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Via Email [william.k.harrington@usdoj.gov](mailto:william.k.harrington@usdoj.gov)

William K. Harrington, Esq.  
United States Trustee (Region 2)  
U.S. Federal Office Building  
201 Varick Street Room 1006  
New York, NY 10014

Re: Purdue Pharma, LP, et al., case no. 19-23649 (Bankr. S.D.N.Y.)

Dear Mr. Harrington:

We write to urge the Office of the United States Trustee to seek an order for the appointment of a chapter 11 examiner in the reorganization of Purdue Pharma, L.P., *et al.* (“Purdue Pharma” or the “Debtors”), pursuant to section 1104(c) of the United States Bankruptcy Code. This case presents unique challenges to the chapter 11 system which an examiner could better address than other alternatives.

#### *Introduction*

The *Purdue Pharma* case is unique because the opioid crisis in America is unique. Opioid abuse is a “national public health care emergency,”<sup>1</sup> an “epidemic” in the words of the U.S. Department of Health and Human Services, accounting for more than 42,000 deaths in 2016.<sup>2</sup> “Every day,” according to the National Institute on Drug Abuse, “more than 130 people in the United States die after overdosing on opioids.”<sup>3</sup> As the Debtors themselves acknowledge, “America faces a profound problem of opioid abuse, misuse and addiction, one that has led to the loss of tens of thousands of lives each year.”<sup>4</sup> The crisis has spurred over 2600 lawsuits against the Debtors, and is thus the chief cause of their bankruptcy filing.<sup>5</sup>

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<sup>1</sup> See, e.g., National Inst. on Drug Abuse, *Opioid Overdose Crisis*, available at <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> (“the misuse of and addiction to opioids—including prescription pain relievers, heroin, and synthetic opioids such as fentanyl—is a serious national crisis that affects public health as well as social and economic welfare.”) (rev’d Jan. 2019) [hereinafter *Overdose Crisis*]. The U.S. Department of Health and Human Services has declared the opioid crisis a “public health emergency.” News Release, Dept. Heath & Hum. Servs, *HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis*, Oct. 26, 2017, available at <https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html>. [hereinafter *HHS Public Health Emergency*].

<sup>2</sup> See U.S. Department of Health and Human Services, *What is the U.S. Opioid Epidemic?* Available at <https://www.hhs.gov/opioids/about-the-epidemic/index.html>.

<sup>3</sup> See *Overdose Crisis*, *supra* note 1.

<sup>4</sup> Informational Brief, *In re Purdue Pharma, L.P.*, case no. [19-23649], 34 (Sept. 15, 2019) [hereinafter, *Informational Brief*].

<sup>5</sup> *Id.* at 39 (“Against the backdrop of today’s opioid crisis, the Defendant Debtors have been named in more than 2,600 lawsuits filed throughout the state and federal court systems.”).

Admittedly, this crisis—and the Debtors’ role in it—involve complex questions that a bankruptcy examiner cannot fully answer. Nevertheless, *Purdue Pharma* presents two more limited, but key, questions that are appropriate for a bankruptcy examination: (i) What role did certain members of the Sackler family—who apparently owned and controlled the Debtors at all relevant times—play with respect to the Debtors’ role in this crisis? and (ii) What prepetition transfers were made to the Sackler family and/or insiders of the Debtors which may be recoverable for the benefit of the estates?

For the reasons discussed below, we believe that a properly targeted bankruptcy examination, carefully monitored by the Bankruptcy Court, would produce more credible answers to these two questions, at lower cost, than any alternatives available to the Bankruptcy Court, the parties, or the many other courts where the underlying lawsuits are pending.

We understand that Judge Drain has temporarily ordered the automatic stay expanded to halt litigations with plaintiffs who have not agreed to participate in the *Purdue Pharma* reorganization in the hopes of a settlement.<sup>6</sup> Such a settlement, if forthcoming, may reduce the scope of an examiner’s role, but not the overall need for one. The unique public interest in this case is strong and unlikely to be addressed without the aid of an independent examination.

