“Special”: Remedial Schemes in Mass Tort Bankruptcies

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Appellate courts and proceduralist scholars sometimes claim that bankruptcy is a “special” form of aggregate litigation because the Bankruptcy Code has creditor protections, such as plan voting and committee representation. Using the recent and controversial reorganization of opioid-maker Purdue Pharma as a case study, this invited symposium Article questions the strength of those protections. Broad preliminary injunctions, case-dispositive settlements, and privatized fiduciaries of uncertain loyalty—common features of commercial reorganizations—are problematic in a case such as Purdue Pharma*, whose role in the overdose crisis renders it a form of “social debt” bankruptcy. Those and similar mechanisms muted or displaced efforts to determine the merits of serious allegations against Purdue Pharma’s owners and managers, paving the way for notorious “nondebtor releases” that may be “special”—but that are also the opposite of creditor protections.*

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> Our legal system depends on continually persuading people that their right to a day in court is not mere rhetoric.[†]

Is corporate reorganization under Chapter 11 of the Bankruptcy Code a "special remedial scheme"?

The Supreme Court has said so,[1] but has not told us what that means. It matters because the phrase, and whatever it means, lurks in the background of the most contentious issue in bankruptcy today: the use of nonconsensual nondebtor releases (NDRs), which can contain mass tort liability but typically do so at the expense of the individual's right to a "day in court."

The clunky term derives from the Supreme Court's 1989 opinion in *Martin v. Wilks*,[2] which held that white firefighters were not bound by a consent decree granted to prevent racial discrimination because "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."[3] The consent decree could not eliminate the firefighters' right to a day in court.

In a footnote, the Court acknowledged an exception to this general rule: "[W]here a *special remedial scheme* exists expressly foreclosing successive litigation by nonlitigants, *as for example in bankruptcy* or probate, legal proceedings may terminate preexisting rights if the scheme *is otherwise consistent with due process*."[4] Although scholars and appellate courts occasionally parrot the phrase, it has received little serious attention, doubtless because the Supreme Court has invoked it only three other times, and never in an actual bankruptcy case.[5]

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† Hon. Elizabeth M. Welch, *A Judge Comments*, LITIGATION, Fall 2022, at 24.

1. Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989).

2. 490 U.S. 755 (1989).

3. *Id.* at 758, 762.

4. *Id.* at 762 n.2 (emphasis added).

5. In addition to *Wilks*, the Supreme Court has used the phrase (or one like it) in three other published opinions, none directly pertinent to bankruptcy. *See* Richards v. Jefferson Cnty., 517 U.S. 793, 795, 798–99 (1996) (quoting *Wilks*, 490 U.S. at 762 n.2 in tax case); Ortiz v. Fibreboard Corp., 527 U.S. 815, 821, 846 (1999) (quoting same in asbestos case); Taylor v. Sturgell, 553 U.S. 880, 885, 895 (2008) (quoting same in FOIA request case). The U.S. Courts of Appeals have cited it

Yet, the dispute over NDRs may change this by requiring us to consider how “special” bankruptcy really is under *Wilks*. An NDR is the functional equivalent of a bankruptcy discharge—bankruptcy’s “greatest power”[6]—“without a filing and without the safeguards of the [Bankruptcy] Code.”[7] While those safeguards apply to *debtors* in bankruptcy, their application to nondebtors is unclear and the circuits have long split on their permissibility.

NDRs are a lightning rod for scholarly umbrage. Observers say they are “lawless,” a “grift,” or flat-out unconstitutional.[8] Supporters, by contrast, marshal a variety of arguments based in “necessity.”[9] NDRs may increase creditor recoveries by encouraging contributions needed for the reorganization effort free from concerns about future liability.

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somewhat more frequently, but only three cases arose in bankruptcy: Johns–Manville Corp. v. Chubb Indem. Ins. Co. (*In re* Johns–Manville Corp.), 600 F.3d 135, 137, 153–54 (2d Cir. 2010) (quoting *Wilks*, 490 U.S. at 762 n.2); *In re* Montgomery Ward, LLC, 634 F.3d 732, 734, 737 n.5 (3d Cir. 2011) (citing *Taylor*, 553 U.S. at 895); and All. WOR Props., LLC v. Ill. Methane, LLC (*In re* HNRC Dissolution Co.), 3 F.4th 912, 916, 927 (6th Cir. 2021) (quoting *Wilks*, 490 U.S. at 762 n.2). Of those, only *Manville* considered the meaning of the statement in connection with an attempt to use nondebtor releases. *See infra* section I(B)(1).

6. Hanover Nat’l Bank v. Moyses, 186 U.S. 181, 186 (1902) (noting that bankruptcy’s “greatest” power “is the discharge of a debtor from his contracts”); Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 612 (2008).

7. Deutsche Bank AG v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 142 (2d Cir. 2005). Nondebtor releases may be “consensual,” in which case they are considerably less troubling—and presumably less attractive to debtors and allied parties who would benefit from them—because creditors must, in fact, assent in some way to them. *See, e.g.*, *In re* Specialty Equip. Cos., 3 F.3d 1043, 1045–47 (7th Cir. 1993) (explaining that “consensual and non-coercive” NDRs bind only those creditors who vote in favor of them, and only within bankruptcy proceedings, so courts have found such NDRs lawful). As used here, “NDR” means nonconsensual nondebtor releases. The circuit courts have long split on their permissibility. *E.g.*, Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1943 (2022).

8. *See, e.g.*, Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1188–91 (2022) (discussing the Purdue Pharma settlement controversy and whether the bankruptcy court has authority to grant NDRs); Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960, 961–62 (2022) (explaining that bankruptcy “grift[s]” should elicit “shock, disbelief, and outrage” but have largely gone unnoticed—until Purdue Pharma); Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J.F. 409, 411–12 (2021) (noting that add-ons such as NDRs are either reluctantly accepted by courts and stakeholders, or challenged at the risk of losing potential benefits); Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 FORDHAM L. REV. 429, 430 (2022) (calling nonconsensual NDRs “unconstitutional”); Lynn M. LoPucki, *Chapter 11’s Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 255, 292, 310 (2022) (characterizing Purdue Pharma’s plan as “highly controversial,” describing releases as a tool for “lawless Chapter 11s,” and noting “growing unease” with bankruptcy court competition); Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 63 (2021) (arguing NDRs have insulated parties—including the Sacklers, Purdue’s owners—from “fraud, gross negligence, willful misconduct, and deliberate ignorance”).

9. *E.g.*, *In re* Purdue Pharma, L.P., 635 B.R. 26, 37 (S.D.N.Y. 2021) (“Debtors and those who voted in favor of the Plan . . . insist that [the releases] are a necessary feature of the Plan . . . .”), *certificate of appealability granted*, No. 21-CV-7532-CM, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

Whether nondebtor releases are permissible as a doctrinal matter turns on answers to three basic questions: (1) Are they statutorily authorized? (2) If so, do bankruptcy courts have the power (constitutional or otherwise) to impose them? (3) If so, do (or how do) they comport with due process? Woven through each is the assertion that bankruptcy is "special."[10]

These questions were most prominently asked—but not (as of this writing) answered—in the controversial bankruptcy of opioid-maker Purdue Pharma. The bankruptcy court granted broad NDRs to the company's wealthy owners (the Sacklers) and hundreds of other individuals and entities for direct civil liability arising from Purdue Pharma's twice-confessed drug-marketing crimes (the "Sackler Releases").[11] On appeal to the district court, proponents of the Sackler Releases defended them, arguing that bankruptcy is a special remedial scheme, among other things.[12] District Judge Colleen McMahon didn't buy it and vacated the bankruptcy court's order confirming Purdue Pharma's plan of reorganization (which contained the Sackler Releases) because nondebtor releases are not statutorily authorized.[13] A further appeal to the Second Circuit is pending as of this writing.[14] A key question embedded in the appeal is whether bankruptcy is "special" enough to permit the Sackler Releases.

The stakes are high. In other work, I characterize *Purdue Pharma* as a strong example of a social debt bankruptcy: a Chapter 11 case that seeks to resolve liability for serious (e.g., criminal) misconduct, often involving violations of health and safety laws, made unsustainable due to persistent

10. As discussed in subpart I(B) below, Chapter 11's "specialness" was at issue in questions of jurisdiction and due process in the 2010 *Manville* decision and in *Purdue Pharma*'s assessment of statutory authorization. Space limitations prevent me from considering the related question of whether bankruptcy is "exceptional." *Compare* Seymour, *supra* note 7 (arguing "against" "bankruptcy exceptionalism") *with* Lipson, *supra* note 6 (introducing the concept of bankruptcy exceptionalism and offering examples).

11. *In re* Purdue Pharma, L.P., 633 B.R. 53, 97–98 (Bankr. S.D.N.Y.), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21-CV-7532-CM, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022). As explained in subpart I(A) below, Purdue Pharma agreed to plead to federal drug crimes in 2007 and 2020.

12. *E.g.*, Brief of Appellee the Multi-State Governmental Entities Group at 25–26, *In re* Purdue Pharma, L.P., No. 21-cv-7532-CM (Nov. 15, 2021) (citing Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989)).

13. *In re Purdue Pharma, L.P.*, 635 B.R. at 37–38.

14. Daniel Gill, *Purdue Pharma Bankruptcy Plan Appeal Goes to Second Circuit*, BLOOMBERG L. (Jan. 28, 2022), https://news.bloomberglaw.com/bankruptcy-law/purdue-pharma-bankruptcy-plan-appeal-goes-to-second-circuit [https://perma.cc/NL28-J4F7]. In the interest of transparency, I note that I filed an amicus brief in support of the district court's ruling (and thus against the bankruptcy court's approval of the Sackler Releases). Brief of Amici Curiae Law Professors [Lipson and Foohey] in Support of Appellees Regarding the "Abuse" Standard at 1, *In re* Purdue Pharma L.P., No. 22-110 (2d Cir. Mar. 22, 2022), ECF No. 639.

governance failures of transparency and accountability.[15] In addition to *Purdue Pharma* and other opioid-maker bankruptcies (e.g., *Endo*[16]), other examples of social debt bankruptcies include organizational liability for large-scale sexual assault (e.g., over thirty Catholic organizations,[17] the Boy Scouts of America[18]), and alleged contributions to the crisis of gun violence (e.g., Infowars[19]).

