COMMENTARY

The Court in the Boy Scouts Bankruptcy Fails to Do Its Duty

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The traditional Boy Scout oath was that each scout should “do his duty.” Unfortunately, in the bankruptcy case dealing with the fallout from the horrendous sexual abuse scandal, the bankruptcy court failed to do its duty. Instead of looking out for those who were victimized, the case has turned into another feeding frenzy by class action lawyers. To rectify this miscarriage of justice, appeals courts should take a second look.

A few months ago I warned of the efforts by tort lawyers to commandeer the bankruptcy process by loading up the case with claims that would divert funds from actual victims to those with more questionable claims. The final plan approved by the bankruptcy court, and recently affirmed by the federal district court, sadly confirms my fears.

When the Boy Scouts of America filed bankruptcy in February 2020 it had been named in about 275 lawsuits and told insurers it was aware of another 1,400 claims. By the time the case exited bankruptcy, however, the number of claimants had ballooned to more than 80,000 men who claimed to have been abused as children by troop leaders around the country. This explosion in claims arose by abrogating the statute of limitations that typically bar old and stale claims from court and by allowing claims for compensation with minimal protections against fraudulent claims.

The bankruptcy plan sets aside $2.46 billion in a settlement trust to pay restitution to claimants. Most of the money will come from a few large insurers, the national Boy Scouts of America, and local Boy Scout Councils around the country that agreed to the plan.

But the plan also forces several other insurers to participate in the settlement fund even though they did not agree to be bound. Under the terms of the plan, these insurers are required to provide coverage without confirmation of their rights to require the Boy Scouts of America to assist them to investigate and defend against claims to ensure their validity, including raising the statute of limitations as a defense. Indeed, so extreme is the plan, these insurers aren’t entitled to even the most basic information to determine the validity of an individual’s claim. While the language of the plan

requires procedures designed for the “prevention and detection of any fraud” there is minimal safeguards in place to ensure this. Under the plan these objections and contractual obligations to help defend against questionable claims are extinguished.

Some abuse survivors object to a different component of the plan—the release from future claims of some 100,000 third parties who will be protected from any future liability in exchange for contributing to the victims’ compensation fund, or even just not objecting. The court overruled the objections of the Department of Justice’s bankruptcy trustee, the government’s “watchdog” agency, to this element of the plan. By granting this broad relief to non-debtor parties, the case conflicts with the ruling of the appeals court in the Purdue Pharma opioid case that decided the bankruptcy courts lack this power.

The procedural irregularities and substantive corner-cutting of the final plan illustrates the underlying dynamic this case brings to light—the ability of tort lawyers to overwhelm the bankruptcy process by using modern marketing techniques to aggregate claims, many of dubious validity, to ram through a swift and huge settlement in bankruptcy that could not be achieved outside bankruptcy court. The plaintiffs’ lawyers control the Settlement Trust Advisory Committee, which is responsible for overseeing the settlement trustee and governance of the trust, including the approval of the initial claims questionnaire to determine whether an individual has a valid claim.

This danger of a runaway process is heightened in a case such as this one where the overwhelming bulk of the settlement funds will be coming from third-party insurers, not the debtor itself. This underlies the concerns of the objecting insurers in this case that they are being forced to write checks without having a right to investigate the validity of the underlying claims. In turn, dubious claimants looking for a quick payout with minimal hassle will be willing to offer broad releases to non-debtor third parties rather than dragging out the process.

The dynamics of this case illustrate the dangers posed by the intersection of bankruptcy law with the modern tort system. In theory, the bankruptcy system provides an ideal forum for the resolution of mass tort actions, as it enables a fundamentally sound business or organization to resolve discrete issues of past liability that could hamper its ability to thrive going forward. But the Boy Scouts bankruptcy case illustrates the vulnerability of the system to predatory plaintiffs’ lawyers. Outside bankruptcy, tort defendants like the Boy Scouts of America have a natural incentive to resist questionable and time-barred claims and to ensure it is not paying out more than it owes. Inside bankruptcy, however, the incentives shift—the defendant is concerned above all else with getting through bankruptcy and emerging on the other side, even if that means throwing aside the rights of insurers to know what they are paying for. On the other side of the equation, Plaintiff’s lawyers have the incentive to pile on questionable claims in order to ram through plan approval and a quick payout, even if that means releasing valid claims against non-debtor parties. The typical protections of the adversary system that mitigate the risk of collusive settlements are absent.

In short, bankruptcy provides ripe conditions for a collusive settlement between plaintiffs’ lawyers and the debtor, funded by third-party insurers and at the expense of victims’ claims against non-debtor entities. In such circumstances, it is incumbent on the bankruptcy judge to step up and protect the public interest. Here the court failed to do its duty.

For years, the national and local Boy Scouts turned a blind eye to charges of abuse and exercised insufficient control over abusive behavior by scout leaders, leaving a horrible trail of victims in its wake. Justice for victims and against their abusers is warranted. But a process that steamrolls insurers into contributing with no right to investigate the legitimacy of claims and diverts funds from actual victims to others is not justice. Moreover, by upholding this plan despite its flaws, the bankruptcy and district courts have signaled it is open season for tort lawyers to exploit the bankruptcy system to accomplish payouts they could not get at a fair trial. The Third Circuit should take a second look at this case and send it back for reconsideration.

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