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Note

Evaluating Nondebtor Releases: How Purdue Pharma Emphasizes the Need for Congress to Resolve the Decades-Long Debate

In 2019, Purdue Pharma filed a petition for relief under Chapter 11 of the Bankruptcy Code (the “Code”) due to an onslaught of lawsuits arising from its alleged contribution to the opioid crisis. The proposed plan of reorganization became notorious for its release of the Sackler family—nondebtors—from future civil liability relating to opioid litigation. For over 30 years, Federal Circuit Courts of Appeal have split on whether the Code allows release of nondebtors. A majority of circuits have recognized that the Code’s grant of broad, discretionary equitable powers authorizes nondebtor releases. The recent emergence of several mass-tort bankruptcies containing nondebtor releases has sparked a movement for Congress to expressly prohibit the practice. This legislation would negatively impact the practice of bankruptcy law by threatening claimants’ potential recovery and increasing the likelihood that corporations who could possibly reorganize through the use of nondebtor releases, will not be able to without their availability. This note argues that Congress should amend the Bankruptcy Code—specifically section 524(g)—beyond the asbestos context and explicitly allow for nondebtor releases in the mass-tort context.

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Evaluating Nondebtor Releases: How Purdue Pharma Emphasizes the Need for Congress to Resolve the Decades-Long Debate

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INTRODUCTION

Due to an onslaught of over 2,600 lawsuits filed against it, Purdue Pharma L.P. and 23 affiliated debtors (collectively, “Purdue Pharma”) each filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code (“the Code”) in the United States Bankruptcy Court for the Southern District of New York.¹ Purdue Pharma’s controlling stockholders—the Sackler family—did not file a petition. Purdue Pharma’s alleged role in the creation and perpetuation of an opioid epidemic that caused the deaths of almost one half of one million individuals in the preceding twenty years is the basis of these lawsuits, as claimants seek to get monetary relief from Purdue Pharma.² The current plan of reorganization in the Purdue Pharma case would release members of the Sackler family (“the Sackler Release”) from all civil opioid-related liability in consideration of a monetary contribution to a fund, the significance and legality of which is contested.³ Courts vary in their approach to the question of nondebtor releases⁴ – the heart of the controversy

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¹ Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, N.Y. TIMES (Nov. 24, 2020), <https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html>.

² Jan Hoffman & Katie Benner, *Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales*, N.Y. TIMES (Sept. 1, 2021) <https://www.nytimes.com/2020/10/21/health/purdue-opioids-criminal-charges.html>.

³ Jan Hoffman, *Sacklers Threaten to Pull Out of Opioid Settlement Without Broad Legal Immunity*, N.Y. TIMES (Sep. 16, 2021), <https://www.nytimes.com/2021/08/17/health/sacklers-purdueopioids-settlement.html>; *infra* Section I.

⁴ Nondebtor releases are a protective method commonly used in Chapter 11 proceedings, whereby third parties, usually corporate insiders, who share an associative interest with the debtor are shielded from any liability, claim, obligation, or cause of action to any claimant of the debtor’s bankruptcy, or a party that has been given notice thereof. Ashraf Mokbel, *The Permissibility of Chapter 11 Non-Debtor Release Provisions*, 7 ST. JOHN’S BANKR. RSCH. LIBR. No. 16 (2015). While the issue of third-party releases extends beyond the context of mass tort and anomalous claims, the scope of this paper is limited to third-party releases in the context of mass tort bankruptcies. The debate surrounding

surrounding Purdue Pharma’s bankruptcy and many other large corporate bankruptcies nationwide.⁵ Congress should resolve this debate by explicitly allowing these nondebtors the benefits of the Code.

In August 2021, Bankruptcy Judge Robert D. Drain⁶ approved a plan of reorganization that would dissolve Purdue Pharma and transfer control of its assets to a new company, which will be controlled by a trust designed to combat the opioid epidemic, rather than by the Sackler family.⁷ The most controversial aspect of the restructuring plan was the nondebtor release provision, which would absolve the Sackler family of liability for future opioid litigation.⁸ As founders and owners of the pharmaceutical giant, the Sackler family has amassed a net worth estimated to be about \$11 billion.⁹ Under the plan of reorganization, they would make a \$4.325 billion contribution to addiction treatment and prevention programs nationwide for their role in perpetuating the crisis, to be paid over a ten-year period.¹⁰ The

third-party releases outside the mass tort context, in realms such as releases for directors and officers for breaches of fiduciary duty and securities law violations, for example, undertakes a different analysis and craftiness, and therefore is not addressed in this article. This note uses the terms “nondebtor release” and “third-party release” interchangeably.

⁵ Mallinckrodt PCL, a large opioid manufacturer who filed for Chapter 11 protection in October 2020, recently won court approval of its plan of reorganization including the release of corporate officers from all civil opioid liability, despite objections from Rhode Island authorities and others arguing nonconsensual releases of legal liability for nondebtors is prohibited by bankruptcy law. Jonathan Randles, *Mallinckrodt Cleared to Leave Bankruptcy Under \$1.7 Billion Opioid Deal*, WSJ PRO BANKR. (Feb. 4, 2022), <https://www.wsj.com/articles/mallinckrodt-cleared-to-leave-bankruptcy-under-1-7-billion-opioid-deal-11643936693>. USA Gymnastics recently exited Chapter 11, reaching a settlement agreement with victims and survivors after many objections were raised as to the release provisions included in the plan for the United States Olympic & Paralympic Committee, a nondebtor-entirety who sought to shield itself from liability claims in exchange for a monetary contribution. WSJ PRO BANKR., *Pro Bankruptcy Briefing: USA Gymnastics Bankruptcy Ends; Boy Scouts Insurer Strikes \$800 Million Abuse Deal*, WSJ PRO BANKR. (Dec. 14, 2021), <https://www.wsj.com/articles/pro-bankruptcy-briefing-usa-gymnastics-bankruptcy-ends-boy-scouts-insurer-strikes-800-million-abuse-deal-11639492464>.

⁶ Judge Drain is a bankruptcy judge in the Southern District of New York. Of significance, 57% of bankruptcies filed in 2021 went before either Judge Drain or two other judges in different districts. *Hearing on Abusing the Bankruptcy Code Before the House Judiciary Subcomm. on Antitrust, Com., and Admin. Law*, 117th Cong. 1 (2021) [hereinafter *Hearing on Abusing the Bankruptcy Code*] (statement of Rep. Ken Buck, Ranking Member, Subcomm. on Antitrust, Com., and Admin. Law).

⁷ *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021).

⁸ *See, e.g., Attorney General William Tong, Attorney General Tong Responds to Purdue Bankruptcy*, CONNECTICUT’S OFFICIAL STATE WEBSITE (Sept. 1, 2021) <https://portal.ct.gov/AG/Press-Releases/2021-Press-Releases/Attorney-General-Tong-Responds-to-Purdue-Bankruptcy-Decision> (announcing that Connecticut plans to file a notice of appeal in response to Judge Drain’s bench decision that he will approve Purdue Pharma’s bankruptcy plan that grants nondebtor releases to the Sackler family).

⁹ Rep. Carolyn B. Maloney, *Committee Releases Documents Showing Sackler Family Wealth Totals \$11 Billion*, HOUSE COMM. ON OVERSIGHT AND REFORM, CHAIRWOMAN CAROLYN B. MALONEY (Apr. 20, 2021). <https://oversight.house.gov/news/press-releases/committee-releases-documents-showing-sackler-family-wealth-totals-11-billion>.

¹⁰ *In re Purdue Pharma L.P.*, 633 B.R. at 73.

question of whether the bankruptcy court had authority to grant the nondebtor releases was appealed to the District Court for the Southern District of New York in December 2021, where Judge Colleen McMahon reversed the settlement plan and concluded that neither the Code nor Second Circuit precedent authorizes nondebtor releases explicitly, implicitly, or through a reading any section of the Code singly or jointly.¹¹ Judge McMahon recognized the ambiguity and subjectivity of this conclusion, stating that “[t]his opinion will not be the last word on the subject, nor should it be. This issue has hovered over bankruptcy law for thirty-five years – ever since Congress added [sections] 524(g) and (h) the Bankruptcy Code. It must be put to rest sometime”¹²

The time is now. This note argues that Congress should amend section 524(g) of the Bankruptcy Code to explicitly provide for nondebtor releases. This would allow courts to approve plans of reorganization that achieve the purposes of Chapter 11. This argument draws comparisons between Purdue Pharma and Johns-Manville, specifically how Congress added section 524(g) to the Bankruptcy Code to allow for nondebtor releases in asbestos cases in the aftermath of the Johns-Manville bankruptcy, and concludes that the rise of mass tort bankruptcy presents a situation comparable to that of the 1990s, indicating section 524(g) should be amended to expand the use of nondebtor releases beyond the asbestos context. Some argue that nondebtor releases create a loophole in the bankruptcy system, but the reality is releases play an essential role in the continuation and existence of efficient and effective reorganization processes for indebted corporations.

Part I of this note will analyze the current circuit split and the various interpretations of sections 105(a) and 524(e) of the Code – the two provisions that courts consider when evaluating nondebtor releases. It will look at the different interpretations of these provisions and how a majority of the circuits have understood them to permit nondebtor releases, but how section 524(g) is not a consideration in that decision. Part II will analyze the Second Circuit’s jurisprudence surrounding nondebtor releases and through the lens of Purdue Pharma, illustrate how the lack of congressional or Supreme Court guidance on the matter leads to conflicting resolution of cases. Part III argues the best solution to this debate is an amendment to the

¹¹ In re Purdue Pharma, L.P., 635 B.R. 26, 31 (S.D.N.Y. 2021).

¹² *Id.*

Bankruptcy Code that modifies existing language and expands section 524(g) to the ambit of mass tort bankruptcies, eliminating the limiting language focused on asbestos torts. This amendment would include a definition of mass tort, as well as a process debtors must undertake to properly identify and certify their class of claimants that will be bound by the nondebtor releases. This section acknowledges alternative proposals for resolving the nondebtor release issue, but concludes they provide an inadequate path forward. Part IV will address and rebut arguments against the use of nondebtor releases, illustrating how their use in certain situations would benefit all parties involved in the bankruptcy proceeding by optimizing recovery for claimants and allowing debtors to successfully reorganize.

I. THE CIRCUIT SPLIT FAVORS NONDEBTOR RELEASES

The Supreme Court has not addressed the decades-old question of whether bankruptcy courts have the power to approve plans of reorganization that contain nondebtor releases, which has left circuits to their own interpretations of the Code.¹³ Jurisprudence on the validity of nondebtor releases varies by circuit,¹⁴ although most find that these releases are permitted in unique situations.¹⁵ The two main sections of the Code at play in this debate are 105(a), which vests bankruptcy courts with the power “to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this Title,”¹⁶ and 524(e), which states that “discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt.”¹⁷ While the circuit courts vary in their approach to the issue of nondebtor releases, all circuits recognize the Code grants bankruptcy courts significant discretion and “broad equitable powers to effectuate solutions that are ‘necessary’ or ‘appropriate’ and comply with other sections of the Code.”¹⁸

¹³ Jason W. Harbour & Tara L. Elgie, *The 20-Year Split: Nonconsensual Nondebtor Releases*, 21 J. BANKR. L. & PRAC. 4, Art. 4, 1 (2012).

¹⁴ Ryan M. Murphy, *Shelter from the Storm: Examining Chapter 11 Plan Releases for Directors, Officers, Committee Members, and Estate Professionals*, 20 NORTON J. BANKR. L. & PRAC. 4 Art. 7, 1 (2011).

¹⁵ 11 U.S.C. § 524(g).

¹⁶ Murphy, *supra* note 14, at 2; 11 U.S.C. § 524(g).

¹⁷ 11 U.S.C. § 524(e).

¹⁸ Jason J. Jardine, *The Power of the Bankruptcy Court to Enjoin Creditor Claims Against Nondebtor Parties in Light of 11 U.S.C. 524(e): In re Dow Corning Corp.*, 2004 B.Y.U. L. REV. 283, 285 (2004); *see* 11 U.S.C. § 105(a) (stating “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”).

