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Purdue Pharma and the Latest on Third-Party Releases

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PURDUE PHARMA AND THE LATEST ON THIRD-PARTY RELEASES

BACKGROUND

- Purdue filed for bankruptcy in 2019 after thousands of lawsuits were filed against it for injuries and deaths stemming from their product OxyContin, which fueled the opioid crisis.
- Chapter 11 plan was confirmed in 2021. The Sackler family, who owned and controlled Purdue, agreed to contribute $4.325 billion in exchange for non-consensual releases from all opioid liability.
- Certain states and the U.S. Trustee's office appealed. The district court held that nothing in the law authorizes bankruptcy courts to extinguish claims against third parties, like the Sacklers, without the claimants' consent.
- The Sacklers increased their contribution to $5.5-6 billion and the states dropped their objection to the plan.
- Purdue appealed to the Second Circuit. A divided panel reversed the district court and revived the bankruptcy court's order approving the now-modified plan.
- The U.S. Trustee's office appealed to the United States Supreme Court. The Court granted certiorari due to a circuit split regarding the issue of whether bankruptcy courts can grant third-party releases without the consent of claimants.

2

HOLDING

- Outside of § 524(g), the Bankruptcy Code does not authorize nonconsensual, third-party releases.
  - The only possible authorization for a nonconsensual, third-party release is § 1123(b)(6) allowing "any other appropriate provision not inconsistent with the applicable provisions of this title."
  - "Catchall" encompasses only provisions similar to the preceding list.
  - Nothing in § 1123(b) suggests authority to adjust or release claims against a non-debtor without consent of claimant.
  - Giving a non-debtor a release even broader than a bankruptcy discharge conflicts with the fundamental bargain of bankruptcy law: a debtor receives a discharge in exchange for filing a case, proceeding honestly, and placing assets on the table for creditors.

OPEN ISSUES

- "Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor."
  - Do opt-out provisions satisfy Purdue's consensual release requirement?
  - What constitutes a plan that provides for "full satisfaction" of claims against a third-party nondebtor?

OPT-IN VS. OPT-OUT

- Does an opt-out provision evidence a creditor's consent to third-party releases?

OPT-OUT APPROVED – NO IMPACT OF PURDUE

- "Purdue did not change the law in this Circuit . . . . And what constitutes consent, including opt-out features and deemed consent for not opting out, has long been settled in this District." In re Robertshaw US Holding Corp., et al., Case No. 24- 90052 (Bankr. S.D. Tex.)

- "In my view, the Supreme Court was not saying that third-party consensual releases through an opt out process are per se improper. I think opt out releases remain a valid way for a debtor to be able to obtain releases through the plan process and do so on a consensual basis because the parties are given the opportunity to opt out; if they don't opt out or if they don't return a ballot at all, then they're presumed to have opted out." In re FTX Trading Ltd., Case No. 22-11068 (Bankr. D. Del.)

    - Eiger BioPharmaceuticals, Inc., et al., Case No. 24- 80040 (Bankr. N.D. Tex.)
    - GigaMonster Networks, LLC, Case No. 23-10051 (Bankr. D. Del.)
    - Diamond Sports Group, LLC, et al., Case No. 24-90116 (Bankr. S.D. Tex.)
    - Fisker, Inc., et al., Case No. 24-111390 (Bankr. D. Del.)

OPT-OUT APPROVED – NOTICE, NOTICE, NOTICE!

- In re BowFlex Inc., et al., Case No. 24-12364 (Bankr. D. N.J.)
  - Overruled the UST's objection to the opt-out, finding that the releases were consensually provided after notice and an opportunity for a hearing.
  - The court noted that "in addition to the instructions on the ballot and nonvoting creditor notices, the committee sent a letter to creditors explaining the opt-out procedures and the consequences of the choice."
- In re Sam Ash Music Corporation, et al., Case No. 24-14727 (Bankr. D. N.J.)
  - "It may not be the affirmative substantive consent, but it couldn't be any clearer: They've opted out . . . Understanding goes both ways. This court can't decide who will understand, as long as there is notice."

OPT-OUT REJECTED – STATE LAW

- In re Tonawanda Coke Corp., 2024 Bankr. LEXIS 2032 (Bankr. W.D.N.Y. Aug. 27, 2024)
  - "In its decision in Harrington v. Purdue Pharma, the Supreme Court declined 'to express a view on what qualifies as a consensual release.' Nonetheless, the Court observed that 'nothing in the bankruptcy code contemplates (much less authorizes) it.' Hence, any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent. Not authorized by any provision of the Bankruptcy Code, any such consensual agreement would be governed instead by state law."

OPT-OUT REJECTED – STATE LAW

- In re Ebix, Inc., et al., Case No. 23-80004 (Bankr. N.D. Tex.)
  - "Consent is defined by state law governing contract formation."
  - Failing to return the release opt out form is insufficient to form a contract under Texas law.

