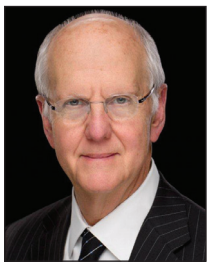
By David R. Kuney[1]

The Aftermath of *Purdue Pharma*: The Myth of the Full-Pay Plan



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The U.S. Supreme Court ruled on June 27, 2024, that nonconsensual third-party releases in a bankruptcy reorganization plan are not permitted under the Bankruptcy Code other than in 11 U.S.C. § 524.[2] "[A] bankruptcy court's powers are not limitless, and do not endow it with the power to extinguish without their consent claims held by nondebtors ... against other nondebtors."[3] Further, 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."[4] The scope of the ruling has already generated debate as to the meaning of the final paragraph in the majority decision, authored by Justice Neil Gorsuch, which reads as follows:

> Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party non-debtor ... [and] we do not address whether our reading of the [B]ankruptcy [C]ode would justify unwinding reorganization plans that have already become effective and have been substantially consummated.[5]

The Boy Scouts of America have a pending appeal before the Third Circuit Court of Appeals that likewise involves the validity of a nonconsensual third-party release.[6] The Boy Scouts have already pounced on this last paragraph in the hopes of convincing the Third Circuit that the nonconsensual releases in its plan are valid, notwithstanding the ruling in *Purdue*. In the Boy Scout's post-*Purdue* letter to the Third Circuit dated June 28, 2024 (just one day after *Purdue* was decided), it argued that their chapter 11 plan is "materially different from the plan at issue in *Purdue* in multiple respects," including that their plan supposedly "provide[s] for payment in full."[7] In the Boy Scouts' *amicus* brief in *Purdue*, it expressly asks the Court to reserve on the issue of "full satisfaction."[8]

Justice Brett Kavanaugh's dissent is fairly read as closing the door on the "full pay" argument as a matter of law.[9] "The Court decides today to reject the plan by holding that nondebtor releases are *categorically impermissible* as a matter of law."[10] Again, "the Court categorically decides that nondebtor releases are *never* allowed as a matter of law."[11] However, "the Court today says that a plan can *never* release victims' and creditors' claims *against nondebtor officers and directors of the company*."[12] "Categorical" and "never" are not words lacking in force.

Justice Kavanaugh said that he believed "full satisfaction" releases should be permitted.[13] However, he acknowledged that under the majority's opinion, "full satisfaction releases *might* be permissible," but only if one "eviscerated" the majority's analysis under the rule of construction of *ejusdem generis*.[14] If the majority's decision is to be regarded now as the legally correct and binding view, then third-party releases are not permitted — even if the plan provides for the "full satisfaction" of claims. He also stated that it was possible that "full satisfaction releases are actually impermissible" under the majority's view of § 1123(b)(6) — a view that he held was "extreme."[15] In short, permitting full-pay plans as a justification for nonconsensual third-party releases eviscerates the majority's holding in *Purdue*.

If the Supreme Court truly did not "express" a view on the legitimacy of full-pay plans, it was mostly because the issue was not before it. *Purdue* was not a full-pay plan, so the Court had no need to address the issue. Nevertheless, the underlying logic and rationale of the majority decision is entirely consistent with the view that even full-pay plans would fall outside of what Congress intended to permit.

The appellants in the *Boy Scouts* case, the D&V claimants, argued that there were serious deficiencies with the expert testimony and

1 Mr. Kuney has authored two *amicus* briefs in the *Boy Scouts of America* case in support of a group of sexual abuse claimants (herein referred to as the "D&V claimants"). This article represents solely the author's own views and not those of Georgetown University Law Center.
2 *Harrington, United States Trustee, Region 2 v. Purdue Pharma LP, et al., slip op.* 23-124 (June 27, 2024).
3 *Id.* at 13.
4 *Id.* at 19.
5 *Id.*
6 *Dumas & Vaughn, Claimants v. Boy Scouts of Am., et al. (In re Boy Scouts of Am. and Delaware BSA LLC)*, App. Case No. 23-1666 (3d Cir.) (hereinafter, *In re Boy Scouts of Am.*).
7 *Id.* at ECF Dkt. 191-1.
8 Brief for the Boy Scouts of America as *Amicus Curiae* in Support of Respondent, at 18, n.2.
9 Justice Kavanagh's dissent was joined by Chief Justice John Roberts and Justices Sonia Sotomayor and Elena Kagan.
10 *Purdue Pharma*, *slip op.* at 31 (Kavanaugh, J., dissenting) (emphasis added).
11 *Id.* at 32.
12 *Id.* at 2.
13 *Id.* at 39.
14 *Id.* at 39-40 (emphasis added).
15 *Id.* at 40.

