AMERICAN BANKRUPTCY INSTITUTE

2020 ABI Health Care Program: The New Reality in Health Care

Today's Health Crisis: Behavioral Health and Opioids

Thomas R. Califano
DLA Piper; New York

Steven R. Korf
ToneyKorf Partners, LLC; New York

Aman Malik
HPS Investment Partners, LLC; New York

Shelley Skarda
Meridian Behavioral Health, LLC; Minneapolis

2020

Draft Materials

ABI Health Care Panel

Today's Health Care Crisis: Behavioral Health & Opioids[1]

Behavioral Health

Introduction

The Agency for Healthcare Research and Quality Academy (AHRQ) describes behavioral health as "an umbrella term that includes mental health and substance abuse conditions, life stressors and crises, stress-related physical symptoms, and health behaviors."[2] Behavioral health conditions often encompass mental illnesses like anxiety and depression and also conditions like anorexia, autism, and post-traumatic stress disorder (PTSD).[3] Behavioral health considers not only the direct impacts of specific diagnoses on a person's health, but also how those diagnoses affect a person's overall ability to be healthy by influencing behavior.[4]

Certain healthcare providers offer integrated behavioral health and primary care to their patients. "Integrated behavioral health care" blends care in one setting for medical conditions and related behavioral health factors that affect health and well-being.[5] Integrated behavioral health care, a part of "whole-person care," is a rapidly emerging shift in the practice of high-quality health care. It is a core function of the "advanced patient-centered medical home."[6] Integrated behavioral health care is sometimes called "behavioral health integration," "integrated care," "collaborative care," or "primary care behavioral health." Regardless of the different names, they all share the same goal: better care and health for the whole person by inducing healthier behavior[7] Providers practicing integrated behavioral health care recognize that both medical and behavioral health factors are important parts of one's overall health.

The ability and efficacy of primary care providers addressing behavioral health matters is subject to continued debate.[8] One perspective is that the workload of the average primary-care physician

---

[1] This paper is provided to generally discuss broad issues that provide a framework for the panel and to provide a reference for future research by interested parties. However, it does not represent the opinions or positions of the moderator or any particular panel member. Therefore, the views, thoughts, and opinions expressed in the text do not belong to, or represent the views of, any one speaker or the moderator, nor any speaker or the moderator's employer, organization, committee or other group or individual.

[2] https://integrationacademy.ahrq.gov/about/what-integrated-behavioral-health (last visited Feb. 16, 2020).

[3] Elizabeth M. Winchell, *Understanding and Overcoming Privacy Challenges in Behavioral Health Integration,* 12 J. Health & Life Sci. L. 70, 73 (2019)

[4] *Id.*

[5] https://integrationacademy.ahrq.gov/about/what-integrated-behavioral-health (last visited Feb. 16, 2020).

[6] *Id.*

[7] *Id.*

[8] https://www.modernhealthcare.com/reports/behavioral-health/#!/ (last visited Feb. 16, 2020)

is heavy enough without adding the responsibility of being a mental health provider. There is also the question of whether a patient can be effectively treated for a behavioral health disorder by a physician with limited time and without the expertise to address the disorder.[9] However, the demands on and roles of primary care providers are of necessity constantly evolving to address the public's health needs. The record number of overdose deaths from prescription opioid painkillers and heroin abuse seen over the past decade has fueled demand for substance abuse treatment.[10] Such care is not as effective without a behavioral healthcare component, which will only add to the demand for such services now and in the future. How the nation's health system ultimately defines mental health's role as part of the larger healthcare framework will determine the future of not only behavioral health in the U.S., but overall health itself.[11]

Legislation & Expanded Coverage

In 2008, the passage of The Mental Health Parity and Addiction Equity Act required health insurers for the first time to treat behavioral health benefits on a par with medical or surgical benefits.[12] In 2010, The Patient Protection and Affordable Care Act ("ACA"), expanded insurance coverage nationwide. The ACA includes substance abuse disorders as one of the 10 elements of essential health benefits, resulting in treatment becoming a mandated benefit that must be provided by all health plans on health insurance exchanges. In 2014, California expanded its Medicaid program under the ACA. In 2015, the Comprehensive Addiction and Recovery Act expanded availability of MAT in areas of high Opioid Use Disorder prevalence and improved access to overdose treatment. In 2016, the 21st Century Cures Act authorized $1 billion in grant funding to states to supplement opioid abuse prevention and treatment. In 2018, the Bipartisan Budget Act Provided $6 billion in opioid funding to be disbursed in 2018 and 2019. The same year, Opioid Crisis Response Act extended MAT coverage to Medicare patients for the first time (effective January 1, 2020) and authorized $8 billion in appropriations for the Centers for Disease Control and Prevention, the U.S. Department of Health and Human Services, and other agencies with programs aimed at addressing the opioid epidemic.

