

# Creditor Consent in Chapter 11: Recent SDNY Bankruptcy Court Decisions Build On Parameters of Consensual Third-Party Releases Following Purdue

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In its decision last year in the case of *Harrington v. Purdue Pharma L.P.*, the Supreme Court held that *nonconsensual* third-party releases in chapter 11 plans of reorganization are impermissible. 144 S.Ct. 2071, 2088 (2024) (“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.”) (emphasis added).

The Supreme Court in *Purdue* expressly left open the possibility for chapter 11 plans to provide for consensual third-party releases without any guidance on the issue of what exactly constitutes consent. 144 S. Ct. 2071, 2087-88 (“nothing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan; these sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual releases at issue here” and “nor do we have occasion today to express a view on what qualifies as a consensual release”).



Long before *Purdue*, bankruptcy courts grappled with the bounds of consensual releases with some courts holding that only third-party releases that creditors affirmatively “opt-in” would qualify as proper consent.

Other courts, including bankruptcy courts in New York and a handful of other jurisdictions, have taken a more expansive approach to consensual non-debtor releases, holding that a mechanism for providing creditors with notice and the opportunity to “opt-out” of releases is sufficient to bind creditors to releases if they do not check the opt-out box regardless of whether they voted for or against the plan or abstain from

voting. See, e.g., *In re LATAM Airlines Grp. S.A.*, 2022 WL 2206829 \*46-48 (Bankr. S.D.N.Y. Jun. 18, 2022); *In re Avianca Holdings S.A.*, 632 B.R. 124, 133 (Bankr. S.D.N.Y. 2021); *In re Wash. Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011).

Opponents of opt-out release mechanics—most often the United States Trustee (UST) whose responsibility is to protect the public interest and monitor plans and disclosure statements—argue that a creditor’s failure to return a ballot or form with an “opt-out” box checked cannot constitute such creditor’s consent to the plan’s third-party releases.

These objectors argue that consent to third party releases must be determined by state law and under state law consent cannot be procured by inaction or silence, but instead requires a manifestation of assent to an agreement. See, e.g., Restatement (Second) Of Contracts §17(1) (1981) (“[T]he formation of a contract requires a bargain in which there is manifestation of mutual assent to the exchange and a consideration.”).

Following *Purdue*, the debate over whether opt-out mechanics manifest consent to non-debtor releases has reignited. Recently, the Bankruptcy Court for the Southern District of New York in two separate opinions further clarified its position on opt-out releases and the contours of creditor consent in the context of a chapter 11 case.

In March, the U.S. Bankruptcy Court for the Southern District of New York in the *Spirit Airlines* approved the proposed opt-out mechanism as an adequate manifestation of consent based upon the circumstances of the chapter 11 cases. See *In re Spirit Airlines, Inc., et al.*, Case No. 24-11988, 668 B.R. 689, 703 (Bankr. S.D.N.Y. March 7, 2025) (“Decisions in this District generally permit use of an opt-out mechanism if the affected parties receive clear and prominent notice and explanation of the release and are provided an opportunity to decline to grant them.”).

The *Spirit Airlines* plan included third-party release provisions as to which a creditor was

deemed to have consented if the creditor (i) timely and properly voted to accept or reject the plan but did not check the opt-out box on their ballot, (ii) abstained from voting on the plan and did not check the opt-out box on a timely and properly submitted ballot, (iii) failed to timely and properly submit an opt-out form with the opt-out box checked, or (iv) failed to timely and properly file an objection. *Spirit Airlines*, 668 B.R. 689, 699.

The UST objected to the plan releases on the basis that they were, in its view, nonconsensual and prohibited by the ruling in *Purdue*.

The court in *Spirit Airlines*, overruled the UST objection and upheld the use of opt-out mechanics for non-debtor releases in appropriate cases.

