Involuntary Third-Party Releases: A Riposte

Written by:
Cliff White
Former Director of the U.S. Trustee Program;[1] *Washington, D.C.*

Last week, ABI published an essay by prominent bankruptcy practitioner **Thomas Salerno**, who defended involuntary third-party releases in the well-known *Purdue Pharma* case. In this piece, Mr. Salerno argues that the U.S. Trustee Program (USTP), which I headed for 17 years, is on a "fool's errand" as it seeks the "destruction of third-party releases."

The most recent USTP/Justice Department action that raised Mr. Salerno's ire was a request filed in the Second Circuit for a stay pending Supreme Court review. There was a fair amount of invective hurled throughout the article, reminding me of the old adage that "if the law is on your side, argue the law; if the facts are on your side, argue the facts; and if neither is on your side, pound the table."

Here are my takeaways from the Salerno article:

1. The Supreme Court just might rule in favor the U.S. Trustee Program. Mr. Salerno makes clear that he does not have much regard for the Supreme Court, commenting that "the Supreme Court has a spotty record at best in dealing with complex bankruptcy issues. . . ." I wonder if Mr. Salerno's line will be quoted in any of the upcoming Supreme Court briefs.

In a piece I wrote for the Creditor Rights Coalition's (CRC) online publication,[2] I predicted that the High Court would strike down the nonconsensual releases in *Purdue Pharma* by a vote of 9-0. Textualists will find no authority in the Bankruptcy Code for the releases, and those who take a more flexible approach to statutory interpretation will find no evidence of congressional purpose to allow bankruptcy judges to take away the rights of nondebtors in order to protect other non-debtors.

2. Congress is little better than the Supreme Court in rational decision-making. I could be off here in my interpretation of the author's intended point, but Mr. Salerno asserts that congressional intent to authorize involuntary third-party releases would require a "business-like and real-world approach" that "Congress has never taken." Nonetheless, he maintains that the *Purdue* releases should be upheld. While Congress might not always speak with perfect clarity, I think it is

[1] Cliff White headed the U.S. Trustee Program from 2005 until his retirement in 2022. He currently heads bankruptcy compliance for AIS, a financial technology company. The views expressed are those of the author only.
[2] I commented on the Second Circuit decision in *Purdue Pharma* in the CRC's on-line *Creditor Corner* weekly. https://creditorcoalition.org/cliff-white-speaks-on-the-purdue-pharma-decision/.

quite a stretch to assume that if Congress did not prohibit the releases in question, then they should be considered authorized.

3. As bad as the Judicial and Legislative Branches may be, the Executive Branch is even worse. Mr. Salerno condemns only the USTP for seeking *cert.*,[3] perhaps without realizing that the stay request and forthcoming petition for Supreme Court review required support from the top. The Attorney General himself has criticized *Purdue's* nonconsensual releases. The Solicitor General (SG) approves all Supreme Court filings after receiving input from internal Justice Department and other government stakeholders. The SG also routinely hears from opposing parties before deciding on its position before the Supreme Court.

According to the essay, the USTP has no "skin in the game" and thus has no right to interfere in the litigation. In fact, the Bankruptcy Code provides ample authority for the USTP to take enforcement and other actions, including in § 307 of title 11, which accords the USTP broad standing to raise and appear on any issue except that it may not file a chapter 11 plan.

In recognition of the multiplicity of competing parties in a bankruptcy case who may possess varying capacities to pursue their statutory rights, as well as the public interests at stake, the USTP was created as a *neutral party without a pecuniary interest in the outcome*. In complete contrast to Mr. Salerno's view, Congress empowered the USTP to litigate matters and file appeals *precisely because it has, to use Mr. Salerno's words, no "skin in the game."*

The USTP often brings issues in both consumer and business cases, even in mega-chapter 11 cases, that no one else can or will bring. I cannot tell you how many times parties, from *pro se* debtors to Big Law, urged my USTP colleagues and me to intervene on matters great and small because those parties lacked funding to pursue meritorious issues or because the internal dynamics of the case would create too much awkwardness for them to present the issues to the court.

Mr. Salerno derides the "amorphous 'integrity of the system'" arguments made by the USTP. To those in the USTP, the "integrity of the system" is what keeps the bankruptcy system vibrant, legitimate and able to achieve its purpose of protecting the rights of all stakeholders. The rule of law is not just a concept; it is the foundation of our system of government. That may sound corny, but it is nonetheless true.

4. Even though all three branches of the federal government are fatally flawed, no worries, because the lawyers will come to the rescue. Mr. Salerno argued that "the Deal" worked out between bankruptcy and tort lawyers should be

[3] In its filing in the Second Circuit, the government said it would seek *cert.* before the August deadline to do so. Mr. Salerno mistakenly said that the USTP already had "filed a petition for *certiorari*."

accepted without challenge from that pesky USTP. Under this view, the Bankruptcy Code should not be allowed to limit the contours of "the Deal." Apparently, "the Deal" — and not the law — reigns supreme.

Mr. Salerno does not sufficiently recognize that there are alleged victims of the opioid crisis who want their day in court. Who is to say that the bankruptcy and tort lawyers who got together with the Sackler family to work out "the Deal" know what is best for the holdout creditor-victims?[4] And even if the elite professionals do know what is best, what right do they have to trample on minority rights?

5. The delay in final adjudication is depriving needy victims of the assistance they deserve. Finally, we agree on something. I find this argument sometimes misused, however, in light of the fact that "the Deal" gives the Sacklers many years to make payments, perhaps allowing returns on their investments to grow in size sufficient to pay the entirety of the amounts due. In other words, the Sacklers may be able to buy their discharge without eroding the principal in the Sackler Family fortune.

To be sure, individual victims will be eligible to get some money, with many of them probably receiving $3,000. But the biggest payouts will go to the state and local governments. It is also worth noting that criticism of delay has largely been confined to the USTP's stay and appellate actions, while not one word of criticism was publicly uttered by the major parties during the Second Circuit's delay of more than one year in deciding the case.

The legality and wisdom of involuntary third-party releases in bankruptcy merit continued discussion. The legal issues are important, and resolution of them will have an enormous impact on the proper role of the bankruptcy system in the future. Although I disagree with him, I am grateful to Tom Salerno for continuing to make his points. I respect him greatly. But I humbly suggest that he should do so next time with a tad less invective.

[4] I will not rehash other points made in the Salerno article and in the case briefs on the merits of the arguments or likely consequences of striking down "the Deal," except to say that the majority of victim-creditors did not vote on "the Deal," and many among the massive number of known and unknown alleged victims might not have read or understood the *Financial Times* notices or television announcements about the scope of the releases. After all, a Sackler witness said under oath that the release language was too confusing for him to understand.