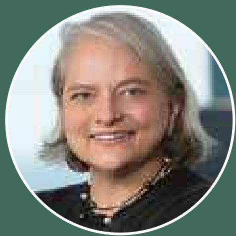

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NO MORE DRAWING OUTSIDE THE LINES: U.S. Supreme Court's Purdue Pharma Decision Constrains Chapter 11 Bankruptcies

OVERVIEW

On June 27, 2024, the U.S. Supreme Court released its highly anticipated opinion in *Harrington v. Purdue Pharma L.P.*, Case No. 23-124 ("*Purdue*").[1] The question before the Court was whether the bankruptcy code lets a court approve, as part of a chapter 11 plan, a release that extinguishes claims held by nondebtors against nondebtor third parties, without such claimants' consent.[2] Nonconsensual third-party releases of nondebtors allow those nondebtors to escape the rigors of filing for bankruptcy protection themselves while still receiving its primary benefit: a discharge of all material liability under a confirmed chapter 11 plan.[3]

This outcome upends decades of chapter 11 practice in many circuits, including the Second and Third Circuits (though other circuits, such as the Fifth and Ninth, had banned the practice.)[4] The decision resolves that circuit split and imposes a uniform law prohibiting nonconsensual nondebtor releases and injunctions in chapter 11 plans.

Although highly controversial, plan proponents have used these releases in chapter 11 cases in the circuits permitting them for decades. This is especially true in mass tort bankruptcy plans.

Purdue is a mass tort bankruptcy case where the debtor leveraged the collective process of bankruptcy to corral thousands of torts claims into bankruptcy to resolve all tort liabilities through a chapter 11 plan. *Purdue* has put into question this strategy because nonconsensual nondebtor releases were an essential part of the intended chapter 11 plan.

The large settlements in mass tort cases like Purdue Pharma's require large financial contributions by nondebtors to satisfy billions in current and future tort claims. In *Purdue*, a nearly $6 billion settlement funded by the nondebtor Sackler family was at stake.[5] Without this settlement and its controversial nonconsensual third-party releases, plan proponents threatened an all-or-nothing tradeoff and the potential for no relief to opioid claimants if reversed.[6]

The bankruptcy court confirmed Purdue Pharma's proposed Chapter 11 plan, but the U.S. District Court reversed the confirmation order. The Second Circuit then reversed the District Court and affirmed the chapter 11 plan.[7] The U.S. Trustee and others sought relief at the Supreme Court.[8] In its 5-4 decision, the Supreme Court held that no authority exists for nonconsensual third party releases under the bankruptcy code and reversed the Second Circuit, again rejecting Purdue Pharma's plan.

Justice Gorsuch, writing for the Court, held "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 affected claimants."[9] The Court remanded the case to the bankruptcy court for further proceedings consistent with the majority opinion.

On remand, the debtors promptly sought court assistance at a July 9 status conference to resume mediation on a new plan.[10] The bankruptcy court granted relief and extended the litigation stay until September 9 to pause lawsuits during the mediation.[11] Plan proponents want fast-track negotiations on a new chapter 11 plan. Meanwhile, the creditor's committee has sought standing to pursue almost $12 billion in fraudulent transfer claims against the Sacklers.[12]

The Sacklers still seem committed to settlement, telling the press after the Supreme Court's decision "that a swift negotiated agreement to provide billions of dollars for people and communities in need is the best way forward."[13] The case is fast moving, and developments will occur after CLW's August publication deadline. This article discusses the majority and dissenting opinions in what seems to have been a close and heated call by the justices. It concludes with some preliminary views on the implications for chapter 11 practice.

