AMERICAN BANKRUPTCY INSTITUTE

Midwestern Bankruptcy Institute

Evolution of Third-Party Releases

Hon. Dennis R. Dow (ret.)
Shawnee Mission, Kan.

FRANK KOGER LUNCHEON AND LECTURE

2024

<u>2024 Koger Lecture</u>

A Tribute to Judge Koger and the Evolution of Third-Party Releases from Master Mortgage to Purdue Pharma and the Future

Midwestern Bankruptcy Institute

presented by the
American Bankruptcy Institute
and the
University of Missouri-Kansas City

Hon. Dennis R. Dow (Ret.)
U.S. Bankruptcy Court for the
Western District of Missouri

Michael A. Morris
Law Clerk, *Hon. Brian T. Fenimore*
U.S. Bankruptcy Court for the
Western District of Missouri

I. Introduction

For decades, debtors have used third-party releases as a restructuring tool in chapter 11 cases. In his *Master Mortgage* decision, Judge Frank Koger of the Western District of Missouri created a widely-adopted multifactor approach to analyzing the merits of third-party releases.[1] But after the Supreme Court's *Purdue Pharma*[2] decision, nonconsensual third-party releases are no more. In this lecture, Judge Dennis Dow, will discuss the background of *Master Mortgage* and *Purdue Pharma* as well as what's to come after the Supreme Court's landmark decision.

For our purposes, a third-party release is a chapter 11 plan provision that releases creditors' claims against nondebtors. Similar to the discharge injunction, a third-party release can eliminate future liability for pre-bankruptcy conduct. At issue in *Purdue Pharma* were nonconsensual third-party releases where Purdue's plan released all opioid crisis-related claims against the Sackler family.

For decades, third-party releases were common in chapter 11 cases—though there was a longstanding circuit split over whether bankruptcy courts had the authority to grant nonconsensual third-party releases. Even among the circuits that allowed third-party releases, courts disagreed over when granting a third-party release was appropriate. The Second and Seventh Circuits permitted nonconsensual third-party releases when presented with unusual circumstances.[3] Similarly, the

---

[1] *In re Master Mortgage*, 168 B.R. 930 (Bankr. W.D. Mo. 1994).
[2] *Harrington v. Purdue Pharma*, 144 S. Ct. 2071 (2024).
[3] *See Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005) (expressing reluctance to routinely approve nonconsensual third-party releases because the Code does not expressly permit them and "a nondebtor release is a device that lends itself to abuse."); *In re Ingersoll*, 562 F.3d 856, 864–65 (7th Cir. 2009) (expressing the same

Third Circuit permitted nonconsensual third-party releases in limited circumstances when the releases were fair and necessary to the reorganization.[4] The Fourth, Sixth, and Eleventh Circuits approved third-party releases and applied the factors set out in *In re Dow Corning Corp.*[5] to decide the merits of third-party releases.[6] The Fifth, Ninth and Tenth Circuits, however, held that nonconsensual third-party releases were not permitted by the Bankruptcy Code.[7]

In circuits where they were allowed, nonconsensual third-party releases were a particularly useful tool in mass-tort bankruptcies where nondebtor officers and affiliates of the debtor are jointly liable for the debtor's misconduct or independently liable for their own misconduct relating to their management of the debtor. In fact, in these cases, the debtor would often contractually indemnify many of its officers and nondebtor affiliates. Thus, a claim against the indemnified nondebtor was essentially a claim against the debtor's estate. As a result, when approving third-party releases, courts would often reason that not settling the claims against indemnified nondebtors would jeopardize the debtor's reorganization. Moreover, many courts saw releases as valuable tools preventing a race to the courthouse to sue

---

reluctance to approve nonconsensual third-party releases unless presented with unique circumstances).

[4] *See Gilman v. Cont'l Airlines (In re Cont'l Airlines)*, 203 F.3d 203, 212–13 (3rd Cir. 2000).

