ALERT MEMORANDUM

Use of Nonconsensual Third-Party Releases in Chapter 15 Confirmed by Recent Bankruptcy Rulings

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The Supreme Court's recent decision in *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024) ("Purdue") established that nonconsensual third-party releases could not be granted in chapter 11 cases, but left many questions about the validity of releases in other scenarios. Recent decisions from bankruptcy courts in Delaware and the Southern District of New York have both found that such releases are enforceable under chapter 15 of the bankruptcy code. These recent holdings may affect how foreign companies approach restructurings in the United States.

The U.S. Bankruptcy Court for the District of Delaware (the "Delaware Court") *in re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.*, held that nonconsensual third-party releases ordered by foreign courts were enforceable under chapter 15, even if those same releases could not be granted in a chapter 11 case. In doing so, the Delaware Court found that, provided that the foreign proceeding is procedurally fair and recognition does not impinge on any constitutional or statutory rights, the releases can be granted and are not manifestly contrary to U.S. public policy. The U.S. Bankruptcy Court for the Southern District of New York (the "SDNY Court") *in re Odebrecht Engenharia e Construção S.A. - Em Recuperação Judicial, et al.*, similarly ruled that, pursuant to Section 1521 of the Bankruptcy Code, the court could grant a recognition order containing nonconsensual third-party releases in support of a foreign proceeding.

The rulings may start a trend among bankruptcy courts of refusing to extend Purdue's limitation on nonconsensual third-party releases to chapter 15 proceedings.

I. Background

A. *Crédito Real*

Crédito Real, S.A.B. de C.V., SOFOM, E.N.R., ("Crédito Real"), one of Mexico's largest non-bank financial lending institutions, commenced a prepackaged restructuring proceeding in Mexico on October 6, 2023.[1] The Mexican concurso plan included releases that shielded certain parties who played a role in the negotiation and implementation of the restructuring process.[2] This included parties to a restructuring support agreement, the indenture trustee, former Crédito Real directors and officers, and other related parties.[3] After receiving approval of its plan from the Mexican Court, Crédito Real filed its chapter 15 petition on February 7, 2025.[4] In response, the United States International Development Finance Corporation (the "DFC"), one of Crédito Real's U.S. creditors, objected to the petition on the grounds that the nonconsensual third-party releases contained within the concurso plan were not authorized under chapter 15 and were also "manifestly contrary to the public policy of the United States."[5] The DFC also argued that the Purdue court's interpretation of statutory language in chapter 11 should extend to chapter 15 provisions.[6]

B. *Odebrecht*

On June 27, 2024, a large Brazilian construction company, Odebrecht Engenharia E Construção S.A. ("Odebrecht"), initiated Brazilian insolvency proceedings after experiencing significant liquidity constraints.[7] Odebrecht's Brazilian resolution plan was confirmed on March 7, 2024.[8] The plan included releases for the "[c]ompanies under Reorganization and their officers, directors, agents, employees and representatives."[9] After receiving approval in Brazil, Odebrecht sought recognition and enforcement of its Brazilian insolvency proceeding in the Southern District of New York on March 14, 2025.[10] Odebrecht's proposed order for recognition sought to enjoin "all persons and entities" from taking action against the debtors and their property.[11] The United States Trustee's Office objected to the proposed order, arguing that it went beyond the terms of the Brazilian

[1] Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521, *In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.*, Case No. 25-10208 (TMH) (D. Del. Feb. 7, 2025), ECF No. 2 ("Crédito Real Verified Petition"), ¶¶ 1, 21.

[2] Concurso Plan, Exhibit E to Declaration of Juan Pablo Estrada Michel Pursuant to 28 U.S.C. § 1746, *In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.*, Case No. 25-10208 (TMH) (D. Del. Feb. 7, 2025), ECF No. 3, Clause 16.

[3] *Id*.

[4] *See* Crédito Real Verified Petition.

[5] Objection of United States International Development Finance Corporation to Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520, and 1521, *In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.*, Case No. 25-10208 (TMH) (D. Del. Mar. 4, 2025), ECF No. 30, ¶1.