1 603 U.S. – (2024); 144 S.Ct. 207 (2024).
2 *Id.* at 2077. For the Questions Presented, visit https://www.supremecourt.gov/qp/23-00124qp.pdf.
3 *Id.* at 2079, 2081. This article uses references third-party and nondebtor releases interchangeably.
4 For a discussion of the circuit court split, see Candice Kline, *Nonconsensual Third-Party Releases in the Spotlight: Challenging the Limits of the Law and Drawing Congressional Scrutiny*, COMMERCIAL LAW WORLD, Vol. 35, Issue 1, pp. 26–35 (2021).
5 *Id.* at 2088 (dissenting opinion).
6 *Id.* at 2015 (dissenting opinion); See also Brief for Debtor Respondents (filed Oct. 23, 2023), available at https://www.supremecourt.gov/DocketPDF/23/23-124/285728/20231020162712854_2023-10-20%20-%20SCT%20No.%2023-124%20-%20Debtor%20Respondents%20Merits%20Br.pdf ("As the bankruptcy court found, without the releases, the plan would 'unravel', and victims would likely recover nothing." *Id.* at p.4.)
7 144 S.Ct. at 2074.
8 *Id.* at 2080.
9 *Id.* at 2088.
10 *See* Letter to Chambers Requesting Status Conference, Docket No. 6498 (filed June 27, 2024), available at https://restructuring.ra.kroll.com/purduepharma/Home-DocketInfo website ("Kroll website").
11 *See* Order Appointing Co-Mediators, Docket No. 6537 (filed July 10, 2024), available at Kroll website.
12 *See* Motion of Official Committee of Unsecured Creditors for Sole Standing to Commence and Prosecute Estate Causes of Action, Docket No. 6523 (filed July 8, 2024).
13 Allison Durkee, *Billionaire Sackler Family Members Could Face Fresh Lawsuits After Purdue Opioid Settlement Falls Apart*, FORBES (July 9, 2024), available at https://www.forbes.com/sites/alisondurkee/2024/07/09/billionaire-sackler-family-members-could-face-fresh-lawsuits-after-purdue-opioid-settlement-falls-apart/.

1. PURDUE LEVERAGED CHAPTER 11 PLAN PROCESS TO SEEK RELIEF AND SETTLE WITH THE SACKERS USING NONCONSENSUAL NONDEBTOR RELEASES

Purdue Pharma, the maker of OxyContin, a pain-relieving opioid drug, filed bankruptcy in 2019 to address thousands of opioid-related claims totaling billions in claimed damages.[14] The opioid public health crisis hurt families and municipalities across the country.[15] Claimants alleged Purdue had a significant role in the crisis by aggressively marketing OxyContin using deceptive marketing practices.[16] That aggressive marketing push resulted in $34 billion in revenue for Purdue from 1996 to 2019, mostly earned from OxyContin sales.[17] The Sackler family, which owned and controlled the company, likewise amassed great wealth – estimated at $14 billion in net worth.[18]

Aware of the litigation and risk after a Purdue affiliate pled guilty to a federal felony for misbranding OxyContin, from 2008 through 2016 the Sacklers transferred around $11 billion to themselves, draining Purdue's financial resources.[19] The Sacklers then placed much of the transferred money in overseas trusts as additional asset protection,[20] and also secured an indemnification agreement with Purdue.[21] When Purdue filed for bankruptcy, the transfers to the Sacklers had weakened its financial health and depleted its remaining assets to the point that there they were not enough assets to satisfy the growing volume of claims against it. Purdue required an outside contribution to its chapter 11 plan and that contribution was coming from the Sacklers.[22]

After significant effort to negotiate a chapter 11 plan, including through extensive use of mediation, the proposed plan intended to convert Purdue to a public benefit corporation and provide distributions to victims and creditors.[23] Purdue's proposed plan included a $4.5 billion contribution from the Sacklers in exchange for a full and comprehensive release of all claims, including those held by nondebtors who did not consent to the plan.[24] Following extensive fact-finding and a six-day confirmation trial, the bankruptcy court confirmed Purdue's chapter 11 plan with the Sackler nondebtor releases mostly intact.[25]

The bankruptcy court concluded that the Sackler releases were appropriate given their large contribution to the plan and the practical considerations around mass tort settlements, such as providing equitable distributions, and the difficulties creditors and victims would face if they sought recovery outside the plan.[26] Citing Second Circuit precedent, the bankruptcy court confirmed the plan.[27]

Various claimants appealed to the district court.[28] While that appeal was pending, the parties revised the proposed settlement with the Sacklers, raising the contribution to $5.5 to $6 billion, which had the result of resolving most of the remaining objections, including those of the handful of states' AGs which had opposed the plan.[29] Improved funding notwithstanding, the district court reversed plan confirmation, finding no authority in the bankruptcy code for the nonconsensual releases of the Sacklers.[30]

The debtors and plan proponents appealed to the Second Circuit, which reversed the district court and revived the bankruptcy court's confirmation order approving the plan.[31] The U.S. Trustee for Region 2, William Harrington, applied to the Supreme Court to stay the decision, which the Court granted when it agreed to take the case.[32]

In the Supreme Court, the primary remaining plan opponent was Harrington.[33] The U.S. Trustee is neither a debtor nor creditor, but a "watchdog" charged with overseeing the integrity of the bankruptcy system. (Some parties and observers questioned his standing to challenge the plan on appeal.) Over 90% of creditors who had voted on the plan approved it, and the unsecured creditors' committee supported the plan.[34] All fifty state attorneys general eventually supported the plan.[35] Regardless, the U.S. Trustee persisted–to finally get a decision on whether authority existed under the bankruptcy code for nonconsensual nondebtor releases in chapter 11 plans.

