The Purdue Pharma Ruling – Some Clear Rules, Some Grey Areas, and the Implications for Victims

Bradford J. Sandler
Jonathan Kim
Pachulski Stang Ziehl & Jones LLP

Recently, the U.S. Supreme Court issued its momentous ruling in the Purdue Pharma Chapter 11 case on the permissibility of nonconsensual third party releases.[1] The Supreme Court, in a 5-4 ruling, categorically held 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." This is perhaps the most important and consequential bankruptcy decision issued in this millennium, if not longer, which will have ripple effects beyond mass tort cases and potentially impact many other larger Chapter 11 cases.

Plan / Settlement Background

Owned and controlled by the Sackler family, Purdue began marketing OxyContin, an opioid prescription pain reliever, in the mid-1990s. After Purdue earned billions of dollars, in 2007, one of its affiliates pleaded guilty to a federal felony for misbranding OxyContin as "less addictive" and "less subject to abuse." Thousands of lawsuits followed. The Sacklers proceeded to withdraw approximately $11 billion from Purdue - roughly 75% of the company's total assets - over the next decade and more, leaving the company in "a significantly weakened financial" state.

In 2019, Purdue filed for Chapter 11 bankruptcy protection, and the Sacklers initially proposed to return approximately $4.3 billion (spread out over a decade) to Purdue's bankruptcy estate; this proposed amount was later increased by the Sacklers to $5.5 - 6.0 billion.[2] In exchange, the Sacklers sought a judicial order releasing the family from all opioid-related claims and enjoining victims from bringing such claims against them in the future:

> The release sought to void not just current opioid-related claims against the family, but future ones as well. It sought to ban not just claims by creditors participating in the bankruptcy proceeding, but claims by anyone who might otherwise sue Purdue. It sought to extinguish not only claims for negligence, but also claims for fraud and willful misconduct…. And it proposed to end all these lawsuits without the consent of the opioid victims who brought them. To enforce this release, the Sacklers sought an injunction 'forever stay[ing], restrain[ing,] and enjoin[ing]' claims against them…. That injunction would not just prevent suits against the company's officers

[1] *Harrington v. Pharma L.P.*, No. 23-124, 2024 U.S. LEXIS 2848 (U.S. June 27, 2024). Note that this opinion addressed non-consensual releases to non-debtors, and did not address consensual releases or releases of claims held by a debtors' bankruptcy estate.

[2] *Id*., at *12-*13 ("As for individual victims harmed by the company's products, Purdue offered, with help from the Sacklers' anticipated contribution, to provide payments from a base amount of $3,500 up to a ceiling of $48,000 (for the most dire cases, and all before deductions for attorney's fees and other expenses)…. For those receiving more than the base amount, payments would come in installments spread over as many as 10 years.").

and directors but would run in favor of hundreds, if not thousands, of Sackler family members and entities under their control.[3]

While thousands of opioid claimants approved of the proposed exchange, together with the support of all 50 state Attorneys General, some parties, including the U.S. Trustee and certain U.S. states, opposed the relief, arguing that nonconsensual third-party releases are not permitted.[4] The bankruptcy court approved Purdue's proposed reorganization plan, including the broad, nonconsensual third party releases in favor of the Sacklers. The district court vacated that decision, holding that nothing in the law authorizes bankruptcy courts to extinguish claims against third parties like the Sacklers, absent the claimants' consent. A divided panel of the Second Circuit reversed the district court and revived the bankruptcy court's order approving a modified plan. After years of back-and-forth rulings in appeals, the Supreme Court finally decided in favor of the U.S. Trustee and the states.

The Majority Opinion

Justice Neil Gorsuch delivered the majority opinion of the Supreme Court, in which Justices Clarence Thomas, Samuel Alito, Amy Coney Barrett, and Ketanji Brown Jackson joined, making the following main points:

(i) The Bankruptcy Code does not authorize a release and related 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. Here, the Sacklers have not filed for bankruptcy or placed all their assets on the table for distribution to creditors, but they seek what essentially amounts to a discharge. No provision of the Bankruptcy Code authorizes that kind of relief.

