TO RELEASE OR NOT TO RELEASE, THAT IS THE QUESTION: DEFINING "CONSENT" FOR OPT-OUT THIRD-PARTY RELEASES IN MASS TORT BANKRUPTCIES

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In America, mass torts are nothing new. Since its popularization in the 1970's, the term "mass tort" has become a legal shorthand for all civil lawsuits with many, similarly injured plaintiffs against one or a few defendants. The concept may be old, but recently a new mass tort playbook has begun to take shape. Increasingly, companies across industries are seeking bankruptcy protection to manage their mass tort exposure. Often, this protection comes in the form of filing for bankruptcy under Chapter 11 of the Bankruptcy Code, which initiates a process allowing the corporation to reorganize its finances and operations while continuing to operate. Chapter 11 filings are desirable for companies facing mass tort liability because they allow the company to consolidate the claims brought against them and, if successful, resolve these claims in a manner that is efficient and equitable. Efficient, as compared to alternative methods for aggregating claims such as class actions or MDLs, and equitable, in the sense that claimants are compensated equally to others similarly situated and in an amount that a judge deems fair. Crucially, the bankruptcy process also provides non-debtor third parties with the opportunity to "settle" claims not yet brought against them. This option presents advantages for individuals and companies alike.

When Harrington v. Purdue Pharma *was decided in June 2024, it nominally did not affect this potential circumstance: the Court held that so long as the release was consensual between the third party and the claimholders, bankruptcy courts could continue implementing these tools. This Note argues, however, that given the structure and text of the Bankruptcy Code, the* Harrington *ruling will inevitably force bankruptcy judges to grapple with and potentially redefine "consent" as it applies to third-party releases. This issue is particularly salient in mass tort bankruptcies, as additional hurdles threaten to impact the above-mentioned goals of efficient and equitable resolution of claims. Further, the limited judicial discretion imposed by the* Harrington *approach is in tension with the norms of Bankruptcy Court. To solve these issues, this Note proposes the adoption of a class action-like standard for consensual third-party*

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releases, which is in conformance with the Code and will provide fair outcomes for companies and victims alike.

INTRODUCTION

On June 27, 2024, the Supreme Court decided *Harrington v. Purdue Pharma LP* ("*Harrington*"), addressing whether a non-consensual third-party release as part of a Chapter 11 restructuring plan violated the U.S. Bankruptcy Code ("the Code").[1] Respondent Purdue Pharma LP ("Purdue") was a company purchased by the Sackler family in 1952.[2] Over nearly seven decades, Purdue manufactured and sold OxyContin, "a drug with addictive potential that was improperly marketed as a non-addictive pain reliever."[3]

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[1] *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 204 (2024).

[2] *Id.* at 244 (Kavanaugh, J. dissenting).

[3] *In re Purdue Pharma: Nonconsensual Third-Party Releases Are Impermissible, in* PRACTICAL LAW BANKRUPTCY & RESTRUCTURING, Westlaw (2024), https://ca.practicallaw.thomsonreuters.com/w-043-4878?transitionType=Default&contextData=(sc.Default)&firstPage=true#:~:te

The company—privately held by the Sacklers[4] for its entire lifespan—capitalized on American addiction and pain to build an empire exceeding $34 billion in revenue from OxyContin.[5]

In 2007, one of Purdue's affiliates pled guilty to a federal felony for misbranding OxyContin; from there, thousands more lawsuits followed.[6] By September 2019, when Purdue and its affiliates filed for bankruptcy in the Southern District of New York ("S.D.N.Y."), the company faced 2,900 lawsuits, the Sackler family itself faced 400, and creditors proceeded to file more than 618,000 claims against the company totaling more than $2 trillion.[7] Finally, it seemed, victims would have the opportunity to receive some compensation for the harm they had suffered. Instead, Plaintiffs faced a devastating reality: in preparation for this very circumstance, the Sacklers had been engaging in a self-described "milking program," wherein they drained as much as 70% of Purdue's annual revenue *every year* beginning in 2008.[8] By the time claims against the company were filed in 2019, Purdue was left in "a significantly weakened financial" state.[9] Why? Because money diverted to the Sackler family's personal coffers—$11 billion over eight years—was out of reach of the Court proceedings.[10] At no point would Purdue have been able to pay out their $2 trillion debt in its entirety, but the Sacklers' advance planning significantly reduced the potential recovery for their victims and stirred a sense of injustice for creditors and onlookers alike.

xt=Background,the%20lawsuits%20against%20the%20Sacklers [https://perma.cc/CLS6-HA3X].

[4] The Sackler family is the former owner of Purdue Pharma LLC and has become a household name in the past decade due to the family's ties to the Opioid Crisis. The family has been profiled in various media. *See, e.g.*, PATRICK RADDEN KEEFE, EMPIRE OF PAIN (2021).

[5] *In re Purdue Pharma: Nonconsensual Third-Party Releases Are Impermissible*, *supra* note 3.

[6] *Harrington*, 603 U.S. at 210. These suits involved, among other things, claims alleging negligence, fraud, and unfair trade practices.

[7] *In re Purdue Pharma: Nonconsensual Third-Party Releases Are Impermissible*, *supra* note 3.

[8] *Harrington*, 603 U.S. at 210–11.

[9] *Id.* at 211.

[10] *See id.* "Out-of-reach" in this context describes a strategy by which the Sacklers funneled money into a combination of offshore and spendthrift trusts.

Nearly five years after the initial filing, when *Harrington v. Purdue Pharma* was finally argued before the U.S. Supreme Court, the question of how the Sacklers' personal finances should play into the case resolution remained central. The Court was ruling on the viability of the restructuring plan that was negotiated between the Sackler family, the corporate entity Purdue, and its creditors, about twenty percent of whom were personal injury tort claimants.[11] The plan included a third-party release: The Sacklers, in exchange for contributing between $5.5 and $6 billion from their personal bank accounts to the Purdue repayment plan, argued that they (the third-party) should be released from future personal liability claims for the harm they perpetrated.[12] This method of contributing personal funds to a corporate bankruptcy resolution is relatively common, but given the circumstances, the Sacklers' agreement received outsized media attention.[13] The general public sentiment was one of outrage that the Sacklers would not be forced to empty their personal bank accounts, and, perhaps unusually, the majority of Justices seemed to agree.[14]

The opinion featured a surprising ideological alignment. The majority was authored by Justice Gorsuch, joined by Justices Thomas, Alito, Barrett, and Jackson, and the dissent by Justice Kavanaugh, joined by Justices Roberts, Sotomayor, and Kagan.[15] The Court struck down the restructuring plan proposed by the

[11] *In re Purdue Pharma: Nonconsensual Third-Party Releases Are Impermissible*, *supra* note 3.

[12] *Harrington*, 603 U.S. at 227 (Kavanaugh, J. dissenting).

[13] *See, e.g.*, Jan Hoffman, *Sacklers and Purdue Pharma Reach New Deal With States Over Opioids*, NEW YORK TIMES (Mar. 3, 2022), https://www.nytimes.com/2022/03/03/health/sacklers-purdue-oxycontin-settlement.html [https://perma.cc/7YQN-EEXR]; Geoff Mulvihill & John Seewer, *Purdue Pharma, US states agree to new opioid settlement*, OREGON PUBLIC BROADCASTING (Mar. 3, 2022), https://www.opb.org/article/2022/03/03/purdue-pharma-us-states-agree-to-new-opioid-settlement/ [https://perma.cc/ZK6T-A2K9]; *Purdue Pharma, US states agree to new opioid settlement*, CHICAGO TRIBUNE (Mar. 3. 2022) https://www.chicagotribune.com/2022/03/03/purdue-pharma-us-states-agree-to-new-opioid-settlement/ [https://perma.cc/F58F-6V7D].

[14] Molly Redden, *Supreme Court Overturns Opioid Settlement That Shielded Sacklers From Lawsuits*, YAHOO NEWS (June 27, 2024), https://ca.news.yahoo.com/supreme-court-overturns-opioid-settlement-141611183.html [https://perma.cc/QCD3-8QRV].

