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Why Opioid Victims Aren't Getting Billions of Dollars They Were Promised; Settlement payments pledged by Purdue Pharma, Endo and Mallinckrodt have either been reduced or delayed after getting snared in the bankruptcy system

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Abstract

None available.

Full Text

Drugmakers and distributors pledged tens of billions of dollars to settle lawsuits accusing them of helping fuel the country's opioid crisis. But much of the money may never be paid.

Opioid victims are finding that billions of settlement dollars have been snared in the morass of the nation's bankruptcy system, where they face financial engineering by sophisticated investors and management teams, roadblocks from the federal government, and extensive legal wrangling and costs.

The Supreme Court last week heard the Justice Department's argument for why OxyContin maker Purdue Pharma's roughly \$8 billion settlement should be scrapped even though it has the support of nearly all opioid victims who voted on the matter. Pharmaceutical manufacturers Mallinckrodt and Endo International both completed transactions that gave priority to the interests of their financial creditors over those of opioid victims, and rewarded the companies' top executives with bonuses or accelerated compensation before filing for chapter 11.

The drug industry has committed to provide more than \$50 billion to address the opioid crisis, with most of the funds coming from major pharmaceutical manufacturers like Johnson & Johnson and retailers such as CVS and Walgreens. About \$10 billion would have come from Purdue Pharma, Mallinckrodt and Endo, which all filed for bankruptcy to pause mass lawsuits as they negotiated settlement agreements with state and local governments, individual victims and their family members.

Those companies said chapter 11 would be the best forum to equitably distribute funds to the opioid claimants and government bodies. But the settlement deals they agreed to have been either delayed or eliminated in long and expensive court proceedings. Victims are left wondering whether payments will ever arrive, while people continue to die of overdoses and governments struggle to address the continuing epidemic.

Purdue pleaded guilty in 2007 to a felony charge of misbranding a drug with the intent to defraud or mislead, and entered into a corporate integrity agreement with the Department of Health and Human Services to monitor the company's conduct. But in the decade that followed, Purdue continued to aggressively market its flagship OxyContin product while distributing more than \$10 billion of cash to members of the Sackler family, who placed much of it in offshore trusts and bank accounts after paying \$4.6 billion in taxes.

By moving the money to overseas jurisdictions like the Bailiwick of Jersey, the Sackler family made their wealth difficult to reach through lawsuits, giving them leverage as they negotiated settlements following Purdue's 2019 bankruptcy filing, stakeholders and lawyers in the case said.

After lengthy negotiations, Sackler family members in 2022 agreed to provide \$6 billion, with Purdue providing an additional \$1 billion to \$2 billion by handing its assets and cash over to the claimants. In exchange, the Sacklers would be released from civil liability over their involvement with Purdue and its distribution of opioids. The settlement won support of roughly 95% of the victim groups that voted on it, as well as nearly all state attorneys general. Roughly \$750 million would go directly to opioid victims and their families, while the remaining billions would go toward state and local governments for programs to address the opioid crisis.

In July, the Justice Department appealed the settlement to the Supreme Court, arguing that it would illegally bind the small number of claimants who don't agree with its terms. Should the high court rule against the Purdue settlement, it could send all parties back to square one to pursue litigation. In that scenario, the federal government would also have a \$2 billion priority claim on Purdue from a previous civil settlement between the Justice Department and the company. Even if the justices approve the settlement, the Supreme Court review would set the payments back by months. In last week's Supreme Court hearing, Justice Brett Kavanaugh said that the opioid victims and their families overwhelmingly approved the Purdue plan and that the Justice Department is standing in their way. "What the opioid victims and their families are saying is you, the federal government, with no stake in this at all, are coming in and telling the families, no, we're not going to give you payment, prompt payment, for what's happened to your family," Kavanaugh said.

Kavanaugh also said that bankruptcy courts for 30 years have been approving plans with similar releases. During the bankruptcy of battery maker Exide Holdings, the DOJ argued in favor of providing legal releases, saying in a 2021 motion that "such an extraordinary situation giving rise to the need for a third-party release can also be the basis and justification for a third-party release in a liquidating plan."

But several justices said providing the release might violate the constitutional rights of the minority who didn't consent. Justice Neil Gorsuch said that "we don't normally say that a nonconsenting party can have its claim for property eliminated in this fashion...It would raise serious due process concerns and Seventh Amendment concerns, as the government highlighted."

The Seventh Amendment provides a right to jury trials in certain circumstances.

In Endo's case, the manufacturer of generic and branded opioids has faced allegations in bankruptcy court that it worked with its secured lenders to minimize the amount it would have available to pay for its opioid liabilities.

Through an effort code-named "Project Zed," Endo took on \$3 billion in secured debt by swapping out unsecured bonds in advance of its 2022 bankruptcy, according to a complaint filed by the official committee of Endo's creditors in January.

The new debt ranks ahead of Endo's opioid liabilities in a bankruptcy. The company allegedly used its new debt structure as "settlement leverage" against government claimants, the committee's complaint said.

Endo resolved the complaint earlier this year, pledging roughly \$600 million for opioid claimants. But the plan has been held up since the Justice Department in July said the cash should go to pay down federal taxes before going to the opioid claims. Endo's senior lenders have proposed a resolution for the tax payments and other DOJ-related claims, but an agreement hasn't been finalized.

Mallinckrodt used bankruptcy to commit funding to opioid abatement programs—and to walk it back. The drugmaker exited from its first chapter 11 in 2020 with a \$1.7 billion settlement of its opioid liability. It then cut \$1 billion earlier this year through another bankruptcy filing. The company's directors and officers are still released from personal opioid-related liability even though the company didn't hold up its original funding commitment.

In the months leading up to Endo's 2022 bankruptcy filing, the company accelerated more than \$90 million of compensation to senior management to incentivize them to stay with the company through bankruptcy. Mallinckrodt paid \$5 million in executive bonuses shortly before its 2020 bankruptcy filing, and an additional \$3.4 million in executive bonuses before filing for chapter 11 again in 2023.

While victims wait for settlements, the expensive process of bankruptcy is eating into their potential recoveries. Purdue has spent at least \$794 million on lawyers, bankers and other professional advisers in chapter 11, more than it has offered to compensate individuals who allege personal injuries from OxyContin.

Rite Aid filed chapter 11 in October without any settlement agreements in place for the mass lawsuits against the company over its handling of suspicious opioid prescriptions. The drugstore chain is aiming to hand over its assets to secured lenders in bankruptcy and hasn't specified any payment for its opioid liabilities, which are expected to be treated as junior claims.

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