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Hot Topics: Selected Cases of Interest from 2024 and 2025

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CONCURRENT SESSION
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HOT TOPICS

Selected Bankruptcy Cases and Issues of Interest from 2024 and 2025

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"IT'S GOOD TO BE KING"

Issues of Sovereign Immunity & Unconstitutional Overpayments to U.S. Trustees

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UNITED STATES V. MILLER, 604 U.S. _____, 145 S.Ct. 839 (2025)

Concerning the powers given to a bankruptcy trustee under Section 544(b) of the Bankruptcy Code to set aside, or "avoid" certain fraudulent transfers of a debtor's assets

ISSUE: Does § 106(a)(1) abrogate sovereign immunity with respect to state-law cause of action incorporated through § 544(b)?

11 U.S.C. § 106(a)(1)

"Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305 and 1327 of this title. "

FACTS

- David Miller was the chapter 7 trustee of a failed Utah-based business whose shareholders misappropriated $145,000 in company funds to satisfy their personal federal tax liabilities.
- Chapter 7 Trustee filed an "avoidance" suit against the United States seeking to claw back the misappropriated funds for the benefit of the bankruptcy estate. He filed the action pursuant to § 544(b), which allows a trustee to "avoid any transfer of an interest of the debtor . . . that is voidable under applicable law by a creditor holding an unsecured claim."
- To prevail under § 544(b), a trustee must identify an "actual creditor" who could have voided the transaction under applicable law outside of bankruptcy proceedings.
- Chapter 7 Trustee invoked Utah's fraudulent-transfer statute – which gives creditors a cause of action to invalidate certain transfers by a debtor – as the "applicable law" underlying his § 544(b).
- United States Government argued that Trustee's § 544(b) claim failed because the Trustee could not identify an "actual creditor" that could have voided the fraudulent transfer because sovereign immunity would bar any such Utah cause of action against the Government.
- Bankruptcy Court for the District of Utah disagreed, concluding that § 106(a) of the Bankruptcy Code – which waives the Government's sovereign immunity "with respect to" some ***59*** Bankruptcy Code provisions including § 544 – also waives immunity for the Utah cause of action nested within the § 544(b) claim.
    - District Court for the District of Utah adopted the Bankruptcy Court's Decision.
    - Tenth Circuit affirmed.

HOLDING: Section 106(a)'s sovereign-immunity waiver applies only to a § 544(b) claim itself and NOT to the state law claims nested within that federal claim.

Historical Background:

- Competing Goals at Issue in the case:
  - Maximization of the bankruptcy estate and equality of distribution among creditors.
  - The U.S., as a sovereign, is immune from suit unless it consents to be sued.
- Congress has the power to reconcile these two goals & can waive sovereign immunity.
  - Enacted waiver of sovereign immunity provision (§ 106) as part of Bankruptcy Code in 1978.
- Supreme Court has said the waiver wasn't clear enough in two cases:
  - *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 101 (1989).
  - *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 39 (1992).
- Court reiterated that the waiver at issue has to be unequivocally expressed and unmistakably clear.

Historical Background, Cont.

- The Legislative history from 1978 includes the statement that § 106 was "included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective."
- Furthermore, Congress quickly amended § 106 in 1994 (the current version of § 106(a)(1) was entirely new) to overrule the Court's decision and holding in *Hoffman* and *Nordic Village*. The intent was to "expressly provide[] for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief."
- There was no express exception made for § 544(b) claims.

Historical Background, Cont.

- In 1994, the House Judiciary Committee stated that, in enacting the Bankruptcy Code in 1978, "Congress intended to make the States subject to a money judgment" by waiving sovereign immunity and that, through the 1994 amendment to the Bankruptcy Code, intended "to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 waiving the sovereign immunity of the States and the Federal Government in this regard."
- In an amicus brief filed by 23 states and the District of Columbia, the states argued that the doctrine of constitutional avoidance required the Court to overrule the Tenth Circuit.
  - Argued that if § 106(a)(1) waived the federal government's sovereign immunity, it would have to do the same for the states.
  - But this would exceed the limit placed on congressional power to abrogate state sovereign immunity under the Bankruptcy Clause of the Constitution as discussed in *Central Va. Cmty Coll. v. Katz*, 546 U.S. 356 (2006).
  - Interestingly, the Court didn't write a limited opinion that found for the Trustee in terms of federal sovereign immunity and left the state sovereign immunity question for another day.

Historical Background, Cont.

- Judge R. Kimball Mosier (Bankr. D. Utah) (ret.) ruled that § 106(a)(1) unequivocally abrogated sovereign immunity as to the underlying state law clause of action incorporated through § 544(b).
- Decision turned on the phrase "with respect to."
- Using such a word or phrase "in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." Congress uses such words "to reach any subject that has a 'connection with' . . . the topics the statutes enumerates." *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 717 (2018).
- United States District Court for the District of Utah and the Tenth Circuit Court of Appeals each affirmed.
- The United States Supreme Court reversed.

REASONING

- The dispute turns on the interplay between § 106(a) and § 544(b) of the Bankruptcy Code.
  - Section 106(a)(1) provides that the Government's "sovereign immunity is abrogated . . . with respect to" a list of Code provisions, *including* § 544.
  - Trustee argues sovereign immunity is also waived with respect to whatever state-law cause of action a trustee might invoke as the source of "applicable law" for his or her § 544 claim.
- Trustee's argument would transform § 106(a) from a *jurisdiction-creating provision* to a *liability-creating provision*, which conflicts with the Court's traditional understanding of sovereign-immunity waivers.
  - "Sovereign immunity is justification in nature" and operates to deprive courts of the power to hear suits against the United States absent Congress's express consent.
  - Waivers of sovereign immunity function simply as "prerequisite[s] for jurisdiction" – they do not create any substantive rights or alter any pre-existing ones.
- Trustee's attempt to leverage § 106(a)'s waiver of immunity – i.e., the statute's grant of jurisdiction – into an affirmative expansion of the trustee's avoidance powers under § 544(b) conflicts with the Court's understanding of sovereign immunity waivers.
- Section 106(a)'s text, context, and structure make clear that it does not operate to modify § 544(b)'s substantive requirements.
  - § 106(a)(5) expressly provides that "[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing" under some other source of law.
    - That language directly refutes Trustee's argument that § 106(a)'s sovereign-immunity waiver extends to both the cause of action [§544(b) establishes] and its elements.
  - Construing § 106(a) to modify the "elements" of a § 544(b) claim would give a trustee a substantive claim for relief against the Government that does not "otherwise exis[t]" under § 544(b) or Utah law in direct conflict with §106(a)(5).

REASONING, CONT.

- Section 544's text and structure reinforce the Court's conclusion.
  - Unlike § 544(b), § 544(a) has no actual-creditor requirement and thus permits a trustee to invalidate certain transfers that a lien holder could have avoided "whether or not such a creditor exists." §544(a)(1), (2).
    - This contrast reflects Congress's deliberate choice to tie a trustee's rights under subsection (b) to the rights of an actual creditor under "applicable law."
    - Eliminating the actual-creditor requirement would upend decades of practice and precedent recognizing that § 544(b) merely empowers a trustee to step into the shoes of a creditor, subject to the same limitations and defenses that would apply to that creditor outside bankruptcy.

- Courts precedents require construing sovereign-immunity waivers narrowly, with any ambiguities resolved in favor of the sovereign.
  - Trustee asserts that § 106(a)(1)'s use of the phrase "with respect to" shows Congress's intent to abrogate sovereign immunity for "all subjects that concern or regard" the listed provisions, including the meaning of "applicable law" in § 544(b).
    - Trustee's reliance on dictionary definitions and cases that adopt capacious readings of phrases similar to "with respect to" cannot support the Trustee's argument, as those authorities all examine those terms in very different statutory contexts.
    - Respondent's textual argument thus flouts the "fundamental canon of statutory construction" that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."
    - Context cuts decidedly against Trustee's broad reading of § 106(a)(1).

- Trustee's appeal to the legislative history of § 106(a) also is unpersuasive.
  - Section 106 has always been understood to provide a "limited waiver" of sovereign immunity in bankruptcy cases, designed to "achieve approximately the same result that would prevail outside of bankruptcy."
  - Nothing in the 1994 amendments to § 106 dislodged that original understanding.
  - In any event, legislative history cannot supply a waiver where the language of the statute does not clearly do so.

REASONING, CONT.

- Trustee's remaining arguments lack merit.
  - Court's interpretation does not render § 106(a)'s waiver meaningless with respect to § 544.
    - Section 106(a) enables trustees to prevail against the Government under § 544(a), which has no actual-creditor requirement. For example, because federal tax law separately provides that tax liens held by the Federal Government may be invalidated under particular circumstances, *see* 26 U.S.C. § 6323, § 106(a) allows trustees to avoid transfers of these tax liens.
    - Section 106(a) also grants federal courts jurisdiction to hear § 544(b) claims against state governments that have consented to being sued under their fraudulent-transfer statutes.

  - Court rejected Trustee's argument that because § 106(a)(1) refers to § 544 as a whole (rather than by subsection), the waiver must be construed to give substantive effect to all of § 544's subsections.
    - Many of the other 58 Bankruptcy Code provisions listed "as a whole" in § 106(a)(1) include subsections that plainly do not implicate sovereign immunity at all.

  - Trustee's reliance on *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz,* 601 U.S. 42, 144 S. Ct. 457, 217 L. Ed. 2d 361 (2024), to support his argument that Congress sometimes waives sovereign immunity, while simultaneously establishing a new substantive right, is unavailing.
    - *Kirtz*k involved a statute that bears little resemblance – in text, structure, or operation – to § 106(a), and indeed explicitly authorized claims against the Government.
    - Nothing in *Kirtz* suggests that courts should presume, in the absence of explicit statutory language, that Congress has waived the Government's sovereign immunity.

WHAT ABOUT *LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, ET AL. V. BRIAN W. COUGHLIN*, 599 U.S. 382 (2023)?

- Broad Language regarding § 106(a): "We conclude that the Bankruptcy Code unequivocally abrogates the sovereign immunity of any and every government that possesses the power to assert such immunity."
- Interesting to note that Justice Jackson, the author of *Miller*, also wrote *Coughlin*.
- But *Coughlin* isn't cited, much less discussed, anywhere in *Miller*.

DISSENT (JUSTICE GORSUCH)

- Three statutory provisions are relevant:
  - 11 U.S.C. § 106(a)(1) waives the government's sovereign immunity "with respect to" § 544 of the Bankruptcy Code.
  - 11 U.S.C. § 544(b)(1), which empowers a bankruptcy trustee to invoke the rights of "a creditor holding an unsecured claim" to set aside any transfer "that is voidable under applicable law."
  - Third, Utah's fraudulent-transfer statute supplies the "applicable law" for purposes of § 544(b)(1).
- Under these three provisions, the Court's decision should play out this way:
  - Under the Utah statute, a transfer is "voidable" if, after a creditor's claim arose against the debtor, the debtor (1) "made the transfer" (2) "without receiving reasonably equivalent value in exchange," and (3) "was insolvent at the time."
- No one before the Court disputes these conditions are satisfied here and a good-fraudulent-transfer claim exists.
- Thus, under "applicable law," the relevant transfers are "voidable," and the bankruptcy trustee can use § 544(b) to set them aside.
  - This remains true even though the trustee must sue the United States to void the relevant transfer because § 106(a)(1) bars the government from raising a sovereign-immunity defense in the trustee's action.
- The Court conflates two different things. Whether pursued by a private creditor or a bankruptcy trustee, a good substantive claim for relief exists. No one disputes that a fraudulent transfer took place but distinguishes between a private creditor (whose claim is barred by sovereign immunity outside of bankruptcy) and a trustee (whose claim is not barred within bankruptcy)
  - "In one setting, but not another, Congress has chosen to waive an affirmative defense to an otherwise valid claim."
- The question before us is a distinct one: Can the federal government defeat the claim by raising the affirmative defense of sovereign immunity?
  - With respect to a private creditor pursuing relief in state court, the answer is YES.
  - With respect to a trustee pursuing relief in a federal bankruptcy proceeding, the answer – thanks to § 106(a)(1) – is NO.

QUESTIONS AFTER *MILLER*

WHY WOULD CONGRESS TREAT § 544(b) DIFFERENT FROM OTHER CHAPTER 5 POWERS?

- Congress opened itself up to liability for monetary judgments in bankruptcy by providing for sovereign immunity waivers in both the 1978 and 1994 versions of the Bankruptcy Code.
- Congress clearly contemplated (and accepted) the risks for actions under other sections of the Bankruptcy Code, such as § § 547, 548, and 549. What makes § 544(b) any different?

WHY DID THE COURT IGNORE THE AMICUS BRIEFS?

- The only brief filed in support of the Government was that of the States Attorneys General.
- Four (4) briefs were filed in support of the Trustee.
  1. U.S. Chamber of Commerce.
  2. National Creditors Bar Association
  3. National Association of Bankruptcy Trustees
  4. Bankruptcy professors and former judges including Eugene Wedoff (Bankr. N.D. Ill.)(ret.) and Bruce Markell (Bankr. D. Nev.)(ret.) (Prof. Northwestern University Pritzker School of Law).
     - The Supreme Court dropped a single footnote to address a minor point raised in one of the amicus briefs but otherwise did not address any of the more substantive points.

IS *MILLER* RECONCILABLE WITH THE SUPREME COURT'S PRIOR (AND ARGUABLY COMPETING) PRECEDENT ON THE INTERPRETATION OF SOVEREIGN IMMUNITY WAIVERS?

- Courts may "not enlarge the waiver beyond the purview of the statutory language." ***United States v. Williams*, 514 U.S. 527, 531 (1995)**.
- Courts may not "import immunity back into a statute designed to limit it." ***Indian Towing v. United States*, 350 U.S. 61, 69 (1955)**.

WHERE DOES THIS LEAVE US?

- Bankruptcy estates are left poorer with smaller pots to divide among creditors.
- Governmental creditors are favored at the expense of the creditor body as a whole.
- Creditors that receive less are potentially at a greater financial risk themselves.
- Will Congress amend the Bankruptcy Code to overrule the Supreme Court again?

Montana Dep't of Revenue v. Blixseth (In re Blixseth), 112 F.4th 837 (9th Cir. 2024)

Is 11 U.S.C. §106, as it applies to the states, unconstitutional?