A. THE MINORITY VIEW: ARGUMENTS AGAINST THE USE OF NONDEBTOR RELEASES

The Fifth, Ninth, and Tenth Circuits (collectively, the “minority circuits”) read section 524(e) as a constraint on a court’s broad equitable powers, and conclude that since the only reference to nondebtor releases in the Code is in section 524(g), the use of nondebtor releases is prohibited outside the context of asbestos cases.¹⁹

1. NONDEBTORS ARE NOT “DEBTORS” AS DEFINED BY THE CODE

The Code defines a “debtor” as a “person or municipality concerning which a case under this Title has been commenced.”²⁰ One of the primary benefits to the debtor for filing a bankruptcy petition is the discharge of liability for most debts that arose prior the date of confirmation of a plan of reorganization.²¹ Importantly, the discharge provision explicitly references its application to the debtor but makes no mention of a discharge for nondebtor entities.²² In fact, the Code specifies that a “discharge 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.”²³ Further, not all debts are dischargeable,²⁴ and a discharge in Chapter 11 may only be granted if the debtor’s plan of reorganization satisfies a number of statutory and procedural requirements.²⁵

¹⁹ See, e.g., *Bank of New York Trust Co., NA v. Official Unsecured Creditors’ Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009) (holding that “Section 524(e) only releases the debtor, not co-liable third parties”); *Resorts Int’l v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir. 1995) (concluding that “Section 524 does not provide for the release of *third parties* from liability . . . [section] 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors”); *In re W. Real Estate Fund*, 922 F.2d 592, 600 (10th Cir. 1990) (explaining how Congress did not intend to extend the benefits of section 524(e) beyond the debtor to third-party bystanders).

²⁰ 11 U.S.C. § 101(13).

²¹ 11 U.S.C. § 1141(d)(1)(A).

²² See *id.* (“Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation . . .”).

²³ 11 U.S.C. § 524(e).

²⁴ See, e.g., 11 U.S.C. § 523(a) (enumerating a number of categories of debt that are excepted from discharge in bankruptcy).

²⁵ See, e.g., 11 U.S.C. § 1129(a)(3) (requiring “The plan has been proposed in good faith and not by any means forbidden by law”); 11 U.S.C. § 1141(d)(3) (noting instances in which confirmation of a plan does not discharge a debtor).

Upon filing for bankruptcy, debtors undergo a public judicial process in which creditors actively participate.²⁶ To maintain transparency with creditors, the debtor is required to file schedules detailing their bankruptcy estate: the assets, liabilities, related parties, current and potential litigation, and insurance coverage.²⁷ The purpose of these disclosures is to determine how much debt the debtor is able to satisfy and what assets they can contribute toward the resolution of their bankruptcy. Additionally, the debtor must file a monthly operating report outlining any changes in their financial statements,²⁸ which gives the creditors a glimpse into the administrative costs associated with the bankruptcy and assures them the debtor's assets are within the bankruptcy estate.²⁹ While the debtor must satisfy these statutory and procedural requirements, nondebtors do not.

2. BANKRUPTCY COURTS DO NOT HAVE THE AUTHORITY TO ISSUE RELEASES

A plain meaning of the Code controls unless legislative intent dictates otherwise.³⁰ Since the only reference to section 524(e) in legislative history states that this section “provides [that] the discharge of the debtor does not affect co-debtors or guarantors,” the minority circuits interpret this to mean that Congress believed this section was straightforward and did not require extended discussion.³¹ Accordingly, the minority circuits wrongfully posit that since section 524(e) only authorizes a discharge of personal liabilities of a debtor, an ordinary reading of this section bars a discharge of a nondebtor under section 105(a)'s broad authority.³² One interpretation of section 524(e)'s language suggests it prohibits nondebtor releases in a debtor's bankruptcy since the nondebtor constitutes an “other entity.”³³ Additionally, when read in conjunction with section 524(a), which restricts a discharge to debts constituting “personal liabilities

²⁶ 11 U.S.C. §§ 341, 1109.

²⁷ Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L. J. 1154, 1197, 1207–1210 (2022).

²⁸ See Fed. R. Bankr. P. 2015 (requiring the debtor in possession in a Chapter 11 reorganization case to file and transmit “a statement of any disbursements made during that quarter and of fees payable . . . for that quarter”).

²⁹ *Id.*

³⁰ *United States v. Ron Pair Enters., Inc.* 489 U.S. 233, 241 (1989).

³¹ Peter M. Boyle, Note: *Non-Debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy*, 61 FORDHAM L. REV. 421, 424 (1992).

³² *Id.* at 423.

³³ Elizabeth D. Lauzon, *Validity of Non-Debtor Releases in Bankruptcy Restructuring Plans*, 18 A.L.R. FED. 3d Art.2, 35 (2016).

of the debtor,” section 524(e) precludes the use of nondebtor releases. Under these views, bankruptcy courts cannot rely on section 105(a) to effectuate nondebtor releases because section 524(e) precludes such a result.³⁴

Another interpretation of section 524(e) focuses solely on the restriction of debtors’ discharges and does not provide insight into how it might affect nondebtor entities, thus leaving the door open for nondebtor releases.³⁵ This outcome forces the minority circuits to turn to section 105(a) to support their position. The circuits find support in the text of this provision, specifically, how the court’s equitable powers are limited to actions “necessary or appropriate to effect the provisions” of the Code.³⁶ Thus, in order for a bankruptcy court to invoke its section 105(a) power to carry out a provision of the Code, “there must be a section which implies that discharges of nondebtors are necessary or appropriate.”³⁷ Because there is no such section in Chapter 11 or elsewhere in the Code, bankruptcy courts lack the power to confirm plans of reorganization authorizing nondebtor releases.

Lastly, some argue that Congress did not intend for the Code to impact relationships outside that of the debtor and its creditors.³⁸ For instance, conversation in congressional hearings before the enactment of the Bankruptcy Reform Act of 1978 focused on the nature of bankruptcy as a tool “to sort out all of the debtor’s legal relationships with others, and to apply the principles and rules of the bankruptcy laws to those relationships.”³⁹ Accordingly, the argument goes that Congress did not intend for the protections of bankruptcy laws to extend beyond the debtor and to the relationship between nondebtor entities and creditors.

³⁴ Jardine, *supra* note 18, at 286.

³⁵ Boyle, *supra* note 31, at 437.

³⁶ *Id.* at 422.

³⁷ *Id.* at 438.

³⁸ *Id.* at 439.

³⁹ H.R. Rep. No. 595, 95th Cong., 2d Sess. 10 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 5971.

B. THE MAJORITY VIEW: ARGUMENTS FOR THE USE OF NONDEBTOR RELEASES

Bankruptcy courts possess broad powers.⁴⁰ A majority of circuit courts—the First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Eleventh—(collectively, the “majority circuits”) conclude nondebtor releases are permissible when essential to accomplish the purposes of a Chapter 11 reorganization.⁴¹ In evaluating whether to confirm a plan of reorganization containing a nondebtor release, the majority circuits rely on various fact-based standards, with some circuits adopting only some of, and other circuits adopting all of, the following factors: (1) an identity of interest exists between the debtor and the third party, such that a suit against the third party either is a suit against the debtor or would deplete the debtor’s estate; (2) the third party contributes substantial assets to the debtor’s plan of reorganization; (3) the reorganization would not succeed absent the nondebtor release; (4) the classes impacted by the release vote overwhelmingly to accept the plan of reorganization; (5) the plan of reorganization otherwise provided payment for all, or substantially all, of the enjoined claims; (6) the enjoined claims are channeled to a settlement fund rather than extinguished; (7) the plan provides means by which claimants who opt out of settlement can recover in full (such as through the tort system); and (8) the bankruptcy court makes specific factual findings to support its conclusion.⁴²

⁴⁰ See 11 U.S.C. § 105(a) (noting “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title”); 28 U.S.C. § 157(b) (stating that “[b]ankruptcy judges may hear and determine all cases under Title 11 and all core proceedings arising under Title 11, or arising in a case under Title 11, . . . and may enter appropriate orders and judgments”).

⁴¹ See, e.g., *In re Millennium Lab Holdings, II, LLC*, 945 F.3d 126, 137–140 (3d Cir. 2019) (describing how the Third Circuit permits nondebtor releases when factual findings demonstrate they are fair and necessary to the reorganization); *Nat’l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 350 (4th Cir. 2014) (concluding that “the power to authorize nondebtor releases is rooted in a bankruptcy court’s equitable authority.”); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 657 (6th Cir. 2002) (concluding that section 524(e) merely explains the effect of a debtor’s discharge and does not prohibit the release of a nondebtor); *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1047 (7th Cir. 1993) (holding that the language of § 524(e) “does not purport to limit or restrain the power of the bankruptcy court to otherwise grant a release to a third party . . .” and a “rule disfavoring all releases in a reorganization plan would be . . . unwarranted, if not a misreading” of section 524(e)); *Se Prop. Holdings, LLC v. Seaside Eng’g & Surveying (In re Seaside Eng’g & Surveying)*, 780 F.3d 1070, 1078 (11th Cir. 2015) (concluding that “the natural reading of [section 524(e)] does not foreclose a third-party release from a creditor’s claims . . . [and] says nothing about the authority of the bankruptcy court to release a nondebtor from a creditor’s claims.”).

⁴² Compare *In re Dow Corning Corp.*, 280 F.3d at 658 (adopting factors (1) through (5), (7) and (8) in its analysis of whether a third-party release should be confirmed), with *In re Metromedia Fiber*, 416 F.3d 136, 142 (2d Cir., 2005) (relying on the presence of factors (1) through (3) and (6) through (8) when approving a plan with third-party releases).

While the standards for determining when a nondebtor release is appropriate might vary among the majority circuits, their method for recognizing the legitimacy of their use in practice is the same: the equitable powers granted to bankruptcy courts in section 105(a) of the Code allow them to approve nondebtor releases that are vital to a reorganization, and section 524(e) does not restrict a bankruptcy court's authority to do so.

1. BANKRUPTCY COURTS HAVE BROAD EQUITABLE POWERS TO GRANT NONDEBTOR RELEASES

While nondebtors are not debtors as defined in the Code, the argument that this precludes bankruptcy courts from granting nondebtor releases lacks merit, as Congress granted bankruptcy judges broad authority to hear and determine all cases and core proceedings arising under Title 11.⁴³ The Supreme Court clarified the breadth of section 105(a) and noted that “Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate, . . . [and] more than simply proceedings involving the property of the debtor or the estate.”⁴⁴ The majority circuits understand this broad standard of authority to mean a proceeding can be related to a Title 11 case if the action's outcome “might have any conceivable effect on the bankrupt estate,” including “suits between third parties which have an effect on the bankruptcy estate.”⁴⁵ The Supreme Court's articulation of bankruptcy courts' power, and the circuit courts' application thereof, swallows the argument that nondebtors cannot receive releases through bankruptcy proceedings because they are not debtors as defined by the Code and refutes the contention that Congress did not intend for the Code to impact relationships outside of the debtor-creditor relationship.

Further, critics' assertion that Chapter 11 of the Code does not include a provision implying the necessity or appropriateness of a third-party release, thereby preventing a bankruptcy court from invoking its section 105(a) power, is misguided. Section 1123(b)(6) provides that “a plan may . . . include any other appropriate provision

⁴³ 28 U.S.C. § 157(b).

⁴⁴ *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995).

⁴⁵ *SPV OSUS, Ltd. V. UBS AG*, 882 F.3d 333, 339–340 (2d Cir. 2018).

not inconsistent with the applicable provisions of this Title.”⁴⁶ Courts interpret this provision as granting bankruptcy judges “residual authority” to release nondebtors from liability if such a release is “appropriate” and not inconsistent with any other provision of the Code.⁴⁷ Accordingly, Congress provided bankruptcy courts with the statutory and equitable powers to confirm plans of reorganization that include nondebtor releases.

2. SECTION 524(E) DOES NOT LIMIT A BANKRUPTCY COURT’S POWER

The text of section 524(e) makes no mention of nondebtors, and therefore cannot be read as limiting the bankruptcy court’s power to release a nondebtor from a creditor’s claims.⁴⁸ Nor does section 524(e) make any mention of the court’s authority to exercise its equitable powers. Accordingly, the argument that section 524(e) precludes a bankruptcy court from using its section 105(a) power to effectuate nondebtor releases fails. If Congress intended section 524(e) to limit the bankruptcy court’s authority, it would have clearly done so, as it has in other provisions of the Code, by including language explicitly limiting the court’s ability to act.⁴⁹ Instead, Congress replaced the previous version of section 524(e), which provided that “the liability of a person who is a co-debtor with . . . a bankrupt shall not be altered by the discharge of such bankrupt,”⁵⁰ with the current provision, which states that “discharge of a debt of the debtor does not affect the liability of any other entity on, or . . . for, such debt.”⁵¹ Through this amendment, Congress eliminated the mandatory language of the previous statute, “shall,” with the definitional term “does,” and included the prepositional phrase “on,

⁴⁶ 11 U.S.C. § 1123(b)(6).

