Discussion of Purdue Pharma and Third Party Releases

Presented by The New York Institute of Credit

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Panelists:
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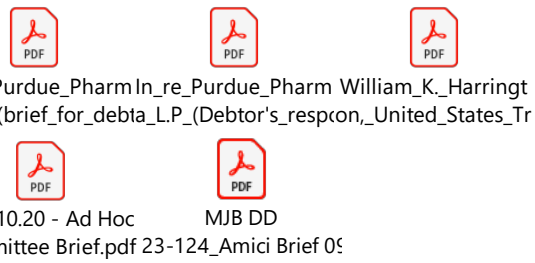
NOTE: Not every panelist will respond to every question. This program is intended to be an off the record discussion. No one will be making an official position statement on behalf of their client(s) unless they say otherwise. Recording is prohibited. Panelists are free to express views with which they disagree but which they believe will foster intellectual discussion. If a panelist does not respond to a question, it should not be deemed to be agreement with any other responders. It may mean that they feel that the question has been adequately responded to without further responses. Or it may simply mean that they do not wish to respond. Declining to respond may be for any reason or for no reason. Many people have strong views on how the Supreme Court should decide the issues before it in the Purdue matter. Panelists may not respond to questions about what they intend to do after the Supreme Court issues its decision.

Briefs filed by Debtor, Official Creditors' Committee, ad hoc committee(s) and US Trustee



Questions for the panelists:

1. (a) What is the legal framework relating to releases?

   (b) What are the statutory arguments for and against coerced releases?

2. What are the constitutional arguments for and against coerced releases?

3. Is the United States Trustee's position justified by its statutory role?

4. What are the legal and social implications of reversing confirmation of the Purdue Pharma plan?

5. Closing statements (optional)

Articles, summaries, insights and comments from third parties. The panelists may or may not agree with the descriptions, statements or conclusions contained therein. Inclusion below does not necessarily mean that the panelists agree with contents.

Attachments

1. New York Times article
2. Los Angeles Times article
3. The Economist article.
4. Bloomberg article

What are the legal issues to be decided by the Supreme Court in the Purdue Pharma case regarding releases?

The legal issues to be decided by the Supreme Court in the Purdue Pharma case regarding releases center on the validity and authority of the bankruptcy court to approve a reorganization plan that includes nonconsensual third-party releases. Specifically, the issues involve whether the Bankruptcy Code authorizes such releases that extinguish claims against non-debtors without the consent of the claimholders and

without compensating them, particularly when those claims could not have been discharged if the non-debtors themselves had filed for bankruptcy.

The key statutory provisions involved are Sections 105(a) and 1123(b)(6) of the Bankruptcy Code. The court of appeals had relied on these residual provisions to validate the release of claims against the Sacklers and associated individuals and entities, which are non-debtors, as part of Purdue Pharma's reorganization plan. The U.S. Trustee argues that the Bankruptcy Code does not authorize nonconsensual third-party releases, and that the court of appeals' construction of Sections 105(a) and 1123(b)(6) to allow such releases must be rejected.

The U.S. Trustee contends that these sections do not explicitly provide the power to authorize nonconsensual third-party releases and that such releases conflict with other limits on powers under the Code. Additionally, the U.S. Trustee points to the narrow allowance for asbestos trusts in Section 524(g) of the Bankruptcy Code as an illustration of the impermissible breadth of the Sackler release.

The policy considerations raised by the plan proponents are also at issue, with the U.S. Trustee arguing that nonconsensual third-party releases undermine public confidence in the bankruptcy system and allow tortfeasors to avoid mass-tort liability without undergoing the obligations imposed by the Bankruptcy Code.

The Supreme Court's decision will address these issues and determine the extent to which the Bankruptcy Code permits or prohibits nonconsensual third-party releases in bankruptcy reorganization plans.

Summary of oral argument

First, two justices appear to be solidly in favor of the U.S. Trustee's position without qualification. Their representative comments from the compilation below are:

- "this is the problem that we're creating here, that we have half of it inside the bankruptcy, that's Purdue, and we have half of it outside the bankruptcy, that's the Sacklers" (**Justice Jackson**, at 114); and
- "on the constitutional question, we have serious questions. We don't normally say that a nonconsenting party can have its claim for property eliminated in this fashion without consent or any process of court . . . It would raise serious due process concerns and seventh amendment concerns" (**Justice Gorsuch**, at 73).

Second, at least four justices raise concerns about upending the deal. Their representative comments from the compilation below are:

- "What if a bankruptcy court were faced with a situation where funds like this are not reachable? You're saying that the bankruptcy court is powerless to do anything?" (**Justice Alito**, at 14);
- "what the opioid victims and their families are saying is you, the federal government, with no stake in this at all, are coming in and telling the families, no, we're not going to give you payment, prompt payment, for what's happened to your family, . . . in exchange, really, for this somewhat theoretical idea that they'll be able to recover money down the road from the Sacklers themselves" (**Justice Kavanaugh**, at 20);
- "It's overwhelming, the support for this deal, and among people who have no love for the Sacklers, among people who think that the Sacklers are pretty much the worst people on earth, they've negotiated a deal which they think is the best that they can get (**Justice Kagan**, at 22); and
- "And what exactly is the interest of the Trustee . . . in undoing this? . . . But the Trustee has a separate role, and I'm just wondering what exactly is that role and why is it that you're able to come in and undo something that has such overwhelming agreement" (**Justice Thomas**, at 34).