[15] *See Harrington*, 603 U.S. at 208.

Sacklers and Purdue and held that a Bankruptcy Court may not authorize a release nor injunction that extinguishes claims against non-debtor third parties in a Chapter 11 reorganization plan without the claimants' consent.[16]

Crucially, the decision resolved a longstanding circuit split regarding nonconsensual third-party releases. Before *Harrington*, judges were allowed significant discretion in approving plans with third-party releases, so much so that they could approve a third-party release over the objections of creditors.[17] Now, no longer able to award non-consensual third-party releases, judges must define "consensual"—generally thought to encompass elements of traditional due process, such as sufficient notice and a fair opportunity to respond—to implement what the Supreme Court would consider a permissible third-party release. Bankruptcy judges across the country are now grappling with the newly central question of "consent" in restructuring deals where third parties seek the waiver of outstanding personal liability claims.

This Note focuses on how *Harrington* may affect consensual third-party releases using an opt-out mechanism and how this could change the broader landscape of Chapter 11 mass tort bankruptcies. Crucially, *Harrington* calls into question how much discretion may be afforded to judges in the absence of explicit statutory authorization to approve third-party releases. Part I will discuss the relevant legal background: the statutes from the U.S. Bankruptcy Code and an overview of the scholarly landscape. This section explains why mass tortfeasors increasingly prefer Chapter 11 bankruptcy as a mechanism to aggregate and resolve liability claims. Of particular importance to these proceedings are third-party releases. Part II will explain how *Harrington* changed the landscape of third-party releases and the resulting inconsistencies in how Bankruptcy Courts define consent. This section also argues that inconsistency in defining consent poses a unique challenge for mass tort creditors. Part III will propose a solution to the issues raised in Part II: suggesting a framework for third-party consensual releases

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[16] *See In re Purdue Pharma: Nonconsensual Third-Party Releases Are Impermissible*, *supra* note 3 (suggesting that the *Harrington* plan was considered "non-consensual" because the creditors did not unanimously approve it).

[17] *See Third-Party Releases in Bankruptcy Plans, in* PRACTICAL LAW BANKRUPTCY & RESTRUCTURING AND PRACTICAL LAW FINANCE (2025), Westlaw 3-570-7925.

that structurally parallels Federal Rule of Civil Procedure 23(b)(3) class action requirements. This section explains why this solution satisfies the provisions of the Code, provides fair and efficient relief to mass tort victims, and achieves the goals of the bankruptcy system—namely resolving aggregated claims while providing finality and closure to debtors and creditors alike. While there is no guarantee that a class action parallel will provide more lucrative outcomes for mass tort victims, the idea is that a more standard process for third-party releases will help resolve questions about judicial discretion and alleviate concerns that bankruptcy proceedings may result in less fair outcomes than class actions or other forums for aggregating claims.

PART I

A. *Legal Background: What is Bankruptcy?*

The bankruptcy process in the United States is a legal procedure designed to provide relief to debtors who are unable to meet their financial obligations, as well as an organized process for creditors to recover (as much as possible) on their claims.[18] Bankruptcy proceedings are available to individuals as well as to companies and municipalities.[19] A bankruptcy begins when a debtor files a petition for relief with a federal District Court, where the case is then referred to a specialized bankruptcy court to be heard by a United States bankruptcy judge.[20] While a debtor is involved in bankruptcy proceedings, there is a pause placed on all other pending litigation against them, called the "automatic stay."[21] Generally, a bankruptcy trustee—an individual separate from the debtor itself but acting to oversee administration of the debtor's estate—is then appointed.[22] Depending on the case, the debtor will

[18] BARRY E. ADLER, ANTHONY J. CASEY & EDWARD R. MORRISON, BAIRD AND JACKSON'S BANKRUPTCY: CASES, PROBLEMS, AND MATERIALS 17–18 (6th ed. 2024).

[19] *See* 11 U.S.C. § 109.

[20] *See* ADLER ET AL., *supra* note 18, at 36. An involuntary petition may be filed on behalf of creditors, but this is rare.

[21] *See* 11 U.S.C. § 362.

[22] *Bankruptcy Basics*, U.S. COURTS, https://www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics/process-bankruptcy-basics [https://perma.cc/ZK2S-4VXJ] (last visited Feb. 23, 2026).

either undergo liquidation or commit to a negotiated repayment plan in exchange for the discharge, or cancellation, of their debt.[23]

Proceedings in bankruptcy court are governed by their own Federal Rules of Bankruptcy Procedure and by Title 11 of the United States Code, also known as the Bankruptcy Code ("the Code").[24] Throughout the bankruptcy process, a debtor must adhere to the provisions of the Code. Organized in chapters, the Code provides varying procedures, eligibility requirements, and forms of relief for different types of debtors. For example, Chapter 7 bankruptcy is a liquidation proceeding available to consumers and businesses, while Chapter 12 specifically allows a family farmer or a fisherman to file for bankruptcy.[25] Of primary interest for this paper is Chapter 11 bankruptcy, which provides a course of action by which a corporation can reorganize its finances and operations—generally repaying creditors over time—while continuing to operate.[26]

In Chapter 11 bankruptcies, the debtor company typically remains in control of its operations as a "debtor-in-possession," subject to court oversight, and develops a reorganization plan ("the plan") under which to repay part or all of its assets.[27] The plan is a court-ordered agreement that satisfies the various statutory requirements set out in the Code and lays out the treatment of the debtor's obligations with respect to each class of creditors and interest holders.[28] The plan typically includes debt restructuring proposals, operational changes to improve profitability, as well as classification and treatment of different creditor claims.[29] Alongside the plan, the debtor must file a disclosure statement providing adequate information on the assets, liabilities, and business affairs

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[23] *Id.*

[24] FED. R. BANKR. P.; 11 U.S.C.

[25] *See* 11 U.S.C. § 109.

[26] *See* 11 U.S.C. § 109(d); *Overview of Bankruptcy Chapters*, U.S. Dep't of Justice, https://www.justice.gov/ust/bankruptcy-fact-sheets/overview-bankruptcy-chapters [https://perma.cc/3Q5T-TA2U] (last visited Jan. 15, 2025).

[27] 11 U.S.C. §§ 1121, 1123, 1129, 1141.

[28] Dorothy Coco, *Third-Party Bankruptcy Releases: An Analysis of Consent Through the Lenses of Due Process and Contract Law*, 88 FORDHAM L. REV. 231, 232 (2019).

[29] *Chapter 11 Reorganization*, U.S. BANKR. CT. N.D. FLA., https://www.flnb.uscourts.gov/chapter-11-reorganization [https://perma.cc/NG4W-37CF] (last visited Jan. 15, 2025).

of the debtor, such that creditors can make an informed decision in approving the plan.[30] A debtor corporation's reorganization plan is crafted with participation from creditors, then presented to the bankruptcy judge for their approval.[31] If the plan meets statutory requirements and receives necessary creditor approval, the court confirms the plan.[32] Then, the bankruptcy court's order confirming the reorganization plan "discharges the debtor" of relevant pre-petition debts.[33]

B. *Mass Torts in Bankruptcy Court*

Mass tort cases involving many plaintiffs suffering from similar injuries caused by a common defendant frequently end up in Bankruptcy Court due to the financial distress of the liable company. In these circumstances, Defendants face substantial liability claims which exceed their ability to pay. As a result, Bankruptcy Court becomes a venue for managing these claims, allowing the company to reorganize its finances or liquidate its assets while attempting to resolve the litigation.

The use of bankruptcy proceedings to handle mass tort cases became prominent with asbestos litigation. Companies like Johns-Manville Corporation filed for bankruptcy to address billions of dollars in tort claims from individuals who developed asbestos-related diseases like mesothelioma.[34] Now, bankruptcy has become an increasingly common tool.[35] Companies across industries, including in pharmaceuticals, consumer products, and environmental contamination, have increasingly sought bankruptcy protection to manage their mass tort exposure.