#### *Who We Are*

We are professors at law schools throughout the United States.<sup>7</sup> One of us has written extensively about the use of examiners in chapter 11 cases.<sup>8</sup> We have no involvement in these cases, and submit this letter based solely on our concern for the operation of the chapter 11 system.

#### *Bankruptcy Examiners*

As you know, section 1104(c) of the United States Bankruptcy Code provides that a bankruptcy court “shall” order the appointment of an examiner “to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or by current or former management of the debtor, if”: (1) such appointment is “in the interests of creditors, any equity security holders, and other interests of the estate”; or (2) the

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<sup>6</sup> Mary Williams Walsh, *Judge Orders Pause in Opioid Litigation Against Purdue Pharma and Sacklers*, N.Y. Times, Oct. 11, 2019, available at <https://www.nytimes.com/2019/10/11/health/purdue-bankruptcy-opioids.html>.

<sup>7</sup> “We” are the undersigned and supporting signatories listed on Appendix A. This letter was originally submitted Nov. 5, 2019 by Jonathan Lipson, Adam Levitin and Stephen Lubben. Additional signatories joined thereafter, and all are listed on Appendix A.

<sup>8</sup> Jonathan C. Lipson, *Examining Success*, 90 AM. BANKR. L.J. 1 (2016) (with C. Marotta) [hereinafter “*Examining Success*”]; Jonathan C. Lipson, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 AM. BANKR. L.J. 1 (2010) [hereinafter “*Understanding Failure*”]. Other leading work on examiners includes Daniel J. Bussel, *A Third Way: Examiners As Inquisitors*, 90 AM. BANKR. L.J. 59, 61 (2016) [hereinafter “*Third Way*”]; Daniel J. Bussel, *Ethics for Examiners*, 84 FORDHAM L. REV. 2073 (2016).

In the interest of full disclosure, Jonathan Lipson worked for Judge Drain in 1990-1991 as an associate at Milbank, Tweed, Hadley & McCloy. That experience has not affected the views expressed in this letter.

debtor's fixed, liquidated unsecured debts, other than debts for "goods, services, or taxes," exceed \$5 million.<sup>9</sup> 11 U.S.C. §1104(c).

As you also know, the "shall" in section 1104(c) is not a strong command. Studies have found that, notwithstanding this language, examiners are rarely sought or appointed.<sup>10</sup> Judges "are often reluctant to appoint an examiner if there is no apparent benefit to the estate or if a party requests one for transparently strategic reasons."<sup>11</sup> Thus, the important question is: Why would an examiner be superior to the other mechanisms available under chapter 11?

There are two high-level answers: (i) economic efficiency; and (ii) public legitimacy. Either would be sufficient grounds to support an examination in this case. The combination here makes the case for an examiner compelling.

*Efficiency—The Economics of Bankruptcy Examiners*

The dominant argument against the appointment of an examiner is economic: a bankruptcy examination is ordinarily difficult to justify as an administrative expense of the estate. Other checks and balances in the system—a creditors' committee; the "public" nature of the reorganization process—are thought to be sufficient in most cases to explain how and why a debtor encountered financial distress. "As professionals paid from the estate—in effect, with money that would otherwise go to creditors—courts and system participants worry that examiners could simply be expensive fishing expeditions."<sup>12</sup>

Thus, cases which can support a bankruptcy examination are axiomatically rare: they will be cases with significant equity in the estate and some pressing reason to believe that the ordinary operation of the system will be inadequate.

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<sup>9</sup> We note that it is somewhat unclear whether the Debtors have fixed, liquidated unsecured debts, other than debts for "goods, services, or taxes," in excess of \$5 million. According to Official Form 204 filed by Purdue Pharma (the *List of Creditors Who Have the 50 Largest Unsecured Claims and Are Not Insiders*), it would appear that the Debtors have more than \$5 million in fixed and liquidated unsecured debts. A significant portion of such claims, however, appear to be for "Payer Rebates"—a term not explained in Form 204. If such claims are for "goods or services," as that term is used in section 1104(c)(2), then such debts may not count toward the \$5 million calculation. In any case, an examiner would be in the interests of the estate, regardless of the amount of the Debtors' qualifying unsecured debt.