[5] 280 F.3d 648 (6th Cir. 2002). The *Dow Corning* factors are similar to those set out in *In re Master Mortgage* considering the fairness of the releases, their necessity to the reorganization, and the extraordinary nature of the case.

[6] *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347 (4th Cir. 2014); *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070, 1079 (11th Cir. 2015).

[7] *Bank of N.Y. Tr. Co. v. Off. Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252–53 (5th Cir. 2009); *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401–02 (9th Cir. 1995); *Landsing Diversified Properties-II v. First Nat'l Bank and Tr. Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990).

nondebtor affiliates. With releases, all claims against the debtor and its affiliates could be efficiently administered through one chapter 11 plan rather than complex multidistrict litigation. In exchange for releases, nondebtors would often agree to contribute significant funds to the debtor's reorganization.

The Bankruptcy Code does not expressly permit third-party releases in most cases, but courts would approve them under § 1123(b)(6), which allows bankruptcy courts to approve any "appropriate" provision in a chapter 11 plan that is "not inconsistent with the applicable provisions of this title." Some courts also cited § 105(a) which allows the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Judge Koger, for example, emphasized the role of § 105(a) in his *Master Mortgage* decision.[8]

II. Master Mortgage

In *Master Mortgage*, several parties entered settlement agreements with debtor Master Mortgage, a real estate investment fund. Several of the settlement agreements included third-party releases. Specifically, Skopbank, the debtor's primary secured lender, agreed to assign its interests in several mortgages, and investor notes. These assignments contributed $4 million to the estate. In exchange, Skopbank, among other things, received a release of all the debtor's claims against it, and an injunction that prevented any creditor or equity holder from bringing a claim against Skopbank for its involvement in transactions with Master Mortgage. Several other nondebtors also contributed funds to Master Mortgage's reorganization in

[8] *In re Master Mortgage*, 168 B.R. 930, 934 (Bankr. W.D. Mo. 1994) (analyzing § 105(a)).

exchange for third-party releases. At confirmation, all but one class of creditors voted in favor of the plan, and every class that voted in favor of the plan supported it with over 90% acceptance. The SEC, however, objected to confirmation, arguing that the plan's nonconsensual third-party releases violate the discharge provisions of § 524(e), and therefore, the plan failed to comply with § 1129(a)(1).[9]

Judge Koger relied on the plain language of § 524 and the broad equitable powers § 105(a) authorizes. Although § 524 generally limits discharge to the debtor, Judge Koger, persuaded by the reasoning of several courts,[10] concluded that § 524 does not affect the power to grant third-party releases. He also emphasized that Congress broadly drafted § 105(a) to allow orders necessary and proper to effectuate a reorganization.

Although Judge Koger embraced a permissive approach to third-party releases, he cautioned that the court's power to grant nondebtor releases is "discretionary" and should be exercised "only upon a showing of exceptional circumstances."[11] Judge Koger then turned to the merits of the third-party releases at issue by analyzing the following five factors he compiled from previous cases analyzing the merits of third-party releases:

(1) Whether there is an identity of interest between the debtor and the third party being released such that a suit against the third party is essentially a suit against the debtor,
(2) Whether the third party has contributed substantial assets to the reorganization,

---

[9] Section 1129(a)(1) says the court shall not confirm a plan unless it "complies with the applicable provisions of this title."
[10] *See In re Specialty Equip. Co.*, 3 F.3d 1043, 1047 (7th Cir. 1993); *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).
[11] *Master Mortgage*, 168 B.R. at 937.

(3) Whether the injunction is essential to the reorganization,
(4) Whether a substantial number of creditors consent to the release—specifically those whose claims against the nondebtors would be extinguished by the release, and
(5) Whether and to what extent the plan provides for payment of the parties affected by the release.

