# Turnarounds & Workouts

JULY 2022

VOLUME 36, NUMBER 7

News for People Tracking Distressed Businesses

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# SCOTUS Limits Discovery Tool

*By Kyle Kolb*

The Supreme Court's decision in *ZF Automotive US, Inc., v. Luxshare, Ltd.* is its first to address the scope of a federal statute that can serve as a powerful tool in legal disputes unfolding outside of the United States. The statute, 28 U.S.C. § 1782, may not be well-known amongst U.S. bankruptcy practitioners, as these applications must be filed in federal district courts, but it is increasingly used to assist proceedings in a variety of foreign jurisdictions and can potentially aid in disputes and proceedings that *Turnarounds & Workouts* readers are involved in abroad.

The requirements of Section 1782 are well-established, even if certain facets of this law remain subject to the disputes discussed further below, including the one resolved this term by the Supreme Court. Section 1782, in relevant part, states as follows:

> The district court of the district in which a person resides or is found

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# All Eyes on *Boy Scouts* Plan Ruling

*By Steven B. Smith and Rachel Ginzburg*

The propriety of non-consensual, third-party releases, always a hot topic in the restructuring world, is making again headlines in several high-profile bankruptcy cases including the *Boy Scouts of America* case in Delaware and the *Purdue Pharma* case in the Southern District of New York. The linchpin of the *Boy Scouts* plan is the global settlement where the debtor will grant releases to non-debtor third parties from estate claims in exchange for the funding of a $2.7 billion settlement fund. After a five-week confirmation trial, the bankruptcy court took the matter under advisement and has not ruled yet. This article will discuss some of the issues surrounding the third-party releases in the *Boy Scouts* plan, some of the debtor's responses to those objections, and some policy considerations surrounding third-

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party releases.

## Case Background

The Boy Scouts of America (BSA) filed for bankruptcy on February 18, 2020, to achieve dual objectives: (1) equitably compensating victims of abuse, and (2) ensuring that the BSA emerges from bankruptcy with the ability to continue its charitable mission. BSA reported that there were approximately 275 pending civil actions against it and affiliated local councils and chartered organizations alleging abuse suffered by a scout at the hands of a scouting leader or volunteer. These actions were being litigated in numerous state and federal jurisdictions, and very few were close to trial. The BSA also reported that it was aware of approximately 1,400 additional claims of abuse.

In March 2021, after extensive negotiations, under the supervision of three court-appointed mediators, the BSA entered into a settlement with various parties, including the official creditors committee. Several months later, the BSA entered into a restructuring support agreement (RSA), later approved by the bankruptcy court, with the future claimants' representative and the tort claimants' committee, which provided for a plan of reorganization. The RSA was also supported by representatives of approximately 70,000 holders of abuse claims.

## The *Boy Scouts* Plan

The BSA plan, which was originally filed in September 2021, incorporated the material terms of the RSA and provided for the establishment of the largest sexual abuse compensation fund in the history of the United States — more than $2.7 billion in cash and property in addition to "valuable rights to pursue additional recoveries against those parties that have not yet settled…." Central to the plan is the implementation of a release of scouting-related abuse claims as well as a complementary channeling injunction for the benefit of the BSA, local councils, chartered organizations and certain insurance companies, without which the BSA's goals could not be achieved. The BSA argued that "Scouting" is a movement carried out through not only the BSA but also the separate local councils chartered by the BSA as well as a network of thousands of other independent non-profit organizations. And the BSA further warned that if a global resolution is not reached via chapter 11, "the country will be left with a fragmented Scouting movement and no fair or equitable resolution for the other parties in interest — primarily abuse survivors, most of whom will never be compensated outside the Plan." The plan has been touted as "bridg[ing] the gaps between survivors of abuse, insurers, Chartered Organizations, and Local Councils," and that "[i]t has garnered the support of every voting class, and a supermajority of survivors."