<sup>10</sup> One study found that examiners were sought in only 14% of eligible cases, and appointed less than half the time sought. See *Examining Success*, *supra* note 8, at 4 (observing that "Stakeholders in chapter 11 cases rarely want examiners.").

<sup>11</sup> See *Understanding Failure*, *supra* note 8, at 3.

We are aware, of course, that Judge Drain declined to appoint an examiner in the *Loral* bankruptcy. *In re Loral Space & Commc'ns Ltd.*, 313 B.R. 577, 587 (Bankr. S.D.N.Y. 2004), rev'd and remanded sub nom. *In re Loral Space & Commc'ns, Ltd.*, No. 04 CIV. 8645RPP, 2004 WL 2979785 (S.D.N.Y. Dec. 23, 2004). We think this case is easy to distinguish from *Loral*. The examiner there was sought to perform a valuation of the debtor, a task that, Judge Drain observed, "not only [was] far removed from the normal "investigatory" function of an examiner, as set forth in the statutory text, but also [was] unsupported by credible allegations of misconduct . . ." *Loral*, 313 B.R. at 587. Although Judge Drain's decision was reversed by the District Court on grounds that an examiner was "mandatory" under the Bankruptcy Code, we do not take a position with respect to that issue. Under any reading of the statute, there are ample grounds for a bankruptcy examiner in this case.

<sup>12</sup> *Examining Success supra* note 8, at 14.

This is such a case. Here, the Debtors' estates appear to have ample equity. The Debtors' petition for chapter 11 relief estimated that the Debtors have \$1-10 billion in assets as against liabilities of \$500 million to \$1 billion.<sup>13</sup> According to the summary of the Debtors' recently-filed schedules of assets and liability, there is no secured debt.<sup>14</sup> A properly targeted examination should therefore not impose a significant burden on the Debtors' operating cash flow or assets.

At the same time, and as noted above, it appears that there are essentially two questions that a bankruptcy examiner could answer more efficiently, effectively and with greater legitimacy than the ordinary mechanisms available: (i) the role of the Sackler family in the operation of the Debtors; and (ii) the propriety of prepetition transfers by the Debtors. There are, for example, concerns that the Debtors are using chapter 11 to shield the Sacklers from additional scrutiny—initially via the stay and, ultimately, through third-party releases in a reorganization plan—and that executives and directors of the Debtors,<sup>15</sup> as well as members of the Sackler family,<sup>16</sup> may have stripped assets out of the Debtors in anticipation of bankruptcy.

An examiner's independent, non-adversarial production of information about these disputes would likely help to spur resolution and, if appropriate, increased contributions by the Sackler family and/or recoveries from transferees of property of the Debtors. Although promoting settlement is not necessarily the principal function of a bankruptcy examiner, examiners can be highly effective at persuading parties to soften their litigation stances in order to come to settlement.<sup>17</sup>

Nor is an examination likely to duplicate ongoing litigation. If anything, a bankruptcy examiner, particularly if armed with subpoena power and the power to question witnesses under oath,<sup>18</sup> may produce relevant factual information more efficiently than the adversarial litigation process that would take place around the nation but for Judge Drain's expanded stay.

This would be especially true if the parties are unable to come to some resolution in connection with that stay and Judge Drain nevertheless ordered it extended.<sup>19</sup> There is no reason to

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<sup>13</sup> See Official Form 201, Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Purdue Pharma, L.P. (Sept. 15, 2019)[hereinafter "*Petition*"], items 15 and 16.

<sup>14</sup> See Global Notes and Statements of Limitation, Methodology, and Disclaimers Regarding the Debtors' Schedules of Assets and Liabilities and Statements of Financial Affairs, *In re* Purdue Pharma, L.P., et al., case no. 19-23649 (Oct. 29, 2019) at 8 ("Schedule D – Creditors Holding Secured Claims. The Debtors are not aware of any secured claims against the Debtors.").

