Beckham and Foohey Presentation Materials – Post-*Purdue* Decisions and Rulings

This section includes a summary of various decisions and rulings issued since the Supreme Court's decision, *Harrington v. Purdue Pharma L.P.*, 144 S.Ct. 2071, 2088 (2024) ("*Purdue*") through October 7, 2024. Generally, the courts' application of *Purdue* is arising in three circumstances: (1) plan confirmation; (2) disclosure statement approval; and (3) automatic stay extension to non-debtors. The cases are ordered by circuit, with the most recent decisions first.

With respect to disclosure statement and plan objections, the U.S. Trustee ("UST") is the main objecting party arguing that post-*Purdue*, opt-out structures are no longer sufficient for a debtor to prove consent for third-party releases. Most courts have held that an opt-out structure can work post-*Purdue*, but courts are universally considering the issue on a case-by-case basis. The outliers to this generalization include Bankruptcy Judge Buckie for the Western District of New York, Bankruptcy Judge Everett for the Northern District of Texas, and Bankruptcy Judge Robson of the Middle District of Florida, who have each held that an opt-in structure is required post-*Purdue* to satisfy consent.

With respect to stay extensions, courts are considering whether the applicability of a potential third-party release can be used in the analysis of whether to extend the automatic stay to non-debtors (through a temporary restraining order and injunctions). In general, courts will not consider the potential third-party release in the stay extension analysis.

Case	Judge	Relevant Holding	Opt-Out / Opt-In	Types of Claims Subject to Third-Party Release	Supplemental Case Facts/Notes/Comments
Second Circuit					
In re FTX Trading Ltd., No. 22-11068 (Bankr. S.D.N.Y. Oct. 7, 2024).	Dorsey	At the confirmation hearing, the court confirmed the plan, overruling the UST's objection to the debtors' opt-out procedures.	Opt-out	Limited to plan formation and the chapter 11 cases, with carve-outs for fraud and gross negligence	The court analyzed *Purdue*'s prohibition on nonconsensual third-party releases, but found *Purdue* left open the question of what constitutes consent. The court said that opt-out procedures are not *per se* invalid because the procedures would still provide parties an opportunity to opt out, and that courts should review the issue on a case-by-case basis. The court stated that the debtors' opt-out procedures were appropriate because the releases were limited in scope and parties were provided individual notice and "extensive" publication notice.
In re 2U, Inc., No. 24-11279 (Bankr. S.D.N.Y. Sep. 9,	Wiles	The court approved a plan that included an opt-in for the provision of third-party releases. Creditors that voted	Opt-in	Broad third-party release, limited to entities sued "solely" and "by	For creditors who accepted the plan, the court found that the affirmative act of returning a signed ballot demonstrated affirmative consent under applicable state law, but that the court would

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2024) [Docket No. 176].		to accept the plan were deemed to participate in the third-party release. Creditors that voted against the plan or did not vote had to affirmatively opt-in.		reason" of their acts on behalf of a released party	consider consent on a case-by-case issue post-*Purdue*.
In re Tonawanda Coke Corp., No. 18-12156, 662 B.R. 220, at *1 (Bankr. W.D.N.Y Aug. 27, 2024).	Bucki	The court denied disclosure statement approval because it solicited votes for an unconfirmable plan. The plan proposed a third-party release unless a creditor opted out.	Opt-out	General release	The UST objected to the disclosure statement, and the court considered the adequacy of consent under New York state law. The court found that creditors must affirmatively opt-in under applicable New York law for the third-party release to be consensual.
In re RML, LLC, 662 B.R. 858 (Bankr. S.D.N.Y. Aug. 12, 2024).	Jones	The court granted the debtors' motion to enforce the discharge injunction, finding a debtor can obtain a discharge from asbestos liability even without § 524(g). In support of its ruling, the court cited *Purdue* dicta that § 524(g) does not impair or modify other available Bankruptcy Code authority.	None	Asbestos claims	The debtors (Revlon) moved for an order enforcing the discharge and injunction provisions of the plan against talc claimants who continued lawsuits against Revlon.
In re Acorda Therapeutics, Inc., No. 24-22284 (Bankr. S.D.N.Y. Aug. 7, 2024) [Docket No. 428].	Jones	The court confirmed a plan that included a third-party release by voting to accept the plan, overruling a UST's objection based on *Purdue*.	Opt-out	General release, with carve out for gross negligence, willful misconduct, and intentional fraud	The UST objected to confirmation, arguing that the opt-out releases violated *Purdue* because creditors that voted to accept the plan were automatically deemed to consent to the third-party release. The court found that under the facts, consent existed by voting to accept because the ballots were conspicuous on the issue.

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Third Circuit					
In re Smallhold, Inc., No. 24-10267 (Bankr. D. Del. Sep. 25, 2024) [Docket No. 288 (Mem. Op.)].	Goldblatt	In a subchapter V case, the court held that creditors must provide affirmative consent to third-party releases. While opt-out releases for general unsecured creditors that return ballots are allowed, the court rejected releases for creditors who did not vote on the plan, including two classes that were unimpaired and deemed accepted.	Opt-out	General release, with carve out for gross negligence, willful misconduct, and intentional fraud	Here, the court found a creditor must affirmatively return a ballot voting on the plan and electing to opt-out to be deemed to have consented for purposes of the opt-out release.
In re Optio Rx, LLC, No. 24-11188 (Bankr. D. Del. Sep. 13, 2024).	Horan	In oral ruling, the court confirmed the plan with third-party releases. The plan included the ability to opt-in to releases in favor of released parties.	Opt-in	General release of all claims (release did not include an intentional fraud carve out, but exculpation does), with carve out for direct-third party claims	UST and other objector filed objections to "overbroad" nonconsensual third-party releases that they alleged violated *Purdue* since none of the "Related Parties" were asked to consent to the releases such that the plan would impose third-party releases on them without their consent. Judge Horan stated at the confirmation hearing that he did not agree with the objections and found the language to be "perfectly clear."
In re Sam Ash Music Corp., No. 24-14727 (Bankr. D.N.J. Aug. 30, 2024) [Docket No. 501].	Meisel	The court held in its confirmation order that procedures for opting out of the third-party release in the ballots and non-voting notice were good, sufficient, and adequate to bind the applicable parties to the third-party release, such that the releases were consensual	Opt-out	General release "solely to the extent of the Releasing Parties' authority to bind," with carve out for gross negligence, willful misconduct, and intentional fraud	
In re Bowflex, Inc., No. 24-12364	Altenburg	In oral ruling confirming plan, Judge Altenburg held that the opt-out procedures were	Opt-out	General release, with carve out for gross negligence, willful	The UST objected to the plan arguing that third-party release provisions imposed releases on claimants without first obtaining their affirmative

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