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TAKING THE *PURDUE PHARMA* DECISION SERIOUSLY: NOT EVEN *CONSENSUAL* NONDEBTOR PLAN RELEASES ARE PERMISSIBLE (PART I)

*By Ralph Brubaker**

INTRODUCTION

Last summer, in *Harrington v. Purdue Pharma*,[1] the Supreme Court finally addressed the longstanding, yet extremely controversial practice whereby bankruptcy courts discharged the obligations of a nondebtor, who had *not* filed bankruptcy, through so-called nonconsensual nondebtor (or third-party) release provisions. Nonconsensual nondebtor-release provisions, included in a Chapter 11 debtor's confirmed plan of reorganization, extinguished creditors' direct claims of liability against a nondebtor without the consent (and even over the objection) of creditors in precisely the same way that a bankruptcy discharge extinguishes a bankruptcy debtor's debts.[2] And in confirming a plan containing such a nondebtor-discharge provision, the court would typically enter an order permanently enjoining assertion of the released claims (which came to be known by the misleading moniker of a "channeling" injunction[3]), which replicated the effect of the Bankruptcy Code's statutory discharge injunction (which is, of course, by its terms applicable to only *the debtor's* discharged debts).[4]

In its much-anticipated *Purdue Pharma* decision, the Supreme Court repudiated nonconsensual nondebtor releases, holding "that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of the affected claimants."[5]

Post-*Purdue*, much attention has focused upon the Court's explicit refusal to opine upon *consensual* nondebtor-release provisions:

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> As important as the question we decide today are ones we do not. Nothing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. See, *e.g.*, *In re Specialty Equipment Cos.*, 3 F.3d 1043, 1047 (CA7 1993). Nor do we have occasion today to express a view on what qualifies as a consensual release. . . .[6]

Post-*Purdue*, many courts have approved purportedly consensual nondebtor-release provisions contained in a confirmed plan of reorganization,[7] and the recently announced, new settlement with the Sacklers in the *Purdue Pharma* case also contemplates a consensual release of opioid victims' direct claims against the Sacklers.[8]

The post-*Purdue* controversy and debate regarding consensual nondebtor-release provisions has solely concerned the latter issue flagged by the *Purdue* opinion: What is necessary for a creditor to consent to a plan provision releasing that creditor's direct claim against a nondebtor? Simply voting in favor of a plan containing a nondebtor-release provision?[9] Indicating affirmative approval of the nondebtor-release provision, separately from the creditor's vote on the plan?[10] Failing to affirmatively opt out of the release provision, separately from the creditor's vote on the plan?[11] Failing to file a formal objection to confirmation of a plan containing a nondebtor-release provision?[12]

The reason the courts have struggled with that second question left open by the *Purdue* opinion is that they have wholly neglected to even address the first question: Why is it permissible to include a consensual nondebtor-release provision in a plan of reorganization? Without a legal theory for why a nondebtor-release provision can be included in a plan, it is impossible to answer the question of what constitutes sufficient consent, because different rationales will lead to different conclusions regarding the necessary indicia of consent.

What's more, the first question posed (and left open and unresolved) by the *Purdue* opinion, in the above-quoted excerpt, necessarily also asks: *Is it* permissible to include a consensual nondebtor-release provision in a plan of reorganization? One cannot simply assume (as nearly everyone has) that the answer to that question is yes. Indeed, at the *Purdue Pharma* oral argument, Justice Thomas insistently probed both petitioner's and respondent's counsel regarding that question.[13] And the *reasoning* of the *Purdue* opinions, in *both* Justice Gorsich's majority opinion *and* Justice Kavanaugh's dissent, leads to the ineluctable conclusion that, as is true with nonconsensual nondebtor releases, the Bankruptcy Code simply does *not* authorize inclusion of *any* nondebtor-release provision *in a plan of reorganization*, even if it purports to release the third-party claims of only those who "consent" in

some manner to the release. In this Part I, I will explain why that must be the case.

That conclusion, however, does not mean that it is impossible to consensually settle and release creditors' direct claims against nondebtors "*in connection with* a bankruptcy reorganization plan"—the *Purdue* majority's actual framing of the relevant question in the above-quoted passage.[14] Such settlements, however, must be struck in the same way that any other nonbankruptcy litigation, including mass tort litigation, is settled. The bankruptcy courts simply do not have the power (under the Bankruptcy Code or otherwise) to create, at their own behest, a settlement-only class-action process for creditors' direct claims against nondebtors. In the forthcoming Part II of this article, I will explore the proper bounds of consensual release of third-party nondebtor claims (*not* through the terms of a plan of reorganization) after *Purdue Pharma*.

