No. 23-124

In the Supreme Court of the United States

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2,

Petitioner,

v.

PURDUE PHARMA L.P., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ADAM J. LEVITIN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Adam J. Levitin is the Carmack Waterhouse Professor of Law and Finance at Georgetown University Law Center, where he teaches courses in bankruptcy and financial restructuring. Professor Levitin has previously served as the American Bankruptcy Institute's Scholar in Residence. His article *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1 (2006), was cited (though misinterpreted) by the bankruptcy court as a basis for its power to confirm a plan containing nonconsensual releases of nondebtors. J.A. 392-393. His other publications include *The Constitutional Problem of Nondebtor Releases in Bankruptcy,* 91 FORDHAM L. REV. 429 (2022) and *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079 (2022). Professor Levitin frequently testifies to Congress, including on July 28, 2021 before the House Judiciary Committee regarding the abuse of releases of nondebtors in Chapter 11 cases.

Professor Levitin is concerned that the Sackler release (as Petitioner uses that term)—the effect of which is to exculpate nondebtors accused of contributing to one of the nation's deadliest public health crises—represents an abuse of the bankruptcy system and that the decision of the court of appeals produces an enormous moral hazard that will

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[1] No one other than *amicus* or his counsel has authored this brief in whole or in part nor made a monetary contribution intended to fund the brief's preparation and submission.

encourage highly undesirable conduct by the owners of potentially insolvent companies.

Professor Levitin submits this brief to elaborate on the serious constitutional and policy problems presented by the Sackler release—problems that actually go well beyond even those articulated by Petitioner.

SUMMARY OF ARGUMENT

Nonconsensual releases of nondebtors' claims against other nondebtors (referred to in this brief as nonconsensual releases of third parties) are anathema to the Constitution. Such releases are outside the scope of Congress's bankruptcy power under an original understanding of the Constitution. Levitin, *The Constitutional Problem*, *supra.* They also offend the Fifth Amendment's guaranty of Due Process because they deprive creditors of a valuable property right without any sort of adjudication. *Id.* Additionally, portions of the Sackler release fall outside the constitutional (and even statutory) subject matter jurisdiction of the federal courts because the release captures claims that have not ripened into actual litigation and therefore do not satisfy Article III's requirement of a "case" or "controversy" (nor the statutory requirement of a "civil *proceeding*" related to a bankruptcy case). *Id.*

The plan proponents and their *amici* have made policy arguments about the supposed utility and convenience of nonconsensual releases of third parties, both in general and in the context of this case. These arguments only go so far. They cannot transmogrify an unconstitutional restructuring

practice into a legitimate one. The convenience of the deal does not determine the scope of the law.[2]

But it just so happens that nonconsensual releases of third parties are also terrible policy. A regime that permits them creates a substantial moral hazard that incentivizes bad conduct by the owners and managers of potentially insolvent companies, not least the diversion of money from the debtors' estate into the owners' pockets—exactly as happened here. Additionally, contrary to the claims of the plan proponents and their *amici*, nonconsensual releases of third parties actually result in *lower* recoveries for creditors relative to a regime that only allows consensual releases—as this very case illustrates. On top of all that, it is simply not true that such releases are required for global resolution of complex mass tort situations. In and out of bankruptcy American law contains other, proven mechanisms for aggregating and resolving mass-tort claims, and for dealing appropriately—and fairly—with hold-outs.

ARGUMENT

I. The Sackler Release Is Unconstitutional

A. The Sackler Release Is Outside the Scope of the Bankruptcy Power as Originally Understood

The sole font of authority for bankruptcy law in the United States is the Bankruptcy Clause of the

[2] One scholar has put the constitutional point this way: "though the chief liability of the bankrupt is thought to be his [spouse], the bankruptcy court cannot strike at the root of his financial troubles by granting him a divorce." Alfred Hill, *The* Erie *Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1037-38 (1953).

Constitution. It provides that "The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. While the Bankruptcy Clause does not spell out what the content of such uniform laws might be, this Court's recent cases teach that the Clause's scope should be determined with reference to its original meaning. See *Allen* v. *Cooper*, 140 S. Ct. 994, 1002-1003 (2020) (discussing the scope of bankruptcy jurisdiction "at the Founding"); *Cent. Va. Cmty. College* v. *Katz*, 546 U.S. 356, 362, 370 (2006) ("It is appropriate to presume that the Framers of the Constitution were familiar with the contemporary legal context when they adopted the Bankruptcy Clause"). Such an approach is sensible because otherwise the Bankruptcy Clause provides almost no limitations on its scope; without reference to original meaning, "the subject of Bankruptcies" could be read so expansively as to devour almost all topics that might affect a debtor.

