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"We're Not in Kansas Anymore": U.S. and Foreign Companies in U.S. and Foreign Bankruptcies

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The New Brazilian Cross-Border Insolvency Framework and the Adoption of the JIN Guidelines for Direct Communication and Cooperation Between Courts

By the Honorable Daniel Carnio Costa, Permanent Judge at the First Bankruptcy Court of São Paul, Brazil and Lecturer at INSOL, and Frederico A. O. de Rezende, INSOL Fellow, Lawyer, and Judicial Administrator

The impact of technological innovations and behavioral changes is directly reflected by the way justice is administered. The COVID-19 pandemic caused a rapid acceleration and improvement of the use of digital tools by the courts, which aimed to keep the courts fully operational, even during health-related measures of social distancing.

The activities of the judiciary branch in Brazil went uninterrupted, even during the most critical periods of social distancing measures imposed by the COVID-19 pandemic, due to the virtualization of jurisdictional activities. As to the courts with jurisdiction over bankruptcy and judicial reorganization proceedings, Brazil's National Council of Justice issued Recommendation n.63 in March 2020. The purpose of the Recommendation was to advise local judges on how to handle insolvency cases in light of the pandemic in order to mitigate COVID's impact on companies; encourage decisions like prioritized analyses withdrawal requests of creditors and debtors; suspend in-person general meetings of creditors and convert them into online meetings; extend the stay period; authorize the presentation of modified judicial reorganization plans in the event that compliance with original plans was impossible; and allow judicial administrators/trustees to virtually oversee the activities of companies being reorganized.

Along the same lines, in October 2020, the National Council of Justice approved Resolution n.345, which allowed state courts to function digitally, conducting judicial proceedings exclusively via electronic and remote means with no in-person appearances required at any time.

Amid all of the changes that were instituted as a result of the COVID-19 pandemic, there was also great concern for companies in financial distress, which led to efforts to reform Brazil's reorganization and bankruptcy law, culminating with the enactment of Law n. 14.112/2020 on January 23, 2021. The law instituted substantial changes in the Brazilian insolvency framework and sought to modernize the legal instruments for dealing with companies' financial difficulties, including the full adoption of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law for cross-border insolvencies.

The reform of Brazilian insolvency legislation and the regulatory acts issued by the National Council of Justice are aimed at improving the business environment, unlocking the nation's economy, and working toward better governance in judicial reorganization and bankruptcy processes. As a result, Brazilian indicators in the World Bank's "Doing Business" Report have improved.

Brazilian insolvency legislation underwent a major reform after the enactment of Law n. 14.112/2020. Diverging from the state-sovereignty-based territorial model of bankruptcy legislation, the new law introduced the concept of transnational insolvency into Brazilian law (Articles 167-A to 167-Y of Law n. 11.101/2005) and, with the adoption of the UNCITRAL Model Law, centered on a post-universalist model.

The modernization of the Brazilian insolvency system reflects a major advance for the country. Despite Brazil having one of the largest economies in the world and holding a prominent position in the World Economic Outlook Database of the International Monetary Fund (IMF), and despite the large influx of international investments, bankruptcy legislation did not provide for specific rules for the transnationality of corporate business.

When making financial resources available to companies located in Brazil, the international investor wants to find an environment that is both friendly and predictable, with clear rules that offer efficient and fair solutions for handling corporate insolvency between domestic and foreign creditors.

In this reform scenario—and in view of Brazil's adoption of the UNCITRAL Model Law for cross-border insolvencies—the National Council of Justice issued Resolution n.394[1] on May 18, 2021. The Resolution institutes rules on cooperation and direct communication with foreign insolvency courts for the processing and judging of cross-border insolvency proceedings. Specifically, Resolution n. 394 implements the changes introduced in the national legal system—through Law n. 14.112/2020—to regulate and control transnational insolvency (Articles 167-A to 167-Y of Law n. 11.101/2005).

Direct cooperation between Brazilian judges and foreign authorities or representatives is addressed in Articles 167-P and 167-Q of Law n. 11.101/2005. The articles provide for waiver of the issuance of rogatory letters, direct assistance procedures, and similar formalities.

In practice, National Council of Justice Resolution n.394 adopted the rules of communication and cooperation among courts, insolvency representatives, and other parties involved in cross-border insolvency proceedings, proposed by the Judicial Insolvency Network ("JIN") Guidelines. Those Guidelines have been adopted by courts around the world, including the United States Bankruptcy Court for the District of Delaware, the Southern District of New York, the Southern District of Texas, and the Southern District of Florida; the Chancery Division of England and Wales; the Federal Court of Australia; the Seoul Bankruptcy Court (in South Korea); the Supreme Court of British Columbia (in Canada); the Supreme Court of Singapore; and the Grand Court of the Cayman Islands.[2] Brazil has become the sixteenth jurisdiction to be included on the list of courts that have adopted the JIN Guidelines.[3]

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[1] *See* https://atos.cnj.jus.br/atos/detalhar/3956.

[2] For an updated list of countries, *see* http://www.jin-global.org/jin-guidelines.html.

[3] *See* http://www.jin-global.org/jin-guidelines.html. The JIN was established in October 2016 by a group of judges from England and Wales, Australia, Bermuda, British Virgin Islands, Canada, Cayman Islands, Singapore, and the United States of America. The JIN Guidelines "address key aspects of and the

Although Resolution n.394 addresses the rules of cooperation and direct communication among insolvency courts in the national legal system, the origin of the guidelines that inspired it is international. It is worth highlighting the caveat contained in Guideline 6 of Annex I of the Resolution, which provides as follows: "In interpreting such guidelines or any insolvency protocol or decision established in compliance with these guidelines, the international origin of the instrument and the need to promote good faith and uniformity in its application must be followed."

The Guidelines are consistent with the provision set forth in Paragraph 1 of Article 167-A of the Brazilian Bankruptcy Law (Law n. 11.101/2005), which sets forth the following: "In interpreting the provisions of this Chapter, its objective of international cooperation, the need for uniform application and the observance of good faith must be considered."

The Guidelines in connection with the established rules are based on speed, transparency, and good faith and focus on achieving the objectives provided for in the UNCITRAL Model Law: "(i) authorize and encourage cooperation and coordination between jurisdictions; (ii) promote the equitable and efficient management of international insolvencies, aiming to protect the interests of all creditors and other parties involved, including the debtor; (iii) maximize the value of the debtor's assets; (iv) establish greater legal security for international trade and investments; (v) enable the recovery of companies experiencing difficulty, preserving investments and jobs."[4]

In short, the Resolution provides that judicial authority must coordinate or manage concurrent proceedings, with special attention to the provisions of Articles 167-R to 167-Y of Law n. 11.101/2005, whose effects will be different, depending on whether there is recognition by a foreign proceeding as principal. The greater the transparency in communication and cooperation between the authorities involved, the lower the costs of the proceeding and the litigation between the parties.

To reduce the costs of various proceedings, information that might be shared includes reports related to assets and values existing in the national territory, as well as information about companies—those that are insolvent or in judicial recovery—and their partners, which may facilitate collection with respect to subsequent settlement of liabilities. Other examples of information and documents that can be exchanged between judicial authorities are copies of judicial decisions or judgments, informal writings with general information and observations, and copies of court proceedings, all of which can be distributed or communicated by telephone, facsimile, email, or other appropriate means.

In this regard, when signing insolvency protocols for direct communication and cooperation, Brazilian judges must observe the following guidelines:

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modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings. The overarching aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs." *Id.*

[4] Daniel Carnio Costa, Os impactos do PL 6.229/05 na insolvência transnacional. In: SALOMÃO, Luis Felipe; GALDINO, Flávio (coordenadores). Análise de impacto legislativo na recuperação e na falência, Rio de Janeiro: Editora J&C, 2020, p. 85.

1 – Court-to-court communication for the purpose of coordinating or deciding on material or procedural issues may be carried out by any means that allow for the participation of the parties as observers, except in exceptional situations to be defined in the insolvency protocol, whereby the parties will not have any participation in the act;

2 – In the event of participation by the parties, they must be summoned or subpoenaed no fewer than five (5) days in advance, except in cases of court-recognized urgency;

3 – The communications referred to in item 1, when public, shall be recorded and freely accessible to the parties to the suit; and

4 – The place and time of communication between the courts will be defined by mutual agreement by the courts themselves.

The courts may hold joint hearings, if they deem it appropriate and pertinent to the achievement of the cooperation goals, pursuant to the rules defined in the insolvency protocol and in fulfillment of the guidelines contained in the cooperation guide and direct communication between insolvency courts of the JIN. When holding joint hearings, the Resolution provides for the possibility of participation by the foreign court, as well as the parties involved, who may present claims during the performance of the act, to be decided by the judicial authority, within the strict limits of the matter under its jurisdiction.

The provision contained in Annex I of the Resolution, related to joint hearings (Annex A) which permits a judge to authorize a foreign lawyer or party in another jurisdiction to be heard, presents the due requests. There is also provision for the judges involved to communicate, after the joint hearing, even without the presence of lawyers and parties, in order to resolve outstanding matters.

The general objective of the guidelines is "to increase, in the interest of all interested parties, the efficiency and effectiveness of cross-border proceedings relating to insolvency or the adjustment of debts declared in more than one jurisdiction ("competing proceedings"), in order to reinforce coordination and cooperation between the courts that conduct such processes."

In conclusion, the Brazilian reform of the insolvency legislation, along with the regulatory acts issued by the National Council of Justice, have begun to widely allow the use of technological tools in online environments to deal with the financial distress of companies. Likewise, the adoption of the cross-border insolvency regulation and the rules of best practices proposed by the JIN Guidelines for direct communication and cooperation have made the business environment in Brazil more internationalized and transparent. Thus, there will likely be greater legal certainty and efficiency in dealing with companies having financial difficulties, which will, in turn, result in investment and the attraction of foreign capital for business development in Brazil.

Comity Is Key: Nonconsensual Third-Party Releases Alive and Well in Chapter 15 Despite Recent Decisions Casting Doubt in Chapter 11 Context

By Lisa Laukitis, Peter Newman, Justin Winerman, and Anthony Joseph

Decisions in some recent chapter 11 cases, including *In re Purdue Pharma, L.P.*, have garnered a lot of attention and caused judges to take pause before granting approval of non-consensual third-party releases in the chapter 11 context.[1] Despite the publicity and increased uncertainty with respect to non-consensual third-party releases in chapter 11 cases, those decisions do not (and should not) affect the ability to obtain such releases in chapter 15 cases.

A critical aspect of this distinct treatment is that chapter 15 is different from chapter 11 in both its purpose and its statutory framework. In contrast to chapter 11's goal of facilitating restructurings in the United States, the primary goal of chapter 15 is to facilitate cooperation between U.S. and foreign courts through "ancillary" cases commenced to aid foreign insolvency cases.[2] In furtherance of—and to assist in effectuating—this purpose, the Bankruptcy Code provides statutory authority in chapter 15, not available in chapter 11, to provide relief that is consistent with principles of comity, even where such relief may not be available under the Bankruptcy Code or other U.S. law.[3] For instance, a number of courts have agreed that sections 1507 and 1521 authorize recognition and enforcement of non-consensual third-party releases

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[1] *See In re Purdue Pharma, L.P.*, 635 B.R. 26, 38 (S.D.N.Y. 2021), *rev'd sub nom. Purdue Pharma, L.P. v. City of Grand Prairie (In re Purdue Pharma, L.P.)*, 69 F.4th 45 (2d Cir. 2023); *see also Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, at *702–03 (E.D. Va. 2022) (invalidating plan's third-party releases because bankruptcy court "plainly lacked the constitutional power to adjudicate" certain claims covered by the releases). *But see In re Mallinckrodt PLC*, 639 B.R. 837, 868, n.70 (Bankr. D. Del. 2022) (approving non-consensual third-party releases in mass tort context and noting that "the Third Circuit . . . has recognized that bankruptcy courts do have statutory and constitutional authority to approve a plan of reorganization that contains non-consensual third-party releases, *albeit*, only in extraordinary cases").

[2] *See* 11 U.S.C. § 1501.

[3] *See* 11 U.S.C. §§ 1507 ("[T]he court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States") & 1521 ("Upon recognition of a foreign proceeding, . . . the court may, at the request of the foreign representative, grant any appropriate relief"); *see, e.g.*, *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) ("'[R]elief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity.'" (quoting *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y.2008))); *In re Sino-Forest Corp.*, 501 B.R. 655, 662 (Bankr. S.D.N.Y. 2013) ("'The relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical. A U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court. The key determination required by this Court is whether the procedures used in Canada meet our fundamental standards of fairness.'" (quoting *Metcalfe*, 421 B.R. at 697)); *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603, 616 (Bankr. S.D.N.Y. 2018) ("In deciding whether to grant appropriate relief or additional assistance under chapter 15, courts are guided by principles of comity and cooperation with foreign courts."); *see also Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de CV (In re Vitro S.A.B. de CV)*, 701 F.3d 1031, 1060–62 (5th Cir. 2012) (noting that section 1507 is meant to "provide relief not otherwise available under [the Bankruptcy Code or other] United States law").

granted by a non-U.S. court, even if such releases would not otherwise be available under U.S. law.[4]

In light of this statutory authority in chapter 15, applicable case law holds that U.S. bankruptcy courts should enforce third-party releases approved in foreign proceedings as long as the foreign proceedings comport with U.S. notions of fundamental fairness and just treatment of creditors.[5] Accordingly, as shown in at least a few recent chapter 15 cases, establishing a robust record on fundamental fairness in the foreign proceeding is key to obtaining such releases in chapter 15 on the basis of comity.