THE *PURDUE PHARMA* DECISION

From the inception of (the now-discredited) nondebtor-discharge practice, with the Fourth Circuit's 1989 decision approving sweeping nondebtor-discharge provisions in the *A.H. Robins* plan of reorganization,[15] the principal statutory authorization upon which courts relied was Code § 105(a).[16] That statutory provision codifies bankruptcy courts' traditional equitable powers to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code.[17] Bankruptcy courts' general equitable powers, however, were always a highly dubious justification for nondebtor discharge.[18] Indeed, "[t]he power to grant a discharge of indebtedness . . . does not descend from the equity powers of the Lord Chancellor. Bankruptcy discharge has always been a creature of statute."[19]

Moreover, as nondebtor-discharge practice took root and flourished, reliance upon § 105(a) as authority therefor became more and more untenable in light of the Supreme Court's ever-more-stingy jurisprudence on bankruptcy courts' general equitable powers.[20] In the ensuing brute-force search for some (any) fig leaf of statutory sanction for nondebtor discharge, Code § 1123(b)(6) ultimately emerged as the only available alternative. Thus, the Second Circuit proffered § 1123(b)(6) as the statutory authority for nondebtor discharge, in its opinion affirming the nondebtor-discharge provisions approved by the bankruptcy court in the *Purdue Pharma* case.[21] And by the time the issue ultimately came before the Supreme Court in *Purdue*, discussion of Code § 105(a) was relegated to a short footnote:

> The Sacklers [the beneficiaries of the *Purdue* nondebtor-discharge provisions] suggest that, if 11 U.S.C. § 1123(b)[6] does not permit a bankruptcy court to release and enjoin claims against a nondebtor without the affected claimants' consent, § 105(a) does. . . . As the Second Circuit recognized, however, "§ 105(a) alone cannot justify" the imposition of nonconsensual third-party releases because it serves only to "carry out" authorities expressly conferred elsewhere in the code. . . . Necessarily, then, our focus trains on § 1123(b)(6).[22]

Like the vague, general necessary-and-proper authorization of § 105(a), however, the vague, general necessary-and-proper authorization of § 1123(b)(6) was also far "too weak a reed upon which to rest so weighty a power"[23] as the "novel and extraordinary power to extinguish claims against third parties without claimants' consent."[24] Most significantly for our present purposes, though, the *Purdue* Court's holding regarding the limits of § 1123(b)(6), and why it does not and cannot authorize nondebtor discharge, has direct and dispositive implications for the permissibility of including *consensual* nondebtor-release provisions in a plan of reorganization.

PLAN PROVISIONS CAN ONLY ADDRESS THE DEBTOR'S RIGHTS AND OBLIGATIONS

As I pointed out nearly 30 years ago, the crux of many fundamentally disturbing problems spawned by nonconsensual nondebtor releases was that they "interject[ed] discharge of credi-

tors' non-debtor rights into a bankruptcy process designed to restructure *only* creditor claims against the debtor."[25] The aspect of the Supreme Court's *Purdue Pharma* decision with perhaps the most significant (and vastly underappreciated) ongoing systemic implications is the Court's holding that the statute does, indeed, *limit* the permissible scope of Chapter 11 plans to addressing *only* the rights and obligations of *the debtor*.[26] And it is that aspect of the *Purdue* holding which forbids including even *consensual* nondebtor-release provisions in a plan of reorganization.

The *Purdue* decision framed the determinative inquiry regarding the permissibility of a nonconsensual nondebtor-release provision as whether "it is a provision that a debtor *may* include and a court *may* approve in a reorganization plan."[27] And according to the Court, "Section 1123(b) governs that question."[28] Section 1123(b) provides as follows:

> **(b)** Subject to subsection (a) of this section [prescribing what a plan *must* contain], a plan *may*—
>
> **(1)** impair or leave unimpaired any class of claims, secured or unsecured, or of interests;
>
> **(2)** subject to section 365 of [the Bankruptcy Code], provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;
>
> **(3)** provide for—
>
> **(A)** the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
>
> **(B)** the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;
>
> **(4)** provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;
>
> **(5)** modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and
>
> **(6)** include any other *appropriate* provision not inconsistent with the applicable provisions of [the Bankruptcy Code].[29]

The *Purdue* Court held that § 1123(b)(6) does *not* authorize inclusion or approval of a nonconsensual nondebtor-release provision in a plan—i.e., such a plan provision is *not* "appropriate"—because § 1123(b)(6)'s authorization is limited to plan provisions dealing with "*the debtor*—its rights and responsibilities, and its relationship with its creditors," *not* those of a nondebtor.[30]

The Court's reasoning, which also speaks to *consensual* nondebtor-release provisions, was as follows:

> Paragraph (6) is a catchall phrase tacked on at the end of a long and detailed list of specific directions. When faced with a catchall phrase like that, courts do not necessarily afford it the broadest possible construction it can bear. Instead, we generally appreciate that the catchall must be interpreted in light of its surrounding context and read to "embrace only objects similar in nature" to the specific examples preceding it. . . . This ancient interpretive principle, sometimes called the *ejusdem generis* canon, seeks to afford a statute the scope a reasonable reader would attribute to it.
>
> Viewed with that much in mind, we do not think paragraph (6) affords a bankruptcy court the authority the plan proponents suppose. In some circumstances, it may be difficult to discern what a statute's specific listed items share in common. But here an obvious link exists: When Congress authorized "appropriate" plan provisions in paragraph (6), it did so only after enumerating five specific sorts of provisions, all of which concern *the debtor*—its rights and responsibilities, and its relationship with its creditors.[31]

"[T]he five paragraphs that precede the catchall tell us that bankruptcy courts may have many powers, . . . when they implicate the debtor's rights and responsibilities. But those directions also indicate that a bankruptcy court's powers are not limitless."[32] And as regards the announced limit—that the provisions which may be included in a plan and approved by the bankruptcy court can address *only* the debtor's rights and obligations and *only* the debtor's relationship with *its* creditors—the Court stated that "we discern no ambiguity in § 1123(b)(6)."[33]

A PLAN CAN CONSENSUALLY RELEASE ONLY CLAIMS OF THE DEBTOR'S ESTATE

The analytical framework that the *Purdue* decision used, to determine whether a *nonconsensual* nondebtor-release provision can be included in a plan and approved by the bankruptcy court, is directly applicable to the *identical question* regarding a *consensual* nondebtor-release provision. As the *Purdue* Court stated, "Section 1123(b) governs that question" of whether "it is a provision that a debtor *may* include and a court *may* approve in a reorganization plan."[34]

And as is true for a *nonconsensual* release of a creditor's claims against nondebtor, the *only* subdivision of § 1123(b) that could conceivably authorize *consensual* release of a creditor's claim against a nondebtor is paragraph (6). As the Court stated in *Purdue*:

> We can easily rule out the first five of these paragraphs [of § 1123(b)] as potential sources of legal authority for the [release of creditors' claims against a nondebtor third-party]. They permit a plan to address claims and property belonging to a debtor or its estate. §§ 1123(b)(2), (3), (4). They permit a plan to modify the rights of creditors who hold claims against the debtor or its estate. §§ 1123(b)(1), (5). But nothing in those paragraphs authorizes a plan to [address, much less] extinguish [creditors'] claims against third parties . . . . If authority . . . can be found anywhere, it must be found in paragraph (6).[35]

Indeed, the *Purdue* dissenters[36] (as well as the plan proponents[37]) acknowledged that § 1123(b)(6) is the *only* possible source of authority for inclusion of consensual nondebtor-release provisions in a plan of reorganization. Thus, the *Purdue* holding that § 1123(b)(6) only authorizes plan provisions "which concern *the debtor*—its rights and responsibilities, and its relationship with its creditors,"[38] *not* those of a nondebtor—means that even *consensual* nondebtor-release provisions simply cannot be included in a plan of reorganization, which the *Purdue* dissenters (and plan proponents) fully acknowledged. As the majority opinion further elaborated:

> The catchall's text underscores the point. . . . Congress set out a detailed list of powers, followed by a catchall that it qualified with the term "appropriate." That quintessentially "context dependent" term often draws its meaning from surrounding provisions. And we know to look to the statute's preceding specific paragraphs as the relevant "context" here because paragraph (6) tells us so. It permits "any *other* appropriate provision"—that is, "other" than the provisions already discussed in paragraphs (1) through (5). (Emphasis added.) Each of those "other" paragraphs authorizes a bankruptcy court to adjust claims without consent only to the extent such claims concern the debtor. From this, it follows naturally that an "appropriate provision" adopted pursuant to the catchall that purports to extinguish claims without consent should be similarly constrained.[39]

Likewise, those "other" paragraphs authorize a plan of reorganization to release claims *with consent* only to the extent the released claims concern the debtor. Indeed, the Court specifically pointed out that those "other" paragraphs explicitly authorize (in subsection (b)(3)(A)) *consensual* release of *only* claims *belonging to the debtor*. Under § 1123(b)(3)(A), "a plan may . . . provide for the settlement or adjustment of any claim or interest belonging to the debtor or the estate."[40] As the Court emphasized,[41] that explicit authorization for a *consensual* release of *only* claims belonging to the debtor or the estate simply confirms and reinforces § 1123(b)(6)'s similarly "appropriate" limitation to plan provisions "which concern *the debtor*—its rights and responsibilities and its relationship with its creditors,"[42] *not* those of a nondebtor.

