THE RULE OF THE DEAL, REVISITED: *PURDUE PHARMA* AND THE LIMITS OF BARGAINING

by

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Introduction

On November 18, 2025, the Purdue Pharma bankruptcy plan was approved by U.S. Bankruptcy Judge Sean Lane, closing a six-year chapter on one of the most perplexing chapter 11 cases in modern history.[1] The Purdue Pharma bankruptcy spurred significant scholarship, ranging from critiques of third-party releases generally to debates over the use of bankruptcy as a forum for resolving mass tort liability.[2]

With a plan now confirmed, it provides an opportunity to revisit scholarship on Purdue Pharma. In *The Rule of the Deal: Bankruptcy Bargains and Other Misnomers* (hereinafter, "*The Rule of the Deal*"), Professor Jonathan Lipson offered one of the first analyses of *Purdue Pharma*, and argued that modern chapter 11 cases are increasingly controlled not by the rule of law, but by the "rule of the deal."[3] This practice is problematic in "social debt" bankruptcies where transparency, accountability, and unresolved liability are important counterweights to bankruptcy's traditional goal of distributive efficiency.[4] Almost three years later, there is an opportunity to reconsider Professor Lipson's arguments and analysis of *Purdue* to explore the future of third-party releases and other lessons for practitioners.

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[1] Press Release, Letitia James, N.Y. Att'y Gen., Attorney General James Secures Approval of Purdue Bankruptcy Plan (Nov. 18, 2025), accessed at https://ag.ny.gov/press-release/2025/attorney-general-james-secures-approval-purdue-bankruptcy-plan.

[2] *See, e.g.*, Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154 (2022); Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261 (2023); Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 UNIV. CHI. L. REV. 973 (2023); Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV. 361 (2022).

[3] Jonathan C. Lipson, *The Rule of the Deal: Bankruptcy Bargains and Other Misnomers*, 97 AM. BANKR. L.J. 41, 43 (2023) (defining "rule of the deal" as "bankruptcy's strong appetite for bilateral bargains—deals—among small groups of strategically placed stakeholders that can distort or deviate from positive law.").

[4] *Id.* at 43–44.

I. *Purdue Pharma* Decision

In a 5–4 decision that defied conventional ideological lines, the Supreme Court held that the Bankruptcy Code does not authorize the non-consensual third-party releases the Sackler family sought as part of the Purdue Pharma reorganization plan.[5] Applying the statutory canon of *ejusdem generis*, the Court analyzed section 1123(b)(6),[6] determining that the provision's catchall provision could not afford "a nondebtor a discharge usually reserved for the debtor alone."[7]

By foreclosing the potential use of non-consensual third-party releases, the parties were forced to recommence negotiations. Because the Sacklers had made any potential contribution contingent on the availability of the non-consensual releases, the parties faced an uphill battle in creating a reorganization plan that aligned with the Court's decision in *Purdue Pharma*. Nearly one and a half years later, a plan was finally confirmed.[8]

II. The 2025 Reorganization Plan

In the period following the Supreme Court's decision in *Purdue Pharma*, interested parties attempted to renegotiate a plan that conformed with the Court's ruling on non-consensual third-party releases. After three days of confirmation hearings, U.S. Bankruptcy Judge Sean Lane indicated that he would confirm the revised plan (hereinafter, the "2025 Plan"). In a press release, Purdue Pharma provided an overview of the 2025 Plan, including that the [2025] Plan will "deliver approximately $7.4 billion in cash to creditors," with additional cash recoveries "expected" from residual litigation pursued by the bankruptcy estate.[9] Purdue Pharma stated that "the Sacklers will contribute up to $6.5–7 billion" with $1.5 billion paid on the 2025 Plan's effective date.[10] The 2025 Plan will "meaningfully compensate[] individual victims, providing

[5] Harrington v. Purdue Pharma L.P., 603 U.S. 204, 227 (2024).

[6] *See* 11 U.S.C. § 1123(b)(6) ("Subject to subsection (a) of this section, a plan may— . . . include any other appropriate provision not inconsistent with the applicable provisions of this title.").

[7] *Purdue Pharma*, 603 U.S. at 221.

[8] *See In re* Purdue Pharma L.P., No. 19-23649 (SHL), 2025 WL 3246149, at *1 (Bankr. S.D.N.Y. Nov. 20, 2025).