This article first reviews chapter 15 jurisprudence on non-consensual third-party releases. The article then examines recent chapter 11 decisions on non-consensual third-party releases. Finally, the article explains why, for the reasons above, those decisions do not affect the continued availability of non-consensual third-party releases in chapter 15.

Chapter 15 Jurisprudence on Non-Consensual Third-Party Releases

Beginning with the case of *In re Metcalfe & Mansfield Alternative Investments*, several U.S. courts have extended comity to foreign court orders and found that Bankruptcy Code section 1507 authorizes recognition and enforcement of non-consensual third-party releases granted by a non-U.S. court, even if such releases would not otherwise be available under U.S. law.

In re Metcalfe & Mansfield Alt. Invs.: In *Metcalfe*, the U.S. Bankruptcy Court for the Southern District of New York evaluated a request to recognize non-consensual third-party releases granted pursuant to a Canadian court order.[6] The bankruptcy court noted that a recent Second Circuit decision had rendered "uncertain" whether a bankruptcy court had jurisdiction to

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[4] *Metcalfe*, 421 B.R. at 696 ("[P]rinciples of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case."); *Vitro*, 701 F.3d at 1062 (noting that "although our court has firmly pronounced its opposition to such releases, relief is not thereby precluded under § 1507, which was intended to provide relief not otherwise available under the Bankruptcy Code or United States law"); *Sino-Forest Corp.*, 501 B.R. at 663 (finding that "[s]imilar to *Metcalfe*, relief here is proper as 'additional assistance' under section 1507 of the Bankruptcy Code"); *Avanti*, 582 B.R. at 618 ("The Court concludes that schemes of arrangements sanctioned under UK law that provide third-party non-debtor guarantor releases should be recognized and enforced under chapter 15 of the Bankruptcy Code.").

[5] *See, e.g.*, *Metcalfe Invs.*, 421 B.R. at 696 ("Section 1507 directs the court to consider comity in granting additional assistance to the foreign representative"); *Sino-Forest Corp.*, 501 B.R. at 664 (noting that "the factors identified in section 1507(b)(1)–(5)" which include, among other things, consideration of just treatment of creditors, are "required to be considered in determining whether to extend comity in a case under chapter 15"); *Avanti*, 582 B.R. at 616 ("In deciding whether to grant appropriate relief or additional assistance under chapter 15, courts are guided by principles of comity and cooperation with foreign courts.").

[6] *Metcalfe*, 421 B.R. at 687.

grant such a release in chapter 11.[7] Nonetheless, the *Metcalfe* court approved the releases in the chapter 15 context. In reaching its conclusion that such releases may be recognized when granted by foreign courts, the court noted as follows:

> This Court is not being asked to approve such provisions in a plenary case; rather, the Court is being asked to order enforcement of provisions approved by Canadian Courts. . . . [P]rinciples of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case.[8]

The bankruptcy court noted that the Canadian court had evaluated and dismissed challenges to its own jurisdiction to grant the release. Thus, the bankruptcy court, relying on those findings, approved the releases despite case law that created doubt as to a bankruptcy court's jurisdiction to grant non-consensual third-party releases in chapter 11.

In re Sino-Forest Corp.: Subsequently, the U.S. Bankruptcy Court for the Southern District of New York reaffirmed its decision in *Metcalfe*. In *In re Sino-Forest*, the court found that the parties had a full and fair opportunity to litigate third-party releases in Canada and that extending comity does not contravene any of the principles outlined in section 1507(b).[9] The court noted that "the Canadian court's decision to approve the non-debtor release reflected similar sensitivity to the circumstances justifying approving such provisions as those considered by U.S. courts."[10] For that reason, the bankruptcy court agreed that the third-party releases should be recognized and enforced in the United States.[11]

In re Avanti Commc'ns Grp. PLC: In this case, the U.S. Bankruptcy Court for the Southern District of New York agreed to recognize an English-law scheme of arrangement that provided for the release of non-debtor subsidiary guarantees.[12] The court distinguished *Vitro*, in which it had denied U.S. enforcement of third-party releases contained in a foreign restructuring plan because the foreign plan had been approved primarily by insider votes, and a majority of non-insider creditors had not voted in favor of the plan.[13] In contrast, the *Avanti* court held that the English-law scheme adequately provided for creditor voting and that such creditors

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[7] *Id.* at 694–95 (citing *In re Johns-Manville Corp.*, 517 F.3d 52 (2d Cir. 2008), *rev'd sub nom. Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009)).

[8] *Id.* at 696.

[9] *Sino-Forest Corp.*, 501 B.R. at 662–66.

[10] *Id.* at 665–66 (internal quotations omitted).

[11] *See id.* at 662.

[12] *Avanti,* 582 B.R. at 605.

[13] *Id.* at 617–18 (discussing *Vitro)*.

overwhelmingly voted in favor of the releases.[14] The court noted that failure to recognize the releases could "result in prejudicial treatment of creditors to the detriment of the Debtor's reorganization efforts and prevent the fair and efficient administration of the [r]estructuring."[15] Thus, the court recognized and enforced the scheme, including the releases.

* * *

These cases illustrate that the role of the bankruptcy court evaluating non-consensual third-party releases in a chapter 15 case is not to determine whether such releases are appropriate under U.S. law but rather to decide whether recognition and enforcement of such releases are a proper exercise of comity.[16] To satisfy this standard, the foreign proceedings should, in line with the statutory authority provided under Bankruptcy Code sections 1507 and 1521, satisfy U.S. notions of fundamental fairness and just treatment of creditors.

Purdue Decision and Its Progeny

In re Purdue Pharma, L.P.: In the highly publicized *Purdue Pharma* decision, the U.S. District Court for the Southern District of New York vacated the bankruptcy court's order confirming the plan of reorganization of oxycontin manufacturer Purdue Pharma, L.P. and its affiliated debtors.[17] Purdue and its owners, the Sackler family, were defendants in more than 2,600 civil actions at the time of Purdue's bankruptcy filing. Those actions generally alleged that Purdue and the Sacklers acted improperly in the sale and marketing of opioids. The releases sought to release and discharge claims against the Sackler family and their related entities that third parties, including state and other personal injury litigants, asserted or might assert in the future.

The district court's *Purdue* decision held that bankruptcy judges lack statutory authority under the Bankruptcy Code to approve non-consensual third-party releases of creditors' direct claims in chapter 11 cases.[18] On May 30, 2023, the Second Circuit Court of Appeals affirmed the bankruptcy court's confirmation order and reversed the district court's holding that the Bankruptcy Code does not permit non-consensual third-party releases of direct claims.[19] The case is currently on appeal to the United States Supreme Court.

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[14] *Id.* at 618–19.

[15] *Id.* at 619.

[16] *See In re Sino-Forest Corp.*, 501 B.R. at 662 ("[T]he correct inquiry in a chapter 15 case [is] not whether the [foreign] orders [granting third-party releases] could be enforced under U.S. law in a plenary chapter 11 case, but whether recognition of the [foreign] courts' decision was proper in the exercise of comity in a case under chapter 15." (citing *In re Metcalfe*, 421 B.R. at 696)).

[17] *Purdue Pharma*, 635 B.R. at 37–38.

[18] *Id.* at 97–98.

[19] *Purdue Pharma, L.P. v. City of Grand Prairie (In re Purdue Pharma, L.P.)*, 69 F.4th 45 (2d Cir. 2023).

Patterson v. Mahwah Bergen Retail Grp., Inc.: In consolidated appeals challenging the confirmation order of debtor Mahwah Bergen Retail Group, Inc. (formerly known as Ascena Retail Group, Inc.) filed by the U.S. Trustee and certain securities fraud plaintiffs, the U.S. District Court for the Eastern District of Virginia invalidated the plan's non-consensual third-party releases, which would have barred, among other things, claims brought by the securities plaintiffs. In his memorandum opinion, District Judge David J. Novak referenced the *Purdue* decision's reasoning with respect to non-consensual third-party releases in chapter 11[20] before ultimately holding that, under the U.S. Supreme Court's decision in *Stern v. Marshall*,[21] the bankruptcy court exceeded its constitutional authority by extinguishing a wide swath of claims in approving the third-party releases without first determining whether it had jurisdiction to do so and without conducting the analysis required by applicable Fourth Circuit precedent to approve such releases.[22] Finding that the bankruptcy court did in fact lack jurisdiction over such claims and that the releases failed to satisfy the factors for approval under such precedent, the district court vacated and remanded the case for further proceedings consistent with the opinion.[23]

In re Mallinckrodt PLC: In contrast, the U.S. Bankruptcy Court for the District of Delaware confirmed opioid manufacturer Mallinckrodt PLC's chapter 11 plan, including the plan's non-consensual third-party releases. Similar to the Purdue debtors, Mallinckrodt faced substantial opioid litigation, and the third-party releases contained in the plan sought to release such claims, among others. In his opinion, Judge John T. Dorsey specifically addressed both the *Purdue* and the *Ascena Retail* decisions, noting that:

> While I am cognizant of the objection by the U.S. Trustee that Section 524(e) of the Code should be read to preclude non-debtor releases, I disagree with the notion that releases are the equivalent of a discharge. I am also aware of the recent rulings from courts in the Second Circuit and the Fourth Circuit that hold otherwise. In this case, however, I am applying the law of the Third Circuit which has recognized that bankruptcy courts do have statutory and constitutional authority to approve a plan of reorganization that contains non-consensual third-party releases, *albeit*, only in extraordinary cases.[24]

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[20] *Mahwah Bergen Retail Grp.,* 636 B.R. at 654 ("Third-party releases, such as those at issue here, carry much controversy, for they are a 'device that lends itself to abuse.' . . . And a District Judge in the Southern District of New York recently concluded in a thoughtful opinion that no statutory basis exists for their use (citing *Purdue Pharma*). The *Mahwah Bergen* court noted that "[t]he ubiquity of third-party releases in the Richmond Division demands even greater scrutiny of the propriety of such releases. And[] their prevalence also undermines assertions that they are integral 'to the success of this particular reorganization plan. As District Judge Colleen McMahon astutely observed: "'When every case is unique, none is unique.'" *Id.*

[21] 564 U.S. 462 (2012).

[22] *Mahwah Bergen Retail Grp.,* 636 B.R. at 668.

[23] *Id.* at 703.

[24] *Mallinckrodt*, 639 B.R. at 868 n.70 (internal citations omitted).

Judge Dorsey ultimately concluded that the releases were necessary to the reorganization and satisfied applicable Third Circuit requirements.

Recent Chapter 15 Decisions

Even after some of these recent decisions raised questions about the permissibility of non-consensual third-party releases in chapter 11, such releases were upheld in a number of chapter 15 cases, two of which are notable for the bankruptcy court's specific pronouncements on the issue.[25]

In re Huachen Energy Co. Ltd.: Huachen Energy, a thermal power generator in the People's Republic of China (the "PRC"), sought chapter 15 recognition in the United States Bankruptcy Court for the Southern District of New York of a financial restructuring of its funded debt, including approximately $578 million of New York-law governed senior secured notes, pursuant to a reorganization plan under the PRC Enterprise Bankruptcy Law.

The third-party releases released noteholder claims against certain non-debtor parties involved with the restructuring, including the notes trustee, the tabulation agent, the notes collateral agent, and other agents and relevant parties related to the notes or the restructuring. U.S. Bankruptcy Judge Lisa G. Beckerman granted recognition of the Huachen reorganization plan, including the third-party releases. In approving the releases, Judge Beckerman noted:

> Non-consensual third-party releases and what constitutes consent for a third-party release given in connection with a Chapter 11 plan of reorganization remain[] controversial under the United States Bankruptcy Code especially in light of the recent [*Purdue* decision]. . . .
>
> However, this Court is not being asked to approve non-consensual third-party releases under the U.S. Bankruptcy Code, but rather, to determine whether the recognition of the PRC's decision is a proper exercise of [comity] in a Chapter 15 case.[26]

Accordingly, the bankruptcy court "provide[d] additional assistance in the form of recognizing and enforcing the releases in the plan" under Bankruptcy Code sections 1507 and 1521.[27] The court noted that creditors had a full and fair opportunity to vote on the plan and to be heard in the underlying proceedings based on the information and notice provided. As a result,

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[25] *See also, e.g., In re RongXingDa Dev. (BVI) Ltd.*, No. 22-10175 (DSJ) (Bankr. S.D.N.Y. Mar. 14, 2022) (recognizing, on certificate of no objection and without a hearing, British Virgin Islands scheme of arrangement containing third-party releases); *In re PT Pan Brothers Tbk*, No. 22-10136 (MG) (Bankr. S.D.N.Y. Mar. 8, 2022) (recognizing non-main proceeding regarding Singaporean scheme of arrangement and enforcing third-party releases under a deed of release).

