Tails of Purdue

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Purdue Pharma ~ The Big Bad Wolf

- In the mid 1990s, Purdue Pharma—owned by the Sackler Family—began marketing OxyContin as a "less addictive" pain medication.
- In 2007, a Purdue affiliate pled guilty on federal felony charges for the misbranding and false marketing and advertising. Purdue soon faced thousands of tort cases.
- On September 15, 2019, Purdue filed bankruptcy in the SDNY before Judge Drain.
- Purdue filed bankruptcy to "finalize and implement" a settlement with "more than $10 billion of value to address the opioid crisis."
- Judge Drain approved the settlement and granted the Sackler Family releases of civil liability related to Purdue's opioid business.
- After multiple appeals, the release issue went to SCOTUS.

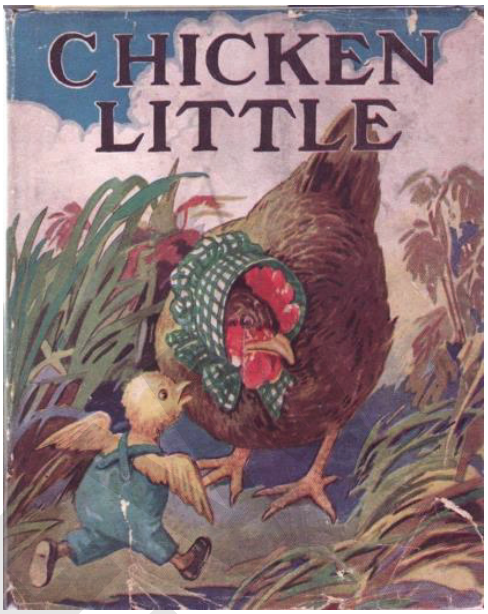
The Supreme Court Decision: Poor Ugly Duckling

- Issue presented: "Whether the bankruptcy court had statutory authority [under 11 U.S.C. § 1123(b)(6)] to enter the non-consensual releases of third-party direct claims against non-debtors as part of the Debtors' plan of reorganization."
- SCOTUS applied the *ejusdem generis* canon of interpretation and found that § 1123(b)(6) did not give the bankruptcy court "the authority the plan proponents suppose."
- SCOTUS leaves open the issue of what constitutes consent.

11 U.S.C. § 1123(b)(6) states a plan "may . . . include any other appropriate provision not inconsistent with the applicable provisions of this title."

The Sky is Falling

- What is Bankruptcy Exceptionalism?
- Comparing First Day relief with third-party releases
- Post-Purdue case studies



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Goldilocks and the Post-Purdue Releases

- What is consent post-*Purdue*?
  - *Smallhold* (Del.): Judge Goldblatt searches for perfect and finds consent requires a plan vote + option to opt-out.
  - *Red Lobster* (M.D. Fla.): Judge Robson required opt-in post-*Purdue*.
  - *Robertshaw* (SDTX): Judge Lopez finds standard opt-out sufficient.

"Creative lawyers will undoubtedly dream up other tools, which will be considered, when presented, on their merits in light of applicable law." – Judge Greenblatt, *Smallhold*

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Also available as part of the eCourse
[eSupplement to the 35th Annual Conference on State and Federal Appeals]

First appeared as part of the conference materials for the
43rd Annual Jay L. Westbrook Bankruptcy Conference session
"Taking Stock After Purdue Pharma"