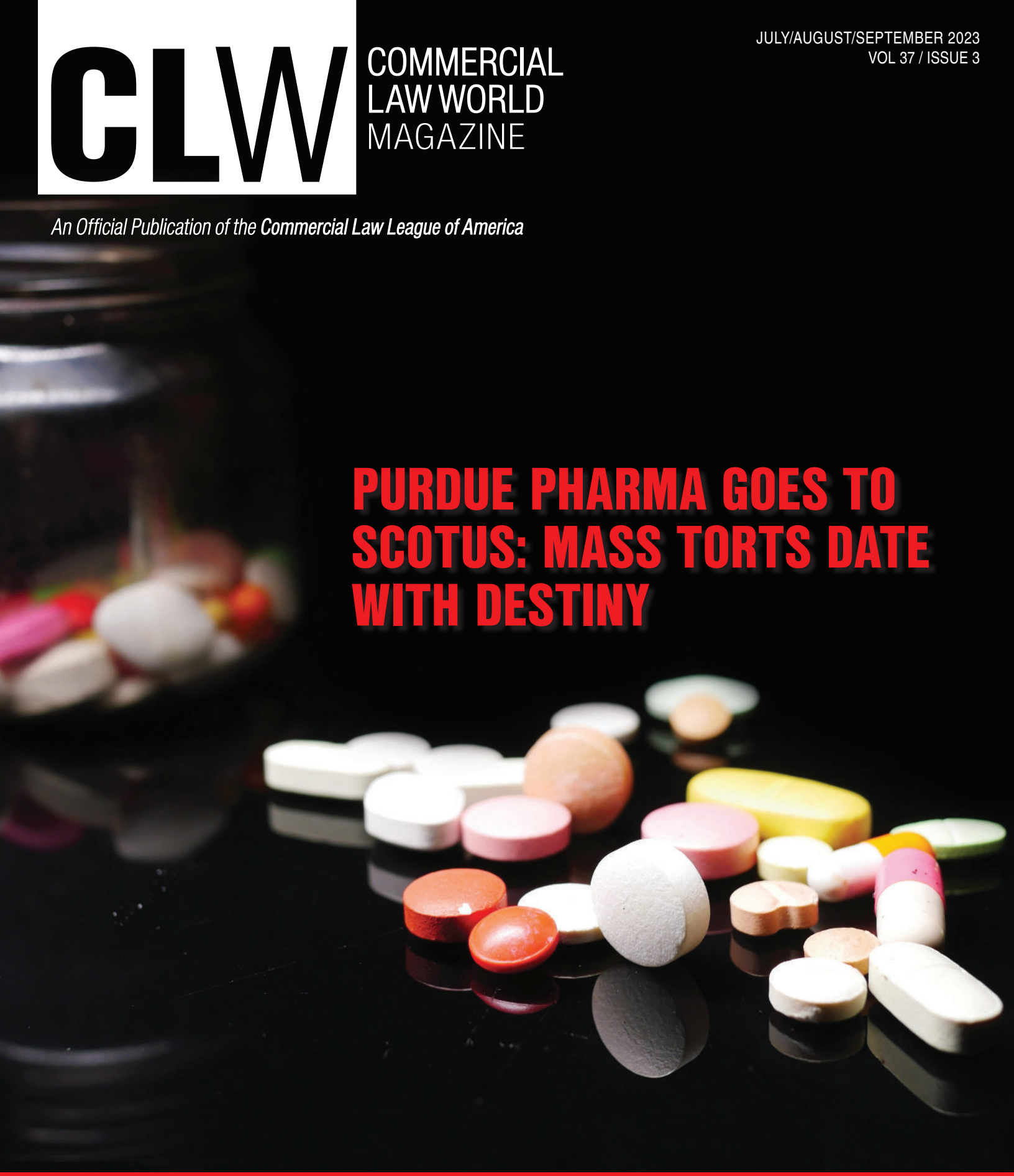
CLW COMMERCIAL LAW WORLD MAGAZINE

JULY/AUGUST/SEPTEMBER 2023
VOL 37 / ISSUE 3

An Official Publication of the ***Commercial Law League of America***



PURDUE PHARMA GOES TO SCOTUS: MASS TORTS DATE WITH DESTINY

THE ANNUAL BANKRUPTCY ISSUE

FROM THE EDITOR

One of the reasons that I like working on the CLW is that it scratches an itch that I otherwise only occasionally get to scratch in my practice: the academic side of law. My practice is primarily creditors' commercial litigation; most days involve pleadings and discovery (and emails and zoom calls), but few days involve legal research into a new argument or novel legal theory. As a result, my day to day practice is a very long way away from what first got me interested in the law. It was not advocacy or argument, it was the opinions of the U.S. Supreme Court. Beginning with the seminal cases in constitutional law, I wasn't content to learn the summary of why *Marbury v. Madison* or Dred Scott was important, I liked reading the opinions. Concurrences and particularly dissents make for interesting reading as they highlight the ways in which these issues - which often seem cut-and-dried as initially written out by the majority - are not so clear-cut.

So I especially enjoy the Bankruptcy Issue of the CLW every year because it comes the closest to that academic interest, articles highlighting opinions that I've read and ones that I seek out and read once I see them mentioned. This issue features several such articles because it has been a banner year for important bankruptcy opinions. I am very fortunate to get to work with these writers, who are crafting the first draft of history.

The largest development is not an opinion yet, but the promise of one to come. For several years, we have been following the progression of mass tort cases through the bankruptcy system, and one of the largest is now headed to the Supreme Court. I have engaged in some spirited disagreements with my fellow bankruptcy practitioners about the legal propriety of the variety of procedural tactics pursued by the tort defendants - venue shopping, channeling injunctions, extending stay protection to non-debtor parties and non-consensual third party releases - and we will finally get to see whether the Court approves of wide-ranging use of Section 105, among other approaches.

