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# Litigators of the Week: Davis Polk Gets 2nd Circuit Blessing for Purdue Pharma's Multibillion-Dollar Bankruptcy Settlement

**By Ross Todd**
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More than $40 trillion. That's with a T.

Those were the estimated claims facing OxyContin maker Purdue Pharma and its founders, the Sackler family, when a bankruptcy court enjoined all litigation against them in 2019. In exchange for getting the Sacklers—who did not enter bankruptcy and who had all left the board of the company by that time—to chip in billions to fund a bankruptcy settlement, the company's reorganization plan contained several nonconsensual releases that, in effect, permanently barred certain third-party claims against the Sacklers

This week the Second Circuit gave its blessing to that arrangement. The appellate court overturned a district court ruling finding the bankruptcy code didn't authorize the releases for the Sacklers. The Second Circuit's ruling lays out a seven-factor test for determining when imposing such releases is appropriate. **Marshall Huebner** and **Benjamin Kaminetzky** of **Davis Polk & Wardwell,** our Litigators of the Week, helped Purdue Pharma reach that result.

**Lit Daily: I usually start out by asking: "Who is your client and what was at stake?" But on top of that question, perhaps here it's also helpful to clarify that you do not represent the Sackler family, right?**

Courtesy photos

**(L-R)Marshall Huebner and Ben Kaminetzky of Davis Polk & Wardwell.**

Marshall Huebner: Our client is the Chapter 11 fiduciary estate of Purdue Pharma—the fiduciary for the over 600,000 governmental and private stakeholders in the Purdue ecosystem. Said differently, we are, among other things, *the plaintiffs* and the Sacklers—who ceased having any role or authority at Purdue four and a half years ago—are *the defendants*. It was the creditors, alongside the Debtor's special committee, who negotiated the settlements with the Sacklers and among themselves. And these stakeholders have spoken clearly, definitively and all but unanimously: More

than 95% of all voting claimants voted to accept the plan, and it was supported by every single organized creditor group in the cases—including the official committee of creditors appointed by the DOJ, and organized groups of states, municipalities, tribes, schools, hospitals, ratepayers, and adult and pediatric victims.

As much was at stake in this case as any in which I have been involved in over 30 years of practice. 100% of all distributions under the plan are required to go to opioid abatement and victim compensation. And those distributions—$5.5-$6 billion in cash from the Sacklers, and 100% of Purdue's cash and valuable operating assets—are very material, and have the potential to improve, and in some cases even save, tens of thousands of American lives. There are also important non-economic aspects of the plan. These include a comprehensive document repository (larger than the entire tobacco industry repository), as well as many limitations on the Sacklers, including not objecting to their names being removed from schools, museums, hospitals and other organizations, and a requirement that they exit the opioid business everywhere in the world.

**Who is on your team and how have you divided the work?**

Ben Kaminetzky: Marshall and I have been doing this together for well over 20 years, including back when we were both still senior associates. We seamlessly weave together a team of Davis Polk's best-in-class restructuring lawyers with litigators who are repeat players in this space and have a sophisticated understanding of bankruptcy law and lore. On the restructuring side, **Eli Vonnegut**, **Chris Robertson**, **Dylan Consla** and **Stephanie Massman** led on the plan and so many other issues over the last 5 years, and **Angela Libby** and **Jake Weiner** ran point on documenting the extremely complex deals reached with and among 12 different pods of the Sackler family worldwide. On the litigation side, **Jim McClammy**, **Marc Tobak**, **Gerry McCarthy**, **Kathryn Benedict** and **Garrett Cardillo** were the indefatigable field generals who led a team of many extraordinary litigation associates.

**What have been the most significant issues you've had to litigate for the debtor during the course of this bankruptcy?**

Kaminetzky: Even putting the layers of appeals aside, there were dozens of litigated issues in the 44 months since the cases were filed, which is not surprising in a case of this scope and notoriety—with over $40 *trillion* of claims filed by over 614,000 parties. But two litigations certainly stand out: The first is the preliminary injunction we filed in the first days of the case that stayed all the pre-petition litigation. Prior to the Chapter 11 filing, Purdue was facing over 2,600 lawsuits by individuals, states, municipalities, tribes, hospitals, insurers, etc. etc. in state and federal courts around the country, many of which also named Sackler family members as defendants. Plaintiffs were engaged in unrestrained and uncoordinated races to the courthouse, and the company was burning approximately $2 million per *week* just in defending these lawsuits. The highly contested preliminary injunction put a stop to all of this. It served as the backbone of the case by forcing all public and private stakeholders to the table to negotiate a comprehensive plan. The second was the contested confirmation hearing during the pandemic. This was a remote, multi-week trial with 41 witnesses and oral argument on countless statutory and constitutional issues. This would have been an enormous effort under "normal" conditions. That we, the court and dozens of parties in interest pulled this off remotely was truly extraordinary.

**Mr. Huebner, when this appeal was argued at the Second Circuit more than a year ago, you faced what I'd characterize as a pretty hot bench. Looking back, what stands out about that argument to you?**

Huebner: First off, its unexpected length. We were allotted 18 minutes for my opening and reserved 4

minutes for rebuttal. Instead, the opening ran 36 minutes and the rebuttal 16—well more than double the allotted time, which I am advised is quite unusual in the Second Circuit. Second, the panel was terrific. I think it was Judge Lee's first time presiding, and of course, Judges Newman and Wesley are two of the most senior judges in the circuit—Judge Newman was the chief judge when I clerked on the Second Circuit 30 years ago. Second, Judge Lee had complete command of the courtroom and of all of the issues. And her opinion is a tour de force. Third, the round-the-clock preparation paid off even more than I expected. I had tear sheets with me with mini-argument outlines for the top 40 or so "hard" questions we thought the panel was likely to ask. It was amazing how many of them got used. Fourth, there was defense. Several of the appellees had really twisted the facts and the law in their papers, and we were hoping they would do it again from the podium. When they did, we were ready and called them out on it with specificity, which I believe resonated with the panel. Finally, we knew we were right, and there really was no question we were not comfortable being asked. I think I several times said "I am so glad that you asked me that question"—and I meant it.