FACTS

- Montana conducted a tax audit of Mr. Blixseth and discovered a deficiency. Mr. Blixseth contested the finding of the auditor and appealed to the Montana State Tax Appeals Board. Rather than defend Mr. Blixseth's appeal, the state of Montana filed an involuntary petition for bankruptcy against Mr. Blixseth alleging that he owed $219,258.00. However, Montana could not prosecute a single-creditor involuntary petition against Mr. Blixseth. Montana subsequently recruited the states of Idaho and California. Montana still had an additional problem: Mr. Blixseth was contesting the debt before the State Tax Appeals Board; and, thus, its claim was subject to a bona fide dispute.
- California and Idaho quickly settled their tax claims again Mr. Blixseth. The validity of the involuntary petition dragged out for more than ten (10) years. During the course of these proceedings, the Bankruptcy Judge asked Montana's lawyer if Montana was consenting to the jurisdiction of the Bankruptcy Court and waiving sovereign immunity. Counsel for Montana answered affirmatively that the state was consenting to the jurisdiction and waiving sovereign immunity.
- After the Bankruptcy Court dismissed the involuntary petition, Mr. Blixseth filed an adversary proceeding seeking damages as authorized by 11 U.S.C. § 303(i).

HOLDING/REASONING

- While the Bankruptcy Court had relied on the principle that when a state files a proof of claim in a bankruptcy case, it waives sovereign immunity as to any claim by the bankruptcy estate that arises out of the same transaction or occurrence as the state's claim, the Court of Appeals held that a section 303(i) claim does not arise from the same transaction or occurrence underlying the involuntary petition, because it arises from the fact of the petition itself.
- Next, the Court further found that the Montana's lawyer's statement regarding the consent to jurisdiction and the waiver of sovereign immunity was of no effect. Waiver of sovereign immunity must be found *pursuant to Montana law*.
- The Court next analyzed whether Blixseth's section 303(i) claim fell under the Supreme Court's analysis in *Central Va. Cmty Coll. v. Katz*, 546 U.S. 356 (2006), by looking to the three core functions of the bankruptcy process referenced in *Katz:* (1) the exercise of exclusive jurisdiction over all of the debtor's property, (2) the equitable distribution of that property among the debtor's creditors, and (3) the ultimate discharge that gives the debtor a fresh start by releasing him, her, or it from further liability for old debts. The Court concluded that an action under 11 U.S.C. § 303(i) failed to meet any of these criteria, and that instead, section 303(i) is a remedial scheme for dismissed involuntary petitions.
- Finally, and based on large part on the Court's narrow reading of *Katz*, the Court concluded that 11 U.S.C.§106 is an unconstitutional assertion of Congress' power as it relates to the states.

CURRENT STATUS

- There is a split in the circuits with the First, Second, Third, and Sixth Circuits upholding the constitutionality of 11 U.S.C. § 106, and the Fourth, Fifth, Seventh, Ninth, and Tenth Circuits holding the statute unconstitutional with respect to the states.
- Blixseth filed his brief in support of cert. on February 27, 2025.

OFFICE OF THE UNITED STATES TRUSTEE V. JOHN Q. HAMMONS FALL 2006, LLC, 602 U.S. 487 (2024)

Determining the appropriate remedy for unconstitutional overpayments of U.S. Trustee fees

FACTS

- The federal bankruptcy system is administered by two (2) programs:
  - The U.S. Trustee program, housed within the Department of Justice, administers 88 of the 94 bankruptcy districts.
  - The six remaining districts, all in Alabama and North Carolina, are administered by the Bankruptcy Administrator Program, which the Administrative Office of the U.S. Courts runs under the supervision of the Judicial Conference.

- For purposes of this case, the biggest difference between the two programs is their funding.
  - Congress designed the U.S. Trustee Program to be entirely self-funded by user fees paid by debtors (28 U.S.C. § 589a(b)).
  - By contrast, Congress supports the Bankruptcy Administrator Program through its general appropriation for the Judiciary, with fees used only to offset that funding. (28 U.S.C. § 1930(a)(7)).

- Despite the different funding schemes, the fees charged to debtors in U.S. Trustee and Bankruptcy Administrator districts were identical between 2001 and 2018.
  - During that almost two-decade period, Congress would set the filing and quarterly fees for the U.S. Trustee districts, and then the Judicial Conference, pursuant to a standing order, would require the Bankruptcy Administrator districts to match them.

- In 2017, facing a funding shortfall for the U.S. Trustee Program, Congress amended the fee statute to raise fees in U.S. Trustee districts.
  - Congress increases quarterly fees for new and pending Chapter 11 cases in which debtors disbursed $1 million or more in that quarter.
    - Congress made the fee increase for large debtors conditional on the operating fund for the program falling below $200 million in the prior fiscal year.
    - That threshold was met in 2017, so starting in January 2018, fees increased for large Chapter 11 debtors in U.S. Trustee districts.

FACTS CONT.

- Despite the Judicial Conference's standing order, though, fees did not immediately increase in Bankruptcy Administrator districts.
  - For reasons that were not clear from the record, it was not until October 2018 that the Judicial Conference increased fees for newly filed cases in Bankruptcy Administrator districts.
  - Fees for already pending large Chapter 11 cases in Bankruptcy Administrator districts remained at the 2017 level until Congress mandated equal fees in 2021.
- In the meantime, a disparity emerged between the fees paid by large Chapter 11 debtors in U.S. Trustee districts and those paid by large Chapter 11 debtors in Bankruptcy Administrator Districts.

- The disparity in the fee arrangement came to the Supreme Court in 2022, in *Siegel v. Fitzgerald*, 596 U.S. 464, 468, 142 S.Ct. 1770, 213 L.Ed.2d 39 (2022), wherein the Court held that the origin of the disparity traced back to a single statutory word.
  - The fee statute passed by Congress and in effect at the time of the 2017 increase, read: [T]he Judicial Conference of the United States *may* require the Debtor in a case under chapter 11 of title 11" in a Bankruptcy Administrator district "to pay fees equal to those imposed" on otherwise identical debtors in U.S. Trustee districts.
  - The Court held that permissive language violated the Constitution's Bankruptcy Clause.

- The Bankruptcy Clause empowers Congress "[t]o establish . . . laws on the subject of Bankruptcies through the United States," but it requires that such laws be "uniform." **U.S. Const. art. I, § 8, cl. 4 .**
  - Though the Clause "confers broad authority on Congress," including the flexibility to "enact geographically limited bankruptcy laws . . . if it is responding to geographically limited problems," the Court concluded that the Clause's grant of power did not extend to the disparate fee facility by the permissive language in the fee statute.
  - Congress could not constitutionally "treat identical debtors differently based on an artificial funding distinction that Congress itself created."

FACTS, CONT.

- Having found a constitutional wrong, the Court faced the question of how to remedy it. The Court acknowledged three (3) options:
  - Refund fees for those charged more in the U.S. Trustee districts,
  - Retroactively extract higher fees from those charged less in Bankruptcy Administrator districts, or
  - Require only prospective parity.
- By the time *Siegel* reached the U.S. Supreme Court, Congress had replaced the permissive "may" in the fee statute with a mandatory "shall," resulting in equal fees for U.S. Trustee and Bankruptcy Administrator districts as of April 2021. But because the remedial question had not been passed on below, the Court remanded to the Fourth Circuit to address it in the first instance.
- In 2016, a group of 76 legal entities related to a chain of hotels and resorts filed for bankruptcy in the District of Kansas, a U.S. Trustee district.
- In March 2020, the debtors challenged the constitutionality of those fees, seeking both a refund of fees already paid and a reversal of future fees to their 2017 level.
- Finding no Constitutional violation, the Bankruptcy Court did not reach the remedial question.
- The Tenth Circuit reversed.
  - Anticipating the U.S. Supreme Court's upcoming holding in *Siegel*, the Tenth Circuit found that the fee statute permitting nonuniform fees violated the Bankruptcy Clause.
  - To remedy that violation, the panel then ordered a refund of the debtors' quarterly fees so that they equaled the lower fees the debtors would have paid had their case been filed in a Bankruptcy Administrator district.
  - The U.S. Trustee sought certiorari.
- After deciding *Siegel*, the U.S. Supreme Court granted the petition, vacated the Tenth Circuit's judgment, and remanded for further consideration.
- The Tenth Circuit sought supplemental briefing but ultimately reinstated its original opinion without alternation.
- After rehearing was denied, the U.S. Trustee again petitioned for review, and the Court granted certiorari to answer the remedial question left open in *Siegel*.

HOLDING/REASONING

- The Court started its analysis by noting that, generally speaking, "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem" and that "the nature of the violation determines the scope of the remedy."
  - Before determining the appropriate remedy for the Bankruptcy Clause violation in this case, we must analyze the particulars of the Constitutional violation identified in *Siegel*.
- Court identified three (3) aspects of its holding in *Siegel* worth highlighting.
  - First, the violation identified was nonuniformity, NOT higher fees.
    - There was no doubt raised in *Siegel* about Congress's power to raise fees for large Chapter 11 debtors. The Constitutional issue arose only because the fee statute's permissive language effectively "exempted debtors in" Bankruptcy Administrator districts from paying the new rates, resulting in a disparity in fees between the two types of bankruptcy districts.
  - Second, the fee disparity at issue was short lived.
    - It began in January 2018. By October 2018, the Judicial Conference required newly filed Chapter 11 cases in Bankruptcy Administrator districts to pay the higher fee. And starting in April 2021, Congress required uniform fees for pending cases, too.
    - Due to these policy shifts by the Judicial Conference and Congress, a large Chapter 11 debtor was subject to, at most, three years and three months of nonuniform treatment.
  - Third, the disparity was small. The Government estimates (and no one disputed) that during the relevant period, only about 50 out of the more than 2,000 cases involving large chapter 11 debtors were filed in Bankruptcy Administrator districts – a mere 2%.
    - Even when the statute unconstitutionally permitted the complained-of fee disparity, 98% of the relevant class of debtors still paid uniform fees.
- The Constitutional violation the Court identified in *Siegel* created a monetary disparity in bankruptcy fees that was short lived and small.

REASONING, CONT.

- Court next turned to the question of how to remedy this short-lived and small disparity.
- The touchstone for any decision about remedy is legislative intent.
  - Key question in determining how to remedy a Constitutional violation wrought by the legislative process is always 'what the legislature would have willed had it been apprised of the Constitutional infirmity."
  - In cases involving unequal treatment, answering this question generally leads to a focus on two considerations:
    - Congress's "intensity of commitment" to the more broadly applicable rule, and "the degree of potential disruption of the statutory scheme that would occur" if the Court were to extend the exception.
  - Court remains mindful that Congress likely would not have intended relief that is impractical or unworkable.
  - Court keeps in mind that its ultimate aim is to remedy the Constitutional wrong consistent with Congressional intent, not to provide the complaining parties' preferred form of relief.
- Congress's intentions here were unmistakable.
  - Congress would have wanted prospective parity, not a refund or retrospective raising of fees. To remedy the fee disparity, Congress would have wanted to impose equal fees in all districts going forward.
    - Conclusion is clear from (i) the intensity of Congress's commitment to raising fees in U.S. Trustee districts, (ii) the extreme disruption a refund would cause to the bankruptcy system, and (iii) Congress's own decision to remedy the wrong faced by imposing equal fees going forward.

REASONING, CONT.

- Congress's Commitment to Higher Fees in U.S. Trustee Districts
  - Congress designed the U.S. Trustee Program to "be funded in its entirety by user fees."
  - Chapter 11 cases play a central role in achieving that goal.
  - Congress required 100% of Chapter 11 Quarterly fees to be deposited in the U.S. Trustee's operating fund.
  - By 2017, almost two-thirds of the U.S. Trustee Program's funding came from Chapter 11 fees alone.
  - In 2021, when Congress amended the fee statute, it removed any doubts about its commitment to raising fees in order to keep the U.S. Trustee Program self-funded.
    - The statute specifically stated that the purpose of keeping fees at an elevated level was "to further the long-standing goal of Congress of ensuring that the bankruptcy system is self-funded, at no cost to the taxpayer."
- The disruption that would follow from granting the request to refund fees
  - Imposition of a refund would significantly undermine Congress's goal of keeping the U.S. Trustee Program self-funded.
    - Refunding all the large Chapter 11 debtors in U.S. Trustee districts would be expensive
      - Estimates indicated it would cost $325 Million.
  - Mandating a refund as a remedy would transform a program Congress designed to be self-funding into an enormous bill for taxpayers, a remedy diametrically opposed to clear congressional intent.
  - A proposed refund would exacerbate the small fee disparity the Court was attempting to remedy.
    - Government estimated that more than 85% of the large Chapter 11 cases subject to higher fees between January 2018 and April 2021 have closed, and some of those debtors have been liquidated or otherwise ceased to exist.

REASONING, CONT.

- The only real question, then, is whether Congress would have wanted to retrospectively impose higher fees on debtors in Bankruptcy Administrator districts.
  - Best evidence that Congress did not intend such a remedy is that Congress itself chose not to pursue that course.
  - In the 2021 Act, as acknowledged, "Congress revised the fee scheme to address this very issue, and it did so by mandating equal fees *prospectively only*."
  - Congress's choice makes sense. Because fees collected in Bankruptcy Administrator districts go toward offsetting the Judiciary's appropriation, not to supporting the U.S. Trustee Program, retrospectively raising fees in Bankruptcy Administrator districts would do nothing to achieve Congress's goal of keeping the U.S. Trustee Program self-funding.
    - With the 2021 Act, Congress evidenced a clear desire to comply with the Constitutional mandate of uniformity by requiring prospective parity, but it reasonably chose not to impose higher fees retrospectively in Bankruptcy Administrator districts.
  - There are serious practical challenges to a retrospective imposition of higher fees.
    - As in U.S. Trustee districts, many of the debtors who paid lower fees in Bankruptcy Administrator districts have exited bankruptcy and ceased to exist.
      - Government estimates that only 10 of roughly 50 cases involving debtors who paid lower fees are still open.
      - Moreover, locating all the former debtors or their successors would not end the practical problems.
      - The Government would be forced to extract fees from funds that might already be disbursed, inevitably prompting additional litigation and even the unwinding of closed cases.
      - And all that effort would be directed against parties who followed the law and complied with the fee scheduled imposed by the Judicial Conference under the 2017 Act.

- How equality is accomplished – by extension or invalidation of the unequally distributed benefit or burden, or some other measure – is a matter on which the Constitution is silent.
  - So, when seeking to remedy an unconditional disparity, rather than divining the right answer ourselves or picking a party's preferred form of relief, the Court generally looks to the intent of the Legislature.
    - Again, the best evidence that Congress did not intend such a remedy is that Congress itself chose not to pursue that course in the 2021 Act, and instead Congress revised the fee scheme to address this issue and did so by mandating equal fees prospectively only.

