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The Future Viability of 105(a) Injunctions Following the Supreme Court's Decision In 'Purdue Pharma'

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The U.S. Supreme Court's recent decision in *Purdue Pharma* has put an end to the use of permanent plan injunctions in the form of nonconsensual third-party releases as a reorganizational tool in Chapter 11, at least for now. What was not addressed by the Supreme Court in *Purdue Pharma* is the propriety of temporary injunctions that halt third-party litigation pending formulation of a Chapter 11 plan (typically a plan that would contain nonconsensual third-party releases). At the outset of a Chapter 11 case, debtors often seek entry of a preliminary injunction pursuant to Section 105(a) of the Bankruptcy Code extending the automatic stay to and temporarily enjoining litigation against nondebtors. Commonly referred to by bankruptcy practitioners and courts as a "105(a) injunction", this relief is particularly prevalent in cases, like *Purdue Pharma*, involving multi-party, mass tort litigation where the debtor and certain nondebtors may be co-defendants in prepetition litigation with shared insurance, defenses, evidence and liability.

The rationale for a 105(a) injunction is to stay litigation that could impede the debtor's reorganization such as by depleting insurance assets, increasing estate liability through indemnification and contribution claims, or distracting debtor principals from attending to their responsibilities in Chapter 11 and formulating a plan. Underpinning most every request for a 105(a) injunction, and particularly in the mass tort bankruptcy context, is the debtor's primary objective of stopping litigation in multiple forums in favor of addressing claimants' claims in a single forum (the bankruptcy court) pending an eventual permanent injunction under a plan which includes third-party releases in favor of the nondebtor defendants and/or co-obligors. The breathing spell afforded by a 105(a) injunction enables creditors to analyze whether they would support an eventual plan containing third-party releases.

Until now, a successful reorganization assumed the debtor could confirm a plan with nondebtor releases and injunctions based on less than full creditor consensus. Now that nonconsensual releases in Chapter 11 plans are no longer permitted, will debtors have a more difficult time obtaining a 105(a) injunction, even if only pending confirmation of a plan of reorganization?

'Likelihood of a Successful Reorganization' Requirement for 105(a) Injunctions

Section 105(a) of the Bankruptcy Code provides that the court "may issue any order, process, or

judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a). To enjoin litigation against nondebtors under §105(a), a bankruptcy court must "find that the claims 'threaten to thwart or frustrate the debtor's reorganization efforts,' … and that the injunction is 'important' for effective reorganization." *McHale v. Alvarez (In re The 1031 Tax Group, LLC)*, 397 B.R. 670, 684 (Bankr. S.D.N.Y. 2008) (*quoting In re Johns-Manville Corp.*, 91 B.R. 225, 228 (Bankr. S.D.N.Y. 1988)). Courts have also extended the stay to codefendants when the claims against them and the claims against the debtor are "inextricably interwoven, presenting common questions of law and fact, which can be resolved in one proceeding." *In re Ionosphere Clubs, Inc*., 111 B.R. 423, 434 (Bankr. S.D.N.Y. 1990). Because one of the overriding purposes of the Bankruptcy Code is to provide debtors with breathing room from creditors to increase the chance of a successful reorganization, section 105 injunctions are granted where "[c]ongressional intent to provide relief to debtors would be frustrated by permitting indirectly what is expressly prohibited in the Code." *Rosetta Res. Operating LP v. Pogo Producing Co. (In re Calpine Corp*.), Adv. No. 06-1757, 2007 WL 1302604, at *2 (Bankr. S.D.N.Y. Apr. 30, 2007) (citations omitted).