[26] Hr'g Tr. at 18:23–19:10, *In re Huachen Energy Co. Ltd.*, No. 22-10005 (LGB) (Bankr. S.D.N.Y. Feb. 1, 2022) (hereinafter, the "Huachen Hearing Transcript").

[27] Huachen Hr'g Tr. at 20:3–5; 20:20–21:3.

the court found that "[p]rinciples of [comity] permit a United States Bankruptcy Court to recognize and enforce this plan."[28]

In re Markel CATCo Reinsurance Fund Ltd.: Judge Beckerman similarly enforced broad, third-party releases as part of the Markel CATCo chapter 15 cases.[29] Notably, while Judge Beckerman indicated that there has been resistance to granting non-consensual third-party releases in the chapter 11 context, she encouraged the creative use of foreign restructuring tools and chapter 15 to achieve a result that may not be possible in a chapter 11 case.[30]

Markel CATCo and its affiliated debtors ("CATCo" or the "CATCo Debtors") consisted of a Bermuda-based investment fund business that raised capital to invest in reinsurance products. After suffering historic losses in 2017 and 2018, the CATCo business began a run-off in 2019 to return remaining capital to investors as the underlying insurance policies were settled.

In 2020, an investor sued the former CATCo CEO on account of its losses. Although this first suit was quickly settled, other investors also asserted or threatened to assert similar claims. Any successful investor claims would ultimately be paid from fund assets due to various indemnities between the CATCo entities and their officers and would therefore reduce assets available for distribution to fund investors in the run-off. Investors were thus incentivized to assert claims in order to keep other investors from benefiting by jumping the queue. Additionally, as the total amount of investor losses significantly exceeded the amount of cash remaining in the funds, the CATCo funds became unable to make further distributions to investors, as they needed to reserve funds for any potential investor claims.

To (a) resolve the uncertainty about further investor litigation; (b) ensure that all investors were treated alike and that none gained an unfair advantage through litigation; and (c) facilitate the expeditious return of funds to investors, the CATCo Debtors proposed a buy-out transaction (the "Buy-Out Transaction") under which the CATCo Debtors' parent, Markel Corporation, would fund the return of substantially all of the investors' remaining capital invested in the CATCo Debtors, as well as the investors' pro rata shares of certain additional cash consideration,[31] in exchange for comprehensive, third-party releases of any claims such investors may have been holding against the CATCo Debtors, Markel Corporation, and their affiliates, including claims for gross negligence, willful misconduct, and fraud (the "Releases").

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[28] *Id.* at 20:13–15.

[29] Skadden represented the foreign representatives of the CATCo Debtors in these chapter 15 cases.

[30] *See* Hr'g Tr. at 27:2–10, *In re Markel CATCo Reinsurance Fund Ltd.*, No. 21-11733 (LGB) (Bankr. S.D.N.Y. Mar. 16, 2022) (hereinafter, the "Enforcement Hearing Transcript") (noting that the buy-out transaction at issue "was an interesting and unique way of dealing with a restructuring problem and one that actually I'm sure people will be interested in looking at, and perhaps utilizing the methodology in the future" and "appear[s] to be a well thought out and uncommon but creative use of various provisions in Bermuda law, as well as obviously just overall restructuring proceedings").

[31] Additionally, Markel Corporation covered the costs of the transaction so that such costs did not reduce the distributable amounts available to investors.

To implement the Buy-Out Transaction, the CATCo Debtors entered Bermudian provisional liquidation proceedings, and the CATCo funds proposed schemes of arrangement (the "Schemes") to their investors (the "Scheme Creditors") and sought U.S. chapter 15 recognition and enforcement of those Bermudian proceedings. Following negotiations and settlements with certain key investors who had objected to the Schemes, the Supreme Court of Bermuda (the "Bermuda Court") approved the Schemes and, in particular, the Releases. In a judgment, dated February 25, 2022 (the "Judgment"), the Bermuda Court found that:

> (a) the Releases are necessary in order to give effect to the proposed arrangement between the Scheme Companies and the Scheme Creditors; (b) the Releases are necessary for the Schemes to achieve their purposes; and (c) there is a sufficient nexus between the relationship between the Scheme Creditor and the Scheme Company on the one hand, and the release of Investor Claims against all of the Released Parties on the other hand. Thus, I am satisfied that the Releases fall within the jurisdiction of [the Bermuda Companies Act, governing schemes of arrangement].[32]

Judge Beckerman recently recognized and enforced the same in the CATCo Debtors' chapter 15 cases, noting that while non-consensual third-party releases are still controversial in chapter 11, especially in light of the *Purdue* decision,

> this Court is not being asked in this case to approve nonconsensual third-party releases under the United States Bankruptcy Code in connection with a plan of reorganization, but instead is being asked to determine whether recognition of the Bermuda court's decision is a proper exercise of comity in a case under chapter 15 in connection with the sanctioned schemes that were approved by the Bermuda court.[33]

The CATCo Debtors established a fulsome record to overcome any concerns that the bankruptcy court may have had with respect to the Releases.[34] Among other things, the CATCo Debtors presented as evidence a declaration from local Bermuda counsel attesting to the permissibility of third-party releases under Bermuda law, the Bermuda Court's judgment approving the Releases, and key submissions in the Bermuda proceedings illustrating how the Releases were repeatedly disclosed to and considered by the Scheme Creditors.

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[32] Judgment ¶ 87.

[33] Enforcement Hr'g Tr. at 21:23–22:5.

[34] *Cf. In re PT Bakrie Telecom Tbk*, 628 B.R. 859, 882–85 (Bankr. S.D.N.Y. 2021) (denying approval of third-party releases in Indonesian restructuring plan where there was "no clear and formal record that sets forth whether or how the foreign court considered the rights of creditors when considering th[e] third-party release" there and stating that, as such, "relying on the [Indonesian] Commercial Court Judgment [approving the restructuring plan] is insufficient where it does not provide any justification for the release, either under Indonesian law or otherwise").

Based on this robust record, Judge Beckerman stated: "[T]he [Bermuda] Court has clearly ruled that those [releases] are permissible under Bermuda law, both with respect to the statute and also with respect to the cases cited in the motion and the declaration that was filed by [local Bermuda counsel] as well."[35] In addition, the court noted that "[e]xtending comity to the releases and the injunction and other parts of the scheme sanction orders, and the schemes themselves, does not affect the just treatment of creditors."[36]

Therefore, even though Judge Beckerman pointed out that "there might be an issue if [releases with no carveouts for gross negligence, willful misconduct, and fraud] were done in a United States Chapter 11 plan, in addition to the issue of nonconsensual third-party releases, as a whole, and whether those are appropriate or legal, or satisf[y] . . . Second Circuit principles," those issues were not before her in the chapter 15 context.[37] Instead, because "principles of enforcement of foreign judgments and comity in the chapter 15 cases strongly counsel approv[al] of enforcement in the United States of third-party nondebtor release and injunction provisions, even if those provisions could not be entered in a plenary Chapter 11 case," the bankruptcy court granted the enforcement motion, including enforcement of the Releases.[38]

As a result of the enforcement of the Releases in the United States, the CATCo Debtors were able to successfully complete their restructuring and effectuate the Buy-Out Transaction.

Conclusion

As these two recent cases show, non-consensual third-party releases remain alive and well in chapter 15 despite the controversy they are causing in chapter 11 after the *Purdue* decision. Given that chapter 15 is different in purpose and statutory framework, the cases interpreting chapter 15 continue to permit non-consensual third-party releases even if they might be impermissible in chapter 11. The key to approval in chapter 15 is producing a fulsome record demonstrating fundamental fairness and just treatment of creditors so that a U.S. bankruptcy court is comfortable enforcing the releases as a matter of comity.

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[35] Enforcement Hr'g Tr. at 22:22–23:1.

[36] Enforcement Hr'g Tr. at 23:2–5

[37] Enforcement Hr'g Tr. at 22:12–21.

[38] Enforcement Hr'g Tr. at 22:6–11.

The Next Chapter in Mass Tort Litigation: Chapter 15 and Non-Consensual Third-Party Releases

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ABSTRACT

This paper analyzes whether chapter 15 authorizes United States bankruptcy courts to enforce non-consensual third-party releases granted in foreign restructurings. The paper argues that the enforcement of non-consensual third-party releases is not authorized by chapter 15, primarily because a non-consensual third-party release is effectively a permanent injunction, and injunctions issued by foreign courts are traditionally not enforceable under the federal common law of comity. Additionally, in the context of mass tort litigation, there are explicit statutes preserving the right to a trial by jury, and chapter 15 conflicts with those statutes to the extent that it allows a bankruptcy court to extinguish a serious tort creditor's right to a jury trial against a non-debtor. This paper should not be construed to suggest any limitation on the ability of bankruptcy courts to grant injunctive relief consistent with the provisions of chapter 15 *for the debtor in bankruptcy*. The paper merely argues that chapter 15 does not authorize the enforcement of permanent injunctions that protect the U.S.-based assets of foreign entities, when those foreign entities have not filed for bankruptcy themselves.

The "Introduction" portion of this paper gives a brief history of chapter 15's implementation and purpose. The introduction also explains what a non-consensual third-party release is in plain terms and why, in most instances, Judge Colleen McMahon's language in *Purdue Pharma* describing this legal maneuver as the "non-consensual release of direct claims against a non-debtor" is the more accurate phraseology. Whether the phrase "non-consensual third-party release" or "non-consensual release of direct claims against a non-debtor" is used, the reader is best served by keeping in mind the specific legal action that these phrases describe: The court is permanently enjoining a creditor of a debtor from pursuing a related claim against a non-debtor, *even if* the enjoined creditor did not consent to the plan or participate in the plan confirmation process.

The "Discussion" section begins with an analysis of the case law on enforcing non-consensual third-party releases in chapter 15. The paper proceeds to explain why non-consensual third-party releases are not authorized by the federal common law of comity and then considers what kinds of injunctions are actually authorized by chapter 15. The paper also raises the issue of

[1] This paper was prepared for Professor Jay Westbrook's spring 2023 International Litigation Seminar. I would like to thank Professor Westbrook for his help and guidance in preparing this paper.

the limits placed on bankruptcy courts by 28 U.S.C. § 1411. Finally, the paper concludes with a summary of the points made.

INTRODUCTION

I. CHAPTER 15: A BRIEF OVERVIEW

Chapter 15 of the United States Bankruptcy Code was enacted in April of 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").[2] Despite its inclusion in a consumer-focused amendment to the Bankruptcy Code, chapter 15 concerns itself primarily with the insolvency of international corporations.[3] The language of chapter 15 was adopted from the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law ("UNCITRAL") at its Thirtieth Session on May 12–30, 1997.[4]

The purpose of the Model Law, and therefore chapter 15, is to facilitate the efficient reorganization of entities with assets and liabilities spread across multiple sovereign jurisdictions.[5] Chapter 15 is the only chapter of the Bankruptcy Code with an introductory section explaining its explicit purpose and objectives.[6] Section 1501 makes it clear that chapter 15 was enacted to: (1) increase cooperation between United States courts and foreign insolvency proceedings, (2) improve certainty in trade and investment, (3) provide for fair administration of cross-border disputes, (4) maximize the value of the debtor's assets, and (5) facilitate the rehabilitation of distressed businesses to preserve investment and employment.[7]

To help facilitate international cooperation, section 1507 of chapter 15 provides U.S. courts with the broad authority to grant "additional assistance" as needed to facilitate successful reorganizations.[8] In essence, section 1507 allows the court to take whatever actions are necessary and appropriate to maximize recovery in the reorganization, unless the actions are prohibited in other sections of chapter 15.[9] The United States bankruptcy practitioner will likely read the previous sentence and recognize the similarities of section 1507's function to section 105's function.[10] Whether a bankruptcy court has the power to issue a non-consensual third-party release

[2] Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

[3] H.R. REP. NO. 109-31, at 106 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 169.

[4] U.N. G.A., UNCITRAL 30th Sess. U.N. Doc. A/CN.9/442 (1997).

[5] H.R. REP. NO. 109-31, at 106 n.101 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 169; U.N. G.A., UNCITRAL 30th Sess., ¶ 12, U.N. Doc. A/CN.9/442 (1997).

[6] *Compare* 11 U.S.C. § 1501 *with* 11 U.S.C. §§ 701, 901, 1101, 1201, and 1301.

[7] 11 U.S.C. § 1501.

[8] 11 U.S.C. § 1507.

[9] *See id.*

[10] *Compare* 11 U.S.C. § 105 *with* 11 U.S.C. § 1507.

under section 105 and other sections is the subject of a major circuit split in the United States.[11] In May of 2023, the Second Circuit Court of Appeals, which governs New York City, affirmed that a non-debtor can receive non-consensual releases from liability without filing its own bankruptcy in limited factual scenarios.[12]

The extent of a bankruptcy court's power under section 1507 is a newer issue and has been litigated far less than the bankruptcy court's power under section 105. The purpose of this paper is to analyze whether chapter 15 authorizes a U.S. bankruptcy court to enforce non-consensual third-party releases issued in foreign proceedings, regardless of the case law in chapter 11. The potential for "imported releases" in chapter 15 is largely a separate issue from the current case law surrounding releases in chapter 11, because the goals and language of chapter 15 differ significantly from the goals, language, and history of the other chapters of the U.S. Bankruptcy Code.