Given the Court's reliance upon the *consensual* claims release authorized by § 1123(b)(3)(A) to derive § 1123(b)(6)'s scope limitation, it simply is not possible to conclude that the announced scope limitation applies only to *nonconsensual* nondebtor releases (as nearly all have assumed post-*Purdue*). The Court's holding that § 1123(b)(6) does not authorize inclusion of *nonconsensual* nondebtor-release provisions in a plan *necessarily* means that § 1123(b)(6) likewise does not authorize inclusion of *consensual* nondebtor-release provisions in a plan, because

such a provision does not "concern *the debtor*—its rights and responsibilities and its relationship with its creditors."[43] As is true for a nonconsensual nondebtor-release, a *consensual* nondebtor release provision solely addresses the rights and responsibilities of a *nondebtor* and its relationship with its creditors.

1. SETTLEMENT OF A DERIVATIVE CLAIM CONSENSUALLY RELEASES ONLY A CLAIM OF THE DEBTOR'S ESTATE

The dissent argued that § 1123(b)(3)(A) indicates that "appropriate" plan provisions regarding nonconsensual modification of claims need not be limited to claims against the debtor, invoking the example of a derivative cause of action, such as a corporate derivative claim:

> Under (b)(3), a bankruptcy court may approve a reorganization plan that settles, adjusts, or enforces "any claim" that the debtor holds against non-debtor third parties. That provision allows the debtor's estate to enter into a settlement agreement with a third party, where the estate agrees to release its claims against the third party in exchange for a settlement payment to the bankruptcy estate. And the bankruptcy court has the power to approve such a settlement if it finds the settlement fair and in the best interests of the estate. The bankruptcy court may later enforce that settlement.
>
> Importantly, in some cases, including this one, the debtor's creditors may hold derivative claims against that same non-debtor third party for the same "harm done to the estate." So when the debtor settles with the non-debtor third party, that settlement also extinguishes the creditors' derivative claims against the non-debtor. And the creditors' consent is not necessary to do so.
>
> To connect the dots: A plan provision settling the debtor's claims against non-debtors under (b)(3) therefore nonconsensually extinguishes creditors' derivative claims against those non-debtors.[44]

That argument evidences either a misunderstanding of the nature of derivative claims, or just an "effort to blur th[e] distinction"[45] between "derivative claims against a non-debtor" and "creditors' direct claims against" a non-debtor, which the dissent asserted are "basically the same thing."[46] As the majority opinion correctly points out, though, the dissent's argument is misguided.

"The dissent neglects *why* a bankruptcy court may resolve derivative claims under paragraph (3)."[47] The *only* reason a plan can release derivative claims is "because those claims belong to the debtor's estate."[48] It is a misleading mischaracterization, therefore, for the dissent to repeatedly describe derivative claims as "*creditors'* derivative claims against a nondebtor."[49] To the extent an individual (e.g., a shareholder in the case of a corporate derivative claim) has authority to assert and control such a derivative claim, the individual does so *not* on his/her own behalf; the claim is asserted on behalf of the corporate debtor, because "[t]he substantive claim belongs to the corporation."[50] Settlement of a derivative claim, therefore, simply does not release *a creditor's* claim against a nondebtor; it releases only *the debtor's* claim against that nondebtor.

Moreover, when a corporate derivative claim is settled and released in bankruptcy, either through a plan provision or otherwise, it is *not* the *claim release* that terminates any authority or control that an individual might be able to exercise over that claim outside of bankruptcy. What terminates that individual's ability to assert that claim is the bankruptcy filing itself, which creates the corporate debtor's bankruptcy estate and vests that bankruptcy estate with all of the corporate debtor's petition-date property, including any and all causes of action belonging to the corporate debtor, such as derivative claims.[51]

"[T]he bankruptcy estate is a unique legal entity that owes its existence solely to federal bankruptcy law. Determining the appropriate 'representative of the estate' to prosecute" causes of action belonging to the estate, therefore, "is strictly an issue of federal bankruptcy law,"[52] "including a distinct body of law regarding control of 'derivative' litigation,"[53] that entirely preempts state law that might otherwise allow an individual stakeholder to assert a derivative claim on behalf of a corporate debtor.[54]

Additionally, as the Supreme Court made clear in *Meyer v. Fleming* in 1947, the appropriate estate representative for a corporate derivative claim must ultimately be determined by the federal bankruptcy court, which "has exclusive authority to determine how causes of action which have become a part of the bankruptcy estate shall be enforced."[55] And the chosen estate representative, "being in a position to take control of the litigation by reason of the fact that the cause of action has become a part of the estate, should have the opportunity to make the choice which is most advantageous to the estate" and, thus, "should be allowed a choice . . . in case he deems it more provident from the point of view of the estate to make a settlement of the claim" that consensually releases it.[56]

Code § 1123(b)(3)(A) simply authorizes inclusion and effectuation of that consensual settlement and release in and through the terms of a plan of reorganization.[57] Contrary to the dissent's suggestion, though, such a plan release does *not* extinguish a shareholder's otherwise-existent state-law right to assert that claim; that happened immediately and automatically upon the filing of the bankruptcy petition.