**Judge Wesley's concurrence noted that he joined the panel's holding "reluctantly" and wrote that "extinguishing direct, particularized claims against non-debtors without the claimholder's consent, and without compensating the claimholder, is an extraordinarily powerful tool for a bankruptcy court to wield—indeed, for any court to wield." Why was it appropriate for Judge Drain to wield it at the bankruptcy court here?**

Huebner: We fully agree that nonconsensual third-party releases are an "extraordinarily powerful tool" that are subject to abuse. Indeed, *we* argued—and I strongly believe—that third-party releases should be used sparingly and are appropriate only in unique circumstances. And the Second Circuit agreed by articulating an exacting seven-factor test to ensure that releases are approved only when appropriate.

Kaminetzky: Here, the facts we presented at trial demonstrate why third-party releases were appropriate. Judge Drain found that without the releases and the billions of dollars in settlement proceeds, victims and creditors—except for the United States—would likely recover *nothing* from the bankruptcy. The releases were essential not only to the settlement with the Sacklers, but also the settlements *among* the governmental and private creditor groups. Without the releases, creditors, the estate, and the Sacklers would be locked in years of costly inter-creditor litigation. I haven't yet touched on the process that led to these releases, which is itself a critically important part of why they were and are appropriate in this case. As Judge Lee noted in her opinion, these releases followed searching discovery—Judge Drain said perhaps the most extensive he had ever seen in his career. They were the product of more than a year of mediation among creditor groups and the Sacklers, supervised by preeminent mediators including both a sitting federal bankruptcy judge and a retired federal district judge. These releases are supported by all organized creditor groups, including the Official Committee of Unsecured Creditors and the Ad Hoc Groups representing adult and minor personal injury victims and many governmental entities. And Judge Drain scrutinized them and approved them only after they were yet again narrowed and subjected to additional conditions.

**While this appeal was pending, eight states and the District of Columbia—which had appealed the confirmation of the original settlement—reached a new deal with your clients and the Sacklers and a new settlement agreement was filed with the bankruptcy court providing for an additional $1.175–$1.675 billion in contributions by the Sacklers. How much of a factor were those additional funds and the lack of opposition of those nine former objectors to this outcome?**

Kaminetzky: Even before the deal with the final nine holdout states, the Sacklers already agreed to contribute more than any other shareholders in history. While the additional $1.175–$1.675 billion for opioid abatement and victim compensation is certainly wonderful and incredibly important, I think the incremental dollars are less important as a legal matter than what this final settlement represented. When there was a settlement with these nine states, every creditor (save for three pro se claimants and a handful of Canadian municipal and First Nation entities) either supported or no longer opposed the plan. Just pause and think about that: We had more than 614,000 proofs of claim for over $40 trillion—and near unanimity.

**What's important for future debtors in this Second Circuit decision?**

Huebner: There is now a clear and appropriately demanding standard for third-party releases—the Second Circuit both set forth a seven-factor test and noted that releases may not be appropriate even if all seven are met. Third-party releases should be rare and reserved for extraordinary circumstances, like the ones amply present here. The real problem with these releases is their ubiquity, not their legality. This landmark decision likely solves that problem. So don't ask for them unless they meet the test.

**The U.S. Supreme Court hasn't spoken on this particular issue and three circuits—the Fifth, Ninth and Tenth—don't permit nonconsensual third-party releases. Would it be helpful for the justices to weigh in?**

Kaminetzky: As an initial matter, I am not convinced that the circuit split is as stark as you suggest. But more importantly, this case should certainly not be the vehicle for the Supreme Court to weigh in on these issues. Victims and other creditors have already waited far too long for the billions of dollars to abate the opioid crisis and for victim compensation that the plan will provide. Notably, this plan is the *only* opioid settlement to date that provides for material direct compensation to individual victims. Not a single governmental creditor in the United States—not one state, territory, city, town, district or other such entity—opposes the plan. While the Supreme Court may well weigh in on these issues at some point, given the striking level of support, the billions of dollars waiting—far too long—to be put to good use, and the unthinkable likely scenario if there is no plan, this is not that case.

**What will you remember most about getting to this milestone in the case?**

Huebner: It is the victims who suffered and bore the full cost of the 20 months that have now tragically elapsed since the confirmation order was entered—all due to the appeals by fewer than 10 parties out of 614,000 (well under one one-hundredth of 1%). The debtors' cash and resources have not yet been able to be used to help any victims, and the Sacklers will have gotten two more years before they had to start funding their settlement payments. It is the victims and other stakeholders for whom I and Davis Polk have been working for more than five years, and it is mission-critical that we get this company's assets out of Chapter 11 as soon as possible to put the allocated billions to work to help with the opioid crisis. Eighty-three pages of complete and total vindication on the law was gratifying, but it is all of very little moment unless and until the dollars and lifesaving medicines are flowing to those in desperate need.

Kaminetzky: I am just so proud of the extraordinary effort of our team. To get to where we are today, this case required unprecedented creativity, patience, thick skin, focus—and crushingly hard work. Our multidisciplinary team of extraordinary lawyers delivered at every juncture, even when suffering through temporary setbacks and a global pandemic. And for me, working with Marshall is always … a treat!