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COMMENTARY

WHEN BANKRUPTCY HAS BENEFITS

WILLIAM ANDERSON*

Purdue Pharma filed for Chapter 11 bankruptcy on September 15 as part of a settlement deal to end several lawsuits alleging the company's responsibility for the opioid crisis.¹

In December of 1995, the FDA approved Purdue Pharma's narcotic pain reliever OxyContin, and by 2001, OxyContin was the best-selling narcotic in the United States.² In 2017, the city of Everett, Washington sued Purdue, alleging that Purdue misled the public regarding OxyContin's risk for addiction and did not intervene for years despite knowing of the overuse of their product. The city of Everett claimed damages incurred by the opioid epidemic and alleged that Purdue's actions were directly related to the onset of the opioid crisis.³ By January 2019, 36 states and some 2,000 other municipalities and individuals joined the lawsuit, some alleging that the Sackler family (the current owners of Purdue) is personally responsible for the deception.⁴

* J.D. Candidate, 2021, Arizona State University Sandra Day O'Connor College of Law.

¹ Andrew Joseph, *Purdue Pharma Filed for Bankruptcy. What Does it Mean for Lawsuits Against the Opioid Manufacturer?*, STAT (Sept. 16, 2019), <https://www.statnews.com/2019/09/16/if-purdue-pharma-declares-bankruptcy-what-would-it-mean-for-lawsuits-against-the-opioid-manufacturer/>.

² Bethany Winkel, *The History of OxyContin*, Treatment Solutions (Jan. 9, 2010), <https://www.treatmentsolutions.com/blog/the-history-of-oxycontin/>.

³ Harriet Ryan, *City Devastated by OxyContin Use Sues Purdue Pharma, Claims Drugmaker Put Profits Over Citizens' Welfare*, Los Angeles Times (Jan. 19, 2017), <https://www.latimes.com/local/lanow/la-me-oxycontin-lawsuit-20170118-story.html>.

⁴ CBS News, *Family Behind OxyContin Maker Engineered Opioid Crises, Massachusetts AG Says*, CBS This Morning (Jan. 24, 2019), <https://www.cbsnews.com/news/purdue-pharma-lawsuit-massachusetts-attorney-general-blames-sackler-family-for-creating-opioid-crisis-oxycontin/>.

Why bankruptcy?

Typically, when companies facing civil litigation file for bankruptcy, all their civil cases are frozen and remanded to bankruptcy courts.⁵ The bankruptcy courts then ensure that each plaintiff receives a just proportion of the company's wealth. Filing companies can choose between filing Chapter 7 bankruptcy or Chapter 11 bankruptcy. Under Chapter 7, a company liquidates all their assets and goes out of business. Because the assets are usually greater than the debts, bankruptcy courts divide the assets as follows: banks are paid first, other creditors second, and, if anything is leftover, shareholders divide the rest.⁶

Purdue has filed under Chapter 11, which works a bit differently. The purpose of Chapter 11 is to reorganize the indebted company in such a way as to be profitable once again. The bankruptcy court appoints a committee to represent creditors and stockholders who then meets with representatives of the filing company and negotiates a plan for settling the company's debts.⁷ In Purdue's case, this committee would represent the plaintiffs from the lawsuit as they are Purdue's main creditors.

Declaring bankruptcy is a common strategy for companies facing extensive class action liability and is beneficial to Purdue for several reasons. First, all litigation is frozen, and settlements are negotiated with the bankruptcy court's committee. Second, during these negotiations, Purdue's day to day management will continue as usual, with the caveat that significant decisions must all be approved by the bankruptcy court. Finally, when the negotiations finish, most Purdue executives and employees will maintain their jobs and Purdue will theoretically continue as a profitable reorganized business.

How is filing bankruptcy part of a settlement plan?

Purdue has not only filed bankruptcy but has already offered a settlement to the bankruptcy committee.⁸ The Sacklers are to give up ownership of Purdue and pay \$3 billion to the plaintiffs over seven years. The Sacklers will also sell their Britain-based drug company, with the profits from that sale adding to plaintiff payouts. Purdue will then be restructured as a public benefit trust, with all future OxyContin profits donated to research for addiction and overdose treatments.⁹ Purdue believes the net worth of this proposed settlement to be between \$10 to \$12 billion.¹⁰

This type of settlement is not unprecedented.

In 1982, the asbestos manufacturer Johns Manville declared bankruptcy and restructured as a public benefit trust to settle thousands of mesothelioma suits.¹¹ In 1995, Dow Corning did the

⁵ Andrew Joseph, *Purdue Pharma Filed for Bankruptcy. What Does it Mean for Lawsuits Against the Opioid Manufacturer?*, STAT (Sept. 16, 2019), <https://www.statnews.com/2019/09/16/if-purdue-pharma-declares-bankruptcy-what-would-it-mean-for-lawsuits-against-the-opioid-manufacturer/>.

⁶ U.S. Securities and Exchange Commission, *Bankruptcy: What happens when Public Companies Go Bankrupt*, Investor Publications (Jan. 19, 2016), <https://www.sec.gov/reportspubs/investor-publications/investorpubsbankrupthtm.html>.

⁷ U.S. Securities and Exchange Commission, *Bankruptcy: What happens when Public Companies Go Bankrupt*, Investor Publications (Jan. 19, 2016), <https://www.sec.gov/reportspubs/investor-publications/investorpubsbankrupthtm.html>.

⁸ Jan Hoffman, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, The New York Times (Sept. 15, 2019), <https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

same to settle lawsuits relating to breast implants it manufactured.¹² Purdue's decision to file for bankruptcy in the face of serious civil lawsuits is not unheard of and not a strategy to escape liability.

Is this desirable for the plaintiffs?

Approximately half the states suing Purdue, including Florida, Texas, and West Virginia, as well as the lead plaintiff's attorneys, are in support of this settlement agreement.¹³ They believe this settlement secures a guarantee of monetary relief and ends the expensive government-funded litigation. There is controversy, however, over the actual value of the settlement. Many states, including New York, California, and Massachusetts, believe the number to be totally speculative and want the Sacklers themselves held more personally liable, particularly because of recent evidence that the Sacklers have systematically transferred billions of dollars from Purdue to private personal accounts.¹⁴ Only time will tell if this bankruptcy strategy and settlement proposal will end Purdue Pharma's legal liabilities.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*