Third, at least one justice focuses on derivative claims as, (i) being outside the scope of the U.S. Trustee's can't-release position, and (ii) comprising the vast bulk of the claims at issue. Representative comments from the compilation below are:

- "I always thought that any release in bankruptcy would stop suits for derivative claims, correct? Fraudulent conveyance claims are derivative claims that belong . . . to Purdue and those can be settled by Purdue, correct? . . . and I take it from the government's brief that the settlement can include an extinguishment of all derivative claims" . . . "So you're telling me that most claims are derivative and that there's only a few direct claims" (**Justice Sotomayor**, at 77 & 104).

And finally, two justices are hard to read (although, I'd put their comments as more-favorable to the position of the victims than to the position of the U.S. Trustee). Their representative comments from the compilation below are:

- "are you saying that you shouldn't allow this because there's going to be a better deal down the road?" (**Justice Roberts**, at 27); and
- "is this the best that we can do for the victims? Lots of victims have agreed to it for that reason . . . But, in any event, this is a very complicated problem in mass tort litigation that involves bankruptcy. So what happens to those other cases if you win? . . . I'm saying, going forward, depriving bankruptcy courts of this tool, what will be the effect going forward on other cases like this?" (**Justice Barrett**, at 53).

Compilation of Justices' Comments/Questions

–Comments/Questions During U.S. Trustee's arguments

JUSTICE ALITO: . . . As a practical matter, . . . the Sacklers, the bankruptcy court, the creditors, Purdue, and just about everybody else in this litigation thinks that the Sacklers' funds in spendthrift trusts overseas are unreachable. Do you agree with that? And, if you do agree with that, is this the best deal that's available for the creditors? . . . What if a bankruptcy court were faced with a situation where funds like this are not reachable? You're saying that the bankruptcy court is powerless to do anything? [at 12 & 14]

JUSTICE SOTOMAYOR: Counsel, what does consent look like? I've been trying to imagine that in a case like this. You have the states and so they could consent. They are an identified party. But there's, I don't know, thousands, if not hundreds of thousands, maybe millions of personal injury claims. Is an opt-out consent? How do you get it? . . . We have a separate petition in Highland Capital, and the amici briefs . . . suggest that your argument here about nonconsensual third-party releases affects the question of exculpation clauses for professional services firms that work on a bankruptcy. Does it? . . . it appears you want a broad ruling that all third-party releases, unless they're consensual, are not permitted. So how do we write this not to affect that case or any others. [at 15 & 37-38]

JUSTICE KAVANAUGH: . . . we have 30 years of bankruptcy court practice that have approved releases of this kind . . . [against] officers or directors of the company, where they're indemnified, meaning that the claims against them are in effect claims against the

company, . . . your opening never mentioned the opioid victims. The opioid victims and their families overwhelmingly approve this plan because they think it will ensure prompt payment. So, . . . for 30 years have been approving plans like this, and . . . why we would say it's categorically inappropriate when the statutory term "appropriate" is one that takes account usually of all the facts and circumstances. . . . But, more broadly, I think what the opioid victims and their families are saying is you, the federal government, with no stake in this at all, are coming in and telling the families, no, we're not going to give you payment, prompt payment, for what's happened to your family, and . . . the federal government's not going to allow all this money to go to the states for prevention programs to prevent future overdoses and future victims and in exchange, really, for this somewhat theoretical idea that they'll be able to recover money down the road from the Sacklers themselves. [at 18, 19 & 20]

JUSTICE KAGAN: I mean, it's 3 percent. You know, what if it were 1 percent, .1 percent? And your position would still say, well, no, the Trustee can come in here and blow up the deal and should blow up the deal. . . . It's overwhelming, the support for this deal, and among people who have no love for the Sacklers, among people who think that the Sacklers are pretty much the worst people on earth, they've negotiated a deal which they think is the best that they can get. . . . your position rests on a lot of sort of hifalutin principles of bankruptcy law. But another hifalutin principle of bankruptcy law is you're supposed to maximize the estate, and you're supposed to do things that will effectuate successful reorganizations. And it seems as though the federal government is standing in the way of that as against the huge, huge, huge majority of claimants who have decided that, if this provision goes under, they're going to end up with nothing. . . . What if there's just liquidation of the company, which is what the other side raises the specter of? So there's liquidation of a billion. There's no contribution. And then everyone's left with a lottery ticket to try to get something . . . in litigation years from now. . . . I take it there's no amount that the Sacklers could have put on the table that would alter your position, is that right? . . . it seems that your basic position would still apply if there was one kind of nut-case holdout, and so I guess I'm wondering why one nut-case holdout should hold up something like this. . . . some of your rhetoric today has been that the Sacklers just haven't put in enough . . . isn't the discovery process that the bankruptcy court commissioned and oversaw that was very thorough . . . designed to ensure that the amount contributed . . . is an appropriate amount to increase the value of the res and therefore help the ultimate

creditors and victims? . . . I think the problem and maybe the disconnect between you and the opioid victims is you're implying or even saying, oh, if you just . . . reject this plan, there's going to be more money available down the road from the Sacklers. And I don't think you're accounting for the uncertainty of liability, first of all, the uncertainty of the indemnification, insurance, contribution claims, and the uncertainty of recovery. And so the point of this provision as it's been applied for 30 years is to take into account those uncertainties in thinking about whether this is a appropriate settlement and overall plan. . . . And the views of the opioid victims and their families . . . doesn't matter? . . . I think your position is saying it doesn't matter. [at 21, 22, 23, 26, 39, 41, 44 & 45-46, 47]