Industry Expansion & Resulting Headwinds

Addiction treatment is a highly fragmented business that, despite the high profile of the opioid epidemic, is often referred to as being an "orphan" within medical services, accounting for just 1 percent of total medical spending.[13] There are about 14,000 treatment centers in the U.S., with the

[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Nicolas P. Terry, *Structural Determinism Amplifying the Opioid Crisis: It's the Healthcare, Stupid!*, 11 Ne. U.L. Rev. 315, 328 (2019).
[13] Ted Jackson, *There's Money In Our Addictions*, available at https://www.chicagobusiness.com/health-care/theres-money-our-addictions (Oct. 12, 2018) (last visited Feb. 17, 2020).

average residential facility having 40 beds.[14] Over 90 percent of addiction centers are outpatient facilities.[15]

The industry expanded because of the addiction epidemic in the United States (including opioids discussed below). Ana Gupte, an analyst at Leerink Partners, noted the sector has been growing, fueled by federal and state policy as well as consumer demand.[16] "Given the attractive price paid (for control of Elements) and if they manage things astutely, returns could be quite good." John Ransom, an analyst at Raymond James, agrees that returns of addiction treatment investments should be superior. "Behavioral health care in general has been on an upswing," he says, "and that should continue for the foreseeable future."[17] As a result, there has been a flood of private-equity investment, together with related debt financing into the $35 billion-a-year addiction treatment industry. Industry consolidation agents include publicly traded Acadia Healthcare of Franklin, Tenn., the largest provider in the world, and Dallas-based Origins Behavioral Healthcare.[18]

Prior to 2015, providers enjoyed a robust market, but by 2015 reimbursements for behavioral health were under pressure from health insurers to go "in-network" and to accept the insurers pricing model, by mounting competition and also by fast-rising marketing costs fueled by the competition.[19] When treatment centers go "in-network" with a health insurer, they agree to take a reduced daily rate in exchange for a steady flow of patient referrals from the insurer. The alternative is to remain "out-of-network," where treatment centers typically get a higher reimbursement rate but must spend money on sales and marketing to acquire clientele and are impacted more by the increased competition.[20] The business model also faces pressure from the rise of medication-based treatments, including blockbuster opioid-treatment drug Suboxone, which is undermining traditional residential and inpatient models. Investment is pouring into medication-based outpatient treatment centers, thousands of which have popped up all over the country in recent years, Gupte says.[21]

---

[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Michael Hiltzik, *Health Net Became The Favored Insurer Of Drug Abuse Patients In California. Then It Stopped Paying Their Bills* (Los Angeles Times, Dec. 6, 2017), available at https://www.latimes.com/business/hiltzik/la-fi-hiltzik-healthnet-20171208-story.html (last visited at Feb. 17, 2020); Emily Bregel, Cenpatico increasing pressure on mental health agencies (Feb. 15,2016), available at https://tucson.com/news/cenpatico-increasing-pressure-on-mental-health-agencies/article_80052a5e-0be4-5ebe-bfb1-7f9fc764ae50.html (last visited Feb. 17, 2020).
[20] American Addiction Centers, How to Find an In-Network Drug Rehab Center (Feb. 3, 2020), available at https://americanaddictioncenters.org/rehab-guide/in-network (last visited Feb. 17, 2020).
[21] Ted Jackson, *There's Money In Our Addictions*, available at https://www.chicagobusiness.com/health-care/theres-money-our-addictions (Oct. 12, 2018) (last

By 2018, articles with titles like "Addiction Treatment Industry Blood Bath" started to appear and various providers started filing for chapter 11 protection.[22]

Treatment providers face stringent requirements that often conflict with respect to insurance (coverage and reimbursement issues), licensure (requirements vary per state), and accreditation (regulatory compliance). As set forth below, providers have filed chapter 11 based on, among other reasons, decline in out-of-network admissions, lower reimbursement rates by insurance providers and the decline in the average length of stay that contributed to financial losses of the debtors.

