

Landmark Second Circuit decision affirms Purdue Plan, legality of nonconsensual third-party releases

June 5, 2023 | Client Update | 13-minute read

The Plan—the result of years-long efforts by the Debtors (represented by Davis Polk) and other key stakeholders to resolve opioid claims against Purdue and recover from its owners—will provide billions of dollars and other critical benefits for opioid abatement and victim compensation, among other important benefits. The Plan was accepted by over 95% of the over 120,000 voting creditors.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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¹ *In re Purdue Pharma L.P.*, No. 22-110-bk(L) (2d Cir. May 30, 2023).

Purdue's bankruptcy, plan, and confirmation

- o a mediated settlement among Purdue's governmental creditors, pursuant to which (i) the non-federal public claimants made an historic commitment to dedicate all value received by them to abate the opioid crisis; (ii) the non-federal public claimants resolved critical issues as to the allocation of value among themselves; and (iii) public and non-public claimants reached agreements addressing the allocation of estate value to each group;
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The District Court decision and settlement with the Nine

The Second Circuit decision

- o Factor 1. Identity of Interests Between Debtors and Released Parties: There was a sufficient identity of interests between Purdue and the Sacklers such that a suit against the Sacklers is, "in essence, a suit against [Purdue] or will deplete the assets of the estate" through indemnity, contribution, or otherwise.¹⁶
- o Factor 2. Factual and Legal Overlap Between Claims Against Debtors and Settled Third-Party Claims: Especially as narrowed by the Bankruptcy Court, the third-party releases in the Plan covered only claims against the Sacklers that are factually and legally intertwined with claims against Purdue.
- o Factors 3 and 4. The Releases are Essential to the Reorganization & Proper in Scope: The third-party releases, as narrowed by Judge Drain, were necessary and essential to the reorganization. Without the settlement of which the third-party releases are a critical part, the res of the estate would be completely depleted. The third-party releases "are both needed for the distribution of the res and to ensure the fair distribution of any recovery for claimants."¹⁷

- Factor 5. Substantial Contribution to the Reorganization: The Sacklers have agreed to contribute a “significant sum”—\$5.5 to \$6.0 billion, possibly “the largest contribution in history for [third-party] releases”—toward the reorganization.¹⁸
- Factor 6. Overwhelming Approval by Creditors: “The claimants voted overwhelmingly to approve” the Plan, with “[o]ver 95% of the personal injury classes vot[ing] to accept” it. Indeed, “the main challenge . . . is not by creditors, but by the Trustee—a government entity without a financial stake in the litigation.”¹⁹
- Factor 7. Fair Payment of Enjoined Claims: The value of all claims is approximately \$40 trillion, making full payment impossible. The Plan provides for a “fair allocation” of proceeds, and “no party” has given any reason to doubt that the Plan is “fair and equitable.”²⁰

² *In re Purdue Pharma L.P.*, 635 B.R. 26, 86-87 (S.D.N.Y. 2021) (McMahon, J.) (quoting *Dunaway v. Purdue Pharma. L.P.*, 619 B.R. 38, 51 (S.D.N.Y. 2020)).

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³ *Id.* at 35.

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⁴ *In re Purdue Pharma L.P.*, 633 B.R. 53, 59 (Bankr. S.D.N.Y. 2021) (Drain, J.).

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⁵ *Id.* at 84.

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⁶ *Id.* at 109.

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⁷ *Id.* at 94, 107, 109.

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⁸ The District Court agreed with the Bankruptcy Court that the Canadian Creditors’ claims were properly classified differently than those domestic claimants, who have access to abatement trusts. The Canadian Creditors cross-appealed this issue. The Second Circuit, however, affirmed, holding that the Canadian Creditors’ classification was proper and that the Canadian Creditors had another source of recovery, Purdue Canada. The Second Circuit also rejected the Canadian Creditors’ argument under the Foreign Sovereign Immunities Act.

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⁹ *In re Purdue Pharma L.P.*, No. 22-110-bk(L) (2d Cir. May 30, 2023) (slip op. at 47-48) (quotation omitted). The Second Circuit also ruled that that the Bankruptcy Court lacked constitutional authority to finally approve the Shareholder Releases, and, thus, that District Court correctly construed the Bankruptcy Court’s decision as setting forth its proposed findings of fact and conclusions of law for the district court’s *de novo* review, pursuant to *Stern v. Marshall*, 564 U.S. 462. But it further concluded “that the practical import of the *Stern* issue is nonexistent given that only

conclusions of law [were] at issue” in the appeal. *Id.* at 41.

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¹⁰ *Id.* at 62.

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- o Factor 7. Fair Payment of Enjoined Claims: The value of all claims is approximately \$40 trillion, making full payment impossible. The Plan provides for a “fair allocation” of proceeds, and “no party” has given any reason to doubt that the Plan is “fair and equitable.”²⁰

¹² *Id.* at 52 (quotation omitted).

Purdue’s bankruptcy, plan, and confirmation

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¹³ Judge Wesley filed a separate opinion concurring in the judgment, concluding that clear Second Circuit precedent authorized nonconsensual third-party releases, but disagreeing that the Bankruptcy Code authorized them.

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¹⁴ *Id.* at 63.

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¹⁵ *Id.* at 67.

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¹⁶ *Id.* at 64, 68-89.

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¹⁷ *Id.* at 72.

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¹⁸ *Id.* at 74.

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²⁰ *Id.* at 75.

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