

**BANKRUPTCY UPDATE**

**Expert Analysis**

## Mired in Litigation, Opioid Makers File for Chapter 11

This issue of the Bankruptcy Update focuses on Chapter 11 filings by opioid manufacturers, including Insys Therapeutics, Purdue Pharma and Mallinckrodt, as the industry faces a reckoning over its role in driving an addiction crisis in America and worldwide.

### Insys Therapeutics

On June 10, 2019, Insys Therapeutics and affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware. (Bankr. D. Del. Case No. 19-11292).

The debtors commenced their cases to effectuate a sale of their assets following criminal and civil investigations that led to Insys pleading guilty to five counts of mail fraud and agreeing to pay \$225 million in connection with allegations that Insys bribed doctors to prescribe a fentanyl-based painkiller called Subsys.

Contemporaneously with the bankruptcy filing, the debtors sought to enjoin multiple lawsuits filed by state AG offices, other governmental entities, counties and municipalities. The actions were stayed following an

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agreement with certain states and the official committee of unsecured creditors.

In August 2019, the bankruptcy court approved the sale of Insys' naloxone nasal spray and cannabis based products to Hikma Pharmaceuticals USA and Chillion Group Holdings US for total consideration of approximately \$29 million. Subsequently, in September 2020, the bankruptcy court approved the sale of the debtors' Subsys assets to BTcP Pharma for \$250,000 in cash and an agreement to pay royalties on future drug sales.

Throughout this time period, the debtors, the official committee of unsecured creditors and several other major constituents engaged in mediation to facilitate resolution of various disputes and claims outside of a formal claim estimation process. Ultimately, in November 2019, the parties reached an agreement on a framework for a Chapter 11 plan that would provide tiered recoveries to claimants in different classes.

On Jan. 16, 2020, the debtors secured confirmation of their Chapter 11 plan embodying the above compromise and establishing two trusts to provide recoveries to creditors and opioid injury victims.

### Purdue Pharma

On Sept. 14, 2019, Purdue Pharma and affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of New York. (Bankr. S.D.N.Y. 19-23649).

The OxyContin maker was facing a multitude of lawsuits stemming from its role in fueling the opioid epidemic by deceptively marketing its opioid pain medication and downplaying its addictive properties and potential for abuse and commenced its bankruptcy proceeding to effectuate the terms of a settlement reached with 24 states. Under the proposed settlement, the company would seek to restructure as a public benefit trust with profits from the sale of OxyContin together with an estimated \$3 billion contribution from its owners, the Sackler family, used to fund recoveries. As of the filing, the proposed structure did not have the support of 26 additional litigating states or a large segment of other public and private claimants.

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Contemporaneously with the filing, Purdue sought an injunction from the bankruptcy court to apply the automatic stay of litigation to the non-settling governmental entities and to extend the stay to certain non-debtor related parties, namely the Sacklers. The bankruptcy court approved the proposed injunction and stayed litigation through at least early April 2020.

On March 2, 2020, the court entered an order appointing two mediators to oversee a mediation between governmental and private parties over the allocation of estate assets among the various case constituents. The mediation would include, among others, the official committee of unsecured creditors, groups of settling states, non-settling states, individual victims of Purdue, children born with neonatal abstinence syndrome (NAS), multistate governmental agencies, hospitals, insurance carriers and insurance purchasers.

Following entry of the mediation order, the court agreed to extend the injunction and litigation stay for an additional 180 days over objections of non-settling states and certain counties. The injunction was then further extended on September 30, 2020 for an additional five months. The latest extension followed a mediation report signaling significant mediation progress on allocation. Specifically, governmental and tribal claimants reached an agreement committing all funds to be earmarked for them toward abatement, and distribution term sheets were reached with groups of individual victims of Purdue, NAS children, hospitals, and insurance carriers.

In October 2020, Purdue reached a deal with the U.S. Department of Justice to plead guilty to felony fraud, violations of the Federal Food, Drug and Cosmetic Act and kickback charges related to OxyContin sales. The deal included \$8.3 billion in financial penalties by Purdue and a

\$225 civil penalty to be paid by certain members of the Sackler family. The settlement was approved by the bankruptcy court on Nov. 17, 2020.

### **Mallinckrodt**

On Oct. 12, 2020, Mallinckrodt and affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware. (Bankr. D. Del. Case No. 20-12522).

The global pharmaceutical company sought bankruptcy protection as it faced mounting opioid litigation costs estimated at \$1 million per week as well as a potential \$15 billion in damages awards related to its H.P. Acthar Gel used to treat conditions such as multiple sclerosis.

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Mallinckrodt entered bankruptcy having reached a restructuring support agreement (RSA) with holders of around 84% of the company's guaranteed unsecured notes, attorneys general for 50 states, the District of Columbia, U.S. territories and the plaintiffs' executive committee, representing 1,000 plaintiffs in multidistrict litigation. The proposed restructuring calls for, among other things, reinstatement of Mallinckrodt's secured debt, holders of unsecured notes receiving \$375 million of new seven-year secured second-lien notes and 100% of the equity interests in the reorganized debtors, \$150 million in cash distributions for holders of other unsecured claims and

trade claims, \$260 million settlement of H.P. Acthar Gel claims and establishment of a \$1.6 billion trust for opioid claimants.

Notably absent from the RSA parties were holders of the debtors' first lien debt who questioned the feasibility of the proposed restructuring at a hearing on the debtors' request for authority to use cash collateral. While the cash collateral request was unopposed following deals struck with the official committees of unsecured creditors and opioid claimants, the first lien debtholders' concerns signal potential issues down the road.

The debtors also faced preliminary opposition to their motion to appoint a future claims representative and decision to exclude opioid claims for the bar date for filing proofs of claims. The official opioid claimants committee as well as ad hoc groups of individual victims and children with neonatal abstinence syndrome posited that a traditional bar date and noticing process, which were utilized in Purdue, were more appropriate here. Hearings on the debtors' motion for appointment of a future claimants representative and the official opioid claimants committee's motion to compel the debtors to seek to establish a bar date were adjourned to late January to allow parties to engage in substantive allocation discussions in the interim period.