<sup>15</sup> See Paul Schott, *Purdue Pharma paid \$9 million to CEO before bankruptcy*, STAMFORD ADVOCATE, Oct. 30, 2019, available at <https://www.stamfordadvocate.com/business/article/Purdue-Pharma-paid-9-million-to-CEO-before-14580113.php>.

<sup>16</sup> See Paul Schott, *Connecticut looks to keep pursuing Purdue Pharma, Sackler claims*, STAMFORD ADVOCATE, Oct. 5, 2019, available at <https://www.stamfordadvocate.com/business/article/Connecticut-looks-to-keep-pursuing-Purdue-Pharma-14494923.php>.

<sup>17</sup> See, e.g., Michael Oneal, *Tribune Co. reaches bankruptcy settlement with 2 creditors*, CHICAGO TRIBUNE, Sept. 28, 2010, available at <https://www.chicagotribune.com/business/ct-xpm-2010-09-28-ct-biz-0929-tribune-20100928-1-story.html>. See also, *supra* note 8, at 2 (discussing examiners' role in settlements in large chapter 11 cases).

<sup>18</sup> For a discussion of powers to be accorded an examiner, including the subpoena power, see Bussel, *Third Way*, *supra* note 8, at 120-22.

<sup>19</sup> We expect that Judge Drain will continue the expanded stay, at least to some extent. To permit any significant amount of litigation against the Debtors to continue in other courts would defeat the purpose of the reorganization.

think that, in that case, the plaintiffs who have resisted it would suddenly become docile participants in the Debtors' chapter 11 case. Rather, we imagine that they would continue to fight on at least two fronts. One would be a collateral or appellate challenge to the expanded stay, itself. The other would be to pursue their litigation strategies within the reorganization, for example through Rule 2004 examinations of the Sackler family and the Debtors' management.<sup>20</sup> Both are likely to be costly to the Debtors' estates, and neither is likely to produce information as efficiently and credibly as a bankruptcy examiner.

To be sure, the appointment of an examiner may not, in itself, halt either (or both) efforts. However, the presence of a bankruptcy examiner may help to persuade judges in other fora to respect the stay because the reorganization process takes the underlying claims seriously and provides a more efficient means of generating information salient to their resolution than other pathways, including litigation in those courts.

#### *Duplication of Effort?*

Still, there may be three other, more specific concerns about duplication of effort. We address each.

First, the Debtors may argue that they have answered, or will answer, the questions noted above. In particular, they may point out that they filed an Informational Brief ("Informational Brief")<sup>21</sup> with their petitions which argues, in various ways, that the chapter 11 process and this reorganization are the best plausible paths to resolving the challenges that the Debtors and their creditors face. That brief provides a fairly detailed discussion of the Debtors' role in the development and distribution of opioids; their efforts to remediate the harms of the opioid crisis; and, most importantly, the need to use chapter 11 to implement a settlement with many, but not all, of the plaintiffs in the underlying litigations.<sup>22</sup>

Although the Sackler family would apparently relinquish ownership of the Debtors and make additional contributions to the proposed settlement, the Informational Brief does not address the merits of the two basic issues noted above, namely the role of the Sackler family in running the Debtors and petition transfers. Without some clarity on those questions, it will be difficult to

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<sup>20</sup> One can further imagine serious challenges to claims estimation and determination procedures, including over whether such proceedings are "core" under 28 U.S.C. § 157(b)(2)(B) (excepting from "core" proceedings the "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11").

<sup>21</sup> See Informational Brief, *supra* note 4.

