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The Third Circuit Affirms the Sufficiency of Publication Notice to Discharge Prepetition Claims of Unknown Creditors

"The discharge of claims in bankruptcy applies with no less force to claims that are meritorious, sympathetic, or diligently pursued. Though the result may chafe one's innate sense of fairness, not all unfairness represents a violation of due process."

On April 20, 2021, the United States Court of Appeals for the Third Circuit issued an opinion, which is not precedential, affirming that notice by publication of a claims bar date and plan confirmation hearing affords unknown creditors due process sufficient to discharge their claims in bankruptcy.[1] In reaching its conclusion, the Third Circuit affirmed that due process in this context depends on the reasonableness of both the *manner* (e.g., publication in papers of national circulation) and *content* (e.g., the information conveyed) of the notice provided. Under this standard, reasonable diligence on the part of a debtor needs to only focus on the debtor's own books and records and does not require a "vast, open-ended investigation" or obligate the debtor to search out each "conceivable or possible creditor" to urge that person or entity to file a claim.

Background

The debtor, Eastman Kodak Company ("Kodak"), was a technology company that produced photography products. Kodak manufactured and distributed a chemical component of Pantopaque, a medical-imaging dye. In 1975, John Sweeney sustained significant injuries and was injected with that dye by his physicians. Mr. Sweeney enjoyed a full recovery from his injuries in 1976, but began to experience lower extremity weakness, numbness, clumsiness, and difficulty walking beginning in 2009. In August 2014, he was diagnosed with advanced adhesive arachnoiditis. In late 2015, a neurosurgeon confirmed that Mr. Sweeney's exposure to Pantopaque decades ago had likely caused his progressive loss of lower extremity function.

In 2016, Mr. Sweeney commenced a personal injury lawsuit against Kodak and certain co-defendants in the United States District Court for the District of New Jersey. Kodak moved to dismiss the claims against it based upon the terms of its chapter 11 plan, which was confirmed in 2013, that discharged all claims against

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1 *John M. Sweeney et al. v. Alcon Laboratories et al.*, No. 20-2066 (3d Cir. Apr. 20, 2021) (not precedential). Not precedential decisions are not binding precedent but may be cited as persuasive authority. *See, e.g., In re Boyd*, 410 B.R. 137, 141 (Bankr. D.N.J. 2008) ("nothing bars the lower courts for relying on [not precedential opinions] as strongly persuasive authority").

Kodak, known or unknown, and enjoined the commencement or prosecution of any claims or causes of action so discharged.[2]

The District Court granted Kodak's motion to dismiss. As parties agreed that Mr. Sweeney's claims were prepetition claims, the sole issue for the District Court to decide was whether publication notice of the claims bar date and plan confirmation hearing was sufficient to afford unknown creditors, such as Mr. Sweeney, sufficient due process for them to be bound by the plan discharge.[3] Mr. Sweeney did not challenge the sufficiency of the method of notice, but argued that the contents of the publication notice were insufficient, because Kodak had been sued in the late 1980s and 1990s for injuries related to Pantopaque, and as a result should have included information specifically referencing those potential claims in the notices. The District Court rejected this argument. Among other things, the District Court considered the six-factor test in *In re Grossman's Inc.*, 607 F.3d 114, 127–28 (3d Cir. 2010) to determine whether a particular claim had been discharged by a plan. The District Court found that these factors weighed in favor of dismissal, given that, among other things, Mr. Sweeney was exposed to Pantopaque well before Kodak filed for bankruptcy.[4]

The Third Circuit's Decision

On appeal, the Third Circuit affirmed the District Court's decision and affirmed the sufficiency of publication notice to discharge claims of unknown creditors.

The Third Circuit agreed with Mr. Sweeney that the content of any given publication notice – that is, what types of claims are subject to discharge – is a critical component of due process. The Third Circuit also noted, however, that the search a bankrupt company must undertake to identify such claims is not "open-ended."[5] Relying on *Chemetron Corp. v. Jones*, 72 F.3d 341, 347 (3d Cir. 1995), the Third Circuit confirmed that reasonable diligence on the part of a debtor with regard to both the manner *and* content of notice requires a "search . . . focuse[d] on the debtor's own books and records," and a "careful examination of

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2 *Sweeney v. Lafayette Pharms., Inc.*, No. CV164860ESMAH, 2020 WL 2079283, at *1 (D.N.J. Apr. 30, 2020).

3 Kodak published the bar date notice in the *Rochester Democrat & Chronicle* and in the *New York Times* and published the confirmation notice in the *Rochester Democrat & Chronicle*, *USA Today*, and in the National Edition of the *Wall Street Journal*. *See Id.*, at *4.

4 The six factors are (i) the circumstances of the initial exposure to the product at issue, (ii) whether and/or when the claimants were aware of their vulnerability to the product at issue, (iii) whether notice of the claims bar date came to their attention, (iv) whether the claimants were known or unknown creditors, (v) whether the claimants had a colorable claim at the time of the bar date, and (vi) other circumstances specific to the parties, including whether it was reasonable or possible for the debtor to establish a trust for future claimants.

5 *Sweeney v. Alcon Laboratories*, slip op. at 9.

[those] documents."[6] Thus, only when a debtor's records reveal the existence of persons with claims against the debtor would due process require that the nature of those claims be specified in the relevant notices. Applying this standard, the Third Circuit rejected Mr. Sweeney's claim that the mere existence of Pantopaque-related lawsuits filed in the late 1980s and the 1990s should have been sufficient to cause Kodak to specifically list those types of claims in its publication notice. The Third Circuit found that absent an allegation that Kodak's books and records *at the time of* Kodak's bankruptcy filing in 2012 disclosed the Pantopaque suits (actions that were resolved over a decade earlier), Kodak was not required to include specific reference to such claims in its publication notice. As a result, the Third Circuit concluded that Kodak's published notice satisfied the standards for due process and was constitutionally sufficient. To hold otherwise, the Court concluded, would "dramatically expand the burdens borne by debtors."[7]

Conclusion

The *Sweeney* decision affirms the sufficiency of publication notice for discharging prepetition claims of unknown creditors. By limiting the scope of the debtor's reasonable diligence to its own books and records for purposes of determining the constitutionally sufficient manner and content of publication notice, the Third Circuit declined to expand a debtor's noticing burden to include open-ended or impracticable investigations for every conceivable claim or creditor. While not precedential, the decision confirms the breadth and sanctity of the bankruptcy discharge.

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6 In *Chemetron*, the Third Circuit held that because the claimants were "'unknown' creditors," "notice by publication was sufficient to satisfy the requirements of due process," and their claims were barred. *Chemetron*, 72 F.3d, at 345–46.

7 The Third Circuit also refused to review the District Court's allegedly incorrect application of the *Grossman*'s six-factor test, as the Third Circuit found the test, which was offered in dicta in *Grossman*'s, to be non-prescriptive in nature. *Sweeney v. Alcon Laboratories*, slip op. at 8, fn. 6.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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