The Purdue Papers: The Petitioner's Perspective on Why Third-Party Releases Are Not Permitted

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

On Sept. 20, 2023, the U.S. Solicitor General, counsel for the petitioner, filed its opening brief in the U.S. Supreme Court in *William K. Harrington, U.S. Trustee, Region 2 v. Purdue Pharma L.P,. et al.*[2] The brief addresses what District Court Judge McMahon called the "the great unsettled question" of bankruptcy law today: whether a bankruptcy court can approve nonconsensual third-party releases.[3] The other appellants filed their briefs the same day. The respondents' briefs are due shortly.[4] On Oct. 11, 2023, the U.S. Supreme Court announced that oral argument in *Purdue* will be heard on Dec. 4, 2023.

This "great unsettled question" generated the filing of *amicus* briefs on behalf of, or authored by, many of the leading academic commentators on U.S. bankruptcy law, including the following:

> Martin J. Bienenstock, Susan Block-Lieb, Ralph Brubaker, Laura Coordes, Diane Lourdes Dick, Pamela Foohey, Sara Greene, Edward Janger, George Kuney, Adam J. Levitin, Angela Littwins, Jonathan Lipson, Stephen Lubben, Bruce Markell, Nathalie Martin, Megan McDermott, Juliette Moringiello, Christopher Odinet, Chrystin Ondersman, Lawrence Ponoroff and Eugene Wedoff.

The *Purdue* briefs analyze some of the most important questions of modern bankruptcy law, including the constitutional limits on the Bankruptcy Power under the U.S. Const., art. I, § 8, cl. 4; the scope of implied powers under 11 U.S.C. § 105(a); the correct mode of statutory interpretation, including the role of "originalism"; the import of federal common law under *Erie R.R. Co. v. Tompkins*, 304 U.S. 54 (1938), *and Butner v. United States*, 440 U.S. 48 (1979); and bankruptcy abuses and "grifting," including venue-shopping, judge-picking and the "Texas Two-Step." *Purdue* should not be misunderstood as just another statutory bankruptcy case for the Court. It may well be one of the defining moments of bankruptcy law, as it is likely to alter the course of bankruptcy law and practice for many years. Indeed, it has been suggested that *Purdue* may well be the most important bankruptcy decision since *Stern v. Marshall*, 564 U.S. 462 (2011).

---

[1] David R. Kuney is an adjunct professor of law at Georgetown University Law Center. He teaches the Bankruptcy Advocacy Practicum, in which law students write and submit an *amicus* brief in a pending case before the U.S. Supreme Court or a court of appeals. He is counsel of record to Hon. Eugene Wedoff (ret.) and Profs. Sara Greene, George Kuney, Stephen Lubben and Lawrence Ponoroff, who filed an *amicus* brief in *Purdue*. The views in this article are those solely of the author and do not reflect the views of Georgetown University Law Center. Please see his website at https://www.bankruptcyadvocacy.net for the *Purdue* brief, as well as his prior briefs.

[2] Brief for the Petitioner in *William K. Harrington, U.S. Trustee, Region 2 v. Purdue Pharma, L.P.*, S. Ct. Case No. 23-124 (hereafter *Purdue*).

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

[4] Briefs in support of the respondent are due Oct. 20, 2023, and *amicus* briefs in support of the respondent are due Oct. 27, 2023.

Purdue could require the Supreme Court to confront the barrage of academic criticism of both third-party releases and other forms of "abuse" within some of the larger bankruptcy cases. Respected academic writers view third-party releases as part of a trend toward lawlessness in bankruptcy jurisprudence.[5] Prof. Ralph Brubaker writes that "[n]ondebtor releases are an illegitimate and unconstitutional exercise of substantive lawmaking powers by the federal courts."[6] In addition, commentators have written that third-party releases have led to substantial abuses within the bankruptcy system, and that they permit a distortion of bankruptcy law that is wholly outside the carefully articulated congressional scheme found in Title 11.[7]

The Supreme Court may take note of these larger issues. Conversely, the Court could limit its decision to a strict statutory analysis, not unlike what it did in *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639 (2012). But the turmoil behind the briefs is large and cannot go unnoted. And regardless of what decision the Court renders, these issues are likely to linger for many years. Regardless of one's views on how *Purdue* should be decided, this collection of briefs — what we are calling the "Purdue Papers" — is a valuable collection of the systemic issues that confront bankruptcy law today and provides key insights into the meaning of the decision by the Supreme Court.

