EXPERT OPINION

More Reasons to Deny Releases to Nondebtors in the Purdue Bankruptcy

Even if the U.S. Court of Appeals for the Second Circuit were right that some releases are permitted, there are many other significant questions about who is entitled to a release, and under what circumstances, on which the statute provides absolutely no guidance, writes contributor Alan B. Morrison.

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The briefs of the U.S. trustee and his amici in *Harrington v. Purdue Pharma,* Sup. Ct. No. 22-124, demonstrate that there is no statutory basis on which a bankruptcy court may grant nondebtors a release from liability as a part of a plan of reorganization. The Solicitor General treats the question as if it were like an off-on switch, either the court can or cannot grant a release. But even if the U.S. Court of Appeals for the Second Circuit were right that some releases are permitted, there are many other significant questions about who is entitled to a release, and under what circumstances, on which the statute provides absolutely no guidance. Those additional questions should only be answered by Congress and not the bankruptcy court, which is a further basis why the Second Circuit decision upholding the release should be reversed.

The nondebtor releases here were granted to the Sackler family who are individual shareholders of the debtor, some of whom were also officers or directors. Would parent or subsidiary companies also fall into the permissible category? What about shareholders who hold no official position with the debtor or family members of shareholders? Would the national distributors and the retail pharmacies that paid out vast sums for wrongly pushing the sale of Purdue Pharma's addictive products also be eligible? In some environmental cases lenders have been sued when a company has caused serious harm, as have insurance companies when they are alleged to have ignored danger signals that their insureds are engaging in conduct that puts members of the public at risk. Can they be included, and if so, what are the limits? There is a not a word in the Bankruptcy Act or the opinion of the court of appeals that would tell a court in the next case how to answer those questions.

Once there is a possibility of nondebtor releases, the courts would have to decide how much the nondebtor must contribute to obtain that protection. For the debtor that is essentially out of money, the creditors get it all; for the debtor in reorganization, the answer depends on what the debtor needs to keep the business alive, which is how most of the creditors will be paid. Neither of those rationales applies to a nondebtor, and so the unanswerable question for them will be, how much is enough, with no congressional guidance.

The prior question ties very closely with the next: what kind of discovery will the creditors obtain from the nondebtor to help determine how much the non-debtor should pay. The debtor has to make available all its financial information: Shouldn't the nondebtor have to do the same, because without that information, it will be impossible to know the facts on which the court can decide how much is enough.

In order to preserve the bankrupt's assets and to assure equal treatment of all creditors, the bankruptcy law provides for an automatic stay of all litigation for or against the bankrupt as soon as their case is filed. Would that apply to nondebtors and if so, which ones, especially parents or subs of the bankrupt party? Or would any stay not be automatic, but available only for good reasons, whatever they might be?

One of the main arguments against nondebtor releases for Purdue is that Congress has already provided for them, in a special statute (11 U.S.C. 524(g)) that is limited to asbestos claims. One of the rationales that supports this provision is the long latency period for the diseases resulting from asbestos exposure, so that fairness to both present and future claimants requires a long-term trust with protection for nondebtors who contribute to the fund. Should releases in other cases be limited to cases like that, and if not, why not?

The Second Circuit recognized that it needed to include some conditions on third-party releases, and so it imposed seven conditions on their future use, although none of them is found in the statute. By way of comparison, there are seven subsections in Section 524(g), each with multiple paragraphs and subparagraphs, which condition the use of third-party releases in asbestos cases. Not surprisingly, they do not fit Purdue's situation, but if the court of appeals had used them in modified form, that might have seemed even more like the judges were legislating than when they created their own seven-factor test.

Over the last two terms, the Supreme Court has solidified what it calls "the major question" doctrine, which it has applied to reject efforts of the executive branch to expand its authority in important areas where the court concluded that the statutory basis is weak or nonexistent. The court's rationale is that major policy questions should be decided by Congress, not administrative agencies. That same rationale applies to the judiciary, perhaps with even greater force since its members are not elected and have life tenure. Thus, the court could quite sensibly use the doctrine in *Purdue*, not just because whether to grant a release to nondebtors is a major question, but also because there are many other major questions as to how that would work in practice that are surely the province of Congress not the courts to decide.

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