(ii) The plan proponents' section 1123(b)(6) argument is baseless. Section 1123(b)(6) permits any term in a plan not expressly forbidden by the Bankruptcy Code so long as a judge deems it "appropriate." According to the plan proponents, because plan provisions like the Sackler discharge are not expressly prohibited under the Code, paragraph (6) necessarily permits them. To the contrary, according to the majority, "[w]hen faced with a catchall phrase like paragraph (6), 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." In this case, each of the preceding paragraphs in section 1123(b) concerns the rights and responsibilities of the debtor; and they authorize a bankruptcy court to adjust claims without consent only to the extent such claims concern the debtor. Paragraph (6) cannot be read under the canon of *ejusdem generis* to endow a bankruptcy court with the "radically different" power to discharge the debts of a nondebtor without the consent of affected claimants.

---

[3] *Id*. at *12.

[4] Notably, the majority addressed the fact that only a minority of opioid creditors actually voted on the plan, and it was that smaller group that largely affirmatively supported the plan. *Id.* at *13 ("Creditors were polled on the proposed plan. Though most who returned ballots supported it, fewer than 20% of eligible creditors participated…. Thousands of opioid victims voted against the plan too, and many pleaded with the bankruptcy court not to wipe out their claims against the Sacklers without their consent.").

(iii) Additionally, the Bankruptcy Code reserves discharges only for the debtor; the Code requires the debtor to submit all of the debtor's assets to the court; even a discharge is not "unbounded" because some claims are exempted from discharge; and section 524(g)(4)(A)(ii) is the only Code provision expressly authorizing nondebtor releases "but does so in only one context" (namely, plans dealing with asbestos claims). According to the majority, the Purdue plan "transgresses all these limits too."

(iv) Further, "every bankruptcy law cited by the parties and their amici - from 1800 until the enactment of the present bankruptcy code in 1978 - generally reserved the benefits of discharge to the debtor who offered a 'fair and full surrender of [its] property.' … Had Congress meant to reshape traditional practice so profoundly in the present bankruptcy code, extending to courts the capacious new power the plan proponents claim, one might have expected it to say so expressly 'somewhere in the [c]ode itself.'"

(v) With respect to policy issues and implications, while both sides may have their points, "this Court is the wrong audience for such policy disputes. Our only proper task is to interpret and apply the law; and nothing in present law authorizes the Sackler discharge."

(vi) The majority painted its ruling as a narrow one, leaving for another day other important related issues including some continued grey areas:

> 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…. Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor. Additionally, because this case involves only a stayed reorganization plan, we do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated.[5]

The Dissent

Joined by Chief Justice John G. Roberts, Jr., Sonia Sotomayor, and Elena Kagan, Justice Brett Kavanaugh "respectfully" dissented in a 54-page opinion (compared to the less than 20 pages for the Opinion of the Court), making a number of arguments including relying on section 1123(b)(6)'s catchall. Ultimately, however, Justice Kavanaugh focused more on the practical, equitable implications involving mass tort cases.

According to the dissent, the majority's decision was "wrong on the law and devastating for more than 100,000 opioid victims and their families." "Bankruptcy seeks to solve a collective-action problem and prevent a race to the courthouse by individual creditors who, if successful, could obtain all of a company's assets, leaving nothing for all the other creditors. The bankruptcy system works to preserve a bankrupt company's limited assets and to then fairly and equitably distribute those assets among the creditors—and in mass-tort bankruptcies, among the victims. To

---

[5] *Id*. at *31-*32.

do so, the Bankruptcy Code vests bankruptcy courts with broad discretion to approve 'appropriate' plan provisions. 11 U. S. C. §1123(b)(6)."[6]

