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Note

The Aftermath of the Supreme Court's *Purdue Pharma* Decision

MEGAN DALTON DOYLE

The 2024 Supreme Court decision, Harrington v. Purdue Pharma*, resolved a decades-long Circuit split regarding nonconsensual nondebtor releases in Chapter 11 bankruptcy cases. On nonpartisan lines, the Court held that Purdue Pharma's bankruptcy plan could not include a provision releasing the Sackler brothers from the claims pending against them. In doing so, it expressly disallowed nonconsensual nondebtor releases in any Chapter 11 bankruptcy. However, the Court left open an important question: What qualifies as a* non*consensual nondebtor release?*

In the months that followed, bankruptcy courts started to promulgate differing opinions regarding such consensual releases. This Note aims to determine what the best next steps are in light of the Supreme Court's decision. Part I briefly discusses a background on Chapter 11 and the Circuit split regarding nonconsensual nondebtor releases. Part II analyzes the Supreme Court's Purdue Pharma decision and the unique circumstances surrounding the case. Part III highlights a few lower court decisions of note which occurred in the months immediately following the Purdue Pharma decision. These cases illuminate two different ways to determine "consent" in the context of Chapter 11 bankruptcies: "opt-in" or "opt-out" releases. Finally, Part IV weighs the benefits and disadvantages of "opt-in" and "opt-out" releases and ultimately concludes that such decisions are best left to the Legislature.

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INTRODUCTION

Purdue Pharma L.P. ("Purdue Pharma"), owned and controlled by the Sackler brothers, was at the center of the devastating opioid epidemic that affected thousands of citizens across the United States. In 2007, a Purdue Pharma affiliate pleaded guilty to a federal felony for misbranding OxyContin as "less addictive" than its alternatives.[1] Following this conviction, thousands of individuals, families, and governments filed suits against Purdue Pharma and the Sackler family for deceptive marketing.[2] Due to the onslaught of mass tort claims, Purdue Pharma filed for bankruptcy in 2019 under Chapter 11 of the United States Bankruptcy Code ("Chapter 11").[3] This tactic is not uncommon among large corporations facing overwhelming tort claims, and some assert it is the best response to such a situation as it ensures each creditor, including the tort victims, is paid—at least in part.[4]

In Purdue Pharma's Chapter 11 plan, the Sacklers aimed to halt the growing number of lawsuits filed against them as officers and directors of the corporation. To that end, they proposed a release and injunction that would forever stay, restrain, and enjoin any claims against the Sacklers, even though the Sacklers were not themselves debtors in the bankruptcy proceedings.[5] Creditors were given an opportunity to vote on the proposed plan, which would force them to release any tort claims against the Sacklers

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* J.D. Candidate, University of Connecticut School of Law, May 2026; B.A., University of Vermont, 2022. I would like to extend my sincerest gratitude to Professor Thomas Marrion for his guidance in the development and mentorship of this Note. I would also like to thank the members of Volume 58, especially my dear friends Catherine Cheek and Alexander Kiley. To my parents and friends: I could not have done this without you.

[1] Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071, 2078 (2024).

[2] *Id.*

[3] Elizabeth Joseph, *Purdue Pharma Files for Bankruptcy as Part of a $10 Billion Agreement to Settle Opioid Lawsuits*, CNN, https://www.cnn.com/2019/09/16/us/purdue-pharma-bankruptcy-filing/index.html (last updated Sept. 16, 2019, 3:50 PM).

[4] *See* Anthony J. Casey & Joshua C. Macey, Essay, *In Defense of Chapter 11 for Mass Torts*, 90 CHI. L. REV. 973, 976 (2023) (arguing that bankruptcy proceedings are "an appropriate and often superior forum in which to resolve mass tort claims").

[5] Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071, 2078 (2024). Only the company Purdue Pharma, and not the Sacklers, were debtors in this Chapter 11 bankruptcy. *In re* Purdue Pharma, L.P., 635 B.R. 26, 26 (Bankr. S.D.N.Y. 2021).

as individuals.[6] Only twenty percent of eligible creditors participated in the voting,[7] but of the personal injury victims who returned a vote, ninety-five percent voted in favor of the plan.[8]

Purdue Pharma's reorganization plan was confirmed by the United States Bankruptcy Court for the Southern District of New York; on appeal, the United States District Court for the Southern District of New York vacated the confirmation.[9] On appeal from the District Court, the United States Court of Appeals for the Second Circuit (the "Second Circuit") reversed and reinstated the Bankruptcy Court's confirmation order.[10] Then, the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee")[11] appealed and the United States Supreme Court (the "Supreme Court") agreed to take the case in 2023.[12] In July 2024, the Supreme Court reversed the Second Circuit's decision, rejected the proposed Chapter 11 plan, and held that such nonconsensual third-party releases were improper under the United States Bankruptcy Code (the "Bankruptcy Code").[13] The Court was split on non-partisan lines, with the majority written by Justice Gorsuch and the dissent written by Justice Kavanaugh.

The majority rested its argument on the fact that the Bankruptcy Code does not explicitly allow nonconsensual third-party releases, except in asbestos cases.[14] In the final section of their opinion, the majority emphasized that the decision is narrow—it only applies to *non*consensual releases.[15] Justice Gorsuch explicitly refrained from answering whether *consensual* releases were permissible, leaving open the possibility of later

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[6] *Purdue Pharma*, 144 S. Ct. at 2079.

[7] *Id.*

[8] *In re* Purdue Pharma L.P., 69 F.4th 45, 82 (2d Cir. 2023).

[9] *In re* Purdue Pharma, L.P., 635 B.R. at 118. In the Second Circuit, bankruptcy appeals do not rise directly to the Court of Appeals; the case first rises to the applicable district court and can only be appealed to the Second Circuit after a decision is rendered by the district court. *Bankruptcy Appeals*, U.S. CT. OF APPEALS FOR THE 2D CIR., https://www.ca2.uscourts.gov/clerk/case_filing/appealing_a_case/civil_case/bankruptcy_appeals.html (last modified Dec. 17, 2010).

[10] *In re* Purdue Pharma L.P., 69 F.4th at 85.

[11] The U.S. Trustee program is a group of lawyers who oversee the administration of bankruptcy cases under 28 U.S.C. § 586 (governing the appointment and responsibilities of U.S. Trustees) and 11 U.S.C. § 101, *et seq.* (defining U.S. Trustee as it pertains to a bankruptcy case). Their mission is to "promote the integrity and efficiency of the bankruptcy system." *U.S. Trustee Program*, U.S. DEP'T OF JUST., https://www.justice.gov/ust (last visited July 31, 2025).

[12] *See* Application for a Stay of the Mandate of the United States Court of Appeals for the Second Circuit Pending the Filing and Disposition of a Petition for Writ of Certiorari at 31, Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071 (2023) (No. 23-124) [hereinafter Trustee's Application to Stay the Second Circuit Mandate] (appealing to the Supreme Court for relief); *see also* Order Granting Writ of Certiorari at 1, Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071 (2023) (No. 23-124) (treating the application for stay as a petition for writ of certiorari and granting said writ).

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

[14] *Id.* at 2082–83, 2087.

[15] *Id.* at 2088 ("[W]e 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.") (emphasis added).

revisiting such releases, and commented that "those sorts of releases pose different questions and may rest on different legal grounds."[16] However, the majority also neglected to explicitly define "consent" in the context of third-party nondebtor releases.[17] Thus, the majority opinion has left lower courts with a new question: what constitutes a nonconsensual nondebtor release?

In this Note, I explore the impact this open question will have on Chapter 11 bankruptcies across the country and what the most effective next steps are in light of the Supreme Court's recent decision. Before exploring the post-*Purdue Pharma* state of bankruptcy law, I first provide a background on Chapter 11 bankruptcies prior to the 2024 decision. In Part I, I briefly overview Chapter 11 bankruptcies and nondebtor releases, as well as survey the Circuit split on nonconsensual nondebtor releases before the *Purdue Pharma* decision. In Part II, I explore the intricacies of the *Purdue Pharma* case itself, including what led to the bankruptcy and the majority's opinion. In Part III, I turn to current, post-*Purdue Pharma* trends in bankruptcy law. I address how the *Purdue Pharma* decision impacted bankruptcies across the country, and I showcase recent Chapter 11 bankruptcy decisions that had varying results. In Part IV, I evaluate the conflicting approaches to nondebtor releases in Chapter 11 bankruptcies and ultimately conclude that the most effective change must come from Congress.

I. BANKRUPTCY BACKGROUND: CHAPTER 11

A. *Chapter 11 Bankruptcy and Nondebtor Releases*

The Bankruptcy Code, codified in Title 11 of the U.S. Code, governs all bankruptcy cases in the United States and provides avenues for debtors to resolve their financial distress.[18] One of the overall goals of the Bankruptcy Code is to provide the "honest but unfortunate debtor" with a fresh start.[19] This is accomplished by granting a discharge of debts. The requirements for obtaining a discharge are set forth in several chapters of the Bankruptcy Code.[20] Bankruptcy Code Section 524 provides that a discharge "operates as

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[16] *Id.* at 2087.

[17] Nondebtors or third parties—terms which are used interchangeably in this Note—are parties in interest in a bankruptcy case who have not filed for bankruptcy themselves. Jennifer Kellner, Note, *To Release or Not to Release? An Examination of Nondebtor Releases in the Context of Complex Chapter 11 Bankruptcy Filings*, 3 CORP. & BUS. L.J. 281, 291 (2022). Such third parties are typically "insiders" of the debtor, or other persons or entities involved with the debtor. Dorothy Coco, Note, *Third-Party Bankruptcy Releases: An Analysis of Consent Through the Lenses of Due Process and Contract Law*, 88 FORDHAM L. REV. 231, 235 (2019). In the *Purdue Pharma* case, for example, the members of the Sackler family—who own Purdue and sit on its board—are third parties. Kellner, *supra*, at 291.

[18] *Chapter 11 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics (last visited Feb. 20, 2025) [hereinafter *Bankruptcy Basics*].

[19] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

[20] *See, e.g.*, 11 U.S.C. §§ 727, 1141, 1328 (explaining the requirements for granting a discharge in Chapters 7, 11, and 13, respectively).

an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability from the debtor . . . ."[21] In other words, it prevents creditors from proceeding with or filing a new action to collect a discharged debt from the debtor.

