

Examiner With Narrow Scope Approved In Purdue Ch. 11

By **Vince Sullivan**

Law360 (June 16, 2021, 6:44 PM EDT) -- A New York bankruptcy judge begrudgingly approved the appointment of an examiner in the Chapter 11 case of OxyContin maker Purdue Pharma LP on Wednesday, saying he was doing so only because the baseless allegations included in the examiner motion needed to be addressed publicly.

During a hearing conducted by videoconference and telephone, U.S. Bankruptcy Judge Robert Drain lambasted the filings by professor Jonathan C. Lipson of Temple University's Beasley School of Law on behalf of creditor Peter Jackson in seeking the appointment of an examiner. Judge Drain concluded that Lipson's papers served to mislead the thousands of people involved in the case who don't have legal backgrounds into believing there was some impropriety occurring in the proceedings.

"When it is asserted with no evidence that the process lacks integrity and that the fiduciaries and their own representatives have misguided motives or have misled or have confused or somehow acted without integrity, that's a problem," Judge Drain said. "It's particularly a problem when a law professor who one would think understands how courts work, who one would think understands that integrity is the fundamental basis of the legal system, raises questions, concerns or issues without any real support. That's not how it works here."

Once those allegations of impropriety against the attorneys in the case as well as the court itself were raised, Judge Drain said there was a real risk that the public at large and the thousands of opioid injury claimants would be left with the impression that the system was stacked against them if an examiner weren't appointed. When first seeking the appointment of an examiner in a letter to Judge Drain and the Office of the United States Trustee, Lipson copied The Wall Street Journal on the document, which Judge Drain cited as an effort to raise media awareness about Lipson's efforts.

"I am concerned if I do not appoint an examiner, the next press release will read 'court refuses to appoint examiner...'" Judge Drain said in his ruling.

The hearing, which ran more than five hours, was largely taken up by Judge Drain's confrontational questioning of Lipson about the evidentiary support for the examiner motion. In his papers, Lipson said he was seeking an examiner on behalf of Jackson to investigate the role the Sackler family played in negotiating a settlement framework that eventually morphed into a deal where the Sacklers would give up their ownership of Purdue and contribute more than \$4 billion to the bankruptcy estate in exchange for being released from all claims against them relating to Purdue's marketing and sale of OxyContin.

Jackson's 18-year-old daughter died after ingesting a single pill of Purdue's painkiller OxyContin in 2006.

At the hearing, Lipson said relief being sought was much more limited, boiling down to an investigation into whether Purdue's board of directors was unduly influenced by the Sacklers when presenting the Chapter 11 plan currently under consideration by creditors and set for a confirmation hearing in August.

"The integrity of the process is affected by the power the shareholders have to influence the board before and during the bankruptcy," Lipson said.

He cited Purdue's efforts to constrain the Sacklers from being able to remove people from the board in the weeks after the company filed for bankruptcy in September 2019 as evidence that the Sacklers had the power to exert control over directors during the time the company was negotiating the settlement framework.

An attorney for Purdue, Marshall S. Huebner of Davis Polk & Wardwell LLP, said the settlement framework was created during contentious, adversarial negotiations between the debtor and the Sacklers on one hand and on the other the attorneys general of all 50 states and other governmental entities that were engaged in multidistrict litigation with the company over its role in the national opioid crisis.

Once the bankruptcy case was filed, that framework was used as a jumping off point for negotiations through mediation proceedings where no less than four groups of claimants — including the states that didn't consent to the initial framework — were adversaries of the debtor.

"Prior to the petition date, the attorneys general ... and the MDL plaintiffs' committee comprised of the most terrifying tort lawyers in America were on one side, and Purdue and the Sacklers together were on the other side," Huebner said. "That's who cut the framework. The plaintiffs were suing Purdue and its owners in thousands of lawsuits."

After the appointment of an official committee of unsecured creditors in the bankruptcy case, the group embarked on an extensive investigation of the prepetition conduct of the debtor and the Sacklers and the process through which the settlement framework was constructed, he argued. That investigation had the benefit of reviewing nearly 100 million documents produced during the discovery process in the Chapter 11 case and the MDL and resulted in the creditors committee signing off on the terms of the settlement that now underpins the Chapter 11 plan.

Lipson argued that the public wasn't privy to the results of the committee's investigation, which added a cloud of mystery to the proceedings.

"We are concerned that those inside the case simply do not see what it looks like from outside," Lipson argued. "The questions that we have about the board governance and the Sacklers' influence over the board will not go away after confirmation."

In granting the appointment of the examiner, Judge Drain said the position would be filled by one person who did not need to retain any additional counsel and would have a \$200,000 budget. The examiner's role would be limited to the narrow task of assessing the independence of the Purdue board of directors from the Sackler family when it approved the submission of the Chapter 11 plan featuring the settlement.

Purdue filed for Chapter 11 protection in September 2019 in the wake of a tentative settlement with 24 states that sued to hold the company responsible for damages caused by opioid addiction.

When the case began, Purdue announced the settlement framework, which included a \$3 billion payment from the Sacklers and a commitment for them to relinquish their ownership interests in the company in exchange for a release of any claims against the Sacklers for their role in Purdue's marketing and sale of OxyContin.

As the bankruptcy case progressed, the settlement terms evolved into a \$4.5 billion package that

includes a \$225 million payment already made to the U.S. Department of Justice to settle civil claims. The company would be converted into a public benefit corporation whose profits would be used — in combination with the \$4.27 billion contributed by the Sacklers — to fund opioid abatement programs and to make payments to creditors whose claims arise from opioid use and treatment.

A confirmation hearing on the proposed plan is slated to begin in August.

Purdue is represented by Marshall S. Huebner, Benjamin S. Kaminetzky, Eli J. Vonnegut, Timothy Graulich and Christopher Robertson of Davis Polk & Wardwell LLP.

Jackson is represented by Jonathan C. Lipson of Temple University's Beasley School of Law and Karen F. Neuwirth of Martin S. Rapaport PC.

The ad hoc committee of governmental and other contingent litigation claimants is represented by Kenneth H. Eckstein, Rachael Ringer and David E. Blabey Jr. of Kramer Levin Naftalis & Frankel LLP, Scott D. Gilbert, Craig Litherland and Kami E. Quinn of Gilbert LLP, David J. Molton and Steven D. Pohl of Brown Rudnick LLP and Melanie L. Cyganowski and Jennifer S. Feeney of Otterbourg PC.

The committee of unsecured creditors is represented by Ira S. Dizengoff, Arik Preis, Mitchell P. Hurley and Sara L. Brauner of Akin Gump Strauss Hauer & Feld LLP.

The case is In re: Purdue Pharma LP, case number 7:19-bk-23649, in the U.S. Bankruptcy Court for the Southern District of New York.

--Editing by Jill Coffey.