 2021), [https://www.nytimes.com/2021/12/09/arts/design/met- museum-Packler-wing.html](https://www.nytimes.com/2021/12/09/arts/design/met-museum-sackler-wing.html) [↑](#footnote-ref-20)
21. As noted, the proposed settlement amount has increased to $7 billion in the wake of the District Court’s reversal of the Bankruptcy Court. [↑](#footnote-ref-21)
22. Judge Wains considered all of the *Iridium* factors, but not in the order in which they are discussed in *Iridium*. I employ Judge Wains’s framework in this decision. [↑](#footnote-ref-22)
23. Given Oxy’s admissions in connection with its 2020 Plea Agreement, this Court cannot assign much weight to the “oversight” factor. [↑](#footnote-ref-23)
24. It is actually not clear what members of the Packler family are contributing to the settlement and in what amounts. The record contains some suggestion that the various trusts that are contributing are for the benefit of all members of the family. [↑](#footnote-ref-24)
25. Judge Wains did not explain what he meant by that, except to say that the release would be further narrowed so that it was limited in the manner discussed above. I assume that he meant that the release was limited to claims involving the Debtor’s conduct, and claims in which the Debtor’s conduct is “a legal cause of the released claim, or a legally relevant factor to the third-party cause of action.” *In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2B%2Bwl%2B%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*45. [↑](#footnote-ref-25)
26. Judge Wains also argued that the best interest test under section 1129(a)(7) requires that the amount that an objecting creditor stands to receive under the plan on account of its claim be at least as much it would receive if the debtor were liquidated under chapter 7. *In re Oxy Pharma L.P.*, [2021 WL 4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2B%2Bwl%2B%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*50. Thus, he concluded, the best interest test does not require analysis of the claimant’s rights against third parties. *Id.* He acknowledged that his reading of the statute was at odds with at least two of his colleagues’ reading of the same statute. I mention this fact but it has nothing to do with the ultimate decision on this appeal. [↑](#footnote-ref-26)
27. “Non-core” proceedings are interchangeably referred to as “related to” proceedings. [↑](#footnote-ref-27)
28. The core/non-core distinction is also critically important when assessing the bankruptcy court’s subject matter jurisdiction, a topic that will be taken in that section. [↑](#footnote-ref-28)
29. *In re Kirwan Offices S.a.R.L.,* [594 B.R. 489](http://scholar.google.com/scholar?q=594+b.r.+489&btnG=&hl=en&as_sdt=6) (S.D.N.Y. 2018) does not stand for the proposition that *Stern* authorizes a bankruptcy court to release non-core claims because a release is not a final judgment on the merits of the third-party claim. In that case, *Stern* was of no moment because, as this court held and the Second Circuit affirmed, all parties had consented to the bankruptcy court’s exercise of jurisdiction. *In re Kirwan Offices S.a.R.L*, [792 F. App’x 99, 103](http://scholar.google.com/scholar?q=792++f.++app%c3%bd%c3%bd%c3%bdx++99&btnG=&hl=en&as_sdt=6) (2d Cir. 2019). [↑](#footnote-ref-29)
30. The Section 10.7 Shareholder Release extends to every Packler presently alive, to their unborn progeny, and to various trusts, partnerships, corporations, and enterprises with which they are affiliated or that have been formed for their benefit. Exhibit X to the Settlement Agreement, expressly incorporated into the Plan identifies over 1,000 separate released parties, either by name or by some “identifying” feature, such as “the assets, businesses and entities owned by” the named released parties. [↑](#footnote-ref-30)
