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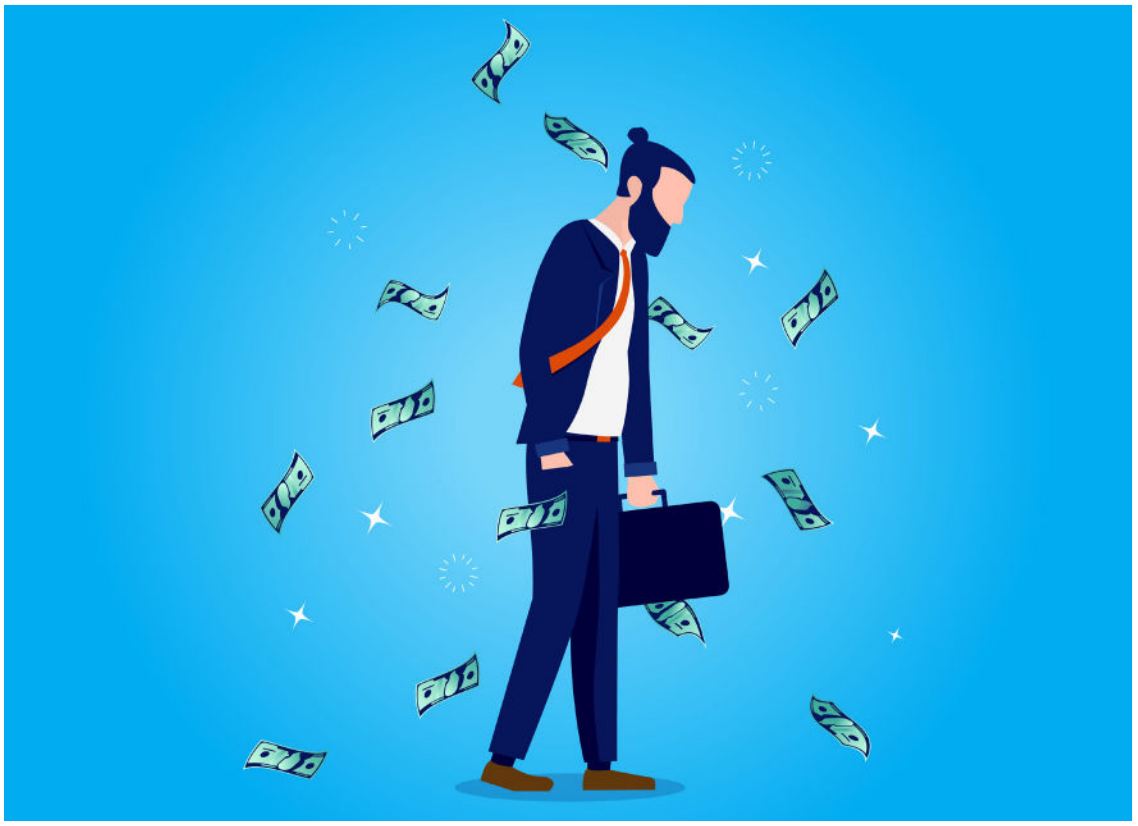
PERSPECTIVE

You can't buy happiness or a bankruptcy discharge

By Catherine E. Bauer



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On June 27, 2024, in *Harrington v. Purdue Pharma L.P.*, the Supreme Court sided with the Fifth, Ninth and Tenth Circuits in ruling that the Bankruptcy Code does not allow a plan of reorganization to give the equivalent of a bankruptcy discharge to third-party nondebtors without the consent of affected claimants. The outcry in the mainstream media was fairly uniform: the Supreme Court was denying much needed compensation to opioid victims.

According to *The New York Times*, "(t)he ruling effectively prevents the release of billions of dollars that could help alleviate the ravages of opioid addiction."

The truth is the Sackler family, like many wealthy tortfeasors, wanted to use the bankruptcy system in a way that is not authorized by the Bankruptcy Code and that would cause societal harm in the long run. Had the Supreme Court ruled in favor of the Sacklers, "bankruptcy grifting" would have only increased (and it's already pretty bad).

