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PERSPECTIVE

Purdue portends a change of bankruptcy venue laws

By Brian L. Davidoff

After agreeing to settle some 2,600 separate lawsuits over the company's involvement in fostering the nation's opioid crisis, Stamford-based Purdue Pharma, the maker of OxyContin, filed for bankruptcy protection in September 2019 — in White Plains, New York, of all places. After an intensely litigated bankruptcy case over a two-year period, Judge Robert D. Drain recently confirmed Purdue's plan of reorganization. Notably, the confirmed plan includes a wide-ranging bankruptcy settlement that will require the owners of the company, the Sackler family, to turn over approximately $4.5 billion of their fortune to address the deadly opioid epidemic. But the agreement includes a much-disputed condition: It largely absolves the Sackler family of Purdue's opioid-related liability.

Judge Drain approved the painstakingly negotiated plan that will end thousands of lawsuits brought by state and local governments, tribes, hospitals and individuals to address a public health crisis that has led to the more than 500,000 deaths nationwide. The settlement terms have been harshly criticized for shielding the Sackler family. They are receiving protections that are typically given to companies that emerge from bankruptcy, but not necessarily to third parties who, like the Sacklers, did not themselves file for bankruptcy.

The response to the plan approval has been swift and significant. The Office of the United States Trustee — the unit of the Justice Department charged with monitoring the nation's bankruptcy cases — stated in a recent court filing that Judge Drain was wrong to approve the plan's settlement terms, because it unconstitutionally deprives people of their right to take the Sackler family to court. The U.S. Trustee has joined attorneys general in Washington, Connecticut, Maryland and the District of Columbia who have said they also intend to challenge the settlement in the higher courts. If upheld on appeal, legal releases granted to members of the Sackler family will protect them from civil litigation that could be brought by private citizens or state authorities, regardless of whether they agreed to the settlement.

Separately, Sens. Elizabeth Warren, D-Mass.; Dick Durbin, D-Ill.; and Richard Blumenthal, D-Conn.; and Reps. Jerrold Nadler, D-N.Y.; and Carolyn Maloney, D-N.Y., introduced legislation aimed at blocking nonconsensual third-party releases of individuals or companies not in bankruptcy, such as the Sackler family in the Purdue case.

To understand the road that led to approval of the controversial releases, it is important to start from the beginning: How was it possible that Purdue was able to file the case in White Plains, New York in the first place? Current U.S. bankruptcy law gives companies wide discretion to file a bankruptcy in the venue of their choice. A company can file for bankruptcy in any federal district where it has its "domicile, residence, principal place of business in the United States, or principal assets in the United States" or where an affiliate of the company has a pending bankruptcy case. Often a company whose business primarily is, say in California, will file bankruptcy in another state where it might have a small corporate affiliate. These lenient venue selection rules long have allowed bankruptcy courts in a handful of locations (Delaware, New York, Houston, Richmond and White Plains) to handle the majority of major business bankruptcy filings.

Purdue has insisted that it was appropriate to file in White Plains, stating that "Purdue Pharma Inc., the general partner of Purdue Pharma LP, has been a N.Y. corporation since its incorporation on Oct. 1, 1990: "White Plains is about 15 miles from our corporate headquarters and is the closest federal bankruptcy courthouse. Thus, it was the most appropriate place for us to file."

As Professor Adam Levitin put it in his Credit Slips article of July 29, 2021: "Let's get real. Purdue — and that really means the Sacklers, who were still in control when Purdue's bankruptcy filing strategy was worked out — filed in White Plains because it wanted its case to be heard by Judge Robert Drain." He goes on to say, "But if convenience to HQ really matters, let's just note that according to Google, the drive from Purdue's headquarters to the Bridgeport, Connecticut courthouse is only two minutes longer than to White Plains."

Undoubtedly, Purdue chose White Plains because it knew that Judge Drain was open to third party releases. While the District of Connecticut and the Southern District of New York are both 2nd Circuit courts, the Manhattan courts currently have several judges and Connecticut has a single judge, Chief Judge Julie A. Manning, who has served as a Connecticut bankruptcy judge since 2013. White Plains' only has Judge Robert. D. Drain who has served since 2002, presiding over numerous high-profile bankruptcies, including A&P and Sears.

Southern District of New York Bankruptcy Court judges have contrasting views on whether bankruptcy courts have jurisdiction to issue third-party releases. Written opinions reveal that Judge Michael Wiles believes

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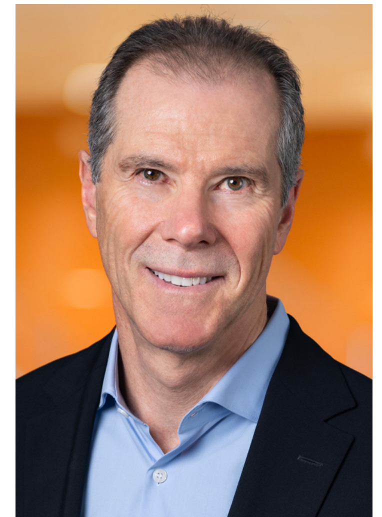

that third-party releases are likely outside the jurisdiction of the bankruptcy court, while Judge Robert Drain, Judge Sean Lane, and Judge Martin Glenn believe third-party releases should be ruled on more liberally. But judges Lane and Glenn are two of several judges in Manhattan and Judge Drain is the only bankruptcy judge in White Plains.

That companies can file bankruptcy cases in jurisdictions far from their home base is inconsistent with how venue is usually determined. If a business dispute or personal injury case is based on events taking place in California, the lawsuit must be filed in the California county or district where it all happened. The same should be true for bankruptcy. Other prominent examples of forum shopping of Los Angeles based companies include The Los Angeles Dodgers, American Apparel, Open Road Films, Relativity Media, Woodbridge Group of Companies, and many others. If a company's principal place of business is in Los Angeles, the bankruptcy case should be filed in the bankruptcy courts in Los Angeles.

Applying general venue rules in bankruptcy makes sense as a matter of due process. Companies should not be able to file in a venue simply because they can better predict a judge's inclinations and thus the outcome of the case. People who are affected by a business bankruptcy should be able to personally participate in the process — not be forced to pay attorneys to represent their interests on the other side of the country. State and local governments enforcing environmental and employment laws, or collecting revenues from locally based companies in bankruptcy, should not be forced to jump through extra hurdles to protect their rights in distant venues. Bankruptcy judges throughout the United States should have the opportunity to develop the law governing large corporate bankruptcies. The citizens of each state should benefit from the same ease of access to the courts that the citizens of Delaware, New York, Virginia and Texas enjoy.

A bi-partisan bankruptcy venue reform bill to fix venue laws, H.R. 4421, co-sponsored by Zoe Lofgren of California (Democrat) and James Sensenbrenner of Wisconsin (Republican) was introduced into the Congress in 2019 but did not proceed to the Senate. 163 current and retired bankruptcy judges and 42 state attorneys general sent a letter to Congress supporting that bill. The same bill now styled H.R. 4193 has again been introduced into the House by Zoe Lofgren of California and Ken Buck of Colorado (Republican). The proposed law would require companies to file for bankruptcy in the location of their principal assets or place of business. This bill makes sense, and should garner our support and the support of our representatives. ■

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