14 144 S.Ct. at 2077–79.
15 *Id.* at 2078.
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.* at 2078–79.
20 *Id.* at 2079.
21 *Id.* at 2081, n.7.
22 *Id.* at 2101.
23 *Id.* at 2079.
24 *Id.*

25 *Id.* at 2080, 2101.
26 *Id.* at 2101.
27 *Id.* at 2080 (citing confirmation decision, 633 B.R. 53, 95–115 (Bankr. S.D.N.Y. 2021)).The dissenting opinion provides an extensive discussion of the bankruptcy court and second circuit decisions, id. at 2098–2104.
28 *Id.* at 2080.
29 *Id.* at 2101–02.
30 *Id.* at 2080 (citing the district court decision, 635 B.R. 26 (S.D.N.Y. 2021)). An article earlier in this CLW series discussed the district court decision, which caught practitioners by surprise given the decades of precedent in the Second Circuit. See Candice Kline, *Are Nonconsensual Third Party Releases Headed to the Supreme Court?*, COMMERCIAL LAW WORLD, Vol. 36, Issue 3, pp. 32–35 (2022).
31 144 S.Ct. at 2080.
32 *Id. See* Application, No. 23A87 (filed July 28, 2023), petition granted August 10, 2023, U.S. Supreme Court docket, available at https://www.supremecourt.gov.
33 *Id.* at 2103 & n.4.
34 *Id.* at 2103.
35 *Id.*

2. A DIVIDED COURT DEBATED LAW AND POLICY, AND THE ROLE OF THE COURT ITSELF

The Court split hard in *Purdue*, crossing ideological lines, and highlighting the tough call. Justice Jackson of the progressive wing of the Court joined the majority comprised of Justice Gorsuch, writing for the Court, and Justices Alito, Barrett, and Thomas. The dissent, by Justice Kavanaugh, included the remaining progressive Justices Sotomayor and Kagan, and Chief Justice Roberts.

That Chief Justice Roberts joined the dissent was intriguing. His questions at oral argument explored the limitations of courts making public policy versus the role of Congress.[36] He also raised the "no elephants in mouse holes" approach to divining Congressional statutory intent. The majority opinion reflected these views and directed the policy issues back to Congress; yet the Chief joined the dissent.

The majority and the dissent offered differing visions of bankruptcy, interpretations of the bankruptcy code, and even where we go from here. The first line of the majority opinion began with the bankruptcy code and the essence of bankruptcy law.[37] The first line of the dissent berated the decision as "wrong on the law and devastating for more than 100,000 opioid victims and their families."[38] The majority and dissent found little common ground and drew wildly different pictures of the future after the decision. The majority was hopeful a better deal may occur, following the U.S. Trustee's position, but the dissent expected a disaster, a viewpoint argued throughout the plan disputes if the court rejected the Sackler releases.

The dissent was remarkable for its strident and aggressive tone toward the majority, undermining perceptions of civility and collegiality among justices. It argued "today's decision makes little sense legally, practically, or economically."[39] The dissenters, so moved to preserve Purdue's plan and avoid grave injustices from losing the Sackler "all or nothing" settlement, infused their criticism with energetic zeal and urgency. For every criticism, though, the majority answered.

36 The author attended oral argument on December 4, 2023.

37 144 S.Ct. at 2077 ("The bankruptcy code contains hundreds of interlocking rules about 'the relations between' a 'debtor and [its] creditors.'").

38 *Id.* at 2088.

39 *Id.* at 2115.

3. THE MAJORITY OPINION STUCK THE LANDING ON STATUTORY INTERPRETATION

In a 20-page opinion, Justice Gorsuch focused on the bankruptcy code and found no statutory support for nonconsensual third-party releases. His analysis was efficient and adhered closely to the bankruptcy code. It closed gaps long relied on by bankruptcy courts and practitioners to get more from the bankruptcy code than provided by the statute.

For example, the decision left little room under section 105(a) for bankruptcy courts to find reserve equitable power not otherwise permitted by another code provision.[40] This alone may compel practitioners to look carefully at additional statutory authority before seeking equitable relief.