2. SETTLEMENT OF A FRAUDULENT TRANSFER CLAIM CONSENSUALLY RELEASES ONLY A CLAIM OF THE DEBTOR'S ESTATE

The type of "derivative" claim that the dissent had in mind was not a corporate derivative claim, but instead, a fraudulent transfer cause of action.[58] While such a claim is not typically referred to as a "derivative" claim, that is not an inaccurate characterization. Outside of bankruptcy, an individual judgment creditor can avoid (i.e., rescind) a fraudulent transfer made by its judgment debtor to the extent necessary to satisfy its judgment, by levying on the property after avoidance/rescission and the consequent restoration of the debtor's ownership interest in that property.[59] That kind of "derivative" avoidance/rescission claim does indeed share a close kinship with a corporate derivative claim, as far as settlement and release of those claims in bankruptcy.

> There is clearly authority for the bankruptcy estate's representative, be it a trustee or Chapter 11 debtor-in-possession, or even a creditors' committee if authorized to pursue claims on behalf of the estate, to compromise claims and causes of action belonging to the estate and give the defendants a release of those settled claims. The bankruptcy court can approve those settlements, and [Code § 1123(b)(3)(A)] expressly provides that the terms of such a settlement can be incorporated into a debtor's plan of reorganization.
>
> That kind of settlement and corresponding release of claims belonging to the bankruptcy estate includes causes of action that individual creditors or shareholders could pursue outside bankruptcy. For example, fraudulent conveyance claims are claims assertable by individual judgment creditors outside bankruptcy. When the debtor who allegedly made a fraudulent transfer files bankruptcy, however, [Code § 544(b)(1)] gives those state-law fraudulent transfer claims to the debtor's bankruptcy estate to pursue on behalf of all creditors. A bankruptcy filing, therefore, preempts individual creditors' fraudulent conveyance claims, which are stayed once the debtor files bankruptcy, and the estate representative thereafter has exclusive authority to prosecute and (with bankruptcy-court approval) settle that cause of action.[60]

As is the case with corporate derivative claims, Code § 1123(b)(3)(A) simply authorizes inclusion and effectuation of that consensual settlement and release in and through the terms of a plan of reorganization. And again, it is *not* the plan release that bars a creditor from asserting that claim; that happened immediately and automatically upon the filing of the bankruptcy petition when the cause of action became property of the debtor's bankruptcy estate.

3. CONSENSUAL RELEASE OF CLAIMS NEITHER BY NOR AGAINST THE DEBTOR'S ESTATE CANNOT BE INCLUDED IN A PLAN

For purposes of the question at hand, the most important aspect of the exchange between the *Purdue* majority and dissent regarding "derivative" claims is that it explicitly addressed *consen-*

sual release of claims through a plan of reorganization. Thus, the holding of *Purdue* regarding § 1123(b)(6)'s limits on permissible plan provisions—that they must "concern *the debtor*—its rights and responsibilities and its relationship with its creditors"[61]—is equally applicable to *consensual* nondebtor plan releases. In the words of the *Purdue* opinion, the terms of a plan may consensually "resolve . . . claims under paragraph (3) [of § 1123(b)] because those claims belong to the debtor's estate."[62] The problem with even a *consensual* nondebtor-release provision, then, is that "[r]ather than seeking to resolve claims that substantively belong to" the debtor's estate, they seek to resolve "claims [against nondebtors] that belong to their" creditors.[63] Because "[t]hose claims neither belong to [the debtor or the debtor's estate] nor are they asserted against [the debtor] or its estate,"[64] § 1123(b)(6) cannot and does not authorize their release, whether consensual or nonconsensual, through a plan of reorganization.

In the forthcoming Part II of this article, I will explore the proper bounds of consensual release of third-party nondebtor claims (*not* through the terms of a plan of reorganization) after *Purdue Pharma*.

ENDNOTES:

[1]Harrington v. Purdue Pharma L.P., 603 U.S. 204, 144 S. Ct. 2071, 219 L. Ed. 2d 721, 73 Bankr. Ct. Dec. (CRR) 159 (2024).

[2]The bankruptcy court's confirmation of a plan of reorganization in a Chapter 11 case "discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C.A. § 1141(d)(1)(A).