There are three mechanisms by which factually similar mass tort claims from multiple jurisdictions may be aggregated into a single lawsuit: (1) class certification such that the case becomes a class action lawsuit, (2) consolidation by the Judicial Panel on

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[30] *Bankruptcy Basics*, *supra* note 22.

[31] *Id.*

[32] *Id.*

[33] 11 U.S.C. § 1141(d)(1)(A).

[34] U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 8 (2011).

[35] Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447, 457 (2022).

Multidistrict Litigation and transfer to a single district court, and (3) corporate bankruptcy filing. Particularly, Chapter 11 bankruptcy is increasingly favored by mass tortfeasors, both for the benefits to the debtors (originally often defendants in the mass tort claim), but also to creditors.

Although it may seem likely that a company would exploit the bankruptcy process to avoid fully paying for their malfeasance, this is not necessarily true. In fact, there are aspects of bankruptcy that uniquely privilege plaintiffs. Much of the focus on Chapter 11 bankruptcy comes from the reality that the U.S. tort system is poorly designed. The state-law tort system allows for case-by-case resolution, and potentially lottery-like compensation, where damage awards are based on the sentiment of individual juries. While some victims may receive generous compensation, many others may be left with much less or nothing at all. In contrast, bankruptcy allows a judge to equitably distribute the debtor's assets to the victims, to the extent that the debtor is able to pay out the claims. There is no collective action or "race-to-the-courthouse" problem, where only the first filers receive compensation. Further, the bankruptcy process also represents a scenario where mass tort victims may be made whole in ways beyond a payout. For example, in *Harrington*, the proposed plan included the Sacklers' "agreement to exit the opioid business worldwide and a public repository of Purdue's records to study the causes of the opioid crisis."[36] This agreement provides a salient example of how the legal framework of bankruptcy may provide monetary compensation as well as a sense of justice for victims.

That said, there are also several procedural features that make mass torts in bankruptcy unique from typical mass tort litigation and offer benefits to debtors. For example, choice of venue. While a plaintiff would generally have the upper hand in determining jurisdiction (especially where the defendant is a big company doing business across the U.S.), bankruptcy allows the debtor to file where it is most convenient.[37] The automatic stay halts all pending litigation, giving the debtor time to develop a strategy and assess the severity of their liability.[38] Further, an agreement that

[36] Brief for Debtor Respondents at 8, Harrington v. Purdue Pharma L.P., 603 U. S. 204 (2024) (No. 23-124).

[37] 28 U.S.C. § 1408.

[38] 11 U.S.C. § 362.

bankruptcy ends with a "discharge of debt" covers both discharge of debts and of claims, meaning that the litigation ends with a universal resolution of claims.[39]

C. *Third-Party Releases & Mass Tort Resolution*

As mentioned, a Chapter 11 plan of reorganization may include an agreement that releases non-debtor parties who are closely related to the debtor from future creditor claims and causes of action held by creditors and other stakeholders.[40] The release is often in exchange for the non-debtor third-party contributing assets to repayment.[41] Third-party releases, as compared to estate releases or exculpation clauses, are a mechanism by which a non-debtor releases another non-debtor from both pre- and post-petition claims.[42] For example, when a corporation files for bankruptcy, the individual officers of the corporation are not themselves bankrupt. Officers are closely related to the corporation, so they may face related claims from parties injured by the corporation (e.g., alleged mismanagement during the period leading up to the bankruptcy). In exchange for the creditors surrendering these claims, officers can agree to contribute funds to repay creditors. In effect, this exchange allows a debtor to "extend [the release of creditors' claims] to a non-debtor party who participates in or impacts the debtor's ability to reorganize."[43] Third-party releases are implemented via plan provisions that enjoin future litigation against the released parties for their pre-confirmation actions.[44]

Pre-*Harrington*, there were two types of third-party releases: consensual, wherein creditors agreed to the release provision in the plan, and non-consensual, where a judge imposed the release despite objections by creditors.[45] As noted above, in *Harrington* the Supreme Court disallowed the non-consensual release, leaving

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[39] 11 U.S.C. § 1141.

[40] *Third-Party Releases in Bankruptcy Plans*, *supra* note 17.

[41] *Id.*

[42] *Id.* ("Released third parties may include a debtor's principals, guarantors, affiliates, officers, directors, insurers, creditors, and shareholders.").

[43] Coco, *supra* note 28, at 232.

[44] *Third-Party Releases in Bankruptcy Plans*, *supra* note 17.

[45] *See id.* (describing the landscape pre- and post-Harrington).

judges only with the option to impose the consensual variety.[46] Technically, the letter of the Code only provides for third-party releases relating to asbestos liability; however, third-party releases have become increasingly common in all types of bankruptcies.[47]

Third-party releases—consensual and (previously non-consensual)—play a significant role in mass tort resolution within bankruptcy proceedings, particularly in Chapter 11 cases. In fact, such releases have been deemed one of the "key strategies tortfeasors use to manage the tremendous volume of costly claims that currently exist and can arise in the future by virtue of tortuous conduct."[48] *Harrington* itself provides a salient illustration of the debate surrounding their value. The majority opinion in *Harrington* characterized the third-party release as allowing immunity for debtors without putting their full assets on the table, essentially allowing the Sackler family to "pay less than the [C]ode ordinarily requires and receive more than it normally permits."[49] That characterization of a non-consensual release is a biting critique, but ultimately fails to capture many of the nuances of the debate. In fact, there are many reasons to support third-party releases in bankruptcy proceedings, particularly in the mass tort context.

Third-party releases provide for the equitable distribution of a debtor's assets among creditors by facilitating a comprehensive settlement framework. For one, third-party releases in mass tort resolution allow for the inclusion of non-debtor parties (e.g., company officers, directors, or related entities) in the overall settlement, potentially increasing the pool of assets available for distribution to creditors.[50] Releases are needed to "ensure that individual creditors . . . cannot deplete the assets otherwise available

[46] Harrington v. Purdue Pharma L.P., 603 U.S. 204, 226 (2024) ("Nothing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan[.]").

[47] 11 U.S.C. § 524; Coco, *supra* note 28, at 232.

[48] *In re Purdue Pharma: Nonconsensual Third-Party Releases Are Impermissible*, *supra* note 3.

[49] *Harrington*, 603 U.S. at 206.

[50] *From Opioids to Opt-Outs: Nonconsensual Third-Party Releases and the Aftermath of Purdue*, PROSKAUER (Oct. 28, 2024), https://www.proskauer.com/alert/from-opioids-to-opt-outs-nonconsensual-third-party-releases-and-the-aftermath-of-purdue [https://perma.cc/T4JH-798F].

for equitable distribution to all creditors by going through the back door."[51] In other words, third-party releases—like bankruptcy proceedings generally—prevent a race to the courthouse where the first party to successfully file and litigate their claim gets the greatest payout. Third-party releases can also be used as a tool to secure valuable monetary and non-monetary relief from the debtor and related parties. Oftentimes, an entity related to the debtor in a bankruptcy case will make available additional assets for the reorganization plan where they are being offered a release.[52] This additional funding, in turn, may incentivize creditors to vote in favor of a plan and avoid prolonged litigation.[53] Assets may also include non-monetary provisions such as agreements to turn over documents previously unavailable to the public. Disclosure and subsequent reporting on wrongdoing, for example, can provide a sense of closure and justice for victims.

One of the major criticisms of third-party releases is that it deprives individuals of their opportunity to pursue claims against non-debtor third parties who have perpetrated harm, potentially infringing on creditors' constitutional right to due process.[54] While this is true to a certain extent, the effect of losing "released" claims should not be overstated. Put simply, the scope of released claims is not absolute. Creditors may still sue for other wrongs, so long as they are distinct. For example, in *Harrington*, the proposed plan maintains that:

> Any third-party claims against the Sacklers that are (a) not held by a creditor of the Debtors, (b) not opioid-related, or (c) opioid-related but not dependent on the Debtors' conduct (e.g., "a claim against one of the Sacklers, some of whom are

[51] Brief for Debtor Respondents at 2, Harrington v. Purdue Pharma L.P., 603 U. S. 204 (2024) (No. 23-124).

