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Extending the Stay After *Purdue*

Can Nondebtors Still Benefit from Injunctive Relief on Preliminary Basis in Chapter 11 Cases?

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By its terms, § 362(a) of the Bankruptcy Code makes the automatic stay applicable only to actions pending against the debtor. As with any general rule, this fundamental principle of the automatic stay is subject to certain exceptions. However, within mass tort bankruptcy practice, the exception is beginning to swallow the rule. Debtors facing mass tort lability will regularly seek to enjoin present and future suits by their creditors against nondebtor parties during the pendency of the debtor's chapter 11 case. Often — and sometimes interchangeably — these injunction requests made prior to plan confirmation are referred to as requests for "preliminary injunctions" or for an "extension" of § 362(a)'s automatic stay.

In *Harrington v. Purdue Pharma*, the U.S. Supreme Court rejected another common mass tort practice: nonconsensual third-party releases in chapter 11 plans. While the Court characterized its decision as limited to the issue before it, a question unavoidably follows: If a bankruptcy court cannot, without consent, permanently release or enjoin claims against nondebtors in a chapter 11 plan without consent, does it maintain authority to do so on a preliminary basis?

The handful of bankruptcy courts to have considered this question have concluded that temporary injunctive relief for nondebtors is still available under the Code. This article looks at stay extensions and preliminary injunctions, and how courts have handled preliminary injunction requests in the wake of *Purdue*.

Stay Extensions and Preliminary Injunctions, Generally

Section 362(a)(1) provides for an automatic stay upon the filing of a petition of certain actions or proceedings "against the debtor" or "to recover a claim against the debtor."[2] Similarly, § 362(a)(3) operates to stay acts to obtain possession or control over "estate property" — that is, property in which the debtor had an interest as of the petition filing.[3] As a result, it has generally been understood that § 362(a)'s automatic stay applied only to prohibit actions pending against a debtor and could not be invoked to protect such nondebtor parties as sureties, guarantors or co-obligors.[4]

Section 362(a)'s text has been understood to include a limited number of exceptions to this general principle, however. For example, a stay of actions to "recover a claim against a debtor" under § 362(a)(1) might encompass a fraudulent-conveyance litigation pending between a creditor of the debtor and a nondebtor transferee.[5] Similarly, that same fraudulent-conveyance claim, as well as other "derivative" claims, might be stayed under § 362(a)(3) as a claim that belongs to the debtor's estate.[6] The same could be true of actions between two nondebtor parties that would be "certain" to draw down on a debtor's insurance policies.[7]

It was not long after the introduction of these stay provisions in the Bankruptcy Reform Act of 1978, referring to the "debtor" and "estate," that courts began to find statutory and other bases to "extend" the stay offered by the provision to certain nondebtor third parties.[8] One of the first such extensions came in 1983, out of the *Johns-Manville* bankruptcy.[9] Three years later, the Fourth Circuit Court of Appeals' decision in *A.H. Robins* was issued, which is frequently cited to support extension of the stay to nondebtor third parties.[10]

In *A.H. Robins*, the Fourth Circuit concluded that the automatic stay could be applied for the benefit of nondebtors where there existed "unusual circumstances," such that "there is such iden-

1 The authors represent the *Ad Hoc* Committee of Governmental and Other Contingent Litigation Claimants in the bankruptcy case of *Purdue Pharma LP*, and the Coalition of Counsel for Justice for Talc Claimants in the bankruptcy case of *Red River Talc LLC*, both discussed herein. The opinions expressed in this article represent those of the authors alone, and not of the committee, coalition or the authors' firm. In addition, the authors thank **Melanie Cyganowski**, a member and chair of the firm's Bankruptcy Department, for her contributions to this article.

2 11 U.S.C. § 362(a)(1).

3 11 U.S.C. §§ 362(a)(3), 541(a)(1).

