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Are Reports of the Demise of Bar Orders Exaggerated for Federal Equity Receiverships?

By Kevin B. Duff, Esq.

In the December 2024 issue of *The Receiver*, NAFER member Michael Napoli thoughtfully explored whether we are witnessing a sea change for bar orders in the wake of the United States Supreme Court's decision in *Harrington v. Purdue Pharma L.P.*¹ In particular, he queried whether the Court's decision—which held that the Bankruptcy Code does not permit a bankruptcy court to extinguish direct claims against non-debtor third parties without claimants' consent—will result in district courts disallowing bar orders outside of bankruptcy.²

More recent federal receivership rulings have shed further light on the issue and may indicate which way the precedential tide is flowing. They suggest *Harrington* is not a death knell but a narrowing, leaving room for bar orders in federal receivership actions to bar claims for losses arising out of the same events out of which the receivership arose and allowing barred claimants to seek recompense from the receivership estate.

On February 20, 2025, in *SEC v. Peterson*, the United States Court of Appeals for the Ninth Circuit found that the district court overseeing a receivership had not abused its discretion in finding the bar order in a global settlement agreement to be equitable. In reaching its decision, the Court had occasion to consider whether *Harrington* supported an argument that “a district court may not ‘permanently bar and extinguish independent, non-derivative third party-claims that do not affect the res of the receivership estate.’”³

In *Peterson*, the SEC obtained the appointment of a receiver in an enforcement action that ended a \$389 million Ponzi scheme.⁴ The fraud, perpetrated by Gina Champion-Cain, involved fraudulent investments tied to California liquor license transfers. Over 300 investors suffered net losses of \$183 million. The complex scheme involved a number of participants, including Chicago Title Company and complicit real estate counsel, Nossaman. Unable to recover losses from the corporate defendant through which Cain

facilitated her scheme, defrauded investors sued third parties—including Chicago Title Company and Nossaman—in California state court, alleging they aided the fraudulent scheme. Peterson was an early investor who allegedly aided in the Ponzi scheme. Peterson brought Nossaman into the scheme as his counsel to lure in new investors through false representations about the purported legitimacy of the scheme.

The case included an intricate web of claims and cross-claims. The district court allowed the receiver and Chicago Title to sue each other. Peterson also sued Chicago Title, which in turn, asserted counterclaims against Peterson and Nossaman; and Peterson cross-claimed against Chicago Title. Relatedly, Ovation Fund Management II, LLC, an investment manager that had invested its clients' money in the Ponzi scheme, also sued Chicago Title, which brought Nossaman into their litigation as a cross-claim defendant. The receiver eventually achieved a settlement,

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which included bar orders.

Specifically, as part of the global agreement with the receiver, Chicago Title agreed to pay \$24 million to settle investors' claim. Additionally, in the Ovation litigation, Chicago Title agreed to pay Ovation \$47 million (covering its investors' losses, attorneys' fees and some of its allegedly lost management fees) and Nossaman agreed to pay Chicago Title \$4.75 million. The settlements included bar orders extinguishing pending lawsuits and future litigation against Chicago Title and Nossaman stemming from the Ponzi scheme. On appeal, Peterson and Ovation challenged the bar orders as to Chicago Title and Nossaman, respectively.

In considering Peterson's appeal, the Ninth Circuit found that "[t]he Receiver's and Peterson's claims against Chicago Title substantially overlapped because they both sought to recover from Chicago Title for the same losses stemming from the Ponzi scheme. The Receiver sought to recover from Chicago Title, among other damages, the amount for which the receivership would be liable to all investors and others who lost money in the Ponzi scheme because of Chicago Title's conduct. Similarly, Peterson sought to recover from Chicago Title the amount of his alleged losses from the Ponzi scheme because of Chicago Title's same conduct."⁵ As a result, the Ninth Circuit concluded, the district court "had authority to bar Peterson's pending claims against Chicago Title in order to prevent that litigation from interfering with the Receiver's efforts to recover from Chicago Title for the same losses arising from the same fraudulent conduct."⁶

