

THIRD-PARTY LIABILITY
RELEASES AFTER *PURDUE*
PHARMA

Harrington v. Purdue Pharma L.P., 144 S.Ct. 2071, 2088 (2024):

“Confining ourselves to the question presented, we hold only 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 affected claimants.”

direct claims by creditors or shareholders against non-debtor third party

- e.g., officers, directors, or other principals
- affiliates, insurers, other creditors
- guarantors
- for direct personal liability
 - e.g., fraud, conspiracy, aiding & abetting, joint tortfeasor
- cause of action does not belong to estate
 - so estate rep/s have no standing/authority to prosecute such third-party claims

See Caplin v. Marine Midland Grace Tr. Co., 406 U.S. 416 (1972)
 - nor compromise/settle such claims

See Purdue Pharma, 144 S. Ct. at 2084 & n.3, 2086

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual release
 - and permanent “channeling” injunction
- expressly permitted for certain third-party claims in asbestos bankruptcies in 1994 *Manville* legislation
 - See Code § 524(g)(4)(A)(ii)-(iii)
 - See, e.g., *In re Red River Talc LLC*, 2025 WL 102930 at *35-*41 (Bankr. S.D. Tex. Mar. 31, 2025)

Estate Claims

release of claims belonging to the estate

- including claims that individual creditors or shareholders can assert outside bankruptcy
 - e.g., fraudulent transfer claims
 - corporate derivate suits

See, e.g., Protective Comm. v. Anderson, 390 U.S. 414 (1968); Code § 1123(b)(3)(A)

Property of the Estate

other *in rem* releases and injunctions

- insurance injunctions

See, e.g., In re Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988); *In re Hopeman Bros., Inc.*, 667 B.R. 101 (Bankr. E.D. Va. 2025); *In re Roman Catholic Diocese of Rockville Centre*, 665 B.R. 71 (Bankr. S.D.N.Y. 2024)

- successor liability injunctions
- partnership debtor releases/injunctions for individual partners

Exculpation Provisions

See, e.g., Blixseth v. Credit Suisse, 961 F.3d 1074 (9th Cir. 2020); *In re Pac. Lumber Co.*, 584 F.3d 229 (5th Cir. 2009); *In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000)

Post-Purdue: *See, e.g., In re Smallhold, Inc.*, 665 B.R. 704, 711 (Bankr. D. Del. 2024) (dicta: *Purdue* “does not affect the practice of exculpation of estate fiduciaries (which is expressly authorized by Third Circuit precedent)”)

Gatekeeper Injunctions

See, e.g., In re Highland Capital Mgmt., L.P.,
132 F.4th 353 (5th Cir. 2025)

“Full Payment” Plans

See Purdue Pharma, 144 S. Ct. at 2088:

“Nor do we have occasion today to . . . pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor.”

Post-Purdue: *See, e.g., In re Red River Talc LLC*, 2025 WL 1029302 at *33-*34 (Bankr. S.D. Tex. 2025); *In re Smallhold, Inc.*, 665 B.R. 704, 710 (Bankr. D. Del. 2024) (“But even if such a release may be imposed in an appropriate case, the argument for such a release is not sufficiently developed by the parties to warrant its imposition.”)

See generally David R. Kuney, *The Aftermath of Purdue Pharma: The Myth of the Full-Pay Plan*, 43 AM. BANKR. INST. J. No. 8, at 12 (Aug. 2024)

Consensual Releases

See Purdue Pharma, 144 S. Ct. at 2088:

“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 . . . ”

Consensual Releases

- What constitutes sufficient consent?
 - vote in favor of plan?

