Reflections and Predictions on the Oral Argument in *Purdue Pharma:* The Supreme Court Should Reverse the Second Circuit

Written by:
David R. Kuney[1]
Georgetown University Law Center; Washington, D.C.

On Dec. 4, 2023, the U.S. Supreme Court heard almost two hours of oral argument in *Harrington v. Purdue Pharma.* The oral argument was an opportunity to probe some of the issues underlying nonconsensual third-party releases, which have been described as the "great unsettled" question of bankruptcy law.[2]

More than one month has now passed since oral argument. Further reflection on what was presented to the Court seems in order. This essay examines whether oral argument revealed any insight into how the Court might rule on this great unsettled question, as well as the Court's views on bankruptcy law in general, and in particular, on the legitimacy of a bankruptcy court expanding its powers to resolve mass-tort and other complex chapter 11 reorganization issues.

My guiding principle reflects a deep skepticism about whether Congress (or the Founders) intended to authorize nonconsensual third-party releases. A release is essentially a discharge.[3] The notion that nondebtor parties may receive a discharge without the duties and obligations of filing for bankruptcy seems fanciful and dangerous.

There is no alternate system of bankruptcy; no parallel universe where nondebtors get the benefits of chapter 11 without filing for bankruptcy. The bankruptcy court cannot authorize a release merely because it finds that the procedures followed in a particular case mimic or replicate some of the statutory requirements for a lawful debtor. There is no way the bankruptcy court can make a meaningful assessment of whether a nondebtor has acted in accordance with the "applicable provisions of the Code." For that to occur, the nondebtor would have to submit to the jurisdiction of the bankruptcy court and undergo the kind of adversarial, searching inquiry that is imposed on legal debtors. That simply did not happen here, and the bankruptcy court is not authorized to run a parallel nonbankruptcy case.

In short, the deviation from the law was twofold: The bankruptcy court displaced the state and federal tort system, and created out of whole cloth a parallel nonstatutory scheme to grant nondebtors a discharge/release. It then sought to justify it by saying this is the best deal for most. But the best deal is not a legal deal, and it is not the "deal" Congress authorized when it created the bankruptcy system. As Prof. Adam Levitin has

---

[1] David R. Kuney is an adjunct professor of law at Georgetown University Law Center, where he teaches the Bankruptcy Advocacy Practicum, which focuses on *pro bono amicus* briefs. He submitted an *amicus* brief in *Purdue Pharma* on behalf of Hon. Eugene Wedoff and a group of prominent law professors.

[2] *In re Purdue Pharma L.P.,* 635 B.R. 26, 37 (S.D.N.Y. 2021).

[3] Justice Kagan disagreed with Purdue's assertion that a release is not functionally the same as a discharge. "In some ways, they're getting a better deal than the usual bankruptcy discharge." Transcript of Oral argument, Dec. 4, 2023, at 65.

written, the Founders never envisioned anything resembling a nonconsensual third-party release.[4]

In sum, I believe the Sacklers would have been better served if they had known when they authorized Purdue's filing for bankruptcy that a *nonconsensual* release was not lawful, and that a more realistic goal would have been to try to obtain a supermajority vote, and then let the few likely dissenters opt out and take the minimal risk of a large verdict. Certainly their success in most of the opioid litigation suggests that this was not an unreasonable risk. I believe that most, or all, large companies involved in mass tort cases might be better served with the knowledge that nonconsensual third-party releases are not permitted; then they can expend their energy in seeking resolution with the willing and able. The savings in time and legal expense might make this a more productive route.

I believe and hope that the Supreme Court is headed in that direction. Despite some questions from the Court suggesting otherwise, the overall tenor of the questions suggest that the Court is likely to reverse the Second Circuit. In my view, the bankruptcy system will function far better if it does so.