DISSENT (JUSTICES GORSUCH, THOMAS, and BARRETT)

- "What's a constitutional wrong worth these days? The Court's answer today seems to be: not much."
  - "Today . . . the Court performs a remedial root canal, permitting the government to keep the cash it extracted from its unconstitutional fee regime."
  - "The path the Court follows is as striking as its destination. Never mind that a refund is the traditional remedy for unlawfully imposed fees. Never mind that the government promised to supply precisely that relief if the debtors in this case prevailed, as they have, in their constitutional challenge. Never mind that backtracking on that promise raises separate due process concerns. As the majority sees it, supplying meaningful relief is simply not worth the effort. Respectfully, that alien approach to remedies has no place in our jurisprudence."
  - "A promise of fee uniformity going forward may prevent future discrimination between debtors. But it does nothing to remedy fees unlawfully exacted in the past. Far from an 'appropriate remedy,' the majority's *prospective* remedy for a *past* injury is no remedy at all."
  - "By overlooking the (obvious) distinction between prospective and retrospective relief, the majority defies this Court's teachings that, in cases like this one, effective relief consists of damages, not an injunction."

THE AFTERMATH OF *PURDUE*

A discussion of the current state of third-party releases in plans of reorganization in light of the holding of *Harrington v. Purdue Pharma*

By Deborah R. Chandler, Esq.
Anderson & Karrenberg

THE 2024 HOLDING OF *HARRINGTON V. PURDUE PHARMA*:

The Bankruptcy Code does not authorize a bankruptcy court to approve, as part of a plan of reorganization under Chapter 11, a release and injunction that extinguishes claims against non-debtor third parties without the consent of affected claimants, thereby effectively extending to non-debtors the benefits of a discharge usually reserved for debtors

WHAT PURDUE DIDN'T HOLD:

Post-Purdue, the sole method by which third parties may be released is through consent.

Contention now lies in the method by which consent may be obtained, as the Supreme Court in Purdue Pharma specifically declined to define methods by which consent is achieved:

"Nor do we have occasion today to express a view on what qualifies as a consensual release ...." Harrington v. Purdue Pharma L. P., 603 U.S. 204, 206, 144 S. Ct. 2071, 2088, 219 L. Ed. 2d 721 (2024) ("Purdue Pharma")

SINCE *PURDUE*...

Chapter 11 debtors have had to find different ways to address third-party releases, such as opt-in provisions, opt-out provisions, and non-consensual releases by way of Chapter 15.

ARE YOU IN OR ARE YOU OUT?

- An opt-out provides that a third-party release will be effective as to each party who is sent a ballot or opt-out form that clearly explains that the ballot or opt-out form must be returned and the opt-out box checked if the party elects not to approve the third-party release.

- An opt-in provides that no party (even a party voting in favor of the proposed plan) would be deemed to have granted a third-party release unless that party elected to submit a form that opted into a release, with that election being separate from that party's vote with respect to the plan.

In re Spirit Airlines, Inc., 668 B.R. 689, 703 (Bankr. S.D.N.Y. 2025)

In re Roman Catholic Diocese of Syracuse, New York, 667 B.R. 628 (Bankr. N.D.N.Y. 2024):

Facts:

- The Roman Catholic Diocese of Syracuse filed for Chapter 11 bankruptcy in response to numerous sexual abuse claims.
- As part of the reorganization plan, the Diocese, along with the Official Committee of Unsecured Creditors, proposed a plan that included **"opt-out" third-party releases**—claimants would release certain third parties from liability unless they explicitly opted out.
- The proposed Ballot contained an optional form allowing a sexual assault survivor to check an opt-out box, and if a survivor either did not check the box or failed to return a ballot, then such failure is deemed consent to the third-party releases.
- Approval of the disclosure statement and the related solicitation procedures was sought, including forms of ballots and notices regarding the releases.
- Several insurers and the United States Trustee (UST) objected, arguing that the opt-out mechanism was unconstitutional or contrary to recent precedent (notably *Purdue Pharma*).
- The UST argued that the process is governed by state contract law that requires affirmative consent, and therefore an "opt-in" procedure must be used.

In re Roman Catholic Diocese of Syracuse, New York, 667 B.R. 628 (Bankr. N.D.N.Y. 2024):

Holding:
The opt-out mechanism itself did not render the plan patently unconfirmable, even in light of the Supreme Court's *Purdue Pharma* decision.

Reasoning No. 1: Opt-Out Mechanism was valid consent under the circumstances:
- Clear notice of the release provisions;
- Representation of the sexual abuse survivors on the creditors' committee;
- A high percentage (94%) of claimants represented by sophisticated counsel;
- The "class-like" nature of the claims;
- Precedent from (pre-Purdue)cases such as *LATAM Airlines* and *Avianca,* which allowed opt-out procedures in similar contexts.

Reasoning No. 2: Class-Like Treatment of Survivors
- The court accepted the argument that the survivors shared "commonality" akin to a class under Fed. R. Civ. P. 23, given they all suffered sexual abuse by clergy within the Diocese.
- The creditors' committee could serve as a de facto class representative

In re Roman Catholic Diocese of Syracuse, New York, 667 B.R. 628 (Bankr. N.D.N.Y. 2024):

Solicitation and Ballot Deficiencies
- Despite accepting the opt-out mechanism in principle, the court found flaws in the actual ballot and solicitation materials, including:
  - Inadequate and confusing placement of the opt-out provision;
  - "Doomsday" language that could mislead or pressure claimants;
  - Lack of clear, sufficient notice;
  - Overly broad exculpation and release language.

In re Spirit Airlines, Inc., 668 B.R. 689 (Bankr. S.D.N.Y. 2025) (March 7, 2025):

Facts:

- Spirit Airlines, the seventh largest airline in the US, filed for Chapter 11 bankruptcy to implement a comprehensive financial restructuring through a plan of reorganization.
- The restructuring was based on a Restructuring Support Agreement (RSA) entered into by the Debtors and certain stakeholders before the bankruptcy filing.
- The plan provided for full recovery of allowed priority claims and general unsecured claims, with the value for this recovery coming from the consenting stakeholders' agreement to convert their debt to equity.
- The plan also included third-party releases that would be binding on creditors unless they opted out by checking a box on their ballot or submitting an opt-out form.
- The UST and SEC objected to these releases, arguing they violated the Supreme Court's ruling in Purdue Pharma by not obtaining affirmative consent through an opt-in mechanism

In re Spirit Airlines, Inc., 668 B.R. 689 (Bankr. S.D.N.Y. 2025) (March 7, 2025):

Holding: The third-party releases in the proposed Chapter 11 plan of reorganization were consensual and appropriate, and did not violate *Purdue Pharma*, even though procured through opt-out mechanism, and a creditor was deemed to have consented to releases if it 1) timely and properly voted to accept or reject plan but did not check ballot's opt-out box **or** 2) if it abstained from voting and did not opt out of the releases.

- The court approved the releases because they were:
  - clearly worded and prominently presented in all plan materials;
  - reasonably calculated to inform interested parties of their rights;
  - consistently part of the proposed plan since the beginning of the case;
  - offered to parties receiving substantial recovery;
  - not proposed for parties deemed to reject the plan

In re Spirit Airlines, Inc., 668 B.R. 689 (Bankr. S.D.N.Y. 2025) (March 7, 2025):

The court distinguished this case from others where opt-out mechanisms were rejected:

- Meager to no recovery available to the affected creditors;
- There were changes to the plan or scope of releases shortly before the voting deadline;
- The widely publicized endorsement of the plan by other creditor groups could have prompted a higher than usual degree of inattentiveness or inaction among affected creditors;
- Small creditor involvement;
- Lack of a separate opt-out mechanism - only way to withhold consent was to reject the plan
- Contradictory and confusing provisions related to the opt out provision;
- Concern that releasors had no previous dealings with the released parties
- The plan proposed the same distribution regardless of whether a creditor opted out

In re GOL Linhas Aéreas Inteligentes S.A., --- B.R. ---- (Bankr. S.D.N.Y. 2025)(May 22, 2025):

Facts:

- GOL Linhas Aéreas Inteligentes S.A., a Brazilian airline, and its affiliates filed for Chapter 11 bankruptcy in the Southern District of New York.
- The filing was prompted by financial strain from COVID-19, the grounding of Boeing 737 MAX aircraft, and rising interest rates in Brazil and the U.S.
- The plan included a third-party release provision with an **opt-out mechanism** for consenting creditors, along with standard exculpation and injunction clauses.
- The UST objected on the basis (1) that the plan contained non-consensual third-party releases, and (2) the plan injunction was overbroad and expands the scope of the improper third-party releases.
- Specifically, the UST argued that since there is no federal bankruptcy law to determine what consent is, state law must apply, and that under state law, opt-outs are impermissible.

In re GOL Linhas Aéreas Inteligentes S.A., --- B.R. ---- (Bankr. S.D.N.Y. 2025) (May 22, 2025):

HOLDING: The Court held that **opt-out-based third-party releases** are valid when properly noticed and voluntarily accepted.

- Citing recent rulings (e.g., *LATAM*, *Avianca*), Judge Glenn reaffirmed that **consent can be implied** by silence, provided that creditors have an opportunity to opt out and are given clear notice.
- The plan made clear that the only creditors who were bound by the releases were:
  - Those that accepted the plan, and
  - Those that rejected or abstained and failed to opt out.
- Impaired non-voting classes (who were deemed to reject) were not bound by the releases.

In re GOL Linhas Aéreas Inteligentes S.A., --- B.R. ---- (Bankr. S.D.N.Y. 2025) (May 22, 2025):

REASONING:

- **Procedural Fairness -** The plan made clear that the only creditors bound by the releases either:
  - Accepted the plan,
  - Rejected or abstained and failed to opt out,

  were bound by the releases.
  - The opt-out box was prominently displayed on ballots.
  - The Disclosure Statement clearly explained the releases.
  - Creditors who did not have voting rights because they were deemed to reject the Plan were **not bound** by the releases—avoiding non-consensual application.
- **Substantive Fairness**
  - The releases were part of broader, negotiated settlements that helped deliver meaningful recoveries to unsecured creditors (notably, ~$235 million in new equity).
  - Multiple creditor constituencies supported the Plan, including the Official Committee of Unsecured Creditors.
- **Adequate Representation**
  - The Plan was supported by major creditor constituencies (including the UCC) and resolved complex intercreditor disputes.

CHAPTER 15: AN END RUN AROUND *PURDUE*?

Post-*Purdue*, two separate bankruptcy courts - the District of Delaware and the Southern District of New York – issued opinions authorizing nonconsensual third-party releases in a Chapter 15 setting - highlighting the difference between available relief under chapter 15 versus chapter 11.

On April 1, 2025, Judge Thomas M. Horan for the District of Delaware issued an opinion in *In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R,* No. 25-10208, 2025 Bankr. LEXIS 751, at *1 (Bankr. D. Del. Apr. 1, 2025) holding that nonconsensual third-party releases in a foreign debtor's plan of reorganization should be recognized and enforced within the territorial jurisdiction of the US, under the express provisions of chapter 15 and its general principles of comity.

Just weeks after Judge Horan's decision, on April 21, 2025, Chief Judge Martin Glenn for the Southern District of New York issued a decision in *In re Odebrecht Engenharia e Construção S.A*, No. 25-10482, 2025 Bankr. LEXIS 990, at *1 (Bankr. S.D.N.Y. Apr. 21, 2025), holding that US bankruptcy courts have the power to issue orders containing provisions for nonconsensual third-party releases, even if those releases are not contained in a foreign debtor's plan.

In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R, No. 25-10208 (TMH), 2025 Bankr. LEXIS 751, at *1 (Bankr. D. Del. Apr. 1, 2025)

Facts:

- Crédito Real, one of the largest "nonbank" lending institutions in Mexico filed for creditor protection under Mexican law in October 2023. In May 2024, it obtained approval of its concurso plan by the requisite majority of unsecured creditors and subsequently by the Mexican court.
- On February 7, 2025, Crédito Real petitioned the Delaware bankruptcy court for recognition of the Mexican concurso proceedings as foreign main proceedings under chapter 15, seeking enforcement of the plan within the US – including its nonconsensual third-party releases.
- The US International Development Finance Corporation (DFC) objected to enforcement of the nonconsensual third-party releases based on *Purdue Pharma*.
- Specifically, DFC asserted that enforcement of the plan was beyond the scope of "any appropriate relief" available in chapter 15 because nonconsensual third-party releases are not permitted under the Bankruptcy Code.
- DFC also argued that Crédito Real had failed to demonstrate "extraordinary circumstances" that would permit the bankruptcy court to grant relief otherwise unavailable under US law, and that following Purdue, nonconsensual third-party releases are manifestly contrary to US public policy.

In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R, No. 25-10208 (TMH), 2025 Bankr. LEXIS 751, at *1 (Bankr. D. Del. Apr. 1, 2025)

Holding: the plain language of both section 1521(a)(7) and section 1507(a) permit a U.S. court to enforce a foreign order for nonconsensual third-party releases, which are not manifestly contrary to US public policy.

- Judge Horan framed his analysis within the policy statement in Section 1501 of the Bankruptcy Code, which "highlights that the Court should be guided by the main policy goals of chapter 15—cooperation and comity with foreign courts and deference to those courts within the confines established by chapter 15," adding that "No other chapter of the Bankruptcy Code sets forth a similar statement about its purpose."
- Judge Horan rejected the DFC's arguments that chapter 15 relief was limited by *Purdue* and the catchall provisions of Sections 1521(a)(7) and 1507 should be read in the same way as the Section 1123(b)(6) – as limiting provisions that provide no authority for the releases.
- The plain language of chapter 15, however, enumerates relief that a bankruptcy court may grant at the request of a foreign representative, expressly identifying what relief was prohibited in chapter 15.

In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R, No. 25-10208 (TMH), 2025 Bankr. LEXIS 751, at *1 (Bankr. D. Del. Apr. 1, 2025)

Holding (cont):

- Judge Horan found that since chapter 15 has a "much different purpose and context" than the rest of the Bankruptcy Code, "relief that is appropriate subject to limitations in chapter 15 must be different than relief that is not inconsistent with the applicable provisions of the Bankruptcy Code."
- The Delaware court further explained that "U.S. courts do not have to reject relief solely because it would be unavailable in the United States." Instead, Judge Horan noted that the prohibitive provision in chapter 15 is limited to those rare situations in which the relief is manifestly contrary to the public policy of the US.
- Non-consensual third-party releases were not manifestly contrary to the public policy of the US, noting that the "narrowly construed" public policy exception is restricted to "the most fundamental policies of the United States," and should only be used "to deny enforcing foreign relief sparingly."
- Delaware court held that the public policy exception only applies when the "the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections."
- Judge Horan concluded that "[t]he simple fact that a U.S. court could not grant such releases in a typical chapter 11 plan does not make them manifestly contrary to U.S. public policy so as to require this Court to prohibit enforcement of the Release[s]."

STANDING

A discussion of the recent case of *Truck Ins. Exch. V. Kaiser Gypsum Co.*

P. Matthew Cox, Esq.
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***TRUCK INSURANCE EXCHANGE V. KAISER GYPSUM COMPANY, INC.*, 602 U.S. 268 (2024)**

Who is a "party in interest" with standing to object to a Chapter 11 Plan

FACTS

Truck is an insurer for companies that manufactured and sold products containing asbestos.