For businesses, including large corporations, the typical avenue is to file under Chapter 11, titled "Reorganization," of the Bankruptcy Code.[22] Chapter 11 serves as an effective tool for businesses across the country to reorganize and restructure their debts, thereby protecting investors and preserving jobs.[23] Each year, multiple major corporations file for Chapter 11 bankruptcy under varying circumstances in an attempt to restructure their debts.[24] The looming threat of multi-million-dollar mass tort litigation has become a huge motivator for corporations to enter Chapter 11 bankruptcy,[25] as it allows a corporate debtor to consolidate its liability into a single proceeding and sometimes a single trust that will administer payouts to creditors.[26] Chapter 11 also arguably *helps* creditors, as the goal of bankruptcy is to ensure creditors are repaid as equitably as possible. Without the structure of the bankruptcy court and Bankruptcy Code, creditors may "race to the courthouse" and attempt to collect before the company is insolvent—leaving some creditors with nothing. However, upon the filing of bankruptcy, these proceedings are halted. This gives the debtor breathing room, a chance to reorganize, and a chance to pay back each creditor to the fullest extent possible.[27] As Justice Kavanaugh recognized in his dissent, "[t]he bankruptcy system works to preserve a bankrupt company's limited assets and to then fairly and equitably distribute those assets among the creditors"—which, in mass tort bankruptcies, includes the victims.[28]

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[21] 11 U.S.C. § 524(a)(2).

[22] Chapter 11 refers to 11 U.S.C. §§ 1110–1195.

[23] Toibb v. Radloff, 501 U.S. 157, 163 (1991) (specifying that Congress's purpose in creating Chapter 11 was to "permit[] business debtors to reorganize and restructure their debts in order to revive [their] businesses," which subsequently preserves jobs and protects investors).

[24] Ramishah Maruf, *Here Are 7 of the Well-Known Companies That Went Bankrupt in 2023*, CNN, https://www.cnn.com/2023/12/25/business/here-are-the-companies-that-went-bankrupt-in-2023 (last updated Dec. 26, 2023, 4:11 PM) (reporting on household-name businesses that filed for Chapter 11 bankruptcy in 2023, including Rite Aid, who was facing opioid-related lawsuit settlements, and Party City, who was struggling due to competition and financial losses).

[25] Luke A. Barefoot, Thomas S. Kessler & Jack Massey, *Discharge of Mass Tort Liability, Due Process & Illusory Finality in Chapter 11*, BLOOMBERG L. (Aug. 2022), https://www.bloomberglaw.com/external/document/X2IVVMOO000000/bankruptcy-professional-perspective-discharge-of-mass-tort-liabi.

[26] *Id.*; *see also* Steven W. Sather, *The Controversial Role of Third-Party Releases in Bankruptcy*, 31 AM. BANKR. INST. L. REV. 71, 101 (2023) ("In mass tort cases (whether they involve asbestos, opioids, or sexual abuse), bankruptcy has the ability to muster funds into a common pot and determine a method for dividing those funds among many claimants.").

[27] *See Bankruptcy Basics*, *supra* note 18 (describing the stay as a "breathing spell" for the debtor, giving them the chance to negotiate and resolve their financial difficulties).

[28] Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071, 2088 (2024) (Kavanaugh, J., dissenting).

The Bankruptcy Code requires the creation of a bankruptcy estate which consolidates all of the debtor's assets.[29] The debtor, or, under certain circumstances, another party in interest, will propose a reorganization plan that governs the distribution of the assets of the bankruptcy estate to the debtor's creditors.[30] Section 1123(a) of the Bankruptcy Code enumerates what *must* be included in a restructuring plan, such as requiring the plan to designate classes of claims and to "provide adequate means for the plan's implementation."[31] Section 1123(b) of the Bankruptcy Code lists a range of provisions that *may* be included in a plan, ending the list with a "catch-all" provision which states that the plan may incorporate "any other appropriate provision not inconsistent with the applicable provisions of this title."[32] The broad discretion regarding what may be included in the plan works to facilitate negotiations between the debtor and creditors. The debtor must often propose multiple modifications to the plan before its final confirmation.[33] The plan confirmation process gives creditors and interested parties the opportunity to vote on the plan.[34] If the plan receives requisite support from creditors and other parties in interest, and complies with all statutory requirements, the bankruptcy judge will then confirm the plan.[35]

A plan proponent may propose to include a "nondebtor release" provision as part of a plan, which seeks to relieve the nondebtor of any liability associated with the debtors' business activities.[36] For example, if Purdue Pharma's plan had been accepted, the creditors damaged by the actions of Purdue Pharma would have been enjoined from proceeding with or initiating a claim against the Sacklers. Nondebtor releases can never release a party from potential criminal liability, including in the *Purdue Pharma* case.[37]

The Bankruptcy Code does not explicitly contemplate nondebtor releases, except in asbestos cases,[38] but it does allow for a Chapter 11 plan

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[29] *Id.* at 2074.

[30] *Id.*; *see also* 11 U.S.C. §§ 1121(a), (c), 1123(a), 1129(a), 1141(a)–(c).

[31] 11 U.S.C. § 1123(a).

[32] 11 U.S.C. § 1123(b)(6).

[33] *Bankruptcy Basics*, *supra* note 18.

[34] *Id.* (explaining the process of accepting a plan of reorganization, including balloting).

[35] The requirements for confirming a Chapter 11 plan are enumerated in 11 U.S.C. § 1129(a). Some of the requirements include, among others, that the plan was proposed in good faith and that the proponent of the plan has disclosed the identity of insiders. 11 U.S.C. § 1129(a)(3), (5)(A)(i).

[36] Kellner, *supra* note 17, at 291.

[37] *See* Thomas J. Salerno & Clarissa C. Brady, *In Defense of Third-Party Releases in Chapter 11 Cases: Part II*, 41 AM. BANKR. INST. J. 30, 30 n.9 (2022) ("Even the landmark pending Sackler settlement did not try to cross that bridge.").

[38] *See* 11 U.S.C. § 524(g)(2)(B)(i)(I) (allowing the court to confirm a reorganization plan that discharges a nondebtor without the approval of creditors as long as it is concerned with "asbestos or asbestos-containing products").

to include a broad range of provisions.[39] Due to the lack of explicit language authorizing nondebtor releases, courts have justified the practice with varying provisions found in the Bankruptcy Code.[40] Regardless of how it is justified, it has become a common practice across the country to provide for the release of third parties—such as shareholders, officers, directors, or other corporate insiders—in the Chapter 11 reorganization plan.[41]

The release of nondebtors can be an extremely useful tool as it incentivizes third parties to contribute to the pool of funds available to the bankruptcy estate, effectively providing more funds to pay creditors.[42] Third parties often contribute substantial amounts to the bankruptcy estate in return for a nondebtor release provision.[43] But many academics have protested against such provisions, arguing they are an abuse of the bankruptcy system.[44] Nondebtor releases that are agreed upon or otherwise approved by the creditors, dubbed "consensual" releases, are generally allowed in every court that has considered the issue.[45] The crucial questions, however, arise when the courts are faced with release provisions that bind every creditor, even those who do not agree. These are dubbed "nonconsensual" releases as they have not been explicitly approved by the entire class of creditors.[46] For these types of releases, a split formed among United States Courts of Appeals prior to the *Purdue Pharma* decision; some allowed plans to release third parties even without the consent of the creditors, while others did not.[47]

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[39] *See* 11 U.S.C. § 1123(b) (allowing for the modification of creditor's rights, the settlement or adjustment of claims, and "any other appropriate provision not inconsistent with the applicable provisions of th[e] title").

[40] *See* Sather, *supra* note 26, at 73–79 (examining the varying legal justifications for nondebtor releases, including Sections 524(e) and 1141, 105(a), 1123, and 524(g) of the Bankruptcy Code and Rules 1306(c) and 7001(7) of the Federal Rules of Bankruptcy Procedure).

[41] *See id.* at 100 ("When lawyers find a neat trick that works in one case, they try it out in others. When it passes without objection, it becomes part of the boilerplate that associates use in drafting new plans. The unique becomes the commonplace."); *see also* Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 FORDHAM L. REV. 429, 430 (2022) ("Over the past two decades, nondebtor releases have become a routine feature of big-case Chapter 11 practice.").

[42] *See* Sather, *supra* note 26, at 101 (acknowledging that third-party provisions can play an important role in cases, especially to create incentives for third parties to contribute to the bankruptcy pot).

[43] *See, e.g.*, *In re* Boy Scouts of Am., 642 B.R. 504, 562 (Bankr. D. Del. 2022) (confirming a plan in which multiple insurers contributed an aggregate of $1.656 billion to the trust in exchange for "a complete release").

[44] *See, e.g.*, Levitin, *supra* note 41, at 434.

[45] *See* Sather, *supra* note 26, at 87 ("It seems clear that a plan may include a consensual release of third-party claims.").

[46] For more discussion on what is a "consensual" versus "nonconsensual" release, especially under the new Supreme Court ruling, see *infra* Part III.A.

[47] Megan O'Connor, Recent Development, *Are Nonconsensual Third-Party Releases Acceptable in United States Courts*, 14 ST. JOHN'S BANKR. RSCH. LIBR. 1 (2022) ("There is currently a split between United States Courts of Appeals regarding the scope of who can be bound by a release by creditors . . . .").

B. *The Circuit Split Regarding Nonconsensual Third-Party Releases*

Confusion throughout the United States regarding the permissibility of nonconsensual nondebtor releases persisted nearly since the inception of the Bankruptcy Code.[48] The majority of federal circuit courts, including the D.C. Circuit and the First, Third, Fourth, Sixth, Seventh, and Eleventh Circuits, held that nonconsensual third-party releases are generally permissible, employing varying tests depending on the jurisdiction.[49] The Second Circuit's stance has varied case-by-case, and the Eighth Circuit found nonconsensual nondebtor releases permissible but only under "exceptional circumstances."[50] The minority—the Fifth, Ninth, and Tenth Circuits—held that the statutory language of Section 524(e), which states, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt," strictly prohibits nonconsensual third-party releases.[51]

On the other hand, the majority view holders, such as the Sixth Circuit, found that Section 524(e) does not prohibit the release of a nondebtor—it merely explains the effect of the debtor's discharge.[52] To justify this reading, courts such as the Sixth Circuit looked to Section 105,[53] which bestows bankruptcy courts with equitable power to take appropriate steps in resolving a bankruptcy case.[54] Similarly, the Third Circuit found nonconsensual third-party releases are permissible only where they are "integral to the restructuring of the debtor-creditor relationship."[55] The Seventh Circuit, however, considered the congressional intent behind Section 524(e), concluding that Congress did not intend to place such limits on a Bankruptcy Court's equitable powers.[56] After concluding that these releases were permissible in general, each court then proceeded to use varying tests to determine whether a given release was appropriate in the particular case at hand. For example, both the Sixth and Eleventh Circuits utilized the seven-factor *Dow Corning* balancing test. Its factors include both whether the nondebtor contributed substantially to the reorganization and

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[48] *Id.* at 2 ("This Circuit split is not new, but rather has been afflicting the federal courts since the early 1980s."). The Code was created in 1978. *See* Pub. L. No. 95-598, 92 Stat. 2549 (1978) (creating the Code).

