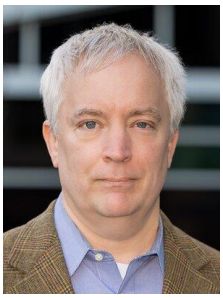
High Court Made Profound Mistake In Tossing Purdue Deal

By **Swain Wood** (July 16, 2024)



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The U.S. Supreme Court's June 27 decision in Harrington v. Purdue Pharma LP to throw out Purdue Pharma's Chapter 11 plan and the multistate settlement agreement was a profound mistake.

The agreement, which would resolve claims that Purdue Pharma sales of OxyContin played a major role in creating the U.S. opioid crisis, brought together all 50 states and thousands of other public entity claimants to provide approximately $7 billion in much-needed relief to help local communities across the country fight the opioid epidemic. Real people have been suffering due to the opioid crisis for years, but to date they have received nothing from either Purdue or the Sackler family that owned it.

The U.S. Solicitor General's Office should have recognized and prioritized the human impact of the agreement and declined to seek certiorari for the U.S. Court of Appeals for the Second Circuit's ruling that upheld the agreement. For the same reason, the Supreme Court should have declined to take the case despite the solicitor general's urging.

One of the main reasons our civil justice system exists is to compensate people for injuries and harm inflicted by wrongdoers. The Purdue settlement would have resulted in more dollars being spent on remediation of harm than all but a handful of other settlements in U.S. history.

Fortunately, the Purdue settlement is not the only opioid-related litigation settlement that states have reached in recent years. States and localities have recovered more than $50 billion from a range of other companies involved in the manufacturing, distribution and dispensing of opioids. That funding will make an enormous difference. But $7 billion more from Purdue and the Sacklers would have extended that impact to thousands more people.

It took years of tough and intense negotiations with countless stakeholders for a bipartisan coalition of state attorneys general to engineer the Purdue agreement. State negotiators had to make dozens of extremely tough practical judgments and compromises to unlock billions of dollars from Purdue and the Sackler family.

Nothing about it was easy, but the states that led the effort consistently returned their focus to one group of people: the victims, whose daily lives require constant struggle with chemical addiction. That focus was not imaginary or theoretical. Many of those involved in the negotiations, on all sides, had friends and loved ones who were struggling with addiction or had been lost to it.

Like the other recent public opioid settlements, but unlike the national tobacco settlement in the 1990s, the Purdue agreement had important restrictions on how the public entities that were to receive funds would have to spend the money.

Under the Purdue agreement, the overwhelming majority of the $7 billion was required to be spent on evidence-based measures to combat opioid addiction. The agreement also would have given local communities a powerful voice in deciding which anti-addiction strategies would be most effective for their community. Critically, the agreement did not

release any of the Sacklers from criminal liability.

The Supreme Court's 5-4 decision to throw out the Purdue settlement threatens to turn $7 billion in desperately needed relief into nearly nothing. Unless something that resembles the previous agreement can be salvaged, states will likely face the prospect of spending years chasing individual defendants across the globe, as many of them live overseas.

The time and energy that states may now have to devote to chasing foreign defendants would have been much better spent distributing billions of dollars in settlement funds to local communities' addiction treatment programs and using limited staff resources to focus on the many other critical issues that state attorneys general are faced with addressing.

The flaw that the Supreme Court majority found with the Purdue settlement was that it allowed members of the Sackler family, who were not individually filing for bankruptcy protection, to receive broad nonconsensual releases from further civil liability in exchange for paying billions of dollars to the states and localities for opioid treatment.

Releases from civil liability in exchange for monetary payments are, of course, a cornerstone of civil litigation and are the mechanism for how nearly every civil lawsuit in America ultimately gets resolved. Likewise, nonconsensual releases are a standard feature of bankruptcy plans.

What was unusual, though not unique, about this nonconsensual release was that it would cover third parties to the bankruptcy — i.e., the Sackler family members — and not just their bankrupt company. Several federal appellate courts have allowed the use of nonconsensual third-party releases, but the Supreme Court had denied certiorari in numerous cases that presented the issue over many years, including the massive bankruptcies of breast implant maker Dow Corning Corp. and Dalkon Shield maker A.H. Robins Co., until now.[1]

In dissent, Justice Brett Kavanaugh recognized the harsh consequences of the court's decision, describing it as "wrong on the law and devastating for more than 100,000 opioid victims and their families."

If the Supreme Court majority was determined to put an end to nonconsensual third-party releases, they could have — and should have — denied certiorari one more time and waited for the next case. Preferably, that would have been one that wouldn't result in immediately depriving thousands of people of access to addiction treatment.

They could also have waited for a case where support for the plan among creditors was not so overwhelming and the objections not so isolated. As Justice Kavanaugh noted, the only objectors to the Purdue plan were "a small group of Canadian creditors and one lone individual."

It is tempting — but extraordinarily speculative — to imagine that litigants will now be able to successfully pursue the Sacklers individually in dozens of different courts, fight and win jurisdictional battles, trace funds through multiple overseas accounts, and prevail in potential post-judgment litigation over collection efforts and ultimately pry as much or more than the $7 billion that was on the table until the Supreme Court's decision.

The Second Circuit found no evidence that such a recovery was likely, and the practicalities and resources required to attempt it would be monumentally substantial. Moreover, without going through bankruptcy court, any recoveries that may occur may not be divided in any

rational way based on need but will differ from one plaintiff to the next based on litigation exigencies, the plaintiffs' comparative resources, collectability and luck.

Even if a somewhat greater collective litigation recovery is somehow achieved despite these obstacles, thousands of people who could have been helped will suffer — and some will die — during the time it takes for those efforts to play out. All that said, the skill that the current negotiation team has shown throughout this arduous process provides some reason for hope.

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Disclosure: While serving as assistant attorney general of North Carolina, Wood was a lead member of the executive committee of state negotiators in the national opioid settlements, including the Purdue settlement.

[1] See, e.g., MacArthur Co. v. JohnsManville Corp. (In re Johns-Manville Corp., 837 F.2d 89, 92-94 (2d Cir.), cert. denied, 488 U.S. 868 (1988); In re Millennium Lab Holdings II, LLC, 945 F.3d 126, 139-40 (3d Cir. 2019), cert. denied, 140 S. Ct. 2805 (2020); Menard-Sanford v. Mabey (In re A.H. Robins Co.), 880 F.2d 694, 700-02 (4th Cir.), cert. denied, 493 U.S. 959 (1989); Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 656-58 (6th Cir.), cert. denied, 537 U.S. 816 (2002); Airadigm Commc'ns, Inc. v. FCC (In re Airadigm Commc'ns, Inc.), 519 F.3d 640, 657-58 (7th Cir. 2008); SE Property Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070, 1076-79 (11th Cir.), cert. denied, 577 U.S. 823 (2015).