Two of those companies, Kaiser Gypsum Co. and Hanson Permanente Cement filed for Chapter 11 after facing thousands of asbestos-related lawsuits.

The proposed Chapter 11 Plan created an Asbestos Injury Trust under Section 524(g) to handle present and future asbestos-related claims.

The plan treated insured versus uninsured claims differently.

Under Section 1109(b), Truck objected to the plan as a party in interest. Truck argued that the proposed plan exposed it to potentially fraudulent claims because certain insurance required disclosures were not required under the Plan.

The 4th Circuit held that Truck was not a party in interest and therefore did not have standing to object to the Plan.

HOLDING/REASONING

The Supreme Court overruled the 4th Circuit and held that in insurer with financial responsibility for bankruptcy claims is a party in interest under Section 1109(b) that "may raise and may appear and be heard on any issue."

"The general theory behind [Section 1109(b)] is that anyone holding a direct financial stake in the outcome of the case should have an opportunity to participate in the adjudication of any issue that may ultimately shape the disposition of his or her interest."

When Congress uses "party in interest" in bankruptcy provisions when it intends the provision to apply broadly.

The court rejected the "insurance neutral doctrine."

CONSUMER CASE UPDATE

A discussion of recent and notable Chapter 7 and 13 consumer cases

P. Matthew Cox, Esq.
Spencer Fane LLP

MARSHALL V. JOHNSON, **100 F. 4th 914 (7th Cir. 2024)**

Whether a Chapter 13 Standing Trustee is entitled to take a fee for payments made if a case is not confirmed

FACTS

While Edward Johnson's Chapter 13 bankruptcy case was pending, he made payments to the bankruptcy trustee under his proposed repayment plan. But the bankruptcy court never confirmed his plan and ultimately dismissed his case for unreasonable delay. He made about $3,800 in pre-petition plan payments, which included $750.00 in adequate protection payments to a secured creditor.

Consequently, the bankruptcy court found that the trustee must return all of Johnson's undisbursed payments to him without first deducting a statutory percentage fee as compensation.

The trustee filed a direct appeal, arguing that she is entitled to be paid a fee under 28 U.S.C. § 586(e)(2) and 11 U.S.C. § 1326(b), even though Johnson's case was dismissed.

HOLDING/REASONING

The Seventh Circuit agreed with the Ninth and Tenth Circuits that the United States Bankruptcy Code requires the Chapter 13 trustee to return her fee when the debtor's plan is not confirmed.

Within 30 days of filing a proposed repayment plan, a Chapter 13 debtor must begin making payments as "proposed by the plan to the trustee." 11 U.S.C. § 1326(a)(1)(A).

The trustee must retain such payments until a plan is confirmed or denied. Id. § 1326(a)(2).

As relevant here, pre-confirmation payments to creditors are allowed under certain circumstances if they "provide[ ] adequate protection ... to a creditor holding an allowed claim secured by personal property ...." Id. § 1326(a)(1)(C).

If the plan is confirmed, the trustee must distribute the remaining payments in accordance with the plan. Id. § 1326(a)(2). But where, as here, a plan is not confirmed, "the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b)." Id.

This requires "the standing trustee [to] return all of the pre-confirmation payments [she] receives, without first deducting [her] fee." *In re Doll*, 57 F.4th 1129, 1141 (10th Cir. 2023) (emphasis in original).

While § 1326(a)(2) has two exceptions, neither covers the trustee's fee.

As to the first, "[t]he Chapter 13 trustee's fee is not an administrative expense under Section 503(b)," In re Evans, 69 F.4th 1101, 1104 n.2 (9th Cir. 2023), and the trustee has not argued that it is.

REASONING CONT.

As for the second, the trustee's fee is not a payment "previously paid"—because only certain adequate protection payments are permitted pre-confirmation—nor is it a payment "due and owing to creditors." 11 U.S.C. § 1326(a)(2). Because neither exception applies to the Chapter 13 trustee's fee, she must return her fee to the debtor.

The Court explained that § 1326(b) is inapplicable to adequate protection payments because such payments are not payments "under the plan." They are owed under an "order for relief," not the plan. Id. § 1326(a)(1)(C); see also In re Perez, 339 B.R. 385, 398–99 (Bankr. S.D. Tex. 2006), aff'd sub nom. Perez v. Peake, 373 B.R. 468 (S.D. Tex. 2007) ("[A] Chapter 13 debtor ... makes adequate protection payments pursuant to a court order ..., not pursuant to a proposed plan.").

PRACTICE POINTERS

While the court found that the trustee's fee was not an administrative expense, the court noted that administrative expenses could be paid. Can a Chapter 13 Trustee file a fee application for the Chapter 13 staff attorneys?

SECTION 523 DISCHARGEABILITY IN CORPORATE SUBCHAPTER V CASES

The status of whether a corporate debtor is subject to Section 523 in Subchapter V cases and current Circuit split

The Hon. Casey D. Parker

United States Bankruptcy Court, District of Wyoming

CIRCUIT SPLIT

SECTION 523 DOES APPLY TO CORPORATE DEBTORS IN SUBCHAPTER V:

- Fourth Circuit – *In re: Cleary Packaging, LLC,* 36 F. 4th 509 (4th Cir. 2022)
- Fifth Circuit – *In re Matter of GFS Industries LLC*, 99 F. 4th 223 (5th Cir. 2024)

SECTION 523 DOES NOT APPLY TO CORPORATE DEBTORS IN SUBCHAPTER V:

- Ninth Circuit – *In re: Off-Spec Solutions, LLC,* 651 B.R. 862(9th Cir. BAP 2023)

NOTABLE DISTRICT DECISIONS

SECTION 523 DOES APPLY TO CORPORATE DEBTORS IN SUBCHAPTER V:

- District of Colorado – *In ETG Fire, LLC*, No. AP 24-1225 TBM, 2025 WL 915381 (Bankr. D. Colo. Mar. 20, 2025)

SECTION 523 DOES NOT APPLY TO CORPORATE DEBTORS IN SUBCHAPTER V:

- Northern District of Florida – *In re Davidson*, No. 23-30018, 2025 WL 511226 (Bankr. N.D. Fla. Feb. 14, 2025)

HOW COURTS ADDRESSING THE ISSUE HAVE USED DIFFERENT RULES OF STATUTORY CONSTRUCTION AND STATUTORY INTERPRETATION

RULES OF STATUTORY CONSTRUCTION

1) **Plain Language Rule**:

a) *ETG Fire* - As a matter of plain language statutory interpretation, the Court assesses that when Section 1192(2) refers to "any debt … of the kind specified in section 523(a)" that phrase is referring to the 20 categories (and subparts) of debt listed in Section 523(a) — nothing more or less."

a) *Cleary* - Thus, while § 523(a) references numerous discharge provisions of the Bankruptcy Code, § 1192(2) is the more specific, addressing only Subchapter V discharges

a) *GFS Indus.* - § 1192 excepts from discharge "any debt . . . of the kind specified in section 523(a)," and that this language must be applied as written

RULES OF STATUTORY CONSTRUCTION CONT.

2) **Specific Over General**:

a) *ETG Fire* - In particular, the Court agrees with the *Cleary Packaging* appellate panel's conclusion that Section 1192(2), the more specific provision of the Bankruptcy Code which addresses both individual and corporate debtors, should govern over the more general preamble of Section 523(a), which does not refer to the kind of debt which is excepted from discharge

3) **Avoiding Surplusage** - counsels against interpreting statutes in a way that renders any language superfluous

a) *Off Spec* - Interpreting § 1192 to extract from § 523(a) only the list of nondischargeable debts, without its limitation to individuals, would render the amendment surplusage ….If § 1192 makes the debts specified in § 523(a) nondischargeable to all debtors, the concurrent amendment to § 523(a) has no meaning

4) **Identical Words and Phrases**:

a) *Cleary Packaging* - This language in Chapter 12 is virtually identical to the language included in § 1192(2). Moreover, § 523(a) specifically references § 1228(a) discharges, just as it does § 1192 discharges. Yet, the courts construing the scope of § 1228(a) have concluded that § 1228(a)'s discharge exceptions apply to both individual debtors and corporate debtors. Thus, prior interpretations of § 1228(a) support our interpretation of § 1192(2)'s virtually identical language.

RULES OF STATUTORY INTERPRETATION

1) **Contextual Reading**: The court considered the context of Section 1192(2) within the Bankruptcy Code and its structure:

a) *Cleary* - "The context of § 1192(2) within the Bankruptcy Code and the Bankruptcy Code's structure further support our interpretation. It is readily apparent from a review of different Bankruptcy Code chapters that Congress conscientiously defined and distinguished the kinds of debtors covered by each provision. For example, Chapter 7 discharges are explicitly limited to individuals, see 11 U.S.C. § 727(a)(1), as are Chapter 13 discharges, see id. §§ 109(e), 1328. More tellingly, as to traditional Chapter 11 proceedings, Congress explicitly distinguished the discharges of individual debtors from the discharges of corporate debtors in § 1141(d).

b) *GFS Indus.* - other provisions explicitly limit discharges to "individual" debtors, whereas § 1192 applies to both individual and corporate debtors without such a limitation

RULES OF STATUTORY INTERPRETATION CONT.

2) Textual Analysis: The court engaged in a textual analysis of Sections 523(a), 1192(2), and 1141(d), determining that all Subchapter V debtors are subject to the discharge limitations, not just individual debtors:

a) *ETG Fire* - "In Cleary Packaging, the appellate court engaged in a thoughtful and thorough analysis of Sections 523(a), 1192(2), and 1141(d), and determined that "all Subchapter V debtors are textually subject to the discharge limitations, not just individual Subchapter V debtors."

b) *Cleary Packaging* - The section's use of the word "debt" is, we believe, decisive, as it does not lend itself to encompass the "kind" of debtors discussed in the language of § 523(a). This is confirmed yet more clearly by the phrase modifying "debt"— i.e., "of the kind."

c) *GFS Indus* - cannot add words to Section 1192

RULES OF STATUTORY INTERPRETATION CONT.

4) **Legislative Intent**:

a) *ETG Fire* - It is not this Court's place to second guess Congress and certainly not to construe the Bankruptcy Code so as to impose policies which this Court might prefer but which Congress did not adopt.

b) *GFS Indus.* - Subchapter V is a compromise: affording small business debtors unique benefits while subjecting them to **§ 523(a)**'s dischargeability exceptions.

c) *In re Davidson*, No. 23-30018, 2025 WL 511226, at *5 (Bankr. N.D. Fla. Feb. 14, 2025) this Court finds the reasoning of the Ninth Circuit BAP and the bankruptcy courts in the Eleventh Circuit, holding the exceptions to discharge under § 523(a) apply only to individual debtors under § 1192(2), convincing. Such decisions provide the best statutory interpretation of § 1192's *incorporation of 523(a) by giving effect to all the statutory language*, recognizing the long-standing application of § 523(a) to only individual debtors, *and comporting with the overall purpose of the SBRA*.

RULES OF STATUTORY INTERPRETATION CONT.

1) **Ordinary Meaning:**
   a) *Cleary Packaging* - this interpretation of "of the kind" is in line "with the ordinary meaning of the word 'kind' as 'category' or 'sort.'
2) **Harmonization of Provisions:**
   a) *Cleary Packaging* - we find more harmony from following a close textual analysis and contextual review of § 1192(2) and thus conclude that it provides discharges to small business debtors, whether they are individuals or corporations, except with respect to the 21 kinds of debts listed in § 523(a).

sider a criminal defendant charged with crossing state lines to have a sexual encounter with a teenager. If those charges and defenses are made in public, why should college students enjoy a privilege to keep misdeeds secret?

[10] Third, we come to the district judge's concern that identifying Doe would enable some people to infer Roe's identity. Loyola's supplemental memo contends that it is "unlikely that there are observers of this case who know enough about [Doe's] past romantic relationships and disciplinary history to discover the identity of the nonparties involved simply from having [Doe's] name made public." There is another possibility: that everyone who could put two and two together already has done so. See *Doe v. Smith*, 429 F.3d 706, 710 (7th Cir. 2005). The people who might be able to identify Roe after learning Doe's identity are those who knew they had been dating before Doe's expulsion. These people also likely learned about the expulsion. If they did not put two and two together then, why would they do so now? Still, maybe there is a reason why the litigation could provide that information, even when the expulsion did not. An evidentiary hearing could explore the subject, perhaps with input from Roe about the possible effect of disclosing Doe's identity; a court of appeals is not the right forum for factual findings.

Then there is the question whether Roe has a legal entitlement to concealment. Courts often extend the protection of anonymity to victims of sex crimes, *Blue Cross*, 112 F.3d at 872, and perhaps that is the best analogy for Roe. See also Eugene Volokh, *The Law of Pseudonymous Litigation*, 73 Hastings L.J. 1353, 1430–37 (2022) (collecting decisions pro and con on whether status as a victim supports anonymity). There is also a question whether 20 U.S.C. § 1232g(b) offers some protection to Roe. This issue was flagged but not resolved in *Indiana University*, 101 F.4th at 493. We do not resolve it here either. We lack the benefit of an adversarial exchange in either the briefs or the post-argument memos and think it best to postpone decision until the issue has been joined. Cf. *United States v. Sineneng-Smith*, 590 U.S. 371, 140 S.Ct. 1575, 206 L.Ed.2d 866 (2020).

Indiana University remanded to the district court so that the plaintiff could decide whether to dismiss the suit rather than reveal his name. That course is appropriate here as well. If Doe wants to continue the suit—and if it is not moot—then the district judge must decide whether Roe is entitled to anonymity and, if she is, whether putting Doe's name in the public record would be equivalent to revealing Roe's identity as well. If after the proceedings on remand a live controversy remains, any appeal will return to this panel, with new briefs limited to newly arising issues.

Remanded for proceedings consistent with this opinion.

Marilyn O. MARSHALL, Trustee-Appellant,

v.

Edward JOHNSON, Debtor-Appellee.

No. 23-2212

United States Court of Appeals, Seventh Circuit.

Argued February 15, 2024

Decided May 3, 2024

Background: Following dismissal of his case prior to confirmation of a plan, Chap-

ter 13 debtor filed motion to disgorge the statutory fee that standing trustee had deducted from plan payments received from him during the case and had not returned to him when the case was dismissed. Standing trustee filed notice of objection. The United States Bankruptcy Court for the Northern District of Illinois, Timothy A. Barnes, J., 650 B.R. 904, granted debtor's motion. Trustee appealed.