[52] *Id.*

[53] Marshall S. Huebner & Marc J. Tobak, *Please Don't Forget the Victims: Mass Torts, Third Party Releases and the U.S. Bankruptcy Code*, HARV. L. SCH. BANKR. ROUNDTABLE (Dec. 13, 2022), https://bankruptcyroundtable.law.harvard.edu/2022/12/13/please-dont-forget-the-victims-mass-torts-third-party-releases-and-the-u-s-bankruptcy-code/ [https://perma.cc/X2Y9-CNZF].

[54] *See* Henry Reynolds, *Third-Party Bankruptcy Releases and the Separation of Powers: A Stern Look*, 40 EMORY BANKR. DEV. J. 111, 111 (2024).

doctors, for negligently prescribing OxyContin"), are not subject to the releases.[55]

D. *Judicial Authority for Third-Party Releases*

The source of judicial authority for granting third-party releases has long been a subject of debate. Section 524(e) of the Code says that the discharge of debt is intended to protect the interests solely of the debtor and "does not affect the liability of any other entity on, or the property of any other entity for, such [preconfirmed] debt."[56] Prior to *Harrington*, courts permitting nonconsensual releases had relied on the following two provisions of the Code to justify third-party releases. The first of these provisions was § 105(a), which authorizes bankruptcy courts to "issue any order, process or judgement necessary or appropriate to carry out the provisions" of the Code.[57] The second relevant provision was § 1123(b), specifically §1123(b)(6), which permits a court to "include [in the restructuring plan] any other appropriate provision not inconsistent with [the Code]."[58] Together, these provisions were interpreted as granting broad judicial discretion in determining the terms allowed in a plan. The *Harrington* ruling, though, emphasized that the Code's discharge provisions typically apply only to the debtor and not to third parties, and that the only exception to the §524(e) rule is found in §524(g), which applies specifically to asbestos-related bankruptcies.

Accordingly, the source of a judge's power to "release" third-party claims is now only located in §1129 of the Code, which states, "The court shall confirm a plan only if all of the following requirements are met" and then lists various criteria that the plan must satisfy.[59] Requirements include the plan's compliance with applicable provisions of the Code, proposal in good faith, and the plan's feasibility.[60]

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[55] Brief for Debtor Respondents at 9, Harrington v. Purdue Pharma L.P., 603 U. S. 204 (2024) (No. 23-124).
[56] 11 U.S.C § 524(e).
[57] 11 U.S.C. § 105(a).
[58] 11 U.S.C. § 1123(b).
[59] 11 U.S.C. § 1129.
[60] *See id.*

PART II

A. *The Legal Problem: Defining "Consensual"*

At its most basic, a "consensual" third-party release means that the creditors or other parties who are being asked to release their claims against the third party must agree to it voluntarily. This decision could occur as part of a settlement or as a condition of receiving some benefit under the plan. The Code itself is silent on whether a third-party release requires *express* consent—in other words, there is no Code provision which demands that a third-party release be agreed to by all creditors.[61] That said, Bankruptcy Courts over time have invariably evaluated consent as a central element in determining whether releases are approvable.[62] Partly, this is in order to adhere to constitutional principles, like due process for creditors' deprivation of rights.[63] These constitutional concerns are complicated by the fact that the Code also does not define "consent."[64] As a result, Bankruptcy Courts are left to determine what is required to satisfy creditor "consent" to third-party releases.[65]

Consent is a crucial element to plan approval, but the absence of a formal statutory requirement or definition creates a tension wherein Bankruptcy Courts have difficulty applying a consistent consent standard across, and even sometimes within, circuits.[66] For example, some courts have held that voting in favor

[61] *See generally* 11 U.S.C. §§ 1123, 1129 (notable for their lack of consent language).

[62] *See, e.g.*, *In re* Zenith Elecs. Corp., 241 B.R. 92, 110–11 (Bankr. D. Del. 1999) (applying five factors, known as the *Master Mortgage factors,* to consider in allowing a release of a third party as part of a plan of reorganization, fourth of which is "an agreement by a substantial majority of creditors to support the injunction, specifically if the impacted class or classes 'overwhelmingly' votes to accept the plan[.]"). The *Master Mortgage* factors are discussed further in Part II.D.

[63] There are other reasons for requiring consent in the absence of a statutory mandate, such as maintaining uniformity in bankruptcy law, but these are less relevant to this Note.

[64] *See generally Third-Party Releases in Bankruptcy Plans*, *supra* note 17 (discussing the myriad ways that Bankruptcy Courts across the country have interpreted "consent," in the absence of a specific statutory requirement).

[65] *Id.*

[66] *Bankruptcy: Post-Purdue Pharma Third-Party Release Ruling Tracker*, *in* PRACTICAL LAW BANKRUPTCY AND RESTRUCTURING, Westlaw (2025), https://www.westlaw.com/w-045-

of a plan which provides for a third-party release indicates consent to the release,[67] while others have held that for a release to be consensual, merely voting in favor of a plan is not enough.[68] This Note will discuss the different approaches to consent at length in Part II.B. Nominally, the *Harrington* opinion on non-consensual releases was not intended to affect the terms of permissible consensual releases. In fact, the Court specifically stated that "[n]othing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan[.]"[69] That said, the *Harrington* decision is, in practice, impacting analyses of valid creditor consent and as a result is calling into question what constitutes a "consensual" third-party release.

B. *Consent Via Opt-In versus Opt-Out Mechanisms*

No circuit court has categorically banned consensual third-party releases, but U.S. Courts of Appeals are divided on when to allow them.[70] As this Note will highlight, even in circuits where consensual third-party releases are used regularly, the process by which valid consent is achieved is a subject of vigorous debate.

There are two primary consent mechanisms, the first of which is "opt-in." In an opt-in scenario, creditors affirmatively choose to be bound by the release.[71] In essence, they are agreeing that they will not sue the third-party now or at any time in the future

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9285?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0&documentSection=co_anchor_a869883 [https://perma.cc/QA24-FV4H].

[67] *See, e.g.*, *In re* Coram Healthcare Corp., 315 B.R. 321, 336 (Bankr. D. Del. 2004) (holding that to the extent creditors or shareholders voted in favor of the Trustee's Plan, which provides for the release of claims, they are bound by that vote); *In re Zenith Elecs. Corp.*, 241 B.R. at 111 (holding the same).

[68] *See In re* Arrowmill Dev. Corp., 211 B.R. 497, 507 (Bankr. D.N.J. 1997) (a creditor must have "unambiguously manifested assent to the release of the nondebtor from liability on its debt"); *see also In re* PG&E Corp., 617 B.R. 671, 683–84 (Bankr. N.D. Cal. 2020) (affirmative opt-out is allowed, "deemed" consent via voting in favor of the plan or not voting at all is not allowed).

[69] Harrington v. Purdue Pharma L.P., 603 U.S. 204, 226 (2024).

[70] *Bankruptcy: Post-Purdue Pharma Third-Party Release Ruling Tracker*, *supra* note 66.

[71] Andrew J. Gallo & David K. Shim, *The Evolving Landscape of Third-Party Releases Post-Purdue,* MORGAN LEWIS (Oct. 21, 2024), https://www.morganlewis.com/pubs/2024/10/the-evolving-landscape-of-third-party-releases-post-purdue [https://perma.cc/JY5W-3KWQ].

for the relevant claims. Opt-in procedures are relatively uncontroversial because a judge is not "guessing" what a creditor wants. An opt-in third-party release is conducted as follows: the question of whether to accept or reject the third-party release is posed to each creditor, via materials which provide enough information such that the creditor can make an informed decision.[72] The creditor then responds, marking an affirmative agreement to the release provision of the plan.