The Court cited the Fifth Circuit's decision in *Zacarias* to support its conclusion that the district court had the authority to enter the bar order as to Chicago Title on the basis that "the receiver was seeking to recover from the [targeted third-party defendants] for the same losses as those claimed by the defrauded investors. This was so, notwithstanding that the receiver and the defrauded investors may have been asserting different legal theories, because the losses all ultimately stemmed from the Ponzi scheme."⁷ Further, the Ninth Circuit distinguished *Zacarias* and the case before it from *SEC v. Stanford Int'l Bank, Ltd.*,⁸ on which Peterson relied. *Stanford* involved claims against insurance underwriters relating to professional liability insurance and bad faith denial of coverage. The Ninth Circuit noted that the extracontractual bad-faith claims at issue in *Stanford* "were independent of any claims belonging to the Receiver because the bad-faith claims 'lie directly against the Underwriters and do not involve proceeds from the insurance policies or other receivership assets.'"⁹

The Ninth Circuit thus reasoned that recovering on the bad-faith claims would not impact the policies' coverage limits and, therefore, would not come from the receivership res.¹⁰ The Court explained, "[u]nder those circumstances, the Fifth Circuit held that the district court supervising the Bank receivership lacked the authority to bar the Bank officers' extracontractual bad-faith claims against the professional liability insurance Underwriters."¹¹ However, the Court distinguished the bad-faith claims in *Stanford* from those brought by Peterson and the receiver, as both sought recovery from Chicago Title for the same conduct and losses, and instead found the situation before it "more closely analogous to the claims at issue in *Zacarias*."¹² In *Stanford*, the underwriters were not involved in the Ponzi scheme, and the claims asserted

by the Bank's managers and employees arose from a separate tort injury unrelated to the scheme. By contrast, the *Zacarias* defendants were active participants in the scheme, and the investors' claims stemmed directly from their fraudulent actions.¹³

The Court also found that the bar order was necessary to protect receivership assets for three reasons: "First, the bar order was a necessary condition of the global settlement ..., which benefited the receivership estate as a whole by bringing in more than \$24 million to pay defrauded investors' net losses."¹⁴ Second, the settlement eliminated the costs of, and the receiver's attention to, further litigation.¹⁵ The Court noted, relying on *Zacarias*, that "additional legal expenses that the receiver might have to incur before upholding a global settlement and bar order" would be enough to support this point.¹⁶ Third, the receiver faced the risk of an equitable indemnification subordination claim from Chicago Title, should any of the barred parties have brought and obtained a claim against Chicago Title.¹⁷

Peterson nevertheless asserted that the settlement and Chicago Title bar order were unfair and inequitable. His first argument was that the bar order should be denied because it extinguished his pending claims against Chicago Title but he could not recover any of the settlement proceeds (because he was a net winner).¹⁸ The Ninth Circuit then made reference to the Fifth Circuit having noted, in *Stanford*, "the importance of allowing receivership claimants whose claims against third parties were extinguished by a bar order an opportunity to recover for their losses instead through distributions from the receiver estate."¹⁹ In *Stanford*, the parties subject to the bar order were seeking to recover under the same insurance policies as the receiver.²⁰ However, the settlement in that case precluded the barred parties from sharing in the recovered proceeds or filing claims against the receivership estate.²¹

In *Peterson*, it was a key point of distinction for the Ninth Circuit that Peterson was able to submit a claim against the estate for his losses, like other claimants.²² He was only ineligible to receive a distribution because he was a net winner. "Under those circumstances, [the Ninth Circuit held that] the district court did not abuse its discretion by determining that an order barring Peterson's state-court claims against Chicago Title was not inequitable."²³

Lending further depth to its view of the appropriateness of bar orders in federal receiverships, the Ninth Circuit then addressed Ovation's challenge to the Nossaman bar order. Ovation argued that the district court lacked authority to enter the bar order and the bar order violated the Anti-Injunction Act. Of particular note, Ovation asserted that the Supreme Court's decision in *Harrington* precluded the district court from barring independent, non-derivative third party-claims that do not affect the res of the receivership estate.²⁴ But the Ninth Circuit rejected that notion, making clear that "*Harrington* does not apply here because it specifically addressed whether the bankruptcy code permitted the court overseeing Purdue Pharma's bankruptcy to bar claims against, not the debtor itself, but individuals who own the corporate debtor."²⁵ The Court noted that *Harrington* involved bankruptcy code provisions that were not before it in *Peterson*.²⁶ And the Court specifically relied on the fact that the Sacklers had neither filed for bankruptcy nor had they placed their assets on the table for distribution.²⁷ Moreover, in *Harrington* and in distinction to *Peterson*, the bar order before the Court had not

arisen in the context of the estate's claims against the beneficiaries of the bar order.

