

# Pratt's Journal of Bankruptcy Law

LEXISNEXIS® A.S. PRATT®

NOVEMBER-DECEMBER 2024

## EDITOR'S NOTE: LESSONS

Victoria Prussen Spears

### LESSONS FROM *CRÉDIT AGRICOLE V. PPT*: THE EVOLUTION OF THE FRAUD EXCEPTION AND THE CRITICAL ROLE OF LETTERS OF CREDIT – WHY FINANCING BANKS MUST REMAIN WARY

Pierre Dzakpasu, Anne Jesudason and Dennis Xin

### *JEVIC* KEEPS ON GIFTING: U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT REAFFIRMS SOLVENT DEBTOR EXCEPTION BY HOLDING UNSECURED CREDITORS OF SOLVENT DEBTOR ENTITLED TO POST-PETITION INTEREST AT THE CONTRACT RATE

Gregory Petrick, Ingrid Bagby, Michele Maman, Casey Servais and Thomas Curtin

### U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT AGREES WITH LOWER COURT: ROYALTY OBLIGATION NOT TIED TO INTELLECTUAL PROPERTY LICENSE IS A DISCHARGEABLE UNSECURED CLAIM

Martin E. Beeler, Dianne F. Conino, Peter A. Schwartz and Julian Wright

### DELAWARE DISTRICT COURT SHEDS LIGHT ON STANDARDS FOR DISMISSAL OF CHAPTER 11 CASE BASED ON BAD FAITH

Robert Klyman and Scott C. Shelley

### TOGGLE PLANS: A RISING VALUE-MAXIMIZING STRATEGY

Lisa Schweitzer and Hoori Kim

### NOVEL BANKRUPTCY ISSUES IN THE CRYPTO BANKRUPTCY CLUSTER

Jane VanLare and Jack Massey



LexisNexis

# Pratt's Journal of Bankruptcy Law

---

---

VOLUME 20

NUMBER 8

November-December 2024

---

**Editor's Note: Lessons**

Victoria Prussen Spears

325

**Lessons from *Crédit Agricole v. PPT*: The Evolution of the Fraud Exception and the Critical Role of Letters of Credit – Why Financing Banks Must Remain Wary**

Pierre Dzakpasu, Anne Jesudason and Dennis Xin

327

***Jevic* Keeps on Gifting: U.S. Court of Appeals for the Third Circuit Reaffirms Solvent Debtor Exception by Holding Unsecured Creditors of Solvent Debtor Entitled to Post-Petition Interest at the Contract Rate**

Gregory Petrick, Ingrid Bagby, Michele Maman, Casey Servais and Thomas Curtin

340

**U.S. Court of Appeals for the Third Circuit Agrees with Lower Court: Royalty Obligation Not Tied to Intellectual Property License Is a Dischargeable Unsecured Claim**

Martin E. Beeler, Dianne F. Coffino, Peter A. Schwartz and Julian Wright

347

**Delaware District Court Sheds Light on Standards for Dismissal of Chapter 11 Case Based on Bad Faith**

Robert Klyman and Scott C. Shelley

349

**Toggle Plans: A Rising Value-Maximizing Strategy**

Lisa Schweitzer and Hoori Kim

356

**Novel Bankruptcy Issues in the Crypto Bankruptcy Cluster**

Jane VanLare and Jack Massey

363

QUESTIONS ABOUT THIS PUBLICATION?

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

Ryan D. Kearns, J.D., at ..... 513.257.9021  
Email: ..... ryan.kearns@lexisnexus.com

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

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

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

Library of Congress Card Number: 80-68780

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

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

ISSN: 1931-6992

Cite this publication as:

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

**Example:** Patrick E. Mears, *The Winds of Change Intensify over Europe: Recent European Union Actions Firmly Embrace the “Rescue and Recovery” Culture for Business Recovery*, 10 PRATT’S JOURNAL OF BANKRUPTCY LAW 349 (2014)

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

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2024 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

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

Editorial Office  
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862  
[www.lexisnexus.com](http://www.lexisnexus.com)

