No. 23-124

IN THE

Supreme Court of the United States

WILLIAM K. HARRINGTON,
UNITED STATES TRUSTEE, REGION 2,
Petitioner,

v.

PURDUE PHARMA L.P., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN COLLEGE OF BANKRUPTCY AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

Marc A. Levinson
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

James L. Stengel
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Robert M. Loeb
Counsel of Record
Thomas M. Bondy
Katherine M. Kopp
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
rloeb@orrick.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The American College of Bankruptcy is an organization of lawyers, judges, academics, and other insolvency professionals, primarily from the United States, who are selected as fellows based on years of achievement in their chosen professions and service to the bar, the community, and their profession. As set forth in its Mission Statement, the College is "dedicated to the enhancement of professionalism, scholarship and service in bankruptcy and insolvency law and practice." Recognizing and respecting the diversity of viewpoints and interests among its fellows, the College will intervene in legal controversies only to advocate for the effective functioning of the bankruptcy system, expressing views that reflect a general consensus among bankruptcy professionals.

Consistent with this mandate, the College does not take a position on whether the court of appeals ruling on review is correct. Rather, this brief seeks to assist the Court by identifying recurring situations where third-party releases are utilized without controversy and are vital to the functioning of the bankruptcy system. The College urges the Court to craft an opinion that—no matter what the disposition of the controversy before it—preserves the use of third-party releases in situations where they have long been recognized as not only appropriate for a chapter

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[1] No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and its counsel made any monetary contribution intended to fund the preparation or submission of the brief.

11 plan or other settlement of estate claims, but necessary and proper.

The views expressed in this brief are those of the College and do not necessarily reflect the personal views of any fellow of the College or of any firm or organization with which any fellow is affiliated. No judicial fellow participated in any way in the decision to file this brief or in the drafting or review thereof.

INTRODUCTION AND SUMMARY OF ARGUMENT

Bankruptcy's three critical functions are: "[1] the exercise of exclusive jurisdiction over all of the debtor's property, [2] the equitable distribution of that property among the debtor's creditors, and [3] the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts." *In re Venoco LLC*, 998 F.3d 94, 104 (3d Cir. 2021) (Ambro, J.) (internal quotation marks omitted). In the context of chapter 11, the latter function is carried out by the Bankruptcy Code's discharge provisions, which can relieve the debtor from prepetition unsecured debt. *See* 11 U.S.C. §§ 524, 1141(d)(1). With the discharge power motivating the creditors, the "[c]hapter 11 reorganization provides a debtor with an opportunity to reduce or extend its debts so its business can achieve long term viability, for instance, by generating profits which will compensate creditors for some or all of any losses resulting from the bankruptcy." *In re Trump Ent. Resorts*, 810 F.3d 161, 173-74 (3d Cir. 2016).

While such discharge of unsecured prepetition debts generally is limited only to the debts of those entities that file for chapter 11 protection, chapter 11 plans frequently encompass limited liability releases for non-debtor third parties. The College submits this brief to caution the Court against categorically barring all manner of third-party releases. Certain types of third-party releases are commonplace, important to the bankruptcy system, and broadly accepted by the courts and practitioners as necessary and proper. In particular, this Court's disposition of the present case should not foreclose or draw into question the availability of 1) consent releases, 2) core exculpation clauses, or 3) bars against assertion by non-debtors of claims that are property of the bankruptcy estate or against estate property. These types of releases are materially different from those in the case under review, and this Court's disposition of the present case (on which the College takes no position) should not draw them into question.

ARGUMENT

Certain types of third-party release are widely accepted within the bankruptcy community as vital to the functioning of the bankruptcy system. In deciding this case, the Court should tailor its opinion so as not to disturb or call into question these three categories of third-party releases:

- **Consent releases**, by a non-debtor "releasor" included in the terms of a chapter 11 plan to which the releasor affirmatively consents.

- **Core exculpation clauses**, limiting potential liability of estate fiduciaries and their professionals for conduct in connection with the chapter 11 case.

- **Protecting property of the bankruptcy estate**. Claims that are property of the estate include, for example, fraudulent transfer claims asserted by the trustee, as well as claims against insurers for coverage under insurance policies administered as an asset of the bankruptcy estate.

I. The Court Should Not Suggest That Consent-Based Releases Of Third-Party Claims Are Impermissible.

In ruling on the present case, this Court should take care not to draw into question the power of a bankruptcy court to include third-party releases effectuated pursuant to a chapter 11 plan when those releases bind releasors who have provided consent following full disclosure.