[6] Written Opinion Signed On 04/01/2025, *In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.*, Case No. 25-10208 (TMH) (D. Del. Apr. 1, 2025), ECF No. 65 ("Crédito Real Opinion"), 20.

[7] Verified Petition for Recognition of the Brazilian RJ Proceeding and Motion for Order Granting Final Relief Pursuant to 11 U.S.C. §§ 105(A), 1507, 1509(B), 1515, 1517, 1520(A) and 1521, *In re Odebrecht Engenharia e Construção S.A. - Em Recuperação Judicial, et al.*, Case No. 25-10482 (MG) (S.D.N.Y. Mar. 14, 2025), ECF No. 2 ("Odebrecht Verified Petition"), ¶¶ 32-37.

[8] *Id.* at ¶ 43.

[9] RJ Plan, Exhibit C to Declaration of Adriana Henry Meirelles in Support of Verified Petition Under Chapter 15 for an Order Granting Recognition and Final Relief in Aid of Foreign Proceeding Pursuant to 11 U.S.C. 105(A), 1515, 1517, 1520(A) and 1521, *In re Odebrecht Engenharia e Construção S.A. - Em Recuperação Judicial, et al.*, Case No. 25-10482 (MG) (S.D.N.Y. Mar. 14, 2025), ECF No. 3, § 11.5.

[10] *See* Odebrecht Verified Petition.

[11] Exhibit A to Odebrecht Verified Petition, ¶ 9.

plan and created nonconsensual third-party releases that were impermissible under chapter 15.[12]

II. Bankruptcy Courts' Decisions

During separate recognition hearings held within one month of each other, the Crédito Real and Odebrecht courts considered the applicability of Purdue to nonconsensual third-party releases in chapter 15.[13] In their rulings, both courts specifically considered whether they must apply Purdue's *ejusdem generis* approach to Sections 1521(a) and 1507 of the Bankruptcy Code and whether the releases were against U.S. public policy.[14] While the Crédito Real court considered these questions within the context of a foreign plan containing nonconsensual third-party releases, the Odebrecht court expanded their analysis to address nonconsensual third-party releases allegedly found within the proposed order.[15]

A. Purdue does not impact the statutory interpretation of chapter 15.

Sections 1521(a) and 1507 of the Bankruptcy Code empower U.S. bankruptcy courts to enforce orders entered in a foreign main proceeding.[16] Specifically, Sections 1521(a) and 1507 allow a court to provide a foreign representative with "appropriate relief" and "additional assistance", respectively.[17]

The Crédito Real court recognized that, while this discretion is circumscribed by fundamental policies of fairness, the plain statutory language, legislative history and canon of statutory construction do not indicate that nonconsensual third-party releases are not authorized under chapter 15.[18] In their ruling, the Crédito Real court also reasoned that, as comity is central to chapter 15, the relief granted in a foreign proceeding does not have to be identical to relief in a chapter 11 proceeding if the foreign proceeding was fair.[19]

In building off the Crédito Real court's rationale, the Odebrecht decision also noted that courts wield significantly more power under Sections 1521(a) and 1507 than a court overseeing chapter 11 proceedings would hold under Section 1123(b).[20]

B. Nonconsensual third-party releases are not manifestly contrary to U.S. public policy.

Both courts found that enforcing a foreign plan containing nonconsensual third-party releases is not manifestly contrary to the public policy of the U.S.

To determine the public policy question, the Crédito Real court considered whether the procedural fairness of the foreign proceeding was in doubt and whether recognition would impinge severely on a U.S. constitutional or statutory right.[21] The court found that the Mexican proceedings were fair and that U.S. courts have frequently recognized Mexican concurso plans to be the product of a fair process and that Mexican Law provides for due process to consider objections to a plan.[22] The releases under the Concurso Plan were also determined to be customary and permitted under Mexican law.[23]

[12] Objection of United States Trustee to the Verified Petition Under Chapter 15 for Recognition of a Foreign Main Proceeding and Related Relief, *In re Odebrecht Engenharia e Construção S.A. - Em Recuperação Judicial, et al.*, Case No. 25-10482 (MG) (S.D.N.Y. Apr. 1, 2025), ECF No. 16, 16-18.

