HARRINGTON V. PURDUE PHARMA

AS WE (DON'T) FORGIVE OUR (NON) DEBTORS

Laura N. Coordes

BANKRUPTCY CASES DON'T always make the mainstream news, but the Supreme Court's decision in *Harrington v. Purdue Pharma*[1] made a splash this summer. *Purdue* involved the opioid epidemic, a wealthy and mysterious family, and that family's response to mass tort litigation that threatened to drain their wealth.

In *Purdue*, the Supreme Court held that the Bankruptcy Code does not authorize the use of non-consensual non-debtor releases, essentially saying that bankruptcy law does not permit a release of and injunction against claims directed toward a non-debtor without the claimants' consent.[2]

THE TROUBLE WITH OXYCONTIN

For years, Purdue Pharma ("Purdue") manufactured and marketed an opioid called OxyContin.[3] The Sackler family owned and controlled Purdue, so when OxyContin sales soared, the Sacklers became astronomi-

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[1] 144 S. Ct. 2071 (2024).

[2] *Id*. at 2088.

[3] *Id*. at 2078.

cally wealthy. Things began to unravel for the Sacklers after investigations revealed that Purdue and the Sacklers had used deceptive marketing tactics, promoting OxyContin as safe and non-addictive when, in fact, it was highly addictive.

The Sacklers soon saw the writing on the wall and began draining Purdue of its assets. They transferred approximately $11 billion to overseas trusts and family-owned companies – out of the reach of opioid victims and other creditors, many of whom sued Purdue for its role in the opioid crisis. The Sacklers eventually put Purdue in bankruptcy and proposed a deal: the Sackler family would pay Purdue about $4 billion, in payments spread over a decade; in return, Purdue would seek an order from the bankruptcy court extinguishing any claims the bankruptcy estate had against the Sacklers, as well as any lawsuits opioid victims could bring against the family.[4] In legal terms, the Sacklers sought a release of all current claims against them and an injunction barring any future claims.

If the Sacklers had themselves been debtors in bankruptcy, their request would not have raised so many eyebrows. Bankruptcy law provides releases and injunctions to debtors who seek relief in bankruptcy court. The problem was that the Sacklers were not debtors; as far as Purdue's bankruptcy was concerned, they were third parties. The issue for the bankruptcy court to decide was whether this deal was appropriate.

At first, things seemed to be going well for Purdue and the Sacklers. Purdue included the Sackler deal as the centerpiece of its bankruptcy plan. Most of the creditors that voted in the bankruptcy supported the plan. Notably, however, of the creditors eligible to vote on the plan, fewer than 20% voted at all.

The bankruptcy court then confirmed Purdue's plan over the objections of some holdout creditors.[5] Significantly, a handful of states and the District of Columbia (the "objecting states") objected.[6] The objecting states appealed to the district court, which vacated the bankruptcy court's decision on the grounds that the Sackler deal was not permissible.[7] Undeterred,

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[4] *Id*. at 2079.

[5] In re Purdue Pharma L.P., 633 B.R. 53, 95 (Bankr. S.D.N.Y. 2021).

[6] *Purdue*, 144 S. Ct. at 2080.

[7] In re Purdue Pharma, L.P., 635 B.R. 26, 115 (S.D.N.Y. 2021).

Purdue appealed to the Second Circuit while simultaneously working out a new deal. This time, the Sacklers upped their contribution to approximately $6 billion, on the condition that the objecting states withdraw their objections.[8] They did, and a divided panel of the Second Circuit reversed the district court and revived the bankruptcy court's order approving the plan as modified.[9]

The U.S. Trustee[10] then asked the Supreme Court to stay the Second Circuit's decision and to take up the case. The Court agreed, in order to resolve a circuit split over whether third-party releases, like those at the heart of Purdue's plan, were permissible in bankruptcy.

