The Struggle to Prevent Equitable Mootness and to Avoid Silencing Through Litigation: The Boy Scouts of America Bankruptcy Case

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On Oct. 3, 2023, Hon. Richard G. Andrews of the U.S. District Court for the District of New Jersey entered a memorandum decision denying three renewed stay motions filed by various claimants in the bankruptcy case of *Boy Scouts of America and Delaware BSA, LLC*.[2] The stay request had been sought by various sexual abuse claimants and "certain insurers" (the claimants) on the grounds that the *BSA* plan contained unlawful third-party releases, and that the Supreme Court had recently granted *certiorari* to determine whether such third-party releases were permitted by the Bankruptcy Code.[3]

This was the very issue that was at the center of the *BSA* plan. The stay request argued that the parties and court should defer further action until the Supreme Court rules on the central issue of the validity of third-party releases, and to diffuse any issue of equitable mootness based on the alleged plan consummation. The district court denied the stay request *despite* expressly acknowledging that the Supreme Court's recent granting of *certiorari* in *Purdue* "signals *at least* a reasonable chance that Claimants may succeed on their challenge [to the third-party releases]."[4]

The *BSA* case illustrates the problematic intersection of equitable mootness with the potential invalidity of nonconsensual third-party releases.[5] The question it raises is key: Is it appropriate for a bankruptcy court to permit continued implementation of a plan that is premised largely on third-party releases, but where the lawfulness or constitutional infirmity of third-party releases has been called into question by the U.S. Solicitor General and where the U.S. Supreme Court has granted *certiorari* and ordered expedited briefing and oral argument? Restated, should parties be permitted to continue to implement a plan to enhance an argument of equitable mootness?

The answer is "No." Under the circumstances of the *BSA* case, the parties and the courts should defer to the Supreme Court and stay further action in the *BSA* case until the Supreme Court can determine whether nonconsensual third-party releases are lawful.

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[2] (Civ. No. 22-1237-RGA), ECF Dkt. 254.

[3] *Harrington v. Purdue Pharma, LLC*., S. Ct. Case No. 23-124 (hereinafter *Purdue*).

[4] *Id*. at 14 (emphasis added). Perhaps not coincidentally, two days later the Third Circuit issued an order vacating its prior order staying briefing and directing that briefs be filed by Oct. 20, 2023. *See* ECF Dkt. 94. Mindful of the Supreme Court's recent action, the Third Circuit may wish to determine the appropriate posture for the *BSA* appeal promptly.

[5] As Prof. Adam Levitin has stated, equitable mootness causes chapter 11 to suffer from "illusory appellate review." *See* Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances,* 100 TEX. L. REV. 1079, 1121 (2022).

The Procedural Background of the *BSA* Bankruptcy

On Sept. 8, 2022, the U.S. Bankruptcy Court for the District of Delaware confirmed the plan of reorganization in *BSA*, which contained nonconsensual third-party releases of certain nondebtor entities affiliated with the Boy Scouts. The confirmation order was appealed to the district court by a group of survivors of childhood sexual abuse, known as the "D&V claimants," as well as "certain insurers."[6] The district court affirmed the confirmation order on March 28, 2023.

Three days later, and before the "effective date" of the plan, a group of insurance companies (the "certain insurers") moved for a stay pending appeal, noting that "BSA had refused to refrain from substantially consummating the plan on appeal."[7] The motion for a stay correctly noted that the "loss of appellate rights is the 'quintessential form' of irreparable harm."[8] The D&V claimants likewise filed an emergency motion for a stay pending appeal, arguing that "BSA may argue that further appeals by appellants are equitably moot."[9]

The district court denied the stay motions. According to BSA, the plan became effective on April 19, 2023, but the claimants have shown that the failure to produce required documents delayed the effective date until Oct. 6, 2023, and that this delay strongly favors their stay motions.[10]

The issue of whether the third-party releases were lawful was well known to the parties in the *BSA* case, given what was occurring in the *Purdue* case. The district court in *Purdue* had previously ruled that the "Bankruptcy Court lacked statutory authority to impose nonconsensual third-party releases."[11] On May 30, 2023, the Second Circuit reversed the district court.[12] On July 7, 2023, the U.S. Solicitor General filed a motion to stay the issuance of the mandate by the Second Circuit "pending disposition of petition for *writ of certiorari*."[13] This motion stated, "The United States Trustee intends to file such a petition [for a *writ of certiorari*] on or before the deadline of August 28, 2023."[14]

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[6] *See* Notice of Appeal filed on Sept. 22, 2022, Case No. 20-10343-LSS.