⁴⁷ See *In re Purdue Pharma L.P.*, 633 B.R. 53, 103 (Bankr. S.D.N.Y. 2021) (concluding that a bankruptcy court can exercise the broad equitable powers of section 105(a) in plans of reorganizations because the residual authority granted in section 1123(b)(6) permits such a practice).

⁴⁸ *Airadigm Commc’ns, Inc. v. FCC (In re Airadigm Commc’ns, Inc.)*, 519 F.3d 640, 656 (7th Cir. 2008).

⁴⁹ *Id.* Compare 11 U.S.C. § 1129(a) (explicitly limiting the bankruptcy court’s power by stating “[t]he court *shall* confirm a plan only if all of the following requirements are met”) (emphasis added); with 11 U.S.C. § 1142(b) (acknowledging the bankruptcy court’s discretionary power by stating “[t]he court *may* direct the debtor . . .”) (emphasis added).

⁵⁰ 11 U.S.C. §34 (repealed Oct. 1, 1979, current version at 11 U.S.C. § 524(e)).

⁵¹ 11 U.S.C. § 524(e).

or . . . for, such a debt.” This indicates Congress did not intend for a discharge of a debtor’s debt to prevent the release of a third party from liability.⁵² To this effect, it is noteworthy that the Fifth Circuit—a minority circuit—acknowledged that section 524(e) “does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of . . . reorganization.”⁵³

Additionally, the minority circuits’ contention that 524(e) precludes nondebtor releases misinterprets the totality of section 524.⁵⁴ For instance, section 524(g)⁵⁵ specifically allows for nondebtor releases in the mass tort context of asbestos liability.⁵⁶ In conjunction with section 524(g), Congress enacted section 524(h)(1), which provides that “an injunction of the kind described in subsection (g)(1)(B)⁵⁷ . . . issued before the date of the enactment of this Act, as part of a plan of reorganization . . . shall be considered to meet the requirements” of subsection (g). Congress’ explicit affirmation that the provisions of the Bankruptcy Reform Act of 1994 would not disrupt plans of reorganization confirmed with nondebtor releases prior to the enactment of the Act⁵⁸ can be understood as a validation of the practice.

In sum, section 524(e) neither precludes the practice of nondebtor releases nor does it limit a bankruptcy court’s authority to confirm plans including such releases. Arguments to the contrary ignore Congress’ intention surrounding the Bankruptcy Reform Act of 1994 and undermines the Supreme Court’s articulation of bankruptcy courts’ authority to adjudicate claims between third parties and

⁵² *In re Airadigm Commc’ns, Inc.*, 519 F.3d at 656. Compare 11 U.S.C. § 34 (repealed Oct. 1, 1979), with 11 U.S.C. § 524(e).

⁵³ *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).

⁵⁴ 11 U.S.C. § 524(e) deals with the effect of discharges in bankruptcy proceedings.

⁵⁵ Congress amended the Bankruptcy Code in 1994 to add sections 524(g) and (h).

Bankruptcy Reform Act of 1994, PL 103–394, 108 Stat 4106 (1994) (codified as amended at 11 U.S.C. § 524(g), (h)).

⁵⁶ See 11 U.S.C. § 524(g)(2)(B)(ii)(IV) (providing the requirements associated with seeking confirmation of a plan issuing third-party releases). See also 11 U.S.C. § 524(g)(4)(A)(ii) (stating that a bankruptcy court may confirm a plan including injunction in order to supplement the injunctive effect of a discharge, and that such an injunction “may bar any action directed against a third party who is identifiable from the terms of such injunction . . . and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor . . .”).

⁵⁷ 11 U.S.C. § 524(g)(1)(B) states that “[a]n injunction may be issued . . . to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand . . . to be paid in whole or in part by a trust” under a plan of reorganization.

⁵⁸ See, e.g., *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 92 (2d Cir. 1988) (concluding, before the addition of section 524(g) to the Bankruptcy Code, that the bankruptcy court had the authority to approve settlements and enjoin claimants from filing asbestos-related suits against nondebtor third-party insurance companies).

creditors of the debtor if such a claim would have an effect on the bankruptcy estate. Recently, the public has seen this debate play out in Purdue Pharma's bankruptcy proceeding, with the Sackler family's potential release at the center of renewed controversy. Purdue Pharma provides a modern lens through which to evaluate the implications and effectiveness of such releases.

C. HOW SECTION 524(G) COULD HELP RESOLVE THE DEBATE

Section 524(g) currently authorizes bankruptcy courts to bar claims against third parties alleged to be directly or indirectly liable for the conduct of or claims against the debtor, to the extent their alleged liability arises from their past or present affiliation with, management of, or service as a director or officer to the debtor, if the debtor was named as a defendant in a tort claim relating to the presence of or exposure to asbestos or asbestos-containing products at the time it filed its petition for relief, if the following requirements are met: (1) the debtor is likely to be subject to substantial yet uncertain amount of future liability arising out of the same or similar conduct that gave rise to the claims addressed by the injunction, the pursuit of which would threaten the purpose of the plan of reorganization to deal with future claims; (2) a trust is created to assume the present and future liabilities of a debtor; (3) the trust is funded by the securities and future payments of at least one debtor involved in the plan of reorganization; (4) the trust will own, or be entitled to own, a majority of voting shares of the debtor, parent, or subsidiary; (5) the terms of the injunction are explicitly disclosed in any disclosure statement supporting the plan of reorganization; (6) the plan of reorganization is approved by at least 75% of claimants voting on it; (7) the trust will pay present and future claims; and (8) the trust will pay similar claims in substantially the same manner.⁵⁹

Thus, while circuits have conducted a thorough analysis of sections 105(a) and 524(e) to find authority to release nondebtors in plans of reorganization, they continuously overlook Congress'

⁵⁹ See 11 U.S.C. §§ 524(g)(2)(B)(i)–(ii), (g)(4)(A)(ii) (articulating the requirements and limitations on the use of third-party releases in the context of asbestos bankruptcies). See also Francis E. McGovern, *Symposium: Class Actions in the Gulf South and Beyond: A Model State Mass Tort Settlement Statute*, 80 TUL. L. REV. 1809 (2006) (summarizing the requirements of section 524(g)).

validation of the use of nondebtor releases in subsections 524(g) and (h) because of its limitation to the asbestos context. These provisions were added in 1994 and suggests that nondebtor releases may be the best and most appropriate method to channel mass tort claims into a specific pool of assets.⁶⁰

Due to the effectiveness of nondebtor releases in the asbestos mass claims context, and because many of the factors the majority circuits rely on echo requirements of section 524(g), Congress should expand the language of 524(g) to allow nondebtor releases in mass tort cases such as Purdue Pharma, where there are thousands of claimants alleging trillions of dollars in liability, as the inclusion of nondebtor releases would resolve these bankruptcies more efficiently and more beneficially for both debtors and creditors.

II. ANALYSIS: PURDUE PHARMA AND THE SECOND CIRCUIT'S LACK OF A UNIFORM STANDARD ILLUSTRATES THE NEED FOR CONGRESSIONAL CLARIFICATION

While the Supreme Court affirmed a bankruptcy court's authority to adjudicate claims between third parties and creditors of the debtor,⁶¹ courts continue to debate the validity of nondebtor releases.⁶² And despite the fact that a majority of circuits have reached the conclusion that such releases are permissible, they have articulated different standards for approaching the issue.⁶³ Because of these

⁶⁰ 11 U.S.C. § 524(g); *In re Pac. Lumber Co.*, 584 F.3d 229 (5th Cir. 2009); *see also* *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90 (2d Cir. 1998) (describing the importance and function of channeling injunctions).

⁶¹ *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995).

⁶² *See supra* Section I (discussing the majority versus minority approach to the question of whether nondebtor entities may be released through plans of reorganization).

⁶³ *Compare* *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 980 (1st Cir. 1995) (explaining the factors courts in the First Circuit consider before confirming nondebtor releases to be: (1) the creditors have overwhelmingly approved the plan with the release; (2) the plan contemplates full payment of all creditor claims; and (3) the injunction would affect a relatively small class of claimants (*citing In re Master Mortgage Inv. Fund*, 168 B.R. 930, 935 (Bankr. W.D. MO 1994)), *with In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (holding that a bankruptcy court can confirm a plan including nondebtor releases only when the following factors have been satisfied: (1) the debtor and nondebtor have a relationship such that a suit against the nondebtor is either comparable to a suit against the debtor or will deplete the assets of the estate; (2) the nondebtor significantly contributes assets to the reorganization; (3) the release is critical to the success of the reorganization and the debtor's future as a going concern; (4) the creditors overwhelmingly voted to accept the plan; (5) the plan provides a trust mechanism to compensate claimants affected by the injunction; (6) the plan provides an opportunity for claimants who choose not to settle to recover in full; and (7) the bankruptcy court made a record of factual findings supporting its conclusions).

inconsistencies and differences in jurisprudence, a Supreme Court standard authorizing the use of nondebtor releases in certain scenarios could run the risk of being misinterpreted and applied unpredictably throughout the circuits. As such, the best resolution for debtors, nondebtors, and creditors would be for Congress to explicitly allow for such releases, provided the requirements of section 524(g) are satisfied.

A. SECOND CIRCUIT JURISPRUDENCE FAVORS NONDEBTOR RELEASES

For over thirty years, the Second Circuit has recognized the bankruptcy court's power to confirm plans of reorganization including nondebtor releases when the release "plays an important part in the debtor's reorganization plan."⁶⁴ However, because of the subjectivity of a factor-based approach and the lack of explicit authorization in the Code, two courts within the Second Circuit recently grappled with nondebtor releases in Purdue Pharma's bankruptcy and, despite the circuit's reputation for being a pro-nondebtor release circuit, reached opposite conclusions.⁶⁵

1. ASBESTOS BANKRUPTCIES: *MACARTHUR CO. V. JOHNS-MANVILLE CORP.*

In the 1980s, due to new studies linking asbestos to cancer, between roughly 12,500 lawsuits named Johns-Manville ("Manville"), the biggest miner of asbestos and a major manufacturer of other asbestos products, as a defendant.⁶⁶ However, because a significant characteristic of asbestos-related illnesses is their delayed onset, many asbestos victims remained unknown, and thus the likelihood of future litigation threatened Manville with approximately

⁶⁴ See, e.g., *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992) (noting that "a court may enjoin a creditor from suing a third party" in a bankruptcy case).

⁶⁵ Compare *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (confirming Purdue Pharma's plan of reorganization that included third-party releases for the Sackler family), with *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021) (reversing the bankruptcy court's confirmation of the plan and concluding the third-party releases are impermissible in the Second Circuit).

⁶⁶ Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 593-95 (1996) (citing Irving Selikoff et al., *Asbestos Exposure and Neoplasia*, 188 JAMA 142 (1964)); Joshua M. Silverstein, *Overlooking Tort Claimants' Best Interests: Nondebtor Releases in Asbestos Bankruptcies*, 78 UMKC L. REV. 1, 10-11 (2009).

50,000 to 100,000 additional suits.⁶⁷ Manville estimated its potential liability to be around \$2 billion and consequently filed a petition for relief under Chapter 11 of the Code in August 1982.⁶⁸

After four years of negotiating, Manville proposed its Plan of Reorganization, the cornerstone of which was the Asbestos Health Trust (the “Trust”).⁶⁹ The purpose of the Trust was to provide a means to meet Manville’s perpetual personal injury liability while allowing it to maximize its value by continuing as an ongoing concern.⁷⁰ The value of the Trust was estimated to be around \$2.5 billion,⁷¹ and its establishment furthered the underlying goal of bankruptcy—to ensure that the debtor would not likely be liquidated or need further reorganization following confirmation of the plan of reorganization⁷²—through its injunction provisions, which channeled any and all asbestos-related claims and obligations to the Trust, as opposed to the reorganized entity, for resolution.⁷³ This shielded Manville’s operating entities from the “onslaught of crippling lawsuits that could jeopardize the entire reorganization effort.”⁷⁴

The injunction provisions were a vital but controversial element in “one of the most complicated and difficult bankruptcy reorganizations in history.”⁷⁵ Rejecting creditors’ challenges to the court’s power to issue the injunctions, the bankruptcy court emphasized that it is a court of equity, and as such, it “may issue injunctions when necessary to effectuate reorganizations.”⁷⁶ In affirming the lower courts’ decision to authorize the releases, the Second Circuit found statutory support for the injunctions in section 105(a),⁷⁷ which has been “construed liberally to enjoin suits that might

⁶⁷ Kane v. Johns-Manville Corp (*In re Johns-Manville Corp.*), 843 F.2d 636, 639 (2d Cir. 1988).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 640.

