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To Release or Not to Release: Recent Trends in Restructuring Releases from Thames Water and the Americas

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Introduction

While divided by the Atlantic Ocean and a common language, the UK, in *Thames Water,* and the United States, in *Purdue,* have both had large appeals grappling with the nature of third-party releases in restructurings. However, some divergence appears to have developed, and the potential tightening of third-party releases in US Chapter 11 corporate bankruptcies might provide an avenue for expansion of the UK restructuring plan to companies seeking to forum shop before achieving recognition in the United States through Chapter 15.

Thames Water

In April 2025, the Court of Appeal handed down its awaited judgment in the matter of *Kington SARL* v *Thames Water Utilities Holdings Ltd* [2025] EWCA Civ 475, in which the Court upheld the decision at first instance to sanction the restructuring plan. As a brief summary, the *Thames Water* plan is a 'bridge plan' in that it sought to provide a 'liquidity runway' of two-years of additional lending until a final restructuring plan would be sought. The Class A creditors approved the plan against the objections of Class B creditors, and the Court sanctioned it under a 'cross-class cram down' approach.

While much has been written about the decision in general, an interesting element of the fight at first instance, and on appeal, was the inclusion of a 'release' clause in favour of various parties – including the directors of Thames Water.

"…waives, releases and forever discharges any and all actions, proceedings, claims, damages, counterclaims, […] whether present or future, prospective or contingent, whether in this jurisdiction or any other or under any law, of whatsoever nature and howsoever arising, whether in law or in equity, in contract […], in statute or in tort […] in relation to or arising directly or indirectly out of or in connection with, the negotiation, preparation, sanction or implementation of the Plan and/or the Interim Platform Transaction (including, without limitation, the negotiation, preparation, sanction or implementation of any Transaction Documents)." (underlining added)

While expansive in scope, the wording of the release is not inconsistent with other similar clauses in recent restructuring plans which only apply to actions related to the promulgation and implementation of the plan itself (see also, the Cineworld Group restructuring). The issue raised with this release was that it was being proposed in a context wherein special administration remained a real future possibility, and the plan would not 'cure' the insolvency but would merely provide a lifeline to potential future salvation. The mischief envisioned by those objecting is that special administrators and/or liquidators might be hamstrung by the release in any subsequent review or contemplated proceedings.

At first instance, the Court held that there was no amendment needed to the release, and it matched similar releases in schemes of arrangement that existed to prevent *'ricochet claims'* - wherein non-debtor guarantors are granted releases because otherwise they might assert claims made against them at the scheme debtor in contravention of the debt-reduction purpose of the scheme.

The Court of Appeal was persuaded that the release as it stood needed some amendment in light of the interim nature of the plan and the continuing possibility of special administration, and considered that reference to *'ricochet claims'* was not apt as those involved releases by creditors rather than releases *by the company* itself against its own officers, but rather the question is whether the release is necessary to give effect to the arrangement proposed. The Court ultimately directed that the release clause be amended so that it would not apply to any special administrator or insolvency office-holder as against a director and/or advisor of the company.

The American Scene

On 27 June 2024, the United States Supreme Court handed down judgment *in Harrington, United States Trustee, Region 2 v. Purdue Pharma*, 603 US 204 (2024) (*'Purdue'*), in which the Court held by a majority of 5-4 that releases of potential claims in the Chapter 11 bankruptcy against a non-debtor who is not subject to bankruptcy proceedings are unlawful without the consent of the potential claimants. To put it in its factual matrix, Purdue Pharma, the producer of oxycodone (and a significant contributor to the American opioid crisis of the last 25-years), entered Chapter 11 bankruptcy seeking to restructure itself following a number of years in which the Sackler family (the owners of Purdue Pharma and the villains behind the pushing of oxycodone in the minds of many observers) 'milked' the company of $11billion before ceding control. As part of the Chapter 11 plan, the Sackler family agreed to pay a settlement of $4.3billion in consideration of an expansive third-party release, which would shield them from *all* future civil claims including fraud. A majority of creditors voting approved the release, but the total number of those voting was less than 20% of the total body of creditors, and a number of high-profile creditors dissented from the release including: eight US states, several Canadian municipalities and indigenous tribes, the American city of Seattle, and 2,683 individual creditors. In its decision, the Supreme Court held that the US Bankruptcy Code does not contain any provision for release of non-debtor third-parties, and Chapter 11 was barred to non-consensual third-party releases. The Court noted that its ruling does not affect consensual releases whereby creditors with potential claims consent to the release. This decision overruled previous approaches in American cases, which did allow for non-consensual third-party releases (eg. *Re Weinstein Company Holdings* (2021)), and has led to follow on judgments concerning what constitutes a 'consensual release' (*Re Smallhold, Inc.* (2024)).