Judge Koger concluded that all factors weighed in favor of issuing the third-party releases, and after analyzing the § 1129(a) confirmation requirements, the court confirmed Master Mortgage's plan

The *Master Mortgage* case remained significant because of Judge Koger's thorough compilation of relevant factors courts could analyze to decide the merits of third-party releases. As a result, the case was often cited within[12] and outside of the Eighth Circuit.[13] Moreover, the ABI's 2014 Commission on Chapter 11 Reform embraced Judge Koger's approach to analyzing the merits of third-party releases[14] instead of applying other tests such as the *In re Dow Corning* factors.[15] Thus, *Master Mortgage* was an important case to the development of the law surrounding third-party releases, but *Purdue Pharma* upended *Master Mortgage* and its progeny.

---

[12] The following Eighth Circuit bankruptcy courts applied the *Master Mortgage* factors to third-party releases. *See e.g.*, *In re Riverbend Leasing LLC*, 458 B.R. 520, 526–27 (Bankr. S.D. Iowa 2011); *In re U.S. Fidelis, Inc.*, 481 B.R. 503, 519–21 (Bankr. E.D. Mo. 2012); *In re Hoffinger Indus., Inc.*, 321 B.R. 498, 513–14 (Bankr. E.D. Ark. 2005); *In re Mercy Hosp.*, Case No. 23-006623, 2024 WL 2890139 at *4–7 (Bankr. N.D. Iowa Jun 7, 2024); *Matter of Fansteel Foundry Corp.*, Case No. 16-01825-als11, 2018 WL 5472928 at *10–12 (Bankr. S.D. Iowa Oct. 26, 2018).
[13] Indeed, the *Master Mortgage* case was cited by four circuit courts of appeal. *See In re Purdue Pharma L.P.*, 69 F.4th. 45, 78–79 (2d Cir. 2023) (applying factors); *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 979–80 (1st Cir. 1995) (discussing factors); *In re Continental Airlines*, 203 F.3d. 203, 213 n. 9 (3d Cir. 2000) (discussing *Master Mortgage*'s reasoning that nonconsensual third-party releases should only be granted in rare circumstances); *Eastman Kodak Co. v. Atlanta Retail, Inc. (In re Atlanta Retail), Inc.*, 456 F.3d 1277, 1290 (11th Cir. 2006) (discussing split in authority and the *Master Mortgage* factors).
[14] American Bankruptcy Institute, *Commission to Study the Reform of Chapter 11*, 255–56 (2014).
[15] *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir 2002) (listing factors).

III. Purdue Pharma

A. Background

Although *Purdue Pharma* dealt with many of the same issues as *Master Mortgage*, the facts were quite different. In *Purdue Pharma*, Purdue and its owners, the Sackler family, faced enormous liability for their marketing of oxycontin, which contributed to the opioid crisis. There were many entities pursuing the Sacklers and Purdue—including victims and their families, state attorneys general, and foreign governments. During the bankruptcy, the parties were able to resolve most of the issues that could prevent confirmation. The final iteration of Purdue's plan included a release of all opioid-related claims against the Sacklers in exchange for a several-billion-dollar contribution to the estate. Under the terms of the plan, Purdue would reorganize as a benefit corporation with the purpose of ameliorating the opioid crisis. Impaired classes, including the victims and their families, strongly supported the plan, but the United States Trustee objected to the third-party releases. The United States Trustee argued that the Bankruptcy Code does not permit the nonconsensual release of claims against nondebtors and raised concerns about the victims' due process rights.

B. Majority Opinion

The Supreme Court did not address the United States Trustee's due process arguments but, in a five-to-four majority opinion written by Justice Neil Gorsuch, agreed that the Code does not permit nonconsensual third-party releases. The Court first analyzed the text of § 1123(b) which sets forth what a chapter 11 plan may include. Section 1123(b)(6) specifically states that a debtor may include in its plan "any other appropriate provision not inconsistent with the applicable provisions of this title."[16] The Court reasoned that because "[p]aragraph (6) is a catchall phrase tacked on at the end of a long and detailed list of specific directions,"[17] it must be interpreted within the context of the rest of the subsection. Thus, because paragraph (6) follows a list of provisions relating to the rights, relationships, and responsibilities of the debtor to its creditors, the majority interpreted § 1123(b)(6) to only permit the bankruptcy court to grant orders concerning the relationships between the debtor and its creditors—not relationships between nondebtors.

