

Pratt's Journal of Bankruptcy Law

LEXISNEXIS® A.S. PRATT®

NOVEMBER-DECEMBER 2022

EDITOR'S NOTE: FOLLOW THE MONEY

Victoria Prussen Spears

**JUST UNDER THE WIRE: LOAN AGENT ENTITLED TO RECLAIM \$500 MILLION MISTAKEN
REVLON PAYMENT**

George H. Singer

**NEW BORROWER DEFENSE RULE EXPANDS STUDENT LOAN DISCHARGES ON MULTIPLE
FRONTS**

Kristina Gill, Edward M. Cramp, Anthony J. Guida Jr., and Jonathan Helwink

**THIRD CIRCUIT ADOPTS STANDARD FOR APPOINTMENT OF FUTURE CLAIMANTS
REPRESENTATIVES**

Jeff Bjork, Roman Martinez, Kimberly A. Posin, Helena Tseregounis and Deniz A. Irgi

**THE ONGOING SOLVENT DEBTOR DEBATE: DIVIDED NINTH CIRCUIT PANEL HOLDS
THAT PG&E CREDITORS ARE ENTITLED TO CONTRACT RATE OF INTEREST**

Ingrid Bagby, Michele Maman, Thomas Curtin and Marc Veilleux

**SECTION 523(a) DISCHARGE EXCEPTIONS ARE APPLICABLE IN ALL SUBCHAPTER V
CASES, INCLUDING THOSE OF CORPORATE DEBTORS, FOURTH CIRCUIT RULES**

James V. Drew

A TALE OF TWO CITIES: DISCHARGE OF U.S.-DENOMINATED DEBT IN CHAPTER 15

Lynn P. Harrison III, Richard Keady and David Kwok

**ITALY'S NEW (AND AMENDED) INSOLVENCY AND RESTRUCTURING CODE ENTERS INTO
FORCE**

Carlo de Vito Piscicelli, Giuseppe Scassellati-Sforzolini, Francesco Iodice and Mattia Paglierini



LexisNexis

Pratt's Journal of Bankruptcy Law

VOLUME 18

NUMBER 8

November-December 2022

Editor's Note: Follow the Money Victoria Prussen Spears	351
Just Under the Wire: Loan Agent Entitled to Reclaim \$500 Million Mistaken Revlon Payment George H. Singer	354
New Borrower Defense Rule Expands Student Loan Discharges on Multiple Fronts Kristina Gill, Edward M. Cramp, Anthony J. Guida Jr., and Jonathan Helwink	360
Third Circuit Adopts Standard for Appointment of Future Claimants Representatives Jeff Bjork, Roman Martinez, Kimberly A. Posin, Helena Tseregounis and Deniz A. Irgi	367
The Ongoing Solvent Debtor Debate: Divided Ninth Circuit Panel Holds that PG&E Creditors Are Entitled to Contract Rate of Interest Ingrid Bagby, Michele Maman, Thomas Curtin and Marc Veilleux	371
Section 523(a) Discharge Exceptions Are Applicable in All Subchapter V Cases, Including Those of Corporate Debtors, Fourth Circuit Rules James V. Drew	379
A Tale of Two Cities: Discharge of U.S.-Denominated Debt in Chapter 15 Lynn P. Harrison III, Richard Keady and David Kwok	388
Italy's New (and Amended) Insolvency and Restructuring Code Enters into Force Carlo de Vito Piscicelli, Giuseppe Scassellati-Sforzolini, Francesco Iodice and Mattia Paglierini	391

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Ryan D. Kearns, J.D., at 513.257.9021
Email: ryan.kearns@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number: 80-68780

ISBN: 978-0-7698-7846-1 (print)

ISBN: 978-0-7698-7988-8 (eBook)

ISSN: 1931-6992

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S JOURNAL OF BANKRUPTCY LAW [page number] ([year])

Example: Patrick E. Mears, *The Winds of Change Intensify over Europe: Recent European Union Actions Firmly Embrace the “Rescue and Recovery” Culture for Business Recovery*, 10 PRATT’S JOURNAL OF BANKRUPTCY LAW 349 (2022)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc. Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SCOTT L. BAENA