First, it's worth noting that Purdue Pharma isn't calling everything off after the Supreme Court's ruling. Purdue issued a statement saying that it would "immediately reach back out to the same creditors who have already proven they can unite to forge a settlement in the public interest." Their website landing page says: "The decision does nothing to deter us from the twin goals of using settlement dollars for opioid abatement and turning the company into an engine for good. We are reaching back out to creditors and renewing our pursuit of a resolution that delivers billions of dollars of value for opioid abatement…."

For their part, the Sacklers stated: "While we are confident that we would prevail in any future litigation given the profound misrepresentations about our families and the opioid crisis, we continue to believe that a swift negotiated agreement to provide billions of dollars for people and communities in need is the best way forward."

Purdue Pharma and the Sacklers' optimism on achieving settlements at this point is rather perplexing given their prior statements. Throughout the bankruptcy process they insisted that the Sacklers would not repatriate any of the $11 million they "milked" out of Purdue Pharma unless and until a Chapter 11 confirmed plan of reorganization gave them the releases and injunctions they demanded.

What would these releases and injunctions have given the Sacklers? They would have released all of the Sacklers opioid-related liabilities, both known and unknown. The Purdue Pharma plan would, essentially, have given each of the Sackler family members the equivalent of personal bankruptcy discharges without them filing personal bankruptcies. And, frankly, their demands were not unreasonable given the circuit split on the acceptability of these types of releases. In the Second, Third and Fourth Circuits, approval of nonconsensual third-party releases was standard operating procedure. So, on appeal to the Supreme Court, it wasn't ridiculous for the Sacklers to believe the highest court would rule in their favor.

Unfortunately, manipulation of the bankruptcy system by "bankruptcy grifters" has become commonplace. Perhaps the best example of this is Johnson & Johnson's slick

"Texas Two-Step" bankruptcies. J&J created LTL Management solely for the purpose of taking over J&J's talc liabilities and for filing bankruptcy to get rid of them. While J&J claimed their concern was for the talc cancer victims, it became clear that "Project Diamond" was really about the company's corporate reputation and financial bottom line. Indeed, if Project Diamond had been about the victims, would it have been wrapped up in the utmost secrecy? Would confidentiality agreements have been required of everyone involved in Project Diamond if it was really an unselfish endeavor?

J&J's Texas Two-Step victims filed an Amici Brief in the Purdue Pharma case. They urged the Supreme Court to tread lightly because of "(t)he increasing prevalence of bankruptcy abuse by wealthy, solvent tortfeasors…." Other Amici echoed these concerns and cautioned against allowing grifters to continue their misuse of the bankruptcy system.

As some of the Amici pointed out, one ironic aspect of nonconsensual third-party releases is they can result in bankruptcy-equivalent discharges that go beyond what would be allowed in personal bankruptcy. In Purdue Pharma, had the Supreme Court allowed the releases, the Sacklers would have received discharges they would not have received in their own bankruptcies. That's because fraud-based claims are not dischargeable. So, not only would they have avoided all the inconveniences of personal bankruptcy (such as disclosing assets and submitting to oversight), but they would also have received "super discharges."

However, it didn't go their way.

What the Sacklers undoubtedly have in mind at this point is making as many deals as possible but with consensual third-party releases. The Supreme Court's decision made it very clear they were not ruling on the legality of consensual releases of third parties in a plan. Since the vast majority of creditors have already agreed to support the plan containing the third-party releases, what's the harm in asking for voluntary releases? Yes, the Sacklers may have to repatriate a few more billion dollars since bargaining power has shifted toward their victims, but isn't 95% certainty better than no certainty at all?

Without a doubt there will be "workarounds" developed by creative lawyers to get around the Purdue Pharma decision. For one, the Supreme Court left open the possibility of allowing for nonconsensual third-party releases if creditors are "paid in full" (whatever that means). Is payment over 10 years considered payment in full?

There are still unknowns to be sure, but the Purdue Pharma decision will help cut down on bankruptcy grifting. Despite the soundbites from certain media outlets, this will work itself out and be good in the long run for the little guys.

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