Justice Gorsuch then turned to other Code provisions for insight on whether bankruptcy courts may grant nonconsensual third-party releases. He first discussed how the discharge provisions under § 524 limit discharge to the debtor and do not permit the discharge of third parties. Also, the Court discussed how the code generally requires the debtor to pledge all of its assets to its bankruptcy estate. In contrast, a nondebtor receiving a release might not be required to contribute all its assets to the estate. The Court further reasoned it would be far-fetched for the Code to implicitly permit granting a nonconsensual third-party release that could exceed the scope of the discharge injunction by allowing a nondebtor to release debts that would be excepted from a debtor's discharge under the Code. Justice Gorsuch also noted that § 524(g) already provides an exception to the discharge provisions by authorizing nonconsensual releases of third-party claims under limited

[16] 11 U.S.C. § 1123(b)(6).
[17] *Harrington v. Purdue Pharma*, 144 S.Ct. 2071, 2082 (2024).

circumstances in asbestos-related cases. He reasoned that if Congress intended to broadly authorize nonconsensual third-party releases, it could have included language to that effect.

The Court then pointed out that pre-Code bankruptcy statutes did not include any language permitting third-party releases, and the Court reasoned that it would be unlikely for Congress to reshape the law in such a significant way without expressed statutory authorization.

The opinion closes with a non-exhaustive list of questions the Court does not address. First, the Court did not address *consensual* third-party releases nor does it answer what constitutes consent. The Court also did not answer whether substantially consummated confirmed plans should be unwound if the plan includes non-consensual third-party releases.

C. Justice Kavanaugh's Dissent

Justice Kavanaugh, joined by Chief Justice Roberts and Justices Kagan and Sotomayor, vociferously dissented—describing the Court's holding as "wrong and devastating for more than 100,000 opioid victims and their families."[18]

After a detailed discussion of third-party releases generally, Justice Kavanaugh explained why he thought the third-party releases were appropriate in this case. His two key points were that (1) the *Purdue Pharma* release was essential to preserve existing estate assets because Purdue indemnified the Sacklers, and (2) in exchange for the releases, the Sacklers contributed large sums of money to the

[18] *Purdue Pharma*, 144 S.Ct. at 2088 (Kavanaugh, J., dissenting).

reorganization that may not have otherwise been available to victims. He further emphasized that without third-party releases, the victims would race to the courthouse to sue the Sacklers. He explained how many of the Sacklers' assets may be unavailable because they are protected by trusts, and more importantly, even if there were significant assets available, the race to the courthouse may lead to a select few victims receiving a lot while others receive nothing.

In the dissent's discussion of the Sacklers' third-party releases, Justice Kavanaugh mentioned several factors the bankruptcy court considered when determining whether third-party releases were appropriate—including the *Master Mortgage* factors. Justice Kavanaugh concluded that the bankruptcy court correctly approved the releases because in this case, extraordinary circumstances justified it.

Justice Kavanaugh next attacked the majority's § 1123 analysis. To reiterate, the majority reasoned that because paragraphs (1) through (5) of § 1123 concern the relationships between the debtor and its creditors, paragraph (6) should be interpreted to permit only additional plan provisions that also concern the debtor and its creditors—thus not permitting nonconsensual third-party releases. In turn, Justice Kavanaugh, argued that this "link" the majority created between §§1123(b)(1)–(5), is "so vague…as to be almost meaningless—and if not meaningless, so broad as to plainly cover non-debtor releases."[19] Justice Kavanaugh again emphasized that Purdue indemnified the Sacklers, and the claims against the

[19] *Id.* at 2106 (Kavanaugh, J., dissenting).