Holdings: The Court of Appeals, Kirsch, Circuit Judge, held that:

(1) on issue of first impression, provision governing payments made after Chapter 13 plan had been confirmed was inapplicable to adequate protection payments, and

(2) on issue of first impression, trustee did not have right to keep her statutory percentage fee following dismissal of debtor's case prior to confirmation of plan.

Affirmed.

1. Bankruptcy ⚿3782

Whether standing Chapter 13 trustee must return her statutory percentage fee if debtor's plan is not confirmed is question of law that Court of Appeals reviews de novo. 11 U.S.C.A. § 1326(b); 28 U.S.C.A. § 586(e)(2).

2. Statutes ⚿1079

In interpreting statute, court begins its analysis with statutory text.

3. Bankruptcy ⚿3717

Upon preconfirmation dismissal of Chapter 13 case, the standing Chapter 13 trustee must return all of the pre-confirmation payments she receives, without first deducting her fee. 11 U.S.C.A. § 1326(b); 28 U.S.C.A. § 586(e)(2).

4. Bankruptcy ⚿3152

The standing Chapter 13 trustee's statutory percentage fee is not an administrative expense. 11 U.S.C.A. §§ 503(b) 1326(b); 28 U.S.C.A. § 586(e)(2).

5. Bankruptcy ⚿3152

The standing Chapter 13 trustee's statutory percentage fee is not a payment "previously paid"—because only certain adequate protection payments are permitted pre-confirmation—and it is not a payment "due and owing to creditors." 11 U.S.C.A. § 1326(b); 28 U.S.C.A. § 586(e)(2).

6. Bankruptcy ⚿3703

Provision governing payments made after Chapter 13 plan had been confirmed was inapplicable to adequate protection payments because they were owed under "order for relief," not plan, and such payments were not payments "under the plan." 11 U.S.C.A. § 1326(b).

7. Bankruptcy ⚿3152, 3717

Standing Chapter 13 trustee did not have right to keep her statutory percentage fee following dismissal of debtor's case prior to confirmation of plan, since adequate protection payments were not payments "under plans" and provision only addressed source of funds that could be accessed to pay standing trustee fees. 28 U.S.C.A. § 586(e)(2).

8. Bankruptcy ⚿3717

Statutory provision governing what happens to collected payments if a Chapter 13 plan is not confirmed mandates that the standing trustee return all payments, including her fee, to the debtor. 11 U.S.C.A. § 1326(b).

9. Statutes ⚿1377

Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress

acts intentionally and purposely in the disparate inclusion or exclusion.

Appeal from the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division. No. 22-04449 — **Timothy A. Barnes**, *Bankruptcy Judge.*

Onofrio A. Olivadoti, Attorney, Office of the Chapter 13 Trustee, Chicago, IL, for Trustee-Appellant.

Michael A. Miller, Attorney, Semrad Law Firm, LLC, Chicago, IL, for Debtor-Appellee.

James J. Haller, Attorney, Haller Law, Mundelein, IL, for Amici Curiae National Association of Consumer Bankruptcy Attorneys, National Consumer Bankruptcy Rights Center.

Before Sykes, Chief Judge, and Easterbrook and Kirsch, Circuit Judges.

Kirsch, Circuit Judge.

While Edward Johnson's Chapter 13 bankruptcy case was pending, he made payments to the bankruptcy trustee under his proposed repayment plan. But the bankruptcy court never confirmed his plan and ultimately dismissed his case for unreasonable delay. Consequently, the bankruptcy court found that the trustee must return all of Johnson's undisbursed payments to him without first deducting a statutory percentage fee as compensation. The trustee filed a direct appeal, arguing that she is entitled to be paid a fee under 28 U.S.C. § 586(e)(2) and 11 U.S.C. § 1326(b), even though Johnson's case was dismissed. Because we agree with the Ninth and Tenth Circuits that the United States Bankruptcy Code requires the Chapter 13 trustee to return her fee when the debtor's plan is not confirmed, we affirm.

I

Edward Johnson petitioned for bankruptcy relief under Chapter 13 of the United States Bankruptcy Code. While his case was pending before the bankruptcy court, he made around $3,800 in payments to the bankruptcy trustee, Marilyn O. Marshall, under his proposed repayment plan. Of those payments, the trustee paid around $750 in pre-confirmation adequate protection payments to Johnson's creditors. The rest of the payments were to be disbursed upon plan confirmation. But despite the bankruptcy court holding multiple confirmation hearings, the court never confirmed Johnson's plan because he was unable to satisfactorily address an outstanding loan and his domestic support obligations. The bankruptcy court ultimately dismissed his case for unreasonable delay.

Before returning Johnson's undisbursed payments to him, the trustee had deducted a percentage fee of around $260 as compensation under 28 U.S.C. § 586(e)(2) and 11 U.S.C. § 1326(b). Johnson then filed a motion requesting that the trustee disgorge her fee. The bankruptcy court granted Johnson's motion and ordered the trustee to return all undisbursed payments, including her fee, to him. The court reasoned that the trustee did not have statutory authority to deduct her fee because Johnson's plan was not confirmed. The trustee filed a direct appeal.

II

[1] Whether the Chapter 13 bankruptcy trustee must return her fee if the debtor's plan is not confirmed is a question of law that we review de novo, see *Stamat v. Neary*, 635 F.3d 974, 979 (7th Cir. 2011), and is one of first impression in our circuit.

[2–5] We begin our analysis with the statutory text. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69, 131 S.Ct. 716,

178 L.Ed.2d 603 (2011). Within 30 days of filing a proposed repayment plan, a Chapter 13 debtor must begin making payments as "proposed by the plan to the trustee." 11 U.S.C. § 1326(a)(1)(A). The trustee must retain such payments until a plan is confirmed or denied. *Id.* § 1326(a)(2). As relevant here, pre-confirmation payments to creditors are allowed under certain circumstances if they "provide[ ] adequate protection ... to a creditor holding an allowed claim secured by personal property ...." *Id.* § 1326(a)(1)(C). If the plan is confirmed, the trustee must distribute the remaining payments in accordance with the plan. *Id.* § 1326(a)(2). But where, as here, a plan is not confirmed, "the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b)." *Id.* This requires "the standing trustee [to] return all of the pre-confirmation payments [she] receives, without first deducting [her] fee." *In re Doll*, 57 F.4th 1129, 1141 (10th Cir. 2023) (emphasis in original). While § 1326(a)(2) has two exceptions, neither covers the trustee's fee. As to the first, "[t]he Chapter 13 trustee's fee is not an administrative expense under Section 503(b)," *In re Evans*, 69 F.4th 1101, 1104 n.2 (9th Cir. 2023), and the trustee has not argued that it is. As for the second, the trustee's fee is not a payment "previously paid"—because only certain adequate protection payments are permitted pre-confirmation—nor is it a payment "due and owing to creditors." 11 U.S.C. § 1326(a)(2). Because neither exception applies to the Chapter 13 trustee's fee, she must return her fee to the debtor.

[6] The trustee argues that § 1326(b) authorizes her to keep her fee when making pre-confirmation adequate protection payments to creditors. This argument is unavailing. That provision states: "Before or at the time of each payment to creditors under the plan, there shall be paid ... the percentage fee fixed for [the] standing trustee ...." *Id.* § 1326(b)(2). But § 1326(b) "addresses only payments made after a plan has been confirmed." *In re Doll*, 57 F.4th at 1145 (emphasis in original); see also *In re Evans*, 69 F.4th at 1107 ("The plain text of Section 1326(b) unambiguously shows that it is the specific provision governing when a trustee 'shall be paid': 'before or at the time of each payment to creditors under the plan,' which necessarily means post-confirmation of a plan."). Because Johnson's plan was never confirmed, § 1326(b) is inapplicable. And regardless, § 1326(b) is inapplicable to adequate protection payments because such payments are not payments "under the plan." They are owed under an "order for relief," not the plan. *Id.* § 1326(a)(1)(C); see also *In re Perez*, 339 B.R. 385, 398–99 (Bankr. S.D. Tex. 2006), aff'd sub nom. *Perez v. Peake*, 373 B.R. 468 (S.D. Tex. 2007) ("[A] Chapter 13 debtor ... makes adequate protection payments pursuant to a court order ..., not pursuant to a proposed plan.").

[7, 8] Under the same logic, the trustee also has no right to keep her fee under 28 U.S.C. § 586(e)(2), which states that the trustee "shall collect such percentage fee from all payments received by such individual under plans ...." As discussed, adequate protection payments are not payments "under plans," and thus this section is inapplicable to the pre-confirmation payments the trustee made. And § 586(e)(2) is irrelevant, as it "only addresses the source of funds that may be accessed to pay standing trustee fees." *In re Doll*, 57 F.4th at 1140; see also *id.* at 1144 (" '[C]ollect' in 28 U.S.C. § 586(e)(2) cannot mean ... that the act of 'collection' of funds irrevocably constitutes a payment to the Trustee of his

fees."); *In re Evans*, 69 F.4th at 1108 ("Section 586 only provides that when a trustee does collect her fee pursuant to 1326(b), she does so by collecting her fee from all payments received under confirmed plans.") (cleaned up). Rather, § 1326(a) governs "what happens to such [collected] payments if a Chapter 13 plan is not confirmed." *In re Doll*, 57 F.4th at 1140. Section 1326(a)(2) mandates that the trustee return all payments, including her fee, to the debtor. Sections 1326(b) and 586(e)(2) do not compel a different result.

[9] The treatment of the trustee's fee in other Chapters of the Bankruptcy Code reinforces our interpretation. In cases brought under Chapter 12 and Subchapter V of Chapter 11, "Congress provided explicitly that the standing trustee should first deduct his or her fee before returning pre-confirmation payments to the debtor." *Id.* at 1141 (emphasis in original); see 11 U.S.C. § 1226(a)(2) ("If a plan is not confirmed, the trustee shall return any such payments to the debtor, after deducting ... the percentage fee fixed for such standing trustee."); 11 U.S.C. § 1194(a)(3) ("If a plan is not confirmed, the trustee shall return any such payments to the debtor after deducting ... any fee owing to the trustee."). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (cleaned up). Put differently, if Congress intended for the Chapter 13 trustee to deduct her fee before returning pre-confirmation payments, it would have expressly said so. *In re Doll*, 57 F.4th at 1142.

Accordingly, we join the Ninth and Tenth Circuits in holding that the Chapter 13 trustee must return her fee when, as here, the debtor's plan is not confirmed.

AFFIRMED

Robert J. POPE, Petitioner-Appellee,

v.

Je'Leslie TAYLOR, Interim Warden, Racine Correctional Institution, Respondent-Appellant.

No. 23-2894

United States Court of Appeals, Seventh Circuit.

Argued April 9, 2024

Decided May 6, 2024

Background: After affirmance, 389 Wis.2d 390, 936 N.W.2d 606, of reversal of state postconviction relief with respect to state prisoner's convictions for two counts of first-degree intentional homicide and sentence of life in prison without parole, prisoner petitioned for federal habeas relief, alleging that he was denied his right to meaningful direct appeal of his convictions. The United States District Court for the Eastern District of Wisconsin, Brett H. Ludwig, J., 2023 WL 5672593, granted petition, and state appealed.

Holdings: The Court of Appeals, Easterbrook, Circuit Judge, held that state's 28-year delay in resolving petitioner's direct appeal made state procedures ineffective to protect his rights, thus warranting federal habeas relief.

Affirmed.

estate tax, we affirm the judgment of the Court of Appeals.

It is so ordered.

TRUCK INSURANCE EXCHANGE, Petitioner

v.

KAISER GYPSUM COMPANY, INC., et al.

No. 22-1079

Supreme Court of the United States.

Argued March 19, 2024

Decided June 6, 2024

Background: Chapter 11 debtors, the former manufacturers and sellers of asbestos-containing products, sought confirmation of joint plan of reorganization which, inter alia, would establish a channeling injunction and trust to resolve debtors' present and future asbestos personal-injury liabilities. Debtors' primary liability insurer objected. The United States Bankruptcy Court for the Western District of North Carolina, J. Craig Whitley, J., issued proposed findings of fact and conclusions of law, and recommended confirmation of plan. The District Court, Graham C. Mullen, Senior District Judge, adopted the findings of fact and conclusions of law, 2021 WL 3215102, and confirmed plan, 2021 WL 3239513. Insurer appealed. Debtors and their corporate parent moved to dismiss appeal. The United States Court of Appeals for the Fourth Circuit, Agee, Circuit Judge, 60 F.4th 73, affirmed. Certiorari was granted.

Holdings: In a unanimous opinion, the Supreme Court, Justice Sotomayor, held that an insurer with financial responsibility for a bankruptcy claim is a "party in interest" that may raise and be heard on any issue in a Chapter 11 case, including an objection to a proposed plan of reorganization.

Court of Appeals' judgment reversed, and case remanded.

Justice Alito took no part in the consideration or decision of the case.

1. Bankruptcy ⚿2363.1

Bankruptcy offers individuals and businesses in financial distress a "fresh start" to reorganize, discharge their debts, and maximize the property available to creditors.

2. Bankruptcy ⚿3501

Chapter 11 of the Bankruptcy Code enables a debtor company to reorganize its business under a court-approved plan governing the distribution of assets to creditors.

3. Bankruptcy ⚿3568(1)

Chapter 11 plan, which is primarily the product of negotiations between the debtor and creditors, governs the distribution of valuable assets from the debtor's estate and often keeps the business operating as a going concern.

4. Bankruptcy ⚿3501

Chapter 11 of the Bankruptcy Code strikes a balance between a debtor's interest in reorganizing and restructuring its debts and the creditors' interest in maximizing the value of the bankruptcy estate.

5. Bankruptcy ⚿2205

Section of the Bankruptcy Code allowing any "party in interest" to raise and be heard on any issue in a Chapter 11 case addresses which stakeholders can partici-

pate, and to what extent, in reorganization proceedings. 11 U.S.C.A. § 1109(b).

6. Bankruptcy ⚿3533.1, 3566.1, 3626

Under the Bankruptcy Code, a "party in interest" enjoys certain rights in reorganization proceedings, including the ability to file a Chapter 11 plan when a trustee has been appointed, request the appointment or removal of a trustee, challenge the good faith of persons voting to approve a plan, and object to confirmation of a plan. 11 U.S.C.A. §§ 1104, 1105, 1109(b), 1121(c)(1), 1126(e), 1128(b).

7. Bankruptcy ⚿3555

In response to the unique challenges faced by companies filing for bankruptcy because of asbestos liability, which, due to latency period of as long as 40 years for some asbestos-related diseases, can expect a continuing stream of claims arriving on a long and unpredictable timeline, Congress enacted subsection of the Bankruptcy Code allowing a Chapter 11 debtor with substantial asbestos-related liability to establish and fund a trust that assumes debtor's liability for damages allegedly caused by presence of, or exposure to, asbestos or asbestos-containing products, and into which all present and future claims are channeled. 11 U.S.C.A. § 524(g).