the determination of the aggregate value of the tort claims (which effectively caps liability) this being an issue that leading scholars have identified as one of the core defects with assertions of "full pay." This is further explained in the discussion below concerning Profs. **Ralph Brubaker** of the University of Illinois College of Law and **Melissa B. Jacoby** of the University of North Carolina School of Law. In short, the aftermath of *Purdue* is that the use of full-pay releases should not be seen as a legitimate road map for future cases to impose nonconsensual third-party releases, nor should it prevail in the existing appeal in the *Boy Scouts* case now pending before the Third Circuit.

The Structural and Legal Defects with the Full-Pay Argument

At its core, the majority's decision is a legal determination that Congress did not intend to permit nonconsensual releases, other than in one narrow area under § 524(g). No Bankruptcy Code provision permits them, various Code provisions are inconsistent with such releases, and there is neither a public policy nor historical precedent to justify them. This is likely why Justice Kavanaugh stated that the majority opinion categorically held releases to be impermissible.

"Full pay" is nothing more than one of the many factors sometimes used to justify permitting nonconsensual third-party releases. The notion that a list of "factors" can be developed and deployed by the bankruptcy court to sanction the use of nonconsensual third-party releases has been sharply criticized by Prof. Brubaker.

The legal defect, which is broad, is that the power to determine the scope of the bankruptcy discharge is constitutionally vested solely within Congress's bankruptcy power. Under basic principles of separation of powers, bankruptcy courts are not constitutionally free to infringe on this legislative power by judicially adding "factors" that create substantive discharge rights. Prof. Brubaker noted that "federal courts are illicitly creating substantive federal common law through their jurisprudence authorizing nondebtor releases. Indeed, this is apparent from the list of criteria — exclusively the product of judicial imagination — that supposedly trigger bankruptcy courts' power to grant discharge relief for nondebtors."[16]

What makes the use of such factors as "full pay" illicit is that it allows the courts to usurp the congressional power to determine the scope of the discharge. However, "nondebtor release practice — including the requirement that a discharged nondebtor 'has contributed substantial assets to the reorganization — presumes to lodge plenary authority for such determination in the courts,'" thus violating basic principles of separation of powers of Congress and the courts.[17]

The further legal defect with engrafting "full pay" onto the discharge/release power is its "pernicious" unfairness and the almost certain likelihood that the promise of full pay will prove illusive. Prof. Brubaker points out that the structural defect with full-pay plans is that the actual aggregate liability to all mass tort claimants is not yet fully determined; instead, the court uses an estimate to put a "hard cap" on the liability, which is then used to fund a settlement trust. As such, the "prejudice to mass tort claimants from such a cap is obvious, given that [the] estimated amount ultimately may prove incorrect."[18] Prof. Brubaker emphasized how characterizing mass tort plans as "full payment" is perniciously disingenuous when the plan caps the debtor's aggregate liability and discharges its liability for anything more (which the plan invariably does):[19]

> It is, of course, impossible to know, at the time of confirmation of the plan of reorganization, what amount is ultimately going to be necessary to pay all of the mass tort claimants in full. That amount cannot be known until all the claims are fully liquidated, which can take years or even decades.... All references to "full payment" mass tort bankruptcy plans, therefore, describe plans that do *not actually promise to pay all claimants in full*.
>
> The most pernicious (and vastly misunderstood, underappreciated, or strategically de-emphasized) aspect of so-called "full payment" plans is that the inevitable errors in estimating the debtor/defendants, aggregate mass tort liability systematically go in only one direction. *Estimate errors systematically prejudice the tort claimants* by underestimating the debtor/defendant's aggregate tort liability.[20]

Another serious problem with the notion of "full pay" is that historically, many such promises of full pay turned out to be wrong. As Prof. Jacoby outlined in her new book, *Unjust Debts*, "a promise is a promise and money is money, but a promise to pay is not money."[21] Prof. Brubaker likewise noted the high failure rate in plans that promise full pay.[22] What is meant, of course, is that "history has shown that other mass tort cases have failed dramatically to live up to the bold expectations of [their] sponsors."[23]