Plan proponents relied on code section 1123(b)(6), which states a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title" [41] to permit nonconsensual third-party releases.[42] The Second Circuit relied on this catchall clause relied on to allow the nondebtor releases in the *Purdue* plan.[43] The majority opinion, though, narrowly interpreted section 1123(b)(6), holding that the provisions only apply to the debtor and finding that they provide no authority for nondebtor releases.[44] The dissent would have interpreted the provision broadly and permitted them.[45] (The majority also found important the existence of section 524(g), which allows injunctions against nondebtors but only in asbestos cases, as undercutting the dissent's argument that 1123(b)(6) "is best read to afford courts that same authority in *every* context.")[46]

The opinion also dismissed as "word games" the debate that a release such as the Sacklers received in the plan is not a "discharge." [47] A confirmed plan discharges the debtor under section 1141(d)(1)(A) and "does not affect the liability of any other entity" under section 524(e).[48] Plan proponents and their supporters argued that the releases granted to the Sacklers differed from the discharge granted under code section 524(e), reasoning that the plan's releases addressed less than all

40 *Id.* at 2082 & n.2. References to bankruptcy code sections are to chapter 11 of title 11 of the U.S. Code, e.g., 11 U.S.C. 105(a).

41 *Id.* at 2081-84.

42 *Id.* at 2081–82.

43 *Id.* at 2082. For the Second Circuit's decision affirming plan confirmation, see *In re Purdue Pharma L.P.*, 69 F.4th 45 (2d. Cir. 2023).

44 *Id.* at 2084–85.

45 *Id.* at 2088, 2095.

46 *Compare* majority view restricting section 524(g)) to asbestos cases only, id. at 2085, *with* dissenting view providing an expansive mass tort application based on congressional intent, id. at 2111–12 .

47 *Id.* at 2085–86.

48 *Id.* at 2081.

the claims and debts facing the Sacklers.[49] The majority, though, found that the plan's releases covered the claims most material to the Sacklers and viewed this as a distinction without a difference.[50]

The majority opinion focused on the law and the "simple bargain" underlying the bankruptcy system: to obtain a discharge of claims, a debtor must have acted honestly and put its assets on the table for creditors.[51] What the majority found difficult to accept was that the Sacklers did not do this.[52] The opinion noted on a couple of occasions that the Sacklers never filed for bankruptcy protection but would receive the practical benefits of a bankruptcy discharge.[53]

The majority also seemed dismayed by the gap between the $11 billion extracted from Purdue by the Sacklers in the years before the bankruptcy filing and the far smaller $4.5 billion first offered (though improved to $5.5-$6 billion during the appeal) in exchange for the releases.[54] The Sacklers' failure to put all their assets on the table was made worse for the majority by a proposed payment schedule for their contributions to the plan, stringing payments out over 10 years. In effect, this arrangement would let the Sacklers keep a significant portion of these monies, earning interest which would fund the contributions, potentially incurring no real loss at all.[55] In the majority's view, the settlement violated the basic principle underlying bankruptcy relief: The Sacklers were not humble and honest debtors holding their hats in hand, surrendering for judgment, and giving up. The majority saw them as abusing the system.

Additionally, the majority struggled with the Sacklers obtaining a full and comprehensive release of claims that might involve fraudulent and wrongful conduct. Section 523 ensnares fraudsters and excepts from discharge debts arising from wrongful acts by small businesses and individuals. Creditors use those provisions with some zeal in smaller cases outside the mass tort context. The majority widened its lens and looked to that same section in the case of the Sacklers and the $6 billion settlement, with no good result for settlement of such larger cases as *Purdue*.[56]

Offended by the Sacklers' effort to dodge accountability, the majority rejected the Sacklers attempt to "seek greater relief than a bankruptcy discharge normally affords ... and seek to do so without putting anything close to all their assets on the table." [57] Section 523 and the "simple bargain" are both policy decisions made by Congress when it enacted the bankruptcy code. That the Court applied them in *Purdue* suggests concerns about a two-tiered bankruptcy system that lets large corporations and billionaires buy releases for wrongful conduct by funding chapter 11 plan settlements when smaller debtors could never receive such a benefit because of the section 523 exceptions from discharge.

The majority relied on a rule of statutory construction called *ejusdem generis*.[58] Although described as an "ancient interpretive principle," this rule is probably foreign to most readers.[59] The rule means that a catchall clause like (b)(6) at the end of a list such as that in 1123(b) must reflect its "surrounding context and read to 'embrace only objects similar in nature' to the specific examples preceding it." [60] The idea, according to the majority, would "afford a statute the scope a reasonable reader would attribute to it." [61] The approach would confine all items in a list to the context and nature of the listed items before it.

Armed with these guidelines, the majority concluded the "appropriate" relief allowed under section 1123(b)(6) pertained to the debtor and in no way permitted nonconsensual nondebtor releases.[62] The result limited the equitable catch-all in (b)(6) to a downspout trickle of related items to those listed in subsections (b)(1)-(5). This restrained approach prevented the broad equitable language of (b)(6) from achieving a greater glory by permitting nonconsensual releases of nondebtors.