Bankruptcy Cases Related To Behavioral Health:

Solid Landings Behavioral Health, Inc., Case No 17-12213, filed on June 1, 2017, Bankr. C.D. Cal.

On June 1, 2017, Solid Landings Behavior Health, Inc. and its four affiliated debtors filed chapter 11 bankruptcy cases in the Central District of California. The debtors were providers of individualized 12-Step and alternative treatment programs for people suffering from substance abuse and mental health disorders, with facilities located in California, Nevada, and Texas. As of the petition date, Solid Landings served as the corporate arm of the debtors' enterprise, was the employer for all of the employees who provide services to the debtors, and operated the corporate office. EMS Toxicology operated a clinical laboratory facility located in Las Vegas, Nevada. The remaining three Debtors (i.e., Cedar Creek, Silver Rock, and Sure Haven) operated a total of ten (10) residential, inpatient, outpatient, and sober living facilities—specifically, Cedar Creek operated a residential treatment facility located in Manor, Texas; Silver Rock operated one outpatient treatment facility and one inpatient treatment facility, both located in Las Vegas, Nevada; and Sure Haven operated five residential treatment facilities, one outpatient treatment facility, and one sober living facility.

When the debtors first began operating in 2009, client payments were primarily self/cash-pay. However, with the implementation of the Patient Protection and Affordable Care Act and with more individuals having access to behavioral health insurance benefits, by 2015, approximately 95% of the debtors' revenue came from reimbursements from commercial insurance companies. Calendar year 2016 brought a marked decrease in reimbursement rates and slowdown in the timing

visited Feb. 17, 2020); *see also* Treatment Magazine, *Investor Group Gains Control of Elements Behavioral* (Sep. 11, 2018), available at http://treatmentmagazine.com/newswires/728-investor-group-gains-control-of-elements-behavioral.html (last visited Feb. 17, 2020).

[22] Jim Peake, *Addiction Treatment Industry Blood Bath* (July 2, 2018), available at https://addiction-rep.com/blog/addiction-treatment-industry-blood-bath/ (last visited Feb. 17, 2020).

of reimbursements from the insurance companies, with certain companies such as Cigna and Health Net ceasing payments altogether.

The debtors attempted to downsize and streamline business operations. However, the revenues generated by the debtors' streamlined operations (which significantly reduced patient census) were insufficient to meet the debt obligations originally tied to a much larger business enterprise. The debtors defaulted on their loan obligations in June 2016 and undertook efforts to market and sell their businesses. The debtors filed their cases after finalizing an asset purchase agreement with Alpine Pacific Capital, LLC.

During the post-petition sale process, the debtors' shareholders submitted a competing bid for the debtors' assets and challenged whether Alpine, who provided prepetition management services to the debtors and was affiliated with the debtors' prepetition secured lender, could be considered a good faith purchaser. Ultimately, Alpine withdrew its bid and the shareholders were approved as purchasers of substantially all of the debtors' assets. The debtors confirmed their plan of liquidation on March 22, 2018.

Elements Behavioral Health, Inc., Case No 18-11212-BLS, filed on May 23, 2018, Bankr. D. Del.

Long Beach based Elements and 31 related companies were providers of behavioral health services and the largest independent provider of residential drug and alcohol addiction treatment in the United States. The debtors provided a wide range of clinical programs tailored to the individual needs of its patients, including detoxification, residential treatment, intensive outpatient, and continuing treatment programs. The debtors operated 13 treatment centers across 8 states, with 772 beds and 22 outpatient locations, drawing patients from all 50 states and 29 countries internationally.

The overall census of the facilities and revenue declined since 2017. The decline in out-of-network admissions, lower reimbursement rates by insurance providers and the decline in the average length of stay were all contributing factors to the financial losses of the debtors. While the debtors attempted to increase census through ongoing marketing efforts of their in-house sales team and internet advertising, the increased cost of these efforts did not result in the increase in revenue to improve the financial results of the debtors and offset the debtors' cash burn.