When looking at cases from *Manville* to *Mallinckrodt*, what one sees is overly optimistic assertions of full pay that resulted instead in plan failure and disappointment.[24] Further, even if the plan fails to pay the claims, the releases remain in place: "[T]he company's admission that it cannot honor its promises to fund the trust to compensate opioid claim-

16 Ralph Brubaker, "Mandatory Aggregation of Mass Tort Litigation in Bankruptcy," 131 *Yale L.J.*, 976 (Feb. 28, 2022).

17 *Id.* at 978 (internal citation omitted).

18 Ralph Brubaker, "Assessing the Legitimacy of the 'Texas Two-Step' Mass-Tort Bankruptcy," 42 *Bankr. L. Letter* No. 4, at 13 (August 2022).

19 Ralph Brubaker, "Mass Torts, the Bankruptcy Power, and Constitutional Limits on Mandatory No-Opt-Outs Settlements," 23 *FSU Bus. Rev.* __ (forthcoming 2024), at 10-11.

20 *Id.* at p. 10.

21 Melissa B. Jacoby, *Unjust Debts: How Our Bankruptcy System Makes America More Unequal*, 203 (2024).

22 Ralph Brubaker, "Non-Debtor Releases in Bankruptcy," 1997 *Univ. Ill. L.R.* __, 987-88, n.102 (stating that promises of full pay "tend to ring hollow" and pointing out an "empirical study of large Chapter 11 cases, finding that in 32 percent of cases where the entity survived confirmation of a plan, the emerging entity subsequently filed another Chapter 11 case").

23 Lloyd Dixon, Geoffrey McGovern & Amy Coombe, "Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts," RAND Inst. for Civil Justice, *available at* rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.sum.pdf ("Unfortunately, bankruptcy has a rocky track record in delivering its hoped-for financial benefits. While *Manville* lived on, the trust created by its bankruptcy swiftly ran out of money and slashed recoveries to even the most severely ill claimants. And asbestos cases continue to generate underfunding and inconsistent payouts. People have received vastly different recoveries depending on when they got sick. Concerns that asbestos trusts shortchanged people with severe injuries while potentially overcompensating others fueled several (ultimately unsuccessful) congressional efforts to move asbestos claims out of court systems altogether.") (unless otherwise specified, all links in this article were last visited on July 8, 2024).

24 Jacoby, *supra* n.21 at 201-02 (describing Mallinckrodt's inability to fund claims under its first bankruptcy case and requiring second bankruptcy case).

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ants does not make claimants' legal rights spring back to life unless a plan expressly provides such a remedy."[25]

Promises of Full Pay in *Boy Scouts* Case

The pernicious effects of systematic underestimation of aggregate liability is at the very heart of the defect with the assertion of full pay in the *Boy Scouts* case. The related problem with the use of "full pay" as a factor in future cases is illustrated by the dispute in the *Boy Scouts* case — a dispute that highlights the problem with using estimates and speculation to determine when and if victims will be paid.

The D&V claimants, who have appealed from the confirmation of the Boy Scouts' reorganization plan, have challenged the notion that their claims for sexual abuse will be paid in full.[26] The Boy Scouts' expert, Dr. Charles Bates, estimated that the direct-abuse claims had an aggregate value of $2.4 billion to $7.1 billion, although he later claimed that the likely range was $2.4 billion to $3.6 billion.[27] The D&V claimants have argued that "[T]he only findings about actual, existing funds provided for payment [of claims] is the finding that the plan calls for $2,484,200 in 'noncontingent funding.'"[28]

Further, the D&V claimants state that with estimated administrative expenses of 10 percent, there will be only $2,235,780 in the settlement trust.[29] The D&V claimants contend that even at Bates' lowest estimate of aggregate tort liability, the claimants would receive approximately 93 percent payment; at the higher end of his expected range, $3.6 billion, claims would only receive 62 percent, and at the upper end of Bates' possible range, only 31.5 percent.[30]