The Government's Opening Argument: Congress Did Not Authorize Third-Party Releases — No Exceptions

The Solicitor General began oral argument by asserting a broad proposition that would seem to prohibit most, if not all, nonconsensual releases: "This release extinguishes personal property rights, the creditors' state law choses in action that do not belong to the bankruptcy estate. That result is not supported by any historical analogue in equity, and it raises significant constitutional questions that should be avoided in the absence of a clear command from Congress." Tran. 5. Restated, it means that the bankruptcy court cannot release "direct" claims that do not belong to the estate. A different rule would pertain to "derivative" claims.

The government did not limit its opening oral argument to a statutory framing, but rather urged a broader point of view: A third party can never receive a release of direct claims held by a creditor *under any circumstances*. This binary view would require parties to seek a consensual resolution with a large majority of creditors and tort victims, and would discourage excessively creative lawyering to try to fit into a "facts and circumstances" test that might authorize such releases in "rare" cases.

Justice Roberts' questions during oral argument suggested he may agree that there is no statutory basis for a third-party release, although he approached this from a different perspective. He asked the government why they had not cited precedents in their brief that reflect the major questions doctrine.[5] What he seemed to signal is that the power to

[4] Brief of Prof. Adam J. Levitin as *amicus curiae* in support of petitioner ("English bankruptcy law, at the time of the Founding, did not contemplate a discharge for nondebtors."), p. 8; *see also* Adam Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 202 (2022).
[5] *See W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2609 (2022) ("We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies."); *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc). *See also* Chief Justice Robert's recent decision in *Biden v. Nebraska*, 143 S. Ct. 2355, 2373, 216 L. Ed. 2d 1063 (2023), stating that the major questions doctrine is "about one branch of government arrogating to itself power belonging to another."

grant third-party releases has no statutory foundation and was in effect a grant of power that lacked specific authorization by Congress. This was similar to statements made by the Court in *Jevic* and *RadLAX*.[6] It is noteworthy that Justice Kavanaugh, who at some points seemed to favor affirming the Second Circuit, referred back to the Chief Justice's questions about the major questions doctrine, noting that the Court had been "cautious, especially in recent years about reading [statutes] to give too much authority [under] the major questions doctrine, elephants in mouse holes." Tran. 88-89.

The "absence of a clear command from Congress" was key. Justice Roberts suggested that congressional silence is not an adequate basis for inferring a broad grant of power. Legal scholars likewise urge limits to the powers of bankruptcy courts when they improperly invoke what one scholar calls "bankruptcy exceptionalism."[7]

Purdue's Opening Argument: Three Decades of Precedent Support Third-Party Releases

Purdue's opening argument stated that § 1123(b)(6) permits the use of "any" provision that is "appropriate," but without focusing on the notion of "inconsistency" as the key test.[8] Purdue argued that "third-party releases have been used in limited circumstances for more than three decades, nearly the life of the current Code, to resolve some of the most important and complex bankruptcies."[9] It referred back to "three decades" on several occasions. This is a familiar trope in bankruptcy appeals that cautions the Court not to upset a system that has proven its worth over time.

This argument that the circuit courts have uniformly permitted third-party releases was rejected by the district court in *Purdue*, which meticulously went through the law in all other circuits.[10] It concluded that "a majority of the Circuits that have spoken to the statutory authority either dismiss the idea that such authority exists, or, as with the Second Circuit, (i) reject the notion that such authority can be found by looking solely to Section 105(a) and then (ii) fail to answer the question of where such authority can be found."[11]

The creditors' committee, which supports Purdue, was granted permission to address the Court. Its opening argument disparaged the U.S. Trustee by pointing out that "the U.S. Trustee does not speak for the victims of the opioid crisis" and that this was the

---

[6] *Czyzewski v. Jevic Holding Corp*., 580 U.S. 451, 471 (2017) ("[W]e conclude that Congress did not authorize a 'rare case' exception. We cannot 'alter the balance struck by the statute,' not even in 'rare cases.'... [C]ourts cannot deviate from the procedures 'specified by the Code,' even when they sincerely 'believ[e] that ... creditors would be better off.'") (citations and some text omitted). *See also RadLAX Gateway Hotel LLC v. Amalgamated Bank*, 566 U.S. 639, (2012).