<sup>22</sup> The Informational Brief explains three key elements of the proposed settlement:

Under the agreed-upon Settlement Structure, as part of a resolution of the litigation: (1) Purdue's existing shareholders will relinquish all of their equity interests in the Debtors and consent to the transfer of all of the Debtors' assets to a trust or similar post-emergence structure for the benefit of claimants and the U.S. public, "free and clear" of Purdue's liabilities to the fullest extent permitted by law; (2) Purdue's existing shareholders will engage in a sale process for their ex-U.S. pharmaceutical companies; and (3) Purdue's existing shareholders will contribute an additional \$3 billion over seven years (in addition to 100% of the value of all Debtors), with the hope of substantial further contemplated contributions from the sales of their ex-U.S. pharmaceutical businesses.

See Informational Brief, *supra* note 4, at 44 (footnote omitted).



assess whether the Sacklers' contributions warrant the relief they will presumably seek.<sup>23</sup> Thus, it will be difficult to assess whether a plan of reorganization implementing this proposed settlement can, or should, be confirmed.

Because a plan of reorganization can be “crammed down” against dissenters if a sufficient number and amount of creditors in other classes support the plan, there is reason to think that the plan process will force some claimants to accept the outcome of the reorganization whether they like it or not. This is, of course, an essential aspect of reorganization, and it is ordinarily not especially problematic.

Here, however, dissenters may have strong and unusual reasons to challenge the plan process. If, for example, the role that the Sacklers played is not clarified, non-settling plaintiffs may be justified in believing that the reorganization was used to shield them from scrutiny. Conversely, the Sacklers' contributions may be generous in light of their role with the Debtors, and so may be a second-best solution that most participants in these cases should come to accept.

It is no answer to defer these questions to the plan and disclosure statement stage of the case. While a plan cannot be confirmed unless supported by a disclosure statement containing “adequate information” (11 U.S.C. § 1125), a disclosure statement is unlikely to be an effective way to address the important questions in this case. Among other things, it will be produced by a party that supports plan confirmation, and thus (most likely) the settlement noted above. In that case, it could not independently assess the merits of the issues that create concern here.

The Debtors are, in short, unlikely to be able to address these issues more effectively than a neutral bankruptcy examiner.

Second, some may point out that there is a “Special Committee” of the Board of Directors (“Special Committee”) of Purdue Pharma, Inc., (“PPI”), the general partner of Debtor Purdue Pharma (the limited partnership and lead debtor).<sup>24</sup> The Debtors' Informational Brief states that

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<sup>23</sup> If, for example, a plan of reorganization seeks to provide third-party releases for the Sacklers, there would have to be a determination of whether their contribution was “substantial consideration” in circumstances that were “unique,” among other things. See *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005). For his part, Judge Drain has approved such releases, at least where they are not “overreaching on their face”:

While it is true that third-party releases and related injunctions in Chapter 11 plans and confirmation orders are, under the law of the Second Circuit, proper only in rare cases, see *Deutsche Bank AG v. Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir.2005), if they are consensual or are not objected to after proper notice, courts generally approve them unless they are truly overreaching on their face.

*In re MPM Silicones, LLC*, No. 14-22503-RDD, 2014 WL 4436335, at \*32 (Bankr. S.D.N.Y. Sept. 9, 2014), aff'd, 531 B.R. 321 (S.D.N.Y. 2015), aff'd in part, rev'd in part and remanded sub nom. *Matter of MPM Silicones, L.L.C.*, 874 F.3d 787 (2d Cir. 2017). Here, it would be very difficult to assess the relative value of the Sackers' contributions under any standard (“substantial,” “unique” or “overreaching”). A bankruptcy examination could help answer this question.

<sup>24</sup> According to the Informational Brief, the names, dates of appointment and board positions of the Special Committee members are as follow:

“Under PPI’s Shareholder Agreement, the Special Committee is required to approve, and has full delegated authority with respect to, all matters between the Debtors, on the one hand, and any member of the Sackler Families or any of their affiliates, on the other.”<sup>25</sup> In particular, it appears that the Special Committee “has been overseeing various investigations, including an exhaustive review by outside experts of distributions made by the Debtors to the Sackler Families and their affiliates, as well as any dealings between the Debtors and any member of the Sackler Families or any of their affiliates.”<sup>26</sup> Thus, like *Enron*, and other companies that have faced allegations of serious wrongdoing, the Debtors are apparently using the mechanism of an internal investigation by a special committee of the board to assess at least some allegations of wrongdoing.