The Statutory Argument

Despite the underlying complex issues, it is possible that *Purdue* will be resolved by resorting to fundamental statutory construction, and that many of the larger constitutional issues will have to wait for another day. Indeed, the Second Circuit panel in *Purdue* stated that the statutory issue was the "primary issue in this appeal."[8]

The narrowest statutory argument is that § 524 by itself is sufficient to resolve the question presented. This straightforward analysis says that § 524 describes the effect of a discharge on the liability *"of the debtor,"* and § 524(a)(2) operates as an injunction against any effort to recover a personal liability *of the debtor*. Further § 524(e) states that a discharge of a debtor does not affect the liability of any other entity on or for such debt. This was one of the principal arguments put forth in the *amicus* brief of Nexpoint Advisors, L.P. and Nexpoint Asset Management, L.P.[9]

Many of the briefs that focused primarily on statutory construction argued that the issue of third-party releases could be resolved by referencing the scope of a bankruptcy court's residual powers under Code §§ 105(a) and 1123(b)(6). These briefs highlighted that the Second Circuit had acknowledged that § 105(a) standing by itself was *not sufficient* to justify the authorization of nonconsensual third-party releases.[10] That means, in short, that the decision will rise or fall on the meaning of 11 U.S.C. § 1123(b)(6), which states, in straightforward language, that a plan of

---

[5] "The perpetrators of lawless Chapter 11s use an array of legal devices to insulate themselves against liability for their wrongdoing [including third-party releases]." *See* Lynn LoPucki, *Chapter 11's Descent into Lawlessness,* 96 AM. BANK. L. J. 247 (2022).

[6] Ralph Brubaker, *Mandatory Aggregation of Mass Tort Liability in Bankruptcy*, 131 YALE L. J. F. 960, 960 (2022).

[7] *See, e.g.,* Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L. J. 1062 (2022) (third-party releases have led to abuse by "grifters").

[8] *In re Purdue Pharma, L.P.,* 69 F.4th 45, 66 (2023).

[9] *See* Brief for *amici curiae* Nexpoint Advisors, L.P. and Nexpoint Asset Management, L.P. in Support of Petitioner.

[10] *Purdue,* 69 F.4th at 73.

reorganization may contain "any other appropriate provision not inconsistent with the applicable provisions of this title."

The dispositive issue then becomes this: Is a nonconsensual third-party release inconsistent with the other applicable provisions of Title 11?

The Second Circuit panel concluded that "§ 1123(b)(6) is limited only by what the Code expressly forbids, not what the Code explicitly allows."[11] The U.S. Trustee disagreed and argued that "a general authorization to approve appropriate provision[s]" cannot swallow the Code's "more limited, specific authorization[s]," citing *RadLAX Gateway Hotel LLC v. Amalgamated Bank,* 566 U.S. 539, 645 (2012). Second, this brief argued that a catchall provision cannot be read as granting a power of a fundamentally different character from the preceding enumerated examples of what is authorized.[12]

The *amicus* brief of Judge Wedoff (ret.) and a group of law professors also focused on the meaning of § 1123(b)(6) as the dispositive issue.[13] This brief argued that the key phrase concerns the understanding of what is a provision that is "inconsistent with the applicable sections of this title." Here the argument was that granting a release was the functional equivalent of a "discharge," and that the Code's statutory scheme permits a debtor to obtain a discharge *only* when there is first a faithful and lawful compliance with other statutory requirements that pertain to disclosure, distribution and discharge. Not the least of these is the obligation of a debtor to make its non-exempt assets available for distribution to creditors. But in *Purdue*, the Sacklers neither disclosed all their assets, nor made all their assets available for distribution. In short, the granting of a discharge to a party that fails to comply with the statutory scheme is a wholesale abandonment of the "applicable provisions of this title" and hence cannot be permitted.

Underlying this statutory debate is the larger issue of the role of statutory construction. A recent law review article by Prof. Jonathan Seymour, who appeared at ABI's Bankruptcy 2023: Views from the Bench, notes that the Court's recent history shows a firm inclination to apply traditional rules of statutory construction, and an inclination *not* to invest the bankruptcy court with "exceptional" and discretionary powers to shape the law. The Court's more recent decisions on bankruptcy law have repeatedly emphasized that the touchstone for its decisions is statutory compliance with the Bankruptcy Code, and that "equitable" considerations cannot substitute for compliance with the Code.[14]

Bankruptcy and Originalism

Prof. Adam Levitin argued in his *amicus* brief that the Court's recent cases "teach that the Constitution's Bankruptcy Clause "should be determined with reference to its original meaning."[15]

---

[11] *Purdue,* 69 F.4th at 106.