[13] *See* Crédito Real Opinion; *see also* Memorandum Opinion Granting Motion for Recognition of Foreign Main Proceedings and Overruling UST Objections, *In re Odebrecht Engenharia e Construção S.A. - Em Recuperação Judicial, et al.*, Case No. 25-10482 (MG) (S.D.N.Y. Apr. 21, 2025), ECF No. 23 ("Odebrecht Opinion").

[14] *Id.*

[15] *Id*.

[16] Crédito Real Opinion at 15.

[17] *Id*.

[18] *Id*. at 29.

[19] *Id.* at 16-17.

[20] Odebrecht Opinion at 21.

[21] Crédito Real Opinion at 33.

[22] *Id.* at 34-35..

[23] *Id.* at 35.

Second, the Crédito Real court found that no constitutional or statutory right was impinged upon, noting that the Supreme Court had previously recognized Congress' authority under the Bankruptcy code to authorize nonconsensual third-party releases in the context of asbestos cases.[24] In their reasoning, the Crédito Real court stated that the releases could not go against U.S. public policy if Congress could provide for it.[25] Bankruptcy courts could, therefore, enforce similar releases where principles of cooperation and comity so required under chapter 15.[26]

The Odebrecht court affirmed the Crédito Real analysis, stating that Purdue's limited ruling could not be read to hold that nonconsensual third-party releases were manifestly contrary to public policy.[27]

C. Chapter 15 recognition extends to nonconsensual third-party releases in recognition orders.

Unlike in Crédito Real, all parties agreed that neither the foreign plan nor foreign order in Odebrecht contained nonconsensual third-party releases.[28] The releases at issue, were instead alleged to have been drafted more broadly in the proposed recognition order through a provision that enjoined "all persons and entities" from taking action against the debtors and their property, than they were drafted in the foreign plan.[29]

The Odebrecht court did not find that the language at issue in the order clearly created nonconsensual third-party releases.[30] The court further noted that, as written, the section of the recognition order at issue was "carefully limited to bar only those actions that contravene relief provided in the RJ Plan and the Brazilian Confirmation Order."[31]

Despite the difference in posture to Crédito Real, the Odebrecht court reasoned that (assuming *arguendo* the provision did create nonconsensual third-party releases) there was no difference "between *enforcing, via order, a foreign plan* with a third-party release provision, and *issuing an order enforcing a foreign plan*, which order contains a third-party release which itself is not in the foreign plan."[32] Both would result in a U.S. order that released claims the U.S. had jurisdiction over.[33] Accordingly, the *Odebrecht* court held that recognition orders containing nonconsensual third-party releases could be granted under chapter 15.[34]

III. Conclusion

As the shake-out from the Supreme Court's ruling in Purdue continues, the Crédito Real and Odebrecht rulings serve as important guides for foreign debtors seeking chapter 15 recognition within the U.S.

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[24] *Id.* at 37.

[25] *Id.*

[26] *Id.* at 38.

[27] Odebrecht Opinion at 23.

[28] Odebrecht Opinion at 4. Counsel for Odebrecht argued that the releases in the foreign plan do "not in our view release any independent or direct claims against third parties without their consent" and "only provide[] that once payment is made pursuant to the plan, those claims cannot be recast as derivative type claims…that would allow those parties a second bite of the apple by bringing those same claims against officers directors or affiliates." Hr'g Tr. at 14:2-9, (ECF No. 24), *In re Odebrecht Engenharia e Construção S.A. - Em Recuperação Judicial, et al.*, Case No. 25-10482 (MG) (S.D.N.Y. Apr. 1, 2025). The United States Trustee agreed that it had no problem with the releases in the foreign plan because they are "limited." ***Id.*** at 19:8-12.

[29] Odebrecht Opinion at 6.

[30] *Id.*

[31] *Id.* at 20, n.3.

[32] *Id.* at 20.

[33] *Id.* at 21.

[34] *Id.* at 27.