

Purdue's Side Effects: Using Due Process to Realign Mass Tort Bankruptcies

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ABSTRACT

In *Harrington v. Purdue Pharma*, the Supreme Court held that victims of the opioid crisis could not be forced to release their independent claims against the Sacklers, who owned and controlled Purdue, without the victims' consent. Such releases had become a controversial mainstay of mass tort bankruptcy filings. Yet *Purdue* was decided on narrow, textualist grounds, leaving as a side effect many seemingly disparate and difficult questions unanswered. This Article argues that *Purdue* and its open issues should be analyzed through a broader due process lens in tension with some aspects of current bankruptcy practice, but consistent with the Court's recent bankruptcy jurisprudence.

Although the Court now requires consent to settle claims against third parties, it expressly declined to define consent. Similarly, it explicitly refused to determine whether a plan that fully satisfies claims against nondebtors can be approved over creditor objections. After studying the complexities of these issues, this Article explores two more questions, entirely ignored by the Court, that are essential to understanding future mass tort bankruptcies. First, it investigates when and how governments, which are often the largest creditors in a mass tort bankruptcy, should consent to releases in favor of third parties or bind inferior levels of government to settlements they make. Second, it analyzes how debtors, governments, and third parties use and abuse anti-litigation injunctions—a mainstay of mass tort bankruptcy practice. Collectively, these are critical issues in mass tort bankruptcies both pending and on the horizon.

With no direct guidance from the Supreme Court, this Article argues that these disparate questions can be unified through the Court's recent bankruptcy jurisprudence emphasizing the importance of due process. Bankruptcy may offer exceptional powers, but they must be tempered by reforms that respect a litigant's ultimate control of their claim. These include more robust statements of consent, limitations on injunctions (and their circumvention), and guardrails around case-determinative settlements. If *Purdue* is part of a broader trend of realigning bankruptcy law with other areas of litigation, due process provides the cipher to resolve the problems that will inevitably arise in future mass tort bankruptcies.