The debtors entered into a process to market their assets. Although the debtors entered into a prepetition exclusivity period with a potential purchaser, during the exclusivity period and after significant negotiations and diligence, it became clear that the potential purchaser would be unable to close on a transaction consistent with the initial terms. Following the failure of the sale, the debtors and their prepetition lenders agreed to structure debtor in possession financing to allow the debtors to attempt to market their assets in a bankruptcy process.

The bankruptcy sale process resulted in a sale of substantially all of the debtors' assets to Project Build Behavioral Health, LLC ("PBBH") for a $65 million credit bid. PBBH is a joint venture between affiliates of BlueMountain Capital Management and Ben Klein. Shortly before the petition date, the debtors' prepetition lenders sold and assigned their first lien rights to PBBH. The sale resulted in a settlement between PBBH and the Committee, wherein PBBH agreed to create budgets to fund a chapter 11 liquidating plan process and the wind-down of the debtors' estates, among other things.

On February 26, 2019, the bankruptcy court confirmed the debtors' plan of liquidation.

SAS Healthcare Inc., Case No. 19-40401, filed Jan. 31, 2019, N.D. Tex.

SAS and two related entities operated three mental health treatment facilities—in Arlington, Dallas, and Fort Worth. Therein, the debtors provided in-patient and out-patient mental health care to children, adolescents and adults struggling with substance abuse and addiction, mental health disorders and behavioral and psychological disorders. Due to a decline in patient census and the resulting decline in revenues, which resulted in large part from the investigation by the Tarrant County District Attorney and subsequent indictments, the Debtors ceased operating their medical facilities and ceased accepting new patients as of December 21, 2018. The debtors filed their bankruptcy cases on January 31, 2019 to facilitate a sale of substantially all of their assets.

The debtors completed a sale of substantially all of their assets to REP Perimeter Holdings, LLC on April 12, 2019. The grand jury investigation was ultimately resolved pursuant to an August 2019 plea agreement resulting in SAS's guilty plea to a single misdemeanor count and agreement to pay a $200,000 fine. The debtors initially filed motions to dismiss the bankruptcy cases in October 2019 because they retained limited cash on hand and expected further collections to be difficult. At the dismissal hearing, the Debtors agreed to withdraw the motion and, instead file a motion to convert their cases from chapter 11 to chapter 7. On January 29, 2020, the bankruptcy court ordered the cases converted to chapter 7.

In re Anka Behavioral Health, Inc., Case No. 19-41025, filed Apr. 20, 2019, Bankr. N.D. Cal.

ANKA was a 501(c)(3) non-profit behavioral healthcare corporation that operated since 1973. It earned national recognition as a result of its ability to design, implement, and operate exceptional, innovative programs. Over the course of a year, ANKA served nearly 15,000 individuals and their families and generally had 200-300 clients at any one time at over 50 facilities that it operated throughout California and Michigan. ANKA had residential and Intensive Outpatient Programs (IOP) located in Contra Costa, Alameda, Solano, Sonoma, Santa Clara, Fresno, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Riverside Counties and Michigan. Before bankruptcy, ANKA employed almost 1,000 professional and specialized staff members and independent contractors across the states of California and Michigan.

ANKA provided crisis residential treatment, transitional residential treatment, long-term residential treatment, outpatient services, forensic programs and vocational services. ANKA

expanded into new developmental disabilities services and when licensure grants were unexpectedly delayed for significant periods, ANKA was accruing expenses without the corresponding revenue. In the face of threats by vendors to discontinue services, ANKA filed chapter 11 to orderly transfer its patients to other providers.

ANKA was required to address unique HIPAA issues as a result of its liquidation. Due to the nature of the debtor's business, the collection of accounts receivable required access to confidential patient information maintained by debtor that was reported to certain private payor agencies to support the debtor's billings. All staff involved on behalf of the debtor in the management and collection of accounts receivable were required to be HIPAA qualified. In addition, many of debtor's contracts with payors were "cost plus" contracts, meaning the debtor was required to collect and submit the eligible costs in order to justify reimbursement. Similarly, the debtor was required to arrange for a HIPAA qualified company to store the patient records and provide access to future requestors for a fee as permitted by the regulations.

