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The Purdue Pharma Decision and Its Potential Effect on Insurers

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The Supreme Court's decision in Harrington v. Purdue Pharma, L.P., is of major significance to insurers who have grown accustomed to using Chapter 11 bankruptcy cases as a means of resolving mass tort cases for their insureds and themselves.

Insurers have been able to secure mass tort settlements in a large variety of cases including asbestos, pollution, sexual misconduct, and financial fraud, providing finality for their insureds for both current and future claims. Critically, they have also been able to obtain releases and injunctions protecting the insurers themselves against those claims and other derivative matters. The decision in *Purdue Pharma* will make those efforts much more complicated.

The Case

The case arose in the context of the opioid crisis. Hundreds of thousands of claimants asserted that they were injured by a drug called OxyContin. Purdue Pharma marketed OxyContin as a form of pain relief that it said was time-released, and so avoided risks of addictions that were prevalent for other opioids. The consequence was that OxyContin became the most prescribed opioid drug and brought in billions in revenues for Purdue Pharma.

Purdue Pharma is a closely held company, controlled by various members of the Sackler family. The claimants alleged that the Sacklers took a deep role in Purdue Pharma's business, and so were potentially individually liable for their injuries. More to the point, they also claimed that the Sacklers had stripped the assets of Purdue Pharma once they became sensitized to the potentially mammoth personal injury claims that the company — and perhaps they — were facing.

Purdue Pharma filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code, seeking a respite from the OxyContin claims and a mechanism for a global resolution. The company claimed to have a potential net worth of approximately $1.8 billion, and the United States government already had a $2 billion "super priority" claim that put it ahead of the claimants. In short, Purdue Pharma claimed that if it liquidated, the personal injury claimants would take nothing or next to nothing. The solution that was proposed came from the Sacklers. They were facing substantial claims related to the more than $11 billion they had pulled out of the company. They proposed to contribute a very substantial part of those funds to the claimants in exchange for a bankruptcy plan and confirmation order that would provide not only for a final discharge of all the OxyContin claims that currently exist and would arise in the future for Purdue Pharma, but also for them.

The Legal Issue

The issue was whether the bankruptcy court had the power to provide a release to the Sacklers even though some parties objected — a so-called non-consensual third-party release. In some parts of the United States, the Circuit Courts of Appeals covering those regions said such releases were acceptable, in certain, limited circumstances. In others, they were not. So, there was a "spilt" in the Circuits — a key thing the Supreme Court looks for in deciding whether to take a case to resolve such a split so that there is uniformity across the country.

The *Purdue Pharma* case was pending in New York — which is covered by the Second Circuit. That Circuit seemed to allow such non-consensual third-party releases for non-debtors in the right circumstances. The bankruptcy judge found that without the releases, the Sacklers would not contribute the billions they were giving in the settlement and that the claimants would have a very difficult time succeeding in their claims against the Sacklers. It also found that the Bankruptcy Code did not prohibit the releases the Sacklers requested, so it approved the plan. Some governmental entities objected to that resolution and appealed. They were initially successful on the first appellate step, but they lost at the Second Circuit in a divided opinion. The case was large and highlighted a critical disagreement among the circuits, so it was clearly a good vehicle to present the issues to the Supreme Court, which accepted it for discretionary review.

The issue on appeal was potentially very simple: did the Bankruptcy Code give the federal courts the power to release claims that parties had against entities who were not bankrupt debtors, or did it not? On the one side of the argument, people pointed to the very long line of cases that had done just that over several decades, without any objection from the Supreme Court. While those cases had begun in fairly narrow circumstances, dealing with defective birth control devices, asbestos claims, and breast implants, they had grown in breadth and size over the decades. The statutory argument in favor of those results focused on two sections of the Bankruptcy Code: Section 1123(b)(6) and 105(a).

Section 1123 describes the contents of a plan of reorganization, which will govern the way claimants are paid and how the bankrupt debtor will function after it emerges from bankruptcy. Section 1123(b) describes the things that the plan may do. At the end of a fairly long list of things that the plan may specifically do, Section 1123(b)(6) adds a "catchall" saying that the plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." Proponents of non-consensual third-party releases argued that nothing in the Bankruptcy Code specifically precluded such relief, so Section 1123(b)(6) authorized it. In addition, they pointed to Section 105(a) that says a court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." In short, they said that such releases were "necessary or appropriate" to carry out the objectives of the Bankruptcy Code to resolve cases fairly and efficiently for the benefit of both bankrupt debtors and their creditors.