The majority also saw a more limited role for bankruptcy courts and criticized the suggestion that bankruptcy courts have "a roving commission to resolve all such problems that happen its way." [63] For the majority, "bankruptcy court's powers are not limitless and do not endow it with power to extinguish [nondebtors' claims] without their consent." [64]

The majority dismissed the many policy reasons for upholding the *Purdue* plan and the Sackler settlement and saw a narrow role for courts in addressing major policy questions. The Court deferred to Congress on the discharge and described its "only proper task is to interpret and apply the law as we find it; and nothing in present law authorizes the Sackler discharge." [65]

After analyzing the bankruptcy code and concluding no authority exists for bankruptcy courts to approve plans with nonconsensual third-party releases, the majority ended on an optimistic note, in contrast with the strident tone of the dissent. Filled with possibility, Justice Gorsuch leaned into an argument made on

49 *Id.* at 2082, 2012.
50 *Id.* at 2081, 2086.
51 *Id.* at 2077–78.
52 *Id.* at 2086.
53 *See, e.g.,* id. at 2077, 2086.
54 *Id.* at 2079–80.
55 *Id.* at 2079.
56 *Id.* at 2085.
57 *Id.* at 2086.
58 *Id.* at 2082–83.
59 *Id.*
60 *Id.* at 2082 (quoting *Epic Sys. Corp. v. Lewis,* 584 U.S. 497 (2018)).
61 *Id.* at 2083.
62 *Id.* at 2084–85.
63 *Id.* at 2084.
64 *Id.*
65 *Id.* at 2087

behalf of the U.S. Trustee that a better plan was still out there.[66]

It has happened before. The Purdue settlement with the Sacklers improved to nearly $6 billion from $4.5 billion after the district court rejected plan confirmation. A similar improvement could occur again.

4. THE DISSENT FOCUSED ON POLICY AND EQUITABLE CONCERNS, AND SOME LAW

The dissent came out swinging. The 54-page dissenting opinion by Justice Kavanaugh—almost three times longer than the majority opinion—simmered throughout with anger and outrage that the nonconsensual third-party releases were essential to the confirmed Purdue plan. If the majority opinion based its authority on the law, the dissent found its authority in public policy, concern for opioid victims, and in state mitigation programs that flowed from the plan. They believed the plan proponents' arguments that the consequences of reversal were nothing short of dire and would leave opioid victims and creditors with nothing. Reversal, warned the dissent, would unravel the plan, and destroy all the good expected from the settlement.[67]

The conventional-wisdom ideological leanings among the dissenting justices highlighted the nonpartisan nature of bankruptcy decisions. The dissent echoed the plan proponents on the merits of the settlement and the profound harm to victims if the plan did not survive. The dissent placed weight on the extensive deliberations and work by the bankruptcy judge to confirm the plan, calling the plan a "shining example of the bankruptcy system at work." [68] It focused on the overwhelming creditor support, though without concern for voting participation.[69] For the dissent, the plan process was thorough, inclusive, and should stand undisturbed.

This desire to leave the Sacker settlement alone and preserve the nonconsensual third-party releases declared essential to the Purdue plan is not new. Without saying so, the dissent leans into the equitable mootness doctrine. Equitable mootness is a court-made doctrine that protects plans after confirmation from the effects that a reversal based on errors of law would inflict and favors plan implementation over legal correctness when unraveling the plan would be inequitable or difficult. Equitable mootness is judicial deference to lower courts, a doctrine that protects reliance on the plan from the few remaining objectors still challenging it on appeal, even if the appeal presents merits.

The dissent found persuasive that there was diverse and overwhelming support for the Purdue Pharma plan, and particularly as relative to the few remaining objectors, described as "a sole individual and a small group of Canadian creditors" besides the U.S. Trustee.[70] (For the Trustee, the dissent in footnote 4 reserved special criticism of his dogged effort to challenge the Sackler releases in the Purdue Plan. The dissent called his position "mystifying" and reduced his role from "bankruptcy watchdog" to the "Regional Trustee for three States." [71] The criticism of the U.S. Trustee was direct: "U.S. Trustee purports to look out for victims and creditors, but here the victims and creditors made emphatically clear that the 'U.S. Trustee does not speak for the victims of the opioid crisis' and is thwarting the opioid victims' efforts at fair and equitable recovery." [72])

This criticism would apply to any objector—and any public interest objector—where threats of standing and a lack of economic stakes could hamper meritorious appeals in other chapter 11 cases. This term, however, the Supreme Court acknowledged a broad right for parties in interest to participate in bankruptcy cases in *Truck Insurance Exchange v. Kaiser Gypsum Co. Inc*, an 8-0 opinion by Justice Sotomayor (who is in the dissent in *Purdue*).[73] This earlier clear statement that parties-in-interest have a valid place in the process may have kept the dissent from declaring that the U.S. Trustee lacked standing, despite plan proponents' invitation to do so.