However, while *Purdue* has closed the door on non-consensual third-party releases under traditional Chapter 11 bankruptcy restructuring, foreign restructurings can gain recognition in the United States through Chapter 15 bankruptcy, which allows for a foreign restructuring to seek relief through the US courts with full force and effect.

Previous US decisions have held that even where American law might preclude a specific third-party non-consensual release, then under Chapter 15 it can be allowed in 'exceptional circumstances' where the release in question was essential for a restructuring plan such as whether an estate received 'substantial consideration' in exchange for the release. Chapter 15 recognitions of foreign third-party release plans have included UK schemes, in 2018 Chapter 15 recognition was granted to a UK scheme in *In re Avanti Communications Group*, which contained non-consensual third-party releases for guarantors. While the scheme of arrangement contemplated a non-consensual release of third-party guarantees, the court held that failing to recognise and enforce the scheme could prevent the fair and efficient administration of the restructuring.

Forum Shopping and a Potential Opportunity for England & Wales

The $60,000 question (to keep with the American theme) is whether the post-*Purdue* environment will open a door to local practitioners in this jurisdiction advancing schemes or restructuring plans that might otherwise have looked to Chapter 11 protections in the States.

Scope for broad releases being recognized in Chapter 15 despite *Purdue* appeared as early as July 2024. In R*e Nexii Building Solutions*, the US court considered a Canadian restructuring from British Columbia wherein a broad release clause was included that released the debtor companies and their officers from '*any and all*' claims relating to '*any action or omission, transaction, dealing or other occurrence*' in any way related to the affairs of the company, and granted recognition under Chapter 15 despite the open admission by counsel for the company that such a release could not be granted in Chapter 11.

Forum shopping in England for restructuring plans is not novel. In *Re Gategroup* [2021] EWHC 775 (Ch), Gategroup Guarantee Ltd was incorporated in England and interposed into a larger group of companies' finance arrangements by execution of a deed of indemnity and contribution in favour of the lenders and bondholders. These newly created liabilities (backed by agreements to pay contributions from the existed group companies), allowed Gategroup Guarantee to restructure via Part 26A in England, which could not have been done by the existing group as it would have constituted an insolvency event in the original lending documents.

More recently, in February 2025, the US recognised an English scheme containing non-consensual third-party releases where the proceedings replicated the Gategroup approach in *Mega Newco*. Operadora de Servicios Mega, S.A. De C.V., Sofom, E.R. ("Mega") was an automobile financial services company in Mexico which In order to restructure $351million of debt issued under New York law, incorporated an English company ('Mega Newco') that became liable under the same debt. In November 2024, Mega Newco proposed a scheme of arrangement in England, which was sanctioned on 5 February 2025 ([2025] EWHC 479 (Ch)). As a term of the scheme, noteholders would either receive cash equivalent to 45% of their value, or equity in Mega Newco, and Mega would be released from liability. While more than 75.9% of the creditors voted in favour of the scheme (more than the 75% required), roughly a quarter of the creditors did not consent to the release. Mega Newco sought recognition under Chapter 15 to enforce the scheme in the United States, which was approved, but not without some judicial consideration. The American court considered whether this was an improper manipulation of COMI, but was ultimately swayed that it was not.

The theme of recent cases is that companies with associations to the United States might struggle to achieve restructuring under Chapter 11 where third-party releases are involved and 100% of creditors might not vote in favour, but Chapter 15 is available to recognise foreign proceedings that do allow for non-consensual third-party releases of potential director or guarantor liability including companies from the UK. The limited release in Thames Water has created a great deal of publicity, but it is only the tip of the iceberg of what might be seen in future releases if further forum shopping to England is attempted.

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