8. Bankruptcy ⚿3555

Safeguards imposed by subsection of the Bankruptcy Code allowing a Chapter 11 debtor with substantial asbestos-related liability to establish and fund a trust into which all present and future asbestos-related claims are channeled ensure that health claims can be asserted only against the trust, that debtor's operating entities will be protected from an onslaught of crippling lawsuits that could jeopardize the entire reorganization effort, and that future claimants are treated identically to present claimants. 11 U.S.C.A. § 524(g).

9. Bankruptcy ⚿2205

Courts must determine on a case-by-case basis whether a prospective party has a sufficient stake in reorganization proceedings to be a "party in interest." 11 U.S.C.A. § 1109(b).

10. Bankruptcy ⚿3566.1

An insurer with financial responsibility for a bankruptcy claim is a "party in interest" that may raise and be heard on any issue in a Chapter 11 case, including an objection to a proposed plan of reorganization; such insurer may be directly and adversely affected by a reorganization plan in myriad ways, as a plan may, for example, impair insurer's contractual right to control settlement or defend claims, abrogate insurer's right to contribution from other insurance carriers, or impair insurer's financial interests by inviting fraudulent claims, and that financial exposure is sufficient to give insurer a right to voice its objections in reorganization proceedings. 11 U.S.C.A. § 1109(b).

See publication Words and Phrases for other judicial constructions and definitions.

11. Bankruptcy ⚿2205

Section of the Bankruptcy Code allowing any "party in interest" to raise and be heard on any issue in a Chapter 11 case provides an illustrative but not exhaustive list of parties in interest; a common thread uniting the seven listed parties is that each may be directly affected by a reorganization plan either because they have a financial interest in the estate's assets (the debtor, creditor, and equity security holder) or because they represent parties that do (a creditors' committee, an equity security holders' committee, a trustee, and an indenture trustee). 11 U.S.C.A. § 1109(b).

12. Bankruptcy ⚿2205

General theory behind the section of the Bankruptcy Code allowing any "party

in interest" to raise and be heard on any issue in a Chapter 11 case is that anyone holding a direct financial stake in the outcome of the case should have an opportunity, either directly or through an appropriate representative, to participate in the adjudication of any issue that may ultimately shape the disposition of his or her interest. 11 U.S.C.A. § 1109(b).

13. Bankruptcy ⚿2021.1

Congress uses the phrase "party in interest" in bankruptcy provisions when it intends the provision to apply "broadly."

14. Bankruptcy ⚿2205

Term "party," as used in the section of the Bankruptcy Code allowing any "party in interest" to raise and be heard on any issue in a Chapter 11 case, is best understood as meaning a person who constitutes or is one of those who compose one or the other of the two sides in an action or affair, one concerned in an affair, or a participator. 11 U.S.C.A. § 1109(b).

See publication Words and Phrases for other judicial constructions and definitions.

15. Bankruptcy ⚿2205

Term "interest," as used in the section of the Bankruptcy Code allowing any "party in interest" to raise and be heard on any issue in a Chapter 11 case, is best understood as meaning concern, or the state of being concerned or affected, especially with respect to advantage, personal or general. 11 U.S.C.A. § 1109(b).

See publication Words and Phrases for other judicial constructions and definitions.

16. Bankruptcy ⚿2205

Plain meaning of phrase "party in interest," as used in the section of the Bankruptcy Code allowing any "party in interest" to raise and be heard on any issue in a Chapter 11 case, refers to entities that are potentially concerned with or affected by a proceeding. 11 U.S.C.A. § 1109(b).

See publication Words and Phrases for other judicial constructions and definitions.

17. Statutes ⚿1082

Court's analysis of a term in a particular statute does not apply across all other, unrelated statutory schemes; rather, the term's meaning elsewhere turns on the text, structure, context, history, and purpose of those statutory provisions.

18. Bankruptcy ⚿2205

In enacting the section of the Bankruptcy Code allowing any "party in interest" to raise and be heard on any issue in a Chapter 11 case, Congress continued its efforts to encourage and promote greater participation in reorganization cases. 11 U.S.C.A. § 1109(b).

19. Bankruptcy ⚿2205

Broad participation, as encouraged by the section of the Bankruptcy Code allowing any "party in interest" to raise and be heard on any issue in a Chapter 11 case, promotes a fair and equitable reorganization process. 11 U.S.C.A. § 1109(b).

20. Bankruptcy ⚿2205

Bankruptcy Code seeks to prevent the danger inherent in any reorganization plan proposed by a debtor that the plan will simply turn out to be too good a deal for the debtor's owners; the section of the Code allowing any "party in interest" to raise and be heard on any issue in a Chapter 11 case addresses that concern. 11 U.S.C.A. § 1109(b).

21. Bankruptcy ⚿2205

Section of the Bankruptcy Code allowing any "party in interest" to raise and be heard on any issue in a Chapter 11 case was designed to serve the policies of inclusion underlying the Chapter 11 process. 11 U.S.C.A. § 1109(b).

22. Bankruptcy ⚿2205

When a proposed Chapter 11 plan allows a party to put its hands into other people's pockets, the ones with the pockets are entitled to be fully heard and to have their legitimate objections addressed. 11 U.S.C.A. § 1109(b).

23. Bankruptcy ⚿2205, 3566.1

"Insurance neutrality" doctrine, whereby courts faced with question of whether a Chapter 11 debtor's insurer is a "party in interest" that may raise and be heard on any issue in the case, in particular, an objection to a proposed reorganization plan, look to whether the plan increases the insurer's prepetition obligations or impairs the insurer's prepetition policy rights, is wrong approach to take in answering the question; doctrine is conceptually wrong, as it conflates the merits of insurer's plan objection with the threshold party-in-interest inquiry, and it makes little practical sense, since by focusing on insurer's prepetition obligations and policy rights it wrongly ignores all the other ways in which bankruptcy proceedings and reorganization plans can alter and impose obligations on insurers. 11 U.S.C.A. § 1109(b).

24. Bankruptcy ⚿2205

Inquiry under the section of the Bankruptcy Code allowing any "party in interest" to raise and be heard on any issue in a Chapter 11 case asks whether the reorganization proceedings might affect a prospective party, not how a particular reorganization plan actually affects that party. 11 U.S.C.A. § 1109(b).

25. Statutes ⚿1405

"Parade of horribles" argument generally cannot surmount the plain language of a statute.

26. Bankruptcy ⚿2205

Section of the Bankruptcy Code allowing any "party in interest" to raise and be heard on any issue in a Chapter 11 case provides parties in interest only an opportunity to be heard, not a vote or a veto in the proceedings. 11 U.S.C.A. § 1109(b).

27. Bankruptcy ⚿2125

Bankruptcy courts have equitable discretion to control participation in a proceeding. 11 U.S.C.A. § 105(a).

28. Bankruptcy ⚿2205

Under the section of the Bankruptcy Code allowing any "party in interest" to raise and be heard on any issue in a Chapter 11 case, a "party in interest" is not intended to include literally every conceivable entity that may be involved in or affected by the proceedings; there may be difficult cases that require courts to evaluate whether truly peripheral parties have a sufficiently direct interest. 11 U.S.C.A. § 1109(b).

See publication Words and Phrases for other judicial constructions and definitions.

Syllabus *

Petitioner Truck Insurance Exchange is the primary insurer for companies that manufactured and sold products containing asbestos. Two of those companies, Kaiser Gypsum Co. and Hanson Permanente Cement (Debtors), filed for Chapter 11 bankruptcy after facing thousands of asbestos-related lawsuits. As part of the bankruptcy process, the Debtors filed a proposed reorganization plan (Plan). That Plan creates an Asbestos Personal Injury Trust (Trust) under 11 U.S.C. § 524(g), a provision that allows Chapter 11 debtors with substantial

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

asbestos-related liability to fund a trust and channel all present and future asbestos-related claims into that trust. Truck is contractually obligated to defend each covered asbestos personal injury claim and to indemnify the Debtors for up to $500,000 per claim. For their part, the Debtors must pay a $5,000 deductible per claim, and assist and cooperate with Truck in defending the claims. The Plan treats insured and uninsured claims differently, requiring insured claims to be filed in the tort system for the benefit of the insurance coverage, while uninsured claims are submitted directly to the Trust for resolution.

Truck sought to oppose the Plan under § 1109(b) of the Bankruptcy Code, which permits any "party in interest" to "raise" and "be heard on any issue" in a Chapter 11 bankruptcy. Among other things, Truck argues that the Plan exposes it to millions of dollars in fraudulent claims because the Plan does not require the same disclosures and authorizations for insured and uninsured claims. Truck also asserts that the Plan impermissibly alters its rights under its insurance policies. The District Court confirmed the Plan. It concluded, among other things, that Truck had limited standing to object to the Plan because the Plan was "insurance neutral," *i.e.,* it did not increase Truck's prepetition obligations or impair its contractual rights under its insurance policies. The Fourth Circuit affirmed, agreeing that Truck was not a "party in interest" under § 1109(b) because the plan was "insurance neutral."

Held: An insurer with financial responsibility for bankruptcy claims is a "party in interest" under § 1109(b) that "may raise and may appear and be heard on any issue" in a Chapter 11 case. Pp. 1423 – 1428.

(a) Section 1109(b)'s text, context, and history confirm that an insurer such as Truck with financial responsibility for a bankruptcy claim is a "party in interest" because it may be directly and adversely affected by the reorganization plan. Pp. 1423 – 1427.

(1) Section 1109(b)'s text is capacious. To start, it provides an illustrative but not exhaustive list of parties in interest, all of which are directly affected by a reorganization plan either because they have a financial interest in the estate's assets or because they represent parties that do. This Court has observed that Congress uses the phrase "party in interest" in bankruptcy provisions when it intends the provision to apply "broadly." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U. S. 1, 7, 120 S.Ct. 1942, 147 L.Ed.2d 1. This understanding aligns with the ordinary meaning of the terms "party" and "interest," which together refer to entities that are potentially concerned with, or affected by, a proceeding. The historical context and purpose of § 1109(b) also support this interpretation. Congress consistently has acted to promote greater participation in reorganization proceedings. That expansion of participatory rights continued with the enactment of § 1109(b). Broad participation promotes a fair and equitable reorganization process. Pp. 1423 – 1426.

(2) Applying these principles, insurers such as Truck are parties in interest. An insurer with financial responsibility for bankruptcy claims can be directly and adversely affected by the reorganization proceedings in myriad ways. In this case, for example, Truck will have to pay the vast majority of the Trust's liability, and § 524(g)'s channeling injunction, which stays any action against the Debtors, means that Truck would stand alone in carrying that financial burden. According to Truck, however, a plan that lacks the disclosure requirements for the insured claims risks exposing Truck to millions of

dollars in fraudulent tort claims. The Government frames Truck's interest slightly differently, but the result is the same: Where a proposed plan "allows a party to put its hands into other people's pockets, the ones with the pockets are entitled to be fully heard and to have their legitimate objections addressed." *In re Global Indus. Technologies, Inc.*, 645 F. 3d 201, 204.

Providing Truck an opportunity to be heard is consistent with § 1109(b)'s purpose of promoting a fair and equitable reorganization process. Here, the Plan eliminates the Debtors ongoing liability, and claimants similarly have little incentive to propose barriers to their ability to recover from Truck. Truck may well be the only entity with an incentive to identify problems with the Plan. Pp. 1425 – 1427.

(b) The Court of Appeals looked exclusively at whether the Plan altered Truck's contract rights or its "quantum of liability." This approach, known as the "insurance neutrality" doctrine, is conceptually wrong and makes little practical sense. Conceptually, the doctrine conflates the merits of an objection with the threshold party in interest inquiry. The § 1109(b) inquiry asks whether the reorganization proceedings might affect a prospective party, not how a particular reorganization plan actually affects that party. Practically, the doctrine is too limited in its scope. By focusing on the insurer's prepetition obligations and policy rights, the doctrine wrongly ignores all the other ways in which bankruptcy proceedings and reorganization plans can alter and impose obligations on insurers and debtors. The fact that Truck's financial exposure may be directly and adversely affected by a plan is sufficient to give Truck a right to voice its objections. Finally, in resisting the text of § 1109(b), the Debtors emphasize the risks of allowing "peripheral parties" to derail a reorganization. This "parade of horribles" argument cannot override the statute's text, and in any event, § 1109(b) provides parties in interest only an opportunity to be heard—not a vote or a veto in the proceedings. In all events, the Court today does not opine on the outer bounds of § 1109. Difficult cases may require courts to evaluate whether truly peripheral parties have a sufficiently direct interest to be heard. This case is not one of them because insurers such as Truck with financial responsibility for claims are not peripheral parties. Pp. 1426 – 1428.

60 F.4th 73, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which all other Members joined, except ALITO, J., who took no part in the consideration or decision of the case.

Allyson N. Ho, Dallas, TX for Petitioner.

Anthony A. Yang, for the United States, as amicus curiae, supporting petitioner.

C. Kevin Marshall, Washington, DC, for Debtor Respondents.

David C. Frederick, Washington, DC, for Claimant Respondents.

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For U.S. Supreme Court briefs, see:

2023 WL 6215094 (Reply.Brief)

2024 WL 841922 (Reply.Brief)

2023 WL 8652822 (Pet.Brief)

2024 WL 328749 (Resp.Brief)

2024 WL 328747 (Resp.Brief)

Justice SOTOMAYOR delivered the opinion of the Court.

The Bankruptcy Code allows any "party in interest" to "raise" and "be heard on any issue" in a Chapter 11 bankruptcy. 11 U.S.C. § 1109(b). The question in this case is whether an insurer with financial responsibility for a bankruptcy claim is a "party in interest" under this provision.

Truck Insurance Exchange (Truck) is the primary insurer for companies that manufactured and sold products containing asbestos. Those companies filed for Chapter 11 bankruptcy after facing thousands of asbestos-related lawsuits. Truck is obligated to pay up to $500,000 per asbestos claim covered under its insurance contracts with the companies. Truck sought to object to the companies' bankruptcy reorganization plan primarily because the plan lacked disclosure requirements that Truck thought could save it from paying millions of dollars in fraudulent claims.

The Court of Appeals concluded that Truck was not a "party in interest" because the reorganization plan was "insurance neutral"; that is, the plan neither increased Truck's prepetition obligations nor impaired its rights under the insurance contracts. This Court disagrees. The insurance neutrality doctrine conflates the merits of an insurer's objection with the threshold § 1109(b) question of who qualifies as a "party in interest." Section 1109(b) asks whether the reorganization proceedings might directly affect a prospective party, not how a particular reorganization plan actually affects that party.

Truck is a "party in interest" under § 1109(b). An insurer with financial responsibility for a bankruptcy claim is sufficiently concerned with, or affected by, the proceedings to be a "party in interest" that can raise objections to a reorganization plan. Section 1109(b) grants insurers neither a vote nor a veto; it simply provides them a voice in the proceedings.