Thus, *Peterson* distinguished *Harrington* on two grounds instructive for bar orders in federal equity receivership settlements. First, *Harrington* does not apply if the scope of the bar order is sufficiently limited in scope with respect to the released parties. Specifically, whereas the release in *Harrington* covered the owners of the corporate debtor, the release in *Peterson* did not. Second, whereas *Harrington* addressed the application of the bankruptcy code, *Peterson* did not. Thus, in *Peterson* and unlike in *Harrington*, an opportunity remained for those whose independent litigation had been extinguished by the bar order to nevertheless recover through a claims process overseen by the receiver from the assets of the beneficiaries of the bar order.

These distinctions also may lend perspective for Sixth Circuit's decision in *Digital Media Solutions, LLC v. South University of Ohio, LLC*,²⁸ in which that Court rejected a settlement containing a broad bar order. In *Digital Media*, the bar order sought to foreclose claims against third parties entirely outside the receivership and distinct from the receiver's claims. The Sixth Circuit ruled a bar order was not appropriate to cover such claims. The Ninth Circuit distinguished *Digital Media Solutions* from the case before it in *Peterson* on similar grounds. First, *Digital Media Solutions* did not involve a Ponzi scheme, but rather a receivership for a company in significant debt.²⁹ Second, the Sixth Circuit held that the district court had did not have authority to issue bar orders that precluded third parties' claims that were not only against the receivership but also against third parties outside the receivership.³⁰

The Ninth Circuit thus concluded that—unlike *Peterson* and *Zacarias*—in *Digital Media Solutions* “the improperly barred claims were for an injury that the receivership entity itself did not suffer and, therefore, the receiver could not assert claims for the same alleged losses.”³¹ In this way, *Peterson*, *Zacarias*, and even *Digital Media Systems*, can be viewed as in line with *DeYoung*. In the latter action, the district court whose approval order was upheld by the Tenth Circuit, found the receiver's claims to be “substantially identical” to the claims of the parties to be barred “because they involved ‘the same loss, from the same entities, related to the same conduct, and arising out of the same transactions and occurrences by the same actors.’”³²

On February 28, 2025, shortly after the Ninth Circuit issued its decision in *Peterson*, the Honorable Judge Rodolfo A. Ruiz II, issued a ruling upholding a bar order in *SEC v. Complete Business Solutions Group, Inc.*, a federal equity receivership pending in the United States District Court for the Southern District of Florida.³³

Complete Business Solutions involved a settlement between the receiver, putative investor class representatives, class counsel, and a defendant law firm. Notably, the preliminary approval order entered in *Complete Business Solutions* established opt-out procedures by which investors could exclude themselves from participating in the settlement, up to a threshold. Certain investors objected and raised *Harrington* as warranting rejection of the bar order.

Judge Ruiz noted that “*Harrington* was narrowly based on a textual interpretation of a court's authority to extinguish claims of non-debtor third parties without consent in a plan of reorganization under the bankruptcy code.”³⁴ He went on to note, citing the Ninth Circuit's decision in *Peterson*, that “*Harrington* did not purport to (nor did its logic extend to) bar orders

entered in other contexts and pursuant to different authorities, such as a court's equitable powers in a receivership.”³⁵ Judge Ruiz further observed, “[n]or does *Harrington* appear to displace this Circuit's long-standing precedent in *Munford* and *U.S. Oil and Gas* allowing bar orders as part of a settlement, which are conceptually distinct from bar orders issued pursuant to a Chapter 11 plan of reorganization.”³⁶

Finally, in *In re Hopeman Brothers, Inc.*, a recent bankruptcy court found that a bar order did not run afoul of *Harrington* where it was “limited in scope and serves only to preserve the value of [insurance] policies for the benefit of all creditors whose claims are covered under the policies.”³⁷ In *Hopeman Brothers*, the court also noted that without the protection of a bar order, “insurance companies would have little incentive to settle, purchase, or otherwise monetize policies.”³⁸

