



## LOWENSTEIN BANKRUPTCY LOWDOWN

### Lowenstein Bankruptcy Lowdown

#### Video 4- Consensual Third-Party Releases

By [Jordana Renert](#) and [Eric Chafetz](#)  
JANUARY 2022

---

**Jordana Renert:** Hi, I'm Jordana Renert and I'm here with Eric Chafetz today. We're partners in Lowenstein Sandler's Bankruptcy & Restructuring department. In the last Lowdown series, Andrew Behlmann, our partner, discussed the recent Purdue decision and its implications on non-consensual third-party releases. Today, Eric and I are here to discuss consensual third-party releases and an emerging trend for approval of such releases under Section 1141(a) of the Bankruptcy Code. Historically courts approve releases in instances where they're consensual. Courts apply traditional contractual theories in determining whether or not a predator or a security holder is deemed to have consented to the release. This approach has resulted in differing views and results among courts, even within the same district where courts and judges have taken different positions on what is necessary in order for a creditor to consent. For example, in recent cases, numerous courts have found that opt-out provisions are enough for where our creditor had the option to opt out. That's all that's necessary for the release to be deemed consensual. In other instances, however, courts have found that it's necessary for the creditor or security holder to actually opt into the release. In a recent case that Eric and I were involved in, Aberdeen Health, Judge Goldblatt took a different approach in approving the consensual third-party release. In fact, he approved it under Section 1141(a) of the Bankruptcy Code. Eric's going to discuss that now.

**Eric Chafetz:** Thanks Jordana. As Jordana alluded to, we both represented the official committee of unsecured creditors and the Aberdeen Health bankruptcy cases that are still pending in the Bankruptcy Court for the District of Delaware. In those cases, the United States trustee and individual creditor objected to certain third-party release provisions included in a plan of liquidation. They took the position that because there was an opt-out mechanism instead of an opt-in mechanism, there was no consent, and the traditional contractual analysis that Jordana referred to was not satisfied. Judge Goldblatt overruled those objections. He took the position that instead of relying on a traditional contracts analysis, he should rely on Section 1141(a) of the Bankruptcy Code. Section 1141(a) of the Bankruptcy Code specifies that a confirmed plan of liquidation or reorganization is binding upon equity security holders, creditors, and/or the debtor's general partner, irrespective of whether certain creditors are impaired and/or whether those creditors actually vote in favor of a plan.

In relying on Section 1141(a), the judge relied also on two recent decisions. The first was Judge Silverstein's decision, also on the Bankruptcy Court for the district of Delaware, in Melinta Therapeutics, and the second was Judge

Drain's recent decision *In re Top Co.* in the Southern District of New York. Based on those two decisions, the court determined that there was an affirmative duty to speak and/or object to any provision in a plan of liquidation and/or re-organization. It didn't matter that a third-party release was the provision of issue; every provision should be treated the same. And based on that, Judge Goldblatt determined and confirmed the plan, allowing folks to opt out if they chose to opt out, but binding everybody else that they didn't take any affirmative steps to address the release issue. Unless and until the Third Circuit and/or the Supreme Court or Congress actually addresses the third-party release issue, the release will be an avenue in the Third Circuit and/or the Bankruptcy Court for the District of Delaware at least, for parties to seek approval of third-party releases, consensual ones, under 1141 of the Bankruptcy Code.

**Jordana Renert:** Thanks, Eric. Us here at Lowenstein will continue to monitor this trend and other new bankruptcy decisions, and report back during our Lowdown series. So please continue to tune in. And in the meantime, please feel free to reach out if you have any questions. Speak to you soon.