[9] Press Release, Purdue Pharma, Bankruptcy Court to Confirm Purdue Pharma's Plan of Reorganization (Nov. 14, 2025), available at https://www.purduepharma.com/news/2025/11/14/bankruptcy-court-to-confirm-purdue-pharmas-plan-of-reorganization/ [hereinafter Purdue Press Release].

[10] *Id.*

a pool of up to $865 million."[11]

In addition to monetary recoveries, Purdue Pharma stated that the 2025 Plan will generate significant further value with the creation of a new company—Knoa Pharma—with a "public-minded mission dedicated to solutions for the opioid crisis" and no involvement or interest from the Sackler family.[12] The 2025 Plan creates a document repository that will make available to the public millions of documents relating to "Purdue's historical sales and marketing practices."[13] Finally, and most important to the Supreme Court's decision, the 2025 Plan includes *consensual* third-party releases whereby "each creditor can decide whether or not to settle and release any direct claims they hold against the Sacklers."[14]

To incentivize the consensual releases, the 2025 Plan frames the allocation of settlement proceeds and distributions as tied to the contributions made by the Sackler family.[15] The 2025 Plan states: "The Debtors . . . believe the treatment provided in respect of Claims . . . is fair and appropriate only when combined with the distribution scheme . . ." indicating the interdependence of the distribution structure and consensual releases.[16] As predicted by Professor Lipson in *The Rule of the Deal*, the notion that parties willing to consent to releases would receive more than those that did not was a theme that remained throughout plan negotiations.[17] The 2025 Plan therefore not only increased recoveries for releasors, but made direct litigation economically less attractive because opting out of the consensual releases would forfeit the ability of a claimant to participate in the increased distributions.[18]

Although the Sacklers did not get the non-consensual third-party releases they initially sought, the 2025 Plan did provide protection for the Sackler family consistent with the Court's decision in *Purdue Pharma*. One

[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *See* Eighteenth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors, *In re* Purdue Pharma, L.P., No. 19023649 (SHL) (Bankr. S.D.N.Y. Nov. 11, 2025), ECF No. 8233, at 72 [hereinafter Eighteenth Amended Plan of Reorganization].
[16] *Id.*
[17] *See* Lipson, *supra* note 3, at 104 (" . . . or a plan that permitted creditors to opt out of the Sackler release—might have required the Sacklers to contribute more to win necessary support.").
[18] Eighteenth Amended Plan of Reorganization, *supra* note 15.

condition of increased contributions by the Sacklers was the establishment of a legal defense fund for the family to use to defend direct litigation.[19] In effect, the $800 million fund will result in the Sacklers reducing distributions to individual consenting creditors to the extent they must defend themselves in direct litigation. This setup was clearly intended to deter direct litigation against the Sacklers, and represents a new deal struck by the Sacklers, demonstrating how Professor Lipson's "rule of the deal" continues to operate even after *Purdue Pharma*, as sophisticated parties can still engineer mechanisms that channel creditors toward a consensual version of a settlement the Court refused to allow under the Bankruptcy Code.

III. *The Rule of the Deal*, Revisited

The 2025 Plan does not reject the idea of the "rule of the deal;" instead, it demonstrates the adaptability of the concept in practice. The 2025 Plan empowers claimants to negotiate better deals for themselves. There may be no stronger evidence than the fact that in an earlier iteration of a plan of reorganization, the Sacklers agreed to contribute around $4.3 billion.[20] In the end, however, the Sacklers' contribution increased to approximately $7 billion.[21]

The original Sackler Settlement Framework represented a deal-driven bankruptcy proceeding, where creditor support and the apparent practical necessity of non-consensual third-party releases were emphasized despite the lack of clear statutory guidance. In *Purdue Pharma*, the Court rejected the non-consensual third-party releases, and tangentially, the bankruptcy bargains that underpinned their inclusion, reasserting the textual limits on the practice.

The Court emphasized the narrow holding of its decision,[22] declining to address the legality of consensual third-party releases, what might qualify as a consensual release, or plans providing for the "full satisfaction of claims against a third-party debtor."[23] Although the Court appeared to admonish the Sackler's attempt to avail themselves of a benefit reserved only for debtors, the Court

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[19] *See* 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/health/sacklers-purdue-settlement-opioids.html.