Sacklers relate to Purdue's conduct. Thus, Justice Kavanaugh believed the releases clearly concerned Purdue's relationship with its creditors.

Justice Kavanaugh further asserted that the majority's § 1123 analysis is incorrect because § 1123(b)(3) allows debtors to non-consensually extinguish creditors' derivative claims against nondebtors—essentially amounting to a form of third-party release. The majority, however, countered this argument by asserting that derivative claims are different because they are estate property, not direct claims against nondebtors. But Justice Kavanaugh rebutted that direct claims against nondebtors are relevantly similar to derivative claims that the bankruptcy court can release under § 1123(b)(3). Justice Kavanaugh also identified various other plan provisions courts routinely authorize that are substantially similar to third-party releases, like exculpation provisions.

The dissent pointed to the one previous Supreme Court case dealing with the catchall authority of § 1123(a)(6), *United States v. Energy Resources Company*.[20] In *Energy Resources*, the Supreme Court upheld a plan provision requiring the IRS to apply the debtor's plan payments to its trust-fund tax liability before paying down any other tax debts. Justice Kavanaugh emphasized that Energy Resources' trust-fund tax debt was not paid by the debtor, then non-debtor affiliates would be personally liable for the debt. Thus, Kavanaugh argued, the provision at issue was like a third-party release because it reduced the potential liability of nondebtors. Notably, the majority does not counter this argument, but they would likely argue

[20] *United States v. Energy Res. Co.*, 495 U.S. 545 (1990).

that the provisions at issue in *Energy Resources* primarily concern the relationship between the debtor and the IRS—a creditor—even if it had some tangential benefit to nondebtor third-parties.

Justice Kavanaugh next argued that the majority's reasoning is inconsistent with the purpose of § 1123(b)(6) to broadly authorize courts to approve plan provisions necessary for the debtor to successfully reorganize. He reiterated that the third-party releases in this case were necessary here to maximize the estate and prevent a disorderly race to the courthouse to sue the Sacklers.

Justice Kavanaugh next addressed the majority's discussion of § 524(g)'s authorization of third-party releases for asbestos liability in limited circumstances. He asserted that the text of § 524(g) acknowledges the use of confirmation "injunctions" in other circumstances outside of asbestos cases. Justice Kavanaugh specifically relied on a comment to § 524(g) that says "[n]othing in [§ 524(g)] shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization."[21] Thus, Kavanaugh argued, that the majority incorrectly interpreted § 524(g) as evidence that Congress intended to limit third-party releases to asbestos cases when in fact, the comment to § 524(g) says it does not limit the bankruptcy court's authority to issue other injunctions. The majority countered this argument in a footnote by explaining that the majority's § 524(g) discussion illustrated how Congress could authorize nonconsensual third-party releases, and the majority is not suggesting

[21] 108 Stat. 4117, note following 11 U.S.C. § 524.

§ 524(g) itself impairs or modifies the authority of the court to issue third-party releases.

Next, Justice Kavanaugh accused the majority of conflating discharge with third-party releases. He notes that in bankruptcy, discharge is a term of art, and a third-party release does not grant the same level of protection. Instead, he explained, third-party releases are part of the settlement of claims that occurs in chapter 11 cases. Justice Kavanaugh further argued that there is no basis in the Code for the majority's assertion that the Sacklers must file their own bankruptcy to have any of their debts released because, he argued, § 524(e) and the other discharge provisions by their terms do not limit the court's authority to grant third-party releases.