The normative challenge of social debt bankruptcies—the social and moral implications of the underlying wrong—put a premium on questions of transparency and accountability. Who caused the harm, and have they been held accountable?

Creditor protections created by Congress in the Bankruptcy Code—the things that allegedly make bankruptcy “special”—could, and should, have answered those questions in *Purdue Pharma*, helping creditors to know whether (or not) the Sacklers were using Purdue Pharma’s Chapter 11 case to “get away with it.”[20] In fact, this Article shows, those protections were undermined by various practice conventions that may be common and

15. Jonathan C. Lipson, *The Rule of the Deal: Bankruptcy Bargains and Other Misnomers*, 97 AM. BANKR. L.J. 41, 43 (2023) [hereinafter Lipson, *Rule*]; Jonathan C. Lipson, Response, *First in Time; First Is Right: Comments on Levitin’s* Poison Pill, 101 TEXAS L. REV. ONLINE 33, 35 (2022) [hereinafter Lipson, *First*], https://texaslawreview.org/first-in-time-first-is-right-comments-on-levitins-poison-pill/ [https://perma.cc/5VVZ-58W5].

16. *In re* Endo Int’l PLC, No. 22-22549-JLG, 2022 WL 16935997 (Bankr. S.D.N.Y. Nov. 14, 2022). Other opioid bankruptcies include those of *Mallinckrodt* and *Insys*. *In re* Mallinckrodt PLC, 639 B.R. 837 (Bankr. D. Del. 2022); Insys Therapeutics, Inc. v. Quinn Emanuel Urquhart & Sullivan, LLP (*In re* Insys Therapeutics, Inc.), Ch. 11 Case No. 19-11292-JTD, Adv. No. 21-50359-JTD, 2021 WL 5016127 (Bankr. D. Del. Oct. 28, 2021).

17. *E.g.*, *Catholic Dioceses in Bankruptcy*, PA. STATE L. ELIBRARY (May 2022), https://elibrary.law.psu.edu/bankruptcy/ [https://perma.cc/L92B-G2KL]; *see also* Jonathan C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, 79 S. CAL. L. REV. 363, 363–64 (2006) (discussing early diocesan Chapter 11 reorganizations).

18. *In re* Boy Scouts of Am., 642 B.R. 504 (Bankr. D. Del. 2022). Others include USA Gymnastics and the Weinstein Company. *In re* USA Gymnastics, No. 18-09108-RLM-11, 2020 WL 1932340 (Bankr. S.D. Ind. Apr. 20, 2020); David v. Weinstein Co. Holdings, LLC, No. 21-171-MN, 2021 WL 979603 (D. Del. Mar. 16, 2021) (denying motion for stay pending appeal of confirmation order by sexual assault victims); Laura Ly & Taylor Romine, *A Judge Has Approved a $17 Million Settlement Plan for Sexual Misconduct Victims of Harvey Weinstein*, CNN (Jan. 26, 2021), https://www.cnn.com/2021/01/26/us/harvey-weinstein-victims-settlement-approved/index.html [https://perma.cc/JNK6-N9XM].

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

20. *See* Gerald Posner & Ralph Brubaker, *The Sacklers Could Get Away With It*, N.Y. TIMES (July 22, 2020), https://www.nytimes.com/2020/07/22/opinion/sacklers-opioid-epidemic.html [https://perma.cc/4R8F-X285] (noting that the question of whether the Sacklers coordinated fraudulent marketing remains unresolved).

tolerable in ordinary commercial bankruptcies, but are problematic in social debt bankruptcies.

Part I analyzes the most thorough discussions of whether Chapter 11's "special" qualities justify NDRs, the Second Circuit's 2010 *Manville*[21] opinion (in the long-running reorganization of asbestos-maker Johns–Manville) and the district court's opinion in *Purdue Pharma*.[22] *Manville* takes what we may call a "property" view, focusing on the fact that bankruptcy is an "in rem" process, which implies greater tolerance of NDRs. Judge McMahon's opinion in *Purdue Pharma*, by contrast, takes a more "process-oriented" approach, assessing the loss of the opportunity to litigate outside bankruptcy, which implies less tolerance of them.

Unfortunately, neither opinion says much about the attributes of the bankruptcy processes as they unfolded in those cases, and thus what did (or did not) make those cases special for these purposes.

Part II begins to fill the gap. I assess what actually happened in *Purdue Pharma* along familiar dimensions of "exit," "voice," and "loyalty." These are characteristics against which proceduralist writers and appellate courts assess aggregate litigation processes.[23] These writers and courts suggest that bankruptcy may be "special" because it has creditor protections that make it as good as, or better than, other aggregate processes on these dimensions.[24]

On paper, Chapter 11 certainly has potentially powerful creditor protections that promote exit, voice, and loyalty. Conventions in practice, however, erode those protections. In *Purdue Pharma*, for example, a broad preliminary injunction at the beginning of the case foreclosed exit by shielding the Sacklers (who were not debtors) from direct suits that might

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21. Johns–Manville Corp. v. Chubb Indem. Ins. Co. (*In re* Johns–Manville Corp.), 600 F.3d 135 (2d Cir. 2010).

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

23. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376 (2000) [hereinafter Coffee, *Class Action Accountability*]; *see also* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 308 (2010) ("Organizational theorists have long grouped organizational remedies under two basic headings: voice and exit.") [hereinafter Coffee, *Litigation Governance*]; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 341–42. Although mass tort bankruptcies are not new, scholars have just begun to assess them along these lines. *See* William Organek, *Mass Tort Bankruptcy Goes Public*, 77 VAND. L. REV. (forthcoming 2024) (manuscript at 45–54) (on file with author) (discussing exit, voice, and loyalty in mass tort bankruptcies).

24. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 860 n.34 (1999) (noting that in certain circumstances, a debtor in a Chapter 11 reorganization may establish a trust towards which they may channel future liability); Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 990 nn.115–16, 1024 (2012) (citing Taylor v. Sturgell, 553 U.S. 880, 898 (2008) as evidence of the Supreme Court's reluctance to carve out new exceptions to nonparty preclusion in, e.g., class actions, and arguing that "bankruptcy serves as a better reference model"); *see also* discussion *infra* Part II.

have determined whether they were independently liable for Purdue Pharma’s confessed misconduct. Voice was muted because the vote on Purdue Pharma’s plan was coerced and uninformed as to the claims being released. Loyalty was problematic because the case was plagued by structural conflicts among estate and creditor representatives.

Part III offers brief reflections on the future of *Purdue Pharma*, and what could have happened differently to make the case less problematic. To be sure, many features of Purdue Pharma’s controversial plan of reorganization might be socially beneficial, including the promise of several billion dollars in opioid remediation funds over an extended period of time. But those benefits come at the price of significant threats to the individual’s right to a day in court, and the role and rule of law in determining the merits of allegations of serious misconduct. It is not clear that bankruptcy is “special” enough to make those difficult tradeoffs.

I. Background: The Special Remedial Scheme Exception and Nondebtor Releases

Beginning in the late 1990s, the Supreme Court made the settlement of mass-tort litigation through class actions increasingly difficult.[25] The Court said it was concerned, among other things, about preserving the individual’s right to a day in court in aggregate litigation.[26] But it also suggested that bankruptcy may be an exception, and it has, in fact, become an increasingly attractive means of aggregation.[27]

A. Bankruptcy’s Creditor Protections

The Court has not explained what makes bankruptcy “special,” but Congress built a number of creditor protections into the Bankruptcy Code that might count. Perhaps the most important protections involve what proceduralists call “voice” and “loyalty.”[28] To many, the former means the right to vote; the latter requires some assessment of the conduct of party

25. Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 428 (2014) (noting that Supreme Court “pullback” began with *Amchem Prods.* and *Ortiz* and that “[a]gain and again in recent years, the Supreme Court has made it more difficult to use class action to resolve large-scale disputes arising out of mass injuries”).

26. *Ortiz*, 527 U.S. at 846.

27. *Id.* (“[W]e have recognized an exception to the general rule . . . where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate.” (quoting Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989))). *See also* Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV. 361, 362 (2022) (“Bankruptcy courts have become the favored forum for large corporate defendants to seek global resolution of mass tort liability claims.”).

28. *See generally* Coffee, *Class Action Accountability*, *supra* note 23 (arguing these elements must be balanced to protect class members in bankruptcy proceedings).

representatives in aggregate litigation. On paper, the Bankruptcy Code has both.

The commencement of a Chapter 11 case creates an "estate" comprised of the debtor's property, which remains in the possession and control of the debtor's management (and so is known as the "debtor in possession" or "DIP").[29] That estate is protected by a broad "automatic stay" of all civil litigation against or affecting the debtor or its estate.[30] Management of the debtor acts as a fiduciary for the debtor's stakeholders.[31] In larger cases, an official committee of unsecured creditors acts as a representative check on management.[32]

The goal of a Chapter 11 case is to confirm a "plan of reorganization" for the debtor which requires, among other things, the supermajority vote of at least one class of creditors entitled to vote on the plan.[33] That vote, in turn, requires the proponent of the plan (usually the DIP) to provide a "disclosure statement" with information adequate to enable creditors to vote for or against the plan.[34]

These creditor protections are a counterweight to the DIP's powers, which can give it significant leverage over creditors. Perhaps the most important powers are the exclusive right to propose a plan for the first 120 days of the case and presumptive control over causes of action belonging to the estate.[35]

If, for example, the DIP proposes a plan that settles the estate's claims against third parties who received fraudulent transfers of company property, creditors get to vote on that plan. The settlement of such claims under the

29. 11 U.S.C. §§ 541(a), 1101(1), 1107(a).

30. *Id.* § 362(a).

31. *Id.* § 1106; 7 COLLIER ON BANKRUPTCY ¶ 1106.02 (Richard Levin & Henry J. Sommer eds., 16th ed. 2023).

32. *See* 11 U.S.C. § 1102(a) (requiring the appointment of the committee); *id.* § 1103(c) (the committee may "consult with the [DIP] . . . concerning the administration of the case"); 1 COLLIER ON BANKRUPTCY, *supra* note 31, ¶ 1.07.

33. 11 U.S.C. §§ 1126(c), 1129(a)(10); 7 COLLIER ON BANKRUPTCY, *supra* note 31, ¶¶ 1103.05, 1126.04.

