The role of Investigative Forensic Accountants in 'social debt' Chapter 11 Bankruptcy cases

A hypothetical report for Bankruptcy Judge Drain
In re: Purdue Pharma L.P., et al., SDNY Case No. 19-23649

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For
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CONTEXT FOR THIS PAPER

The Masters in Forensic Accounting Emerging Issues course requirement is to author a paper on a current issue through a forensic accounting (IFA) lens and highlight how and why this topic is relevant to the future of the IFA profession.

The overarching premise of this paper is that social justice and forensic accounting can be linked, which is evident in the Purdue Pharma Chapter 11 bankruptcy case. There are two sub points which I believe are central to the issue of how IFAs can support bankruptcies with a social component:

1. The Purdue Pharma case highlights that the Bankruptcy Code may be outmoded to address the issues that arise in 'social debt' bankruptcies, especially relating to "weaponization'' and noncore proceedings, because the broad wording in some Bankruptcy Code provisions continues to be interpreted in a way that supports debtors, and encourages them to exploit and take advantage (Zoppo, 2023).
    - Despite proposed reforms, the "boundary-pushing"[1] components of Chapter 11 restructuring plans (especially nonconsensual non-debtor releases) will continue because the outcome of the Purdue Pharma bankruptcy will "… [give] lawyers representing debtors further comfort that courts have the

[1] https://www.law.com/nationallawjournal/2023/06/01/sky-is-the-limit-what-2nd-circuits-broad-view-of-bankruptcy-code-means-beyond-purdue-pharma/ (Zoppo, 2023). "[According to Melissa Jacoby, UNC Chapel Hill School Law Professor] In addition to keeping the door open for non-consensual non-debtor releases in Chapter 11 cases, the Second Circuit decision also opens the door to other boundary-pushing components of restructuring plan(s) because the authority the Second Circuit relies on for these releases is so generic,"

authority to approve a broad range of restructuring tools."[2]

- Legal scholars have for many years supported bankruptcy reform, especially as it relates to abuse of the bankruptcy system and lack of reinforcement of accountability and integrity (Jones, 1997). Because "legislative changes have been really hard to come by,"[3] mitigating the critical issues in the Purdue Pharma bankruptcy (weaponizing by using bankruptcy as a first resort/pre-emptive filing, nonconsensual non-debtor third-party releases, debtor manipulation of creditors[4] and venue and judge shopping), in the near term will be most effective by employing "an infusion of Judicial discretion" (Landry, 2020).

Further, it is my view that IFA is a fitting profession to provide comprehensive context on 'noncore' issues. IFAs are governed by professional standards that require integrity, objectivity, and superior verbal and written communication. The input of an independent IFA may help expand what can be considered as 'core' issues in a Chapter 11 bankruptcy and support the court in maximizing the financial resources available to compensate creditors (which, in this case includes victims of OxyContin).

- Barriers to consideration of noncore issues (i.e., to reclassify as core) may be a necessary equalizer given that corporations can "weaponize"[5] bankruptcy proceedings to achieve a better outcome with a Chapter 11 filing than they

[2] https://www.law.com/nationallawjournal/2023/06/01/sky-is-the-limit-what-2nd-circuits-broad-view-of-bankruptcy-code-means-beyond-purdue-pharma/ (Zoppo, 2023).
[3] https://www.law.com/nationallawjournal/2023/06/01/sky-is-the-limit-what-2nd-circuits-broad-view-of-bankruptcy-code-means-beyond-purdue-pharma/ (Zoppo, 2023)
[4] (Levitin, 2022) "Poison pill".
[5] (Levitin, 2022)

could achieve in a civil litigation proceeding.

2. An IFA is governed by both a set of Standard Practices and case law that sets precedents for IFA conduct as expert witnesses.[6] However, IFA Standard Practices were created in 2006 the Purdue Pharma case shows that they require a refresh. Necessary improvements to the IFA profession include that IFA participation in 'social debt' bankruptcy cases becomes common practice. The current IFA Standard Practices (2006) may not reflect the current demands of IFAs in general, or as they relate to 'social debt' bankruptcy cases. I am proposing that the IFA Standard Practices (2006) be updated to reflect how an IFA can contribute to a 'social debt' bankruptcy case, requiring an IFA to possess and/or acquire knowledge beyond investigation and accounting.

The paper is organized into four sections:

1. An introduction to the complexities of the Purdue Pharma Chapter 11 bankruptcy case.
2. Background information describing Chapter 11 proceedings under the Bankruptcy Code and how Purdue Pharmacy was able to use certain features to pursue an effective legal strategy.
3. A hypothetical IFA report for Judge Robert Drain, as if he had commissioned it to consider prospective noncore matters, and to examine issues that might lead to increasing the settlement amount for creditors and victims of OxyContin.
4. Suggested improvements to the 2006 IFA Professional Standards that are relevant to a

[6] E.g., In Canada: R.v. Mohan (1994), SCC; in the USA: Daubert v. Merrell Dow Pharmaceuticals (1993), USSC.

social debt bankruptcy.

SECTION 1: INTRODUCTION

This paper will focus on the Purdue Pharma Chapter 11 bankruptcy because it is a poignant and "extreme"[7] example of a social debt bankruptcy. In the context of the Purdue Pharma case, I am suggesting that the U.S. Bankruptcy Code and procedures overlook (albeit deliberately) issues that expose potential corporate misconduct The Purdue Pharma social debt bankruptcy case is a lens through which we see shortcomings of not just the case law and legal doctrines, but also with the supporting experts, including IFAs. While IFAs typically focus on *where* money goes (e.g., money laundering, embezzlement), *who* took money that shouldn't have (e.g., fraud), the *amount* of money in question (e.g., valuation, loss quantification, insurance claims), and *which* rules were broken (e.g., compliance, audit). When 'how' an individual or corporation earned money controversial, it is typically handled in a legal setting because democratic systems tend to be well-established i.e., legal thresholds, case law and doctrines that exist to support judiciary processes. I suggest that IFAs should overtly be concerned also with '*how'* the money has been earned which is central to a social debt bankruptcy possibly necessary in order to assist the bankruptcy court in maximizing creditor / victim compensation.

From September 15th, 2019, when Purdue Pharma filed for bankruptcy to May 30th, 2023, when the second circuit appellate court three-judge panel confirmed Judge Drain's original bankruptcy

[7] (Lipson, First in Time First is Right Comments on Levitin's Poison Pill, 2022)

plan of confirmation (including third-party releases for the Sacklers family[8] and over 400 others[9]), this case has stood out from other bankruptcies because of its financial complexity and other unique outliers relative to typical Chapter 11 cases (e.g., the high touch role of Sackler owners in the day-to-day business).[10] Even in his own ruling, Judge Robert Drain opened his 159-page decision with the following statement:

> *"The wrongful use, including marketing and distribution, of opioid products has contributed to a massive public health crisis in this country. The role of [Purdue Pharma] and their owners in that crisis makes these bankruptcy cases highly unusual and complex"* (In RE: Purdue Pharma L.P., et al. (Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan), 2021)

From 1996, when OxyContin was launched, to 2018, Purdue Pharma and Sackler family owners manufactured and marketed OxyContin and were reported to have profited over $35 billion (Committee on Oversight and Reform, House of Representatives, 2021). Purdue Pharma represents an "extreme" example (i.e., of a focused set of products) because OxyContin accounted for 91% of their opioid revenues[11] (Expert Report of Professor John C. Coffee Matter of Purdue Pharma L.P, et. al., 2019), and their conduct, which has been characterized as

[8] (In re: Purdue Pharma L.P., 2023) "The district court explained that the "Sackler Family," as used in the court's opinion, "means the Mortimer D. Sackler Family (also known as 'Side A' of the Sackler family) and the Raymond R. Sackler Family (also known as 'Side B' of the Sackler family.)." See Appendices IV for details.
[9] https://www.nytimes.com/2023/05/30/health/sacklers-purdue-liability-bankruptcy.html
[10] https://knowledge.wharton.upenn.edu/podcast/knowledge-at-wharton-podcast/purdue-pharma-bankruptcy/
[11] (Expert Report of Professor John C. Coffee Matter of Purdue Pharma L.P, et. al., 2019)p 12 (the cumulative total for all opioid products was $31,989,862,082, and for OxyContin, it was $29,193,539,155). "…privately held firms often have a narrower focus. Purdue represents an extreme example of this pattern... almost all its revenues came from one product, OxyContin."

deceptive,[12] shocking,[13] illegal,[14] and that they owe 'social debt.'[15] The scale of the impact of their egregiousness is captured by Judge Drain in his decision on page 2:

> *"In a very real sense, every person in the range of [Purdue Pharma's] opioid products, sold throughout the United States, was a potential creditor…and likely the largest creditor body ever… with roughly 618,000 claims that were filed…"* (In RE: Purdue Pharma L.P., et al. (Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan), 2021)

It was because of this widespread impact of OxyContin, that Purdue Pharma chose to pre-emptively file for Chapter 11 bankruptcy (i.e., because the cost of the mounting litigation against them was prohibitive). Despite numerous critics and media 'noise' about the injustices of the U.S. Chapter 11 bankruptcy system for Purdue Pharma victims, bankruptcy is both legal and constitutional. The Bankruptcy Code is so fundamental to the constitutional rights of Americans, that it was established as a clause in Article 1[16] in 1787[17] by all Delegates of Congress[18] (except for, ironically, the Connecticut delegate[19]). However, unlike Article III civil and criminal courts,

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[12] (Keefe, Empire of Pain: The Secret History of the Sackler Dynasty, 2021)
[13] (Jacoby, 2021)
[14] Purdue pleaded guilty in 2007 to misbranding OxyContin, and then again in 2020 for defrauding federal health agencies and violating anti-kickback laws, paying illegal kickbacks to doctors, and to Practice Fusion (an electronics records company) (Jan Hoffman, 2021)
[15] (Lipson, First in Time First is Right Comments on Levitin's Poison Pill, 2022)
[16]https://www.archivesfoundation.org/amendments-u-s-constitution/ showing that bankruptcy in Article 1 specifically appears in Section 8, Clause 4"
[17] https://constitution.congress.gov/browse/essay/artI-S8-C4-2-2/ALDE_00013181/ "The Convention ultimately approved the bankruptcy provision on September 3, 1787"
[18] Note that the Constitution was not ratified by the then 13 states beginning with Delaware in December 1787, New Hampshire in June 1788 (which was required 9th state making the Constitution legal), with Rhode Island last in 1790.
[19] The irony is that while the activities relating to ratifying the Constitution had no direct bearing on the actions of the Sacklers and Purdue Pharma as it relates to the Opioid Epidemic, Purdue Pharma is headquartered in Stamford

U.S. bankruptcy courts have limited authority to hear all matters presented during case proceedings.

There is a statute stipulating that matters deemed to be 'core' can be addressed by bankruptcy proceedings but 'noncore'[20] cannot (see Appendix II for examples pertaining to both 'core' and 'noncore' proceedings). 'Noncore' matters must be sent to a district court.[21] However, bankruptcy judges may have some latitude in the determination of what constitutes a 'core' matter because the law does not include a clear definition (Rosenberg, Martin, Greenberg LLP, 2022). Because a bankruptcy judge will only hear or consider noncore matters (i.e., to address if it is worthy of being a core matter) with the consent of all parties, it was unlikely to happen in the Purdue Pharma case as noncore matters were likely to weaken their defence or that of the Sackler family. Moreover, Sacklers' prompting Purdue Pharma to file for Chapter 11[22] was likely strategic to deliberately avoid the chance that some noncore issues (which would normally be considered in civil or criminal court) might be deemed core.

In a situation where there is little chance of consent from all parties to permit the judge to hear and consider noncore matters in Chapter 11, an IFA investigation could serve as a proxy for the

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CT, and current Attorney General William Tong has been vigilant in his efforts to hold the Sacklers and executives at Purdue Pharma accountable.

[20] https://www.daveburnslaw.com/bankruptcy/2019/12/04/core-and-non-core-proceedings-in-bankruptcy-litigation-what-is-the-difference-and-why-does-it-matter/#:~:text=Stated%20another%20way%2C%20core%20issues,outcome%20of%20the%20bankruptcy%20case. i.e., "… core issues are matters arising under the Bankruptcy Code that relate directly to the bankruptcy. Non-core matters do not involve the bankruptcy itself but affect the outcome of the bankruptcy case."

[21] https://www.akerman.com/en/perspectives/supreme-court-clarifies-procedure-for-deciding-stern-claims-in.html "In "noncore" proceedings, however, bankruptcy courts must make findings of fact and conclusions of law and send their rulings to the district court for *de novo* review."

[22] (Expert Report of Professor John C. Coffee Matter of Purdue Pharma L.P, et. al., 2019) (This is inferred based on findings that the Sacklers governed Purdue Pharma directly until 2018, and although the bankruptcy filing was not until September 15th, 2019, the approximately $11 billion withdrawn from Purdue Pharma between 2008 and 2018 was to minimize Sackler losses in potential future litigation)

proceedings that otherwise would have flushed out and given rise to consideration of noncore matters. Because consent is a barrier to consideration of noncore issues, and those noncore issues could be material to bolstering creditors' claims, it behooves bankruptcy judges to boldly test (but not exceed) the boundaries of the Bankruptcy Code and jurisprudence, in their consideration of noncore issues.[23] A comment from Judge Drain illustrates the limitations of the Bankruptcy Code:

> "This is a bitter result," Drain said. "I believe that at least some of the Sackler parties have liability for those [opioid OxyContin] claims. … I would have expected a higher settlement.[24]"

Note to reader: An IFA is typically required to stay within their area of expertise. This paper covers legal, medical, regulatory, policy, pharmacology and ethical research that exceeds my professional training and certification. In this context, it is appropriate to provide enough information for someone unfamiliar with the Purdue Pharma bankruptcy case to see the 'big picture,' and to put into context my argument that IFAs could have a meaningful role in social debt bankruptcy cases, even though it requires careful fact-finding regarding topics into which IFAs do not typically venture.

SECTION 2: BACKGROUND

[23] Note that, at first, Judge Drain refused to have an independent examiner, and although he ultimately relented, he limited the scope and budget of the independent examiner to one prescribed item. The details are described below.
[24] https://www.npr.org/2021/09/01/1031053251/sackler-family-immunity-purdue-pharma-oxcyontin-opioid-epidemic. See Appendix V for Jude Drain's full written quote.

In this section of the paper, I cover the following:

A. Chapter 11 in U.S. Bankruptcy Court and the features that enabled Purdue Pharma's legal strategy.
B. The Purdue Pharma Chapter 11 Bankruptcy Case.
C. Bankruptcy reform.
D. Purdue Pharma's role in the opioid epidemic (also referred to as The Opioid Crisis).
E. OxyContin.
F. Chronological development of the Purdue Pharma bankruptcy case.
G. Other notable case details for added context.

A. Chapter 11 in U.S. Bankruptcy Court and the features that enabled Purdue Pharma's legal strategy:

Article 1, Section 8, Clause 4 of the United States Constitution authorizes Congress to enact "Uniform Laws on the subject of Bankruptcies throughout the United States." It states that Congress shall enact bankruptcy laws to enable Americans to exercise their bankruptcy rights. Therefore, filing for bankruptcy relief is a constitutional right in the United States (https://www.senate.gov/civics/constitution_item/constitution.htm).

> Chapter 11 bankruptcy objective is for proceedings to restore a corporation as 'a going concern': U.S. Chapter 11 bankruptcy has two central aims: (i) to relieve debtors of certain financial obligations they are unable to satisfy by providing them with a 'fresh start' and (ii) to preserve the countervailing interests of creditors and other stakeholders by maximizing total creditor return on debts as quickly as possible. In bankruptcy court,

the goal is to find a reasonable resolution between creditors who are owed money from insolvent debtors. A typical bankruptcy case will proceed quickly to minimize procedural costs and result in improved financial value compared to the state of a company prior to liquidation or reorganization.

Unlike the adversarial process of civil and criminal courts, the primary objective of the presiding judge in a Chapter 11 bankruptcy case is for the judge to rule on the 'deal' possible between debtors and their creditors given the facts of the case. Two core features of Chapter 11 bankruptcy are notable: (i) financial relief is premised on extensive and prompt disclosure; and (ii) access to the Chapter 11 bankruptcy 'package deal' which is premised on having a good faith reason to file for bankruptcy in the first place (Jacoby, 2021).