An original understanding of the Bankruptcy Clause necessarily precludes nonconsensual releases of third parties. Prior to the 1986 Chapter 11 plan confirmation order in the Johns-Manville bankruptcy, the idea of such a release was entirely unknown in American bankruptcy.[3] The concept would have been

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[3] Significantly, this means that the pre-Code practices doctrine, under which the Court has grandfathered in certain pre-Code practices not expressly authorized in the 1978 Bankruptcy Code, does not apply. See Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy*: Judicial Lawmaking in a Statutory Regime, 80 AM. BANKR. L.J. 1, 57 (2006) (summarizing the pre-Code (continued…)

incomprehensible to the Framers. As one scholar has demonstrated, "the 'subject of Bankruptcies' is limited to the adjustment of the relationship between an insolvent debtor and [their] creditors." Thomas E. Plank, *Bankruptcy & Federalism*, 71 FORDHAM L. REV. 1063, 1089 (2002).

The Framers' understanding of the Bankruptcy Clause may be gleaned from the provisions of English bankruptcy law in 1789, from Blackstone's *Commentaries*, and from the first American bankruptcy statute, the Bankruptcy Act of 1800, which was "a faithful transcript of the English statutes."[4] From these sources it is clear is that bankruptcy law as understood in the Anglo-American world in the 18th century contained four features relevant to this case:

(1) the law applied solely to the debtor, who was required to have committed a defined act of bankruptcy;[5]

(2) all of the debtor's assets were required to be made available for distribution to creditors;[6]

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practices doctrine). Even if it did, however, the pre-Code practices doctrine is about implied statutory authority and has no bearing on constitutional questions.

[4] F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW 124 (1919).

[5] See*, e.g.*, 2:31 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 477-79 (1st ed. 1765-69); Bankruptcy Act of 1800, 6th Cong. Sess. I., Ch. 19 (Apr. 4, 1800) (Bankruptcy Act of 1800), § 1. Today the filing of a voluntary bankruptcy petition functions as the "act of bankruptcy."

[6] See*, e.g.*, Bankruptcy Act of 1800 §§ 5 (entirety of assets), 13 (debts owed to the debtor), 14 (concealed property), and 17 (fraudulently conveyed assets).

(3) creditors had extraordinary rights of discovery against the debtor in order to ferret out concealed assets;[7] and

(4) the debtor—and solely the debtor—was able to obtain a discharge at the end of the process.[8]

The fourth point is the necessary implication of the first three. Bankruptcy comes with extraordinary burdens—transparency and making available all assets to creditors. Those burdens fall solely on the debtor. Accordingly, it is only the debtor that is freed from the debt upon passing through the ordeal. This is the bankruptcy bargain—discharge (and a fresh start) in exchange for full surrender of current assets.

Even from the first days of the Republic, limits on the scope of this bargain were clearly articulated. The primary form of business organization in the early Republic (beside the ubiquitous sole proprietorship) was the partnership. Frederick G. Kempin, Jr., *Limited Liability in Historical Perspective*, 4 AM. BUS. L. ASS'N BULL. 11, 14 (1960). This was not the statutory limited liability partnership common today, but a general partnership, in which partners were jointly liable for all the partnership debts. See *id.* at

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[7] See, *e.g.*, BLACKSTONE, *supra*, 482 ("The brankrupt [sic], upon this examination, is bound . . . to make a full discovery of all his estate[.]"). Bankruptcy Act of 1800 §§ 18 (submission to examination by creditors), 19 (creditors' right to search all of the bankrupt's property, including breaking doors and locks), 22 (access to debtor's books and records). No spousal privilege was admitted regarding bankrupts. BLACKSTONE, *supra*, 481; Bankruptcy Act of 1800 § 24. The examination was so searching that American law even paid bounties to those who discovered concealed property of the debtor. Bankruptcy Act of 1800 § 26.

[8] See, *e.g.*, Bankruptcy Act of 1800 § 34; Bankruptcy Act, 1731, 5 Geo. 2, c. 30, § 7 (1732).

16 n.25. There is no closer sort of business relationship than this joint liability. And yet, the Bankruptcy Act of 1800 expressly provided that—contrary to the traditional common law rule on the satisfaction of partnership debts[9]—if the debtor was a partner in a partnership, the discharge of the debtor in bankruptcy would have no effect on the joint liability of the debtor's partners for partnership debts.[10] Similar provisos appear in the Bankruptcy Act of 1841,[11] the Bankruptcy Act of 1867,[12] and the Bankruptcy Act of 1898.[13]

Although it might be argued that such provisos were necessary because it was not self-evident that the Bankruptcy Clause was limited to a discharge of the debtor, the more plausible reading is that these provisions were designed to reinforce existing limits as then understood and thereby preclude any possible argument that the debtor's partner could benefit from

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[9] Ralph Brubaker, *An Incipient Backlash Against Nondebtor Releases? (Part I): The "Necessary to Reorganization" Fallacy*, 42 BANKR. L. LETTER 1, 5 (2022).