[7] Emergency Motion of Certain Insurers for Stay Pending Appeal and a Temporary Stay While the Court Rules on the Motion, ECF Dkt. 152, filed on March 31, 2023. The motion noted that the Supreme Court then had a pending petition for *certiorari* that asked the Supreme Court to rule on the validity of equitable mootness. *U.S. Bank N.A. v. Windstream Holdings Inc.,* No. 22-926. The Supreme Court ultimately denied *cert.* on Sept. 30, 2023.

[8] *Id*. at p. 8 (citing *CW Capital Asset Mgmt. v. Burcam Capital II LLC.,* 2013 WL 3288092, at *7 (E.D.N.C. June 28, 2013).

[9] Emergency Motion of the Dumas & Vaughn Claimants for Stay Pending Appeal and a Temporary Stay While the Court rules on the Motion, Case no. 23-1666, ECF Dkt. 2, filed on April 11, 2023.

[10] The D&V claimants point out that because of the failure of BSA to produce the "Document Appendix documents" required by the plan, the actual "effective date" is Oct. 6, 2023. *See infra*, n. 21, p. 8. "This Court could nullify the April 19 purported 'effective date' and stay the plan on this basis alone." *Id*. at p. 23.

[11] *In re Purdue Pharma L.P.* 635 B.R. 25, 37 (S.D.N.Y. 2021).

[12] *In re Purdue Pharma L.P.,* 69 F.4th 25 (2023).

[13] *See* Memorandum of Law in Support of Motion to Stay Mandate Pending Disposition of Petition for *Writ of Certiorari*, Case No. 22-110, ECF Dkt. 1012.

[14] *Id*. at 1.

The Solicitor General did not wait until Aug. 28, 2023. Instead, on July 28, 2023, the Solicitor General filed its Application for a Stay with the U.S. Supreme Court.[15] The Solicitor General, as had the appellants in *BSA*, argued that there was a risk of equitable mootness without prompt judicial review. The last sentence of the motion for a stay stated, "In addition to granting the stay, the Court may wish to construe this application as a petition for a *writ of certiorari* and grant *certiorari*."[16]

The Supreme Court apparently saw merit in the underlying issue, and likely over the related issue of equitable mootness, and on Aug. 10, 2023, less than two weeks later, granted *certiorari* without a formal petition. The Court also accelerated both the briefing and oral argument. Given that oral argument before the Court is scheduled for December 2023 and a ruling is possible by early 2024, the stay motion in *BSA* was entirely appropriate. The same concern over equitable mootness exists in the *BSA* bankruptcy.

The Renewed Stay Motions

Following the grant of *certiorari*, the D&V claimants, the certain insurers and the "Lujan claimants" then filed renewed motions to stay the implementation of the *BSA* plan and to stay the pending appeals in the Third Circuit. They first sought a stay from the Third Circuit, which denied the stay request but without prejudice to their right to first seek a stay from the district court. The renewed stay motions were then filed in the district court.[17]

The purpose of the renewed stay motions was to prevent further implementation of BSA's plan of reorganization until after the Supreme Court issues its ruling in *Purdue.*[18] The stay motions were filed in recognition that the channeling injunctions and releases were the "cornerstone of the Plan,"[19] and that there was a reasonable likelihood that the Supreme Court would find the releases to be either statutorily unlawful or unconstitutional.[20]

The District Court Ruling

The district court had ample grounds to grant the stay motion, and in our view, the requested relief was well within the legal standards for a stay. The district court applied the traditional four-part test for injunctive relief. Perhaps the most important criterion for the issuance of a stay pending appeal is the likelihood of success on the merits. The claimants prevailed on this point. The district court agreed that a "fair prospect" that the *Purdue* appeal will succeed equates to a "reasonable chance of success."[21] It further stated, "The Court agrees that the Supreme Court's grant of a stay to consider the issue of nonconsensual third-party releases in *Purdue* signals at least

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[15] Application for a Stay of the Mandate of the United States Court of Appeals for the Second Circuit Pending the Filing and Disposition of a Petition for a *Writ of Certiorari*, filed in U.S. Supreme Court, Case No. 23-124, on July 28, 2023.

[16] *Id*. at 31.