*Compare, e.g., In re Lavie Care Centers LLC, 2024 WL 4988600 at *14 (Bankr. N.D. Ga. Dec. 5, 2024) (yes), and In re Chassix Holding, Inc., 533 B.R. 64 (Bankr. S.D.N.Y. 2015) (yes), with In re Arrowmill Dev. Corp., 211 B.R. 497 (Bankr. D.N.J. 1997) (no).*

Consensual Releases

- What constitutes sufficient consent?
 - failure to opt out of release?
 - **YES:** See, e.g., *In re Spirit Airlines, Inc.*, 2025 WL 737068 (Bankr. S.D.N.Y. Mar. 7, 2025); *In re Robertshaw US Holding Corp.*, 2024 WL 3897812 (Bankr. S.D. Tex. Aug. 16, 2024); *In re Roman Catholic Diocese of Syracuse*, 2024 WL 5456196 (Bankr. N.D.N.Y. Nov. 14, 2024)
 - **NO:** See, e.g., *Patterson v. Mahwah Bergen Retail Grp, Inc.*, 636 B.R. 641 (E.D. Va. 2022); *In re Tonawanda Coke Corp.*, 662 B.R. 220 (Bankr. W.D.N.Y. 2024)
 - **SOMETIMES YES, SOMETIMES NO:** See, e.g., *In re Smallhold, Inc.*, 2024 WL 4296938 (Bankr. D. Del. Sept. 25, 2024) (only if creditor also votes); *In re Chassix Holdings, Inc.*, 533 B.R. 64 (Bankr. S.D.N.Y. 2015) (same)

Consensual Releases

- If failure to opt out of release is consent, what constitutes failure to opt out of release?
 - not signing/checking separate opt-out election
See, e.g., In re Washington Mutual, Inc., 442 B.R. 314 (Bankr. D. Del. 2011); *In re DBSD N. Am., Inc.*, 419 B.R. 179 (Bankr. S.D.N.Y. 2009); *In re Consecro, Inc.*, 301 B.R. 525 (Bankr. N.D. Ill. 2003)
 - not voting on plan
See, e.g., In re Smallhold, Inc., 2024 WL 4296938 (Bankr. D. Del. Sept. 25, 2024); *In re Chassix Holdings, Inc.*, 533 B.R. 64 (Bankr. S.D.N.Y. 2015)
 - not objecting to plan
See, e.g., In re Arsenal Intermediate Holdings, LLC, 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023)

Consensual Releases

- What constitutes sufficient consent?
 - use of “death trap” to induce “consent” to release?
 - *See, e.g.*, recently proposed plan in *Purdue Pharma* case

Consensual Releases

- Are consensual third-party *plan* releases permissible at all?
 - See, e.g., *In re Lavie Care Centers, LLC*, 2024 WL 4988600 at *13-*14 (Bankr. N.D. Ga. Dec. 5, 2024)
 - See generally Ralph Brubaker, *Taking the Purdue Pharma Decision Seriously: Not Even Consensual Nondebtor Plan Releases are Permissible (Part I)*, 45 BANKR. L. LETTER No. 3 (Mar. 2025)

Temporary Stays

See, e.g., Celotex Corp. v. Edwards, 514 U.S. 300 (1995); *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648 (1935)

See generally 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, 22-47 (1998)

Post-Purdue decisions:

In re Hal Luftig Co., 2025 WL 586757 (Bankr. S.D.N.Y. Feb. 24, 2025); *In re Parlement Techs., Inc.*, 661 B.R. 722 (Bankr. D. Del. 2024); *In re Coast to Coast Leasing, LLC*, 661 B.R. 621 (Bankr. N.D. Ill. 2024)

Co-Defendant Indemnification/Contribution Bar Order for Settling Defendant

See, e.g., In re Munford, Inc., 97 F.3d 449 (11th Cir. 1996)

See generally Ralph Brubaker, *An Incipient Backlash Against Nondebtor Releases? (Part I): The “Necessary to Reorganization” Fallacy*, 42 BANKR. L. LETTER No. 2 (Feb. 2022)

International Insolvency Tourism: Shopping for Third-Party Releases

See, e.g., In re Crédito Real, S.A.B., 2025 WL 977967 (Bankr. D. Del. Apr. 1, 2025); *In re Avanti Commc'ns Grp., PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018).

See generally Bruce A. Markell, *Domestic Entities as Chapter 15 Debtors: A Possibility?*, 41 BANKR. L. LETTER No. 7 (July 2021)