

WEDNESDAY, JULY 17 2024

PERSPECTIVE

Purdue Pharma correctly interprets the bankruptcy code

By Leonard Gumport

Members of the Sackler family attempted to obtain the equivalent of a bankruptcy discharge without filing bankruptcy and without putting all their assets on the table for their creditors. In *Harrington v. Purdue Pharma L.P.* 603 U.S. ___, 2024 U.S. LEXIS 2848 (June 27, 2024) (Purdue 4), the U.S. Supreme Court correctly concluded that the Bankruptcy Code did not authorize this type of non-bankruptcy discharge, sometimes referred to by bankruptcy lawyers as a nonconsensual third-party release.

The majority opinion in *Purdue 4* held that the Bankruptcy Code “does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants.” *Id.* at *31-32. Justice Gorsuch wrote the majority opinion, joined by Justices Thomas, Alito, Barrett, and Jackson. Justice Kavanaugh wrote an impassioned and lengthy dissent, joined by Chief Justice Roberts and Justices Sotomayor and Kagan.

As set forth in *Purdue 4*, the Sackler family has an estimated net worth of \$14 billion. The Sacklers own Purdue Pharma L.P., and its products include OxyContin, an “opioid prescription pain reliever.” In 2007, a Purdue affiliate pleaded guilty to a federal felony count for misbranding OxyContin as less addictive and abuseable than other pain medications. Between 2008-2016, as part of what one Sackler family member described as a “milking program,” the Sacklers



Shutterstock

withdrew \$11 billion from Purdue. *Id.* at *9-11.

In 2019, while deluged by a tsunami of OxyContin-related litigation against both Purdue and the Sacklers, Purdue filed for chapter 11 protection in the U.S. Bankruptcy Court for the Southern District of New York. *Id.* at *11. Between November 2019 and September 2021, the bankruptcy court granted preliminary injunctions that temporarily stayed creditors from pursuing their claims against the Sacklers.

In September 2021, over the objections of creditors and the U.S. Trustee, the bankruptcy court confirmed Purdue’s chapter 11 plan, which released and permanently enjoined its creditors’ claims against the Sacklers. In return, they agreed to pay, in installments spread out over years, approximately \$4.325 billion (later increased to \$6 billion). Under the plan, billions will be paid for opioid abatement and education programs, but individual victims of OxyContin will receive

between \$3,500 and \$48,000, before deduction of attorney’s fees and other expenses. Opioid victims who seek more than the base amount of \$3,500 will receive payment in installments spread out over as many as 10 years. *Id.* at *11-16; *Id.* at *60 (Kavanaugh, J., dissenting).

Under Purdue’s chapter 11 plan, the funds available for individual victims are capped at \$700 to \$750 million. *Id.* at *60-61. To date, Purdue and its subsidiaries have paid more than \$800 million in restructuring fees, including fees for professionals, mediators, and a fee examiner. *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y., June 25, 2024), ECF Doc. 6492, p. 23 (Chap. 11 Monthly Operating Report).

In the majority opinion in *Purdue 4*, Justice Gorsuch correctly states that the Bankruptcy Code authorizes a debtor to win a discharge of its debts if the debtor “proceeds with honesty and places virtually all its assets on the table for its creditors.” *Id.* at *8. In Purdue’s plan, the Sacklers essentially sought a bankruptcy discharge without putting virtually all their assets on the table. Justice Gorsuch explains that there was no meaningful distinction between a discharge and the nonconsensual releases of the Sacklers in Purdue’s plan, except that the Sacklers sought a discharge that was broader than what the Code permits by way of a bankruptcy discharge. In the plan’s releases, “the Sacklers seek greater relief than a bankruptcy discharge normally affords, for they hope to extinguish even claims for wrongful death and fraud, and they seek to do so without putting anything close to all their assets on the table.” *Id.* at *27.