[49] *See* Sather, *supra* note 26, at 94–95 tbl.1 (charting the relevant cases by Circuit).

[50] *Id.*

[51] 11 U.S.C. § 524(e) ("Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."); *see* O'Connor, *supra* note 47, at 2 (observing the same).

[52] *See* O'Connor, *supra* note 47, at 4 (observing the same).

[53] *See id.* at 5 (stating that the Sixth Circuit used Section 105 in its reasoning).

[54] *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

[55] O'Connor, *supra* note 47, at 4 (quoting *In re* Millenium Lab Holdings II, LLC., 945 F.3d 126, 135 (3d Cir. 2019)).

[56] *Id.* at 6.

how much the plan proposes to pay creditors.[57] Other courts did not utilize a specific balancing test, instead opting for malleable ideas such as whether the nonconsensual releases were "important" or "integral" to the reorganization.[58] Naturally, confusion persisted even within the majority group, emphasizing the need for clear direction from the Supreme Court.

This survey of the Circuit split merely scratches the surface of the confusion across the country prior to the Supreme Court's 2024 *Purdue Pharma* decision. Other than the obvious issues with this persistent Circuit split, the differing stances also hinder the Bankruptcy Code's established goal of Chapter 11 restructuring. As the Supreme Court stated in *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*, the goal of Chapter 11 is to "strike[] a balance between a debtor's interest in reorganizing and restructuring its debts an00..d the creditors' interest in maximizing the value of the bankruptcy estate."[59] In the *Purdue Pharma* dissent, Justice Kavanaugh reiterated this goal within the context of mass-tort bankruptcies, noting that it is designed to ensure "fair and equitable recovery for victims and creditors."[60] However, this goal is made more difficult when the debtors, the creditors, and the court have different understandings of what is permissible under their restructuring plan. The confusion opens the door for more negotiations, more iterations of proposed plans, and less room to obtain the best outcome for all parties involved. Thus, it was imperative for the Supreme Court to clarify Bankruptcy Courts' statutory authority—not only to resolve the majority/minority split, but also the differing justifications within the majority group.

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[57] The factors in the *Dow Corning* balancing test include:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002).

[58] *See* O'Connor, *supra* note 47, at 3–4 (discussing the Second and Third Circuits' decisions which justify the nonconsensual releases as necessary and important to the plan).

[59] Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 51 (2008); *see also* Kellner, *supra* note 17, at 283 ("[T]he lack of uniformity in the treatment of nondebtor releases is inherently complex, creating uncertainty whilst forcing bankruptcy judges to use their broad, discretionary powers without clear guidelines promulgated by the Bankruptcy Code and without coherent consensus on whether the standards for nondebtor releases apply differently in complex Chapter 11 reorganizations, especially those involving issues of public policy and health.").

[60] Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071, 2090 (2024) (Kavanaugh, J., dissenting).

II. PURDUE PHARMA'S BANKRUPTCY

The Supreme Court addressed the Circuit split in Purdue Pharma, focusing the question on whether nonconsensual nondebtor releases were valid under the Bankruptcy Code. Unfortunately, the decision left many questions unanswered and arguably further hindered the efficiency of Bankruptcy Courts. But before we can discuss the effects of the decision, we must first look at the Purdue Pharma case itself, the proposed reorganization plan it considered, and the decision for which it now stands.

A. *The Lead-Up to Purdue Pharma's Chapter 11 Bankruptcy*

What makes Purdue Pharma's bankruptcy unique is the company's direct involvement in—or, more accurately, inducement of—the country's devastating health catastrophe: the opioid crisis. This crisis has resulted in hundreds of thousands of deaths across the country,[61] still affects many citizens to this day,[62] and can be directly traced back to Purdue Pharma and the Sackler family.[63] Despite knowing about the addictive quality of their drugs, Purdue Pharma marketed OxyContin as suitable for a wide range of uses and even claimed that OxyContin was "less addictive" than other pain medications.[64]

Eventually, Purdue Pharma's involvement in the opioid crisis was brought to light, culminating in the company pleading guilty to multiple federal felonies.[65] Civil lawsuits followed, with thousands of individuals, families, and governments filing claims against Purdue Pharma *and* the Sackler family for deceptive marketing.[66] In anticipation of this, the Sacklers funneled roughly $11 billion from Purdue Pharma into their own pockets

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[61] *Purdue Pharma*, 144 S. Ct. at 2074 ("Between 1999 and 2019, approximately 247,000 people in the United States died from prescription-opioid overdoses.").

[62] *Understanding the Opioid Overdose Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 9, 2025), https://www.cdc.gov/overdose-prevention/about/understanding-the-opioid-overdose-epidemic.html (explaining that although "[d]eaths involving various types of opioids are declining at different rates," deaths from opioid overdoses "remain high").

[63] *Purdue Pharma*, 144 S. Ct. at 2078 ("Members of the Sackler family served as president and chief executive officer; they dominated the board of directors; and they 'were heavily involved' in the firm's marketing strategies.").

[64] *Id.* For a far more detailed discussion of Purdue Pharma and the Sacklers' involvement in the Opioid Epidemic, see PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY chs. 17–19 (2021).

[65] Press Release, U.S. Dep't of Just., Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family (Oct. 21, 2020), https://www.justice.gov/archives/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid (announcing that Purdue Pharma had agreed to plead guilty to a three-count felony—one count of dual conspiracy to defraud the United States and to violate the Food, Drug, and Cosmetic Act, and two counts of conspiracy to violate the Federal Anti-Kickback Statute).

[66] *See Purdue Pharma*, 144 S. Ct. at 2078 (noting that thousands of individuals, families, and governments—both domestic and foreign—filed civil lawsuits against Purdue Pharma and the Sacklers).

between 2008 and 2016.[67] This drained Purdue Pharma's total assets by seventy-five percent, leaving the company in serious financial trouble.[68] Then, in the midst of litigation, Purdue Pharma filed for bankruptcy.[69]

B. *The Proposed Restructuring Plan and Lower Court's Decisions*

Upon their filing for bankruptcy, the claims against Purdue Pharma and the Sacklers were temporarily stayed, pending the resolution of the Chapter 11 bankruptcy.[70] This, ostensibly, gave Purdue Pharma the opportunity to develop the first iteration of its restructuring plan. Initially, the Sacklers proposed returning "$4.325 billion of the $11 billion they had withdrawn from the company in recent years" to the bankruptcy estate.[71] In exchange, the Sacklers sought a release and injunction "forever staying, restraining, and enjoining" any current or future claims against them.[72] The plan was presented to the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") and creditors were given an opportunity to vote on the contents. Although fewer than twenty percent of eligible creditors participated,[73] more than ninety-five percent of those who did vote voted to approve the proposed plan.[74] However, the Office of the United States Trustee (the "U.S. Trustee"), as well as multiple states, Canadian municipalities, and Tribes, objected.[75]

The Bankruptcy Court confirmed the proposed plan, including the provision relating to the Sackler release as it pertained to derivative causes of action.[76] The District Court, however, vacated the decision, concluding that the Bankruptcy Court did not have the authority to void claims against the Sacklers without the claimants' consent.[77] Purdue Pharma appealed to the Second Circuit, and, while the appeal was pending, the Sacklers proposed a new plan wherein they promised to contribute an additional $1.2 to $1.7 billion—raising their total contributions to between $5.5 and $6 billion—if certain opposers withdrew their objection.[78] This convinced the states and the District of Columbia to drop their objections, but the Canadian

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[67] *Id.* at 2078–79.

[68] *Id.* at 2079.

[69] *In re* Purdue Pharma, L.P., 635 B.R. 26, 35 (Bankr. S.D.N.Y. 2021) ("Engulfed in a veritable tsunami of litigation, Purdue filed for chapter 11 bankruptcy in September 2019.").

[70] *See* 11 U.S.C. § 362(a) (providing that, upon the filing of a bankruptcy action, an automatic stay will be imposed, preventing creditors from pursuing judgments, collection activities, foreclosures, and other actions).

[71] *Purdue Pharma*, 144 S. Ct. at 2079.

[72] *Id.* (citation omitted).

[73] *Id.*

[74] *Id.* at 2098 (Kavanaugh, J., dissenting).

[75] *Id.* at 2080.

[76] *In re* Purdue Pharma L.P., 633 B.R. 53, 115 (Bankr. S.D.N.Y. 2021) (approving the plan).

[77] *In re* Purdue Pharma, L.P., 635 B.R. 26, 115 (Bankr. S.D.N.Y. 2021) (vacating the approval).

[78] *Purdue Pharma*, 144 S. Ct. at 2080.

creditors and U.S. Trustee persisted.[79] Eventually, the Second Circuit reversed the District Court's ruling and approved the now-revised reorganization plan.[80] The Supreme Court granted certiorari in 2023,[81] and a divided court handed down its reversal of the Second Circuit decision, agreeing with the District Court and disapproving the plan, in July 2024.[82]

C. *The Majority Opinion*

In the majority opinion, written by Justice Gorsuch and joined by Justices Thomas, Alito, Barrett, and Jackson, the majority ultimately concluded that Bankruptcy Courts are *not* authorized to release nondebtors without the consent of creditors as part of the reorganization plan.[83] Thus, the Court rejected Purdue Pharma's proposed plan and remanded to the Bankruptcy Court to create a plan that did not contain such a provision.[84] The majority focused its analysis on 11 U.S.C. § 1123(b), which enumerates what *may* be included in Chapter 11 plans.[85] The last item listed, subsection six, is a "catch-all" provision. It states that the plan may "include any other appropriate provision not inconsistent with the applicable provisions of th[e] title."[86] Some lower courts, and the dissent, have interpreted this catch-all phrase as allowing nonconsensual nondebtor releases.[87] However, the majority concluded that nonconsensual nondebtor releases were not adequately "appropriate" in the context of the Bankruptcy Code, and thus are not allowed in Chapter 11 Reorganization Plans.[88] In its analysis, the majority observes that every other item listed in Section 1123(b) permits the plan to adjust claims without the consent of creditors *only* when it relates to

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[79] *Id.*

[80] *In re* Purdue Pharma L.P., 69 F.4th 45, 47 (2d Cir. 2023).