4 *See, e.g., McCartney v. Integra Nat. Bank N.*, 106 F.3d 506, 509-10 (3d Cir. 1997).

5 *See In re Colonial Realty*, 980 F.2d 125, 131-32 (2d Cir. 1992).

6 *See, e.g., In re Wilton Armetale Inc.*, 968 F.3d 273, 283 (3d Cir. 2020) (discussing derivative claims and estate property).

7 *See, e.g., In re Quigley Co.*, 676 F.3d 45, 53-54, 58 (2d Cir. 2012).

8 Both § 362(a)(1) and (a)(3) were amended in 1984. *See* 98 Stat. 371 (July 10, 1984). While these broadened the scope of the provisions — § 362(a)(1) now covered "other actions" in addition to "proceedings" not otherwise enumerated, and subsection (a)(3) was amended to cover actions "to exercise control over property of the estate," in addition to those to obtain possession — they arguably did not materially change the basic concepts contained in the provisions.

9 *In re Johns-Manville Corp.*, 26 B.R. 420, 425 (Bankr. S.D.N.Y. 1983). The U.S. Bankruptcy Court for the Southern District of New York concluded that §§ 362(a)(1) and 105(a) could be used in tandem to extend the stay and, separately, that suits against nondebtors could be stayed if the standard for a preliminary injunction had been met. *Id.*; *see also In re Old Orchard Inv. Co.*, 31 B.R. 599, 603 (Bankr. W.D. Mich. 1983); *In re Otero Mills Inc.*, 25 B.R. 1018, 1020-21 (Bankr. D.N.M. 1982).

10 *A.H. Robins Co. Inc. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986).

tity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant."[11] In such circumstances, the Fourth Circuit reasoned that failing to apply the stay would defeat its "purpose and intent."[12] The court concluded that this type of extension based on "unusual circumstances" was authorized by § 362(a)(1) alone.

However, the Fourth Circuit did not stop there. It further identified three additional sources of authority by which the stay could benefit nondebtors, any one of which was alone sufficient: (1) § 362(a)(3) (discussed above); (2) § 105(a); and (3) a court's "inherent authority."[13]

Since *A.H. Robins*, other circuit and lower courts have weighed in on the issue, but with little consistency in approach. Some rely on *A.H. Robins*'s "unusual circumstances" test to characterize the extended stay relief as authorized by § 362(a) alone,[14] or in conjunction with § 105(a).[15] Others instead look to the standard factors for a preliminary injunction under the Federal Rules of Civil Procedure, concluding that such relief is available under § 105(a).[16] Some courts look at §§ 362(a) and 105(a) as separate grounds to extend the stay,[17] while still others have allowed a stay to benefit third parties only when a movant demonstrates *both* unusual circumstances and the preliminary injunction factors.[18]

Regardless, the outcome is the same: While § 362(a) applies only to debtors and their bankruptcy estate, courts have used their authority to stay actions between nondebtor third parties pending the outcome of a bankruptcy that — until *Purdue* — might have included a nonconsensual release of those same claims.

The *Purdue* Decision

Purdue's chapter 11 plan was confirmed with a broad nonconsensual release[19] of claims against members of the Sackler family, who were Purdue's owners and the primary source of funding for Purdue's plan — but were not themselves debtors.[20] Reviewing the validity of these releases, the Supreme Court concluded 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."[21]

This conclusion turned, primarily, on the Court's interpretation of § 1123(b)(6), the catch-all provision that permits a plan to include "any other appropriate provision not inconsistent" with other Code provisions.[22] Relying on *ejusdem generis* canon of statutory interpretation,[23] the Court concluded that the reference to "any other appropriate provision" was constrained by the other subsections of § 1123(b), all of which involved the rights and obligations of the debtor.[24]

Thus, § 1123(b)(6) must likewise be limited to addressing the debtor's liabilities.[25] The Court also explained that while Congress had authorized nonconsensual third-party releases in the asbestos context, under § 524(g) it had not spoken to the issue otherwise, implying that such releases were intended to be available only in accordance with that provision.[26]

Ultimately, the court concluded by noting that the opinion should not be read to impact other issues beyond the question immediately before it about the permissibility of permanently enjoining claims against nondebtors without consent through a chapter 11 plan.[27] Yet it is hard to read the Court's opinion in a vacuum, particularly as it relates to stay extensions and preliminary injunctions that also enjoin claims against nondebtors.