JUSTICE BARRETT: I was just going to ask you what the United States' position is going to be. Let's say that you win and it goes back down. The Sacklers withdraw their offer to contribute all these billions of dollars. You have a super-priority claim that would deplete most of what's on the table based on Purdue's assets right now. Would you assert that claim, or would you withdraw that and allow the opioid victims to recover some — what's left in Purdue's estate? . . . let's say that the bankruptcy wraps up, . . . and let's imagine you win. Let's imagine the bankruptcy wraps up. Then people do go after the Sacklers, and let's say they secure judgments, and the Sacklers want to seek indemnification from Purdue. As I understand it, there's a division of authority in the courts below about whether these would be prepetition or post-petition claims and so whether they would even be allowed. But I also am wondering, what's left to get? So, if they're bringing these indemnification claims . . . and Purdue has been restructured, where are they going to get money anyway? So I just don't understand how it affects the res in the way that the Respondents say. . . . if it is available against them, what assets are there to get once Purdue is reorganized . . . what I'm saying . . . not much. . . . this is a very complicated problem for a lot of the reasons that . . . that people have been asking you about . . . is this the best that we can do for the victims? Lots of victims have agreed to it for that reason . . . But, in any event, this is a very complicated problem in mass tort litigation that involves bankruptcy. So what happens to those other cases if you win? Does this have ramifications for other victims of mass torts that would be negative in cases like the Johnson & Johnson litigation? . . . I'm not talking about the cases that are actually pending. I'm saying, going forward, depriving bankruptcy courts of this tool, what will be the effect going forward on other cases like this? [at 24-25, 49-50, 51, 52-53 & 54]

CHIEF JUSTICE ROBERTS: . . . are you saying that you shouldn't allow this because there's going to be a better deal down the road?. . . So you would be here making the same argument if everything was as the way it is except that in terms of the claimants who do not want to be bound by the order of the bankruptcy court, there was just one of them. [at 27 & 28]

JUSTICE THOMAS: . . . under your reading of these provisions of the Bankruptcy Code, are consensual agreements or releases acceptable? . . . What's the difference — on what provision in the code do you rely for that? . . . So you're saying that the mere fact that they consent gives the bankruptcy court authority? . . . Conceptually, though, what's the difference between a consensual and a nonconsensual release? . . . from the standpoint of the bankruptcy court resolving that, I don't see what the difference is. . . . And what exactly is the interest of the Trustee . . . in undoing this? . . . But the Trustee has a separate role, and I'm just wondering what exactly is that role and why is it that you're able to come in and undo something that has such overwhelming agreement. [at 6, 7 & 34]

JUSTICE GORSUCH: Even if they put all their assets on the table, they still wouldn't get a release for fraud, right? . . . : That's not if somebody were willing to pursue that claim after the bankruptcy. . . . And so that their assets not just in the past but in the future would be potentially attachable by creditors, correct? [at 42]

JUSTICE JACKSON: . . . I'm trying to understand why this would be laid at the feet of the one nut-case holdout, as Justice Kagan puts it. . . . even if you have a group of people who do not consent, the Sacklers could still give the money. They could still fund the victims who do consent. And so it's not the holdouts. It's the Sacklers' insistence on getting releases from every single person that's causing this problem, correct? . . . And your only point is that they may still, if the Court says no, go ahead and settle with all of the people who are willing or interested in doing this? [at 58-59]

–Comments/Questions During Purdue Pharma arguments

JUSTICE KAGAN: . . . I thought that one of the government's stronger arguments is this idea that there's a fundamental bargain in bankruptcy law, which is you get a discharge when you put all your assets on the table to be divided up among your creditors. And I think

everybody thinks that the Sacklers didn't come anywhere close to doing that. And the question is why should they get the discharge that usually goes to a bankrupt person once they've put all their assets on the table without having put all their assets on the table? . . . what I'm suggesting is that this is a fundamental principle of bankruptcy law, and when we're trying to read this provision and figure out what powers it gives to the bankruptcy court and what not, it would be a kind of extraordinary thing if we gave the power to basically subvert this basic bargain in bankruptcy law. . . . in some ways, they're getting a better deal than the usual bankruptcy discharge because . . . they're being protected from claims of fraud and claims of willful misconduct. So, yeah, in some ways, they're getting not quite as much, but in some ways, they're getting much more . . . without putting . . . their entire pot of assets on the table. [at 63, 64, 65]

JUSTICE JACKSON: But, even if they could be authorized, . . . why would this be an appropriate situation to allow it? . . . they're not putting all of their assets on the table, . . . [and most of the assets we're talking about were originally in the company and that they actually took the assets from the company, which started the set of circumstances in which the company now doesn't have enough money to pay the creditors. So even if there was a world in which categorically we wouldn't say you can never do these kinds of releases, why wouldn't this be a clear situation in which we would not allow it? . . . Only because the Sacklers have taken the money offshore, right? I mean, it's not like by operation of law it's necessary to do this. It is necessary to do this because the Sacklers have taken the money and are not willing to give it back unless they have this condition. . . . if (b)(6) is as broad as you say it is, then what are (b)(1) through (5) doing there? In other words, I mean, right before we have a bunch of specific grants of authority, and if (b)(6) means what you say, then why did Congress have to put those in? . . . haven't we normally said in our jurisprudence with respect to statutory interpretation that a catchall that ends after a list is sort of like in the same nature of the list? It can't be just a totally different, huge thing. . . . With respect to "inconsistent" in (b)(6), what is your view of the work of "inconsistent"? I mean, can a plan provision that conflicts with the principles underlying the Bankruptcy Code be inconsistent, or is it your view that it has to be inconsistent with a particular provision? [at 66–67, 68, 90, 91]

JUSTICE BARRETT: . . . I take your point about 40 percent of the money that they took from the corporation going to the payment of taxes, but . . . the 97 percent of the money after

tax that they're contributing is all money that they took out of the corporation. And to your point to Justice Kagan about, well, this is a corporate restructuring and so the fraud position doesn't apply, . . . but if the Sacklers went into individual bankruptcy, which is what this is saving them from, those fraud exceptions would apply. . . . if 1123(b)(6) is as broad as you say, did Congress need to enact 524(g) to give bankruptcy courts special authority to handle these problems in the asbestos context? . . . Was that just clarifying or was it necessary? [at 68–69, 88, 89]

