
CHAMBERS GLOBAL PRACTICE GUIDES

Insolvency 2025

Definitive global law guides offering
comparative analysis from top-ranked lawyers

USA – Delaware: Trends and Developments

Rachel Jaffe Mauceri, Evan M. Lazerowitz,
Margaret A. Goggins and Davis Lee Wright
Robinson & Cole LLP



USA – DELAWARE



Trends and Developments

Contributed by:

Rachel Jaffe Mauceri, Evan M. Lazerowitz, Margaret A. Goggins and Davis Lee Wright
Robinson & Cole LLP

Robinson & Cole LLP has approximately 275 attorneys in 15 US locations, with a global client base. The firm’s bankruptcy and reorganisations practice group, with 15 attorneys located primarily in Wilmington DE, Philadelphia PA, Hartford CT and New York City, has extensive experience innovating and implementing effective strategies and providing strong, independent, tailored advice regarding the debtor-creditor relationship. The group represents diverse parties in bankruptcy cases, advising debtors through the restructuring process, assisting trade creditors with

enhancing recoveries, and advocating on behalf of committees in complex, fast-moving cases. Robinson & Cole is a leader in personal injury mass tort bankruptcy cases, regularly contributing to developments in US and global jurisprudence by employing agile thinking and innovative approaches. The firm has been involved in prominent Chapter 11 cases, including Bestwall LLC, DBMP LLC, Aldrich Pump LLC, Murray Boiler LLC, SWC Industries LLC, Presperse Corp., Mariner Health Central Inc., Mallinckrodt plc, and O.W. Bunker USA.

Authors



Rachel Jaffe Mauceri is a partner in Robinson & Cole’s bankruptcy and reorganisations group. She has more than 20 years’ experience counselling a variety of clients in complex insolvency matters across a range of

industries. Rachel regularly represents official committees, post-bankruptcy trustees and significant creditors in bankruptcies and other distressed situations. Her other clients have included debtors; indenture trustees and financial institutions; pension and health plans; stalking horse and other bidders; and other parties-in-interest. Rachel is listed under Bankruptcy/Restructuring in the Chambers USA Guide 2025. She frequently speaks and writes on current developments in bankruptcy.



Evan M. Lazerowitz is counsel in Robinson & Cole’s bankruptcy and reorganisations practice group. His practice focuses on Chapter 11 bankruptcy cases, with a particular emphasis on the technology, mass

tort, life sciences, healthcare, and retail sectors. Evan has represented creditors’ committees in complex Chapter 11 cases, including JCPenney, Mallinckrodt, Endo Pharmaceuticals, Lord & Taylor, and Brookstone. He also has experience representing mass tort claimants’ committees, including in LTL Management, Whittaker Clark & Daniels, and SWC Industries. Evan is a member of the American Bankruptcy Institute and is admitted to practise law in the states of New York and New Jersey.

USA – DELAWARE TRENDS AND DEVELOPMENTS

Contributed by: Rachel Jaffe Mauceri, Evan M. Lazerowitz, Margaret A. Goggins and Davis Lee Wright, **Robinson & Cole LLP**



Margaret A. Goggins is an associate in Robinson & Cole's corporate restructuring and bankruptcy practice. Prior to joining private practice, Margaret served for two years as a judicial law clerk in the US

Bankruptcy Court for the District of Connecticut and litigated on behalf of the Internal Revenue Service as part of its Office of Chief Counsel.



Davis Lee Wright co-chairs Robinson & Cole's bankruptcy and reorganisations practice group and is a member of the firm's business litigation group. He has substantial experience representing a full range

of parties-in-interest in a variety of distressed situations and restructuring transactions, including out-of-court workouts, pre-packaged and pre-negotiated bankruptcies, and traditional reorganisations brought under Chapters 7, 11, 13 and 15 of the Bankruptcy Code. He litigates breach of fiduciary duty, preferential transfer and fraudulent conveyance matters in the federal courts and his experience includes representations in the maritime, transportation and shipping, energy, mass tort, financial services, precious metals and mining, and retail industries.

