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VALUING CONTRIBUTIONS BY AFFILIATES IN MASS TORT BANKRUPTCIES POST-PURDUE

The availability of non-consensual third-party releases has drawn companies facing mass tort liability into bankruptcy courts with increasing regularity. For these companies, bankruptcy’s offer of non-consensual third-party releases — by which an entire corporate enterprise may be relieved of all tort claims, both present and future — may affect a “truly global peace.” However, the Supreme Court is expected to rule this year on the permissibility of non-consensual third-party releases in Harrington v. Purdue Pharma L.P. Should the Court deem non-consensual third-party releases impermissible, “truly global peace” may no longer be possible. Yet, as recent MDL settlements make clear, “nearly global peace” — with virtually universal participation in consensual releases — is possible without bankruptcy and provides a substantial benefit to those who contribute to the settlement. The driver for these consensual settlements is the same as a key element for obtaining non-consensual third-party releases in bankruptcy: adequate valuation of tort liability. Thus, irrespective of the outcome in Purdue, claim valuation will remain a critical component of any resolution of mass tort liability, whether in or out of bankruptcy.

By Melanie Cyganowski, David Castleman, and Michael Maizel *

In recent years, large companies facing substantial mass tort liability have increasingly turned to the bankruptcy courts seeking to obtain something only those courts purport to offer — a “truly global peace.” A “truly global peace” is one that resolves all tort claims — even those claims of non-consenting claimants — for both the company filing for bankruptcy (the debtor) and the debtor’s affiliates. This “truly global peace” is made

possible by the bankruptcy-unique concept of non-consensual third-party releases. The draw for companies facing mass tort liability is easy to see: the promise of obtaining releases from *all* tort claimants, present and future, for all time, for an entire corporate enterprise.¹

¹ Whether bankruptcy is or ought to be available to companies purely as a means of reaching global resolution of their tort

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