JUSTICE GORSUCH: . . . So we're being asked to interpret 1123(b)(6), and you'd agree that the term "appropriate" doesn't mean anything goes, right? . . . It has some limits. And we would normally look for those limits, for example, in the structure of the Bankruptcy Code and other surrounding provisions, right? . . . As a federal interpretive matter. . . . How about statutory context? . . . And we might look at historic equity practice. . . . And we might look at background constitutional concerns. . . . we wouldn't turn a blind eye to the Constitution of the United States when interpreting a statute? . . . When we look at the background structure of the Bankruptcy Code, it has a couple of important provisions, right? One is you got to put everything on the table, . . . right? . . . And the other is that at least with respect to individuals, you don't get off the hook for fraud, right? . . . And then when we look at historic equity practice, I think you got a couple of cases from the 1600s and a couple of district court cases more recently and pretty much nothing else. . . . There's a lot running the other way, right? . . . You got a lot running against you, don't you? . . . What was that case from the 1600s again? . . . Tiffin. . . . And then on the constitutional question, we have serious questions. We don't normally say that a nonconsenting party can have its claim for property eliminated in this fashion without consent or any process of court . . . This would defy what we do in class action contexts. It would raise serious due process concerns and seventh amendment concerns, as the government highlighted. . . . But we're not in bankruptcy. That's the whole point, is your clients aren't in bankruptcy. If the they were, then equity would kick in . . . With respect to a debtor, that would be traditionally the case, but we're talking about a nonconsensual claim against a nondebtor. . . . And that, normally, we'd have serious due process and Seventh Amendment concerns. [at 69, 70, 71, 72, 73, 74 & 75]

JUSTICE SOTOMAYOR: Counsel, can we talk a little bit about what is direct and what's derivative? . . . neither side has satisfied me in answering that. I always thought that any

release in bankruptcy would stop suits for derivative claims, correct? Fraudulent conveyance claims are derivative claims that belong — those claims belong to Purdue and those can be settled by Purdue, correct? . . . and I take it from the government's brief that the settlement can include an extinguishment of all derivative claims. . . . you're still not helping me with the definition, as that that issue has to be resolved below, and it would be resolved in future lawsuits as to whether or not the bankruptcy agreement extinguished that particular type of derivative. . . . I'm trying to understand if it's your view that the Sacklers could condition their funding of this estate on anything that the code does not expressly prohibit . . . but you define "necessary" . . . as anything the Sacklers require . . . So what does "necessary" mean in your view? . . . Only because the Sacklers wouldn't give the money back, right, under those circumstances? They are conditioning their willingness to fund this estate on the releases. . . . So it's only necessary insofar as they are requiring it. . . . I guess I don't understand why. Why isn't — since the linchpin fact here, as you've just articulated it, is the Sacklers' willingness to put money into the estate, why can't they — and that it's necessary insofar as the Sacklers are demanding it in this situation — . . . why can't they demand anything and let that be necessary? I don't understand why there's a difference as to it being necessary, you know, in a different way. [at 77, 79, 80, 81, 82, 83]

JUSTICE KAVANAUGH: . . . On the statutory point of the term "appropriate," which, to me, is key, in isolation, that's a broad term and really helps you, but, . . . we, in interpreting statutes like that that assign broad authority to usually regulatory agencies, here, the bankruptcy court, we've been cautious, especially in recent years, about reading those to give too much authority, . . . And I'm curious why in this case that those principles which go way back in this Court's jurisprudence as I see it wouldn't apply here and say, yeah, "appropriate's" a broad term, but we should read it narrowly because that would be a question of great economic significance that we won't assume Congress lightly assigned. . . . The U.S. Trustee doesn't have standing in your view, and I think that's a strong argument. But Ellen Isaacs would have standing. So do we need to get into the U.S. Trustee's standing given that Ellen Isaacs would have standing? [at 84–85, 87]

Comments/Questions During Creditor Committee arguments

JUSTICE THOMAS: Well, let's assume that the Sacklers actually filed for bankruptcy. What would it look like? [at 95]

CHIEF JUSTICE ROBERTS: Here, you have basically the, what is it, 3 percent we're talking about of the individual claimants. What if you have a situation where the 97 percent is a particular type of claimant, individual claimants, but the 3 percent that is holding out are different — have different claims altogether, commercial claims? Could the individuals and the bankruptcy court force the commercial claims into the bankruptcy settlement? . . . under the code, is there something that requires it to be a supermajority of every class? . . . In one sense, you do have different classes. . . . But then you have a class that prefers to see the claims go forward, the money isn't enough or however you want to phrase it. They have different interests. . . . And yet you have a supermajority of the one . . . Supermajority of each class? [at 96, 97, 98, 99]

JUSTICE KAGAN: . . . [U.S. Trustee's counsel] suggests that if we rule for him, it actually gives victims greater leverage in this kind of situation. . . . there's something to what [U.S. Trustee's counsel] says. You rule for him, then you have another tool in your toolbox when when the people that you represent sit around the table with Purdue and the Sacklers. [at 100-101]