34. 11 U.S.C. § 1125(b); 1 COLLIER ON BANKRUPTCY, *supra* note 31, ¶ 1.07.

35. As to exclusivity, see 11 U.S.C. § 1121(b). Causes of action typically include claims that the debtor engaged in avoidable (i.e., fraudulent) transfers of assets. *See, e.g.*, *id.* §§ 544, 548; 5 COLLIER ON BANKRUPTCY, *supra* note 31, ¶ 548.01 (noting that "fraudulent transfer law allows creditors to avoid transactions which unfairly or improperly deplete a debtor's assets or that unfairly or improperly dilute the claims against those assets," including "transactions which are not frauds"). Such avoidance actions are generally property of the estate, *see* Off. Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (*In re* Cybergenics Corp), 226 F.3d 237, 245 (3d Cir. 2000) (concluding that neither fraudulent transfer claims nor the avoidance power belongs to the debtor, but instead to its estate), and may present concerns that the debtor in possession "acts under the influence of conflicts of interest." Off. Comm. of Unsecured Creditors of Cybergenics Corp. *ex rel.* Cybergenics Corp. v. Chinery, 330 F.3d 548, 573 (3d Cir. 2003) (quoting Canadian Pac. Forest Prods. Ltd. v. J.D. Irving, Ltd. (*In re* Gibson Grp., Inc.), 66 F.3d 1436, 1441 (6th Cir. 1995)).

plan would almost certainly involve “releases” of the potential defendants which, assuming sufficient creditor support, are rarely controversial.

NDRs, such as those sought by the Sacklers, are different because they extinguish not claims of the *debtor’s estate* against third parties, but instead claims of *creditors* against third parties.

When NDRs are consensual, they are not problematic; they are simply contract terms.[36] As I explain in other work, they may appear as a line-item on the creditor ballot, enabling each creditor to decide whether to release the nondebtor.[37] This obviously presents the risk of holding out, which the nondebtor beneficiary may fear. The equally obvious economic response, however, should be money: the nondebtor that wants the consensual release should pay for it.

Nevertheless, as a collectivizing solution, bankruptcy seeks to deter destructive holding-out. Thus, in order to induce (or coerce) broader participation, NDRs are sometimes not consensual. Rather, they are forced onto creditors on the theory that they are part of a value-maximizing settlement among the debtor and most, but not all, creditors.[38]

B. The Ambiguity of the Special Remedial Scheme Construct

The claim that bankruptcy is a special remedial scheme lurks behind efforts to justify nonconsensual nondebtor releases. A close reading of the opinions in two leading cases on NDRs—the Second Circuit’s opinions in *Manville* and the district court’s opinion in *Purdue Pharma*—reveals two different ways to understand the phrase, and its implications for NDRs.

1. Manville *and the Property-Based View.*—Start with *Manville*, the progenitor of the NDR. “[C]rushed” by the weight of massive asbestos liability, the company went into Chapter 11 reorganization in the Southern District of New York on August 26, 1982.[39] Manville’s most valuable assets were insurance policies which would cover some of its asbestos liability.[40] But Manville and its insurers fought over coverage.[41] They settled that

36. *See, e.g.*, DiFilippo v. Barclays Cap., Inc., 552 F. Supp. 2d 417, 426 (S.D.N.Y. 2008) (“A release is a type of contract and is governed by contract law”).

37. Lipson, *First*, *supra* note 15, at 55.

38. Douglas G. Baird, Anthony J. Casey & Randal C. Picker, *The Bankruptcy Partition*, 166 U. PA. L. REV. 1675, 1687 (2018) (“Third-party releases are easiest to justify when the release affects a large group of similarly situated creditors and a supermajority are willing to accept the plan in which they are subject to a third-party release.”).

39. *In re* Johns–Manville Corp., No. 82-B-11656-BRL–82B22676-BRL, 2004 WL 1876046, at *14 ¶ 52 (Bankr. S.D.N.Y. Aug. 17, 2004), *aff’d* in part and *vacated* in part, 340 B.R. 49 (S.D.N.Y. 2006); *In re* Johns–Manville Corp., 97 B.R. 174, 176 (Bankr. S.D.N.Y. 1989).

40. Johns–Manville Corp. v. Chubb Indemn. Ins. Co. (*In re* Johns–Manville Corp.), 600 F.3d 135, 138 (2d Cir. 2010).

41. *Id.*

dispute through the creation of what came to be known as a "Manville trust" which would give the insurers "broad releases" (NDRs) relating to "any and all claims . . . whether or not presently known . . . based upon, arising out of or related to the [insurance policies]."[42] The Manville trust and NDRs were contained in Manville's plan of reorganization, which was confirmed in 1986 and was the subject of multiple appeals.[43]

By 2002—over a decade after Manville's plan had been confirmed—two groups of claimants (personal injury plaintiffs and certain insurance companies) sought to sue Manville's main insurer, Travelers, on grounds that it had independent and direct liability to them.[44] Travelers responded that it was protected by Manville's NDRs.[45]

The personal injury claimants argued that they were "not adequately represented" at earlier proceedings involving the NDRs.[46] The Second Circuit disagreed. Their claims, the court reasoned, were part of a settlement reached in 2004, which the bankruptcy court approved—and "at which the Objecting Plaintiffs were represented."[47] Because they were provided with "notice and a hearing before the settlements were approved," the Second Circuit concluded that there was "no basis in the record for the Asbestos Personal Injury Plaintiffs' assertion that the Due Process Clause required more."[48]

The insurers, led by Chubb, stood on a different footing. They asserted direct claims for indemnification and contribution against Travelers.[49] Chubb had argued that it was not bound by the Manville NDR because "it was not given constitutionally sufficient notice of the 1986 [plan-related] Orders, so that due process absolve[d] it from following them, whatever their scope."[50] Chubb alleged that it did not even know it was a creditor at the time.[51] The Manville plan and insurance settlement could not have been binding on it under *Amchem* and *Ortiz*, Chubb argued.[52]

42. *Id.* at 139.

43. *In re Johns–Manville*, 340 B.R. at 54.

44. Travelers Indem. Co. v. Bailey, 557 U.S. 137, 142–43 (2009).

45. *Id.*

46. *In re Johns–Manville*, 600 F.3d at 144, 147.

47. *Id.* at 148.

48. *Id.* These plaintiffs may have forfeited the argument in prior proceedings. *See id.* at 147 ("[W]e lack the authority to reach the merits of this due process question because the Supreme Court instructed us to address only properly preserved arguments on remand.").

49. *Id.* at 152.

50. *Id.* at 137 (quoting Travelers Indemn. Co. v. Bailey, 557 U.S. 137, 155 (2009)).

51. *Id.* at 151.

52. *Id.* at 145 (citing *In re* Johns–Manville Corp., 340 B.R. 49, 68 (S.D.N.Y. 2006)) (arguing it was not bound "in light of the due process concerns identified" in Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) and Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999))).

The Second Circuit agreed. Because Chubb did not seek to collect from the insurance policies that Travelers issued to Manville, “the bankruptcy court was not exercising its *in rem* power when it concluded that Chubb’s claims were enjoined.”[53] Therefore, “the ‘special remedial scheme’ due process ‘exception’ relating to *in rem* bankruptcy proceedings [was] insufficient to sustain the bankruptcy court’s action as to Chubb.”[54]

Notwithstanding Chubb’s success, the subsequent history of *Manville* strongly suggests that neither its bankruptcy court nor the Second Circuit wants to hear from late-arriving plaintiffs asserting claims directly against nondebtors. In the unpublished 2020 *Parra*[55] decision, for example, the Second Circuit held that insurance brokers were shielded by Manville’s NDRs, but not because claims against them may have had an effect on the estate.[56] Instead, the court concluded that the appointment of a so-called Future Claims Representative in the bankruptcy satisfied any concerns about due process, even though there is little reason to think that the representative could have asserted these “novel” claims in the bankruptcy.[57]

Manville reflects a “property” approach to the special remedial scheme exception because the unit of analysis appears to be the potential effect of collateral litigation on the bankruptcy estate.[58] But “property of the estate” is a broad concept,[59] so it is not difficult to imagine that litigation against nondebtors could easily affect property of the estate. Those nondebtors may,

53. *Id.* at 154.

54. *Id.*

55. John–Manville Corp. v. Parra, 802 F. App’x 20 (2d Cir. 2020).

56. *See id.* at 22–23 (reinstating the bankruptcy court’s order enjoining Parra’s state law claims because “the bankruptcy court did not clearly err in concluding that Parra’s interests as to both *in rem* and *in personam* claims were represented by the Future Claims Representative”).

57. *In re* Johns–Manville Corp., 581 B.R. 38, 45, 58 (Bankr. S.D.N.Y.) (nodding to “so-called ‘novel’ legal theories” but ultimately concluding there was no due process issue because “[t]he very objections Parra seeks to make now have been raised, repeatedly, and were explicitly considered by the Future Claims Representative”), *rev’d* and *remanded*, 319 F. Supp. 3d 633 (S.D.N.Y. 2018), *rev’d*, 802 F. App’x 20 (2d Cir. 2020). The Second Circuit also glossed over concerns about the zeal of future claimants’ representatives. *See* Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325, 346–47 (2022) (noting future claimants’ representatives “occup[y] a unique and extremely influential position within the resolution model” and raising the question of what happens if future claimants’ representatives “failed to properly represent the interests of future victims”). Still, the problem of long-tail mass tort claims is vexing. *See* Lynn A. Baker, *Models of Closure in Mass Torts: A Comment on “The Mass Tort Bankruptcy: A Pre-History,”* 5 J. TORT L. 85, 86 (2012) (“Mass tort bankruptcies under Chapter 11, such as those involving asbestos, have struggled with the issue of how to achieve closure for the defendant given the need to provide compensation for unknown numbers of future claimants as well as present claimants.”).

58. *In re Johns–Manville*, 600 F.3d at 152 (“In this case, the ‘thing in question’ is the Manville bankruptcy estate . . . .”).

