RELIEF AND ITS COSTS: THE NEED FOR A CONGRESSIONAL RESPONSE TO THE AFTERMATH OF *HARRINGTON V. PURDUE PHARMA*

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INTRODUCTION

In 2022, over eighty thousand people in the United States died of an overdose involving an opioid drug.[1] This number is staggering, but it is not surprising. For more than two decades, opioid-related deaths in the nation have been on the rise.[2] While a crisis of this degree cannot be blamed on a single factor, one cause has been recognized as particularly significant: the marketing of the opioid drug OxyContin by the Sackler-led Purdue Pharma Company in the late 1990s and early 2000s.[3] The opioid crisis fueled by Purdue Pharma has resulted in immense costs. Aside from the immeasurable value of the thousands of lives lost or irreparably harmed, a

1. *Drug Overdose Deaths: Facts and Figures*, NAT'L INST. ON DRUG ABUSE (Aug. 2024), https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates [https://perma.cc/B94B-BUAJ] (recording "U.S. Overdose Deaths Involving Any Opioid by Sex, 1999-2022"). Since the Supreme Court's decision in *Harrington v. Purdue Pharma*, the opioid crisis and the issue of nonconsensual third-party releases have gained renewed interest and been the subject of extensive legal scholarship, including an article published by the *William & Mary Law Review*. At the time of writing, an online article published by this journal also provides an overview of the *Harrington* decision and the potential for a congressional response. While that article focuses on a potential amendment to the Bankruptcy Code that would permit release in all mass tort restructuring cases and discusses whether such an amendment is even necessary, this Note argues in favor of an amendment that targets issues such as the opioid crisis and provides more detail regarding the uncertainty that surrounds Chapter 11 plans after the Supreme Court's decision without such an amendment. *See* Lawrence Ponoroff, *The Supreme Court Sack[ler]s Third-Party Releases in Chapter 11: Should Congress Seize the Cudgel?*, 66 WM. & MARY L. REV. ONLINE 1, 3-5, 22, 26 (Nov. 19, 2024), https://wmlawreview.org/supreme-court-sacklers-third-party-releases-chapter-11-should-congress-seize-cudgel [https://perma.cc/9MMB-M63E].

2. NAT'L INST. ON DRUG ABUSE, *supra* note 1 (showing an increase in overdose deaths across sexes and drug classes).

3. *See* Ronald Hirsch, *The Opioid Epidemic: It's Time to Place Blame Where It Belongs*, 114 MO. MED. 82, 83 (2017) (discussing Purdue Pharma's role in the opioid crisis from the viewpoint of a physician); *see also* Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused*, N.Y. TIMES (May 29, 2018), https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html [https://perma.cc/5N8A-Q6HQ] (claiming Purdue Pharma continued to market OxyContin as nonaddictive despite knowing it was being abused); Press Release, U.S. Dep't of Just., Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family (Oct. 21, 2020), https://www.justice.gov/archives/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opiod [https://perma.cc/LYT2-S8P3] (recognizing "Purdue's reckless actions and violation of the law" as a contributing factor of the opioid crisis).

recent study estimates that states may spend over $1 trillion addressing opioid use disorders and overdoses *in a single year*.[4]

In 2020, after being found criminally liable for its part in the opioid crisis, Purdue Pharma began negotiating a bankruptcy deal under which it would contribute $8 billion to state and local governments and individuals impacted by the opioid crisis.[5] The deal eventually mandated that individual members of the Sackler family would personally contribute $6 billion to these causes in exchange for release from personal liability for claims related to the opioid crisis.[6]

Bankruptcy courts had long granted similar releases, though not without criticism.[7] This controversy eventually carried Purdue's bankruptcy case to the Supreme Court in *Harrington v. Purdue Pharma*, where the Court invalidated the plan and generally struck down the use of nonconsensual third-party releases in bankruptcy plans.[8] The ruling upended bankruptcy law and now leaves parties seeking protection under bankruptcy plans—and those who would bring suits against them—in a state of uncertainty, as a tool long used to prevent potential mass tort claims is now unavailable.[9]

However, the Supreme Court left open a path for settling these uncertainties. In its decision, the Court noted that whether to allow such releases is a matter of policy that Congress is entitled to

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4. Feijun Luo, Mengyao Li & Curtis Florence, *State-Level Economic Costs of Opioid Use Disorder and Fatal Opioid Overdose—United States, 2017*, 70 CDC MORBIDITY & MORTALITY WKLY. REP. 541, 541 (2021), https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7015a1-H.pdf [https://perma.cc/8TUT-XQ87].

5. Nina Totenberg, *Purdue Pharma, Sacklers' OxyContin Settlement Lands at the Supreme Court*, NPR (Dec. 4, 2023, at 05:00 ET), https://www.npr.org/2023/12/04/1215717223/purdue-sacklers-oxycontin-supreme-court [https://perma.cc/6G34-WH47].

6. *Id.*

7. The releases, called "non-consensual third-party releases," allowed a party related to the bankrupt organization (but not bankrupt itself) to avoid personal liability in exchange for contributing some sort of relief to potential claimants. Eamonn O'Hagan, *On a "Related" Point: Rethinking Whether Bankruptcy Courts Can "Order" the Involuntary Release of Non-Debtor, Third-Party Claims*, 23 AM. BANKR. INST. L. REV. 531, 531 (2015). Before *Harrington*, some courts allowed them in limited circumstances, while others maintained a blanket prohibition on their use. Stephen W. Sather, *The Controversial Role of Third-Party Releases in Bankruptcy*, 31 AM. BANKR. INST. L. REV. 71, 93-95 (2023).

8. 144 S. Ct. 2071, 2087-88 (2024) ("[W]e hold ... the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants.").

9. *See id.* at 2116-17 (Kavanaugh, J., dissenting).

change.[10] Indeed, Congress can and should do just that by addressing cases such as *Harrington* in a change to the Bankruptcy Code that permits nonconsensual third-party releases.

An exception allowing release from liability for third parties to debtors facing asbestos-related claims already exists and is a simple structure for permitting such releases in only exceptional cases.[11] Congress should extend a similar exception to pharmaceutical cases as well, allowing claimants in those cases a path to relief. If Congress wants to address the policy concerns created by the *Harrington* ruling, it should adopt even stronger procedures that would protect the rights and abilities of potential claimants. Ultimately, by adapting existing procedures in the Bankruptcy Code, Congress should craft a standard for issuing these releases that provides certainty and relief for those impacted by the wrongdoings of debtors and other responsible parties.

This Note explores the fallout of the *Harrington* decision and the uncertainty it lends to the future of bankruptcy plans and third-party releases. Specifically, it proposes potential congressional solutions that can pave a path forward for parties to seek relief for the harms they have suffered under the actions of corporations and their leaders. Part I provides background information on the use of nonconsensual third-party releases in bankruptcy cases and their controversial nature. Part II analyzes the Supreme Court's settling of that controversy in *Harrington* and the bases that it relied on in doing so. Part III argues that the Court's ruling has serious policy implications that will prevent victimized parties from seeking and obtaining needed relief. Finally, Part IV suggests potential solutions that Congress can pursue to allow such victims to receive relief from third parties in bankruptcy cases.

I. BACKGROUND

Prior to the Supreme Court's ruling in *Harrington*, nonconsensual third-party releases were a disputed tool in bankruptcy cases.[12]

10. *Id.* at 2087.

11. *See* 11 U.S.C. § 524(g)(1)-(2).

12. *See, e.g.*, Sather, *supra* note 7, at 93-100 (surveying the circuit courts' approaches to the granting and scope of nonconsensual third-party releases).

Federal courts relied on various authorities in granting such releases, which led to vastly different results across the United States.[13] This background section discusses the authorities that courts relied on to validate nonconsensual third-party releases, how those releases operated in general practice, and their development in *Harrington* specifically.