JUSTICE SOTOMAYOR: I know you're making this very dramatic, but I read your brief, and . . . you argue that all personal injury claims against the Sacklers are derivative of claims against Purdue. And so only a small subset of claims fall into the nonconsensual third-party release of direct claims at issue in this case. . . . So you're telling me that most claims are derivative and that there's only a few direct claims. So, if there's only a few direct claims, how is that going to leave the estate? . . . Tell me what direct claims exist . . . Yeah, but the states are all willing to settle with you. . . . if all the states are saying consensually we're going to agree, so we're not going to sue you, . . . you're telling me that the individual claims are mostly derivative . . . like personal injury and others. . . . you're talking about a small subset, using your own words, of claims that are direct will survive. How is that going to be an inducement to the Sacklers to pull out of this deal? [at 104, 105, 106]

JUSTICE KAVANAUGH: What about individual suits against the Sacklers that could happen if you lose this case, there's a liquidation, so you get nothing from the estate. [at 107–108]

JUSTICE JACKSON: So my one nagging concern about your emphatic presentation is I'm thinking about those circuits that do not permit third-party nonconsensual releases. . . . And I think, if I agree with you or if I believe your forecast about what's supposed to happen or what might happen in this situation . . . that there would never be a settlement of mass tort cases arising in those circuits, and the government has given several examples here of situations in which, once there's a rejection of a bankruptcy effort to take care of this, parties settle in tort. So how do you explain that if you're right about what's likely to happen in this situation? . . . this is the problem that we're creating here, that we have half of it inside the bankruptcy, that's Purdue, and we have half of it outside the bankruptcy, that's the Sacklers. . . . And what's troubling me is the sort of shifting between those two as we think about what's going to happen. You say in a suit against the Sacklers, if this gets blown up and people are suing the Sacklers as soon as one victim gets money, then it's wiped out for everybody else. . . . But I don't understand why that's so, because the Sacklers would not be in bankruptcy unless they file for bankruptcy at that point. Is that where your hypothetical is going? . . . I mean, they have at least $11 billion or something. And so why would it be, unless a particular claimant gets that amount of money, there wouldn't be anything left for anyone else in suits against them? . . . But are we looking at what is collectible or not through the lens of bankruptcy? And they're not in bankruptcy, so I don't understand how we know. [at 113, 114, 115, 116]

New York Times

Supreme Court Appears Split Over Opioid Settlement for Purdue Pharma

The justices' questions reflected the tension between the practical effect of unraveling the settlement and broader concerns about whether the Sacklers should be granted such wide-ranging immunity.

Demonstrators outside the Supreme Court on Monday. In agreeing to take the case, the court temporarily halted the deal.Credit...Julia Nikhinson for The New York Times

By Abbie VanSickle

Dec. 4, 2023

The Supreme Court justices seemed divided on Monday over a fiercely contested bankruptcy settlement for Purdue Pharma that would funnel billions of dollars into addressing the opioid epidemic in exchange for shielding members of the wealthy Sackler family from related civil lawsuits.

The U.S. Trustee Program, an office in the Justice Department, had challenged the deal for Purdue, the maker of the prescription painkiller OxyContin. It said the agreement violated federal law by guaranteeing such wide-ranging legal immunity for the Sacklers, who once controlled the company, even though they themselves had not declared bankruptcy.

Questions from the justices reflected why the deal has drawn intense criticism in a dispute that pits money against principle. Under debate was the practical effect of unraveling the agreement, painstakingly negotiated for years for victims and families who have urgently sought settlement funds, and broader concerns over whether releasing the Sacklers from liability would free them from further scrutiny over their role in the opioid crisis.

WHAT TO KNOW

Here is what is at stake and what an outcome in the case would mean for the settlement with Purdue Pharma over the opioid crisis.

A decision in the case could also have consequences for similar agreements resolved through the bankruptcy system that have been structured to insulate a third party from liability.

“The opioid victims and their families overwhelmingly approve this plan because they think it will ensure prompt payment,” Justice Brett M. Kavanaugh said. He asked why the government was pushing to end a tactic approved over “30 years of bankruptcy court practice.”

The lawyer for the government, Curtis E. Gannon, acknowledged that tension, but he argued that the U.S. trustee “has been given this watchdog role” and that a ruling for the government would not foreclose an opioid deal with the Sacklers. He noted that after a federal judge rejected the deal, the Sacklers increased their cash offer, to $6 billion from roughly $4 billion, to settle thousands of claims.

Justice Amy Coney Barrett raised what a victory for the U.S. trustee would mean “for other victims of mass torts,” including plaintiffs who have accused the Boy Scouts of America and the Catholic Church of sexual abuse. Those settlements have included similar releases of liability, known as nonconsensual third-party releases.

Mr. Gannon responded that Congress could pass legislation that specified how such deals could work. It was not the government’s role, he said, to speak for victims but rather to be “concerned about the entire process.”

Inside the crowded courtroom, the justices appeared deeply engaged, leaning forward periodically during two hours of argument.

Their questions did not appear to line up along ideological lines, signaling the decision could be closely divided.

Justice Ketanji Brown Jackson seemed skeptical that releases of liability were the only way to compensate opioid victims, asking why the agreement needed to be reached through bankruptcy court.

A lawyer for victims’ groups, Pratik A. Shah, insisted that the releases were critical to the deal. Otherwise, he said, members of the Sackler family would not sign on to an agreement, which risked leaving victims with nothing.

> “Without the release, the plan will unravel,” he said. “There will be no viable path to any victim recovery.”

“Well, that sounded very emphatic,” Justice Elena Kagan replied, to laughter.

Justice Kagan appeared to be puzzling through her views from the bench. She seemed doubtful of the U.S. trustee’s position and asked whether the government was standing in the way of an agreement that had the overwhelming approval of victims. They are among those “who think that the Sacklers are pretty much the worst people on Earth,” she added.

But she later pointedly asked whether such deals subverted the bankruptcy process: Did the settlement allow wealthy people like the Sacklers to shield themselves from lawsuits,

including claims of fraud, without putting "anything near their entire pot of assets on the table?"