Regardless of whether ***non***consensual third-party releases are included, chapter 11 provides important, if not essential, tools for implementing mass settlements through negotiations by representatives of all constituencies in a single forum. Any such settlement must be explained to claimants through a court-approved disclosure statement.[2] Voting to approve a

[2] Consistent with the Bankruptcy Code and the requirements of due process, creditors' acceptance or rejection of a chapter 11 plan may be solicited only through a disclosure statement

proposed plan and to give third-party release is subject to court supervision. Such releases can be subject to conditions, with the bankruptcy court determining whether the conditions have been met before the release is effective. For example, a settlement involving third-party releases may be conditioned on not less than a specified percentage of claimants voluntarily giving the release. Claims in a mass tort or other case with hundreds or even hundreds of thousands of claimants can be allowed and valued efficiently and in accordance with uniform standards; indeed, availability of this process can be a substantial incentive for creditors to participate in a voluntary release of claims. Funds from multiple sources can be marshalled and distributed in accordance with the terms of the plan, with quick recourse to the bankruptcy court to resolve any disputes. Given the value of chapter 11 as a forum and process for resolving multiple claims, this Court should tailor its decision on whether nonconsensual third-party releases may be a part of such process so as not to cast doubt on the availability or efficacy of the process itself as applied to consensual releases.

Courts generally agree that third-party releases can properly be effectuated through an affirmative agreement with or consent of the third party affected by the release. *See e.g., Flake v. Schrader-Bridgeport, Int'l, Inc.*, 538 F. App'x 604, 613 (6th Cir. 2013) (Section 524 "limits the effects of a bankruptcy discharge, but does not bar parties from settling their claims.");

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approved by the court as containing adequate information for a typical claimant to make an informed decision about the plan. 11 U.S.C. § 1125.

In re Specialty Equip. Cos., 3 F.3d 1043, 1047 (7th Cir. 1993) ("[C]ourts have found releases that are consensual and non-coercive to be in accord with the strictures of the Bankruptcy Code."); *In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 775-76 (Bankr. N.D. Tex. 2007) (citing Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 Emory Bankr. Dev. J. 13, 25 (2006)); *see also* Kyung S. Lee et al., *Revisiting the Propriety of Third-Party Releases of Nondebtors*, 18 Norton J. Bankr. L & Prac. 465, 466 (July/Aug. 2009). Courts routinely allow consensual third-party releases to be included in a chapter 11 plan where the release binds only those creditors who adequately manifested their consent. *In re Specialty Equipment*, 3 F.3d at 1047; *In re Central Jersey Airport Servs., LLC*, 282 B.R. 176, 182 (Bankr. D.N.J. 2002) (voluntary consensual releases are permissible under the Bankruptcy Code); *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 506 (D.N.J. 1997) ("When a release of liability of a nondebtor is a consensual provision, however, … it is no different from any other settlement or contract and does not implicate 11 U.S.C. § 524(e)."); *In re Monroe Well Serv., Inc.*, 80 B.R. 324, 334-35 (Bankr. E.D. Pa. 1987) ("[A] plan provision permitting individual creditors the option of providing a voluntary release to nondebtor plan funders does not violate 11 U.S.C. § 524(e).").[3] Thus, it is no accident that in its

[3] Section 524(e) is agnostic as to third-party releases. By its terms the provision addresses only the effect of a discharge of the debtor ("discharge of a debt of the debtor does not affect the

application to this Court seeking a stay (which triggered the grant of review), the Government was very careful to describe the three circuits barring third-party releases as all dealing with contexts *without* consent of the third parties. Application for Stay 14-15.

Relying on 11 U.S.C. § 1123(b)(6), courts typically allow such consensual third-party releases to be included in a plan because they serve to facilitate final resolution of the case and a fresh start for the debtor, while also enhancing creditors' recoveries. *See In re Arrowmill*, 211 B.R. at 507 ("These settlements by their voluntary nature, serve the interests of all parties involved by promoting reorganization without unfairly burdening other creditors."). In approving such terms, the courts recognize that the third parties and the debtor are engaging in a quasi-contractual arrangement based on the third party's opting to release the covered claims in exchange for receiving property under a plan. *See Food Lion, Inc. v. S.L. Nusbaum*