A. Authority for Nonconsensual Third-Party Releases

The United States Bankruptcy Code plainly benefits the debtors in a Chapter 11 plan by granting them a discharge "from any debt that arose before the date of ... confirmation" of the plan.[14] Such a discharge "voids any judgment" that relied on "a determination of the personal liability of the debtor"[15] and enjoins "the commencement or continuation of an action ... to collect ... any such debt as a personal liability of the debtor."[16] However, there have been issues when a Chapter 11 plan sought to protect a party other than a debtor from liability. Although the Code is clear that "discharge of a debt of the debtor does not affect the liability of any other entity,"[17] some federal courts routinely allowed plans that included mechanisms to protect non-debtor third parties.[18]

Nonconsensual third-party releases were one of those very mechanisms. Bankruptcy courts implemented these releases in Chapter 11 plans to release nondebtor parties from liability for actions that may have no relation to the bankruptcy case itself.[19] While third-party releases, in general, raise questions of fairness and the authority of bankruptcy courts, nonconsensual ones are especially vulnerable to critique, as they provide release from

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13. *See id.*

14. 11 U.S.C. § 1141(d)(1)(A).

15. 11 U.S.C. § 524(a)(1).

16. 11 U.S.C. § 524(a)(2).

17. 11 U.S.C. § 524(e).

18. *See, e.g.*, Lacy v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 656-58 (6th Cir. 2002) (approving the use of third-party releases in the Sixth Circuit). *See generally* Sather, *supra* note 7 (providing an overview of several types of those mechanisms).

19. *See Nonconsensual Third-Party Releases: What They Are and Why You Should Care*, BRADLEY (Mar. 14, 2022), https://web.archive.org/web/20250311161826/ https://www.bradley.com/insights/publications/2022/03/nonconsensual-third-party-releases-what-they-are-and-why-you-should-care [https://perma.cc/9UQ2-QKSS].

liability to potential creditors who had not approved—and may have outright opposed—the Chapter 11 plan.[20]

Despite these concerns, courts found authority to grant such releases throughout the Bankruptcy Code.[21] Two sections of the Code in particular grant broad power to bankruptcy courts and were viewed as sources of authority for such releases: 11 U.S.C. § 105(a) and § 1123(b)(6).[22] The former gives a court the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Chapter 11]."[23] In a similarly broad permissive statement, the latter permits a Chapter 11 plan to "include any other appropriate provision."[24] These code provisions, along with Chapter 11's lack of an explicit bar on third-party releases, resulted in bankruptcy courts granting nonconsensual releases in various bankruptcy plans.[25]

B. Nonconsensual Third-Party Releases in Practice

Because of the lack of clear authority on the matter, federal circuit courts varied in the requirements that had to be met before bankruptcy courts could grant nonconsensual third-party releases. While *Harrington* has decidedly settled this circuit split,[26] an understanding of how different circuits approached the issue provides insight into the implications of that ruling and how Congress may respond to it.

In theory, bankruptcy courts that did grant third-party releases were to do so sparingly, and only when certain conditions regarding the relationship between the debtor, third party, and bankruptcy proceedings were met.[27] Circuit courts that enforced such restrictions looked to factors that indicated "unusual circumstances," such

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20. *See id.*

21. *See* Sather, *supra* note 7, at 73-75, 78 (discussing various statutory bases for third-party releases generally).

22. *See* Karen Cordry, *Unraveling the Origins Behind Third Party Releases in Bankruptcy*, COM. L. WORLD MAG., July-Sep. 2022 at 12, 15, 19-20 (highlighting the broad authority conferred by these statutes in jurisdictions that permit nonconsensual third-party releases).

23. 11 U.S.C. § 105(a).

24. 11 U.S.C. § 1123(b)(6).

25. *See* BRADLEY, *supra* note 19.

26. *See* 144 S. Ct. 2071, 2080 (2024).

27. *See* Sather, *supra* note 7, at 95.

as whether "[t]here [was] an identity of interests between the debtor and the third party ... such that a suit against the non-debtor [was], in essence, a suit against the debtor," and whether "[t]he impacted class, or classes, ha[d] overwhelmingly voted to accept the plan," among others.[28] In contrast, other bankruptcy courts showed less discretion in granting releases, and they became increasingly common.[29] Instead of the rigorous factor-balancing test described above, some circuit courts simply stated that granting third-party releases generally fell within bankruptcy courts' broad powers.[30]

Other federal circuit courts refused to allow nonconsensual third-party releases at all. The Ninth Circuit held that 11 U.S.C. § 524(e) limited release from liability to debtors only, and that bankruptcy plans thus could not provide releases for third parties.[31] Similarly, the Tenth Circuit held in its review of the same provision that "Congress did not intend to extend such benefits [as discharge of debt] to third-party bystanders."[32]

The *Harrington* case developed under this dichotomy and stark circuit split. With the question of nonconsensual third-party releases having no clear answer, Purdue Pharma filed for bankruptcy and negotiated for a deal that would later have a national impact.

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28. Lacy v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 658 (6th Cir. 2002) (establishing circumstances that must be met, even though 11 U.S.C. § 1123(b)(6) and § 105(a) grant broad authority).

29. *See* Sather, *supra* note 7, at 95-96; *see also* Cordry, *supra* note 22, at 13 (recognizing the prevalence of third-party releases).

30. *See, e.g.*, Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 701-02 (4th Cir. 1989) (holding releases were within "equitable powers" of bankruptcy courts); *see also, e.g.*, Airadigm Commc'ns Inc. v. FCC (*In re* Airadigm Commc'ns, Inc.), 519 F.3d 640, 657 (7th Cir. 2008) (holding that such releases fell within bankruptcy courts' "traditionally broad" powers and congressional grant of "residual authority").

31. Resorts Int'l, Inc. v. Lowenschuss (*In re* Fred Lowenschuss), 67 F.3d 1394, 1401-02 (9th Cir. 1995).

32. Landsing Diversified Props. v. First Nat'l Bank & Tr. Co. of Tulsa (*In re* W. Real Est. Fund, Inc.), 922 F.2d 592, 600 (10th Cir. 1991).

C. The Harrington *Case*

Purdue Pharma filed for bankruptcy in 2019.[33] With that filing, the company intended to enter into a plan that would shield itself and members of the Sackler family from liability for lawsuits relating to the opioid crisis.[34] The bases for those lawsuits and the parties' roles in the ongoing opioid crisis cannot be adequately covered in this Note.[35] However, the company's malicious and dishonest marketing of the opioid drug OxyContin was the central issue in these suits.[36]

Beginning in 1996, Purdue Pharma, a company owned and operated by various members of the wealthy Sackler family,[37] began marketing a new opioid drug, OxyContin, to healthcare providers across the United States.[38] In doing so, the company knowingly made false and misleading statements about the drug's addiction risk, claiming it was safe to prescribe in large doses[39] without evidence and, later, with the knowledge that such statements were untrue.[40] This aggressive marketing led to widespread OxyContin use and has been identified as a significant contributing factor to the ongoing opioid crisis.[41] As a result of these actions, Purdue faced

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33. 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 [https://perma.cc/A7CK-PB9Q].

34. *Id.*

35. See generally SAM QUINONES, DREAMLAND: THE TRUE TALE OF AMERICA'S OPIATE EPIDEMIC (2015), for an in-depth exploration of the opioid crisis.

36. *See* Joanna Walters, *Meet the Sacklers: The Family Feuding Over Blame for the Opioid Crisis*, THE GUARDIAN (Feb. 13, 2018, at 11:11 ET), https://www.theguardian.com/us-news/2018/feb/13/meet-the-sacklers-the-family-feuding-over-blame-for-the-opioid-crisis [https://perma.cc/C488-8HHG].

37. *See id.*

38. *See* Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 221-23 (2009).

