THE END(S) OF BANKRUPTCY EXCEPTIONALISM: *PURDUE PHARMA* AND THE PROBLEM OF SOCIAL DEBT

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The Supreme Court's recent 5-4 decision in the controversial chapter 11 bankruptcy reorganization of opioid-maker Purdue Pharma ends the use of nonconsensual third-party "releases," which discharge (eliminate) liabilities of nondebtors who may share liability with a corporate debtor. Although the majority opinion is correct that the Bankruptcy Code does not permit this, it failed to recognize the problematic exceptionalism of the lower courts which approved those releases or the "social" qualities of Purdue Pharma's mass tort liability.

Bankruptcy exceptionalism has been a contested concept since it emerged over fifteen years ago and reflects a willingness to bend the rule of law in order to maximize economic recoveries. But the statutory exceptionalism rejected by the Purdue Pharma *majority is not its only form. This Article shows that in bankruptcy, the Court has also tolerated "structural exceptionalism," a willingness to permit deviations from constitutional rules, standards, norms, and values when in tension with insolvency proceedings that involve significant public interests. Seen this way, Purdue Pharma seemed an ideal candidate for a broadly exceptionalist ruling: the company's mass torts played a unique role in a public health crisis that has taken hundreds of thousands of lives.*

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Yet, the significant prebankruptcy misconduct of Purdue Pharma and its insiders who sought the releases created a kind of "social debt," a subset of mass tort liability reflecting serious misconduct. Although the precise boundaries are unclear, the defining features of social debt are its moral gravity, scale, and public spillovers, here liability for drug-marketing fraud, which translate poorly into dollars. Other examples of social debt include large-scale liability for sexual assault and the crisis of gun violence.

The noneconomic demands of social debt are in tension with the economic aspirations of bankruptcy exceptionalism. The Purdue Pharma *majority neither recognized this tension nor ended the use of chapter 11 to resolve mass tort liability, an increasingly attractive but problematic substitute for (an exception to) ordinary litigation. Justice Kavanaugh's flawed but "emphatic" dissent fully embraced bankruptcy exceptionalism without acknowledging the extraordinary, and problematic, power he would vest in bankruptcy judges to resolve social debt.*

The important question is not whether to end bankruptcy exceptionalism—all agree that bankruptcy courts must have some flexibility and can play an important role in resolving mass tort liability—but the ends that it serves. We unpack the Supreme Court's opinion in Purdue Pharma *to anticipate the next points of conflict in mass tort reorganization, with emphasis on the emerging problem of social debt. We offer guidance on ways that courts and Congress can balance economic goals of maximizing recoveries with noneconomic concerns presented in social debt bankruptcies, including on what constitutes "consent" to a third-party release and the problematic incentives of privatized fiduciaries who run these cases.*

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INTRODUCTION

Since the Bankruptcy Code was enacted in 1978,[1] chapter 11 reorganization has become an increasingly attractive alternative to ordinary litigation as a means of resolving mass tort liability.[2] Unlike adversary litigation, which aims to produce a neutral adjudication on the merits of claims of liability, corporate reorganization is a "special remedial scheme" which seeks to adjust the debts of going concerns regardless of the normative merits of those claims.[3] To do so, it vests significant power and discretion in corporate debtors and bankruptcy judges, who typically view their shared goal as approving a viable plan of reorganization for the debtor. It looks forward to a "fresh start" rather than backward to the merits of claims about the conduct that may have landed the debtor in trouble in the first place.[4]

Using chapter 11 to reorganize businesses dealing with mass tort litigation ("mass tort reorganization") has long been controversial. On one hand, chapter 11 offers "global peace" for liabilities arising from large-scale harm at a lower cost than the tort system, and avoids the lottery-like effects of differing outcomes from different courts.[5] On the

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1 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1330).

2 *See* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 976 (2023) [hereinafter Casey & Macey, *Defense*] ("[W]e argue that Chapter 11 proceedings provide an appropriate and often superior forum in which to resolve mass tort claims."); Anthony J. Casey & Joshua C. Macey, *Bankruptcy by Another Name*, 133 YALE L.J. F. 1016, 1018 (2024) [hereinafter Casey & Macey, *Another Name*] ("[B]ankruptcy . . . could—in the right cases and under the right circumstances—provide an efficient and cost-effective means of resolving proceedings with multiple claimants."); Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV. 361, 362 (2022) ("Bankruptcy courts have become the favored forum for large corporate defendants to seek global resolution of mass tort liability claims."); *see also* discussion *infra* Section I.B.

3 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) ("[W]e have recognized an exception to the general rule [requiring individualized justice where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate." (quoting Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989))); *see also* Jonathan C. Lipson, *"Special": Remedial Schemes in Mass Tort Bankruptcies*, 101 TEX. L. REV. 1773, 1774 (2023). For a discussion of the rise and dynamics of mass tort reorganization, see *infra* Section I.B.

4 The Supreme Court has identified the two main purposes of chapter 11 as (1) preserving going concerns and (2) maximizing property available to satisfy creditors. *See* Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 453 (1999); *see also* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 271 (2024) (Kavanaugh, J., dissenting) ("When a debtor in bankruptcy receives a discharge, most (if not all) of their pre-petition debts are released, giving the debtor a fresh start." (citing 11 U.S.C. § 1141(d)(1))).

5 *See, e.g.*, Casey & Macey, *Another Name*, *supra* note 2, at 1017 (arguing that mass tort reorganization "can offer significant economic benefits to both plaintiffs and corporate

other hand, while it may promote equal treatment (in theory, everyone gets the same thin slice of the pie) it has been unclear whether it makes the pie larger for all.[6] More importantly, in some cases it can undercut noneconomic interests in having a neutral adjudication on the merits of allegations of serious wrongdoing—the right to a day in court.[7]

The Supreme Court's recent, deeply divided decision in the reorganization of opioid-maker Purdue Pharma closed one chapter in this controversy and opened the next.[8] In *Harrington v. Purdue Pharma L.P.*, the wealthy and secretive Sackler family sought to eliminate personal liability for their role at the company, which they owned and controlled as it committed two sets of confessed drug-marketing crimes over twenty years.[9] But they did not go into bankruptcy themselves.[10] Instead, they sought to use a nonconsensual "third-party release" under the company's chapter 11 plan of reorganization (the "Sackler Release") to eliminate this liability.[11]

A 5-4 majority held that the Bankruptcy Code did not permit the Sackler Release.[12] "Describe the relief the Sacklers seek how you will," Justice Gorsuch wrote for himself and an unusual majority (conservative Justices Alito, Barrett and Thomas, joined by liberal Justice Jackson), "nothing in the [B]ankruptcy [C]ode contemplates (much less authorizes) it."[13] The proponents of the Sackler Release—including the official committee of unsecured creditors—had argued forcefully that § 1123(b)(6) of the Bankruptcy Code permitted Purdue to include the Sackler Release in its plan of reorganization and gave the bankruptcy

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defendants"); Casey & Macey, *Defense*, *supra* note 2, at 976–77 ("Bankruptcy law resolves the collective action problem that arises when creditors pursue their claims in a variety of separate proceedings. . . . The Bankruptcy Code's core provisions—the automatic stay, priority rules, prohibitions on fraudulent transfers, preference rules, and treatment of unpaid claims—are all designed to address [this problem]." (footnote omitted)); *see also* Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1747 (2023) ("Lawyers in the newer cases not only tout Chapter 11 as the best, or, indeed, the only way to find global peace, but they explicitly cast aspersions on juries, multidistrict litigation, and other parts of the civil justice system.").

6 *See* Jonathan C. Lipson, *The Rule of the Deal: Bankruptcy Bargains and Other Misnomers*, 97 AM. BANKR. L.J. 41, 98–102 (2023).

7 *See, e.g.*, Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1330 (2023).

8 *Purdue Pharma*, 603 U.S. at 227.

9 *Id.* at 210–11.

10 *Id.* at 211.

11 *Id.*

12 *Id.* at 226–27.

13 *Id.* at 223–24.

judge discretion to approve it.[14] This "catchall" provision permits a plan to "include any other appropriate provision not inconsistent with the applicable provisions of this title."[15]

The majority rejected the argument on a fairly standard statutory interpretation theory, "ejusdem generis," meaning that a general term at the end of a list of specific provisions must be limited by those prior provisions.[16] In this case, the catchall "appropriate provision" was limited to plan provisions involving claims against the corporate debtor or its assets—not claims of victims against third parties, such as the Sacklers and other directors and officers (insiders) of Purdue Pharma.[17] "Rather than seek to resolve claims that substantively belong to Purdue," the majority reasoned, the Purdue Pharma plan sought "to extinguish claims against the Sacklers that belong to their victims. And precisely nothing in § 1123(b) suggests those claims can be bargained away without the consent of those affected, as if the claims were somehow Purdue's own property."[18]

The majority's reasoning is sound, but shortsighted because it failed to recognize the deeper structural stakes of the case. As others have observed, the Sackler Release would not merely expand bankruptcy court power, but would do so at the expense of other courts and their role in determining the merits of serious claims of liability.[19] It would, as one of us (with Christopher Odinet) has written elsewhere, "silence victims."[20] Traditional judicial functions in serious disputes—fact-finding and reporting; interpretation and application of the law to those facts—would

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14 *Id.* at 252 (Kavanaugh, J., dissenting) ("Importantly, the victims and creditors—who obviously have no love for the Sacklers—insisted on the releases of their claims against the Sacklers."). Counsel to the Unsecured Creditors' Committee (UCC) argued that the broad interpretation of § 1123(b)(6) was "essential to restructuring the debtor-creditor relationship in this case on which lives literally depend." Transcript of Oral Argument at 93–94, Harrington v. Purdue Pharma L.P., 603 U.S. 204 (No. 23-124).

15 *Purdue Pharma*, 603 U.S. at 216–19 (citing 11 U.S.C. § 1123(b)(6)).

16 *Id.* at 217–19 ("[The] ancient interpretive principle, sometimes called the ejusdem generis canon, seeks to afford a statute the scope a reasonable reader would attribute to it."). The majority opinion does not define the term but treats it consistent with a standard definition. *See Ejusdem Generis*, LEGAL INFO. INST. (Feb. 2022), https://www.law.cornell.edu/wex/ejusdem_generis [https://perma.cc/YDU3-QFXZ] ("The statutory and constitutional construction principle of 'ejusdem generis' states that where general words or phrases follow a number of specific words or phrases, the general words are specifically construed as limited and apply only to persons or things of the same kind or class as those expressly mentioned.").

17 *Id.* at 218 (citing 11 U.S.C. § 1123(b)(6)).

18 *Id.* at 219–20.

19 *See* Abbe R. Gluck, Elizabeth Chamblee Burch & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J. F. 525, 530 (2024) (comparing bankruptcy courts to other courts for purposes of mass tort reorganizations).

20 Foohey & Odinet, *supra* note 7, at 1269.

be endangered because the bankruptcy system has neither the capacity nor the incentives to make those difficult liability determinations.[21] It can play an important remedial role in addressing mature claims—where the liability pattern is fairly well-understood[22]—but would threaten the rule of law as used in *Purdue Pharma*.[23] It was not by accident that the Court had previously characterized bankruptcy as a special *remedial* scheme, rather than as a special *liability-determining* scheme.

Justice Gorsuch's opinion marks not only the end of the nonconsensual third-party release, but also a form of "bankruptcy exceptionalism." Fifteen years ago, one of us published a paper arguing that the Court's approach to Congress' bankruptcy power reflected "structural exceptionalism," an operating principle by which the Court would permit deviations from constitutional rules, standards, norms, and values around matters such as the power of Article I courts, due process, and state sovereign immunity in insolvency cases.[24] More recently, a debate has emerged about bankruptcy's methodological exceptionalism, i.e., the tendency to tolerate off-label innovations,[25] such as the third-party release at issue in *Purdue Pharma*, through exceptionally broad equitable powers.[26]

Whether one is "for" or "against" bankruptcy exceptionalism in either form,[27] the Court's opinion in *Purdue Pharma* purports to end the statutory version.[28] It is less clear whether it ends structural exceptionalism, however. Justice Gorsuch's careful statutory analysis correctly does away with nonconsensual third-party releases not

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21 *See infra* Section I.B.

22 *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989) (describing mature mass tort litigation as cases in which "there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions").

23 *See* Gluck et al., *supra* note 19, at 528–29 ("[T]he more bankruptcy's unique features draw these cases in, the more distance we create from the traditional trial system's public values: transparency, accountability, participation, law development, due process, educating the public, jurisdictional redundancy, and more.").

24 *See* Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 605 (2008) ("[H]ow should [the bankruptcy] power interact with structural features of our constitutional system[?]"); *id.* at 606, 637–38.

25 *See* Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J. F. 409, 411 (2021) (discussing practices labeled as "bankruptcy à la carte" and "off-label bankruptcy").

26 *Compare* Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1942–43 (2022), *with* Jared I. Mayer, *For Bankruptcy Exceptionalism*, U. CHI. L. REV. ONLINE, June 27, 2023, at 1, 8.

27 *Compare* Mayer, *supra* note 26, *with* Seymour, *supra* note 26.

28 Harrington v. Purdue Pharma L.P., 603 U.S. 204, 218 (2024) ("Congress set out a detailed list of powers, followed by a catchall that it qualified with the term 'appropriate.' That quintessentially 'context dependent' term often draws its meaning from surrounding provisions." (quoting Sossamon v. Texas, 563 U.S. 277, 286 (2011))).

specifically authorized by the Bankruptcy Code.[29] But it may fall short because it fails to engage the serious due process and related concerns just below the surface in *Purdue Pharma*.[30]

Although it is easy to decry exceptionalism, in truth we are all exceptionalists to some extent. No one seriously argues that bankruptcy courts lack discretion to recognize equitable exceptions to general rules, or that common law courts lack the power to make reasoned incremental innovation. The important question is not whether to *end* bankruptcy exceptionalism, but instead the *ends* that exceptionalism serves.

Viewed in this light, the *Purdue Pharma* decision was remarkable and somewhat surprising. It was remarkable because facially, the ends seemed laudable: Who does not want to take some money from the Sacklers to fund opioid abatement? Who does not want to see survivors and their families receive at least some compensation sooner or later? To many, these ends justified the means deployed in the bankruptcy.[31] The *Purdue Pharma* plan, with the Sackler Release, "was a shining example of the bankruptcy system at work," Justice Kavanaugh said ruefully in dissent.[32]

At the same time, it was surprising because the Court has historically tolerated structural exceptions to constitutional rules, standards, norms, and values when presented in insolvency cases involving significant public interests. Thus, as one of us (with David Skeel) has shown in forthcoming work, the railroad receiverships of the late nineteenth century tolerated exceptions to judicial integrity in the name of the public interest in keeping the trains running.[33] In the 1990s, in *Amchem Products, Inc. v. Windsor*[34] and *Ortiz v. Fibreboard Corp.*, the Supreme Court held that due process values would forbid mandatory class action personal injury settlements but bankruptcy might be an exception, a "special remedial scheme," as the latter Court put it.[35] Justice Kagan

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29 *Id.* ("[W]e do not think paragraph (6) affords a bankruptcy court the authority the plan proponents suppose.").

30 Foohey & Odinet, *supra* note 7, at 1268–69. The Court has shown that it is willing to engage with larger questions raised by the bankruptcy cases it hears. *See generally* Stern v. Marshall, 564 U.S. 462 (2011) (discussing Article III powers); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) (detailing the importance and virtues of juries).

31 *See, e.g.*, Casey & Macey, *Defense*, *supra* note 2, at 977 ("Chapter 11 proceedings mitigate" problems of cost and delay "and provide an appropriate and often superior forum in which to resolve mass tort claims").

32 *Purdue Pharma*, 603 U.S. at 228 (Kavanaugh, J., dissenting).

33 *See* Jonathan C. Lipson & David A. Skeel, *FTX'd: Conflicting Public and Private Interests in Chapter 11*, 77 STAN. L. REV. (forthcoming 2025), https://papers.ssrn.com/abstract=4760736 [https://perma.cc/X3JN-6NFH]; *see also* discussion *infra* Section I.A.

34 521 U.S. 591 (1997).

35 527 U.S. 815, 846 (1999); *see also* discussion *infra* Section I.B. *See generally* Lipson, *supra* note 3.

candidly conceded in her 2020 opinion in *Allen v. Cooper* that bankruptcy was "exceptional" in its abrogation of state sovereign immunity.[36] These examples suggest that the Court has been willing to tolerate structural exceptionalism when massive insolvency joined credible claims that the restructuring process advanced the public interest.

Against this backdrop, *Purdue Pharma* presented a strong case for bankruptcy exceptionalism. Proponents routinely asserted that the Sackler Release was necessary to their effort to abate the opioid crisis, a public health crisis in which the Sacklers and their company played a critical role.[37] Moreover, the dominant creditors in the case were public actors, such as state, local, and federal governments.[38]

Yet, the deeper implications were potentially devastating. *Purdue Pharma* involved not merely billions of dollars in debt but also what one of us has described elsewhere as "social debt": liability for serious misconduct (e.g., crimes or intentional torts), often involving violations of health and safety laws, with significant public spillovers.[39] The other of us has characterized this type of liability as having the potential to create "onslaught litigation": liability for misconduct that threatens to take significant time and resources for a company to resolve, and which brings worries about the extent of public relations costs.[40] Onslaught litigation is often the way social debt appears in court.[41] In addition to *Purdue*

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36 589 U.S. 248, 257 (2020) (discussing bankruptcy exceptionalism in the context of state sovereign immunity); *see also* discussion *infra* Section I.A.

37 *Purdue Pharma*, 603 U.S. at 230 (Kavanaugh, J., dissenting) ("[W]ithout the plan's substantial funding to prevent and treat opioid addiction, the victims and creditors bluntly described further repercussions: 'more people will die without this Plan.'") (quoting Brief for Respondent Official Committee of Unsecured Creditors of Purdue Pharma L.P. et al. at 55, *Purdue Pharma*, 603 U.S. 204 (No. 23-124)).

38 Indeed, as discussed *infra* Section II.B, the federal government was on both sides of the dispute. The Sackler Release was backstopped by a deal struck during the bankruptcy between Purdue and the United States Department of Justice which had a "poison pill," making any alternative to the Sackler Release economically unattractive. Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1083 (2022). But another arm of the Department of Justice, the United States Trustee, then led the challenge to the Sackler Release in the Supreme Court. The tension is likely explained by a change in administration: the poison pill was approved by the Department of Justice under Attorney General Jeff Sessions. The Sackler Release was challenged under Attorney General Merrick Garland. *See* Lipson, *supra* note 6, at 82 for a discussion of the dynamics of this change.

39 *See* Lipson, *supra* note 6, at 43; Jonathan C. Lipson, *First in Time; First Is Right: Comments on Levitin's Poison Pill*, 101 TEX. L. REV. ONLINE 33, 35 (2022).

40 *See* Foohey & Odinet, *supra* note 7, at 1264–65, 1314.

41 *See id.* at 1264 n.9.

Pharma and other opioid-maker bankruptcies (e.g., *Endo*[42]), other social debt bankruptcies include organizational liability for serial sexual assault (e.g., over thirty Catholic organizations,[43] *Boy Scouts of America*,[44] *USA Gymnastics*,[45] and the *Weinstein Company*[46]), and alleged contributions to the crisis of gun violence (e.g., *Infowars*[47]). Coming examples may include litigation over the mistreatment of inmates[48] and liability for "forever" chemicals.[49]

Social debt bankruptcies are a subset of mass tort reorganizations involving serious misconduct, as opposed to mere negligence. The defining features are moral gravity, scale, and public spillovers: intentional (e.g., criminal) misconduct that harms many people has social dimensions for which the bankruptcy system is an awkward and incomplete solution. The social features of *Purdue Pharma* reflected and refracted the fact that the company—but not the Sacklers or other insiders—confessed twice to drug-marketing fraud, crimes which played a pivotal role in triggering and accelerating a prescription drug crisis that

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42 *In re* Endo Int'l PLC, No. 22-22549, 2022 WL 16640880 (Bankr. S.D.N.Y. Nov. 2, 2022). Other opioid bankruptcies include those of *Mallinckrodt* and *Insys*. *In re* Mallinckrodt PLC, 639 B.R. 837 (Bankr. D. Del. 2022); *In re* Insys Therapeutics, No. 19-11292, 2021 WL 5016127, at *1 (Bankr. D. Del. Oct. 28, 2021).

43 *E.g.*, *Catholic Dioceses in Bankruptcy*, PA. STATE L.: ELIBRARY, https://elibrary.law.psu.edu/bankruptcy [https://perma.cc/L92B-G2KL]; *see also* Jonathan C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, 79 S. CAL. L. REV. 363, 363–64 (2006) (discussing early diocesan chapter 11 reorganizations).

44 *In re* Boy Scouts of Am. & Del. BSA, LLC, 642 B.R. 504, 518 (Bankr. D. Del. 2022).