1. Chapter 11 bankruptcy has a limited appeal process:

   The U.S. court system is geographically divided into 'circuit' courts and staffed by Article III judges (who are creations of the U.S. Constitution, nominated by the President of the United States, Confirmed by the U.S. Senate, and can only be removed by impeachment from the House of Representatives and conviction by the Senate).[25] Bankruptcy judges are non–Article-III judges appointed to 14-year terms by a majority vote of the judges of the U.S. Court of Appeal for their circuit. Bankruptcy Appellate Panels (BAPs) are used in some circuits (i.e., the first, sixth, eighth, ninth, and tenth), and are composed of other bankruptcy court judges from the same circuit who have been

[25] https://www.foxrothschild.com/publications/u-s-supreme-court-dramatically-curtails-bankruptcy-courts-powers

designated to hear bankruptcy appeals. Purdue Pharma's original case was heard by Bankruptcy Judge Robert Drain and overturned in the second circuit (without a BAP) by an Article III federal judge, Colleen McMahon of the United States District Court for the Southern District of New York. On May 30th, 2023, the U.S. Court of Appeals for the second-circuit three-Judge panel released their decision to uphold the original decision by Judge Drain approving Purdue Pharma's Plan of Reorganization, along with the third-party non-debtor releases (In re: Purdue Pharma L.P., 2023).

2. Bankruptcy judges have a narrow focus and limited authority:

   Bankruptcy judges who serve 14-year terms, have a narrower authority than federal courts and deal only with 'core' issues (i.e., to bankruptcy) during bankruptcy proceedings under Article 1 of the U.S. Constitution (Rosenberg, Martin, Greenberg LLP, 2022) because legislative powers are given to Congress via the U.S. House of Representatives and the Senate.[26] However, "non-core claims" (Rosenberg, Martin, Greenberg LLP, 2022) can only be adjudicated by courts established under Article III of the U.S. Constitution and the corresponding Article III courts: The Supreme Court, Appeals Court, and trial courts, all of which have judges who are appointed for life by the President of the United States and confirmed by the Senate.[27] Note that the Sacklers had a strong incentive to avoid Article III court because Constitution would prevent them from getting releases without having filed for bankruptcy (Rosenberg, Martin, Greenberg LLP, 2022), which is explained in additional detail below.

[26] https://constitutioncenter.org/the-constitution/articles/article-i/clauses/749
[27] https://constitutioncenter.org/the-constitution/articles/article-iii/clauses/45

3. The Bankruptcy Code has two options relevant to the Purdue Pharma case:

    - Chapter 7: Personal bankruptcy liquidation. If the Sacklers themselves had declared bankruptcy, then they would have filed for Chapter 7 bankruptcy (Lipson, 2023).

    - Chapter 11: Corporation restructuring to remain a going concern. The debtor (Purdue Pharma in this case) produced a Plan of Reorganization that was confirmed by Judge Robert Drain after having been approved by most of Purdue Pharma's creditors. Complications arise when not all creditors agree to the Plan of Reorganization (which happened in Purdue's case). For example, following a bankruptcy court's confirmation of a Plan of Reorganization, parties that disagree with the confirmation can file for appeal (as in the Purdue Pharma bankruptcy following Judge Robert Drain's confirmation order). The equitable mootness doctrine is an "equitable remedy"[28] that allows an appellate court to dismiss the appeal of a bankruptcy court judge's confirmation order (Chang, 2022). Debtors are permitted to implement a confirmed Plan of Reorganization even if an appeal is proceeding. If an appeal is successful but the lapsed time to accomplish the appeal means that the original Plan of Reorganization is already underway, it can be too difficult to "unscramble"[29] the parts of the plan underway to honour the successful appeal, so the original decision stands (i.e., the appeal is rendered

[28] Chang (2022) p. 354
[29] Chang (2022) p. 354

'moot').[30]

A trend has emerged where companies whose alleged wrongdoings would otherwise end up in civil or criminal court, pre-emptively file for Chapter 11 on the basis that mounting litigation would lead to insolvency were they to attempt to litigate. Even more concerning to legal scholars than pre-emptive Chapter 11 filings are that companies with deep pockets have the financial means to "weaponize" (Levitin, 2022) the Bankruptcy Code to achieve a legal deal that is unfair to creditors. Unlike in a typical bankruptcy case, some of the creditors may disagree with a proposed plan (liquidation or reorganization), but it is approved by the court even without consensus.[31]

Further, there is a growing number of cases involving companies whose products or actions have resulted in a significant negative impact on human health (or have been lethal in some cases). Legal scholars have categorized these as "social debt" (Lipson, Response: First in Time; First is Right: Comments on Levitin's Poison Pill, 2022), where one of the hallmark features is that there are numerous civil or criminal or 'mass tort'[32] actions pending against the company, which is not necessarily the case in typical Chapter 11 cases. Social debt cases also tend to be very complicated, spanning many topics that typically would not be discussed or considered during

[30] In the case of Purdue Pharma, Judge Colleen McMahon explicitly stipulated that she would not let further decisions (her overturning of Judge Drain's original confirmation is still under appeal) trigger the equitable mootness doctrine, which if it were to happen, would be in the Sackler's favour.

[31] https://agilelegal.com/chapter-11-plan-of-reorganization/#:~:text=Voting%20on%20the%20Chapter%2011%20Plan&text=In%20order%20for%20a%20plan,of%20reorganization%20by%20that%20class. "In order for a plan to be confirmed, an affirmative vote of at least two-thirds in dollar amount of claims and more than one-half in number of the creditors in a class that submit votes is required for the acceptance of the plan of reorganization by that class."

[32] https://www.forbes.com/advisor/legal/personal-injury/mass-tort/ "A mass tort occurs when many people are harmed by the same act or omission. All of those individual victims have claims against the same defendants arising out of the same circumstances."

Chapter 11 proceedings. Also relevant to social debt is in establishing the context around whether, or at what point a company knew their products or services were causing harm. These types of nuances may be disregarded by presiding judges only because Chapter 11 proceedings are not structured to accommodate them. This means that social debt cases that wind up in Chapter 11 proceedings may sidestep the due process and day in court constitutionally afforded to victims and creditors of a company's wrongdoings.

Some recent examples of 'social debt' in Chapter 11 cases include the following:

1. Asbestos: (1986 and many companies manufacturing and selling thereafter)
2. PG&E Corp. (2019): Wildfires
3. Dow Corning (1995): Leaking silicone implants
4. Dakon Shield (1985): Faulty Intrauterine Devices (IUDs)
5. Boy Scouts of America 2023–Sexual Abuse

B. The Purdue Pharma Chapter 11 Bankruptcy Case:

The 2019 Purdue Pharma bankruptcy case can also be characterized as a 'social debt' bankruptcy. This is because of the widespread impact of OxyContin, especially for the extensive attributable loss of life (Levitin, 2022). Compared to other social debt bankruptcy cases, Purdue Pharma's case is considered an "extreme example" (Lipson, Response: First in Time; First is Right: Comments on Levitin's Poison Pill, 2022).

Legal scholars have summarized that Chapter 11 bankruptcy is a package deal and that Purdue Pharma took an "*a la carte* approach violating the premises and spirit of reorganization (Jacoby,

2021), and overreaching by "weaponizing" bankruptcy using " coercive restructuring" tactics (Levitin, 2022) for an outcome that would be most favourable to the Sackler family owners. This approach, it turns out, is not just in violation of the 'spirit' of the Bankruptcy Code (>>source), but it also may be unconstitutional (In re: Purdue Pharma, L.P. Decision and Order on Appeal, 2021).

Examples of Purdue Pharma's legal tactics:

1. Purdue Pharma as a public trust

   One of Purdue Pharma's concessions to the court was to relinquish Purdue Pharma and reorganize it into a public trust called Knoa.[33] The profits from Knoa would qualify as part of the funds the Sacklers are required to pay under the settlement agreement. This means Purdue Pharma's creditors (the largest of which is the U.S. government) are now "in the business of selling OxyContin" (Lipson, The Rule of the Deal, 2023), an irony considered egregious by lawmakers[34]

2. The Sackler family's non-consensual non-debtor releases

   The Sacklers and over 200 others are to be released from any future civil liability associated with the sale of opioids. Even for a 'social debt' bankruptcy case, it is unusual for the debtors to escape the transparency and accountability that a 'scorched-earth

[33] https://www.purduepharma.com/news/2021/09/03/confirmed-plan-of-reorganization-facilitates-creation-of-new-company-knoa-pharma/ "Following the United States Bankruptcy Court approval of the Purdue Pharma L.P. chapter 11 plan of reorganization (the "Plan"), the name of the new company that will emerge was announced: Knoa Pharma LLC (pronounced "No-ah"). The name was selected by the Company's creditors."

[34] https://www.wbur.org/news/2021/03/16/maura-healey-purdue-settlement-oxycontin-sackler-rejection "And the other thing is this — in Massachusetts, we don't want to own an opioid company. So right now, Purdue is hoping that the government can essentially take over this and reap the profits and continue to sell. And I'm not interested in operating a drug company. There needs to be a wind down of this company."

litigation'[35] would uncover (Lipson, 2022). Specifically, the Sackler family pursuing future legal immunity through a non-debtor release (NDR) which is considered "a device that lends itself to abuse" (Levitin, 2022). Under the current law, federal courts that oversee Chapter 11 reorganization plans have the authority to release non-debtors from liability even if creditors withhold their consent. The bankruptcy code does not prohibit NDR. This is reflected in the code as amended in 1984 "…to enjoin prosecution of claims resulting from exposure to asbestos against non-debtors under carefully delineated circumstances" (Rosenberg, Martin, Greenberg LLP, 2022). There was a specific amendment made to the Bankruptcy Code to prohibit NDRs in the limited circumstances contemplated related to asbestos cases. Non-asbestos cases have no bankruptcy-code-based limitations (Simon, 2022). There has however been a 2021 bill proposed by Senator Elizbeth Warren in both the U.S. House of Representatives and the U.S. Senate named 'The Sackler Act' designed to hold the Sackler family accountable for their role in the opioid epidemic.[36]

3. Bankruptcy relief without the bankruptcy filing

Purdue Pharma was "engulfed in a veritable tsunami of litigation" (In re: Purdue Pharma, L.P. Decision and Order on Appeal, 2021)[37] There are an estimated 3000+ civil cases against Purdue Pharma making it untenable for them to fight each individually. However, while Purdue Pharma filed for Chapter 11, the Sackler family did not declare personal

[35] https://www.lawpracticetoday.org/article/scorched-earth-tactics-are-not-zealous-advocacy/ "Scorched-earth tactics have as their genesis the belief by military leaders that the only way to defeat an opponent is to destroy its ability to respond (i.e., burn or destroy an enemy's crops). Litigation does not work the same way as military combat. While scorched-earth tactics may increase the costs of litigation, they almost never advance the ultimate matter or resolution, with most litigants withstanding such an onslaught."
[36] https://www.congress.gov/event/117th-congress/house-event/LC67559/text?s=1&r=79
[37] Page 2

bankruptcy (which would have been under Chapter 7). Personal bankruptcy under Chapter 7 would have required comprehensive financial disclosures (which the Sacklers actively sought to avoid). The Sacklers did, however, get the benefits of Chapter 11 and have received over 704 days of injunction (Levitin, 2022), protecting them from civil suits while the Purdue Pharma bankruptcy case works its way through the courts. As noted above, if Purdue Pharma and the Sackler family had gone to civil court, then under Article III of the U.S. Constitution, third-party non-debtors like the Sacklers, are not allowed to "bootstrap any and all of their disputes into a bankruptcy case to obtain relief." (JOEL PATTERSON, et al., Appellants, v. MAHWAH BERGEN RETAIL GROUP, INC, 2022).

4. Wealth-preserving payment terms

   The Sacklers eventually raised their settlement amount from $4.5 billion under a previously proposed settlement, to $6 billion,[38] which was ultimately accepted by Judge Drain despite that some creditors continued to object (In re: Purdue Pharma, L.P. Decision and Order on Appeal, 2021). However, although the increased settlement amount may appear to be a win for the creditors and victims because the payment period was extended from 9 to 18 years, the net present value of the settlement did not materially change (Lipson, 2023).

5. Pre-emptive backroom deals

   - Purdue Pharma had three issues to solve in bankruptcy court (Levitin, 2022):

[38] https://www.npr.org/2022/03/03/1084163626/purdue-sacklers-oxycontin-settlement

a. How to determine and allocate the value of the creditors' claims against them. Note that the victims could be awarded between $3,500 and $48,000 in restitution.

b. Liability to the federal government for Medicare, Medicaid, and violations of the *Food and Drug Act*.[39]

c. The Sackler family's liability to Purdue Pharma and its creditors.

- The Sackler Settlement Framework had three basic elements:

  a. The Sackler family will "give" Purdue Pharma to creditors.[40]

  b. The Sackler family will pay $3 billion USD (later increased to $5.5 billion USD) into creditor trusts 9 years (later extended to 18 years)[41]

  c. In exchange for the above concessions, the Sackler family (along with 400 others) will be granted comprehensive releases from further civil liability relating to the sales and marketing of OxyContin and generic Oxycodone[42]

- Strategically, the Sacklers and Purdue Pharma arranged three deals that effectively guaranteed they would get their third-party releases, despite objections from 24 non-consenting states along with certain other creditors:[43]

[39] https://www.justice.gov/usao-nj/pr/opioid-manufacturer-purdue-pharma-admits-guilt-fraud-and-kickback-conspiracies "Opioid manufacturer Purdue Pharma LP (Purdue) today [November 24, 2020] admitted its guilt in conspiracies to defraud the United States, violate the Food, Drug, and Cosmetic Act, and violate the Federal Anti-Kickback Statute, the Department of Justice announced."
[40] Notice of Filing of Term Sheet with Ad Hoc Committee at 4, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. Oct. 8, 2019)
[41] Notice of Filing of Term Sheet with Ad Hoc Committee at 4, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. Oct. 8, 2019) at 9
[42] Notice of Filing of Term Sheet with Ad Hoc Committee at 4, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. Oct. 8, 2019) at 5
[43] https://www.npr.org/2021/05/03/991648432/25-states-mount-legal-fight-to-block-sackler-bid-for-opioid-immunity

a. They undertook ex-ante/prebankruptcy bargains, including governance changes (presumably in anticipation of their yet undisclosed and upcoming bankruptcy) and a restructuring support agreement (RSA). RSAs are often developed by a small group of stakeholders to ensure deals do not collapse and are presented on an emergency basis (although it may be difficult for a judge to approve if they do not have extensive familiarity with the background facts) (Levitin, 2022).

b. They brokered a preliminary injunction to avoid financial, time, and legal pressures involved in fighting civil litigation in parallel with the bankruptcy case.

c. Purdue Pharma reached a settlement with the Department of Justice (DOJ) with a 'poison pill,' or "coercive ex-post-bankruptcy bargain" that impacts the magnitude and distribution of settlement funds (Lipson, 2023).

6. Forum Shopping

Although it is headquartered in Stamford, Connecticut, Purdue Pharma 'rented' office space in White Plains, New York, and effectively 'judge shopped'[44] because Judge Robert Drain (who is known for his acceptance of non-consensual third-party releases) is the only sitting judge in White Plains Bankruptcy Court. In Purdue's second district, there are 13 judges,[45] who are randomly assigned (Lipson, 2023).

[44] https://www.creditslips.org/creditslips/2021/05/judge-shopping-in-bankruptcy.html "There are 375 bankruptcy judges nationwide. Yet last year, 39% of large public company bankruptcy filings ended up before a single judge, Judge David R. Jones in Houston. A full 57% of the large public company bankruptcy cases filed in 2020 ended up before either Jones or two other judges, Marvin Isgur in Houston and Robert D. Drain in White Plains.

[45] https://ballotpedia.org/Stamford/Norwalk_District_Superior_Court,_Connecticut

C. Bankruptcy reform:

Changes to the Bankruptcy Code historically tend to be minor.[46] The Bankruptcy Code has not been updated to address the above concerns, so there might be additional cases that employ a Purdue Pharma/Sackler–like playbook before reforms are implemented (Levitin, 2022). However, there is some momentum:

- Bankruptcy filings are required to be made in good faith. All circuit courts support that filing Chapter 11 bankruptcy in bad faith constitutes grounds for dismissal of a bankruptcy petition even though it's not stated explicitly in the Bankruptcy Code. Note that the interpretation of what constitutes 'bad faith' differs between circuit courts, so this element is subject to some interpretation (Sciarrotta, n.d.).

- Further bankruptcy reform embedded in *The Sackler Act*[47] created in March 2021 by U.S. Representatives Carolyn Maloney (D-NY) and Mark DeSaulnier (D-CA) will be to avail bankruptcy protections to average citizens that are currently only available to corporations. *The Sackler Act* is intended to prevent wealthy debtors from shielding assets in trusts, which is currently permissible in some states. Further implications for Purdue Pharma are that *The Sackler Act* would strengthen the law prohibiting 'fraudulent conveyances' (also referred to as fraudulent transfers)'[48] which the Sackler family

[46] https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments/pending-or-recent-changes-bankruptcy-forms

[47] https://www.congress.gov/bill/117th-congress/senate-bill/2472/text "Stop shielding Assets from Corporate Known Liability by Eliminating non-debtor Releases Act" or the "SACKLER Act" (The Act seeks to amend section 105(b) of the Bankruptcy Code to prohibit courts from granting releases to non-debtors like the Sackler family without creditor consent).