39. These statements resulted in doctors prescribing the drugs in larger individual doses and with more frequency; prescription rates rose drastically in the late 90s and early 2000s. *See id.* at 222-24.

40. *Id.* at 223-24; Meier, *supra* note 3.

41. Initially, Purdue targeted marketing at areas with high numbers of chronic pain patients, such as Appalachian coal-mining counties in West Virginia, Eastern Kentucky, and Southwest Virginia. Van Zee, *supra* note 38, at 222-25; *see* Meier, *supra* note 3. High prescription and abuse rates in those areas soon spread across the nation. *See* Arthur Gale, *Sacklers Sacked but Purdue Still Caused Opioid Epidemic*, 119 MO. MED. 109, 109 (2022) (discussing the misleading marketing tactics used by Purdue to sell OxyContin); Hirsch, *supra*

thousands of civil lawsuits from individuals and communities that have suffered because of that crisis.[42]

The initial Chapter 11 plan for Purdue Pharma released the company from liability in exchange for the payment of $8 billion to individual and government victims of the opioid crisis.[43] The deal also released members of the Sackler family from liability, who, in return, agreed to pay $6 billion from their own funds to the same causes after negotiations with several states.[44] Though every state and a majority of local governments approved that agreement, the United States Trustee continued to challenge the plan's inclusion of nonconsensual third-party releases that would bind those governments and individuals who had not approved the plan.[45]

In 2021, the United States District Court for the Southern District of New York vacated the bankruptcy court's confirmation of the plan.[46] After a lengthy discussion and in-depth review of existing law on the matter, the district court held that there was "no such authority" for a bankruptcy court to "order the non-consensual release of third-party claims against non-debtors."[47] Two years later, the Second Circuit reversed that order, finding that 11 U.S.C. § 105(a) and § 1123(b)(6) granted courts the authority to approve nonconsensual third-party releases and that such releases were appropriate in that case.[48] The Supreme Court finally struck down the plan in June 2024, agreeing with the district court that the Bankruptcy Code does not allow for the grant of nonconsensual third-party releases in Chapter 11 plans.[49] In doing so, the Court

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note 3, at 83 (likewise discussing Purdue's targeted and misleading marketing).

42. Hoffman & Walsh, *supra* note 33; Alison Durkee, *Billionaire Sackler Family Members Could Face Fresh Lawsuits After Purdue Opioid Settlement Falls Apart*, FORBES (July 9, 2024, at 13:24 ET), https://www.forbes.com/sites/alisondurkee/2024/07/09/billionaire-sackler-family-members-could-face-fresh-lawsuits-after-purdue-opioid-settlement-falls-apart/ [https://perma.cc/HAA7-X59L]; John Kruzel, *US Supreme Court Blocks Purdue Pharma Bankruptcy Settlement*, REUTERS (June 27, 2024, at 15:47 ET), https://www.reuters.com/legal/us-supreme-court-blocks-purdue-pharma-bankruptcy-settlement-2024-06-27/ [https://perma.cc/Z8VH-NUXM].

43. Totenberg, *supra* note 5.

44. *Id.*

45. *See id.*

46. *In re* Purdue Pharma, 635 B.R. 26, 37-38 (S.D.N.Y. 2021).

47. *Id.* at 115.

48. *In re* Purdue Pharma, 69 F.4th 45, 72-75, 82-83 (2d Cir. 2023).

49. *See* Harrington v. Purdue Pharma, 144 S. Ct. 2071, 2087-88 (2024).

settled a long-standing disagreement but left many questions open about the future of bankruptcy proceedings.

II. THE COURT'S DECISION IN *HARRINGTON*

In *Harrington*, the Supreme Court categorically struck down the use of nonconsensual third-party releases in Chapter 11 bankruptcy plans.[50] It did so in a 5-4 ruling that reviewed both the Bankruptcy Code and the history of those releases in practice.[51] Potential solutions to the fallout created by this decision are better informed by a review of the three primary tools of analysis that the Supreme Court emphasized in its ruling: (1) construction of the 11 U.S.C. § 1123(b)(6) bankruptcy "catchall" provision, (2) the structure and language of the Bankruptcy Code more generally, and (3) historical legal precedent concerning such releases.

A. 11 U.S.C. § 1123(b)(6): The "Catchall" Provision

One of the statutory authorities bankruptcy courts relied on in granting nonconsensual third-party releases was 11 U.S.C. § 1123(b)(6), which provides that a Chapter 11 plan can "include any other appropriate provision not inconsistent with the applicable provisions of this title."[52] The Second Circuit relied on this provision in its approval of the Purdue plan.[53] However, the Supreme Court—identifying 11 U.S.C. § 1123(b)(6) as a "catchall" provision that courts must not interpret broadly—declined to extend the provision's coverage to nonconsensual third-party releases.[54]

To support this conclusion, the Supreme Court largely relied on the *ejusdem generis* canon of construction.[55] Because the preceding paragraphs of 11 U.S.C. § 1123(b)(1)-(5) gave explicit instructions as

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50. *See id.*

51. *See id.* at 2077-88.

52. 11 U.S.C. § 1123(b)(6); *see, e.g.*, Airadigm Commc'ns, Inc. v. FCC (*In re* Airadigm Commc'ns, Inc.), 519 F.3d 640, 657 (7th Cir. 2008).

53. *See In re Purdue Pharma*, 69 F.4th at 73-74.

54. *See Harrington*, 144 S. Ct. at 2082-83.

55. *See id. See generally Ejusdem Generis*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("[W]hen a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.").

to what actions bankruptcy courts could take and whom those actions could affect, the Court held that 11 U.S.C. § 1123(b)(6) itself could not be read so broadly.[56] The earlier provisions concern actions that can affect the debtor itself, and so, according to the Court, cannot extend a bankruptcy court's power to third parties.[57] The Court explained that if Congress had intended to grant the bankruptcy courts such a power, Congress would have drafted the statute using broader, more sweeping language.[58]

B. Structure of the Bankruptcy Code Generally

Looking beyond the "catchall" provision, the Supreme Court held that other instructions within the Bankruptcy Code structurally limited a Chapter 11 plan from discharging the debts of a third party.[59] First, the Bankruptcy Code consistently refers to discharge releases as a benefit for "the debtor" which, the Court explained, indicates that the privilege should not extend to others.[60] Second, the Court held that a discharge is intended to be a limited privilege that protects only a debtor who "come[s] forward with virtually all its assets" in certain types of cases, and that the Sackler family members did not qualify for release under that limitation.[61]

Notably, the Court also stated that its analysis considered 11 U.S.C. § 524(g), which allows for nonconsensual third-party releases from claims related to harms caused by asbestos exposure,[62] and which this Note will return to in more detail.[63] In passing this narrow exception, Congress noted that it was targeting a particular industry both to allow victims of asbestos-related illnesses to recover for their harms and to allow companies in that industry to

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56. *See Harrington*, 144 S. Ct. at 2082-83.

57. *See id.* at 2083.

58. *See id.*

59. *See id.* at 2084-85.

60. *See id.* at 2085.

61. *Id.* Individual members of the family had not filed for bankruptcy themselves and sought release in exchange for contributing a small portion of their assets to relief funds. *See id.* at 2086.

62. *See id.* at 2085 (quoting 11 U.S.C. § 524(g)(4)(A)(ii)).