Robinson & Cole LLP

1201 N. Market Street
Suite 1406
Wilmington
Delaware 19801
USA

Tel: +1 302 516 1700
Fax: +1 302 516 1699
Web: www.rc.com

The logo for Robinson + Cole, featuring the name in white text on a dark blue rectangular background. The plus sign is green.

Third-Party Releases After Purdue: What Constitutes Consent?

The Supreme Court's 2024 landmark ruling in *Harrington v Purdue Pharma* determined once and for all that the United States Bankruptcy Code does not authorise non-consensual third-party releases – releases of non-debtor parties for pre-petition liability given in exchange for plan support or some other consideration regardless of creditor support – other than in the specific context outlined in Section 524 (g). The *Purdue* decision, however, expressly endorsed the use of consensual third-party releases, although the Court declined to opine on what qualifies as a consensual release.

Accordingly, debtors have continued to construct Chapter 11 plans that include broad releases of third-party non-debtors, and to seek implementation of those releases through express or deemed “opt-ins” or “opt-outs” by voting and non-voting creditors. Those approaches have varied across, and even within, jurisdictions across the country. The Office of the United States Trustee, consistent with its pre-*Purdue* posture, continues to object to plans that propose “opt-out” provisions, with mixed success.

This chapter of the guide examines the plan release provisions in several Chapter 11 cases across multiple circuits since the release of the *Purdue* decision in June 2024. As even a limited case review shows, given the lack of uniformity of approach, creditors and their advisers will need to be diligent to ensure they do not inadvertently rest on their rights and release potentially valuable causes of action against non-debtors.

The *Purdue* decision

Purdue Pharma filed its Chapter 11 petition in September 2019 in the Bankruptcy Court for the Southern District of New York, largely in response to thousands of personal injury and wrongful death claims relating to the *Purdue*-owned opioid OxyContin. The bankruptcy court approved a preliminary injunction that extended stay relief to preclude opioid litigation against the *Sackler* family, who owned *Purdue Pharma* and were also defending against the opioid-related suits.

In 2021, after extensive mediation, the bankruptcy court confirmed a proposed plan that was significantly

financed by the *Sackler* family, and pursuant to which they agreed to give up their equity in addition to the multibillion-dollar contribution, and contemplated broad releases of the *Sackler* family, including for opioid claims. The US Trustee (UST) objected to the plan, arguing that the proposed releases were beyond the breadth and scope of the authority provided in the Bankruptcy Code. In September 2021, Judge Robert D. Drain overruled the US Trustee's objection and confirmed the *Purdue* plan, noting that the First, Second, Third, Fourth, Sixth, Seventh, Eleventh, and DC Circuits allowed third-party releases in “appropriate, narrow circumstances” (*In re Purdue Pharma L.P.*, 633 B.R. 53, 100 (Bankr. S.D.N.Y. 2021)). In so ruling, Judge Drain observed that each voting class voted “overwhelmingly” in favour of confirmation of the plan, with over 95% of voting creditors voting in favour of confirmation, a “remarkable result given the very large number of people who got notice, who were entitled to vote, and who voted” (*ibid* at 61).

On appeal, the district court reversed Judge Drain's ruling, finding that the Bankruptcy Code did not authorise non-consensual third-party releases of the *Sacklers* (*In re Purdue Pharma L.P.*, 635 B.R. 26, 115 (S.D.N.Y. 2021)). The Second Circuit, however, reversed once again, determining in a 2:1 opinion that the third-party releases were authorised (*In re Purdue Pharma L.P.*, 69 F.4th 45 (2d Cir. 2023)). The United States Supreme Court granted certiorari and heard argument in December 2023.

In June 2024, in a heavily anticipated and closely analysed decision, the Supreme Court held that, outside the limited context of Bankruptcy Code Section 524 (g), the Code does not authorise non-consensual third-party releases (*Harrington v Purdue Pharma, L.P.*, 603 U.S. 226 (2024)). The Court also held, however, that consensual third-party releases are permissible in connection with a bankruptcy plan, citing *United States v Energy Resources Co.*, 495 U.S. 545 (1990), a case involving non-debtor affiliates, to support that proposition. The Court declined to determine “what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor” (*ibid* at 226).