When evaluating whether to grant a 105(a) injunction, courts have applied a modified version of the traditional preliminary injunction standard and consider the following four factors as relevant: 1) whether there is a reasonable likelihood of successful reorganization; 2) the risk of irreparable harm to the debtor in the absence of an injunction; 3) the balance of hardships between the debtor and its creditors; and 4) the public interest in an injunction. *See, In re Lyondell Chem. Co*., 402 B.R. 571, 588-89 (Bankr. S.D.N.Y. 2009) (*citing In re Calpine Corp.*, 365 B.R. 401, 409 (Bankr. S.D.N.Y. 2007); *see also, Dunaway v. Purdue Pharmaceuticals L.P. et al.*, (*In re Purdue Pharmaceuticals L.P.*, *et al*.), 619 B.R. 38, 58 (S.D.N.Y. 2020); *accord Ball v. Soundview Composite Ltd (In re Soundview Elite Ltd.*, *et. al*.), 543 B.R. 78, 118-19 (Bankr. S.D.N.Y. 2016). And most courts give special attention to "whether the suits would (i) threaten the debtor's insurance coverage, (ii) increase the debtor's indemnification liability, (iii) result in inconsistent judgments, (iv) expose the debtor to risks of collateral estoppel or *res judicata*, and (v) burden and distract the debtor's management by diverting its manpower from reorganization to defending litigation." *1031 Tax Group*, 397 B.R. at 684 (citations omitted); *see also, The Lautenberg Foundation, et al. v. Irving H. Picard, Trustee (In re Bernard L. Madoff Investment Securities, LLC)*, 512 Fed. Appx. 18, 20 (2d Cir. 2013) ("Section 105(a) is to be 'construed liberally to enjoin suits that might impede the reorganization process'") (internal citations omitted).

In the context of a debtor seeking a preliminary injunction, courts have held that "reasonable likelihood of a successful reorganization" does not require a showing of certainty that the reorganization will be successful. *Lyondell,* 402 B.R. at 589 (observing that only a "reasonable" likelihood of success need be shown for emergency relief as "there is no way to predict what will ultimately happen in a large Chapter 11 case as new issues arise."); *see also, Soundview Elite*, 543 B.R. 78, 119 (courts do not demand "certainty of a successful reorganization" but "only reasonable prospects of such"); *Caesars Entertainment Operating Company, Inc., et al. v. BOKF, N.A., et al.* (*In re Caesars Entertainment Operating Co*.), 808 F.3d 1186, 1189 (7th Cir. 2015) (determining that the issuance of a preliminary injunction would give the parties a "clear shot at negotiating an overall settlement"). As long as a debtor could show that it is "proceeding on track" toward formulating a plan of reorganization, it would be deemed to have satisfied the first prong for injunctive relief. *See, Union Trust Philadelphia,*

LLC v. Singer Equipment Company, Inc. et al. (*In re Union Trust Philadelphia, LLC*, 460 B.R. 644, 660 (E.D. Pa. 2011 (holding a reorganization likely to succeed so long as the prospects of reorganization "remain viable"); *Lyondell*, 402 B.R. 571, 588-89 (noting that "if there are reasons to conclude that the debtor(s) *could not* reorganize, that plainly should affect debtors' ability to invoke this factor, [but] where debtors are proceeding "on track" and have met the challenges they have faced so far, that is sufficient.").

Supreme Court Holding In *Purdue Pharma*

The Supreme Court in *Purdue Pharma* ruled that the Bankruptcy Code does not authorize nonconsensual releases and injunctions under a Chapter 11 plan. *See, Harrington v. Purdue Pharma L.P., et al.*, 144 S. Ct. 2071 (2024) ("we hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants"). In rejecting the argument that Section 1123(b) authorizes a bankruptcy court to approve a Chapter 11 plan providing for nonconsensual release and injunction provisions, the Supreme Court also examined whether Section 105(a) would permit such relief and determined that it did not. *Id*. at 2082, n.2 ("[a]s the Second Circuit recognized … '§105(a) alone cannot justify' the imposition of nonconsensual third-party releases because it serves only to '"carry out"' authorities expressly conferred elsewhere in the code." *Id*. Importantly, however, the Supreme Court clearly noted that its decision is a narrow one and "[n]othing [in our decision] should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here." *Id*. at 2087. The Court further clarified that it does not "express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor." *Id*. at 2087.