I

A

[1–4] Bankruptcy offers individuals and businesses in financial distress a fresh

start to reorganize, discharge their debts, and maximize the property available to creditors. "Chapter 11 of the Bankruptcy Code enables a debtor company to reorganize its business under a court-approved plan governing the distribution of assets to creditors." *U. S. Bank N. A. v. Village at Lakeridge, LLC*, 583 U.S. 387, 389, 138 S.Ct. 960, 200 L.Ed.2d 218 (2018). This plan, which is primarily the product of negotiations between the debtor and creditors, "govern[s] the distribution of valuable assets from the debtor's estate and often keep[s] the business operating as a going concern." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 455, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017). Chapter 11 strikes "a balance between a debtor's interest in reorganizing and restructuring its debts and the creditors' interest in maximizing the value of the bankruptcy estate." *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008).

[5] Section 1109(b) of the Bankruptcy Code addresses which stakeholders can participate, and to what extent, in these reorganization proceedings:

> "A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter."

[6] A "party in interest" enjoys certain rights in the proceedings, including the ability to file a Chapter 11 plan when a trustee has been appointed, 11 U.S.C. § 1121(c)(1); request the appointment or removal of a trustee, §§ 1104, 1105; challenge the good faith of persons voting to approve a plan, § 1126(e); and object to confirmation of a plan, § 1128(b).

B

[7] This case concerns the Chapter 11 reorganization of companies facing overwhelming asbestos liability. Exposure to asbestos, a natural mineral used in industrial work, has led to devastating health consequences for millions of people. See National Cancer Institute, Asbestos Exposure and Cancer Risk (Nov. 29, 2021). Companies filing for bankruptcy because of asbestos liability face unique challenges. " '[B]ecause of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected.' " *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Claims therefore arrive on a long and unpredictable timeline. If bankruptcy proceedings resolved only existing asbestos liability, companies would face unknown future liability and claimants might be unable to recover just because their injuries had not yet manifested.

[8] Congress responded to these challenges in § 524(g) of the Bankruptcy Code. This section allows a Chapter 11 debtor with substantial asbestos-related liability to establish and fund a trust that assumes the debtor's liability for "damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products." § 524(g)(2)(B)(i)(I). Section 524(g) then channels all present and future claims into the trust by "enjoin[ing] entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery" for claims "to be paid in whole or in part by [the] trust." Finally, § 524(g) imposes safeguards, including the appointment of a representative to protect the interest of future claimants, § 524(g)(4)(B)(i); treatment of "present claims and future demands that involve similar claims in substantially the same manner,"

§ 524(g)(2)(B)(ii)(V); and approval from at least 75% of current claimants, § 524(g)(2)(B)(ii)(IV)(bb). This all "ensure[s] that health claims can be asserted only against the Trust and that [the company's] operating entities will be protected from an onslaught of crippling lawsuits that could jeopardize the entire reorganization effort." *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640 (C.A.2 1988). It also ensures that "future claimants" are "treated identically to the present claimants." *Ibid.*

C

Kaiser Gypsum Company, Inc., and its parent company, Hanson Permanente Cement, Inc., manufactured and sold products that, at some point, contained asbestos. The companies faced tens of thousands of asbestos-related lawsuits as a result. To resolve their liabilities, both companies (Debtors) filed for Chapter 11 bankruptcy. The Bankruptcy Court in turn appointed representatives for the current and future asbestos claimants (Claimants). The Debtors eventually agreed on a proposed reorganization plan (Plan) with the Claimants, various creditors and government agencies, and all but one of their insurance providers.

The Plan creates a § 524(g) Asbestos Personal Injury Trust (Trust) that assumes the Debtors' liabilities and is funded by the Debtors and their parent company. The Plan also transfers "all of the Debtors' rights" under their insurance contracts to the Trust, including "all rights to coverage and insurance proceeds." App. to Pet. for Cert. 181a.

Truck was the Debtors' primary insurer. It issued policies that covered the Debtors from 1965 through 1983. Truck is contractually obligated to defend each covered asbestos personal injury claim and typically indemnify the Debtors for up to $500,000 per claim. The Debtors have to pay a $5,000 deductible per claim, and assist and cooperate with Truck in defending against the claims. The Plan required the Bankruptcy Court to make a finding that the Debtors' conduct in the bankruptcy proceedings neither violated this assistance-and-cooperation duty nor breached any implied covenant of good faith and fair dealing (Plan Finding).

The Plan treats insured and uninsured claims differently. Insured claims are filed "in the tort system to obtain the benefit of [the] insurance coverage." *Id.*, at 241a. Truck has to defend these lawsuits, and if the claimant obtains a favorable judgment, the Trust pays the deductible and Truck pays up to $500,000 per claim. Uninsured claims, however, are submitted directly to the Trust for resolution. As part of that process, claimants have to identify "all other [related] claims" and file a release authorizing the Trust to obtain documentation from other asbestos trusts about other submitted claims. See 2 App. 428–431. These disclosure requirements are intended to reduce fraudulent and duplicative claims.[1]

Truck was the only party involved in the bankruptcy that did not support the Plan.

1. Without these requirements, Truck contends, it can be difficult to trace an asbestos injury to a particular exposure or to identify earlier claims against other entities. Knowing a claimant's other exposures and claims helps prevent inflated recoveries. The Debtors and Claimants contend that Truck was not entitled to these disclosures before bankruptcy and could still obtain them in discovery in the tort system. That ignores the practical and legal consequences of the Debtors' bankruptcy petition. See *infra*, at 1427 – 1428. Indeed, in recent years, "nearly every Section 524(g) trust has included almost identical fraud-prevention measures to protect debtors and their insurers." Brief for Petitioner 10. In any event, these are merits arguments on which Truck is entitled to be heard.

It advanced three main objections. First, and most relevant here, the Plan was not "proposed in good faith," 11 U.S.C. § 1129(a)(3), "because it reflected a collusive agreement between the Debtors and claimant representatives," and did not require "the same disclosures and authorizations" for insured and uninsured claims, *In re Kaiser Gypsum Co.*, 60 F.4th 73, 80 (C.A.4 2023). This "disparate treatment would expose [Truck] to millions of dollars in fraudulent tort claims." *Ibid.* Second, the Plan Finding impermissibly altered Truck's rights under its insurance policies "by relieving the Debtors of their assistance-and-cooperation obligations and by barring Truck from raising the Debtors' bankruptcy conduct as a defense in future coverage disputes." *Ibid.* Third, the Trust did not comply with various provisions of § 524(g), including the requirement to "deal equitably with claims and future demands," as required by § 524(g)(2)(B)(ii)(III).

Following the Bankruptcy Court's recommendation, the District Court confirmed the Plan. Relevant here, it concluded that "Truck has limited standing to object to the Plan solely on the grounds that the Plan is not insurance neutral." *In re Kaiser Gypsum Co.*, 2021 WL 3215102, *27 (WDNC, July 28, 2021). The court found, however, that the Plan was "insurance neutral" because it "neither increase[d] Truck's obligations nor impair[ed] its prepetition contractual rights under the Truck Policies. The Plan simply restore[d] Truck to its position immediately prior to the Petition Date." *Id.*, at *26. The court also rejected Truck's challenge to the Plan Finding because the Plan expressly provided that the Debtors "will continue to fulfill their cooperation obligations arising under" the policies. *Id.*, at *27.

The Fourth Circuit affirmed, agreeing with the District Court that Truck was not a "party in interest" under § 1109(b) because the Plan did not "increase [Truck's] pre-petition obligations or impair [Truck's] pre-petition policy rights." 60 F.4th at 83. In other words, the Plan was "insurance neutral" because it did not "alte[r] Truck's pre-bankruptcy 'quantum of liability' " given that Truck was "not entitled" to the "fraud-prevention measures" it sought. *Id.*, at 87. The court also concluded that the Plan Finding did not alter Truck's contractual rights and that the Debtors did not "breach their assistance-and-cooperation obligations or the implied covenant of good faith and fair dealing." *Id.*, at 84.

This Court granted certiorari to decide whether an insurer with financial responsibility for a bankruptcy claim is a "party in interest" under § 1109(b). 601 U. S. ——, 144 S.Ct. 325, 217 L.Ed.2d 154 (2023).[2]

II

[9, 10] Courts must determine on a case-by-case basis whether a prospective party has a sufficient stake in reorganization proceedings to be a "party in interest." Section 1109(b)'s text, context, and history confirm that an insurer such as Truck with financial responsibility for a bankruptcy claim is a "party in interest" because it may be directly and adversely affected by the reorganization plan.

A

[11–13] Section 1109(b) permits any "party in interest" to "appear and be heard on any issue" in a Chapter 11 pro-

2. The courts below also addressed whether Truck is a "party in interest" on the separate basis that it is "a creditor." 11 U.S.C. § 1109(b). Because this Court holds that Truck is a "party in interest" based on its insurer status, the Court does not address alternative arguments based on Truck's creditor status.

ceeding. This text is capacious. To start, § 1109(b) provides an illustrative but not exhaustive list of parties in interest. See *supra*, at 1421. A common thread uniting the seven listed parties is that each may be directly affected by a reorganization plan either because they have a financial interest in the estate's assets (the debtor, creditor, and equity security holder) or because they represent parties that do (a creditors' committee, an equity security holders' committee, a trustee, and an indenture trustee). "The general theory behind [§ 1109(b)] is that anyone holding a direct financial stake in the outcome of the case should have an opportunity (either directly or through an appropriate representative) to participate in the adjudication of any issue that may ultimately shape the disposition of his or her interest." 7 Collier on Bankruptcy ¶1109.01 (16th ed. 2023). This understanding aligns with this Court's observation that Congress uses the phrase "'party in interest'" in bankruptcy provisions when it intends the provision to apply "broadly." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 7, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (quoting 11 U.S.C. § 502(a)).

[14–17] The ordinary meaning of the terms "party" and "interest" confirms this. "Party" in this context is best understood as "[a] person who constitutes or is one of those who compose . . . one or [the] other of the two sides in an action or affair; one concerned in an affair; a participator; as, a *party* in interest." Webster's New International Dictionary 1784 (2d ed. 1949). "Interest" is best understood as "[c]oncern, or the state of being concerned or affected, esp[ecially] with respect to advantage, personal or general." *Id.*, at 1294. The plain meaning of the phrase thus refers to entities that are potentially concerned with or affected by a proceeding.[3] The parties in this case land on roughly this same definition. See Brief for Petitioner 26 (defining "party in interest" as anyone that may be "'directly and adversely affected' by the reorganization" (alterations omitted)); Brief for Debtor-Side Respondents 29 ("To the extent Truck acknowledges that a 'party in interest' under Section 1109(b) is someone 'directly and adversely affected by the reorganization,' the parties are in violent agreement"); Brief for Claimant Respondents 1 (similar).[4]

3. Legal dictionaries from the time of § 1109(b)'s enactment and onward similarly define the phrase "party in interest." See Ballentine's Law Dictionary 920 (3d ed. 1969) (defining "party in interest" as a "party to an action who has an actual interest in the controversy, as distinguished from a nominal party"); cf. Black's Law Dictionary 1122 (6th ed. 1990) ("Primary meaning ascribed the term 'party in interest' in bankruptcy cases is one whose pecuniary interest is directly affected by the bankruptcy proceeding").

4. The phrase "party in interest" appears in other statutory contexts. The Court's analysis of the term today does not apply across all other, unrelated statutory schemes. The term's meaning elsewhere will turn on the text, structure, context, history, and purpose of those statutory provisions, just as it does here. Still, precedent confirms that this Court's interpretation of § 1109(b) is not an outlier. See, *e.g.*, *Western Pacific California R. Co. v. Southern Pacific Co.*, 284 U.S. 47, 51–52, 52 S.Ct. 56, 76 L.Ed. 160 (1931) (competitor railroad was a "party in interest" under the Transportation Act of 1920 because the challenged railroad expansion had the potential to "directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation"); *L. Singer & Sons v. Union Pacific R. Co.*, 311 U.S. 295, 304, 61 S.Ct. 254, 85 L.Ed. 198 (1940) (food vendors were not a "party in interest" under the Transportation Act of 1920 because a "person engaged in business within or adjacent to a public market" was only "indirectly and consequentially affected" by a railroad "seeking only to serve a competing market by means of an extension"); *Alton R. Co. v. United States*, 315 U.S. 15, 19–20, 62 S.Ct. 432, 86 L.Ed. 586 (1942) (railroad companies were "parties in interest" under the

The historical context and purpose of § 1109(b) also support this interpretation. Congress consistently has acted to promote greater participation in reorganization proceedings. Section 77B of the Bankruptcy Act of 1898, for example, provided debtors the right to be heard on all issues, but limited the right of creditors and stockholders to only certain issues. See 11 U.S.C. § 207 (1946 ed.). Section 206 of the Bankruptcy Act of 1938 broadened participation and provided that "[the] debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter." § 606. Although the 1938 Act allowed a "party in interest" to intervene "for cause shown," it permitted only the four named parties to intervene as of right. Still, the Advisory Committee's Note to Former Chapter X, Bkrtcy. Rule 10–210(a) (1976), which implemented § 206, noted that the section "was originally enacted to broaden the practice that had developed upon former § 77 .... This broader concept was to insure fair representation and to prevent excessive control over the proceedings by insider groups." 11 U.S.C. App., p. 1445 (1976 ed.).

[18] In 1978, Congress enacted the Bankruptcy Code containing § 1109(b), which continued the expansion of participatory rights in reorganization proceedings. Congress moved from an exclusive list to the general and capacious term "party in interest," accompanied by a nonexhaustive list of parties in interest. These parties "may raise and may appear and be heard on any issue." 11 U.S.C. § 1109(b). "Section 206 ... and Chapter X Rule 10–210(a), the predecessor provisions of section 1109(b) of the Code, constituted an effort to encourage and promote greater participation in reorganization cases.... Section 1109(b) continues in this tradition and should be understood in the same way." *In re Amatex Corp.*, 755 F.2d 1034, 1042 (C.A.3 1985).

[19–21] Now consider the purpose of § 1109(b). Broad participation promotes a fair and equitable reorganization process. The Bankruptcy Code seeks to prevent "the danger inherent in any reorganization plan proposed by a debtor" that "the plan will simply turn out to be too good a deal for the debtor's owners." *Bank of America Nat. Trust and Sav. Assn. v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 444, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999); see also *ibid.* (discussing Congress's concern that "'a few insiders, whether representatives of management or major creditors, [could] use the reorganization process to gain an unfair advantage'"). Section 1109(b) addresses this concern. "[D]rafters and early commentators hoped that an expansive definition [of "party in interest" in § 1109(b)] would allow a broad range of individual and minority interests to intervene in Chapter 11 cases, and expressly warned that undue restrictions on who may be a party in interest might enable dominant interests to control the restructuring process." D. Dick, The Chapter 11 Efficiency Fallacy, 2013 B. Y. U. L. Rev. 759, 774–775 (2014). In short, § 1109(b) was "designed to serve ... the policies of inclusion underlying the chapter 11 process." 7 Collier on Bankruptcy ¶1109.02.