63. *See infra* Part IV.A.

reorganize without being subject to the threat of future claims.[64] The Supreme Court found the presence of this exception in the Bankruptcy Code to be informative, stating that, had Congress intended to extend such releases to other cases, it would have explicitly done so.[65]

C. Legal Precedent

Finally, the Court held that congressional acts and the Court's own rulings prior to the adoption of the Bankruptcy Code indicated that nonconsensual third-party releases were not appropriate in a Chapter 11 plan.[66] The Court found no history of such releases in American law.[67] Instead, it pointed to a series of cases and statutes that limited release from liability to bankrupt parties who surrendered all of their assets.[68] In this analysis, the Court reiterated that pre-enactment history can be useful in answering questions about current bankruptcy issues.[69]

D. What the Court Did Not Say

It is also important to briefly note what the Supreme Court *did not* say in the *Harrington* ruling. The Court said that its striking

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64. *See* 140 CONG. REC. 27691-92 (1994) (statement of Rep. Brooks) (inserting text from H.R. REP. NO. 103-835, at 40 (1994) into the congressional record).

65. *See Harrington*, 144 S. Ct. at 2085 (2024) ("That the code *does* authorize courts to enjoin claims against third parties without their consent, but does so in only *one* context, makes it all the more unlikely that § 1123(b)(6) is best read to afford courts that same authority in *every* context." (first citing Bittner v. United States, 598 U.S. 85, 94 (2023); and then citing AMG Cap. Mgmt., LLC v. FTC, 593 U.S. 67, 77 (2021))).

66. *See id.* at 2086.

67. *See id.*

68. *See id.* (asserting that bankruptcy law has historically "reserved the benefits of discharge to the debtor who offered a 'fair and full surrender of [its] property'" (alteration in original) (first quoting Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 176 (1819); then citing Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363-64 (2006); then citing Bankruptcy Act of 1800, ch. 19, § 5, 2 Stat. 19, 23 (repealed 1803); then citing Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 440, 442-43 (repealed 1843); then citing Act of Mar. 2, 1867, ch. 176, §§ 11, 29, 14. Stat. 521, 531-32 (repealed 1878); and then citing Bankruptcy Act of 1898, ch. 541, §§ 7, 14, 30 Stat. 544, 548, 550 (repealed 1978))).

69. *See id.* ("[P]re-code practice may sometimes inform our interpretation of the code's more 'ambiguous' provisions." (citing RadLAX Gateway Hotel v. Amalgamated Bank, 566 U.S. 639, 649 (2012))).

down of nonconsensual third-party releases should not be extended to invalidate consensual releases, which it recognized as raising different legal questions.[70] However, it declined to provide guidelines for determining whether a release is consensual.[71] Furthermore, it did not address how its ruling should affect bankruptcy plans that have already been confirmed but not yet fully carried out.[72] Thus, while *Harrington* may appear at first to be a narrow holding that regards only one particular legal mechanism, the Court left open important questions of interpretation and application.

Moreover, the Court noted that there were policy arguments in favor of allowing the bankruptcy court to issue a nonconsensual third-party release in cases such as *Harrington*.[73] It left those arguments to the realm of Congress, stating that legislative change is the appropriate avenue to incorporate those policy considerations into bankruptcy law.[74]

To summarize: On its face, the Supreme Court's text-based ruling narrowly struck down the use of nonconsensual third-party releases in Chapter 11 plans. However, the Court's decision left open important questions about the structure of existing and future bankruptcy cases. It also raised concerns about the political and social merits of a bankruptcy system that does not allow for such releases. Fortunately, the Supreme Court outlined a clear path for the resolution of these issues by recognizing the possibility of congressional change.

III. THE UNCLEAR LANDSCAPE OF POST-*HARRINGTON* BANKRUPTCY LAW

As noted above, the effects of the *Harrington* ruling are facially simple: Bankruptcy courts can no longer include nonconsensual release from liability for third parties in Chapter 11 bankruptcy plans. Yet, in the short time since the Court's decision, practitioners

70. *See id.* at 2087.

71. *See id.* at 2088.

72. *See id.*

73. *See id.* at 2086-87. The Court acknowledged the argument that victims of the opioid crisis might not receive any relief from the Sacklers unless it was contributed under a third-party release plan. *See id.*

74. *See id.* at 2087.

and observers have already found that this shift in bankruptcy law has created several areas of uncertainty and potential injustice.[75] These concerns can be broadly sorted into two categories: structural questions about practical effects on bankruptcy cases and policy questions about how parties that have suffered harm will seek relief for corporate wrongdoing.

A. Structure of Bankruptcy Cases

First, the *Harrington* ruling raises issues about the structure and operation of current and future bankruptcy proceedings. Practitioners have noted that the Court's decision alters the way in which parties should pursue Chapter 11 plans and leaves unclear what mechanisms those plans can include.[76] Others have highlighted the difficulty that the ruling presents to those hoping to settle mass tort claims, as it took away a tool that incentivized nondebtor parties to contribute funds to pay such claims as part of a Chapter 11 plan.[77]

One area in which these structural questions come to light is cases that include nonconsensual third-party releases and were approved by courts prior to *Harrington* but have only been carried out in part. The Supreme Court declined to speak on whether its holding should apply retroactively to those cases.[78] Still, some worry

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75. *See, e.g.*, Brett Axelrod & Agostino Zammiello, *Navigating the Bankruptcy Terrain After Purdue Pharma*, LAW360 (Oct. 18, 2024, at 16:23 ET), https://www.law360.com/articles/1890750/navigating-the-bankruptcy-terrain-after-purdue-pharma [https://perma.cc/4K67-ZRMP].

76. *See id.*; Christopher F. Graham & Michael Ingrassia, *SCOTUS Curtails Third-Party Releases, Prospectively Derails Mass Tort Chapter 11 Plans*, WHITE & WILLIAMS LLP (June 27, 2024), https://www.whiteandwilliams.com/resources-alerts-SCOTUS-CURTAILS-THIRD-PARTY-RELEASES-PROSPECTIVELY-DERAILS-MASS-TORT-CHAPTER-11-PLANS [https://perma.cc/KDD9-ULRZ].

77. *See* Noah Feldman, Opinion, *Supreme Court Shreds Opioid Deal, Bankruptcy Norms*, U.S.L.W. (June 27, 2024, at 11:25 ET), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XA6C5OM4000000?bna_news_filter=us-law-week#jcite [http://perma.cc/NN2N-BPKC]; Louis S. Chiappetta, Tyler R. Ferguson, Devi Shah & Joshua R. Gross, *I Shall (Not) Be Released: With Purdue Pharma Decision, US Supreme Court Remakes Chapter 11 Landscape*, MAYER BROWN (July 9, 2024), https://www.mayerbrown.com/en/insights/publications/2024/07/i-shall-not-be-released-with-purdue-pharma-decision-us-supreme-court-remakes-chapter-11-landscape [https://perma.cc/DR7K-4VSN].

78. *See* Harrington v. Purdue Pharma, 144 S. Ct. 2071, 2088 (2024) ("[W]e do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated.").

that approved plans, and the releases contained within them, may be in danger of being unwound on appeal.[79] This worry is exemplified by another company whose bankruptcy case, like *Harrington*, captured widespread attention because of the potential tort claims that the company faced: the Boy Scouts of America.

The Boy Scouts of America gained widespread media coverage in 2020 when it filed for bankruptcy after hundreds of former members came forward as victims of abuse from organization leaders.[80] From the time of that filing, the organization claimed that a goal of its Chapter 11 negotiations was to set up a trust to be used to settle claims from those victims.[81] The United States Bankruptcy Court for the District of Delaware confirmed such a plan in 2022;[82] it would release the national organization and various third parties, such as local scout councils, from future liability for any claims that abuse victims might bring.[83] Abuse victims challenged that plan in the United States District Court for the District of Delaware, arguing that the releases were not permissible under the Bankruptcy Code.[84] The district court upheld the plan's confirmation, holding that the bankruptcy court had the authority to grant the release based on 11 U.S.C. §§ 105(a) and 1123(b)(6).[85] Interestingly, the district court

79. *See* Thomas Gleason & Evan Ochsner, *Purdue Pharma Bankruptcy Deal Ruling Is Taking Courts by Storm*, BLOOMBERG LAW (July 25, 2024, at 05:01 ET), https://news.bloomberglaw.com/bankruptcy-law/purdue-pharma-bankruptcy-deal-ruling-is-taking-courts-by-storm [https://perma.cc/X2EP-BJCD].