⁷¹ *In re Johns-Manville Corp.*, 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986), aff’d 843 F.2d 636 (2d Cir. 1988).

⁷² See 11 U.S.C. § 1129(a)(11) (“Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.”).

⁷³ *In re Johns-Manville Corp.*, 68 B.R. at 624.

⁷⁴ Kane v. Johns-Manville Corp (*In re Johns-Manville Corp.*), 843 F.2d 636, 640 (2d Cir. 1988).

⁷⁵ *In re Johns-Manville Corp.*, 68 B.R. at 624 (citing *In re Johns-Manville Corp.*, 801 F.2d 60, 69 (2d Cir. 1986)).

⁷⁶ *Id.* at 625 (citing *Cont’l Ill. Nat. Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648 (1935)).

⁷⁷ See 11 U.S.C. § 105(a) (providing in part that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”).

impede the reorganization process.”⁷⁸ The Second Circuit ultimately concluded that the Trust and injunction arrangement fell within the bankruptcy court’s equitable authority because it “was essential in this case to a workable reorganization,”⁷⁹ and it ensured that “substance will not give way to form, that technical considerations will not prevent substantial justice from being done.”⁸⁰

2. SECURITIES LIABILITY: *IN RE METROMEDIA FIBER NETWORK, INC.*

In 2002, Metromedia Fiber Network, Inc. (“Metromedia”), a telecommunications company, filed a petition for relief under Chapter 11 of the Code because of its failure to successfully market its Internet services to customers.⁸¹ Metromedia’s plan of reorganization included nondebtor releases for the Kluge Trust, which held certain senior secured claims against the bankruptcy estate, and the Kluge Insiders.⁸² The District Court for the Southern District of New York affirmed the Bankruptcy Court’s decision approving the plan of reorganization, and creditors Deutsche Bank and Bear, Stearns & Co. appealed to the Second Circuit, arguing the plan of reorganization’s nondebtor releases “improperly shielded certain nondebtors from suit by the creditors.”⁸³ In affirming the bankruptcy court’s decision, the Second Circuit noted that while a court “may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor’s plan of reorganization,”⁸⁴ it has never defined when a nondebtor release is “important” to a plan.⁸⁵ The Second Circuit then undertook an analysis of when nondebtor releases should be granted.⁸⁶

The Court recited a number of factors, derived from *In re Drexel Burnham Lambert Group* and *In re Johns-Manville Corp.*, that it will consider when determining whether a nondebtor release should be

⁷⁸ *Macarthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir. 1988).

⁷⁹ *Id.* at 94.

⁸⁰ *Id.* (citing *Pepper v. Litton*, 308 U.S. 295, 305 (1939)).

⁸¹ Simon Romero, *Metromedia Fiber Files for Bankruptcy*, TECH.: NYT (May 21, 2002), <https://www.nytimes.com/2002/05/21/business/technology-metromedia-fiber-files-for-bankruptcy.html>.

⁸² When the debtor is a corporation, the term “insider” includes any director, officer, person in control, or general partner of the debtor, or any relative of the previously mentioned persons. 11 U.S.C. § 101(31)(B).

⁸³ *Deutsche Bank, AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network)*, 416 F.3d 136, 136 (2d Cir. 2005).

⁸⁴ *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992).

⁸⁵ *In re Metromedia Fiber Network*, 416 F.3d at 141.

⁸⁶ *Id.* at 142.

granted, namely: (1) the release is crucial to the plan of reorganization; (2) the estate received substantial consideration; (3) the enjoined claims would indirectly impact the debtor’s reorganization; (4) the enjoined claims were channeled to a settlement fund rather than extinguished; (5) the plan of reorganization otherwise provided for the full payment of the enjoined claims; and (6) specific factual findings support the bankruptcy court’s conclusion.⁸⁷ The court emphasized the importance of the presence of “circumstances that may be characterized as unique” in order to tolerate a nondebtor release.⁸⁸ For an example of “unique” circumstances, the court referred to the nondebtor release in *In re Drexel Burnham Lambert Group*, which came at the cost of a \$1.3 billion payment into a fund by co-liable Drexel personnel – a cost that would not have been paid absent approval of the release provisions.⁸⁹ Ultimately, the court emphasized that nondebtor releases are permitted in a plan of reorganization when there are “truly unusual circumstances [that] render the release terms important to success of the plan” of reorganization.⁹⁰

3. SUMMARY OF SECOND CIRCUIT JURISPRUDENCE

The Second Circuit recognizes the practice of nondebtor releases beyond the asbestos context. The Circuit’s jurisprudence puts forth a number of factors to consider when faced with a nondebtor release provision, but it ultimately begs the question of whether the plan of reorganization presents circumstances that are “unique” or “unusual.”⁹¹ This standard provides bankruptcy judges an insufficient framework to determine a particular case’s merits, resulting in a prolonged bankruptcy process for all parties and lingering uncertainty about the future of claimants’ recovery and the debtor’s going concern.⁹²

⁸⁷ *Id.* (citing *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d at 293 and *In re Johns-Manville Corp.*, 801 F.2d at 69).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 143.

⁹¹ *In re Metromedia Fiber Network*, 416 F.3d at 42. For a discussion on why such an arbitrary standard is insufficient, see *infra* Section IV.D.1.

⁹² Richard Herold & Jacob Sparks, *An Open Question: Release of Non-Debtor Third Parties and Enjoinment of Future Claims*, 58 ARIZ. ATT’Y 38, 42 (2022). Compare the Bankruptcy Court for the Southern District of New York concluding in *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) that Purdue Pharma was an unusual and unique case that warranted the confirmation of a plan including nondebtor releases with the Southern District of New York’s reversal thereof and determination that the Second Circuit’s jurisprudence in fact precludes the use of nondebtor releases. *In re Purdue Pharma L.P.*, 635 B.R. 26 (S.D.N.Y. 2021).

B. PURDUE PHARMA’S INCONSISTENT APPELLATE HISTORY EXEMPLIFIES THE NEED FOR CONGRESS TO PROVIDE GUIDANCE ON NONDEBTOR RELEASES

The lack of congressional or legal clarity on the topic forces judges to grapple with interpreting decades of case law on whether or not to approve a plan of reorganization that contains nondebtor releases. Uncertainty in judicial decisions is inherent in the United States’ legal system. In the world of nondebtor releases in mass tort bankruptcies, however, Congress should provide Judges with more guidance, in the form of statutory authorization and requirements, for determining what constitutes “unusual” or “unique” and when a plan of reorganization including a nondebtor release can be confirmed. In the Second Circuit, the bankruptcy court and district court have yielded opposite decisions on whether to approve the releases contained in Purdue Pharma’s plan of reorganization.⁹³

1. PURDUE PHARMA SATISFIES THE “UNIQUE” AND “UNUSUAL” CIRCUMSTANCES REQUIREMENT

The two federal Judges who have reviewed the bankruptcy case have described it as highly unusual, complex, and unprecedented.⁹⁴ The opioid epidemic, which Purdue Pharma has pled guilty to its role in perpetrating, has claimed the lives of over 450,000 individuals since 1999.⁹⁵ It should therefore come as no surprise that this case involves the largest creditor body in bankruptcy history, with over 2,600 lawsuits and 618,000 claims filed⁹⁶ for an estimated liability value

⁹³ See *In re Purdue Pharma L.P.*, 633 B.R. at 53 (confirming Purdue Pharma’s plan of reorganization, including the nondebtor releases for the Sackler family); *but see In re Purdue Pharma L.P.*, 635 B.R. at 26 (vacating the bankruptcy court’s confirmation of the plan of reorganization and rejecting the practice of nondebtor releases).

⁹⁴ *In re Purdue Pharma L.P.*, 633 B.R. at 3; Jonathan Randles, *Purdue Pharma’s Sackler Family Settlement Unprecedented, Judge Says*, W.S.J. (Oct. 12, 2021, 6:15 PM), <https://www.wsj.com/articles/purdue-pharmas-sackler-family-settlement-unprecedented-judge-says-11634076912>.

⁹⁵ Hoffman & Benner, *supra* note 2.

⁹⁶ *In re Purdue Pharma L.P.*, 633 B.R. at 3.

exceeding \$40 trillion.⁹⁷ Also unprecedented is the number of votes cast on the plan—over 120,000—and the \$4.325 billion that the Sackler family is paying, amongst other contributions, to the settlement.⁹⁸ Similar to the monetary contribution in *In re Drexel Burnham Lambert Group*, the \$4.325 billion is a cost that will not be paid unless the court grants the release of Sackler family members from opioid-related claims.⁹⁹ Another unique factor surrounding the case is the intricate relationship between the Sackler family and Purdue Pharma.¹⁰⁰ Specifically, the Purdue Pharma’s assets include large claims against members of the Sackler family, “whose aggregate net worth, though greater than [Purdue Pharma’s], also may well be insufficient to satisfy [Purdue Pharma’s] claims against them” and other closely related and separately asserted third-party claims by creditors of Purdue Pharma against the Sackler family.¹⁰¹

On these facts, Purdue Pharma represents the epitome of a “unique” and “unusual” case in which a nondebtor release should be permitted because a reorganization would be nearly impossible given the complex nature of the debtor-creditor relationship and the existing inextricable settlement arrangements.¹⁰²

2. THE SACKLER FAMILY RELEASES ARE CRUCIAL TO THE PLAN

The proposed plan of reorganization includes two settlements that hinge on the release of the Sackler family from opioid-related liability in exchange for their \$4.325 billion contribution: (1) Purdue Pharma’s claims against the Sackler family and related entities for the benefit of Purdue Pharma’s creditors, and (2) the third-party claims that could be asserted by others against the Sackler family.¹⁰³ These two settlements lie at the center of a web of other intercreditor

⁹⁷ Jeremy Hill, *Purdue’s \$40 Trillion of Opioid Claims Top Size of U.S. Economy*, BLOOMBERG L. (Mar. 19, 2021, 8:36 AM), <https://www.bloomberg.com/news/articles/2021-03-19/purdue-s-40-trillion-of-opioid-claims-top-size-of-u-s-economy>. The roughly \$40 trillion in liability covers only about 10% of the total claims filed. *In re Purdue Pharma L.P.*, 633 B.R. at 64.

⁹⁸ *In re Purdue Pharma L.P.*, 633 B.R. at 84, 88.

⁹⁹ Hoffman, *supra* note 3.

¹⁰⁰ *In re Purdue Pharma L.P.*, 633 B.R. at 58–59.

¹⁰¹ *Id.*

¹⁰² See *In re Metromedia Fiber Network*, 416 F.3d 136, 141 (2d Cir. 2005) (stating that a nondebtor release “is proper only in rare cases.”).

¹⁰³ *In re Purdue Pharma L.P.*, 633 B.R. at 83.

settlements.¹⁰⁴ One strand of the web involves parties¹⁰⁵ to the intercreditor settlements who agreed in mediation that any value they received from the plan of reorganization would be dedicated solely to abatement purposes.¹⁰⁶ Another strand is a settlement between the Department of Justice (“DOJ”) and Purdue Pharma, in which the DOJ agreed to dedicate \$1.775 billion of its \$2 billion superpriority administrative expense claim—a claim that stands first in line to receive any consideration from a debtor’s estate—to the plan of reorganization’s abatement program provided that Purdue Pharma establishes the abatement structure and purpose of NewCo.¹⁰⁷

In exchange for their release from opioid-liability, and in addition to their \$4.325 billion contribution to trusts, the Sackler family agreed to dedicate two charities worth at least \$175 million for abatement purposes, to not engage in any business with NewCo, to exit their foreign companies within seven years, to certain “snap back” provisions to ensure their settlement payments are collected, and to disclose over 10 million Purdue Pharma documents to the public.¹⁰⁸ This document depository ensures full transparency between the Purdue Pharma and creditors throughout the negotiation and mediation processes.¹⁰⁹

If the release provisions are not granted, the Sackler family will not make their monetary contribution, and consequently the private, public, and abatement settlements would not materialize. Rather, these settlements “would likely fall apart for lack of funding and the inevitable fighting over a far smaller and less certain recovery” would commence, as parties would focus on their individual claims and personal collection.¹¹⁰ This would be a lose-lose situation for all parties involved. Thus, as was the case in *In re Metromedia Fiber Network*,¹¹¹ the release provision for Purdue Pharma’s bankruptcy is

¹⁰⁴ See *id.* (stating that “the plan contains several other settlements interrelated to those [plan] settlements that would not be achievable if either of the settlements with the Sacklers fell away”).