The Supreme Court's reasoning can also be read to cast doubt on the various sources of authority for stay extensions and preliminary injunctions. The Court has said before, and reiterated in *Purdue*, that § 105(a) alone cannot authorize action without another statutory predicate.[28] It is now far less clear that § 362(a) can serve as that predicate.

As previously discussed, § 362(a) refers only to the debtor and the property of its estate, and § 1123(b) employs similar language. If § 1123(b)(6) is not capacious enough to encompass nondebtor claims, the extent to which § 362(a) encompasses such claims — particularly on any type of broad basis and in the absence of consent — might be a question that the lower courts will need to address.

A Survey of Post-*Purdue* Cases

How have courts handled stay extensions and preliminary injunctions after *Purdue*? Most have recognized and considered the connection between *Purdue*'s holding and staying litigation against nondebtors, and have attempted, to differing degrees, to grapple with its impact.[29] Of those that have considered the connection, none has yet determined that *Purdue* precludes a preliminary injunction.

11 *Id.*
12 *Id.*
13 *Id.* at 1000-05.
14 Although the Third Circuit Court of Appeals has not, to date, expressly ruled on the issue, its decision in *McCartney v. Integra Nat'l Bank N.*, 106 F.3d 506, 510 (3d Cir. 1997), adopts *A.H. Robins*'s unusual-circumstances test, which relies on § 362(a) alone.
15 *See, e.g., Patton v. Bearden*, 8 F.3d 343, 349 (6th Cir. 1993); *Teachers Ins. & Annuity Ass'n of Am. v. Butler*, 803 F.2d 61, 65-66 (2d Cir. 1986).
16 *See, e.g., Solidus Network Inc. v. Excel Innovations Inc. (In re Excel Innovations Inc.)*, 502 F.3d 1086, 1094 (9th Cir. 2007).
17 *See, e.g., In re Roman Catholic Diocese of Rockville Centre, N.Y.*, 651 B.R. 622, 648-52 (Bankr. S.D.N.Y. 2023) (discussing §§ 362(a) and 105(a) as alternate bases for staying actions against nondebtors, but declining to extend stay or issue injunction).
18 *See In re Philadelphia Newspapers LLC*, 407 B.R. 606, 616 (E.D. Pa. 2009); *see also In re LTL Mgmt. LLC*, 638 B.R. 291 (Bankr. D.N.J. 2022) (applying multi-part *Philadelphia Newspapers* test).
19 Although the plan was approved by the class of channeled claimants whose claims were to be released and channeled into a trust, the releases were "nonconsensual" in the sense that there was no ability for claimants to opt into or out of those releases. *See Harrington v. Purdue Pharma LP*, 144 S. Ct. 2071, 2079-80 (2024).
20 *Id.*
21 *Id.* at 2088.
22 *Id.* at 2081 (quoting 11 U.S.C. § 1123(b)(6)).
23 The canon provides that a catch-all preceded by more specific examples, such as § 1123(b)(6), must "be interpreted in light of its surrounding context and read to 'embrace only objects similar in nature'" to the specific example. *Id.* at 2082 (quoting *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 512 (2018)).
24 *Id.* at 2083.
25 *Id.*
26 *Id.* at 2085.
27 *Id.* at 2088.
28 *Id.* at 2082, n.2; *see also Law v. Siegel*, 571 U.S. 415, 423 (2014) (stating that § 105(a) cannot be used in contravention of Bankruptcy Code).
29 Two additional decisions, not discussed in this article, granted preliminary injunctions without reference to *Purdue*: *Whittaker, Clark & Daniels Inc. v. Brenntag, AG (In re Whittaker, Clark & Daniels Inc.)*, Case No. 23-13575 (MBK), Adv. Pro. No. 23-01245 (MBK) (Bankr. D.N.J. Oct. 24, 2024), ECF No. 360; *Red River Talc LLC v. Those Parties Listed on Appendix A to Complaint (In re Red River Talc LLC)*, Case No. 24-90505 (CML), Adv. Pro. No. 24-03194 (CML) (Bankr. S.D. Tex. Oct. 24, 2024), ECF No. 57.