"In some ways, they're getting a better deal than the usual bankruptcy discharge," Justice Kagan said, because "they're being protected from claims of fraud and claims of willful misconduct."

Justice Jackson seemed to share those concerns. She described frustrations voiced by the original bankruptcy judge that the Sacklers had moved money out of Purdue into offshore accounts. The Sacklers "took the assets from the company, which started the set of circumstances in which the company now doesn't have enough money to pay the creditors," she said.

Outside the courtroom, dozens of demonstrators called on the justices to overturn the bankruptcy deal, saying that they believed it did little for families of victims and failed to hold the Sacklers to account.

Many wore red T-shirts that read "Sackler v. the people" under an image of the Supreme Court and brandished signs with photos of family members who had died from drug overdoses.

"I don't want their money," said Ralph DeRigo, who said one of his sons had died of an opioid overdose in 2014 and another had struggled with addiction. "They should lose it or, at least, every bit that they made on OxyContin."

He added that he did not believe a cash settlement would bring justice: "I think they should be in jail."

A decision could come as late as June, near the end of the court's term.

In recent years, bankruptcy court has become a popular place to deal with mass-injury settlements.

In agreeing to take the case, Harrington v. Purdue Pharma, No. 23-124, the Supreme Court temporarily halted the deal, most likely suspending payments to plaintiffs until it issues a ruling.

The U.S. trustee had asked the court to intervene after an appeals court upheld the settlement. The agreement allowed the Sacklers to take advantage of protections meant for those in "financial distress," the government said, offering "a road map for wealthy corporations and individuals to misuse the bankruptcy system."

Lawyers for Purdue said in court filings that the plan would "provide billions of dollars and lifesaving benefits to the victims of the opioid crisis." Striking down the deal, they added, would jeopardize that. The suggestion that the plan laid out a strategy for the rich seeking to avoid accountability was "unfounded," they added.

Purdue, which is widely viewed as helping to spark the opioid crisis, has faced a flood of challenges since OxyContin's addictive qualities and potential for abuse became clear.

The company continued to aggressively push the painkiller regardless. In 2007, a holding company for Purdue pleaded guilty to a felony charge of "misbranding" the drug, including its risk of addiction, and agreed to pay some $600 million in fines and other fees.

As the number of overdose deaths soared, municipalities, tribes, families and others sought funding to address the ravages of the drugs. Many pinned much of the blame on OxyContin.

Purdue filed for bankruptcy protection in September 2019 as civil lawsuits against the company and, increasingly, the Sacklers themselves mounted.

Under a restructuring plan, filed in March 2021, the company would dissolve and become a public benefit company focused on trying to counter the opioid epidemic. In turn, members of the Sackler family would pour billions from their personal fortune into aiding states, municipalities, tribes and others in fighting a public health crisis that has left hundreds of thousands of people dead. More than 90 percent of the plaintiffs who voted on the plan approved it.

> That September, Judge Robert Drain of the U.S. Bankruptcy Court in White Plains, N.Y., approved the plan. The U.S. Trustee Program was among those that appealed the decision.

Los Angeles Times

Supreme Court leans in favor of Purdue Pharma deal with $6 billion from Sacklers

David G. Savage
December 4, 2023·

The Supreme Court justices sounded Monday as if they will uphold a huge bankruptcy deal that includes $6 billion from the Sackler family to help the nation and tens of thousands of victims recover from the opioid crisis.

Most of the justices said the deal looked to be the best possible outcome, even though it gave the Sacklers a shield from future lawsuits.

Most of their questions were critical of the Biden administration's claim that the deal should not go forward because the Sacklers are not bankrupt.

Tens of thousands of families directly affected by OxyContin "overwhelmingly approve of this settlement," Justice Brett M. Kavanaugh told a Justice Department lawyer. "The federal government, with no stake in this at all, is telling the families we will not give you a prompt payment and to allow this money to go to the states for programs to prevent future overdoses and future victims. And all in exchange for this somewhat theoretical idea that they'll be able to recover money down the road from the Sacklers themselves."

Justice Elena Kagan agreed.

"It's overwhelming, the support for this deal, and among people who have no love for the Sacklers. Your position rests on a lot of highfalutin principles of bankruptcy law ... that you can come in here and blow up the deal," she told Deputy Solicitor Gen. Curtis Gannon. "The federal government is standing in the way against a huge, huge majority of claimants who have decided that if this provision goes under, they're going to end up with nothing."

State attorneys from all 50 states agreed to the deal on the grounds it would provide money for addiction treatment programs. If finally approved, the deal includes smaller payments for the tens of thousands of victims of the opioid crisis. About 97% of the individuals claimants who cast votes said they approved the deal.

But the Justice Department raised a last-minute objection and argued that wealthy people like the Sacklers should not be allowed to use the bankruptcy system to shield themselves from future lawsuits. While their company Purdue Pharma has filed for bankruptcy, the same is not true for the members of the Sackler family.

They originally offered about $4 billion to settle all the claims and later raised the total to $6 billion.

Justice Samuel A. Alito Jr. said it may not be realistic to obtain more. Their assets may not be "reachable," he said, because they are held outside the United States.

The Purdue Pharma case highlighted the difficulty of resolving "mass torts," when hundreds or thousands of lawsuits are filed over a dangerous and defective product or a pattern of misconduct, such as sexual abuse in the Catholic Church or the Boy Scouts of America. In recent years, bankruptcy courts have taken on the task of devising settlements that seek to fairly compensate the victims.

But appeals courts have split over whether the law authorizes a bankruptcy judge to shield one of the parties from future liability in exchange for funding the settlement.