[3]In my many critiques of nonconsensual nondebtor releases, I have explained, at length, how proponents of nonconsensual nondebtor releases grossly perverted the *in rem* channeling rationale, originally used to justify the insurance injunctions at issue in the *Manville* bankruptcy plan, confirmed in 1986. *See* Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960, 963 n.11, 982 n.98 (2022); Ralph Brubaker, *A Case Study in Federal Bankruptcy Jurisdiction: Core Jurisdiction (or Not) to Approve Non-Debtor "Releases" and Permanent Injunctions in Chapter 11*, 38 BANKR. L. LETTER No. 2, at 1, 18 n.39 (Feb. 2018); Ralph Brubaker, *Supreme Court Validates "Clarified"* Manville *Insurance Injunction: Channeling . . . and So Much More!*, 29 BANKR. L. LETTER No. 8, at 1, 1-5 (Aug. 2009); Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten* Callaway v. Benton *Case*, 72 AM. BANKR. L.J. 1, 14-22 (1998). As the Solicitor General's reply brief for the petitioner in *Purdue Pharma* accurately pointed out, "the 'purportedly channeled third-party claims' are 'effectively . . . extinguished for nothing,' " and a plan containing a nonconsensual nondebtor release, therefore, " 'channels' the claims against the [the released nondebtors] only in the sense of funneling them into an incinerator." Reply Brief for the Petitioner at 19, Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024) (No. 23-124) (quoting *In re* Purdue Pharma, L.P., 635 B.R. 26, 67-68 (S.D. N.Y. 2021), *rev'd*, 69 F.4th 45 (2d Cir. 2023), *rev'd*, 603 U.S. 204 (2024)).

[4]*See* 11 U.S.C.A. § 524(a).

[5]*Purdue Pharma,* 603 U.S. at 227. Professors Bruce Markell, Jonathan Seymour, and I submitted an *amici curiae* brief in the Supreme Court, in support of that holding. *See* Brief for *Amici Curiae* Bankruptcy Law Professors Ralph Brubaker, Bruce A. Markell, and Jonathan M. Seymour in Support of Petitioner, Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024) (No. 23-124) [hereinafter Professors Brubaker, Markell & Seymour *Purdue Pharma Amici Curiae* Brief], http://www.supremecourt.gov/DocketPDF/23/23-124/280661/20230927174838497_23-124_Amicus%20Brief.pdf.

[6]*Purdue Pharma*, 603 U.S. at 226.

[7]*See generally* Alex Wittenberg, *After Purdue, Bankruptcy Courts Split on Consent Question*, LAW360 BANKRUPTCY AUTHORITY (Mar. 5, 2025, 12:09 a.m.) (summarizing case law).

[8]*See* Co-Mediators' Fifth Interim Status Report at 3, 5-6, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Feb. 21, 2025).

[9]*See, e.g., In re* Lavie Care Centers, LLC, No. 24-55507, 2024 WL 4988600, at *14 (Bankr. N.D. Ga. Dec. 5, 2024).

[10]*See, e.g., In re* Smallhold, Inc., 665 B.R. 704, 716-25 (Bankr. D. Del. 2024); *In re* Chassix Holdings, Inc., 553 B.R. 64, 75-83 (Bankr. S.D.N.Y. 2015).

[11]*See, e.g., In re* Robertshaw US Holding Corp., 662 B.R. 300, 322-24 (Bankr. S.D. Tex. 2024); *Smallhold*, 665 B.R. at 716-25 (only if creditor also votes).

[12]*See, e.g., In re* Arsenal Intermediate Holdings, Inc., No. 23-10097, 2023 WL 2655592, at *2-*8 (Bankr. D. Del. Mar. 27, 2023).

[13]Transcript of Oral Argument at 6-8, 33-34, 62-63, Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024) (No. 23-124) (transcript available at 2023 WL 9375572) [hereinafter *Purdue Pharma* SCOTUS Oral Argument].

[14]*Purdue Pharma*, 603 U.S. at 226 (emphasis added).

[15]*In re* A.H. Robins Co., Inc., 880 F.2d 694, 700-02, 19 Bankr. Ct. Dec. (CRR) 997, Bankr. L. Rep. (CCH) P 72955 (4th Cir. 1989), *aff'g* 88 B.R. 742, 751-55 (E.D. Va. 1988). *See generally* Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. Ill. L. Rev. 959, 963.

[16]*See* Brubaker, 72 Am. Bankr. L.J. at 14-15.

[17]11 U.S.C.A. § 105(a).

[18]*See generally* Brubaker, 1997 U. Ill. L. Rev. 959.