¹⁰⁵ Parties include neonatal abstinence syndrome (NAS) personal injury claimants, non-governmental entities, public governmental entities, states, and Native American tribes. *Id.* at 82.

¹⁰⁶ *Id.* at 74.

¹⁰⁷ Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family, OFF. OF PUB. AFFS., DEP’T OF JUST. (Oct. 21, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid>.

¹⁰⁸ *In re* Purdue Pharma L.P., 633 B.R. at 84.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *In re* Metromedia Fiber Network, 416 F.3d 136, 141 (2d Cir. 2005).

crucial to the Purdue Pharma’s plan of reorganization, and therefore should be granted.

3. THE ABSENCE OF A RESOLUTION TO THE QUESTION OF NONDEBTOR RELEASES RESULTS IN INCONSISTENT DECISIONS

The Bankruptcy Court for the Southern District of New York (“S.D.N.Y.”) relied on the residual authority of section 1123(b)(6) and the Second Circuit’s factors enumerated *In re Metromedia* to approve the plan of reorganization with the nondebtor releases because the releases were important to the plan of reorganization, the enjoined claimants would recover from a settlement fund as opposed to having their claims extinguished, the bankruptcy estate received substantial consideration in return, and the released claims would otherwise impact the reorganization.¹¹² The satisfaction of these factors combined with the 95% acceptance of the plan of reorganization by voting creditors, which exceeded the 75% required under section 524(g) for asbestos releases, led to the conclusion that the plan of reorganization aligned with Second Circuit jurisprudence and the nondebtor releases were valid.

On appeal, however, the S.D.N.Y. District Court judge reached the opposite conclusion and vacated the bankruptcy court’s decision. While conceding the argument that bankruptcy courts have subject matter jurisdiction to impose a release of nondebtor claims, the District Court concluded that bankruptcy courts lack the statutory authority to issue nondebtor releases, and rejected the notion that bankruptcy courts have the residual authority to grant such releases.¹¹³ Purdue Pharma appealed this decision to the Second Circuit.¹¹⁴

Now pending appeal before the Second Circuit¹¹⁵ and in different jurisdictions across the country,¹¹⁶ the question of whether to permit nondebtor releases is at the forefront of bankruptcy law. The Supreme

¹¹² *In re Purdue Pharma L.P.*, 633 B.R. 53; Herold & Sparks, *supra* note 92, at 40.

¹¹³ *In re Purdue Pharma L.P.*, 635 B.R. 26 (S.D.N.Y. 2021).

¹¹⁴ Daniel Gill, *Purdue Pharma Bankruptcy Plan Appeal Goes to Second Circuit*, BLOOMBERG LAW (Jan. 28, 2022, 10:32 AM), <https://news.bloomberglaw.com/bankruptcy-law/purdue-pharma-bankruptcy-plan-appeal-goes-to-second-circuit>.

¹¹⁵ *Id.*

¹¹⁶ Simon, *supra* note 27, at 1200.

Court’s denial of certiorari for cases presenting this question¹¹⁷ begs Congress to step in and resolve the debate, expanding the application of section 524(g) to mass tort bankruptcies, once and for all.

III. PROPOSAL: CONGRESS SHOULD EXPAND THE LANGUAGE OF SECTION 524(G) TO INCLUDE MASS TORT AND LITIGATION BANKRUPTCIES

Congress should expand section 524(g), which currently authorizes bankruptcy courts to enjoin claims against nondebtors if a number of requirements are met and if the debtor was named as a defendant in a tort claim relating to the presence of or exposure to asbestos or asbestos-containing products at the time it filed its petition for relief.¹¹⁸ Specifically, Congress should amend the language of section 524(g)(2)(B)(i)(I)¹¹⁹ by eliminating the language “personal injury, wrongful death, or property-damage actions . . . allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products,” and replacing it with “a mass tort as defined in section 524(g)(8),” which would be subsequently added. The amended statute would then read as follows: an “injunction is to be implemented in connection with a trust that . . . is to assume the liabilities of a debtor . . . for . . . actions seeking recovery for damages allegedly caused by a mass tort as defined in section 524(g)(8).”

Section 524(g)(8) would define mass tort as “a wrongful or harmful act or failure to act that affects a group of no fewer than 100 similarly impacted persons who have civil liability claims against the same defendant arising out of the same act or omission.” In this sense, “mass tort” is analogous to a mass action. To determine whether there is a readily identifiable class of claimants, and therefore determine whether the debtor may include nondebtor release provisions in their plan of reorganization pursuant to the amended section 524(g), the debtor must submit to the bankruptcy court a motion for class certification. This motion must define the class of claimants and the class claims, issues, and injuries, and must appoint class counsel.

¹¹⁷ Herold & Sparks, *supra* note 92, at 42.

¹¹⁸ See generally 11 U.S.C. § 524(g) (providing a number of requirements that must be satisfied before a bankruptcy judge can enjoin a claim against a third party).

¹¹⁹ “[T]he injunction is to be implemented in connection with a trust that . . . is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products . . .” 11 U.S.C. § 524(g)(2)(B)(i)(I).

There need not be a class action brought against the debtor prior to the debtor filing a petition for relief. Upon the court's order certifying the class of claimants, the debtor must provide notice clearly and concisely stating the nature of the bankruptcy proceeding, a definition of their class of claims, the time and manner for requesting exclusion, and the binding effect of the nondebtor releases on class members, to all members of the class. Throughout the debtor's bankruptcy proceedings, the debtor must serve notice to each class claimant when there is a material change or update to the negotiation proceedings that affect how their claims will be handled. This includes, but is not limited to, monetary contributions from the third-party, payment methods and distribution, timeline for receiving compensation, and the breadth of the releases.

This explicit, expansive amendment to section 524(g) would not only provide courts with a clear and reliable standard for adjudicating nondebtor releases, it would also provide claimants with significant procedural and substantive protections to ensure their claims are not simply being thrown into a pool of recovery. This amended statutory provision builds off the foundation Congress laid for asbestos mass tort bankruptcies and is a logical extension of Congress' intent to provide enhanced guidance to bankruptcy courts for what conduct is permissible in the ambit of bankruptcies arising out of or subject to mass tort claims.

A. SECTION 524(G)'S LEGISLATIVE HISTORY CONTEMPLATED AN EXPANSION BEYOND THE ASBESTOS CONTEXT

Following the Manville injunction in the late 1980s, individuals urged Congress to amend the Bankruptcy Code to “creat[e] greater certitude regarding the validity of the trust/injunction mechanism . . . to strengthen the Manville . . . trust/injunction mechanisms and to offer similar certitude to other asbestos trust/injunction mechanisms that meet the same kind of high standards with respect to . . . the rights of claimants.”¹²⁰ In 1994, Congress responded to the pressing issue of how to account for future claimants and enacted the Bankruptcy Reform Act, including section 524(g)—the nondebtor release

¹²⁰ 140 CONG. REC. 27,692 (1994).

provision—which contains provisions for supplemental injunctions for Chapter 11 cases involving asbestos claims.¹²¹

In drafting section 524(g), Congress understood that reorganization, even with the broad nondebtor releases, best served future claimants’ interests because the company was worth more as a going concern than it would be if liquidated.¹²² Congress ultimately approved section 524(g) because it was “probably the only method of enhancing the maximum amount of money to those suffering the ill effects of exposure to asbestos.”¹²³ In the 1993 Senate Hearings on Bankruptcy Reform Act, Professor Charles W. Murdock, professor of law at Loyola University of Chicago, stated the need for supplemental permanent injunctions “arises in the context of asbestos, but it is equally applicable in a situation that involves any massive tort-type situation with fairly long lead times to when the injury manifests itself. So it has got much broader applicability.”¹²⁴

While Congress explicitly granted approval for nondebtor releases in the asbestos context¹²⁵ “because of the singular cumulative magnitude of the claims involved,”¹²⁶ it acknowledged that debtors were beginning to test similar mechanisms in contexts other than asbestos liability, such as securities fraud liability in the context of Drexel Burnham Lambert Trading Corporation’s bankruptcy.¹²⁷ At

¹²¹ Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994) (codified as amended at 11 U.S.C. § 524(g)); E1 Collier on Bankruptcy, App. Pt. 9(b), 11 (Matthew Bender & Co., Inc. eds., 16th ed. 2021).

¹²² 140 CONG. REC. 27,692 (1994); COLLIER ON BANKRUPTCY, *supra* note 121.

¹²³ *The Need for Supplemental Permanent Injunctions in Bankruptcy: Hearing Before the S. Subcomm. on Courts & Admin. Prac.*, 103rd Cong. 1 (1993) (statement of Hon. Sen. Howell Heflin).

¹²⁴ *The Need for Supplemental Permanent Injunctions in Bankruptcy: Hearing Before the S. Subcomm. on Courts & Admin. Prac.*, 103rd Cong. 1 (1993) (statement of Prof. Charles W. (Bud) Murdock, Trustee, UNR Corp., Asbestos Disease Claims Trust).

¹²⁵ See 11 U.S.C. § 524(g)(2)(B)(i)(I) (stating that an “injunction is to be implemented in connection with a trust that . . . is to assume the liabilities of a debtor . . . for . . . actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products”). Congress also passed Section 524(h) – “Application to Existing Injunctions” – which retroactively deemed injunctions entered in asbestos cases prior to § 524(g)’s enactment statutorily compliant. *In re Purdue Pharma L.P.*, 635 B.R. 26, 170 (S.D.N.Y. 2021).

¹²⁶ 140 CONG. REC. 27,692 (1994).

¹²⁷ H.R. Rep. 103-834, at 12; 140 CONG. REC. 27,692 (1994). In 1988, the Securities and Exchange Commission (“SEC”) filed a civil enforcement action against Drexel Burnham Lambert Trading Corp. and many of its top officials for conducting numerous securities transactions in violation of federal law. *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 287–88 (2d Cir. 1992). Drexel filed a petition for Chapter 11 relief in the Southern District of New York, after which roughly 15,000 bankruptcy claims were filed against it. *Id.* The ultimate settlement with the SEC grouped the securities claimants into two subclasses – subclass A and subclass B – and divided the proceeds of the \$350 million SEC Fund amongst the two, with subclass A receiving 75% (\$262.5 million) and subclass B receiving 25% (\$87.5 million). *Id.* at 288. The settlement agreement also provided for subclass A and Drexel to “pool” their recovery from lawsuits brought against former Drexel directors and officers into

the time the Bankruptcy Reform Act of 1994 was enacted, however, Congress chose to remain silent on and expressed no opinion toward the extent of a bankruptcy court’s equitable powers to grant and implement a trust/injunction mechanism similar to that of Manville.¹²⁸ Congress indicated that it would evaluate the efficacy of section 524(g) injunctions in the asbestos area and then revisit and decide the broader question of whether such injunctions should be explicitly extended into other areas of mass tort liability.¹²⁹ Therefore, because Congress acknowledged the use of nondebtor releases outside the context of asbestos cases and left open the question of whether such practices should be explicitly authorized, section 524(g) can be properly viewed as a limitation on, as opposed to an exception to, the use of nondebtor releases in asbestos bankruptcies and an affirmation of the body of nondebtor release law as it has played out in the majority of circuit courts for over thirty years.

