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Silence Is Not Always Golden: Southern District of New York Rules That Opt-Out Mechanism Is Insufficient to Render a Third-Party Release Valid

By Douglas Mintz, Casey Servais and Thomas Curtin [*]

In this article, the authors discuss a decision by a federal district court in New York striking an "opt-out" third-party release and corresponding injunction from a chapter 11 plan.

Judge Denise Cote of the U.S. District Court for the Southern District of New York has issued a decision striking an "opt-out" third-party release and corresponding injunction from a chapter 11 plan. In *In re Gol Linhas Aéreas Inteligentes, S.A.*,[1] the District Court held that implied consent cannot be inferred from a party's failure to opt out of a third-party release and that the plan therefore included an impermissible non-consensual third-party release. This rendered the release provisions invalid in light of the Supreme Court's *Purdue Pharma* decision.

BACKGROUND

Gol Linhas, a Brazilian airline, sought chapter 11 protection in 2024. The debtors filed a plan and disclosure statement that included provisions purporting to release claims against third parties if the creditors holding those claims failed to affirmatively opt out of the release provision. The released parties included, among others, the DIP lenders, certain administrative agents and indenture trustees, and an ad hoc group of noteholders.

The U.S. Trustee objected to the third-party release provision, arguing that the plan's opt-out mechanism was insufficient to establish a creditor's implied consent to the third-party release provision, and that the opt-out releases were therefore impermissible under the Supreme Court's landmark 2024 decision on third-party releases, *Harrington v. Purdue Pharma L.P.*[2] In *Purdue Pharma*, the Supreme Court held that the Bankruptcy Code does not authorize a court (through confirmation of a chapter 11 plan) to release claims against a

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[1] In re Gol Linhas Aéreas Inteligentes, S.A., Case 1:25-cv-04610-DLC (S.D.N.Y. Dec. 1, 2025).

[2] Harrington v. Purdue Pharma L.P., 603 U.S. 205, 227 (2024).

non-debtor without the consent of the affected claimants.[3] The Supreme Court noted that its decision in *Purdue Pharma* should not be construed as calling into question *consensual* third-party releases and that it was not expressing a view on what qualifies as a consensual release.[4] Thus, a consensual third-party release may be permissible under *Purdue Pharma*.

Courts have since debated what constitutes consent—with some courts permitting "opt-out" releases where a party must expressly choose not to release third parties. [5] Other courts have held that only "opt-in" releases—where the releasing party elects expressly to release third parties—constitute consensual releases under *Purdue*.[6]

In *Gol Linhas*, the U.S. Bankruptcy Court for the Southern District of New York confirmed the debtors' plan, holding that the opt-out releases included in the plan were consensual and therefore permitted under *Purdue Pharma*. The Bankruptcy Court held that federal law—not state law—governed whether the release was consensual. Applying federal law, the Bankruptcy Court held that creditors implicitly consented to the release by consenting to the Bankruptcy Court's jurisdiction; the released third-party claims affected the res of the debtor's estate; and there was adequate service of process.

The U.S. Trustee appealed the decision to the District Court.

THE SOUTHERN DISTRICT'S DECISION

On appeal, the District Court concluded that the "third-party releases at issue here are non-consensual and, thus, barred by the Supreme Court in *Purdue*." Specifically, the District Court found that under state contract law (which in this case was New York law), a creditor's silence may not be construed as consent unless there is a duty to respond or a contemporaneous oral agreement.

The District Court also found that the releases were non-consensual under federal law. Federal courts that apply the federal common law of contract look

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[3] 603 U.S. 205, 227 (2024).

[4] Id. at 226.

[5] See, e.g., In re Robertshaw US Holding Corp., 662 B.R. 300, 323 (Bankr. S.D. Tex. 2024) ("There is nothing improper with an opt-out feature for consensual third-party releases in a chapter 11 plan."); In re Spirit Airlines, Inc., 668 B.R. 689 (Bankr. S.D.N.Y. 2025) (similar).

[6] See In re Smallhold, Inc., 665 B.R. 704, 718-20 (Bankr. D. Del. 2024) (finding that non-voting creditors must affirmatively consent to third-party release for the release to be permissible under Purdue); see also In re Tonawanda Coke Corp., 662 B.R. 220, 223 (Bankr. W.D.N.Y. 2024) (finding that the "mere ability to opt out of a release is insufficient to establish" consent).

to general principles of contract law. Under those general principles (which are embodied in the Restatement of Contracts), "consent cannot be implied from silence."

In so holding, the District Court rejected three arguments advanced by the debtors, some of which were adopted by the Bankruptcy Court. The Bankruptcy Court held that a party that submits to the jurisdiction of a bankruptcy court also consents to the disposition of its claims, including through a third-party release. The District Court found that "it does not follow that all parties that consent to a bankruptcy court's jurisdiction necessarily consent to any release the court may approve."

The District Court likewise rejected the debtors' attempt to rely on a rule from the class action context in which opt-out procedures can establish consent to be joined to a class settlement. The District Court found the class action precedent to be inapt, because Federal Rule of Civil Procedure 23 provides the mechanism for establishing a class and protecting the rights of members of a certified class. However, the releasing parties in *Gol Linhas* were not members of a certified class, and therefore "the opt-out mechanism utilized in the class action context simply does not apply to the third-party release here."

Finally, the District Court rejected the debtors' argument that creditors who fail to opt out of a release can be bound by the consequences of their inaction, much like a default judgment can be entered against parties who fail to respond to a complaint or other pleading. Courts do not enter default judgments against parties who have no duty to respond, and here, the District Court found that the creditors had "no duty to respond to the opt-out opportunity."

Thus, the District Court held that the debtors failed to establish that the opt-out mechanism rendered the third-party release consensual because in this context "consent cannot be implied from silence." The District Court found that a binding contract generally requires "objective manifestation of mutual assent" by the parties to its terms, and ordinarily, an "offeror does not have power to cause the silence of the offeree to operate as acceptance." The District Court held that the "releases are nonconsensual" because the opt-out mechanism failed to evidence mutual assent between the parties and therefore the third-party releases "are barred by *Purdue*." As such, the District Court reversed the confirmation order, and struck the third-party release and injunction provision from the plan.

KEY TAKEAWAYS

- Opt-out releases have become customary in the wake of *Purdue Pharma*, with multiple bankruptcy courts in New York and Texas holding that a creditor's failure to opt out of a third-party release should

be deemed consent to the release, provided that creditors have received sufficient notice of the third-party release.[7]

- The Southern District's decision in *Gol Linhas* disagrees with these decisions. In *Gol Linhas*, the Southern District held that silence cannot be construed as implied consent and therefore failure to opt out of a third-party release provision likewise cannot be deemed consent.
- The debtors have appealed the Southern District's *Gol Linhas* decision. The Second Circuit or potentially the Supreme Court may therefore get the last word on this issue.

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[7] See, e.g., In re Robertshaw US Holding Corp., 662 B.R. 300, 323 (Bankr. S.D. Tex. 2024); In re Spirit Airlines, Inc., 668 B.R. 689 (Bankr. S.D.N.Y. 2025).