80. *See, e.g.*, Rebecca Falconer, *Boy Scouts of America Files for Bankruptcy*, AXIOS (Feb. 18, 2020), https://www.axios.com/2020/02/18/boy-scouts-of-america-files-for-bankruptcy [https://perma.cc/93ZX-NK8J].

81. *Id.*; Laurel Wamsley & Wade Goodwyn, *Boy Scouts of America Files For Bankruptcy as It Faces Hundreds of Sex-Abuse Claims*, NPR (Feb. 18, 2020, at 01:08 ET), https://www.npr.org/2020/02/18/806721827/boy-scouts-of-america-files-for-bankruptcy-as-it-faces-hundreds-of-sex-abuse-cla [https://perma.cc/Z35L-VHTL].

82. *See In re* Boy Scouts of Am., No. 20-10343, 2022 WL 20541782, at *9 (Bankr. D. Del. 2022) (ordering plan confirmation), *aff'd*, 650 B.R. 87 (D. Del. 2023).

83. *See In re* Boy Scouts of Am., 642 B.R. 504, 586 (Bankr. D. Del. 2022), *aff'd*, 650 B.R. 87 (D. Del. 2023).

84. *See* Nat'l Union Fire Ins. of Pittsburgh v. Boy Scouts of Am. (*In re* Boy Scouts of Am.), 650 B.R. 87, 115-16 (D. Del. 2023).

85. *See id.* at 136. These were the same provisions that the Second Circuit relied on to uphold the nonconsensual third-party release in Purdue Pharma's case. *See supra* note 48 and accompanying text.

said that the *Purdue Pharma* case, which was on appeal in the Second Circuit at the time, did not influence its own holding.[86]

Indeed, the challengers of the Boy Scouts' bankruptcy plans relied on *Harrington* in their own opposition.[87] Abuse victims filed an emergency application for a stay of the bankruptcy plan in the United States Supreme Court in February 2024.[88] At the time of filing, the *Boy Scouts* case was on appeal in the Third Circuit,[89] and the Supreme Court was hearing *Harrington*.[90] In light of the Supreme Court's imminent ruling on the validity of nonconsensual third-party releases in *Harrington*, the challengers to the Boy Scouts' plan argued that the Court should grant a stay, pending their own appeal's outcome.[91] The Supreme Court rejected this argument, though, and declined to grant the stay in a brief, unsigned order.[92] The Third Circuit issued an opinion affirming the plan and dismissing the appeal in May 2025.[93] In that opinion, it acknowledged that "[i]f proposed today, the [p]lan would be unconfirmable in the wake of *Purdue*," but held that the appeal could not be upheld when the plan had already largely been carried out.[94]

The *Boy Scouts* case highlights the challenges that the *Harrington* ruling offers to existing bankruptcy plans. In striking down the nonconsensual third-party releases in *Harrington*, the Court declined to comment on how courts should decide similar cases, thereby refusing to extend the effects of the ruling to other cases outright.[95] However, those claimants seemingly have renewed grounds to challenge the plan now that the Supreme Court has so

86. *See In re Boy Scouts of America*, 650 B.R. at 136.

87. *See* Application for a Stay of the Bankr. Plan Presently Being Implemented in the U.S. Dist. Ct. for the Dist. of Del. at *15-19, Lujan Claimants v. Boy Scouts of Am., 144 S. Ct. 883 (2024) (No. 22-1237).

88. *See id.*

89. *See id.* at *14.

90. *See id.* at *1.

91. *See id.* at *1, *15-*18.

92. *See* Lujan Claimants v. Boy Scouts of Am., 144 S. Ct. 883-84 (2024) (mem.). For an overview of the Court's rejection of the application for stay, see Amy Howe, *Court Declines to Put Hold on Boy Scouts Bankruptcy Plan*, SCOTUSBLOG (Feb. 22, 2024, at 17:14 ET), https://www.scotusblog.com/2024/02/court-declines-to-put-hold-on-boy-scouts-bankruptcy-plan/ [https://perma.cc/3WHN-ZVP8].

93. *In re* Boy Scouts of America, 127 F.4th 126, 142 (3d Cir. 2025).

94. *Id.* at 170.

95. *See* Harrington v. Purdue Pharma, 144 S. Ct. 2071, 2088 (2024).

emphatically rejected the very mechanism the plan was designed to take advantage of.[96] While the Third Circuit has settled the matter for this single case, other courts reviewing bankruptcy plans at different stages may come to varying results. No matter which side of the issue a court comes down on, complications will arise. If the court lets the plan stand, abuse victims will face a release that is nearly identical to one that the Supreme Court has deemed improper.[97] If the court strikes the plan down, a debtor could be liable in unanticipated new suits,[98] despite having already made payments to claimants under the plan.[99]

Other cases are also implicated by the uncertainties that *Harrington* contains. In the United States Bankruptcy Court for the District of New Jersey, the United States Trustee challenged the bankruptcy plan of a genetic testing company, arguing that, under *Harrington*, the plan contains impermissible nonconsensual releases.[100] Even though members of classes who voted on the bankruptcy plan had the opportunity to check a box and "opt out" of release, the Trustee argues that because the release would still be binding on everyone who did not check the box, rather than just those who affirmatively consented to the release, it is an impermissible nonconsensual release.[101] *Harrington* raises this issue and leaves its resolution unclear, as the Supreme Court did not define

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96. *See id.* at 2082-83 (rejecting the nonconsensual third-party releases in *Harrington*); *In re* Boy Scouts of Am., 642 B.R. 504, 586 (Bankr. D. Del. 2022) (describing an analogous mechanism in the Boy Scout plan).

97. *See Harrington*, 144 S. Ct. at 2082-83 (rejecting *Harrington* release); *In re Boy Scouts of Am.*, 642 B.R. at 586 (affirming an analogous release).

98. *Cf.* Gregory Germain, *What's Next for the Sackler Family and for Creditors in Other Cases After Supreme Court Eliminates Third Party Releases in Bankruptcy Cases?*, SYRACUSE U. COLL. L. (June 27, 2024), https://law.syracuse.edu/news/professor-gregory-germain-writes-whats-next-for-the-sackler-family-and-for-creditors-in-other-cases-after-supreme-court-eliminates-third-party-releases-in-bankruptcy-cases/ [https://perma.cc/YPD3-G6RB] (describing liability facing Sackler family after rejection of nonconsensual third-party release in *Harrington*).

99. *See* Deitrich Knauth, *U.S. Supreme Court Lets $2.46 Billion Boy Scouts Sex Abuse Settlement Proceed*, REUTERS (Feb. 22, 2024, at 15:34 ET), https://www.reuters.com/legal/us-supreme-court-lets-246-billion-boy-scouts-sex-abuse-settlement-proceed-2024-02-22/ [https://perma.cc/5BC7-KWUN].

100. *See* U.S. Tr.'s Objection to the Second Amended Joint Plan of Invitae Corp. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankr. Code ¶ 31, *In re* Invitae Corp., No. 24-11362, 2024 WL 2230069 (Bankr. D.N.J. July 15, 2024).