The court specifically found that the opt-out mechanism is proper where (i) there is evidence that the third party releases are clearly worded and conspicuously identified in the plan materials including on the ballots and opt out form such that the notice is reasonably calculated to appraise interested parties of their rights in the case; (ii) the third party releases have been part of plan formulation since day one as opposed to being proposed for the first time after months of plan negotiations, formulations and disclosures in the case; and (iii) where the proposed releasing parties stand to gain a meaningful recovery under the proposed plan. *Spirit Airlines*, 668 B.R. 689, 707-708.

The court noted that circumstances may justify a different result in a case where the affected creditors were receiving a de minimis recovery or where the beneficiaries of the releases were not making a substantial contribution.

In *Spirit Airlines*, the beneficiaries of the releases provided hundreds of millions of dollars in fresh capital through restructuring transactions provided for in the plan.

In May, and on the heels of the *Spirit Airlines* decision, the SDNY Bankruptcy Court was once again confronted with a UST challenge to the propriety of opt-out releases under a chapter 11 plan. See *In re GOL Linhas Aéreas Inteligentes*

S.A., et al., Case No. 24-10118, 2025 WL 1466055 (Bankr. S.D.N.Y. May 22, 2025).

Under the proposed chapter 11 plan in *Linhas*, creditors were bound by the plan's third-party releases if they (1) voted to accept the plan (or if they were deemed to accept the plan), voted to reject the plan or abstained from voting on the plan and (2) did not opt out of the third-party releases by checking the appropriate box on the ballot sent to them.

The UST objected to the *Linhas* plan on the basis that the third-party releases were non-consensual because, under state law, creditor inaction by failing to opt-out cannot manifest consent.

Chief SDNY Bankruptcy Judge Martin Glenn disagreed and determined the plan's third-party releases procured through an opt-out structure were consensual and proper. *Linhas*, 2025 WL 1466055 \*16-17.

Significantly, the Bankruptcy Court in *Linhas* held that federal, not state, law governs the consent analysis pointing to authority under section 1123(b)(6) of the Bankruptcy Code which provides that a plan "may include any other appropriate provision not inconsistent with the applicable provisions of this title". 11 U.S.C. 1123(b)(6); *Linhas*, 2025 WL 1466055.

Though the Supreme Court in *Purdue* refused to interpret this catch-all provision of the Bankruptcy Code as authority for *non-consensual* third-party releases, it expressly left open the possibility that consensual releases may be governed by section 1123 and be a part of a chapter 11 plan and not a standalone contract. *Purdue*, 144 S. Ct. 2071, 2083 ("But the catchall cannot be fairly read to endow a bankruptcy court with the . . . power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants.").

In rejecting the UST's argument that state law should govern the issue of consent to releases

under a chapter 11 plan, the Bankruptcy Court in *Linhas* observed that applying state law would lead to chaos, stating that "[t]he potential need to engage in untold numbers of individualized choice-of-law analysis cuts in favor of applying federal law, for the sake of both judicial efficiency and the code's goal of creating a centralized bankruptcy law." *Linhas*, 2025 WL 1466055 \*21; see also *Spirit Airlines*, 668 B.R. 689, 716, n. 31 (noting that "the UST's position [that state law applies to the consent analysis] would result in a multitude of different outcomes for each of the creditors at issue . . . [and] applying different standards from fifty states, U.S. territories, and foreign jurisdictions would not facilitate the development of uniform bankruptcy law in the United States").

The Bankruptcy Court's determination in *Linhas* that federal law governs the procedures for obtaining consent to third-party releases in a chapter 11 plan currently is on appeal before the Southern District of New York. See *Harrington v. GOL Linhas Aéreas Inteligentes S.A. et al.*, Case No. 25-cv-094519 (S.D.N.Y.).

The law surrounding the use of opt-out mechanics to procure consent to third-party releases under a chapter 11 plan will undoubtedly continue to evolve in New York and beyond. And it remains to be seen whether the Southern District in an appellate review of *Linhas* will alter the landscape.

For now, however, the recent decisions in *Linhas* and *Spirit Airlines* should provide clear guidance to companies contemplating bankruptcy filings in New York as to what may constitute consent to a third-party release under a chapter 11 plan.

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