On 1 July 2025, the Purdue debtors filed their Thirteenth Amended Chapter 11 Plan of Reorganization, which reflects a revised settlement following continued negotiations over the past several years. The Disclosure Statement accompanying the plan describes a USD7.4 billion settlement of opioid claims, approximately USD6.5 billion of which is contemplated to be contributed by the Sackler family (*Purdue Pharma*, Docket No 7637, Case No 19-23649 (S.D.N.Y. 1 July 2025)). Bankruptcy Court Judge Sean Lane confirmed the proposed plan from the bench on 18 November 2025. The revised Purdue plan incorporates voluntary third-party releases, including for the Sackler family, pursuant to an opt-in procedure that required creditors to affirmatively consent to the release by submitting a completed form as part of the plan solicitation process.

Opt-in and opt-out releases

Plans that contemplate consensual third-party releases generally incorporate one of two approaches: “opt-in” or “opt-out”. In an opt-in plan, voting creditors must opt in by affirmatively indicating, usually by checking a box on a plan voting ballot or another enclosure, to releasing third parties. Non-voting creditors, those who are deemed to accept or reject under the proposed plan, may be offered a form solely for purposes of opting in. The fact of a vote in favour, affirmative or deemed, is not considered consent to release; courts require separate evidence that the creditor specifically agrees to the waiver of rights against released third parties.

In an opt-out plan, the burden falls to the creditor to preserve its own rights. Generally, where a plan contemplates an “opt-out”, voting creditors must submit a writing, usually by checking the appropriate box on their ballots, to retain their third-party claims. In the absence of a checked box, a voting creditor may be deemed to consent to third-party releases – even if that creditor votes against the plan or does not vote at all. Both voting creditors, and those who are deemed to accept or reject, should be ready to raise their hands or risk losing rights.

While “opt-in” plans are largely non-controversial, as detailed below, the UST maintains that “opt-out” plans are non-consensual, as such plans are essentially contracts, and since there is no federal contract law since *Purdue*, applicable state contract law

applies, requiring a writing to manifest acceptance. Accordingly, the UST continues to pursue an active programme of litigation and appeals related to third-party releases.

Post-Purdue decisions: a sampling of third-party release decisions among leading circuits

Circuits throughout the country have differed in opinion on the interpretation of “consensual” in the opt-out and opt-in plans. The following is a summary of some of the more significant recent cases involving third-party releases. Jurisdictions and even judges within the same district have differed on whether an opt-out provision qualifies as consensual.

Second Circuit

While two recent opinions from the Bankruptcy Court for the Southern District of New York suggest that “opt-out” plans survive *Purdue*, a Western District of New York case held to the contrary. The issue has not yet reached the Court of Appeals. These will be discussed in turn.

Second Circuit – recent highlights from the Southern District of New York

Spirit Airlines Spirit Airlines and certain of its affiliates sought protection under Chapter 11 in November 2024 with the intention of selling its operations to JetBlue. Spirit pivoted after the federal government blocked the sale in January 2024, turning to a plan that converted a significant portion of its then-existing debt to equity, and a plan that paid general unsecured creditors in full. The proposed plan contemplated an opt-out for (i) voting creditors that affirmatively checked the box on their timely submitted ballots and (ii) non-voting creditors and interest holders that failed to tick the box on a timely submitted opt-out form. The UST and the US Securities and Exchange Commission (SEC) both objected, citing *Purdue*, on somewhat different bases: the UST objected on the grounds that only an opt-in procedure with affirmative consent would suffice under *Purdue* (including with respect to parties that had executed a restructuring support agreement), while the SEC argued that failure to return a ballot was not sufficient evidence of affected creditors’ consent.