101. *See id.* at ¶¶ 29-30.

the features of a "consensual" third-party release that would differ from those of the nonconsensual releases it struck down.[102]

These cases present just a sample of the structural questions raised by the Supreme Court's ruling in *Harrington*. While the courts may eventually resolve these questions, uncertainty could drag on for some time, further embroiling the affected companies and claimants in litigation and uncertainty. These cases and questions represent the shaky ground on which bankruptcy law now rests as lawyers and debtors try to navigate the new landscape that the Supreme Court has created. Moreover, these are issues that have arisen just in existing Chapter 11 plans. The complications that will arise as completely new plans are negotiated and constructed are yet to be seen.[103]

B. Policy Implications

Aside from structural concerns about what existing and future Chapter 11 plans *may* contain, *Harrington* raises policy concerns about what they *should* contain. In theory, the Supreme Court's ruling holds wrongdoers accountable by ensuring that claimants can bring suit against them.[104] However, in practice, those claimants may struggle to actually seek and receive relief under this new system.[105] *Harrington* and the development of the Purdue Pharma

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102. *See Harrington*, 144 S. Ct. at 2088.

103. *See* Gleason & Ochsner, *supra* note 79 ("[L]awyers have started testing how the guidance can be used to benefit their clients."). Practitioners have also suggested that these questions about bankruptcy plans will have international implications. *See* Aryo Shalviri, Caitlin McIntyre & Jake Harris, *Cross-Border Implications of the U.S. Supreme Court's Decision in* Harrington v. Purdue Pharma L.P., BLAKES (July 8, 2024), https://www.blakes.com/insights/cross-border-implications-of-the-u-s-supreme-court-s-decision-in-harrington-v-purdue-pharma-l-p/ [https://perma.cc/DME2-SPCS]. For example, despite *Harrington*'s restricting nonconsensual third-party releases under Chapter 11, United States courts are likely to use Chapter 15 "recognition proceedings" to continue approving international plans containing such provisions. *Id.* International companies, therefore, may find it more beneficial to initiate proceedings in Canada, which broadly allows nonconsensual third-party releases. *Id.*

104. *See Harrington*, 144 S. Ct. at 2087 ("Nonconsensual third-party releases ... allow tortfeasors to win immunity from the claims of their victims, including for claims ... they could not discharge in bankruptcy.").

105. *See* Swain Wood, *High Court Made Profound Mistake in Tossing Purdue Deal*, LAW360 (July 16, 2024, at 18:42 ET), https://www-law360-com.us1.proxy.openathens.net/health/articles/1858231/high-courtmade-profound-mistake-in-tossing-purdue-deal

bankruptcy plan illustrate some characteristics of these cases that give rise to that difficulty: the large number of potential plaintiffs,[106] those plaintiffs' lack of legal sophistication compared to a large corporation,[107] and the shortcomings of other release types.[108]

Some have characterized the Court's ruling as denying significant and necessary relief to thousands of victims of the opioid crisis based on the objections of a very small number of potential claimants.[109] Justice Kavanaugh echoed this sentiment in his dissent, writing that the ruling was "devastating for more than 100,000 opioid victims and their families."[110] These victims will likely face immense barriers to recovery on their own.[111] Many of the parties holding potential claims against the Sacklers are individuals or local governments[112] who do not possess the legal sophistication or resources for litigation that the wealthy family does. The family is likely to take advantage of those resources too, as without release they could be liable for over $1 trillion in damages.[113] Thus, it is not at all clear that victims of the opioid crisis will be able to actually recover for the harms that they have suffered.[114]

[https://perma.cc/4FZ8-UFES] ("It is ... extraordinarily speculative ... to imagine that litigants will now be able to successfully pursue the Sacklers in dozens of different courts, fight and win jurisdictional battles, trace funds through multiple overseas accounts, and prevail in potential post-judgment litigation over collection efforts.").

106. *See Harrington*, 144 S. Ct. at 2103 (Kavanaugh, J., dissenting).

107. *See* Wood, *supra* note 105; Simone Unwalla, *David vs. Goliath: How Corporate Interests Dominate Civil Appellate Litigation & What We Can Do About It*, THE [F]LAW (Jan. 31, 2023), https://theflaw.org/articles/david-vs-goliath-how-corporate-interests-dominate-civil-appellate-litigation-what-we-can-do-about-it/ [https://perma.cc/A285-XRDH].

108. *See Harrington*, 144 S. Ct. at 2099-103 (Kavanaugh, J., dissenting) (explaining why third-party release was key to "substantially greater recovery for the victims").

109. *See, e.g.*, Wood, *supra* note 105.

110. *Harrington*, 144 S. Ct. at 2088 (Kavanaugh, J., dissenting).

111. *See* Wood, *supra* note 105.

112. *See* Hoffman & Walsh, *supra* note 33; Wood, *supra* note 105; Unwalla, supra note 107.

113. *See* Durkee, *supra* note 42.

114. *See Harrington*, 144 S. Ct. at 2090 (Kavanaugh, J., dissenting) ("As a result of the Court's decision, each victim and creditor receives the essential equivalent of a lottery ticket for a possible future recovery for (at most) a few of them."). During the writing of this Note, there were reports that the Sacklers agreed to contribute money to opioid victim relief without a blanket release, though in exchange for a different protection. Reportedly, claimants who opt into release under the plan would have to set aside hundreds of millions of dollars from that relief into a legal defense fund for the Sacklers to use to fight future claims. At the time of writing, information about this proposed plan is limited, and it has not been approved by a bankruptcy court. Jan Hoffman, *Sacklers Up Their Offer to Settle Purdue Opioids Cases, with a New Condition*, N.Y. TIMES (Jan. 23, 2025), https://www.nytimes.com/2025/01/23/

As the Supreme Court struck down only nonconsensual third-party releases,[115] it is possible that a bankruptcy plan such as Purdue Pharma's could incorporate another form of release, such as a consensual third-party release that would provide an incentive for nondebtor third parties responsible for harm to contribute to relief. However, this potential alternative offers issues of its own. As mentioned above, what constitutes a consensual release remains unclear, and the Court declined to speak on the matter.[116] Lower courts differed on whether one proposed method of consent—an "opt-out" plan—was an acceptable basis for release even before *Harrington* muddied the waters.[117] Moreover, even if a plan developed an appropriate consensual release, there would presumably still be potential claimants against the third party who did not consent to release and could still bring a successful claim. Thus, the relief provided under such a plan would likely not be as significant as that approved under a nonconsensual release, particularly if it implemented a more commonly accepted form of consensual release that excluded a higher number of potential claimants, such as a signed settlement agreement or "opt-in" system.[118] All of this is not to say that opioid crisis victims do not deserve to have each of their claims heard in court, but instead to highlight the difficulty those victims would face in doing so.

Ultimately, the Supreme Court's rejection of nonconsensual third-party releases perhaps gives victims a greater opportunity to recover for their harms, but that opportunity is unlikely to result in actual relief for many of them. This reality, combined with the structural concerns regarding bankruptcy plans after *Harrington*,

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health/sacklers-purdue-settlement-opioids.html [https://perma.cc/U7DJ-CUM5]. Critics of the settlement plan also note that it prioritizes payments to state and local governments without adequately compensating individual victims of the opioid crisis. *See* Brian Mann, *Purdue Pharma, Sacklers Reach New $7.4 Billion Opioid Settlement*, NPR (June 16, 2025, at 14:45 ET), https://www.npr.org/2025/06/16/nx-s1-5435318/purdue-pharma-sacklers-reach-new-7-4-billion-opioid-settlement [https://perma.cc/2M6E-AHBK]; Aneri Pattani, *For Opioid Victims, Payouts Fall Short While Governments Reap Millions*, CBS NEWS (Apr. 8, 2025, at 09:19 ET), https://www.cbsnews.com/news/opioid-victims-settlements-governments-millions/ [https://perma.cc/YNQ3-DD4J].

115. *Harrington*, 144 S. Ct. at 2087-88.

116. *Id.*

117. Sather, *supra* note 7, at 88-91.

118. *Id.* at 87.

illustrates the pitfalls of the Court's holding. The Court has complicated the creation and implementation of bankruptcy plans and extinguished a tool that could provide relief for thousands of victims. The uncertainties of this landscape call for congressional intervention that provides a clear process through which Chapter 11 bankruptcy plans can adequately offer relief for victims.