[17] *See* ECF Dkt. 222, 223 and 235 in Case No. 1:22-01237-RGA.

[18] The stay motion sought to stay "further implementation." "Implementation" apparently meant the further processing of those claims of victims that were being released and channeled pursuant to the *BSA* plan.

[19] *See* Memo., p. 2.

[20] *Id.* at p. 14.

[21] *Id.*

a reasonable chance that Claimants may succeed on their challenge to that aspect of BSA's Plan with respect to their own claims. Claimants have therefore satisfied the first element."[22]

The district court, however, found that the claimants' stay request did not satisfy the elements of the balance of harm, irreparable harm or the public interest. I submit that this was error, and that these elements were amply satisfied and, indeed, fully justified a stay.

The district court noted that there was no irreparable harm because the victims were to be paid in full. This finding was contested. Because the D&V claimants were stayed from pursuing their civil litigation, "the full extent of the liability of the released non-debtors remains unknown."[23]

Further, payment in full does not obviate all harm. Victims are entitled to a public hearing and a jury trial, and to give voice to their harm and experience. A forthcoming article in the *Virginia Law Review* by Profs. Pamela Foohey and Christopher K. Odinet addresses the harm to the survivors of mass tort and the public interest in giving voice to the victims in the public forum of civil litigation:

> Bankruptcy is being used as a tool for silencing survivors and their families. When faced with claims from multiple plaintiffs related to the same wrongful conduct that can financially or operationally crush the defendant over the long term — a phenomenon we identify as *onslaught litigation* — defendants harness bankruptcy's reorganization process to draw together those who allege harm and pressure them into a swift, universal settlement. In doing so, they use the bankruptcy system to deprive survivors of their voice and the public of the truth. [T]his article examines how bankruptcy proceedings like these cause direct harm to survivors, to public trust in the justice system and the corporate economy.[24]

They describe the harm from bankruptcy silencing as impacting both the survivors and the public:

> The silencing aspects of onslaught litigation in bankruptcies may be more harmful and more important to many plaintiffs who become claimants in the bankruptcy cases.... Litigants desire to have a voice and to be heard by a neutral, trustworthy decision-maker who is deemed to behave fairly and in an even-handed manner.... Providing procedural justice is key to respecting human dignity and to meeting the requirements of due process.[25]

The court also found that the balance of harms did not favor the claimants. The district court held that BSA and other constituents had "relied" on the plan's effectiveness[26] and that the stay will put some of the claimants in "limbo."[27] The reliance argument finds little support in the record. The claimants consistently endeavored to alert all parties to the possibility of an appeal and

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[22] *Id*.

[23] Brief of Appellant D&V Claimants, Case No. 1:22-cv-01237-RGA, ECF Dkt. 41, filed on Nov. 7, 2022.

[24] Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy,* 109 VA. L. REV. 1261 (Oct. 2023).

[25] *Id.* at 1316.

[26] *See* Memo., p. 16.

[27] *See* Foohey & Odinet at 1316.

that the likelihood of reversal on the third-party release issue was always key. The *BSA* constituents continued to seek consummation of the plan despite repeated requests for a stay and repeated notice that the payments under the plan based on the nonconsensual releases were likely to be in violation of both the Bankruptcy Code and the U.S. Constitution.

Nor does the concern that some constituents will be in "limbo" outweigh the harm to the claimants and the public interest. Unlike *Purdue*, where the timing of relief is key to those who may need medical treatment, the *BSA* case is far less time-sensitive, and no injury occurs from a short delay. Most of the victims, now in their 50s or older, experienced sexual abuse decades ago. There is no pending need for immediate medical relief. Given that oral argument in *Purdue* will occur in December 2023, and a decision early in 2024 is very possible, a short stay now is entirely appropriate.

Under traditional standard notions of injunctive relief, not all factors must be satisfied, and at times one factor might be the most compelling. There is a sliding scale. This is such a case. The likelihood of success on the merits is now harder to dispute, given that the district court acknowledged this and that the Supreme Court granted *certiorari* without a petition for such.

The D&V claimants and the others have just filed a renewed stay request with the Third Circuit.[28] We submit that the Third Circuit should grant a stay of further implementation of the plan pending the decision in *Purdue.*

[28] Motion of Dumas & Vaughn Claimants for Stay of Bankruptcy Plan and Appeal, Case No. 23-1666, ECF Dkt. 96.