II. NON-CONSENSUAL THIRD-PARTY RELEASES: AN OVERVIEW

Non-consensual third-party releases are a complex and controversial part of many modern chapter 11 reorganizations.[13] A circuit split has existed for three decades on whether bankruptcy courts have the constitutional or statutory authority to grant non-consensual third-party releases in a chapter 11 bankruptcy.[14] While some bankruptcy courts have been granting non-consensual third-party releases for decades, the Sackler family's recent attempt at obtaining a non-consensual third-party release in the *Purdue Pharma* bankruptcy has sparked the public's interest, and scrutiny, over the inclusion of these releases in bankruptcy plans.[15] These releases are a complex creature unique to bankruptcy, so a description is included below. Experienced bankruptcy practitioners may wish to skip to the "Discussion" section of this paper for an analysis of these releases in chapter 15.

Let's start at square one: What exactly is a non-consensual third-party release? It is best explained by breaking the phrase into its component parts and then synthesizing those parts. The following explanation uses terms common in general language, but readers will likely benefit from a cursory understanding of the bankruptcy process. The U.S. court system has posted a helpful

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[11] *See In re Purdue Pharma, L.P.*, 635 B.R. 26, 89 (S.D.N.Y. 2021), *rev'd sub nom. Purdue Pharma, L.P. v. City of Grand Prairie (In re Purdue Pharma, L.P.)*, 69 F.4th 45 (2d Cir. 2023) (discussing circuit split).

[12] *Purdue Pharma, L.P. v. City of Grand Prairie (In re Purdue Pharma, L.P.)*, 69 F.4th 45 (2d Cir. 2023). The Second Circuit's decision is currently on appeal to the United States Supreme Court.

[13] *Purdue Pharma*, 635 B.R. at 37.

[14] *Purdue Pharma,* 69 F.4th at 90 (Wesley, J., concurring).

[15] Brian Mann, *24 States Mount Legal Fight To Block Sackler Bid For Opioid Immunity*, NAT'L PUBLIC RADIO (May 3, 2021), https://www.npr.org/2021/05/03/991648432/25-states-mount-legal-fight-to-block-sackler-bid-for-opioid-immunity; Renae Merle & Lenny Bernstein, *Purdue Pharma's bankruptcy plan includes special protection for the Sackler family fortune*, WASH. POST (Sept. 19, 2019), https://www.washingtonpost.com/business/2019/09/18/purdue-pharmas-bankruptcy-plan-includes-special-protection-sackler-family-fortune.

article explaining business reorganizations in plain language that readers will likely benefit from reviewing if they are new to the field of insolvency.[16]

The term "release" refers to an agreement that insulates a party from liability. Releases are usually granted due to some form of financial consideration.[17] One common example of a release can be found on the back of a parking ticket received when entering a parking garage. On the back of such a parking ticket is often some version of the phrase "by parking in this garage, you agree to waive any and all claims against the owners of this parking garage for any damages that you or your vehicle sustains as a result of parking in this garage." You, the driver, are releasing your claims against the owners of the garage for any damages you incur from using their services. In the bankruptcy context, when creditors submit a proof of claim, they subject themselves to the authority of the bankruptcy court.[18] Bankruptcy courts enforcing non-consensual third-party releases then force these creditors to "release" claims against certain entities not in bankruptcy as part of the plan of reorganization, as long as those non-debtor entities make a sizeable contribution to the debtor's bankruptcy estate.[19] Importantly, courts enforcing these releases will also prevent those that did not file claims in the bankruptcy court from pursuing claims against the non-debtors outside of bankruptcy. This is the most controversial part of the release.

The term "third-party" is where things get confusing. Imagine that company P (Parent) owns company D (Debtor). Company D files for bankruptcy under chapter 11. Company D is the "debtor" in bankruptcy. Company C (Creditor) loaned money to company D before bankruptcy; company C files a proof of claim with the bankruptcy court and is now a "creditor" in company D's bankruptcy. It is well settled that a bankruptcy court has the authority to settle the claims that company C asserts against company D in the bankruptcy. But what if company C wants to assert a related claim against company P outside of company D's bankruptcy? Company P is a "third-party" because it is not a debtor in bankruptcy. However, the bankruptcy court may have jurisdiction over company C's claim against company P based on the financial relationship that company P has with company D.[20] As part of D's reorganization plan, the bankruptcy court releases the third-party, company P, from liability for D's actions. Company P pays a significant amount of money into D's bankruptcy estate to receive the releases. Some practitioners may take umbrage with the simplified description above, specifically as to the issue of whether the "third

[16] *Chapter 11 - Bankruptcy Basics*, United States Courts, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics. It is also worth noting that in the international context, what the United States calls "bankruptcy" is instead referred to as "insolvency" or "restructuring." As this paper is a discussion of U.S. law, I will typically refer to the restructuring process as a bankruptcy.

[17] *Purdue Pharma,* 635 B.R. at 67–68.

[18] *Langenkamp v. Culp*, 498 U.S. 42, 44–45 (1990).

[19] *See Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (In re Dow Corning Corp.)*, 86 F.3d 482, 493–94 (6th Cir. 1996), *as amended on denial of reh'g and reh'g en banc* (June 3, 1996); *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 131 (3d Cir. 2019); *Purdue Pharma*, 635 B.R. at 65.

[20] *See* Andrew J. Currie & Daniel A. O'Brien, In re Millennium Lab Holdings II, LLC: *Third Circuit Upholds Nonconsensual Third-Party Releases Over Stern Constitutional Challenge*, 2020 No. 2 NORTON BANKR. L. ADVISER NL 1 (2020); *Purdue Pharma,* 635 B.R. at 83; *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 339–40 (2d Cir. 2018).

party" is the non-debtor of certain creditors. I believe that the description above is the most simple and efficient way to view the problem, but it does have shortcomings.

There is a lack of clarity in the cases and literature discussing the meaning of the term "third-party" in a non-consensual third-party release. In *Purdue Pharma*, Judge McMahon described a situation in which non-debtor entities sought a broad permanent injunction preventing the current and future creditors of the debtor from ever taking direct action against the non-debtors themselves.[21] In that context, Judge McMahon explained that the relief sought was a "release, on a non-consensual basis, [of] *direct/particularized* claims asserted *by third parties* against *non-debtors*."[22] The judge referred to creditors of the debtor as "third parties" because the creditors are independent of the debtor's estate.[23] In *In re Dow Corning Corp.*, the Sixth Circuit described the same legal action as "enjoining a non-consenting creditor's claims against a non-debtor" and then referred to that non-debtor as the "third-party."[24] Despite the linguistic challenges, the courts certainly agree on the underlying action of a non-consensual third-party release: A creditor (or future creditor) of the debtor is forced to release its claim against an entity that is not the debtor. The description provided above is a simplified summary that ignores some of the complexities of describing the non-consensual release of future tort claimants who are unaware of their injuries at the time of the bankruptcy filing. The descriptive challenges arise, at least some of the time, when future claimants against a debtor, such as tort victims who have not yet discovered injury, have their future claims against a non-debtor enjoined, even though those creditors never filed claims in the debtor's bankruptcy. Judge McMahon's description of the release, quoted above, is more accurate in the mass tort context than the "non-consensual third-party release" phrase used in this paper. The term "non-consensual third-party release" is used here for the sake of simplicity; when readers see either phrase, they are best served by identifying the underlying legal action as "creditors of a debtor being prevented by the court from pursuing claims against an entity that is not the debtor." When this paper refers to third parties, it is referring to entities outside of the debtor-creditor relationship, i.e., non-debtors.

Following the above discussion, readers will be happy to learn that the term "non-consensual" is the most straightforward: Some parties that are releasing claims are not agreeing to the release.[25] Courts are largely in agreement that *consensual* third-party releases are allowed under the bankruptcy court's authority.[26] The controversy over third-party releases arises when the releases are granted over the objection of the parties that are forced to release their claims.

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[21] *Purdue Pharma*, 635 B.R. at 67.

[22] *Id.* at 90.

[23] *Id*. at 91.

[24] *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002).

[25] *Millennium Lab Holdings*, 945 F.3d at 131–32.

[26] Shana A. Elberg & Christine A. Okike, *New Trends Emerge for 'Consensual' Third-Party Releases in the Southern District of New York and District of Delaware*, Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates (2020), https://www.skadden.com/-/media/files/publications/2020/01/2020-insights/newtrendsemergeforconsensual thirdpartyreleasesinth.pdf.

So, in the bankruptcy context, a "non-consensual third-party release" occurs when a creditor of a debtor is forced to release claims that it has against a non-debtor as part of a plan of reorganization, *even if* that creditor objects to the plan's confirmation.[27] These releases often come with a permanent injunction that prevents creditors from taking action against the non-debtor entity.[28] In the first *Purdue Pharma* bankruptcy plan, mass tort claimants were going to be forced to release any direct claims that they had against the Sackler family members as individual tortfeasors, even though those tort claimants objected to the releases and opposed the plan's confirmation.[29] Those tort claimants (as well as other creditors) appealed, and the District Court for the Southern District of New York held that the bankruptcy court lacked the statutory authority to grant the proposed non-consensual third-party releases.[30] The district court's decision was appealed to the Second Circuit.[31] The Second Circuit reversed the district court and affirmed the bankruptcy court, authorizing non-consensual third-party releases under specific circumstances.[32] A circuit split remains, and the *Purdue Pharma* case has now been appealed to the United States Supreme Court.

Due to the inherent uncertainty in pursuing non-consensual third-party releases in chapter 11, international corporations looking for a global resolution of litigation may turn to other authority. If a corporation is international in nature, it can look to chapter 15. At least one busy bankruptcy district theoretically permits non-consensual third-party releases in chapter 15, even though it prohibits them in chapter 11: the Southern District of Texas.[33] The discussion below evaluates some of the cases that have addressed non-consensual third-party releases in chapter 15; the cases generally support the enforcement of non-consensual third-party releases granted in foreign courts. However, an analysis of the language of chapter 15, the federal common law of comity, and title 28 strongly suggests that bankruptcy courts overseeing a chapter 15 case do not have the power to enforce non-consensual third-party releases granted in foreign courts.

DISCUSSION

I. DOES CHAPTER 15 PROVIDE A WORK-AROUND FOR INTERNATIONAL COMPANIES THAT SEEK NON-CONSENSUAL THIRD-PARTY RELEASES?

A. *The existing case law holds that bankruptcy courts have the authority to confirm non-consensual third-party releases under chapter 15.*

[27] 18 A.L.R. Fed. 3d Art. 2, § 2 (2016).

[28] *M. Barnett Gillman v. Cont'l Airlines* (*In re Cont'l Airlines)*, 203 F.3d 203, 214–15 (3d Cir. 2000).

[29] *Purdue Pharma,* 635 B.R. at 67.

[30] *Id*. at 78.

[31] *Purdue Pharma*, No. 21 CV 7532 (CM), 2022 WL 121393, at *2 (S.D.N.Y. Jan. 7, 2022).

[32] *Purdue Pharma, L.P.*, 69 F.4th at 83.

[33] *See Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de CV (In re Vitro S.A.B. de C.V.)*, 701 F.3d 1031, 1062 (5th Cir. 2012) (finding non-consensual third-party releases "theoretically" available in chapter 15, despite prior Fifth Circuit precedent almost completely barring them in chapter 11).

The Bankruptcy Court for the Southern District of New York as well as the Fifth Circuit have both decided cases that turned on whether non-consensual third-party releases granted in a foreign jurisdiction should be enforced against U.S. creditors under chapter 15.[34] Both jurisdictions have held that non-consensual third-party releases can be enforced under chapter 15; however, the Fifth Circuit added a more rigorous standard than the New York courts use for enforcing foreign non-consensual third-party releases.[35]

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

a. Facts

The first case in the Southern District of New York to directly address the enforcement of a non-consensual third-party release granted in a foreign court was *In re Metcalfe*.[36] In *Metcalfe*, the Canadian court in Ontario was restructuring the entire Canadian Asset-Backed Commercial Paper ("ABCP") market.[37] The ABCP restructuring was the largest in Canadian history at the time.[38] The proceeding was initiated by the Pan-Canadian Investors Committee for the Third-Party Structured Asset-Backed Commercial Paper.[39] To simplify for purposes of this paper, the "Investors Committee" represented the "creditors."[40] While the corporations and financial institutions that issued the ABCP were distinct legal entities, a majority of the involved parties agreed that a single, global restructuring would most effectively protect the creditors and maximize the recovery of all parties.[41] Even though this restructuring was "global," I will refer to the parties that issued the ABCP as the "debtors" because the ABCP issuers were the parties that were

[34] *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010); *In re Sino-Forest Corp.*, 501 B.R. 655 (Bankr. S.D.N.Y. 2013); *In re Agrokor d.d.*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018); *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018); *In re Vitro S.A.B. de CV*, 701 F.3d 1031 (5th Cir. 2012).

[35] *Vitro*, 701 F.3d at 1056–57.