On the other side, the argument was that both Sections 1123(b)(6) and 105(a) did not provide the federal courts with *carte blanche* to enter any sort of orders that they thought were "necessary and appropriate." Federal courts only have the powers that are specifically granted to them by Congress, and the vague language of Sections 1123(b)(6) and 105(a) should not be read to confer authority on the courts to extinguish claims against parties who were not even themselves bankrupt debtors. Moreover, they pointed to Section 524(e) of the Bankruptcy Code. It says that generally, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." They contended that language constituted just the sort of prohibition for third party releases referenced in Section 1123(b)(6).

The Decision

The justices split five to four on the issue along what some will say are unusual lines. Many commentators group the Court into two camps: six "conservative" justices, and three "liberal" justices. Here, the "conservatives" and "liberals" are on both sides, with the majority comprised of four "conservatives" and one "liberal" — perhaps showing that those labels may mean less than many think.

The majority, with Justice Gorsuch writing, homed in on the text of the statute itself. They noted that Section 1123(b)(6) was a "catchall" that came at the end of a long line of subparts that dealt exclusively with the debtor. From that they surmised that the "catchall" also referred only to other orders that pertained to the debtor, *not* to third parties. They gave even shorter shrift to the arguments under Section 105(a), relegating them to a footnote. There, they found no basis for the authority to impose nonconsensual third-party releases because that section "serves only to 'carry out' authorities expressly conferred elsewhere in the code." Having found no such authority expressly conferred in the Bankruptcy Code, Section 105(a) was essentially irrelevant.

Justice Gorsuch is famous for a judicial approach that is not focused on the practical consequences of his interpretations of statutes. His reputation for that will surely grow with this case. In response to arguments made about public policy by the dissenting justices, Justice Gorsuch was clear he thinks such considerations are for others, not the Court:

> Both sides of this policy debate may have their points. But, in the end, we are the wrong audience for them. As the people's elected representatives, Members of Congress enjoy the power, consistent with the Constitution, to make policy judgments about the proper scope of a bankruptcy discharge. Someday, Congress may choose to add to the bankruptcy code special rules for opioid-related bankruptcies as it has for asbestos-related cases. Or it may choose not to do so. Either way, if a policy decision like that is to be made, it is for Congress to make. Despite the misimpression left by today's dissent, our only proper task is to interpret and apply the law as we find it; and nothing in present law authorizes the Sackler discharge.

In short, Justice Gorsuch says that any problems caused in resolving mass tort bankruptcies because parties providing the funds necessary for the resolution will not get a release are issues that need to be resolved by Congress. In the meantime, the Bankruptcy Code provides no avenue for dealing with those issues.

The dissent, written by Justice Kavanaugh, in contrast, discussed the practical consequences of the Court's decision and the chaos that is likely to ensue as its result. It contained a lengthy discussion of the policies behind the Bankruptcy Code and the "collective action" problems it is designed to avoid. It noted that non-consensual third-party releases have long been an integral element in the resolution of mass tort cases. In that discussion, it took particular note of the problems facing insurers from potential "direct actions" and that the non-consensual third-party releases had helped resolve those problems. In the end, while the dissent vigorously disagreed with the majority, it did have one thing in common: It also sees the issue now passed to Congress. The final paragraph in the dissent opined:

> Opioid victims and other future victims of mass torts will suffer greatly in the wake of today's unfortunate and destabilizing decision. Only Congress can fix the chaos that will now ensue. The Court's decision will lead to too much harm for too many people for Congress to sit by idly without at least carefully studying the issue.

Unfortunately, Congress does not currently have a sterling reputation for quickly resolving such problems.

The Effects on Insurers

The *Purdue Pharma* decision is likely to have profound consequences for liability insurers. On the one hand, the prolific use of bankruptcy as a means of resolving mass tort claims has presented substantial challenges to insurers. There are serious problems in maintaining the alignment of bankrupt debtors, with the insurers in defense of claims, and in limiting potential payouts to reasonable and appropriate amounts. To the extent that *Purdue Pharma* may limit mass tort bankruptcy resolutions, it might help alleviate those concerns. On the other hand, many insurers have been able to use mass tort bankruptcies to obtain definitive resolutions of expensive and uncertain exposures, not only for their insureds, but also for themselves. *Purdue Pharma* will certainly limit that avenue — at least outside the context of asbestos claims.

Perhaps more concerning is the potential effect on long-resolved claims. As described above, non-consensual third-party releases have been an integral element in the resolution of many billions of dollars of claims in broad factual and legal contexts. The Supreme Court has now ruled that those releases were not authorized by the Bankruptcy Code. What is the effect of that on previously resolved cases? The Court specifically did not say. The majority realized that it was potentially opening up a veritable *Pandora's Box* on the point in the case. Nonetheless, all it said on that is, "we do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated."

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