[12] Petition at 12.

[13] *Amici Curiae* Brief of the Honorable Eugene Wedoff (ret.) and Law Professors Sara Greene, George Kuney, Stephen Lubben and Lawrence Ponoroff in Support of Petitioner.

[14] Jonathan M. Seymour, *Against Bankruptcy Exceptionalism,* 89 UNIV. CHI. L. REV. 1925, 1934 (2022), challenging the notion that bankruptcy courts can rely on notions of equity to depart from standard rules of statutory construction. Prof. Seymour cites *Taggart v. Lorenzen,* 139 S. Ct. 1795 (2019); *City of Chicago v. Fulton,* 141 S. Ct. 585 (2021); *Baker Botts LLP v. ASARCO LLC,* 135 S. Ct. 2158 (2015); and *RadLAX Gateway Hotel v. Amalgamated Bank,* 566 U.S. 639 (2012), as reflecting the Court's strong inclination to rely only on "well established canon[s] of statutory interpretation."

[15] Brief of Adam J. Levitin as *Amicus Curiae* in Support of Petitioner, p.4.

He writes that without this limitation, the subject of bankruptcies "could be read so expansively as to devour almost all topics that might affect a debtor."[16] He argues that an original understanding of the Bankruptcy Clause precludes nonconsensual releases, because "the idea of such a release was entirely unknown in American bankruptcy."[17]

Arguments Based on *Erie v. Tompkins* and *Butner*

An *amicus* brief on behalf of Profs. Ralph Brubaker, Bruce Markell and Jonathan Seymour is noteworthy, in part because Prof. Brubaker is one of the most prolific writers on the issue of third-party releases.[18] He has long argued that "[c]ourts' approval of nondebtor discharge contravenes the separation-of-powers limitation embedded in the Constitution's Bankruptcy Clause, which gives Congress the exclusive power to authorize discharge of indebtedness." But more broadly, his brief argues that "permitting the practice of [nonconsensual third-party releases] is also an unconstitutional exercise of substantive federal common lawmaking, in violation of the federalism and separation-of-powers constraints established by *Erie R.R. Co. v Tompkins,* 304 U.S. 64 (1938)."[19]

This argument has broader application and, if accepted by the Supreme Court, might well constrain a host of decisions by bankruptcy judges that are arguably "federal common lawmaking." The argument is as follows: Nonconsensual third-party releases extinguish claims "in precisely the same way that a bankruptcy discharge extinguishes a bankruptcy debtor's debts." But *only* Congress has the exclusive power to authorize a discharge of debt and to prescribe the circumstances under which a discharge is appropriate — *not* the courts. Thus, when the courts create a paradigm of factors that supposedly permit a third-party release, they are contravening the separation-of-powers limitations of the Bankruptcy Clause and engaging in an unconstitutional exercise of substantive federal common lawmaking, in violation of *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), and principles of federalism.

Constitutional Avoidance Canon

The *amicus* brief filed by Martin J. Bienenstock and Daniel S. Desatnik was "devoted to explaining how the constitutional avoidance canon clinches the answer by corroborating the most plausible interpretation of the Bankruptcy Code, namely, that it [the Code] does not authorize coerced releases."[20] Their brief focuses on the constitutional infirmities by focusing on "the rights the coerced releases take away [from claimants] (the "Lost Rights")."[21] The Lost Rights include the right to sue the released party for money damages, the loss of the right to a judgment determined by the common law, the loss of the right to enforce the judgment against the released party, the loss of the right to discover the released parties' assets in enforcement proceedings, the loss of the judicial branch's right and power to determine creditors' common law claims against the released party and to determine the common law remedies, and the loss of the right to a jury

[16] *Id.*

[17] *Id.*

[18] Brief for *Amici Curiae* Bankruptcy Law Professors Ralph Brubaker, Bruce A. Markell, and Jonathan M. Seymour in Support of Petitioner.

[19] *Id.* at 3

[20] Amici Curiae Brief of Martin J. Bienenstock and Daniel S. Desatnik in Support of Petitioner, at 4.