Throughout the dissent, Justice Kavanaugh feared the total collapse of the Purdue plan and the $6 billion settlement at its heart. This fear and concern—the risk of unwinding a large chapter 11 plan—drove the dissenting justices to harden support for the offending releases, both legally and equitably. The dissent viewed the plan as "fair and equitable" and the only way to get relief for victims and creditors without the downsides of the "tort system" and the inevitable value-destroying race to the courthouse.[74]

Only bankruptcy offers an automatic stay of litigation and an adjudication process that stops the race to the courthouse and forces all parties to the bargaining table. The dissent embraced the superiority of bankruptcy over all other approaches to resolving mass tort liabilities, relying on cases reflecting decades of experience using bankruptcy to resolve mass tort cases (conveniently ignoring several circuits having rejected the approach used by Purdue here) and felt the practice should continue.[75]

66 *Id.*
67 *Id.* at 2115 (relying on oral argument).
68 *Id.* at 2088, 2101–02.
69 *Id.* at 2101.

70 *Id.* at 2103.
71 *Id.*, n.4.
72 *Id.* (citing oral argument transcript).
73 No. 22-1079, 603 U.S. –, 144 S.Ct. 325 (2024).
74 144 S.Ct. at 2101–02, 2092.
75 *Id.* at 2092–93, 2096, 2104, 2114. For the majority's response to "decades" of precedent, see id. at 2086.

For the dissent, the "collective action problem" justified the unique position of chapter 11 bankruptcy courts as a forum for resolving mass tort cases.[76] Professors Casey and Macey developed this argument in their essay, "In Defense of Chapter 11 for Mass Torts" [77] and the dissent heavily relied on their scholarship, citing the essay seven times.[78] It appears that this one essay had more influence than any brief filed. Professors Casey and Macey may be correct in arguing that bankruptcy is the right forum to address mass torts (though with reforms which they explain), but for the majority the cold, dry bankruptcy code is not there yet.

Although policy arguments consume pages of the dissent, it is not without legal criticism. The dissent confronted the majority head on, exclaiming "It is hard to conjure up a weaker *ejusdem generis* argument than the one put forth by the Court today." [79] For the dissent, the purpose of section 1123, the powers embedded in the other subsections (b)(1)-(5), and precedent supported a reserve of "broad powers" for the bankruptcy court in the equitable catchall section 1123(b)(6).[80]

Examples of those powers included the bankruptcy court's power to approve plans that release derivative claims held by nondebtors as part of the debtors' releases under (b)(3) as evidence of nonconsensual releases allowed by the code.[81] The majority, however, distinguished direct claims from derivative claims that belong to the debtor's estate and seemed unconcerned with potential indemnifications claims in *Purdue* or generally, given the potential (as cited by the U.S. Trustee in his Reply Brief) for disallowance or equitable subordination of indemnification claims under code sections 502(e)(1)(B) and 510(c)(1).[82]

The dissent argued that support for *consensual* releases and for full-satisfaction releases, both widely used, can only be found in §1123(b)(6) itself.[83] Since bankruptcy courts regularly approve of both types of releases, such statutory authority must exist. Similarly, bankruptcy courts routinely approve exculpation clauses that protect corporate directors and officers and professionals who work on chapter 11 cases, though such clauses are also without direct statutory authority.[84]

Although the Court's majority opinion did not rule on each of these other types of releases, their vulnerability is obvious: without express statutory authority, any nondebtor release or injunction in a chapter 11 plan is now subject to reversal. It is time for Congress to respond and change the bankruptcy code to align with current chapter 11 practice. The dissent sought to preserve the status quo and defer to practitioners and commentors. The majority reminded us it is statute that matters.

76 *Id.* at 2090–91.
77 90 U. Chi. L. Rev. 973 (2023).
78 *Id.* at 2089, 2092–94, 2102, and 2116.
79 *Id.* at 2106.
80 *Id.* at 2109–11.
81 *Id.* at 2109.
82 *Id.* at 2087, n.7.
83 *Id.* at 2108–09.
84 *Id.* at 2109.