MATTHEW  BENDER

# *Editor-in-Chief, Editor & Board of Editors*

---

## **EDITOR-IN-CHIEF**

**STEVEN A. MEYEROWITZ**

*President, Meyerowitz Communications Inc.*

## **EDITOR**

**VICTORIA PRUSSEN SPEARS**

*Senior Vice President, Meyerowitz Communications Inc.*

## **BOARD OF EDITORS**

**SCOTT L. BAENA**

*Bilzin Sumberg Baena Price & Axelrod LLP*

**ANDREW P. BROZMAN**

*Clifford Chance US LLP*

**MICHAEL L. COOK**

*Schulte Roth & Zabel LLP*

**MARK G. DOUGLAS**

*Jones Day*

**MARK J. FRIEDMAN**

*DLA Piper*

**STUART I. GORDON**

*Rivkin Radler LLP*

**FRANCISCO JAVIER GARIBAY GÜÉMEZ**

*Mayer Brown México, S.C.*

**PATRICK E. MEARS**

*Barnes & Thornburg LLP*

*Pratt's Journal of Bankruptcy Law* is published eight times a year by Matthew Bender & Company, Inc. Copyright © 2024 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, [smeyerowitz@meyerowitzcommunications.com](mailto:smeyerowitz@meyerowitzcommunications.com), 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

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

# U.S. Court of Appeals for the Third Circuit Agrees with Lower Court: Royalty Obligation Not Tied to Intellectual Property License Is a Dischargeable Unsecured Claim

*By Martin E. Beeler, Dianne F. Coffino, Peter A. Schwartz and Julian Wright\**

*In this article, the authors discuss a court decision that has broad implications for any transaction involving rights to future payment streams, including royalty or revenue interest financings and other deals with contingent or deferred payment rights.*

A decision arising out of the Mallinckrodt plc bankruptcy cases<sup>1</sup> has broad implications for any transaction involving rights to future payment streams, including royalty or revenue interest financings and other deals with contingent or deferred payment rights.

The *Mallinckrodt* court held that royalty payments to a seller of intellectual property were dischargeable unsecured claims in bankruptcy. That holding meant that the buyer could continue to sell the drug developed from the acquired IP during and upon emergence from bankruptcy without paying the seller its contractual share of the revenue. The seller was instead left with an unsecured claim to be paid pro rata out of the funds available to other unsecured creditors, with an estimated recovery on the claim of about 4%.

## CIRCUIT COURT RULING

The U.S. Court of Appeals for the Third Circuit recently affirmed the decision of the *Mallinckrodt* district court.<sup>2</sup>

The crux of the seller's argument on appeal was that Mallinckrodt's obligation to pay the seller royalties arose as the sales occurred and therefore had to be satisfied in real dollars going forward if Mallinckrodt wanted to continue to sell the drug.

Largely adopting the reasoning of the lower courts, the Third Circuit held that the debtor's obligation to make the royalty payments, "like most contract

---

\* The authors, attorneys with Covington & Burling LLP, may be contacted at mbeeler@cov.com, dcoffino@cov.com, pschwartz@cov.com and jwright@cov.com, respectively.

<sup>1</sup> Sanofi-Aventis U.S. LLC v. Mallinckrodt plc (In re Mallinckrodt), 646 F. Supp. 3d 565 (D. Del. 2022).

<sup>2</sup> In re Mallinckrodt plc, – F. 4th – (3d Cir. 2024), Case No. 23-1112024 (April 25, 2024).

claims,” arose when the parties signed the agreement: “Once the parties agree to a contingent right to payment, the claim exists. And once the claim exists, bankruptcy can reach it.”

The court of appeals noted, like the district court, that the seller could have protected its claim, and it ended with words of warning for creditors contemplating similar deal structures:

- To protect itself, [the seller] could have structured the deal differently. It could have licensed the rights to the drug, kept a security interest in the intellectual property, or set up a joint venture to keep part ownership. . . .
- Bankruptcy frees debtors from lingering claims like this one. [The seller] kept no property or security interest in Acthar Gel, but only a contractual right to a royalty. Because that contingent claim arose before Mallinckrodt went bankrupt, it is dischargeable in bankruptcy.

## CONCLUSION

The outcome in the *Mallinckrodt* cases throws in sharp relief the difference between deal structures that are wholly unsecured – and thus exposed to the bankruptcy risk of the buyer – and other structures, such as out-licensing or secured transactions, that offer more favorable downside protection.

It is worth noting that it appears that no unsecured synthetic royalty financings by public biotech companies have hit the market since the *Mallinckrodt* district court decision came down in December 2022.