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In Defense of Purdue Pharma's Bankruptcy Plan

BY EDWARD E. NEIGER

On Sept. 1, 2021, Judge Drain confirmed Purdue Pharma's restructuring plan. The plan is the culmination of roughly two years of legal wrangling by 48 states, thousands of municipalities, Indian tribes, and tens of private-side parties, each with a stake in the outcome of the case.

Politicians, advocates and academics have assailed the bankruptcy plan as a travesty of justice because, under the plan, the Sacklers will be released from civil liability and will not be held criminally accountable.

While that may be partially true, there is one overarching reason why the plan is nevertheless in the public interest.

Simply put, it will save lives.

The CDC estimates 93,000 overdose deaths in the last nine months alone, the highest statistic ever recorded in the United States for overdose. The plan, if approved, will put over $4.5 billion in state coffers to use exclusively to abate the opioid crisis.

It will also distribute $750 million to up to 130,000 actual victims of Purdue who have filed eligible claims.

The victims range the gamut from those who suffered or are still suffering from addiction to those who have endured the unthinkable: the loss of a loved one to opioid overdose. The money will start to flow as soon as the plan goes "effective," which could be as soon as October.

Victim-advocates decry the plan because they and others will be forever barred from suing the Sacklers for the injuries they suffered. The fact is, however, that these very victim-advocates have been railing against the Sacklers for years but they have never filed a lawsuit against them.

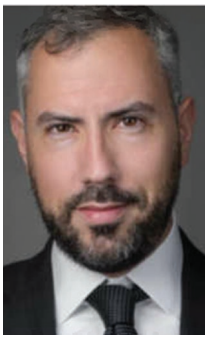
In fact, of the 130,000 victims who filed claims, only a fraction of them actually filed a lawsuit against Purdue and the Sacklers prior to the bankruptcy.

There is a good reason for this.

The stigma of addiction is real, and it is strong. Many victims were not comfortable filing a public lawsuit acknowledging that they or their loved one was affected by the disease of addiction. Moreover, reliving the trauma they have suffered in front of a jury of 12 strangers in a public courtroom was simply more than they could bear.

The bankruptcy plan allows eligible victims who filed a confidential claim to obtain a recovery without ever setting foot in a courtroom.

That's a good thing.


Edward E. Neiger

Others claim that the bankruptcy plan releases the Sacklers from criminal liability, something that no money in the world should buy.

Nothing is further from the truth. Judge Drain has repeatedly stated on the record that he does not have the power to provide criminal releases. The states, and only the states, have the power to release the Sacklers from criminal liability.

Those peddling this mistruth are doing a great disservice to victims, who feel as if salt has been poured on their wounds because their perpetrators have bought their way to freedom with their billions. They didn't, at least not under the bankruptcy plan.

Critics argue that the Sacklers are abusing justice by obtaining releases under the Bankruptcy Code in exchange for the money they are coughing up. They argue, rightfully, that that $4.5 billion is just a fraction of the Sacklers' overall wealth.

However, third-party releases in similar situations are routinely granted in corporate bankruptcies. To deny them in this case because of the Sacklers' bad acts has no basis in the law. Justice is blind and must be dispensed without fear or favor.

The reason "Equal Justice Under the Law" was boldly enshrined above the main entrance of the U.S. Supreme Court is that it is a cornerstone of our judicial system and our democracy, even if it's sometimes unpleasant, as it is here.

The plan isn't perfect, to be sure.

Yes, the Sacklers should pay a lot more for their releases. Of course, the Sackers should acknowledge their wrongdoing and take responsibility for it.

But the plan must be evaluated in light of the alternative, not in light of the ideal.

The alternative is years of hard-fought litigation, which, even if successful, may still not result in a meaningful increase of recovery because much of the Sacklers' net worth is overseas or hidden in judgment-proof shell entities.

Plus, in a non-bankruptcy context, even if the states are successful in clawing back the billions the Sacklers siphoned, it is highly unlikely that actual victims would ever see a penny of that money. The voting mechanisms and other provisions of the Bankruptcy Code (such as "equitable subordination") gave victims unique leverage that they wouldn't have otherwise.

Equally as important, in a non-bankruptcy setting, there is no mechanism to ensure that the states will actually use their recoveries to abate the opioid crisis and not use the money to fill budget gaps, as was the case with the billions recovered in the tobacco litigation.

The bankruptcy plan ensures that the money will go where it was intended: to save lives.

For the most part, the thousands of victims I have spoken to could really use the money they will receive under the plan and can't wait years for the opioid litigation to resolve. This is particularly true coming off a punishing epidemic of another kind: the COVID-19 pandemic.

Victims I know intend on using the money to put gas in their car, bread on their table, to pay for the rehab of a loved one suffering from addiction, or to supplement the income of a family whose breadwinner succumbed to the disease.

Forgoing this money in the hope that the Sacklers suffer for their sins, as much as they would love to see that, is a luxury they can't afford.

It's one thing to pontificate from the ivory towers of academia about how "the bankruptcy system is broken." Things are a lot different when your decisions have real-life consequences for real people.

One need look no further than the recent development of Massachusetts AG Maura Healy and NY AG Letitia James joining the settlement. Healey and James have staked their political fortunes on chasing the Sacklers to the gates of hell. But at the end of the day, they acknowledged that for the sake of those suffering from addiction in their respective states, they "can't let the perfect be the enemy of the good."

Over 500,000 have died from the opioid epidemic thus far. Healy and James understand that if the matter goes back to all-out war, another 500,000 may die before anyone sees a dime from the Sacklers.

The plan contains another important feature: Purdue will turn over for public disclosure the evidence from

(AP Photo/Douglas Healey, File)

The Purdue Pharma logo at its offices in Stamford, Conn.

lawsuits and investigations of Purdue over the past 20 years, including deposition transcripts, deposition videos, and 13 million documents.

Purdue will also be required to turn over more than 20 million additional documents, including every non-privileged email at Purdue that was sent or received by every member of the Sackler family who sat on the Board or worked at the company.

Lastly, Purdue will waive its attorney-client privilege to reveal hundreds of thousands of confidential communications with its lawyers about tactics for pushing opioids, FDA approval of OxyContin, and "pill mill" doctors and pharmacies diverting drugs.

The significance of this cannot be underestimated, and it is highly unlikely that these documents would ever see the light of day in the all-out litigation route.

As the saying in recovery goes: You are only as sick as your secrets. By shining a light on the Sacklers' secrets, the plan will hopefully serve as one step on the long road to our collective recovery from this terrible crisis.

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