Finally, the dissent addressed the history of bankruptcy law and argued that the majority's reliance on pre-Bankruptcy Code legislation and practice is misplaced. Justice Kavanaugh emphasized the comprehensive nature of chapter 11 under the Code and the longstanding practice of bankruptcy courts issuing orders affecting third parties such as preliminary injunctions protecting non-debtors. He concluded by saying that "[o]pioid victims and other future victims of mass torts will suffer greatly in the wake of today's unfortunate and destabilizing decision."[22]

IV. Observations

A. Section 105

In *Purdue*, the majority rejected the Sacklers' argument that § 105(a) could be an independent basis for granting a third-party release. In rejecting this argument,

[22] *Purdue Pharma*, 144 S.Ct. at 2117 (Kavanaugh, J., dissenting).

the majority opinion clearly makes short shrift of the bankruptcy court's equitable powers under § 105(a). Justice Gorsuch only addressed § 105(a) in a footnote stating that the Second Circuit conceded that § 105(a), alone, could not justify a nonconsensual third-party release because § 105(a) only "serves to carry out authorities conferred elsewhere in the code."[23] The Supreme Court's decision in *Law v. Siegel* provides a likely explanation for the *Purdue* majority's disregard of the § 105(a) argument.[24] In *Siegel*, the court held that § 105(a) does not allow bankruptcy courts to contravene a statutory directive found elsewhere in the Code. Justice Scalia, writing for the majority in *Siegel*, said that the equitable powers of the bankruptcy court must be exercised within the confines of the Code.[25]

Critically, the Supreme Court also did not address several issues related to nonconsensual third-party releases that chapter 11 parties will likely litigate in the coming years.

B. Lingering Issues

The *Purdue Pharma* majority said its holding is limited to the issue of nonconsensual third-party releases and identified several issues it did not address. But beyond the issues the majority expressly declined to analyze, Justice Kavanagh's dissent, bankruptcy courts, and scholars have discussed several other issues implicated by the majority's reasoning including preconfirmation preliminary

---

[23] *Id.* at 2082 n. 2 (cleaned up).
[24] *Law v. Siegel*, 571 U.S. 415 (2014).
[25] *Id.* at 421.

injunctions, exculpation provisions, full-satisfaction releases, and consensual releases.

1. Preliminary Injunctions

Two bankruptcy courts have held that *Purdue* does not prevent courts from granting preconfirmation *preliminary* injunctions protecting nondebtors.[26] Those bankruptcy courts reasoned that *Purdue* should be confined to the question presented, which concerned a post-confirmation release. They decided that a preliminary injunction protecting a nondebtor from litigation is appropriate in limited circumstances where a nondebtor, normally an owner and/or officer of the debtor, is intimately involved with the debtor's reorganization. Notably, both courts recognized that in a preconfirmation preliminary injunction case, when analyzing the "likelihood of success on the merits," the court can no longer consider the likelihood of the nondebtor receiving a nonconsensual release because, after *Purdue*, a release would be unavailable. Instead, the court must focus on the "likelihood of a successful reorganization" and determine if not granting a preconfirmation injunction would jeopardize the debtor's reorganization.[27]

2. Exculpation Clauses

Unlike preliminary injunctions, whether exculpation clauses survive *Purdue* has not been thoroughly addressed by any lower courts yet, but there is reason to believe, as Justice Kavanaugh warned, that the *Purdue* decision's rationale applies

---

[26] *In re Parlement Techs., Inc.*, 661 B.R. 722 (Bankr. D. Del. 2024); *Coast to Coast Leasing, LLC v. M&T Equip. Fin. Corp. (In re Coast to Coast Leasing, LLC)*, 661 B.R. 621 (Bankr. N.D. Ill. 2024).
[27] *In re Parlement Techs., Inc.*, 661 B.R. at 727–28; *In re Coast to Coast Leasing, LLC*, 661 B.R. at 625–26.

to exculpation clauses. Exculpation clauses, like nonconsensual third-party releases, protect nondebtors. But exculpation clauses specifically protect those involved with reorganizations from liability stemming from their work on the reorganization. Like third-party releases, the Code does not include explicit authorization for exculpation provisions, so courts have authorized them under § 1123(b)(6). But based on the reasoning in *Purdue*, it is hard to see how § 1123(b)(6) would authorize the bankruptcy court to allow a nonconsensual exculpation provision protecting a third-party from a nondebtor's claim.