[48] https://portal.ct.gov/AG/Press-Releases/2019-Press-Releases/AG-TONG-EXPANDS-LAWSUIT-AGAINST-PURDUE-SACKLERS-ALLEGES-FRAUDULENT-TRANSFER-OF-FUNDS "Purdue, at the direction of the Sacklers, fraudulently conveyed hundreds of 158.165. millions of dollars of Purdue's profits from opioids to the

allegedly made involving up to $10 billion[49] from 2008 to 2016 according to the New York Attorney General Letitia James.[50] Where *The Sackler Act* amends the Bankruptcy Code to prevent releases when creditors object, the *Non-debtor Release Prohibition Act* by proposed by Congress in July 2021, seeks to eliminate nonconsensual non-debtor releases in bankruptcy altogether.

D. Purdue Pharma's role in the opioid epidemic (also referred to as The Opioid Crisis):

The opioid epidemic has led to a staggering number of preventable deaths in North America due to the prevalence of opioid[51] dependencies that are developed by taking doctor-prescribed oxycodone (the generic name for an opioid). The physical dependency on opioids forces people to turn to street drugs to avoid debilitating or lethal physical withdrawal symptoms. According to a New York Times investigative reporter on opioid-related deaths in the United States, "it's like 9/11, every three weeks" (Keefe, 2021). Accidental overdose is the sixth leading cause of death in the United States, ahead of gun and motor vehicle accidents (NSC Injury Facts, 2021), and it is estimated that 70% of these deaths are preventable (verify). Overdose deaths increased by 780% between 1999 (i.e., 2 years after the launch of OxyContin) and 2021. (NSC Drug Overdoses, 2021).

Sacklers each year during the Actionable Period despite Purdue's and the Sacklers' knowledge that they faced certain and significant liabilities because of the multitude of litigation against Purdue including Connecticut."

[49] (In re: Purdue Pharma L.P., 2023) (Note that according to the Second Circuit for Appeals decision dated May 30th, 2023, this figure "…approximated $11 billion in total –to Sackler family trusts and holding companies" p. 17)

[50] https://www.npr.org/2019/03/29/707908973/new-york-attorney-general-targets-sackler-family

[51] Opioids are a drug class that includes heroin (strictly illegal), synthetic opioids such as fentanyl, and pain relievers available legally by prescription, such as oxycodone (OxyContin), hydrocodone (Vicodin), codeine, morphine, and many others. Note that **"opiates" vs. "opioids"** Although these terms are often used interchangeably, they are different: **Opiates** refer to natural opioids such as heroin, morphine and codeine. **Opioids** refer to all-natural, semisynthetic, and synthetic opioids (source: https://www.cdc.gov/opioids/basics/terms.html#:~:text=%E2%80%9COpiates%E2%80%9D%20vs.,%2C%20semisynthetic%2C%20and%20synthetic%20opioids.)

But despite all the publicity, outcry, and highly publicized court cases related to the opioid crisis, the effects seem to be worsening as evidenced by an increase in the overall rate of opioid deaths (see Appendix III). The opioid epidemic strains an already COVID-19–weary healthcare system, is financially catastrophic for the families of addicts (e.g., through the cost of rehab, theft, and addiction-related job loss), and even impacts municipal and state-level tax reserves because governments are politically compelled to continually increase investment support for visible drug-enforcement measures (Lee, 2021).

Purdue Pharma, a privately held holding company with many subsidiaries, is wholly owned by the Sackler family. Until recently, some family members were active on the Purdue Pharma Board of Directors and were heavily involved in the day-to-day business operation (Expert Report of Professor John C. Coffee Matter of Purdue Pharma L.P, et. al., 2019). Purdue Pharma manufactured and aggressively marketed their trademark opioid OxyContin, which, like other opioids, was historically used for end-of-life pain treatment.[52] It is now prescribed for common pain and injuries like those associated with workplace falls, broken bones, and dental work (State of Alaska vs. Purdue Pharma et. al., 2017). Despite receiving a 2007 criminal conviction for the aggressive marketing of OxyContin, Purdue Pharma continued the same behaviour and was convicted again in 2021.

While the opioid epidemic grew, individuals and corporations (like the Sackler family and Purdue Pharma) continued to earn staggering profits from the sales, distribution, and

manufacturing of opioid products. In recent years, legal recourse appears to have been effective against some public companies:

- J&J, McKesson, Cardinal Health, and Amerisource Bergen were charged with igniting the opioid crisis and collectively settled the civil allegations against them for $26 billion USD.[53]
- John Kapoor, the CEO of Insys Therapeutics, received a federal sentence of 66 months for bribery and kickback schemes that helped fuel the opioid crisis.[54]

In September 2019, Purdue Pharma filed for Chapter 11 bankruptcy because it was facing over 3,000 civil lawsuits (the Sacklers had 400 filed against them personally), and it would have been financially crippling to fund a defence against each of them. The confirmation of their plan of reorganization (a required artifact in Ch. 11 proceedings) by Bankruptcy Court Judge Robert Drain (In RE: Purdue Pharma L.P., et al. (Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan), 2021), was subsequently overturned by District Court Judge Colleen McMahon (In re: Purdue Pharma, L.P. Decision and Order on Appeal, 2021). On Tuesday, May 30th, 2023, the federal court of appeals approved the original deal, granting the Sackler family members immunity (along with 400 others) in exchange for $6 billion personally, plus the proceeds of Purdue Pharma as a public trust going forward (Hoffman, 2023).

[53] https://www.npr.org/2022/02/25/1082901958/opioid-settlement-johnson-26-billion
[54] https://www.npr.org/2020/01/23/798973304/pharmaceutical-executive-john-kapoor-sentenced-to-66-months-in-prison-in-opioid

This case is especially notable for its complexity and the widespread view that the Sackler family, with their vast wealth, was able to mount a legal strategy that not only absolved them of facing their victims in civil (and potentially criminal) courts, but also provided a financial arrangement such that the $6 billion settlement over 18 years will likely be covered by interest on their vast holdings, and that they will "walk away richer"[55] when they have completed payments.

E. OxyContin:

Historically, opioids were prescribed for end-of-life cancer patients. However, the Sackler family successfully sought Food & Drug Administration (FDA) approval for oxycodone as a Schedule II drug,[56] the class of which is considered medically necessary. One of their many assertions was that although opioids are generally considered to be addictive because of the neurochemical pathways they disrupt in the human brain, clinical studies appeared to show that their formulation of OxyContin met a maximum threshold for addictiveness and FDA approval. Oxycontin may be significantly more addictive than predicted and there is evidence to indicate that Purdue Pharma knew this, and failed to take any action to address their formulation or warn doctors and their patients ((Ryan, 2016).

[55] https://twitter.com/AGHealeyArchive/status/1371806452839559174?ref_src=twsrc%5Etfw Maura Healey @AGHealeyArchive March 16, 2021, 8:52 am "The Sacklers want to use the disaster they created as leverage to buy immunity at a bargain price. Under the terms of this deal, they will walk away richer. It's not a settlement, it's an insult."

[56] Schedule II drugs have a high potential for abuse but are considered medically necessary, so they can be prescribed by a doctor, but with restrictions (e.g., morphine, oxycodone, hydrocodone, cocaine for eyedrops, and fentanyl).

Purdue Pharma and the Sacklers saw great potential in the earning power of OxyContin and pursued an aggressive marketing strategy by pushing claims[57] that they may have known were false (Expert Report of Professor John C. Coffee Matter of Purdue Pharma L.P, et. al., 2019):

i. The claim that OxyContin rarely was addictive only in the case of "true" abusers.

ii. The claim that OxyContin was safer […];

iii. The claim that OxyContin could be safely and appropriately used for chronic noncancer-related pain (including such common run-of-the-mill problems as osteoarthritis and lower back pain); and

iv. The claim that OxyContin's controlled and continuous release over a 12-hour period would benefit all its users (even though many would need additional medication over this period and might therefore increase their daily dosage [in excess of a doctor's prescription])

OxyContin was designed around each dose lasting for 12 hours (FDA, 2010). According to employees in a 1997 marketing meeting with members of the Sackler family, OxyContin had two advantages over its competitors: (i) it was designed around continuous relief which allowed patients to sleep through the night and (ii) OxyContin was not as strong as MS-Contin, OxyContin's morphine derivative predecessor[58] even though OxyContin is, in fact, double the strength of morphine (Expert Report of Professor John C. Coffee Matter of Purdue Pharma L.P, et. al., 2019) Purdue Pharma and the Sacklers deliberately exploited this misunderstanding for

[57] (Expert Report of Professor John C. Coffee Matter of Purdue Pharma L.P, et. al., 2019) "As a non-medical expert, I cannot testify that these claims are true or false. That must be shown at trial, but it is clear that Richard Sackler pushed these claims on Purdue's sales representatives and others around him." P. 24

[58] (Expert Report of Professor John C. Coffee Matter of Purdue Pharma L.P, et. al., 2019) (This is significant because morphine was associated with end-of-life pain treatment so this association might be a barrier to physicians regularly prescribing OxyContin.)

marketing purposes. Staff in a memo to Richard Sackler and his cousin Kathe Sackler recommended:

> *"…Since the noncancer pain market is much greater than the cancer pain market, it is important that we allow this product to be positioned where it currently is in the physician's mind)"*[59]

Many patients that were prescribed OxyContin for legitimate reasons, developed a tolerance for the drug, possibly to the point of physical dependence, which in turn led them to require escalating daily doses just to stave off potential-lethal withdrawal. Well-meaning doctors would, in turn, terminate the prescriptions and cut off the patient's supply of legal opioids. Patients would then be forced to instead use illicit opioids, often in the form of heroin (NSC Injury Facts, 2021).

'Pill mills' further exacerbate the opioid epidemic by dispensing large quantities of opioids for the purpose of diversion and abuse. They tend to be facilities that appear to be doctors' offices or pain management clinics and typically engage in insurance or healthcare (Medicare & Medicaid) fraud by prescribing controlled substances (including OxyContin) without medical justification (Ramirez, 2010). The volume of opioids distributed from pill mills is substantial. In one case a doctor and her co-defendants distributed over 11 million opioid tablets (including oxycodone) that generated over $21 million in revenue, with a corresponding street value of $360 million.[60]

[59] (Expert Report of Professor John C. Coffee Matter of Purdue Pharma L.P, et. al., 2019) p. 22.
[60] https://www.justice.gov/opa/pr/pain-clinic-owner-sentenced-role-operating-pill-mills-tennessee-and-florida

Two of these doctors were repeatedly called on by Purdue Pharma's sales staff, despite obvious evidence consistent with running a pill mill (strip malls, extensive lineups, security guards).

The opioid crisis is unique because it was preventable through pharmacology and regulatory oversight, and it affects a large and diverse portion of the population. Unlike previous drug crises, the opioid crisis impacts middle-class and affluent members of society.

F. Chronological development of the Purdue Pharma bankruptcy case

While the opioid epidemic grew, individuals and corporations like the Sacklers and their privately held company, Purdue Pharma, earned staggering profits from the sales of opioid products (Keefe, The Sackler Family's Plan to Keep Its Billions, 2020), an estimated 35 billion dollars since launching in 1996.[61] In recent years, legal recourse appears to have been effective against some public companies: J&J, McKesson, Cardinal Health, and Amerisource Bergen were charged with igniting the opioid crisis and collectively settled the civil >>verify>> allegations against them for $26 billion USD, and John Kapoor, the CEO of Insys Therapeutics, received a federal sentence of 5.5 years for bribery and kickback schemes that helped fuel the opioid crisis.

Purdue Pharma, on the contrary, pleaded guilty to misleading doctors and regulators with their marketing in 2007 (paying 'only' a $600 million USD fine), and went on to earn several billion more dollars by employing identical tactics. However, as the case against Purdue Pharma moved through the courts, it became evident to many observers that their contribution to the opioid epidemic was even larger than lawmakers, politicians and medical professionals originally

[61] https://www.govinfo.gov/content/pkg/CHRG-116hhrg43010/html/CHRG-116hhrg43010.htm

thought. A further indication of this was found in a 2019 study concluding that "the introduction and marketing of OxyContin explains a substantial share of overdose deaths over the last two decades."[62] It was also observed that overdose rates (also for heroin and fentanyl) are lower in states where the distribution of OxyContin was 50% lower because of 'triplicate'[63] regulations[64] compared with looser regulations in the regions Purdue Pharma deliberately chose to launch a full OxyContin marketing and sales campaign (Alpert, Evans, Lieber, & Powell, 2019).

In 1997, Sackler-owned Purdue Pharma launched the pharmaceutical opioid OxyContin, the profits from which enabled the Sackler family to become the 19th-richest family in the United States, worth $14 billion according to Forbes in 2015. This is especially remarkable because other families on the list (e.g., Rockefeller and Du Pont) began building their fortunes as early as the late 1600s.

Despite their 2007 conviction for deceptive marketing, Purdue Pharma and the Sackler family employed many tactics that ranged from unscrupulous to criminal activities and continued to do so until charges were laid again, including charges for deceptive marketing, in 2021.

Other manoeuvres by Purdue Pharma included the following (Meier, 2018):

[62] (Alpert, Evans, Lieber, & Powell, 2019) page 1
[63] Doctors in 'triplicate' states when prescribing Schedule II narcotics like OxyContin are required to manage three copies for each prescription: one to the doctor's files, one to the pharmacist, and one to the state regulators' database set up to monitor and detect improper prescribing.
[64] (Alpert, Evans, Lieber, & Powell, 2019) "Recently-unsealed court documents involving Purdue Pharma show that state-based triplicate prescription programs posed a major obstacle to sales of OxyContin and suggest that less marketing was targeted to states with these programs. We find that OxyContin distribution was about 50% lower in "triplicate states" in the years after the launch. While triplicate states had higher rates of overdose deaths prior to 1996, this relationship flipped shortly after the launch and triplicate states saw substantially slower growth in overdose deaths, continuing even twenty years after OxyContin's introduction."

- Misrepresenting clinical trial data submitted for FDA approval.
- Failing to pass on warnings about OxyContin's addiction risk to the FDA, despite mounting evidence that it was far greater than Purdue's 'science' had predicted, and ignoring evidence of OxyContin's widespread abuse, even when the issue was repeatedly raised by their own sales force.
- Aggressively marketing 'pill mills,' which are pain clinics that distribute opioids to patients without any of the required rigour to establish either the patient's home state or medical necessity. Some of Purdue Pharma's highest-billing doctors were eventually convicted and sentenced to jail terms.
- Funding over 20,000 doctor education programs on 'pain' to promote the long-term use of opioids when, historically, opioids were primarily used for end-of-life cancer pain. This created a web of conflicts of interest (and possibly oath breaches) that Purdue Pharma actively concealed.

In 2018, in a lawsuit against Purdue Pharma, Massachusetts Attorney General Maura Healey (who in 2023 was elected Governor of Massachusetts) named the Sackler family members as well as some high-ranking Purdue Pharma executives. This was considered a bold tactic but was likely responsible for charting the course of the case and how it progressed.[65]

In 2019, Purdue Pharma filed for Chapter 11 bankruptcy to avoid facing mounting civil suits and potential criminal charges against it. In the years between their 2007 guilty plea and their 2019

[65] https://apnews.com/article/health-opioids-business-government-and-politics44acd14c5c16b379645a2a9b73e51074

Chapter 11 bankruptcy filing, the Sackler family withdrew an estimated $11 billion USD from Purdue Pharma (In re: Purdue Pharma L.P., 2023), leaving the company incapable of settling the over 2,600 civil suits against Purdue Pharma that added up to approximately $40 trillion in claims[66]. The Sacklers did not declare bankruptcy themselves but were afforded its protection (e.g., a stay on all legal action against them for the duration of the proceedings). As noted, the Sacklers obtained the protection but were not required to disclose their personal financial details, despite having withdrawn billions from Purdue Pharma and having an estimated net worth of $12 billion USD.

On September 17th, 2021, in White Plains New York, U.S. Bankruptcy Judge Robert Drain confirmed Purdue Pharma's proposed Plan of Reorganization after two years of proceedings, which includes $8 billion USD to be paid to Purdue Pharma's creditors (including individuals, the estates of victims, and municipal and state-level governments), almost half of which is to be personally paid by the Sackler family over a period of 18 years. On December 12th, 2021, United States District Judge Colleen McMahon overturned Judge Robert Drain's ruling on the confirmation of Purdue Pharma's Plan of Reorganization, roughly on the basis that some of the terms of the plan were unconstitutional (In re: Purdue Pharma, L.P. Decision and Order on Appeal, 2021), after which Purdue Pharma appealed.

On May 30th, 2023, the United States Court of Appeals for the Second Circuit decision was to reinstate Judge Drain's original confirmation of Purdue Pharma's Plan of Reorganization. There is some speculation that this case will ultimately be concluded in the U.S. Supreme Court.