Congress has yet to speak on the matter since it enacted this provision in 1994,¹³⁰ but the ongoing circuit debate and the delay in resolution of Purdue Pharma’s billion-dollar settlement arrangement,¹³¹ as well as other pending mass tort bankruptcy cases,¹³² emphasizes the need for Congress to do so. These cases present “problems that [Congress] could not have anticipated . . . when the Bankruptcy Code was last revised. And so it is one of those many problems that have arisen that [Congress must] now legitimately examine.”¹³³ Just as it explicitly granted approval for nondebtor releases in the asbestos context to “strengthen the Manville . . .

the Global Settlement, which provided for a total pooled recovery of \$1.3 billion. *Id.* at 288–289. A crucial aspect of this settlement was the permanent injunction that released former Drexel directors and officers from future actions brought by subclass B, despite subclass B not being able to share in the Global Settlement recovery. The Second Circuit affirmed the approval of the settlement plan as well as the release provisions, noting the critical role the release played in Drexel’s reorganization, specifically, how Drexel’s directors and officers would have been less likely to settle absent the release provisions out of fear that future lawsuits would be filed against them, which would have compromised the settlement arrangement that would maximize recovery for all claimants. *Id.* at 293.

¹²⁸ *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d at 293.

¹²⁹ H.R. Rep. 103-834, at 12; 140 CONG. REC. 27,692 (1994).

¹³⁰ H.R. Rep. 103-834, at 12; 140 CONG. REC. 27,692 (1994).

¹³¹ Purdue Pharma filed for bankruptcy in 2019, and their case is set to be heard by the Second Circuit in April 2022. Jonathan Randles, *Purdue Bankruptcy Plan Settles Opioid Lawsuits Against Founding Family. Here’s What to Know*, WALL. ST. J. (Sept. 1, 2021), <https://www.wsj.com/articles/purdue-bankruptcy-plan-settles-opioid-lawsuits-against-founding-family-heres-what-to-know-11630532441#:~:text=Why%20did%20Purdue%20Pharma%20file,Court%20in%20White%20Plains%2C%20N.Y.;Gill,supra> note 114.

¹³² See Simon, *supra* note 27 (summarizing a number of mass-tort bankruptcies that have made headlines in the past years).

¹³³ *The Need for Supplemental Permanent Injunctions in Bankruptcy: Hearing Before the S Subcomm. on Courts & Admin. Prac.*, 103rd Cong. 1 (1993) (statement of Hon. Sen. Howell Heflin).

trust/injunction mechanisms” and “offer similar certitude to other asbestos trust/injunction mechanisms” that satisfy high standards,¹³⁴ the time has come for Congress to expand section 524(g) to allow for nondebtor releases in all mass tort bankruptcies.

B. THE DECADES-LONG CIRCUIT SPLIT WOULD BE RESOLVED AND THE MAJORITY VIEW WOULD BE SUPPORTED

The addition of section 524(g) has resulted in inconsistent jurisprudence among the circuit courts regarding nondebtor releases.¹³⁵ For example, the Second Circuit’s jurisprudence indicates that bankruptcy courts “may enjoin a creditor from suing a third party, provided that the injunction plays an important part in the debtor’s reorganization plan,”¹³⁶ whereas the Ninth Circuit understands the requirements of section 524(g) to “constitute[] a narrow rule specifically designed to apply in asbestos cases . . . where there is a trust mechanism and the debtor can prove . . . that it is likely to be subject to future asbestos cases.”¹³⁷ The result of this circuit split in bankruptcy law has been that corporate debtors pursue nondebtor releases as part of a plan of reorganization and avoid the Fifth, Ninth, and Tenth Circuits.¹³⁸ Neither Congress nor the Supreme Court has stepped in to resolve this ambiguity, which has left courts to resolve the issue of nondebtor releases based on their own interpretations of the Code. Congress’ involvement would best serve the interests of debtors and creditors alike, as it would create the explicit authorization for nondebtor releases, provide a requirement checklist for judges to use in evaluating such releases, and settle the debate once and for all.¹³⁹

In contemplation of passing section 524(g) in the Bankruptcy Reform Act of 1994, Congress questioned why resolution of the

¹³⁴ COLLIER ON BANKRUPTCY, *supra* note 121.

¹³⁵ See *supra* Section I (discussing the different approach circuits take in analyzing sections 105(a) and 524(e)).

¹³⁶ Sec. Exch. Comm’n v. Drexel Burnham Lambert Grp., Inc. (*In re Drexel Burnham Lambert Group, Inc.*), 960 F.2d 285, 293–94 (2d Cir. 1992).

¹³⁷ Resorts Int’l v. Lowenschuss (*In re Lowenschuss*), 67 F.3d 1394, 1402 n.6 (9th Cir. 1995).

¹³⁸ Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 193 and accompanying footnote (2013).

¹³⁹ See *infra* Section IV.D.1 (discussing the implications of a Supreme Court standard which attempts to resolve this debate as opposed to a congressional amendment to the Code).

question of nondebtor releases should not just be left to the courts.¹⁴⁰ In response, the chief executive officer (“CEO”) of the Johns-Manville Corporation responded that courts have attempted to resolve this question and the question of recovery in bankruptcy cases more generally for years.¹⁴¹ Analogizing the assets of and recovery from a debtor-corporation to a pie, the CEO explained how the “bigger the pie, the more for everybody . . . [L]et the courts, as they should, fight over who gets what, but let legislation create as much as possible and get the full value and don’t leave anything on the table for somebody else other than the victims.”¹⁴² Essentially, the CEO rightfully contended that Congress should explicitly authorize the use of nondebtor releases in the asbestos context so that courts, without dispute over the ambiguity that exists in case law, are able to rely upon the releases to establish trusts that maximize recovery to claimants. The same can be said for mass tort bankruptcies. Congress should explicitly authorize the use of nondebtor releases in the mass tort context so that debtors and third-parties will make significant contributions to trusts, which will maximize the claimants’ recoveries and allow for the successful reorganization of a corporation.

C. PURDUE PHARMA AND MASS TORT BANKRUPTCIES PRESENT CIRCUMSTANCES SIMILAR TO THOSE OF THE JOHNS-MANVILLE BANKRUPTCY

Purdue Pharma and mass tort bankruptcies pose similar problems today as did Manville and asbestos bankruptcies in the 1980s. Manville faced at least 12,500 lawsuits with an estimated 50,000 anticipated suits filed by future claimants;¹⁴³ Purdue Pharma faces over 2,600 lawsuits and 618,000 additional claims filed by various states, governmental units, and individuals.¹⁴⁴ Manville estimated its liability to exceed \$2 billion;¹⁴⁵ Purdue Pharma estimates its liability

¹⁴⁰ *Examining the Need for Supplemental Permanent Injunctions in Bankruptcy: Hearing Before the Subcomm. on Courts and Admin. Prac.*, 103rd Cong. 1 (1993) (statement of Prof. Charles W. (Bud) Murdock, Trustee, UNR Corp., Asbestos Disease Claims Trust).

¹⁴¹ *Id.* (statement of Robert A. Falise, Chairman and Managing Trustee, Manville Personal Injury Settlement Trust).

¹⁴² *Id.*

¹⁴³ Silverstein, *supra* note 66, at 10–11.

¹⁴⁴ *In re Purdue Pharma L.P.*, 633 B.R. 53, 58, 90 (Bankr. S.D.N.Y. 2021).

¹⁴⁵ *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 639 (2d Cir. 1988).

to exceed \$40 trillion.¹⁴⁶ The value of the Manville Trust was estimated to be around \$2.5 billion;¹⁴⁷ the Purdue Pharma Trust will be endowed with a \$4.325 billion contribution from the Sackler family, amongst additional contributions in the form of charitable donations and liquidation of overseas subsidiaries of Purdue Pharma.¹⁴⁸

The set of circumstances surrounding Purdue Pharma bear a striking resemblance to Manville: both corporations faced an overwhelming number of lawsuits and claims that imposed exceptionally large liability values. The same situation that arose in the Manville and asbestos context, which ultimately led to Congress' addition of section 524(g) in the Code, is playing out again today in the Purdue Pharma case and in other mass tort bankruptcy cases. To bring a resolution to these cases and to optimize the outcome for creditors, Congress should adopt this article's proposed expansion of section 524(g)'s language from its application from the asbestos context to mass tort bankruptcies more broadly.

D. ALTERNATIVE PROPOSALS DO NOT PROVIDE SUFFICIENT GUIDANCE TO JUDGES ADJUDICATING THE VALIDITY OF A NONDEBTOR RELEASE PROVISION

A number of proposals addressing the issue of how nondebtor releases should be adjudicated in bankruptcy courts nationwide have been suggested since the resolution of Manville in the 1990s. While many of these proposals are steps in the right direction,¹⁴⁹ none provide judges with sufficient guidance or criteria to which they may turn when faced with a plan of reorganization that includes a nondebtor release provision. Consequently these proposals would not adequately protect the bankruptcy process or the interests of the debtors, creditors, and claimants involved in these complex cases.

¹⁴⁶ Hill, *supra* note 97. The roughly \$40 trillion in liability covers only about 10% of the total claims filed. *In re Purdue Pharma L.P.*, 633 B.R. at 64.

¹⁴⁷ *In re Johns-Manville Corp.*, 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986), *aff'd* 843 F.2d 636 (2d Cir. 1988).

¹⁴⁸ *In re Purdue Pharma L.P.*, 633 B.R. at 84.

¹⁴⁹ One draconian proposal advocates for the outright prohibition on nondebtor releases outside the asbestos context. *See infra* Section IV.

1. FACTOR-BASED STANDARDS CREATE SUBJECTIVE AND DISCRETIONARY DECISIONS ON THE VALIDITY OF NONDEBTOR RELEASES

One proposal is for the Supreme Court to accept the practice of nondebtor releases by adopting a plain reading of section 524(e) in conjunction with an adoption of the Sixth Circuit’s seven-factor test¹⁵⁰ articulated in *In re Dow Corning Corp* for determining whether an “unusual circumstance” exists to warrant the use of nondebtor releases.¹⁵¹ While this proposal would rightfully legitimize the use of nondebtor relief, its lack of concrete mechanisms for determining the circumstances in which they apply leaves it solely to the bankruptcy court judge’s discretion to determine what constitutes an “unusual” case. The consequent subjectivity of judicial determinations, while inherent throughout the judicial system, affords judges who morally disagree with the use of nondebtor releases leeway to reject their use by concluding the case did not present such an unusual situation that warranted granting the releases. This would result in a similar problem the bankruptcy community currently faces: which cases are sufficiently unusual and what contribution is substantial enough to warrant the use of nondebtor releases. The issue with this factor-based approach is not the inconsistency of outcomes, but the lack of any uniform guidelines according to which judges assess each case and the resulting means by which judges have discretion to prohibit the use of nondebtor releases in otherwise deserving situations. The adoption of more thorough and explicit guidelines, such as those proposed in this article, would more adequately protect claimants’ interests than would an analysis of subjective factors.¹⁵²

¹⁵⁰ See *supra* Section I (explaining the circuit split); see *supra* note 42 (outlining the difference between the factor-based standards that the Sixth and Second Circuits each apply).

¹⁵¹ 280 F.3d at 658; see, e.g., Pierce G. Hand, IV, *The Eleventh Circuit’s Second Shot at Getting It Right: Nonconsensual Nondebtor Releases in Bankruptcy Court*, 15 DEPAUL BUS. & COMM. L.J. 107 (2017).

¹⁵² See 11 U.S.C. § 524(g)(2)(B)(IV)(bb) (requiring at least 75 percent of an impaired class of claimants whose claims are to be addressed by a trust to vote affirmatively to confirm the plan).

2. TEMPORARY NONDEBTOR RELEASES DETER THIRD PARTIES FROM CONTRIBUTING TO CLAIMANT RECOVERIES

Another proposed solution would only allow temporary nondebtor releases for the duration of the bankruptcy process.¹⁵³ The rationale behind this proposal is that temporary injunctions would allow for a successful reorganization without the fear of nondebtor liability threatening the completion of the reorganization.¹⁵⁴ However, without a permanent injunction, the nondebtor could threaten to walk away from settlement negotiations and not make a substantial contribution to the debtor's estate.¹⁵⁵ Without the nondebtor's contribution, the assets available to the bankruptcy estate would be significantly depleted, resulting in inadequate compensation to claimants, who would stand to recover little after secured and priority creditors receive payment.¹⁵⁶ For example, in Manville's bankruptcy proceeding, it was able to balance the interests of, and meaningfully recompense, tens of thousands of present and future claimants by establishing a trust to which claimants would be directed for recovery.¹⁵⁷ Similarly, in Drexel Burnham Lambert's bankruptcy, it created a Global Settlement endowed with \$1.3 billion from which claimants could recover in exchange for releasing nondebtor directors and officers of the corporation.¹⁵⁸ In mass tort bankruptcies more generally, the deprivation of permanent nondebtor releases threatens to implode the restructuring process because the nondebtor would not make a substantial financial contribution to a fund, which would likely result in the liquidation of the company and deprive claimants of a significant monetary recovery.¹⁵⁹

¹⁵³ Hand, *supra* note 151.