[7] *See* Jonathan M. Seymour*, Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1930 (2022), who cautions that a belief that bankruptcy courts have broad powers to shape the law, with or without statutory support, is a view that bankruptcy law and bankruptcy courts might be untethered to traditional legal norms that restrain courts from straying away from clear and precise statutory standards ("Bankruptcy exceptionalism exacerbates corrosive trends within the bankruptcy system that cannot readily be corrected by other courts, especially in the field of corporate reorganizations. Bankruptcy is a fiercely competitive process. Bankruptcy exceptionalism entrenches the advantage of sophisticated repeat players, especially incumbent ones.").

[8] Tran. p. 60.

[9] Tran. pp. 61, 83, 87.

[10] 635 B.R. 26, 104, *et seq*.

[11] *Id*. at 105.

role of the creditors' committee.[12] The committee's attorney wanted to make it clear that there was no better deal to be had if this plan was overturned. He accused the U.S. Trustee of relying on some "eleventh-hour speculation of some magic alternative permitting an equitable victim recovery."[13] Again, the focus was on the "deal," and he wanted to make one thing "crystal clear: Without the release the plan will unravel … and there will be no viable path to any victim recovery."[14] Whether this focus on "the deal" is relevant is discussed below.

I believe the Court will not base its decision on either the view that third-party releases have become an accepted practice in the majority of the circuits, nor on the fact that the decisive factor is whether there is, or is not, a better deal for the victims if they reverse. The Court is more likely to focus on the absence of any authority, and/or alternatively that § 1123(b)(6) prohibits such releases because they are not and cannot be "consistent" with the provisions of title 11. To the extent consideration of the "better deal" is relevant, I believe a better deal is likely and, indeed, rational from the perspective of the Sacklers and the tort victims.

The Statutory Issue: § 1123(b)(6) and the Inconsistent Test — Putting Everything on the Table

The parties' briefs prior to oral argument had essentially narrowed the statutory issue as being whether the Code's "catch-all" provision found in § 1123(b)(6) permits a court to grant a release. Section 1123(b)(6) states that a plan can include "any other appropriate provision *not inconsistent* with the applicable provisions of the Code." There was very little mention of § 105(a), and the Second Circuit seemingly found that § 105 would not carry the day.[15]

Justice Gorsuch identified why granting the releases would be inconsistent with applicable Code provisions. He said that when one looks at the background and structure of the Bankruptcy Code, one notes "it has a couple of important provisions," including a provision that excludes a discharge for fraud."[16] He also pointed out that a debtor has "to put everything on the table."[17] What he was saying in essence is that the Sacklers would not have been legally eligible for a discharge had they filed their own case, so why should the Court permit them to do so as a third party? Isn't this precisely the kind of inconsistency that § 1123(b)(6) prohibits?

Justice Jackson echoed Justice Gorsuch's comments about the failure of the Sacklers to put all their assets on the table, and for the same reason called into question whether the releases were consistent with historic views of equity.[18] "So Justice Kagan says they're not putting all of their assets on the table. But my understanding is that not only are they not doing that, but most of the assets we're talking about were originally in

[12] Tran. p. 93.
[13] *Id.*
[14] Tran. p. 100.
[15] *Purdue Pharma,* 69 4th 45, 73. "We reject Appellants' suggestion that § 105(a) alone supports the imposition of the releases in this action."
[16] Tran. p. 71.
[17] *Id.*
[18] Tran. p. 59.

the company and that they actually took the assets from the company, which started the set of circumstances in which the company doesn't have enough money to pay the creditors."[19]

No one seemed to dispute that the Sacklers would not have been eligible for a discharge had they filed their own bankruptcy. Counsel for the creditors' committee stated that "it's not clear that the Sacklers are eligible for bankruptcy."[20]

Another reason why the Sacklers might not have been eligible to be debtors relates to the issue of a good-faith bankruptcy filing. Counsel for the committee repeatedly emphasized that the Sacklers have potential liability for $40 trillion. Another way of understanding that comment is that the Sacklers are alleged to have caused harm that was compensable in an amount exceeding the U.S. national debt.[21] They deny any wrongdoing. But if proven, wouldn't such a bankruptcy case be dismissed for bad faith when coupled with the large-scale transfer of funds out of Purdue and into the Sacklers' offshore trusts?