[66] (In re: Purdue Pharma L.P., 2023) "As Appellees concede, the valuation of the claims—estimated at $40 trillion—far exceeds the total funds available, as well as the Sacklers' personal wealth." _

Eunice C. Lee, circuit judge in her May 30th ruling (and on behalf of the three-judge panel that considered the Purdue Pharma appeal) suggests that while there is no case law against third-party non-debtor non-consensual releases, there is ambiguity in the Bankruptcy Code:

> "Those provisions of the Bankruptcy Code say nothing about non-debtor releases, and I am not convinced that statutory footing is up to the task. Accordingly, although mindful that, for this court, the issue has already been settled (albeit without any basis in the code), I write separately to highlight my concerns… The majority[67] does not liken the equitable authority recognized today to anything traditionally recognized as equity. I too am at a loss. Indeed, the idea that bankruptcy courts can order the involuntary release of direct claims against non-debtors is "an extraordinary thing" that is "different... from what courts ordinarily do." *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 723 (S.D.N.Y. 2019)" (In re: Purdue Pharma L.P., 2023).

G. Other notable case details for added context:

The $8 billion settlement figure does not include legal and professional fees for Purdue Pharma, and the Sackler family. The estimated cost of their defence is $1 million per day from their Chapter 11 filing on September 15th, 2019 (Levitin, 2022) and presumably up until (and perhaps beyond) the appellate court decision on May 30th, 2023.

1. Temperamentally, Judge Robert Drain was, at times, impatient and sometimes caustic. For example, Judge Drain did not want the involvement of an independent examiner,

[67] In this context, majority refers to the 2/3 of creditor votes required for a Judge to confirm a bankruptcy Plan of Reorganization, despite that 1/3 of the creditors have voted against the plan.

despite repeated requests by creditors for one (In RE: Purdue Pharma L.P., et al. (Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan), 2021). However, Judge Drain felt pressured to hire one on the basis of a 'request for examiner' report authored by Jonathan Lipson, professor of law (and cited in this paper) because he worried that the wording would encourage misleading press coverage: "I am concerned that if I don't appoint an examiner, the next press release will be 'Court refuses to appoint examiner to show process was fair' but not add 'because there was no evidence,' Drain said. 'So my inclination is to appoint an examiner to look at one issue…'" (In RE: Purdue Pharma L.P., et al. (Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan), 2021)

2. The Sacklers offshored their fortune and spread it among many family members. This could have been a tactic to avoid having to declare Chapter 7 bankruptcy (and the financial disclosures its procedure requires) because the chances that all Sacklers would jointly file for Chapter 7 bankruptcy were low, and not every Sackler holding money was implicated. Unless 100% of the Sackler family members who hold funds that are available to creditors declare bankruptcy (versus the current deal), the total funds available to creditors may have been more limited than the current deal. (Lipson, The Rule of the Deal, 2023)

3. The final settlement amount from the Sacklers (pending appeal), was strangely close to the amount that they would be required to pay if they were convicted of fraudulent transfers (i.e., of ill-gotten funds). Because of the statute of limitations, not all the

fraudulent transfers would have been punishable (Lipson, The Rule of the Deal, 2023).

4. The Sacklers spent millions donating to auspicious institutions (e.g., The Tate, The London Portrait Gallery, The Guggenheim Museum, The Metropolitan Museum of Art, The South London Gallery, the Louvre, Yale, Tufts, Harvard)[68] in the Sackler name, but never in Purdue Pharma's name. The only exception is in Stamford, where Purdue Pharma is headquartered. Note that the Sackler family name has since been removed from all these locations and none will take Sackler money going forward. The once-prominent Purdue Pharma name has also been removed from the masthead of their global head office at One Stamford Place, Stamford CT.

5. Unlike other social debt bankruptcies, it appears that the Sacklers were able to stave off collateral proceedings[69] that might have provided transparency and accountability through scorched-earth litigation, secret settlements, or both (Lipson, Response: First in Time; First is Right: Comments on Levitin's Poison Pill, 2022).

6. Confirmation of the plan and release from civil liabilities may make it difficult to bring criminal charges against the Sacklers, which may be the only avenue for what victims perceive as accountability (Levitin, 2022). Many state Attorneys General are the largest creditors so a criminal prosecution may be politically difficult because it will "bite the

[68] https://www.forbes.com/sites/carlieporterfield/2021/09/01/here-are-the-major-museums-that-refuse-the-sackler-money-though-some-keep-the-name-up/?sh=4ddf58e17923

[69] Unlike other social debt bankruptcies, however, it appears that the Sacklers were able to stave off collateral proceedings that might have provided transparency and accountability through scorched-earth litigation, secret settlements, or both.

hand that feeds them" and potentially jeopardize payments from the civil settlement[70] Note that the United States Government could pursue criminal charges against the Sacklers, but the ex-ante DOJ deal under the Trump administration (played a crucial role in making the releases for the Sacklers happen), is unlikely to be unwound by the Biden Administration.

7. The Sacklers were told by Purdue Pharma employees in a June 2016 update to the Sacklers that surveys showed that nearly half of all Americans knew someone who had been addicted to prescription opioids, and there is no indication that the Sacklers or Purdue Pharma acted on this information (Keefe, 2021). In fact, in 2021, Richard Sackler stated in an email to Purdue Pharma executives "We have to hammer on the abusers in every way possible, they are the culprits and the problem. They are reckless criminals" (Commonwealth of Massachusetts v. Purdue Pharma, Richard Sackler, Craig Landau et. al, 2019).

8. "In a deposition, Richard Sackler's daughter Marianna is sullen and uncommunicative. When she needed money, she says, she simply asked her father or a family financial adviser for it. When questioned, she had no memory of a $4.4-million payment she had received four years earlier, she says that she has no memory of it." Ryan Hampton interview for the New Yorker (https://www.newyorker.com/news/news-desk/an-insider-from-the-purdue-pharma-bankruptcy-speaks-out).

[70] https://texaslawreview.org/first-in-time-first-is-right-comments-on-levitins-poison-pill/

9. In a congressional hearing, Representative Peter Welch (D-VT) argued the following: "Given that the U.S. government was also trying to recover the $12 billion that Juaquin "El Chapo" Guzman had made in illicit heroin sales, why should not it also redistribute the $12 billion made by the Sacklers to taxpayers harmed by OxyContin? "El Chapo got a life sentence, and he's going to forfeit $12 billion. The Sackler family through Purdue has three felony convictions, but no one's in jail, and it has its billions still."

SECTION 3: REPORT FOR JUDGE DRAIN

Having provided context and background in section 2 of this paper, in this section, I propose the essence of a hypothetical report for Judge Drain. If he had employed an IFA to work within a similar scope, I am proposing that the information may have supported extra consideration of what constituted a noncore matter in the Purdue Pharma bankruptcy case, as well as noncore matters in general.

1. This report has been prepared for Honourable Judge Robert Drain, White Plains NY Bankruptcy Court.

2. Introduction/Mandate

i. You have hired our firm to provide independent forensic accounting services to research and investigate factual evidence related to relevant matters, even if considered 'noncore' (i.e., not central to bankruptcy proceedings) matters that might otherwise be relevant in civil or criminal court. These topics are not meant to be comprehensive. Rather, they are

intended to be indicators of the materiality and magnitude of 'noncore' issues and, potentially, a roadmap for highly robust research.

ii. My understanding of the background, based on my review of available documentation, is as follows:

- Purdue Pharma filed for Chapter 11 bankruptcy in September 2019.
- At the time of their filing, they had over 2,000 civil suits against them, and as of this writing, that number is estimated to have increased by 30%.
- The objective of the Purdue Pharma bankruptcy proceedings is to restructure Purdue Pharma into a public trust ('Knoa'), the proceeds of which will belong to the U.S. Government.
- Bankruptcy court does not generally accommodate issues that are 'noncore' to the proceedings (i.e., the only issues that matter are those pertaining to maximizing value for the restructured company or those that help accelerate the proceedings to minimize cost).
- The Purdue Pharma Chapter 11 bankruptcy case is uniquely complex and constitutes a 'social debt' bankruptcy, so consideration will be given to 'noncore' issues that would otherwise be excluded from consideration.

3. Scope of Review

While preparing this report, I relied on the following documents (please see the references section for details):

a. Peer-reviewed journal articles.

b. Court documents and artifacts including unsealed communications between members of the Sackler family as well as various motions.

c. Legal scholar publications on aspects of the Purdue Pharma bankruptcy case, and Chapter 11 bankruptcy in general, including those by Levitin (2022), Jacoby (2021), and Lipson, (2023).

d. Canadian Supreme Court decisions that govern the conduct, qualification, and admissibility of expert witnesses, including Mohan.

e. Third-party information, including the FDA Schedule II drug application process and the Center for Disease Control's definition of *opioid use disorder*.[71]

4. Definitions

For clarity, I have included the definitions I used for this report. I will revise this report if more accurate definitions are identified.

a. Appellant

A person who appeals to a higher court to reverse a lower court's decision. The 'appellate' court is the higher court.

b. Article III judge

Article III of the U.S. Constitution governs the appointment, tenure, and payment of Supreme Court justices and federal circuit and district court judges. These judges are

[71] https://www.cdc.gov/dotw/opioid-use-disorder/index.html "Opioid Use Disorder (OUD)**,** a substance use disorder, is a problematic pattern of opioid use that causes significant impairment or distress… In 2020, an estimated 2.7 million people ages 12 or older reported having an OUD."

nominated by POTUS and confirmed by the U.S. Senate.

c. Equitable Mootness

Promotes finality and protects parties that have justifiably relied on the court's bankruptcy confirmation order and effectuated transactions (i.e., those put into force or operation) pursuant to that order. By the time there is a final order that can be appealed (i.e., it is, in fact, a final order and is appealed within the 14-day window of that final order) and the appellate court actually hears the appeal, the appeal might be "equitably moot," which is a "Humpty Dumpty" concern: once one starts following a plan, the courts are reluctant to reverse anything central to the plan because it is impossible to put Humpty back together again (i.e., get money disbursements back; (Levitin, 2022). This enables creditors to get on with their lives without fear of money being clawed back.

d. Restructuring Support Agreement

At its core, an RSA acts as a lockup agreement, ensuring that the signing stakeholder (typically financial creditors but, sometimes, shareholders or other stakeholders and victims) will support a plan that is consistent with the terms of the restructuring agreement that was discussed during the bankruptcy proceedings.

e. **Legal doctrine**

A legal doctrine is a framework, set of rules, procedural steps, or test that is often established through a precedent in the common law through which judgments can be determined in each legal case. A doctrine results when a judge makes a ruling in which a

process is outlined, and criteria are established and applied in a way that allows for its application to be repeated for other similar cases. When enough judges make use of the process, it may become established as the *de facto* method of deciding like situations. For example, the 'Tipsy Coachman' doctrine is a rule of law that where a correct conclusion will be upheld in a higher court even if the lower court judge's reasoning is flawed (i.e., the lower court decision was correct for the wrong reason(s)).

f. Debtor in possession

When a company files under Chapter 11 of the United States Bankruptcy Code, it is commonly referred to as a 'reorganization,' as opposed to a 'liquidation,' bankruptcy. The debtor remains 'in possession' (i.e., has the powers and duties of a trustee, can secure loans with court approval, and pay employee bonuses) to continue operations to preserve value during bankruptcy proceedings.

5. Assumptions/Scope Restrictions:

The following could not be verified, either because the information was not available/unsealed or because, per project time and scope constraints, we did not spend additional time for review:

- I was not able to read the redacted portions of the John C. Coffee Report (Expert Report of Professor John C. Coffee, 2019), even though it is filed as confidential and subject to a protective order. If the redacted content is ever revealed, then that may alter my findings.

The Coffee report shows that the Purdue Pharma board acted as the "de facto CEO,"[72] that nine Sackler family members were serving on the board of directors at various times, and they had full control over the Purdue Pharma Board of Directors. The unredacted version is only available to reporters and legal scholars through the *Freedom of Information Act*,[73] and the timeline to request the report was too short to obtain the original document.

- I intentionally excluded expert interviews and consultations from this report. However, when possible, we referred to the work of experts who we would otherwise have engaged.

6. Background

i. The Purdue Pharma bankruptcy case is highly complex concerning the legal approach and procedures involved in it. This report was commissioned by the court because there are topics beyond the knowledge of the court that may not be illuminated by the plaintiff's litigation or the defendants' defence during the regular course of the Purdue Pharma bankruptcy proceedings. In this first report, four findings are highlighted and explained in detail.

7. Description of Calculations If Applicable

Due to time and scope restrictions, calculations in the chart titled 'Approximate Lifetime Cost of an Opioid Prescription and of Illicit Opioid Use" are high-level estimates based on

[72] (EXPERT REPORT OF PROFESSOR JOHN C. COFFEE, 2019) referring to a memo from Dr. Craig Landau then President of Purdue Pharma Canada to the Purdue Pharma Board while he was in contention for CEO. Dr. Landau has been CEO since July 2017.

[73] https://foia.state.gov/learn/foia.aspx "generally provides that any person has the right to request access to federal agency records or information except to the extent the records are protected from disclosure by any of nine exemptions contained in the law or by one of three special law enforcement record exclusions."

reasonable sources. Figures have not been verified or triangulated to produce ranges and confidence intervals. Details are provided in Appendix I.

8. Restrictions/Qualifications

i. This report has been prepared for the purpose of providing additional context for the ruling on the Purdue Pharma bankruptcy case for Judge Robert Drain in White Plains, New York. This was also described in the introduction, and this paper is not intended for any other purpose. It is not intended for general circulation or publication. I will not assume responsibility for any losses resulting from its circulation, publication, reproduction, or use contrary to the provisions of this paragraph.

ii. I reserve the right, but should not be obliged, to update this report if further relevant information becomes available.

9. Findings

1. The financial implications of addiction can be catastrophic for the average American family and Purdue Pharma's victim settlement payments of $3,500–48,000 are not likely to have a meaningful economic impact on the affected families.

a. The cost of supporting and treating addiction for addicts and their families is, by rough estimates, more than double their income (see Appendix I for a detailed chart and references).

Approximate Lifetime Cost of an Opioid Prescription and of Illicit Opioid Use*

Financial Cost Item	Prescription Use	Illicit Use
Oxycodone or OxyContin		
Cost / Day of Oxycodone or OxyContin	$32	$374
Subtotal Cost of Oxycodone/ Oxycontin:	**$1900**	**$136,500**
Heroin		
Avg. Heroin 'hits' / day	n/a	13
Est. cost / heroin 'hit'	n/a	$4
Subtotal Lifetime cost of heroin addiction	**n/a**	**$142,730**
Rehabilitation		
Avg. cost of detox (methadone treatment)	n/a	$141,001
Avg. cost of outpatient treatment	n/a	$8,386
Drug Court avg. cost per 'visit'	n/a	$3,278
Subtotal est. rehabilitation costs	**n/a**	**$302,052**
Lost Income		
Lost life years (addict only) yrs	n/a	50.9
Expected years of work but for lost life	n/a	30.9
Median gross income USA	n/a	$31,133
Subtotal lost net income:	**n/a**	**$819,440**
Grand Total Financial Cost:	**$1,900**	**$1,400,731**
Financial Impact Calculation		
Median annual household income USA	$70,784	$70,784
Avg. median household income tax rate	22%	22%
Median household net income	$55,212	$55,212
Tlt. Median Household Income over 9 years:	**$496,904**	**$496,904**
Opioid Rx/Illicit use as % of Median Net Income	**0.38%**	**281.89%**

*See Appendix I for further details and sourcing

2. **Policy and regulation appear to exacerbate the opioid epidemic and enhance the negative effects of Purdue Pharma's aggressive marketing.**

   a. Drug prohibition exacerbates the cycle of addiction, and although it magnifies the harm done by misrepresenting the benefits of OxyContin, the exploration and implementation of better policies than those currently in place is beyond the means of one corporation**.**

   The history of drug regulation shows that 'abuse potential' is an important factor in drug classification because, sometimes, regulation involves banning substances

altogether (i.e., prohibition), and sometimes, the labelling of substances appears to have been done arbitrarily. In 1971, Congress established the Schedule I through V labelling system that still exists today (Hampton, 2021):

- Schedule V drugs were difficult to abuse and safely doctor-prescribed (e.g., cough syrup with codeine)
- Schedule I drugs had a high potential for abuse and lacked any medical necessity in the United States (e.g., heroin, LSD, GHB, MDMA, and even marijuana, which is now legal in some jurisdictions but still does not have any recognized medical uses).
- Schedule II drugs (repeated from above) were easy to/had high potential for abuse but were considered medically necessary, so they could be prescribed by a doctor with restrictions (e.g., morphine, oxycodone, hydrocodone, cocaine for eyedrops, and fentanyl)

Drugs can be divided into two markets: (1) “white markets” for pharmaceutical products supplied by medical providers; and (2) “prohibition markets” that are supplied by an illicit system of cartels. Prohibition markets are often deadly because they lack all the consumer protections afforded in a legal market, so harm reductionists advocate for safe consumption rooms and safe supply policies that involve pharmacy-based dispensing, drug regulation, and decriminalization or legalization based on local political and economic conditions (Lie, 2021).