The role of the receiver in achieving the settlements and bar orders in *Peterson*, *Complete Business Solutions*, *Zacarias*, and *DeYoung* solved the claimants' collective-action problem, without which each claimant would have been motivated to pursue their own claims against the receivership estate, its assets, and its sources of recovery, at the expense of competing claimants.³⁹ Without a receiver, those owed money by the estate would be free and incentivized to claw over each other to scoop up whatever they could gain by speed, aggression, and outspending, then leaving latecomers, the impecunious, and the resourceless among them empty-handed and unremunerated. In this type of situation, a “disorderly race to the courthouse ensues, resulting in inefficiency as assets are dissipated in piecemeal and duplicative litigation. The results are also potentially iniquitous, with vastly divergent results,” among competing claimants.⁴⁰ It is in this context that a bar order may be particularly effective and appropriate to achieve a higher, collective, economic result than would be obtained in the absence of one.⁴¹

What these decisions make clear is that bar orders are alive and well in federal equity receiverships. But they must be reasonably tailored in scope both as to the nature of the claims barred and the parties released, be necessary to protect assets of the estate, and solve a collective action problem for the estate's beneficiaries by enabling a receiver to achieve a higher, collective, economic result than likely would be obtained in the absence of one. Time will tell whether the Eleventh Circuit will have occasion to review the district court's ruling in *Complete Business Solutions*, and whether it and other Circuits will follow the lead of the Fifth Circuit in *Zacarias*, the Ninth Circuit in *Peterson*, and the Tenth Circuit in *DeYoung*. At least for now, it is fair to say, reports of the demise of bar orders in federal equity receiverships are greatly exaggerated. While the Supreme Court's decision in *Harrington* looms large for settlements containing bar orders, and may yet have a chilling effect for those seeking one, it may not be as titanic a decision for federal receiverships as some may fear.

Note: This article has been prepared for informational purposes. It is not intended as and should not be construed to be legal, investment, or tax advice. 🏠

ENDNOTES

¹ 603 U.S. 204 (2024).

² See *Harrington*, 603 U.S. at 227 (“Confining ourselves to the

question presented, we hold only that the bankruptcy code does not authorize a release and injunction that, as a part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants.”).

- ³ *Peterson*, 129 F.4th 599, 614 n.18 (9th Cir. 2025) (citations omitted).
- ⁴ NAFER member Krista Freitag is the Receiver in *Peterson*. Her counsel includes NAFER-members Ted Fates and David Zaro.
- ⁵ *Peterson*, 129 F.4th at 608.
- ⁶ *Id.* at 608-09 (citing *Rotstain v. Mendez*, 986 F.3d 931, 940-41 (5th Cir. 2021) (relying on *Zacarias*, 945 F.3d at 900-01); *SEC v. DeYoung*, 850 F.3d 1172, 1175-76 (10th Cir. 2017) (upholding order barring investors’ claims against a third party that stemmed “from the same loss, from the same entities, relating to the same conduct, and arising out of the same transactions and occurrences by the same actors” as the receiver’s claims)).
- ⁷ *Id.* at 609 (underlining in original).
- ⁸ 927 F.3d 830 (5th Cir. 2019).
- ⁹ *Peterson*, 129 F.4th at 609 (quoting from *Stanford*, 927 F.3d at 847).
- ¹⁰ *Id.* (citing *Stanford*, 927 F.3d at 836).
- ¹¹ *Id.* (citing *Stanford*, 927 F.3d at 847-49).
- ¹² *Id.*
- ¹³ *Id.* at 610 (quoting *Rotstain*, 986 F.3d at 940 (itself quoting *Zacarias v. Stanford Int’l Bank*, 945 F.3d 883, 901 (5th Cir. 2019), and distinguishing it from *Stanford*)).
- ¹⁴ *Id.* (citing *DeYoung*, 850 F.3d at 1182-83 (upholding bar order where “settlement offered the highest potential recovery for the Receiver Estate ... [and] the Claims Bar Order was necessary to that settlement”)).
- ¹⁵ *Id.*
- ¹⁶ *Id.* (citing *Zacarias*, 945 F.3d at 900-01; *DeYoung*, 850 F.3d at 1182-83).
- ¹⁷ *Id.*
- ¹⁸ *Id.* at 612.
- ¹⁹ *Id.* (citing *Stanford*, 927 F.3d at 845-47 (holding it to be inequitable to bar claims against the same assets without allowing the barred parties to file claims against the receivership estate)).
- ²⁰ *Id.* (citing *Stanford*, 927 F.3d at 835-36, 839, 845).
- ²¹ *Id.* (citing and quoting *Stanford*, 927 F.3d at 845-46).
- ²² *Id.* at 613.
- ²³ *Id.*
- ²⁴ *See id.* at 614 n.18.
- ²⁵ *Id.* (citing 603 U.S. at 209).
- ²⁶ *Id.* (citing 603 U.S. at 214).
- ²⁷ *Harrington*, 603 U.S. at 205.
- ²⁸ 59 F.4th 772 (6th Cir. 2023).
- ²⁹ *Id.* at 774-75.
- ³⁰ *Id.* at 774, 777, 781. This interpretation is also consistent with *Gordon v. Dadante*, 336 F. App’x 540, 542 (6th Cir. 2009) (unpublished), involving a private securities action—not a