A key part of the bankruptcy court's ruling confirming the plan was that there was an additional $4 billion in "unallocated" excess insurance coverage, which referred to policy proceeds that were not triggered by the filed abuse claims.[31] The D&V claimants' briefing argued that the plan only gives the settlement trustee the ability to negotiate with the nonsettling insurers to contribute such funds: "For now, these funds do not exist. Their availability is speculative and without evidence or findings concerning the merits of the coverage litigation, defenses or claims."[32]

The D&V claimants' arguments find support in statements made by the settlement trust trustee.[33] In addition, Prof. Jacoby's book shows that the assertions of full pay are often highly unreliable and of doubtful validity.[34] As she observed, "The Boy Scouts of America predicted full compensation for survivors of child sex abuse when it sought approval of its Chapter 11 plan. *Yet it was later made clear that survivors almost certainly will not recover at that level*."[35] Prof. Jacoby outlined the negotiation history and the key change in the expert's testimony:

> Lengthy negotiations and financial contributions from third parties notwithstanding, the Boy Scouts of America initially were unable to attract sufficient numbers of survivors to support its plan. The official committee of survivors ... had recommended that claimants reject the plan. The committee warned that survivors might recover less than 10 percent of their claims.[36]

Conclusion

Prof. Brubaker's analysis of why assertions of "full pay" are inadequate to cure the legal infirmities with nonconsensual third-party releases is set forth in his *amicus* brief filed in the *Purdue* case.[37] If courts do view the final paragraph of the *Purdue* opinion as an opportunity to revisit the issue of engrafting factors onto the law of discharge, then Prof. Brubaker's articles and *amicus* brief — along with Prof. Jacoby's empirical study — should be a strong cautionary note that such engrafting raises serious constitutional issues of federalism and separation of powers. In the final analysis, the question of who is entitled to a discharge is a matter solely for Congress, and tinkering with the entitlement should not be a matter of judicial imagination. In short, the use of full pay as a factor is regressive and would turn back the clock to the state of the law before the Supreme Court announced its decision in *Purdue*. abi

Editor's Note: *ABI held a webinar shortly after the Supreme Court issued its decision, of which the author was a participant. To listen to the abiLIVE recording, please visit abi.org/newsroom/videos. The author also is the editor of ABI's digital book* The Purdue Papers*, a compilation of 3,300+ pages of* amicus *briefs, petitions and other related background material that includes the Supreme Court's decision, an analysis, and a transcript of the abiLIVE webinar. To order your downloadable copy, visit store.abi.org.*

25 *Id.* at 205.
26 Opening Brief of the *Dumas & Vaughn Claimants (In re Boy Scouts of Am.), supra* n.6, ECF Dkt. 61, at 13 (also noting that the releases bar claims for fraud and punitive damages).
27 *Id.* at 60.
28 *Id.* at 62.
29 *Id.* at 9.
30 *Id.* at 65.
31 *In re Boy Scouts of Am. and Delaware BSA LLC*, 642 B.R. 504, 560-561 & n.277 (Bankr. D. Del. 2022).
32 *D&V* Opening Brief at 64.
33 *See* Dumas & Vaughn Claimants Response to Appellees' Motions to Dismiss, *In re Boy Scouts of Am., supra* n.6, ECF Dkt. 153 (quoting settlement trustee: "[Y]ou may not receive payment of the full value that the Trustee assigns to your Abuse Claim.... [T]he percentage of each Allowed Abuse Claim that will be paid depends on the amount of the available funds in the Trust and the aggregate amount of all Allowed Abuse Claims") (internal citation omitted); *see also* Jacoby, *supra* n.21 at p. 209 ("In virtual town hall meetings, the retired judge overseeing the Boy Scouts of America trust as its trustee was candid with survivors: there was no guarantee they would receive full payment.").
34 *See* Jacoby, *supra* n.21.
35 Melissa Jacoby, "The Moral Limits of Bankruptcy Law," *New York Times* (June 4, 2024) (emphasis added), *available at* nytimes.com/2024/06/04/opinion/purdue-sackler-supreme-court.html (subscription required to view article).
36 Jacoby at 195. The article also noted that to get to an agreement with the claimants, "its expert witness revised downward his estimate of the value of the abuse claims." *Id.* at 197-98.
37 Brief for *Amici Curiae* Bankruptcy Law Profs. Ralph Brubaker, Bruce A. Markell and Jonathan M. Seymour in Support of Petitioner (Sept. 27, 2023).