The prohibition model was designed to eradicate or disrupt the supply of illegal

drugs, but recent estimates show that the global illicit drug trade is worth between $426 and $652 billion USD annually (Perrin, 2020). Prohibition policies have historically been used to increase the political platform of enforcement and enable the policing of "a group that you're worried about," according to University of Buffalo historian David Herzberg (Macy, 2022). However, prohibition produced the opposite intended effect in some cases. Despite costly efforts to shut down or disrupt the supply of illicit drugs, illicit drugs dropped in price between 1990 and 2007. From 1990 to 2007, for example, the average price of heroin in the United States decreased by 81% but purity increased by 60%. The reason for this is that with increased policing, drug cartels needed to ship smaller packages more frequently than before to increase the yield of drugs that did not get seized. Fentanyl is the ultimate 'small package drug' because it is sometimes even shipped in micro quantities from China, hidden in what appears to be greeting cards (Perrin, 2020).

3. **The Sackler family and Purdue Pharma had domain expertise and ongoing marketing insights that were inconsistent with their actions.**
   a. Research indicates that the use of Schedule II[74] opioids may not be the best way to treat pain. However, there is no indication that Purdue Pharma pursued clinical studies to validate this.

[74] https://www.deadiversion.usdoj.gov/schedules/ "Schedule II/IIN Controlled Substances (2/2N): Substances in this schedule have a high potential for abuse which may lead to severe psychological or physical dependence. Examples of Schedule II narcotics include hydromorphone (Dilaudid), methadone (Dolophine), meperidine (Demerol), oxycodone (OxyContin, Percocet), and fentanyl (Sublimaze, Duragesic). Other Schedule II narcotics include morphine, opium, codeine, and hydrocodone.

Opioids[75] (like OxyContin) are chemicals derived from natural, semisynthetic, or synthetic compounds. Ingested opioids mimic naturally-occurring opium by activating opioid receptors in the human brain, which in turn, blocks pain signals between the brain and the body.[76] Opioids create a perception of reduced pain, but they also have other physical side effects that include drowsiness, confusion, euphoria, nausea, and severe constipation.[77] They also depress breathing and cause hypoxia, which is a reduced level of oxygen circulating in the bloodstream. Historically, OxyContin was used for end-of-life cancer pain treatment. Examples of common opioids are morphine, heroin, codeine, oxycodone (the compound in OxyContin), hydrocodone, and fentanyl.

After the extended use of opioids (even under doctor care), tolerance and physical and/or psychological dependence may develop. Note that the Sackler family pushed for increasingly longer and larger doses[78] (Ross, 2019).

[75] Note that opioids are different from opiates: Opiates are labelled "natural" because nature creates the active ingredient molecules. Common opiates include opium, morphine, and codeine, both made directly from poppy plants. An opioid is a substance (molecule) that is synthetic or partly synthetic. This means the active ingredients are created chemically https://www.google.com/search?q=opioid+vs+opiate&oq=opioid+vs+opiate&aqs=chrome..69i57j0i22i30j0i390i650l2j69i60.2978j0j4&sourceid=chrome&ie=UTF-8

[76] Specifically, "In the peripheral nervous system (PNS), beta-endorphins produce analgesia by binding to opioid receptors" https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3104618/

[77] In his 2022 memoir, former 'Friends' actor Matthew Perry discusses that his colon "exploded" from years of opioid overuse. He spent 2 weeks in a coma and had a colostomy bag for nine months (which he noted broke at least 55 times), and underwent 14 follow-up surgeries after the initial seven-hour emergency procedure. (Perry, 2022)

[78] https://www.statnews.com/2019/12/02/purdue-richard-sackler-proposed-plan-play-down-oxycontin-risks/ Richard Sackler wrote to Michael Friedman "I am somewhat surprised that 18 months into marketing, significant groups of experts … believe that oxycontin has a ceiling effect," he wrote. "What materials could we pull together that would smash this critical misconception?" Note that Michael Friedman was one of three executives who pleaded guilty to a misdemeanour charge related to Purdue Pharma's 2007 felony charge for misleading marketing (The other two were former top Purdue Lawyer Howard Udell, and one-time medical director Dr. Paul Goldenheim).

Some factors impact the degree to which opioids like OxyContin can induce physical dependency:

1. Genetic Factors: Some people possess a hereditary inclination toward developing substance use disorders, including opioid use disorder. Genetic factors have the potential to influence an individual's opioid processing and response, thereby augmenting their inclination toward developing dependence (Butler et al., 2011).
2. Environmental factors: Exposure to trauma, such as instances of physical or emotional abuse, represents a significant risk factor for the onset of substance abuse disorders (Hampton, American Fix, 2018)
3. Accessibility: The ease of acquisition[79] of prescription opioids has played a significant role in the ubiquitous misuse and dependence observed in the contemporary opioid crisis.

In fact, opioids can lead to physical dependence within a short time, as little as 4–8 weeks.[80] Repeated use can lead to opioid use disorder (OUD), which is a chronic and progressive condition that can lead to disability, frequent relapses, and ultimately, death.

OUD includes the following symptoms:[81]

1. Taking increasing amounts of opioids or taking them for a longer period than intended.

[79] Often prescribed opioids will go unused if the patient has recovered and pill mills are pervasive in some parts of the USA. (Canning, 2021)
[80] Centers for Disease Control and Prevention. Vital Statistics Rapid Release - Provisional Drug Overdose Data
[81] https://www.psychiatry.org/patients-families/opioid-use-disorder#:~:text=Access%20to%20prescription%20opioids%20and,develop%20an%20addiction%20to%20them

2. A persistent desire or unsuccessful efforts to cut down or control opioid use.
3. Spending a great deal of time obtaining or using the opioid or recovering from its effects.
4. Continued opioid use despite having recurring social or interpersonal problems.
5. Giving up or reducing activities because of opioid use.
6. Tolerance (i.e., the need for increased amounts or diminished effects with the continued use of the same amount).
7. Withdrawal (i.e., opioid withdrawal syndrome) or taking opioids (or closely related substances) to relieve or avoid withdrawal symptoms.

b. <u>There is evidence that Purdue Pharma (and its governing Sackler family) were aware that the effects of OxyContin were inconsistent with the intended use outlined in its FDA approval request.</u>

The original OxyContin patent said that "OxyContin controlled pain for 12 hours in approximately 90% of patients,"[82] and the FDA approved Purdue Pharma's original 1992 patent submission (LA Times, 2016). When evidence that OxyContin was being abused emerged, Purdue Pharma reformulated OxyContin (i.e., to be tamperproof) and was granted another FDA approval in 2010 based on the following claims (note that the FDA required Purdue Pharma to conduct a post-market study to analyze whether the new OxyContin formulation was successful at deterring misuse):

[82] https://documents.latimes.com/oxycontin-patent-1992/ "Applying for a patent in 1992, Purdue said OxyContin controlled pain for 12 hours 'in approximately 90% of patients.'"

Purdue Pharma OxyContin FDA application claims:[83]

i. OxyContin is made to slowly release the potent opioid oxycodone to treat patients who require a continuous, around-the-clock opioid to manage moderate to severe pain for an extended period.

ii. Each OxyContin tablet contains a large quantity of oxycodone, which allows patients to take the drug less often.

iii. Reformulated OxyContin is intended to prevent the opioid medication from being cut, broken, chewed, crushed, or dissolved to release additional medication.

iv. "Although this new formulation of OxyContin may provide only an incremental advantage over the current version of the drug, it is still a step in the right direction,"

v. The manufacturer of OxyContin, Purdue Pharma, will be required to conduct a post-market study to collect data on the extent to which the new formulation reduces the abuse and misuse of this opioid (FDA, 2010).

Purdue Pharma's marketing claims were inconsistent with its 2010 FDA application claims (listed above) according to *The New York Times* journalist and author Barry Maier in 2018 after an investigation into and analysis of confidential internal Purdue Pharma documents based on information from sources that include complaints from doctors, reports from Purdue Pharma sales representatives, and independent researchers. Maier also confirmed the FDA's suspicions that reformulated OxyContin

[83] https://wayback.archive-it.org/7993/20170112130258/http:/www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm207480.htm

is not tamperproof, and that Purdue Pharma had not followed FDA instructions to monitor and report on tamper proofing efficacy (Meier, 2018).

Evidence that Purdue Pharma's FDA claims for OxyContin may be fragile:

i. The basis for OxyContin's market success and profitability was Purdue Pharma's claim that it provides 12-hour relief. If this were not the case, then OxyContin would have no other medical advantage over other pain relief options, and its relatively higher price point would put it at a financial disadvantage.
ii. Purdue Pharma executives overtly directed sales representatives to "refocus" prescribing doctors to give 12-hour doses.
iii. When patient feedback indicated that the analgesic effects of OxyContin were lasting less than 12 hours, Purdue Pharma instructed doctors to prescribe increased dosage strengths, which is inconsistent with the above approach of reducing dosage frequency. This is problematic because Ryan (2016) showed that OxyContin prescription potency is positively correlated with accidental overdose rates.
iv. At least half of prescription OxyContin users are on doses (frequency and/or potency) that are considered dangerously high by public health experts (Ryan, 2016).

In his confidential report, John C. Coffee (2019) described a staff memo sent to Theresa and Richard Sackler:

> Since oxycodone is perceived as being a weaker opioid than morphine, it has

> resulted in OxyContin being used much earlier for noncancer pain. Physicians are positioning this product where Percocet, hydrocodone, and Tylenol with codeine have been traditionally used. Since the noncancer pain market is much greater than the cancer pain market, it is important that we allow this product to be positioned where it currently is in the physician's mind (p. 22).

In reality, OxyContin was double the strength of morphine. Purdue Pharma sales representatives were instructed to only reveal that fact if it helped convince a physician to prescribe OxyContin, which was the purpose of sales calls (Coffee, 2019).

Also, according to John C. Coffee (2019), "[t]here seems to have been few, if any, limitations on the kinds of pain for which [Richard Sackler] would prescribe OxyContin" (p. 19), and Richard Sackler "urged the prescription of OxyContin for 'Osteoarthritis, complex and severe back pain, shingles, pain of circulatory compromise, the pain of rehabilitation, and numerous other conditions that can debilitate patients for weeks, months, and even years'" (p. 8).

c. <u>Purdue Pharma and third parties ignored conflict boundaries.</u>

1. Curtis White from the FDA granted the approval for OxyContin. He had worked on the approvals of several other opioid painkillers prior to OxyContin and oversaw pain medication at the FDA. He was the medical reviewer who approved Purdue Pharma's application for OxyContin. He did not initially find Purdue

Pharma's application compelling[84] but was soon 'cultivated' by the Sacklers. Examples of Purdue Pharma 'coaxing' Curtis White includes the following:

(1) a confidential memo (subsequently prepared by federal prosecutors) indicated that a small delegation of Purdue Pharma officials rented a room near Curtis Wright's office in Maryland, and

(2) Purdue Pharma helped Curtis Wright compose (what should be his personal and confidential) reviews of clinical study reports and other required paperwork detailing the efficacy and safety of OxyContin. Within a year of Curtis Wright and the FDA's December 28th, 1995 approval of OxyContin, Curtis Wright took on a consulting role exclusively for Purdue Pharma with an annual salary of almost $400,000 USD (Keefe, Empire of Pain: The Secret History of the Sackler Dynasty, 2021).

2. Demetra Ashley, who was a senior official with the Drug Enforcement Administration (DEA), spent three decades there specializing in anti-diversion tactics for prescription drugs like OxyContin. In 2018, she left the DEA to consult for Purdue Pharma (Strickler, 2019).

3. Practice Fusion, which is based in San Francisco, makes medical clinic software for smart devices and exam room screens (on which a patient's medical history is typically displayed during appointments in the United States). A feature of this

[84] "Curtis Wright cautioned that it might be a bridge too far for Purdue to claim that OxyContin was safer than other available painkillers, warning the company that "care should be taken to limit competitive promotion." He also told officials at Purdue that some of his colleagues at the FDA had "very strong opinions" that opioids "should not be used for nonmalignant pain" (Keefe, Empire of Pain: The Secret History of the Sackler Dynasty, 2021).

software was a real-time pop-up screen that appeared in response to doctors inputting patient symptoms, and it purported to offer independent medical advice. In January 2020, Practice Fusion paid $145 million in fines for taking kickbacks from drug manufacturers (including Purdue Pharma[85]) in exchange for sending pop-up alerts intended to boost opioid prescriptions to physicians (Mann, 2020).

4. McKinsey & Company was a trusted adviser to Purdue Pharma, other companies being held responsible for the opioid epidemic (e.g., Malincroft, Endo, and Johnson & Johnson) as well as government agencies on how to address the opioid epidemic. According to the then-Massachusetts Attorney General Maura Healey, the nature of McKinsey's work with Purdue Pharma was revealed after lawsuits exposed "thousands and thousands of documents and emails" that when taken together told "the story of McKinsey's wrongdoing" (Michael Forsythe, 2021). McKinsey settled for close to $600 million. During her testimony before the Committee on Oversight and Reform in the U.S. House of Representatives, Ms. Healy noted some especially egregious counsel by McKinsey working directly with the Sacklers on how Purdue Pharma could sell more OxyContin:

    - McKinsey demonstrated analytically that it would be very profitable to target the most dangerous prescribers, who put the most patients on

[85] https://www.npr.org/2020/02/01/801832788/healthcare-software-firm-fined-145m-in-opioid-scheme-with-drug-companies "[Practice Fusion issued by about 32,000 practices in the U.S. That's about 100,000 people logging in every day to manage tens of millions of patient records. So, you're talking about e-prescriptions... Practice Fusion decided to monetize its presence in the physician's exam room by selling to pharmaceutical companies the opportunity to prompt physicians to take certain clinical actions. the company in question is Purdue Pharma, maker of OxyContin. The documents detail a joint effort by Purdue and Practice Fusion launched in 2016 that produced the kind of screen prompts described in this (2007) criminal settlement. The marketing effort happened at a time when doctors were becoming more aware of the dangers of opioid addiction.:

opioids, at the highest doses, for the longest periods of time. They referred to the approach to "turbocharge" sales[86] and be more profitable (Testimony Of Massachusetts Attorney General Maura Healey, 2022). McKinsey actively coached Purdue Pharma to band together with other opioid companies to defend against strict treatment by the FDA (a McKinsey client at the time[87]). Also, McKinsey even gloated to Purdue Pharma's CEO that [they] should hire McKinsey because of "who we know," and because the FDA was their client (Testimony Of Massachusetts Attorney General Maura Healey, 2022).

- When McKinsey consultants found out about Attorney General Maura Healey's lawsuit, emails show that they planned to delete incriminating documents and emails from their work for long-time client Purdue Pharma (Testimony Of Massachusetts Attorney General Maura Healey, 2022).

5. In 2002, Purdue Pharma started and funded the Massachusetts General Hospital (MGH) Purdue Pharma Pain Program and renewed the deal in 2009 with a $3 [billion USD] contribution. Despite the financial support, MGH researchers were concerned about Purdue Pharma products. In a July 2011 email from Purdue's then-chief medical officer, Dr. Craig Landau (who has been CEO since his

[86] https://www.industrydocuments.ucsf.edu/opioids/docs/#id=fjpn0256 "Oxycontin Sales Engine Turbocharge Plan"
[87] https://www.nytimes.com/2022/04/13/business/mckinsey-purdue-fda-records.html#:~:text=Since%202010%2C%20at%20least%2022,drafted%20by%20its%20Democratic%20majority. "Since 2010, at least 22 McKinsey consultants have worked for both Purdue and the F.D.A., some at the same time, according to the committee's 53-page report drafted by its Democratic majority."

appointment in 2017), he took issue with a study whose purpose was to study the use of opioid painkillers for chronic pain. Dr. Landau wanted to ensure that any Purdue-funded study supported the use of its medicines (Joseph, 2019).

6. The American Pain Society was a major recipient of Purdue Pharma donations, as were other pain advocacy groups, all of whom did not disclose this fact (Hampton, 2021).

d. <u>The Sackler family employed highly complex corporate structures and numerous offshore financial destinations, which appears to have been a deliberate attempt to put their money out of reach of lawmakers and regulators.</u>

Offshore financing[88] is, at its core, a way for corporations and individuals to minimize the taxes they must pay by owning 'trust' accounts in tax-haven jurisdictions.[89] Secrecy is central to offshore financing because offshore jurisdictions only recently began to disclose[90] some information about the beneficial owners (i.e., the people or entities that own accounts) or the amounts of money contained in the accounts. There are legitimate reasons to set up an offshore trust (e.g., a celebrity is purchasing a house but wants to keep the address of their residence secret, and some

[88] Note that there are 'onshore' geographies that have off-shore style structures like South Dakota which in 2021 was revealed in a data leak coined 'Pandora Papers' to be heavily featured for helping the wealthy avoid paying taxes. https://www.icij.org/investigations/pandora-papers/us-trusts-offshore-south-dakota-tax-havens/

[89] (Janda, 2021) The most pos secrecy jurisdictions are US states, such as Delaware and South Dakota, or British territories. Popular tax havens: Delaware and South Dakota in the USA; Jersey, Guernsey, Isle of Man, Gibraltar, Bermuda, and the British Virgin Islands as British colonies, and the City of London.