45 *See In re* USA Gymnastics, No. 18-09108, 2020 WL 1932340 (Bankr. S.D. Ind. Apr. 20, 2020).

46 *See* David v. Weinstein Co. Holdings, LLC, No. 21-171, 2021 WL 979603 (D. Del. Mar. 16, 2021) (denying motion for stay pending appeal of confirmation order by sexual assault victims); *see also* Laura Ly & Taylor Romine, *A Judge Has Approved a $17 Million Settlement Plan for Sexual Misconduct Victims of Harvey Weinstein*, CNN (Jan. 26, 2021, 12:12 AM), https://www.cnn.com/2021/01/26/us/harvey-weinstein-victims-settlement-approved/index.html [https://perma.cc/JNK6-N9XM].

47 *See* Rachna Dhanrajani, Akriti Sharma & Kanishka Singh, *Alex Jones' InfoWars Files for Bankruptcy in U.S. Court*, REUTERS (Apr. 18, 2022, 5:36 AM), https://www.reuters.com/business/media-telecom/alex-jones-infowars-files-bankruptcy-us-court-2022-04-18 [https://perma.cc/ZE6S-ALB2] (reporting that InfoWars filed for chapter 11 bankruptcy in the wake of multiple defamation lawsuits implicating Jones's false claims that the Sandy Hook shooting was fabricated by gun-control advocates and mainstream media).

48 *See* Declaration of Russell A. Perry in Support of Debtor's Emergency Motion for Entry of Interim & Final Orders ¶¶ 5–6, *In re* Tehum Care Servs., Inc., No. 23-90086 (Bankr. S.D. Tex. Mar. 15, 2023), ECF No. 186 (referring to professional liability claims of prison health-care provider).

49 *See* Dietrich Knauth, *Fire Protection Company Kidde-Fenwal Files for Bankruptcy Citing PFAS Lawsuits*, REUTERS (May 15, 2023, 5:19 PM), https://www.reuters.com/legal/fire-protection-company-kidde-fenwal-files-bankruptcy-citing-pfas-lawsuits-2023-05-15 [https://web.archive.org/web/20230819160609/https://www.reuters.com/legal/fire-protection-company-kidde-fenwal-files-bankruptcy-citing-pfas-lawsuits-2023-05-15].

has taken hundreds of thousands of lives, leading to widespread outrage among activists and survivors.[50]

The problem in *Purdue Pharma* was that, to any careful observer of the case, it appeared that one of the primary goals—perhaps *the* goal—from the perspective of the Sacklers and their designees, was to shield the Sacklers and other insiders who remained at the company from public scrutiny of their role in creating this social debt. This is because the Sacklers—who had been "milking" the company's assets since 2008, after the first criminal plea[51]—only agreed to put the company into bankruptcy after they had lost motions to dismiss direct suits against them in 2019, litigation that would have produced discovery which, we suspect, the Sacklers were willing to pay dearly to avoid.[52]

To give them the release they sought would set a disastrous precedent, however. Rather than use bankruptcy to provide a more efficient distributional scheme *after* a neutral determination of liability—bankruptcy's proper role here—the Sacklers (and all who followed their blueprint) would treat bankruptcy as an option to disable judicial determinations of liability, no matter how grave, exercisable at the will of insiders of the corporate tortfeasor, who could use their company's bankruptcy as an all-purpose civil litigation shield. Thus, chapter 11 would become an exception not only to ordinary remedial mechanisms (e.g., collection through state court) but also to the fundamental, liability-determining role that civil courts play in our system, even in cases of social debt, as to both corporate debtors and the nonbankrupt insiders that created and profited from it.

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50 The larger story of the Sacklers, Purdue Pharma, and the overdose crisis has been the subject of several books and at least two television shows. *See, e.g.*, BETH MACY, DOPESICK: DEALERS, DOCTORS, AND THE DRUG COMPANY THAT ADDICTED AMERICA (2018); GERALD POSNER, PHARMA: GREED, LIES, AND THE POISONING OF AMERICA (2020); PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY (2021); THE CRIME OF THE CENTURY (HBO 2021); *Dopesick* (Hulu 2021). We discuss evidence of these social responses *infra* Section II.C. *Purdue Pharma* also features the characteristics of "onslaught litigation" in that it involves serious misconduct with significant public exposure that threatened the integrity of Purdue Pharma and the Sacklers. *See* Foohey & Odinet, *supra* note 7, at 1264–65.

51 Harrington v. Purdue Pharma L.P., 603 U.S. 204, 210–11 (2024) ("Appreciating this litigation 'would eventually impact them directly,' the Sacklers began what one family member described as a 'milking program' . . . . Between 2008 and 2016, the family's distributions totaled approximately $11 billion, draining Purdue's total assets by 75% . . . ." (citations omitted) (first quoting *In re* Purdue Pharma L.P., 69 F.4th 45, 59 (2d Cir. 2023); and then quoting *In re* Purdue Pharma, L.P., 635 B.R. 26, 59 (S.D.N.Y. 2021)).

52 *See In re* Purdue Pharma, L.P., 635 B.R. 26, 51 (S.D.N.Y. 2021) (discussing Sacklers' loss of motions to dismiss), *rev'd and remanded*, 69 F.4th 45 (2d Cir. 2023), *rev'd and remanded sub nom.* Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024). As explained below, there is little reason to think this discovery occurred in the bankruptcy. *See* discussion *infra* Section II.B.

While the majority opinion in *Purdue Pharma* would purport to end statutory exceptionalism in bankruptcy, its failure to address deeper questions of structural exceptionalism is problematic. Third-party releases were hardly the only trick in the mass tort reorganization playbook. *Purdue Pharma* does not end mass tort reorganization, only the use of nonconsensual third-party releases. The next chapter in mass tort reorganization will involve skirmishes over what constitutes "consent" (consensual releases remain permissible) as well as ambivalence about the treatment of future claimants and the uncertain allegiances of the often-privatized fiduciaries who run these cases.[53] Justice Kavanaugh's dissent, meanwhile, is a *cri de cœur* for those who would ask Congress to amend the Bankruptcy Code to permit the use of nonconsensual third-party releases in all mass tort reorganizations.[54]

While bankruptcy can play a special role in mass tort reorganization, it should not be a free-roving exception to foundational structural protections, such as the right to a neutral adjudication of the merits of claims of serious wrongdoing. Among other things, we show in this Article that these same protections may actually increase payouts, calling into question the economic logic of Justice Kavanaugh's dissent and those who view mass tort reorganizations as nonnegotiable solutions to difficult social problems.[55]

This Article is among the first to assess the Supreme Court's opinion in *Purdue Pharma*, and its implications for the future of mass tort

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53 *See* discussion *infra* Part III.

54 *See* Harrington v. Purdue Pharma L.P., 603 U.S. at 227–78 (Kavanaugh, J., dissenting). Currently, nonconsensual third-party releases are permitted only in cases involving asbestos debt. *See* 11 U.S.C. § 524(g). See *infra* Part IV for a discussion of the structural problems with the asbestos model.

55 *See, e.g.*, Casey & Macey, *Defense*, *supra* note 2, at 977. We note that as of this writing (January 2025), the co-mediators mediating the post-Supreme Court negotiations of the parties reported "substantial progress on multiple complex issues" and "resolution of various, but not all, intercreditor issues" in the case. Co-Mediators' First Interim Status Report ¶ 3, *In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649), ECF No. 6917 [hereinafter Co-Mediators' First Status Report]; Co-Mediators' Third Interim Status Report, *In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649), ECF No. 7049. "In particular," they noted in the First Status Report:

> certain agreements in principle have been reached between and among (i) both of the B Side Sackler family groups; (ii) all but one of the A Side Sackler family groups; (iii) the Debtors; (iv) the Creditors' Committee; (v) the Ad Hoc Committee; (vi) the MSGE Group; and (vii) the State Attorneys General negotiating committee (which presently has 15 members) with respect to (a) the total amount of cash consideration to be provided by the settling Covered Parties; (b) a schedule for the payment of such amount by the settling Covered Parties; and (c) certain non-monetary terms, including terms relating to (i) the means of implementation of any settlement; (ii) the scope and nature of the releases; and (iii) the resolution of various, but not all, intercreditor issues.

Co-Mediators' First Status Report, *supra*, ¶ 3.

reorganization. It proceeds in four Parts. Part I provides an overview of the chapter 11 process and a brief history of structural exceptionalism in mass tort reorganizations. It also explains why chapter 11 reorganization can be an attractive alternative to ordinary civil litigation in cases involving mass torts.

Part II turns to the *Purdue Pharma* case. It explains the exceptional and problematic nature of the proceedings in the Bankruptcy Court and the Sackler Release, and the social debt Purdue and the Sacklers created.

Part III unpacks the opinions of the Supreme Court majority and the dissent in *Purdue Pharma*. It shows how the majority opinion fails to address the deeper structural questions at issue in *Purdue Pharma*. It also identifies flaws in the dissent's "emphatic" plea to approve the Sackler Release, errors of law, fact, and economics that reveal the exceptional power Justice Kavanaugh would vest in bankruptcy judges.[56] In particular, we show that the vagueness of the standards approved by the lower courts (and supported by Justice Kavanaugh's dissent) would increase incentives to litigate in chapter 11, impairing economic recoveries.

Part IV identifies four fields of likely skirmishing in mass tort reorganizations in the wake of *Purdue Pharma*: (1) determining whether a third-party claim is "direct" or "derivative" (a potentially important distinction in *Purdue Pharma*); (2) defining "consent"; (3) protecting the participatory interests of tort claimants; and (4) addressing the uncertain allegiances of privatized fiduciaries who often run these cases.

We argue that as the social attributes of debt grow, courts should be increasingly protective of the interests of individual victims of the underlying misconduct. To the extent that Congress seeks to amend the Bankruptcy Code, it should bear in mind that the exceptionalism of *Purdue Pharma* was not merely a set of deviations from the statute, but a challenge to constitutional rules, standards, norms, and values that have to be taken seriously if bankruptcy courts are to take social debt seriously.

I. BANKRUPTCY EXCEPTIONALISM AND MASS TORT REORGANIZATION

"Every contract in America," Melissa Jacoby recently observed, "contains an invisible exception: different enforcement rules apply if one of the parties files for bankruptcy."[57] This, in a nutshell, is bankruptcy exceptionalism. One could add the words "and tort" after "contract," and thus recognize that bankruptcy, through the broad discharge of debt, is a

56 *Purdue Pharma*, 603 U.S. at 230, 277–78 (Kavanaugh, J., dissenting).

57 Melissa B. Jacoby, *Unbundling Business Bankruptcy Law*, 101 N.C. L. REV. 1703, 1704 (2023).

standing, contingent exception to all forms of corporate liability, contractual and otherwise.[58]

A. *Bankruptcy Exceptionalism*

Bankruptcy exceptionalism is a contested concept.[59] It has been conceived of in at least two senses, methodologically and structurally. Jonathan Seymour has recently developed the methodological version, focusing on deviations from textualist statutory interpretation.[60] Using the Sackler Release as an example, he is "against" bankruptcy exceptionalism because "[t]he danger, most clearly presented" is that the "process produces results that are skewed in favor of the most influential parties."[61]

Fifteen years ago, the structural understanding of bankruptcy exceptionalism began to emerge.[62] On this account, "Bankruptcy exceptionalism is an operating principle that helps to explain . . . exceptions to constitutional rules, standards, norms, and values in order to accommodate the exigencies of financial distress."[63] For example, Justice Kagan recently characterized the Court's unusual approach to state sovereign immunity in the bankruptcy context as reflecting "what might be called bankruptcy exceptionalism."[64]

B. *Chapter 11 as a "Special Remedial Scheme"*

The exceptional nature of chapter 11 starts when a case is commenced, which creates an estate comprised of all of a corporate debtor's property and automatically stays all civil litigation against the debtor.[65] This removes—"excepts"—the debtor from pending civil

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58 *See, e.g.*, Grady v. A.H. Robins Co., Inc., 839 F.2d 198, 202 (4th Cir. 1988) ("[L]egislative history shows that Congress intended that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in bankruptcy. The Code contemplates the broadest possible relief in the bankruptcy court.").

59 It is typically viewed as an epithet. *See* Alice Ristroph, *Exceptionalism Everywhere: A (Legal) Field Guide to Structural Inequality*, 65 ARIZ. L. REV. 921, 923 (2023).

60 Seymour, *supra* note 26, at 1941 (characterizing bankruptcy exceptionalism as "[d]ecisions that alter the parties' positions based not on any specific authorization provided by the Bankruptcy Code but instead on the residue of bankruptcy judges' equitable or inherent power").

61 *Id.* at 1964; *see also id.* at 1975–76.

62 Lipson, *supra* note 24.

63 *Id.* at 606.

64 Allen v. Cooper, 589 U.S. 248, 257–59 (2020).

65 *See* 11 U.S.C. §§ 362(a), 541(a).

litigation in order to solve the collective action problem presented by a corporate debtor who may have hundreds or thousands of creditors.

But this aggregation can be in tension with "our deep-rooted historic tradition that everyone should have their own day in court."[66] All aggregate litigations (e.g., class actions) can threaten that tradition, but until recently, chapter 11 was viewed as a "special remedial scheme," implying that it may be viewed as an exception to ordinary tort litigation that nevertheless satisfied structural due process protections.[67] *Purdue Pharma* shows the risks of that way of thinking.

1. The Supreme Court Deters Mass Tort Litigation

Congress apparently "never contemplated that the bankruptcy process might be used for the resolution of mass tort claims."[68] Yet, the exceedingly broad scope of relief provided by the bankruptcy discharge made it appealing to mass tortfeasors (in particular those with asbestos or medical device liability) in the early 1980s.[69] By 1994, when Congress enacted the asbestos amendments to authorize third-party releases only in cases involving such liability, it understood and accepted the reality that chapter 11 could be used to aggregate and resolve liability for broad-scale negligence or products liability.[70]

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66 Martin v. Wilks, 490 U.S. 755, 762 (1989) (quoting 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (3d ed. 1981)).

67 *Id.* at 762 n.2 (referring to bankruptcy and probate as areas "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants"); Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999).

68 Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. TORT L. 59, 60 (2012).

69 *In re* Johns-Manville Corp., 600 F.3d 135, 139 (2d Cir. 2010) ("[I]n order to resolve the asbestos-related claims that were to be channeled to the Manville Trust, the parties to the settlement agreed that compensation from the Manville Trust would only be available to claimants that executed 'broad releases' of liability as to the Settling Insurers relating to 'any and all claims . . . whether or not presently known . . . based upon, arising out of or related to the Policies.'" (quoting *In re* Johns-Manville Corp., No. 82-11656, 2004 WL 1876046, at *15–17 (Bankr. S.D.N.Y. Aug. 17, 2004))); Grady v. A.H. Robins Co., 839 F.2d 198, 198–99, 202 (4th Cir. 1988) (finding, in a medical device litigation case, that "legislative history shows that Congress intended that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in bankruptcy," and that "[t]he Code contemplates the broadest possible relief in the bankruptcy court").

70 *Fibreboard Corp.*, 527 U.S. at 860 n.34 ("Congress in the Bankruptcy Reform Act of 1994 amended the Bankruptcy Code to enable a debtor in a Chapter 11 reorganization in certain circumstances to establish a trust toward which the debtor may channel future asbestos-related liability . . . ." (citation omitted) (citing Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(a), 108 Stat. 4106 (codified as amended at 11 U.S.C. § 524(g)–(h)))); Jacoby, *supra* note 5, at 1746 n.1 (noting that the "asbestos amendments" are at 11 U.S.C. § 524(g)(2)(B)(i)(I)).

At roughly the same time, the Supreme Court made the settlement of mass tort litigation through class actions increasingly difficult.[71] In *Amchem Products, Inc. v. Windsor*, the Court found that an effort to certify a "settlement class" of asbestos plaintiffs was not a "legitimate" use of Federal Rule of Civil Procedure 23 where, among other reasons, the "sprawling" class of asbestos claimants lacked cohesion and adequate representation.[72] In *Ortiz v. Fibreboard Corp.*, the Court held that, to certify a so-called "limited fund settlement class," it was "essential" that the lower court "independently" find that (1) the funds available to plaintiffs actually were "limited"; and (2) "intraclass conflicts" were addressed by "recognizing independently represented subclasses."[73]

Amchem and *Ortiz* increased pressure to use alternative forms of aggregation, such as multidistrict litigation ("MDL") or quasi-class actions, which proved controversial. Proponents of these new forms of collective litigation argued that they assured access to justice at scale, which would not be possible with individualized tort litigation.[74] Opponents worried that such processes may deprive individuals of their "day in court" through procedures that are "ad hoc"[75] or "unorthodox"[76] at best, and which appeared to be developed by judges in response to the exigencies of the case as articulated by the lawyers before them.[77] Critics

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71 Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 428 (2014) ("Again and again in recent years, the Supreme Court has made it more difficult to use class action to resolve large-scale disputes arising out of mass injuries.").

72 521 U.S. 591, 623–24 (1997). Strictly speaking, the Court in *Amchem* held that class certification requirements apply to settlement classes. *See id.* at 620–21 (stating that Rule 23(e)'s "prescription was designed to function as an additional requirement, not as a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)").

73 *Fibreboard Corp.*, 527 U.S. at 819, 864–65.

74 Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699, 710 (2013); Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1028 (2017).

75 Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 773 (2017) ("Courts resolve claims through procedures established in advance of concrete disputes by policymakers who cannot anticipate the effects of their choices on specific litigants.").

76 Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1672 (2017).

77 *Id.* at 1673–74 ("MDLs exemplify procedural exceptionalism.").

worry that they may be a "black hole,"[78] "undemocratic,"[79] and unable to "offer[] sufficient due process safeguards for plaintiffs."[80]

Until recently, many proceduralists and the Supreme Court viewed chapter 11 as superior to these alternatives on both efficiency and due process grounds. Samuel Issacharoff, for example, has argued that bankruptcy law "protect[s] the individual interest through . . . the formation of creditor's committees, and continuing through the recognition of priorities of different claims on the estate, and finally ending up in the equal treatment of comparably situated claimants."[81] Until *Purdue Pharma*, the Supreme Court appeared to agree: "[P]rotections for creditors"[82] built into the Bankruptcy Code make the process "special"[83]—that is to say, exceptional.

2. Demand for the Mass Tort Reorganization Alternative

Chapter 11 is an exceptional means of resolving mass tort liability, but creditor protections may not be the real selling point. Instead, chapter 11 is increasingly appealing to corporate tortfeasors due to the significant advantages the process confers on all corporate debtors who, until commencing bankruptcy, are typically referred to as "defendants." If ordinary civil litigation is idealized as a level playing field in which opposing parties struggle to ferret out information and argue about the correct application of the law to those facts before a neutral judge or jury, bankruptcy decidedly tilts the field in favor of the debtor.

Managers of the corporate debtor have considerable discretion over whether and where to commence a chapter 11 case, for example. The decision to initiate a chapter 11 case is, as a practical matter, within the

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78 *See, e.g.*, *In re* U.S. Lines, Inc., No. 97-cv-6727, 1998 WL 382023, at *7 (S.D.N.Y. 1998) (noting that the appellants described MDL as "a black hole" and "the third level of Dante's inferno"). There is little doubt about the significance of MDLs. *See* Thomas H.L. Forster, *Out of the "Black Hole": Toward a New Approach to MDL Procedure*, 100 TEX. L. REV. 1227, 1233 (2022).

79 Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 551 & n.207 (2013).

80 *See* Gluck et al., *supra* note 19, at 529.

81 Samuel Issacharoff, *Rule 23 and the Triumph of Experience*, 84 L. & CONTEMP. PROBS. 161, 174 (2021); D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1224 (2013) ("The voting procedures in bankruptcy are designed to prevent a majority of creditors from adopting a plan that oppresses a discrete minority.").

82 Ortiz v. Fibreboard Corp., 527 U.S. 815, 860 n.34 (1999) (contrasting limited fund class actions with bankruptcy, whose "protections for creditors" and mechanism for "establish[ing] a trust toward which the debtor may channel future . . . liability" arguably make it a fairer option for class members).

83 *Id.* at 846.

business judgment of management of the debtor.[84] (Involuntary bankruptcies commenced by disgruntled plaintiffs are rare.[85]) Once in chapter 11, managers presumptively remain in possession and control of the debtor during reorganization, even as they are expected to act as fiduciaries for creditors.[86] The automatic stay of § 362 of the Bankruptcy Code is often expanded through the use of a preliminary injunction to shield third parties (insiders) and to halt regulatory and governmental actions against the debtor.[87]

Management also presumptively controls case resolution. Section 1121 of the Bankruptcy Code gives management the exclusive right to design and propose a plan of reorganization for the first 120 days of the case, which will determine the amount of debt discharged and the consideration paid to creditors.[88] This means that creditors can negotiate for things they want but have limited leverage because they cannot usually threaten a substitute plan that ousts management. Because the plan must provide for the classification and treatment of all claims against the debtor, the Bankruptcy Code displaces civil procedure rules on class actions, and in their stead empowers management to construct those classes, also in its business judgment.[89] While creditors do get to vote on the plan, only the support of a single class is required to approve the plan.[90]

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84 The Bankruptcy Code formally imposes no insolvency requirement, although the Third Circuit Court of Appeals recently suggested that, under some circumstances, too much solvency may permit dismissal of a case on grounds that it was not commenced in "good faith." *In re* LTL Mgmt., LLC, 64 F.4th 84, 101 (3d Cir. 2023).

