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HOW *PURDUE* MAY IMPACT CROSS-BORDER BANKRUPTCY FILINGS, INCLUDING THE USE OF CHAPTER 15

It is clear that the US Supreme Court's ruling striking down nonconsensual third-party releases in *Harrington v. Purdue Pharma* will have a meaningful impact on larger Chapter 11 cases, as such releases have become common if not essential to larger restructurings. What may be less apparent is that the ruling is also likely to encourage more multi-national companies to file bankruptcy outside of the United States as a number of popular foreign bankruptcy regimes permit nonconsensual third-party releases. Once a company files for bankruptcy in one of these countries, the company could then use another part of the Bankruptcy Code, Chapter 15, to recognize and effectuate the foreign bankruptcy relief in the US, including with respect to any third-party releases approved by the foreign court. This circuitous route to obtaining relief that *Purdue* now prohibits under Chapter 11 is possible because the *Purdue* ruling focuses on the statutory text of Chapter 11, sidestepping other constitutional and due process issues that might have implicated Chapter 15's public policy exception.

THE PUBLIC POLICY LIMITS OF CROSS-BORDER RESTRUCTURINGS

Chapter 15 of the Bankruptcy Code governs the process for foreign debtors to obtain assistance from US courts, including recognition of foreign insolvency proceedings and domestication and enforcement of orders entered in those proceedings. Chapter 15 is based on the Model Law on Cross-Border Insolvency, a product of the United Nations Commission on International Trade Law that has been adopted in more than 60 jurisdictions.

The Model Law's recognition and enforcement mechanisms operate largely without regard to differences in substantive insolvency laws. Courts in one

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jurisdiction may – and often do – recognize orders from another jurisdiction where the laws of the two countries differ, and where relief in one jurisdiction exceeds (or is less than) what would be available to the debtor if its insolvency proceeding was pending in the other, so long as the foreign proceeding affords parties some level of due process protections.

Despite this permissiveness, the Model Law does not require recognition and enforcement of *all* relief granted by a foreign insolvency court. Instead, the law allows courts to refuse to grant relief that is "manifestly contrary to the public policy" of their own jurisdiction. Accordingly, Chapter 15 allows US courts to refuse to grant relief in aid of a foreign proceeding that would violate US law or contradict the US's most fundamental policies. The bar for this exception is high, and it has been invoked successfully in only a few cases since Chapter 15 was enacted.

In *Purdue*, the objectors raised constitutional arguments, namely that nonconsensual third-party releases violate the Due Process Clause and the Takings Clause. If the Supreme Court were to prohibit such releases on these grounds, it could have provided the basis for a "public policy" objection to Chapter 15 recognition of a foreign plan that included such a release.

THIRD-PARTY RELEASES AND *PURDUE*

Third-party releases have long been a hot topic in Chapter 11. The idea is simple: A debtor that files for bankruptcy and confirms a Chapter 11 plan typically receives a discharge of claims against it, which are replaced by the restructured obligations set forth in the plan. A third-party release (approved by the bankruptcy court) allows *non-debtors* – "third parties" to the proceeding – to effectively obtain a bankruptcy discharge without consent of affected claimholders, and without having to seek bankruptcy relief or submit themselves to the rigors of the bankruptcy process. This is often ostensibly because those parties contributed in some way to the debtor's restructuring.

As noted by the *Purdue* majority, the Bankruptcy Code explicitly authorizes nonconsensual third-party releases where a debtor faces liability arising from asbestos exposure. Such releases have formed the linchpin of many mass tort bankruptcies that resulted in meaningful compensation to victims even outside of the asbestos context. In recent years, however, use of these releases has expanded well beyond the mass tort arena. Debtors of all types now regularly seek nonconsensual third-party releases of officers and directors, shareholders, equity sponsors, and even lenders or other creditors that support a Chapter 11 plan, all on the theory that these releases contribute to the debtor's reorganization.

While many courts have obliged in granting these releases, objections to such releases are common. Other courts have refused to approve them on statutory and other grounds, including due process and other constitutional concerns. Enter Purdue Pharma, which sought bankruptcy relief in 2019 and confirmed a Chapter 11 plan that provided for nonconsensual third-party releases of its (non-debtor) controlling shareholders in exchange for more than $6 billion in contributions. While substantial, it was still far less than those shareholders' total fortunes.

The Supreme Court's 5-4 ruling reversed the lower courts' approval of the third-party releases in Purdue's plan. Over a vigorous dissent, the majority focused primarily on what it believed to be the clear language of the Bankruptcy Code,

which it read to provide no basis for US courts to approve nonconsensual releases. The Court did not cite any constitutional or due process concerns, avoiding an issue that could have had far-reaching consequences outside of Chapter 11.

With respect to Chapter 11 cases, the Court expressly declined to call into question the approval of consensual releases or express a view on what qualifies as a *consensual* release.

THE POTENTIAL IMPACT OF *PURDUE* IN CHAPTER 15

Although Chapter 15 was not at issue in *Purdue*, the objectors raised constitutional concerns that could have implicated Chapter 15's public policy exception on the basis that recognition of a nonconsensual third-party release granted by a foreign court are manifestly contrary to US public policy. The Court's straightforward statutory interpretation likely leaves little room for parties to argue that a foreign court's approval of third-party releases should be denied recognition in the US, so long as the foreign proceeding observes fundamental due process protections. It remains to be seen whether distressed companies that have the option will instead seek bankruptcy relief outside the US in jurisdictions that permit nonconsensual third-party releases and enforce such releases in the US through Chapter 15 recognition.

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