Judge Lane overruled both objections and confirmed the plan, citing (among others) the Second Circuit’s

2005 decision in *In re Metromedia Fiber Network, Inc.* (416 F.3d 136, 142 (2d Cir. 2005)) as support that the Second Circuit has long approved consensual third-party releases (*In re Spirit Airlines, Inc.*, 668 B.R. at 689, 703) (“In addressing this question, this Court does not write on a blank slate but instead looks to the existing case law in the District and Circuit.”). In so doing, Judge Lane examined several factors raised in prior cases, finding that:

- the releases were “clearly worded and prominently presented” in the plan material, and thus were “reasonably calculated to apprise interested parties of their rights”;
- the releases were “consistently part of the proposed [p]lan here since the very beginning of the bankruptcy”; and
- given the substantial recoveries, the cases were not a situation where creditors were not incentivised to pay attention to the case (ibid at 7070–8).

The court further found the mechanism appropriate despite differing circumstances of the applicable creditors. For voting creditors, the court found that the message to creditors “appears to have been received”, with 190 opt-out ballots returned, and for parties to the RSA, the court found it “exceedingly easy to conclude that a party who signs a contract such as the RSA here has manifested its consent” (ibid at 79). For non-voting parties, the court found the opt-out procedure appropriate under the circumstances, including the well-publicised nature of the cases and the absence of a committee objection (ibid at 708–10).

GOL – Brazilian airline GOL Linhas Aéreas Inteligentes SA and certain of its affiliates (together, GOL) sought Chapter 11 protection in January 2024. The GOL plan included an opt-out that required both creditors in voting classes and unimpaired creditors (who were deemed to accept the plan) to affirmatively opt out by checking the box and returning their ballots (or applicable notices for non-voting creditors). Creditors who were deemed to reject the plan were not bound by the third-party releases. Judge Martin Glenn confirmed the largely consensual GOL plan on 21 May 2025, and wrote separately to address the UST’s objection to the proposed opt-out release. Given the absence of federal bankruptcy law on the point, state law must

apply, the UST argued, and, under state law, “opt-outs are impermissible and do not manifest consent” (*In re GOL Linhas Aéreas Inteligentes S.A.*, 2025 WL 1466055, *16 (Bankr. S.D.N.Y. May 22, 2025)).

Judge Glenn overruled the UST’s objection, holding with respect to the federal law question that statutory, constitutional and precedential considerations all favoured a finding that federal law applied (and disagreeing with courts that have held to the contrary, including in *In re Tonawanda Coke Corp.* and *In re Smallhold, Inc.*, each discussed below) (ibid, *19–22). Judge Glenn also held that the court could issue a final order releasing claims with the consent of creditors to the bankruptcy court’s jurisdiction over non-core claims, which could be implied absent express objection (ibid, *22–24), and that the Court had jurisdiction to grant the releases (ibid, *24).

Turning to the opt-out provisions, Judge Glenn, echoing the ruling in *Spirit*, found that:

- the number of creditors both voting and opting out of the releases indicated adequate service of process;
- the releases were prominently displayed on the ballots and plan materials and no unfavourable changes had been made since the initial version of the plan was filed; and
- non-voting impaired creditors were not bound by the releases, and thus there was no concern that creditors with “financial ‘skin in the game’ [would] be surprised” (ibid, *25).

The GOL Court also overruled the US Trustee’s objection to the plan injunction (ibid). GOL exited bankruptcy in June 2025. The UST appealed the Court’s confirmation order, which remains pending.

Second Circuit – the Western District of New York rejects opt-outs

In *In re Tonawanda Coke Corp.*, the proposed plan of liquidation included a general release of “the Debtor, its interest holders, the members of the Committee and each of their respective directors, officers, shareholders, members, partners, agents, employees, representatives, attorneys and other professionals, subsidiaries and affiliates, and any successor in interest in

any of them”, subject to the right of any creditor to opt out of the release (*In re Tonawanda Coke Corp.*, 662 B.R. 220 (Bankr. W.D.N.Y. 2024)). The UST objected, arguing that only an opt-in was appropriate.

