Third-Party Releases Possibly Headed To Scotus Following Purdue Pharma Plan Confirmation

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Financial Restructuring and Bankruptcy Alert
6.6.23

The Second Circuit's decision on May 30, 2023, to reverse the Southern District of New York's (SDNY) decision and uphold the Bankruptcy Court approval of third-party releases in the Chapter 11 plan of Purdue Pharmaceuticals clears the path for the Supreme Court to definitively resolve this issue. Circuit Judge Richard Wesley — in a 14-page crisp and well-reasoned concurrence — invited the Supreme Court or Congress to step in and provide clarification, imploring:

> *Regardless of the right answer, the majority's answer pins this Circuit firmly on one side of a weighty issue that, for too long, has split the courts of appeals...a non-debtor's ability to be released through bankruptcy turns on where a debtor files.... Absent direction from Congress... or the High Court, the answer is a function of geography.*

See generally In re Purdue Pharma LP et al., Case Number 22-110 (2nd Cir. 2023).

Critically, the Second Circuit ruled that Section 524(e) of the Bankruptcy Code – which bars discharges of debts of non-debtors – is not a bar to third-party releases in toto, stating that Congressional intent was not limiting.

Three circuits – the Fifth, Ninth and Tenth – have cited Section 524(e) as barring non-consensual third-party releases. The Office of the United States Trustee often objects to such releases, as was the case in Purdue, along with numerous other lower courts. At least four circuits, including the Second, Fourth, Sixth and Seventh, have permitted such releases.

Having amassed its substantial fortune largely from the sale of opioids, the Sackler family contributed nearly $6 billion to Purdue Pharma's Chapter 11 plan for payments to creditors, including foreign countries, numerous states, and local governments that have been forced to expend enormous sums battling the opioid epidemic.

As stated in the majority opinion of Circuit Judge Eunice C. Lee:

> "Bankruptcy is inherently a creature of competing interests, compromises, and less-than-perfect outcomes. Because of these defining characteristics, total satisfaction of all that is owed – whether in money or in justice – rarely occurs. When a bankruptcy is the result of mass tort litigation against the debtor, the complexities are magnified because the debts are wide-ranging, and the harm goes beyond the financial. That is the circumstance here."

In a non-tort Chapter 11 case, plan confirmation is often celebrated with speeches, glad-handing, and closing dinners. This is not so in the mass-tort cases, where many of the "creditors" are victims of gross malfeasance or physical abuse. For example, at the conclusion of the confirmation of the USA Gymnastics Chapter 11 plan in Indianapolis in December of 2021, the courtroom mood was somber and stoic. There was no celebration, despite the fact that years of effort and forests of paper had gone into the result. Likewise, in Purdue Pharma, given the devastating societal impact of the opioid epidemic, to paraphrase Circuit Judge Lee, the "less-than-perfect" outcome was not cause for joy despite the realization that some justice had been achieved.

No doubt there will be numerous petitions to the Supreme Court on the Purdue Pharma case. The final chapter has yet to be written.

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