

Lowenstein Bankruptcy Lowdown Video 45 – Third-Party Releases: When Silence Is No Longer Consent

By David M. Posner and Brent Weisenberg

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David M. Posner: Welcome to the Lowenstein Bankruptcy Lowdown's continuing coverage of third-party releases.

I'm David Posner, and I'm with my partner, Brent Weisenberg. Today we're going to revisit third party releases given the recent *Alkagen* decision. After *Purdue Pharma*, everyone was wondering what does consent mean in order to get a third-party release from a bankruptcy court?

Brent, why don't you talk about that?

Brent Weisenberg: Here's what we know. We know that silence in and of itself can't be consent. What is silence? That's kind of what we're trying to determine right now. There's an *Ebix* decision which says, if you do nothing, despite having had the opportunity to opt out, that's not enough. That is not consent.

David M. Posner: In Delaware, in the *Smallhold* decision, that built on *Ebix*. Judge Goldblatt said, "you need an affirmative step, like returning a ballot in favor of a plan that has an opt out box, but you fail to check it, which indicates that you got the ballot, but you didn't check the box, and you took a step, like voting on a plan."

Judge Goldblatt likened that to going to a website, clicking "Agree," that's a click wrap, even though you might not have read everything that was there. That brings us to *Alkagen*, the same Judge Everett as in *Ebix*. Talk to us about that decision.

Brent Weisenberg: In *Alkagen*, the difference is a creditor would be bound if they returned a ballot yet failed to check the opt out box. The difference here is this person showed they were alive by voting on the plan and having had the opportunity to opt out, but not having done so. The judge was more comfortable binding those people.

David M. Posner: The key was clear notice and an affirmative participation, which is why Judge Everett manifested as saying, you let us know you were alive.

Brent Weisenberg: Exactly. Here's the roadmap now. We know that voting creditors can use the opt out mechanism. The question becomes, “how do we bind non-voting creditors who have no obligation to return anything to the debtor?”

David M. Posner: The days of binding everyone through pure silence are clearly over, but if your process is designed right, opt outs can still work, correct?

Brent Weisenberg: Exactly.

David M. Posner: Thanks for joining us. We hope to see you again next time.