

Insurance Coverage and Allocation Issues Conference

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BANKRUPTCY UPDATE

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Bankruptcy Update



- Significant developments in the last 12 months
 - Purdue Pharma
 - Boy Scouts
 - J&J talc bankruptcy cases
 - Truck v. Kaiser Gypsum
- Bankruptcy issues on the horizon

Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024)



- Beginning in the late-2000s, Purdue became the target of thousands of lawsuits arising out of its marketing and sale of OxyContin.
- Purdue's owners, the Sackler family, withdrew approximately \$11B from the firm, leaving it in a significantly weakened financial state.
- In 2019, Purdue filed for bankruptcy under the weight of the thousands of lawsuits filed against it.
- The bankruptcy plan ultimately provided that the Sackler family would contribute up to \$6B to the estate in exchange for a release and injunction extinguishing claims against the family and their companies.
- Second Circuit approved the plan over objections by the U.S. Trustee and certain States and individual claimants.

Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024)



- Supreme Court reverses (5-4) and remands
 - Bankruptcy code provides for a discharge of a debtor’s debts if it “proceeds with honesty and places virtually all its assets on the table for its creditors.”
 - **Non-debtor** third-party releases and injunctions are **not** authorized under the bankruptcy code without the consent of affected claimants.
- Dissent argues the majority was wrong on the law and wrong for the victims.
 - Statutory text and historical bankruptcy practice support the bankruptcy court’s broad discretion to approve plans including non-debtor third-party releases
 - Decision will have a debilitating effect for opioid victims and bankruptcy system at large
- Questions Remain:
 - What is a **consensual** third-party release?
 - When does a plan provide for the **full satisfaction of claims** against a third-party nondebtor?
 - How will the Court address plans that “**have already become effective and been substantially consummated**” prior to the *Purdue* decision?



- Filed for bankruptcy in February 2020 to address liability for sex abuse claims
- Plan confirmed on Sept. 8, 2022, went effective on April 19, 2023
- Confirmation order appealed by abuse victims and insurers of the debtors





Appeals in the District Court and Third Circuit involve, among other issues:

- Equitable mootness
- Insurance neutrality
- *Purdue* SCOTUS decision* regarding third party releases, issued on June 27, 2024



* *Harrington v. Purdue Pharma L.P.*, 144 S.Ct. 2071 (2024)

J&J Talc Bankruptcies — Overview



Texas Two-Step



J&J creates and transfers all talc-related liabilities to a new subsidiary, LTL, supported by J&J guarantee.

LTL files chapter 11 in W.D.N.C.; transferred to NJ.

LTL Loses in NJ (x2)

Round 1: Objectors move to dismiss bankruptcy; Bankruptcy Court denies motion, but Third Circuit reverses on grounds that LTL is not financially distressed.

Round 2: LTL immediately re-files in NJ; Bankruptcy Court dismisses; Third Circuit affirms.

Red River to Texas



J&J creates a new Texas entity (Red River) to settle ovarian cancer claims and submit “prepack” plan in S.D. Texas.

Bankruptcy Court rejects the plan and dismisses the case.

J&J Talc Bankruptcies — *Red River*



- Mass-voting irregularities made the Debtor’s bankruptcy plan unconfirmable
- This was not a “full pay” plan (a prior judgment against J&J exceeded the plan’s proposed payout)
- Court dismisses bankruptcy proceeding
- Objecting insurers also challenged the plan on insurance neutrality grounds

Insurance Carrier “Standing”



11 U.S. Code § 1109 (b): “**A party in interest**, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, **may raise and may appear and be heard on any issue in a case under this chapter**”.

➤ *Combustion Engineering:*

- Insurers may participate only to the extent that their prepetition rights and obligation are directly affected.
- Fashioned “super-preemptory language”:
 - Notwithstanding anything to the contrary in this Order, ... nothing in this Order, the Plan or any of the Plan documents ... shall in any way operate to, or have the effect of, impairing the insurers’ legal equitable or contractual rights, if any. The rights of insurers shall be determined under the Subject Insurance Policies or Subject Insurance Settlement Agreements, as applicable.
- Super-preemptory language > now used Insurance Neutrality Language (“INL”). Long and complex.
- The ACC / TCC often inserts INL language into Plans to prejudice insurers.

Truck v. Kaiser – “Standing”



- *Trial Court*
 - Truck is a primary carrier with unaggregated limits.
 - Truck objected to the Plan and wanted anti-fraud protections for insured claims.
 - Trial court found Truck had no standing to object or request anti-fraud measures.
- *Truck Ins. Exch. v. Kaiser Gypsum Co., 602 U.S. 268 (2024)*
 - Unanimous decision.
 - Defines a “party in interest” as “entities that are potentially concerned with or affected by a proceeding.”
 - Held Truck was a “party in interest.” As an insurer with financial responsibility for a bankruptcy claim, Truck was sufficiently concerned with, or affected by, the bankruptcy proceeding.
 - Truck is allowed to raise objections to a reorganization Plan.

Truck v. Kaiser – “Standing”



- *Truck Ins. Exch. v. Kaiser Gypsum Co., 602 U.S. 268 (2024) (con’t)*
 - Examples of why insurers are parties in interest.
 - Criticized the insurance neutrality doctrine.
 - Remanded back to Fourth Circuit Court of Appeals to decide whether Truck can require the bankruptcy Plan to protect Truck through anti-fraud measures.
- *Fourth Circuit – April 29, 2025 opinion*
 - Rejected Truck’s objections
 - No clear error in district court’s conclusion that the Plan was reached in good faith even though anti-fraud measures were not being applied to all claims.

Bankruptcy Issues on the Horizon



- Whether opt-out releases are consensual
- Sensitive customer data in bankruptcy cases (*23andMe*)
- Potential Congressional action against Texas two-steps
- Debtors' continued search for friendly new venues