In July, U.S. Solicitor Gen. Elizabeth Prelogar urged the Supreme Court to block the pending settlement of the Purdue Pharma bankruptcy because it shielded the Sacklers from future liability. She said members of the Sackler family "withdrew approximately $11 billion from Purdue in the 11 years before the company filed for bankruptcy," and she argued that it was "an abuse of the bankruptcy system" to shield them from further lawsuits.

The justices agreed to temporarily block the settlement and to hear arguments on the legal issue.

It made for an usual bankruptcy argument since the lawyers for the debtors and the creditors — Purdue Pharma and the victims of the opioid epidemic—were on the same side. Both urged the justices to uphold the deal as the best possible under the circumstances.

Not all the justices were in agreement, however. Justices Neil M. Gorsuch and Ketanji Brown Jackson focused on the bankruptcy law and questioned how it can be extended to people who are not bankrupt.

"It would raise serious due process claims," Gorsuch said, to tell victims of OxyContin that they may not sue the Sacklers for the damage done by the opioids that were aggressively marketed by Purdue Pharma.

The Economist

Dec 5th 2023 | NEW YORK

Some cases that reach the Supreme Court thrust the nine justices into an uncomfortable role. *Harrington v Purdue Pharma* seems to be one of those disputes. It centres on the $6bn bankruptcy settlement agreed upon by Purdue, the company that precipitated America's opioid crisis. It may turn less on interpretations of law and precedent than on considered judgments of what is fair.

The case's oral arguments were presented on December 4th. One thing seems clear: the justices want to do right by the victims of the opioid epidemic. They have little sympathy for the Sacklers, the family who owned Purdue when it launched OxyContin in 1996 and profited immensely from the painkiller—despite evidence that it was highly addictive and

destroying lives. When lawsuits started piling up, the Sacklers drained about $11bn in profits out of the company, with around half going to the tax collector. In 2019 a denuded Purdue worth an estimated $1.8bn declared bankruptcy.

The Supreme Court's task is to decide whether the bankruptcy agreement—which was voided by a district court before being revived by the Second Circuit Court of Appeals—should stand. According to the plan, the Sacklers would put $6bn (97% of their profits, after taxes) into an estate to be divided among states, victims and others in return for immunity from further civil lawsuits, including claims of fraud.

Nearly 96% of the 138,000 plaintiffs who voted on the settlement opted for the deal. However, thousands rejected it and tens of thousands did not vote at all. According to Curtis Gannon, the deputy solicitor-general arguing on behalf of the us Trustee Programme (a division of the Department of Justice), which objected to the arrangement, releasing the Sacklers from all future civil lawsuits "extinguishes personal property rights" of the holdouts and "raises significant constitutional questions".

Whether the dissenters should be free to sue the Sacklers on their own was the central question of the hearing. Chief Justice John Roberts asked Mr Gannon if it is consequential enough to trigger the court's new "major-questions doctrine", which requires Congress to clearly authorise an agency's policies with big political or economic implications. Justice Elena Kagan asked if Mr Gannon would be making the same argument with a still smaller pool of objectors—0.1%, say, or even "one-nutcase holdout". Support for the deal is "overwhelming", she pointed out, even "among people who think that the Sacklers are pretty much the worst people on Earth". The vast majority have "negotiated a deal which they think is the best that they can get".

Mr Gannon, in reply, noted that the Sacklers characterised their first offer of $4.2bn as the "best possible deal" before somehow coming up with nearly $2bn more. He suggested a still larger pot might be available if the Supreme Court scuttled this deal and sent the parties back to the drawing board.

That argument does not convince the claimants who want the deal to move forward. Their lawyer argued that without the release for the Sacklers, Purdue is likely to be liquidated, potentially leaving victims bereft of any compensation at all. With no bankruptcy settlement, he said, it would only take one plaintiff to "jump the line", and hit "the jackpot" of a huge judgment from the Sacklers, to "wipe it out for everyone else".

Purdue, for its part, is banking on a catch-all line in the bankruptcy code that it reckons authorises the deal: a settlement may include any "appropriate provision not inconsistent with the applicable provisions of this title". As statutes go, these 11 words are a rather thin reed for the justices to grasp as they decide whether to rip up the deal or let it go into effect. Determining what counts as "appropriate" is not a matter of precision. It might come down to a question Justice Amy Coney Barrett identified as the justices' main worry: "is this the best that we can do for the victims?

Bloomberg Bankruptcy Law

Nov. 29, 2023, 5:02 AM EST

Bankruptcy Court Had No Article III Authority To Enter Final Judgment On Non-Core Claims

Major modern cases have beat back bankruptcy courts' power
Purdue seeks to get Sackler liability releases approved

The US Supreme Court's longstanding skepticism towards bankruptcy courts' authority poses a potentially debilitating obstacle for Purdue Pharma LP in its quest to grant liability releases to its Sackler family owners.

The key question presented in the Purdue case strikes at an issue the Supreme Court has considered multiple times: the extent of a bankruptcy court's power. If the high court takes a narrow view of bankruptcy court authority, as it did in cases such as *Stern v. Marshall* and *Czyzewski v. Jevic Holding Corp.,* it could spell major trouble for a settlement years in the making that stands to deliver billions of dollars to address the opioid crisis.

"Given the court's existing jurisprudence, I would be personally shocked if they find there is statutory power for what the bankruptcy court approved in the Purdue case," said University of Illinois College of Law bankruptcy professor Ralph Brubaker, who filed an amicus brief against Purdue in the case.

At stake in the case is whether non-bankrupt people and entities with ties to a corporate debtor can be released from liability without the consent of creditors. The Supreme Court's ultimate decision could upend corporate bankruptcy practice, as the releases are a central bargaining chip in .