The second mechanism for ascertaining consent is "opt-out." This flips opt-in on its head: rather than assuming creditors don't want to be bound, an opt-out release assumes that a creditor wants to forfeit their claims against the third-party unless and until they indicate otherwise. An opt-out approach treats the third-party release like a standard plan provision—creditors are assumed to approve the plan unless they vote "no." Situations of complete inaction by the creditor are particularly controversial. For example, where a creditor receives a ballot soliciting their vote on the Plan, and the creditor does not vote on the plan *or* check the opt-out box related specifically to the third-party release provision. Opt-out, generally interchangeable with "deemed" consent, leaves more room for judicial discretion in determining whether consent has been satisfied.[73] The result is a largely non-uniform landscape where judges are often making fact specific determinations as to what constitutes a permissible release.[74]

Prior to *Harrington*, a majority of Circuits approved consensual third-party releases using an opt-out mechanism, with slight variation between individual judges regarding "specific preferences" about "the form of the relevant notice and precise opt-out mechanism."[75] Generally, these variations were the result of judges considering the permissibility of a particular release using case-specific factors and "application of the circuit standards for release usage and approval."[76] Post-*Harrington*, though, the ultimate fate of opt-out releases remains to be determined. The sections

[72] "Materials" are generally in the form of a disclosure statement paired with a voting ballot. Disclosure statements are explained *supra* Part I.A.

[73] Coco, *supra* note 28, at 233.

[74] *Id.*

[75] *Third-Party Releases in Bankruptcy Plans*, *supra* note 17.

[76] Coco, *supra* note 28, at 241.

below consider this question in light of opt-out's foundational legal principles and legal precedent.

C. *Foundational Legal Principles: Due Process and Notice*

Foundational to both pre- and post-*Harrington* opt-out releases is a due process concern, relating to protection of creditors' rights in being asked to abandon their claims against the third party. The challenge for bankruptcy courts is balancing the due process rights of individual creditors against the collective interests of all stakeholders in achieving a successful reorganization. As Judge Wiles of S.D.N.Y. points out, when a bankruptcy court imposes an involuntary release, it does not "provide claimants with other procedural and substantive rights that they ordinarily would have."[77] As the U.S. Constitution instructs, a due process violation is a deprivation of a person's life, liberty, or property without the opportunity to be heard.[78] With consensual releases, and particularly with opt-out mechanisms, bankruptcy judges must be conscious of preserving the creditors' rights. To mitigate due drocess concerns and satisfy the "meaningful opportunity to be heard" standard, it is important that creditors are fully informed about the scope and implications of the releases before the releases are enforced. Accordingly, courts generally support implementing robust opt-in or opt-out procedures that provide creditors with the tools to make an informed decision.

In this vein, notice remains a central element in satisfying consent, although bankruptcy courts vary slightly in their view as to what satisfies the procedural notice requirements. In general, bankruptcy courts rely on three separate provisions of the Code. FRBP 3016(c) requires specific and conspicuous language in a disclosure statement to identify all entities subject to an injunction.[79] The Advisory Committee explains that the purpose of the rule is to give "adequate notice" of a plan injunction that is not "substantially the same" as an injunction provided under the Code, which courts

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[77] *In re* Aegean Marine Petroleum Network, Inc., 599 B.R. 717, 725 (Bankr. S.D.N.Y. 2019); *See also In re* Digital Impact, Inc., 223 B.R. 1, 13 n.6 (Bankr. N.D. Okla. 1998) (noting that a third-party release has "the effect of a judgment—a judgment against the claimant and in favor of the non-debtor, accomplished without due process").

[78] U.S. CONST. amend. V; U.S. CONST. amend. XIV.

[79] FED. R. BANKR. P. 3016(c).

have interpreted to include third-party releases.[80] FRBP 2002(c)(3) requires the plan to include a statement with conspicuous language if a plan proposes an injunction, as well as a description of that injunction and those subject to said injunction.[81] FRBP 3020(c)(1) requires the plan confirmation order to describe in reasonable detail the acts enjoined, specify the terms, and identify the entities subject to the injunction.[82] To fulfill the notice standard set out by these provisions, courts analyze the language of the disclosure statement, as well as of the Plan itself.[83]

The standard for notice, like consent, varies between bankruptcy courts, in part because courts have, in past cases, looked beyond strict procedural compliance to ensure fundamental fairness is achieved. For example, the Third Circuit has decided that a third-party release buried in the boilerplate disclosures of a plan, where "[n]o use was made of underlined, italicized or boldfaced text to emphasize the Release or to distinguish it from the more typical releases between the parties to the settlement" violates Rule 3016(c).[84] In contrast, the Eleventh Circuit recently held that lack of notice as required by Rule 2002(c)(3) did not invalidate a third-party release nor violate due process rights where the debtor received copies of the disclosure statement and the release, constituting actual notice.[85] Interestingly, the Supreme Court also seems to consider a creditor's constitutional due process rights satisfied by "*actual* notice of the filing and contents of [the debtor's plan.]"[86]

The relationship between notice requirements from the Code and constitutional due process is complex and interrelated. It

[80] *See* FED. R. BANKR. P. 3016 advisory committee's note to 2001 amendment; *In re* Am. Media, Inc., 2010 WL 5483463, at *6 (Bankr. S.D.N.Y. Dec. 20, 2010).

[81] FED. R. BANKR. P. 2002(c)(3).

[82] FED. R. BANKR. P. 3020(c)(1).

[83] A disclosure statement in bankruptcy court is a document that provides detailed information about a debtor's financial situation, including assets, liabilities, and business affairs, to allow creditors to make an informed decision about the proposed reorganization plan, particularly in a Chapter 11 bankruptcy case. *See Bankruptcy Basics*, *supra* note 22. Statements must be approved by the court before creditors can vote on the plan, and in a third-party release, include explanations about the scope and implications of the release. *Id.*

[84] *In re* Lower Bucks Hosp., 571 F. App'x 139, 143 (3d Cir. 2014).

[85] *Third-Party Releases in Bankruptcy Plans*, *supra* note 17.

[86] United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 272 (2010).

is not necessary, here, to fully discuss the ways in which the Code provides both a statutory foundation and minimum standard for constitutional due process. For our purposes, the FRBP notice requirements serve as a practical implementation of constitutional due process principles in the bankruptcy context. *Harrington* calls into question opt-out releases, putting greater pressure on courts to define consent. In a world where judicial discretion is limited, notice is a concrete and central element to due process which courts may focus on in their consent analyses. Accordingly, this Note argues that notice as demanded by the due process standard is a useful starting point for determining consent: a necessary but not sufficient condition for a consensual third-party release.

D. *Pre-Harrington Consent*

There are two primary legal theories informing permissible consent (i.e. consent which satisfies due process standards) in third-party releases. The first legal theory is that consensual releases are permissible as a matter of contract law, where a plan containing the release is a contract that binds those who vote in favor.[87] In this view, the plan can be understood as a unilateral contract, wherein a court may find that consent is express or manifested by a creditor's conduct.[88] Creditors receive property under the plan as consideration—something of value to which a party is not already entitled—for their consent to the release provision.[89] A court applying strict contract theory would generally hold that "a finding of consent require[s] an affirmative indication that the creditor consented to the release," for example, checking a box on a ballot indicating an intent to "opt-in."[90] Somewhat in conflict with contract theory, consent can also be viewed via the adversarial system model, termed that because it assumes that parties are responsible for raising their own objections, without judicial intervention.[91] Here:

[87] *In re* Arsenal Intermediate Holdings, LLC, No. 23-10097 (CTG), 2023 WL 2655592, at *4 (Bankr. D. Del. Mar. 27, 2023) (citing *In re* SunEdison, 576 B.R. 453 (Bankr. S.D.N.Y. 2017) as an example of this theory in practice).

[88] *Id.*

[89] *Third-Party Releases in Bankruptcy Plans*, *supra* note 17.

