



NONDEBTOR RELEASE PROHIBITION ACT OF 2021 ADVANCES TO THE HOUSE FLOOR



Candice Kline, Esq.

Partner

Saul Ewing Arnstein & Lehr LLP

Candice Kline advises clients on bankruptcy and corporate restructuring matters and related litigation. She represents debtors, trustees, official committees, investors and creditors in bankruptcy proceedings and out-of-court workouts. Her experience includes managing cases from \$10 million to \$13 billion, with key roles in large, complex Chapter 11 and 7 cases. She also handles Chapter 12 cases and has experience with cross-border insolvency Chapter 15 proceedings.

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Editor's Note: Candice Kline wrote extensively about third-party releases in the annual bankruptcy issue of the Commercial World Magazine, Vol. 35, Issue 3 (July/August/September 2021). As she outlined there, the Purdue Pharma case has turned the spotlight onto third-party releases and resulted in legislation to address the perceived abuse. Developments have warranted an update, which Candice has graciously agreed to provide.

On November 3, 2021, the House Judiciary Committee chaired by Representative Jerrold Nadler (D-NY) conducted a Mark-up Session and passed H.R. 4777, the Nondebtor Release Prohibition Act of 2021, out of committee for consideration by the full House of Representatives. The vote was divided by partisan lines, 23 Democrats in favor (2 non-voting) and 17 Republicans against (2 non-voting). The bill was introduced on July 28, 2021, around the same time as the Purdue Pharma plan confirmation hearings, with original co-sponsors, Representatives Carolyn Maloney (D-NY) and David Cicilline (D-RI).

The bill has six total co-sponsors, all Democrats, with the following Representatives joining the original co-sponsors: Peter DeFazio (D-OR), Mark DeSaulnier (D-CA), Raja Krishnamoorthi (D-IL), and Katie Porter (D-CA), who is a former bankruptcy professor. Senator Elizabeth Warren introduced a Senate companion bill, S. 2497, which was referred to the Judiciary committee. The Senate bill has two additional original co-sponsors, all Democrats: Senators Richard Blumenthal (D-CT) and Richard Durbin (D-IL).

H.R. 4777 prohibits nonconsensual releases of nondebtors in bankruptcy cases, a flashpoint in the Purdue Pharma chapter 11 case in the Southern District of New York. The bankruptcy judge approved the nonconsensual releases of the nondebtor Sackler family as part of his decision to confirm the chapter 11 plan. Bankruptcy Judge Drain described the releases as permissible under prevailing Second Circuit law because the Sacklers were providing \$4.5 billion for some relief from the opioid crisis, which he found was likely more than what plaintiffs could recover through mass tort litigation or collection on overseas trust accounts held by the family members. Multiple government bodies have opposed the Purdue Pharma plan on the nonconsensual releases granted to the Sackler family, including the U.S. Department of Justice and the states of Maryland and Washington, and the District of Columbia.

During the Mark-up Session, Rep. Cicilline cited the lack of fairness in recent cases that have allowed nondebtors to “evade accountability for some of the most horrifying claims imaginable,” calling the current practice of affiliate filing and nondebtor releases a “system problem.” Representative Sheila Jackson Lee (D-TX) described such releases as “against the interest of the creditors.” While the Democrats cited concerns about abuse, fairness, and protecting creditors, Republicans sounded a more cautious note. Representative Scott Fitzgerald (R-WI) acknowledged the opioid tragedy, and even questioned the impetus for the Purdue Pharma bankruptcy case, but expressed concern that an outright ban on nonconsensual third-party releases would “take away some of the equitable tools for relief” in bankruptcy court and could lead to “unintended consequences.”

Although Republican rejection of the Democrat-sponsored bill may not be entirely surprising in Washington, it is a departure from other bankruptcy bills that have received bipartisan support at the state and federal level, such as the venue reform bills of H.R. 4193 and the companion Senate bill, S. 2827. Venue reform is related to nondebtor releases because there is a circuit split and the releases sought in Purdue Pharma, Boy Scouts of America, and now Johnson & Johnson, are available in most, but not all circuits.

H.R. 4777 would also prohibit or severely limit the maneuver recently used by Johnson & Johnson, called the “Texas Two-Step,” where J&J transferred its talc powder liabilities to a newly created affiliate, LTL Management LLC, and then filed a chapter 11 case for LTL, in order to address the talc powder litigation claims through the bankruptcy process, to obtain a stay of pending litigation (even for nondebtors), and to secure releases of the main company and other nondebtor stakeholders as part of the ultimate bankruptcy plan for LTL. Under the bill, the practice of creating an affiliate mainly to aggregate liabilities in the affiliate’s bankruptcy to protect nondebtors would mostly be halted, except for asbestos claims, as those are governed by the channeling injunction provided in the Bankruptcy Code at Title 11, section 524(g).

The CLLA continues to monitor developments here and welcomes feedback and dialogue with members. For a copy of the bill, please visit www.congress.gov. To connect on this issue, please contact a member of the CLLA’s Government Affairs Committee or write info@clla.org. ■