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liability of any other entity on . . . such debt") and serves to preclude a guarantor, joint tortfeasor, or similarly situated non-debtor from escaping liability by piggybacking on the debtor's discharge. The language of § 524(e) shows no congressional intent to address the permissibility (or not) of an order enjoining creditors' pursuit of claims against non-debtors. Specifying this non-effect of a discharge of the debtor creates no implication, one way or the other, on whether courts may enjoin creditors' pursuit of particular claims against particular non-debtors based on other provisions of the Code. Notably, such release orders are not inherently dependent on discharge of the debtor. Indeed, it is common for corporations to use chapter 11 for a going-concern sale of their business or other liquidation, and in such instances the debtor is ineligible for a discharge. *See* 11 U.S.C. §§ 1141(d)(3), 727(a)(1).

Ins. Agency, Inc., 202 F.3d 223, 228 (4th Cir. 2000) ("[W]hen a release of liability of a nondebtor is a consensual provision … agreed to by the … creditor, it is no different from any other settlement or contract.") (quotation marks omitted).

As this Court has explained: "Adjudication by consent is nothing new. Indeed, '[d]uring the early years of the Republic, federal courts, with the consent of the litigants, regularly referred adjudication of entire disputes to non-Article III referees, masters, or arbitrators, for entry of final judgment in accordance with the referee's report.'" *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 674-75 (2015) (quoting Ralph Brubaker, *The Constitutionality of Litigant Consent to Non-Article III Bankruptcy Adjudications*, 32 Bankr. L. Letter No. 12, p. 6 (Dec. 2012)). *See also*, *Thornton v. Carson*, 11 U.S. (7 Cranch) 596, 597 (1813) (affirming damages awards in two actions that "were referred, by consent under a rule of Court to arbitrators"); *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123, 131 (1864) (observing that the "[p]ractice of referring pending actions under a rule of court, by consent of parties, was well known at common law," and "is now universally regarded … as the proper foundation of judgment"); *Newcomb v. Wood*, 97 U.S. 581, 583 (1878) (recognizing "[t]he power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it").

The present case does not draw into question the validity of such consent terms in a chapter 11 plan.[4] In ruling on the dispute before it, however, this Court should not draw into question the validity of such provisions, including (a) releases of claims against a non-debtor pursuant to the debtor's chapter 11 plan, by a creditor who affirmatively opts to give such release as part of the plan voting process, and (b) entry of an injunction barring such creditor from pursuing such claim against the non-debtor.

II. The Court Should Not Suggest That Exculpation Clauses In A Chapter 11 Plan Are Improper.

Exculpatory clauses are typical provisions of a chapter 11 plan intended to limit the liability of estate fiduciaries and other specified parties for certain claims that may be asserted against them based on the work they performed related to the restructuring of the estate. Such limited releases are "'a commonplace provision in Chapter 11 plans.'" *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1085 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1394 (2021) (quoting *In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000)). Chapter 11 plans generally limit the liability of estate fiduciaries and their professionals and provide protection for their actions taken in connection with the bankruptcy case. The clauses do not attempt to release the exculpated parties from non-bankruptcy

[4] Indeed, the Government's brief to this Court focuses very intentionally only upon "nonconsensual" releases, using that term almost 30 times, including in the question presented.

acts taken before or after the bankruptcy filing.[5] Moreover, rather than barring such liability completely, an exculpation provision will permit actions for gross negligence or willful misconduct. Consistent with the rationale of this Court in *Barton v. Barbour*, 104 U.S. 126 (1881), such clauses may also provide that any claim against a trustee, professional, or related party arising out of the bankruptcy case only may be brought with permission of the bankruptcy court. *See, e.g., In re Highland Cap. Mgmt., L.P.*, 48 F.4th 419, 435 (5th Cir. 2022), *petition for cert. filed*, (U.S. Jan. 5. 2023) (No. 22-631) (approving a "Gatekeeper Provision" requiring that, "before any lawsuit is filed, the plaintiff must seek the bankruptcy court's approval of the claim as 'colorable'").