59. United States v. Vandevort, 539 F. App’x 783, 784 (9th Cir. 2013) (citing United States v. Whiting Pools, Inc., 462 U.S. 198, 204–05 (1983)) (“Congress intended a very broad definition of property in the bankruptcy context . . . .”).

for example, have secondary claims against the debtor for contribution or indemnification for their direct liability. This was a problematic background feature in *Purdue Pharma*, discussed next.

2. Purdue Pharma *District Court: A Process-Based View*.—The district court opinion in *Purdue Pharma* suggests a different, process-oriented, approach. Purdue Pharma commenced its Chapter 11 bankruptcy on September 15, 2019, seeking to implement a "settlement framework" negotiated among certain members of the Sackler family and certain creditor representatives.[60] Under this framework, the Sacklers would (1) effectively give Purdue Pharma to creditors;[61] (2) pay $3 billion (later increased to $5.5 billion) into creditor trusts over an extended period;[62] and (3) receive "comprehensive releases" in exchange.[63] The last element formed the heart of the controversy in the case.

The Sackler Releases were contained in Purdue Pharma's plan of reorganization. Although creditors who voted did support the plan, only about 20% of creditors actually voted on it.[64] Nevertheless, as confirmed, it would bind all creditors, including any who had (or could have) asserted direct claims against the Sacklers. The bankruptcy court approved the NDRs because, in essence, they reflected a settlement among Purdue Pharma, its creditors, and the Sacklers.[65]

The bankruptcy court's order confirming Purdue Pharma's plan was challenged on appeal for three basic reasons: (1) the Sackler Releases were not statutorily authorized; (2) the bankruptcy court lacked the power and

60. Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors at 1–3, *In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y 2021) (No. 19-23649-RDD), ECF No. 2983 [hereinafter Disclosure Statement].

61. *See* Notice of Filing of Term Sheet with Ad Hoc Committee at 1, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649-RDD), ECF No. 257 (detailing terms in which 100% of the assets of Purdue will be placed under a trust "for the benefit of claimants and the U.S. public").

62. *See id.* at 6 (providing a guaranteed contribution of $3 billion); *see also* Mediator's Third Interim Report at 5, *In re* Purdue Pharma L.P., No. 19-23649-RDD (Bankr. S.D.N.Y. Feb. 18, 2022), ECF No. 4369 ("Upon consummation of a Plan incorporating this Sackler Settlement Proposal, the Sackler Families would be paying, in total, not less than $5.5 billion and up to $6 billion.").

63. Notice of Filing of Term Sheet with Ad Hoc Committee, *supra* note 61, at 2 (providing that Sackler Family's contributions will be "[i]n exchange for comprehensive releases in the form and manner to be agreed upon by the parties").

64. *See* Final Declaration of Christina Pullo Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors at 5, ex. A, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649-RDD), ECF No. 3372 (stating the total number of claims was over 615,000, with 114,370 voting to accept and 5,931 voting to reject).

65. *In re Purdue Pharma L.P.*, 633 B.R. at 98 ("[T]his Circuit [rejects the argument] that such a release is an adjudication of the claim. It is not. It is part of the settlement of the claim that channels the settlement funds to the estate.").

authority to impose them; and (3) granting the Sackler Releases would violate due process.[66] Proponents of the Sackler Releases responded to the last challenge by arguing that “the release of claims against the non-debtor Sacklers and their related entities are proper because the Bankruptcy Code, taken as a whole, creates a ‘special remedial scheme’ in which certain legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process.”[67]

Sitting in an appellate capacity, U.S. District Judge Colleen McMahon never reached the due process argument because she concluded that there was no statutory authority for the releases.[68] Nevertheless, in explaining why bankruptcy courts lacked extra-statutory (residual) authority to grant NDRs, she considered and rejected the argument that the Sackler Releases were permissible under the special remedial scheme exception.[69]

“The ‘special remedial scheme’ contemplated by the Bankruptcy Code,” she reasoned, was inapplicable because it “addresses the rights of persons who have claims against a debtor in bankruptcy—not claims against other non-debtors.”[70] Nondebtors, such as the Sacklers, “have no such obligations, and so do not have any rights at all under the ‘special remedial scheme’ that is bankruptcy—certainly not the ‘right’ to have claims that are being asserted against them outside the bankruptcy process released.”[71]

This is good as far as it goes. But it may not go very far, because the “scheme” also applies to creditors, shareholders and others who are not (to use *Wilks*’s language) “strangers” to the case.[72] The Sacklers, as owners (and potential creditors) of Purdue Pharma, were hardly strangers to the case, and the bankruptcy court had found that, at least for jurisdictional purposes, the Sacklers had claims against Purdue Pharma for contribution and indemnification.[73] Thus, their claims against their company could, conceivably, affect property of its bankruptcy estate.

66. *In re* Purdue Pharma, L.P., 635 B.R. 26, 78–79 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21-CV-7532-CM, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

67. *Id.* at 114. Judge McMahon characterized the argument as a “corollary” to the argument that bankruptcy courts have “residual authority” to grant NDRs. *Id.*

68. *Id.* at 78–79 (“Nor is it necessary to reach . . . the various constitutional challenges to the Section 10.7 Shareholder Release,” including, *inter alia*, “lack of due process . . . .”).

69. *Id.* at 112, 114.

70. *Id.* at 114.

71. *Id.*

72. Martin v. Wilks, 490 U.S. 755, 762 (1989).

73. *In re* Purdue Pharma L.P., 633 B.R. 53, 97 (Bankr. S.D.N.Y.) (concluding for jurisdictional purposes that the Sacklers had claims for indemnification and contribution that “directly affect the res of the Debtors’ estates”), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21-CV-7532-CM, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022). As explained below, if in fact the Sacklers had engaged in fraudulent transfers, any claims they had should have been barred under Bankruptcy Code section 502(d). *See* 11 U.S.C. §§ 502(d), 548.

Judge McMahon focused not on property, but on process. She reasoned that the direct claims that would be barred by the Sackler Releases "*neither stem from Purdue's bankruptcy* nor can they be resolved in the claims allowance process. Yet those claims are being finally disposed of pursuant to the Plan; they are being released and extinguished, without the claimants' consent and *without any payment*, and the claimants are being enjoined from prosecuting them."[74] Thus, the NDRs were impermissible.

Still, under *Manville*, the italicized language is problematic. While the direct claims did not "stem from" Purdue Pharma's bankruptcy, surely the Sacklers' alleged liability is closely related to—if independent from—Purdue Pharma's liability. Indeed, the bankruptcy court had found that the claims against Purdue Pharma and the Sacklers were "fundamentally overlapping."[75] Judge McMahon apparently accepted Judge Drain's factual findings because they were not challenged on appeal.[76] Moreover, the objectors were at least in a position to receive payment from trusts created under Purdue Pharma's plan, funded in large part by Sackler contributions. Like the personal injury plaintiffs in *Manville*, and unlike Chubb there, the parties challenging the Sackler Releases were represented in Purdue Pharma's bankruptcy (how adequately will be discussed below). Unlike Travelers in *Manville*, the Sacklers did not "candidly" admit in *Purdue Pharma* that they might be liable to those plaintiffs.[77]

Yet, Judge McMahon went one step further than *Manville*, recognizing that the characteristics of the process—and not merely an NDR's potential effects on property of the estate—ultimately mattered:

> The [Bankruptcy] Code lays out a claims allowance process so that creditors can file their claims against someone who has invoked the protection of the Bankruptcy Code; it provides a mechanism for those parties to litigate those claims against the debtor and to determine their value. In order to take advantage of this "special remedial scheme," debtors have to declare bankruptcy, disclose their assets, and apply them—all of them, with *de minimis* exceptions—to the resolution of the claims of their creditors.[78]

In short, Judge McMahon tells us, the process lost to bankruptcy—the day in court with the Sacklers—was the problem in *Purdue Pharma*. A threat to

74. *In re Purdue Pharma, L.P.*, 635 B.R. at 81 (emphasis added).

75. *In re Purdue Pharma L.P.*, 633 B.R. at 97–98.

76. *In re Purdue Pharma, L.P.*, 635 B.R. at 82 n.54 ("[N]o one has challenged any of Judge Drain's findings of fact—only the conclusions he drew from them . . . .").

77. In *Manville,* Travelers had "candidly admit[ted]" that the insurance company actions "seek damages from Travelers that are unrelated to the policy proceeds" that were the principal assets of Manville's Chapter 11 estate. Johns–Manville Corp. v. Chubb Indem. Ins. Co. (*In re* Johns–Manville Corp.), 600 F.3d 135, 151 (2d Cir. 2010) (emphasis removed).

78. *In re Purdue Pharma, L.P.*, 635 B.R. at 114.

property of Purdue Pharma’s bankruptcy estate was not, in her view, special enough to overcome these procedural requirements.

Both *Manville* and *Purdue Pharma* are plausible interpretations of what might make bankruptcy “special”—property of the estate versus process lost. But neither considered the quality of the bankruptcy process as it actually played out in those cases. As explained in the next Part, many creditor protections that might make bankruptcy “special”—that might proxy for a day in court—were displaced or muted in *Purdue Pharma*, thus further calling into question the propriety of the Sackler Releases.

II. See No EVL—Due Process Values in *Purdue Pharma*

Proceduralists assess the process quality of aggregate litigation along dimensions of “exit, voice, and loyalty.”[79] Some seem to think that bankruptcy may be as good as, or better than, other aggregate litigations. Professor Chamblee Burch, for example, has argued that bankruptcy may have better fairness protections than other forms of aggregation.[80] Professor Issacharoff argues that bankruptcy law “protect[s] the individual interest through . . . the formation of creditor’s committees, and continuing through the recognition of priorities of different claims on the estate, and finally ending up in the equal treatment of comparably situated claimants.”[81] The Supreme Court would seem to agree: “[P]rotections for creditors” built into the Bankruptcy Code make the process “special.”[82]

In theory and in doctrine, this may be true. Practice may differ. The *Purdue Pharma* case shows how.

79. Coffee, *Class Action Accountability*, *supra* note 23, at 376; *see also* Coffee, *Litigation Governance*, *supra* note 23, at 308 (“Organizational theorists have long grouped organizational remedies under two basic headings: voice and exit.”); Issacharoff, *supra* note 23, at 341–42.