OPT FOR "AFFIRMATIVE CONDUCT"

- In re Smallhold, Inc., 2024 Bankr. LEXIS 2332 (Bankr. D. Del. Sept. 25, 2024)
  - The plan provision that imposed the release on creditors who were paid in full or otherwise unimpaired under the plan (and did not receive a ballot) was unlawful and was not permitted.
  - However, creditors that voted on the plan and returned their ballot without affirmatively marking their ballot to opt-out of the release were still bound by the plan's third-party release.
  - "As to consent to the third-party release, the touchstone is whether the creditor engaged in affirmative conduct to indicate the creditor's consent. For the creditor who voted in favor of the plan, the act of casting the vote, in light of the clear instructions and the failure to check the available box to 'opt out,' was a sufficient action to say that the creditor had evidenced its consent."

FULL SATISFACTION OF CLAIMS

- The *Purdue* Court also recognized an additional potential exception to the prohibition on nonconsensual third-party releases—where the proposed plan provides for full payment of the claims being released. *See Purdue*, 144 S. Ct. at 2088 ("Nor do we have occasion today to … pass upon a plan that provides for the ***full satisfaction*** of claims against a third-party nondebtor.")
    - Potentially simple to prove in prepackaged and traditional bankruptcy proceedings.
    - May be more difficult in mass-tort cases.
    - Does unimpaired mean "full satisfaction"?

"FULL SATISFACTION" – PREPACKAGED PLAN

- Wheel Pros, LLC, et. al, Case No. 24-11939 (Bankr. Del. Oct. 2024)
    - The debtors filed a prepackaged plan to swap $1.4 billion in senior secured debt for controlling equity in the company. The U.S. Trustee objected to the release arguing that it was not consensual under *Purdue*. The U.S. Trustee argued that holders of claims or interests were not entitled to vote on the plan and parties who did not receive notice under the plan also did not consent to the third-party releases.
    - The court overruled the objection and approved the prepackaged plan "noting that the plan pays unsecured creditors in full and the secured creditors were 'overwhelmingly' in favor of the plan."

IN RE BOY SCOUTS OF AMERICA

- In the Boy Scouts chapter 11 case direct abuse claimants are paid in full pursuant to the chapter 11 plan proposed by the Boy Scouts. This finding was affirmed by the United States District Court for the District of Delaware. Pursuant to Judge Silverstein's findings, distributions from the trust constitute payment of full amount of recoverable damages. And because the survivors' legal right to compensation for their injuries is satisfied under the Boy Scouts' plan and trust distribution procedures, the survivors may not pursue any others for further recovery on "Direct Abuse Claims" (i.e., holders of direct sexual abuse claims against the Boy Scouts) by operation of law.
- The payment in full inquiry is heavily factual, complicated by the fact that tort claims are unliquidated, and generally requires expert testimony on claim valuation and forecasting, availability of insurance proceeds, and asset valuation.
- In finding that holders of abuse claims would be paid in full under the Boy Scouts' chapter 11 plan, the Court relied heavily on the analyses performed by the debtor's expert on claim valuation, mass tort matrixes, and trust distribution structures.
- Similarly, the Boy Scouts' insurance expert provided testimony on available insurance coverage.
- Considering all the evidence presented, the bankruptcy court found it "more likely than not" that Direct Abuse Claims would be paid in full.

"FULL SATISFACTION" AND RELEASE (CHANNELING) OF FUTURE CLAIMS?

- As Judge Silverstein herself explained in Boy Scouts, the requirements of § 524(g), such as the appointment of an FCR, the supermajority vote, and the "fair and equitable" requirement, "appear to serve as a proxy for how future claimants would vote on a plan if they could." *Boy Scouts*, 642 B.R. at 629.

UNIMPAIRED VS. FULLY SATISFIED

- Section 1124 provides that a class of creditors is impaired under a plan unless the plan: (i) "leaves unaltered the legal, equitable, and contractual rights" to which each creditor in the class is entitled; or (ii) cures any defaults (with limited exceptions), reinstates the maturity and other terms of the obligation, and compensates each creditor in the class for resulting losses.

- "The word 'satisfaction'— when used in the context of 'satisfaction of [an] interest'—connotes giving something of value in exchange for terminating an outstanding obligation. Black's Law Dictionary defines satisfaction as the 'giving of something with the intention, express or implied, that it is to extinguish existing legal or moral obligation.'"

  - In re Hamilton Rd. Realty LLC, (Bankr. E.D.N.Y. Apr. 26, 2021)

OTHER DEVELOPING AREAS

- *Purdue* distinguished release of claims belonging to the estate, including derivative claims.