On November 18, 2019, the bankruptcy court entered an order converting the case to chapter 7 after the debtor withdrew its plan and consented to conversion. The conversion was based, in part, on the United States Trustee's pending motion to convert or dismiss the cases based, in part, on failure to provide information, failure appear at the meeting of creditors, and diminution of the debtor's estate without a reasonable likelihood of rehabilitation.

In re Jerome Golden Center for Behavioral Health, Case No 19-22704, filed September 24, 2019, Bankr. S.D. Fla.

On September 24, 2019, the debtor filed a chapter 11 bankruptcy case. The debtor is a not for profit corporation operating a psychiatric and substance abuse treatment hospital and outpatient programs with facilities in Palm Beach County, Florida. As of the petition date, the debtor employed approximately 351 individuals (including doctors providing medical care), with 341 being regular employees and ten being contractors.

As of the petition date, the debtor was negotiating a DIP loan which would allow it to operate at least through the end of the year, during which time the debtor would seek to accomplish an asset sale to repay its creditors. Within a very short time after filing the petition, a for-profit healthcare facility offered to purchase the debtor as a going-concern, maintain the existing entity, and operate the facilities. The acquiring entity committed enough funds to bring the debtor current on all of its payment obligations, satisfy all delinquent debts, and fund any shortfall needed to cover operating expenses going forward.

To ensure a seamless transition and minimize the possibility of any detrimental impact to patients during the transition, the debtor entered into a management agreement with South County Mental Health Center, Inc. ("SCMHC") to provide the staffing and contracted support services under the license of the debtor. SCMHC is charged with oversight of behavioral health facilities in Southeast Florida, and its primary objective in this matter is to ensure that patient needs are met, and patient

interests are protected throughout the transition. The management agreement was designed to reduce the debtor's monthly operating expenses while maintaining patient care standards until the acquiring entity was fully positioned to run the facilities.

Due to the sensitive nature of the medical services offered by the debtor, privacy concerns, patient welfare concerns, complexities regarding licensing and medical compliance, and the economic need for an efficient and expeditious turnover to the acquiring entity, the debtor, the acquiring entity, and SCMHC agreed that conducting the sale process outside of bankruptcy was in the best interests of the debtor's patients and its creditors. On October 10, 2019, the bankruptcy court dismissed the bankruptcy case on the debtor's request.

The Opioid Epidemic

Introduction

Opioids are a family of natural, semi-synthetic, and synthetic narcotics, and are among the most abused and most physically addictive type of drugs. Opioids include heroin and prescription pain relievers such as OxyContin, Morphine, Codeine, Percocet, Vicodin, and Fentanyl.

Opioid use disorder and opioid addiction have reached epidemic levels: three million U.S. citizens and 16 million persons worldwide have had or currently suffer from opioid use disorder. [23] Opioid use disorder seen in persons of all educational and socioeconomic backgrounds.

Drug overdose deaths continue to sharply increase in the United States.[24]

- From 1999 to 2017, more than 700,000 people died from a drug overdose.
- Around 68% of the more than 70,200 drug overdose deaths in 2017 involved an opioid.
- In 2017, the number of overdose deaths involving opioids (including prescription opioids and illegal opioids like heroin and illicitly manufactured fentanyl) was 6 times higher than in 1999.
- On average, 130 Americans die every day from an opioid overdose.

From 1999-2017, almost 400,000 people died from an overdose involving any opioid, including prescription and illicit opioids.[25] There are "three waves" of opioid overdose deaths. *Id.* The first wave began with increased prescribing of opioids in the 1990s,[3] with overdose deaths involving prescription opioids (natural and semi-synthetic opioids and methadone) increasing since at least 1999. *Id.* The second wave began in 2010, with rapid increases in overdose deaths involving heroin. The third wave began in 2013, with significant increases in overdose deaths involving synthetic opioids—particularly those involving illicitly-manufactured fentanyl (IMF). The IMF

[23] https://www.ncbi.nlm.nih.gov/books/NBK448203/ (last visited Feb. 16, 2020).
[24] https://www.cdc.gov/drugoverdose/epidemic/index.html (last visited Feb. 16, 2020).
[25] https://www.cdc.gov/drugoverdose/epidemic/index.html

market continues to change, and IMF can be found in combination with heroin, counterfeit pills, and cocaine. *Id.*

Litigation & Bankruptcy Cases

Over 2,500 lawsuits have been filed against manufacturers, distributors and retailers in connection with their marketing and sale of opioid products. Generally, the majority of plaintiffs allege that the manufacturers of prescription opioids grossly misrepresented the risks of long-term use of those drugs for persons with chronic pain, and distributors failed to properly monitor suspicious orders of those prescription drugs—all of which contributed to the current opioid epidemic.