85 Plaintiffs in civil litigation rarely choose to put a common defendant into bankruptcy, even if they may recognize its efficiency benefits, because involuntary bankruptcies are difficult to commence. Susan Block-Lieb, *Why Creditors File So Few Involuntary Petitions and Why the Number Is Not Too Small*, 57 BROOK. L. REV. 803, 806 (1991) (discussing challenges in commencing involuntary bankruptcies).

86 11 U.S.C. § 1107. Bankruptcy trustees are rarely appointed in chapter 11 cases. *See* Jonathan C. Lipson & Christopher Fiore Marotta, *Examining Success*, 90 AM. BANKR. L.J. 1, 37 (2016) (reporting findings from an empirical study that chapter 11 trustees were sought in 7.6% of small cases (under $100 million in assets) and 12.6% of large cases, and were appointed in 2.1% of small cases and 3.7% of large cases).

87 11 U.S.C. § 362(a)(1); *In re* Purdue Pharms. L.P., 619 B.R. 38, 42 (S.D.N.Y. 2020) (approving a preliminary injunction shielding Sacklers and enjoining state actions against the debtor).

88 11 U.S.C. § 1121(b).

89 *Id.* § 1122(a).

90 *Id.* § 1126(c). There are other protections, such as the so-called "best interest of creditors" test of § 1129(a)(7). ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, KATHERINE PORTER & JOHN A.E. POTTOW, THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS 355, 605 (8th ed. 2021). As explained *infra* Part II, the *Purdue Pharma* case shows that these protections can readily be ignored by an activist bankruptcy judge committed to approving a plan proposed by the debtors.

As Abbe Gluck, Elizabeth Burch, and Adam Zimmerman recently observed, chapter 11's rules

> shift the balance of power from plaintiff to defendant, allowing the defendant to choose the forum, centralize claims, shut off tort process, and even sometimes overcome state statutes of limitations. They rarely utilize juries or hear testimony from tort victims anxious to have their day in court because the strong cultural norm in bankruptcy is to save money and streamline.[91]

Thus, as Edward Janger has observed, "Bankruptcy courts have become the favored forum for large corporate defendants to seek global resolution of mass tort liability claims."[92]

3. Due Process Concerns in Mass Tort Reorganization

Yet, due process concerns about alternative forms of aggregate litigation also dog chapter 11 reorganizations. These concerns can be traced to the asbestos-driven bankruptcy of Johns-Manville in the early 1980s, the case which also popularized the third-party release.[93] The principal due process concern then did not involve the third-party release—as will be noted in Part II, the *Manville* release did not go as far as the one struck in *Purdue Pharma*—but instead the intertemporal conflict between the interests of current and future claimants.[94]

Manville's plan of reorganization created a trust (known as the "Manville Trust") to which the company contributed assets, such as its valuable insurance policies.[95] The insurers would only agree to this if they received "'broad releases' . . . relating to 'any and all claims . . . whether or not presently known . . . based upon, arising out of or related to the [insurance policies].'"[96]

Future creditors would want the trust to survive long enough to provide a remedy for them, whereas current creditors would want to be paid more now.[97] Future and current claimants were in inherent tension,

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91 Gluck et al., *supra* note 19, at 525.

92 Janger, *supra* note 2, at 362.

93 Foohey and Odinet summarize the key moves. Foohey & Odinet, *supra* note 7, at 1288–90.

94 *See infra* Part II. Twenty years after Manville had gone into bankruptcy, District Judge Jack Weinstein and Bankruptcy Judge Burton Lifland observed that the "[c]alculation of estimates of future asbestos claims remain[ed] difficult." *In re* Joint E. & S. Dists. Asbestos Litig., 237 F. Supp. 2d 297, 310 (E.D.N.Y. 2002).

95 *In re* Johns-Manville Corp., 600 F.3d 135, 139 (2d Cir. 2010).

96 *Id.*

97 Unfortunately, the Manville Trust ran low on funds almost immediately. *See In re* Joint E. & S. Dists. Asbestos Litig., 237 F. Supp. 2d at 313–14.

and the futures were at a decided disadvantage. How could futures advocate in the bankruptcy to protect themselves? The mere fact of prebankruptcy exposure rendered the claims legally cognizable under the broad statutory definition of "claim," yet injury may not have manifested at the time.[98] Victims of asbestos exposure may not even have known that they were creditors.

In 1997, the National Bankruptcy Review Commission (NBRC), headed by law professor (now Senator) Elizabeth Warren, offered a range of suggestions on how chapter 11 could be amended to balance the efficiency demands of corporate reorganization with due process protections for mass tort claimants.[99] Among other things, the special amendments adopted to codify the Manville third-party releases for asbestos in § 524(g) would have to be scrapped, the voting rights of claimants would have to be protected,[100] and only consensual releases of third-party claims should be permitted.[101]

Congress never took up the NBRC's recommendations.[102] Instead, as Melissa Jacoby has observed, mass tort bankruptcy practice "continued without legislative clarifications or improvements, culminating in envelope-pushing filings" in which lawyers and judges "tout [c]hapter 11 as the best, or, indeed, the only way to find global peace."[103] *Purdue Pharma* sought to push the envelope even further.

4. Academic Debates About Mass Tort Reorganization

Lawyers and judges are not the only ones who sing the praises of mass tort reorganization. Legal academics have debated the propriety of

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98 11 U.S.C. § 101(5) (including contingent and unliquidated rights to payment); *see also* Grady v. A.H. Robins Co., Inc., 839 F.2d 198, 202 (4th Cir. 1988) ("The Code contemplates the broadest possible relief in the bankruptcy court.").

99 NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 315–17, 329–30, 339–41 (1997), https://govinfo.library.unt.edu/nbrc/reportcont.html [https://perma.cc/LVA7-9TR5]. This was followed by a report of the United States Judicial Conference, which expressed skepticism about bankruptcy courts' ability to protect due process in mass tort reorganizations. *See* U.S. JUD. CONF. COMM. ON THE ADMIN. OF THE BANKR. SYS., REPORT OF THE SUBCOMM. ON MASS TORTS 2–16 (2003), *reprinted in* Georgene Vairo, *Mass Torts Bankruptcies: The Who, the Why, and the How*, 78 AM. BANKR. L.J. 93, 131, 135 (2004) ("[I]t is unclear whether the Due Process Clause permits either constructive notice or use of a future claims representative as a complete substitution for notice when meaningful notice cannot be given.").

100 NAT'L BANKR. REV. COMM'N, *supra* note 99, at 315–16, 322–26.

101 *See id.* at 534–40 (outlining the NBRC's recommendations for voluntary releases and specific processes for use); *see also id.* at 24, 456, 534 (recommending that releases of nondebtors be enforceable only with respect to parties that agree to release those nondebtor liabilities).

102 *See* Jacoby, *supra* note 5, at 1749–52 (summarizing recommendations).

103 *Id.* at 1747.

using chapter 11 to resolve mass torts, with the debate heating up noticeably in the last several years following Purdue Pharma's filing. Anthony Casey and Joshua Macey have recently and provocatively argued that chapter 11 is "an appropriate and often superior forum in which to resolve mass tort claims."[104] It "resolves the collective action problem that arises when creditors pursue their claims in a variety of separate proceedings" because it halts the value-destructive "race to the courthouse—or courthouses—to collect what they are owed."[105]

"Of course," they recognize, "debtors and managers can abuse the third-party release."[106] Thus, they argue, "courts should be aggressive in demanding disclosures regarding the released parties' roles in the firm's affairs, in requiring strong proof about the value of assets and liabilities, [and] in policing fraudulent transfers and preventing managers from funneling assets to their preferred stakeholders . . . ."[107] These are laudable goals, but as will be explained in Section II.A., little of that happened in *Purdue Pharma*.

Abbe Gluck, Elizabeth Burch, and Adam Zimmerman reject this and argue forcefully that bankruptcy is ill-suited to adjudicate mass tort claims.[108] Bankruptcy is unique in its emphasis on efficiency and streamlining claims at the expense of what they call "core values" in litigation, which include

> deterring wrongdoers, empowering and compensating victims, testing and valuing claims, generating public goods by making information available to regulators, fostering democracy and voice by allowing litigants and the public to participate in trials, developing legal doctrine, and ensuring a forum in which all citizens are viewed equally before the law.[109]

There is much to be said for both positions because most of us want to maximize recoveries while also respecting due process interests. Finding balance is difficult. As explained in the next two Parts, on the ground, the *Purdue Pharma* bankruptcy was an exceptional case—but the Sackler Release would advance neither core litigation values nor wealth maximization.

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104 Casey & Macey, *Defense*, *supra* note 2, at 976.

105 *Id.*

106 *Id.* at 977.

107 *Id.* at 978.

108 *See* Gluck et al., *supra* note 19, at 528 ("[B]ankruptcy court is not supposed to be a superpower that trumps all others in public litigation.").

109 *See id.* at 551–52.

II. *PURDUE PHARMA*, BANKRUPTCY EXCEPTIONALISM, AND THE PROBLEM OF SOCIAL DEBT

No one boasts about being an exceptionalist.[110] Instead, exceptionalism is the product of claims that a case is "unique," that an exception is "necessary," and perhaps "fair" and "equitable."[111]

In bankruptcy, these arguments are often cast in terms of dollars and cents: resistance to the exception sought (in *Purdue Pharma*, third-party releases) will destroy value and waste precious opportunities to save jobs and businesses.[112] Bankruptcy judges take seriously their duty to achieve bankruptcy's rehabilitative goals and so are often receptive to these arguments, even as they may sometimes be skeptical of them. Bankruptcy Judge Wiles recently observed that nonconsensual third-party releases appear in "[a]lmost every proposed [c]hapter 11 Plan that I receive,"[113] implying that every case he sees casts itself as unique. In reality, of course, most cases are as unique as snowflakes or the children of Lake Wobegon, all of whom were said to be above average.[114]

Purdue Pharma was difficult because it really *was* unique, and yet the exceptionalism that would have justified the Sackler Release was of exactly the wrong sort, threatening core principles of the legal system and irreversible harms beyond dollars and cents. It sought to advance the "rule of the deal," as one of us has put it,[115] rather than the rule of law, which is at a premium in cases involving social debt. This Part explains how and why the *Purdue Pharma* bankruptcy and the Sackler Release were so exceptional, and why addressing Purdue Pharma's social debt was so problematic for the bankruptcy system.

A. *Exceptional Features of Purdue Pharma's Bankruptcy*

Purdue Pharma commenced its chapter 11 case in the Bankruptcy Court for the Southern District of New York on September 15, 2019.[116]

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110 Even if one is "for" it. *See* Mayer, *supra* note 26, at 1–2.

111 *See In re* Purdue Pharma L.P., 69 F.4th 45, 57, 62, 73 (2d Cir. 2023).

112 *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 278 (2024) (Kavanaugh, J., dissenting) ("Nothing is more antithetical to the purpose of bankruptcy than destroying estate value to punish someone." (quoting Casey & Macey, *Defense*, *supra* note 2, at 1017)).

113 *See In re* Aegean Marine Petroleum Network Inc., 599 B.R. 717, 726 (Bankr. S.D.N.Y. 2019).

114 *See* Lipson, *supra* note 24, at 105 (observing that bankruptcy exceptionalism "might be benign, in the same way that we say that all the children of Lake Wobegon are above average," but that "it might also be unprincipled").

115 *See generally* Lipson, *supra* note 6, at 41.

116 *See* Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649), ECF No. 1.

Although Justice Kavanaugh characterized Purdue Pharma's bankruptcy as a "shining example of the bankruptcy system at work,"[117] it was in fact tarnished by exceptionalism in practice that conflicted with the social demands of the case.

At the commencement of the case, the debtors filed an "informational brief"—itself an unusual move—which emphasized the unique nature of the case.[118] There, they told the Bankruptcy Court and the world that "[u]nlike most debtors," they "have no funded debt and no material past due trade obligations. Nor do they have any judgment creditors."[119] While the "case will present unique challenges,"[120] they said it also presented "a unique opportunity to benefit Americans in need with billions of dollars of products, assets, and cash—as an alternative to years of litigation and value destruction."[121] Bankruptcy, they urged, "has the unique ability to further these objectives and productively orient future negotiations because it is the only forum available that both ensures that similarly situated entities are treated equally and can provide the requisite finality to all stakeholders."[122]

The Sacklers began to plan for this unique bankruptcy in 2018 when they negotiated a framework for a global settlement with certain plaintiffs, most of whom were state governments.[123] This "Sackler Settlement Framework" had three basic elements, reflected in an unsigned term sheet filed at the beginning of the bankruptcy: (1) the Sacklers would give Purdue Pharma to creditors (mostly state and local governments); (2) they would pay $3 billion (later increased to $5.5 billion) into creditor trusts over an extended period; and (3) in exchange, they would receive "comprehensive releases."[124] This would be an alternative to direct litigation which would determine the merits of the allegations against the Sacklers.

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117 *See Purdue Pharma*, 603 U.S. at 228 (Kavanaugh, J., dissenting).

118 Debtors' Informational Brief, *In re* Purdue Pharma L.P., 633 B.R. 35 (No. 19-23649), ECF No. 17. As Melissa Jacoby has noted, an informational brief of this sort can be problematic because it "uses the federal court docket as an arm of public relations to shape news media coverage and reinforce taglines without evidentiary or pleading controls." Jacoby, *supra* note 5, at 1760.

119 Debtors' Informational Brief, *supra* note 118, at 1.

120 *Id.* at 5.

121 *Id.*

122 *Id.* at 50.

123 *See* Notice of Filing of Term Sheet with Ad Hoc Committee, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649), ECF No. 257; *see also* Lipson, *supra* note 6, at 85 & n.225 (citing Verified Statement at 5, *In re* Purdue Pharma L.P., 633. B.R. 53 (No. 19-23649), ECF No. 279).

124 Notice of Filing of Term Sheet, *supra* note 123, ¶ 6 (providing that the Sackler Family's contributions will be "[i]n exchange for comprehensive releases in the form and manner to be agreed upon by the parties"); *see also id.* Ex. A, at 9–10.

To implement the Sackler Settlement Framework, the Sacklers needed two things: (1) credible corporate agents and professionals to manage the chapter 11 process; and (2) a bankruptcy judge likely to support their desire to settle rather than to litigate. The Sacklers changed the governance of Purdue Pharma to do both.

To get the first, the Sacklers, then the company's shareholders and a majority of its board, caused the company to hire the law firm Davis Polk & Wardwell as "restructuring counsel" in March of 2018, around the time they struck an initial settlement deal with certain plaintiffs.[125] Turnaround expert Steve Miller joined the company's board in July 2018 as members of the Sackler family left it.[126] Both Davis Polk and Miller are longtime repeat players in the chapter 11 system.[127]

Although Davis Polk often portrayed Miller and the bankruptcy directors he appointed as "independent,"[128] they were committed to the Sackler Settlement Framework from the outset. Before bankruptcy, they coordinated closely with the Sacklers about messaging in support of it.[129] Although they exercised significant control over the reorganization process, as the debtor in possession, they appeared aligned with the Sacklers on virtually all important matters. Later, after the Supreme Court struck the Sackler Release, they ceded control of the estate's most valuable asset—fraudulent transfer claims against the Sacklers for "milking" the company—to the official committee of unsecured creditors, leaving one to question their independence from the Sacklers.[130]

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125 Application of Debtors for Authorization to Employ and Retain Davis Polk & Wardwell LLP as Attorneys for the Debtors *Nunc Pro Tunc* to the Petition Date ¶ 7, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649), ECF No. 419 ("Davis Polk has provided extensive advice to the Debtors since March 2018 on a broad array of matters and has performed services necessary to enable the Debtors to file for protection under chapter 11."); *see also* Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors at 3, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649), ECF No. 2983 [hereinafter Disclosure Statement] (describing timing of Sackler negotiations before bankruptcy).

126 Disclosure Statement, *supra* note 125, at 143.

127 One of us has observed elsewhere that "[i]n large chapter 11 cases, the most important participants—for example, distress investors, lawyers, and judges—often form a tightly knit community of repeat players because they are largely located in or around one of two courts (New York or Delaware) and tend to appear in many of the same cases." Jonathan C. Lipson, *Bargaining Bankrupt: A Relational Theory of Contract in Bankruptcy*, 6 HARV. BUS. L. REV. 239, 245 (2016).

128 *See* Debtors' Informational Brief, *supra* note 118, at 15.

129 In May of 2019, for example, Mr. Miller developed an op-ed in coordination with members of the Sackler family which firmly rejected the prospect of litigation. Steve Miller, *Litigation Won't Solve the Opioid Crisis*, WALL ST. J. (May 27, 2019, 4:32 PM), https://www.wsj.com/articles/litigation-wont-solve-the-opioid-crisis-11558989157 [https://perma.cc/DJ7A-QCJQ].

130 *See* Motion of the Official Committee of Unsecured Creditors for Sole Standing to Commence and Prosecutor Estate Causes of Action at 14, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649), ECF No. 6523 ("The Debtors' Special Committee has since confirmed that it

The Sacklers (presumably with the help of Davis Polk) found the second critical piece, a supportive judge, in United States Bankruptcy Judge Robert Drain. Judge Drain may have been attractive because he was known to be a sophisticated judge with a strong preference for negotiated resolutions. He had previously expressed his willingness to be a "useful tool" to help large companies reorganize.[131] He had also previously approved the sort of nonconsensual release the Sacklers would seek.[132]

He also happened to be the only bankruptcy judge in the White Plains division of the Southern District of New York.[133] Thus, if Purdue could develop a credible link to White Plains, it would know with some confidence the identity and views of the judge who would preside over their bankruptcy.

Purdue and the Sacklers took advantage of liberal venue rules in bankruptcy that have long troubled observers.[134] Forum shopping, however, is hardly unusual: it is expected to be part of "the game." But it was exceptional to "shop" for a specific judge. As Adam Levitin has shown, Purdue Pharma was so certain that they would get Judge Drain that they marked early pleadings with his initials even before the case was technically assigned to him.[135] As one of us has shown elsewhere, it was not merely Purdue in the abstract that made this decision, but in fact the Sacklers.[136]

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believes the Debtors are not the optimal party to prosecute the Estate Claims and has confirmed that the Debtors support the Official Committee's motion for sole standing."). This cause of action is property of the estate, 11 U.S.C. § 541, and the debtors' estate would have the exclusive right to litigate it. Unsecured Creditors Comm. of STN Enters., Inc. v. Noyes (*In re* STN Enters.), 779 F.2d 901, 904 (2d Cir. 1985).

131 Joe Brady, *Bankruptcy Judge Ok Being 'Useful Tool,'* TRADEWINDS (June 23, 2016, 8:15 PM), https://www.tradewindsnews.com/finance/bankruptcy-judge-ok-being-useful-tool/1-1-765831 [https://perma.cc/X8H9-SQSG].

132 *See In re* MPM Silicones, LLC, No. 14-22503, 2014 WL 4436335, at *32–34 (Bankr. S.D.N.Y. Sept. 9, 2014) (allowing nonconsensual third-party releases).

133 Lipson, *supra* note 39, at 43.

134 *See* Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 254 (2022).

135 Levitin, *supra* note 38, at 1134–35.

136 *See* Lipson, *supra* note 6, at 66.

> On March 1, 2019, about a year after first striking the settlement framework, and six months before declaring bankruptcy, it appears that the Sacklers, acting as shareholders of Purdue Pharma's New York general partner, authorized the company to change its registered corporate agent to White Plains, New York (and naming restructuring counsel Davis Polk as such).

Id. (citing Certificate of Change, Purdue Pharma, Inc. May 14, 2019, at ¶ 5).

Judge Drain would prove to be an exceptionally activist judge in the *Purdue Pharma* case. Although he later claimed to be "bitter"[137] that he could not force the Sacklers to pay more money, he also gave them and their company practically everything they sought during the case. He signaled early on that he would support the Sackler Release long before it was presented in Purdue's plan.[138] At the outset of the case, he granted an exceptionally broad preliminary injunction that shielded the Sacklers from direct litigation and the company itself from regulatory scrutiny.[139] Although he narrowed the Sackler Release to cover opioid-related claims (which he dictated from the bench),[140] he publicly berated those who challenged the Sackler Release.[141] He would "cut off" and "yell[]" at efforts to question the Sackler Settlement Framework or how it was constructed.[142]

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137 *In re* Purdue Pharma L.P., 633 B.R. 53, 93 (Bankr. S.D.N.Y.), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21-cv-7532, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022). He then spelled it out for greater emphasis: "B-I-T-T-E-R." *Id.*

138 At a hearing in September 2020, Bankruptcy Judge Drain stated: "[I]t appears to me to have always been the case and will continue to be the case, that a plan in which [the Sacklers] do make a material contribution that satisfies the [S]econd [C]ircuit's test in *In re Metromedia* [*Fiber Network*]*, Inc.* is not only possible but the most likely outcome in this case." Transcript of Hearing at 79, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649), ECF No. 2054 (citation omitted).

