CARLTON FIELDS

Florida District Court Affirms Bankruptcy Court Bar Order In Favor Of Former Ds & Os

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On September 24, Southern District of Florida District Court Judge James I. Cohn issued an opinion affirming an order approving the settlement of a debtor's breach of fiduciary duty, corporate waste, and mismanagement claims against its former directors and officers barring non-debtors' claims against the former directors and officers entered by Southern District of Florida Bankruptcy Court Judge Raymond B. Ray in the bankruptcy proceedings of Chinese company Jiangbo Pharmaceutical, Inc. While there is substantial variance in how federal courts throughout the country treat requests for bar orders, generally, bar orders are available in the Eleventh Circuit. This means that when settling claims brought by a bankruptcy trustee, a former director or officer of a bankrupt company—or the insurer funding defense costs—can seek from the bankruptcy trustees a release barring non-debtors' interrelated claims. In effect, the order approving the Jiangbo settlement between the trustee, one of the company's former officers, and the insurer entered by Judge Ray barred the prosecution of a pending securities fraud class action against the bankrupt company's former directors and officers that had also been filed in the Southern District of Florida. Judge Ray found the securities fraud claims sufficiently interrelated to the estate's claims to warrant the bar order because they arose

from the same facts—i.e., both "sought damages based upon acts and omissions involving the disclosure of materially inaccurate information to third parties and improper insider transactions." Other key factors also militated in favor of the bar order, including that the lead plaintiffs in the securities fraud class action had failed to establish a likelihood of success on the merits of the potentially barred claims. Among other things, the defendant former directors and officers (except the one former officer that settled with the bankruptcy estate) had been defaulted, breaching their duty to cooperate with the insurer, resulting in a denial of coverage for the securities fraud claims against them, and entitling the insurer to the benefit of the bar order. Judge Cohn agreed with this reasoning. In affirming the bar order, Judge Cohn challenged the reasoning of another bar order opinion from Southern District of Florida Bankruptcy Court Judge A. Jay Cristol in *In re Fontainebleau*, No. 09-21481-BKC-AJC, which in denying entry of a proposed bar order asserted that bar orders are appropriate only in "unusual circumstances," for example "where the [defendants] were insolvent." Although Judge Cohn noted that Judge Cristol's decision—which garnered significant attention when it was issued—was not binding, he concluded that even under the *In re Fontainebleau* framework, the types of claims at issue were sufficiently interrelated because the directors and officers liability policy was the debtor's only recoverable asset in the United States, and coverage had been properly denied. Judge Cohn's opinion—the first from an Article III judge within the Eleventh Circuit to address these issues—is of particular interest to insurance companies, which are often the primary source of funds to defend and settle claims against a bankrupt company's directors and officers.

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