THE *PURDUE* MAJORITY

In a 5-4 decision, the Supreme Court struck down Purdue's plan, holding that non-consensual third-party releases are not authorized by the Bankruptcy Code.[11] Justice Neil Gorsuch wrote the majority opinion, which began by framing bankruptcy as a trade-off: a debtor receives a discharge of virtually all its debts, but only by putting virtually all of its assets on the table for distribution to creditors in return.[12] According to the majority, the Sacklers sought to reap the benefits of bankruptcy without making the trade of putting virtually all of their assets on the table.

The majority opinion largely steered clear of policy arguments, instead relying on the text of the Bankruptcy Code to justify its reasoning. In the majority's view, the case was about statutory interpretation. The majority therefore homed in on § 1123 of the Bankruptcy Code, which delineates mandatory and permissive provisions for a bankruptcy plan.[13] The Court

[8] *Purdue*, 144 S. Ct. at 2080.

[9] In re Purdue Pharma L.P., 69 F.4th 45 (2d Cir. 2023).

[10] The United States Trustee is the "bankruptcy watchdog." U.S. Trustees are part of the Department of Justice and oversee bankruptcy case administration.

[11] The Court did acknowledge that Congress has implemented a special rule for asbestos-related bankruptcies. This rule allows non-consensual third-party releases, but only in this limited context. *See Purdue*, 144 S. Ct. at 2085.

[12] *Id*. at 2077-78.

[13] 11 U.S.C. § 1123 (2005).

focused in particular on § 1123(b), which lays out permissive plan provisions in six subsections. Subsections (1) through (5) deal with permissive plan provisions regarding claims and property of either the debtor or the bankruptcy estate. Subsection (6) is a catchall provision, which allows a plan to "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." The question before the Court was how broadly to read this catchall – could a non-consensual third-party release fit within "any other appropriate provision"?

No, said the Court. Section 1123(b)(6) must be read in context with the five subsections that precede it.[14] Because the preceding subsections all concern the debtor, the majority reasoned that subsection (6) must also concern the debtor. Thus, "any other appropriate provision" had to be a provision involving the debtor, rather than a third party. As applied to the releases in *Purdue*, the majority held that the Sackler releases could not be authorized by (b)(6) because they extinguished claims that non-debtors (creditors) had against other non-debtors (the Sacklers).[15]

Having established a lack of statutory support for the releases, the majority turned briefly to policy. It acknowledged that bankruptcy law addresses collective action problems – a point the dissent vociferously made – but pointed out that bankruptcy does not do so to the exclusion of everything else.[16] Returning to the idea of bankruptcy as a trade-off, the majority observed that the Sackler release would have given the Sacklers more than what they could have gotten if they had in fact filed for bankruptcy.[17] That's because the release would have extinguished claims against the Sacklers for things like fraud, willful injury, and wrongful death. For policy reasons, bankruptcy law generally does not provide that kind of release even to debtors.[18]

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[14] *Purdue*, 144 S. Ct. at 2082.

[15] *Id*. at 2084.

[16] *Id*. at 2084 ("No statute pursues a single policy at all costs.").

[17] *Id*. at 2085 ("[T]he Sacklers seek to pay less than the code ordinarily requires and receive more than it normally permits.").

[18] *See* 11 U.S.C. § 523 (2023) (laying out exceptions to discharge).

Although the Court found no textual ambiguity in § 1123, the majority opinion concluded by examining historical practice. Finding that every bankruptcy law in U.S. history generally reserved the benefits of a discharge only to debtors, the majority concluded that if Congress had wanted to alter this result, it would have done so expressly rather than through an oblique catchall provision.[19]

Having supported its conclusion with textual analysis, policy, and historical practice, the majority concluded by emphasizing the limited nature of its holding and by highlighting the numerous questions that remain open and unresolved with respect to third-party releases in bankruptcy.[20]

THE VOCIFEROUS DISSENT

Justice Brett Kavanaugh's dissent, which was joined by Chief Justice John Roberts and Justices Sonia Sotomayor and Elena Kagan, was raw and emotional, in stark contrast to the measured and methodical majority opinion. The dissent began almost immediately with a purpose-based argument: bankruptcy's purpose is to solve collective action problems and prevent a race to dismantle the debtor and its assets. The Purdue plan, "a shining example of the bankruptcy system at work," embodied this purpose, according to the dissent.[21] The dissent went on to lament the "severe" consequences of "throw[ing] out the plan" and "categorically prohibit[ing] non-debtor releases."[22]

Justice Kavanaugh divided the opinion into three substantive parts. In the first, he used purpose and policy to explain why non-debtor releases are "often appropriate and essential."[23] Notably, "[i]n many cases, there is no workable alternative other than bankruptcy for achieving fair and equitable recovery for mass-tort victims."[24]

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[19] *Purdue*, 144 S. Ct. at 2086.