¹⁵⁴ *Id.*

¹⁵⁵ See, e.g., *In re Mallinckrodt*, 2022 WL 334245, at *15, n. 74 (Bankr. D. Del. 2022) (mentioning how one of the debtors' independent directors testified that through interview and meetings he conducted, "it was made very clear . . . that, without those releases, there would be no settlement.").

¹⁵⁶ See generally 11 U.S.C. § 1129(a) (explaining the priority scheme for receiving consideration in bankruptcy reorganizations).

¹⁵⁷ *Kane v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 843 F.2d 636 (2d Cir. 1988).

¹⁵⁸ *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, n. 2 (2d Cir. 1992).

¹⁵⁹ See, e.g., Adam J. Levitin, Purdue's *Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1110–11 (2022) (discussing the implications of the liquidation of Purdue Pharma: the DOJ would pursue its criminal and civil claims against the Company in the amounts of \$9.7 billion and \$8.3 billion respectively, which would leave the Company with no assets from which claimants could recover).

3. MERELY TIGHTENING VENUE RULES DOES NOT RESOLVE THE ISSUE AT BAR

One proposal suggests limiting the potential venues available to large corporate debtors or to create a special nationwide bankruptcy appeals court. This would prevent forum or judge shopping, ensure there are more procedural protections in place for creditors, and resolve complex cases expeditiously.¹⁶⁰ The goal of this proposal is to make the system for adjudicating bankruptcy cases more similar to federal litigation, as opposed to having debtors select their forum based on which district and bankruptcy judge they believe provides the best chance of victory for them. While more stringent venue rules would prevent debtors from choosing “debtor-friendly” forums or judges, this fails to address the crux of the issue of whether nondebtor releases are permissible. Rather, this proposal would likely result in a more contentious debate surrounding the validity of the practice, as circuits who reject the use of nondebtor releases in any situation would potentially be faced with an increased number of mass-litigation bankruptcies on their docket, the likes of which they do not often adjudicate.

If this proposal were to be combined with this article’s recommended amendments to section 524(g), however, the issue of forum shopping in the context of large corporate bankruptcies would be resolved, as courts across the nation would have a uniform guideline and mechanism through which to evaluate and authorize nondebtor releases.

4. A STEP IN THE RIGHT DIRECTION: EXPANDING THE LANGUAGE OF SECTION 524(G)

Richard Epling previously proposed either adding a subsection (x) to section 524 or expanding the language of section 524(g) to cover non-asbestos mass tort cases or other products or activities may be the subject of massive and unliquidated tort claims.¹⁶¹ This proposal

¹⁶⁰ *Id.* at 1128–31.

¹⁶¹ Richard L. Epling, *Third-Party Releases in Bankruptcy Cases: Should There Be Statutory Reform?*, 75 BUS. LAW. 1747, 1756 (2020). Epling also expands his analysis beyond the mass tort context to other areas, such as partnership bankruptcies and settling insurance companies, but for

would statutorily legitimize the use of nondebtor releases outside the asbestos context, which serves the purpose of creating uniformity across the mass-tort industry because there is no “legal logic in applying a different set of rules to a manufacturer of asbestos products than to a maker of products containing silica, [and no] policy reason to differentiate a mass injury caused by the maker of a ladder . . . from a tort caused by inhaling asbestos.”¹⁶² This proposal provides a solid foundation from which to build off, but is not sufficiently broad to cover non-tort claims, such as securities fraud. The mass tort context, which while most commonly associated with nondebtor releases because of their current notoriety due to cases such as Purdue Pharma, Mallinckrodt, and the Boy Scouts of America, comprises only one faction of nondebtor release law, and thus overlooks other mass actions this article advocates extending nondebtor releases to.

IV. RESPONSES TO ARGUMENTS AGAINST THE USE OF NONDEBTOR RELEASES

Reinvigorated by the rise of a number of mass tort bankruptcies, opponents of nondebtor releases have called for Congress to “close the nondebtor release loophole to ensure wealthy bad actors cannot misuse our bankruptcy courts to escape justice.”¹⁶³ Legislation currently pending before Congress seeks to amend the Bankruptcy Code to expressly eliminate the use of nondebtor releases in large corporate bankruptcies.¹⁶⁴ The driving force of this proposed bill—the Nondebtor Release Prohibition Act—is the perceived inequity of the situation: “big corporations and the very wealthy, who have not even filed for bankruptcy but who have figured out how to make the situation work to their benefit . . . leech off another entity’s bankruptcy to hide their misdeeds, silence victims, and secure their ill-gotten payouts.”¹⁶⁵ Such a drastic measure would have deleterious consequences for the practice of bankruptcy law and the possibility of maximizing recovery for claimants.

purposes of this article, discussion is limited to Epling’s proposed amendment in the mass tort context.
Id.

¹⁶² *Id.*

¹⁶³ *Attorney General William Tong, supra* note 8.

¹⁶⁴ Nondebtor Release Prohibition Act of 2021, H.R. 4777, 117th Cong. 2 (2022).

¹⁶⁵ Press Release, Chairman Nadler Statement for Subcommittee Hearing on “Oversight of the Bankruptcy Code, Part 1: Confronting Abuses of the Chapter 11 System,” House Committee on the Judiciary (July 28, 2021), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4672>.

A. NONDEBTOR RELEASES PRESERVE THE EFFICACY OF CHAPTER 11

Critics argue that many large, solvent entities have utilized the Chapter 11 process in the last few years to avoid liability for their wrongdoings.¹⁶⁶ They contend nondebtors neither qualify for nor do they want to file for bankruptcy, yet they receive bankruptcy relief by “offering money to claimants and threatening to implode settlements unless they receive injunctions and releases in bankruptcy court.”¹⁶⁷ Some have coined this practice the “throw in the towel” theory, whereby insiders threaten to abandon the debtor’s efforts to reorganize their corporation if they are not granted broad releases.¹⁶⁸ Proponents of this view argue that courts, creditors, and debtors should not kowtow to practices effectively resembling extortion, for extortionists should not share in the equitable relief that is afforded the debtor through the bankruptcy process.¹⁶⁹

Nondebtor releases, however, have proven to be an integral component in resolving complex mass tort litigation through the bankruptcy system. Often times, any settlement in bankruptcy is contingent on third parties receiving releases in exchange for their contributions to the bankruptcy.¹⁷⁰ This mechanism can generate win-win scenarios for all parties involved in the bankruptcy. Disregarding the moral qualm that nondebtors are able to benefit personally from these releases and avoid liability for their conduct, bankruptcy is meant to benefit the debtor and all parties involved. Therefore, prohibiting nondebtor releases would effectively eliminate a mechanism that facilitates a maximized recovery for claimants and successful reorganization for companies. Through the eyes of advocates of the Nondebtor Release Prohibition Act, precluding the use of nondebtor releases would eliminate a moral flaw of the bankruptcy system, however it would result in a worse

¹⁶⁶ *Hearing on Abusing the Bankruptcy Code*, *supra* note 6 (statement of William Tong, Connecticut Att’y Gen.). For example, the Sackler family pocketed billions from its production of OxyContin, and now uses Purdue Pharma’s bankruptcy to shield themselves from future liability for their role in fueling the opioid epidemic. Hoffman & Walsh, *supra* note 1.

¹⁶⁷ Simon, *supra* note 27, at 1158.

¹⁶⁸ Boyle, *supra* note 31, at 446–47.

¹⁶⁹ *Id.* at 447.

¹⁷⁰ *See, e.g., In re Mallinckrodt*, 2022 WL 334245, at 15, n. 74 (Bankr. D. Del. 2022) (mentioning how one of the debtors’ independent directors testified that through interview and meetings he conducted, “it was made very clear . . . that, without those releases, there would be no settlement.”).

and different set of flaws in the system, namely the decreased sums of monetary recovery for claimants and the increased hurdles to successful reorganization for the debtor. Nondebtor releases are best utilized as a negotiating tactic between parties to create complex and interrelated settlements that provide for fair and equitable outcomes for all parties involved in the bankruptcy proceeding.

B. NONDEBTOR RELEASES MAXIMIZE CLAIMANTS' POTENTIAL RECOVERY

Critics of nondebtor releases argue their use, often in conjunction with a channeling injunction, a mechanism that directs claimants into a debtor's dispute resolution trust system, lacks procedural protections claimants would otherwise have in a class action or multi-district litigation proceeding and deprives claimants of their sacred day in court.¹⁷¹ Critics argue the required appointment of counsel on behalf of all future claimants¹⁷² inadequately protects future claimants' potential recovery because their representation deprives them of their ability to individually participate in the bankruptcy, and thus they are "most likely to be exploited [since] they are never present at the negotiating table, and their interests are hypothetical, indefinite, and uncertain."¹⁷³ With respect to present claimants, critics argue nondebtor releases are unfair because it resolves their case prematurely and without regard for the specifics of their claim.¹⁷⁴ Thus, because of the inequities and injustices that arise from nondebtor releases and their association with channeling injunctions, opponents of their use strongly advocate for their explicit preclusion from bankruptcy practices.¹⁷⁵

¹⁷¹ Simon, *supra* note 27, at 1159; *Hearing on Abusing the Bankruptcy Code*, *supra* note 6 (statement of Tasha Schwikert Moser, Bronze Medal Olympic Gymnast). Moser asserted her issue with nondebtor releases, explaining how "it's the pain . . . it's not being able to get your day in court. Not being able to hold [the nondebtor] accountable . . . [T]hey get to swoop in and barely put any money in the pot and then they just get off." *Id.*

¹⁷² See 11 U.S.C. § 524(g)(4)(B)(i) (requiring a legal representative to be appointed for the purpose of protecting rights of persons who may not be able to assert demands during the bankruptcy proceeding).

¹⁷³ G. Marcus Cole, *A Calculus Without Consent: Mass Tort Bankruptcies, Future Claimants, and the Problem of Third Party Non-Debtor "Discharge"*, 84 IOWA L. REV. 753, 790 (1999) (quoting Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions"*: *An Introduction*, 80 CORNELL L. REV. 811, 828 (1995)).

¹⁷⁴ Simon, *supra* note 27, at 1159

¹⁷⁵ See generally *Hearing on Abusing the Bankruptcy Code*, *supra* note 6 (transcribing witnesses' testimony at a hearing on nondebtors' abuse of the bankruptcy system and the need to remedy it).

These arguments are flawed. Nondebtor releases can be an effective and even necessary tool to maximize value in mass tort bankruptcies, incentivizing and facilitating significant contributions by the nondebtor parties to the bankruptcy estate.¹⁷⁶ These releases “simply prevent third parties from going after released parties through the back door when the Debtors have resolved the claims.”¹⁷⁷ One of the major benefits of allowing nondebtor releases would be the expedited resolution of a large number of claims. In hearings on the Bankruptcy Reform Act of 1994, one senator inquired about what other types of companies could utilize a provision establishing explicit authority to create a trust under a permanent injunction.¹⁷⁸ The response posited that application of nondebtor releases to bankruptcies outside of asbestos would be a positive expansion because recovery through normal mass tort litigation would be on a first-come, first-serve basis, so all the assets of the company would be dedicated to current claimants and there would be no assurance that there would be sufficient funds to cover future claimants.¹⁷⁹ Such a “run on the bank” situation is arguably more unfair to claimants than the nondebtor releases because it rewards those who get to court first and receive a judgment, and often leaves latter claimants with litigation expenses but no assets of the defendant-debtor remaining from which they can recover. Nondebtor releases solve this inequity. They allow all parties to recover and share in the proceeds as opposed to the first-come, first serve nature of mass tort litigation.