[10] Bankruptcy Act of 1800 § 34. See also *Tucker* v. *Oxley*, 9 U.S. 34, 40 (1809) (discussing provision); *Sleech's Case*, 1 Mer. 539 (High Ct. of Chancery 1816) (Eng.) (discussing provision).

[11] Act of Aug. 19, 1841, ch. 9, § 4, 5 Stat. 440, 443-444 (repealed 1843).

[12] Act of Mar. 2, 1867, ch.176, §33, 14 Stat. 517, 533 (repealed 1878) ("[N]o discharge granted under this act shall release, discharge, or affect, or discharge any person liable for the same debt for or with the bankruptcy, either as a partner, joint contractor, indorser, surety, or otherwise."); see also *id.* § 36 (in bankruptcy of partnership, each partner's discharge is independent).

[13] Act of July 1, 1898, ch. 541, § 16, 30 Stat. 544, 550 (repealed 1978) (noting that discharge of a debtor does not affect the liability of a codebtor, guarantor, or surety).

the bankruptcy. Thus, William Cooke's 1785 English treatise, *A Compendious System of the Bankrupt Laws*, did not even discuss the possibility of a discharge for a nonbankrupt partner in the treatise's section on partners of the bankrupt, as it seems that the issue had not arisen in any reported English case.[14] Notably, however, Cooke's treatise observed that "allowing the [discharge] certificate of a bankrupt will not discharge [the] sureties" of the bankrupt.[15] In other words, English bankruptcy law, at the time of the Founding, did not contemplate a discharge for nondebtors, even those who were co-liable with the debtor.

In short, bankruptcy relief as understood by the Framers—and by any observer prior to the 1980s—would have been limited to the debtor and would have been premised on submission to a searching and invasive examination and the surrender of all assets. The bankruptcy court's jurisdiction was over the debtor (*in personam*) and over the debtor's estate (*in rem*). Neither the persona nor the *res* extended to the persons or assets of nondebtors. The Framers would not have been able to conceive of a bankruptcy resulting in the forced release of creditors' claims against nondebtors, whether or not such a release is characterized as a "discharge."[16]

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[14] See WILLIAM COOKE, A COMPENDIOUS SYSTEM OF THE BANKRUPT LAWS (1786).

[15] *Id.* at 343–44.

[16] Again, the label does not affect the constitutional issue, but the Sackler release actually is a discharge for the Sacklers. The court of appeals majority concluded otherwise "because the releases neither offer umbrella protection against liability nor extinguish all claims." J.A. 872. This distinction between (continued…)

Any reading of the Bankruptcy Clause that does not limit the scope of Congress' power to providing relief to the debtor risks transforming the Bankruptcy Clause from a narrow and particular power of Congress into the equivalent of a second "necessary and proper" clause that would allow Congress the free-ranging power to restructure all manner of economic and property relationships as it sees fit. Just as Congress does not hide elephants in statutory mouseholes, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), so too did the Framers not hide a general power of economic regulation within the modest trappings of the Bankruptcy Clause. Accordingly, it does not matter what statutory provision is cited as a purported source of authority for nonconsensual releases of third parties: no such provision is within the scope of Congress's constitutional power.[17]

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discharge and releases per court order cannot be supported. None of the various discharges offered by Chapter 7, 11, 12, and 13 offer umbrella protection against liability nor do they extinguish all claims. 11 U.S.C. §§ 523(a) (general discharge exceptions), 727(a) (Chapter 7 discharge exceptions), 1141(d)(6) (Chapter 11 discharge exceptions for corporate debtors), 1228 (Chapter 12 discharge exceptions), 1328 (Chapter 13 discharge exceptions). A court order releasing or enjoining actions to collect on delineated liabilities is a discharge of the liability, and is thus directly prohibited by section 524(e) of the Bankruptcy Code. 11 U.S.C. § 524(e).

[17] Whether the Bankruptcy Clause authorizes Congress to permit the release of a nondebtor's *derivative* liability—as provided for in the asbestos context under specified narrow conditions by 11 U.S.C. § 524(g)—is a separate question and one not presented here. The Sackler release, unlike a section 524(g) release, covers *direct* claims as well as derivative claims against nondebtors.

B. The Sackler Release Violates the Fifth Amendment

Another constitutional impediment here is the Fifth Amendment's guaranty of due process of law.

1. The Sackler Release Deprives Creditors of Property Without an Adjudication

Nonconsensual releases of third parties offend due process. At the core of due process is notice and the opportunity for an adjudication of a claim on its merits before a competent tribunal. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). See also *Fuentes* v. *Shevin*, 407 U.S. 67, 80-81 (1972) (requiring notice and opportunity to be heard prior to replevin of goods); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) (requiring notice and an opportunity to be heard prior to wage garnishment order).

To be sure, the particulars of the adjudication may vary based on the circumstances. See*, e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976). Nevertheless, "the essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." *Id.* (cleaned up and citing *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring)). It is a "basic principle of justice . . . that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights."