139 Order Pursuant to 11 U.S.C. § 105(a) Granting, in Part, Motion for Preliminary Injunction at 1–4, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-8289), ECF No. 82.

140 Transcript of Hearing at 280, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649), ECF No. 3602 ("I think the parties should take away today, though, that I do have some concerns about the breadth of these releases . . . ."); *see also id.* at 248 ("What is the basis for insisting on a release that covers non-opioid product activities related to Purdue?").

141 By way of example, the Bankruptcy Judge had the following colloquy with counsel to the United States Trustee during the plan confirmation hearing:

> THE COURT: Mr. Schwartzberg, how do you propose to measure overwhelming support except by how everyone measures an election, which is based on those who actually vote? . . . You would poll the man on the street?
>
> MR. SCHWARTZBERG: We're not talking about polling, Your Honor. We're not talking about—
>
> THE COURT: No, you're not talking about counting at all. Just move on from this point. I think the politicians who are objecting to this plan at least understand how elections work.

Transcript of Hearing at 146–47, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649), ECF No. 3659.

142 *E.g.*, Maria Chutchian, *Purdue Pharma Bankruptcy Judge OKs Examiner but Condemns Sackler-Related Attacks*, REUTERS (June 16, 2021, 6:52 PM), https://www.reuters.com/legal/transactional/purdue-pharma-bankruptcy-judge-oks-examiner-condemns-sackler-related-attacks-2021-06-16 [https://perma.cc/DUA4-WJLV].

The case would take an exceptional toll on Judge Drain. Soon after he confirmed Purdue's plan, he retired from the bench.[143] This was unusual because it was eight years before the end of his fourteen-year term.[144] He went on to work for Skadden Arps, special counsel to Purdue Pharma in its bankruptcy, which raised eyebrows.[145] Judge Drain's decision to go to Skadden was not a technical violation of judicial ethics rules. Nevertheless, if it was not an exception to those rules, it was also not, as Kathleen Clark said, "a great look."[146]

B. *The Exceptional Nature of the Sackler Release*

Even as bench-edited by Judge Drain, the Sackler Release was exceptionally broad, exceeding the bounds of the statute and appellate case law.

Justice Gorsuch would later recognize that the Sackler Release was in substance equivalent to a discharge of debt (he called it the "Sackler discharge") and that the Bankruptcy Code does not permit the discharge of individuals' debts for fraud or willful and malicious injury.[147] The Sackler Release defies these limitations, Justice Gorsuch would later observe.[148] In the Second Circuit below, Judge Wesley said bluntly in a separate opinion that the Sackler Release "enjoins a broader swath of claims than a debtor himself could seek to discharge under the Bankruptcy Code, and it does so without providing any compensation to

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143 Press Release, U.S. Bankr. Ct. S.D.N.Y., Distinguished Bankruptcy Judge to Retire from Southern District Bench (Sept. 28, 2021), https://www.nysb.uscourts.gov/sites/default/files/pdf/PressReleaseJudgeDrain.pdf [https://perma.cc/DQ8A-M4ZV].

144 *See* Maria Chutchian, *New York Bankruptcy Judge Who Oversaw Purdue Pharma Case to Retire*, REUTERS (Sept. 29, 2021, 10:29 AM), https://www.reuters.com/legal/transactional/new-york-bankruptcy-judge-who-oversaw-purdue-pharma-case-retire-2021-09-28 [https://web.archive.org/web/20221225035130/https://www.reuters.com/legal/transactional/new-york-bankruptcy-judge-who-oversaw-purdue-pharma-case-retire-2021-09-28].

145 *See* Justin Wise, *Purdue Pharma Law Firm Builds 'Ethical Wall' to Shield Ex-Judge*, BLOOMBERG L. (Apr. 21, 2023, 5:30 AM), https://news.bloomberglaw.com/business-and-practice/purdue-pharma-law-firm-builds-ethical-wall-to-shield-ex-judge [https://perma.cc/32GU-P3TD].

146 *Id.* Before joining the bench, Judge Drain had worked for two of the main firms representing the Sacklers personally, Paul Weiss and Milbank. *Id.*; Bryan J. Hall & Hon. Alan S. Trust, *Judicial Profile: Hon. Robert D. Drain U.S. Bankruptcy Judge, Southern District of New York*, FED. BAR ASS'N (2013), https://www.fedbar.org/wp-content/uploads/2019/10/drain-JanFeb13-pdf-3.pdf [https://perma.cc/8RUP-X5VB].

147 Harrington v. Purdue Pharma L.P., 603 U.S. 204, 221–22 (2024) ("[O]rdinarily" the discharge of debt "does not reach claims based on 'fraud' or those alleging 'willful and malicious injury.'" (citing 11 U.S.C. § 523(a)(2), (4), (6))).

148 *See id.* at 222–23.

the claim holders, who must abide by its terms whether they like it or not."[149]

It also appears to have been broader than those approved by other appellate courts. While some third-party releases had previously been used to enjoin securities fraud litigation,[150] none involved the types of consumer-facing fraud and claims of personal injury and wrongful death at issue in *Purdue Pharma*. The release in the *A.H. Robins* case, for example, covered product liability claims but not claims for willful or malicious injury, as the Sackler Release would have done.[151] Although the Second Circuit had previously approved broad releases of so-called "derivative" claims, in *Manville*, it had carefully distinguished "direct" causes of action that creditors might have had against third parties.[152] The Sackler Release, by contrast, included "particularized or direct claims" against the Sacklers, "including claims predicated on fraud, misrepresentation, and willful misconduct under various state consumer protection statutes."[153]

In *Dow Corning*, the Sixth Circuit Court of Appeals had previously rejected nondebtor releases on, among others, grounds that the plan there did not provide an alternative opportunity for plaintiffs to recover "full payment" outside the bankruptcy.[154] Here, the Second Circuit opinion approving the Sackler Release transformed this element from "full payment" to "fair payment," a vague standard that would have hard-wired exceptionalism into mass tort reorganizations.[155] If it remained the law, it is not hard to imagine chapter 11 lawyers routinely arguing for the broadest possible third-party releases on grounds that "fairness" required the exception.

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149 *In re* Purdue Pharma L.P., 69 F.4th 45, 88 (2d Cir. 2023) (Wesley, J., concurring).

150 *See, e.g.*, *In re* Drexel Burnham Lambert Grp., Inc., 960 F.2d 285, 293 (2d Cir. 1992).

151 The closest analog to *Purdue Pharma*, *In re A.H. Robins Co., Inc.*, 880 F.2d 694, 701 (4th Cir. 1989), was silent on whether it went so far. *See also In re* Airadigm Commc'ns, Inc., 519 F.3d 640, 657 (7th Cir. 2008) (explaining that the release was appropriately tailored because it was limited to "claims 'arising out of or in connection with' the reorganization itself and does not include 'willful misconduct'").

152 *In re* Johns-Manville Corp., 600 F.3d 135, 152 (2d Cir. 2010) (declining to enforce a third-party release against one insurance company asserting the direct right of indemnification against another on grounds that defendant breached the duty of good faith in connection with debtor's harms); *see also* Lipson, *supra* note 3, at 1781–83 (discussing *In re* Johns-Manville Corp.).

153 *In re* Purdue Pharma, L.P., 635 B.R. 26, 36 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21-cv-7532, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022), *rev'd and remanded*, 69 F.4th 45 (2d Cir. 2023).

154 *In re* Dow Corning Corp., 280 F.3d 648, 656–57, 659 (6th Cir. 2002).

155 *In re* Purdue Pharma L.P., 69 F.4th 45, 79 (2d Cir. 2023) ("Because *the amount of the payment does not necessarily indicate its fairness*," the majority below reasoned, "the determinative question is not whether there is full payment, but rather whether the contributed sum permits the fair resolution of the enjoined claims." (emphasis added)).

Jonathan Seymour has recently characterized the Sackler Release as a prime example of statutory bankruptcy exceptionalism.[156] Applying "ordinary principles of statutory interpretation, the best reading of the statute is that Section 524(e), which provides that 'discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt,' prohibits courts from authorizing third-party releases."[157] Justice Gorsuch would later take a different path, focusing instead on § 1123(b)(6) of the Bankruptcy Code, but most assuredly rejecting statutory exceptionalism.[158] Neither Jonathan Seymour nor Justice Gorsuch, however, focused on the social qualities of the debt at issue, which made the exceptionalism of the lower courts and the dissent so problematic.[159]

C. *Purdue Pharma and Social Debt*

Purdue's bankruptcy and the debt it sought to eliminate reflect the misconduct of the company and its owners. That misconduct has been recounted elsewhere and warrants only a brief summary here.[160] But it contributed to the social characteristics of Purdue Pharma's debt, moral gravity, and scale, which made the case difficult to address in chapter 11.

1. *Purdue Pharma*, OxyContin, and "Milking"

Purdue Pharma began marketing OxyContin, an opioid prescription pain reliever, in the mid-1990s.[161] OxyContin soon became "the most prescribed brand-name narcotic medication" in the United States.[162] "Between 1996 and 2019, 'Purdue generated approximately $34 billion in revenue . . . , most of which came from OxyContin sales.'"[163] The Sacklers, the company's sole owners, soon joined lists "of the top

156 Seymour, *supra* note 26, at 2008 (arguing that "the kind of third-party release contemplated in *Purdue* likely could not stand" without exceptionalism).

157 *Id.* (quoting 11 U.S.C. § 524(e)).

158 Harrington v. Purdue Pharma L.P., 603 U.S. 204, 214–19 (2024) (conducting a statutory analysis of 11 U.S.C. § 1123(b)(6)).

159 The term "due process," for example, appears only once. Seymour, *supra* note 26, at 1962.

160 *See* sources cited *supra* note 50.

161 *Purdue Pharma*, 603 U.S. at 209–10 (citing *In re* Purdue Pharma L.P., 69 F.4th 45, 56 (2d Cir. 2023)).

162 *Id.* (quoting *In re* Purdue Pharma, L.P., 635 B.R. 26, 43 (S.D.N.Y. 2021)).

163 *Id.* (quoting *In re* Purdue Pharma, L.P., 635 B.R. at 39).

twenty wealthiest families in America," with an estimated net worth of $14 billion.[164]

Eventually, however, the firm came under scrutiny.[165] In 2007, a Purdue affiliate pleaded guilty to a federal felony for misbranding OxyContin as "less addictive" and "less subject to abuse . . . than other pain medications."[166] Purdue Pharma had, according to the United States Department of Justice, falsely "marketed and promoted OxyContin as less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications."[167]

Despite a corporate compliance agreement, Purdue Pharma continued to engage in this misconduct and soon faced a "veritable tsunami" of tort litigation,[168] including multidistrict litigation in the Northern District of Ohio.[169] Based on discovery in the MDL, Sackler family members were added as defendants in hundreds of the more than 2,000 cases pending against Purdue Pharma.[170] "By the middle of 2019, forty-nine states' Attorneys General had filed new or amended lawsuits . . . nam[ing] specific members of the Sackler family and/or Sackler-related entities."[171]

These "direct" claims asserted liability "under various unfair trade practices and consumer protection laws that make officers, directors, and managers who are responsible for corporate misconduct personally liable for their actions."[172] In the summer of 2019, the Sacklers lost "at least three" motions to dismiss lawsuits asserting direct liability.[173] Discovery would soon begin on the merits of these allegations—unless the Sacklers could get another court to halt those lawsuits.

Recognizing long before they were named directly that this litigation "would eventually impact them directly,"[174] "the Sacklers began what one family member described as a 'milking' program . . . taking as much as 70% of the company's revenue each year."[175] "Between 2008 and 2016, the family's distributions totaled approximately $11 billion, draining

164 *Id.* (quoting *In re* Purdue Pharma, L.P., 635 B.R. at 40).

165 *Id.*

166 *Id.* (quoting *In re* Purdue Pharma, L.P., 635 B.R. at 48).

167 United States v. Purdue Frederick Co., 495 F. Supp. 2d 569, 571 (W.D. Va. 2007).

168 *In re* Purdue Pharma, L.P., 635 B.R. at 34–35.

169 *Id.* at 49 (citing *In re* Nat'l Prescription Opiate Litig., No. 17-md-2804, ECF No. 1, at Schedule A).

170 *Id.* at 50–51.

171 *Id.* at 51.

172 *Id.* at 70.

173 *Id.* at 51.

174 Harrington v. Purdue Pharma L.P., 603 U.S. 204, 210 (2024) (quoting *In re* Purdue Pharma L.P., 69 F.4th 45, 59 (2d Cir. 2023)).

175 *Id.* at 211 (citing *In re* Purdue Pharma, L.P., 635 B.R. at 57).

Purdue's total assets by 75% and leaving it in 'a significantly weakened financial' state."[176] "The Sacklers diverted much of that money to overseas trusts and family-owned companies."[177] Then the Sacklers left the Board and retired as managers.[178]

The net effect of the actions of Purdue Pharma and its insiders—the Sacklers on the board and the executives they hired—was to create social debt and to render the principal debtor (the company) unable to pay that debt. This, in turn, created the necessity for the Sackler Release that led to the exceptional characteristics of that release.

2. The Problem of Social Debt

The debt created by Purdue and the Sacklers was not like ordinary commercial debt or even liability for negligence. It was "social" because the liability arose from grievous misconduct at a massive scale.[179] The term is an obvious reference to Ronald Coase's famous problem of *social cost* because the social qualities of this debt mesh poorly with the transaction cost economics often used to justify bankruptcy exceptionalism (and inaptly used to justify the Sackler Release, as discussed in Part III).[180]

"Social debt" is not a category recognized by the Bankruptcy Code: all unsecured debt is presumed equal under the Bankruptcy Code's broad definition of "claim."[181] Views about the norms around indebtedness have changed fundamentally since Congress included the Bankruptcy Clause in the Constitution.[182] Back then, general default was a crime, and a federal bankruptcy law was needed to spring the "honest but unfortunate debtor" from prison.[183] But, the stigma of indebtedness for

176 *Id.* (quoting *In re* Purdue Pharma L.P., 69 F.4th at 59).

177 *Id.* (citing *In re* Purdue Pharma, L.P., 635 B.R. at 71).

178 *In re* Purdue Pharma, L.P., 635 B.R. at 36, *rev'd and remanded*, 69 F.4th 45 (2d Cir. 2023), *rev'd and remanded sub nom.* Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024).

179 *See supra* Introduction.

180 *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

181 11 U.S.C. § 1101(5); *see also* Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1276–77 (5th Cir. 1994); *In re* Chateaugay Corp., 944 F.2d 997, 1003–05 (2d Cir. 1991).

182 U.S. CONST. art I, § 8, cl. 4 provides that Congress shall have the power to enact "uniform Laws on the subject of Bankruptcies throughout the United States."

183 Cohen v. de la Cruz, 523 U.S. 213, 217 (1998) (quoting Grogan v. Garner, 498 U.S. 279, 287 (1991)); *see also In re* Lawson, 791 F.3d 214, 218 (1st Cir. 2015) ("The Bankruptcy Code aims to strike a balance between providing debtors with a fresh start by discharging debts upon plan confirmation, and avoiding abuse of the system.").

entrepreneurs and their business debts eroded over time and with it the risk of criminal sanctions.[184]

Chapter 11 scholarship has largely eschewed any focus on the moral qualities of the underlying debt, preferring to follow Congress's lead in ignoring the normative characteristics of the actions that gave rise to corporate debt in a reorganization.[185] This reflects the broadly held assumption that chapter 11 reorganization is largely about commercial debt, and involves sophisticated creditors such as banks and bondholders who can fend for themselves. The normative stakes in most chapter 11 reorganizations are comparatively low and the quality of creditor participation is acceptable, if not high.

3. The Individual/Entity Distinction

The distinction between normatively neutral and morally "reprehensible" debt has not been entirely lost on Congress, even though it is not reflected in the operation of chapter 11.[186] Individuals who engage in a long list of bad acts cannot take advantage of the discharge of debt in a chapter 7 liquidation. No one would dispute that crimes or intentional torts can evidence serious misconduct, as wrongs malum in se.[187] These include debts arising from fraud or willful and malicious injury, which (as noted above) are excepted from discharge.[188] Debtors who engage in a fraudulent transfer can be denied the discharge entirely.[189] More

184 Individual debt remains stigmatized, and consumer bankruptcy is sometimes characterized as a moral failing. *See* Lipson, *supra* note 24, at 654, 683–84. We discuss the individual/entity distinction that the Bankruptcy Code makes around this *infra* Section II.C.3.

185 The few exceptions are Donald R. Korobkin, *The Role of Normative Theory in Bankruptcy Debates*, 82 IOWA L. REV. 75 (1996); Susan Block-Leib, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503 (2001).

186 *See* Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 117 (2017) ("Some . . . exceptions to discharge are based on reprehensible conduct by a debtor, such as embezzlement or fraud." (footnote omitted)).

187 Youngjae Lee, Mala Prohibita *and Proportionality*, 15 CRIM. L. & PHIL. 425, 426 (2021) ("When one thinks of crimes, paradigmatic offenses are crimes like murder, rape, and robbery, but offenses like failure to register as an investment advisor are different. But in what way? One standard explanation is the distinction between two types of offenses, *malum in se* and *malum prohibitum*. Some offenses, like murder, are wrongs 'in themselves' ('*in se*') whereas other offenses, like investment advising without registering as an advisor, are wrongs because they have been prohibited ('*prohibitum*').").

188 11 U.S.C. § 523(a)(2)(A)–(B), (a)(6).

189 11 U.S.C. § 727(a).

generally, the bankruptcy system defers to the imperatives of the criminal justice system.[190]

Congress and the courts have also long treated individuals and entities differently for this normative purpose.[191] Entities such as corporations can get a far broader discharge through a confirmed chapter 11 plan than can individuals seeking to liquidate under chapter 7 because the long list of exceptions to discharge applies by its terms to "individuals" and not to entities.[192]

There appears to be no clear and well-articulated theory justifying the distinction. Perhaps it is rooted in the belief that punishing an entity (by not discharging debt) only punishes its stakeholders. Perhaps, instead, it reflects the fact that a plan of reorganization (unlike a chapter 7 liquidation) requires a creditor vote based on "adequate information" provided by the plan proponent.[193] If creditors know about the underlying misconduct and vote to discharge the resulting debt anyway, that is a good thing. We would generally prefer forgiveness to litigation if the former were knowing and genuine. The case law does not seem to support this, however. Critics of the pro-entity bias of bankruptcy source the rationale in historical practice,[194] which is really no rationale at all.

Whatever the rationale, the distinction could not have mattered to the Sackler Release. The most notorious beneficiaries of that release would have been *individual* members of the Sackler family (as well as executives who ran the company when it engaged in its misconduct). They could not have discharged debts for willful or malicious injuries in their own bankruptcies (had they commenced them) if the allegations against them were true. Indeed, the Sackler Release would also have

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190 *See* Ohio v. Kovacs, 469 U.S. 274, 276, 282–84 (1985) (holding that an environmental cleanup order was convertible to a monetary obligation in bankruptcy and the bankruptcy discharge does not prevent the debtor from prosecution for violation of environmental laws).

191 *See generally* Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 EMORY BANKR. DEVS. J. 497 (2023) (detailing how bankruptcy treats individuals and entities differently). This may be changing in the case of "small business" reorganizations under subchapter V of chapter 11. *Cf. In re* Cleary Packaging, LLC, 36 F.4th 509, 511–12 (4th Cir. 2022) (holding that an exception from discharge applied to both individual debtors and corporate debtors in small business reorganization).

192 "A discharge under section 727, 1141, 1192 1228(a), 1228(b), or 1328(b) of this title does not discharge an *individual* debtor from any debt . . . ." 11 U.S.C. § 523(a) (emphasis added). The one statutory exception is for corporate fraud resulting in liability to a domestic government, which cannot be discharged under 11 U.S.C. § 1141(d)(6). Incredibly, the Sackler Release would have eliminated that debt, too.

193 11 U.S.C. § 1125 (providing what must be included in the disclosure statement accompanying the plan).