[36] *Metcalfe*, 421 B.R. at 688.

[37] *Id*. at 687. ABCP is a financial instrument used primarily by large corporations that want access to capital in a quicker and more cost-effective way than a bank loan. Commercial paper in the United States is merely an unsecured promissory note with a fixed maturity of no longer than 270 days. The commercial paper underlying the *Metcalfe* bankruptcy was "asset-backed," meaning that the commercial paper was "secured." Typically, this would be considered a low-risk financial instrument to hold in a portfolio. However, only some of the collateral backing the Canadian commercial paper constituted traditional assets such as residential and commercial mortgages. In the tradition of the financial excesses of the mid 2000s, most of the assets backing the commercial paper were in fact synthetic collateralized debt obligations ("CDOs"). The purchasers of the assets that supported the ABCP entered into $26 billion worth of credit default swaps on the underlying CDOs. There were additional leveraging mechanisms at play that are outside the scope of this paper. Volatility ensued. *Id.*

[38] *Id*.

[39] *Id*.

[40] *Id*. at 690.

[41] *Id*. at 690–91.

ultimately liable to the creditors when the issuers failed to make their contractually-required payments under the ABCP agreements.[42]

Proceeding with this 30,000-foot-view of the case, we can review the context of the non-consensual third-party releases granted by the Canadian court.[43] The plan included injunctions that protected three key non-debtors.[44] The Investors Committee, the asset providers, and the liquidity providers were all protected by releases and injunctions that prevented creditors from taking direct action against them, unless the creditors alleged a particularized claim of fraud against the specific entity that the creditors brought a claim against.[45] The main legal issue in the Canadian restructuring was whether the Ontario court could sanction the plan, when that plan called for the release of solvent third-parties that were not creditors of the debtor.[46] The Ontario Court of Appeals decided that the Companies Creditors' Arrangement Act, which governs Canadian restructurings, allows third-party releases if the releases are reasonably connected to the restructuring.[47] After the plan was confirmed, the representative for the debtors in the Canadian proceedings sought recognition of the Canadian proceedings under section 1517 of chapter 15.[48] The representative also sought an order enforcing the Canadian orders in the United States.[49]

b. Argument

The debtors made two arguments for enforcing the non-consensual third-party releases. First, they argued that the releases should be enforced because they would have been approved in a chapter 11 case.[50] Second, they argued that even if the releases and injunctions would not have been granted in a chapter 11 case, the district court should recognize the Canadian court's judgment as a matter of international comity and the public policy underlying chapter 15.[51]

Addressing the first argument, the bankruptcy court found that the power of the bankruptcy courts in the Second Circuit to allow non-consensual third-party releases had been substantially undermined by the Second Circuit's panel decision in *Manville*.[52] In that decision, the Second Circuit held that a bankruptcy court could issue a third-party release only if the release would

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[42] *Id.*at 690.

[43] While the court never explicitly describes the Metcalfe releases as "non-consensual," the releases were challenged by at least some creditors in the Canadian court, and the releases preclude all future claimants from asserting actions against the third parties. These releases necessarily bound some creditors who objected, or simply did not consent, to the releases proposed in the plan.

[44] *Id*. at 693.

[45] *Id*.

[46] *Id*. at 694.

[47] *Id*.

[48] *Id*. at 687.

[49] *Id*.

[50] *Id*. at 694.

[51] *Id*.

[52] *Id*. at 695. *See also Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 517 F.3d 52 (2d Cir. 2008), *rev'd on other grounds sub nom Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009).

directly affect the *res* of the bankruptcy estate.[53] The *Metcalfe* court, concerned about its jurisdiction, asked the debtors' representative if the releases would preclude lawsuits against U.S.-based asset providers for claims arising out of negligence, even if those claims did not affect the *res* of the bankruptcy estate.[54] The debtors' representative affirmed that the releases protected U.S.-based asset providers.[55] Even though the *Manville* decision was overturned by the U.S. Supreme Court due to a civil procedure issue regarding impermissible collateral attacks on a final judgment, the *Metcalfe* court decided that its power to issue the third-party releases and injunctions was unclear.[56] However, the court concluded that the Second Circuit jurisprudence regarding third-party releases applied only to chapter 11, so the controlling issue was actually the second argument presented by the debtors' representative: whether the principles of enforcing foreign judgments and comity support the enforcement of non-consensual third-party releases and injunctions.[57]

The bankruptcy court found that principles of comity, especially the emphasis on comity in chapter 15, strongly supported the enforcement of the Canadian court's third-party release and injunction provisions.[58] The *Metcalfe* court pointed out that multiple provisions of chapter 15 support the enforcement of foreign judgments and that 28 U.S.C. § 157(b)(2)[59] specifically states that the decision of whether to enforce foreign court orders in a chapter 15 case is a core proceeding.[60]

The debtors' representative sought enforcement of the Canadian court's order through the "additional assistance" provision of section 1507.[61] Section 1507 states:

> (a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.

[53] *Id*.
[54] *Id*. at 696 n.3.
[55] *Id*.
[56] *Id*. at 696.
[57] *Id*.
[58] *Id*.
[59] 28 U.S.C. § 157 authorizes bankruptcy courts to enter final orders on certain "core proceedings" related to a bankruptcy. Confirming a plan is a core proceeding. However, the debate about whether bankruptcy courts have the power to issue non-consensual third-party releases often revolves around (1) whether 28 U.S.C. § 1334 gives bankruptcy courts the "related-to" jurisdiction needed to finally adjudicate a claim involving parties not in bankruptcy, and (2) whether a non-consensual third-party release is simply a matter of "plan confirmation" or something else entirely. Those concerns are significantly mitigated in chapter 15, because 28 U.S.C. § 157 explicitly states that deciding whether to enforce foreign court orders in a chapter 15 case is a core proceeding that the bankruptcy court may determine.
[60] *Metcalfe,* 421 B.R. at 696.
[61] *Id.* Certain relief is explicitly authorized by section 1521; however, the enforcement of a foreign court's order is not one of the specifically enumerated forms of relief. This is why the debtors' representative needed to seek enforcement under section 1507. The Fifth Circuit in *In re Vitro*, discussed below, elaborates on this specific issue.

> (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—
>
> (1) just treatment of all holders of claims against or interests in the debtor's property;
>
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
>
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
>
> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[62]

The bankruptcy court found that the third-party release and injunction provisions were not unfair, and no creditor argued that the releases and injunctions adversely affected any of the claimants in relation to their claims against the debtors' property.[63] The court noted that it had broad discretion to grant post-recognition relief consistent with principles of comity under section 1507.[64]

However, the court also noted that it was limited by section 1506, which states: "Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."[65] Citing the District Court for the Southern District of New York, the bankruptcy court explained that section 1506 is to be construed narrowly and should prevent recognition only if the action sought would conflict with "the most fundamental policies of the United States."[66] The court looked to Second Circuit precedent regarding the recognition of foreign judgments and decided that it could enforce the Canadian court's judgment as long as the Canadian procedures satisfied "fundamental standards of fairness."[67]

In deciding whether the Canadian relief was fair, the bankruptcy court noted that "[t]he relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical."[68] While the Second Circuit placed narrow constraints on when a non-consensual third-

[62] 11 U.S.C. § 1507.
[63] *Metcalfe,* 421 B.R. at 697.
[64] *Id*.
[65] 11 U.S.C. § 1506.
[66] *Metcalfe,* 421 B.R. at 697 (quoting *In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333, 336 (S.D.N.Y. 2006)).
[67] *Id*.
[68] *Id*.

party release could be granted, the Second Circuit did not entirely prohibit them.[69] Further, the Canadian court showed concern and care in granting the third-party releases similar to the concerns expressed by the Second Circuit in *In re Metromedia*.[70] Finally, the court pointed out that the only reason that its power to grant a third-party release was in question was due to the *Manville* decision but that jurisdictional limitation was only regarding the powers of a U.S. court to grant a release; it did not limit the power of a U.S. court to enforce a properly authorized release from another jurisdiction.[71] Therefore, the court decided that there was no violation of a fundamental policy of the United States and that section 1506 did not preclude its power to enforce the foreign judgment.[72] The court granted recognition and enforcement of the foreign judgment.[73] The court also buttressed its position with a discussion of the principles of comity generally.

There have been several chapter 15 cases in the Bankruptcy Court for the Southern District of New York since the *Metcalfe* decision that also required the recognition of non-consensual third-party releases and/or injunctions.[74] Each of those cases contained a similar analysis to *Metcalfe* and cited approvingly to *Metcalfe*.[75] It is worth noting, however, that the court in *In re Sino-Forest* expressed concern over the differences between sections 1507 and 1521 and questioned which one's standards should govern the granting of "appropriate relief."[76]

2. *Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.)*, 701 F.3d 1031 (5th Cir. 2012)

The Fifth Circuit Court of Appeal directly addressed the issue of enforcing non-consensual third-party releases under chapter 15 in *In re Vitro*.[77] The Fifth Circuit affirmed the bankruptcy court's decision to deny the enforcement of the Mexican court's order granting non-consensual third-party releases.[78] However, a closer reading of the case reveals that the Fifth Circuit would in fact recognize non-consensual third-party releases in a chapter 15 case under different circumstances.

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[69] *Id*.

[70] *Id*. at 694–98 (discussing *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136 (2d Cir. 2005)).

[71] *Id*.

[72] *Id*.

[73] *Id*. at 700.

[74] *In re Sino-Forest Corp.*, 501 B.R. 655 (Bankr. S.D.N.Y 2013); *In re Agrokor d.d.*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018); *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018).

[75] *Sino-Forest Corp.*, 501 B.R. at 664; *Agrokor*, 591 B.R. at 189; *Avanti*, 582 B.R. at 619.

[76] *Sino-Forest Corp.*, 501 B.R. at 664 n.4.

[77] *Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.)*, 701 F.3d 1031 (5th Cir. 2012).

[78] *Id*. at 1036.

a. Facts

Vitro S.A.B. de C.V. ("Vitro") was a Mexican holding company which, together with its subsidiaries, was the largest glass manufacturer in Mexico.[79] Between 2003 and 2007, Vitro borrowed $1.216 billion from a group of mostly U.S. investors.[80] This debt was acquired through three series of notes.[81] Although the notes were unsecured, payment in full was guaranteed by substantially all of Vitro's U.S.-based subsidiaries (the "Guarantors").[82] The guaranty agreements provided that "the obligations of the Guarantors will not be released, discharged, or otherwise affected by any settlement or release as a result of any insolvency, reorganization, or bankruptcy proceeding affecting [the debtor]."[83] Vitro ran into serious financial difficulty in 2008, concurrent with the global recession.[84] In February of 2009, Vitro announced its intention to restructure its debt and stopped making scheduled payments under the unsecured notes.[85]

Prior to December of 2009, Vitro's subsidiaries owed Vitro roughly $1.2 billion in intercompany debt.[86] Also in December of 2009, Vitro entered into a series of transactions that wiped out that debt, and its subsidiaries became creditors to whom Vitro now owed approximately $1.5 billion.[87] Vitro did not disclose these transactions to the unsecured noteholders, despite those noteholders' requests.[88] Vitro finally disclosed the intercompany transactions in October of 2010, which brought the transactions just outside of Mexico's "suspicion period."[89] Vitro filed for bankruptcy in Mexican court on December 13, 2010.[90]

Vitro's Mexican bankruptcy petition was initially denied because less than 40% of its independent creditors approved of the filing.[91] However, the Mexican appellate court eventually allowed Vitro to count insider votes, and the bankruptcy petition was approved.[92] The court appointed a *conciliador*, similar to a U.S. trustee, to oversee the reorganization.[93]

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[79] *Id*.
[80] *Id*. at 1037.
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] *Id*. at 1038. Under Mexican law, transactions occurring within 270 days of a bankruptcy are subject to additional scrutiny. The debtor avoided this scrutiny by entering the transactions, and then waiting about 300 days to file for bankruptcy.
[90] *Id*. Technically, the debtor filed for a *concurso* proceeding. A *concurso* proceeding is the Mexican equivalent of a voluntary judicial reorganization proceeding under United States law.
[91] *Id*.
[92] *Id*.
[93] *Id*.; *id*. at 1038 n.2. The creditors argued that the *conciliador* was compromised under Mexican law because he had a direct personal financial incentive to recognize the insider intercompany claims. Additionally, the law firm that the *conciliador* worked for had extensive business with the debtor going back to 2001.