Chief Judge Carl L. Bucki agreed and denied confirmation, taking the view that third-party releases (not just non-consensual third-party releases) are not authorised by the Bankruptcy Code. Rather, as “an ancillary offer that becomes a contract upon acceptance and consent”, consensual releases are governed by state law, and, under New York law, require a signed writing (*ibid* at 223). Contract law aside, the court held that “[c]onsent and failure to object are not synonymous” (*ibid*).

The Tonawanda plan became effective in February 2025 following the confirmation of an amended plan that removed third-party releases.

Third Circuit

Bankruptcy courts in both the Districts of Delaware and New Jersey have been active, with several recent cases considering both opt-in and opt-out releases. As a general matter, opt-in releases remain generally non-controversial, and recent cases adopting opt-in releases include *In re Basic Fun, Inc.*, Case No 24-11432-CTG (D. Del. 2024) (both voting and non-voting creditor opt-in) and *In re Rite Aid Corp.*, Case No 23-18993-MBK (D.N.J. 2023) (opt-in process for voting creditors and for creditors deemed to reject). Opt-out plans are still far from uniform, however, and courts within the same district have shown different levels of comfort with respect to deemed releases.

Third Circuit – In re Smallhold

In the Delaware bankruptcy case *In re Smallhold*, Judge Craig T. Goldblatt examined a proposed opt-out that featured a check-the-box for voting creditors, with deemed releases for unimpaired non-voting creditors. The UST objected to both. The plan did not include a deemed opt-out for impaired creditors that did not return their ballots.

The court held that voting creditors who returned their ballots and failed to tick the opt-out box could be presumed to consent, because “the affirmative act of voting, coupled with clear and conspicuous dis-

closure and instructions about the consequences of the vote and a simple mechanism for opting out, is a sufficient expression of consent to bind the creditor to the release under ordinary contract principles” (*In re Smallhold, Inc.*, 665 B.R. 704, 710 (Bankr. D. Del. 2024)). While sympathetic to the policy reasons that might favour it, the court found that non-voting creditors could not be deemed to opt in under *Purdue* without some affirmative expression of the creditor’s consent (*ibid* at 711).

Third Circuit – deemed releases in other bankruptcy cases

Several other bankruptcy courts within the District of Delaware have overruled UST objections and approved a variety of opt-out provisions, including:

- *In re True Value Co.*, Case No 24-12337-KBO (approving release for creditors voting in favour and failing to affirmatively opt out);
- *In re Wheel Pros LLC*, Case No 24-11939-JTD (approving deemed release for those voting in favour and those failing to return ballots, and release for parties voting against plan that failed to check the box); and
- *In re Fisker*, Case No 24-11390-TMH (approving opt-out provision, but excluding parties deemed to reject, as parties cannot be assumed to consent).

Opt-out provisions have also seen success in bankruptcy courts within the District of New Jersey. See, for example:

- *In re BowFlex Inc.*, Case No 24-12364-ABA (approving third-party releases of (i) those voting to accept plan, and (ii) those deemed to accept or reject, and those abstaining or voting to reject, and not affirmatively opting out);
- *In re Invitae Corp.*, Case No 24-11362-MBK (approving release for all voting and non-voting creditors that did not affirmatively opt out (other than those not receiving an opt-out form), plus a supplemental post-confirmation opt-out period for certain classes of claims); and
- *In re Sam Ash Music Corp.*, Case No 24-14727-SLM (approving release for all parties deemed to accept the plan, and all parties voting in favour or against or abstaining from voting on the plan, and

failing to affirmatively opt out (other than those not sent appropriate forms)).

Fifth Circuit

The Fifth Circuit Court of Appeals recently confronted non-consensual third-party releases post-*Purdue* in *Highland Capital Management Fund Advisors, L.P. v Highland Capital Management, L.P.* (*In re Highland Capital Management, L.P.*), 132 F.4th 353 (5th Cir. 2025). In *Highland*, the Fifth Circuit reiterated its prior precedent, some of which pre-dated *Purdue*, that non-consensual third-party releases are impermissible (*ibid* at 358). However, because *Highland* did not address opt in versus opt out, bankruptcy courts in the Fifth Circuit have arrived at differing conclusions, with courts in the Northern District of Texas approving both types of plans, and courts in the Southern District of Texas generally confirming opt-out plans. Of note, *Highland* also limited the types of parties who can be exculpated under a plan (*ibid* at 362).