194 Jacoby, *supra* note 191, at 503, 522 (citing Am. Serv. Co. v. Henderson, 120 F.2d 525, 529–30 (4th Cir. 1941) (holding that a provision barring discharge of debts arising from willful and malicious injuries applied only to individuals not to corporations in a reorganization)).

discharged the debtors' corporate debt for fraud owed to governments, which entities are not permitted to do under § 1141.[195]

Moreover, if voting is the rationale for cleansing fraud under a plan, then the vote must be fair and informed. This, in turn, places pressure on the quality of the process by which the vote is solicited. The noneconomic characteristics of social debt, however, are more likely to be addressed by "dignitary" protections often associated with due process values that can be costly, and to which the Sackler Release would have been a large and problematic exception.[196]

4. The Problem of Noneconomic (Dignitary) Harm

"Civil litigation is not exclusively a vehicle for securing material benefit," Rachel Bayefsky has argued, because "[i]t can also be a way to pursue an interest in something more intangible: dignity, respect, or vindication."[197] "Dignity" figures prominently in literature on human rights,[198] religious liberty,[199] tort law,[200] and the so-called "victims' rights" movement, because "crime victims should be treated with dignity and respect. This goal is intuitive and is rarely rejected outright."[201]

It is not hard to see that the thousands of victims and survivors of Purdue Pharma's twice-confessed drug-marketing crimes are in an important sense crime victims. As such, it is not surprising that some wanted nothing to do with Purdue Pharma's bankruptcy or the Sacklers'

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195 11 U.S.C. § 1141(d)(6); Harrington v. Purdue Pharma L.P., 603 U.S. 204, 221–24 (2024).

196 Recent work on dignitary justice includes Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1265 (2021); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 171 (2011); Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. 501, 514 (2020). *See generally* JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS (Meir Dan-Cohen ed., 2012).

197 Bayefsky, *supra* note 196, at 1265; *see also* Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1929–38 (2003); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1735–63 (2008); Shapiro, *supra* note 196, at 558–77.

198 *See* Johanna Kalb, *Litigating Dignity: A Human Rights Framework*, 74 ALB. L. REV. 1725 (2011).

199 *See* Alan Brownstein, *Protecting the Religious Liberty of Religious Institutions*, 21 J. CONTEMP. LEGAL ISSUES 201, 212 (2013).

200 *See* Stephen D. Sugarman & Caitlin Boucher, *Re-Imagining the Dignitary Torts*, 14 J. TORT L. 101, 101 (2021) (arguing that "dignitary torts" include torts of "offensive battery, assault, false imprisonment, privacy invasion, defamation, some nuisance claims, and the more broadly labeled actions for intentional and negligent infliction of emotional distress").

201 Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREXEL L. REV. 43, 44 (2016).

financial contribution because they viewed it as "blood money."[202] Some survivors became activists and engaged in provocative performative events to call attention to the allegations against the Sacklers and, later, to concerns about the bankruptcy process.[203] A group of artists led by photographer Nan Goldin dropped imitation prescriptions in the atrium of the Guggenheim in New York to mock Dr. Richard Sackler's infamous statement that Purdue Pharma sales representatives would produce a "blizzard of prescriptions."[204] Once the bankruptcy was commenced, activists and survivors protested at bankruptcy hearings until COVID-19 forced the proceedings onto Zoom.[205] Activists photoshopped images of Bankruptcy Judge Drain as the "iron curtain of the Sackler massacre."[206]

These are not the ordinary dynamics of corporate reorganization. They bespeak moral outrage in response to the severe harms suffered by Purdue Pharma's victims. While the bankruptcy itself sought to provide certain noneconomic remedies—in particular, the company and the Sacklers would contribute to a "public document repository" and precluded the Sacklers from obtaining naming rights for charitable contributions[207]—there was an understandable sense in which money

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202 *See* Geoff Mulvihill & Claire Galofaro, *'Blood Money'? Purdue Settlement Would Rely on Opioid Sales*, ASSOCIATED PRESS (Sept. 17, 2019, 8:42 PM), https://apnews.com/article/us-news-ap-top-news-opioids-health-care-industry-health-cd313598c3c8445b985089d05e060cbf [https://perma.cc/BRF2-2EBP]. "'It's blood money paying for blood money,' said Lynn Wencus, of Wrentham, Massachusetts, whose son Jeff died at 33 of an overdose in 2017. 'It's ludicrous. The whole thing would be almost comical if we weren't talking about human lives here.'" *Id.*; *see also* Edward Helmore, *The Woman Who Turned Down Her Share of a $6bn Settlement to Fight the Family Behind the Opioid Crisis*, GUARDIAN (Apr. 10, 2022, 2:00 AM), https://www.theguardian.com/us-news/2022/apr/10/ellen-isaacs-purdue-pharma-opioid-settlement [https://perma.cc/H2TX-PPUW].

203 *See* Masha Gessen, *Nan Goldin Leads a Protest at the Guggenheim Against the Sackler Family*, NEW YORKER (Feb. 10, 2019), https://www.newyorker.com/news/our-columnists/nan-goldin-leads-a-protest-at-the-guggenheim-against-the-sackler-family [https://perma.cc/2CDU-CMWQ].

204 *Id.* The "blizzard of prescriptions" line has been attributed to Dr. Richard Sackler most notably by John Oliver. *Last Week Tonight with John Oliver: Opioids II* (HBO Apr. 15, 2019), https://www.youtube.com/watch?v=-qCKR6wy94U [https://perma.cc/4UQD-ZL2Z].

205 Valentina Di Liscia, *A Protest Against Purdue Settlement Transforms Courthouse Landscape into a Graveyard*, HYPERALLERGIC (Aug. 9, 2021), https://hyperallergic.com/669004/pain-sackler-protest-against-purdue-settlement-transforms-courthouse-landscape-into-graveyard [https://perma.cc/SWB7-CVFG].

206 *See id.*

207 One of the mediators in the case, Judge Shelley Chapman, induced the parties to agree to "several non-monetary terms; specifically, a 'material expansion of the scope of the public document repository' to be established under the Plan, and certain prohibitions on Sackler family demands for naming rights in exchange for charitable contributions." *In re* Purdue Pharma, L.P., 635 B.R. 26, 65 (S.D.N.Y. 2021), *rev'd and remanded*, 69 F.4th 45 (2d Cir. 2023), *rev'd and remanded sub nom.* Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024).

could never fully right these wrongs.[208] As one of us has observed, the effects of the exceptionalist features of *Purdue Pharma* led to "the denial of victims' voices, the destruction of procedural justice, and the suppression of information."[209]

The bankruptcy judge in *Purdue Pharma* offered mixed views on his concerns about the noneconomic harm caused by the debtors and the Sacklers.[210] On one hand, at the hearing to confirm the plan with the Sackler Release, he conceded: "Bitterness over the outcome of these cases is completely understandable."[211] On the other hand, he said at an earlier hearing that he did not "distinguish between justice and dignitary justice," and that Purdue's reorganization was merely "about who should pay money."[212] If he did not reject dignitary goals outright, he saw little place for them in *Purdue Pharma*.

Practitioners have characterized *Purdue Pharma* as "bad facts" which, to proponents of third-party releases, may have produced "bad law."[213] Even supporters of the Sackler Release made no effort to conceal their contempt for the Sacklers. Pratik Shah, counsel to the Official Committee of Unsecured Creditors, told the Supreme Court at oral argument that "[t]here is no body of victims, no one, who would more like to have retribution against the Sacklers" than claimants, yet, he asserted, "97[%] of the victims agreed to this nonconsensual release."[214]

As one of us has explained elsewhere, we should take the Official Committee's declarations of umbrage with a grain of salt: prior to the Supreme Court's decision in the case, they did very little to challenge the Sacklers or Purdue Pharma.[215] Moreover, as we shall see, Mr. Shah's arithmetic was deeply misleading—only 20% of creditors (victims) voted

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208 Ella Epstein, Note, *The Need for Dignitary Justice for Tort Creditors in Chapter 11 Bankruptcy*, 2022 COLUM. BUS. L. REV. 943, 955 (2023).

209 Foohey & Odinet, *supra* note 7, at 1269.

210 *See In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y.), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *rev'd and remanded*, 69 F.4th 45 (2d Cir. 2023), *rev'd and remanded sub nom.* Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024).

211 *Id.* at 83.

212 Transcript of Hearing at 141, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649), ECF No. 3094.

213 Thomas J. Salerno & Clarissa C. Brady, *In Defense of Third-Party Releases in Chapter 11 Cases: Part I: Let's Define the Battlefield!*, 41 AM. BANKR. INST. J. 32, 35 (2022) ("Although the consensus is that the *Purdue Pharma* case presents egregious facts, including the fact that the Sacklers are responsible for creating the opioid epidemic, the 'bad facts' do not justify the creation of bad law.").

214 Transcript of Oral Argument, *supra* note 14, at 108–09.

215 *See* Lipson, *supra* note 3, at 1797 ("Perhaps the ultimate evidence of problems of loyalty [in *Purdue Pharma*] involves what did *not* happen. No party in any position to do so—not the debtor in possession, the UCC, or any ad hoc committee—attempted to sue the Sacklers notwithstanding the severity of the allegations against those involved with Purdue Pharma.").

at all.[216] True, a large majority may have agreed to live with the Sackler Release rather than continue to litigate. That, however, is not necessarily because they wanted the Sackler Release, but because the Sacklers and their designees on Purdue Pharma's board, supported by an exceptionally activist bankruptcy judge, left them little choice.[217]

5. The Casey/Macey Maneuver and *Purdue Pharma*'s Exceptionalism in Action

Critics have worried that bankruptcy sacrifices noneconomic "public-regarding values of litigation,"[218] such as the capacity to "develop state tort doctrines," to conduct "broad discovery," or to "utilize juries . . . or take testimony from tort victims anxious to have their day in court."[219]

Anthony Casey and Joshua Macey have aggressively responded, defending the use of chapter 11 as a way to resolve mass torts, even as they recognize the tension between economic and noneconomic harms.[220] They argue that bankruptcy "can accommodate noneconomic and public values as effectively as—and often more than—existing alternatives."[221] They assert that the "Bankruptcy Code already requires judges to provide many of the procedures that bankruptcy skeptics complain it lacks—including review of substantive law, referral of cases for trial, [and] extensive discovery."[222]

Although much of what they say about bankruptcy could, in theory, protect these noneconomic interests in cases involving social debt, the key point of *Purdue Pharma* is that the bankruptcy judge and lead participants in that case honored few of them. More importantly, the vague standard approved by the Second Circuit would have locked in a broad form of exceptionalism by allowing virtually any deviation from the statute when determined by a bankruptcy judge to be "fair," "equitable" and "necessary."[223]

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216 Harrington v. Purdue Pharma L.P., 603 U.S. 204, 211–12 (2024).

217 Lipson, *supra* note 6, at 103 ("[T]his article has shown that the Sackler Releases were virtually inevitable from the outset, reflecting strategic choices by Purdue Pharma and the Sacklers before and throughout the bankruptcy, choices which Judge Drain largely support[ed], and which creditors could not effectively challenge.").

218 *See* Gluck et al., *supra* note 19, at 532.

219 *Id.* at 527.

220 Casey & Macey, *Another Name*, *supra* note 2, at 1019.

221 *Id.*

222 *Id.* at 1021 (footnotes omitted).

223 *In re* Purdue Pharma L.P., 69 F.4th 45, 73, 82 (2d Cir. 2023).

As an example of "extensive discovery" in bankruptcy, they cite *Purdue Pharma*: "[W]ithout a single case going to trial . . . the company was forced to disclose extensive information about its production . . . ."[224] There are factual problems with this assertion, however. While there was the extensive discovery of the *debtors* (the company) in *Purdue Pharma*, much of that appears to have come from the MDL in the Northern District of Ohio in 2017.[225] Moreover, and more problematically, while the bankruptcy doubtless added to that information, much, if not all, of the bankruptcy discovery involved the claims of the *company* against the Sacklers for fraudulent transfer and similar, *derivative* claims for "milking" it—not the *third-party direct* claims at issue. There is little evidence that anyone took discovery of the Sacklers on the facts and issues in the direct litigations that were pending when the Bankruptcy Court halted them in October 2019 or could realistically have been asserted thereafter.[226]

Indeed, the Creditors' Committee in the case—the official representative of all creditors—admitted as much in a "plan support letter" that the Committee sent urging creditors to vote for the plan (and thus to support the Sackler Release).[227] It offered a three-page summary of the issues raised by the misconduct at issue, but almost no analysis of the merits of those issues or the results of any investigation that led the Creditors' Committee to support the plan.[228] It concluded that "[t]his letter is not the appropriate forum to address each of these issues

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224 Casey & Macey, *Another Name*, *supra* note 2, at 1021, 1042.

225 Casey and Macey offer an explanation that presumably includes a typographical error. They write: "[Gluck, Burch, and Zimmerman] argue that the extensive discovery in *Purdue* is attributable not to bankruptcy but to the fact that Purdue 'participated in the MDL for over a year and a half before filing for bankruptcy.'" *Id.* at 1043 (quoting Gluck et al., *supra* note 19, at 557). "But," they say, "this characterization is not correct. *The relevant discovery in Purdue was due to MDL, not to bankruptcy.*" *Id.* (emphasis added). Presumably, Casey and Macey meant to counter the point Gluck, Burch, and Zimmerman were trying to make that the discovery in Purdue was during the MDL.

226 Formal discovery on the direct claims did not proceed in the courts of original jurisdiction, and it is unclear whether discovery in the bankruptcy covered the same issues. Certainly, the public record said very little. According to Judge Drain,

> Although most discovery disputes were resolved in conferences with the Court, the UCC filed motions to compel production of certain information withheld by Sackler family members and businesses and the Debtors under claims of privilege. The Motions to Compel were later fully resolved as to the Debtors and sufficiently resolved as to the Sacklers without the need, to date, for a decision by this Court.

In re Purdue Pharma L.P., 632 B.R. 34, 37 (Bankr. S.D.N.Y. 2021) (footnote omitted).

227 *See* Objection of the Official Committee of Unsecured Creditors to Motion to Appoint Examiner Pursuant to 11 U.S.C. § 1104(c) at 21, Ex. A at 30–31, *In re* Purdue Pharma L.P., 633 B.R. 35 (Bankr. S.D.N.Y. 2021) (No. 19-23649), ECF No. 3023.

228 *Id.* at 21–23.

regarding . . . third-party claims."[229] But because the vote on the plan they urged would, if upheld, end all efforts to take discovery of the Sacklers or to hold them accountable if the facts warranted it, one must ask: If not there, where? If not then, when?

Similarly, the disclosure statement that accompanied the *Purdue Pharma* plan said almost nothing about the direct claims at issue.[230] It gave creditors only two pages on them and focused almost entirely on why pursuing such claims would be futile.[231] Nor did it contemplate the sort of consumer fraud types of claims that were asserted in the direct actions, but instead a more conventional tort analysis.[232] Confusingly, Purdue Pharma claimed in its disclosure statement that the value of the direct claims against the Sacklers (and other nondebtors) was "unknowable" and then accounted for them as worth $0.[233] Logically, both could not be true. If they were worthless, they would not have been worth fighting over. Judge Drain overruled objections to the disclosure statement on these grounds and approved it notwithstanding these problems.[234]

Casey and Macey argue that chapter 11 is superior to other forms of aggregation because, among other things, a "court-appointed future claims representative . . . aim[s] to ensure representation for future claimants and other parties who may not be in a position to advocate to protect their own interests."[235]

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229 *Id.* at 42–43.

230 *See* Disclosure Statement, *supra* note 125.

231 *See id.* at 33–38.

232 *See id.* at 173 ("[T]hird-party creditors nevertheless face significant legal hurdles in proving the elements of their claims and collecting on any judgments. Notably, third-party creditors would need to specifically prove that individual members of the Sackler Families and Sackler Entities engaged in conduct that would give rise to personal liability and that such conduct caused the harms allegedly sustained by such third parties.").

233 *See id.* app. B, at 5, 8 ("The Liquidation Analysis assumes that all opioid-related claims asserted against the Debtors are asserted solely against Debtor PPLP."). The various scenarios contemplated by the liquidation analysis recognized the Department of Justice's forfeiture claim, which would essentially consume all (or almost all) of the debtors' value, leaving nothing for tort claimants. *See, e.g.*, *id.* Ex. 1, at 13.

234 *See* Order Approving (I) Disclosure Statement for Fifth Amended Chapter 11 Plan, (II) Solicitation and Voting Procedures, (III) Forms of Ballots, Notices and Notice Procedures in Connection Therewith, and (IV) Certain Dates with Respect Thereto at 1–3, *In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649), ECF No. 2988; *see also* Objection of Peter W. Jackson to Amended Disclosure Statement for First Amended Chapter 11 Plan for Purdue Pharma L.P. and Its Affiliated Debtors, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649), ECF No. 2819; Supplemental Objection of Peter W. Jackson to Disclosure Statement for Second Amended Chapter 11 Plan for Purdue Pharma L.P. and Its Affiliated Debtors (Fourth Plan Supplement), *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649), ECF No. 2881.

235 Casey & Macey, *Another Name*, *supra* note 2, at 1030.

This, too, was problematic in *Purdue Pharma*. The Bankruptcy Code requires a future claimants representative ("FCR") only in an asbestos case involving a third-party release.[236] There was no FCR in *Purdue Pharma* although there could have been; one was appointed in at least one other opioid case.[237] Even if an FCR had been appointed, Sergio Campos and Samir Parikh have raised serious questions about the loyalties of FCRs, since they are typically identified by management of the corporate debtor—not a representative of creditors or at least an independent authority, such as the Department of Justice.[238]

This bespeaks more general failures of representation that were endemic to *Purdue Pharma*. The Official Committee of Unsecured Creditors was internally divided between four personal injury creditors, four commercial creditors (including LTS Lohman, an opioid patch manufacturer, and Blue Cross-Blue Shield), and the Pension Benefit Guaranty Corporation.[239] The personal injury claimants doubtless wanted to pursue the Sacklers whereas the commercial members may have been (or feared becoming) defendants in other opioid litigations. The former would surely want robust discovery on the merits; the latter might not.[240]

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236 11 U.S.C. § 524(g)(4)(B) (providing for the appointment of "a legal representative for the purpose of protecting the rights of" future claimants).

237 *In re* Mallinckrodt PLC, 639 B.R. 837, 852–53 (Bankr. D. Del. 2022) ("On October 27, 2020, an official committee of unsecured creditors (the 'Unsecured Creditors' Committee' or 'UCC') and an official committee of opioid claimants (the 'Opioid Claimants' Committee' or 'OCC') (together the 'Committees') were appointed. On March 16, 2021, Roger Frankel was provisionally appointed as the legal representative of the future claimants (the 'FCR'), and finally appointed on June 11, 2021.").

238 Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325, 350 (2022) ("[B]ankruptcy courts have delegated th[e] responsibility to [appoint an FCR to] the corporate debtor—the very party against whom the FCR will be negotiating. In these cases, the debtor proposes one FCR candidate." (footnote omitted)).

239 *See* Verified Statement of the Official Committee of Unsecured Creditors of Purdue Pharma, L.P. et al. at 4–6, *In re* Purdue Pharma L.P., 633 B.R. 35 (No. 19-23649), ECF No. 218. Oddly, Casey and Macey say that the Committee was "constituted mostly by opioid victims and states representing their interests." Casey & Macey, *Another Name*, *supra* note 2, at 1028. But this is demonstrably false, as noted by Casey & Macey, *Another Name*, *supra* note 2, and Verified Statement, *supra*. It is especially curious since it is well known that government entities cannot sit on official creditors' committees. *See* 11 U.S.C. §§ 101(41), 1102(b)(1) (defining "person" as excluding government entities in this capacity and providing that a committee should consist of persons, respectively).

240 Ryan Hampton, an opioid activist and former co-chair of the Official Committee of Unsecured Creditors in *Purdue Pharma*, wrote in the *New York Times* that the release of the Sacklers was "the opposite of what I and many other victims sought: We repeatedly called for transparency into the process, accountability for the Sacklers who had owned the company and reparations for the millions of people affected by the OxyContin-fueled drug epidemic." Ryan Hampton, *The Sacklers Are Walking Off into the Sunset. Reform the System*, N.Y. TIMES (Sept. 11,

The bankruptcy case was, as one of us has argued, "rife with private fiduciaries with uncertain mandate and loyalties."[241] These uncertainties overall benefitted the company and the Sacklers and impaired the ability of current claimants—victims—to ensure they would have adequate representation "to protect their own interests," in the words of Casey and Macey.[242] Although there were a dozen "ad hoc" committees, these committees are not statutory fiduciaries and their performance and compensation are not subject to bankruptcy court scrutiny. The ad hoc committee purporting to represent personal injury claimants, for example, asserted that it was "comprised of 60,761 personal injury claimants" but, in fact, ultimately had only personal injury lawyers as members who, in turn, claimed to represent some unnamed and undisclosed individuals.[243] In many cases, Purdue effectively bribed ad hoc committees into supporting the plan by promising to pay their professional fees if they supported it.[244]

Casey and Macey ignore these critical problems[245] and characterize the tension between economic and noneconomic harms at issue in what we call social debt bankruptcies as a problem of "incommensurable competing values."[246]

No doubt.