[81] Order Granting Certiorari, *supra* note 12. William K. Harrington, the U.S. Trustee for Region 2, presented an application for stay of the Second Circuit decision to Justice Sotomayor in 2023. *See* Application for a Stay of the Mandate, *supra* note 12. The Court treated this application as a petition for writ of certiorari and granted it as such in August 2023. The parties were directed to brief an answer to the question of whether the Code authorizes a court to approve of nondebtor releases. Order Granting Certiorari, *supra* note 12.

[82] *Purdue Pharma*, 144 S. Ct. at 2088.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 2082–83; *see also* 11 U.S.C. § 1123(b) (including provisions such as the settlement and adjustment of claims *of the debtor* and the sale of substantially all property *of the estate*).

[86] 11 U.S.C. § 1123(b)(6).

[87] *Purdue Pharma*, 144 S. Ct. at 2088 (Kavanaugh, J., dissenting) (asserting that Section 1123(b) grants bankruptcy courts with "broad discretion" to approve "appropriate" plans, and the bankruptcy court acted as such in approving the plan here). For a more detailed discussion of lower courts that previously held Section 1123(b)(6) permits the bankruptcy court to include nonconsensual nondebtor releases, see *supra* Part I.B.

[88] *Purdue Pharma*, 144 S. Ct. at 2083–84.

the debtor.[89] Therefore, any "appropriate" provision which includes nonconsent should be similarly constrained and not apply to nondebtors.[90]

To support its conclusion, the majority also considered other aspects of the Bankruptcy Code and history. First, it looked at "what is and who can earn a discharge," observing that, throughout the Bankruptcy Code, discharges are granted exclusively to debtors.[91] Second, the Court pointed out that the Bankruptcy Code constrains the debtor. To be granted a discharge, the debtor must come forward with almost all its assets and refrain from certain privileges.[92] Nondebtors, however, are not constrained by the same rules and thus should not be granted a discharge without the consent of creditors.[93] Also, the majority observed that the Bankruptcy Code grants one notable exception to nonconsensual nondebtor releases: asbestos cases.[94] The presence of this exception proves (at least to the majority) that the Bankruptcy Code must not permit such a release in any other type of case.[95] Last, the majority looked to the relevant legislative history and concluded there were no cases or statutes presented that allowed nonconsensual nondebtor releases.[96] In terms of policy arguments (which the dissent concentrated on): the majority claimed the Supreme Court is the "wrong audience" for them.[97] The majority redirected such questions to Congress, stating that only Congress possesses the power to make policy judgments about the scope of the bankruptcy courts' authority.[98]

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[89] *See* 11 U.S.C. § 1123(b) (permitting the plan to provide for "the settlement or adjustment of any claim or interest belonging *to the debtor or to the estate*" and "the assumption, rejection, or assignment of any executory contract or unexpired lease *of the debtor*," among other things) (emphasis added); *see also Purdue Pharma*, 144 S. Ct. at 2083 (observing that paragraphs (1) through (5) authorize a bankruptcy court to adjust the claims without the consent of a creditor only to the extent that it concerns the debtor, not a third party).

[90] *Purdue Pharma*, 144 S. Ct. at 2085.

[91] *Id.*

[92] *Id.*; *see also* 11 U.S.C. § 1141 (outlining the effects of confirming a plan, including a discharge, and specifying repeatedly that the discharge applies to the *debtor*, and not contemplating a discharge for any other entity); *see also* 11 U.S.C. § 523 (listing the multitude of reasons why a debtor may be denied a discharge, exemplifying the many constraints the Code places on the debtor in order to receive such a discharge).

[93] *Purdue Pharma*, 144 S. Ct. at 2085 ("The Sacklers have not agreed to place anything approaching their full assets on the table for opioid victims. Yet they seek a judicial order that would extinguish virtually all claims against them for fraud, willful injury, and even wrongful death, all without the consent of those who have brought and seek to bring such claims.").

[94] *Id.* (discussing 11 U.S.C. § 524(g)).

[95] *Id.* ("That the code *does* authorize courts to enjoin claims against third parties without their consent, but does so in only *one* context, makes it all the more unlikely that § 1123(b)(6) is best read to afford courts the same authority in *every* context." (emphasis in original)).

[96] *Id.* at 2086 ("No one has directed us to a statute or case suggesting American courts in the past enjoyed the power in bankruptcy to discharge claims brought by nondebtors against other nondebtors, all without the consent of those affected.").

[97] *Id.* at 2087.

[98] *Id.*

The majority confined itself to the question presented: whether the Bankruptcy Code authorizes the release of claims against nondebtors without the consent of affected claimants.[99] Justice Gorsuch also decidedly declined to answer what qualifies as a consensual release or whether the Court's holding should unwind already-confirmed restructuring plans.[100] Despite the narrow holding, the effects of the Supreme Court's decision have already started to trickle down to the lower courts. The next Part discusses the impact of the Supreme Court's decision, how the lower courts have reacted, and what next steps should be taken.

III. THE AFTERMATH

In the Supreme Court's decision, the majority undoubtedly held that *non*consensual nondebtor releases are impermissible under the Bankruptcy Code.[101] However, the majority made clear that this opinion was not casting judgment on the use of *consensual* nondebtor releases, clearly stating: "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 . . . ."[102] Justice Gorsuch stated that such releases may "rest on different legal grounds," leaving open the possibility of revisiting the issue in a future case.[103] This open-ended question has left the bankruptcy courts confused on what releases may or may not be included in a Chapter 11 plan.[104] Following the decision, debtors are still putting forth plans that include *consensual* nondebtor releases. But, without clear direction from the Supreme Court, lower courts have begun to promulgate differing opinions on whether these provisions are permissible.[105] This Part will explore the question posed by the Supreme Court and how disagreeing courts have decided to answer the question.

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[99] *Id.* at 2088.

[100] *Id.*

[101] *Id.* at 2087.

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

[103] *Id.*

[104] *See, e.g.*, *In re* Lavie Care Centers, LLC, No. 24-55507, 2024 WL 4988600, at *12 (Bankr. N.D. Ga. Dec. 5, 2024) ("Maybe not surprisingly, there has been significant activity since *Purdue* . . . was decided concerning its effect on consensual third-party releases. . . . [A] review of the case law on what constitutes a consensual release indicates that there is a case to support every view. . . . Regardless of the framework of analysis, courts are markedly split on the issue . . . .").

[105] *Compare In re* Robertshaw US Holding Corp., 662 B.R. 300, 322 (Bankr. S.D. Tex. 2024) (holding that opt-out releases, whereby the creditors either opt-out or are deemed to have consented, are consensual and therefore permissible under the Supreme Court's decision), *with In re* Tonawanda Coke Corp., 662 B.R. 220, 223 (Bankr. W.D.N.Y. 2024) ("We find that the mere ability to opt out of a release is insufficient to establish that consent.").

A. *What Counts as Consensual?*

In the context of Chapter 11 bankruptcies, a nonconsensual nondebtor release binds the creditors of the nondebtor, regardless of whether the creditors agreed to it.[106] The creditors are often given the opportunity to vote on the plan—as they were in *Purdue Pharma*—but if the plan is confirmed, they will be bound by the releases regardless of how they voted. This is what the debtor was trying to accomplish in *Purdue Pharma*, but it was rejected by the Supreme Court.

The question of what constitutes a consensual release remains unanswered, but it seems clear that for a release to be consensual the creditor must have a choice of some sort.[107] Courts have identified two main methods by which the debtor may give creditors a choice, called "opt-in" and "opt-out" releases.[108] The "opt-in" release is fairly straightforward—only creditors who have affirmatively consented to the plan and release are bound to it.[109] Creditors are normally sent a ballot to vote on the plan; if they respond affirmatively, they are consenting to the plan. If a creditor rejects or fails to respond to an "opt-in" release, the creditor is not bound and does not receive a recovery.[110] Conversely, with "opt-out" releases, all creditors who do not respond are deemed to have consented to the plan.[111] Those creditors are similarly sent a ballot giving them the opportunity to affirmatively "opt-out" of the release—otherwise, their consent is implied.[112] Before the Supreme Court's decision, bankruptcy courts had approved both methods, subject to the specific circumstances of each case.[113] Although the Supreme Court's holding may allow consensual releases, it did not define what would suffice as consent, leaving lower courts to determine what qualifies as permissible under *Purdue Pharma*.[114]

To ascertain the Court's opinion on what counts as "consent," it is necessary to examine the unique facts of *Purdue Pharma*. Before Purdue

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[106] *See In re* Lavie Care Centers, 2024 WL 4988600, at *8 (describing the differences between consensual and nonconsensual third-party releases).

[107] For an in-depth discussion on the importance of consent for parties to mass tort ligation, see Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 269–70 (arguing for the importance of consent in mass tort litigation).

[108] *In re* Lavie Care Centers, 2024 WL 4988600, at *8.

[109] *Id.*

[110] *Id.*

[111] *See* Marshall S. Huebner & Kate Somers, *Opting Into Opting Out: Due Process and Opt-Out Releases*, 43 AM. BANKR. INST. J. 26, 26 (arguing that following the *Purdue Pharma* decision, there will be a greater emphasis on opt-in and opt-out releases for mass tort bankruptcies).

[112] *Id.*

[113] *See, e.g.*, *In re* Chassix Holdings, Inc., 533 B.R. 64, 77–78 (Bankr. S.D.N.Y 2015) (confirming a plan that contained an opt-in release, albeit with some modifications to ensure the right entities were opting-in); *In re* Arsenal Intermediate Holdings, LLC, No. 23-10097, 2023 WL 2655592, at *1 (Bankr. D. Del. Mar. 27, 2023) ("[I]t is appropriate to infer consent from a creditor's failure to opt out.").