5. GAMES CONCLUDED: CHAPTER 11 CASES FACE CHANGE AND UNCERTAINTY

Supreme Court decisions are often more important for what they leave for another day. Indeed, Justice Gorsuch concluded: "As important as the question we decide today are ones we do not." [85] The Court left unanswered what is consent and whether support exists for bankruptcy courts to approve consensual releases, something presently taken for granted in chapter 11 practice. Foreshadowing the issue, in oral argument Justice Thomas questioned the authority for bankruptcy courts to grant consensual releases; for practitioners this is an ominous sign.

The cure is congressional action, something hard to expect from the same congress that allowed the lapse of the Subchapter V debt limit extension in June 2024. But the Court has told practitioners that policy decisions are up to Congress.

What more can we discern from the opinion? A few selected observations, all subject to the caveat that courts are wrestling with the implications in real time, appeals take a long time to percolate up to the Court, and the Court generally does not try to answer questions not directly before it. It took over three decades for nonconsensual third-party releases to have their day in court.

The Holding: Chapter 11 plans with releases and injunctions that protect nondebtors from direct claims held by other nondebtors are now impermissible if without the consent of the affected nondebtors. Releases by the debtor remain valid and are unaffected by the decision.

Asbestos Cases: The Court highlighted that code section 524(g) permits injunctions and releases protecting certain nondebtors, but only for asbestos cases and within the express scope of that code provision. Following that same model framework, cases like *Purdue* and *Boy Scouts* extended section 523(g) beyond asbestos cases to apply to non-asbestos mass tort liabilities, being opioids and abuse cases, respectively.[86] The Court rejected this evolution as being

85 *Id.* at 2087.
86 For information on the *Boy Scouts* chapter 11 case, see https://cases.omniagentsolutions.com/?clientId=3552.

without legal basis until Congress has revised the bankruptcy code.

Boards, Officers, and Professionals: The bar on nonconsensual nondebtor releases will change how companies and their stakeholders and professionals approach chapter 11 plans. Nonconsensual nondebtor releases have proliferated beyond the asbestos and even mass tort cases; in many plans, these broad releases have become expected and form part of routine chapter 11 plans. *Purdue* closes the door on approving such plans.

Consensual Releases: The Court declined to address consensual nondebtor releases and what is consent, leaving both issues unresolved. Plans that let creditors opt out of nondebtor releases seem unaffected by the opinion, though we can expect future disputes around questions of consent, for example, how to solicit consent and what to do with non-participating creditors. The Opt-in approach seems favored by the U.S. Trustee's office and some courts in the immediate aftermath of Purdue.[87] Opt-in plans that require affirmative creditor consent may yet remain valid. Plans based on consensual nondebtor releases seem consistent with the *Purdue* opinion and may remain lawful.

Full-Satisfaction Releases: The Court declined to address nonconsensual nondebtor releases in plans that provide for the full satisfaction of claims against the released nondebtor, leaving open a question about what full satisfaction is. This is an issue as plans confirmed as full satisfaction plans seem to show substantial impairment post-confirmation. A recent example is the *Boy Scouts* case.

Substantially Consummated Plans: The Court did not say what should happen to plans with nonconsensual nondebtor releases that have gone into effect, with plan distributions commenced. This deference may protect cases like *Boy Scouts* that have gone effective. The *Boy Scouts* plan has escaped this snare, though it and other non-asbestos cases with active appeals could stumble on further review.

Equitable Mootness: The equitable mootness doctrine may be the next longstanding bankruptcy doctrine to fall. Equitable mootness protects plans from being unraveled by objectors who appeal plan confirmation. After *Purdue*, though, this judge-made doctrine seems vulnerable, as it exists outside any statutory authority under the bankruptcy code except section 105(a). The *Purdue* majority rejected any standalone authority under section 105(a). Equitable mootness, long enforced by policy to protect reliance on confirmed plans and to avoid practical difficulties of unwinding chapter 11 plans, may fall short. An expansion of statutory mootness under code section 363(m), which protects reliance on bankruptcy sale and lease transactions, may hint at a possible legislative fix.

Exculpation: Exculpation clauses seem vulnerable after the *Purdue* opinion as nonconsensual third-party releases. An approach could have debtors solicit consent for these releases like the other releases. A practical near-term approach is for chapter 11 plans to maintain the existing plan form treatment and see how the exculpation clause and injunction weather plan objections.