The question presented in this case—whether the Bankruptcy Code permits nonconsensual releases of pre-bankruptcy claims—is entirely different from whether an exculpation clause in a chapter 11 plan is an "appropriate provision" pursuant to 11 U.S.C. § 1123(b)(6) (granting the bankruptcy court the power to "include any other appropriate provision not inconsistent with the applicable provisions of this title"). Claims limited by an exculpatory clause are not pre-bankruptcy state-law claims; rather, they arise out of acts and omissions relating to administration of the

[5] What is described here is a core exculpation clause. In some plans the exculpatory clause may be drafted more broadly, to include other parties besides estate fiduciaries and actions taken outside the bankruptcy case. In the present case, this Court has no need to address the proper breadth of such clauses. And the College takes no position here other than that core exculpation clauses are proper and permissible under the Bankruptcy Code.

chapter 11 case. As this Court recognized in *Barton*, placing proper bounds on claims against fiduciaries in an insolvency case falls squarely within the powers and responsibilities of the court administering the case. A person participating in the administration of a debtor's reorganization efforts should not face liability for his or her good-faith efforts in doing so. Exculpation provisions allow the trustee (and other estate representatives) and professionals hired to administer the estate the ability "to engage in the give-and-take of the bankruptcy proceeding without fear of subsequent litigation over any potentially negligent actions in those proceedings." *Blixseth*, 961 F.3d at 1084. Without such exculpation clauses, competent professionals would be deterred from engaging in the bankruptcy process, which would undermine the main purpose of chapter 11—achieving a successful restructuring. American Bankruptcy Institute Commission to Study the Reform of Chapter 11, *2012–2014 Final Report and Recommendations* 251 (2014), http://commission.abi.org/full-report ("[Exculpatory provisions] encourag[e] parties to engage in the process and assist the debtor in achieving a confirmable plan—actions that committees, committee members, other estate representatives and their professionals, and certain parties (such as key lenders) may not be willing to undertake in the face of litigation risk.").

Exculpation clauses are consistent with this Court's decision in *Barton*, *supra*, where this Court recognized that "before suit is brought against a receiver leave of the court by which he was appointed must be obtained." *Barton*, 104 U.S. at 128 (internal citations omitted). The Court explained that absent

leave of the appointing court, another forum would lack subject-matter jurisdiction over a lawsuit because allowing the unauthorized suit to proceed "would have been a usurpation of the powers and duties [that] belonged exclusively to another court." *Id.* at 136. The *Barton* rule is widely understood as "necessary to ensure a consistent and equitable administration of the receivership property" by preventing the gamesmanship that could follow if competing parties were permitted to pursue litigation outside the territorial jurisdiction of the appointing court. *In re VistaCare Grp., LLC*, 678 F.3d 218, 224-25 (3d Cir. 2012) (internal citations omitted). Likewise, if a professional or trustee or other estate representative is to be brought to account for conduct in the administration of the bankruptcy estate, then authority to grant such relief is properly limited to the appointing bankruptcy court.

The Government recognizes that its arguments in the present case, regarding other types of third-party releases, do not implicate exculpation clauses. The Government has not challenged the clause in the Purdue plan that releases estate fiduciaries for actions related to the bankruptcy case.[6] This Court, thus,

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[6] Section 10.6(c) of the Purdue Plan releases "all Holders of Channeled Claims" from "any Claim in connection with, or arising out of, (i) the administration of the Chapter 11 Cases; the negotiation and pursuit of the Restructuring Transactions, the Plan, the Master Disbursement Trust, the Creditor Trusts (including the trust distribution procedures and the other Creditor Trust Documents) and the solicitation of votes with respect to, and confirmation of, the Plan; the funding of the Plan; the occurrence of the Effective Date; the administration of the Plan and

need not address the propriety of such clauses. But the Court also should be careful in its ruling not to include any statement that would cast doubt on the effectiveness of these commonplace and vitally important provisions.

III. The Court Should Not Rule In A Manner That Calls Into Question The Bankruptcy Court's Power Over Property Of The Estate.

The powers of a bankruptcy court and trustee to deal with property of the estate are fundamental elements of the bankruptcy process. Under 11 U.S.C. § 541, filing of the bankruptcy petition creates (with exceptions not pertinent here) an estate including all legal or equitable interests of the debtor in property existing on the filing date. To protect the bankruptcy court's control of estate assets, the filing triggers an automatic stay of "any act to obtain possession of … or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The Code requires the bankruptcy trustee (or the debtor-in-possession carrying out the same role pursuant to 11 U.S.C. § 1107(a)) to preserve and protect the estate, and to recover property of the estate. *See, e.g.,* 11 U.S.C. §§ 704(a)(1), 1106(a)(1). Performing that statutory role, trustees often bring turnover, fraudulent transfer, and preference actions to recover the property of the estate. 11 U.S.C. §§ 542, 547, 548. As this Court has long recognized, "causes of action" that can be brought by the trustee in the

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the property to be distributed under the Plan; and the wind-up and dissolution of the Liquidating Debtors and the transactions in furtherance of any of the foregoing or (ii) such Holder's participation in the Pending Opioid Actions." J.A. 270.

name of the debtor or estate are "property of the estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995).