[114] *See* Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071, 2088 ("Nor do we have occasion today to express a view on what qualifies as a consensual release . . . .").

Pharma's plan was confirmed by the Bankruptcy Court, each creditor was given the opportunity to vote on whether to accept or reject the plan, though the arrangement did not include "opt-in" or "opt-out" language.[115] The Second Circuit had a list of requirements the plan must meet before confirmation, including that seventy-five percent of creditors who vote must approve the plan.[116] Purdue Pharma met this threshold easily—the plan was "overwhelmingly" approved, with ninety-five percent of all personal injury victims who voted responding in the affirmative.[117]

However, the Supreme Court was very concerned with the *amount* of responses across *all eligible* creditors.[118] Justice Gorsuch points out that although the responses were positive, "fewer than [twenty percent] of eligible creditors participated."[119] Thus, it appears the lack of responses played a large role in rendering the releases nonconsensual. This suggests that "opt-out" releases—which deem nonresponses as expressing consent—are impermissible. Since Purdue Pharma did not include "opt-out" language in its process, however, the Supreme Court's decision does not explicitly foreclose the "opt-out" method. Therefore, as is shown in the following section, the 2024 decision has instigated a new split between bankruptcy courts about what can be deemed adequate consent for nondebtor releases.

B. *Emerging Approaches to Determining Consent Post-Purdue*

In the months following the *Purdue Pharma* decision, two categories of opinions started to arise in bankruptcy courts. The first: some courts believe opt-out releases are still valid in light of the *Purdue Pharma* holding. The second: other courts disapprove of opt-out releases, holding they cannot be considered "consensual" under *Purdue Pharma.*

1. *"Opt-Out" Third-Party Releases are Valid under Purdue Pharma*

On August 16, 2024, a United States Bankruptcy Court for the Southern District of Texas published *In re Robertshaw*, one of the first opinions that addressed the *Purdue Pharma* holding.[120] In this case, the Chapter 11 debtor proposed a restructuring plan that sought to release or exculpate nondebtors from claims in connection with the bankruptcy.[121] To obtain the consent of the creditors, the debtor utilized an "opt-out" method.[122] The debtor gave its creditors the opportunity to affirmatively opt out by responding to a ballot

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[115] *In re* Purdue Pharma L.P., 69 F.4th 45, 61 (2d Cir. 2023).

[116] *Id.* at 78.

[117] *Id.* at 82.

[118] *Purdue Pharma*, 144 S. Ct. at 2079.

[119] *Id.*

[120] *In re* Robertshaw US Holding Corp., 662 B.R. 300, 322 (Bankr. S.D. Tex. 2024) (confirming a Chapter 11 plan despite objections from U.S. Trustee).

[121] *See id.* at 313 (summarizing the contents of the disputed plan).

[122] *Id.* at 323.

sent to each creditor—otherwise, their consent would be implied.[123] Each ballot contained a bolded statement reiterating the consequences of failing to respond.[124] The nondebtor release language was also published in the Wall Street Journal.[125] In response, over 100 creditors opted out of the release, while the rest were deemed to have consented.[126]

Despite the major creditors agreeing with the release and methods by which consent was obtained, the Office of the United States Trustee for the Southern District of Texas objected, arguing that opt-out releases are now insufficient to constitute consent under *Purdue Pharma*.[127] Additionally, the Office of the United States Trustee argued that opt-out releases are "coercive and otherwise improper," especially in light of the Supreme Court's decision.[128] The Bankruptcy Court overruled the objection, holding that the opt-out provision was enough to establish creditor consent of the nondebtor releases.[129] In terms of the *Robertshaw* plan itself, the court held it was not coercive because the language was clear and specific and had appeared to reach every creditor.[130] Additionally, the Court did not agree that the *Purdue Pharma* decision rendered opt-out releases invalid. The court stated that opt-out provisions have previously constituted consent in similar bankruptcies,[131] and that *Purdue Pharma* does not call this into question.[132] In other words, the court read *Purdue Pharma* as having allowed implied consent via opt-out releases.

The *Purdue Pharma* decision left the Southern District of Texas Bankruptcy Court's law on nondebtor releases substantially unchanged. In the Fifth Circuit, where this bankruptcy court resides, nonconsensual nondebtor releases were already prohibited[133] and opt-out releases were considered consensual in the context of Chapter 11 bankruptcies. Therefore, the court emphasized that "*Purdue* did not change the law in th[at] Circuit."[134]

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[123] *Id.*

[124] *Id.* ("If you submit your Ballot without this box checked, or if you do not submit your Ballot by the Voting Deadline, you will be deemed to consent to the releases contained in Article X.C of the Plan to the fullest extent permitted by applicable law.").

[125] *Id.* at 323–24.

[126] *Id.* at 324.

[127] *Id.* at 322 ("The Trustee wants to use the *Purdue* holding as an opportunity to advance its long-held position that consensual third-party releases in a plan should require an opt-in feature, rather than an opt-out.").

[128] *Id.* (internal quotation marks omitted).

[129] *Id.* at 324.

[130] *Id.* ("There is no evidence in the Record of coercion or confusion alleged by the Trustee.").

[131] *Id.* at 323 (citing *In re* Arsenal Intermediate Holdings, LLC, No. 23-10097, 2023 WL 2655592, at *6–8 (Bankr. D. Del. Mar. 27, 2023)).

[132] *In re Robertshaw US Holding Corp.*, 662 B.R. at 322 (emphasizing, again, that Purdue Pharma did not change the law in the Fifth Circuit).

[133] *Id.*; *see also* discussion *supra* Part I (providing background information for Chapter 11 bankruptcies).

[134] *In re Robertshaw US Holding Corp.*, 662 B.R. at 323.

The United States Bankruptcy Court for the Northern District of Georgia, which previously approved of nonconsensual third-party releases, agreed that opt-out releases are still viable under *Purdue Pharma*, albeit in less decisive terms than the Texas court.[135] In a December 2024 decision, *In re Lavie Care Centers*, the Georgia court debated at length whether an opt-out release is acceptable, ultimately concluding it was in that particular case.[136] The case concerned a Chapter 11 debtor in the business of operating skilled nursing facilities with numerous locations across multiple southern U.S. states and thousands of employees.[137] The debtor had a plethora of both secured and unsecured creditors, including a group of tort victims.[138] After extensive negotiations, the debtor proposed the modified plan at issue, which provided for a full release of claims against the involved third parties who made "substantial contributions" to the restructuring plan.[139] As part of the plan, creditors were given the opportunity to opt out of the release. A ballot was sent to each creditor, explicitly stating the consequences of their vote or silence.[140] While a few creditors did respond, eighty-seven percent did not.[141]

The Office of the United States Trustee for the Northern District of Georgia was the sole objector to the plan and argued that the creditors who failed to respond should not be deemed to have consented.[142] The Office of the United States Trustee used many of the same arguments that they did in *Robertshaw*, expressing concern that the process was inadequate in actually ascertaining the consent of the creditors.[143] In noting this, the court acknowledges the flaws with the opt-out method, enumerating some of the various, unrelated reasons creditors may not have responded.[144] To rectify this, the court decided to provide the creditors with an opportunity to argue that they should not be bound by the release.[145]

Yet, ultimately, the court approved the plan and the corresponding opt-out release. Like the *Robertshaw* court, the *Lavie Care Centers* court does *not* consider the *Purdue Pharma* decision to have disallowed opt-out releases altogether.[146] Instead, the court looked to other bankruptcy courts'

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[135] *In re* Lavie Care Centers, LLC, No. 24-5507, 2024 WL 4988600, at *18 (Bankr. N.D. Ga. Dec. 5, 2024) (concluding that opt-out provisions are acceptable, but only under certain circumstances such as this case, and surmised that the issue will continue to plague court opinions).

[136] *Id.*

[137] *Id.* at *2.

[138] *Id.* at *3.

[139] *Id.* at *5.

[140] *Id.* at *6.

[141] *Id.* at *12.

[142] *Id.* at *1.

[143] *Id.* at *10.

[144] *Id.*

[145] *Id.* at *15 ("As a result, an opportunity for those people and entities to make a case to this Court sometime after confirmation that they should not be bound, that they should not be 'deemed' to have consented, must be provided in the Order confirming the Plan.").

[146] *Id.* at *8.

plan confirmations from both before and after the *Purdue Pharma* decision, stating, "an overwhelming majority of cases find that a creditor's vote to accept a plan containing a third-party release . . . makes the release consensual, and this Court agrees."[147] However, the court emphasized that the specific facts of *Lavie Care Centers* lent themselves to opt-out releases, which may not be the same in every subsequent case.[148]

2. *"Opt-Out" Third-Party Releases are Invalid under Purdue Pharma*

In August 2024, the United States Bankruptcy Court for the Western District of New York decided "opt-out" releases are *not* acceptable in *In re Tonawanda Coke Corp*.[149] The Tonawanda Coke Corporation had amassed significant debt, mostly related to the alleged emission of environmentally toxic pollutants.[150] The company liquidated its assets and, in search of a discharge, filed its second amended plan.[151] The plan included a provision which granted a "general release" to the debtor, interest holders, directors, officers, shareholders, partners, members, and other insiders from unsecured creditor and tort claims[152]—subject to a condition wherein any creditor may opt out of the release.[153] The United States Trustee for the Western District of New York, however, objected to the proposed plan, arguing that nondebtor releases were permitted *only* with creditor consent, which can only be obtained through opt-in releases.[154] The court ultimately agreed with the Trustee and held that the requirement for consent under *Purdue Pharma* is not satisfied by an opt-out release.[155] It reached this conclusion by looking at the state law of contracts, under which opt-out provisions do not suffice.[156] Prior to the *Purdue Pharma* decision, the Second Circuit allowed nonconsensual nondebtor releases only in

[147] *Id.* at *11.

[148] *Id.* at *17–18 (listing the facts relevant to the court in approving the opt-out release).

[149] *See In re* Tonawanda Coke Corp., 662 B.R. 220, 223 (Bankr. W.D.N.Y. 2024) (holding that the Chapter 11 plan was not confirmable in the current format due to a provision that releases nondebtors without the consent of claimants).

[150] *Id.* at 221.

[151] *Id.*

[152] *Id.* (including "the Debtor, its interest holders, the members of the Committee and each of their respective directors, officers, shareholders, members, partners, agents, employees, representatives, attorneys and other professionals, subsidiaries and affiliates, and any successor in interest in any of them").

