



## Lowenstein Bankruptcy Lowdown Video 40 - Opt-Out or Opt-In: Third-Party Releases After *Azul*

By [Eric Chafetz](#) and [Eric James Seltzer](#)

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- Eric Chafetz:** Welcome to today's [Bankruptcy Lowdown](#). We'll be discussing third-Party releases and the implications of the recent *Azul* decision.
- Eric James Seltzer:** To understand *Azul*, we need to start with the Supreme Court's ruling in *Purdue*, where the Court held that the Bankruptcy Code does not authorize non-consensual third-party releases. This decision left open several questions, including: what exactly counts as “consensual?”
- Eric Chafetz:** And that's where opt-out releases come in. An opt-out process works like this: creditors are bound to third-party releases unless they affirmatively opt out, usually by checking a box on a ballot or other form.
- Eric James Seltzer:** These opt-out structures have recently faced greater scrutiny. The key question is whether silence—not checking the opt-out box—constitutes consent.
- Eric Chafetz:** And that brings us to two cases out of the Southern District in New York. First, there was *GOL*, where the District Court struck down the opt-out releases, reasoning that consent cannot be implied from silence under either federal or state law.
- Eric James Selzer:** That ruling called into question whether opt-out releases could survive in the Southern District of New York. Then came *Azul*, where the Debtors proposed the plan with the opt-out structure similar to *GOL*.
- Eric Chafetz:** However, the Debtors decided to amend their plan so that third-party releases would only be granted if a creditor returned a ballot and did not opt out.
- Eric James Selzter:** The Bankruptcy Court confirmed the plan, reasoning that creditors who returned a ballot but didn't check the opt-out box had clearly manifested their consent under federal and state law, because the releases only applied to creditors who took affirmative action.
- Eric Chafetz:** So, opt-out releases survived? A victory for plan proponents, right?
- Eric James Seltzer:** Well, maybe not. Typically, only a small percentage of creditors who are solicited actually vote on a plan, as was the case in *Azul*.

**Eric Chafetz:** And look at the unsecured convenience class there, where the return ratio was so low that the Debtors chose not to buy in the class entirely.

**Eric James Seltzer:** This illustrates a real problem for plan proponents, especially in cases involving smaller trade creditors or individuals who historically vote on plans in very low numbers. If the effectiveness of third-party releases depends on creditors returning ballots and not opting out, we could see the benefit of these releases diminish.

**Eric Chafetz:** And that narrow benefit could disincentivize plan sponsors to provide consideration to fund global settlements.

**Eric James Seltzer:** In sum, *Azul* preserves opt-out releases in at least some form, but their practical effectiveness may be limited by creditor engagement. Plan proponents will need to think carefully about how to maximize ballot returns, particularly from smaller creditors.

**Eric Chafetz:** This is definitely an area to watch, and we'll continue to monitor developments in this space.

**Eric James Seltzer:** Thanks for joining us.