

Bankruptcy & Restructuring Department

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Purdue Pharma: Supreme Court Prohibits Non-Consensual Third-Party Releases; Ruling Will Reshape Bankruptcy Practice

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In a landmark 5-4 decision in *Harrington v. Purdue Pharma* that will significantly reshape corporate bankruptcy practice, the U.S. Supreme Court resolved a circuit split regarding the authority of a bankruptcy court to approve releases in favor of non-debtor entities without the consent of impacted third parties. Reversing the decision of the Second Circuit, the Supreme Court's narrow majority held that such non-consensual releases—other than in the context of asbestos-related claims—are not authorized under the Bankruptcy Code.

Holding, Background, and Procedural History

The Bankruptcy Code does authorize non-debtor third-party releases in one specific context: “cases involving mass harm caused by the presence of, or exposure to, asbestos or asbestos-containing products” under section 524(g) of the Bankruptcy Code. The Supreme Court inferred that non-consensual third-party releases are prohibited in non-asbestos contexts given the absence of express statutory authority.

Some lower courts—including the U.S. Courts of Appeal for the Second Circuit (which includes lower courts in New York) and Third Circuit (which includes lower courts in Delaware and New Jersey)—previously authorized non-consensual third-party releases in certain extenuating circumstances (such as mass tort cases involving sexual abuse, opioid, or other product liability claims). Those courts found that it was permissible under the Bankruptcy Code to approve the non-consensual release of third-party claims against non-debtors and thereby prevent such third parties from pursuing direct actions against any released party under a Chapter 11 bankruptcy plan.

However, other lower courts, including the U.S. Courts of Appeal for the Fifth Circuit (which includes lower courts in Texas) and Ninth Circuit (which includes lower courts in California), prohibited non-consensual releases of third-party claims against non-debtors. In such circuits, courts have approved of so-called “gatekeeping” provisions to prevent claims from being asserted against critical plan-protected parties unless the Bankruptcy Court first finds that such claims are colorable and/or not otherwise permissibly released under a confirmed plan.

Beginning in 2007, Purdue Pharma (the maker of OxyContin, an opioid prescription pain reliever) and its owners, the Sackler family, were sued in thousands of lawsuits related to their role in the opioid crisis. In 2019, facing a continued barrage of lawsuits, Purdue Pharma filed for bankruptcy and ultimately proposed a Chapter 11 plan of reorganization, the centerpiece of which was a contribution of approximately \$6 billion from the Sacklers to the Purdue Pharma bankruptcy estate in exchange for the release of all opioid-related claims against the Sacklers. The United States Bankruptcy Court for the Southern District of New York confirmed the Plan, the District Court reversed, and the Second Circuit reinstated the Bankruptcy Court's decision approving the non-consensual third-party releases.

On appeal, the Supreme Court disagreed, and a slim majority reversed the Second Circuit. The Court explained that nothing in the Bankruptcy Code authorizes the non-consensual release of third-party claims against non-debtors outside of an asbestos context. When a company files for bankruptcy, it can obtain approval of a plan that discharges claims against the debtor. However, for parties like the owners of a debtor that have not themselves filed for bankruptcy relief, nothing in the Bankruptcy Code authorizes non-consensual releases for the benefit of such parties with that one important asbestos exception.

The Supreme Court explained that while section 1123(b)(6) allows a bankruptcy plan to include appropriate provisions not inconsistent with the Bankruptcy Code, this provision cannot be read to give a bankruptcy court the power to release the claims of a non-debtor against a non-debtor without the consent of the affected claimants. However, in asbestos-related bankruptcies, section 524(g) of the Bankruptcy Code authorizes the release of third-party claims against other non-debtors, even without consent, assuming certain requirements are met. While the dissent in *Purdue Pharma* argued that, historically, such non-consensual releases were approved by courts prior to the enactment of section 524(g), the majority rejected this approach. The majority explained that Congress may make future policy judgments about non-consensual releases in other non-asbestos mass tort bankruptcies, but that is a decision for Congress, and not the courts to make.

The Supreme Court's majority (a) further clarified that its decision does not prohibit "consensual" third-party releases, and (b) confirmed that a debtor is free to release its own claims, including so-called estate "derivative" claims. However, the Supreme Court expressly declined to rule on:

1. The impact of its decision on cases where plans containing non-consensual third-party releases have already been confirmed and substantially consummated;
2. What qualifies as a "consensual" third-party release; or
3. The permissibility of non-consensual third-party releases where the released claims are satisfied in full under the plan.

Analysis and Conclusion

The immediate impact of the *Purdue Pharma* decision will be most acutely felt in the non-asbestos mass tort bankruptcy context, where some courts previously confirmed plans releasing non-debtor third parties without the consent of impacted claimants. Such plans are no longer permissible.

Also significant, but left unresolved and sure to continue to be litigated in many corporate bankruptcy cases in the future, is: (a) what constitutes "consent" with respect to third-party releases (i.e., does consent to the release require an affirmative act on the part of the claimant, or is the failure to object or take any other action enough to infer consent to a release?); (b) the impact of this decision on bankruptcy plans previously approved; and (c) whether non-consensual releases can be approved where the claims of the impacted third parties are fully satisfied under the plan.

While the Supreme Court's decision in *Purdue Pharma* is impactful, it may be equally important with respect to the issues that remain unresolved.

If you are interested in exploring this issue further, please reach out to one of the attorneys in the [Bankruptcy & Restructuring Department](#).