[90] *In re* Smallhold, Inc., 665 B.R. 704, 708 (Bankr. D. Del. 2024).

[91] *See In re Arsenal Intermediate Holdings*, 2023 WL 2655592, at *5–8.

> so long as the creditor was clearly and conspicuously informed that the failure to "opt out" would operate a release of third-party claims, such a release would be effective against any creditor that did not check a box to "opt out" of the third-party release.[92]

In satisfying due process, the adversarial model gives more weight to meeting the standard for sufficient notice, reasoning that a creditor is inattentive at their own risk.

Contract law has always been a central tenet of consent analysis; however, pre-*Harrington* it was rarely applied in its strictest form. Courts, as a matter of judgment rather than law, were previously allowed to balance the requirements of the Code (which generally are seen as framing the restructuring plan as if it were a more typical contract) with the competing expectation that an adversarial system required parties to raise their own objections.[93] Specifically in courts which permitted nonconsensual third-party releases (and thus found authority in the sweeping provisions of 105(a) and 1123(b)(6)), satisfying the high bar for affirmative consent under contract theory was not considered necessary for approving an opt-out third-party release.

In practice, this generally meant that the permissibility of the release depended on the facts and circumstances of the case, specifically whether the court determined creditors were deserving of greater protection due to a comparatively serious loss of rights with the release.[94] For example, a commission of the American Bankruptcy Institute (ABI) recommended that all bankruptcy courts apply certain factors when deciding whether to implement a non-consensual third-party release.[95] They included "[whether] the non-debtor has contributed substantial assets to the reorganization . . . [whether] the injunction is essential to reorganization . . . [and whether] a substantial majority of the creditors agree to such

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[92] *In re Smallhold*, 665 B.R. at 708.

[93] *See In re Arsenal Intermediate Holdings*, 2023 WL 2655592, at *8.

[94] *Id.*

[95] AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: 2012 - 2014 FINAL REPORT AND RECOMMENDATIONS 256 (2014), http://commission.abi.org/full-report [https://perma.cc/97VD-V9R7].

injunction . . . ."[96] While non-consensual releases are, admittedly, different in important ways, these factors still serve to capture the *type* of concerns that bankruptcy courts formerly considered in deciding whether a release was permissible. In a world where judges did not need to justify their authority to release third-party claims, there was far less discussion of due process and notice standards. Instead, it is interesting to note the largely qualitative thrust of the consideration, where judges are given broad discretion to evaluate whether the circumstances of the release are in service of a successful reorganization and fair treatment of bankruptcy participants.

E. *Post-Harrington Consent*

More recent rulings indicate that the discretionary adversarial model, or the sliding-scale approach, which includes "pure opt-out" releases may no longer be tenable under *Harrington*. Instead, there has been a turn, by some judges, towards satisfying due process via the "contract model," where bright-line rules about affirmative consent guide courts. This section focuses on a recent case from Delaware, captioned *In re Smallhold*, for its particularly salient application of the contract model post-*Harrington*.[97]

Smallhold, the debtor, was a mushroom farming company which had filed for Chapter 11 bankruptcy.[98] One of the key plan provisions was a modified opt-out mechanism, stipulating that "impaired creditors who received a ballot and voted on the plan would be bound by the releases unless they affirmatively opted out by checking a box, regardless of their vote in favor or for against the plan."[99] The plan also proceeded under the assumption that unimpaired creditors were deemed to accept the plan—and automatically bound by the release—even though they did not receive ballots.[100] The U.S. Trustee objected to the release

[96] *See*, *e.g.*, *In re* Master Mortg. Inv. Fund Inc., 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994) (applying several of the factors enumerated by the ABI).

[97] *In re Smallhold*, 665 B.R. at 710.

[98] *Id.* at 711.

[99] Gallo & Shim, *supra* note 71. Impaired creditors are those whose legal, equitable, or contractual rights are altered by a Chapter 11 reorganization plan. A creditor is considered impaired if they will not be repaid in full under the proposed plan. *See Bankruptcy Basics*, *supra* note 22.

[100] Gallo & Shim, *supra* note 71.

mechanism for both unimpaired and impaired classes of creditors.[101]

Hon. Judge Craig T. Goldblatt agreed with the U.S. Trustee that, post-*Harrington*, affirmative consent is required to bind a creditor to a release.[102] He subsequently found consent to be satisfied for the impaired creditors but not the unimpaired.[103] The consent framework that Judge Goldblatt applied in *Smallhold* mirrors that of contract law, wherein the "sliding scale" approach is dismissed in favor of a strict requirement of affirmative consent to contractually bind the parties.[104] Judge Goldblatt argues that the third-party release is not an ordinary plan provision; he frames the decision as a stand-alone contract between the debtor and each of the creditors.[105] Previously, as in *In re Arsenal*, the possibility of the non-consensual release was sufficient to impose a duty on the creditor to speak up and object to the third-party release.[106] Without the threat of a non-consensual third-party release to impose such a duty on the creditor, there is now no legal reasoning for treating silence as default acceptance.[107]

Judge Goldblatt's application of this legal standard to the facts of the case in *Smallhold* provides a useful illustration of how contract theory works in practice. Regarding the unimpaired claims, those parties were informed that the plan would operate to release their claims against third parties but were "not solicited to vote on the plan and were never given an opportunity to opt out."[108] Judge Goldblatt analogizes the relations between each unimpaired creditor and the debtor to be that of a typical offeror and offeree, and points to the Restatement of Contracts for the proposition that "[o]rdinarily an offeror does not have power to cause the silence of

[101] *Id.*

[102] *In re Smallhold*, 665 B.R. at 717–18.

[103] *Id.* at 717, 723 (holding the unimpaired creditors whose claims would be paid in full and thus were not given the opportunity to vote could not be said to have validly consented to the releases; but impaired creditors that voted on the plan could be deemed to have consented to the release).

[104] *Id.* at 723.

[105] *Id.* at 709.

[106] *Id.* at 718.

[107] *See id.* at 720.

[108] *See id.* at 723.

the offeree to operate as acceptance."[109] By the same logic, silence "in the face of language in the plan telling them that they would be giving the third-party release is insufficient to bind [unimpaired creditors] to it."[110] Conversely, impaired creditors *were* solicited to vote, after "receiving clear instruction that such a vote would operate to grant a release unless they opted out."[111] Thus, regardless of how impaired creditors voted on the plan, Judge Goldblatt distinguishes their circumstances, writing that "the vote is an affirmative step, and coupled with conspicuous notice of the opt-out mechanism, suffices as consent" to the release under "general contract principles."[112]

In recent months, bankruptcy judges have continued to hand down decisions that demonstrate to what extent *Harrington*—and subsequently what we'll call the "*Smallhold* application" of *Harrington* principles—are shaping the third-party release and consent landscape. So far, Bankruptcy Courts in Delaware, Florida, Georgia, Iowa, New Jersey, New York, and Texas have grappled with *Harrington* in different ways, addressing questions of permissibility, notice, non-voting classes, and whether specific plan factors support approval of an opt-out mechanism.[113] So far, twenty-eight rulings on third-party releases have occurred since *Harrington*.[114] Of these, an overwhelming majority (nineteen) allowed for an opt-out mechanism for creditors voting on the third-party release.[115] From this preliminary data, it seems like the effects of *Harrington* are being seriously mitigated by judges exercising their discretion and largely ignoring the contract-theory confines Judge Goldblatt identified in *Smallhold*. Now, more than ever, we are left

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[109] *Id.* (citing Restatement (Second) of Contracts § 69, cmt. a (Am. L. Inst. 1981) ("Ordinarily an offeror does not have power to cause the silence of the offeree to operate as acceptance.")).

[110] *Id.* at 723. Interesting to note that typically, unimpaired creditors are not given the opportunity to vote on the plan because they are being paid in full. Characterizing the third-party release as not a typical plan provision does away with a disparate treatment of unimpaired versus impaired creditors in this context.