80. L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 215–16 (2004) (highlighting “the principles of fairness and justice inherent in the bankruptcy process that promote the view that bankruptcy provides a superior method for resolving mass torts”). In fairness, it would appear that her views have evolved. *See* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 73 (2021) (“[I]t seems clear that bankruptcy court is not the right way to launch such a massive shift in our understanding of federal-court authority.”).

81. Samuel Issacharoff, *Rule 23 and the Triumph of Experience*, 84 LAW & CONTEMP. PROBS., no. 2, 2021, at 174.

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

A. Chapter 11—No Exit

"Opting out is the paradigmatic exit remedy," John Coffee has argued[83]—and that is the most obvious way in which Chapter 11 differs from other forms of aggregation.

Most other aggregations permit plaintiffs to opt out.[84] Bankruptcy does not. For creditors, "exit" from bankruptcy is usually all but impossible because the automatic stay at commencement halts all civil litigation against the debtor.[85] Discharge under a confirmed plan makes that permanent.[86]

But, outside the asbestos context—where the *Manville* trust approach was codified to permit the release of third-party asbestos claims[87]—the Bankruptcy Code forecloses exit only as to creditors of a Chapter 11 *debtor*, not as to creditors of *nondebtors*.[88] In principle, nondebtors who want to eliminate joint or several liability with a debtor must either file their own bankruptcies or obtain *consensual* releases. As explained in Part I, NDRs change this.

1. The Preliminary Injunction.—Purdue Pharma's NDRs grabbed the headlines. But in many ways, they were virtually inevitable due to a broad preliminary injunction granted at the beginning of the case by Judge Drain[89] because he was apparently committed to the Sackler Releases from the start.[90]

83. Coffee, *Litigation Governance*, *supra* note 23, at 308.

84. *See* Issacharoff, *supra* note 81, at 167, 174 (noting the right to opt out of certain class actions and contrasting bankruptcy with "ordinary civil litigation," which "starts from the premise of individual autonomy, even where aggregate proceedings are inevitable").

85. 11 U.S.C. § 362(a).

86. *See id.* §§ 524(a), 1141(d)(1) (explaining that "confirmation of a plan . . . discharges the debtor" from all relevant debt and that discharge voids judgments obtained and enjoins current and future actions against the debtor). There are differences between the effects of the stay and the discharge that are not relevant here.

87. *Id.* §§ 524(g)–(h).

88. *Id.* § 524(e) ("[D]ischarge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."). The *Purdue Pharma* bankruptcy court read this language differently. *See In re* Purdue Pharma L.P., 633 B.R. 53, 101 (Bankr. S.D.N.Y.) (citing various courts' arguments that "effectively refute[]" a reading of section 524(e) that would preclude third-party claim releases), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21-CV-7532-CM, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

89. *See* Order Granting, In Part, Motion for a Preliminary Injunction at 1–2, *In re* Purdue Pharma L.P., 633 B.R. 53 (Ch. 11 Case No. 19-23649-RDD, Adv. No. 19-08289-RDD), ECF No. 82.

90. "[I]t appears to me to have always been the case and will continue to be the case," Bankruptcy Judge Drain observed at a September 2020 hearing, that "a plan in which [the Sacklers] do make a material contribution that satisfies the [S]econd [C]ircuit's test in *In re Metromedia* [*Fiber Network*]*, Inc.* is not only possible but the most likely outcome in this case." Transcript of Sept. 30, 2020, Hearing at 79, *In re* Purdue Pharma L.P., 633 B.R. 53 (Ch. 11 Case No. 19-23649-RDD, Adv. No. 19-08289-RDD), ECF No. 2054 (citation omitted).

When Purdue Pharma declared bankruptcy in September 2019, the Sacklers were defending hundreds of lawsuits asserting direct liability for personal injury as well as deceptive acts and practices arising from their role in Purdue Pharma’s fraudulent opioid marketing.[91] Purdue Pharma declared bankruptcy shortly—and not coincidentally—after the Sacklers lost “at least three” motions to dismiss lawsuits asserting direct liability.[92]

The injunction was critical because it foreclosed all efforts to determine through adversary litigation outside bankruptcy the truth of the allegations against the Sacklers, many of which were quite serious. As is well known, the Sacklers owned and controlled Purdue Pharma when it committed two sets of confessed federal drug crimes. The company first pled guilty to such crimes in 2007, after which the Sacklers took over $10 billion out of the company, offshoring more than half of it.[93] The company, still under the Sacklers’ ownership and control, allegedly persisted in its criminal ways, seeking to “[t]urbocharge” the opioid market with the help of consulting firm McKinsey as late as 2013.[94]

Certain plaintiffs urged the bankruptcy court to permit at least a bellwether trial against the Sacklers.[95] Bankruptcy Judge Drain refused. The “prospect” of a plan that implemented the Sackler Settlement Framework warranted the injunction in order to give the parties a “clear shot” to negotiate, free from the distraction of litigation on the merits.[96] Even a test (“bellwether”) case would produce a litigation explosion. “Why would I just do this one?” he asked rhetorically at the first preliminary injunction hearing.[97] Drawing an analogy to *Dr. Strangelove*, Judge Drain said he feared that “people will want to advance so they can say I’m going to be next. . . . They want the next doomsday machine.”[98]

One might think there was some relationship between the preliminary injunction and the merits of the direct claims against the Sacklers. But there wasn’t. Like all preliminary injunctions, the main issue was likelihood of

91. *In re Purdue Pharma*, *L.P.*, 635 B.R. at 34–35, 40.

92. *Id.* at 51.

93. *Id.* at 36.

94. Press Release, Committee on Oversight and Accountability Democrats, Maloney and DeSaulnier Release Documents Following DOJ Settlement with Purdue and Sackler Family (Oct. 27, 2020), https://oversightdemocrats.house.gov/news/press-releases/maloney-and-desaulnier-release-documents-following-doj-settlement-with-purdue [https://perma.cc/4B7Y-P9T6].

95. Transcript of Oct. 11, 2019 Hearing at 219–20, *In re* Purdue Pharma L.P., 633 B.R. 53 (Ch. 11 Case No. 19-23649-RDD, Adv. No. 19-08289-RDD), ECF No. 108.

96. *Id.* at 260–61.

97. *Id.* at 185.

98. *Id.*

success on the merits.[99] Here, however, the success in question was in confirming a plan of reorganization—not in establishing the Sacklers' personal liability. And this required only a showing that "discussions [were] continuing"—not that the plan would inevitably be confirmed.[100] But those discussions had to continue because the plaintiffs had no choice: the preliminary injunction assured that there was nowhere else to go.[101]

To be sure, the bankruptcy court rejected the assertion that the preliminary injunction would foreclose all alternatives.[102] To the contrary, Judge Drain stated that "the purpose of this injunction is to enable all of the states and all of the other claimants . . . to perform due diligence to decide whether a plan [of reorganization] . . . should consider a contribution by third parties."[103]

2. *The DOJ Settlement*.—The use of the phrase "due diligence" was telling. This phrase is typically used in transactional practice to describe a process of investigation in connection with a proposed deal. *Purdue Pharma* would be a case in pursuit of a deal—not a determination of the analytically prior question, which was whether a deal was appropriate at all.

Given that state of affairs, the only practical alternative—the only way to preserve plaintiff exit—would have been to have the case dismissed or converted to a liquidation under Chapter 7.[104] But no creditor sought this. Why not?

There are several reasons, some reflecting problems of voice and loyalty discussed below. But it was also due to a troubling settlement with the United States Department of Justice which foreclosed virtually any option that did not include a plan that released the Sacklers.

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99. The preliminary injunction was challenged unsuccessfully on appeal. *See* Dunaway v. Purdue Pharms. L.P. (*In re* Purdue Pharms. L.P.), 619 B.R. 38, 58 (S.D.N.Y. 2020) ("Appellants cannot say that a reorganization is unlikely simply because they intend to object to the plan as presently constituted.").

100. *Id.* at 59. "[D]ebtors need not present 'proof of the uncertain' in order to demonstrate a '*reasonable* likelihood of a successful reorganization.'" *Id.* at 58 (quoting Lyondell Chem. Co. v. CenterPoint Energy Gas Servs. Inc. (*In re* Lyondell Chem. Co.), 402 B.R 571, 589–90 (Bankr. S.D.N.Y. 2009)).

101. It is true, of course, that bankruptcy would not prevent criminal actions. 11 U.S.C. § 362(b)(1). Indeed, the United States Department of Justice pursued a significant criminal investigation involving Purdue Pharma and, as explained below, a key moment in the case involved the settlement of criminal claims against the company as part of the bankruptcy.

102. *See In re Purdue Pharms. L.P.*, 619 B.R. at 46 ("At the hearing preceding the [preliminary injunction], [Bankruptcy] Judge Drain rejected the suggestion by Appellants that the Preliminary Injunction amounted to a full release for the individual Related Parties, including [the] Sacklers.").

103. *Id.* (quoting the appellate record, at A716).

104. *See* 11 U.S.C. § 1112 (naming conversion under Chapter 7 or dismissal as alternatives to confirmation of a plan).

A key moment in Purdue Pharma’s bankruptcy was the company’s agreement to plead guilty to federal drug-marketing crimes in 2020 (which would be its second such plea), crimes that would also have been committed while Purdue Pharma was owned and controlled by the Sacklers.[105] At bottom, it had a “poison pill,” which meant that if there was any outcome other than a confirmed plan of reorganization for Purdue Pharma with certain features, the United States government would assert special priority rights to all of Purdue Pharma’s assets, potentially eliminating recoveries for all others.[106] If, however, a plan for Purdue Pharma was confirmed, the federal government agreed to contribute a portion of its recovery to the states, which were the most active creditors in the case.[107] Thus, any alternative to a plan—in particular, to exit by converting the case to a liquidation under Chapter 7 or dismissing it—would have been economically irrational.

The DOJ settlement did not require a release of the Sacklers. But, as explained in the next Part, the Sacklers had appointed corporate agents and professionals for Purdue Pharma shortly before bankruptcy. They had the exclusive right, on behalf of the debtor, to propose a plan. As a practical matter, it was certain that any plan they proposed would have those releases. And, of course, it did.[108]

B. Voice

Still, we might tolerate the loss of exit if we think that the process protects “voice.”[109] Questions of voice focus on participation, for example through voting.[110]

1. Voting.—To many, Chapter 11 may be as good as, or better than, adversary litigation because it codifies creditors’ right to vote on a plan of

105. Press Release, United States Department of Justice, Settlement Agreement Between the United States and Purdue Pharma L.P., (Oct. 21, 2020), https://www.justice.gov/opa/press-release/file/1329571/download [https://perma.cc/F3WM-3F98].