City of New York v. *N.Y., N.H. & H.R. Co.*, 344 U.S. 293, 297 (1953). In essence, parties cannot be deprived of property without getting their proverbial "day in court" in some form, meaning access to a process that allows a claim to be heard on its merits. See *Martin* v. *Wilks*, 490 U.S. 755, 761-762 (1989) (noting the "deep-rooted historic tradition that everyone should have his own day in court" and that "[A] voluntary settlement … cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of [those] who do not join in the agreement.").

Creditors who have a direct claim possess a "chose in action," which is property protected by the Due Process Clause. See*, e.g.*, *Tulsa Prof'l Collection Servs.* v. *Pope*, 485 U.S. 478, 485 (1988) ("Little doubt remains that [a cause of action] is property protected by the Fourteenth Amendment."); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 807 (1985) ("[A] chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs."); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."); *Mullane*, 339 U.S. at 313 (recognizing a cause of action as a property interest). Moreover, these "choses in action" also clearly have significant value: that is exactly *why* the Sacklers' contribution to the reorganization plan is conditioned upon their release.

Under the plan, all creditors of Purdue are forced to release virtually all claims they may have against the Sacklers. There is no way to reconcile this with the demands of due process. The claims that are the subject of the Sackler release have never been adjudicated in any fashion by *any court*. In fact, in

most cases, there were not even actions on the released claims *pending*, and the preliminary injunction entered at the beginning of Purdue's bankruptcy (see, *e.g.*, J.A. 212) foreclosed all efforts to make a merits determination outside of bankruptcy, such as through a bellwether case.

Nor could the Chapter 11 plan confirmation process function as an adjudication. The bankruptcy court's findings of fact in the Plan Confirmation Order all relate to whether the *Debtors*—that is, the Purdue Pharma entities, rather than the Sacklers—have met the requirements for plan confirmation. The bankruptcy court made no findings of fact regarding the merits of the myriad claims covered by the Sackler release. *See* Brief for Appellant-Cross-Appellee The Raymond Sackler Family, No. 22-110 (2d Cir. Mar. 28, 2022) [ECF 751] at 38 ("The confirmation hearing—by agreement and with the bankruptcy court's approval—was not a hearing on the merits of the settled claims[.]").

The Debtors' Disclosure Statement made no attempt to value claims released as a result of the Sackler release and did not include them in its liquidation analysis. The Debtors noted that "[t]he Liquidation Analysis assumes that there is no settlement with" the Sackler families, and that "[t]he amount of any hypothetical judgment is *unknowable*." Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, *In re Purdue Pharma L.P.*, Case No. 19-23649 (Bankr. S.D.N.Y. June 3, 2021) [ECF 2983] at 5 (emphasis added). The Chapter 11 plan confirmation procedures do not begin to satisfy constitutionally required due process.

Likewise, plan proponents may claim that the opportunity for a very small number of opioid victims to deliver impact statements—including subsequent to the entry of the Plan Confirmation Order—somehow counts as having their "day in court." But no one should mistake an *ad hoc* process for the delivery of victim impact statements for an adjudication on the merits. Accordingly, releasing the Released Claims violates the Fifth Amendment because it deprives the holders of Released Claims of property without an adjudication.

2. The Sackler Release Contains No Opt-Out Mechanism

A related Fifth Amendment problem is that the plan binds *all* creditors—those who voted for the Plan, those who voted against the plan, and those who did not vote at all. (While proponents of the plan note that the plan was supported by the majority of *voting* creditors, the overwhelming majority of creditors did not cast ballots.)

It is well established that in a Rule 23(b)(3) money damages class action, due process requires, at a minimum, the opportunity to opt out of a class.[18] *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011) ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process."); *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846-848 (1999) (noting the due process problem of a mandatory class in a class action for damages). This Court has held the same in the

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[18] Whether consent in these circumstances would require an opt-in rather than an opt-out is an issue that has divided lower courts but that this Court need not decide here.

context of a state-law class action. *Phillips Petroleum Co.*, 472 U.S. at 812 ("[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class.").

It is quite puzzling that what is forbidden to an Article III district judge in the context of a Rule 23(b)(3) class action is somehow permitted to a non-Article III bankruptcy judge whose powers derive entirely from those of the district court. See 28 U.S.C. § 1334. Bankruptcy is not and was never intended to be a backdoor to bypass the constitutional strictures that govern class actions.

On the contrary, the Due Process Clause applies to bankruptcy cases, just as it does to class actions. It requires that any settlement of claims against nondebtors be consensual, which would require, at the very least, the possibility of an opt-out for creditors that is not tied to their vote on a plan.