My interest in these cases is primarily academic, but not exclusively so. Lawyers are, after all, prolific copycats; what proves effective in one case will get used in others. While the smaller cases that my creditor clients get dragged into seldom involve forum-shopping, the other tactics of the mass tort cases are coming for rest of us too. In the past couple of years, I have seen a motion to extend the stay in a Sub-V case to the principal of the debtor company, arguing that pursuit of collection on his guaranty of the business debt should be stayed because he should not be distracted by litigation from the apparently all-consuming task of running his company. Another business debtor attempted to engraft, onto an otherwise routine Chapter 11 plan, a general release of the principals of the company from "any and all obligations" related to the company, which presumably would have been argued to apply to guaranties, fraudulent transfers, malfeasance, deepening insolvency or any of the other theories under which corporate officers can be found liable for the debts of the companies they run into the ground. With *Purdue Pharma* on the docket for argument and decision in the current term, my academic interest could not be higher.

My guide along the twisting, halting yellow-brick road of mass tort bankruptcy cases has been Candice Kline, who has outdone herself with this issue's thorough review of how we got here and where mass tort bankruptcy may be going. Having read the decision in the first *LTL* case, I was interested to learn that LTL II had been rejected, and promptly pulled up the Order in that case to see what had changed (and more importantly for LTL, what had not).

Also of interest this year is the *Bartenwerfer* decision from the Supreme Court, holding that the fraud exception to dischargeability does not always require that the debtor be an active participant in the fraud. Discussed here by Ron Peterson and Breana K. Drozd, the *Bartenwerfer* decision has generated significant interest among creditors' attorneys. We shall soon be seeing multiple cases applying *Bartenwerfer,* which may turn out to be the most significant Chapter 7 case in years.

Finally, I would be remiss if I did not mention that Ron Peterson was awarded the President's Cup by the CLLA this last year, in recognition of his outstanding contributions to bankruptcy law and practice and our organization over the years. His annual case law updates are my favorite program during the League's National Conference, and the article we get to include here is merely the latest evidence that he is truly a worthy recipient of this honor. ■

Beau Hays
Co-Chair of the Board of Associate Editors

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