[111] *Id.*

[112] *Id.*

[113] *Bankruptcy: Post-Purdue Pharma Third-Party Release Ruling Tracker*, *supra* note 66.

[114] *Id.*

[115] *Id.* In nineteen cases, the judge allowed opt-out. In only four (including *Smallhold*) did the judge explicitly reject the opt out mechanism. *Id.*

with uncertainty about how to create permissible third-party releases that will be uniformly approved by the presiding judge.

F. *The Impact of the "Consent" Definition on Mass Torts*

Although it is clear that many judges continue to approve third-party releases via opt-out mechanism, the stakes of individual judges choosing to follow the *Smallhold* framework remain high. In a mass tort bankruptcy, the opt-in requirement may create a significant delay in resolution and the distribution of relief. Further, the limited judicial discretion imposed by the *Harrington* and *Smallhold* approach is in tension with the norms of Bankruptcy Court, wherein equitable considerations not provided for in the Code are often left to the presiding judge, absent a party's objection.

As applied to mass tort victims, limited judicial discretion is uniquely unfavorable. As noted in Part I, third-party releases are central to mass tort resolution. Where judges are not given latitude to navigate novel circumstances in mass tort cases, third-party releases become less available and bankruptcy objectives like "finality and closure" are jeopardized.[116] Justice Sonia Sotomayor hammered home this point during the *Harrington* oral argument when faced with the suggestion that opt-in consent should be required for potentially millions of personal injury claims, replying, "So, basically, you're [saying] that there really is no way to do this in bankruptcy right now, because I don't know how an opt-in process . . . would actually work."[117]

Further, a strict opt-in approach effectively discounts policy concerns. Thus, where a judge may previously have considered factors and context beyond the strict text of the Code (think back to the ABI-recommended factors listed above), *Harrington* stands for the assertion that policy does not carry nearly as much weight in this consideration.[118] Consider a tort victim in a consumer products liability case: an average American, often unfamiliar with the legal process and not individually represented. They have experienced considerable harm, but this does not necessarily translate into responsiveness or ability to comprehend the legal

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[116] *Id.*

[117] Transcript of Oral Argument at 16, Harrington v. Purdue Pharma LP, 603 U.S. 204 (2024) (No. 23-124).

[118] *See In re* Smallhold, Inc., 665 B.R. 704, 710 (Bankr. D. Del. 2024).

landscape they have been thrust into.[119] These claimants benefit uniquely from judicial flexibility in resolving their claims. Plans of reorganization are often "dense and difficult to comprehend" and the disclosure statements, "originally intended to inform lay creditors of their rights . . . have more recently become similarly complex."[120] For example, the disclosure statement in *Harrington* (included in the solicitation materials for voting) stood at nearly five hundred pages long.[121] Although it is possible that some claimants will navigate these documents and fully comprehend the terms of the agreement, it is also fair to assume that many individuals will neither understand nor attempt to insert themselves in this process.

Criticisms of "deemed" consent focus on due process; however, it is worth noting that assuming that an unresponsive claimant would be willing to accept the terms and conditions of a pending lawsuit occurs all the time in the class action and multi-district litigation context. Further, the notion that a tort claimant would be unable to fill a one-page form to timely opt-out but at the same time maintain a genuine interest in prosecuting a lawsuit against a third party is "illogical."[122] Judges should be able to afford claimants equitable and efficient compensation for their harm, while at the same time avoiding prolonged litigation that may

[119] S. ELIZABETH GIBSON, JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES 50, FED. JUD. CTR. (2005) (describing mass tort victims as frequently lacking "sophisticated business experience or a familiarity with the bankruptcy process . . ." and maintaining a "remoteness" from the bankruptcy proceedings).

[120] Jacob Deradoorian, *Read Option Playbook: The Value of Opt-Out Procedures in Third-Party Releases in Chapter 11 Bankruptcy*, VILL. L. REV. ONLINE (2024), https://www.villanovalawreview.com/post/2819-read-option-playbook-the-value-of-opt-out-procedures-in-third-party-releases-in-chapter-11-bankruptcy [https://perma.cc/Q29Y-HLGM] (citing Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, *In re* Purdue Pharma L.P., Bankr. S.D.N.Y., Case no. 19-23649 (June 3, 2021)).

[121] Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, In re Purdue Pharma L.P, Bankr. S.D.N.Y., Case no. 19-23649 (June 3, 2021).

[122] *See* Marshall S. Huebner & Kate Somers, *Opting Into Opting Out: Due Process and Opt Out Releases,* 43 AM. BANKR. INST. J., at 1 (Aug. 2024), https://www.davispolk.com/sites/default/files/2024-08/Litigator%27s%20Perspective%20August%202024.pdf [https://perma.cc/3GR6-LK6F].

ultimately pay less without the contributions incentivized via the third-party release.

Generally, inconsistency and inefficiency are bad for litigants, and mass tort litigants are no different. An inconsistent application of the Code results in different results depending on the filing location, contributing to incentives for debtors to forum shop, already commonplace in bankruptcy based on the jurisdictional rules. The potential hurdle for these cases in bankruptcy court places more stress on the other systems for resolving mass torts via claim aggregation (i.e. class actions, MDLs, individual settlements), which struggle with volume and with mechanisms for resolving future claims. By and large, *Harrington* complicates a landscape already riddled with variation. Particularly for mass tort creditors, the departure in consent doctrine initiated by *Harrington* will only further exacerbate the difficulties these victims face in securing compensation for their injury.

PART III

A. *Proposed Solution*

Even under an evolving consent doctrine, third-party releases remain central to mass tort resolution. One option is to maintain that even within a rigid contract law approach (i.e., *Smallhold*) narrower forms of opt-out plans are still allowed, so long as they maintain elements of affirmative consent.[123] However, adopting the affirmative consent standard applied via opt-in releases is neither the only nor the best approach. Judge Goldblatt's bright-line rule for consent is alluring for the ease of its application and its strong parallels to well-established contract theory; however, such a solution is inadequate as applied to the world of mass tort bankruptcies. Strict affirmative consent would make more difficult the efficient resolution of many consolidated claims, which, as noted in Part II, is uniquely detrimental for resolving mass torts. Judge Goldblatt makes a strong argument, but his theory is not authoritative. Until the Supreme Court weighs in, as occurred in *Harrington* with non-consensual third-party releases, bankruptcy judges in different circuits are free to permit or reject opt-out mechanisms as they see appropriate.

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[123] *In re Smallhold*, 665 B.R. at 711 (Bankr. D. Del. 2024).

B. *Applying Rule 23(b)(3) Principles*

Despite decisions like *Smallhold*, some bankruptcy judges still find consent where creditors take no affirmative action. Instead, judges assess independently whether the plan confirmation process in their case meets standards for due process and notice, based on general principles and as specifically articulated by the Code. In mass tort cases with many hundreds or thousands of victims, this assessment may resemble a process that looks and operates much like that of Federal Rule of Civil Procedure ("FRCP") 23, which governs class actions.

Courts and scholars generally agree that the Rule 23 requirements have some applicability when it comes to determining due process standards for third-party releases in mass tort bankruptcies.[124] It is worth noting that *Smallhold* itself pays passing mention to the idea, as the Court specifically leaves open "how it might decide a different case—one in which the plan process builds in the protections of the class action mechanism under Rule 23(b)(3), where an 'opt-out' mechanism is deemed appropriate."[125] Incorporating the due process concerns and solutions from class actions is valuable here because it provides a body of law for judges to look to where opt-in affirmative consent seems unrealistic or inequitable.[126] Although class actions and bankruptcy are far from identical, there are foundational similarities that make the two comparable. In the absence of a clear national standard—particularly where recently complicated by *Harrington*—a judge looking to preserve the availability of consensual third-party releases may benefit from relying on Rule 23 jurisprudence.