At least 30 states have either sued distributors or have been involved in talks to resolve claims.[26] The Wall Street Journal reported in October that three major distributors—McKesson Corp., AmerisourceBergen Corp., and Cardinal Health Inc.—were in talks to collectively pay $18 billion over 18 years to settle the state- and local-government claims. *Id.* On February 15, 2020, the Wall Street Journal reported that more than 20 state attorney generals rejected this offer and this attempt at settlement failed.[27] Many in the industry had hoped the offer would be a first step toward resolving the claims outside bankruptcy. *Id.*

Insys Therapeutics, Inc., Case No 19-11292, filed on June 10, 2019, Bankr. D. Del.

On June 10, 2019, Insys Therapeutics, Inc. and six (6) affiliated companies filed chapter 11 bankruptcy cases. The debtors are a specialty pharmaceutical company that developed (including preclinical and clinical trials and studies) and commercialized certain drugs and novel drug delivery systems for targeted therapies to improve patients' quality of life. The debtors' business focused on the research and development, manufacture, marketing, and sales in support of these drugs and drug delivery systems. As of the petition date, the debtors had two commercially marketed products: SUBSYS® ("Subsys") and SYNDROS®. Subsys is an opiod pain medication.

Beginning in 2017, Insys and numerous other opioid manufacturers, distributers, and retailers faced litigation in connection with their marketing and sale of opioid products. Some of the litigation is common to all opioid manufacturers, while other claims are based on particular activities of the Debtors' former executives, a number of whom either pled guilty to, or were convicted after trial of, federal crimes relating to such activities. The expenses and settlement costs resulting from such litigation were substantial, and consumed large portions of the Debtors' revenue and liquidity. The debtors also agreed to stop all marketing and promotion of Subsys as a result of a Corporate Integrity Agreement and Conditional Exclusion Release with the Office of

[26] *21 States Reject $18 Billion Offer From Drug Wholesalers to Settle Opioid Litigation*: https://www.wsj.com/articles/21-states-reject-18-billion-offer-from-drug-wholesalers-to-settle-opioid-litigation- (last visited Feb. 16, 2020).
[27] *21 States Reject $18 Billion Offer From Drug Wholesalers to Settle Opioid Litigation*: https://www.wsj.com/articles/21-states-reject-18-billion-offer-from-drug-wholesalers-to-settle-opioid-litigation- (last visited Feb. 16, 2020).

Inspector General of the United States Department of Health and Human Services related to the debtors' past marketing and sales practices.

On December 4, 2019, the debtors proposed a plan that resulted from settlements with creditor constituencies and certain states, but not the United States Department of Justice. The proposed plan provided a structure for the debtors to liquidate their remaining assets (the debtors sold certain assets prior to filing the disclosure statement), including their remaining business, operating assets, and Subsys royalties. However, the debtors admitted that they may not be able to sell their remaining business or operating assets, and that the value of the Subsys royalties is subject to substantial uncertainty. The disclosure statement was approved on December 4, 2019 and a the court entered a confirmation order on January 16, 2020.

Purdue Pharma L.P., Case No 19-23649, filed on September 15 & 16, 2019, Bankr. S.D.N.Y.

On September 15, 2019 and September 16, 2019, Purdue Pharma L.P. and 23 affiliated debtors filed their chapter 11 bankruptcy cases. The debtors are pharmaceutical companies that manufacture, sell, or distribute, among other products, extended release, long-acting, abuse-deterrent opioid pain medications. OxyContin® Extended-Release Tablets CII ("OxyContin"), Purdue Pharma's most prominent pain medication, has been the target of over 2,600 civil actions pending in various state and federal courts and other fora across the United States and its territories ("Pending Actions"). These Pending Actions name as defendants Purdue Pharma and certain of the other Debtors ("Defendant Debtors"), among other parties, and generally allege that the Defendant Debtors falsely and deceptively marketed OxyContin and opioid pain medications, and are liable for the national opioid crisis.