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In re Parlement Technologies Inc.[30]

Addressing the issue as a "preliminary injunction," the court recognized the challenge presented by offering a preliminary injunction that could no longer become permanent after *Purdue*,[31] yet the court did not view this as fatal. Although a preliminary injunction in a standard civil action and in bankruptcy rely on the same four factors, the bankruptcy injunction does not depend on the likelihood that the party will ultimately obtain that relief on a permanent basis.[32] Rather, the "likelihood of success" relevant in a bankruptcy preliminary injunction is the likelihood of plan confirmation.[33]

As such, in addition to the Supreme Court's limiting language, a debtor's likelihood of success can no longer be predicated on the entitlement to obtain a nonconsensual third-party release in a plan, but *Purdue* otherwise did not change the preliminary injunction analysis.[34] Nevertheless, the court denied the injunction based on the debtor's failure to meet its evidentiary burden.[35]

In re Coast to Coast Leasing LLC[36]

Implicitly relying on the Supreme Court's limiting language, the court in this case distinguished *Purdue*'s focus on nonconsensual third-party releases from the request before it: for a temporary restraining order for a limited period.[37] The court further found support for the continued viability of preliminary injunctive relief in the *Parlement* opinion, and in the extension of a litigation stay in the *Financial Oversight and Management Board for Puerto Rico* bankruptcy.[38] The court ultimately granted the temporary restraining order.[39]

In re Diocese of Buffalo, N.Y.[40]

Consistent with the *Parlement* opinion, though not in reliance on it, the court concluded in this case that the likelihood of obtaining a nonconsensual nondebtor release through a plan could no longer meet the "likelihood of success" prong for a preliminary injunction.[41] The likelihood of that outcome had formed the basis of the court's issuance of a preliminary injunction in response to earlier requests in the case.[42] However, because it was now unavailable, the court denied a further extension of the preliminary injunction.[43]

Conclusion

Although courts continue to issue stay extensions and preliminary injunctions after *Purdue*, the Supreme Court's opinion raises real questions about the viability of the relief. It will be interesting to see whether subsequent cases converge, or diverge, on the issue. abi

Editor's Note: *ABI held a webinar shortly after the Supreme Court issued its decision in* Purdue. *To listen to the abiLIVE recording, please visit abi.org/newsroom/videos. ABI also published a digital book,* The Purdue Papers, *a compilation of 3,500+ pages of* amicus *briefs, petitions and other related background material. To order your downloadable copy, visit store.abi.org.*

30 Case No. 24-10755 (CTG), 2024 WL 3417084 (Bankr. D. Del. July 15, 2024).
31 *Id.* at *3-4.
32 *Id.*
33 *Id.* at *7.
34 *Id.* at *2.
35 *Id.* at *6.
36 661 B.R. 621 (Bankr. N.D. Ill. 2024).
37 *Id.* at 624.
38 *Id.* at 624-25.
39 *Id.* at 626.
40 BK 20-10322 CLB, AP 20-01016 CLB, 2024 WL 4488459 (Bankr. W.D.N.Y. Sept. 30, 2024).
41 *Id.* at *3.
42 *Id.*
43 *Id.*