A fair question is why this straightforward point is not dispositive. How could it be that the Sacklers could evade their ineligibility for a discharge had they filed for bankruptcy, yet receive the same benefits by *not* filing for bankruptcy? In short, it seems that good arguments could be made that the Sacklers would have failed the "honest but unfortunate debtor" criteria of who is entitled to seek relief under the Bankruptcy Code. All of this means that reversal of the Second Circuit is likely and that the prospect of a better deal is not "magical" but rational.

The Appropriate Test: Possible Dissent

Justice Kavanaugh appeared to urge that the test for what is permitted under § 1123(b)(6) has a much lower bar and only requires that the bankruptcy court find that the release is appropriate under the facts and circumstances of each case. This seems to suggest that the Court could permit releases in some cases, perhaps returning to the rejected notion of a "rare case."

The district court in *Purdue* rejected this approach, noting that § 105(a) has simiar language and permits a court to enter "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[22] The court stated that it widely agreed that § 105 confers no substantive authority, and that if it does not, then neither does § 1123(b)(6) using the identical phrase.

If "appropriate" is the test, then the implications are serious. No one seemed to question the basic proposition that subject-matter jurisdiction under *Pacor v. Higgins* requires a showing that the third-party claim "could conceivably have any effect on the

---

[19] Tran. p. 66-67.
[20] Tran. p. 94.
[21] The national debt is approximately $33 trillion; *see* https://www.pgpf.org/national-debt-clock#:~:text=The%20%2433%20trillion%20gross%20federal,funds%20and%20other%20government%20accounts.
[22] *Purdue Pharma,* 635 B.R. at 106.

estate being administered in bankruptcy."[23] This broad test for subject-matter jurisdiction would then be tied to the statutory test for a valid release whenever a court found it was "appropriate." This would likely embrace notions of what is equitable. In short, Justice Kavanaugh seemed inclined to follow the *Metromedia* approach of identifying six or seven key factors and, if some or all were satisfied, to permit the release.[24]

Given this view, Justice Kavanaugh is likely to vote to affirm the Second Circuit, and if in the minority, to dissent and possibly to write separately. Perhaps he will be joined by Justice Thomas and Alito, although here there were few clues. Thus, there could be three votes in favor of affirming the Second Circuit.

Questions from the Court, and the Shift to Whether There Was a Better "Deal"

While reversal of the Second Circuit seems likely, it must be acknowledged that there were more than a few questions that expressed some skepticism about the loss of the "deal." The Court asked various questions that are essentially nonlegal and may be paraphrased as follows: "Isn't this the best deal that can be made?," "Is there a better deal if we kill this deal?," and "Would it have mattered if the Sacklers had put in all their assets?" Another seemingly nonstatutory line of questioning at oral argument was why should a single "nut-case" (the Court's phrase) be able to derail what the overwhelming number of creditors desire, and why was the U.S. Trustee there at all, given that the Trustee has no economic stake in this case and is just trying to blow up a deal that most creditors want.

Justice Alito was the first to raise the question of whether the Sacklers' contribution was "the best deal that's available for the creditors."[25] Justice Kagan asked why, if most creditors want to do a deal, "highfalutin'" concepts should stand in the way. Justice Kagan said, "I mean, your position rests on a lot of sort of highfalutin principles of bankruptcy law. But another highfalutin principle of bankruptcy law is you're supposed to maximize the estate, and you're supposed to do things that will effectuate successful reorganizations. And it seems as though the federal government is standing in the way of that as against the huge, huge, huge majority of claimants who have decided that, if this provision goes under, they're going to end up with nothing."[26]

What Justice Kagan was really asking was this: If a vast majority of creditors want to do a deal, why is a dissident empowered to stand in the way? Why does the lack of consent matter? There are several answers as to why there is likely to be a better deal, and why it matters if the Sacklers have not put all their assets on the table and why the U.S. Trustee was the key appellant.