Bilzin Sumberg Baena Price & Axelrod LLP

ANDREW P. BROZMAN

Clifford Chance US LLP

MICHAEL L. COOK

Schulte Roth & Zabel LLP

MARK G. DOUGLAS

Jones Day

MARK J. FRIEDMAN

DLA Piper

STUART I. GORDON

Rivkin Radler LLP

PATRICK E. MEARS

Barnes & Thornburg LLP

Pratt's Journal of Bankruptcy Law is published eight times a year by Matthew Bender & Company, Inc. Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Journal of Bankruptcy Law*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Third Circuit Adopts Standard for Appointment of Future Claimants Representatives

*By Jeff Bjork, Roman Martinez, Kimberly A. Posin, Helena Tseregounis and Deniz A. Irgi**

In this article, the authors explain that a decision by the U.S. Court of Appeals for the Third Circuit clarifies the appointment standard for future claimants representatives in the Third Circuit under Bankruptcy Code Section 524(g).

In a precedential decision, the U.S. Court of Appeals for the Third Circuit has upheld the appointment of James L. Patton, Jr., as the legal representative for future talc claimants (“FCR”) by the bankruptcy court in the Imerys Talc America Chapter 11 cases.¹

Resolving a split among lower courts, the Third Circuit adopted a heightened fiduciary standard for the appointment of FCRs in lieu of the “disinterestedness” standard applicable to Chapter 11 professionals. Notably, however, the Third Circuit declined to prescribe any particular process for a bankruptcy court to follow in appointing an FCR.

BACKGROUND

Imerys Talc America, together with its North American affiliates (collectively, “ITA”), previously specialized in the production and supply of talc in the North American market. In 2019, faced with mounting talc-related litigation liabili-

* Jeff Bjork, a partner in the Los Angeles office of Latham & Watkins, is global vice chair of the firm’s Restructuring and Special Situations Practice, representing public and private companies, creditors, and investors in all aspects of restructuring. Roman Martinez, a partner in the firm’s office in Washington, D.C., and a member of the firm’s Supreme Court & Appellate Practice, focuses primarily on appeals in the U.S. Supreme Court, the federal courts of appeals, and state appellate courts. Kimberly A. Posin, a partner in the firm’s Los Angeles office, advises debtors and creditors on high-profile matters and on a range of restructuring related transactions. Helena Tseregounis, a partner in the firm’s Los Angeles office, represents clients in all aspects of domestic and cross-border corporate reorganizations and restructurings. Deniz A. Irgi is a finance associate in the firm’s Los Angeles office and a member of the firm’s Restructuring and Special Situations Practice. The authors may be contacted at jeff.bjork@lw.com, roman.martinez@lw.com, kim.posin@lw.com, helena.tseregounis@lw.com and deniz.irgi@lw.com, respectively. The firm represents the Imerys Talc America entities in the appeal discussed in this article and also is counsel to the debtors in the Chapter 11 cases.

¹ *In re Imerys Talc America, Inc., et al. v. Cyprus Historical Excess Insurers*, No. 20-3485 (3d Cir. June 30, 2022).

ties, ITA initiated Chapter 11 proceedings in the U.S. Bankruptcy Court for the District of Delaware to pursue a plan of reorganization to permanently resolve its talc-related liabilities (including asbestos-related claims) pursuant to Sections 524(g) and 105(a) of the Bankruptcy Code. Section 524(g) requires that an FCR be appointed by the bankruptcy court to represent the interest of future claimants in plan negotiations.

In 2018, ITA engaged James L. Patton, Jr. as proposed FCR to represent the interests of future talc claimants in a potential Chapter 11 filing. Once ITA initiated the Chapter 11 cases, it moved to have Patton officially appointed as FCR by the bankruptcy court. In May 2019, over the objection of some of ITA's historical insurers, the bankruptcy court issued an order appointing Patton as FCR.

Several historical insurers appealed the bankruptcy court's order appointing Patton as FCR. The insurers argued that Patton was conflicted from serving as FCR in the ITA bankruptcy because his law firm represented two of the insurers in an unrelated insurance coverage dispute that also involved asbestos liabilities. The insurers pivoted to this conflict argument in the bankruptcy court after unsuccessfully objecting to Patton's appointment based on his prepetition engagement by the debtors as proposed FCR. As the first level of review, the U.S. District Court for the District of Delaware denied the insurers' arguments and affirmed the bankruptcy court's order appointing Patton.