The Sacklers' proposed releases, which would shield them against litigation accusing them of helping fuel the opioid crisis through their leadership of Purdue, were approved by a bankruptcy court in 2021 and upheld by the US Court of Appeals for the Second Circuit earlier this year.

But the Justice Department and some bankruptcy experts say the bankruptcy court didn't have theauthority to grant the releases in the first place. A federal district court judge rejected the releases before being overturned by the Second Circuit.

The Justice Department has also raised constitutional questions and said the supposed necessity of the releases doesn't make them legal. Purdue and most of its creditors have pushed back. In the pharma company's defense, it points to the same 1990 Supreme Court decision, *United States v. Energy Resources Co.,* the Second Circuit cited when it upheld the Sacklers' releases, which it says gives bankruptcy judges more leeway.

The Supreme Court will hear oral arguments on the Purdue case on Dec. 4.
"This is the most important bankruptcy case to be taken by the Supreme Court in decades," PamelaFoohey, a bankruptcy law professor at Cardozo School of Law, said in an email.

Overly Pragmatic?
In *Jevic*, the Supreme Court held that bankruptcy courts can't approve agreements that wander too farastray from the bankruptcy code. In the 2017 case, the high court determined that bankruptcy courts don't have authority to sign off on agreements that change the creditor priority structure of the bankruptcy code without the consent of affected creditors.

"What the court is very careful about is letting judges get outside the parameters of the code," said DavidK uney, a former Sidley Austin restructuring partner who now has an appellate practice focusing on bankruptcy. "They're very worried that judges will be pragmatic," as opposed to sticking to the law, headed.

Bankruptcy court can became a high stakes game of "Let's Make a Deal," where judges are eager approve any deal debtors and creditors come up with in pursuit of a bankruptcy exit, he said. "You can't say that the law goes to the highest bidder. There's got to be a long-term principal that carries forward," Kuney, who is also an adjunct professor at Georgetown Law, added. But the high court's devotion to the bankruptcy code is also a product of the lack of restructuring expertise on the panel, Kuney said.

"The Supreme Court wants to be careful," he said. "They don't understand all the dynamics of bankruptcylaw and they're a little afraid of wrecking things, so they want to stay within the code."

Another key decision, *Stern*, came in 2011 when the Supreme Court found that Congress impermissibly gave bankruptcy courts powers that belong only to courts that were established by the Constitution. The case involved the estates of former Playboy Playmate Anna Nicole Smith and her husband, oil magnate J. Howard Marshall, both of whom were deceased when the ruling was handed down.

Stern serves as a reminder that even when bankruptcy courts find authority in the bankruptcy code, they face further restraints because they weren't created by the Constitution.

"That's a type of reining-in powers," Georgetown University bankruptcy law professor Adam Levitin said. *Stern* is "consistent with this theme that there are hard limits on what the bankruptcy judges can do, not only in the statue but in the Constitution," Brubaker said.

Appellate Review

A Supreme Court case last year hinted at a continued pattern of diminishing bankruptcy courts' authority. In *MOAC Mall Holdings LLC v. Transform Holdco LLC*, the Supreme Court unanimously held that district courts have jurisdiction to review certain sales approved by a bankruptcy court. In doing so, the court checked the finality of bankruptcy court approvals and left open the possibility of appellate review.

The case centered on who owned a $10-a-year lease for what used to be a three-story flagship Sears storein the Mall of America: the mall itself, or the company that purchased Sears when it went bankrupt. After a bankruptcy court ruled in its favor, Transform Holdco, which bought the iconic chain out of bankruptcy, argued Section 363(m) of the bankruptcy code deprived appellate courts from challenging the lease transfer. The high court rejected that argument, finding that appellate courts have jurisdiction to review certainbankruptcy sales.

"It's a way of trimming back bankruptcy court authority," Levitin said. But recent cases don't necessarily offer clear guidance on what the court will do with Purdue, Foohey said. "It's hard to glean from prior recent cases what it may do with the issue in Purdue or how it may approachthe Purdue case," Foohey said in an email.

Implicit Powers

Purdue argues the bankruptcy code allows for the releases it seeks for the Sacklers. It points to a SupremeCourt case that the Second Circuit relied on when it backed Purdue's plan earlier this year. The high court's 1990 decision in *United States v. Energy Resources Co.* focused on part of a bankruptcy planthat required the Internal Revenue Service to apply tax payments to offset some of a debtor's taxobligations—something not explicitly authorized in the bankruptcy code.

But the Supreme Court's opinion quoted part of the bankruptcy code that gives courts the power toapprove plans, including "any other appropriate provision not inconsistent with the applicable provisionsof this title." The Supreme Court said that amounts to "residual authority to approve reorganizationplans."

"These statutory directives are consistent with the traditional understanding that bankruptcy courts, ascourts of equity, have broad authority to modify creditor-debtor relationships," the court said at the time.

But Brubaker and other bankruptcy professors say Purdue is reading too much into that 1990 decision.*Energy Resources* upheld a bankruptcy court's power to compel the IRS to treat tax liabilities in a way thatwas necessary for plan approval. That actually indicates that the Purdue liability releases are improper,according to the professors' amicus brief.

Purdue's reading of the *Energy Resources* case seeks to turn it "into a vast reservoir of extraordinary andunlimited *implicit* equitable *powers*, untethered to any explicit statutory authority," the brief says.

The dissonance between the two interpretations of the 1990 case points to a broader disagreement.

"In general there's a disconnect between how the Supreme Court views things, which is you have to stickto the statute, and bankruptcy courts, which is the statute is a starting point," Levitin said.

The case is William K. Harrington v. Purdue Pharma LP, U.S., No. 23-124, 12/4/23.

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