[20] *Id*. at 2087-88.

[21] *Id*. at 2088 (Kavanaugh, J., dissenting).

[22] *Id*. at 2088-89.

[23] *Id*. at 2090.

[24] *Id*. at 2092.

The dissenting opinion maintained that bankruptcy is capable of resolving problems that have stymied other parts of the legal system.[25] Because of this, § 1123(b)(6)'s use of the word "appropriate" allows bankruptcy judges to have wide discretion. And, according to the dissent, bankruptcy judges have exercised that discretion appropriately, approving non-debtor releases in "narrow circumstances."[26]

The second part of the dissenting opinion explains the importance of third-party releases to the *Purdue* case specifically. Here, Justice Kavanaugh notes that Purdue had indemnified the Sacklers.[27] Consequently, he reasoned that if the Sacklers were sued, nothing was stopping them from turning around and looting Purdue to satisfy the claims against them. Some scholars have already questioned the soundness of this claim, so I will leave a full analysis of its merits to them.[28] However, the dissent presented an alternative reason to support these releases – namely, that they increased the money available for Purdue to distribute to its creditors.[29] As most opioid victims would not find it worth their time or money to take on the Sackler family, the dissent viewed the releases as a deal the victims struck with the Sacklers so that more money would be available to everyone. The releases were, therefore, not simply essential to Purdue's reorganization but essential to getting victims paid at all. Thus, it was unsurprising to the dissent that the victims provided "almost universal[] support" for the plan.[30]

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[25] *Id*. ("[I]t may be uncertain whether the victims can recover in tort suits against the non-debtors due to legal hurdles or difficulty reaching the non-debtors' assets."); *see id*. at 2094 ("[I]n some cases where various closely related but distinct parties share liabilities or share assets (or both), bankruptcy provides the *only* forum in the U.S. legal system where a unified and complete resolution of mass-tort cases can reliably occur in a manner that results in a fair recovery and distribution for all claimants.") (emphasis in original) (internal quotations omitted).

[26] *Id*. at 2095.

[27] *Id*. at 2099.

[28] *See, e.g.,* Jonathan C. Lipson & Pamela Foohey, *The End(s) of Bankruptcy Exceptionalism: The Future of Mass Tort Reorganization After Purdue Pharma*, HARV. BANKR. ROUNDTABLE (July 17, 2024), bankruptcyroundtable.law.harvard.edu/2024/07/17/the-ends-of-bankruptcy-exceptionalism-the-future-of-mass-tort-reorganization-after-purdue-pharma/ (noting that Justice Kavanaugh "apparently forgot how joint and several liability and corporate indemnification work").

[29] *Purdue*, 144 S. Ct. at 2100 (Kavanaugh, J., dissenting).

[30] *Id* at 2103. It is difficult to understand how 99% of 20% (recall that only about 20% of

Finally, the third part of the dissent directly attacked the majority's arguments. It claimed that the true problem the majority had with the plan was that it viewed the Sacklers' proposed contribution as "insufficient."[31] It also took issue with the majority's statutory analysis, arguing that non-debtor releases "obviously" concern the debtor.[32]

The dissent concluded by emphasizing what it saw as the dire outcomes of the majority's decision for both the parties in *Purdue* and the bankruptcy system as a whole. "Opioid victims and other future victims of mass torts will suffer greatly in the wake of today's unfortunate and destabilizing decision."[33]

WHAT'S NEXT?

