Lowenstein Bankruptcy Lowdown Video 36 – Silence Does Not Equal Consent: Opt-Out Mechanisms in Third-Party Releases

By David Posner and Brent Weisenberg

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Brent Weisenberg: Welcome back to the Lowenstein Lowdown. We are here to continue our coverage of third-party releases by delving into a recent decision from the U.S. District Court for the Southern District of New York in the *GOL* case about third-party releases and the use of opt-out mechanisms in bankruptcy plans.

Third-party releases are a hot topic in Chapter 11 cases, and this video is a follow-up from the one we did earlier this year on the same topic. In our earlier video, we discussed a case which held that under certain circumstances, silence equals consent in an opt-out scenario.

David, what's the bottom line?

David M. Posner: The court held that you cannot treat creditor silence or their failure to check an opt-out box as consent to give up claims against non-debtors. Because of that, the court struck the third-party releases from the plan.

Brent, unpack that in plain English.

Brent Weisenberg: Sure. After the Supreme Court's decision in *Purdue Pharma*, courts cannot approve nonconsensual third-party releases. The only way a plan can include releases of claims against non-debtors is if their releases are consensual.

So, the key question is: what counts as consent? In this case, the plan used an opt-out approach. Creditors receive ballots or notices saying essentially, “You will be deemed to release your claims unless you check this box to opt out.” While some creditors did opt out, the majority of the creditors did not check the box. The debtors argued that that meant those creditors consented. The Bankruptcy Court overruled

the U.S. Trustee and found that the releases were consensual, in part because the court concluded that federal law, not state law, applies to determine whether a third-party release was consensual.

David, why did the court disagree?

David M. Posner: First, under basic contract principles, silence is not acceptance. Whether you look to state law or general federal contract law, the rule is the same. You normally need an affirmative manifestation of assent—words or conduct that clearly shows, “Yes, I agree.” Simply not mailing back a form or not checking a box is usually not enough, and there is no special duty here requiring creditors to respond.

Second, the court rejected the analogy to class action practice, where opt-out can be enough if the Rule 23 safeguards are followed. This wasn't a certified class action; those procedures and protections didn't apply, so you can't import that opt-out logic into a Chapter 11 plan’s third-party releases.

Third, the court said that consenting to the Bankruptcy Court's jurisdiction is not the same thing as consenting to release your separate claims against non-debtors. Jurisdiction to hear cases doesn't magically create consent to give up your rights.

Putting that all together, the court found that these were nonconsensual third-party releases. And because *Purdue* says non-consensual releases are not authorized, the court struck the releases and the related injunction provisions and sent the case back for further proceedings.

Brent Weisenberg: Here's the takeaway: plans that rely on opt-out checkboxes to bind creditors to third-party releases are increasingly on shaky ground. And certainly, what jurisdiction you in may very well determine whether you can obtain a third-party release utilizing an opt-out mechanism. If you want certainty in obtaining valid third-party releases–that will be upheld–you may want to consider an affirmative explicit consent.

Think opt-in, not opt-out. Clearly notice matters, but notice alone won't convert silence into consent.

David and I and the Lowenstein team will continue to keep our eyes on the developing case law. Until then, we'll see you soon.