



Lowenstein Bankruptcy Lowdown Video 26 – Does Silence Equal Consent? Third-Party Releases Under the Purdue Decision

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David M. Posner: Welcome to the [Lowenstein Lowdown](#). Today, we are revisiting the fallout from the Supreme Court's *Purdue* decision by discussing what it means for a third-party release to be consensual.

Brent Weisenberg: Generally speaking, there are two structures under which releases may be granted under a plan of reorganization:

- An opt-in structure where the default is that all creditors do not consent to the third-party release unless they have affirmatively opted into that release;
- In contrast, in an opt-out structure, the default is that all creditors consent to third-party releases unless they have affirmatively opted out of granting that release.

David M. Posner: Since *Purdue*, courts across the country have grappled with what consent means when a party neither opts in nor opts out of the proposed release.

Brent Weisenberg: And that leads us to a recent decision issued out of the Northern District of Georgia in the *LaVie Care Centers* case. In *LaVie*, the debtors proposed an opt-out structure.

David M. Posner: As the United States Trustee's office has done across the country since *Purdue*, it objected to the plan, arguing that state contract law should determine whether a third-party release is consensual. Under general contract principles regarding acceptance of an agreement, silence cannot constitute consent to a third-party release.

Brent Weisenberg: But the court overruled the U.S. Trustee's objection, holding that silence can be deemed consent under certain circumstances.

So, David, why is it that we're focusing on this case today and not some of the others addressing this very issue?

David M. Posner: Because of the unique way in which the court addressed silent creditors—claimants who either failed to return a ballot after receiving a solicitation package, or those who were not entitled to vote, but received and did not respond to their opt-out package.

Judge Baisier generally agreed with courts that silence may be binding but recognizing that facts may make it unreasonable to assume that silence equals consent.

Judge Baisier held that a confirmation order must allow silent parties to argue that they should not be bound by the plans third-party release.

Brent Weisenberg: Notably, Judge Baisier held that such opportunity cannot be time bound. It should, however, include some provision that requires the party seeking relief to identify the claims or types of claims that they seek to pursue, and the identities or types of defendants that they intend to name.

We will keep our eye on forthcoming decisions, including any adoptions by other courts of Judge Baisier's creative post confirmation approach to silent creditors and interest holders.

Stay tuned for updates and future [Lowdowns](#).