On the petition date, the debtors and a critical mass of plaintiff constituencies had reached an agreement in principle on the structure of a global resolution of the Pending Actions ("Settlement Structure")—one that could only be finalized and effectuated through chapter 11. The plaintiff constituencies supporting the Settlement Structure included 24 state attorneys general and analogous officials from five U.S. territories, the court-appointed Plaintiffs' Executive Committee, and Co-Lead Counsel in the federal multidistrict litigation pending in Ohio, which comprises attorneys at law firms that collectively represent over 1,000 counties, municipalities, Native American tribes, individuals, and third-party payors. The debtors sought and obtained an injunction against the continued prosecution of non-bankruptcy litigation not otherwise subject to the automatic stay under the police and regulatory powers exception through April 8, 2020.

The Settlement Structure had three key basic components: (1) Purdue's existing shareholders will relinquish all of their equity interests in the Debtors and consent to the transfer of all of the Debtors' assets to a trust or similar post-emergence structure for the benefit of claimants and the U.S. public, "free and clear" of Purdue's liabilities to the fullest extent permitted by law; (2) Purdue's existing shareholders will engage in a sale process for their ex-U.S. pharmaceutical companies; and (3) Purdue's existing shareholders will contribute an additional $3 billion over seven years (in addition

to 100% of the value of all 24 Debtors), with the hope of substantial further contemplated contributions from the sales of their ex-U.S. pharmaceutical businesses.

The debtors are currently in the process of developing an opioid overdose drug and delivery system that is more effective than currently available as they attempt to transition to a public benefit entity as a result of the proposed settlement.

The deadline for the debtors to file a proposed plan is July 13, 2020.

The Bankruptcy Process as a Means to Resolve Opioid Liability

As can be seen from the Purdue and Insys cases, chapter 11 may be invoked by defendants in the Opioid litigation where the potential liability exceeds the subject company's ability to pay in an orderly fashion. This should come as no surprise the U.S. Bankruptcy Code is especially suited to provide for collective resolutions, equitable distribution mechanics and creative economic resolutions. Recently, this has been seen in a spate of filings in other areas designed to deal with mass tort liability arising in a number of different ways. This has included the use of so-called "channeling injunctions."

Originally designed to deal with asbestos liability, channeling injunctions have been used to deal with a number of different types of mass tort liability from automobile airbags (Taketa) to silicone breast implants (Dow Corning) to over the counter diet supplements. Recently, channeling injunctions have been proposed to resolve the problems of institutions that are subject to extensive sexual abuse claims, such as the Boy Scouts of America. While section 542(g) of the Bankruptcy Code provides a statutory framework for these channeling injunctions, recent decisions make clear that it is not the exclusive authority for the relief. The question is are opioid litigation defendants candidates for this relief?

Through a channeling injunction, present and future claims litigation claims are channeled to a trust created to resolve those claims. The litigation process is replaced with an administrative claims process, thus, simplifying the process for claimants. Claimants rights are solely against the trust and all litigation is "channeled" to that trust. All current and future claimants are enjoined from pursuing claims against the Debtor and against any affiliate who participates in the funding of the trust even if those affiliates do not file for bankruptcy protection. The benefits of channeling injunctions have been extended not only to corporate affiliates, but to any party whose liability is derived from the same activities as the debtor. In some cases, other parties in the distribution chain have been able to participate and thus obtain the benefit of a channeling injunction. Thus, while one of the considerations in favor of channeling injunctions—i.e., the ability to resolve the claims of unknown future claimants—does not appear to be a primary issue in this regard other potential benefits of such relief could be obtained. Under the appropriate circumstances and with the right evidentiary showing, other parties in the distribution chain could participate in and benefit from a trust designed to address opioid liability. The benefit of such a trust could be clear, the claimants injuries could be addressed without the massive cost and uncertainty of multiple litigations in

multiple fora. The bankruptcy process is uniquely suited for maximum realization of asset values and orderly administration and resolution of claims.