

How Can Rights to Future Payments Survive Bankruptcy? Lessons Learned from Pharma Bankruptcy Cases

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In a decision published earlier this year, the Third Circuit gave creditors in the pharma space clear pointers on how to manage risk in advance and structure a transaction in a way that rights to future payments could survive a bankruptcy filing. In re Mallinckrodt PLC, 99 F.4th 617.

Mallinckrodt and its affiliates operated a global specialty biopharmaceutical company that produces and sells both generic and branded pharmaceutical products including specialty products for the treatment of rare diseases and controlled substances. Prior to the Mallinckrodt's bankruptcy filing Sanofi and Mallinckrodt entered into an Asset Purchase Agreement ("APA ") which transferred ownership of a drug called Acthar which treats chronic inflammation and auto immune disease, and related intellectual property to Mallinckrodt. It was an outright sale in which Mallinckrodt paid Sanofi \$100,000 upfront and promised a perpetual royalty of 1% of all net sales over \$10 million per year. Sanofi took a security interest in the up-front payment but not the royalty. By 2019, sales hit almost one billion dollars. With the confirmation of Mallinckrodt's reorganization plan, the Sanofi's claim for royalties was discharged and Mallinckrodt kept the drug and IP without the obligation to share revenue upon emergence from bankruptcy.

Sanofi 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. Instead Sanofi transferred its rights to Alchar Gel in an outright sale.