IV. A CONGRESSIONAL RESPONSE TO *HARRINGTON*

The Court recognized that the important policy implications of its holding in *Harrington* were for Congress to address.[119] Congress is aware of the policy concerns surrounding nonconsensual bankruptcy releases: House representatives introduced a bill in 2021 (appropriately titled the SACKLER Act) that would prohibit the use of nonconsensual releases, but the bill never made it out of committee.[120] However, Congress, noting the various complications caused by the *Harrington* ruling, should instead focus its attention in the other direction and amend the Bankruptcy Code to provide a process that would allow claimants against powerful parties to effectively seek relief.

Such legislation could take many forms, and this Note does not claim to develop a complete or foolproof one. Nevertheless, Congress should look to a few existing legal structures to address post-*Harrington* issues. A statutory framework for allowing nonconsensual third-party releases already exists in the 11 U.S.C. § 524(g) exception for asbestos cases.[121] If the legislature wants to go beyond that structure to protect the interests of non-consenting potential claimants, it should incorporate language that sets more rigorous conditions that must be met for such a release to be granted.

A. Extend the Existing 11 U.S.C. § 524(g) Asbestos Exception

As mentioned above, Congress has expressly allowed for nonconsensual third-party releases in certain Chapter 11

119. *Harrington*, 144 S. Ct. at 2087.
120. H.R. 2096, 117th Cong. (2021).
121. 11 U.S.C. § 524(g).

bankruptcy cases via 11 U.S.C. § 524(g).[122] The provision allows a bankruptcy court to issue an injunction barring future "personal injury, wrongful death, or property-damage" claims seeking to recover for harms caused by "asbestos or asbestos-containing products."[123] Claims included in the reorganization plan are paid from a trust established under the plan and funded at least in part by the debtor's securities, while others are extinguished.[124] The provision provides guidance for the type of demands and claims that a debtor must be subject to before such an injunction is issued[125] and the types of third parties that the injunction may cover.[126]

Congress enacted 11 U.S.C. § 524(g) after the Second Circuit upheld the bankruptcy plan of the Johns-Manville Corporation, a company that mined asbestos and produced asbestos-containing products before filing for bankruptcy in 1982 with thousands of asbestos-related claims against it.[127] The approved plan enjoined future claims against the company and provided for the creation of a trust to pay existing claims that were included in the plan.[128] When it enacted the provision, Congress noted that it would provide a structure to allow debtor companies to have more certainty about the amount of relief that they would be required to pay and establish a process by which such numerous and long-lasting claims could be paid.[129]

Just as it developed 11 U.S.C. § 524(g) to address the unique characteristics of mass claims against bankrupt asbestos companies, Congress should extend the provision to address the unique challenges of claims brought against companies such as Purdue Pharma. Just as in *Johns-Manville*, the thousands of potential claims against Purdue are specific to a particular industry, and the

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122. *Id.*

123. *Id.* § 524(g)(2)(B)(i)(I).

124. *Id.* § 524(g)(1)(B).

125. *Id.* § 524(g)(2)(B)(ii). To issue an injunction, the court must determine that potential future claims against a debtor are "substantial," of an undeterminable amount, and so significant as to interfere with the debtor's reorganization and settlement of claims. *Id.*

126. *Id.* § 524(g)(4)(A)(ii). An injunction may extinguish claims against third parties who are or were involved in the financing, management, or insurance of a debtor. *Id.*

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

128. *Id.* at 640-41.

129. 140 CONG. REC. 27692 (1994).

decades-long effects of the opioid crisis suggest that even more could be brought for some time yet.[130] The extent of these claims and the barriers to Purdue's reorganization that they create demonstrate the benefit of applying the *Johns-Manville* logic outside of the asbestos context to cases just like this one.

In enacting this extension, Congress would, of course, have to determine just how far its scope should go. The existing provision is very narrow: It covers *only* cases where there is a need to prevent a future wave of claims related to asbestos exposure.[131] At the least, Congress should extend the allowance of nonconsensual third-party releases to claims involving harms related to the manufacture and marketing of opioids, due to the widespread harm that they have caused.[132] Or it could adopt a broader scope that allows release from liability for claims related to all pharmaceutical manufacturing, or even medical manufacturing. Whatever method is chosen will ultimately be up to congressional discretion and should balance the Supreme Court's skepticism of broad releases[133] with recognition of the benefits that they can provide for both debtors and claimants.[134]

While 11 U.S.C. § 524(g) allows for a more settled and certain Chapter 11 reorganization procedure, it may not always be the best route to account for the interests of potential claimants. The provision does have some protections for claimants: Those with asbestos-related claims must be a separately defined class under the plan, and at least 75 percent of them must vote to approve it.[135] However, parties who have not yet brought claims or are not notified of the bankruptcy proceedings could have their claims extinguished.[136] Though they would make pursuing releases through Chapter 11 plans less appealing to debtors, Congress can respond to this concern by enacting safeguards to ensure that releases are

130. *See* Hoffman & Walsh, *supra* note 33; Durkee, *supra* note 42.

131. *See* 11 U.S.C. § 524(g)(2)(B)(i)(I).

132. U.S. DEP'T OF JUST. OFF. OF PUB. AFFS., *supra* note 3. Limiting releases to "opioid-related" cases was the scope suggested by the Court in *Harrington v. Purdue Pharma*, 144 S. Ct. 2071, 2087 (2024).

133. *See Harrington*, 144 S. Ct. at 2081-87.

134. *See* Kane v. Johns-Manville Corp., 843 F.2d 636, 640-41 (2d Cir. 1988).

135. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

136. These concerns were the basis for opposition to the *Johns-Manville* plan; the challenger in that case argued that the rights of future claimants were extinguished without due process under the plan's release provision. *Kane*, 843 F.2d at 643.

granted only when necessary and that claimants who wanted to preserve their claims had the opportunity to do so. These procedures can supplement those already present in 11 U.S.C § 524(g) and are discussed in the following sections.

B. Adopt Requirements Developed by Lower Courts

Before the *Harrington* ruling, courts that allowed nonconsensual third-party releases required that certain conditions be met before one was granted. The Sixth Circuit set out some of the strongest requirements in *In re Dow Corning Corporation*.[137] If Congress extends the scope of 11 U.S.C. § 524(g) to opioid cases (or a broader range of cases), it should look to these factors to strengthen the requirements already present in that provision.

Codifying the *Dow Corning* factors would not be a very large change from the current 11 U.S.C. § 524(g) requirements. In fact, to develop them, the Sixth Circuit cited *Johns-Manville*, the case that the asbestos exception provision was modeled after.[138] However, the language of the *Dow Corning* factors is stronger than that of 11 U.S.C. § 524(g) and requires a closer connection between the debtor company and third parties and the release's importance to the success of the bankruptcy plan before it can be issued.[139] Though it would be ultimately up to the courts to weigh whether an injunction is appropriate under these factors, stronger language in the Bankruptcy Code would provide greater protection for potential claimants and lower the risk of nonconsensual releases being used frivolously.

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137. *See* 280 F.3d 648, 658 (6th Cir. 2002).

138. *Id.*

139. *Compare* 11 U.S.C. § 524(g)(4)(A)(ii) ("[S]uch an injunction may bar any action directed against a third party who ... is alleged to be directly ... liable for the conduct of, claims against, or demands on the debtor ... by reason of the third party's ownership of a financial interest in[,] ... involvement in the management of[,] ... [or] provision of insurance to the debtor."), *with In re Dow Corning Corp.*, 280 F.3d 648, 658 ("There is an identity of interests between the debtor and the third party ... such that a suit against the non-debtor is, in essence, a suit against the debtor."); *compare* 11 U.S.C. § 524(g)(2)(B)(ii)(III) ("[P]ursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands."), *with In re Dow Corning Corp.*, 280 F.3d at 658 ("The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor.").

