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## New Trend in Third-Party Releases in Delaware



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U.S. Bankruptcy Courts in the District of Delaware have been split on whether consent for third-party releases in a chapter 11 reorganization plan can be obtained via opt-in or opt-out mechanisms.<sup>2</sup> While the majority view allows opt-out third-party releases that contain adequate notice,<sup>3</sup> the minority view prefers opt-in releases to, among other things, ensure that there is evidence of affirmative consent for creditors that fail to return the ballot or are not allowed to vote.<sup>4</sup>

After *Purdue*,<sup>5</sup> where the U.S. Supreme Court held that the Bankruptcy Code does not authorize nonconsensual third-party releases in a reorganization plan, certain Delaware bankruptcy judges are now leaning more toward requiring parties to opt into third-party releases.<sup>6</sup> This article discusses the trend by at least two Delaware judges toward opt-in third-party releases and predicts that what once was a minority view in Delaware might very soon become the majority view.

### Minority View on Opt-In Releases Trending in Delaware Courts

In *Purdue*, the Supreme Court made clear that a court may approve third-party releases if they are consensual and appropriately tailored.<sup>7</sup> Delaware Bankruptcy Courts are now navigating the permissibility of opt-out releases post-*Purdue* and the nuances of what is “consensual.”

An opt-out third-party release binds creditors to a nondebtor release unless they take an affir-

mative action not to be bound, such as checking the “opt-out” box on a ballot or filing an objection. On the other hand, an opt-in third-party release only binds creditors if they take an affirmative action to be bound, such as checking the “opt-in” box on a ballot. Delaware bankruptcy courts have generally agreed that consensual releases are appropriate, but have differed on what constitutes “consent.”<sup>8</sup>

Prior to *Purdue*, opt-out third-party releases were routinely approved in chapter 11 plans.<sup>9</sup> However, Hon. **Craig Goldblatt** in *Smallhold* recently changed his position on opt-out releases.<sup>10</sup> He stated that while this court “had previously been comfortable, for the reasons described in *Arsenal*, concluding that creditors that failed to opt out may be deemed to consent to a plan’s third-party release, the Court no longer believes [that] it is appropriate to do so.”<sup>11</sup> He grappled with his previous holdings and those of other courts, but ultimately upheld the use of opt-out releases in limited circumstances, such as for creditors that affirmatively voted, but not for creditors that had not been provided a ballot or an opt-out form.<sup>12</sup>

Judge Goldblatt agreed with opinions that adopted a “contract model” when concluding that consent requires an affirmative act, such as “check[ing] a box on its ballot indicating that it intend[s] to ‘opt in’ to the third-party release.”<sup>13</sup> Notably, in *Yellow Corp.*, he disagreed with the debtors that a vote to accept the plan provides affirmative consent to all of the plan’s provisions, thus showing that the affirmative act needs to be something more than voting to accept a plan.<sup>14</sup>

Despite Judge Goldblatt allowing opt-out releases in certain scenarios, in practice he is increasingly favoring opt-in releases. During the

1 Any views expressed in this publication are strictly those of the authors and should not be attributed in any way to White & Case LLP.

2 Hon. Christopher S. Sontchi (ret.) & Sara Beth A.R. Kohut, “In Defense of Consensual Opt-Out Third-Party Releases from a Delaware Perspective”, XLIII *ABI Journal* 11, 12-13, 62-63, November 2024, [abi.org/abi-journal/in-defense-of-consensual-opt-out-third-party-releases-from-a-delaware-perspective](https://www.abi.org/abi-journal/in-defense-of-consensual-opt-out-third-party-releases-from-a-delaware-perspective) (“The split on whether consent can be deemed based on silence and inaction or requires an affirmative act of assent is evident among the Delaware bankruptcy bench, where the majority view has permitted opt-out releases as long as adequate notice was provided.”).

3 See, e.g., *In re Arsenal Intermediate Holdings LLC*, No. 23-10097 (CTG), 2023 Bankr. LEXIS 752, \*2 (Bankr. D. Del. March 27, 2023).

4 See *In re Emerge Energy Servs. LP*, Case No. 19-11563 (KBO), 2019 Bankr. LEXIS 3717, \*53 (Bankr. D. Del. Dec. 5, 2019).

5 See generally *Harrington v. Purdue Pharma LP*, 144 S. Ct. 2071 (2024).

6 See *In re First Mode Holdings Inc.*, Case No. 24-12794 (KBO) (Bankr. D. Del. Feb. 6, 2025) [Docket No. 266] Hr’g. Tr. at 37:14–38:9; 41:14–23 (overruling disclosure statement objection, finding that opt-in mechanism for third-party releases is “gold standard” and potentially “appeal-proof”); see also *In re SunPower Corp.*, et al., Case No. 24-11649 (CTG) (Bankr. D. Del. Oct. 18, 2024) [Docket No. 872] (approving third-party releases that required releasing parties to affirmatively opt in by voting to accept plan or by completing and returning applicable opt-in form).