[153] *Id.* (stating the arrangement is conditioned on the right of any creditor to "'opt out'").

[154] *Id.*

[155] *Id.* at 223.

[156] *See id.* at 222 ("Hence, any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent. Not authorized by any provision of the Bankruptcy Code, any such consensual agreement would be governed instead by state law.").

"exceptional circumstances."[157] However, this analysis did not arise in *Tonawanda Coke Corp.*; the court instead discussed state contract law.[158]

The United States Bankruptcy Court for the Western District of New York reiterated its holding in *In re Diocese of Buffalo*, a September 2024 preliminary decision regarding an ongoing Chapter 11 case.[159] Unlike the other cases in this section, this case did not concern the confirmation of a proposed Chapter 11 Plan. Instead, the debtor was seeking to further a temporary stay, ostensibly to facilitate negotiations and construct a Chapter 11 Plan.[160] The Bankruptcy Court previously granted temporary stays to "enable the parties to negotiate a plan," which would include a nondebtor release.[161] However, the court stated that without the "affirmative consent of all creditors," such a plan could no longer be permitted.[162] To bolster its conclusion, the Court cited both *Purdue Pharma* and *Tonawanda Coke*, reiterating that under the Supreme Court's decision, such a plan would require each creditor to agree.[163] The Court did not see any possibility of the creditors affirmatively consenting; thus, negotiations could not be successfully facilitated, and the Court could not justify furthering the temporary stay.[164]

To date, the Western District of New York is not alone. In September 2024, the United States Bankruptcy Court for the District of Delaware also held that opt-out releases were not sufficient to establish consent for nondebtor releases in Chapter 11 plans.[165] That case, *In re Smallhold*, involved a small business that filed for bankruptcy under Subchapter V of Chapter 11.[166] After negotiations, the debtor proposed a plan that included a provision which released nondebtors, or "representatives" of the small business. As in *Robertshaw*, a notice was sent to all creditors, with a statement that clearly and conspicuously disclosed, in bold type, the opt-out statement.[167]

Previously, the United States Bankruptcy Court for the District of Delaware—including this particular bankruptcy judge—would grant

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[157] *See* discussion, *supra* Part I.B (exploring the Circuit split regarding nonconsensual third-party releases); *see also In re Tonawanda Coke Corp.*, 662 B.R. at 221–22 (explaining that the court delayed the decision in anticipation of the Supreme Court's influence).

[158] *Id.* at 222–23 (explaining that the creditors are being asked to give releases to third parties without consideration, and therefore, the agreement is governed by New York General Obligations Law).

[159] *See In re Diocese of Buffalo*, 663 B.R. 197, 200–01 (Bankr. W.D.N.Y. 2024) (denying the motion from the debtor to further a temporary stay).

[160] *Id.* at 198–99.

[161] *Id.* at 201.

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *See In re Smallhold, Inc.*, 665 B.R. 704, 725 (Bankr. D. Del. 2024) (holding the Subchapter V Chapter 11 debtor's plan could not be confirmed because it contained an "opt-out" release of third parties such as the debtor's representatives).

[166] *Id.* at 711 (explaining that Smallhold filed for bankruptcy under Subchapter V of Chapter 11, for small businesses to reorganize).

[167] *Id.* at 712 (describing the contents of the plan and the notice that was sent out to all creditors).

nonconsensual nondebtor releases under "exceptional cases."[168] However, the court claimed this analysis, and others that allow opt-out releases, are "no longer viable" under the *Purdue Pharma* decision.[169] The court wrote: "[A]fter that decision, there does not appear to be a principled basis for authorizing 'opt out' third-party releases in cases like this one, even if such releases might be supported by strong policy arguments."[170] The court, however, does leave itself some wiggle room: it "does not foreclose the possibility" that some opt-out releases could be accepted if they include certain protections, as may be found in Federal Rule of Civil Procedure 23(b)(3).[171] But, overall, the Delaware Bankruptcy Court held that opt-out provisions do not constitute consent under *Purdue Pharma*.[172]

Ultimately, both the Delaware and Western District of New York bankruptcy courts reworked their stances on nondebtor releases following the Supreme Court's decision.[173] In their recent opinions, they held that consent for nondebtor releases may only be obtained through affirmative agreement of the creditors.[174] Each court also held that "opt-out" releases are no longer acceptable in light of the *Purdue Pharma* decision.[175]

IV. HOW SHOULD BANKRUPTCY COURTS PROCEED?

Overall, the Supreme Court's *Purdue Pharma* decision has left the already-conflicted bankruptcy courts with more questions. Although the Court was very clear that nonconsensual nondebtor releases are impermissible under the Bankruptcy Code, thus curing the circuit split that had plagued the country since the 1980s, the Court failed to define what is permissibly consensual. Thus, the bankruptcy courts are confronted with a new question: what is consensual under *Purdue Pharma*? As discussed above, courts have already begun to take differing stances on what is permissible consent for Chapter 11 nondebtor releases. In this forthcoming section, I advocate how the bankruptcy courts should react to nondebtor releases moving forward.

As noted, there are two possible avenues courts may pursue in determining what constitutes a consensual nondebtor release in the wake of *Purdue Pharma*. Both options, however, have substantial flaws. First, judges

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[168] *Id.* at 708.

[169] *Id.* at 709.

[170] *Id.* at 710.

[171] *See id.* at 711 ("And this Court does not foreclose the possibility (offered in a recent article) that a different outcome on the opt-out question might be appropriate in a case in which the plan process itself builds in the protections of Rule 23(b)(3), under which a named representative is authorized to act on behalf of a class, subject to the rights of unnamed members to receive notice and opt out.").

[172] *Id.*

[173] *Id.* at 711, 723, 726; *In re* Diocese of Buffalo, 663 B.R. 197, 200–01 (Bankr. W.D.N.Y. 2024).

[174] *In re Smallhold, Inc.*, 665 B.R. at 711; *In re Diocese of Buffalo*, 663 B.R. at 201.

[175] *In re Smallhold, Inc.*, 665 B.R. at 720; *In re Diocese of Buffalo*, 663 B.R. at 201.

may align with the Offices of the U.S. Trustee and require that consent be obtained only by opt-*in* provisions. Although this method would provide meaningful creditor consent, it has serious practical limitations. On the other hand, judges may decide to allow opt-*out* provisions, though their use is not necessarily supported by the Supreme Court's decision; this approach also has significant policy concerns.

With no clearly workable judicially made solution, attention should turn to Congress. The question of what is a consensual (and thus permissible) nondebtor release brings with it a host of policy concerns. Such policy questions may be best addressed by Congress, as the majority suggests at the end of *Purdue Pharma*.[176] This type of "fix" is not unheard of—in fact, Congress previously amended the Bankruptcy Code to add Section 524(g), which allows nondebtor releases specifically in asbestos cases.[177] Therefore, effective legislation is not impossible and is likely the best answer to the question posed by *Purdue Pharma*. Below, I dig deeper into the practical and policy considerations of opt-in and opt-out releases, as well as the potential solution Congress could implement.

A. *"Opt-In" Releases*

One option courts may pursue is to allow nondebtor releases only when the creditor affirmatively agrees or "opts into" the release. This avenue, as argued by the U.S. Trustee and a few courts, is the only allowed option under *Purdue Pharma*.[178] The majority emphasized the lack of response from the vast majority of creditors and considered this when determining that the releases were nonconsensual and impermissible.[179] However, the Court emphasized that its decision did not address the permissibility of *consensual* nondebtor releases.[180] Therefore, the release *may* have been valid if Purdue Pharma received approval from every, or almost every, creditor. Some courts, such as the United States Bankruptcy Court for the Western District of New York, have decided that consensual nondebtor releases are still permissible and that opt-in provisions are the only way to obtain consent under *Purdue Pharma.*[181] Likewise, in Delaware, the Bankruptcy Court explicitly stated that "a creditor cannot be deemed to consent to a third-party

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[176] Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071, 2087 (2024).

[177] 11 U.S.C. § 524(g)(2)(B)(i)(I) (the proposed injunction must "assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, *asbestos or asbestos-containing products*") (emphasis added).

[178] *See, e.g.*, *In re Smallhold, Inc.*, 665 B.R. at 709 ("After *Purdue Pharma*, a third-party release is no longer an ordinary plan provision that can properly be entered by 'default' in the absence of an objection."). For a more in-depth discussion, see *supra* Part III.B.2.

[179] *Purdue Pharma*, 144 S. Ct. at 2079.

[180] *Id.* at 2088.

[181] *See, e.g.*, *In re* Tonawanda Coke Corp., 662 B.R. 220, 223 (Bankr. W.D.N.Y. 2024) (holding that without written affirmative consent from the creditors, the plan could not be confirmed).

release without some affirmative expression of the creditor's consent."[182] Opt-in releases, therefore, are most likely to be deemed acceptable under the Supreme Court's decision. It is certainly preferable, especially in certain courts, as it guarantees that the creditors have affirmatively consented to the plan. There is no assumption of consent, as with opt-out releases, given that only those who have affirmatively responded are bound to the release.

Following the Supreme Court's 2024 decision, Purdue Pharma proposed a new plan in March 2025. In this plan, the Sacklers promise to contribute slightly more, now totaling $6.5 billion, as opposed to their previous promise of $5.5 to $6 billion, with $850 million set aside for individual tort victims.[183] Additionally, this plan would include an opt-*in* provision, which the company states is "[i]n compliance with the Supreme Court's 2024 ruling" because it no longer contains nonconsensual nondebtor releases.[184] Purdue Pharma's approach to its new plan indicates that the Supreme Court's ruling may support opt-in, instead of opt-out, releases. As of this writing, it is not yet known whether the Bankruptcy Court will accept this new plan.

However, requiring creditors to affirmatively opt into the releases is not a perfect solution. In the context of mass tort bankruptcies, obtaining the consent of thousands of claimants is likely not feasible.[185] The near impossibility of receiving affirmative communication from each claimant has been recognized both in and out of bankruptcy.[186] During the *Purdue Pharma* oral arguments, when confronted with the possibility of always requiring opt-in releases, Justice Sotomayor expressed serious doubt in its feasibility, remarking "I don't know how an opt-in process . . . would actually work."[187] She expressed that if opt-in elections were required in mass tort bankruptcies, there might as well not be a nondebtor release.[188] But opt-in provisions can also provide troubles in smaller scale bankruptcies, as typified by *Diocese of Buffalo*.[189] Such a requirement would put a strain on negotiations and ultimately delay the plan.