C. Federal Courts Lack Article III—as well as Statutory—Jurisdiction over Many of the Released Claims

1. Statutory Bankruptcy Subject Matter Jurisdiction Extends Only to Actual "Civil Proceedings"

Before demonstrating that the federal courts lack Article III jurisdiction over many of the released claims, we pause to note an antecedent problem, which is that the federal courts actually lack even *statutory* subject matter jurisdiction over many such claims. The bankruptcy court held that 28 U.S.C. § 1334 confers "broad jurisdiction over matters that are related to the Debtors' property and cases." J.A.

376. The district court agreed. J.A. 725. So did the court of appeals. J.A. 874.

The courts below failed to give effect to the textual limitation of 28 U.S.C. § 1334(b) to "civil ***proceedings*** arising under title 11, or arising in or related to cases under title 11."[19] In other words, even if someone's *claim* against a nondebtor is "related to" the bankruptcy case, there is still no statutory subject matter jurisdiction unless there is some sort of pending lawsuit—a "civil proceeding"—brought against the nondebtor. As this Court has noted, "related to" jurisdiction covers "*suits* between third parties which have an effect on the bankruptcy estate." *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 307 n.5 (1995) (emphasis added). Suits, not unripened claims.

This subject-matter limitation makes sense—a court cannot assert jurisdiction over litigation that has not yet materialized, as the court cannot know what the litigation is about and therefore whether it actually falls within the ambit of its jurisdiction.

When this Court has previously addressed the scope of bankruptcy subject matter jurisdiction under section 1334(b), it was in the context of *pending* civil litigation. *Celotex*, 514 U.S. at 301-302 (execution on supersedeas bond on judgment); *Stern* v. *Marshall*, 564 U.S. 462, 470 (2011) (counterclaim filed by debtor

[19] To be clear, 28 U.S.C. § 1334(a), which creates exclusive jurisdiction "of all cases under title 11," is a grant of jurisdiction over the *bankruptcy* itself, including claims filed against the debtor or scheduled by the debtor. But third-party claims against the third-party Sacklers are not part of the bankruptcy "case"; they are at best "related to" it and in that regard would come solely within Section 1334(b), not Section 1334(a).

against creditor). This case presents a very different circumstance, namely that many, perhaps most, of the released claims have not ripened into actual litigation. Potential plaintiffs' *claims* against the nondebtor Sacklers might well be "related to cases under title 11." However, unless an actual lawsuit has been filed – as has happened for only a subset of released claims – there is no "civil proceeding," and hence no statutory subject matter jurisdiction.

2. Article III Jurisdiction Does Not Extend to Claims Against Third Parties that Have Not Ripened into Actual Litigation

For similar reasons, constitutional jurisdiction also is lacking. Article III extends the judicial power solely to "cases" and "controversies." U.S. Const. art. III, § 2. It is axiomatic that a "case" or "controversy" requires litigation to have actually been brought, for if litigation has not been commenced there is nothing for the court to adjudicate. Again, the requirement of actual litigation makes sense because it requires some sort of pleadings articulating the claim. Without that, the court—and the parties—could not know what was actually being adjudicated in terms of subject matter, parties, and remedies. Nor could other courts determine the preclusive effect of any judgment.

This jurisdictional limitation means that if there was no actual litigation pending on a released claim at the time of plan confirmation, then there could not be Article III jurisdiction for any federal court to release that claim in the first place. If a creditor merely has a *potential* claim against the Sacklers, but has not yet sued, federal courts lack Article III jurisdiction to resolve that potential claim until it ripens into actual litigation (which could be brought

by the claimant, or by the Sacklers, for example in the form of a declaratory judgment action).[20]

Here, only some of the claims covered by the Sackler release involved *pending* litigation against the Sacklers. *See* Complaint, *Purdue Pharma L.P.* v. *Commonwealth of Massachusetts (In re Purdue Pharma, L.P.)*, Adv. Proc. No. 19-08289 (Bankr. S.D.N.Y. Sept. 18, 2019) [ECF 1], Exhibit B (listing 560 actions pending against various related parties of the Debtors, including the Sacklers). The rest of the claims covered by the Sackler release are claims that merely could *potentially* be asserted in litigation. The bankruptcy court had jurisdiction to enter the Sackler release solely as to the approximately 560 cases in which Purdue's creditors had actually sued the Sacklers and other nondebtor parties. For all other claims, no federal court, including the bankruptcy court in this case, has jurisdiction to enter the Sackler release.

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[20] Recognizing this limitation on federal court jurisdiction does not affect the ability of bankruptcy law to address contingent and unmatured claims against the debtor because the filing of a proof of claim or scheduling of a claim by a debtor should function like a complaint for the purposes of bringing the matter within the scope of Article III. Similarly, even outside the bankruptcy context, unripened claims covered by *consensual* court-ordered releases do not raise the same issues, not least because *parties before the court* are always free to bargain away their claims as a condition for obtaining some form of judicial relief. And courts are empowered to issue orders in aid of their own jurisdiction, which includes effectuating a bargain to resolve a case or controversy that comes within their jurisdiction. That said, even in consensual situations, broad judicially-ordered releases may well present constitutional problems, though not ones that the Court needs to reach here.