7 See *Harrington*, 144 S. Ct. at 2074 (“[N]othing in [this opinion] should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan.”).

8 See, e.g., *In re Smallhold Inc.*, 665 B.R. 704, 708 (Bankr. D. Del. 2024) (noting that consensual releases are “commonplace”); *In re Washington Mut. Inc.*, 442 B.R. 314, 352 (Bankr. D. Del. 2011) (observing that consensual third-party releases are permissible).

9 See, e.g., *In re MolyCorp Inc.*, Case No. 15-11357 (CSS) (Bankr. D. Del. April 8, 2016) [Docket No. 1580].

10 *In re Smallhold Inc.*, 665 B.R. at 717-18.

11 *Id.* at 721.

12 *Id.* at 723-25; see also Sontchi, *supra* n.2 (discussing Delaware jurisprudence and Judge Goldblatt’s limited ruling in *Smallhold*).

13 *In re Smallhold Inc.*, 665 B.R. at 708, 711 (“[A] creditor cannot be deemed to consent to a third-party release without some affirmative expression of the creditor’s consent”).

14 *In re Yellow Corp.*, et al., Case No. 23-11069 (CTG) (Bank. D. Del. Nov. 21, 2024) [Docket No. 5026].

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same time that he presided over the *Smallhold* and *Yellow Corp.* cases, but prior to his *Smallhold* decision, he held a hearing concerning *SunPower*'s disclosure statement. The initial *SunPower* plan included opt-out releases, so Judge Goldblatt warned the debtors that the court would be issuing a ruling in *Smallhold* and that using an opt-in mechanism was the "safest thing to do."<sup>15</sup> The debtors in *SunPower* quickly pivoted and filed a revised solicitation procedures order requiring all parties to opt in to the third-party releases.<sup>16</sup> *SunPower*'s chapter 11 plan was subsequently approved, including the third-party releases.<sup>17</sup>

Judge Goldblatt is not alone in the trend toward opt-in releases. Hon. **Karen B. Owens** has also explicitly favored opt-in mechanisms for third-party releases. During the disclosure statement hearing in *First Mode Holdings*, she stated that the opt-in mechanism for third-party releases is the "gold standard" and potentially "appeal-proof."<sup>18</sup>

In *First Mode Holdings*, the court cautioned the official committee of unsecured creditors — which was initially advocating for the debtors to not include either an opt-in or opt-out mechanism — of the risk of the U.S. Trustee objecting to the third-party releases given the current post-*Purdue* "climate" on consent.<sup>19</sup> As previewed, Judge Owens approved *First Mode Holdings*' disclosure statement and ultimately confirmed a plan that included opt-in releases.<sup>20</sup> She has continued to approve opt-in third-party releases, including in *Exp OldCo Winddown*, *Casa Systems* and *WOM*.<sup>21</sup>

## Certain Delaware Judges Are Allowing Opt-Out Releases Through a Hybrid Approach

Although the opt-in trend seems to be gaining traction, other Delaware judges, including Hon. **John T. Dorsey** and Hon. **Thomas M. Horan**, have approved a hybrid opt-out and opt-in approach to third-party releases post-*Smallhold*.<sup>22</sup>

In *FTX*,<sup>23</sup> the ballots contained both an opt-in and opt-out mechanism depending on the creditor's voting status.<sup>24</sup> Creditors not entitled to vote were required to opt in to the third-party release, but creditors entitled to vote on the plan were required to opt out if they did not want to grant the third-party release — even if they chose not to reject the plan or submit a vote on the plan.<sup>25</sup>

In *Fisker*, Judge Horan allowed opt-out releases for creditors, including those who did not submit a vote on the plan but rejected the use of an opt-out mechanism for equityholders, because there is not a sufficient consent by a party that does not execute an opt-out form when it is "receiving nothing under the plan."<sup>26</sup> Other Delaware bankruptcy judges might continue to allow opt-out mechanisms until a higher court weighs in on the issue.

## Opt-In Releases Preferred by the U.S. Trustee in Delaware

Considering *Purdue* and recent Delaware Bankruptcy Court decisions such as *Smallhold*, debtors in recent cases have pivoted from opt-out releases to opt-in releases, generally after objections from the U.S. Trustee. For example, in *Basic Fund*, the debtors decided to pivot from opt-out releases to opt-in releases after the *Smallhold* ruling and an objection from the U.S. Trustee.<sup>27</sup> In *Franchise Group*, the debtors initially filed ballots with an opt-out mechanism for third-party releases,<sup>28</sup> but after the U.S. Trustee objected, they switched to an opt-in mechanism.<sup>29</sup> The U.S. Trustee might continue to object to debtors who initially use an opt-out mechanism, and it will be up to the courts to decide what is permissible.