31. While Judge Wains expressly found that these claims were not derivative (*In re Oxy Pharma L.P*., [2021 WL](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts) [4240974](https://www.westlaw.com/Link/Document/FullText?rs=USCLink&vr=3.0&findType=Y&cite=2021%2Bwl%2B4240974&refPos=4240974&refPosType=s&clientid=USCourts), at \*44), he was quite clear that the congruence between these claims and derivative claims against the same individuals was critically important to his conclusion that they could be released. [↑](#footnote-ref-31)
32. We can only assume that this argument derives from Congress’ mention of the fact that courts dealing with non­asbestos bankruptcies were “reportedly beginning to experiment with similar mechanism.” [↑](#footnote-ref-32)
33. In a structured dismissal, the debtor obtains an order that simultaneously dismisses its chapter 11 case and provides for the administration and distribution of its remaining assets. [↑](#footnote-ref-33)
34. The Court is advised that the *Manville I* injunction did not conform in every particular to the rules set out in Section 524(g), and that Section 524(h) was included in the Bankruptcy Code to be sure that the *Manville I* injunction was deemed to be Code-compliant notwithstanding that fact. [↑](#footnote-ref-34)
35. It bears reiterating that *Drexel* was one of those cases to which the Judiciary Committee referred when it said that debtors in other industries were “reportedly experimenting” with non-debtor injunctions in the years prior to the passage of Section 524(g). *See supra*, note 59. [↑](#footnote-ref-35)
36. *In re Dairy Mart* was hardly the first time this settled principle had been recognized by the Second Circuit*. See, e.g*., *FDIC v. Colonial Realty Co.*, [966 F.2d 57, 59](http://scholar.google.com/scholar?q=966++f.2d++57&btnG=&hl=en&as_sdt=6) (2d Cir. 1992) (“105(a) limits the bankruptcy courts equitable powers, which ‘must and can only be exercised within the confines of the Bankruptcy Code”) (quoting *Norwest Bank Worthington v. Ahlers*, [485 U.S. 197, 206](http://scholar.google.com/scholar?q=485++u.s.++197&btnG=&hl=en&as_sdt=6), [(1988))](http://www.google.com/search?q=(1988))). [↑](#footnote-ref-36)
37. We disagree with Appellees that *Metromedia*’s discussion of non-consenual third-party releases is dictum. (*See id.*). The actual holding in the case is that the bankruptcy court failed to make the findings in order to justify approval of such a release. *Metromedia*, [416 F.3d at 143](http://scholar.google.com/scholar?q=416+f.+3d+136&btnG=&hl=en&as_sdt=6). A discussion of what type of findings would be necessary to approve a non-consensual third-party release was, at least arguably, a necessary predicate to that holding. The *Metromedia* court’s equitable mootness ruling only justified the decision not to remand so that the missing findings could be made. We did not vacate approval of the releases on equitable mootness grounds, so it was not the actual holding in the case. [↑](#footnote-ref-37)
38. Further to the discussion of *Drexel* - the case was cited by us in *Metromedia*, but only for the proposition that a contribution to a debtor’s estate from a released third party was one factor that had in the past been relied on by a court to justify a non-debtor release. [↑](#footnote-ref-38)
39. *Manville III*, [517 F.3d at 66](http://scholar.google.com/scholar?q=517++f.3d++66&btnG=&hl=en&as_sdt=6); *Manville IV*, [600 F. 3d at 152](http://scholar.google.com/scholar?q=600++f.++3d++152&btnG=&hl=en&as_sdt=6); *In re Quigley Co.*, [676 F.3d 45](http://scholar.google.com/scholar?q=676++f.3d++45&btnG=&hl=en&as_sdt=6) (2d Cir. 2012). [↑](#footnote-ref-39)
40. The phrase “residual authority” derives from *United States v. Energy Res. Co*., [495 U.S. 545, 549](http://scholar.google.com/scholar?q=495+u.s.+545&btnG=&hl=en&as_sdt=6) (1990), which we discuss in detail below. [↑](#footnote-ref-40)
41. [11 U.S.C. §§ 507(a)(7)](http://www.google.com/search?q=11+u.s.c.++507(a)(7)), [523(a)(1)(A)](http://www.google.com/search?q=11+u.s.c.+523(a)(1)(a)). [↑](#footnote-ref-41)
42. [11 U.S.C. § 1129(a)(9)(C)](http://www.google.com/search?q=11++u.s.c.++++1129(a)(9)(c)). [↑](#footnote-ref-42)