But that does not relieve us of the need to try to commensurate or to balance that which is hard, emotional, and ungainly with the economic goals of chapter 11 reorganization. This is what the legal system demands. One set of values should not be sacrificed to the other, as would have

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2021), https://www.nytimes.com/2021/09/11/opinion/purdue-sacklers-opioids-oxycontin-settlement.html [https://web.archive.org/web/20241204182752/https://www.nytimes.com/2021/09/11/opinion/purdue-sacklers-opioids-oxycontin-settlement.html].

241 *See* Lipson, *supra* note 3, at 1795.

242 Casey & Macey, *Another Name*, *supra* note 2, at 1030.

243 *See* Lipson, *supra* note 6, at 84–85 (citing Second Amended Verified Statement of the Ad Hoc Group of Individual Victims of Purdue Pharma L.P. et al. at 2, *In re* Purdue Pharma L.P., 633 B.R. 35 (No. 19-23649), ECF No. 3939). This committee was represented by the law firm of White & Case, a Wall Street mainstay. Amended Verified Statement of the Ad Hoc Group of Individual Victims of Purdue Pharma L.P. at 2, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649), ECF No. 1480.

244 *See, e.g.*, Debtors' Motion to Approve Payment or Reimbursement of Certain Fees & Expenses of the Non-Consenting States Group, the Ad Hoc Comm. & the MSGE Group Pursuant to Sections 363(B) & 105(A) of the Bankruptcy Code & Bankruptcy Rule 6004 at 7, *In re* Purdue Pharma L.P., 633 B.R. 35 (No. 19-23649), ECF No. 3986; Order Granting Debtors' Motion to Approve Payment or Reimbursement of Certain Fees & Expenses of the Non-Consenting States Group, the Ad Hoc Committee, & the MSGE Group at 1, *In re* Purdue Pharma L.P., 633 B.R. 35 (No. 19-23649), ECF No. 4185.

245 As do their critics. *See, e.g.*, Daniel J. Bussel, *The Mass Tort Claimants' Bargain*, 97 AM. BANKR. L.J. 684, 707 & n.64 (2023) (noting, in passing, that costs of ad hoc committees and their professionals, but otherwise ignoring problems of representation in *Purdue Pharma*).

246 Casey & Macey, *Another Name*, *supra* note 2, at 1019.

happened in *Purdue Pharma*, because it is not the set of values that appeals to bankruptcy professionals. Indeed, perhaps the opposite. Social debt bankruptcies highlight how the bankruptcy system has evolved to handle certain difficult problems, but some problems are too exceptional for bankruptcy as it currently operates.

The problem of social debt—the poor fit between the economic imperatives of bankruptcy and the noneconomic demands of social debt—was the deeper challenge of *Purdue Pharma*. As discussed in the next Part, the Supreme Court's majority opinion recognized the importance of statutory guardrails in mass tort reorganizations but largely elided the deeper stakes presented by social debt bankruptcies.

III. *PURDUE PHARMA* IN THE SUPREME COURT

Midway through the nearly two-hour oral argument before the Supreme Court in *Purdue Pharma*, Justice Barrett made a mistake. She was questioning Curtis Gannon, counsel to the petitioner, the United States Trustee, about what to do about creditors who had not voted for or against the *Purdue Pharma* plan of reorganization (the "*Purdue* plan"). Should they have been deemed to have consented to the Sackler Release or not? Justice Barrett referred to them not as creditors, however, but as "*invisible debtors*."[247]

It was an easy slip to make, but it was telling. In a literal sense, the Sacklers *were* invisible debtors—they would escape their debts under the Sackler Release without the visibility to which corporate debtors are subject.

But Justice Barrett really meant creditors, and here the irony is deeper. Just outside the Court were scores of protesters chanting "shame on Sackler."[248] These protesters loudly opposed the Sackler Release, as they had done during the bankruptcy.[249] But those inside the Court could

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247 Transcript of Oral Argument, *supra* note 14, at 57 ("[W]hen you're talking about the property rights, you're referring writ large to maybe what we might call like some of the *invisible debtors* who just didn't vote, who didn't respond." (emphasis added)).

248 Eleanor Laise, *As Supreme Court Weighs Purdue Pharma Bankruptcy, Families Say the Process Has Compounded Their Pain*, MARKETWATCH (Dec. 4, 2023, 3:39 PM), https://www.marketwatch.com/story/as-supreme-court-weighs-purdue-pharma-bankruptcy-families-say-the-process-has-compounded-their-pain-01f16463 [https://web.archive.org/web/20240102155025/https://www.marketwatch.com/story/as-supreme-court-weighs-purdue-pharma-bankruptcy-families-say-the-process-has-compounded-their-pain-01f16463].

249 Justin Kounelias, *Protesters Plead for Justice as Supreme Court Hears Oral Argument in Purdue Bankruptcy Case*, DC NEWS NOW (Dec. 4, 2023, 4:13 PM), https://www.dcnewsnow.com/news/protesters-plead-for-justice-as-supreme-court-hears-oral-argument-in-purdue-bankruptcy-case [https://web.archive.org/web/20240613140346/https://www.dcnewsnow.com/news/protesters-plead-for-justice-as-supreme-court-hears-oral-argument-in-purdue-bankruptcy-case].

not see or hear them. These were a few of the thousands of invisible and silent creditors who concerned Justice Barrett.

The 5-4 majority that she joined preserved the right of these invisible creditors to pursue direct claims against the Sacklers outside of bankruptcy. Although this has enormous implications for the legal system, Justice Gorsuch's careful opinion said little about those larger systemic implications.[250] While Justice Kavanaugh's lengthy dissent expressed concern for Purdue Pharma's victims, he exaggerated the risks presented by undoing the Sackler Release and ignored the larger systemic implications of the expanded form of bankruptcy exceptionalism he would embrace.[251] If sustained by the Court, the Sackler Release would have become a blueprint not only for corporate tortfeasors but also for the insiders who might actually have caused the harm in question, as was nearly the case in *Purdue Pharma*.

A. *The Majority Opinion*

There is nothing exceptional about Justice Gorsuch's opinion for the majority. It is a straightforward statute-reader. The majority viewed the question as whether the word "appropriate" in § 1123(b)(6) of the Bankruptcy Code could be construed so broadly as to permit a plan of reorganization to embrace nonconsensual third-party releases.[252] Applying the ejusdem generis canon of statutory construction, it said it did not.[253]

"[W]e do not think paragraph (6) [of § 1123(b)] affords a bankruptcy court the authority the plan proponents suppose," Justice Gorsuch wrote for the majority.[254] "When Congress authorized 'appropriate' plan provisions in paragraph (6), it did so only after enumerating five specific sorts of provisions, all of which concern *the debtor*—its rights and responsibilities, and its relationship with its creditors."[255] The "any other appropriate" catchall "cannot be fairly read to endow a bankruptcy court with the 'radically different' power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants."[256]

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250 *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024).

251 *See id.* at 227–31 (Kavanaugh, J., dissenting).

252 *Id.* at 218 (majority opinion).

253 *Id.*

254 *Id.*

255 *Id.*

256 *Id.* (quoting Epic Sys. Corp. v. Lewis, 584 U.S. 497, 513 (2018)); 11 U.S.C. § 1123(b)(6).

This analysis is fine, as far as it goes. But it does not go very far, and it is curious because it would appear there was an even easier path in the statutory words after "appropriate": "not *inconsistent* with the applicable provisions of this title."[257]

The Sackler Release *was* inconsistent with a host of applicable provisions of the Bankruptcy Code. As noted above, it was inconsistent with § 524(e), which provides that a "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."[258] The Sackler Release would assuredly have "affected" the Sacklers' joint and several liability on Purdue's debt: it would have eliminated it.[259]

It was also inconsistent with specific exceptions to the discharge of debts for fraud and willful and malicious injury[260] and the denial of the discharge entirely for those who engage in fraudulent transfers, as the Sacklers apparently did by "milking" the debtors.[261] The fact that Congress went to the trouble to codify the one instance where third-party releases were permissible—asbestos—is further evidence of the "inconsistency" in approving the Sackler Release.[262]

The majority opinion seemed to recognize that there were bad facts about both the Sacklers and the bankruptcy, but did not fully appreciate their deeper implications. It opened by observing that "[t]he opioid epidemic represents 'one of the largest public health crises in this nation's history,'"[263] that "Purdue sits at the center of these events,"[264] and that "Purdue was a 'family company,' owned and controlled by the Sacklers."[265] It also recognized that the Sacklers, having "milk[ed]" the

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257 11 U.S.C. § 1123(b)(6) (emphasis added).

258 11 U.S.C. § 524(e).

259 The dissent had little to say about this, arguing weakly that "Section 524(e) does not speak to the issue of non-debtor releases or other steps that a plan may take regarding the liability of a non-debtor for the same debt. As the American College of Bankruptcy says, 'Section 524(e) is agnostic as to third-party releases.'" *Purdue Pharma*, 603 U.S. at 270 (Kavanaugh, J., dissenting) (quoting Brief for American College of Bankruptcy as Amicus Curiae Supporting Neither Party at 6 n.3, *Purdue Pharma*, 603 U.S. 204 (No. 23-124), 2023 WL 6393035).

260 The majority recognized that the discharge "does not reach claims based on 'fraud' or those alleging 'willful and malicious injury.'" *Purdue Pharma*, 603 U.S. at 221–22 (quoting 11 U.S.C. § 523(a)(2), (4), (6)).

261 *See Purdue Pharma*, 603 U.S. at 209; 11 U.S.C. § 727(a)(1).

262 11 U.S.C. § 524(g)(4)(A)(ii). The majority opinion did recognize that "the code *does* authorize courts to enjoin claims against third parties without their consent, but does so in only *one* context, [which] makes it all the more unlikely that § 1123(b)(6) is best read to afford courts that same authority in *every* context." *Purdue Pharma*, 603 U.S. at 222.

263 *Purdue Pharma*, 603 U.S. at 209 (quoting *In re* Purdue Pharma L.P., 69 F.4th 45, 56 (2d Cir. 2023)).

264 *Id.*

265 *Id.* at 210 (quoting *In re* Purdue Pharma, L.P., 635 B.R. 26, 40 (S.D.N.Y. 2021)).

company when they faced trouble,[266] had not contributed all of their assets to satisfy claims, as debtors must ordinarily do to receive a discharge of debt.[267]

Yet, the majority opinion did not see that, because Purdue pleaded guilty to two sets of drug-marketing felonies—once in 2007 and again in 2020—much of the $11 billion milked by the Sacklers was almost certainly proceeds of Purdue's confessed drug-marketing crimes. Nor did it remark on the corrosive effect of the Sacklers' prebankruptcy maneuvers, including hiring bankruptcy directors of dubious independence and "shopping" for a bankruptcy judge who would give Purdue and the Sacklers almost everything they sought.[268]

Nor did the majority opinion acknowledge serious defects in the conduct of the bankruptcy itself. While it expressed healthy skepticism about dubious claims of "overwhelming" support for the Sackler Release, it failed to recognize that chapter 11 is no substitute for the adversarial process in the presence of credible allegations of serious misconduct, i.e., social debt.[269] Rather, the opinion repeatedly stated that the Sacklers did not deserve the Sackler Release because they had not put "all their assets on the table," an economic assertion that was true, but that was also only half the story.[270]

The majority also failed to acknowledge that whatever creditor protections might make chapter 11 an acceptable substitute for ordinary

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266 *Id.* at 210–11.

267 *Id.* at 215 ("The Sacklers have not filed for bankruptcy and have not placed virtually all their assets on the table for distribution to creditors, yet they seek what essentially amounts to a discharge.").

268 *See* Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351, 353 (overviewing why Purdue Pharma picked Judge Drain).

269 "Though most [creditors] who returned ballots supported it, fewer than 20% of eligible creditors participated," he said.

> Thousands of opioid victims voted against the plan too, and many pleaded with the bankruptcy court not to wipe out their claims against the Sacklers without their consent. "Our system of justice," they wrote, "demands that the allegations against the Sackler family be fully and fairly litigated in a public and open trial, that they be judged by an impartial jury, and that they be held accountable to those they have harmed."

Harrington v. Purdue Pharma L.P., 603 U.S. at 212 (quoting Brief Statement of Interest of the United States of America Regarding the Shareholder Release at 21, *In re* Purdue Pharma, L.P., No. 21-cv-7532 (S.D.N.Y. Oct. 25, 2021), ECF No. 94).

270 *Id.* at 223 ("[T]he 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."). A cynic might respond that the Sacklers did put all of their *collectible* assets on the table because the billions they placed offshore could never be "on the table" through the operation of ordinary legal process (being in unreachable trusts). But that assertion was never legally tested—Bankruptcy Judge Drain simply accepted expert testimony to that effect—and in any case, if it is true, it is outrageous. *See In re* Purdue Pharma L.P., 633 B.R. 53, 89 (Bankr. S.D.N.Y. 2021).

litigation did not apply to the Sacklers, because they were not debtors. The rules on discovery and disclosure that apply to *debtors* did not apply to the Sacklers, yet the chapter 11 case was used to halt all other efforts to get that critical information. While creditors got a vote on the plan, they had no say in whether to release the Sacklers—that is, to consent or withhold their consent, ultimately a fatal omission. The fact that the Sackler Release sought to eliminate social debt made matters worse, not better.

B. *Justice Kavanaugh's Dissent*

If the majority opinion is unexceptional, Justice Kavanaugh's dissent—at nearly three times the length—is a capacious tour-de-force of policy and practical arguments in favor of the Sackler Release. If he had persuaded one more Justice to join, he would have dilated bankruptcy exceptionalism beyond what existed before *Purdue Pharma*.

Justice Kavanaugh started from a different view of the facts of the case. He inferred that the affirmative vote of 18% of personal injury creditors was "fervent[] support" for the *Purdue* plan.[271] Despite the procedural failures in the Bankruptcy Court, he wrote that the Bankruptcy Court exercised its "discretion appropriately—indeed, admirably"[272] and that the *Purdue* plan was a "shining example of the bankruptcy system at work."[273]

Although he made a modest effort to challenge the majority's statutory analysis, his principal sources of authority seem to be policy and pragmatism.

1. The Policy Rationale and the Seven-Factor Test

Like many observers, Justice Kavanaugh started from the policy position that "[t]he purpose of bankruptcy law is to address the collective-action problem that a bankruptcy poses."[274] To solve this problem, bankruptcy must be "*collective* and *compulsory*."[275]

Like the majority, he viewed the dispositive statutory language as the word "appropriate" which, he argued, should be interpreted as a "broad

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271 *Id.* at 228 (Kavanaugh, J., dissenting).

272 *Id.* at 227.

273 *Id.* at 228.

274 *Id.* at 231.

275 *Id.* at 232 (quoting THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 13 (1986)).

and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors."[276] Like the majority, he seemed unconcerned that even if nonconsensual releases might be "appropriate" they may still be "inconsistent with" other provisions of the Bankruptcy Code.

Instead, Justice Kavanaugh repeated with approval the seven-factor test developed by the Second Circuit below, which boiled down to a test that considers whether there is an identity of economic interest between the debtor and the third-party (a suit "against the non-debtor 'is, in essence, a suit against the debtor' that could 'deplete the assets of the estate'"[277]); whether there is "substantial" consideration paid for the release; whether the release is "essential" to the plan; and whether the release is supported by over 75% of votes cast.[278]

Ironically, if this were the test, it is not clear that the Sackler Release should have passed. While the vote satisfied the 75% (of votes cast) threshold, there was no credible finding on the identity of economic interest, i.e., that a suit against the Sacklers would have triggered an indemnification obligation of the estate. Instead, as explained above, there is good reason to think that could never happen. If the Sacklers had independent liability, it is highly likely that it would have been joint and several, and there would be no basis for indemnification. Justice Kavanaugh seemed unconcerned by this foundational rule.[279]

Nor is there evidence that all or even most of the thousands of beneficiaries of the Sackler Release contributed anything for the release, much less "substantial assets." And, while the Sackler Release may have

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276 *Id.* at 240 (quoting Michigan v. EPA, 576 U.S. 743, 752 (2015)).

277 *Id.* at 228 (quoting *In re* Purdue Pharma L.P., 69 F.4th 45, 78 (2d Cir. 2023)).

278 *Id.* at 242. Some of the factors overlap. Justice Kavanaugh stated the test in full as follows:

> First, and critically, the court must determine whether the released party is closely related to the debtor—for example, through an indemnification agreement—where "a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate." Second, the court must determine if the claims against the non-debtor are "factually and legally intertwined" with claims against the debtor. Third, the court must ensure that the "scope of the releases" is tailored to only the claims that must be released to protect the plan. Fourth, even then, the court should approve the release only if it is truly "essential" to the plan's success and the reorganization would fail without it. Fifth, the court must consider whether, as part of the settlement, the non-debtor party has paid "substantial assets" to the estate. Sixth, the court should determine if the plan provides "fair payment" to creditors for their released claims. Seventh, the court must ensure that the creditors "overwhelmingly" approve of the release, which the Second Circuit defined as a 75 percent "bare minimum."

Id. (citations omitted) (quoting *In re* Purdue Pharma L.P., 69 F.4th at 78–79)).

279 *Id.* at 243–44 ("The only difference with non-debtor releases is that they release victims' and creditors' claims not against the debtor but rather against non-debtors who are closely related to the debtor, such as indemnified officers and directors.").

been "essential" to the Sacklers, it was the Sacklers who created the need for bankruptcy in the first place, both by virtue of the underlying misconduct and their milking program thereafter. The release was essential, in other words, because it was the only deal Purdue Pharma, under the control of the Sacklers' designees, was willing to offer.

2. Justice Kavanaugh's Fears and Bankruptcy Exceptionalism

Justice Kavanaugh's dissent showed that he was understandably moved by the potentially "severe" consequences that might follow if the Sackler Settlement Framework collapsed.[280] "Without releases, there will be no $5.5 to $6 billion settlement payment to the estate, and 'there will be no viable path to any victim recovery.'"[281] And, he feared, "without the plan's substantial funding to prevent and treat opioid addiction, the victims and creditors bluntly described further repercussions: 'more people will die without this Plan.'"[282]

It is important to take that concern seriously. But it is improbable. The more likely outcome is that the Sacklers, the debtors, and the other major participants will negotiate a new plan, as they have in fact done since immediately after the Supreme Court released its opinion.[283] That new plan will have to include a mechanism by which individual creditors can give or withhold consent to release the Sacklers. As discussed in Part IV, what constitutes "consent" will likely be contested here and in mass tort reorganizations going forward.[284] The Sacklers may also have to pay creditors more to buy their consent, for example by offering a differential class structure: creditors who agree to release the Sacklers get twice what

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280 *Id.* at 230.

281 *Id.* (quoting Transcript of Oral Argument, *supra* note 14, at 100).

282 *Id.* (quoting Brief for Respondent, *supra* note 37, at 55). It is important to note that, even if the *Purdue* plan were confirmed, the Sacklers had eighteen years to make their payments. Thus, it was unlikely many lives would be saved *by the plan* any time soon. *See* Samantha Delouya & Devan Cole, *US Supreme Court Scrutinizes Controversial Opioid Crisis Settlement That Would Give Sackler Family Immunity*, CNN (Dec. 4, 2023, 5:06 PM), https://www.cnn.com/2023/12/04/business/supreme-court-purdue-pharma-sackler-opioid-bankruptcy-preview/index.html [https://perma.cc/VN73-SK87].

283 *See, e.g.*, Statement in Response to Debtors' Motion to Extend the Preliminary Injunction to Facilitate Mediation at 2, *In re* Purdue Pharma, L.P., No. 19-8289 (Bankr. S.D.N.Y. July 1, 2024), ECF No. 493 (writing on behalf of forty-eight states: "We are willing to agree to [a sixty-day] mediation period, so that the States, the Debtors, the Sacklers, and all the Sacklers' creditors, have one final attempt at resolving these matters. We hope the mediation succeeds."); *see also* Co-Mediators' First Status Report, *supra* note 55.

284 *See infra* Part IV.

creditors who do not.[285] Such "tips" are common in bankruptcy and are said to be one reason it can maximize economic recoveries.[286] The Sacklers would also have to tolerate some litigation risk outside bankruptcy, perhaps the most important of which is continued discovery on the direct claims.

If the majority said little about the larger stakes of the case, Justice Kavanaugh said even less. He was unconcerned about the potential abuse of nonconsensual releases because, he said, "[a] non-debtor release must be 'appropriate' given all of the facts and circumstances of the case" and must be confined to "narrow and relatively rare circumstances where the releases are necessary to help victims and creditors achieve fair and equitable recovery."[287] But bankruptcy judges motivated to confirm reorganization plans are likely to have very different views of what is "appropriate" than will ordinary trial courts or the victims of alleged misconduct.