[90] https://www.thebalancemoney.com/how-swiss-bank-accounts-work-4156553: "Swiss banks now cooperate with tax and criminal investigations, turning over information that account holders might wish to conceal from others"

regions have obscure double-taxation scenarios that can be avoided through offshore financing). Secrecy, in this case, protects the beneficial owner from paying taxes that may otherwise be required if it was reported, and many wealthy individuals do not want to publicly disclose what their net worth is. However, offshore accounts can be used to launder money and channel funds to nefarious entities (e.g., terrorist organizations). Although offshore banking is available to anyone, the biggest cost is associated with getting the correct advice to do so legally (Janda, 2021). Recent data leaks have exposed many individuals and corporations:

Highlights of historical widespread data leaks:

1. 1971 Pentagon Papers
    - High volumes of secret documents leaked by Daniel Ellsberg revealed details about the U.S. war in Vietnam.

2. 2016 Panama Papers
    - Millions of documents (2 terabytes of data) were leaked revealing "countless" links to organized crime[91] and serious financial wrongdoing and exposing many public officials and executives who had used offshore financial systems for private gain (Hays, 2019). The Panama Papers investigation revealed that the offshore system—much of which was run from British Overseas Territories and crown dependencies—was far more extensive than previously thought.

[91] (Hays, 2019)Europol reported that it had found 3,649 likely matches with criminal and terrorist organizations when they compared the Panama Papers to their own files.

3. 2017 Paradise Papers
    - 13.4 million records exposed ties between Russia and then-U.S.-President Donald Trump's commerce secretary, the Canadian Prime Minister's chief fundraiser's offshore tax manoeuvres (Chittum, 2017), and the offshore interests of the Queen of England and more than 120 politicians around the world (Will Fitzgibbon, 2017). Note that the Sackler name was on documents associated with this leak.

4. 2021 Pandora Papers
    - These papers were exposed by the largest collaboration in journalism history: 600 journalists at 151 news organizations in 117 countries worked to compile the papers (Alecci, 2022).
    - Legislation favourable to offshore-like trusts in South Dakota resulted in the combined assets held in these trusts growing to $360 billion over the past 10 years (The Conversation, 2021).

Purdue Pharma's offshore tactics appeared to be for the purposes of concealment.

- Purdue Pharma attempted to protect its wealth using layers of limited partnerships, holding companies, and trusts according to an Associated Press review of court papers, securities filings by companies that have had dealings with Purdue, and documents leaked from an exclusive Bermuda law firm. However, it is common for companies to set up limited partnerships and country-

specific subsidiaries to limit the risk of liability for shareholders, and many wealthy individuals manage their investments through opaque entities, "the Sacklers' web shows striking complexity and a desire for secrecy, while revealing links between far-flung holdings" (The Guardian, 2019).

Details about the search for the Sackler family's offshore wealth:

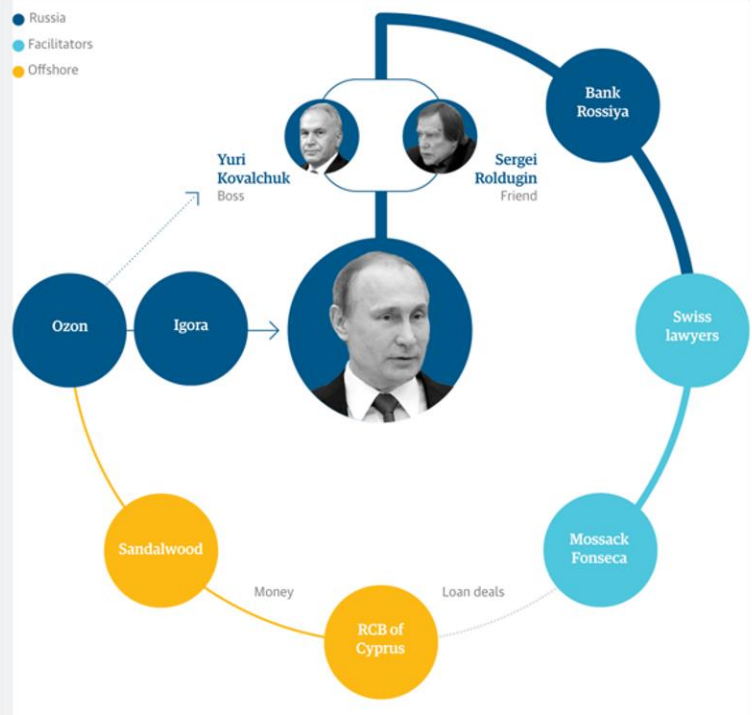
- In Purdue's 2007 plea agreement with federal prosecutors, it listed 215 companies under its corporate umbrella but omitted the companies used to manage property and investments for family members or the (onshore and offshore) trusts, which are the 'holding tanks' from which it administers money to family members (In re: Purdue Pharma, L.P. Decision and Order on Appeal, 2021)
- New York AG Letitia James issued subpoenas to 33 Sackler companies, advisers, and banks in the United States, seeking details about transactions in which money was transferred out of Purdue Pharma's possession (Rabin, 2019).
- The Sacklers own a vast property in West Berkshire UK called 'Rooksnest' that was acquired before Purdue introduced OxyContin. Public filings do not show who actually owns the estate, but documents leaked from a Bermudian law firm show that companies belonging to the Sacklers, among at least 30 island-based entities, were controlled through family trusts (The Guardian, 2019).
- Mundipharma is a network of companies based in Bermuda set up by the Sacklers to conduct business outside North America. Mundiphrma also includes unrelated holdings like family foundations, real estate holding companies, and an insurer according to the Paradise Papers leak (The Guardian, 2019).

- Rosebay is run from an office in Oklahoma City that manages many family holdings. When David Sackler paid $22.5 million last year for a mansion in Los Angeles, the money came from the Rosebay account. It is also the owner-of-record for Sackler companies spread from Poland to New Zealand according to corporate registries in those countries (The Guardian, 2019).

Three examples to illustrate how offshore financing works represent some of the tactics the Sackler family used to offshore the $11 billion they withdrew from Purdue Pharma between 2008 and 2019:

Example 1: Concealment of money intended for Putin

How Vladimir Putin's 'personal bank' moved money offshore and returned it to Russia



Bank Rossiya
Closely associated with Putin and his friends. Its managers were behind billions of dollars in suspicious offshore transactions

Swiss lawyers
Lawyers from Dietrich Baumgartner and Partners in Zurich received instructions from Bank Rossiya and passed them on to Mossack Fonseca

Mossack Fonseca
Panamanian law firm that registers and runs offshore firms. It set up Sandalwood and other offshores linked to Roldugin

Russian Commercial Bank of Cyprus
A subsidiary of Russia's state-owned VTB bank at the time. RCB made massive unsecured loans to Sandalwood, extending $650m in credit

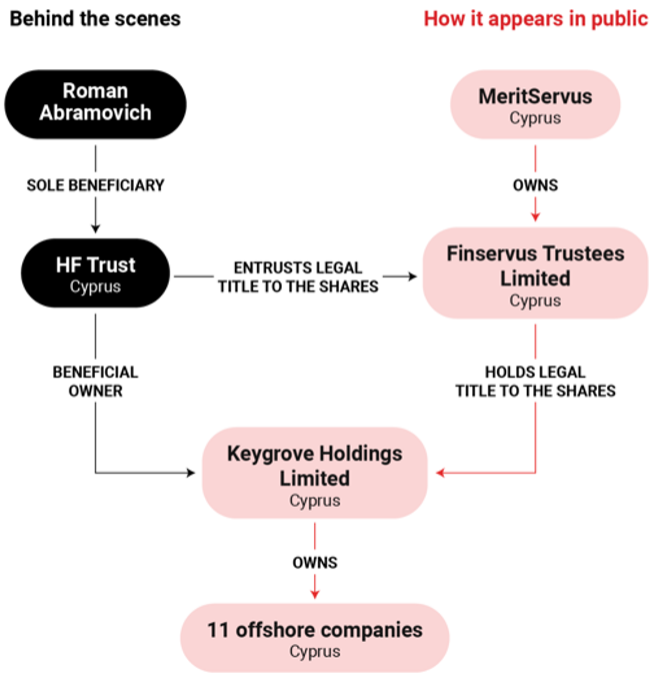
Sandalwood Continental Ltd
An offshore firm set up in the British Virgin Islands. Between 2009 and 2012 it got more than $1bn in loans. The cash came from state banks and other offshores

Ozon
Ozon owns the private Igora ski resort outside St Petersburg. In 2010/11 Sandalwood lent Ozon $11.3m. Putin's daughter Katya got married at the resort in 2013

Source https://www.theguardian.com/news/2016/apr/03/panama-papers-money-hidden-offshore

Example 2: Oligarch Abromovich's corporate structure obscured his ownership

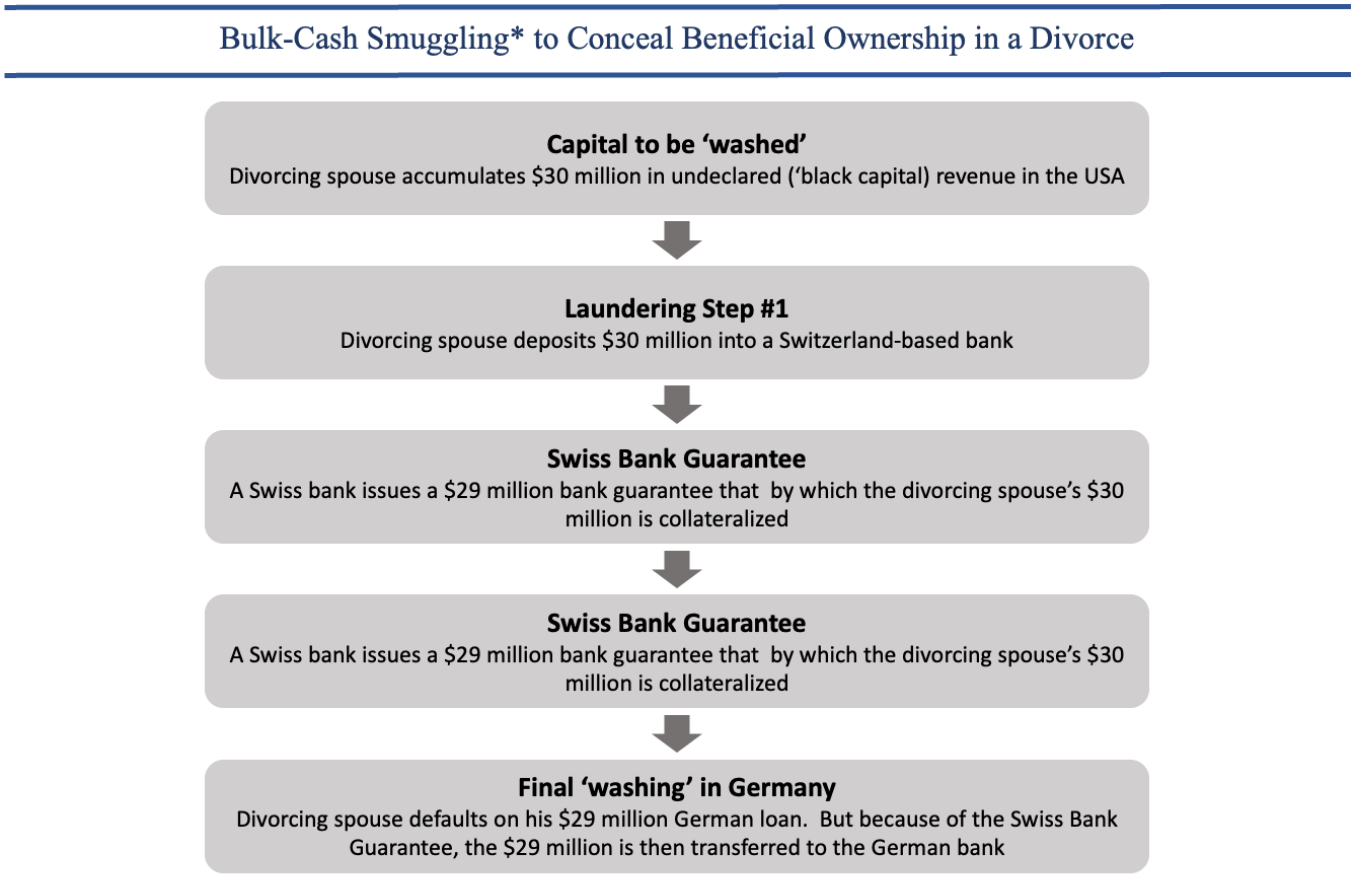
How Oligarch Roman Abramovich Hid his Ownership in Offshore Companies



- Leaked documents from Credit Suisse and MeritServus (based in Cyprus) revealed that Russian oligarch Roman Abramovich held over two billion in assets at Credit Suisse, UBS, and Barclays.
- Abramovich's ownership of several offshore companies was obscured by a complex corporate structure involving an obscure trust and an intermediary company owned by MeritServus.
- The offshore firms owned blue-chip U.S. stocks, which were used as collateral for big loans from Credit Suisse, and a series of suspicious loans between the offshore companies were flagged for potential money laundering.

Source: https://www.occrp.org/en/investigations/credit-suisse-banked-abramovich-fortune-held-in-secret-offshore-companies#:~:text=Abramovich's%20ownership%20of%20several%20offshore,intermediary%20company%20owned%20by%20MeritServus. (January 2023) *Credit Suisse Banked Abramovich Fortune Held in Secret Offshore*

Example 3: Hiding money from a spouse



*Bulk Cash Smuggling is an offense under the Bank Secrecy Act, when someone knowingly conceals more than $10,000 in currency or other monetary instruments…from a place within the United States to a place outside of the United States, or from a place outside the United States to a place within the United States, they may be found guilty of a currency smuggling offense. Source: https://www.ice.gov/partnerships-centers/bcsc/faq#:~:text=%C2%A7%205332%20(Bulk%20Cash%20Smuggling,%C2%A7%C2%A7%205316%20and%205317.

Source: https://www.assetsearchblog.com/2013/07/02/bank-search-offshore-banking-swiss-bank-account-hidden-assets/

4. **Reform is urgently required: Beyond holding individual companies accountable, reform is needed to prevent a drug crisis like the opioid epidemic from recurring, notwithstanding that changing policies and the law can be onerous to mobilize. It is reasonable to expect that it is up to the triers of fact to push the boundaries of the Bankruptcy Code as more information potentially relevant to a social debt case becomes available.**

a. The stigmatization of addicts is a barrier to recovery and systemic change. Reform may be made effective by changing the common belief that addiction is a "moral failing" and reversing the notion that healthcare systems have "weaponized stigma in many forms"[92]

The opioid epidemic only shed light on problems that have historically existed in the pharmaceutical industry "in an exaggerated fashion" (Herzberg, 2022). According to practising physician and (while he was a) recovering addict Sean Folger, he suggests that flawed drug policy leads to ineffective enforcement. For example, the *Controlled Substances Act* legislated in 1970[93] criminalized addiction and fuelled stigma against addicts, but the best first steps to mitigating drug abuse will come from within healthcare and its practitioners (Folger, 2020).

b. Drug abatement is an important component of attempts to mitigate the opioid epidemic, but like counteracting the downsides of drug prohibition, doing so is beyond the means of an individual corporation and its owners. Reform at the policy level.

Decriminalization is a policy-based strategy which removes criminal penalties for violations of drug laws. The benefits are that it minimizes the downsides of chronic drug use, (e.g., reducing people 'trapped' in the criminal justice system through a cycle of possession and rearrest), has been shown to enhance public health (e.g., safer

[92] (Folger, 2020)
[93] https://www.dea.gov/drug-information/csa A five-category system (Schedules I-V) for most legal and illicit drugs but does not include tobacco or alcohol. Each category has a degree of regulation and control. Schedule 1 drugs are generally prohibited because there is no accepted medical use and because they have a high potential for abuse.

schools and prison systems), and has significant economic benefits (e.g., an estimated $50 billion could be saved from the cessation of ineffective drug suppression tactics). Note that arguments against decriminalization tend to be neutralized by the notion that prescription and illicit drugs are so readily accessible that decriminalizing them does not deter drug use (Duke & Gross, 1996).