Another benefit of expanding the language of section 524(g) to cover all mass tort cases would be the savings in legal costs. Without the protection of the nondebtor releases, the reorganized business would be “forced to waste millions of dollars in defense lawyers,”

¹⁷⁶ Gregg M. Galardi, Ryan Preston Dahl, & Mark Maciuch, *Nondebtor Release Bill Would Excessively Limit Ch. 11 Access*, LAW 360 (Nov. 5, 2021). For example, in exchange for being released from all civil liability stemming from claims that are tied to Purdue Pharma, the proposed agreement the Sackler family reached includes a \$4.325 billion Sackler family contribution to a trust dedicated to opioid victims, two charities dedicated to abatement purposes valued at \$175 million, and the establishment of a public benefit corporation. *In re Purdue Pharma L.P.*, 633 B.R. 53, 107 (Bankr. S.D.N.Y. 2021). In other contexts, child abusers in local Boy Scout councils and dioceses (subsidiary groups who hold a majority of their parent entity’s assets) use their financial position to negotiate a settlement that protects them from liability associated with their heinous acts. *Hearing on Abusing the Bankruptcy Code Before the House Judiciary Subcomm. on Antitrust, Com., and Admin. Law*, 117th Cong. 1 (2021) (statement of Rep. David Cicilline, Chairman, Subcomm. on Antitrust, Com., and Admin. Law).

¹⁷⁷ *In re Purdue Pharma L.P.*, 633 B.R. 53, 107 (Bankr. S.D.N.Y. 2021).

¹⁷⁸ *The Need for Supplemental Permanent Injunctions in Bankruptcy: Hearing Before the Subcom. On Courts and Admin. Practice*, 103rd Cong. 1 (1993) (statement of Sen. Grassley).

¹⁷⁹ *Id.*

whereas the “trust can distribute funds without excessive litigation.”¹⁸⁰ One of the lessons learned from the Manville Trust is that “the costs and delays [of litigation] must be considered. Once these costs are considered, principles of tort liability may be forced to yield to economic realities.”¹⁸¹ Under the Manville bankruptcy, for example, there were an overwhelming number of cases that were settled under the trust, which prevented both plaintiffs and debtors from expending large amounts in legal fees for representation.

C. PURDUE PHARMA ILLUSTRATES HOW THE USE OF NONDEBTOR RELEASES CREATE WIN-WIN SCENARIOS FOR ALL PARTIES

Creditors objecting to Purdue Pharma’s plan of reorganization argue that the Sackler family is abusing the bankruptcy system to preserve their wealth and that they should not benefit from bankruptcy laws because they themselves did not file for bankruptcy protection.¹⁸² Objecting creditors argue that the plan “does not provide enough money and does not hold adequately accountable members of the Sackler family” for their role in perpetuating the opioid epidemic.¹⁸³ While there is merit to this claim, creditors should not lose sight of their goal of maximizing recovery for their respective constituents.¹⁸⁴

Creditors of Purdue Pharma overwhelmingly decided to accept the plan. Over 95% voted in support thereof because they recognized that this is the best possible outcome.¹⁸⁵ This exceeds the section 524(g) requirement of obtaining an affirmative vote of at least 75 percent of creditors voting on the plan of reorganization before confirming nondebtor releases in asbestos bankruptcies.¹⁸⁶ To realize that this is the best result, one only need consider what might happen if the

¹⁸⁰ *Id.* (statement of Prof. Charles W. (Bud) Murdock, Trustee, UNR Corp., Asbestos Disease Claims Trust).

¹⁸¹ Macchiarola, *supra* note 66, at 587.

¹⁸² *Attorney General William Tong*, *supra* note 8.

¹⁸³ Steve Karnowski & Geoff Mulvihill, *States Split by Party on Accepting Purdue Pharma Settlement*, AP NEWS (Sept. 13, 2019), <https://apnews.com/article/tn-state-wire-luther-strange-opioids-ia-state-wire-mi-state-wire-c89c308de07b40c4a0ae215e721f913a>; Ana Radelat, *Rejecting Purdue Settlement, CT Hopes to Gain from Other Opioid Deals*, CT MIRROR (Oct. 3, 2019), <https://ctmirror.org/2019/10/03/rejecting-purdue-settlement-ct-hopes-to-gain-from-other-opioid-deals/>; Hoffinan & Benner, *supra* note 2.

¹⁸⁴ Karnowski & Geoff Mulvihill, *supra* note 183.

¹⁸⁵ *In re Purdue Pharma L.P.*, 633 B.R. 53, 10 (Bankr. S.D.N.Y. 2021).

¹⁸⁶ 11 U.S.C. § 524(g)(2)(B)(ii)(IV).

settlement were to fall through. Objecting creditors rejected the plan of reorganization in hopes they will receive a better settlement offer or recovery for their claimants.¹⁸⁷ For the following reasons, this is not possible. If the settlements were to fall through, Purdue Pharma would likely be liquidated, and parties would be sent back to the drawing board and would litigate amongst themselves in order to maximize their respective recoveries.¹⁸⁸ There are grave implications to this. If the plan of reorganization were to be rejected, the DOJ's agreement to forego a significant portion of its \$2 billion claim would be rescinded.¹⁸⁹ Purdue Pharma's going concern was valued at \$1.8 billion,¹⁹⁰ and thus the eradication of the DOJ's settlement in and of itself would effectively prevent any other creditor from recovering because the DOJ's superpriority administrative expense claim entitles it to recover in full before other creditors receive any consideration for their claims.¹⁹¹ What this means, is that most, if not all, of the Debtor's money, would go towards paying the DOJ's claim.¹⁹²

Some argue that the Sackler family illegally transferred large values of money into spendthrift trusts,¹⁹³ and that because of their net worth, they could and should donate a significantly greater monetary value towards the plan if they wish to receive the releases.¹⁹⁴ However, a greater recovery is not as feasible as it sounds, despite the Sackler family's net worth.¹⁹⁵ The implication, as revealed in trial, is that collection of monies from the Sackler family, and from many nondebtors seeking these releases, is highly uncertain.¹⁹⁶ This begs the

¹⁸⁷ Attorney General William Tong, *supra* note 8.

¹⁸⁸ *In re Purdue Pharma L.P.*, 633 B.R. at 91.

¹⁸⁹ *Id.* at 92.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Such a "gift" from the DOJ to unsecured creditors would violate the absolute priority rule, which requires that in order for a plan to satisfy the fair and equitable condition, secured creditors must "receive on account of [their] claim deferred cash payments totaling at least the allowed amount of such claim, of a value . . . of at least the value of such holder's interest . . ." 11 U.S.C. § 1129(b)(2)(A)(II). In *In re DBSD North America*, the Second Circuit held that a junior interest holder may not receive property of the bankruptcy estate regardless of whether such property is allegedly "gifted" by a secured creditor. 634 F.3d 79, 102–105. As such, the DOJ cannot simply "gift" its interest in Purdue Pharma's bankruptcy estate, as it would violate the Code's absolute priority rule and contradict Second Circuit jurisprudence.

¹⁹³ *Id.* at 86–87.

¹⁹⁴ Hoffman, *supra* note 3.

¹⁹⁵ A number of the Sackler family's assets have been dispersed – some is in offshore spendthrift trusts and some is with individuals who reside outside of, and have not sufficiently subjected themselves to, U.S. jurisdiction such that a U.S. court could exercise personal jurisdiction over them. *In re Purdue Pharma L.P.*, 633 B.R. at 86–87. Much of the Sackler family's wealth is invested in shares of their foreign businesses, which, as part of the plan, they are required to sell within seven years. *Id.* at 89.

¹⁹⁶ *Id.* at 87–88.

question of whether creditors really stand to recover more outside of the proposed plan of reorganization. It should be emphasized that, “a settlement is not evaluated in a vacuum, as a wish list. It takes an agreement, which . . . if properly negotiated . . . generally reflects the underlying strengths and weaknesses of the opposing parties’ legal positions and issues of collection, not moral issues.”¹⁹⁷ Thus, the proposed plan of reorganization represents the merits of the potential claims, serves as the most cost-effective method of providing relief, and satisfies the purposes of Chapter 11.¹⁹⁸

Further, another consequence of rejecting Purdue Pharma’s plan of reorganization would be the continued expense of litigation. Hundreds of prepetition lawsuits against the Sackler family would result in significant costs and detract from any future recovery.¹⁹⁹ With the number of claimants well into the thousands, “dockets in both federal and state courts [would] continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims’ recovery . . . ; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.”²⁰⁰ At the early stages of the bankruptcy proceeding in 2019, Purdue Pharma spent approximately \$2 million per week on legal and other professional fees for their services in the bankruptcy process.²⁰¹ As of March 2021, professional fees owed for services rendered throughout the process neared \$400 million – over half of the amount that victims would recover in the proposed plan of reorganization.²⁰² One can only imagine what this bill would jump to

¹⁹⁷ *In re Purdue Pharma L.P.*, 633 B.R. at 102.

¹⁹⁸ These proposals are typically in the creditors’ best interest, since it provides them an opportunity to receive more through the bankruptcy proceeding and established trust than they would if they attempted to litigate their claim or if the debtor liquidated, and the injunction ensures the company will not likely be plunged into bankruptcy in the future. *See* 11 U.S.C. § 1129(a)(7) (explaining that if a class of creditors will not recover the full value of their claim through the plan of reorganization, the plan must at least provide more than the creditors would receive in the case of liquidation); 11 U.S.C. § 1129(a)(11) (providing that a court should only confirm the plan if, among other things, “confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor . . .”).

¹⁹⁹ *In re Purdue Pharma L.P.*, 633 B.R. at 90.

²⁰⁰ Macchiarola, *supra* note 66, at 589 (*quoting*, Ad Hoc Comm. on Asbestos Litig., Report of the Jud. Conf. Ad Hoc Comm. on Asbestos Litig. 3 (1991)).

²⁰¹ Renae Merle & Lenny Bernstein, *Purdue Pharma’s Bankruptcy Plan Includes Special Protection for the Sackler Family Fortune*, WASH. POST (Sept. 18, 2019), <https://www.washingtonpost.com/business/2019/09/18/purdue-pharmas-bankruptcy-plan-includes-special-protection-sackler-family-fortune/>.

²⁰² Jeremy Hill & Dawn McCarty, *With \$2,300 Phone Calls, Purdue Runs Up Huge Bankruptcy Tab*, BLOOMBERG (May 11, 2021, 8:13 AM), <https://www.bloomberg.com/news/articles/2021-05-11/purdue-runs-up-nearly-400-million-in-bankruptcy-adviser-bills>.

if the thousands of temporarily enjoined claimants who filed prepetition lawsuits against the Sackler family were allowed to pursue those claims. The cost of litigation would be astronomical, and claimants' recoveries would suffer as a result.

The claimants might wish the Sackler family would contribute more of their wealth to the plan of reorganization, and creditors could receive greater compensation for their suffering. In this case, as is true of many cases in the bankruptcy context, it is imperative to put moral issues aside and focus on resolving claimants' cases in an efficient and effective manner. After over a year of intense mediation, in which talented mediators explained "the strengths and weaknesses of the claims, costs, delay, collection issues," and other concerns surrounding any potential or prospective litigation, over 95% of creditors agreed to this settlement. This means that over 95% of creditors recognize that this is their best chance to recover; for the individuals they represent, to recover; for victims to seek some sort of retribution and justice for the Sackler family's role in perpetuating a crisis that has lasted twenty years.²⁰³ To deliver that recovery to the victims and their families, not just in this case but in mass tort bankruptcy cases generally, and to resolve a 30 year inter-circuit debate, section 524(g) of the Bankruptcy Code should be amended to eliminate the asbestos language and replace it for all mass tort bankruptcies that satisfy the stringent requirements of the section.

CONCLUSION

In enacting section 524(g), Congress noted that it was "affirming what Chapter 11 reorganization is supposed to be about: allowing an otherwise viable business to quantify, consolidate, and manage its debt so that it can satisfy its creditors to the maximum extent feasible, but without threatening its continued existence and the thousands of jobs that it provides."²⁰⁴ Criticism surrounding many of the modern-era mass tort bankruptcies threatens to undermine this objective, as many are calling for the explicit prohibition of the use of nondebtor releases. Congress, however, should do the opposite. It should protect this practice by explicitly recognizing its validity outside the asbestos context through an amendment to the Bankruptcy Code. Congress' failure to make this amendment jeopardizes the purpose of Chapter

²⁰³ Hoffman & Benner, *supra* note 2.

²⁰⁴ 103 CONG. REC. 28355 (1994).

11, as it will result in prolonged litigation in which many claimants will not recover and threatens the continued viability of bankrupt corporations. Purdue Pharma is just one example of a group of claimants that would greatly benefit from the explicit approval of nondebtor releases, and it demonstrates the urgency with which Congress should act to make such a recovery available for victims suffering from mass tort cases.