Even if we assume that payments proposed under the *Purdue* plan were fair and equitable, there is good reason to think that the Bankruptcy Court stifled the development and consideration of "all of the facts and circumstances," through the broad preliminary injunction and approval of a problematic disclosure statement.[288] Nor is there evidence that nonconsensual releases are "rare."[289] As noted above, Bankruptcy Judge Wiles stated that he saw them in almost every chapter 11 case. Casey and Macey suggest they are ubiquitous, "a key feature in every mass tort bankruptcy."[290]

If, as the Second Circuit stated, the "key factor" was the presence of an indemnification agreement—not a fixed indemnification obligation, as the Bankruptcy Code requires; just the agreement contemplating it—then nearly every well-advised corporation in the United States would satisfy the test because any insider powerful enough to make harmful

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285 The unfortunately named "death trap" is a "coercive provision that seeks to encourage claimants to vote in favor of a plan with promises—in return for a favorable vote—of treasure and/or favorable treatment. Should the claimants vote against the plan, the claimants will receive less or no treasure and/or is otherwise penalized." *In re* MPM Silicones, LLC, 596 B.R. 416, 423 n.10 (S.D.N.Y. 2019) (quoting Douglas E. Deutsch & Eric Daucher, *Chapter 11 Plan Confirmation Issues: Settlements, Releases, Gifting and Death Traps*, 29 AM. BANKR. INST. J. 54, 92 (2010)).

286 *See* David Skeel, *Unwritten Rules and the New Contract Paradigm*, 36 EMORY BANKR. DEV. J. 739, 745 (2020) (observing that "modest payments to potential dissenters" to induce support "are okay but side payments and bribes are not" and recognizing difficulty of differentiating among them).

287 *Purdue Pharma*, 603 U.S. at 243 (Kavanaugh, J., dissenting).

288 *Id.* For a discussion of problems created by Purdue Pharma's preliminary injunction and disclosure statement, see *supra* Sections II.A–B.

289 *Purdue Pharma*, 603 U.S. at 243 (Kavanaugh, J., dissenting).

290 Casey & Macey, *Defense*, *supra* note 2, at 974.

decisions for the company will almost certainly be powerful enough to benefit from indemnification, whether through contract or bylaws. Third-party releases would become ubiquitous.

Justice Kavanaugh's dissent rests, in short, on basic errors of law and fact. Bankruptcy does not automatically eliminate joint and several liability of nondebtors and it is virtually inconceivable that the Sacklers would have had viable indemnification claims against Purdue Pharma.[291]

These errors compound the broad form of bankruptcy exceptionalism he apparently supports. He would vest in bankruptcy judges the unparalleled power to issue a nationwide injunction halting all civil litigation against both a debtor and its insiders with little, if any, consideration of the merits of the claims being enjoined. The judge need only believe the injunction is "appropriate."[292]

But from the perspective of the bankruptcy system, and its reorganizational imperatives, it will usually seem appropriate to enjoin tort litigation that interferes with corporate operations. Bankruptcy judges understandably want to confirm plans of reorganization, because that is the metric of success in the system. That is an exception to the way we approach ordinary civil litigation. The bankruptcy system is designed to tolerate this given the need to rehabilitate otherwise viable companies where the normative stakes are usually fairly low.

As the normative stakes increase—as debt becomes more social—the understanding of what is "appropriate" must change, however. Under these circumstances, the process should vest less power and discretion in corporate tortfeasors, not more, as currently happens and as Justice Kavanaugh would do.

Had Justice Kavanaugh persuaded a majority to join his opinion, however, bankruptcy would become a nearly irresistible exception to ordinary civil litigation for even very serious misconduct. And what would have been missed entirely was that, when designed, little thought was given to how the bankruptcy system should handle social debt, let alone social debt owed by insiders of the corporate debtor.

C. *Economic Exceptionalism and the Sackler Release*

Although Justice Kavanaugh's opinion referenced the human consequences of the opioid crisis, his overarching motivation read as economic: he compared the value of the Sackler Release to what he thought the alternative would be and concluded that the Sackler Release

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291 *See* Lipson, *supra* note 3, at 1797.

292 11 U.S.C. § 1123(b)(6).

was more. The Release, he figured, was worth $7 billion, whereas any other outcome would be $0.[293] "Absent the releases and settlement payment, . . . the 'most likely result' would be liquidation of a much smaller $1.8 billion estate," he reasoned.[294] Given the earlier settlement with the Department of Justice (the so-called "poison pill"), he believed that "[i]n a liquidation, the United States would recover first with its $2 billion superpriority claim, taking for itself the whole pie. And the victims and other creditors 'would probably recover nothing.'"[295]

If these economics are correct, then Justice Kavanaugh's dissent makes sense. While it fails to account for the significant noneconomic harms of social debt, it is obvious that $7 billion to abate the opioid crisis is better than nothing.

But that was the wrong calculation. And the long-term implications of the exceptionalism he endorsed would likely have very problematic economic consequences. His dissent, in other words, makes sense only if one thinks that mass tort reorganization is subject to some kind of economic exceptionalism.

1. The Economics of the Sackler Release

Consider first the economics of the Sackler Release. It is false to frame the choice as between $7 billion and $0. If the reorganization effort failed—meaning the case was converted to a chapter 7 liquidation—then a trustee would be appointed. That trustee would have every incentive to pursue the Sacklers for as much as they could possibly get, chiefly through fraudulent transfer litigation.

Justice Kavanaugh simply ignored those potential recoveries in his dissent. At the same time, individual creditors—governments and tort victims—would pursue their direct litigations against the Sacklers in courts of original jurisdiction. He also failed to account for those potential recoveries.

There is little doubt that those alternatives would be expensive—possibly even more expensive than the $800 million Purdue's bankruptcy estate professionals have been paid so far in *Purdue Pharma* (thus sadly

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293 *Purdue Pharma*, 603 U.S. at 227–28 (Kavanaugh, J., dissenting) ("[The Bankruptcy Court] built up the estate to approximately $7 billion by securing a $5.5 to $6 billion settlement payment from the Sacklers, who were officers and directors of Purdue. The plan then guaranteed substantial and equitable compensation to Purdue's many victims and creditors, including more than 100,000 individual opioid victims. The plan also provided significant funding for thousands of state and local governments to prevent and treat opioid addiction.").

294 *Id.* at 254 (quoting *In re* Purdue Pharma L.P., 633 B.R. 53, 90 (Bankr. S.D.N.Y. 2021)).

295 *Id.* (quoting *In re* Purdue Pharma L.P., 633 B.R. at 109).

exceeding the $750 million promised to tort victims[296]). In that sense, they would be wasteful, so the parties understandably agreed immediately to continue to negotiate toward a consensual resolution.[297]

But recoveries outside of reorganization had to have some value, and Justice Kavanaugh's failure to account for that value is problematic. The only time the Sacklers increased their offers was when they lost or faced a serious risk of doing so—not when given a free pass by the bankruptcy judge.[298] That they face another loss now may mean nothing—but it may also mean a better payout.

2. The Economic Implications of Bankruptcy Exceptionalism

More problematic still are the long-term implications of the bankruptcy exceptionalism that Justice Kavanaugh's dissent would endorse. A well-established body of research shows that the vast majority of disputes do and should settle before trial.[299] Because chapter 11 is understood as a settlement, it would seem a natural candidate to proxy for mass tort settlements of a debtor's liability, a "special remedial scheme."[300]

But it has long been an article of faith among the economically oriented that, other things equal, uncertainty increases incentives to

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296 *See* Corp. Monthly Operating Report (as of May 31, 2024) at 23, *In re* Purdue Pharma, L.P., No. 19-23649 (Bankr. S.D.N.Y. June 25, 2024), ECF No. 6492 (reporting total expenses of restructuring professionals as $838,700,365).

297 In late January 2025, Purdue Pharma, the Sacklers, and key creditor groups announced a roughly $1 billion increase in the total payout under a revised plan of reorganization. *See* Press Release, Letitia James, N.Y. State Att'y Gen., Attorney General James Secures $7.4 Billion from Purdue Pharma and Sackler Family to Combat Opioid Crisis (Jan. 23, 2025), https://ag.ny.gov/press-release/2025/attorney-general-james-secures-74-billion-purdue-pharma-and-sackler-family [https://perma.cc/Y2GW-M3D4]. This $1 billion increase by the Sackler family defies the fears expressed by Justice Kavanaugh and scholars such as Casey and Macey. *See id.* Importantly, this seemingly is $1 billion that should have been included in the Sackler family contribution negotiated through the bankruptcy process, as part of the elimination of their personal liability for their role in the company's drug-marketing crimes. The amount is nearly 15% more than the final settlement approved by the bankruptcy court, and nearly 25% more than the initial settlement that the bankruptcy court approved, which led to that plan's appeal to the district court. The outcome strongly suggests that the exceptional nature of third-party releases in the context of social debt have the potential to lead to suboptimal results. The proposed new agreement was subject to court approval at the time this Article went to press.

298 As Justice Gorsuch noted in the majority opinion, "[D]uring the appeal in this very case, the Sacklers agreed to increase their contribution by more than $1 billion in order to secure the consent of the eight objecting States. If past is prologue, the Trustee says, there may be a better deal on the horizon." *Purdue Pharma*, 603 U.S. at 225.

299 *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 13–17 (1984) (concluding that uncertain rules reduce the frequency of pretrial settlement).

300 *See* discussion *supra* Section I.B.

litigate, while clarity reduces those incentives.[301] As Larry Ribstein observed, "[T]here are good reasons for courts to resolve any doubts against gap-filling, including the risk of judicial error, the high litigation costs of open-ended standards, and the general problem of erecting barriers to private contracting."[302] David Skeel and George Triantis, otherwise supporters of free contract, have called bankruptcy policy toward contracting "incoherent" because the governing standards are vague.[303] Adversity, by contrast, tends to sharpen issues of fact and law, and thus the willingness and ability to settle.

Vague standards like "appropriate," "necessary", "fair" and "equitable" would not simply vest great discretion in bankruptcy judges. They would also invite more litigation in complex and high-stakes disputes going forward. It is not surprising that, before the Supreme Court's ruling in *Purdue Pharma*, restructuring lawyers were aggressively promoting sophisticated "liability management" techniques—euphemisms for chapter 11 plans with broad third-party releases.[304]

Consider the viability of insider guarantees of corporate debt under the dissent's approach to third-party releases. It is common for controlling shareholders or other insiders of small and medium-sized borrowers to guarantee corporate debt.[305] The reasons are obvious: the insider may have the capacity to manipulate corporate assets to the harm of creditors. The guarantee deters asset manipulation by the guarantor-insider, who would be held accountable for such conduct under the guarantee. Thus, guarantees exist to provide an added layer of protection for lenders with leverage sufficient to obtain them.

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301 *See* Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1229 (1982) (open-ended standards may increase litigation costs by widening the scope of evidence that parties may present at trial); A. Mitchell Polinsky & Steven Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law*, 5 J.L. ECON. & ORG. 99, 99–100 (1989) (broad legal standards increase the frequency of litigation); Priest & Klein, *supra* note 299, at 13–17 (uncertain rules reduce the frequency of pretrial settlement); Larry E. Ribstein, *Takeover Defenses and the Corporate Contract*, 78 GEO. L.J. 71, 114–15 (1989) (broad fiduciary duty rule regarding defenses against takeovers increases litigation costs).

302 Larry E. Ribstein, *Efficiency, Regulation and Competition: A Comment on Easterbrook & Fischel's Economic Structure of Corporate Law*, 87 NW. U. L. REV. 254, 258–59 (1992) (footnotes omitted).

303 David A. Skeel, Jr. & George Triantis, *Bankruptcy's Uneasy Shift to a Contract Paradigm*, 166 U. PA. L. REV. 1777, 1783, 1791 (2018).

304 Sasha M. Gurvitz, *Bankruptcy Decision on the Supreme Court's Decision Desk in 2024*, NORTON BANKR. L. ADVISER 3 (Jan. 2024), https://www.ktbslaw.com/wp-content/uploads/2020/03/Bankruptcy-Cases-on-the-Supreme-Courts-Decision-Desk-in-2024.pdf [https://perma.cc/A64T-GS2R] (observing before the Supreme Court decision that "[i]f the Court limits the ability of bankruptcy courts to approve these releases in the absence of creditor consent, bankruptcy becomes a less powerful liability management tool").

305 *See, e.g.*, *In re* Charles St. Afr. Methodist Episcopal Church of Bos., 499 B.R. 66, 73 (Bankr. D. Mass. 2013) (discussing guarantee by the parent organization of member church's debt).

Until *Purdue Pharma*, whether a plan of reorganization could "release" an insider's guarantee obligation was unclear. Some courts held that this was forbidden under the multi-factor tests developed by courts to address nonconsensual third-party releases.[306] Others have suggested that case law permits it.[307]

If Justice Kavanaugh had written the majority opinion in *Purdue Pharma*, it is not clear why any lender should accept an insider guarantee going forward. Under his analysis, such claims should be as vulnerable to a third-party release as the direct claims asserted by survivors of the opioid crisis against the insiders of Purdue Pharma: both are contingent unsecured claims. While one is a contract claim and the other a tort claim, the obligors of both would be shielded where a bankruptcy court views it as "fair," "necessary" and "equitable," the vague standards articulated by the Second Circuit below and embraced by Justice Kavanaugh's dissent.[308] If an overwhelming number of creditors vote for a plan that eliminates an insider guarantee—say because the insider proposed a plan that favors creditors who vote for it—the guarantee should fare no better than the tort claims at issue in *Purdue Pharma.*

Casey and Macey (with Edward Morrison) have boldly declared the *Purdue Pharma* ruling a "debacle" because, they assert, "The beneficiaries of this decision are fee-collecting attorneys and large institutions (such as state attorneys general) that can now divert money from victims to themselves during settlement negotiations."[309] Although it is not clear how state attorneys general could "divert" funds from victims to "themselves," the multi-factor test advanced by Justice Kavanaugh and other economically oriented proponents of bankruptcy exceptionalism would create uncertainty with potentially significant collateral consequences for which they have no economic account.[310]

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306 *Id.* at 103 (refusing to confirm plan with nonconsensual release of insider guarantee because the release was "not essential to the debt repayment objectives of the Plan, . . . does not have the assent of the affected creditor, and . . . does not treat that creditor so well that the release is of virtually no concern").

307 *See* Brian E. Greer, Joel S. Moss & Nicole B. Herther-Spiro, *Guaranties in Bankruptcy: A Primer II*, 2014 ANN. SURV. BANKR. L. 155, 219 ("In the circuits that allow third-party releases, plans where the debtor seeks to release its nondebtor guarantors are analyzed within the same framework as other third-party releases.").

308 *See In re* Purdue Pharma L.P., 69 F.4th 45, 77, 79–80 (2d Cir. 2023).

309 Anthony Casey, Joshua Macey & Edward Morrison, *What Happens After the Supreme Court's Debacle in* Purdue Pharma*?*, HARV. BANKR. ROUNDTABLE (July 18, 2024), https://bankruptcyroundtable.law.harvard.edu/2024/07/18/what-happens-after-the-supreme-courts-debacle-in-purdue-pharma [https://perma.cc/9FPQ-26V2].

310 Notably, even under the proposed, post-Supreme Court agreement in *Purdue Pharma*, there is no evidence that state attorneys general would take the increased recoveries for "themselves." Instead, such funds would apparently be directed toward opioid abatement. *See* Press Release, *supra* note 297.

IV. *PURDUE PHARMA* AND THE FUTURE OF MASS TORT REORGANIZATION

A. *Next Steps: Deriving Consent and Better Estimation Procedures*

Although the *Purdue Pharma* Court answered an important, and long-standing, question about nonconsensual third-party releases, it left a number of questions in its wake: How broad is the ruling (meaning what sort of third-party releases are still permitted)? What is consent for these purposes? Must, or should, courts now address long-standing practices that dilute the voice of tort creditors or the value of their claims in mass tort reorganizations, where pressure to use third-party releases will remain strong?

This Part begins to delimit the scope of these questions and the parameters for answers. As noted above, the need to balance economic efficiency and noneconomic dignitary protections is both difficult and of the utmost importance in cases involving social debt.

1. The Direct/Derivative Distinction

One of the many sources of disagreement between the majority and dissent in *Purdue Pharma* was whether the Sackler Release covered "direct" or "derivative" claims. The majority took the position that the claims against the Sacklers for consumer fraud were direct claims, distinct from the claims the company may have had against the Sacklers.[311] The dissent thought otherwise.[312]

The distinction in *Purdue Pharma* was fairly clear because the underlying consumer fraud statutes said they were creating direct and independent grounds for liability on the part of directors and officers, and, in at least some cases, forbade indemnification from the corporation.[313] As noted above, this was one of several reasons the Sacklers could not have recovered from the company, undercutting a central element of Justice Kavanaugh's dissent.[314]

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311 Harrington v. Purdue Pharma L.P., 603 U.S. 204, 219 (2024) ("Rather than seek to resolve claims that substantively belong to Purdue, it seeks to extinguish claims against the Sacklers that belong to their victims.").

312 *Id.* at 262 (Kavanaugh, J., dissenting) ("[B]oth the derivative and direct claims against the Sacklers are held by the same victims and creditors, and both the derivative and direct claims against the Sacklers could deplete Purdue's estate.").

313 *In re* Purdue Pharma, L.P., 635 B.R. 26, 51 (S.D.N.Y. 2021) (discussing the Sacklers' loss of motions to dismiss), *rev'd and remanded*, 69 F.4th 45 (2d Cir. 2023), *rev'd and remanded sub nom.* Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024).

314 *See supra* Sections III.B–C.

The majority asserted that the claims against the Sacklers were direct, but did not say why, or what should happen when, as here, the same transactions or occurrences create claims that are both direct and derivative.[315] This is not entirely surprising. The Delaware Supreme Court, surely a leading authority on the subject, has conceded that "[t]he distinction between direct and derivative claims is frustratingly difficult to describe with precision."[316]

Generally, a derivative claim is one by and in the right and name of a corporation or other entity.[317] Thus, in the classic example, a shareholder derivative suit is litigation commenced by shareholders in the name of the corporation.[318] To maintain the suit, the shareholders must show, among other things, that the injury was to the corporation, and that the corporation's fiduciaries are failing to pursue the wrongdoers.[319] The cause of action is property of the corporation, and any recovery goes to the corporation—not to particular shareholders who might have been motivated to sue.[320] In the corporate setting, a breach of fiduciary duty claim against directors is typically a derivative claim because directors owe duties to the corporation, not to specific shareholders.[321]

Direct causes of action, by contrast, stem from a particularized injury to an individual who happens to have a relationship with a corporation which may also have suffered due to the same transaction or

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315 *See Purdue Pharma*, 603 U.S. at 220 n.3 ("Those claims neither belong to Purdue nor are they asserted against Purdue or its estate. The dissent disregards these elemental distinctions.").

316 Brookfield Asset Mgmt. v. Rosson, 261 A.3d 1251, 1263 n.42 (Del. 2021) (quoting Agostino v. Hicks, 845 A.2d 1110, 1117 (Del. Ch. 2004))).

317 *See* Corp. L. Comm., ABA Bus. L. Section, *Changes in the Model Business Corporation Act—Amendments to Sections 1.43 and 2.08 and Chapter 7D Relating to Derivative Proceedings*, 78 BUS. LAW. 157, 165 (2023).

318 Under Delaware law, whether a stockholder's claim is direct or derivative in nature turns on a two-part test: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004).

319 Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1264–65 (Del. 2012) (Berger, J., concurring in part) ("Because a derivative suit is being brought on behalf of the corporation, any recovery must go to the corporation. . . . [A stockholder's] individual injury is distinct from an injury to the corporation alone. . . . [T]he corporation was harmed and the total recovery is awarded to the corporation . . . —not 'nominally' but actually. . . . No stockholder, including the majority stockholder, has a claim to any particular assets of the corporation.").

320 Thus, in a merger, a derivative claim is generally acquired by the acquiror. Lewis v. Anderson, 477 A.2d 1040, 1049 (Del. 1984).

321 *See* Yudell v. Gilbert, 949 N.Y.S.2d 380 (App. Div. 1st Dep't 2012) (adopting the test to distinguish derivative from direct claims in *Tooley*, 845 A.2d at 1039, and noting that here, "plaintiffs' claim for breach of fiduciary duty is derivative, because any pecuniary loss plaintiffs suffered derives from a breach of duty and harm to the business entity").

occurrence.[322] Shareholders may assert direct claims against corporate officers or directors, but this is rare and typically requires some specific action by the fiduciary that hurt that particular shareholder.[323]

The distinction is complicated in bankruptcy both because the doctrine developed largely around shareholders, rather than creditors, and because at the margins, the same transaction or occurrence may produce a cause of action, or causes of action, that are both direct and derivative.