  - What constitutes claims belonging to the estate that can be extinguished by a release? *See, e.g., In re Wilton Armetale, Inc.*, 968 F.3d 273 (3d Cir. 2020); *In re Tronox Inc.*, 855 F.3d 84 (2d Cir. 2017); *In re Whittaker, Clark, & Daniels*, No. 23-13575 (MBK), 2024 WL 3811311 (Bankr. D.N.J. Aug. 13, 2024)

Faculty

Joseph M. Mulvihill is an associate with Young Conaway Stargatt & Taylor LLP in Wilmington, Del., and has represented diverse clients through the chapter 11 process, including some of the most well-known retailers and high-profile companies to recently undertake restructuring initiatives. He has represented debtors, lenders, purchasers and official committees of unsecured creditors as both lead and co-counsel. Mr. Mulvihill previously clerked for the Delaware Bankruptcy Judges Brendan L. Shannon, Kevin Gross, Laurie S. Silverstein and Peter J. Walsh (ret.); was a judicial extern for the Delaware Supreme Court for Chief Justice Myron T. Steele (ret.) and Justice Henry DuPont Ridgely (ret.); and served as a federal judicial intern for Delaware Bankruptcy Judge Mary F. Walrath. He is a member of the Delaware, New York and Pennsylvania state bars. Mr. Mulvihill is a member of the Turnaround Management Association and has been listed in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights Law since 2020, and he was named a 2023 *Delaware Super Lawyers* "Rising Star." He received his B.A. in 2011 from Muhlenberg College and his J.D. *magna cum laude* from Widener University Delaware Law School, where he was an articles editor for the *Delaware Journal of Corporate Law* and a member of the Transactional Law Honor Society.

Hon. Laurie Selber Silverstein is a U.S. Bankruptcy Judge for the District of Delaware in Wilmington, initially sworn in on Jan. 7, 2015. She served a term as Chief Judge. Judge Silverstein is a member of the American Bar Association's Business Law and Litigation Sections and a Fellow of the American College of Bankruptcy and the American Bar Foundation. She serves on the board of directors of the Delaware Bar Foundation and the Historical Society of the United States Court of Appeals for the Third Circuit. She also is a member of the Legislative Committee of the National Conference of Bankruptcy Judges. Prior to joining the bench, Judge Silverstein was a partner at Potter Anderson & Corroon LLP in Wilmington, Del., where she led the firm's bankruptcy and corporate restructuring practice group. She received her B.S. *cum laude* in economics in 1982 from the University of Delaware and her J.D. with honors from George Washington University's National Law Center in 1985.

Andrew R. Vara is the U.S. Trustee for Regions 3 and 9 in Cleveland, which encompass 10 field offices in Delaware, New Jersey, Pennsylvania, Ohio and Michigan. He has worked for the U.S. Department of Justice for 30 years, serving as a trial attorney, Assistant U.S. Trustee in Cleveland and Wilmington, Del., and the acting assistant U.S. Trustee in both the Southern District of New York and Western District of Michigan. Following law school, Mr. Vara clerked for Hon. Laurence Howard, Chief Judge for the U.S. Bankruptcy Court in Grand Rapids, Mich. He also is a regular faculty member and lecturer at training seminars held at the National Advocacy Center in Columbia, S.C. Mr. Vara has been a panelist at numerous ABI conferences, including its Annual Spring Meeting, Winter Leadership Conference, Mid-Atlantic Bankruptcy Workshop and Central States Bankruptcy Workshop. He was a member of the ABI's Ethics Task Force and chaired ABI's Ethics and Professional Compensation Committee. Mr. Vara served as a presenter on U.S. and international insolvency law at forums sponsored by the Commercial Law Development Program in Bahrain and the Kingdom of Saudi Arabia. He received his B.A. *magna cum laude* in political science from Duke University and his J.D. with honors from The Ohio State University in May 1991, where he was awarded membership in the Order of the Coif.

Hon. Mary F. Walrath is a U.S. Bankruptcy Judge for the District of Delaware in Wilmington, appointed in 1998. She served as Chief Bankruptcy Judge from 2003-08. Judge Walrath previously clerked for Hon. Emil F. Goldhaber, Chief Bankruptcy Judge for the Eastern District of Pennsylvania, and was an attorney at Clark Ladner Fortenbaugh & Young in Philadelphia, concentrating in the areas of debtor/creditor rights and commercial litigation. In addition to speaking at numerous bankruptcy educational programs and panels throughout the country, Judge Walrath is a founding member and former co-president of the Delaware Bankruptcy American Inn of Court, a member of the Delaware Chapter of the International Women's Insolvency & Restructuring Confederation (IWIRC), a member of ABI and a Fellow in the American College of Bankruptcy. She is also an editor of the *Rutter Group Bankruptcy Practice Guide*. Judge Walrath is active in the National Conference of Bankruptcy Judges (NCBJ), having served on its Board of Governors from 2007-12, as secretary from 2013-14, as chair of its Education Committee from 2014-15 and as president from 2016-17. Judge Walrath served as an associate editor and then business manager of the *American Bankruptcy Law Journal* from 2009-15. She also testified before the House Judiciary Committee on H.R. 1667, the Financial Institution Bankruptcy Act of 2017. Judge Walrath received her A.B. in history from Princeton University and earned her J.D. *cum laude* from Villanova University, where she was a member of the *Villanova Law Review* and was awarded the Order of the Coif.