This is commendable, but it is difficult at this point to know how independent the Special Committee can be. Unlike *Enron*, the Debtors are not publicly-traded entities, so the Shareholders Agreement that apparently governs their appointment is not readily available. It is thus possible that members of the Sackler family retain power to remove them. Although we have no reason to doubt the integrity of the members of the Special Committee, we also note concerns recently raised about payments to one of its members.<sup>27</sup> In any case, even with an independent investigation in *Enron*, the court there also appointed a bankruptcy examiner. It is hard to see why the same should not be true with *Purdue Pharma*.

Third, there may be concerns that the Official Committee of Unsecured Creditors can and should conduct all the investigations needed in this case. Here, the problem is not the potential for (the appearance of) conflicts of interest, as may be the case with the Special Committee, but instead potential conflict among creditors. The Official Committee, for example, appears to be comprised of both commercial creditors (e.g., CVS; Blue Cross-Blue Shield) and individuals who may be plaintiffs in lawsuits against the Debtors.<sup>28</sup> They may well have different interests and goals in these cases. Moreover, several ad hoc committees appear to have formed. Thus, these cases involve creditors who have settled with the Debtors and those who have not; creditors who are government entities and those who are not; and other creditors caught in between. It is not difficult to imagine

Robert S. “Steve” Miller	July 2018	Chairman of the Board
Kenneth Buckfire	May 2019	At-Large Director
John S. Dubel	July 2019	At-Large Director
Michael Cola	July 2019	At-Large Director

*See* Informational Brief, *supra* note 4, at 14.

<sup>25</sup> *See* Informational Brief, *supra* note 4, at 15.

<sup>26</sup> *See* Informational Brief, *supra* note 4, at 16.

<sup>27</sup> *See* Schott, *supra* note 15. We also note that it is not immediately apparent whether the Special Committee has independent counsel and, if so, who is paying for such counsel. The Informational Brief states that “AlixPartners LLP, Bates White, and Davis Polk & Wardwell LLP have dedicated more than 12,000 hours to these projects to date at the direction and under the supervision of the Special Committee.” *See* Informational Brief, *supra* note 4, at 16. If these firms also represent the Debtors, generally, in these cases (e.g., as with Davis Polk), it may be difficult for them to provide the independent advice required for an effective investigation.

<sup>28</sup> Notice of Appointment of Official Committee of Unsecured Creditors, *In re* Purdue Pharma, L.P., case no 19-23649 (Sept. 27, 2019).

that these groups will have different views about how to proceed. Those differences may become costly disputes in these cases.

Again, an examination is not a guarantee against such disputes, but it does make collateral challenges to the reorganization process less compelling and therefore less likely to impose needless cost and delay.

*Legitimacy—The Public Interest*

Even if all of the current plaintiffs in the underlying lawsuits agreed to put down their litigation arms and make peace with the Debtors and the Sacklers, we think there is another, equally important, reason for an examiner in these cases: the legitimacy of the chapter 11 process. We do not use “legitimacy” in a fancy way: we mean simply that there is intense public scrutiny of these cases given the severity of the opioid crisis, and serious concern about the propriety of the process, in particular that these cases may be used to shield the Sackler family and/or the Debtors from scrutiny in ways that many might find problematic.<sup>29</sup> Neither settlement of the underlying lawsuits, nor any plan of reorganization, is likely to produce a publicly-available report that would allay these concerns. A bankruptcy examination can and should.