Justice Kavanaugh found that "the Bankruptcy Court exercised that discretion appropriately - indeed, admirably." It was, in his view, a "shining example of the bankruptcy system at work."[7] In making a categorical preclusion of nondebtor releases for "no good reason," he said that the majority "now throws out . . . a critical tool for bankruptcy courts to manage mass-tort bankruptcies like this one."[8]

Concluding his dissent, Justice Kavanaugh criticized the majority's opinion as "mak[ing] little sense legally, practically, or economically." Pointing to the Boy Scouts, the Catholic Church, the breast implants, and other mass tort cases, he stated that nondebtor releases "have been indispensable to solving that problem and ensuring fair and equitable victim recovery." Justice Kavanaugh suggested that the "Court's decision will lead to too much harm for too many people for Congress to sit by idly without at least carefully studying the issue." If the majority believed that $5.5 billion to $6 billion from the Sacklers was not enough, he argued that the Court "at most" should have remanded for the lower courts to decide "whether the releases were 'appropriate' under 11 U.S.C. § 1123(b)(6) (if anyone had raised that argument here, which they have not)."

Takeaways

The dissent, making statutory interpretation and other arguments, was trying to put a square peg into a round hole, primarily driven by practical and equitable concerns. Indeed, the Purdue Pharma ruling may severely hinder or at least delay, at more significant costs, acceptable settlements or other fair resolutions in mass tort and other bankruptcies. In short, mass tort bankruptcy cases and other complex bankruptcy cases will likely be considerably more expensive and protracted to get to a resolution, as any party not on board with providing a required release to a third party will have greater leverage. The ripple effect of the Purdue Pharma decision may extend beyond non-consensual third-party releases as the Supreme Court's Opinion, unlike the dissent, read 1123(b)(6) narrowly, and thus, how creative and far-reaching plan terms can be is now unknown and certainly will be tested in the lower courts.

Moreover, likely in the very near term, the next fight in chapter 11 bankruptcies will be over the form of consent required (by affected claimants), potentially leading to more bankruptcy

---

[6] *Id*. at *33.

[7] As stated in the dissent, absent the Sackler releases and settlement payment under the chapter 11 plan, the bankruptcy court found the "most likely result" would be liquidation of a much smaller $1.8 billion estate, and in such a liquidation, the United States would recover first with its $2 billion superpriority claim, likely leaving the victims and other creditors with nothing.

[8] According to the dissent, "The Bankruptcy Code gives bankruptcy courts authority to approve non-debtor releases to solve the complex collective action problems that such cases present. As noted above, a Chapter 11 reorganization plan may release creditor claims against debtors. §1123(b)(1). And a plan may settle and release debtor claims against non-debtors. §1123(b)(3). In addition, the plan may also include 'any other appropriate provision not inconsistent with the applicable provisions of' the Code. §1123(b)(6). Section 1123(b)(6) provides ample flexibility for the reorganization plan to settle and release creditor claims against non-debtors who are closely related to the debtor." *Id*. at *50-*51.

litigation and further delays.[9] While various jurisdictions like the Second and Third Circuits have allowed for opt-in or opt-out "consensual" third party releases under chapter 11 plans, the U.S. Trustee, creditors' committees, and other affected creditors and parties in interest may raise more objections as to whether such plan release provisions are truly consensual. To the extent that all victims of mass tort have to be solicited, the already expensive cost of solicitation will skyrocket. Beyond the added cost of solicitation, there are practical challenges of soliciting all class members, including identifying and locating them and protecting their often desired confidentiality (in terms of service, proof of service, *etc*.). Many class members may not be easily located, and even if located, they may not want their identity to be known, at least not in the bankruptcy court; however, under the Purdue Pharma ruling, the Supreme Court has put their identity at issue due to the requirement of obtaining their affirmative consent to any proposed third party release.