First, the committee's argument that a better deal was a "magical alternative" was not consistent with other arguments. The Sacklers' refusal to improve the deal would not seem to be a rational outcome. Filing an individual bankruptcy was not an option, nor

---

[23] The Third Circuit first established this test in *Pacor Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). In this case, the court stated that jurisdiction depends on whether the third-party action "could conceivably have any effect on the estate being administered in bankruptcy."

[24] *In re Metromedia Fiber Network,* 416 F.3d 136 (2d Cir. 1992).

[25] Tran. p. 12.

[26] Tran. p. 23.

was the prospect of litigating claims outside of bankruptcy. Counsel for the creditors' committee argued that the "estimated value of claims [against the Sacklers] here is $40 trillion."[27]

Given that these claims may be nondischargeable for the individual Sackler family members, the likelihood of a better deal was not far-fetched. Wasn't the admission that the Sacklers might be liable for $ 40 trillion an admission of the astounding level of harm they have been alleged to have caused and the likely outcome of jury verdicts? The sheer magnitude of these claims could call into question the good faith of any individual filing by the Sacklers. If the Sacklers were not likely candidates for their own filing, then they may be better served by seeking a more consensual deal, one that permits an opt-out for the few that prefer not to surrender their claims.

The question about the so-called "single nut case" is answered by referencing the best-interest test under § 1129(a)(7). Here, the Code insists that any dissenting member of a class that votes for a plan *must* receive at least as much as they would in a hypothetical chapter 7. Case law and leading commentators state that this includes what they would receive from the third parties being released.[28] The district court seemed to question whether the bankruptcy court had properly considered the recovery from the released parties when analyzing § 1129(a)(7).[29]

Returning to Bankruptcy's Higher Values: The Honest Debtor and the Bankruptcy Bargain

The third question addressed why the U.S. Trustee should be heard at all on this appeal, given that it had no economic stake in the outcome. However, that is beside the point; the U.S. Trustee represents the bankruptcy system and not just the U.S. government when it is a creditor. The role of the U.S. Trustee in cases such as this is critical; their office protects the functioning of the system and protects it from veering from what the law is to what is seen as the best "deal" despite long-term prospects for abuse and further manipulation of the Code. Its interest is not economic but the protection of all parties, including those before it now and those who may appear in later cases.

Tara Twomey, recently appointed as the director of the Executive Office for U.S. Trustees, stated in an interview for the *ABI Journal* that the "idea[s] that the honest-but-unfortunate debtor should get a fresh start and that failing businesses should have an opportunity to reorganize ... have really shaped American society and economy."[30]

Justice Kagan voiced her key concern over whether the releases were inconsistent with the basic "bankruptcy bargain." "But I guess what I'm suggesting is that this is a fundamental principle of bankruptcy law, and when we're trying to read this provision and figure out what powers it gives to the bankruptcy court and what [it does] not, it would be a kind of extraordinary thing if we gave the power to — to basically subvert this basic bargain in bankruptcy law."[31]

---

[27] Tran. pp. 96, 108, 114.
[28] *See Amicus Curiae* Brief of Judge Eugene Wedoff, pp. ___.
[29] *See Purdue*, 635 B.R. 26, 76-77, n. 46.
[30] *ABI Journal*, December 2023, Vol. XLII, No. 12, p. 8.
[31] Tran. p. 64.

There was ample evidence before the bankruptcy court and the Supreme Court that the Sacklers were almost certainly not entitled to use the bankruptcy system to discharge their debts. They also were not entitled to invoke a parallel system of law that does not actually exist and achieve a result that is inconsistent with applicable law and the higher values that underlie the bankruptcy system. For this reason, reversal of the Second Circuit is both important and appropriate.