On December 5, 2011, the *conciliador* submitted a restructuring plan substantially identical to the plan initially proposed by Vitro.[94] Under the plan, the independent unsecured noteholders would see their old notes extinguished.[95] Vitro would issue new unsecured notes with a face value of $814,650,000 that would mature in seven years.[96] The unsecured notes carried an annual interest rate of 8%, but the noteholders would not receive any payments of principal during the first four years of the plan and would not receive most of their principal until a lump-sum was paid at maturity.[97] The noteholders also received mandatory convertible debt obligations with a three-year term, bearing 12% annual interest and convertible into 20% equity in Vitro if the debt obligations were not paid in full at maturity.[98]

Under the plan, Vitro's subsidiaries would be released from their guarantees of the old notes.[99] The U.S.-based subsidiaries had assets that would have otherwise been reachable by Vitro's creditors under the terms of the old notes.[100] The debtor's subsidiaries were not in bankruptcy; they had become co-creditors only due to questionable financial maneuvers, and we should therefore consider the subsidiaries "third parties" as that term has been used in this paper.[101] The release of Vitro's subsidiaries from their prior guarantees effectuated the non-consensual third-party release.[102] The plan was approved on February 3, 2012 over the objections of the primarily U.S.-based unsecured noteholders because the noteholders were outvoted by Vitro's subsidiaries.[103]

b. Argument

The Fifth Circuit began its analysis by stating the standard of review for the appeal: Questions of law are reviewed de novo, and a court's decision to grant comity is reviewed for abuse of discretion.[104] The objecting creditors raised two arguments for denying Vitro's requested relief: (1) The bankruptcy court should not recognize Mr. Arechavaleta-Santos as a "foreign representative," and (2) the bankruptcy court cannot enforce a plan that contains a release of a guaranty obligation of a third party.[105]

The Fifth Circuit quickly dispatched of the first issue, finding that chapter 15 does not require that a "foreign representative" be formally appointed by a court; the representative can be

[94] *Id*.
[95] *Id*. at 1039.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *Id*. at 1037.
[101] *See id*.
[102] It is worth noting, however, that the subsidiaries were guarantors on the new notes. The terms of the new notes were much more favorable to the debtor and its subsidiaries than the terms of the prior notes.
[103] *Id*. at 1039.
[104] *Id*. at 1042.
[105] *Id*.

appointed by a debtor similar to a "debtor-in-possession" under chapter 11.[106] According to the Fifth Circuit, Vitro's representative met this requirement, so it was proper for the bankruptcy court to recognize Mr. Arechavaleta-Santos and the foreign proceeding.[107]

The second issue, whether the U.S. bankruptcy court was authorized to enforce a non-consensual third-party release under chapter 15, was more complex. The debtor sought enforcement of the Mexican court's order through the operation of 11 U.S.C. §§ 105, 1507, and 1521.[108] Specifically, the debtor sought a permanent injunction "enjoining all persons from initiating or continuing any suit . . . or any enforcement or collection process . . . against [the debtor] or [the subsidiaries] . . . or their Property . . . except as permitted under the *Concurso* Plan."[109]

The bankruptcy court held that the *Concurso* Plan should not be accorded comity in connection with the non-consensual third-party releases for three reasons: (1) Section 1507 did not grant authority because the distribution of the debtor's property was not "substantially in accordance" with title 11; (2) section 1521 did not grant authority because the Mexican court did not sufficiently protect the interests of creditors in the United States; and (3) section 1506 actually prohibited the injunctions because "the protection of third party claims in a bankruptcy case is a fundamental policy of the United States."[110]

On appeal, the Fifth Circuit narrowed the issue and specifically addressed whether the bankruptcy court erred, as a matter of law, when it refused to enforce the *Concurso* Plan solely because that plan voided the obligations of non-debtor parties and replaced them with new obligations of substantially the same parties.[111] The appellate court began its analysis by noting, as the Bankruptcy Court for the Southern District of New York had done, that the clear intention of chapter 15 is to promote international comity.[112] Citing directly to *Metcalfe*, the Fifth Circuit reiterated that it is not necessary that the relief requested by a foreign representative be identical to, or available under, United States law.[113]

Given the bankruptcy court's holding and the arguments presented by the parties, the Fifth Circuit needed to determine exactly how a court should proceed when evaluating whether to grant a type of relief not specifically listed in section 1521. The Fifth Circuit noted that this issue appeared to be a matter of first impression.[114] In short, the Fifth Circuit held that a bankruptcy court should first evaluate whether it can grant relief under section 1521(a) and (b).[115] If the relief

[106] *Id.*
[107] *Id.*
[108] *Id.* at 1051.
[109] *Id.* (internal quotations omitted).
[110] *Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (In re Vitro, S.A.B. de C.V.)*, 473 B.R. 117, 132 (Bankr. N.D. Tex. 2012), *aff'd sub nom. In re Vitro S.A.B. de CV*, 701 F.3d 1031 (5th Cir. 2012); *Vitro*, 701 F.3d at 1051–52.
[111] *Vitro*, 701 F.3d at 1053.
[112] *Id.*
[113] *Id.*
[114] *Id.* at 1054.
[115] *Id.*

sought is not explicitly listed in the enumerated provisions of section 1521, then the court should consider whether it can grant relief under the broad "any appropriate relief " language of section 1521(a)'s introductory paragraph.[116] The court may consider "appropriate relief" only as relief previously available under chapter 15's predecessor, section 304.[117] Finally, "[o]nly if a court determines that the requested relief was not formerly available under § 304 should a court consider whether relief would be appropriate as 'additional assistance' under § 1507."[118]

The court's reasoning provides an important clarification for foreign representatives seeking relief under chapter 15. Two law review articles had been published prior to *Vitro* questioning (1) whether a representative could seek relief under both sections 1521 and 1507, and (2) where the reach of section 1521 ended and section 1507 began.[119] The debtor's representative in *Vitro* even acknowledged that its decision to seek relief under section 1507, and, only in the alternative, under section 1521, was simply because every other foreign representative seeking relief under chapter 15 had done the same.[120]

The Fifth Circuit found that a bankruptcy court evaluating a request for foreign relief should first look to the specific forms of relief listed under section 1521.[121] Section 1521(a) states that a court may grant "any appropriate relief," including:

> (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
> (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
> (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
> (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
> (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States

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[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] Alesia Ranney–Marinelli, *Overview of Chapter 15 Ancillary and Other Cross–Border Cases,* 82 AM. BANKR. L.J. 269, 317 (2008); George W. Shuster, Jr., *The Trust Indenture Act and International Debt Restructurings,* 14 AM. BANKR. INST. L. REV. 431, 455 (2006).
[120] *Vitro*, 701 F.3d at 1054.
[121] *Id.* at 1055.

> to the foreign representative or another person, including an examiner, authorized by the court;
> (6) extending relief granted under section 1519(a); and
> (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).[122]

The Fifth Circuit found that section 1521's specifically listed forms of relief should be the first source of authority for two reasons. First, specific terms should prevail over general term.[123] Second, other courts have held that when the relief sought by the foreign representative is listed under section 1521, the court does not need to consider whether section 1507 also applies.[124]

If the foreign representative is requesting relief not listed in the enumerated subparts of section 1521(a), then the court can turn to the broad provision in the beginning of section 1521(a) that allows for "any appropriate relief."[125] The Fifth Circuit found that the "appropriate relief" referenced by section 1521(a) is constrained to the types of relief that were previously allowed under section 304.[126] The court based this construction on the fact that Congress did not intend to expand or reduce the scope of relief previously available under other provisions when it drafted section 1521.[127] Additionally, a court granting relief under the "appropriate relief" provision of section 1521 should consider whether the relief is allowed in the United States.[128] This is because section 1507 is the provision authorizing relief beyond that provided for in the Bankruptcy Code or United States law.[129] Finally, under section 1522, a court cannot grant relief under section 1521 unless the interests of the creditors and other entities, including the debtor, are sufficiently protected.[130]

Only when a court cannot grant relief under any part of section 1521 should it turn to section 1507.[131] Section 1507 is a last resort because, as noted in the House Report accompanying its passage, section 1507 requires the court to consider whether the relief requested will reasonably assure:

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[122] 11 U.S.C. § 1521.

[123] *Vitro*, 701 F.3d at 1056 (quoting *In re Read,* 692 F.3d 1185, 1191 (11th Cir. 2012), and *D. Ginsberg & Sons, Inc. v. Popkin,* 285 U.S. 204, 208 (1932)).

[124] *Id*. at 1056 (quoting *In re Atlas Shipping A/S*, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009) ("Whatever the outer bounds of discretionary relief chapter 15 allows, this case does not push the boundaries. The relief sought by the foreign representative is expressly provided for in §§ 1521(a)(5) and 1521(b). The Court need not venture into the area of 'additional assistance,' 'consistent with principles of comity' under § 1507.")).

[125] *Id*.

[126] *Id*. Section 304 was the previous source of authority for a bankruptcy court to recognize and enforce a foreign court's orders.

[127] *Id*. at 1056–57.

[128] *Id*. at 1057.

[129] *Id*.; *In re Artimm, S.r.L.*, 335 B.R. 149, 160 n.4 (Bankr. C.D. Cal. 2005).

[130] 11 U.S.C. § 1522.

[131] *Vitro*, 701 F.3d at 1057.

> (1) just treatment of all holders of claims against or interests in the debtor's property;
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[132]

This additional test recognizes that relief under section 1507 is "more extraordinary" and suggests that section 1507 is a last resort, not a first resort.[133]

With the procedure of evaluating a foreign debtor's request for relief settled, the Fifth Circuit turned to whether section 1521 or 1507 authorized the non-consensual third-party release sought by Vitro.

The Fifth Circuit found that the enumerated provisions of section 1521 did not authorize the non-consensual third-party releases.[134] The court identified section 1521(a)(1) as the closest, as that statute provides for "staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities."[135] However, the court found section 1521(a)(1) inapplicable, as the debtor was seeking to permanently enjoin actions brought against its subsidiaries and discharge obligations and liabilities held by its subsidiaries.[136] The court acknowledged that a stay protecting the assets of a third party had been previously allowed under section 304 but distinguished *Vitro* by pointing out that the debtor was seeking a permanent release and injunction, not a stay to protect assets on a temporary basis.[137] The court also found that section 1521(b) did not apply, as the debtor was seeking to protect its subsidiaries' assets, and section 1521(b) allows for the protection of only the debtor's assets.[138]

Consistent with its proposed procedure, the court then evaluated whether section 1521(a)'s "any appropriate relief" provision could authorize the non-consensual third-party releases. The court decided that the releases fell outside of section 1521(a)'s grant of authority for two reasons. First, the court found that non-consensual third-party releases are generally not available under

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[132] 11 U.S.C. § 1507.
[133] *See Vitro*, 701 F.3d at 1057.
[134] *Id*. at 1058.
[135] *Id*.
[136] *Id*.
[137] *Id*. at 1059 n.30.
[138] *Id*. at 1059.

United States law.[139] Second, the court found that in the one case in which a foreign proceeding's third-party discharge was approved by a United States court, *Metcalfe*, that court authorized the approval and enforcement of the Canadian court's order under section 1507.[140] Additionally, the court found that relief was unavailable under either the enumerated provisions of section 1521 or the broad "any appropriate relief" language because the requested action failed to "balance the interests of the creditors and debtors" and therefore violated section 1522.[141]

Finally, the court evaluated whether section 1507 provided authority to grant the releases. The court found that section 1507 did theoretically authorize non-consensual third-party releases but that the bankruptcy court did not abuse its discretion in denying enforcement of Vitro's requested releases based on the specific facts of the case.[142] The court began by acknowledging that non-consensual third-party releases are available in other circuits, albeit only under narrow and restricted circumstances.[143] Additionally, the court emphasized that section 1507 was intended to provide relief not otherwise available under the Bankruptcy Code or United States law.[144] Since the relief was not completely prohibited, and section 1507 could authorize relief not available under U.S. law in either case, the relief could be allowed under section 1507.

Even though relief was "theoretically" available under section 1507, the Fifth Circuit could review the bankruptcy court's denial of relief only for abuse of discretion.[145] The bankruptcy court had denied relief because the *Concurso* Plan significantly reduced the recovery of creditors in addition to eliminating their ability to pursue recovery against Vitro's solvent subsidiaries.[146] Vitro argued that, in effect, the bankruptcy court denied relief simply because the *Concurso* Plan did not provide creditors with exactly what they would have received under chapter 11.[147] Vitro also argued that the bankruptcy court improperly relied on section 1507(b)(4) to deny relief, because that provision requires the court to consider whether a plan distributes the property of the debtor—not a non-debtor—in accord with chapter 11.[148] In addition, Vitro argued that whether its plan deviated from chapter 11 or not, those deviations did not justify the court overlooking the value of comity in chapter 15 proceedings.[149]

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[139] *Id*. at 1059–60. It should be noted that the type of releases sought in this case were certainly available under the precedent of other circuits at the time, and currently a plurality of the circuits allows non-consensual third-party releases in specific circumstances. This point ultimately was not dispositive to the Fifth Circuit's decision, as the court determined that the releases would have been barred by section 1522 even if they were authorized by section 1521(a).

[140] *Id*. at 1060.

[141] *Id*.

[142] *Id*. at 1060–61.

[143] *Id*. at 1061.

[144] *Id*. at 1062.

[145] *Id*.

[146] *Id*.

[147] *Id*. at 1062–63.

[148] *Id*.at 1063.

[149] *Id*.