While much of the focus has been on mass tort, all significant bankruptcy cases will be impacted. Prepackaged bankruptcy cases will be much more challenging if the plan sponsors want releases from all parties in interest, including employees, unions, vendors, and shareholders. Obtaining consent from these creditors, who generally ride through a prepack, could materially risk business operations. In addition, aggressive shareholders could seek to organize a class action seeking to disrupt the prepack by refusing to grant a desired, if not required, release to the plan sponsors, as they likely would be slated to get no recovery in a prepack. The shareholders could then use the threat of a failed prepack as leverage to generate value, making the success of the prepack not only more tenuous but also more expensive. Unions that may not like the intended treatment of their collective bargaining agreements under a proposed plan may also attempt to disrupt operations as well as the prepack itself, leading to riskier and more expensive restructuring plans. Even employees who potentially have employee-related claims, such as those arising under the WARN Act, will have more leverage. Suffice it to say, the more parties in interest, the more challenging it will be to efficiently and successfully confirm a speedy prepackaged bankruptcy plan in which the plan sponsors want or desire a release from third parties, which means that the planning for any prepack will not only be more expensive, but the planning process will need to start earlier for maximizing the likelihood of success.

In order to incentivize voting creditors to consent to the non-debtor releases, it is likely Plan Sponsors will more frequently use a carrot-and-stick approach to procure consensual releases, such as increasing the use of death traps[10] and other negative consequences for not providing consent, leading to two practical options: one, non-debtor parties will offer to pay more consideration to obtain consent by all parties in interest, or two, because money is fungible and

---

[9] The form of consent required was not addressed by the Supreme Court. In addition, the Supreme Court left open the issue of what may happen if parties in interest attempt to question the propriety of nonconsensual third party releases in some previously-confirmed plans. Presumably, in such cases, the plan proponents will attempt to argue that the applicable plan has been consummated and any new attempt to undo the release should be equitably mooted. The success of this potential argument, no doubt, will be determined by the lower courts.

[10] Deathtrap plan provisions commonly provide the impaired voting class receives a distribution, or an increased distribution, in exchange for the class's acceptance of the plan, but receives no distribution, or only the distribution to which the class is minimally entitled, if the class votes to reject the plan. A number of courts have found deathtrap provisions are permissible where the incentive is consideration beyond a creditor's existing rights and all creditors in the affected class are offered the same opportunity, but impermissible where the incentive is the threat of stripping existing rights. Post-Purdue Pharma, debtors may more commonly propose similar plan provisions varying the treatment of the claim based on whether the creditor provides the relevant third party release.

obtaining consent from all parties may be impractical, if not impossible, pay less consideration (be it upfront or via a death trap if there is a failure to obtain full consent) and use the "savings" as a defense fund for potential future litigation. In the first situation, the "hold out" creditors win; in the second situation, the "hold out" creditors lose, and may lose substantially as the consideration that may desperately be needed, such as in many mass tort cases for victims, would not be forthcoming, if at all, for likely many, many years down the road.

Any non-debtor party that pays additional consideration for consent likely will (and should) want assurances that the consent and the attendant "settlement" is approved, not only by the bankruptcy court, but also, in the case of class action settlements, by the court in which the class action is asserted. This additional procedural step, which likely will become a standard condition precedent to the effective date of any mass tort plan with consensual non-debtor releases, will further delay and complicate bankruptcy cases, causing them to be more expensive and uncertain.

Bankruptcy courts and case participants may be able to work out some clearer guidelines or principles relating to consensual third party releases in particular, but such matters will take time to be fleshed out in chapter 11 bankruptcies. As these issues get resolved in the lower courts, such as what form of consent is required (*e.g.*, opt-in, opt-out, *etc.*), restructuring advisors will need to be keenly focused on plan treatment, solicitation strategy, and forum selection (as different jurisdictions will determine the boundaries of consent) to maximize the likelihood of successful chapter 11s seeking third party releases. Regardless of the merits of the majority opinion in Purdue Pharma, it seems likely, and is unfortunate, that a substantial price will have to be paid by innocent mass-tort victims as the implications of the Purdue Pharma ruling develop over time through the judicial system.