

## Bankruptcy & Restructuring Department

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### **Azul Provides Some Color on Opt-Out Releases and Indenture Trustee Fees in the Southern District of New York**

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Since the 2024 ruling in *Harrington v. Purdue Pharma (Purdue)*, where the Supreme Court held that the Bankruptcy Code does not authorize nonconsensual third-party releases, courts around the country have grappled with whether third-party releases granted by an “opt-out” process are consensual. An opt-out process binds creditors to third-party releases contained in a Chapter 11 plan unless a creditor affirmatively opts out of granting the releases, usually by checking a box on a voting ballot and returning the ballot. If no action is taken by the creditor, the creditor is deemed to have consented to the third-party release. The propriety of opt-out structures came to a head once again in the Chapter 11 cases of *Azul S.A. (Azul)*.

By way of background, opt-out releases have been approved both before and after *Purdue*, though they have recently been subjected to significantly greater scrutiny. Approximately one month prior to Judge Sean H. Lane’s opinion in *Azul*, Judge Cote of the Southern District of New York issued an opinion reversing the *Gol Linhas Aereas Inteligentes S.A. (Gol)* confirmation order and striking the opt-out third-party releases contained therein. Judge Cote’s opinion held that third-party opt-out releases are nonconsensual under state law and federal law because “consent cannot be implied from silence.” This opinion called into question the continued viability of opt-out releases in the Southern District of New York.

In *Azul*, the debtors proposed a Chapter 11 plan with an opt-out structure similar to that of *Gol*. Unsurprisingly and just like in *Gol*, the Office of the United States Trustee (UST) objected to the plan on the grounds that the opt-out releases were nonconsensual and, as a result, impermissible under *Purdue*. Rather than digging in their heels on the release issue, especially in light of Judge Cote’s ruling in *Gol*,<sup>1</sup> the *Azul* debtors amended the plan to provide that the third-party release would be granted only if the creditor returns a ballot and does not opt out. This modification proved to be critical.

On January 6, Judge Lane issued an opinion approving the opt-out releases as revised. The opinion states that the use of the opt-out is permissible because “the Debtors amended the plan to provide that the releases are provided **only by creditors that both returned a ballot and did not elect to opt-out.**” Judge Lane explained that “[t]his conclusion is the same regardless of whether one applies federal or state law because the only releases granted here are for those creditors who took the affirmative step of returning a ballot but did not check the box for an opt out.” According to Judge Lane, “creditors that returned a ballot but did not check the opt-out box have ‘clearly manifested their consent.’” While the *Azul* opinion ostensibly preserves opt-out releases in the Southern District of New York, limiting the applicability of third-party releases to creditors who vote on the plan may be a pyrrhic victory.

As a general matter, only a small percentage of creditors who are solicited to vote on a Chapter 11 plan actually vote. According to the voting declaration filed in *Azul*, excluding master ballots, the debtors sent out approximately 3,326 ballots and received 767 opt-out elections, for a total opt-out percentage of just over 20 percent. The return ratio for Class 7 unsecured convenience class claims was particularly underwhelming. For that class, the debtors sent out 2,733 ballots and only received back 167 (less than 7%), of which 148 elected to opt out. In fact, due to the underwhelming return ratio for Class 7, the debtors withdrew the applicability of the third-party release to Class 7 altogether.

The Class 7 return ratio illustrates a potential problem for plan proponents, particularly in cases where creditors are smaller trade creditors, retail holders, or individuals—people who generally vote on Chapter 11 plans in relatively low numbers. Put simply, if the efficacy of third-party releases is going to depend, even in part, on creditors timely returning a voting ballot (and not electing to opt out), *Azul*’s holding may materially narrow the scope of parties granting third-party releases under a Chapter 11 plan. This narrowed scope could create a disincentive for plan sponsors to provide consideration to fund global

settlements, which may frustrate rather than facilitate a consensual case resolution.

The *Azul* opinion is also notable because it addresses the propriety of paying the fees and expenses of an unsecured notes indenture trustee—who was also a member of the official committee of unsecured creditors—as part of a global settlement. The UST objected to the payment of these fees and expenses and argued, among other things, that such fees must satisfy the substantial contribution requirement under Section 503(b) of the Bankruptcy Code. Judge Lane overruled this objection as well, finding that the indenture trustee contributed to the development of the global settlement and that the applicable indentures provide a legal right for recovery of the expenses of the indenture trustee. Judge Lane also distinguished the UST’s reliance on *In re Lehman Bros. Holdings, Inc.*, reasoning that unlike in *Lehman*, the justification for payment of the fees and expenses is rooted not in the indenture trustee’s role as a committee member but rather in the legal rights under the indentures. The holding also aligns with how payment of indenture trustee fees and expenses is often dealt with in other complex Chapter 11 cases around the country (i.e., paid as part of a global settlement), as was the case in *Desktop Metal, Inc.* (Bankr. S.D. Tex.), *Enviva Inc.* (Bankr. E.D. Va.), *WeWork Inc.* (Bankr. D.N.J.), and many others.

Judge Lane’s decision can be found [here](#).

If you are interested in exploring this issue further, please reach out to one of the lawyers in the [Bankruptcy & Restructuring Department](#).

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<sup>1</sup> The *Gol* opinion was issued on December 1, 2025. The amended *Azul* plan was filed on December 10, 2025.

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