[21] *Id.* at 6.

trial.[22] Many of these Lost Rights involve the "fundamental right to sue," and the Constitution's Privileges and Immunity clause expressly grants citizens of every state the privileges and immunities of the other states, which includes the right to sue in each state's courts.[23]

The "Abuse" Arguments

The *amicus* brief of Profs. Jonathan Lipson and Pamela Foohey (along with other prominent law professors) focuses on the abusive nature of the *Purdue* bankruptcy case.[24] They argue that a release is the functional equivalent of a discharge, and that the discharge has only been available to debtors "not considered abusive."[25] Congress has enumerated the types of debts that are excluded from discharge on grounds of abuse, which include "fraud, willful and malicious injury, and fraudulent transfer." They argue that the beneficiaries of the Sackler releases "stand credibly accused of these and related forms of misconduct. For example, they argue that "there is little question that the Sacklers took billions of dollars out of the Debtors starting shortly after the 2007 criminal plea, some of which would be considered fraudulent transfers. Fraudulent transfers can, in turn, be grounds to deny a discharge."[26]

The *amicus* brief on behalf of the Texas Two-Step victims argues that the Code should not be seen as a way to escape the rigors of the multi-district litigation system that Congress created under 28 U.S.C. § 1407.[27] "While 'the Bankruptcy Code presents an inviting safe harbor for such companies,' its 'lure creates the possibility of abuse which must be guarded against to protect the integrity of the bankruptcy system and the rights of all involved.'"[28] This brief notes that the Texas Two-Step involves a corporation transferring its tort liability. They argue that this abusive tactic is the subject of a brewing fight in the lower courts over injunctions that have blocked thousands of terminally ill asbestos victims, like the *amici* here, from prosecuting their claims against even highly solvent corporations like Johnson & Johnson.[29]

A somewhat unique argument about abuse was found in the style and rhetoric of the brief submitted by Ellen Isaacs (authored by Michael Quinn), who opened with this:

> Twenty years ago, when Richard Sackler was President of Purdue, his friend wrote to him: "I hate to say this, but you could become the Pablo Escobar of the new millennium." Escobar was a billionaire Columbia drug lord and one of the most notorious criminals of the twentieth century. When the Columbian government finally made a show of enforcement against Escobar, the country's judiciary oversaw a special arrangement in which the drug dealer was given his own private prison, specially built on a hill overlooking his hometown. The compound was so opulent that the citizens of Colombia named it *La Caterdral.*

[22] *Id* at 7.

[23] *Id*. at 8.

[24] Brief of *Amici Curiae* Bankruptcy Law Professors in Support of Petitioner.

[25] *Id*. at 2.

[26] *Id*. at 16.

[27] Brief of "Texas Two-Step" Victims as *Amici Curiae* in Support of Petitioner.

[28] *Id*. at 22.

[29] *Id*. at 2.

> Unless the Supreme Court stops it, this bankruptcy will be the Sackler's cathedral.[30]

Briefs Arguing Caution About Overreach

Some of the briefs contained a "caution" asking the Court not to let its ruling embrace certain limited areas where third-party releases or injunctions should be permitted, especially where the releases are consensual or provide for opt-out provisions. One brief asked the Court *not* to limit the power of a court to permit "exculpation" clauses in plans that only involve releases for third parties for their conduct relating to the bankruptcy proceeding and only for claims short of gross negligence or willful misconduct.[31]

An *amicus* brief submitted by the American College of Bankruptcy (lead counsel was Robert M. Loeb) argued that there are three categories of releases that are materially different from those in the *Purdue* case and broadly accepted by the courts. These include consent releases in which the releasor affirmatively consents to the release; core exculpation clauses, which limit potential liability of estate fiduciaries for conduct in connection with a chapter 11 case; and protecting property of the bankruptcy estate, which includes claims that are property of the estate, such as fraudulent transfer claims and claims against insurers for coverage under a policy that is considered an asset of the bankruptcy estate.

What the Court Is Likely to Do

Taken together, the briefing makes a compelling case to predict that the Supreme Court is likely to reverse the Second Circuit. Some well-known academics have predicted a nine-zero outcome in favor of reversal; others have predicted a six-three verdict in favor of affirmance. This author agrees that reversal seems the most likely outcome.

[30] Brief for Ellen Isaacs as Respondent Supporting Petitioner, p. 2.

[31] *See amicus* brief of Nexpoint Advisors, L.P. and Nexpoint Asset Management, L.P. in support of petitioner, noting that there is currently a pending petition for *certiorari* that raises the issue of the permissibility of exculpation clauses, citing *Highland Cap. Mgmt. L.P. v. NexPoint Advisors L.P.,* No. 22-631 (filed Jan. 5, 2023).