For all of its difficulties, the direct-derivative distinction in *Purdue Pharma* was fairly easy to make. The fraudulent transfer claim arising from the Sacklers' "milking program" was a derivative cause of action because bankruptcy law has long treated that as exclusive property of the bankruptcy estate, even though such causes of action could be asserted by individual creditors prior to bankruptcy.[324] The causes of action for consumer fraud, by contrast, appear to have been direct claims because the alleged fraud did not harm the corporation—it hurt consumers. Moreover, directors and officers generally cannot be indemnified for fraudulent or bad faith conduct[325] and the underlying state laws may have prohibited corporate officers and directors with direct and independent liability from asserting indemnification or contribution claims against the corporation.[326]

The misconduct of the Sacklers and other insiders at Purdue Pharma over many years harmed both the company and individual creditors, creating both derivative and direct causes of action. The majority in *Purdue Pharma* is saying that the Sacklers could not use the presence of derivative claims to avoid their own direct liability.

Other cases may not be so easy, yet it seems the distinction between direct and derivative claims matters, difficult though it may be. The

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322 *See* Richard A. Booth, *Direct and Derivative Claims in Securities Fraud Litigation*, 4 VA. L. & BUS. REV. 277, 295 (2009) ("A direct claim is a claim by which the plaintiff stockholders recover from the wrongdoer because the wrong is one that violates a right or interest that runs directly to the stockholder.").

323 *See id.*

324 *See, e.g.*, Caplin v. Marine Midland Grace Tr. Co. of N.Y., 406 U.S. 416, 434 (1972). In a draft essay, Douglas Baird found it "mystifying that none of the litigants confronted" the "oddity" that the litigants in *Purdue Pharma* had not raised this issue. Douglas G. Baird, Bankruptcy Minimalism 25 (Sept. 2024), https://ncbj.org/wp-content/uploads/2024/09/ABLJ-Symposium-Materials-2024.pdf [https://perma.cc/VGF2-KM94]. He suggests that he concurs with the *Purdue* majority by arguing that bankruptcy trustees cannot settle the claims of others. *Id.* While the Petitioner in *Purdue Pharma* had not, at least one of the amici had. *See* Brief for Bankruptcy Law Professors as Amici Curiae Supporting Petitioner at 21, Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024) (No. 23-124), 2023 WL 6624373 (citing *Caplin*, 406 U.S. at 434).

325 *See* RSUI Indem. Co. v. Murdock, 248 A.3d 887, 903–05 (Del. 2021).

326 *In re* Purdue Pharma, L.P., 635 B.R. 26, 70 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21-cv-7532, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

majority opinion was careful to say that it did not forbid corporate debtors from releasing their own claims, so may not bar the release of derivative claims (although it is not entirely clear). If so, this would be consistent with what appears to be a more careful understanding of Second Circuit precedent on nonconsensual releases prior to *Purdue Pharma*. As noted in Section II.B, the Second Circuit in *Manville* distinguished between direct claims that one insurance company may have had against another from derivative claims that personal injury victims would have had against the corporate tortfeasor.[327]

With what the *Purdue Pharma* majority has provided, and the difficulties with the direct versus derivative distinction, courts should seek clarity on this issue early. Given the incentives of bankruptcy courts to support reorganization efforts, this determination should not be made by bankruptcy courts, but instead by courts of original jurisdiction when the claims involve personal injury, abuse, product liability, or wrongful death. If another court has already made the determination, then the question has been answered, and the bankruptcy court should be bound by that determination. If not, bankruptcy courts should step back and permit the federal district court to make that determination, as Congress already contemplates for the merits determination of contingent and unliquidated personal injury and wrongful death claims.[328]

2. Defining "Consent" to Third-Party Releases

The *Purdue Pharma* Court also seemed to make a basic distinction between consensual and nonconsensual third-party releases. The former were permissible and the latter (if involving direct claims) were not. But this begs the question: What is consent?

The immediate fight is likely to involve "opt-in" versus "opt-out" plans. As one of us has explained elsewhere, many courts have tolerated third-party releases because they were consensual, the assent evidenced as a separate line item on the ballot used to vote on the plan of reorganization.[329] Some courts required creditors affirmatively to opt in to the release, meaning that creditors who failed to execute a ballot or release (or both) retained whatever direct claims they had before

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327 *In re* Johns-Manville Corp., 600 F.3d 135, 151 (2d Cir. 2010); *see supra* Section II.B.

328 28 U.S.C. § 157(b)(5) ("The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.").

329 Lipson, *supra* note 6, at 48.

bankruptcy against the third party.[330] Others would require creditors affirmatively to opt out—meaning the default is to release third parties.[331]

Neither approach is perfect. We view the underlying questions as akin to those that inform contracts debates generally: Is the assent informed and voluntary—and what do we make of silence?[332] These questions have challenged contracts scholars and judges for many years. We doubt bankruptcy scholars and judges will find these questions easier to answer if taken seriously. The key point, however, is that they must be taken seriously, especially in cases involving social debt. Thus, the need for clear evidence of informed assent would seem to correlate with the gravity and scale of the underlying misconduct.

Ordinary notions of notice and informed assent can be especially problematic in cases involving social debt, for purposes of a release and otherwise. In *Purdue Pharma*, for instance, many claimants likely lacked housing or were incarcerated, brutal consequences of opioid addiction for many individuals.[333] Such claimants were in no position to receive or respond to a typical plan solicitation package which would include a copy of the disclosure statement, a ballot, and related materials. While electronic service is possible and, in many cases, preferable, it works only if the recipient has an email address and access to a computer and the internet. None of those things can be said confidently of persons who lack housing or are incarcerated.

If the chapter 11 system is to take seriously the harms that it would purport to address in cases involving social debt, then it must do far better

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330 *See, e.g.*, *In re* PG&E Corp., 617 B.R. 671, 683–84 (Bankr. N.D. Cal. 2020) (approving as "consensual" opt-in releases contained in chapter 11 plan), *appeal dismissed sub nom.* Int'l Church of the Foursquare Gospel v. PG&E Corp., No. 20-cv-4569, 2020 WL 6684578 (N.D. Cal. Nov. 12, 2020); *In re* Bainbridge Uinta, LLC, No. 20-42794, 2021 WL 2692265, at *3 (Bankr. N.D. Tex. June 28, 2021) (approving "opt-out" form in plan solicitation materials). Even in the Southern District of New York, courts appear to prefer option-releases. *See* Rick Archer, *Judge Approves 3rd-Party Releases in Stoneway Ch. 11 Plan*, LAW360 (May 12, 2022, 6:15 PM), https://www.law360.com/articles/1492359/judge-approves-3rd-party-releases-in-stoneway-ch-11-plan [https://perma.cc/ZKS2-SANW] (citing *In re* Stoneway Cap. Ltd., No. 21-bk-10646 (Bankr. S.D.N.Y. 2022)).

331 *See, e.g.*, *In re* Mallinckrodt PLC, 639 B.R. 837, 879 (Bankr. D. Del. 2022).

332 *See id.* ("The question is, what constitutes consent and can consent be inferred from failure to respond to a notice including an opt out? In other words, can consent be inferred from silence or more accurately, the failure to act?").

333 *See* Andrew Taylor, Charlotte Miller, Jason Tan de Bibiana & Jackson Beck, *Overdose Deaths and Jail Incarceration: National Trends and Racial Disparities*, VERA (Jan. 26, 2021), https://www.vera.org/publications/overdose-deaths-and-jail-incarceration/national-trends-and-racial-disparities [https://perma.cc/P4GA-7CFT] (linking opioid use, overdose deaths, and incarceration); BRETT POE & ALAINA BOYER, NAT'L HEALTH CARE FOR HOMELESS COUNCIL, ADDRESSING THE OPIOID EPIDEMIC: HOW THE OPIOID CRISIS AFFECTS HOMELESS POPULATIONS (2017), https://nhchc.org/wp-content/uploads/2019/08/nhchc-opioid-fact-sheet-august-2017.pdf [https://perma.cc/6MWB-SDDN] (linking the opioid epidemic, substance abuse, and homelessness).

than was the case in *Purdue Pharma*. While the company advertised massively about the opportunity to file claims, it made little practical effort to enable those who were incarcerated or unhoused to vote. The ballot accompanying the plan obviously provided no basis for giving or withholding assent to the Sackler Release. But even if it had, the hundreds of words of dense legalese that comprised the Sackler Release were nearly impossible to understand. Even Richard Sackler, perhaps the most notorious beneficiary of the Sackler Release, conceded that its language was so "extremely dense" and would take such "an enormous amount of time to fully understand," that he gave up trying to read it.[334]

3. Protecting the Voice of Victims: Better Voting and Estimation Procedures

Voting is a key creditor protection in chapter 11. It is how most creditors express their voice.[335] There are, however, a number of persistent problems with voting in practice which will likely become more pronounced in the wake of *Purdue Pharma*.

Take the number of votes cast. As noted above, proponents of the Sackler Release often claimed there was overwhelming support for the plan, which would have been true if one looked only at the votes cast. But a plan of reorganization is not an election; it is a cross between a contract and a consent decree.[336] And the vast majority of Purdue's creditors cast no vote at all.[337] While a bankruptcy court cannot force creditors to vote, or to impose a votes-cast threshold, courts should aggressively question low voter turnouts in mass tort cases.

Some creditor protections depend on valuing claims. The vote on a plan, for example, is counted on both a per-capita and dollar-value basis.[338] Whether future claimants recover anything is a function of how much a plan places into a trust for them. In the mass tort context, these and similar determinations often require courts to estimate contingent and unliquidated tort claims.

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334 Transcript of Hearing at 133, *In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649), ECF No. 3614.

335 Lipson, *supra* note 3, at 1791–94.

336 *See* Jonathan C. Lipson, *The Secret Life of Priority: Corporate Reorganization After* Jevic, 93 WASH. L. REV. 631, 634 (2018) (characterizing plans as "a cross between a consent decree and a contract").

337 *See supra* Part II.

338 11 U.S.C. § 1126(c) (stating that a class approves a plan if supported by a vote of creditors that hold "at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors").

Section 502(c) permits bankruptcy courts to estimate most contingent and unliquidated claims because it would not be possible to provide finality and a fresh start to a corporate debtor who was not able to channel all potential liability from past misconduct into its plan.[339] Although bankruptcy courts are not supposed to estimate contingent and unliquidated personal injury or wrongful death tort claims for distribution purposes,[340] bankruptcy courts retain the power to estimate them for other purposes—notably voting.[341]

As explained in Part I, to confirm a plan, at least one class of claims must support the plan by a supermajority vote of two-thirds in amount and more than half in number.[342] For contractual claims, estimation is rarely required, because the contract spells out the amount of the claim. It is the same for tort claims subject to a final judgment or settlement. By contrast, the existence and amount of contingent and unliquidated tort claims is unknown. Bankruptcy courts could require any number of steps to estimate such claims, including bellwether trials, expert testimony, probabilistic analysis, and so on.

In practice, concerns about cost and delay lead bankruptcy courts to dispense with these efforts. Instead, it appears that mass tort reorganization plans routinely value tort claims at $1 per claim.[343] The 1997 Report of the National Bankruptcy Review Commission recognized that claims-estimation accuracy was an important component of the integrity of the mass tort bankruptcy process and that the early asbestos cases had failed to estimate properly for funding purposes.[344]

Like other courts, bankruptcy courts are reluctant to engage in valuation exercises. Valuation often devolves into a battle of experts touting incommensurable (and perhaps incomprehensible) formulas. Bankruptcy judges, like other judges, would prefer that the parties negotiate an agreed valuation that seems plausible because the parties

339 *See* 11 U.S.C. § 502(c).

340 *See* 28 U.S.C. § 157(b)(2)(B).

341 *See A Practitioners Guide to Counting Ballots for a Chapter 11 Plan*, AM. BANKR. INST. J. (1997), https://www.abi.org/abi-journal/a-practitioners-guide-to-counting-ballots-for-a-chapter-11-plan [https://perma.cc/44DF-7TWA].

342 *See supra* Part I; 11 U.S.C. § 1126(c).

343 *See* Jacoby, *supra* note 5, at 1757 (discussing $1 per vote provisions in mass tort reorganization plans).

344 *See* NAT'L BANKR. REV. COMM'N, *supra* note 99, at 343–44 (recognizing that claims-estimation accuracy is an important component of the integrity of the mass tort bankruptcy process and noting underestimation of claims occurred in the *Johns-Manville* case, one of the earliest asbestos bankruptcy cases, while also pointing to the adequate funding of trusts in subsequent cases to show those risks are surmountable).

themselves are likely to have a greater capacity to get it right than a judge or jury.[345]

For the reasons we discuss immediately below, however, we worry about agreed valuations. In *Boy Scouts*, for example, the debtors proclaimed that their plan would pay tort victims in full.[346] But this was only because representatives of tort claimants agreed not to challenge the debtors' valuation—not because the valuations were accurate.[347] This, however, places a great deal of pressure on the incentives of representatives to get it right.

More effective claims estimation would serve both economic and noneconomic goals. It would provide a more credible voice for mass tort victims by more accurately weighting their votes and would force debtors to more accurately set aside assets to pay claims as they were presented and paid. More effective claims estimation would also incentivize more information production, which may provide mass tort victims additional confidence in the bankruptcy process's ability for judges and other adjudicators to appreciate the gravity of the issues, separate and apart from the actual monetary recovery.

4. Watching the Watchers

Bankruptcy is not a system that would "go of itself."[348] It depends on cadres of professionals and other representatives and analysts to contest, negotiate, and resolve the many problems that led to the debtor's bankruptcy in order to reorganize successfully.

When Congress created the chapter 11 system, it appears to have assumed that it would largely be run by judges, lawyers, and financial professionals. Lawyers and professionals for the debtor in possession and an official committee of unsecured creditors would, in turn, be retained by the bankruptcy estate subject to fairly rigorous impartiality standards, and their fees would be subject to judicial review and approval.[349] While Congress presumed that debtors would remain in the possession and control of management, if a trustee or examiner were appointed, they

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345 As Daniel Bussel points out, commencing a chapter 11 case after causes have matured through the civil litigation process would reduce uncertainty in the estimation of other, like claims. *See* Bussel, *supra* note 245, at 706.

346 *In re* Boy Scouts of Am. & Delaware BSA, LLC, 642 B.R. 504, 651 (Bankr. D. Del. 2022).

347 *See* Jacoby, *supra* note 5, at 1769 (explaining that the failure to challenge valuation "stemmed from a deal among plan proponents, not a signal of agreement on the empirical proposition that survivors would be paid anywhere near that amount").

348 *Cf.* Donald P. Board, *Retooling "A Bankruptcy Machine that Would Go of Itself,"* 72 B.U. L. REV. 243 (1992) (book review).

349 *See* 11 U.S.C. §§ 327–328, 330.

would be appointed by the Department of Justice, not bankruptcy judges, debtors, or creditors.[350] This assured that those who ran the system on a daily basis were subject to official checks and balances that kept their incentives aligned with those of their constituencies.[351]

Not long after the Bankruptcy Code was enacted, however, an industry of distress professionals arose who would participate in the process in various unofficial ways. Turnaround managers would act as private trustees. Ad hoc committees would be formed as rump groups outside court supervision, the payment of their professionals' fees dangled as a carrot by the estate for supporting a plan. As noted above, this was often the case with *Purdue Pharma*, which naturally raises the question: Do counsel for ad hoc committees want what is best for their clients, or what is more likely to get them paid? Presumably, the answer accounts for both.

A problematic example of this is the future claimants representative to be appointed in connection with an asbestos bankruptcy. Unlike other estate professionals, an FCR is not appointed by the Department of Justice, but instead by the bankruptcy court.[352] As noted above, Campos and Parikh have found that in practice, it is the mass tort debtor, itself, who appoints the FCR, and these are often repeat players whose incentives may not align with the interests of the future claimants they purport to represent.[353]

This is not to say that we should do away with FCRs. On the contrary, like other official representatives in a case, they should be appointed by the Department of Justice and their retention and fees reviewed and approved by the bankruptcy judge. Courts should also take more seriously the possibility that future claimants are not a monolith. In the case of long-tail harms, such as asbestos exposure, the future needs of those with mesothelioma may differ from the needs of those with ovarian cancer. The appointment of multiple FCRs may be warranted in some cases. If chapter 11 wishes to address problems of social debt, then it must account adequately for the distinctive characteristics of social debt claimants, even if doing so adds transaction costs that may be unusual in ordinary commercial cases.

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350 *See* FED. R. BANKR. P. 2007.1.

351 The background and concerns are discussed in Lipson & Skeel, *supra* note 33.

352 *See In re* Imerys Talc Am., Inc., 38 F.4th 361 (3d Cir. 2022) (establishing a standard for the appointment by the bankruptcy court of an FCR).

353 *See* Campos & Parikh, *supra* note 238, at 350.

B. *Congressional Action*

The *Purdue Pharma* majority and dissent agreed on little, except that Congress should solve the mess created by the use of nonconsensual third-party releases.[354] Proponents of these mechanisms, such as Casey and Macey, have urged congressional action in this regard.[355]

We think the observations immediately above apply with equal force in any effort to amend the Bankruptcy Code. We here summarize some of the key elements of mass tort reorganization amendments that would expand the use of third-party releases. We put forth five core ideas:

(1) Applicable provisions of titles 11 and 28 should be amended to require that a chapter 11 plan of reorganization may not treat mass tort (e.g., personal injury tort, products liability, or wrongful death) claims unless and until a court of original jurisdiction (or the U.S. District Court where the bankruptcy is pending) has determined which claims are direct and which are derivative.

(2) Applicable provisions of chapter 11 should be amended to provide that, to the extent such claims are direct, they may only be released consensually. Although we recognize that developing appropriate mechanisms for obtaining and evidencing consent may be difficult and iterative, bankruptcy courts must account for the wide range of unusual characteristics and circumstances of many claimants in social debt bankruptcies. They must provide procedures to ensure that all creditors actually receive and have the opportunity to examine and understand plan voting materials such that they can make informed decisions.

(3) Applicable provisions of chapter 11 should be amended to provide that the plan may release derivative claims with or without consent, but only to the extent the chapter 11 case has adequately estimated for voting purposes the value of all tort claims filed or reasonably anticipated. We leave to Congress the decision of what sorts of methods to use to value claims, but $1 per claim is very difficult to justify.

(4) Applicable provisions of chapter 11 should be amended to require a minimum vote threshold of personal injury creditors

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354 *Compare* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 226 (2024) ("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. Either way, if a policy decision like that is to be made, it is for Congress to make."), *with id.* at 278 (Kavanaugh, J., dissenting) ("Only Congress can fix the chaos that will now ensue. The Court's decision will lead to too much harm for too many people for Congress to sit by idly without at least carefully studying the issue.").

355 *See* Casey et al., *supra* note 309.

in mass tort reorganizations.[356] That is, for personal injury creditors, the plan should not be treated as an election but as something closer to the mass contract that it is and reflect full and substantial support from all affected by it—not just those motivated to support it.

(5) FCRs should be appointed as appropriate to the needs of the social debt case by the UST, mindful of differences among such claimants. Sections 327–328 and 330 of the Bankruptcy Code should be amended to require that professionals representing unofficial committees of tort claimants must be retained and compensated according to the usual ethical standards that apply under the Bankruptcy Code.

Amending the Bankruptcy Code has historically been a mixed experience. While the 1978 Bankruptcy Act was considered highly successful, subsequent amendments have had an uneven reception.[357] The asbestos amendments of 1994 and the consumer-facing amendments of 2005 have been lamented as poorly conceived and executed products of special interest groups.[358]

There is no guarantee that amendments to address demand for third-party releases would fare better. Still, we believe that mindfulness of the areas of dispute after *Purdue Pharma*—and the special demands placed on bankruptcy courts asked to address problems of social debt—would help produce legislation that balances the economic and noneconomic challenges at issue in all bankruptcies and especially those involving serious misconduct at scale.

CONCLUSION

The foregoing is among the first Articles to explore the deeper implications of the Supreme Court's important ruling in the *Purdue Pharma* bankruptcy. Although the Court in *Purdue* decisively answered one question—nonconsensual third-party releases of direct claims are forbidden—it left many others unanswered, including on the proper balance of the economic and noneconomic interests at stake in chapter

356 *See* MELISSA B. JACOBY, UNJUST DEBTS: HOW OUR BANKRUPTCY SYSTEM MAKES AMERICA MORE UNEQUAL 228 (2024).

357 *See* Lipson, *supra* note 24, at 689 (discussing special interest groups in bankruptcy legislation); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of 11 and 28 U.S.C.); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

358 *See* sources cited *supra* note 357.

11 reorganizations involving social debt. We have no illusions about the challenges courts and Congress face in striking this balance.

We have proceeded from what we believe are broadly held views about due process values and economic efficiency in an effort to produce tractable recommendations about the future of mass tort reorganization. *Purdue Pharma* is not the end of social debt or all forms of bankruptcy exceptionalism, just a moment for a new beginning.