For example, post-*Purdue*, the Southern District of New York bankruptcy court denied releases to corporate officers and directors based on violating the executive compensation restrictions in code section 503(c) while allowing the releases for non-insiders over the objection of the U.S. Trustee, without mentioning Purdue or otherwise ruling on the permissibility of the releases.[88]

Texas Two-Step: The Court did not address divisive mergers and the "Texas Two-Step" maneuver increasingly common in mass tort cases. Although enterprise liability management seems likely to persist, the attractiveness of using bankruptcy to resolve the mass tort liabilities of the liability-laden affiliate may wane. J&J/LLT Management (formerly LTL Management) is probably the first test case post-*Purdue* in its third attempt at securing bankruptcy relief (now planned to occur in Texas instead of New Jersey, the place of its twice dismissed attempts at bankruptcy relief) to control and resolve its substantial talc-based product liability issues.[89]

Meanwhile, congressional leaders have introduced bipartisan legislation aimed at banning the two-step practice. The legislation, called the Ending Corporate Bankruptcy Abuse Act of 2024, would require bankruptcy courts to presume bad faith under several scenarios common to Texas Two-Step transaction and limit preliminary injunctions protecting nondebtor entities.[90]

Preliminary Injunctions: Preliminary injunctions at the outset of the case still seem possible, though they too accrue skepticism in some courts, e.g., *3M/Aearo Technologies*.[91] While it is an essential part of the mass tort playbook to obtain a stay of all litigation on day one, courts do not always grant them and even on remand in *Purdue*, the injunction is a short 60 days.

87 *See* Dietrich Knauth, *Red Lobster Can't Use 'Opt-Out' Liability Releases for Bankruptcy, Judge Rules,* REUTERS (July 26, 2024), available at https://www.reuters.com/legal/litigation.

88 *See* Decision, *In re Mercon Coffee Corp.*, No. 23-11945, Docket No. 674 (Bankr. S.D.N.Y. July 19, 2024) (Wiles, J.).

89 For information about the J&J/LLT Management (fka LTL Management) chapter 11 case, see https://dm.epiq11.com/case/redrivertalc/info. J&J also issues press releases about the bankruptcy at https://www.jnj.com/media-center/press-releases.

90 For the bill's text, see Press Release, *Whitehouse, Hawley, Sykes, Gooden Introduce Bipartisan Legislation to Deter 'Texas Two-Step' Bankruptcy Trick* (July 23, 2024), available at https://whitehouse.senate.gov/news/release/.

91 For information on the Aearo Techs. chapter 11 case, see https://restructuring.ra.kroll.com/aearotechnologies/Home-Index.

Courts since the *Purdue* decision seem cautious yet permissive under the right facts.[92]

Forum-Shopping to Foreign Jurisdictions: Several commentators and practitioners predict a movement to use foreign insolvency regimes that grant nonconsensual third-party releases and then seek recognition of the foreign main proceeding under the chapter 15 cross-border insolvency provision to enforce the releases in the U.S. as a matter of comity.

Forum shopping is already rife in chapter 11 practice. Before *Purdue*, it was essential in mass tort cases to shop the case into a circuit that granted nonconsensual third-party releases. With a uniform ban on nonconsensual third-party releases across the country, there will be less necessity to shop a case on that basis alone, although other reasons cited for venue shopping will persist. Time will tell if releases alone would compel a large company to file the case in a foreign country. Other factors, such as flexibility and costs, may drive insolvency cases to foreign lands.

CONCLUSION

Any future authority for nonconsensual third-party releases beyond the section 524(g) for asbestos cases must come from Congress and not the courts. Whether this constraint and others that may evolve in the courts cause less demand for bankruptcy filings is an open question. Major chapter 11 stakeholders, such as insurers and senior lenders who often were reliant on comprehensive releases, must adapt to post-*Purdue* realities. It remains true that bankruptcy offers an experienced forum for addressing the collective action problem; the creativity and resilience of bankruptcy practitioners seem likely to find a path forward.

As embraced by plan proponents and the dissent, pessimism reigns over prospect of any better deal with the Sacklers, let alone the efficacy of chapter 11 in mass tort cases post decision. The majority and the U.S. Trustee suggest optimism deserves its due. That optimism—and respect for the rule of law—lies at the heart of the hard work of restructuring and settlements.

[Ed. Note - The CLLA's bankruptcy section has a subcommittee on third-party releases and has been working on proposed legislation to solve this practical problem. The league also filed an amicus brief in Purdue. Please contact Dawn Federico at CLLA.org if you want to learn about or join our efforts.] ■

92 For a post-*Purdue* opinion describing updates to preliminary injunction analysis, see *In re Parlement Techs., Inc.*, No. 24-10755, Docket No. 102, 2024 WL 3417084 (Bankr. D. Del. July 15, 2024) (Goldblatt, J.).