CLIENT ALERTS & INSIGHTS

The Cloud Over Third-Party Releases in the Southern District of New York

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Key Takeaways

- Recent court decisions in the Southern District of New York have created uncertainty around the use of third-party releases in bankruptcy cases, especially regarding whether "opt-out" releases are considered consensual after the Supreme Court's Purdue decision.
- This evolving legal landscape increases risk for companies and stakeholders relying on third-party releases to shield against post-bankruptcy litigation, as inconsistent rulings could impact the predictability and effectiveness of plans of reorganization.
- Businesses considering filing for bankruptcy or seeking a third-party release from a bankruptcy court should closely monitor ongoing appeals and developments in the Second Circuit and work with their legal counsel to ensure compliance with the latest legal standards.

Third-party releases are a common and important component of plans of reorganizations. Key bankruptcy case constituencies have historically relied upon third-party releases as a way to mitigate the risk of post-bankruptcy litigation claims. However, since the 2024 Supreme Court decision in *Harrington v. Purdue Pharma L.P.* ("*Purdue*"), third party releases have been limited to situations where those releases were given "consensually." Before and after *Purdue*, many bankruptcy courts, including those in leading jurisdictions such as the District of Delaware, the Southern District of Texas, and the Southern District of New York, permitted what are known as "opt-out" releases, or releases that are granted unless a creditor affirmatively elects to "opt out" of the release.

This established practice was called into question recently when Judge Denise L. Cote, of the District Court for the Southern District of New York, reversed the confirmed plan of reorganization in the *Gol Linhas* case,[1] finding that the opt-out provisions of the third-party releases in the Plan were nonconsensual and therefore unconstitutional under *Purdue*. In her analysis, Judge Cote focused on basic contract law, citing the principle that "consent cannot be implied from silence." Judge Cote's opinion brought into question whether third-party releases would continue to be available in the Southern District of New York, or at the very least, in what form.

That question has been somewhat answered by Southern District of New York Bankruptcy Judge Sean H. Lane. Judge Lane recently confirmed a plan of reorganization which contained a third-party release in the *Azul* bankruptcy case.[2]

In that case, the debtors proposed a plan with similar opt-out provisions to the *Gol Linhas* plan and the Office of the United States Trustee objected on the basis that the releases were non-consensual and thus improper under *Purdue*. The debtors then made modifications to the proposed plan so that only creditors who returned a ballot without opting out would be bound by the third-party releases. The debtors argued that returning the ballot without completing the opt-out section was an active choice. Judge Lane relied on this change to the proposed plan to distinguish *Azul* from the *Gol Linhas* case and found that there was ample case law to support that a third-party release of this kind was consensual under both federal and New York state law.

The debtors in *Gol Linhas* have appealed Judge Cote's decision. This appeal could potentially set the table for the availability of third-party releases in the Second Circuit for years to come. This is important because it is common for companies to "forum shop" when determining where to file for bankruptcy. Other circuits, particularly the Fifth Circuit, have long held that third-party releases may utilize opt-out provisions, as recently discussed by Southern District of Texas Bankruptcy Judge Christopher M. Lopez while confirming the proposed plan in *Ascend Performance Materials* which contained such opt-out provisions.3 We expect the Second Circuit to shed additional light on this developing area of bankruptcy law.

1 *In re Gol Linhas Aereas Inteligentes S.A., et al.*, Case No. 25cv4610 (DLC) (S.D.N.Y.).

2 *In re Azul S.A., et al.*, Case No. 25-11176 (SHL) (Bankr. S.D.N.Y).

3 *In re Ascend Performance Materials Holdings Inc., et al.*, Case No. 25-90127 (CML) (Bankr. S.D. Tex.).