II. Nonconsensual Releases Against Third Parties Create a Moral Hazard

For all the supposed virtues of the plan trumpeted by its proponents, the decision below, if affirmed, will produce a terrible moral hazard. Specifically, if nonconsensual releases of third parties are available, then the owners of companies can, as the Sacklers are alleged to have done, not only engage in misconduct but at the same time siphon out huge amounts of money from a company once it becomes clear that the company may be rendered insolvent *as a result of that very misconduct*. Company owners will know from the getgo that they can always piggyback on the company's future bankruptcy and get releases that cap their own liability, including for receiving fraudulent transfers.

If the Sacklers (who have had sophisticated advice at every turn) had known *ex ante* that civil immunity would *not* be available, for one thing, they might have been more circumspect in their conduct running Purdue. They also would likely not have been so quick to take billions of dollars out of Purdue, meaning there would likely have been far more money left in the estate to fund opioid abatement and otherwise compensate creditors without the debtors now having to bargain with the Sacklers for a contribution.

That the current deal *may* be the "best" available under the circumstances is, even if true, a problem of the Sacklers' own making. Purdue's *entire bankruptcy* was in fact premised from the beginning on the assumed existence of a legal regime that would allow the Sacklers to obtain civil immunity through a

blanket release of nondebtors.[21] Such a regime does our society no good in the long run.

III. Nonconsensual Releases Against Third Parties Result in Lower Recoveries for Creditors

A. Only Nonconsensual Releases Are at Issue

Purdue's *amicus* supporters claimed below that nonconsensual releases against third parties result in greater recoveries for creditors.[22] They are wrong.[23]

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[21] The term sheet that Purdue filed at the very beginning of its bankruptcy—essentially a partial draft of a plan—included a nonconsensual release for the Sacklers in exchange for a $3 billion contribution. Notice of Filing of Term Sheet with *Ad Hoc Committee*, *In re Purdue Pharma L.P.*, Case No. 19-23649 (Bankr. S.D.N.Y. Oct 8, 2019) [ECF 257] at Exhibit A.

[22] Brief of *Amici Curiae* Law Professors in Support of Appellants, No. 22-110 (2d Cir. Mar. 2, 2022) [ECF 476] at 4 (nonconsensual third-party releases allow "creditors to obtain higher recoveries").

[23] It is also important to note that maximizing dollar recoveries to creditors is not all that matters. While that might be true in the garden-variety commercial bankruptcy case, the situation is more complicated for tort victims. Some tort victims might not want to accept a deal for their own dignitary reasons. They might wish to have their day in court and risk losing on the merits, rather than accept a settlement from people they view as morally repugnant and/or become unwitting beneficial owners of an opioid company, even under new management. They might be seeking purely *symbolic* or even nominal damages (as when Taylor Swift famously sued an alleged sexual harasser for one dollar, see Phoebe Lett, *Taylor Swift's Priceless Dollar*, N.Y. TIMES, Aug. 16, 2017) because what some tort victims really seek is judicial vindication for themselves (or a lost loved one) through a definitive finding that the defendant committed a wrong. For these victims, money isn't everything and may not even be (continued…)

To understand why, it is critical to distinguish (as Purdue's *amici* have sometimes failed to do) between consensual and nonconsensual releases against nondebtors. This case is only about nonconsensual releases. The claimed benefits of nondebtor releases are not lost by ensuring that such releases are consensual.

A consensual nondebtor release is merely another name for a settlement between a creditor and a nondebtor. Parties are always free to enter into their own private settlements, and they are free to coordinate those settlements with a reorganization plan in the bankruptcy court. See Edward J. Janger & Adam J. Levitin, *Badges of Opportunism: Principles for Policing Restructuring Support Agreements*, 13 BROOK. J. CORP. FIN. & COM. L. 169, 170 (2018) (explaining the use of restructuring support agreements—"contractual agreements among creditors, and sometimes the debtor, to support restructuring plans that have certain agreed-upon characteristics"). Similarly, a bankruptcy court is free to take private settlements into account and to coordinate at some level with privately negotiating parties, even if the court lacks jurisdiction to include certain releases of nondebtors in a plan of reorganization.

Contrary to the arguments of Purdue's *amici,* the choice here is not between allowing nonconsensual releases of third parties, on the one hand, and, on the other, leaving mass tort "crises to be resolved only through years-long value-destructive litigation with

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anything. For a claimant who pursues legal action for expressive or dignitary purposes, being bound to a nonconsensual release literally adds insult to injury.

lower, if any, victim recoveries and liquidated businesses as collateral damage."[24] That is a false dichotomy. For one thing, American law contains mechanisms for resolving mass tort liabilities outside of the bankruptcy system. See Section IV, *infra*. And, forbidding *nonconsensual* releases against nondebtors does not preclude consensual releases against nondebtors. Instead, it forces the nondebtors to purchase consent. Creditors will agree to those releases only if they believe the nondebtor's settlement offer is appropriate. This might mean nondebtors like the Sacklers will have to pay more for their releases.