## Conclusion

After *Purdue*, the applicability of opt-out releases will remain a fact-sensitive inquiry that judges in Delaware and elsewhere will have to navigate. However, it is becoming apparent that opt-in releases are the "safer" choice to avoid objection and appeal by the U.S. Trustee.

Debtors who are seeking finality in their reorganization should take this into account when deciding whether to include opt-in or opt-out mechanisms in their ballots. Consideration should also be given as

15 *In re SunPower Corp., et al.*, Case No. 24-11649 (CTG) (Bankr. D. Del. Sept. 27, 2024) [Docket No. 639], at Hr'g. Tr. 18:15-24.

16 *Id.* at Docket No. 223.

17 *Id.* at Docket No. 872.

18 *In re First Mode Holdings Inc.*, Case No. 24-12794 (KBO) (Bankr. D. Del. Feb. 6, 2025) [Docket No. 266], Hr'g. Tr. at 37:14-38:9; 41:14-23.

19 *Id.* at Hr'g. Tr. 34:22-35:1. In *First Mode Holdings*, the official committee of unsecured creditors argued that the ballot should allow certain unsecured creditors to either vote to accept or reject without an option to opt in or out to the third-party releases, because the ballots were "confusing and it's unnecessary." *Id.* at 35:6-21. Prior to arguments, Judge Owens stated, "It's very interesting that this is turned the academic arguments on their face, and I'm not sure if the committee really wants to go down this path because it really could have ramifications for other cases ... it could be an argument that cuts against the parties in other cases because of the unique facts and circumstances of this case." *Id.* at 16:8-21.

20 *In re First Mode Holdings Inc.*, Case No. 24-12794 (KBO) (Bankr. D. Del. Feb. 6, 2025) [Docket Nos. 252, 375].

21 See, e.g., *In re Exp OldCo Winddown Inc.*, Case No. 24-10831 (KBO) (Bankr. D. Del. Dec. 17, 2024) [Docket No. 1150] (approving third-party releases in chapter 11 plan that required releasing parties to affirmatively "opt-in" via ballot or opt-in form); *In re Casa Sys. Inc.*, Case No. 24-10695 (KBO) (Bankr. D. Del. June 5, 2024) [Docket No. 421] (same); *In re WOM S.A.*, Case No. 24-10628 (KBO) (Bankr. D. Del. March 7, 2025) [Docket No. 1250] (same).

22 See, e.g., *In re FTX Trading Ltd., et al.*, Case No. 22-11068 (KBO) (Bankr. D. Del. Oct. 7, 2024) [Docket No. 26412] Hr'g. Tr. at 115:25-116:7 ("[T]he Supreme Court was not saying that third-party consensual releases through an opt-out process are *per se* improper. I think opt-out releases remain a valid way for a debtor to be able to obtain releases through the plan process and do so on a consensual basis because the parties are given the opportunity to opt out."); *In re Fisker Inc.*, Case No. 24-11390 (TMH) (Bankr. D. Del. Oct. 16, 2024) [Docket No. 722].

23 Judge Dorsey presided over *FTX* until the case was reassigned to Judge Owens on March 14, 2025. *In re FTX Trading Ltd., et al.*, Case No. 22-11068 (KBO) (Bankr. D. Del. March 14, 2025) [Docket No. 29926].

24 *Id.* at Docket No. 19068.

25 *Id.*

26 *In re Fisker Inc.*, Case No. 24-11390 (TMH) (Bankr. D. Del. Oct. 11, 2024) [Docket No. 706], Hr'g. Tr. at 45:5-19.

27 *In re Basic Fun Inc., et al.*, Case No. 24-11432 (CTG) (Bankr. D. Del. Oct. 12, 2024) [Docket No. 261]. Judge Goldblatt approved Basic Fun's chapter 11 plan. *Id.* at Docket No. 261.

28 *In re Franchise Grp. Inc., et al.*, Case No. 24-12480 (LSS) (Bankr. D. Del. Feb. 21, 2025) [Docket No. 657].

29 *Id.* at Docket No. 1017. The *Franchise Group* chapter 11 plan has not yet been confirmed.

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to whether a hybrid approach best accomplishes the debtor's goals and comports with *Purdue*. While several judges in Delaware have yet to opine on this issue, it is clear that what was once a minority view could eventually become the majority view in Delaware jurisprudence. **abi**

**Editor's Note:** ABI held a webinar shortly after the Supreme Court issued its decision in *Purdue*. To listen to the abiLIVE recording, please visit [abi.org/newsroom/videos](http://abi.org/newsroom/videos). ABI also published a digital book, *The Purdue Papers*, a compilation of 3,500+ pages of amicus briefs, petitions and other related background material. To order your downloadable copy, please visit [store.abi.org](http://store.abi.org).

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