The insurers appealed to the Third Circuit.

FCR APPOINTMENT AFFIRMED

Firmly rejecting the insurers' arguments, the Third Circuit was satisfied that the bankruptcy court gave due consideration to the purported conflict in the course of Patton's appointment and reasonably determined that no disqualifying conflict existed.

Specifically, after requesting additional disclosures from Patton regarding his firm's other representation, the bankruptcy court found that the insurers' prospective conflict waiver (which specifically envisioned that Patton's firm would represent other clients in Section 524(g) bankruptcy proceedings), coupled with the fact that Patton and his FCR team were walled off from the firm's insurance litigation matters, provided adequate assurance that Patton could faithfully serve as a fiduciary for future claimants without divided loyalties.

The Third Circuit also rejected the insurers' argument that the ITA bankruptcy and the other asbestos-related matters handled by Patton's firm were

“substantially related” because they both involved insurance coverage disputes—calling this assertion “vague” and unsupported.²

STANDARD FOR FCR APPOINTMENTS

The Third Circuit’s decision clarifies the standard for appointment of FCRs under Section 524(g)(4)(B) of the Bankruptcy Code. Specifically, the court held that an FCR must be able to “act in accordance with a duty of independence from the debtor and other parties in interest in the bankruptcy, a duty of undivided loyalty to the future claimants, and an ability to be an effective advocate for the best interests of the future claimants.”³

In so holding, the Third Circuit declined to adopt the “disinterestedness” standard applicable to Chapter 11 professionals, finding that an FCR’s statutory mandate as a “legal representative” for future claimants requires it to “fulfill the heightened duties owed by fiduciaries.”⁴ The fiduciary standard adopted by the Third Circuit is similar (though not identical) to the guardian ad litem standard utilized in other contexts and is consistent with the standards governing creditors’ committees in bankruptcy proceedings.

The Third Circuit also addressed the role of the bankruptcy court in addressing purported conflicts of interest. The court stressed that “*whether* a conflict exists is less relevant to an [FCR] appointment than the nature of the conflict and importance of the conflict to the future claimants’ interests.”⁵ The court emphasized that a conflict with a “minimal or no impact on an FCR’s ability to successfully represent the future claimants’ interests[]” should likely not preclude appointment.⁶ The Third Circuit noted that even a conflict under Rule 1.7 of the Model Rules of Professional Conduct (assuming, without deciding, that those rules apply to FCRs) may not be sufficient to disqualify an otherwise qualified FCR; that too is left to the discretion of the bankruptcy court.

Finally, the Third Circuit declined to mandate any particular process for the bankruptcy court to follow in making FCR appointments. The only “proce-

² *Id.* at 30.

³ *Id.* at 19.

⁴ *Id.* at 22.

⁵ *Id.* at 25.

⁶ *Id.* at 25–26.

dural requirement” is that the bankruptcy court receive “the information necessary to assess the candidate(s)’s qualifications.”⁷

INSURERS LACK GENERALIZED STANDING

While the Third Circuit ultimately reached the merits of the appeal, it found that only two of the insurers were actually involved in the firm’s previous coverage litigation and therefore had standing to raise the alleged conflict of interest.

The Third Circuit reaffirmed its earlier holding in *Travelers Insurance Co. v. H.K. Porter Co., Inc.*⁸ that standing in bankruptcy appeals is limited to “person[s] aggrieved”—a standard parties meet when a contested order “diminishes their property, increases their burdens, or impairs their rights.”⁹

The court rejected the remaining insurers’ arguments for standing based on an asserted generalized interest in the “integrity of the bankruptcy process.”¹⁰ The remaining insurers could not bypass the “person[s] aggrieved” standard absent a clear need to expand the pool of those with standing to raise the alleged conflict. In so holding, the court observed that the insurers’ objection appeared to be a “tactical one to delay Imerys’s plan confirmation,” and was the sort of “bad-faith tactic” that the Third Circuit has previously guarded against in the standing context.¹¹

⁷ *Id.* at 27.

⁸ *Travelers Insurance Co. v. H.K. Porter Co., Inc.*, 45 F.3d 737 (3d Cir. 1995) (citation omitted).

⁹ *In re Imerys Talc America*, No. 20-3485 at 12–13.

¹⁰ *Id.* at 12.

¹¹ *Id.* at 14.