The Court's decision has, unsurprisingly, generated a lot of commentary. Like most Supreme Court decisions, it resolves some issues and generates uncertainty about others.[34] Notably, the Court avoided discussing the constitutionality of non-consensual third-party releases and held only that the Bankruptcy Code itself prohibits them.[35]

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those eligible to vote did vote) amounts to "universal support," but I will leave that to the mathematicians to explain.

[31] *Id*. at 2104.

[32] *Id*. at 2106.

[33] *Id*. at 2116.

[34] *See* Zack Tripp et al., *Supreme Court Rejects Non-Consensual Third-Party Releases in Chapter 11 Plans*, WEIL (June 28, 2024), *available at* www.weil.com/-/media/mailings/2024/q2/supreme-court-rejects-non-consensual-third-party-releases-in-chapter-11-plans.pdf ("The Court's decision brings certainty to bankruptcy law by resolving a major question that had divided the circuit courts of appeals and the lower courts … . The broader impact of this decision on bankruptcies going forward … remains to be seen.").

[35] *See* Michelle McGreal, Douglas Deutsch, & Robert Johnson, *Purdue Pharma Bankruptcy Ruling Sidesteps Chapter 15 Implications*, BLOOMBERG L. (July 10, 2024) (suggesting that the Court's decision may encourage multinational companies to file for bankruptcy outside the U.S. and to use chapter 15 to recognize and effectuate third-party releases approved by a foreign court because the Court said nothing about the constitutionality of the releases or whether they violated public policy); Lipson & Foohey, *supra* note 28 (noting that the Court failed to address constitutional concerns or to address "deeper questions of structural exceptionalism").

In the months since the Court issued its decision, two courts have already held that *Purdue* does not preclude them from issuing preliminary injunctions to halt lawsuits against non-debtors.[36] And, of course, lawyers are already testing the scope and impact of the decision.[37]

The contrast between the majority and dissenting opinions is striking, and reads almost like a battle between head and heart. Justice Gorsuch's majority opinion was methodical and even technical, while Justice Kavanaugh's passionate dissent was heated and emotional. The *Purdue* opinions also raise a question about the role policy should play in court decisions. Despite the majority's best efforts to characterize the issue in the case as one of statutory interpretation, policy concerns were a constant theme throughout the case.

Justice Kavanaugh's dissent raised several structural questions about separation of powers and overlapping areas of law. He lamented the lack of a workable alternative to the bankruptcy system for addressing mass torts. But this seems like a problem for Congress, not the courts, to resolve. Furthermore, although Justice Kavanaugh noted that courts have used their discretion to approve non-consensual third-party releases in "narrow circumstances" only, those narrow circumstances take place in the broad realm of mass tort bankruptcies, affecting hundreds of thousands of people.

This is not to say the majority opinion was perfect. Far from it. In stressing the limited nature of its holding, the majority drew a roadmap for those seeking workarounds. And the majority's failure to engage with broader constitutional and policy issues leaves the door open for parties to test the waters with legislative reform and creative court maneuvers.

CONCLUSION

In an era where creativity is a hallmark of large chapter 11 practice, *Purdue* saw the Court begin to put down some limits on what bankruptcy law can

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[36] *See* Bill Rochelle, *Chicago's Judge Cox Enjoins Suits Against Nondebtors, Distinguishing* Purdue, ROCHELLE'S DAILY WIRE (July 23, 2024), www.abi.org/newsroom/daily-wire/chicago%E2%80%99s-judge-cox-enjoins-suits-against-nondebtors-distinguishing-purdue (discussing these cases).

[37] *See* Thomas Gleason & Evan Ochsner, *Purdue Pharma Bankruptcy Deal Ruling is Taking Courts by Storm*, BLOOMBERG L. (July 25, 2024), news.bloomberglaw.com/bankruptcy-law/purdue-pharma-bankruptcy-deal-ruling-is-taking-courts-by-storm.

do. Time will tell whether those limits hold. Commentators have been remarkably quick to highlight the weaknesses of the Court's opinion and to posit workarounds. Proponents of allowing non-debtors to take advantage of bankruptcy's benefits may have lost a battle, but there is a larger war still to come.