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[124] *See, e.g.*, Patterson v. Mahwah Bergen Retail Grp., Inc., 636 B.R. 641, 687 (E.D. Va. 2022) (holding "[t]hird-party releases in bankruptcy actions based only on a failure to opt out also raise serious due process concerns, because they lack the critical due process protections of Rule 23.").

[125] *In re Smallhold*, 665 B.R. at 717. Rule 23 was not raised by the parties and so did not warrant further discussion, although the Court seemed to indicate it may be receptive to such arguments in the future. *Id.*

[126] Rule 23(b)(3) due process standards have been developed beginning with Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (holding that when "a fully descriptive notice is sent [by] first-class mail to each class member, with an explanation of the right to 'opt out,' [that procedure] satisfies due process.").

Building out the Rule 23 analogy between a typical class action and a mass tort bankruptcy proceeding helps illustrate the principle. The argument in favor of applying 23(b)(3) class action principles to bankruptcies rests on three main points of comparison: who comprises the class, how the class is compensated, and how the class is notified. The body of claimants that comprise mass tort bankruptcies and a product liability class action can be similar in important ways. As noted in Part II, many of each group are average Americans, likely maintaining similarly low levels of legal expertise. The cases are generally similarly large in number and geographically dispersed, both often without formal contractual relationships between the perpetrator of the harm and the victims.[127] Rule 23(b)(3) is used most often in securing money damages, also similar to the relief available in bankruptcy cases. In class actions, the composition of the victims helps inform the type of notice that is required. Rule 23(c)(2)(B) states, as applied to (b)(3) classes, that "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[128] Rule 23 acknowledges the reality that providing notice to potential tort claimants is complex and costly. In contrast to an affirmative consent approach for individual creditors, a reasonableness standard allows for a reality where 100% projected outreach to mass tort creditors is unlikely and thus not required.

The crux of Rule 23(b)(3), though, is the logic that underlies the opt-out procedure. Potential class members may opt-out (exclude themselves from the action) so long as they receive some form of notice; otherwise, they are deemed to have consented to class membership and are bound by the proceedings accordingly. In fact, Rule 23(b)(3) is the only type of certification that provides for notice and the opportunity for putative class members to opt out of the class. As compared to other types of class actions, though, 23(b)(3) class actions stipulate additional requirements. Rule 23(b)(3) states, in relevant part:

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[127] *Noticing Mass Tort Claimants in Bankruptcy*, *in* PRACTICAL LAW BANKRUPTCY AND RESTRUCTURING (2025), Westlaw w-028-7055; Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325 (2022).

[128] FED. R. CIV. P. 23.

> A class action may be maintained if Rule 23(a) is satisfied and if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.[129]

Where plaintiffs are identically situated, silence from a plaintiff can be taken as consent, based on the logic that, if the settlement is good for those who choose to participate and everyone is in the same boat, it is probably good for those who don't respond to the opt-out notice.

It is here that bankruptcy proceedings present a potential hurdle, considering that there is no such commonality or predominance requirement. In fact, cases in bankruptcy court are potentially there as a "last resort" specifically because the lack of commonality has prevented global resolution via other means.[130] This is further complicated by the fact that bankruptcy proceedings can potentially bind a broader range of claimants, including future claimants. As a result, the argument goes, it cannot be assumed that victims have sufficient shared interests for opt-out procedure to satisfy due process concerns.

While these arguments are persuasive, the absence of a commonality requirement is far from dispositive. It is worth noting that the "commonality" requirement in class actions was designed to serve a specific purpose: remedying the complexity of the original Rule 23 approach.[131] In the most famous modern case interpreting the commonality requirement, the Supreme Court justified heightened commonality as necessary to ensure that the claims comprising the class "can productively be litigated at once."[132] Crucially, bankruptcy judges operate with wide discretion and can be trusted to evaluate the equitable considerations of an opt-out proceeding. As many scholars of bankruptcy know, judges regularly consider the relative burdens and benefits to respective parties and

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[129] *Id.*

[130] *In re* Smallhold, Inc., 665 B.R. 704, 725 (Bankr. D. Del. 2024).

[131] A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 449–50 (2013).

[132] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

work within the Code (both in letter and spirit) to enact fair resolution of claims. Condoning the Rule 23(b)(3) comparison is not a golden ticket for the approval of opt-out in all cases. Consent determinations can still be challenged and appealed as issues of law under the notice standards discussed above in Part II for bankruptcy proceedings, as well as due process under the Constitution, among other potential legal arguments.

C. *Continued Existence of Hybrid Approaches*

Whether or not one finds the Rule 23(b)(3) analysis compelling, the reality is that courts are, in practice, already leaning on the comparison to justify third-party release agreements implemented via opt-out mechanisms. Delaware Chief Bankruptcy Judge John Dorsey, for example, has maintained a view contrary to Judge Goldblatt in that he has continued to approve hybrid and pure opt-out releases even in the wake of *Harrington* and *Smallhold*. In *In re FTX Trading Ltd.*, Judge Dorsey approved a hybrid approach in which impaired creditors who voted on the plan had to check a box to opt out of the release.[133] In this scenario, regardless of how the creditor voted on the restructuring plan, they would be "deemed" to have granted the release if they "cast a vote and did not affirmatively opt out by checking the box" *or even* if they received a ballot and did nothing.[134] Unimpaired creditors, meanwhile, were deemed to have accepted the plan without voting, and subsequently were automatically treated as agreeing to the third-party release; however, for creditors that were *not* asked to vote (deemed to reject the plan), a pure opt-in mechanism was employed.[135] In another recent case, *In re Wheel Pros, Inc.*, Judge Dorsey approved an opt-out mechanism similar to the one in *FTX*.[136] In both *FTX* and *Wheel Pros*, Judge Dorsey likened the opt-

[133] Order Confirming the Second Amended Joint Chapter 11 Plan of Reorganization, *In re* FTX Trading Ltd., No. 22-11068 at 21 (Bankr. D. Del. Oct. 8, 2024).

[134] *Id.*

[135] *Id.; see also* Gallo & Shim, *supra* note 71 (discussing the decision).

[136] In *Wheel Pros*, parties voting to accept the plan were automatically deemed to have granted the third-party releases. Parties voting against the plan were given the option to opt out of the releases, but if they did not affirmatively do so, they would also be deemed to have granted the releases. *See* Gallo & Shim,

out mechanism to class action settlements, cementing the relevance of Rule 23 to his analysis.[137]

CONCLUSION

Faced with a changing legal landscape, courts today could reimagine the "consent" framework for opt-out third-party releases. Although tempting to punt the question to Congress, it is important that courts themselves act to preserve this tool for mass tort resolution. Congress *could* pass statutory reform defining consent, allowing opt-out releases, even allowing nonconsensual releases as an amendment to the Code, and potential legislation could even be limited to those bankruptcies with unknown or potentially extensive future liability. That said, this outcome appears increasingly unlikely, especially given the public sentiment towards the Sacklers. In fact, any relevant legislation attempts actually operate to make third-party releases *less* available.[138] Instead, a reliance on Rule 23(b)(3) logic for due process and notice of opt-out would allow bankruptcy courts to use their broad, discretionary equitable powers to resolve these cases in a way that not only satisfies the provisions of the Code, but also provides equitable and efficient relief to mass tort victims. Crucially, this approach would serve to honor the goals of the bankruptcy system, which are broadly resolving aggregated claims while providing finality and closure for related parties.

supra note 71. Unlike *FTX*, non-voting, rejecting creditors had no ability to opt in to the release. *Id.*

[137] Gallo & Shim, *supra* note 71.

[138] For example, in 2021, the U.S. House of Representatives and the Senate proposed the Stop Shielding Assets from Corporate Known Liability by Eliminating Non-Debtor Releases (SACKLER) Act, which essentially would have prohibited a court from enjoining or releasing a claim against a non-debtor (except as provided by the Code § 524(g)). *See* SACKLER Act, H.R. 2096, 117th Cong. (2021); SACKLER Act, S. 2472, 117th Cong. (2021).