Additionally, the opt-in method may not adequately protect creditors, especially individual—and often unsophisticated—tort victims.[190] Including a nondebtor release provision typically leads to a larger bankruptcy estate and higher recoveries for victims. However, most claimants will likely never

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[182] *In re Smallhold, Inc.*, 665 B.R. at 711.

[183] *Purdue Pharma L.P. Files New Plan of Reorganization Providing for More Than $7.4 Billion in Creditor Distributions*, PURDUE PHARMA (Mar. 18, 2025), https://www.purduepharma.com/news/2025/03/18/purdue-pharma-l-p-files-new-plan-of-reorganization-providing-for-more-than-7-4-billion-in-creditor-distributions.

[184] *Id.*

[185] Huebner & Somers, *supra* note 111, at *27.

[186] *Id.*

[187] *Id.* For a full transcript and recording of the oral arguments in *Purdue Pharma*, see *Harrington v. Purdue Pharma L.P.*, OYEZ, https://www.oyez.org/cases/2023/23-124 (last visited Aug. 3, 2025).

[188] Huebner & Somers, *supra* note 111, at *27.

[189] *In re* Diocese of Buffalo, 663 B.R. 197, 201 (Bankr. W.D.N.Y. 2024).

[190] Huebner & Somers, *supra* note 111, at *27.

respond to a solicitation requiring them to opt in to the restructuring plan, thus causing them to lose out on a potentially higher recovery. Instead, they will be forced to recover by bringing a costly claim.[191] And, most tort victims either never bring a claim, will not succeed in their claim, or do not receive a high reward because the company is now insolvent.[192] This is highlighted in *Lavie Care Centers*, where the debtor was seeking releases for third parties who contributed significant amounts to the bankruptcy estate.[193] The court acknowledged that without these contributions, the unsecured creditors, including tort victims, "would most likely get nothing from any other possible resolution of these cases."[194] Scholars also use *In re Endo*—a 2024 mass tort bankruptcy which utilized an opt-in release—as an example, noting that because the victims had to "opt-in" to receive the recovery multiplier, "many victims inadvertently lost out on [eighty] percent of their plan recoveries—for nothing."[195]

Therefore, although the opt-in method has many policy justifications, as it ensures only creditors that undoubtedly consented to the plan are bound by the plan, it is not the best option. It is simply not practicable, both in mass tort and smaller scale bankruptcies, and does not provide support for victims and other creditors looking to recover.

B. *"Opt-Out" Releases*

Courts may alternatively choose to approve of opt-*out* releases, deeming such provisions consensual. This approach would align with Bankruptcy Courts in the Southern District of Texas and the Northern District of Georgia, who held that *Purdue Pharma* does not foreclose Chapter 11 debtors from implying creditor consent through silence.[196] This method would also align both with the Federal Rules of Civil Procedure's class action requirements[197] and longstanding practices in bankruptcy courts.[198] Opt-out releases also protect and benefit creditors, allowing them to recover even if they do not affirmatively respond.[199]

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[191] *Id.*

[192] *Id.*

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

[194] *Id.*

[195] Heubner & Somers, *supra* note 111, at *27 (discussing *In re* Endo Int'l PLC, No. 22-22549, 2022 WL 16640880 (Bankr. S.D.N.Y. Nov. 2, 2022)).

[196] *See In re* Robertshaw US Holding Corp., 662 B.R. 300, 322 (Bankr. S.D. Tex. 2024) (holding that the opt-out release was adequate under Purdue Pharma); *In re* Lavie Care Centers, LLC, No. 24-5507, 2024 WL 4988600, at *18 (holding the same).

[197] Huebner & Somers, *supra* note 111, at *26.

[198] *See, e.g.*, *In re Robertshaw U.S. Holding Corp.*, 662 B.R. at 322 (reiterating that the Fifth Circuit has consistently held that *consensual* third-party releases are permissible).

[199] *See* Huebner & Somers, *supra* note 111, at *26 (arguing that opt-out releases adequately protect the creditors' interests while opt-in releases do not).

However, perhaps the biggest concern with opt-out releases is that they likely do not comport with the Supreme Court's decision. While Purdue Pharma's plan did not include an opt-out provision, examining the Supreme Court's decision reveals an apparent disapproval of the opt-out method. The majority appeared primarily concerned with the lack of creditor responses—emphasizing that fewer than twenty percent participated.[200] The U.S. Trustee and some courts have read the majority opinion as prohibiting opt-out releases altogether. The United States Bankruptcy Court for the District of Delaware, for example, stated: "[A]fter that decision, there does not appear to be a principled basis for authorizing 'opt-out' third-party releases" in certain cases.[201] Additionally, there are significant public policy concerns accompanying this method. Opt-out releases are comparatively very debtor-friendly, making it much easier to obtain nondebtor releases than with opt-in provisions. However, making nondebtor releases more accessible to debtors inevitably leads to a plethora of policy concerns.

The concerns associated with nondebtor releases are starkly displayed in *Purdue Pharma*. First, because claims against nondebtors are extinguished, tort victims and others cannot be satisfied that the nondebtors have been adequately held accountable for their wrongdoings. The devastating opioid crisis provides a poignant example of this, as the Sacklers' involvement was highly publicized, garnering an immense amount of anger from the public.[202] Multiple TV shows and books have been promulgated regarding the Sacklers' wrongful conduct.[203] This likely led both the public and the courts to want to "punish" bad actors and ensure they receive the retribution that society feels they so rightfully deserve.[204] The individual tort victims demanded that the Sacklers' acts be "fully and fairly litigated" and held accountable to those they have harmed.[205] But, granting the release would allow the Sacklers to win immunity from their victims' claims without going through litigation. Additionally, the tort victims under the plan would receive comparatively small amounts of monetary recovery, while the Sacklers would be able to retain billions of dollars. Between the years of 2008 and 2016, the Sacklers funneled approximately $11 billion of Purdue Pharma's assets into their own pockets.[206] In comparison, their $5.5 to $6 billion contributions to the bankruptcy estate are downright meager.

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[200] Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071, 2079 (2024).

[201] *In re* Smallhold, Inc., 665 B.R. 704, 710 (Bankr. D. Del. 2024).

[202] *See, e.g.*, Dearbail Jordan, *Is This America's Most Hated Family?*, BBC (Mar. 22, 2019), https://www.bbc.com/news/business-47660040 (describing the Sacklers' involvement with Purdue Pharma and the reasons behind the widespread hatred of the family).

[203] *See, e.g.*, KEEFE, *supra* note 63 (detailing the rise of the Sackler family, its involvement in the opioid epidemic, and the aftermath of the crisis); DOPESICK (Hulu 2021); PAINKILLER (Netflix 2023).

[204] *See* Salerno & Brady, *supra* note 64, at *31 (describing how not allowing third-party releases may be seen as a "punish[ment]" to the nondebtors).

[205] Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071, 2080 (2024).

[206] *Id.* at 2079.

Meanwhile, each tort victim is only able to recover between $3,500 and $48,000 under the restructuring plan—minus attorney's fees—with no option to seek additional recovery upon completion of the plan.[207] Thus, not only will the Sacklers not be held responsible for their wrongdoings, but they will also, arguably, be receiving a windfall in that they will be able to keep billions of the dollars they drained from the company. While the *Purdue Pharma* case is exceptionally large and highly publicized, the tort victims are not alone. Many Chapter 11 bankruptcies involve tort victims seeking justice from the debtor and those involved in the claims.[208] Therefore, with opt-out nondebtor releases, neither the creditors nor the public can be assured the nondebtors will have to reap what they have sown.

Second, nondebtors participating in a release are effectively receiving the benefits of a bankruptcy discharge without submitting to the constraints and requirements of a bankruptcy proceeding. As the majority pointed out, a discharge is a privilege typically only granted to debtors who have complied with all the requirements of bankruptcy.[209] Thus, with nondebtor releases, the nondebtors are able to reap the benefits of bankruptcy without any sacrifice on their end. This appears to be exactly what the Sacklers seek. According to the testimony of David Sackler, the family saw Purdue Pharma's bankruptcy as an "opportunity 'to get [their own] goals accomplished.'"[210] Yet, the Sacklers have not filed for bankruptcy themselves, nor willingly put their assets forward for scrutiny. Additionally, the proposed restructuring plan would grant the Sacklers *even more* than they would have received as a debtor. The claims pending against the Sacklers include suits for wrongful death and fraud,[211] which would ordinarily be nondischargeable if the Sacklers were debtors in their own bankruptcy proceeding.[212] The bankruptcy system's purported goal of providing the "honest but unfortunate debtor"[213] with a fresh start is not satisfied here: the Sacklers are neither honest, nor unfortunate, nor a debtor.

Therefore, the second judge-made solution of approving opt-out releases also is not entirely feasible. The solution likely does not align with the Supreme Court's decision in *Purdue Pharma*. Further, the debtor-friendly

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[207] *Id.* (noting that this amount is all before attorney's fees and other expenses).

[208] *See, e.g.*, *In re* USA Gymnastics, 624 B.R. 443, 446, 456 (Bankr. S.D. Ind. 2021) (denying USA Gymnastics' motion for partial summary judgment; the Chapter 11 plan was brought in the wake of lawsuits against directors and officers of the company for sexual abuse).

[209] *Purdue Pharma*, 144 S. Ct. at 2081.

[210] *Id.* at 2079 (alterations in original).

[211] *Id.* at 2085.

[212] *See* 11 U.S.C. § 523(a)(2), (4), (6) (denying a discharge for debts incurred in connection with fraud or malicious injury); *see also* 11 U.S.C. § 1141(a) (applying the exceptions for discharge found in 11 U.S.C. § 523 to Chapter 11 cases).

[213] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

nature of the opt-out release option poses a host of policy concerns better left to Congress.

C. *A Legislative Solution*

With no feasible judicial solution, it may be best to shift focus to Congress. Both sides of the argument regarding how stringent the standards should be for consensual nondebtor releases ultimately fall to policy questions that are squarely in Congress's purview.