The court first addressed whether the focus on comity in chapter 15 could be ignored due to the Mexican court's decision not to recognize a New York state court ruling.[150] To simplify, the court found that comity still applied even though the Mexican court did not recognize the New York state court's ruling regarding the debtor's subsidiaries' guarantees, because the New York state court explicitly limited its decision to U.S. law and left it to the Mexican court to decide whether the guarantees could be extinguished under Mexican law.[151]

The court then turned to whether the bankruptcy court improperly used section 1507(b)(4) to deny relief. The court acknowledged that the bankruptcy court's concern was focused on the discharge of obligations held by third parties.[152] However, the court found that section 1507(b)(4) requires the bankruptcy court to evaluate the plan of distribution for consistency with chapter 11. The court further found that, in order for the distributions to occur, the subsidiaries had to receive the releases.[153] In other words, the releases were a necessary part of the plan distribution and could therefore be considered within the scope of section 1507(b)(4).[154]

Finally, the court rejected Vitro's argument that principles of comity and enforcement so outweighed the bankruptcy court's concerns under section 1507(b)(4) that the bankruptcy court abused its discretion in denying relief. At trial in the bankruptcy court, Vitro's expert testified that the *conciliador* increased compensation to the creditors from the amount that was originally proposed.[155] The Fifth Circuit found that the marginal increase in compensation for U.S.-based creditors brought about by the *conciliador* "hardly show[ed]" that the result of the *Concurso* proceedings was in line with what the creditors would have received in chapter 11.[156] Vitro's expert also stated that 74% of creditors approved the plan.[157] The court quickly rejected this argument, pointing out that more than half of the unsecured creditors voting in favor of the plan were Vitro's subsidiaries ("insiders").[158] In chapter 11, insider votes are not counted toward plan confirmation, so the *Concurso* Plan would not have been consensually approved in a U.S. bankruptcy court.[159]

Even though the court found that the framework of Mexico's bankruptcy process is substantially similar to U.S. law, the court could not grant comity on that basis alone; it still had to consider the effect of recognition on U.S.-based creditor's claims.[160] The court found that a debtor seeking non-consensual third-party releases under section 1507 must show that the

[150] *Id*. at 1064–65.
[151] *Id*. at 1065.
[152] *Id*.
[153] *Id*.
[154] *Id*.
[155] *Id*.
[156] *Id*.
[157] *Id*.
[158] *Id*.
[159] 11 U.S.C. § 1129(a)(10).
[160] *Vitro*, 701 F.3d at 1066.

circumstances of its bankruptcy are comparable to the U.S. cases in which non-consensual third-party releases were granted.[161]

Vitro failed to do so. There were no unusual circumstances necessitating the non-consensual third-party release.[162] The creditors "did not receive a distribution close to what they were originally owed."[163] The affected creditors did not consent to the plan, as most of the votes cast in favor of the plan came from insiders.[164] Finally, the non-consenting creditors were not given any alternative to recover in full what they were owed.[165]

Vitro attempted to point to *Metcalfe* as an example of a bankruptcy court granting the relief it sought. While the *Metcalfe* court granted a non-consensual third-party release, *Metcalfe* was distinguishable for three reasons: (1) The release and injunction provisions treated all claimants in the Canadian proceedings similarly, (2) the plan received near unanimous support from the creditors, and the voting creditors were not insiders of the debtors, and (3) the release was not complete, unlike the release that Vitro sought.[166] The Fifth Circuit emphasized that insiders were allowed to vote in the *Concurso* Plan confirmation, something that made *Metcalfe* clearly distinguishable.[167] The Fifth Circuit also emphasized the Canadian court's sensitivity and care in granting a non-consensual third-party release.[168] That care and concern were not present in the Mexican court's approval of the plan.[169] Because Vitro did not establish that the circumstances of its restructuring were similar to those in a U.S. proceeding in which a non-consensual release of a non-debtor could be granted, the Fifth Circuit affirmed the bankruptcy court's decision to deny enforcement of the releases.[170]

B. *Common law principles of comity do not support enforcing non-consensual third-party releases.*

The case law holds that a non-consensual third-party release may be enforced in the United States through a chapter 15 proceeding under appropriate circumstances. Combining the case law out of both the Southern District of New York and the Fifth Circuit, we get the general rule that these releases will be granted only if the debtor can show that its plan and bankruptcy proceeding are substantially similar to a proceeding in the United States in which the same relief would be granted. Both courts also focus on the "fairness" of the plan confirmation process in deciding whether to recognize and enforce an order of a foreign court.[171]

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[161] *Id*.
[162] *Id*. at 1067.
[163] *Id*.
[164] *Id*.
[165] *Id*.
[166] *Id*. at 1068.
[167] *See id.*
[168] *Id*.
[169] *Id*.
[170] *Id*. at 1069.
[171] *Metcalfe*, 421 B.R. at 697; *Vitro*, 701 F.3d at 1068.

However, even if the foreign proceedings were perfectly fair, the federal common law of comity does not empower the bankruptcy courts to enforce permanent injunctions. Both the Southern District of New York and the Fifth Circuit cited to the seminal U.S. Supreme Court case *Hilton v. Guyot* in their analysis of whether to grant comity. *Guyot* produced the following well-known rule for U.S. courts deciding whether to grant comity:

> When an action is brought in a court of [the United States], by a citizen of a foreign country against one of our own citizens, *to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff*, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment[.][172]

This rule from *Guyot* does not support the proposition that U.S. courts should extinguish rights held by a U.S. party against the U.S.-based assets of a non-debtor due to a holding in a foreign bankruptcy proceeding. Rather, *Guyot* specifically established that if a U.S. citizen is adjudged to owe money to a foreign citizen, and that judgment is determined in accord with the *Guyot* factors, then the U.S. will recognize that judgment and allow collection against a U.S. citizen.[173] It is a different proposition to say that the U.S. courts should prevent U.S. creditors from taking action against the U.S.-based assets of a foreign entity based on comity, especially when a U.S. court has held that those U.S. creditors have a legal right to take the proposed action under U.S. state law.[174]

In fact, in *Medellin v. Texas,* the U.S. Supreme Court held that "judgments of foreign courts awarding injunctive relief, even as to private parties, . . . are not generally entitled to enforcement."[175] The Court explicitly contrasted injunctive relief with monetary relief, acknowledging that monetary relief was regularly granted under principles of international comity,

[172] *Hilton v. Guyot*, 159 U.S. 113, 205–06 (1895) (emphasis added).

[173] *Id*.

[174] *See Vitro*, 701 F.3d at 1064–65 (U.S. creditors had been successful in litigating their claim against the non-debtor in New York state court, but the state court deferred to the Mexican court under principles of comity to resolve the issue).

[175] *Medellin v. Tex.*, 552 U.S. 491, 522 (2008) (internal quotation omitted).

while injunctive relief was not.[176] *Medellin* was a criminal procedure case, but the Court's language was broad and its specific mention of "private parties" strongly suggests that the Supreme Court would not support enforcing permanent injunctions protecting a non-debtor as part of a foreign bankruptcy proceeding.

Currently, bankruptcy courts justify granting non-consensual third-party releases under the auspices of comity, but this type of relief very likely exceeds what is authorized by the United States Supreme Court in *Guyot* and *Medellin*. A non-consensual third-party release is effectively a permanent injunction that prevents creditors from taking action against the protected non-debtor parties in a U.S. court.[177] A permanent injunction protecting a non-debtor should not be allowed under common law principles of comity, based on Supreme Court jurisprudence.[178]

An argument against enforcing foreign permanent injunctions, taken to its extreme, would effectively destroy the entire purpose of chapter 15. One nuance of the bankruptcy process is that debts are "discharged" but not erased from existence; a discharge is simply a permanent injunction preventing creditors from ever taking action to collect the discharged debts.[179] If no injunctions could ever be issued based on a foreign proceeding, chapter 15 would become inoperable, even for the debtor in bankruptcy. However, as argued below, chapter 15 authorizes courts to enforce foreign injunctions to protect the debtor; it just does not authorize the enforcement of foreign injunctions that protect non-debtor parties.

C. *Chapter 15 provides an independent test for granting comity and enforcing some injunctions but not in the case of non-consensual third-party releases.*

While the common law does not support using principles of comity to enforce a non-consensual third-party release, Congress has the power to codify its own policies of comity, as comity touches on issues relating to international relations.[180] Some courts have found that section 304 of the Bankruptcy Code, which was the predecessor to chapter 15, expressly abrogated federal common law regarding comity and replaced it with a statute.[181] The Fifth Circuit, in a footnote in *Vitro,* found that comity should be granted if a foreign plan "reasonably address[es]" the concerns expressed by Congress in section 1507(b)(1)–(4).[182] Even if chapter 15 does not completely

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[176] *Id.*

[177] *Cont'l Airlines*, 203 F.3d at 214–15.

[178] *Medellin.*, 552 U.S. at 522.

[179] 11 U.S.C. § 524(a); *Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.)*, 885 F.2d 621, 626 (9th Cir. 1989); William L. Norton Jr. & William L. Norton III, 3 NORTON BANKR. L. & PRAC. § 58:2 (3d ed. 2008) ("The effect of a discharge is to interpose a permanent prohibition against debt collection rather than to absolve the underlying debt retroactively.").

[180] Judiciary Act of 1789 (Alien Tort Statute), ch. 20 § (b), 1 Stat. 73, 77, codified at 28 U.S.C. § 1350; Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 & 1601–11.

[181] *Bank of N.Y. v. Treco (In re Treco)*, 240 F.3d 148, 158 (2d Cir. 2001).

[182] *Vitro*, 701 F.3d at 1063 n.35. It is possible that the Fifth Circuit intended to abrogate all federal common law regarding comity in a chapter 15 bankruptcy and look exclusively to the section 1507(b) factors, but based on the

abrogate the common law comity analysis, it appears that it at least provides a wholly independent test for granting comity outside of the requirements of *Guyton* or the limit of injunctive power stated in *Medellin*. However, chapter 15's broad and powerful authorizations apply to protect only *the debtor*.

As discussed in Part B, *supra*, U.S. courts considering whether to enforce foreign injunctions should proceed under the assumption that they should not enforce the foreign injunction.[183] However, specific statutes may govern a court's response to proceedings involving international interests.[184] While chapter 15 authorizes the bankruptcy court to take a broad range of actions to facilitate cooperation with foreign restructurings, these actions are all restricted to protecting the debtor in bankruptcy.[185] There is no authorization to enforce injunctions protecting non-debtor parties.[186] While this may appear to echo inconclusive arguments made against non-consensual third-party releases in chapter 11, the key difference here is that courts in chapter 15 are operating from a presumed prohibition on enforcing foreign injunctions. Bankruptcy courts are not painting on a blank slate when it comes to the enforcement of foreign injunctions.[187] In contrast to chapter 15's silence regarding non-debtors, both sections 1521 and 1507 provide for broad authority to protect a chapter 15 debtor's assets.

The language of section 1521, while not explicitly authorizing a discharge of the debtor's obligations, states that "the court may . . . [stay] the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations, or liabilities to the extent that they have not been stayed under section 1520(a)."[188] Section 1520(a) provides the debtor with the protection of the automatic stay authorized under section 362 (as well as other protections associated with a U.S. bankruptcy), upon recognition of a foreign main proceeding.[189] Section 362(c) authorizes the court to stay any actions against the debtor's estate until: (1) the property sought is no longer property of the estate, (2) the case is closed or dismissed, or (3) discharge is granted or denied.[190] Since section 1521(a) expressly expands the court's powers outside what is authorized under section 1520(a), and section 1520(a) incorporates section 362(c), section 1521(a) allows a bankruptcy court to enter stay orders not necessarily governed by the limits under section 362(c).[191]

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court's actual analysis it appears that the Fifth Circuit merely intended to say that chapter 15 provides an additional basis for granting comity, not that it abrogates the federal common law regarding comity.

[183] *Medellin*, 552 U.S. at 522; *Guyot*, 159 U.S. at 206.

[184] *See* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 & 1601-11.

[185] 11 U.S.C. § 1521 ("[T]o protect the assets of the debtor or the interests of the creditors, the court may . . . grant any appropriate relief"); 11 U.S.C. § 1507 (discussing "additional assistance" for the debtor and creditors).

[186] *See* 11 U.S.C. §§ 1501–1532.

[187] *Medellin*, 552 U.S. at 522.

[188] 11 U.S.C. § 1521.

[189] 11 U.S.C. § 1520.

[190] 11 U.S.C. § 362.

[191] 11 U.S.C. § 1520(a)(1); 11 U.S.C. § 362(c); 11 U.S.C. § 1521(a)(1).