106. Adam J. Levitin, Purdue*’s Poison Pill: The Breakdown of Chapter 11’s Checks and Balances*, 100 TEXAS L. REV. 1079, 1113–15 (2022) (discussing risk of “DOJ’s criminal forfeiture claim gobbling up all of Purdue’s assets, leaving nothing” for other creditors).

107. Press Release, United States Department of Justice, Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family (Oct. 21, 2020), https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid [https://perma.cc/HYE8-B4F9].

108. Gerald Posner and I predicted this outcome and discussed other possibilities in a *New York Times* op-ed from late 2020. Jonathan C. Lipson & Gerald Posner, *The Sacklers’ Last Poison Pill*, N.Y. TIMES (Dec. 5, 2020), https://www.nytimes.com/2020/12/05/opinion/sackler-purdue-pharma-doj.html [https://perma.cc/88F6-48XD].

109. *See generally* Coffee, *Class Action Accountability*, *supra* note 23 (discussing the trade-offs to enhancing voice over exit and vice versa).

110. *Id.* at 376.

reorganization for the debtor.[111] Professor Rave, for example, argues that "[t]he voting procedures in bankruptcy are designed to prevent a majority of creditors from adopting a plan that oppresses a discrete minority."[112]

Again, on the surface this makes sense. A Chapter 11 plan cannot be approved without the supermajority vote of at least one class of creditors.[113] Yet, in *Purdue Pharma* the vote was constrained for at least two reasons. First, as explained above, the DOJ settlement made voting against any plan of reorganization economically irrational.

Second, the vote was uninformed. Creditors could not have had "adequate information" to vote for or against the plan because they were told very little about the merits of direct claims against the Sacklers, which were only coming to light when the preliminary injunction halted civil litigation against them. Those, however, were the claims that the Sackler Releases would eliminate.

To be sure, Purdue Pharma's disclosure statement contained lengthy discussions of the *estate*'s claims against the Sacklers (e.g., for fraudulent transfers) and the difficulty of collecting on a judgment because the Sacklers had offshored assets before bankruptcy.[114] But the disclosure statement offered little meaningful information on the *direct* claims against the Sacklers—which were the ones that mattered. Confusingly, Purdue Pharma claimed in the disclosure statement that the value of the direct claims against the Sacklers (and other nondebtors) was "unknowable" and then effectively gave them no value for plan purposes.[115] The bankruptcy judge approved the disclosure statement and plan notwithstanding this omission.[116]

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111. 11 U.S.C. §§ 1126(c), 1129(a).

112. D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1224 (2013).

113. 11 U.S.C. §§ 1126(c), 1129(a)(10).

114. *See generally* Disclosure Statement, *supra* note 60 (discussing the investigation of potential estate claims against the Sacklers and the process for identifying those claims).

115. *See id.* app. B at 5–6, 8 (stating that Purdue Pharma's Liquidation Analysis "assume[d] that all opioid-related claims asserted against the Debtors are asserted solely against Debtor PPLP" and that creditor recoveries in liquidation would be "lower than recoveries under the Shareholder Settlement Agreement for a number of reasons").

116. Order Approving (I) Disclosure Statement for Fifth Amended Chapter 11 Plan, (II) Solicitation and Voting Procedures, (III) Forms of Ballots, Notices and Notice Procedures in Connection Therewith, and (IV) Certain Dates with Respect Thereto at 1–3, *In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649-RDD), ECF No. 2988. These concerns were raised, and overruled. *See* Objection of Peter W. Jackson to Amended Disclosure Statement for First Amended Chapter 11 Plan for Purdue Pharma L.P. and Its Affiliated Debtors at 3, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649-RDD), ECF No. 2819; Supplemental Objection of Peter W. Jackson to Disclosure Statement for Second Amended Chapter 11 Plan for Purdue Pharma L.P. and Its Affiliated Debtors (Fourth Plan Supplement) at 3 n.5, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649-RDD), ECF No. 2881 (quoting Transcript of May 12, 2021 Hearing at 19, 21, 24, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649-RDD), ECF No. 2898).

2. *Silencing Voices*.—If voice means something more than voting, it is important to understand that both estate professionals and the bankruptcy judge in *Purdue Pharma* attempted to silence those who would challenge the Sackler Settlement Framework.

Ryan Hampton, an opioid activist and former co-chair of the Official Committee of Unsecured Creditors (UCC) in *Purdue Pharma*, for example, wrote in the *New York Times* that the Sackler Releases were “the opposite of what I and many other victims sought: We repeatedly called for transparency into the process, accountability for the Sacklers who had owned the company and reparations for the millions of people affected by the OxyContin-fueled drug epidemic.”[117] But, he said, most of the 130,000 individual victims who filed claims in the case “were left with no choice.”[118]

And nearly without voice. After Hampton resigned from the UCC to write about the experience, he faced threats of suit from counsel to the UCC for billions of dollars for attempting to tell his version.[119]

The most assertive efforts to resist the Sackler Settlement Framework came from the Ad Hoc Committee on Accountability. The Accountability Committee and its lawyer, Michael Quinn, sought to be a “kind of Greek chorus: a moral voice to remind people the Purdue case was about a lot more than extracting some money.”[120] Michael Quinn was a frequent thorn in the sides of Judge Drain and those who supported the Sackler Settlement Framework, objecting to the preliminary injunction (repeatedly) and the DOJ settlement, discussed above.

117. Ryan Hampton, Opinion, *The Sacklers Are Walking Off Into the Sunset. Reform the System*, N.Y. TIMES (Sept. 11, 2021), https://www.nytimes.com/2021/09/11/opinion/purdue-sacklers-opioids-oxycontin-settlement.html [https://perma.cc/F3ZC-7WBC].

118. *Id.*

119. On September 3, 2021, two days after Judge Drain confirmed Purdue Pharma’s plan, Arik Preis, lead counsel for the UCC, wrote to Mr. Hampton’s personal counsel to “remind you and Ryan of certain continuing confidentiality obligations (which apply to all UCC members).” Letter from Arik Preis, Counsel to the UCC, to Anne Andrews, Personal Counsel to Mr. Hampton 1 (Sept. 3, 2021) (on file with author). Violating those obligations, Preis warned, may result in sanctions, contempt, “or any other . . . punishments that the Court considers just and proper under the circumstances” and “could potentially result in damages in the millions, if not tens of millions, hundreds of millions or even billions of dollars.” *Id.* at 3–4. The veiled threat would appear to have been empty, as Preis took no action to enforce whatever confidentiality obligations he had in mind.

120. Libby Lewis, *The Swashbuckling Lawyer Who’s Taking on the Sackler Family*, NEW REPUBLIC (June 28, 2021), https://newrepublic.com/article/162614/sackler-family-oxycontin-purdue-bankruptcy [https://perma.cc/KZ8S-XWJ3]. Admittedly, Quinn’s approach was unorthodox. He analogized the judge and key participants in the case to Galapagos finches who, according to Darwin, crowded out all competing species, leading to their ultimate demise. Quinn included graphic depictions of finches, which led Bankruptcy Judge Drain to tell Quinn: “Clean up your act!” *Id.* Interestingly, there is no transcript of this hearing, as it was “not recorded due to an internal error,” according to a court employee. *Id.* A record of the effort to silence was, itself, silenced.

But perhaps the loudest voice in the case was Judge Drain's, who shouted down those who would challenge the Sackler Settlement Framework. In April 2021, for example, Judge Drain threatened to hold Quinn in contempt for his admittedly unorthodox objections to repeated extensions of the preliminary injunction, angrily telling him "clean up your act."[121] Judge Drain mocked other efforts to challenge the Sackler Releases. The bankruptcy was, he said, "about who should pay money."[122] He would "cut off" and "yell[]" at efforts to question the deal or how it was constructed.[123]

In the interest of disclosure, I was also a target of Judge Drain's ire. As indicated in the author's footnote, I represented on a pro bono basis personal injury claimant Peter Jackson in challenging deficiencies in the disclosure statement and, when those were not cured, in having an examiner appointed for the limited purpose of determining the Sacklers' role in influencing estate fiduciaries' decision to settle rather than to sue.[124] Despite his anger, Judge Drain granted part of the motion, although he severely constrained the scope of the examination, limiting the examiner's budget to $200,000 and precluding investigation of the Sacklers' prebankruptcy conduct.[125]

If "voice" means participation, whether through vote or vocalization, *Purdue Pharma* shows how it can be stifled.

C. *Loyalty*

Questions of voice require a consideration of loyalty: who represents and speaks for the potentially large groups of plaintiffs, who, in bankruptcy, become creditors? Again, on the surface, Chapter 11 would appear to offer special protections that address these concerns—chiefly through sets of official (statutorily-contemplated) fiduciaries who act for the debtor's estate and creditors.

121. *Id.*

122. Transcript of June 16, 2021, Hearing at 141, *In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649-RDD).

123. *E.g.*, Maria Chutchian, *Purdue Pharma Bankruptcy Judge OKs Examiner But Condemns Sackler-Related Attacks*, REUTERS (June 16, 2021, 5:52 PM), https://www.reuters.com/legal/transactional/purdue-pharma-bankruptcy-judge-oks-examiner-condemns-sackler-related-attacks-2021-06-16/ [https://perma.cc/DUA4-WJLV].

124. My work on behalf of Mr. Jackson, and Judge Drain's reactions, are discussed in BETH MACY, RAISING LAZARUS: HOPE, JUSTICE, AND THE FUTURE OF AMERICA'S OVERDOSE CRISIS 227–29 (2022).

125. *E.g.*, Chutchian, *supra* note 123. Not surprisingly, given the examiner's limited budget and scope, he did not find evidence that the Sacklers sought to influence Purdue Pharma's board during the bankruptcy. *E.g.*, Maria Chutchian, *Sacklers Did Not Influence Purdue in Deal Talks, Examiner Finds*, REUTERS (July 20, 2021, 2:49 PM), https://www.reuters.com/legal/transactional/sacklers-did-not-influence-purdue-deal-talks-examiner-finds-2021-07-20/ [https://perma.cc/3B48-XM2D].