In seeking to recover property of the estate, the trustee, with approval of the bankruptcy court, can, and often does, settle such claims. In doing so, the trustee must have the ability to resolve them completely, including preventing non-debtor parties (typically creditors) from asserting the same claim. In some situations—for example, a trustee's action to collect on an account receivable—a creditor will have no plausible basis for a claim against the defendant. In other instances—for example, a classic corporate derivative claim against directors and officers for breach of fiduciary duty—creditors and/or shareholders may have a plausible basis for asserting the claim outside bankruptcy, but when asserted by the trustee in the context of a bankruptcy case and then settled with the court's approval, the settlement is binding on all creditors and shareholders; their only interest in the settlement proceeds consists of the distribution they may be eligible to receive under the chapter 11 plan on account of their claim or equity interest. *See In re Ionosphere Clubs, Inc.*, 17 F.3d 600, 604 (2d Cir. 1994) ("[T]he claims submitted by the [shareholders] to the bankruptcy court are derivative.... They therefore belong exclusively to the [debtor's] Estate and were extinguished by its settlement of those claims.")

Fraudulent transfer claims present another common situation in which a claim that creditors could assert outside bankruptcy becomes property of the bankruptcy estate. Laws such as the Uniform Voidable Transactions Act (UVTA) and its predecessor, the

Uniform Fraudulent Transfer Act (UFTA),[7] permit creditors outside bankruptcy to recover property that the debtor improperly transferred. The Bankruptcy Code, however, grants the trustee the right to assert on behalf of the bankruptcy estate any state-law fraudulent transfer claim that was or could be asserted by any creditor (*see* 11 U.S.C. § 544(b)(1)), and additionally creates a federal fraudulent transfer cause of action in favor of the trustee (*see* 11 U.S.C. § 548).[8] Thus, the Code vests the power of recovering fraudulent transfers on behalf of all creditors squarely in the hands of the trustee.[9]

When the trustee settles (with the bankruptcy court's approval) a fraudulent transfer claim on behalf of the estate and all of the creditors, the creditors are bound by that settlement and have no right to further pursue their own non-bankruptcy claims to avoid the same transfer. *In re Seven Seas Petroleum, Inc.*, 522 F.3d 575, 589 n.9 (5th Cir. 2008); *Flip M Corp. v. McElhone*, 841 F.2d 531 (4th Cir. 1988) (action for recovery of assets as a fraudulent transfer was for the

[7] *See, e.g.,* Cal. Civ. Code § 3439.09; Ga. Code Ann. § 18-2-70; Ky. Rev. Stat. Ann. § 378A.005; Mich. Comp. Laws Ann. § 566.37(1)(a); N.Y. Debt. & Cred. Law §§ 270-281.

[8] These provisions overlap but differ in important ways. For example, the statute of limitation under state law (four years under the uniform version of the UVTA or UFTA) is typically longer than the two-year period of § 548, and the definition of avoidable transfers may differ as well.

[9] The Code vests the trustee with other powers that, outside bankruptcy, would be exercised by the individual creditors. For example, § 544(b)(1) provides the trustee with important avoidance powers, such as the ability to set aside unperfected liens, that could be asserted by creditors outside of bankruptcy.

trustee to prosecute, not the creditor injured by the fraudulent transfer). In order to assure finality, courts may—whether as part of a chapter 11 plan or a separate stand-alone settlement of the fraudulent transfer claim—bar creditors from any further action to recover the same transfer. *See In re Bernard L. Madoff Inv. Sec. LLC*, 740 F.3d 81, 95 (2d Cir. 2014) (enjoining fraudulent transfer claims after approving bankruptcy settlement). Other claims of creditors may similarly become property of the estate when bankruptcy is commenced. *See, e.g., In re Tronox Inc.*, 855 F.3d 84, 106-07 (2d Cir. 2017) (trustee has exclusive standing to assert successor liability claims); *In re Emoral, Inc.*, 740 F.3d 875 (3d Cir. 2014) (same).[10]

