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Capital Solutions & Restructuring Group Bulletin

Texas Bankruptcy Court Confirms Alkegen Plan, Approving Opt-Out Nondebtor Release Over U.S. Trustee Objection

In *In re ASP Unifrax Holdings Inc.* (Bankr. N.D. Tex.), Judge Scott W. Everett confirmed the Alkegen debtors' prepackaged chapter 11 plan in a bench ruling, overruling the U.S. Trustee's objection to its opt-out nondebtor releases. Under the plan, only creditors who voted to accept were bound by the releases unless they affirmatively opted out; creditors who voted to reject, abstained or were ineligible to vote instead received an opt-in notice. The U.S. Trustee argued that a plan vote is not itself consent to a release, and that accepting creditors — the only class bound by opt-out rather than opt-in — were denied the “second bite at the apple” given to everyone else. The court disagreed, holding that creditors who voted in favor had sufficient notice and manifested their intent to consent to the deal. Judge Everett squared the result with his own 2024 *Ebix* ruling, which held that silence cannot establish consent, by finding that accepting creditors — unlike the non-responsive creditors in *Ebix* — were not “truly the silent types.” He adopted Delaware Bankruptcy Judge Craig Goldblatt's reasoning in *In re Smallhold Inc.*, 665 B.R. 704 (Bankr. D. Del. 2024), which likened a ballot cast with clear opt-out instructions to accepting the terms of a clickwrap agreement, and found the plan's injunction was an enforcement mechanism for the release. While the ruling may support plan proponents seeking narrowly tailored opt-out releases in prepackaged cases, its persuasive value outside the Fifth Circuit, and in cases with different solicitation mechanics, remains untested.

Second Circuit Holds That Defensive Setoff Rights Are Not “Claims” Under the Bankruptcy Code

In *In re SVB Financial Group*, the Second Circuit held that a creditor's purely defensive setoff rights are not “claims” within the meaning of § 101(5)(A) of the Bankruptcy Code

Did You Know...

- *Lawdragon* named [Lauren Bilzin](#), [Brian Bolin](#), [Liz Osborne](#), [Sung Pak](#) and [Kai Zeng](#) to its “500 Leading Special Situations Lawyers” list.
- [Jamie Sprayregen](#) participated in a fireside chat, “Why Paul, Weiss,” at Ravinia Capital's “[What's the Deal with Deals?](#)” event, discussing his move to Paul, Weiss and future plans for the firm. He also spoke on a panel, “Trade, USMCA and Restructuring Risk in the Americas,” at [American Bankruptcy Institute's International Latin America Symposium](#), examining the USMCA review process and risk across the Americas. Additionally, Jamie was interviewed in *BankruptcyData*, discussing his career and why restructuring became the “last bastion of the generalist.”
- [Bob Britton](#) spoke on a panel, “Distressed and Restructuring,” at [Deutsche Bank's Leveraged Finance Conference](#), covering market trends in restructuring.
- [Lauren Bilzin](#) spoke on a panel, “The LME Debate: You're Either at the Table or on the Menu,” at the [Octus New York Credit Forum](#), discussing liability management exercises.

and, therefore, that such creditor was not required to file a proof of claim in the bankruptcy proceeding to preserve those rights.

SVB Financial Group (“SVB Financial”) filed for Chapter 11 bankruptcy in the Southern District of New York after its subsidiary, Silicon Valley Bank, failed in March 2023 amid rising interest rates and a run on deposits. The FDIC was appointed as SVB's receiver, and SVB Financial subsequently sued the FDIC in the Northern District of California to recover its deposits, with the claim ultimately fixed at

\$1.71 billion. In the bankruptcy case, SVB Financial's reorganization plan sought to extinguish the defensive setoff rights the FDIC asserted in that California litigation. Specifically, the plan provided that no entity could assert a setoff unless it had filed a proof of claim in the bankruptcy case. The FDIC never filed a proof of claim for its setoff rights and objected to the plan.

The Bankruptcy Court sustained the FDIC's objection, and the Second Circuit affirmed on direct appeal. The court reasoned that under California law, the FDIC's setoff rights constitute an affirmative defense that may

reduce or defeat a plaintiff's claim but do not entitle the holder to any affirmative recovery. Because the FDIC had no independent "right to payment" — the touchstone of the Bankruptcy Code's definition of "claim" — its defensive setoff rights fell outside section 101(5)(A). The court rejected SVB Financial's arguments that other Bankruptcy Code provisions, including sections 362(a)(7), 553(a), 553(a)(1) and 506(a)(1), compelled a different result. For creditors holding defensive setoff rights, the decision suggests that such rights may survive a debtor's bankruptcy without the need to file a proof of claim — at least where the applicable nonbankruptcy law characterizes the setoff as purely defensive.

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