In fact, estate representatives in *Purdue Pharma* suffered from a number of “structural conflicts”[126] through the use of so-called bankruptcy directors and ad hoc committees. Mechele Dickerson was among the first to warn of the ethical and fiduciary problems that can arise when corporate reorganization vests case control in private actors: “[T]hese private trustees have become common, especially in large Chapter 11 reorganizations,” she writes, but “the [Bankruptcy] Code does not authorize them and, indeed, makes no reference to them. Moreover, it is unclear how privatized trustees can adequately represent the interests of all parties in the case when they are hired because of, and often report to, one creditor or creditor group.”[127]

Purdue Pharma was rife with private fiduciaries with uncertain mandate and loyalties:

- *Bankruptcy Directors.* Shortly before bankruptcy, the Sacklers caused Purdue Pharma to hire “bankruptcy directors” to manage the process of negotiating its settlement.[128] Certain of them appear to have had a close working relationship with Judge Drain before bankruptcy and had themselves precommitted to the Sackler Settlement Framework.[129]
- *Ad Hoc Committees.* Although there was a single Official Committee of Unsecured Creditors (the UCC), there were about a dozen ad hoc committees. Ad hoc committees are “‘loose affiliation[s]’ of creditors” formed to represent self-identified interests.[130] “Importantly, ad hoc committees do not purport to represent the interests of any other parties in interest.”[131] Neither they nor their

126. *See* Coffee, *Class Action Accountability*, *supra* note 23, at 385–86 (describing common types of structural conflicts in mass tort class actions).

127. A. Mechele Dickerson, *Privatizing Ethics in Corporate Reorganizations*, 93 MINN. L. REV. 875, 876–77 (2009).

128. Jared A. Ellias, Ehud Kamar & Kobi Kastiel, *The Rise of Bankruptcy Directors*, 95 S. CAL. L. REV. 1083, 1086 (2022) (describing privatized directors as “loud voices in the boardroom shaping the company’s bankruptcy strategy”). They find evidence of “pro-shareholder bias,” which in ordinary cases renders them a new “weapon in the private-equity playbook,” *id.* at 1088, and which here would reflect bias for the Sacklers, Purdue Pharma’s shareholders.

129. They were led by Steve Miller, a long-time distress professional, who became chair of Purdue Pharma’s board in 2018. In May of 2019, six months before the bankruptcy, Mr. Miller wrote an op-ed in coordination with members of the Sackler family that firmly rejected the prospect of litigation. Steve Miller, Opinion, *Litigation Won’t Solve the Opioid Crisis*, WALL ST. J. (May 27, 2019), https://www.wsj.com/articles/litigation-wont-solve-the-opioid-crisis-11558989157 [https://perma.cc/Y8CA-NK59]. “Litigation may satisfy the public’s desire for a scapegoat, but real long-term solutions are needed,” he wrote. *Id.* It is not clear how, as a soon-to-be fiduciary for creditors, he could take this position. He detailed his relationship with Judge Drain, in whose chambers he apparently slept at one point, in his book, STEVE MILLER, THE TURNAROUND KID: WHAT I LEARNED RESCUING AMERICA’S MOST TROUBLED COMPANIES 223 (2008).

130. *In re* Wash. Mut., Inc., 419 B.R. 271, 274 (Bankr. D. Del. 2009).

131. Jennifer Albrecht, *New Bankruptcy Rule 2019: Boon or Bane for Distressed Investors?*, 2011 COLUM. BUS. L. REV. 717, 726.

professionals are statutory fiduciaries or subject to the Bankruptcy Code's special ethics provisions.[132] In many cases, Purdue Pharma agreed to pay their lawyers' fees in connection with the decision to support the Sackler Settlement Framework.[133]

- "*Personal Injury Claimants' Committee*." The ad hoc committee purporting to represent personal injury claimants was, in retrospect, the most problematic. This committee claimed that it was "comprised of 60,761 personal injury claimants" but, in fact, ultimately had only personal injury lawyers as members who, in turn, claimed to represent some unnamed and undisclosed individuals.[134] Among other things, counsel to this group created procedures that would have eliminated their putative clients' right to a jury trial against the debtors (later modified) and imposed significant burdens of proof on individuals, including that they have evidence of original prescriptions for OxyContin.[135] Because many victims died without having had a prescription, or cannot find the one they had, this would eliminate many creditors who might otherwise qualify for the meagre amounts available under the plan (topping out at around $48,000).[136]

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132. *See, e.g.*, 11 U.S.C. § 327(a) (stating that professionals retained by the estate may not hold "an interest adverse to the estate" and must be "disinterested persons").

133. Debtors' Motion to Approve Payment or Reimbursement of Certain Fees and Expenses of the Non-Consenting States Group, the Ad Hoc Committee and the MSGE Group at 3, *In re* Purdue Pharma L.P., No. 19-23649-RDD (Bankr. S.D.N.Y. Oct. 19, 2021), ECF No. 3986; Order Granting Debtors' Motion to Approve Payment or Reimbursement of Certain Fees and Expenses of the Non-Consenting States Group, the Ad Hoc Committee, and the MSGE Group at 1, *In re* Purdue Pharma L.P., No. 19-23649-RDD (Bankr. S.D.N.Y. Nov. 30, 2021), ECF No. 4185.

134. Second Amended Verified Statement of the Ad Hoc Group of Individual Victims of Purdue Pharma L.P. at 2, *In re* Purdue Pharma L.P., No. 19-23649-RDD (Bankr. S.D.N.Y Oct. 13, 2021), ECF No. 3939 [hereinafter Second Amended PI Statement]. Originally, the individuals' ad hoc committee was purportedly comprised of eight victims who had asserted opioid-related claims against the debtors. *See* Verified Statement of the Ad Hoc Group of Individual Victims of Purdue Pharma L.P. at 2–4, *In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y 2021) (No. 19-23649-RDD), ECF No. 348 (identifying the eight victims by name). All were apparently represented by the personal injury firm ASK LLP and attorney Edward Neiger. *Id.* at 1. In March of 2020 (about six months into the case), the individual victims' committee retained the BigLaw firm of White & Case, and its membership expanded to thirteen. Amended Verified Statement of the Ad Hoc Group of Individual Victims of Purdue Pharma L.P. at 2, *In re* Purdue Pharma L.P., 633 B.R. 53 (No. 19-23649-RDD), ECF No. 1480. It later redacted all names. *See* Second Amended PI Statement, *supra* at 2 (noting that "names and addresses of Ad Hoc Group Members constitute 'Personally Identifying Information'" and as such were not listed in the statement).

135. Disclosure Statement, *supra* note 60, at 108, 108 n.82; *see also* Objection of Peter W. Jackson to Amended Disclosure Statement for First Amended Chapter 11 Plan for Purdue Pharma L.P. and Affiliated Debtors, *supra* note 116, at 12–13 (noting the proposed disclosure statement's series of "bright-line tests," including that "a personal injury claimant can recover 'only if the opioid you used was prescribed to you,'" and that apparently sought "to eliminate any right to a jury trial").

136. Disclosure Statement, *supra* note 60, at 111.

Perhaps the ultimate evidence of problems of loyalty involves what did *not* happen. No party in any position to do so—not the debtor in possession, the UCC, or any ad hoc committee—attempted to sue the Sacklers notwithstanding the severity of the allegations against those involved with Purdue Pharma. Nor could anyone else, outside of bankruptcy. The only complaint relevant to the Sackler Releases was the one *against* personal injury plaintiffs for the preliminary injunction, brought by a debtor in possession under the control of directors recently appointed by the Sacklers.

How’s that for loyalty?

Nor did any party assert basic powers under the Bankruptcy Code to neutralize claims the Sacklers might assert for contribution or indemnification, which they might make to support an in rem argument about the “special” power of bankruptcy courts under the property-based reasoning of *Manville*. As noted above, Bankruptcy Judge Drain justified the Sackler Releases for jurisdictional purposes because he thought they could assert claims for indemnification and contribution if they had to pay out on direct lawsuits. But Sections 502(d) & (e) of the Bankruptcy Code would almost certainly have barred any such recoveries by the Sacklers, both because they apparently received voidable (fraudulent) transfers and because the Bankruptcy Code disallows contingent claims for reimbursement or contribution.[137]

No one apparently even tried to make these arguments. Instead, the case was framed from the outset as a “settlement” under which the Sacklers would be given many of the protections of bankruptcy—including, potentially, its greatest benefit, discharge—if only they returned half of the $10 billion they “looted” after Purdue Pharma’s first criminal plea.[138]

Ironically, while proponents of the Sackler Releases may recruit *Wilks*’s vision of bankruptcy as a special remedial scheme, they neglect to cite its other, perhaps more important proposition: “A voluntary settlement . . . cannot possibly ‘settle,’ voluntarily or otherwise, the conflicting claims of [those] who do not join in the agreement.”[139]

That, however, is what the Sackler Releases would do.

137. 11 U.S.C. §§ 502(d)–(e), 548.

138. *See* Jeanne L. Schroeder & David Gray Carlson, *Generalized Creditors and Particularized Creditors: Against a Unified Theory of Standing in Bankruptcy*, 96 AM. BANKR. L.J. 505, 510 (2022) (“The *Purdue* plan, as written, with its channeling injunction, was confirmable because the bankruptcy estate owned looting claims.”).

139. Martin v. Wilks, 490 U.S. 755, 768 (1989). “Of course,” the Supreme Court has admonished, “parties who choose to resolve litigation through settlement may not dispose of the claims of a third party . . . without that party’s agreement.” Loc. No. 93, Int’l Ass’n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986).

D. The Rule of the Deal—Bankruptcy Bargains and Social Debt

As I have explained elsewhere, the Sackler Releases are the product of a larger trend toward the use of "bankruptcy bargains," bespoke agreements among a debtor and small groups of stakeholders negotiated before and during the case, which define and constrain options available in the case.[140] Like third-party releases, intra-case deals such as "restructuring support agreements," case stipulations, and major settlements are common features of Chapter 11 practice.[141]

This "rule of the deal" is not ordinarily problematic. Indeed, bankruptcy bargains are the connective tissue of ordinary commercial reorganizations. They can create space for creative solutions that were not necessarily contemplated by the Bankruptcy Code, but which in fact might be valuable in any number of ways.