[19]Brubaker, 131 Yale L.J.F. at 977-78. In the Supreme Court briefing, both Purdue Pharma and its academic *amici* claimed otherwise. *See* Brief for Debtor Respondents at 27-28, Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024) (No. 23-124); Brief of Amici Curiae Law Professors in Support of Respondents at 9, Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024) (No. 23-124). That claim was based upon the so-called "bill of conformity" process by which composition agreements amongst creditors were enforced "against a dissenting minority," and "[t]hese orders might be accompanied by injunctions against further actions at law and were enforced, if necessary, by the imprisonment of holdouts." John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 Am. Bankr. L.J. 163, 176 (1996). In one case, Lord Chancellor Francis Bacon even enjoined creditors from pursuing the debtor's sureties who "had conveyed all their estates to the use of the creditors," including "even to their very clothes to satisfy the creditors rateably so far as the same would go." Tiffin v. Hart (1618-1619), *reported in* John Ritchie, Reports of Cases Decided by Francis Bacon in the High Court of Chancery (1617-1621), at 161, 162 (1932). Bacon, however, was "convict[ed] by the House of Lords on charges of corruption in office," which "had the effect of bringing the whole of his judicial conduct into immediate disrepute," and "[h]is decisions thereupon ceased to be cited by counsel or relied upon by Judges." Ritchie, Francis Bacon Chancery Cases, at iii. Moreover, the bill-of-conformity process "was ill-defined and resulted in abuses," and "in the wake of Bacon's resignation in disgrace, bills of conformity were abolished by royal proclamation in 1621." McCoid, 70 Am. Bankr. L.J. at 176. And a few years later, in 1624, Parliament also prohibited bills of conformity by statute. *See* David A. Smith, *The Error of Young Cyrus: The Bill of Conformity and Jacobean Kingship, 1603-1624*, 28 L. & Hist. Rev. 307, 307 (2010); Adam Levitin, *What's 300 Years Among Friends?*, Credit Slips (Oct. 27, 2023, 9:40 p.m.), https://www.creditslips.org/creditslips/2023/10/whats-300-years-among-friends-.html. Chancery's experimentation with the bill of conformity to compel dissenting creditors to adhere to a composition, therefore, never ripened into an accepted, enduring equity practice.

[20]*See* Brubaker, 131 Yale L.J.F. at 966-80.

[21]*See Purdue Pharma*, 69 F.4th at 72-74.

[22]*Purdue Pharma*, 603 U.S. at 216 n.2 (quoting 69 F.4th at 73). The wholesale shift in (and inversion of) the dominant rationalization of nondebtor discharge is nicely illustrated by comparing the Supreme Court's *Purdue Pharma* decision with my comprehensive, book-length analysis and critique of nondebtor discharge in a 1997 law review article. In 1997, discussion of § 1123(b)(6) warranted only brief mention in a footnote. *See* Brubaker, 1997 U. Ill. L. Rev. at 1017 n.209.

[23]Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 466, 137 S. Ct. 973, 197 L. Ed. 2d 398, 63 Bankr. Ct. Dec. (CRR) 242, 77 Collier Bankr. Cas. 2d (MB) 596, 41 I.E.R. Cas. (BNA) 1613, Bankr. L. Rep. (CCH) P 83082 (2017).

[24]*Purdue Pharma*, 603 U.S. at 222 n.5 (citing *Jevic*). *See generally* Brubaker, 131 Yale L.J.F. at 977-80; Professors Brubaker, Markell & Seymour *Purdue Pharma Amici Curiae* Brief, at 15-24.

[25]Brubaker, 1997 U. Ill. L. Rev. at 994 (emphasis added). "[B]y injecting discharge of creditors' non-debtor claims into a [Chapter 11] process constructed for treatment of creditors' claims against the debtor," nonconsensual nondebtor releases "systematically dismantle[d] the Bankruptcy Code's attempt to carefully protect the relative payment rights of creditors of a Chapter 11 debtor," and they did "violence to the rights of the permanently enjoined creditor vis-à-vis (1) other creditors of the released non-debtor and (2) the released non-debtor." *Id.* at 981, 994.

[26]Except, of course, to the extent that the statute specifically provides otherwise, for example, in the nondebtor-release provisions explicitly authorized for certain asbestos obligations in Code § 524(g)(4)(A)(ii)-(iii). As another example, Code § 510(a) provides that an inter-creditor "subordination agreement is enforceable in a [bank-

ruptcy] case . . . to the same extent that such agreement is enforceable under applicable non-bankruptcy law." Thus, a plan can provide for classification and treatment of those creditors' claims consistent with their rights inter se under the terms of a subordination agreement. *See* Brubaker, 1997 U. ILL. L. REV. at 984 n.89.

[27]*Purdue Pharma*, 603 U.S. at 215 (emphasis in original).

[28]*Id.*

[29]11 U.S.C.A. § 1123(b) (emphasis added).

