

ARIZONA STATE UNIVERSITY
CORPORATE & BUSINESS LAW JOURNAL FORUM

VOLUME 3

APRIL 2022

NUMBER 24

COMMENTARY

*The Purdue Pharma Bankruptcy and Renewed Focus on Non-Debtor
Releases in Chapter 11 Bankruptcies*

BY ALEX HARTMAN*

Purdue Pharma, the maker of the opioid OxyContin, was a key player in the opioid epidemic that has cost the lives of tens of thousands of people.¹ A deluge of lawsuits pushed the company into Chapter 11 bankruptcy. A key component of Purdue's reorganization plan is a non-debtor release that protects the Sackler family, who own and run the company, from civil liability in return for billions of dollars in contributions to the reorganization.² Non-debtor releases are a controversial topic in bankruptcy law and the broad protections in the Sackler's release drew objections from dozens of states and municipalities. The Bankruptcy Court approved the reorganization plan over their objections only to have that ruling overturned by the District Court.³ This set the stage for a showdown not just for this case but for non-debtor releases generally.

Non-debtor releases, as the name suggests, releases non-debtor parties in a bankruptcy from liability for certain claims. They are a tool used almost exclusively in mass-tort claim bankruptcies, usually for insurers who fund a trust to pay out claims to people injured by a company who filed for Chapter 11 protection. They can be a useful tool to prevent endless litigation and can drastically increase the funds available to pay out claims that otherwise wouldn't receive a dime. They are

* J.D. Candidate, Class of 2023, Sandra Day O'Connor College of Law at Arizona State University.

¹ See Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew its Opioids were Widely Abused*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html>.

² See Laura Strickler, *Purdue Pharma Offers \$10-\$12 billion to settle opioid claims*, NBC NEWS (August 27, 2019), <https://www.nbcnews.com/news/us-news/purdue-pharma-offers-10-12-billion-settle-opioid-claims-n1046526>.

³ See *In re Purdue Pharma, L.P.*, 635 B.R. 26, 34 (S.D.N.Y., 2021).

also unusual because they, in a sense, extend bankruptcy protections to parties who never filed for bankruptcy. Additionally, the bankruptcy code does not explicitly allow for non-debtor releases outside of asbestos related cases. Largely because of this lack of statutory support, a minority of the circuit courts of appeals, including the 9th Circuit, do not allow non-debtor releases at all.⁴ However, the majority of the circuit courts do allow non-debtor releases by considering them as permissible under the reorganization plan confirmation sections of the code in 11 U.S.C. § 1123 and the equitable powers of the bankruptcy court in 11 U.S.C. § 105.⁵

What makes the non-debtor release in the Purdue Pharma bankruptcy so controversial is who is protected and the extent of protection requested. Purdue is privately owned and largely run by the Sackler family and their proposed non-debtor release grants them virtually unlimited civil protection for any of their actions while running Purdue. There is copious evidence that the Sackler family aggressively marketed OxyContin as a safer and less addiction prone opioid product, which turned out to be false.⁶ In return for the protection of the non-debtor release, the Sackler family originally agreed to contribute \$4.3 billion to the reorganization plan to, among other things, pay claims and fund opioid abatement programs.⁷ This contribution is the majority of all the funds available in the bankruptcy state to compensate the tens of thousands of claimants. However, the Sackler family received roughly \$11 billion in profits from Purdue Pharma, predominately from the sale of OxyContin.⁸

In September of 2021, the Bankruptcy Court approved a plan for reorganization only to have that confirmation overruled by the District Court in December of 2021.⁹ The District Court did not accept the lower court's statutory basis for the non-debtor release, finding it violated other provisions of the bankruptcy code.¹⁰ This set the stage for a fight in the Second Circuit Court of Appeals which could draw the attention of the Supreme Court. However, on March 10, 2022, the Bankruptcy Court approved a new plan, agreed to by many of the

⁴ See Elizabeth D. Lauzon, *Validity of Non-Debtor Releases in Restructuring Plans*, 18 A.L.R. Fed. 3d Art. 2 (Originally published in 2016).

⁵ See *In re Purdue Pharma*, 635 B.R. at 43.

⁶ See Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew its Opioids were Widely Abused*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html>.

⁷ See 11th Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors at 1, August 31, 2021, ECF No. 3706, *In re Purdue Pharma L.P.*, No. 19-23649 (RDD), 635 B.R. 26 (Bankr. S.D.N.Y. Sept. 17, 2021).

⁸ See Samson Amore, *John Oliver Creates Anti-Opioid Website Just to Mess with Purdue Pharma (Video)*, THE WRAP (August 8, 2021), <https://www.thewrap.com/john-oliver-anti-opioid-website-purdue-pharma/>.

⁹ See *In re Purdue Pharma, L.P.*, 635 B.R. 26, 34 (S.D.N.Y., 2021).

¹⁰ See *id.* at 47-70.

dissenting states. This new plan had the Sackler's contribute an additional \$1.7 billion to the plan, bringing their contributions up to around \$6 billion. While this is certainly a win for the victims of opioid abuse there remain many unanswered legal questions around the use of non-debtor releases.¹¹

Clarity around the legality of non-debtor releases may be coming. In response to public outcry over the Sackler release, legislation was introduced in both the House and Senate reforming non-debtor releases. The Nondebtor Release Prohibition Act of 2021, as the name implies, prohibits the use of non-debtor releases outside of asbestos cases. Whether or not the bill becomes law remains to be seen.¹² The House Judiciary Committee already passed the bill while the Senate Judiciary Committee has yet to act. A complete prohibition might not be the best move. Debtors in mass-tort claim bankruptcies are unlikely to have the assets to pay even a fraction of the claims made against them and third parties with deeper pockets, like insurers or owners, may not fund a reorganization absent liability protection. This could result in virtually endless litigation against those third parties, which is great for lawyers but not so great for the victims of dangerous products.

¹¹ See Meryl Kornfield, *Opioid victims confront Purdue Pharma's Sackler family: 'It will never end for me,'* WASHINGTON POST (March 10, 2022), <https://www.washingtonpost.com/business/2022/03/10/opioid-purdue-pharma-bankruptcy-sackler/>.

¹² See Nondebtor Release Prohibition Act of 2021, H.R.4777, 117th Congress (2021).