Addressing the public interest is not ordinarily a reason, in itself, to appoint an examiner. Although legislative history to the Bankruptcy Code suggests that examiners were intended to do just that, the economic concerns noted above have largely displaced Senator DeConcini’s claim that examiners would provide “special protection for the large cases having great public interest . . . to determine fraud or wrongdoing on the part of present management.”<sup>30</sup> While examiners are rare, they have nevertheless played important, sometimes critical, roles in some of the nation’s largest and most controversial reorganizations, including *Enron*,<sup>31</sup> *Worldcom*,<sup>32</sup> *Mirant*,<sup>33</sup> *New Century*,<sup>34</sup> *Lyondell Chemical*,<sup>35</sup> *Washington Mutual*,<sup>36</sup> and *Lehman Brothers*.<sup>37</sup> The notoriety of those cases reflected public concerns that an examiner helped to address.

The Debtors’ cases implicate the public interest for many obvious reasons: they are the subject of extraordinary media attention; many of the plaintiffs in the underlying litigations are

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<sup>29</sup> For discussions of “legitimacy” in criminal law, see Tom R. Tyler, *Reducing Corporate Criminality: The Role of Values*, 51 AM. CRIM. L. REV. 267, 268–69 (2014) (defining legitimacy as “the belief that those in power deserve to rule and make decisions influencing the lives of everyone, and the perception that they “ought to be obeyed.”) (quoting Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT’L ORG. 379, 381 (1999)).

<sup>30</sup> See 124 CONG. REC. S17, 403-34 (daily ed. Oct. 6, 1978) (statement of Senator DeConcini) (quoted in COLLIER ON BANKRUPTCY, App. 14.4(f)(iii) (15th ed., Rev 2002)).

<sup>31</sup> *In re Enron Corp.*, No. 01-16034 (Bankr. S.D.N.Y. Dec. 2, 2001).

<sup>32</sup> *In re Worldcom*, No. 02-13533 (Bankr. S.D.N.Y. July 21, 2002).

<sup>33</sup> *In re Mirant Corp.*, No. 03-46591 (Bankr. N.D. Tex., July 14, 2003).

<sup>34</sup> *In re New Century TRS Holdings, Inc.*, No. 07-10416 (Bankr. D. Del. April 2, 2007).

<sup>35</sup> *In re Lyondell Chemical Co.*, No. 09-10023 (REG) (Bankr. S.D.N.Y. Oct. 26, 2009).

<sup>36</sup> *In re Washington Mutual, Inc.*, et al., No. 08-12229 (Bankr. D. Del. Nov. 1, 2008).

<sup>37</sup> *In re Lehman Brothers Holdings, Inc.*, No. 08-13555 (Bankr. S.D.N.Y. Sept. 15, 2008).



public actors (e.g., state and local governments); the opioid crisis of which these cases are a part has been characterized as a “public health emergency.”<sup>38</sup>

There are also three other specific reasons why an examiner would be appropriate to address the public interest in this case. The first reflects a desire on the part of victims of the opioid crisis to “have their day in court” and to get a more complete accounting of Purdue Pharma’s role in the opioid crisis.<sup>39</sup> If the Debtors confirm a plan along the lines suggested in the Informational Brief, the bankruptcy process would, for all practical purposes, foreclose that opportunity, and the closure that would come with it.

To be sure, the costs of vindicating the dignitary interests of thousands of alleged victims of the Debtors would be astronomical, and good reason for the Debtors to have sought chapter 11 protection. But merely suppressing this aspect of the opioid crisis in a chapter 11 plan would not relieve the pressure that many may feel to better understand the roots of the crisis.

It is not difficult to imagine, for example, that victims may believe that the Sacklers are seeking to hide behind chapter 11 in order to prevent revelation of their role.<sup>40</sup> It is also possible that the Sackler family has been inaccurately and unfairly maligned in the media. A bankruptcy examiner may help to substantiate the views of the plaintiff/victims, or the Sacklers, or neither. But, the ordinary operation of the chapter 11 process will provide no such clarity, and thus neither closure for the victims of the opioid crisis nor redemption for the Sacklers.

Second, the Debtors’ cases may well be a template for other companies with opioid exposure. Much as *Manville* and *A.H. Robins* created models from which hundreds of cases involving mass tort liability were resolved, it seems highly likely that companies such as Johnson & Johnson, also facing opioid exposure, will watch the Debtors’ cases closely. The conduct of this reorganization will have collateral consequences for other important cases involving opioid abuse, further magnifying the public impact.