Post-*Purdue Pharma* 105(a) Decisions

Since the *Purdue Pharma* decision, at least several courts have decided motions for preliminary injunctive relief in the reorganization context. *See*, *e.g.*, *Coast to Coast Leasing, LLC v. M&T Equipment Finance Corporation, et al. (In re Coast to Coast Leasing, LLC)*, 2024 WL 3454805 (Bankr. N.D. Ill. July 17, 2024) (granting injunctive relief); *In re Parlement Technologies, Inc. (f/k/a Parler LLC, f/k/a Parler, Inc.)*, 2024 WL 3417084 (Bankr. Del. July 15, 2024) (Goldblatt, J.) (denying injunction based on debtor's failure to make necessary showing of entitlement); *In re Puerto Rico Power Authority*, Bankr. No. 17-04780 (D.P.R. July 11, 2024) (SDNY Judge Laura Taylor Swain extended a litigation stay for 60 days and ordering parties to mediation sessions).

In *Parlement*, the Delaware bankruptcy court, in evaluating a request to extend the automatic stay to litigation against certain of the debtor's officers, first examined the threshold issue of whether the Supreme Court's decision in *Purdue Pharma* impacts a bankruptcy court's power to issue 105(a) injunctions. In determining that *Purdue Pharma* does not preclude granting an extension of the stay to nondebtors, the Delaware court noted that "[i]n the typical case of a preliminary injunction, that analysis is focused on the likelihood that the party seeking the injunction will ultimately obtain permanent relief against the party which it seeks the preliminary injunction." *Parlement*, 2024 WL 3417084, at * 3. The Court concluded that "[f]ollowing ***Purdue Pharma***, 'success on the merits' cannot be based on the likelihood that the nondebtor would be entitled to a nonconsensual third-party release through the plan process." *Parlement*, 2024 WL 3417084, at *1. Notwithstanding, the court noted that "[a] preliminary injunction may still be granted if the Court concludes that (a) providing the debtor's

management a breathing spell from the distraction of other litigation is necessary to permit the debtor to focus on the reorganization of its business or (b) because it believes the parties may ultimately be able to negotiate a plan that includes a consensual resolution of the claims against the nondebtors," either of which would be viewed as "success on the merits" for this purpose. *Id.* The court reasoned that "[g]ranting a preliminary injunction based on a finding that the debtor is likely to succeed in this sense (which is how bankruptcy courts that have entered such preliminary injunctions have typically described the basis for doing so) does not depend at all on the principle rejected by ***Purdue Pharma*** that a bankruptcy court may grant a nonconsensual third-party release." *Id.*

The United States Bankruptcy Court for the Northern District of Illinois, in granting a 105(a) injunction, impliedly adopted the Delaware bankruptcy court's ruling in *Parlement* that the *Purdue Pharma* decision does not extend to the court's power to issue a 105(a) injunction. *Coast to Coast Leasing*, 2024 WL 3454805 *4. The injunction in *Coast to Coast Leasing* was found to be necessary and appropriate based upon evidence that certain assets that were sources of funding for the debtor's reorganization efforts risked dissipation absent a stay of litigation. *Id*.

Conclusion

Though the Supreme Court's decision in *Purdue Pharma* does not preclude bankruptcy courts from granting 105(a) injunctions upon a showing of entitlement to such extraordinary relief, it may change how courts assess the "likelihood of a successful reorganization" prong of the injunction analysis. As a result, debtors may have a more difficult time obtaining preliminary injunctions predicated upon the mere hope of a plan settlement.

Despite that the holding in *Purdue Pharma* is a narrow one based on the issue of nonconsensual releases under a plan and not nonconsensual temporary injunctions pending confirmation of a plan, it is likely that claimants seeking to advance litigation against nondebtors will argue that a successful reorganization is unlikely to occur because third-party releases are necessary to any plan and 100% consensus may be unachievable. Although the case law is clear that debtors need not demonstrate certainty of a successful reorganization, because nonconsensual plan releases are no longer a permissible goal, courts likely will require a greater showing of consensus building early on in a case and potentially may shorten the duration of any injunction and impose more stringent disclosure requirements to keep the pressure on the parties to focus on the reorganization and minimize harm to the nondebtor parties stayed from pursuing their claims.

To maximize the likelihood of obtaining a 105(a) injunction, now more than ever before, debtors will need to make a strong showing of interference with the reorganization and may be best served by getting plan settlement discussions underway before filing Chapter 11 and advancing such discussions in earnest thereafter.

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