[30]*Id.* at 218 (emphasis in original).

[31]*Id.* at 217-18 (emphasis in original) (citations omitted) (quoting Epic Sys. Corp. v. Lewis, 584 U.S. 497, 512 (2018)).

[32]*Purdue Pharma*, 603 U.S. at 220.

[33]*Id.* at 223.

[34]*Id.* at 215 (emphasis in original).

[35]*Id.* at 216.

[36]*See Purdue Pharma*, 603 U.S. at 262-64 (Kavanaugh, J., dissenting) (stating that "the only provision that could possibly supply authority to include those [consensual nondebtor] releases in the bankruptcy plan is the catchall in § 1123(b)(6)").

[37]*See, e.g.*, Brief for Respondent the Official Committee of Unsecured Creditors of Purdue Pharma L.P., et al. at 16, 37-38, 41, Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024) (No. 23-124), http://www.supremecourt.gov/DocketPDF/23/23-124/285645/20231020112016913_No_23-124_BriefForResptOffCommOfUnsecCreditors.pdf; *Purdue Pharma* SCOTUS Oral Argument, at 62-63 (argument of debtor's counsel).

[38]*Purdue Pharma*, 603 U.S. at 218 (emphasis in original).

[39]*Id.* at 218-19 (citations omitted) (quoting Sossamon v. Texas, 563 U.S. 277, 286, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011)).

[40]11 U.S.C.A. § 1123(b)(3)(A).

[41]*See Purdue Pharma*, 603 U.S. at 219 (stating that a plan "may resolve . . . claims under paragraph (3) . . . because those claims belong to the debtor's estate"); *id.* (stating that the problem with a nondebtor-release provision is that "[r]ather than seek[ing] to resolve claims that substantively belong to" the debtor, they seek to resolve "claims against [released nondebtors] that belong to their" creditors).

[42]*Purdue Pharma*, 603 U.S. at 218 (emphasis in original).

[43]*Id.* (emphasis in original).

[44]*Purdue Pharma*, 603 U.S. at 260-61 (Kavanaugh, J., dissenting) (citations and emphasis omitted) (quoting *Purdue Pharma*, 69 F.4th at 70).

[45]*Purdue Pharma*, 603 U.S. at 220 n.3.

[46]*Purdue Pharma*, 603 U.S. at 261 (Kavanaugh, J., dissenting).

[47]*Purdue Pharma*, 603 U.S. at 219.

[48]*Id.*

[49]*See Purdue Pharma*, 603 U.S. at 260-62 (Kavanaugh, J., dissenting).

[50]*Purdue Pharma*, 603 U.S. at 219 (quoting JONATHAN MACEY, CORPORATION LAWS § 13.20[D], at 13-140 (Supp. 2020-4)).

[51]*See generally* Ralph Brubaker, *Third-Party Nondebtor Releases for "Bankruptcy Grifters": A Response to Professor Simon, in* NETH. ASS'N FOR COMPAR. & INT'L INSOLVENCY L. (NACIIL), REPORTS 2022: THIRD PARTY RELEASES BY MEANS OF BANKRUPTCY LAW, GUARANTEES AND (MASS) TORTS 13, 16 (2024) [hereinafter Brubaker, 2022 NACIIL REPORT]; Ralph Brubaker, *The Fundamental (and Limiting) Status Quo Function of Bankruptcy's Automatic Stay*, 41 BANKR. L. LETTER No. 2, at 1, 9 (Feb. 2021).

[52]Ralph Brubaker, *Creditor/Committee Derivative Litigation: Of Textualism and Equitable Powers*, 22 BANKR. L. LETTER No. 11, at 1, 5-6 (Nov. 2002).

[53]Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 827-28 (2000).

[54]*See generally In re* Pack Liquidating, LLC, 658 B.R. 305 (Bankr. D. Del. 2024).

[55]Meyer v. Fleming, 327 U.S. 161, 169, 66 S. Ct. 382, 90 L. Ed. 595 (1946).

[56]*Id.* at 168, 167.

[57]*See* Brubaker, 2022 NACIIL REPORT, at 15.

[58]*See Purdue Pharma*, 603 U.S. at 261-62 (Kavanaugh, J., dissenting).

[59]*See, e.g.*, 2014 Uniform Voidable Transactions Act § 7(a)(1) (avoidance/rescission); *id.* § 7(b) (post-judgment levy); *id.* § 7(a)(2)-(3) (pre-judgment provisional remedies).

[60]Brubaker, 2022 NACIIL REPORT, at 15-16 (footnotes omitted).

[61]*Purdue Pharma*, 603 U.S. at 218 (emphasis in original).

[62]*Id.* at 219.

[63]*Id.*

[64]*Id.* at 220 n.3.