The following are several geographies that have implemented varying degrees of measures toward the decriminalization of drugs, and the specifics of their circumstances:

- **Canada (Vancouver, British Columbia): Clean Needle Exchange Program:** The provision of sterile needles to individuals who engage in drug use through needle exchange programs is intended to mitigate the spread of bloodborne infections, including, but not limited to, HIV and Hepatitis C (Khaira, 2021). Vancouver, Canada, has implemented a comprehensive harm-reduction strategy that includes the provision of a supervised injection site (i.e., InSite) and a needle exchange program. Research indicates that the implementation of InSite has resulted in a decrease in the number of overdose fatalities (Gary Christian, 2012), an increase in public order (Wood, 2004), and a reduction in costs associated with preventable HIV contraction (Urban Health Research Initiative of the British Columbia Centre for Excellence in HIV/AIDS, 2009). According to a publication in the *International Journal of Drug Policy*, InSite was found to be linked to a 30% rise in the probability of individuals enrolling in addiction treatment programs (UNODC, 2018).

According to the Vancouver Coastal Health Authority's report, individuals who utilized InSite were found to have a 30% increased likelihood of utilizing detoxification services compared to those who did not use InSite (Ng et al., 2017).

- **Portugal: Decriminalization Model**

  In 2001, Portugal enacted a policy of drug decriminalization whereby the possession and use of all drugs were no longer subject to criminal prosecution (Greer et al., 2022). This policy shift was motivated by a desire to prioritize the treatment of drug addiction as a public health concern rather than a criminal justice matter. The results have exhibited favourable outcomes and are characterized by noteworthy declines in drug-related fatalities, HIV transmission rates, and drug-related criminal activities. The "SUPPORT" program was instituted by Portugal in 2017 with the objective of offering a synchronized and comprehensive approach to combating drug addiction via community-centred teams (Mastro, 2021). The objective of this program is to improve the availability of prevention, treatment, harm-reduction, and social reintegration services. The Portuguese Government persists in allocating resources to harm-reduction initiatives, such as the amplification of needle and syringe programs, overdose prevention initiatives, and the accessibility of naloxone, a pharmaceutical agent that can counteract opioid overdoses.

- **Mexico: Decriminalization Law**

The decriminalization law implemented in Mexico in 2009 is primarily symbolic in nature. The distinction between "possession" and "trafficking" was established at such a low level that cases of possession are treated as trafficking based on quantity alone, and the sanctions for the latter were heightened. Empirical data suggests that the law implemented in Mexico has resulted in an increase in the number of individuals who have been apprehended and penalized for contravening drug laws (which is colloquially referred to by law enforcement as 'net widening'[94]; Payer, 2018). In contrast to Portugal, Mexico has not allocated equivalent resources toward treatment and harm-reduction initiatives (Eastwood, 2020).

- **Czech Republic**

  In contrast to other countries, the Czech Republic has incorporated various components of harm reduction and therapy into its drug policy. This includes the implementation of opioid substitution treatment with low-threshold accessibility and syringe access programs that are among the most comprehensive in Europe (Dleštíková, 2022). Following its transition from the Soviet Era, the Czech government deemed the act of possessing drugs for personal use to no longer be a criminal offence. An extensive assessment carried out by the Czech government revealed that the imposition of criminal sanctions did not yield any discernible impact on drug consumption rates or

[94] https://www.drugpolicyfacts.org/node/1964 "Net-widening refers to 'an expansion in the number of offenders arrested and charged after the implementation of [a drug court] because well-meaning police and prosecutors now believe there to be something worthwhile that can happen to offenders once they are in the system (i.e., treatment instead of prison)'"

the associated negative consequences thereof, thereby rendering such measures unwarranted. In 2009, the nation implemented a law on drug decriminalization that outlines specific quantities for personal use (Greer et al., 2022).

- **Switzerland's Heroin-Assisted Treatment (HAT)**

  Heroin-assisted treatment programs have been implemented in Switzerland to mitigate severe[95] opioid addiction. HAT offers pharmaceutical-grade heroin to patients who have exhibited resistance to alternative treatment methods (Bascaran et al., 2014). The HAT program has been observed to result in a significant decrease in the consumption of illicit opioids, such as heroin, among its participants, who are administered the drug in a pharmaceutical-grade form as part of the program. In 2010, the *Lancet* published the results of a thorough investigation that involved contrasting the results of individuals enrolled in HAT to those of people undergoing methadone maintenance treatment (Meyer et al., 2022).

- **Oregon's Decriminalization of Small Amounts of Almost All Drugs**

  Oregon became the first U.S. state to decriminalize drug possession in 2020. Measure 110 decriminalized the personal possession of small amounts of illicit drugs, (including cocaine, heroin, oxycodone, and methamphetamine),[96] and reduced the penalties for possession of larger amounts. Possession is now

[95] Note: Another study defines 'severe' in general terms.
[96] https://www.opb.org/article/2020/10/15/measure-110-oergon-politics-decriminalize-drugs/

punishable by a civil citation with a $100 fine (Westervelt, 2021).

10. Conclusion

The objective of this report was to highlight potential areas for further investigation. It is apparent that there are several 'noncore' issues consistent with Article III court proceedings (i.e., civil, or criminal), but that merit consideration for Chapter 11 proceedings even though they do not yet fall within the scope of recent interpretations of the Bankruptcy Code. The economic disparities between the 'staggering' profit earned by Purdue Pharma from the sale of OxyContin and the equally 'staggering' economic devastation suffered by addicts and their families are notable. Purdue Pharma and the Sackler family appeared to continue to market OxyContin under false pretenses (given that their FDA claims were weak) undeterred following their 2007 conviction. Unsealed documents also revealed that the Sacklers actively skirted regulatory requirements. And while research suggests that there are ways to mitigate or abate the opioid epidemic (e.g., alternative pain relief to opioids, successful abatement strategies tested in other geographies), Purdue Pharma and the Sacklers did not invest in or pursue any of those avenues despite that Richard and Kathe Sackler are certified MDs, as are several executives including the current CEO, Dr. Craig Landau. These facts are significant because the nondebtor third-party releases will prevent victims from addressing this, or any other egregious act, in civil court in the future, and because of the prebankruptcy deal with the U.S. DOJ, criminal charges may never materialize either.

SECTION 4: IMPLICATIONS FOR THE IFA PROFESSION

In this final section of the paper, I discuss the qualifications of IFAs to contribute to highlighting relevant matters related social debt bankruptcies and suggest modifications to the IFA Professional Standards to improve the guidance for IFAs in social debt bankruptcy cases.

Forensic accounting engagements are varied, unique, and highly valued when the work is performed properly. Forensic accounting is commonly used in fraud-type cases, but many of the skills used in these cases are not quantitative and only applicable to the nonfinancial analysis of social debt cases and contexts (e.g., understanding what the Sacklers knew by examining unsealed court documents).

1. IFAs have the skills necessary to assist the court in a social debt bankruptcy case.

   a. Investigative approach
   b. IFAs avoid pitfalls (e.g., battle of experts, hired gun, potential prejudice by being fact-based and reliable, junk science) that would otherwise increase litigation costs and time, by clarifying key topics for the court.
   c. Identify potential irregularities that might arise in an off-label bankruptcy case (Jacoby, 2021).

2. IFAs are governed by professional standards or 'Standard Practices' (2006), some of which provide guidance in a 'social debt' bankruptcy scenario.

   a. There are certain IFA Standard Practices that if codified to accommodate emerging

trends like social debt bankruptcies, would benefit the profession and the court. For example, in the expanded use/misuse of Chapter 11 proceedings in mass tort bankruptcies by corporations might be curbed if an IFA investigation and report is assigned by the sitting judge as a rule versus as an exception.,

3. Canadian legal standards underscore the high threshold for an IFA to be qualified as an expert witness. These standards and IFA skillsets are applicable to the complexity and urgency of Chapter 11 proceedings.

a. In *R. v. Mohan*, [1994] 2 SCR 9, the Supreme Court of Canada set out the threshold requirements for expert witnesses:

- Relevance
- The necessity of assisting the trier of fact/reliability [97]
- Absence of any exclusionary rule
- Properly qualified independent expert that is fair/objective/non-partisan in the eyes of the court
- The court provides the gatekeeper function.

b. 'National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd. ('The Ikarian Reefer') **(No.1) [1993] F.S.R. 563** addressing the responsibility of an expert witness:

- An expert witness should provide assistance to the court in an objective and

[97] https://cscja.ca/the-judges-role/#:~:text=Almost%20all%20civil%20cases%20and,witnesses%20are%20telling%20the%20truth. "Almost all civil cases and many criminal ones are heard by a judge sitting without a jury. The judge is the "trier of fact," deciding whether the evidence is credible and which witnesses are telling the truth".

unbiased way, and their opinion should remain within the limits of their expertise.

- An expert report should be (and appear to be) independent and without bias.
- An expert witness should, when expressing an opinion, clearly state the facts and assumptions on which that opinion is based, and not ignore counterarguments or facts that detract from the expert's opinion.

4. Opportunity to enhance IFA Standard Practices (2006)

IFA Standard Practices, which govern IFAs, cover investigative and ethical considerations (independent from an accounting context). Given the many case details that have emerged, the opioid epidemic/crisis was, in large part, driven by some very fundamental and systemic issues, the biggest of which were (1) possible conflicts of interest that led to policy developments that can be directly tied to the ignition and exacerbation of the crisis, and (2) the complicity of many players who 'knew' something was wrong but were unwilling to take the risk required to attempt to stop it.

The following IFA Standard Practices are relevant to 'social debt' bankruptcy cases. I have suggested enhancements (changes to the original denoted by underlined text):

SP 100.08

"Investigative and forensic accounting engagements" are those that:

(a) require the application of professional accounting skills, investigative skills, and an investigative mindset; and

(b) involve disputes or anticipated disputes, or where there are risks, concerns or

allegations of fraud or other illegal or unethical conduct.

(c) assist in a way determined or requested by the court

SP 100.10

“Investigative skills” require the following sub-components:

(a) an understanding of the context within which the engagement is to be conducted (e.g., the Tribunal process, laws, regulations, contracts, or policies relevant to the engagement);

(b) the ability to identify, obtain, examine, and assess information relevant to the engagement;

(c) the ability to analyze and compare various types and sources of information;

(d) an understanding of the types of information that would assist in establishing motivation, intent, and bias;

(e) an understanding of the ways in which information could be fabricated or concealed;

(f) an understanding that information collected and the work performed, including the work and information of others, may become subject to disclosure and be tendered as evidence; and

(g) the ability to document and present investigative findings and conclusions for decision-making purposes.

SP 100.11

An “investigative mindset” requires a skeptical attitude in the identification, pursuit,

Analysis, and evaluation of information relevant to each engagement, as well as the ability to contemplate that it may be biased, false, and/or incomplete. This is applicable to the identification and assessment of relevant issues, the plausibility of the underlying assumptions, substance over form, and the development of hypotheses for the purpose of addressing the issues under investigation.

SP 100.19

Some professional engagements will include one or more parts that meet the definition of an IFA engagement. In these circumstances, these IFA Standard Practices should be applied to those parts of the professional engagement that meet the definition.

400.01

(a) IFA practitioners should use an investigative mindset in the identification, pursuit, analysis, and evaluation of information relevant to each IFA engagement, contemplating that it may be biased, false, unreliable, and/or incomplete.

(b) IFA practices are ideally suited to assist the court in lateral and background work to support decisions

400.11

(a) When IFA practitioners receive estimates and assumptions that are outside of their competence and expertise, and IFA practitioners intend to rely on such estimates and assumptions, they should consider the reasonableness of those estimates and assumptions.

(b) When IFA practitioners are investigating topics outside of their competence and expertise, they should, when possible, identify the appropriate work of experts and develop a working knowledge of current peer-reviewed research.

400.13

IFA practitioners should consider and address reasonable alternative theories, approaches, and methodologies that may be relevant to their work.

400.14

(a) During an IFA engagement, IFA practitioners may rely on persons or firms possessing expertise relevant to the IFA engagement (collectively referred to in these IFA Standard Practices as "others").

(b) IFA practitioners should, when relevant, rely on peer-reviewed and fact-checked investigative reporting.

600.04

IFA practitioners should present their findings and conclusions in an objective and unbiased manner.

600.05

(a) IFA practitioners should confine their findings and conclusions to subject matter, principles, and methodologies within their competence, including their knowledge, skill, experience, training and education.

(b) When conclusions are developed based on information outside of an IFA practitioner's competence, they should be thorough and cite all key points and explicitly indicate that they have done so in their reports.

600.06

IFA practitioners should consider all relevant information that could impact their findings and conclusions. This includes high-quality research and publications that are peer-reviewed and/or fact-checked.

APPENDIX I

Approximate Lifetime Cost of an Opioid Prescription and Illicit Opioid Use.

Note: These calculations are directional only and are meant to illustrate orders of magnitude.

Time and scope restraints did not permit an in-depth analysis.

Approximate Lifetime Cost of Prescription and Illicit Opioid Use (USD)		
	Prescription	**Illicit Use**
Oxycodone/OxyContin		
Average Rx in days	18[1]	n/a
Average # Rx	3.4[2]	n/a
Oxycodone daily dose (mg)	27[3]	187[3]
cost/mg	$1.15[4]	$2[6]
average potency per pill (mg)	10[5]	80[5]
Oxycodone cost/day	$31.05	$374.00
Oxycodone cost/year		$136,510.00
Oxycodone portion of addiction duration		1
Lifetime cost of oxycodone drugs	**$1,900.26**	**$136,510.00**
Addiction age of onset average[9]		26.5[7]
Addiction duration (given onset age)		9[7]
Heroin		

Average Heroin use/day 'bags'		13[8]
estimated cost/heroin use		4[10]
Heroin cost/day		52
Heroin cost/year		$18,980
Likelihood of shift from oxycodone to heroin		0.94[11]
Adjusted cost of using heroin/year		$17,841
Heroin portion of addiction duration		8[7]
Lifetime cost of Heroin addiction		$142,730
Total lifetime cost of oxycodone and heroin		**$279,240**
Rehabilitation Costs[14]		
Average cost of detox (methadone treatment)		$141,001[12]
average cost of outpatient treatment		$8,386[12]
average duration of outpatient treatment (weeks)		18
Median recovery attempts		2
Drug Court average cost per episode		$3,278[12]
Total estimated rehabilitation costs		**$302,052**
Other Costs		
Theft		omitted

Lost life years (addict only) years		50.9[13]
Expected years of work during lost life in years		30.9[14]
Median gross income in the United States		$31,133[15]
Average tax rate		14.82%[16]
Median net income		$26,519
Lost net income		**$819,440**
Total estimated all costs from oxycodone use	$1,900	**$653,825**
Total lost opportunity	$1,900	**$1,400,731**
Median Household income	$70,784	$70,784
Total Median Household Income over 9 years	$637,056	$637,056
Tlt. Lost opportunity as a percentage of Tlt. Median income over 9 years	**0.30%**	**219.88%**

Notes:

1. https://www.cdc.gov/drugoverdose/deaths/prescription/practices.html
2. https://www.cdc.gov/drugoverdose/deaths/prescription/practices.html More than 17% of Americans had at least one opioid prescription filled, with an average of 3.4 opioid prescriptions dispensed per patient
3. https://www.justice.gov/archive/ndic/pubs33/33775/77ppend.htm
4. https://www.justice.gov/archive/ndic/pubs33/33775/77ppend.htm

5. >>>insert source
6. https://www.recoveryohio.org/oxycontin/street-prices/
7. The mean age of onset of opioid use was 25.6 years (SD = 8.8). The majority of the participants (86.3%) had at least one comorbid physical or psychiatric disorder. https://ascpjournal.biomedcentral.com/articles/10.1186/s13722-017-0074-0#:~:text=The%20mean%20age%20of%20onset,comorbid%20physical%20or%20psychiatric%20disorder.
8. average is 10–15 according to https://www.addictioncenter.com/drugs/how-much-do-drugs-cost/
9. used 25.6 which is the average age of onset according to an addiction calculator https://www.omnicalculator.com/health/addiction
10. https://www.addictioncenter.com/drugs/how-much-do-drugs-cost/
11. Cicero TJ, Ellis MS, Surratt HL, Kurtz SP. The changing face of heroin use in the United States: a retrospective analysis of the past 50 years. JAMA Psychiatry. 2014;71(7):821-826. “94% of respondents in a 2014 survey of people in treatment for opioid addiction said they chose to use heroin because prescription opioids were ‘far more expensive and harder to obtain.’”.
12. https://drugabusestatistics.org/cost-of-rehab/ “The cost of intensive outpatient treatment when adjusted for current inflation ranges between $1,908 to $7,969.” Also, note that the average cost of residential treatment is $50,649, and the average duration of residential treatment is 13 days
13. https://americanaddictioncenters.org/blog/long-term-effects-drug-abuse Assumed assume 5x use per day given a daily dose 187/40 mg ~5) for this calculation.