## Objections to Confirmation

The Office of the United States Trustee (UST) and other parties objected to confirmation with many focusing on the plan's non-consensual third-party releases of claims against non-debtor parties and the channeling injunction. The UST claims that, among other things, the plan releases: (1) violate the Fifth Amendment's Due Process Clause, and (2) are not

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authorized by the Bankruptcy Code. The UST argues that the plan's release provisions do not provide affected claimants with adequate notice or an ability to be heard in violation of Due Process Clause. The UST also argues that the plan cannot be confirmed because there is no authority in the Bankruptcy Code for the non-consensual release of claims against non-debtor third parties. In support of this argument, the UST points out that Congress authorized bankruptcy courts to impose non-debtor releases in just one circumstance — in asbestos-related cases, where the plan can enjoin claims against a specified set of non-debtors. And, because Section 524(g) was the only exception created by Congress, there are no other exceptions, and courts may not create new exceptions.

The BSA's position is that when Congress enacted Section 524(g), it expressly noted that it was not undoing the then-existing practice of bankruptcy courts granting non-debtor releases. The BSA further argues that the UST is essentially requesting that the bankruptcy court "write in" a prohibition for non-asbestos consensual third-party releases even though such a prohibition does not exist in the statute and conflicts with the law Congress enacted when it established Section 524(g).

## Is the Tide Going Against Non-Debtor Releases?

Regardless of the outcome, Judge Silverstein's decision in the BSA case will have important consequences for the BSA and its estate, but also for future debtors and creditors in the Third Circuit and beyond. The UST's objection reflects the growing tide moving against non-consensual non-debtor releases under a plan. Judges seem to be starting to look harder at the issue, and the harder they look, the less they like what they see. And the reason for that is straightforward, as the Bankruptcy Code does not provide for non-debtor releases except in the limited circumstances contemplated by section 524(g). The recent frequent use of plans that mimic the provisions of Section 524(g) for mass torts other than asbestos has highlighted the issue. The question judges, practitioners and academics are asking is as follows: If it took a special act of Congress to enact the carefully limited provisions of that statute, how can it be that other cases can ape the structure of Section 524(g) and provide similar non-debtor releases when Congress has not specifically authorized it? Courts have struggled with this, issuing opinions that emphasize that non-debtor releases were intended to be reserved for extraordinary cases or cases where the non-debtor parties have provided genuine consideration in exchange for the non-debtor releases. Yet courts have approved many plans with those features, frequently without comment or objection, even from the UST.

But there's the hard fact that global peace is often the way to settle contentious cases, and non-debtor affiliates have bargained for those releases. The BSA case highlights the struggle between global peace and creditors' rights remarkably well. If the *Boy Scouts* plan fails, there will likely be no compensation fund for survivors. And with no compensation fund, survivors will be forced to return to the tort system, where some believe that there will be no fair or equitable resolution for abuse survivors and

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the vast majority will not recover anywhere close to the recoveries made available under the plan. Survivors would certainly face significant expense and delay litigating against insurers with very deep pockets not to mention having to pursue local councils and chartered organizations in a race to the courthouse — and many of these local councils and chartered organizations could likely be forced to file their own bankruptcy.

## Where Do We Go From Here?

The issue can be resolved in one of two ways: either Congress will take action to amend and clarify the Bankruptcy Code, or the United States Supreme Court will need to rule. The truth is, Congress rarely pays attention to the Bankruptcy Code — it's been 17 years since the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) was enacted, and even that was more tinkering than structural reform. Under Chief Justice Roberts' leadership, the current Supreme Court has repeatedly signaled that it has concern over what happens in bankruptcy court. Both in its jurisdictional and substantive rulings, one has a sense that the Supreme Court believes that bankruptcy courts are an untamed "wild west" where the Bankruptcy Code is often ignored and bankruptcy judges fashion remedies based on individualized views of the equities of the case. In cases like *Jevic*, *Stern v. Marshall*, and *Law v. Siegel*, the Supreme Court either struck down a bankruptcy court's ruling or found that it had otherwise exceeded its jurisdiction or authority. Perhaps the more likely scenario, then, is that the Supreme Court will wait for some more circuit-level decisions to pile up before finding a case that's right for *certiorari* purposes. In the interim, all eyes are on the Delaware bankruptcy court and the Second Circuit as we await rulings on the propriety of non-debtor releases in *Boy Scouts* and *Purdue Pharma*.¤

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