The *Dow Corning* factors also provided a protection for claimants that is not present in 11 U.S.C. § 524(g). The factors required that a plan including nonconsensual releases develop a process for claimants who wished to preserve their claims to recover from the debtor.[140] Codification of such a requirement in the Bankruptcy Code would give even greater protection to claimants, as it would ensure not only that a plan allows them to deny consent to the release, but also accounts for the possibility that the debtor may be able to recover from funds outside of the established trust. For that to happen, though, claimants must have a sufficient opportunity to preserve their claims against the debtor company.

C. Develop Structures to Notify Potential Claimants and Allow Them the Opportunity to Preserve Their Claims

A final area of change that Congress should consider providing for cases such as *Harrington* is establishing procedures for notifying potential claimants of the release and allowing them an opportunity to preserve their claims. Notice and opt-out requirements can be framed as a solution to the post-*Harrington* landscape in two ways. First, they can be incorporated into a provision similar to 11 U.S.C. § 524(g) as requirements that must be met before a nonconsensual release can be granted. Alternatively, Congress can clarify that the existence of an opt-out procedure actually makes a release *consensual*, filling in the gap left by the Supreme Court's refusal to clarify what would constitute an acceptable consensual third-party release.[141] Either method would provide greater protections to potential claimants while allowing a corporation to settle mass tort claims via a bankruptcy plan.

Chapter 11 plans have used opt-out procedures in the past, though not without controversy. Even before *Harrington*, bankruptcy courts differed on whether an opt-out procedure was sufficient to establish consent to a release.[142] After the Supreme

140. *In re Dow Corning Corp.*, 280 F.3d at 658 (holding that the plan must "provide[] an opportunity for those claimants who choose not to settle to recover in full.").

141. Harrington v. Purdue Pharma, 144 S. Ct. 2071, 2088 (2024).

142. *Compare* Patterson v. Mahwah Bergen Retail Group, Inc., 636 B.R. 641, 655 (Bankr. E.D. Va. 2022) (by approving an opt-out third-party release, the Bankruptcy Court for the Eastern District of Virginia "exceeded the constitutional limits of its authority as delineated

Court's ruling, courts remain split on whether an opt-out procedure creates a permissible consensual release, or a now-barred nonconsensual one, with the U.S. Trustee's Office arguing in favor of the latter.[143]

One helpful framing of these split opinions is that courts differ on what type of law should be applied for the definition and structure of consent: contract law or class action law.[144] In most jurisdictions, a contract law application will generally require affirmative acceptance of the plan, while an application of class action procedures is more likely to accept silence as consent.[145] Congress could enact a uniform standard that allows for the use of effective third-party releases while protecting the rights of claimants by adopting the class action approach into bankruptcy law.

Federal civil procedure already manages notice and opt-out processes in class action tort cases.[146] Practices and procedures under this rule can inform a congressional effort. Just as the current Chapter 11 asbestos exception requires that asbestos claimants be classed separately and vote to approve a release by at least 75 percent,[147] a carveout for opioid cases could require that class members (or potential class members) be given adequate notice of the plan and an opportunity to opt out of release. This structure would set a higher standard that must be met before a nonconsensual third-party release could be granted and may make the

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by the Supreme Court ... and offended the most fundamental precepts of due process."), *with In re* Mallinckrodt, 639 B.R. 837, 879 (Bankr. D. Del. 2022) (An opt-out provision in a bankruptcy plan was appropriate, as "[t]he notion that an individual or entity is in some instances deemed to consent to something by their failure to act is one that is utilized throughout the judicial system ... [t]here is no reason why this principle should not be applied."). For a pre-*Harrington* discussion of these cases, see Sather, *supra* note 7, at 87-92.

143. *See* Axelrod & Zammiello, *supra* note 75; Timothy A. Davidson, Ashley L. Harper & Philip M. Guffy, *Southern District of Texas Bankruptcy Court Confirms That Opt-Out Procedures Provide Consent for Third-Party Releases*, HUNTON ANDREWS KURTH (Aug. 21, 2024), https://www.hunton.com/insights/legal/southern-district-of-texas-bankruptcy-court-confirms-that-opt-out-procedures-provide-consent-for-third-party-releases [https://perma.cc/J272-XAML].

144. Evan Ochsner, *Bankruptcy 'Opt-Out' Conflict Emerges Among Judges After Purdue*, BLOOMBERG L. (Sep. 30, 2024, at 04:45 ET), https://news.bloomberglaw.com/bankruptcy-law/bankruptcy-opt-out-conflict-emerges-among-judges-after-purdue [https://perma.cc/ESQ3-TFJA].

145. *See id.*

146. FED. R. CIV. P. 23(c)(2)(B).

147. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

carveout more palatable to those worried about sacrificing future claims in exchange for using Chapter 11 plans as a tool for relief.

Alternatively, Congress can amend Chapter 11 to clarify that opt-out procedures establish a form of *consensual* release. Congress could make this change without further extending the 11 U.S.C. § 524(g) carveout: Rules allowing for a certain type of nonconsensual release would not be needed for companies such as Purdue to pursue opt-out plans. The change would settle the current disagreement across bankruptcy courts over what counts as consent and fill in the definitional gap left by *Harrington*.[148] It would also clarify that existing and proposed Chapter 11 plans for all types of corporations could move forward under *Harrington* by adopting an opt-out procedure.

D. Any Congressional Change May Still Fall Short

Even with changes to Chapter 11 code and procedure, bankruptcy plans may not be the effective settlement tool they once were. Before *Harrington*, some viewed third-party releases in Chapter 11 plans as a more effective means of settling mass tort claims than class action suits.[149] In *Harrington*, members of the Sackler family agreed to give billions of dollars in relief in exchange for release from future liability.[150] Any change that increases the likelihood of a future suit against them will make third parties to bankruptcy suits less likely to contribute relief funds to victims and communities.

Congressional change should now salvage at least some form of the robust power that nonconsensual third-party releases once held while protecting potential claimants who may want to pursue their own damages. Congress should provide a clearer and more effective tool for settling mass claims by building a route for companies such as Purdue to pursue releases under the Supreme Court's guidance in *Harrington*.

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148. *See* Harrington v. Purdue Pharma, 144 S. Ct. 2071, 2088 (2024).

149. *See* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 1021 (2023).

150. Totenberg, *supra* note 5.

CONCLUSION

The Supreme Court's decision in *Harrington v. Purdue Pharma* clarified the Court's standing on nonconsensual third-party releases but left open several questions about the future of bankruptcy law. While a bar on such releases facially protects the rights of potential claimants, it threatens to leave victims of corporate wrongdoing without relief. Just as the Court suggested, Congress should step in to provide a procedure for applying effective third-party releases in cases like Purdue's.[151] This should be done by recognizing the similar policy implications that led to the 11 U.S.C. § 524(g) carve-out for asbestos cases and extending coverage of that provision to opioid or pharmaceutical cases. If even stronger protections for future claimants against Purdue are desired, the law can adopt requirements developed by lower courts in bankruptcy cases or class action law. While questions about the structure and effect of past and future bankruptcy plans would persist, these changes would at least provide a path to relief for some of those who have been harmed by the actions of powerful actors such as Purdue Pharma and the Sackler family.

Emma Skeen[*]

151. *Harrington*, 144 S. Ct. at 2087.

* J.D. Candidate, 2026, William and Mary Law School; B.A., Political Science, 2022, Emory & Henry College. I'd like to thank the *William & Mary Law Review* staff for their work citechecking, editing, and improving this Note. Special thanks to my Notes Editor, Jimmy Garner, for all of his feedback and guidance. Finally, I'm especially grateful to my family (Bryant, Christi, Tum, Christopher, and Barnum!) for their love and support.