The Fifth and Ninth Circuits, however, historically permitted exculpation clauses despite disallowing nonconsensual third-party releases. The Fifth Circuit allowed exculpation provisions protecting "the debtor, the creditors' committee and its members for conduct within the scope of their duties" if the nondebtor did not engage in gross negligence.[28] Similarly, the Ninth Circuit allowed exculpation clauses protecting various participants in a debtor's reorganization.[29] The Ninth Circuit reasoned that an exculpation provision protects the debtor from efforts to indirectly recover debts outside of the bankruptcy process. Thus, even after *Purdue*, certain courts may permit exculpation provisions by distinguishing them from nonconsensual third-party releases.

---

[28] *NexPoint Advisors, L.P. v. Highland Cap. Mgmt. (In re Highland Cap. Mgmt.)*, 48 F.4th 419, 437 (5th Cir. 2022).
[29] *Blixeth v. Credit Suisse*, 961 F. 3d 1074, 1085 (9th Cir. 2020).

3. Full-Satisfaction Releases

The *Purdue* majority also does not address full-satisfaction releases, but the reasoning of *Purdue* suggests that § 1123(b)(6) may prevent them. A full-satisfaction release is a nondebtor release where the creditor's claim is paid in full, often based on a preconfirmation estimate of the claim. Full satisfaction releases are currently at issue in the Boys Scouts of America bankruptcy as Professor David Kuney discussed in a recent ABI Journal article.[30] Professor Kuney argues that full-satisfaction releases are inconsistent with the logic of the *Purdue Pharma* decision. Further, he criticizes the use of "full-satisfaction" releases in mass tort cases because the full value of victims' claims can be difficult to estimate, and the estimates can ultimately turn out to be wrong. In the Boy Scouts case, for example, several claimants appealing confirmation argue that the claims are significantly undervalued by the plan.

4. Consensual Releases

Similarly, the *Purdue Pharma* majority says it does not resolve the issue of consensual third-party releases and what constitutes consent. In his dissent, Justice Kavanaugh questioned the fate of consensual third-party releases given the majority's analysis of § 1123(b)(6). Chapter 11 practitioners have often utilized "opt-out" provisions to solicit consent. Essentially, these provisions provide that unless a creditor expressly opts out, they consent to having their claims released.

In *In re Robertson U.S. Holding Corp.*, Judge Lopez of the Southern District of Texas dealt with the issue of whether *Purdue Pharma* prevents a debtor from

[30] David R. Kuney, *The Aftermath of Purdue Pharma: the Myth of the Full-Pay Plan*, ABI Journal (Aug. 12, 2024).

obtaining a creditor's consent for a nondebtor release when the debtor's plan contains an opt-out provision and a the creditor does not opt out.[31] Specifically, the plan in *In re Robertson* provided that any creditor that did not vote or opt out on its ballot was presumed to opt in and thereby consent to the releases. The United States Trustee objected to the releases, not challenging whether the *Purdue* decision permits consensual third-party releases, but instead challenging the opt-out provision.

Judge Lopez overruled the United States Trustee's objection. Judge Lopez emphasized that *Purdue* leaves open the question of consensual releases and what constitutes consent. Thus, Judge Lopez concluded that Fifth Circuit law regarding consensual third-party releases and opt-out provisions remains unchanged, and in the Fifth Circuit, courts have routinely permitted consensual third-party releases by consent through opt-out provisions. He reasoned that in this case all parties had a meaningful opportunity to opt out. He also discussed how the releases in this case were "narrowly-tailored" and important to the plan.

In contrast, Chief Judge Bucki of the Western District of New York sustained the United States Trustee's objection to confirmation in a similar case.[32] In *Tonawanda*, Judge Bucki said that because the *Purdue* decision concluded that there was no authority in the Code for nondebtor releases, the court would analyze the nondebtor releases under state law. Under New York law, Judge Bucki concluded

[31] *In re Robertson U.S. Holding Corp.*, Case No: 24-90052, 2024 WL 3897812 (Bankr. S.D. Tex. Aug. 21, 2024).
[32] *In re Tonawanda Coke Corp.*, BK 18-12156 CLB, 2024 WL 4024385 (Bankr. W.D.N.Y. Aug. 27, 2024).

that consent must be established by an affirmative agreement to the third-party release rather than by a creditor's inaction.

