The End(s) of Bankruptcy Exceptionalism: *Purdue Pharma* and the Problem of Social Debt

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ABSTRACT

The Supreme Court's recent 5-4 decision in the controversial chapter 11 bankruptcy reorganization of opioid-maker Purdue Pharma ends the use of nonconsensual third-party "releases," which discharge (eliminate) liabilities of nondebtors who may share liability with a corporate debtor. Although the majority opinion is correct as far as it goes—the Bankruptcy Code does not permit this—it does not go very far, because it does not recognize the "social" qualities of Purdue Pharma's mass tort liability or the problematic exceptionalism of the lower courts which approved those releases.

Bankruptcy exceptionalism has been a contested concept since it emerged over fifteen years ago, and reflects a willingness to bend the rule of law in order to maximize economic recoveries. But the statutory exceptionalism rejected by the Purdue Pharma majority is not its only form. This Article shows that in bankruptcy, the Court has also tolerated "structural exceptionalism," a willingness to permit deviations from constitutional rules, standards, norms and values when in tension with insolvency proceedings that involve significant public interests. Seen this way, Purdue Pharma seemed an ideal candidate for a broadly exceptionalist ruling: The company's mass torts played a unique role in a public health crisis that has taken hundreds of thousands of lives.

Yet, the significant prebankruptcy misconduct of Purdue Pharma and its insiders who sought the release created a kind of "social debt," a subset of mass tort liability involving the worst of the worst. The defining features of social debt are its moral gravity and scale, here liability for drug-marketing fraud, which translate poorly into dollars. Other examples of social debt include large-scale liability for sexual assault and the crisis of gun violence.

The noneconomic demands of social debt are in tension with the economic aspirations of bankruptcy exceptionalism. The Purdue Pharma majority neither recognized this tension nor ended the use of chapter 11 to resolve mass tort liability, an increasingly attractive but problematic substitute for ordinary litigation. Justice Kavanaugh's flawed but "emphatic" dissent fully embraced bankruptcy exceptionalism without acknowledging the extraordinary power he would vest in bankruptcy judges to resolve social debt.

*The important question is not whether to **end** bankruptcy exceptionalism—all agree that bankruptcy courts must have some flexibility and can play an important role in resolving mass tort liability—but the **ends** that it serves. We use this framework to anticipate the next points of conflict in the wake of Purdue Pharma. We offer guidance on ways that courts and Congress can balance economic goals of maximizing recoveries with noneconomic concerns presented in social debt bankruptcies, including on what constitutes "consent" to a third-party release and the problematic incentives of privatized fiduciaries who run these cases.*

* Lipson: Temple University-Beasley School of Law; Foohey: University of Georgia School of Law. The authors submitted an amicus brief on behalf of ten law professors supporting petitioner William Harrington in the United States Supreme Court. Professor Lipson also previously represented Peter Jackson, a wrongful-death survivor and opioid activist in objecting to the Purdue Pharma plan's nonconsensual third-party releases (at the disclosure statement stage) and, when that objection was overruled, seeking the appointment of an examiner. The authors thank Tony Casey, David Skeel and [] for comments. Lipson also thanks Temple Law students Maddy Demchick, Ben Kanfer, Melissa Pendleton and Kevin Sherry for excellent research support.

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Since the Bankruptcy Code was enacted in 1978,[1] Chapter 11 reorganization has become an increasingly attractive alternative to ordinary litigation as a means of resolving mass tort liability.[2] Unlike adversary litigation, which aims to produce a neutral adjudication on the merits of claims of liability, corporate reorganization is a "special remedial scheme" which seeks to adjust the debts of going concerns regardless of the normative merits of those claims.[3] To do so, it vests significant power in the debtor, and discretion in bankruptcy judges, who typically view their goal as approving a viable plan of reorganization for the debtor. It looks forward to a "fresh start" rather than backwards to the merits of claims about the conduct that may have landed the debtor in trouble in the first place.[4]

Using chapter 11 to reorganize businesses dealing with mass tort litigation ("mass tort reorganization") has long been controversial. On one hand, chapter 11 offers "global peace" for liabilities arising from large-scale harm at lower cost than the tort system, and avoids the lottery-like effects of differing outcomes from different courts.[5] On the other hand, while it may promote

[1] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, sec. 241(a), § 1471(b)–(c), 92 Stat. 2549, 2668.

[2] *See* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 976 (2023) [hereinafter, "Casey/Macey, *Defense*"] ("we argue that Chapter 11 proceedings provide an appropriate and often superior forum in which to resolve mass tort claims."); Anthony J. Casey & Joshua C. Macey, *Bankruptcy by Another Name*, 133 YALE L.J. Forum 1016, 1018 (2024) [hereinafter "Casey/Macey, *Another Name*"] (arguing that "bankruptcy . . . could--in the right cases and under the right circumstances--provide an efficient and cost-effective means of resolving proceedings with multiple claimants."); Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV. 361, 362 (2022) ("Bankruptcy courts have become the favored forum for large corporate defendants to seek global resolution of mass tort liability claims."); *See also* discussion in Part I.B, *infra*.

[3] *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) ("[W]e have recognized an exception to the general rule [requiring individualized justice]. . . where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate." (quoting Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989))). *See also* Jonathan C. Lipson, *"Special": Remedial Schemes in Mass Tort Bankruptcies*, 101 TEX. L. REV. 1773, 1774 (2023) [hereinafter, "Lipson, *Special*"]. We discuss the rise and dynamics of mass tort reorganization in Part I.B., infra.

[4] The Supreme Court has identified the two main purposes of Chapter 11 as: (1) preserving going concerns; and (2) maximizing property available to satisfy creditors. *See* Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 453 (1999). *See also* Harrington v. Purdue Pharma L.P., _ U.S. __, 144 S. Ct. 2071, 2112–13 (2024) (Kavanaugh J., dissenting) ("When a debtor in bankruptcy receives a discharge, most (if not all) of their pre-petition debts are released, giving the debtor a fresh start.") (citing 11 U.S.C. § 1141(d)(1)).

[5] *See, e.g.*, Casey/Macey *Another Name, supra* note 2, at 1017 (arguing that mass tort reorganization "can offer significant economic benefits to both plaintiffs and corporate defendants") (citing Casey/Macey, *Defense, supra* note 2, at 976-77 (arguing that "[b]ankruptcy law resolves the collective action problem that arises when creditors pursue their claims in a variety of separate proceedings .... The Bankruptcy Code's core provisions-- the automatic stay, priority rules, prohibitions on fraudulent transfers, preference rules, and treatment of unpaid claims--are all designed to address [this problem].") *See also* Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1747 (2023) [hereinafter, "Jacoby, *Bugs*"] ("Lawyers in the newer cases not only tout Chapter 11 as the best, or, indeed, the only way to find global peace, but they explicitly cast aspersions on juries, multidistrict

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