The majority in *Purdue Pharma* admitted there are extensive policy concerns, but states "we are the wrong audience" for such arguments.[214] "Either way," Justice Gorsuch writes, "if a policy decision like that is to be made, it is for Congress to make."[215] Congress has previously made changes to the Bankruptcy Code for various policy reasons, including the question of nondebtor releases.[216] Therefore, it is not out of the question that Congress could choose to broaden or narrow the right of debtors to include nondebtor releases in their plans. In fact, it could decide to explicitly allow consensual nondebtor releases and clearly define what constitutes such a release.

Alternatively, it could make a special rule for opioid-related bankruptcies, as it did for asbestos.[217] Overall, the asbestos-specific subsection allows the court to issue, in connection with the restructuring plan, "an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section."[218] The Section comes with sixteen total requirements that must be satisfied before the court grants an injunction further protecting the debtor.[219] The asbestos subsection allows the court to issue an injunction that bars "any action directed against a third party who is identifiable from the terms of such injunction . . . and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor . . . ."[220] In other words, it allows the court to grant a nondebtor release, subject to four enumerated requirements.[221] However, all of this only applies to injunctions that are in connection with a trust that "is to assume the liabilities of a debtor which at the time of entry of the order for relief . . . [in]

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[214] *Purdue Pharma*, 144 S. Ct. at 2087.

[215] *Id.*

[216] *See, e.g.*, Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (2019) (amending Chapter 11 of the Bankruptcy Code to include specific provisions and instructions for the reorganization of small businesses; this is now colloquially referred to as "Subchapter V").

[217] 11 U.S.C. § 524(g)(2)(B)(i)(I).

[218] 11 U.S.C. § 524(g)(1)(A).

[219] Joshua M. Silverstein, *Overlooking Tort Claimants' Best Interests: Non-Debtor Releases in Asbestos Bankruptcies*, 78 UMKC L. REV. 1, 57–61 (2009) (discussing the sixteen requirements set forth in 11 U.S.C. § 524(g)).

[220] 11 U.S.C. § 524(g)(4)(A)(ii).

[221] 11 U.S.C. § 524(g)(4)(A)(ii)(I)–(IV).

actions seeking recovery for damages allegedly caused by the presence of, or exposure to, *asbestos* or *asbestos-containing* products."[222]

As with asbestos bankruptcies, it is certainly feasible for Congress to add a special provision authorizing the use of nondebtor releases for opioid-related bankruptcy proceedings—or for an even broader category, such as for all mass tort cases. With the asbestos-specific subsection, Congress sought to legitimize the injunctive aspect of the *In re Johns-Mansville* and *In re UNR Industries* cases, which were major asbestos-related bankruptcies.[223] Congress could decide to do the same for opioid-related bankruptcies, which are comparable in sheer scale.[224] In a broader sense, it seems feasible for Congress to authorize the use of consensual nondebtor releases in *every* bankruptcy, utilizing the same structure and restrictions as found in the asbestos specific subsection.

There are compelling reasons why Congress may decide to implement a provision that approves of consensual nondebtor releases. Nondebtor releases have become a staple tool for Chapter 11 business debtors to reorganize.[225] Some of the most notable and successful bankruptcy restructuring plans involved nondebtor releases, such as in *In re Boy Scouts of America*, which has been able to continue operating while implementing its $2.5 billion restructuring plan.[226] The widespread use of nondebtor releases is for good reason. In exchange for the release, nondebtors are willing to contribute large sums of money to the bankruptcy estate.[227] This,

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[222] 11 U.S.C. § 524(g)(2)(B)(i)(I) (emphasis added).

[223] Silverstein, *supra* note 219, at 55; *see also In re* Johns-Manville Corp., 36 B.R. 727 (Bankr. S.D.N.Y. 1984); *In re* UNR Industries, Inc., 45 B.R. 322 (Bankr. N.D. Ill. 1984).

[224] *Compare* Karen Selby, *Asbestos Facts & Statistics*, ASBESTOS.COM (May 22, 2025), https://www.asbestos.com/asbestos/statistics-facts (reporting that over 90,000 people die from asbestos-related diseases each year), *with* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 61 ("Approximately 105,000 people died from a drug overdose in 2023 and nearly 80,000 of those deaths involved opioids (about [seventy-six percent]).").

[225] Betsy L. Feldman, *Bankruptcy Can Establish True Peace: The Importance of Non-Consensual Third-Party Releases in Purdue Pharma's Chapter 11 Case*, 30 NORTON J. BANKR. L. & PRAC. 1, 1 (2021) (arguing in favor of nonconsensual third-party releases and noting that this type of release has become standard in large chapter 11 bankruptcies).

[226] *See The Boy Scouts of America (BSA) Announces Confirmation of Plan of Reorganization and Emergence from Chapter 11 Bankruptcy to Equitably Compensate Survivors While Ensuring Scouting Continues Across the Country*, BOY SCOUTS OF AM. (April 19, 2023), https://www.bsarestructuring.org; *see also* Amy Howe, *Court Declines to Put Hold on Boy Scouts Bankruptcy Plan*, SCOTUS BLOG (Feb. 22, 2024), https://www.scotusblog.com/2024/02/court-declines-to-put-hold-on-boy-scouts-bankruptcy-plan (reporting that the Supreme Court refused to stay the Boy Scouts of America restructuring plan, despite the fact that it has similar release provisions to *Purdue Pharma*); *In re* Boy Scouts of America, 642 B.R. 504, 537 (Bankr. D. Del. 2022).

[227] *See* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 977 (2023) ("Properly used, the third-party release prevents holdout behavior and incentivizes perpetrators of corporate misconduct . . . to contribute assets to the bankruptcy estate."); *see also* Salerno & Brady, *supra* note 37, at *58–59 (arguing that the focus for nondebtor releases should be on the potential benefits to the victims in the mass tort).

in turn, enlarges the pool of funds from which creditors may recover.[228] In comparison to traditional class action suits, bankruptcies involving nondebtor releases typically return a larger percentage to claimants.[229]

This was certainly the case in Purdue Pharma's bankruptcy. Purdue Pharma's plan proponents emphasized the necessity of the release, pointing out that the Sacklers would refuse to make their $5.5 billion contribution if they did not have such a release.[230] Similarly, in *In re Boy Scouts of America*, the Hartford Insurance Company was granted a release after contributing a staggering $787 million to the bankruptcy estate.[231] Other insurance companies also contributed large sums and, after negotiations, were also granted releases.[232] Therefore, nondebtor releases often play a critical role in facilitating Chapter 11 plans and maximizing payments to mass tort victims and other creditors. These policy considerations could certainly sway Congress to make a sweeping authorization of such provisions.

On the other hand, Congress could certainly be inclined to limit the ability of nondebtors to obtain a release at all. This solution is similarly neither impossible nor unheard of. In 2023, Connecticut Senator Richard Blumenthal introduced the Stop shielding Assets from Corporate Known Liability by Eliminating non-debtor Releases Act (or the "SACKLER Act").[233] This bill aims to "prohibit the non-consensual release of claims by States, municipalities, federally recognized Tribes, or the United States against non-debtors, and for other purposes."[234] Notably, this potential prohibition would not extend to *all* nondebtor releases; it only prevents the release of lawsuits brought by certain governmental entities.[235]

There are also compelling policy arguments to ban nondebtor releases altogether, as discussed in the preceding Part. Over the years, various scholars have seriously contemplated the prohibition of nondebtor releases. Melissa Jacoby, for example, categorizes nondebtor releases as a feature of "problematic models of business bankruptcy," and argues against their widespread use.[236] She is certainly not alone in her assessment. The field of bankruptcy law is interminably debating the permissibility of nondebtor

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[228] Casey & Macey, *supra* note 227, at 1001.

[229] Salerno & Brady, *supra* note 37, at *30, 58 (comparing *Johns-Mansville* with average class action lawsuits).

[230] Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071, 2101 (2024) (Kavanaugh, J., dissenting).

[231] *See In re* Boy Scouts of America, 642 B.R. 504, 537 (Bankr. D. Del. 2022) ("[P]ursuant to a settlement . . . Hartford agrees to make a contribution to the Settlement Trust in the amount of $787 million in exchange for the sale of the Hartford Policies to Hartford free and clear of the interests of all third parties, including additional insureds.").

[232] *Id.* at 562 (describing the settlement agreements with the group of insurance companies).

[233] S. 2831, 118th Cong. (2023).

[234] *Id.*

[235] *Id.* at § 2 (proposing to include the following text under 11 U.S.C. § 105(b): "a court may not . . . enjoin or release a claim against a nondebtor by a State, municipality, federally recognized Tribe, or the United States").

[236] Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J.F. 409, 411 (2021).

releases, irrespective of whether the release was obtained consensually.[237] Proponents of extinguishing nondebtor releases often argue that the nondebtor is essentially reaping the benefits of bankruptcy by receiving a discharge without complying with the Bankruptcy Code's accompanying duties and requirements.[238] The Supreme Court also acknowledged that, historically, such benefits were reserved exclusively for the debtor.[239]

Regardless of what the correct solution is, Congress seems best suited to address this issue. The potential judicial solutions—i.e., approving either "opt-in" or "opt-out" releases—both have extensive policy and practicality concerns. Meanwhile, Congress has demonstrated, with the asbestos-specific exception in the Bankruptcy Code, its ability to address these concerns head-on. Overall, Congress *can* and *should* provide for a solution in the Bankruptcy Code itself.

CONCLUSION

The 2024 United States Supreme Court decision in *Harrington v. Purdue Pharma, L.P.* has resolved the decades-long Circuit split regarding nonconsensual nondebtor releases in Chapter 11 cases. On non-partisan lines, the Court held that *non*consensual nondebtor releases were impermissible under the Bankruptcy Code. However, the Court refused to address what qualifies as a permissible *consensual* release, spurring new questions in the bankruptcy courts. In the months following the decision, bankruptcy courts across the country have released widely varying decisions regarding the permissibility of opt-out provisions. Considering the debtor-friendly downfalls associated with opt-out releases, and the impracticality of opt-in releases, neither option appears feasible for the courts, alone, to address. Thus, it is up to Congress to determine the best course forward.

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[237] Kellner, *supra* note 17, at 292 (observing that third-party releases have "generated considerable debate"). *See, e.g.*, Salerno & Brady, *supra* note 37, at *59 (arguing in favor of nondebtor releases); Jacoby, *supra* note 236, at *422 (arguing against nondebtor releases).

[238] Kellner, *supra* note 17, at 293.

[239] Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071, 2085 (2024).