B. The Sacklers' March 2022 Settlement Shows That Requiring Consent Results in Greater Recoveries

Events in this very case falsify the claim that nonconsensual releases result in higher recoveries. Subsequent to the district court ruling prohibiting nonconsensual releases, the Sacklers went back to the negotiating table and increased their offer: on top of their original contribution of $4.325 billion, the Sacklers agreed to pay creditors an extra $1.175 billion in guaranteed payments and up to $500 million in contingent payments in order to obtain the consent of an additional nine states to their releases. Pet. Br. 5, 7-8. (The extra payments did not go exclusively to the additional nine states.)

[24] *Amicus* Brief in Support of Appellants by [certain former] Commissioners of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11, No. 22-110 (2d Cir. Feb. 24, 2022) [ECF 437] at 21.

The Sacklers' actions show that requiring releases to be consensual hardly results in the "lower, if any, victim recoveries" predicted by Purdue's *amici*. The district court's requirement that the nondebtor releases be consensual actually resulted in an increase of up to 39% in the Sacklers' monetary contribution (and thus more funding for opioid abatement), as well as certain nonmonetary concessions.

C. Economic Theory Indicates That Consensual Releases Will Result in Greater Recoveries for Creditors

Not only is the course of this case proof that if only consensual releases are allowed, creditors will do *better* than in a world of nonconsensual releases. This outcome is also what economic theory predicts: consensual releases force "Coasean" bargaining among the parties, whereas nonconsensual releases allow nondebtors like the Sacklers to purchase a release at a discount from the market-clearing price.

To illustrate, recall that the attraction to nondebtors of obtaining releases through the bankruptcy process is the possibility of a global deal that binds all creditors. Now imagine a situation in which there are four creditors with ripened claims (so there is no jurisdictional deficiency) against a nondebtor. One creditor is demanding $1 to settle, the second demands $2, the third demands $3, and the fourth demands $4. Suppose that the bankruptcy court can approve a nonconsensual release that binds all four creditors, as long as three consent, cf. 11 U.S.C. § 524(g) (requiring 75% consent of a class of asbestos claims to approve a channeling injunction), and that all creditors must be paid the same price, cf.

id. § 1123(a)(4) (requiring equal treatment within a class of claims). In such a situation, the nondebtor could settle for the "lowest winning bid" of $3/creditor or $12 total.

If, on the other hand, the bankruptcy court could bind only consenting creditors to the deal (again assume only ripened claims), then the price of a global deal that covered all four creditors would be at $4/creditor, or $16 total, because under a consensual release regime, the nondebtor will have to pay the "highest winning bid," that, is the actual market clearing price, for global peace through bankruptcy. This illustration shows that a consensual release regime will result in greater recoveries for creditors if the nondebtor wants to achieve global peace through the bankruptcy.

To be sure, in a consensual release regime, the "highest winning bid" might be more than the nondebtor is willing to pay. Suppose, for example, that the fourth creditor demanded $4 billion, rather than $4 to settle. In that case, the nondebtor could simply choose to do a deal in the bankruptcy with the first three creditors for $3/creditor or $9 total and then worry about the fourth creditor outside of the bankruptcy plan. This is not unrealistic; it is the same thing that happens in the Rule 23(b)(3) class action context when settling defendants have to deal with the opt-outs.[25]

The "lowest winning bid" rule of nonconsensual releases makes it easier to achieve global deals on

[25] It is also the approach required by the Sixth Circuit in the Dow Corning bankruptcy. *In re Dow Corning*, 280 F.3d 648, 658 (6th Cir. 2002).

nondebtor releases by narrowing the bid-ask spread, but this also means that the creditors will not receive top dollar. In a "lowest winning bid" regime, nondebtors are able to take advantage of some creditors' desperation and liquidity needs to get a bargain vis-à-vis all creditors. A "highest winning bid" rule of consensual releases ensures that consenting creditors get the actual market-clearing price and are at least as well off as under a nonconsensual release deal, and potentially better off.

D. Creditor Majorities Should Not Be Allowed To Bind Minorities Unless There Is a Limited Fund, Which Does Not Exist Regarding Nondebtors

To be sure, the "lowest winning bid" rule of nonconsensual releases mirrors the general Chapter 11 practice of allowing majorities to bind minorities. In regard to a debtor firm, this makes sense because the creditors are competing for a limited fund. If a deal made by a majority did not bind the minority, the bankruptcy would devolve into a grab race for the limited pot of assets. The same is true for Rule 23(b)(1)(B) mandatory class actions.

In contrast, releases of nondebtors do not involve a true limited fund. The Sacklers' settlement offer is an artificially limited fund; the full extent of family assets is not known because they are not debtors in bankruptcy and have not made the public disclosures required of debtors.