On one hand, the court in *In re Ebix, Inc.*, Case No 23-80004, Docket No 851 (Bankr. N.D. Tex. Aug. 2024) declined to follow other decisions within the Northern District of Texas that allowed opt-out structures and, relying on state contract law, held that silence – failing to return an opt-out form – cannot form a contract. Contra, eg, *In re Tommy's Fort Worth LLC*, Case No 24-90000, Docket No 1033 (Bankr. N.D. Tex. 18 Jul. 2025) (approving opt-out plan).

On the other hand, a court in the Southern District of Texas reached the opposite conclusion in *In re Robertshaw US Holding Corp.*, 662 B.R. 300 (Bankr. S.D. Tex. 2024), confirming an opt-out plan and holding that *Purdue* did not change long-standing Southern District practice treating opt-out procedures as consensual when supported by conspicuous notice and a chance to object. In the court's view, what counts as consent in Houston "has long been settled", and *Purdue* effectively endorsed the pre-existing approach in the Fifth Circuit. See also *In re Wesco Aircraft Holdings, Inc.*, Case No 23-90611, Docket No 2550 (Bankr. S.D. Tex. 1 Jan. 2025) (approving opt-out plan).

Eleventh Circuit

While the Eleventh Circuit Court of Appeals has not opined on opt-in versus opt-out releases, two recent

bankruptcy courts in the Middle and Southern Districts of Florida have arrived at duelling conclusions. In *In re Red Lobster Mgmt LLC*, Case No 24-02486, Docket No 728 (Bankr. M.D. Fla. 26 Jul. 2024), the court cited *Purdue* and applicable state contract law in refusing to allow solicitation on a plan that would have deemed creditors to consent to third-party releases unless they opted out. The court later confirmed the plan once the debtors modified the releases to require opt-in. (See *ibid*, Docket No 1140 at 15–16.)

The bankruptcy court in *In re Bird Global Inc.*, Case No 23-20514, Docket No 1254 (Bankr. S.D. Fla. 12 Aug. 2024), confronted a unique scenario in approving a plan that combined a sale under Section 363 of the Bankruptcy Code with insurance settlements that funded a USD19.2 million tort claims trust. Tort claimants objected to the plan, arguing that the opt-out release in the channelling injunction and bar order violated *Purdue*. The *Bird* court disagreed, holding that (i) the plan provided for "full satisfaction" of the tort claims and thus fell outside *Purdue*'s prohibitions, and (ii) *Purdue* did not apply because the channelling injunction and bar order were part of a Bankruptcy Rule 9019 settlement with insurers and a Section 363 sale of the insurance policies. *Bird* implicated a very specific set of facts and procedural mechanisms that are unlikely to arise in every case. But it is likely that courts in cases involving tort liabilities may look to *Bird* to support approval of opt-out releases, provided the debtor can demonstrate payment in full or consummate an insurance policy sale.

Conclusion

Purdue was a long-anticipated decision with far-reaching reverberations, the full impact and import of which are still developing. Indeed, the extent of *Purdue*'s scope has now appeared in both the Chapter 15 context and in proposed sale orders under Bankruptcy Code Section 363. (See, eg, *In re Odebrecht Engenharia E Construção S.A. – Em Ruptação Judicial*, 669 B.R. 457 (Bankr. S.D.N.Y. 2025); *In re Crédito Real SAB de CV, SOFOM, E.N.R.*, 670 B.R. 150 (Bankr. D. Del. 2025); *In re Hopenman Bros., Inc.*, 667 B.R. 101 (Bankr. E.D. Va. 2025).) Debtors and parties-in-interest must stay up to date as jurisprudence continues to evolve, in order to maximise their opportunities and protect their rights.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Rob.Thomson@chambers.com