

October 10, 2023

To: The Senate Committee on the Judiciary

Re: Follow Up Question for Stephen Hessler In Regards to the Record of the Hearing Entitled “Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy” on Tuesday, September 19, 2023

Question for Stephen Hessler:

1. The *Purdue Pharma* case is under heightened scrutiny given the controversy surrounding non-consensual third party releases. Are non-consensual third-party releases a common feature of mass torts cases like *Purdue Pharma*'s which does not involve a divisional merger?

As a baseline, releases are an integral feature of essentially all major chapter 11 reorganizations. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a chapter 11 plan may provide for “the settlement or adjustment of any claim or interest belonging to the debtor or to the estate.” Consistent with this statutory authorization, chapter 11 plans typically contain releases by the debtor of claims and causes of action which the debtor or the estate may have against non-debtor parties. In addition, chapter 11 plans typically contain releases of “derivative” claims that may be held by third parties, as courts generally agree that derivative claims belong to the estate of the debtor and so can be released by the debtor.

“Third party releases” are chapter 11 plan provisions that cause non-debtor parties (the “Releasing Parties”) to release other non-debtor parties (the “Released Parties”) from direct claims the Releasing Party has against the Released Party for liability for certain acts or omissions, which generally must be related to or in some way implicate the debtor or its estate. Third party releases are typically used to effect efficient and timely resolution of plan issues, build consensus and compromise over a plan, and avoid costly and uncertain litigation that may interfere with the reorganized debtor. Third party releases can be granted consensually, typically in connection with soliciting votes on a plan that contains such releases, or, in some jurisdictions, imposed

nonconsensually by the Bankruptcy Court at the request of the plan proponent. Courts generally agree that consensual third party releases are permissible, but disagree about what is required for a Releasing Party to sufficiently manifest consent to release the Released Parties. For example: a release may be deemed consensual if granted by a party who votes to reject the chapter 11 plan but fails to affirmatively opt out of the releases; who is entitled to vote but fails to return a ballot/opt-out form; who is unimpaired under (and thus deemed to accept) the chapter 11 plan; or who is impaired and deemed to reject the chapter 11 plan. In counter-position to the “consensual” third party release is the nonconsensual third party release. A nonconsensual third party release is one in which the Releasing Party does not grant consent (in some form) to the release but is nonetheless barred by the court’s order from bringing the claim. The “majority view” is that nonconsensual third party releases are permissible in certain circumstances, although courts differ on what constitutes these permissible circumstances.

I am not aware of a comprehensive survey of third party releases in mass tort cases where a divisional merger was not implicated. I do note that many third party releases sought in bankruptcy cases, including mass tort cases, are consensual per the standard of the applicable court. In those cases where a nonconsensual third party release is sought, there is a varying degree of opposition to such releases – in some cases, only parties who are not Releasing Parties oppose the release, while in others there is broader opposition to the release and the release is nonetheless granted.

Sincerely,

A handwritten signature in blue ink that reads "Stephen E. Hessler". The signature is written in a cursive style with a large initial 'S' and 'H'.

Stephen E. Hessler