14. Assumed the final 20 years of life (if addiction were not a factor) were spent in retirement and not spent working or making a living wage.
15. https://datacommons.org/place/country/USA/?utm_medium=explore&mprop=income&popt=Person&cpv=age,Years15Onwards&hl=en
16. https://www.statista.com/statistics/318079/average-tax-rate-in-the-us-by-income-percentile/

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APPENDIX II: Core vs noncore proceedings[99]

Bankruptcy is within the federal court system, and bankruptcy jurisdiction is limited to hearing cases authorized by the U.S. Constitution or that pertain to federal statutes. Federal judges are appointed to lifetime terms by the sitting President of the United States, and the appointment is confirmed by the U.S. Senate[100] The American federal court system has three levels of authority:[101]

1. The Supreme Court: Created by Article III of the U.S. Constitution and authorized to oversee a system of lower courts consisting of 94 district courts, which are organized into 12 regional circuits (plus a thirteenth U.S. court of appeals for the federal circuit that hears appeals on patent and some civil cases[102]).

2. The Circuit Courts: These are the first level of appeal following a decision by the lower district court. There are 13 administrative circuit court regions that cover all 50 States and associated territories (Guam, Virgin Islands, Puerto Rico, District of Columbia, and the Northern Mariana Islands[103]). Each of the 12 circuit courts has its own court of appeals. These appellate courts have three-judge panels that review the lower court procedures and decisions to determine whether the law was correctly interpreted and applied by the lower court on a case that has been challenged (i.e., they do not hear new evidence,

[99] https://www.justice.gov/jm/civil-resource-manual-186-reference-proceedings-bankruptcy-judges
[100] https://www.usa.gov/agencies/court-of-appeals-for-the-federal-circuit#:~:text=With%20a%20national%20jurisdiction%2C%20the,of%20Federal%20Claims%2C%20among%20others.
[101] https://www.uscourts.gov/about-federal-courts/court-role-and-structure
[102] https://www.usa.gov/agencies/court-of-appeals-for-the-federal-circuit#:~:text=With%20a%20national%20jurisdiction%2C%20the,of%20Federal%20Claims%2C%20among%20others.
[103] https://www.diffen.com/difference/Circuit_Court_vs_District_Court

witness testimony, or employ juries).

3. The District Courts: There are 94 across the United States, and each state or region has between one and four districts each of which has between 2 and 28 Presidential appointee judges.[104] General trial courts that handle both civil and criminal cases each of which has one sitting judge and district courts may roll up to the same appellate (circuit) court, each of which has at least one judge.[105] As part of the district court system, there are 90 bankruptcy courts, one in each district except for Eastern and Western districts of Arkansas (they share a bankruptcy court), and Guam, Northern Mariana Islands and the U.S. Virgin Islands (where cases are heard by either a district court judge or a visiting bankruptcy judge).[106]

In the case of Purdue Pharma's case, they filed for Chapter 11 in White Plains NY, in the Southern District of New York, where Judge Robert Drain was the only sitting bankruptcy judge. When Judge Drain's ruling (In RE: Purdue Pharma L.P., et al. (Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan), 2021) was appealed, the case was heard in the Southern District of the New York Second Circuit (appellate) court by Judge Colleen McMahon (In re: Purdue Pharma, L.P. Decision and Order on Appeal, 2021).

[104] https://www.diffen.com/difference/Circuit_Court_vs_District_Court
[105] https://www.democracydocket.com/analysis/the-u-s-court-system-explained/
[106] https://www.uscourts.gov/statistics-reports/us-bankruptcy-courts-judicial-business-2018

The distinction between core and noncore proceedings "can often be difficult to discern."[107] However, a bankruptcy judge has the discretion to decide noncore proceedings if all parties consent.[108]

Core Proceedings:[109]

- According to a U.S. Supreme Court ruling, bankruptcy judges may enter final judgments in the following:
    a) All cases under title/Chapter 11
    b) All "core proceedings"[110] arising under Title 11 or arising in a case under Title 11
- If there is no consent from all the parties, a bankruptcy judge is permitted to "hear"[111] but not make a determination, a proceeding that is not considered a core proceeding but is related to a bankruptcy case.
- Examples of core proceedings
    a) Estate matters (e.g., administration of, claims against, counterclaims)
    b) Motions to terminate or modify a stay on litigation against a defendant
    c) Determine, avoid, or recovery fraudulent conveyances
    d) Debt discharge
    e) Proceedings affecting asset liquidation

[107] https://www.justice.gov/jm/civil-resource-manual-186-reference-proceedings-bankruptcy-judges
[108] https://www.daveburnslaw.com/bankruptcy/2019/12/04/core-and-non-core-proceedings-in-bankruptcy-litigation-what-is-the-difference-and-why-does-it-matter/#:~:text=The%20bankruptcy%20judge%20always%20has,only%20if%20the%20parties%20consent.
[109] https://www.justice.gov/jm/civil-resource-manual-186-reference-proceedings-bankruptcy-judges
[110] https://www.justice.gov/jm/civil-resource-manual-186-reference-proceedings-bankruptcy-judges
[111] https://www.justice.gov/jm/civil-resource-manual-186-reference-proceedings-bankruptcy-judges

Noncore Proceedings:[112]

- Has a "life of its own in either state or federal common law or statue independent of the federal bankruptcy laws."[113] Some are unrelated enough that a judge may refuse to hear them at all (e.g., child custody, probate).[114]
- If consent from all parties is absent, the judge can only forward proposed findings to the district court for a final judgment.
- Examples of circumstances that may require a judge to determine whether an issue is core or noncore:
    - Whether a claim is not specifically identified as a "core" matter in jurisdictional provision
    - Whether the claim existed prepetition, which would make it unlikely to be a core proceeding, but if it is post-bankruptcy petition, then it is considered to be a core matter.
    - whether a claim would continue to exist independently from the provisions of Chapter 11 proceedings.
    - whether parties' rights, obligations, or both are significantly affected as a result of a debtor's bankruptcy filing.
    - Where a proceeding presents a mix of core and noncore claims, the bankruptcy court must perform a claim-by-claim analysis to determine the extent of its jurisdiction.

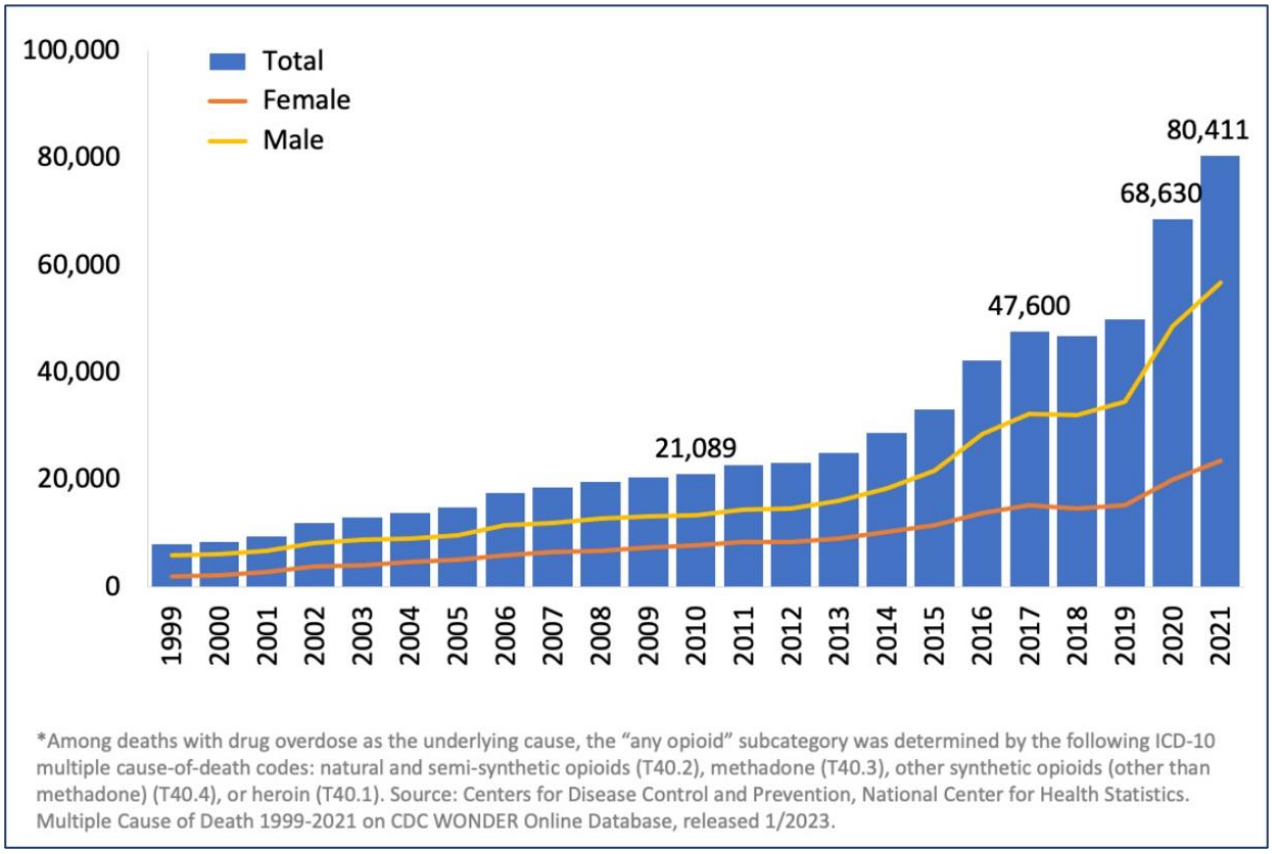
[112] https://www.justice.gov/jm/civil-resource-manual-186-reference-proceedings-bankruptcy-judges
[113] https://www.justice.gov/jm/civil-resource-manual-186-reference-proceedings-bankruptcy-judges
[114] https://www.daveburnslaw.com/bankruptcy/2019/12/04/core-and-non-core-proceedings-in-bankruptcy-litigation-what-is-the-difference-and-why-does-it-matter/#:~:text=The%20bankruptcy%20judge%20always%20has,only%20if%20the%20parties%20consent.

Note: Some courts would, if core matters dominate the proceedings, determine that other noncore matters are core.[115]

In Purdue Pharma's case, it is likely that there was little room to debate or come to a consensus on having the judge hear noncore issues because many of them were likely to have weakened the defence's position, which was an incentive to withhold consent.[116]

[115] https://www.justice.gov/jm/civil-resource-manual-186-reference-proceedings-bankruptcy-judges
[116] https://www.daveburnslaw.com/bankruptcy/2019/12/04/core-and-non-core-proceedings-in-bankruptcy-litigation-what-is-the-difference-and-why-does-it-matter/#:~:text=The%20bankruptcy%20judge%20always%20has,only%20if%20the%20parties%20consent.

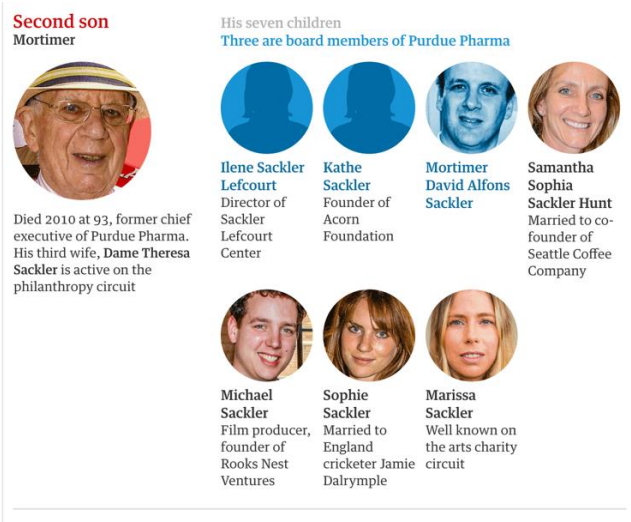
APPENDIX III: OPIOID-RELATED DEATHS 1999–2021



Source: https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates "The figure above is a bar and line graph showing the total number of U.S. overdose deaths involving any opioid from 1999 to 2021. Any opioid includes prescription opioids (natural and semisynthetic opioids and methadone), heroin, and synthetic opioids other than methadone (primarily fentanyl)."

APPENDIX IV: The Sackler Family[117]

Arthur Sackler sold any interest in Purdue Pharma prior to the development of OxyContin, therefore, he and his heirs are not involved in the Purdue Pharma Bankruptcy >>>are they in the releases? (In re: Purdue Pharma L.P., 2023)

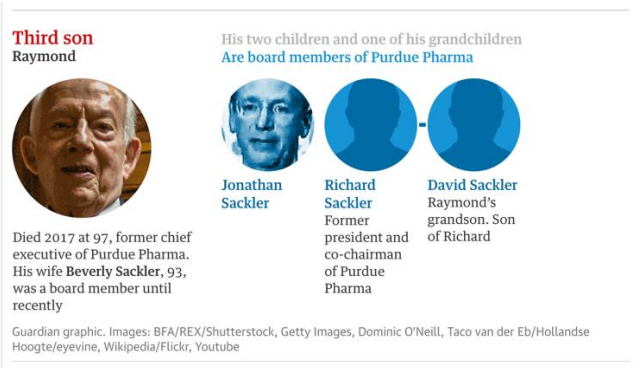


"From the outset, the Purdue board was kept a Sackler family-dominated club, with at least nine Sackler family members serving, at various and generally overlapping times, as directors:

Ilene Sackler Lefcourt (1990-2018)
Beverly Sackler (1993-2017)
David Sackler (2012-2018)
Kathe A. Sackler (1990-2018)
Mortimer D. Sackler (1990-2018)
Mortimer D. A. Sackler (1993-N/A)
Raymond B. Sackler (1990-2017)
Richard S. Sackler (1990-2018)
Theresa Sackler (1993-2018)

Two factual conclusions follow from this pattern:

1. Control of Purdue Pharma lay in the Sackler family and particularly its board representatives
2. Much more than in most corporations, ordinary business decisions were made by representatives of the Sackler family serving as directors. Such persons could "cause" conduct taken, and representations made by Purdue" (Expert Report of Professor John C. Coffee Matter of Purdue Pharma L.P, et. al., 2019).



[117] Source: https://www.theguardian.com/us-news/2018/feb/13/meet-the-sacklers-the-family-feuding-over-blame-for-the-opioid-crisis

APPENDIX V: Judge Drain's sentiment in his bench ruling confirming Purdue Pharma's Plan of Reorganization on September 17th, 2021.

"This is a bitter result. B-I-T-T-E-R. It is incredibly frustrating that the law recognizes, albeit with some exceptions, although fairly narrow ones, the enforceability of spendthrift trusts. It is incredibly frustrating that people can send their money offshore in a way that might frustrate U.S. law. It is frustrating, although a long-established principle of U.S. law, that it is so difficult to hold board members and controlling shareholders liable for their corporation's conduct…. I must say that at the middle stage of these cases, before the mediation, I would have expected a higher settlement, and frankly anyone with half a brain would know that when I directed a second mediation, bravely undertaken by Judge Chapman, I expected a higher settlement, perhaps higher than the materially improved settlement that resulted from that mediation. I do not have the ability to impose what I would like on the parties. Thankfully, no judge in our system is given that power. I can only turn down a request for approval of it and deny confirmation of the plan. Given this record, I'm not prepared to do that… While I wish that the amount were higher, as I believe everyone on the other side of the Sacklers does, the settlement is reasonable in the light of the standards laid out by the Supreme Court and the Second Circuit, and clearly both it and the process of arriving at it have not been in any shape or form a free ride for the Sacklers or enabled them to "get away with it…" (In RE: Purdue Pharma L.P., et al. (Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan), 2021)

APPENDICIES VI: Forensic Accounting description according to the American Bar Association[118]

Although Chapter 11 bankruptcy differs from civil and criminal in the matters that can be heard, the following perspective from The American Bar Association outlines the role (from their perspective) of IFAs and the extent to which the IFA role can contribute to a case.

A. Information about the Forensic Accounting Profession:

1. The term 'forensic' refers to the application of scientific methods and techniques in the investigation of a crime or a legal issue and is often required when an issue is being litigated and a financial argument needs to be decided in a court of law.
2. IFAs are specialists at unraveling financial and compliance puzzles using precise processes and a systematic investigation of data.
3. IFAS are usually called on to assist with a search for the facts and for a truthful conclusion after some sort of devious or fraudulent financial activity has taken place.
4. IFAs work on bankruptcies, divorces, asset misappropriations, financial statement fraud, contract disputes, damage calculations, shareholder disputes, and a variety of corporate internal inquiries.
5. Forensic accountants are often certified public accountants (CPAs)

[118] Source: https://www.americanbar.org/groups/litigation/committees/family-law/practice/2019/what-is-a-forensic-accountant/#:~:text=It%20is%20the%20attorney's%20job,of%20what%20the%20data%20indicate.(*Rebecca Fitzhugh is member of Sobel & Co., LLC in Livingston, New Jersey serving in the Forensic Accounting/Litigation Services group.)*

B. Here is how an IFA can add value:

1. An IFA who is trained to investigate and solve complicated financial cases combines a depth of specialized expertise with a distinctive outsider perspective.
2. IFAs can expand the attorney's capabilities and provide the resources and facts that support a successful case resolution.
3. An IFA should exercise common sense and remain objective. It is the attorney's job to advocate for the client; the forensic accountant's job is to analyze the data and support an expert opinion with facts, not to formulate an opinion that favors the client, regardless of what the data indicate.

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