bankruptcy proceeding—in which Sixth Circuit approved the district court’s approval of settlement between a defendant and the receiver that was conditioned on entry of a bar order.

- ³¹ *Peterson*, 129 F.4th at 610 n.13 (discussing *Digital Media Solutions*, 59 F.4th at 776, 783-85).
- ³² *DeYoung*, 850 F.3d at 1176; *see also Zacarias*, 945 F.2d at 898 (discussing *DeYoung*).
- ³³ *See* No. 20-cv-81205-RAR (S.D. Fla. Feb. 28, 2025). A bar order also was recently entered in an order granting a motion to approve a settlement in *SEC v. EquityBuild, Inc.*, No. 1:18-cv-5587, Dkt. 1803, 1838 (N.D. Ill. Feb. 6, 2025) (motion seeking approval granted without objection). The author serves as the receiver in that action. NAFER Member Michael Rachlis is the receiver’s counsel.
- ³⁴ *Id.* at 5-6 n.3 (quoting *Harrington*, 603 U.S. at 227 (“Confining ourselves to the question presented, we hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a non-debtor without the consent of affected claimants.”)).
- ³⁵ *Id.* (citing *Peterson*, 129 F. 4th at 614 n.18 (finding that *Harrington* was not applicable to a bar order issued in equity receivership)).
- ³⁶ *Id.* (citing *Munford*, 97 F.3d at 455 (approving bar order in settlement of a bankruptcy case); *U.S. Oil and Gas*, 967 F.2d at 491 (approving bar order in settlement of a class action); *see also In re Centro Group, LLC*, No. 21-11364, 2021 WL 5158001, at *3 (11th Cir. Nov. 5, 2021) (noting that bar orders pursuant to a settlement serve different purposes, are subject to different tests, and rest on different legal grounds than bar orders issued as part of a Chapter 11 plan of reorganization)).
- ³⁷ *In re Hopeman Brothers, Inc.*, 2025 WL 297652, *4 (Bankr. E.D. Va. Jan. 24, 2025) (opining that *Harrington* does not alter the standard for settlement bar orders under *In re Munford, Inc.*, 97 F.3d 449 (11th Cir. 1996)).
- ³⁸ *Id.* *See also, e.g., In re Spirit Airlines, Inc.*, No. 24-11988 (SHL), 2025 WL 737068 (Bankr. S.D.N.Y. Mar. 7, 2025) (bankruptcy court approved a release that contained an opt-out provision as a means avoiding *Harrington*’s prohibition against nonconsensual releases; discussing various cases).
- ³⁹ *See Zacarias*, 945 F.3d at 897 (The receiver is “an officer or arm of the court ... appointed to assist the court in protecting and preserving, for the benefit of all parties concerned, the properties in the court’s custody[.]”) (citations omitted).
- ⁴⁰ *Id.* at 896-97.
- ⁴¹ *See CFTC v. Equity Fin. Group*, CIV. 04-1512 (RBK), 2007 WL 2139399, at *1 (D.N.J. July 23, 2007) (approving settlement agreement and bar order as reasonable and in the best interests of the receivership estate when the receiver considered: available malpractice insurance coverage, defendants’ assets were likely not substantial enough to justify the expense of collection, better result could not be assured from further litigation, costs of discovery and trial were likely substantial, and pursuing litigation would further delay the progress of the receivership and satisfaction of claims against the estate).