[20] *In re* Purdue Pharma L.P., 69 F.4th 45, 61 (2d Cir. 2023).

[21] *In re* Purdue Pharma L.P., No. 19-23649 (SHL), 2025 WL 3246149, at *1 (Bankr. S.D.N.Y. Nov. 20, 2025).

[22] *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 225 (2024) ("As important as the question we decide today are ones we do not.").

[23] *Id.*

said little on the other seemingly troublesome aspects of the reorganization plan that were emphasized as such by Professor Lipson.[24]

IV. Lessons for Practitioners

a. Consensual Releases

As the Supreme Court explicitly noted in *Purdue Pharma*, the decision did not affect the use of *consensual* third-party releases.[25] Aligning with the Court's decision, the 2025 Plan included opt-in releases, where individual creditors could decide to litigate individual claims against the Sacklers.[26] An opt-in mechanism "provides that no party . . . would be deemed to have granted a third-party release unless that party elected to submit a form that opted into a release . . . ."[27] The other type of consensual release—not used in the 2025 Plan—uses an opt-out mechanism, where each party is sent a ballot or form explaining that the ballot or form must be returned and the opt-out box checked if a party is electing *not* to approve a third-party release.[28] The efficacy of each type of consensual releases is hotly contested following *Purdue*, and will likely be the topic of future scholarship and litigation in the area.

Regardless of the type of consensual release used in a plan of reorganization, the issues presented by Professor Lipson remain. Sophisticated corporate debtors facing tort liability will continue to employ ex ante and ex post bargaining strategies that best position themselves to avoid as much aggregate liability as possible, whether this be relying on government intervention[29] or filing in forums known to be especially debtor friendly.[30]

[24] *See* Lipson, *supra* note 3, at 103 ("The tragedy of *Purdue Pharma* is that even modest efforts to provide transparency and accountability, such as through a bellwether litigation, a litigation risk analysis, more fulsome disclosure, or line-item consent, might have produced a better outcome, allaying the concerns of victims and survivors whose demands for dignitary justice went largely unheeded and paying more, sooner.").

[25] *Purdue Pharma*, 603 U.S. at 225.

[26] Purdue Press Release, *supra* note 9.

[27] *In re* Spirit Airlines, Inc., 668 B.R. 689, 703 (Bankr. S.D.N.Y. 2025) (citing *In re* Chassix Holdings, Inc., 533 B.R. 64, 77 (Bankr. S.D.N.Y. 2015)).

[28] *Id.* (citing *In re* Avianca Holdings S.A., 632 B.R. 124, 137 (Bankr. S.D.N.Y. 2021)).

[29] *See* Lipson, *supra* note 3, at 77 (discussing a settlement between Purdue Pharma and the Department of Justice that was "a coercive ex post bankruptcy bargain with significant distributive consequences.").

[30] *See id.* at 65 (emphasizing the role U.S. Bankruptcy Judge Robert Drain played in supporting the controversial bargains made by Purdue Pharma and other interested parties); *see generally* Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM

b. Chapter 15

One major question left following the *Purdue Pharma* decision concerned the viability of nonconsensual third-party releases in chapter 15 cases.[31] Although Professor Lipson did not discuss chapter 15 in *The Rule of the Deal*, two recent cases—*Crédito Real*[32] and *Odebrecht*[33]—are illustrative of the role chapter 15 may play in future bankruptcies where third-party releases and mass tort questions are at issue. As Professor Bruce Markell has observed, chapter 15 recognition "deputiz[es]" U.S. courts as "auxiliaries" to foreign courts, allowing for recognition of foreign proceedings that may "employ[] restructuring methods not generally permitted" in the U.S.[34]

Crédito Real concerned a Mexican financial services company seeking foreign recognition of its reorganization plan (hereinafter, the "Concurso Plan") in a U.S. Bankruptcy Court in Delaware.[35] The Concurso Plan included nonconsensual third-party releases, which were opposed by the United States International Development Finance Corporation (hereinafter, the "DFC").[36] The DFC argued that the nonconsensual third-party releases were not authorized under chapter 15 and were manifestly contrary to the public policy of the United States based on the Court's decision in *Purdue Pharma*.[37] The Delaware Bankruptcy Court explained that:

> To be manifestly contrary to U.S. public policy, the contested relief must impinge on some constitutional or statutory right; if a nonconsensual third-party release impinged on some constitutional right, the Supreme Court would not have said that Congress could provide for it . . . . Lack of specific availability in U.S. courts does not equate to manifest contrariness in

L. REV. 361 (2022).

[31] *See* George W. Shuster, Jr. & Benjamin W. Loveland, *Nonconsensual Third-Party Releases in Ch. 15 After Purdue*, AM. BANKR. INST. (Oct. 2025), https://www.abi.org/abi-journal/recognition-of-nonconsensual-third-party-releases-in-ch-15-after-purdue.

[32] *In re* Crédito Real, S.A.B. de C.V., SOFOM, E.N.R., 670 B.R. 150 (Bankr. D. Del. 2025).

[33] *In re* Odebrecht Engenhari e Construção S.A. – Em Recuperação Judicial, et al., 669 B.R. 457 (Bankr. S.D.N.Y. 2025).

[34] *See* Bruce A. Markell, *The International Two-Step: Recognizing Domestic Chapter 15 Reorganizations*, 98 AM. BANKR. L.J. 1, 1 (2024).

[35] *Crédito Real*, 670 B.R. at 155.

[36] *Id.*

[37] *Id.* at 173.

U.S. public policy . . . .[38]

Accordingly, U.S. Bankruptcy Court Judge Thomas Horan held that chapter 15 does authorize a bankruptcy court to enforce a nonconsensual third-party release ordered by foreign courts.[39]

In *Odebrecht*, a Brazilian conglomerate sought chapter 15 recognition in a U.S. Bankruptcy Court in the Southern District of New York.[40] The U.S. Trustee in *Odebrecht* argued that a provision in the Brazilian Confirmation Order constituted an impermissible third-party release.[41] In discussing the validity of the Trustee's claim, U.S. Bankruptcy Court Judge Martin Glenn reasoned that *Purdue* did not hold that nonconsensual third-party releases are contrary to U.S. public policy.[42] Because of the narrow holding in *Purdue*, the ability of a U.S. Bankruptcy Court to enforce a foreign order containing a third-party release is not barred by section 1506 of the Bankruptcy Code.[43]

What *Crédito Real* and *Odebrecht* demonstrate is that while *Purdue* limited the use of nonconsensual third-party releases under chapter 11 of the Bankruptcy Code, the practice may still be viable through enforcement of foreign plans of reorganization in U.S. bankruptcy courts.

Conclusion

In the wake of both the *Purdue* decision and the confirmation of the 2025 Plan, revisiting scholarship such as *The Rule of the Deal* is a useful exercise in exploring how the Court's decision changed the landscape of bankruptcy law and discourse. In *The Rule of the Deal*, Professor Lipson discussed how the bargaining and negotiation that occur in all chapter 11 bankruptcies can be problematic in bankruptcies involving social harm, using Purdue Pharma as one notorious example. With a plan of reorganization now confirmed, academics and practitioners alike can see the outcome of the Court's decision in practice. Consensual third-party releases will become the norm, and chapter 15 may be used more frequently.

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[38] *Id.*

[39] *Id.* at 174.

[40] *In re* Odebrecht Engenhari e Construção S.A. - Em Recuperação Judicial, et al., 669 B.R. 457 (Bankr. S.D.N.Y. 2025).

[41] *See id.* at 472.

[42] *Id.* at 474.

[43] *Id.*; *see also* 11 U.S.C. § 1506 (2005) ("Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.").

Above all, the Purdue Pharma bankruptcy represents the immense complexity that accompanies modern chapter 11 cases involving social harm and mass tort liability. The Purdue Pharma story demonstrates how sophisticated corporate debtors can leverage negotiation, bargaining, and forum selection to shape outcomes while navigating the constraints of legal formalism. Simultaneously, the case highlights the role of the judiciary in ensuring that bankruptcy maintains a balance between efficiency and forwarding the public interest. Purdue serves as a cautionary tale that, while dealmaking will continue to play a central role in corporate reorganization, transparency, consent, and accountability may not be cast aside as optional, especially when social harm has occurred.

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