Thus, it appears most courts are continuing to allow consensual third-party releases, though how a debtor can obtain consent appears to remain an open question. Assuming, the Supreme Court continues to permit consensual third-party releases, there may be some lingering signs of life for *Master Mortgage* and other cases discussing the merits of third-party releases. Indeed, in *Master Mortgage* most of the affected equity holders and creditors consented to the releases. And in cases like *Master Mortgage* where the number of claimants and the liability amounts were smaller than in traditional mass-tort cases, it is more likely that parties will unanimously agree to consensual releases. But for mass-tort cases, the best option might be to amend the Code to permit nonconsensual third-party releases in limited circumstances.

V. Conclusion

As Justice Kavanaugh suggested, Congress can amend the code to expressly permit nonconsensual third-party releases. Although the United States Trustee argued that the third-party releases in *Purdue* violated the nonconsenting parties' due process rights, the *Purdue* decision is strictly statutory. In fact, even the *Purdue* majority appeared to admit that Congress could amend the statute to allow nonconsensual third-party releases without running afoul of the Constitution.

There is strong (though certainly not unanimous) support in the bankruptcy bar for limited nonconsensual third-party releases. The ABI Commission on Chapter

11 Reform provided a tempered approach to the issue that could inform how Congress responds. The ABI Commission recognized that third-party releases are appropriate only in certain circumstances and suggested courts apply the *Master Mortgage* factors to determine the merits of third-party releases. This approach could guide efforts to amend the Code by allowing third-party releases in limited circumstances.

In conclusion, *Purdue* answered a big question but left us with many more. In the coming years, it appears all but certain that courts will wrestle with some of the lingering issues *Purdue* leaves behind.

Faculty

Hon. Dennis R. Dow is a retired U.S. Bankruptcy Judge for the Western District of Missouri in Kansas City, having served on the bench from 2003-24. Prior to his appointment to the bench, he was a partner with the firm of Shook, Hardy & Bacon LLP, where he represented trustees in chapter 7 cases involving significant assets, individual and corporate debtors in proceedings under chapters 7 and 11, and secured, unsecured and priority creditors and lessors in chapter 7, 11, 12 and 13 cases. He also tried numerous adversary proceedings and contested matters, including preference actions, objections to discharge, dischargeability complaints and objections to confirmation of chapter 11 plans, and he had been listed in The Best Lawyers in America in the area of bankruptcy law every year since 1995. Judge Dow is a member of ABI, the Missouri Bar and the Kansas City Metropolitan Bar Association. He is a Fellow of the American College of Bankruptcy, inducted in March 2013, and was selected in November 2014 to become a conferee of the National Bankruptcy Conference. He also is a member of the National Conference of Bankruptcy Judges. Prior to his retirement from the bench, Judge Dow served as Chief Judge of the Bankruptcy Appellate Panel. He also served a term as chair of the Judicial Conference Advisory Committee on Bankruptcy Rules. Judge Dow has authored and co-authored several articles, including "ERISA-Related Claims in Bankruptcy," *Journal of Bankruptcy Law and Practice*, Vol. 3, No. 1 (Nov/Dec 1993), "Rent to Own Agreements in Bankruptcy: Sales or Leases?," *ABI Law Review*, Vol. 2, No. 1 (Spring 1994), and "Gramm-Leach-Bliley and the Bankruptcy/Collection Attorney," *Norton Bankruptcy Law Advisor* (Feb 2002). He received his B.A. with honors from the University of Wyoming and his J.D. from Washburn University School of Law, where he was notes editor of the *Washburn Law Journal*.