Third, significant doubts about the legitimacy of the Debtors’ reorganization may lead Congress to amend the Bankruptcy Code. This may be problematic for those who believe that Congress has generally done a poor job of amending the Bankruptcy Code in recent years.<sup>41</sup> Congress may be the ultimate voice of the public interest, but it is not necessarily one that understands chapter 11 very well.

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<sup>38</sup> See, e.g., *Opioid Crisis* and other sources *supra* note 1.

<sup>39</sup> As the *New York Times* recently observed “The Purdue deal, the most comprehensive of any settlement so far in thousands of opioid-related cases nationwide, holds great symbolic as well as practical value.” See Walsh, *supra* note 6.

<sup>40</sup> We note in this regard that the State of California recently amended its complaint to add “allegations regarding the Sackler family, who significantly contributed to, and profited from, the harmful impact of opioids in our communities.” See Press Release, *Attorney General Becerra Files Amended Complaint in Lawsuit Against Purdue Pharma, Adds Eight Additional Members of the Sackler Family*, Oct. 3, 2019, available at <https://oag.ca.gov/news/press-releases/attorney-general-becerra-files-amended-complaint-lawsuit-against-purdue-pharma>.

<sup>41</sup> See, e.g., Jonathan C. Lipson, *Bargaining Bankrupt: A Relational Theory of Contract in Bankruptcy*, 6 HARV. BUS. L. REV. 239, 294–95 (2016)(observing that “it is highly likely that any effort [by Congress] to amend the Bankruptcy Code today would be as fraught with cronyism as were the 2005 amendments to the Bankruptcy Code that have been decried for their ineptitude and bias.”).

As one of us has explained elsewhere, “there is little doubt that examiners’ reports in cases such as *Enron*, *Worldcom*, and *Lehman Brothers* performed an important public service in explaining the spectacular . . . collapses of these firms.”<sup>42</sup> So, too, in *Purdue Pharma*: the extraordinary public interest in these cases warrants a targeted bankruptcy examination.

We appreciate your attention to this matter. We are at your disposal to discuss this further.

Best,

  
Jonathan C. Lipson

cc: The Hon. Robert D. Drain, United States Bankruptcy Judge (via email)  
Peg Brickley, Wall Street Journal (via email)  
Marshall S. Huebner, Esq., Davis Polk & Wardwell (via email)  
Ira S. Dizengoff, Esq., Akin Gump Strauss Hauer & Feld LLP (via email)  
Arik Preis, Esq., Akin Gump Strauss Hauer & Feld LLP (via email)

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<sup>42</sup> *Examining Success supra* note 8, at 9.

Appendix A—Signatories

Name and Title	Affiliation
Ralph Brubaker, Carl L. Vacketta Professor of Law	University of Illinois College of Law
Kara J. Bruce, Professor of Law	University of Toledo College of Law
Laura Napoli Coordes, Associate Professor of Law	Arizona State University - Sandra Day O'Connor College of Law
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Adam J. Levitin, Agnes N. Williams Research Professor; Professor of Law*	Georgetown University Law Center
Angela Littwin, Ronald D. Krist Professor of Law	University of Texas, Austin
Lynn M. LoPucki, Security Pacific Bank Distinguished Professor of Law	UCLA Law School
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Ronald J. Mann, Albert E. Cinelli Enterprise Professor of Law and co- director of the Charles Evans Gerber Program in Transactional Studies at Columbia Law School	Columbia Law School
Nathalie Martin, Professor and Frederick M. Hart Chair in Consumer and Clinical Law	University of New Mexico School of Law
Megan McDermott, Lecturer	University of Wisconsin School of Law

Juliet M. Moringiello, Professor and Associate Dean for Research and Faculty Development	Widener University Commonwealth Law School
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\* Original signatories. Others joined subsequent to the initial submission on Nov. 5, 2019.