But even under the best of circumstances, they can be problematic, because they derive from (and reflect) a playing field that already tilts in favor of the Chapter 11 debtor in possession.[142] When the debtor is a mass tortfeasor, we may worry that the foxes still run the henhouse. For example, although the Sacklers are no longer on Purdue Pharma's board, they still own the company (they would place it in trust for creditors if the plan is reinstated). Craig Landau has held executive positions with Purdue Pharma since 1999, and he remains its chief executive officer even though Purdue Pharma confessed to two sets of federal drug marketing crimes in that time.[143] He has received over $17 million in compensation during the case.[144]

Bankruptcy bargains may be tolerable in ordinary commercial cases, assuming parties are sophisticated or well-represented. Cases involving social debt, however, demand greater fidelity to the rule of law because the normative stakes are higher and the harm widespread. The rule of the deal in a case like *Purdue Pharma* undercuts the rule of law, giving credence to the widely expressed fear that the Sacklers sought to use Purdue Pharma's

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140. *See generally* Lipson, *Rule*, *supra* note 15 (describing bankruptcy's "strong appetite" for such agreements and evaluating their use in *Purdue*).

141. *See In re* Aegean Marine Petrol. Network Inc., 599 B.R. 717, 726 (Bankr. S.D.N.Y. 2019) ("Almost every proposed Chapter 11 Plan that I receive includes proposed releases."); *see also* Lipson, *Rule*, *supra* note 15, at 49 (discussing this practice).

142. *See* Lipson, *Rule*, *supra* note 15, at 48 (noting that "Chapter 11 reorganization favors consensus over conflict," which can make it a "coercive process").

143. *See* Paul Schott, *Purdue Pharma CEO Has a $2.5 Million Bonus Approved, But Would Forgo Severance Pay*, CT INSIDER (June 16, 2022, 8:38 AM), https://www.ctinsider.com/business/article/Purdue-Pharma-CEO-has-a-2-5-million-bonus-17244197.php [https://perma.cc/5QYN-M8EC] (noting that, after bankruptcy proceedings end, the board of Purdue Pharma's successor company will decide whether Landau can continue as CEO).

144. Corporate Monthly Operating Report, period ending Dec. 31, 2022 at 21, *In re* Purdue Pharma L.P., No. 19-23649-SHL (Bankr. S.D.N.Y. Feb. 8, 2023), ECF No. 5403.

Chapter 11 case to “get away with it.”[145] That may be “special” for them, but it can also corrode confidence in the legal system for those harmed by the opioid and overdose crisis.

III. The Future of *Purdue Pharma*

A. The Difficulty of Prediction

Predicting the future in a case like *Purdue Pharma* is tricky. As of this writing, the quest to reinstate the Sackler Releases is pending before the Second Circuit Court of Appeals. Although District Judge McMahon’s opinion, which is being challenged on appeal, was well-reasoned and careful, Purdue Pharma, the Sacklers, and their allies made strong arguments that the Sackler Releases were necessary given the severity of the overdose crisis and the funding that Purdue Pharma’s plan would make available. The claim that bankruptcy is a special remedial scheme backstopped these arguments.[146]

If the Second Circuit can somehow find a statutory hook—and it shouldn’t—it may then treat the Sackler Releases as it did the release of personal injury claims in *Manville*, reinstating them because claims against the Sacklers would affect Purdue Pharma’s estate and because personal injury claimants had some representation in the case (which was problematic for the reasons discussed above).

In theory, reversing Judge McMahon would not end the story. Opponents of the Sackler Releases could still go to the Supreme Court. Unfortunately, appellate courts often refuse to address problems in Chapter 11 reorganizations on grounds of “equitable mootness.” Equitable mootness is a court-made doctrine under which appellate courts decline to reverse plan confirmation because it would be “inequitable,” and perhaps impossible, to “unscramble the eggs.”[147]

Thus, the Second Circuit may reverse Judge McMahon, and reinstate Purdue Pharma’s plan, in the hope that it is quickly consummated, and any

145. *See* Posner & Brubaker, *supra* note 20 (reporting that, due to the “expansive powers that bankruptcy courts exercise in complex cases,” legal experts “expect the court to give the Sacklers what they want”).

146. *See, e.g.*, Page Proof Brief of Appellant the Official Committee of Unsecured Creditors at 81, *In re* Purdue Pharma L.P., No. 22-110 (2d Cir. Feb. 15, 2022), ECF No. 362 (quoting Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989)) (stating that where a special remedial scheme “expressly foreclos[es] successive litigation by nonlitigants,” legal proceedings otherwise consistent with due process may terminate pre-existing rights).

147. Castaic Partners II, LLC v. Daca-Castaic, LLC (*In re* Castaic Partners II, LLC), 823 F.3d 966, 968 (9th Cir. 2016) (quoting Baker & Drake, Inc. v. Pub. Serv. Comm’n (*In re* Baker & Drake, Inc.), 35 F.3d 1348, 1352 (9th Cir. 1994)) (“Equitable mootness concerns whether changes to the status quo following the order being appealed make it impractical or inequitable to ‘unscramble the eggs.’”). This was the actual outcome in the leading Second Circuit case on NDRs, Deutsche Bank AG v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 145 (2d Cir. 2005).

further appeal rendered moot. True, in the process, it may tell us what factors matter in granting NDRs, perhaps narrowing their use in future cases. That may provide meaningful creditor protections against their future "abuse."[148] But it will be cold comfort for survivors of the overdose crisis, many of whom only wanted a day in court to determine which individuals should bear responsibility for Purdue Pharma's extraordinary—and confessed—misconduct. In that case, *Purdue Pharma* would have been a very special remedial scheme, indeed.

B. Fixing Purdue Pharma

The tragedy of *Purdue Pharma* is that it could have respected rule-of-law values that proxy for the day in court with only modest changes and in the process improved payouts. Judge Drain could have permitted a bellwether trial on the direct claims against the Sacklers; he could have required more fulsome disclosure of the merits of those claims; he could have required that the release of the Sacklers be consensual, as often happens in Chapter 11 cases. These and similar efforts would have improved transparency and accountability in *Purdue Pharma*. They also would have placed greater pressure on the Sacklers who, under ordinary bargaining theory, would likely have paid more to get the releases they sought.[149]

It is possible that, if the Sackler Releases are not reinstated, there will be the litigation explosion Judge Drain feared. But that seems less plausible than continued efforts to achieve the "global peace"[150] the Sacklers—and many creditors—say they want, on terms that do not wholly deprive plaintiffs of their day in court.

The most obvious way to do this, as I have explained elsewhere, would be to amend the plan and disclosure statement to provide a more fulsome analysis of the claims and defenses asserted in the underlying direct litigations.[151] Thereafter, the proponents of the plan would resolicit creditor votes and provide a line-item in the ballot on which creditors could indicate assent to the Sackler Releases, either by opting in to grant the release or by failing to opt out.[152]

148. *See In re Metromedia*, 416 F.3d at 142 (warning that NDRs may be abused).

149. *See,* Lipson, *Rule*, *supra* note 15, at 98–102 (discussing the economics of Purdue Pharma's proposed plan).

150. *In re* Purdue Pharma, L.P., 635 B.R. 26, 36 (S.D.N.Y. 2021) ("[T]he Sacklers offered to contribute toward a settlement, but if—and only if—every member of the family could 'achieve global peace' from all civil (not criminal) litigation . . . ."), *certificate of appealability granted*, No. 21-CV-7532-CM, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

151. Lipson, *First*, *supra* note 15, at 55.

152. *Id.* The preferred method seems to be to require an opt-in—affirmative evidence of assent—but space limitations preclude discussion of details here.

This would hardly be perfect. It might reopen negotiations among some stakeholders who had previously committed to supporting the Sackler Settlement Framework (including some members of the Sackler family). It might require the Sacklers to pay more than the $5.5 billion they have committed to obtain the closure they seek. Instead (or more likely in addition), it might leave the Sacklers and Purdue executives exposed to potential liability and require them to defend themselves in the underlying civil suits.

If, however, the Sacklers are correct that they “acted lawfully in all respects”[153]—and they retain a war-chest of about $6 billion, roughly the amount they off-shored—then they should be able to defend themselves against the likely small number of plaintiffs who would choose to litigate rather than settle under the plan. After all, if the plan really was supported by an “overwhelming[]” number of creditors, then there should be few holdouts.[154] Those who believe their claims to be “special” enough to warrant a day in court would have it, while preserving, and perhaps improving, the efficiency gains of an aggregate resolution under a Chapter 11 plan.

Hindsight is 20-20, and it is easy to second-guess hard decisions in complex cases. As I have stated elsewhere, I do not suggest that Judge Drain did anything other than what he thought was best under conditions as he saw them.[155] Still, creditors sought these and similar protections in *Purdue Pharma*, and were repeatedly thwarted by bankruptcy professionals and a bankruptcy judge committed to the Sackler Settlement Framework from the outset.

Conclusion

The *Purdue Pharma* reorganization is perhaps the most normatively difficult Chapter 11 case ever commenced. It pits laudable goals, such as opioid remediation, against the equally important need to recognize the individual’s right to an adjudication on the merits of plausible allegations of serious misconduct.

Given the gravity of those allegations—given the “social” nature of Purdue Pharma’s debt—Chapter 11’s creditor protections were essential to assure the legitimacy of the process. While those protections could make bankruptcy “special” in the ways the Supreme Court and proceduralist writers imagine, this Article has shown how readily they can be muted or displaced in instances where they should matter most. Although NDRs may

153. Mediator’s Fourth Interim Report at attach. C, *In re* Purdue Pharma L.P., No. 19-23649-RDD (Bankr. S.D.N.Y. Mar. 3, 2022), ECF No. 4409 (statement of Sackler families).

154. *In re* Purdue Pharma L.P., 633 B.R. 53, 107 (Bankr. S.D.N.Y. 2021) (“The plan also has been overwhelmingly accepted . . . .”), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21-CV-7532-CM, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

155. Lipson, *Rule*, *supra* note 15, at 102.

be special in some way, they were in *Purdue Pharma* the opposite of creditor protections.