The possibility of further litigation would only affect the price the Sackers would be willing to pay for something less than global peace. It would not threaten collectability of any consensual deal reached

through bankruptcy if the Sacklers were to fund their contribution upfront. Indeed, the possibility that the Sacklers would exhaust a large share of their assets with a consensual deal executed through Purdue's bankruptcy would create an incentive for creditors to sign on to that deal rather than face the possibility of a post-bankruptcy grab race for the Sacklers' remaining assets.

There is no reason to think that, under the correct legal regime, the Sacklers would be unwilling to pay ratably based on the number/amount of claims settled. And, if the Sacklers' assets do truly prove to be a limited fund that is incapable of paying all the claims against it, a solution is readily on hand: the Sacklers can file for bankruptcy themselves.

IV. Nonconsensual Releases of Third Parties Are Not Necessary To Resolve Mass Torts in or out of Chapter 11

Plan proponents and their *amici* have argued that releases like the Sackler release are essential for resolving mass torts. This claim is demonstrably wrong. American law contains other mechanisms for aggregating and resolving claims—while dealing fairly with opt-outs and hold-outs.

The class action is the most well-known and obvious vehicle for *judicial* resolution of widely dispersed claims. No one suggests class actions are not up to the task simply because some class members will opt out, or because actions may proceed at once in multiple states and in the federal system. In these situations, there are often steering committees of plaintiffs' lawyers (ad hoc or court-appointed), nation-wide coordination, and so on.

Sometimes important settlements are reached through voluntary negotiations that transcend any one court proceeding. The landmark tobacco Master Settlement Agreement of 1998—which was also incredibly complex, involved a large number of parties, was designed to compensate for and abate the public health consequences of an addictive, deleterious product, and was, in dollar terms, at least an order of magnitude larger than the plan here—was negotiated outside of any one court proceeding and did not require nonconsensual releases. See Tobacco Control Legal Consortium, Pub. Health L. Ctr., *The Master Settlement Agreement: An Overview* (2015), *at* https://bit.ly/3IkQDUE.

Even within chapter 11 cases, nonconsensual releases of third parties are not required to resolve mass torts. In the Dow Corning bankruptcy, the Sixth Circuit required that a Chapter 11 plan with releases of nondebtors have an opt-out provision. Specifically, the plan had to "provide[] an opportunity for those claimants who choose not to settle to recover in full." *Dow Corning*, 280 F.3d at 658. In other words, *Dow Corning* did not involve *nonconsensual* releases of third parties and therefore (contrary to what many have argued, see, *e.g.*, Brief of *Amici Curiae* Law Professors, *supra* note 22, at 11-15) is *not* an example of nonconsensual releases supposedly helping to resolve billions of dollars of mass tort claims regarding silicone gel implants. On the contrary, the case is actually an example of how billions of dollars of mass tort claims were resolved *without* nonconsensual releases of third parties. The same is true for Pacific Gas & Energy's 2019 bankruptcy, spurred by mass tort liability for wildfire-related

harms. PG&E successfully emerged from bankruptcy with a plan that ensured through an opt-out mechanism that releases of nondebtors were consensual. Bankr. Ct. Doc. 6353, at 37-38, *In re PG&E Corp.*, No. 19-30088 (Bankr. N.D. Cal. Mar. 17, 2020).

Likewise, even though nonconsensual releases of nondebtors are not available under current law in the Fifth Circuit, debtors facing mass tort liability still file for Chapter 11 in the Southern District of Texas, despite having the ability to file in jurisdictions that permit such releases. For example, in 2023, Tehum Care Services, a provider of health care services in prisons that is facing hundreds of medical negligence claims, filed for Chapter 11 in the Southern District of Texas.[26] Likewise, Limetree Bay Services, LLC, the U.S. Virgin Islands-based operator of what was once the largest in the hemisphere,[27] filed for Chapter 11 in the Southern District of Texas in 2021[28] despite facing mass tort liability arising from pollution emissions. The fact that these debtors with mass tort liabilities filed in a jurisdiction where nonconsensual releases for third parties are not available indicates that such releases are simply not a requirement for dealing with mass torts in bankruptcy.

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[26] Petition, *In re Tehum Care Services, Inc.*, No. 23-90086 (Bankr. S.D. Tex. Feb. 13, 2023); Declaration of Russell A. Perry, *In re Tehum Care Services, Inc.*, No. 23-90086 (Bankr. S.D. Tex. Mar. 15, 2023) [ECF 186] at ¶ 6 (referring to hundreds of professional liability claims).

[27] See Laura Sanicola & Tim Mclaughlin, *Troubled Caribbean refinery seeks bankruptcy as lenders balk at injecting more cash*, REUTERS (July 13, 2021).

[28] Petition, *In re Limetree Bay Services LLC*, No. 4:21-bk-32351 (Bankr. S.D. Tex. July 12, 2021).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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