As the Fifth Circuit recognized in *Vitro*, a permanent stay protecting the debtor's assets is very close in function to a permanent injunction.[192] Section 1521(e) also recognizes this and states that the "standards, procedures, and limitations applicable to an injunction" apply to relief granted under section 1521(a)(1).[193] The Fifth Circuit found, however, that section 1521 could not support a permanent injunction for Vitro because Vitro sought to permanently enjoin actions against its subsidiaries.[194] The bankruptcy court suggested that the appellate court could treat the subsidiaries' assets as Vitro's assets to avoid this conclusion.[195] The Fifth Circuit rejected this potential argument by citing *In re Guyana Development Corp.*, which held that stock in a subsidiary is an asset of a parent company, but ownership does not extend to assets of the subsidiary.[196] While not explicitly stated, the Fifth Circuit's reasoning suggests a different outcome if a debtor is merely seeking to protect its own assets in accordance with a confirmed plan.[197]

Even if section 1521 does not authorize a court to grant the permanent injunction needed to effectuate a debtor's discharge, a discharge is a necessary part of a restructuring and is authorized by federal common law independent of the text of chapter 15.[198] In *Canada Southern Railway Co. v. Gebhard*, the Supreme Court was confronted with the question of whether it should enforce Canadian discharges for debt obligations owed to U.S. citizens.[199] The Court found that the discharges should be enforced in the United States.[200] The Court pointed out that a bankruptcy proceeding is inherently communal in nature and can be effective only when all parties in interest are bound by the arrangement, regardless of their place of residence.[201] After reviewing the process of the Canadian company's reorganization and finding it to be legal and fair, the Court overruled the Second Circuit Court of Appeals and enforced the Canadian discharges.[202]

Gebhard was addressed recently by the Bankruptcy Court for the Southern District of New York in *In re Modern Land*, in which the bankruptcy court needed to clear up some confusion over a recent Hong Kong High Court opinion which erroneously stated that chapter 15 does not result in a discharge of debt governed by New York law.[203] The court stated that clearing up the issue of discharge in chapter 15 was essential because so many international debt financing schemes are

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[192] *See Vitro*, 701 F.3d at 1058–59 (finding section 1521(a)(1) the closest provision authorizing Vitro's requested relief).

[193] 11 U.S.C. § 1521(e).

[194] *Id*.

[195] *Vitro,* 473 B.R. at 132.

[196] *Vitro*, 701 F.3d at 1058–59 (citing *In re Guyana Dev. Corp,* 168 B.R. 892, 905 (Bankr. S.D. Tex. 1994)).

[197] *See Vitro*, 701 F.3d at 1058–59 (denying permanent injunction under section 1521 but focusing on how relief is sought to protect assets of non-debtors).

[198] *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 539 (1883); *In re Modern Land (China) Co.,* 641 B.R. 768, 776–77 (Bankr. S.D.N.Y. 2022).

[199] *Gebhard*, 109 U.S. at 532.

[200] *Id*. at 539.

[201] *Id*.

[202] *Id*.

[203] *Modern Land*, 641 B.R. at 776.

governed by New York law, and a failure to clarify the issue could result in an indenture trustee not taking the actions authorized by a confirmed plan.[204] The bankruptcy court explained:

> Provided that the foreign court properly exercises jurisdiction over the foreign debtor in an insolvency proceeding, and the foreign court's procedures comport with broadly accepted due process principles, a decision of the foreign court approving a scheme or plan that modifies or discharges New York law governed debt is enforceable.[205]

In sum, the text of chapter 15 provides support for granting permanent injunctions to effectuate a debtor's discharge. However, nothing in the text of chapter 15 supports the enforcement of a permanent injunction to protect the assets of a non-debtor. Unlike in the chapter 11 context, courts deciding whether to enforce foreign permanent injunctions protecting the assets of a non-debtor must operate against the backdrop of Supreme Court precedent disapproving of enforcing injunctions. While a prohibition on enforcing foreign injunctions is the general rule, the Supreme Court has carved out a policy of enforcing discharges for debtors when the foreign proceedings meet the traditional standards of fairness as part of the well-known comity analysis presented in *Guyton*. As such, it is proper for bankruptcy courts to enforce foreign discharges, i.e., permanent injunctions, to effectuate the discharge of debtors that complete fair foreign insolvency proceedings. This exception to the general rule against enforcing foreign injunctions exists to protect only debtors that file for bankruptcy; it does not provide authority for courts to enforce foreign permanent injunctions protecting parties that are not in bankruptcy.

D. *Even if non-consensual third-party releases can be enforced under the broad principles of comity expressed in chapter 15, 28 U.S.C. § 1411 may prevent the courts from granting those releases in the mass tort context.*

Metcalfe and *Vitro* support enforcing non-consensual third-party releases that impair U.S. creditors. Both courts based their conclusions on the broad power granted to the bankruptcy courts under section 1507 of chapter 15. However, the U.S. creditors' claims in *Metcalfe* and *Vitro* originated from financial instruments. What would have happened in the mass tort litigation context? Section 1411(a) of title 28 states that "[e]xcept [for certain situations involving involuntary bankruptcy cases], this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim."[206]

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[204] *Id.*
[205] *Id.*
[206] 28 U.S.C. § 1411(a).

This statute seems to clearly state that the bankruptcy court may not abrogate a "serious tort" creditor's right to a trial by jury simply because the creditor is involved in a case under title 11.[207] However, multiple cases have held that claimants waive their right to a trial by jury *against the debtor* when they file a proof of claim.[208] Even if, as the Supreme Court has held, creditors lose their right to a jury trial on the claim they submit to the bankruptcy court, those creditors have not consented to the bankruptcy court's jurisdiction to adjudicate every claim they could possibly assert against non-debtors in relation to the claim they asserted against the debtor. There is no case law supporting the specific proposition that creditors waive their right to take actions against parties not in bankruptcy when they file a proof of claim against a debtor in bankruptcy.[209]

At least one chapter 15 case seemingly runs counter to this argument. In *In re Ephedra*, the U.S. creditors were personal injury and wrongful death tort claimants who had filed claims in the Canadian bankruptcy of "Muscletech."[210] The majority of parties in the Canadian proceeding negotiated a "Claims Resolution Procedure" that would evaluate and liquidate all creditor claims, including those of U.S.-based tort victims, without a jury.[211]

The Canadian debtor argued that the tort creditors waived their right to a jury trial when they filed a proof of claim in the Canadian bankruptcy proceeding.[212] This argument was clearly supported by the Supreme Court's ruling in *Langenkamp*.[213] Interestingly, the bankruptcy court decided to bypass the waiver issue, instead declaring that no law prevents a United States court from giving recognition and enforcement to a foreign insolvency procedure for liquidating claims, even when that procedure does not include the right to a jury trial.[214] The bankruptcy court raised

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[207] Some courts have interpreted section 1411 to broadly encompass most torts. However, the Bankruptcy Court for the Southern District of New York convincingly stated in *In re Gawker Media* that section 1411 was intended to cover a narrow range of serious injuries, such as automobile accidents or asbestos exposure. *In re Gawker Media LLC*, 571 B.R. 612, 621–22 (Bankr. S.D.N.Y. 2017). The Bankruptcy Court for the District of New Mexico provided a nine-part rationale to reach the same conclusion; the court pointed out that the proximity of "personal injury" to "wrongful death" suggests that Congress intended to protect "serious" injuries, not actions such as defamation. *Byrnes v. Byrnes (In re Byrnes)*, 638 B.R. 821, 829–30 (Bankr. D.N.M. 2022).

[208] *Langenkamp v. Culp*, 498 U.S. 42, 44–45 (1990) (stating that when a creditor submits a claim, it is consenting to jurisdiction through equity and forfeits the Seventh Amendment right to a jury trial); *In re Hooker Invs., Inc.*, 937 F.2d 833, 837 (2d Cir. 1991) (explaining that many, if not all, creditors are forced to decide whether to present a claim or to refuse to submit a proof of claim and sue independently).

[209] Some courts have held that bankruptcy courts can permanently enjoin creditors from taking action against a non-debtor entity but only when that non-debtor contributes a large financial sum to the debtor's estate (among a host of other factors depending on the circuit in which the bankruptcy case is filed). This practice is at the root of the circuit split on non-consensual third-party releases in the United States. Even in the circuits that allow bankruptcy courts to enjoin actions against non-debtors, courts focus their analysis on "principles of equity," not intentional waiver.

[210] *Ephedra*, 349 B.R. at 334.

[211] *Id*. Technically, the Canadian procedure had not yet liquidated the claims, but the procedure's rules made it likely that no jury would be involved, and the bankruptcy court agreed that this issue was ripe.

[212] *Id*. at 335.

[213] *Langenkamp*, 498 U.S. at 44–45.

[214] *Ephedra,* 349 B.R. at 335–36.

the issue of 28 U.S.C. § 1411 *sua sponte*, but the parties were not prepared to argue that point, and the court does not explain why it decided that the provision was not relevant.[215]

The bankruptcy court instead focused on comity in chapter 15 and why section 1506 did not prevent it from enforcing the Canadian court's liquidation process.[216] Section 1506 states that U.S. bankruptcy courts can refuse to enforce actions "manifestly contrary to the public policy of the United States."[217] It is undisputed that the "manifestly" phrase in section 1506 means that the public policy exception to comity applies only when the most fundamental policies of the United States are at issue.[218] The court went on to state that, under the federal common law of comity, a jury trial is not a necessary pre-requisite for recognition of a foreign judgment.[219]

The *Ephedra* holding does not undermine the contention that 28 U.S.C. § 1411 prevents a bankruptcy court from enforcing permanent injunctions protecting a non-debtor for two reasons. First, the tort claimants in *Ephedra* filed claims directly against the debtor in the debtor's Canadian bankruptcy. The United States Supreme Court has made it clear that under the rules of equity, these claimants submitted to the jurisdiction of the bankruptcy court and waived their right to a jury trial.[220] The rest of the *Ephedra* opinion is not necessary to the court's holding.

Second, the *Ephedra* court turned to *Guyot* and other federal case law to establish that a trial by jury is not necessary to enforce a foreign judgment.[221] As discussed in Part B, *supra*, the federal common law surrounding comity addresses only the enforcement of money judgments. The case law does not support enforcing injunctions to prevent serious tort claimants from seeking judgments. Tellingly, every case that the *Ephedra* court cites to diminishes the importance of a jury trial involving only money judgments. In *Samyang Food Co.*, the plaintiff was awarded a money judgment of $900,000.[222] At no point did that plaintiff seek the enforcement of a permanent injunction. In *Lockman Foundation v. Evangelical Alliance Mission*, the Ninth Circuit merely found that the fact that a foreign forum does not use a jury does not support a finding of *forum non conveniens*; at no point was the enforcement of a foreign injunction contemplated by the court.[223] In *In re Union Carbide*, the Second Circuit affirmed the dismissal of a U.S. case based on *forum non conveniens* because a jury trial in the United States was not necessary for a money judgment

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[215] *Id*. at 335 n.3.

[216] *Id*. at 336.

[217] *Id*.; 11 U.S.C. § 1506.

[218] 11 U.S.C. § 1506; H.R. REP. NO. 109-31, 109 (2005) (stating that "[t]he word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States"), *reprinted in* 2005 U.S.C.C.A.N. 88, 172.

[219] *Ephedra*, 349 B.R. at 337.

[220] *Langenkamp*, 498 U.S. at 44–45.

[221] *Ephedra*, 349 B.R. at 336–37.

[222] *Samyang Food Co. v. Pneumatic Scale Corp.,* No. 5:05-CV-636, 2005 WL 2711526, at *1 (N.D. Ohio Oct. 21, 2005).

[223] *Lockman Found. v. Evangelical All. Mission*, 930 F.2d 764, 767 (9th Cir. 1991).

to be enforceable; again, the judgment sought by the plaintiffs was only monetary in nature.[224] And, while *Union Carbide* involved a mass tort settlement, the injuries occurred in India, and the tort claimants had no claim to the protections afforded by 28 U.S.C. § 1411.[225]

The Supreme Court has expressly stated that injunctions issued by foreign courts are generally not enforceable in the United States.[226] Additionally, section 1411 clearly states that chapter 15 cannot be used to modify the jury trial rights of a serious tort claimant.[227] The fact that courts do not require jury trials before enforcing foreign monetary judgments is not instructive on the question of whether jury trials are still a protected right for mass tort claimants attempting to sue a U.S.-based non-debtor. The fact that the non-debtor entity's affiliate has filed for chapter 15 protections should have no long-term effects on a serious tort claimant's right to take action against the entity not in bankruptcy.

CONCLUSION

Although the case law supports the ability of bankruptcy courts to enforce non-consensual third-party releases granted in foreign courts, these decisions run into difficulties when further analyzing the specific type of relief authorized by the United States Supreme Court in *Guyot* and *Medellin*. While permanent injunctions to protect non-debtors are not authorized, chapter 15 and case law support the enforcement of injunctions as needed to effectuate a debtor's discharge. Courts must also engage the under-utilized argument that 28 U.S.C. § 1411 prevents bankruptcy courts from permanently enjoining claims arising from serious personal injuries or wrongful deaths. Though claimants may waive their right to a jury trial against a debtor in bankruptcy, they do not waive any rights to a jury trial for wrongful death or serious tort claims against an entity not in bankruptcy. As a last resort, section 1506's public policy exception should preclude United States courts from enforcing foreign injunctions that take away a serious tort creditor's right to a jury trial against a non-debtor.

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[224] *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 809 F.2d 195, 205–06 (2d Cir. 1987). While the Indian court entered a worldwide temporary restraining order against Union Carbide's assets, no enforcement of that order was sought in the U.S. proceeding.

[225] *Id*. at 197. Section 1411 requires that the right to a jury trial must arise under applicable nonbankruptcy law before it is protected. Since the plaintiffs in *Union Carbide* did not have sufficient ties to the U.S. to even bring their suit in a U.S. court, it is a logical deduction that they had no assertable claims in the U.S. for the torts under applicable nonbankruptcy law.

[226] *Medellin*, 552 U.S. at 522.

[227] 28 U.S.C. § 1411.