As explained by Justice Gorsuch, sections 105(a) and 1123(b)(6) of the Bankruptcy Code did not authorize the nonconsensual releases. Section 105(a) merely permits a court to “carry out” other provisions of the Code, and no other provision of the Code authorized the discharge of the Sacklers. Section 1123(b)(6) of the Code is a “catchall” that provides that a plan may “include any other appropriate provision not inconsistent with the applicable provisions of this title.” A catchall provision must be read in context. The five paragraphs of statutory text that precede section 1123(b)(6) “indicate that a bankruptcy court’s powers are not limitless and do not endow it with the power to extinguish without their consent claims held by nondebtors (here, the opioid victims) against other nondebtors (here, the Sacklers).” *Id.* at *24-25 (footnote omitted).

In dissent, Justice Kavanaugh asserts that “virtually all of the opioid victims and creditors in this case fervently support approval of Purdue’s bankruptcy reorganization plan.” *Id.* *34. That statement is imprecise, as reflected by the majority opinion. Although nearly all creditors who voted on Purdue’s plan supported it, fewer than 20% of eligible creditors cast ballots. Thousands of opioid claimants objected to the plan, and many pleaded with the bankruptcy court not

to wipe out their claims against the Sacklers. *Id.* at *13.

In addition, Justice Kavanaugh states: “The Court decides today to reject the plan by holding that non-debtor releases are categorically impermissible as a matter of law.” *Id.* at *75. The word “categorically” is inaccurate. First, the majority opinion expressly does not question the validity of consensual non-debtor releases in chapter 11 plans. Second, the majority opinion expressly does not pass upon the validity of non-debtor releases in plans that provide for the full satisfaction of claims. *Id.* at *31-32. Third, the majority opinion permits chapter 11 plans that release creditors’ derivative claims. *Id.* at *23. Fourth, the majority opinion permits non-debtor releases in asbestos-related cases as authorized by 11 U.S.C. § 524(g)(4)(A)(ii).

Concerning the exception for asbestos-related cases, Justice Gorsuch states: “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 that same authority in every context.” *Id.* at *27 (emphasis in original).

Justice Kavanaugh argues that the Sacklers’ indemnity claims against Purdue may deplete its bankruptcy estate. *See id.* at 45-46.

A post-petition claim for indemnity on a creditor’s pre-petition claim is unlikely to be allowed as a priority claim against a debtor’s bankruptcy estate. *See* 11 U.S.C. §§ 502(e)(1)(B), 503(b)(1). Moreover, the Sacklers’ pre-petition indemnity agreement with Purdue was subject to an exception for conduct that a court determined was not taken in good faith. *See* Purdue 4, at 30 n.7.

Justice Kavanaugh also argues: “Bankruptcy seeks to solve a collective-action problem and prevent a race to the courthouse by individual creditors who, if successful, could obtain all of a company’s assets, leaving nothing for all the other creditors.” *Id.* at *33. Justice Gorsuch correctly responds: “So yes, bankruptcy law may serve to address some collective-action problems, but no one (save perhaps the dissent) thinks it provides a bankruptcy court with a roving commission to resolve all such problems that happen its way, blind to the role other mechanisms (legislation, class actions, multi-district litigation, consensual settlements, among others) play in addressing them.” *Id.* at *24.

The majority opinion in Purdue 4 acknowledges: “As important as the question we decide today are the ones we do not.” *Id.* at *32. Litigants seeking non-debtor releases without filing bankruptcy may re-

sort to the types of releases whose validity the majority opinion does not question. The majority opinion states: “Someday, Congress may choose to add to the bankruptcy code special rules for opioid-related bankruptcies as it has for asbestos-related cases. Or it may choose not to do so.” *Id.* at *31.

Leonard Gumport is a mediator and lawyer at Gumport Law Firm, PC. He is chair of the Legislation Subcommittee of the Insolvency Law Committee of the Business Law Section of the California Lawyers Association. He also served as counsel on the amicus brief of the Insolvency Law Committee in the Purdue Pharma case. The views stated in this article are exclusively his personal opinions.