The Bankruptcy Code expressly provides for claims that are property of the estate to be settled (or further pursued) as part of a chapter 11 plan. 11 U.S.C. § 1123(b)(3). Once court approval of such settlement has been given, whether pursuant to confirmation of a plan or separately, that disposition of estate property is, and must be, enforceable against everyone. Bankruptcy estates must continue to be able to release claims that are property of the estate, and to enforce such release with an injunction against assertion of a released claim by any non-debtor party, including where (but for bankruptcy) the non-debtor

[10] The College does not take a position on whether any particular type of claim should be held to become property of the estate upon commencement of bankruptcy, only that if any claim is property of the estate under applicable law including as it may continue to be developed by the courts, release of such claim by the estate will be binding on third parties, and the release may be backed by a bankruptcy court injunction against the claim being brought in the future.

party has its own cause of action for the released claim.

Protection of estate property also permits entry of injunctions barring creditors from asserting claims directly against an insurer to collect from the debtor's liability policy. It is well settled that insurance policies providing coverage for a debtor's liability to creditors are property of the estate. *In re Stinnett*, 465 F.3d 309, 312 (7th Cir. 2006); *ACandS, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 260 (3d Cir. 2006); *In re Baird*, 567 F.3d 1207 (10th Cir. 2009) (medical malpractice policy property of physician's bankruptcy estate); *In re Vitek*, 51 F.3d 530, 533 (5th Cir. 1995) ("an overwhelming majority of courts have concluded that liability insurance policies fall within § 541(a)(1)'s definition of estate property"); *In re St. Clare's Hosp. & Health Ctr.*, 934 F.2d 15, 18-19 (2d Cir. 1991) ("[a]s this Court has previously ruled … the debtors' rights under its insurance policies are property of a debtor's estate under § 541(a) of the Code"). The proceeds are (or are administered as) property of the estate where insufficient to pay all covered claims. *In re OGA Charters, LLC*, 901 F.3d 599, 604 (5th Cir. 2018). When the estate settles with an insurer over the amount and/or terms of coverage, the settlement is binding on creditors even though, if their claims are covered by the policy, they will under some circumstances have a direct action against the insurer under state law. *See MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 92-93 (2d Cir. 1988) (claims to "collect out of the proceeds of [Debtor's] insurance policies on the basis of [debtor's] conduct" are "inseparable from [debtor's] own insurance coverage and are consequently well

within the Bankruptcy Court's jurisdiction over [debtor's] assets").[11] *See also Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152 (2009); *In re Titan Energy, Inc.*, 837 F.2d 325, 329 (8th Cir. 1988). Barring direct actions against an insurer can be viewed as a nonconsensual third-party release, but such orders are permissible because they protect the core function of the bankruptcy courts to administer and distribute estate assets.

The Code confers on the trustee the power and duty to bring actions to recover property of the estate and stays creditors from interfering with the trustee's control of estate property for the duration of the case. The bankruptcy court must have the power to effect settlement of those claims, including the power to bar non-debtor actions to recover for or from the estate property that is the subject of the settlement. Absent such power, settlement would not be possible and a core function of the bankruptcy process—to maximize recoveries for creditors from property of the estate—would be thwarted. It is critical for the bankruptcy system that, in disposing of the present case, this Court should take care not to cast doubt on this essential power.

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[11] Technically, it is the debtor's rights under insurance policies rather than (necessarily) the policies themselves that constitute property of the estate. The distinction matters where a non-debtor owns or has its own rights under an insurance policy that also covers claims against the debtor.

CONCLUSION

The College respectfully recommends that in ruling on this case, this Court take care not to categorically bar all manner of third-party releases because certain types of third-party releases are permitted under applicable law, important to the bankruptcy system, and long utilized and broadly accepted by courts and petitioners. In particular, the Court's opinion should not foreclose the availability of 1) consent releases, 2) core exculpation clauses, or 3) injunctions protecting property of the estate, including assertion or settlement of claims that are property of the estate and insurance policies of the estate from which creditors might seek to collect their claims by direct action. These types of releases are materially different from those in the case under review, and this Court's disposition of the present case should not draw them into question.

Respectfully submitted,

Marc A. Levinson
ORRICK, HERRINGTON &
SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

James L. Stengel
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Robert M. Loeb
Counsel of Record
Thomas M. Bondy
Katherine M. Kopp
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
rloeb@orrick.com

September 27, 2023