B

Applying these principles, the Court holds that insurers such as Truck with

Motor Carrier Act of 1935 because they were "directly affected by competition with the motor transport industry").

financial responsibility for bankruptcy claims are parties in interest.

Bankruptcy reorganization proceedings can affect an insurer's interests in myriad ways. A reorganization plan can impair an insurer's contractual right to control settlement or defend claims. A plan can abrogate an insurer's right to contribution from other insurance carriers. Or, as alleged here, a plan may be collusive, in violation of the debtor's duty to cooperate and assist, and impair the insurer's financial interests by inviting fraudulent claims. The list goes on. See, *e.g.*, Brief for American Property Casualty Insurance Association et al. as *Amici Curiae* 16–17 (American Property Brief) ("For example, a plan that purports to maintain an insurer's coverage defenses could nonetheless allow claims at amounts far above their actual value and out of line with the claimants' injuries or the payment of claims for which little to no proof of injury is required"). An insurer with financial responsibility for bankruptcy claims can be directly and adversely affected by the reorganization proceedings in these and many other ways, making it a "party in interest" in those proceedings.

Take Truck, for example. Truck will have to pay the vast majority of the Trust's liability—up to $500,000 per claim for thousands of covered asbestos-injury claims. The proposed Plan would have Truck stand alone in carrying the financial burden, because the § 524(g) channeling injunction "permanently and forever stay[s], restrain[s] and enjoin[s]" any action against Debtors, App. to Pet. for Cert. 178a, and other "[e]ntities, other than Asbestos Insurers," *id.*, at 201a. According to Truck, however, a plan that lacks the disclosure requirements for the insured claims risks exposing Truck "to millions of dollars in fraudulent tort claims." 60 F.4th at 80. That potential financial harm—attributable to Truck's status as an insurer with financial responsibility for bankruptcy claims—gives Truck an interest in bankruptcy proceedings and whatever reorganization plan is proposed and eventually adopted.

[22] The Government frames Truck's interest in a slightly different but substantively identical way. According to the Government, Truck is a party in interest because it "is a party to a contract with the debtor that is property of the estate and may be interpreted, assigned, or otherwise affected by the Chapter 11 proceedings." Brief for United States as *Amicus Curiae* 13. This is just another side of the same coin. Those executory contracts are the ones that give insurers an interest in the proceedings and, in this case, make Truck financially responsible for the bankruptcy claims. So, whether Truck's direct interest is framed as its executory contracts or instead its obligations resulting from those contracts, it cashes out in the same way: Where a proposed plan "allows a party to put its hands into other people's pockets, the ones with the pockets are entitled to be fully heard and to have their legitimate objections addressed." *In re Global Indus. Technologies, Inc.*, 645 F.3d 201, 204 (C.A.3 2011).

This opportunity to be heard is consistent with § 1109(b)'s purpose. In this case, neither the Debtors nor the Claimants have an incentive to limit the postconfirmation cost of defending or paying claims. For the Debtors, the Plan eliminates all of their ongoing liability. The Claimants similarly have little incentive to propose barriers to their ability to recover from Truck. Truck may well be the only entity with an incentive to identify problems with the Plan. This "realignment of the insured's economic incentives ... makes participation in the bankruptcy by insurers—who will ultimately be asked to foot the bill

for most or all of those claims—critical." American Property Brief 15–16.

III

[23] The Court of Appeals looked exclusively to whether the Plan altered Truck's contract rights or its "quantum of liability." Under this approach, known as the "insurance neutrality" doctrine, courts ask if the plan "increase[s] the insurer's pre-petition obligations or impair[s] the insurer's pre-petition policy rights." 60 F.4th at 83, 87. This doctrine is conceptually wrong and makes little practical sense.

[24] Conceptually, the insurance neutrality doctrine conflates the merits of an objection with the threshold party in interest inquiry. The § 1109(b) inquiry asks whether the reorganization proceedings might affect a prospective party, not how a particular reorganization plan actually affects that party. Indeed, § 1109(b) cannot "depend on a plan-specific rule—that standard would be unusable for the Code provisions empowering a party in interest to request acts unrelated to a specific plan or that occur before a plan is confirmed or even proposed." Reply Brief 11; see also *supra*, at 1421 (a party in interest, for example, can file a Chapter 11 plan when a trustee has been appointed or request the appointment and removal of a trustee). Practically, the insurance neutrality doctrine is too limited in its scope. It zooms in on the insurer's prepetition obligations and policy rights. That wrongly ignores all the other ways in which bankruptcy proceedings and reorganization plans can alter and impose obligations on insurers. See *supra*, at 1425 – 1426.

In defending the decision below, the Debtors and Claimants contend that Truck faces similar exposure in the tort system before and after bankruptcy, in part because Truck was not entitled to the disclosure provisions before the bankruptcy. That may be so, but this argument suffers from the same flaw identified above—at bottom, it concerns the merits of whether the Plan should include the disclosure provisions for insured claims in accordance with §§ 524(g) and 1129. See *supra*, at 1422 – 1423 (describing Truck's objections). Whether and how the particular proposed Plan here affects Truck's prepetition and postpetition obligations and exposure is not the question. The fact that Truck's financial exposure may be directly and adversely affected by a plan is sufficient to give Truck (and other insurers with financial responsibility for bankruptcy claims) a right to voice its objections in reorganization proceedings. The Debtors' and Claimants' argument also ignores the practical and legal consequences of the Debtors' bankruptcy proceedings and reorganization plan. They transformed the Debtors' asbestos liabilities into bankruptcy claims that Truck will now have to indemnify through the Trust without the protections of disclosure requirements in place for uninsured claims filed directly with the Trust.

[25–28] Finally, in resisting the text of § 1109(b), the Debtors emphasize the risk of allowing " 'peripheral parties' to derail a reorganization." Brief for Debtor-Side Respondents 33. To start, a "parade of horribles" argument generally cannot "surmount the plain language of the statute." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009). Moreover, § 1109(b) provides parties in interest only an opportunity to be heard—not a vote or a veto in the proceedings.[5] In all events, the Court today does

5. Bankruptcy courts also have equitable discretion to control participation in a proceeding. See, *e.g.*, 11 U.S.C. § 105(a) ("No provision of [the Code] providing for the raising of

not opine on the outer bounds of § 1109. Of course, a party in interest is "not intended to include literally every conceivable entity that may be involved in or affected by the chapter 11 proceedings." 7 Collier on Bankruptcy ¶1109.03. There may be difficult cases that require courts to evaluate whether truly peripheral parties have a sufficiently direct interest. This case is not one of them. Insurers such as Truck with financial responsibility for claims are not peripheral parties.

* * *

Section 1109(b) provides parties in interest a voice in bankruptcy proceedings. An insurer with financial responsibility for bankruptcy claims is a "party in interest" that may object to a Chapter 11 plan of reorganization.

The judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO took no part in the consideration or decision of this case.

Xavier BECERRA, Secretary of Health and Human Services, et al., Petitioners

v.

SAN CARLOS APACHE TRIBE

Xavier Becerra, Secretary of Health and Human Services, et al., Petitioners

v.

Northern Arapaho Tribe

No. 23-250, No. 23-253

Supreme Court of the United States.

Argued March 25, 2024

Decided June 6, 2024

Background: San Carlos Apache Tribe, which had entered into self-determination contract with Indian Health Service (IHS) pursuant to Indian Self-Determination and Education Assistance Act (ISDA), brought action against United States for breach of contract, contending that IHS failed to pay contract support costs for Tribe's healthcare services to the extent they were funded by program income, meaning income from third-party payers. Government moved to dismiss for failure to state a claim. The United States District Court for the District of Arizona, Neil V. Wake, Senior District Judge, 482 F.Supp.3d 932, granted motion. Tribe appealed. The United States Court of Appeals for the Ninth Circuit, Paez, Circuit Judge, 53 F.4th 1236, reversed and remanded. Northern Arapaho Tribe brought separate action against United States for breach of contract on same basis. The United States District Court for the District of Wyoming, Nancy D. Freudenthal, J., 548 F.Supp.3d 1134, dismissed complaint for failure to state a

an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process'').

William K. HARRINGTON, United States Trustee, Region 2, PETITIONER

v.

PURDUE PHARMA L. P., et al.
No. 23-124

Supreme Court of the United States.

Argued December 4, 2023

Decided June 27, 2024

Background: Chapter 11 debtors, a privately-held pharmaceutical company and affiliated entities involved in manufacture and promotion of proprietary prescription opioid pain reliever that was the subject of mass tort litigation, sought confirmation of proposed plan of reorganization which, inter alia, contained broad releases of civil claims against non-debtor family members who owned and/or were directors and officers of debtors. United States Trustee (UST), numerous states and municipalities, and others objected. The United States Bankruptcy Court for the Southern District of New York, Robert D. Drain, J., 633 B.R. 53, entered order confirming plan, as modified to limit "shareholder release" of claims against family members. Appeal was taken from that order as well as two merged and related orders. The District Court, Colleen McMahon, J., 635 B.R. 26, vacated confirmation order in pertinent part. Plan proponents appealed and, while appeal was pending, proposed a modified plan. The United States Court of Appeals for the Second Circuit, Lee, Circuit Judge, 69 F.4th 45, reversed the District Court and revived the Bankruptcy Court's order approving the now-modified plan. UST filed application for stay, which the Supreme Court granted and treated as petition for writ of certiorari.

Holdings: The Supreme Court, Justice Gorsuch, held that the Bankruptcy Code does not authorize a bankruptcy court to approve, as part of a plan of reorganization under Chapter 11, a release and injunction that extinguishes claims against non-debtor third parties without the consent of affected claimants, thereby effectively extending to non-debtors the benefits of a discharge usually reserved for debtors; abrogating *In re Millennium Lab Holdings II, LLC*, 945 F. 3d 126; *In re Seaside Engineering & Surveying, Inc.*, 780 F. 3d 1070; *In re Airadigm Communications, Inc.*, 519 F. 3d 640; *In re Dow Corning Corp.*, 280 F. 3d 648; and *In re A. H. Robins Co.*, 880 F. 2d 694.

Court of Appeals' decision reversed and remanded.

Justices Thomas, Alito, Barrett, and Jackson joined.

Justice Kavanaugh filed a dissention opinion in which Chief Justice Roberts and Justices Sotomayor and Kagan joined.

1. Bankruptcy ⚿3251

Beneath the complexity of the Bankruptcy Code, with its hundreds of interlocking rules about the relations between a debtor and its creditors, lies a simple bargain: a debtor can win a discharge of its debts if it proceeds with honesty and places virtually all its assets on the table for its creditors.

2. Bankruptcy ⚿2492, 2532

When a debtor files for bankruptcy, it "creates an estate" that includes virtually all the debtor's assets. 11 U.S.C.A. § 541(a).

3. Bankruptcy ⚿3531, 3566.1

Under Chapter 11, the debtor can work with its creditors to develop a reorganization plan governing the distribution of the estate's assets; it must then present that plan to the bankruptcy court and win

its approval. 11 U.S.C.A. §§ 1121, 1123, 1129, 1141.

4. Bankruptcy ⚿3568(2)

Once the bankruptcy court issues an order confirming a Chapter 11 plan, that document binds the debtor and its creditors going forward, even those who did not assent to the plan. 11 U.S.C.A. § 1141.

5. Bankruptcy ⚿3568(3)

Bankruptcy court's order confirming a Chapter 11 plan discharges the debtor from any debt that arose before the date of such confirmation, except as provided in the plan, the confirmation order, or the Bankruptcy Code. 11 U.S.C.A. § 1141(d)(1)(A).

6. Bankruptcy ⚿2364, 3568(3)

Discharge arising from a bankruptcy court's order confirming a Chapter 11 plan not only releases or voids any past or future judgments on the discharged debt, it also operates as an injunction prohibiting creditors from attempting to collect or to recover the debt. 11 U.S.C.A. § 1141(d)(1)(A).

7. Bankruptcy ⚿3412

Generally, a discharge in bankruptcy operates only for the benefit of the debtor against its creditors and does not affect the liability of any other entity. 11 U.S.C.A. § 524(e).

8. Bankruptcy ⚿3555

The Bankruptcy Code does not authorize a bankruptcy court to approve, as part of a plan of reorganization under Chapter 11, a release and injunction that extinguishes claims against non-debtor third parties without the consent of affected claimants, thereby effectively extending to non-debtors the benefits of a discharge usually reserved for debtors; abrogating *In re Millennium Lab Holdings II, LLC*, 945 F. 3d 126; *In re Seaside Engineering & Surveying, Inc.*, 780 F. 3d 1070; *In re Airadigm Communications, Inc.*, 519 F. 3d 640; *In re Dow Corning Corp.*, 280 F. 3d 648; and *In re A. H. Robins Co.*, 880 F. 2d 694. 11 U.S.C.A. §§ 105(a), 1123(b), 1123(b)(6).

9. Bankruptcy ⚿3548.1

Some plan terms set forth in the section of the Bankruptcy Code addressing the contents of Chapter 11 plans are mandatory; others are optional. 11 U.S.C.A. §§ 1123(a), 1123(b).

10. Bankruptcy ⚿2126

Section of the Bankruptcy Code authorizing a bankruptcy court to issue any order that is necessary or appropriate to carry out the provisions of the Code serves only to "carry out" authorities expressly conferred elsewhere in the Code. 11 U.S.C.A. § 105(a).

11. Statutes ⚿1160

When faced with a statutory "catchall" phrase tacked on at the end of a long and detailed list of specific directions, courts do not necessarily afford it the broadest possible construction it can bear; instead, courts generally appreciate that the catchall must be interpreted in light of its surrounding context and read to embrace only objects similar in nature to the specific examples preceding it.

12. Statutes ⚿1160

In construing a catchall phrase, when, for example, a statute sets out a list discussing "cars, trucks, motorcycles, or any other vehicles," courts appreciate that the catchall may reach similar landbound vehicles, perhaps including buses and camper vans, but it does not reach dissimilar "vehicles" such as airplanes and submarines.

13. Statutes ⚿1160

The ancient interpretive principle known as the "ejusdem generis" canon

seeks to afford a statute the scope a reasonable reader would attribute to it.

14. Bankruptcy ⚿3555

When Congress authorized "appropriate" plan provisions in catchall provision of the subsection of the Bankruptcy Code addressing terms that may be included in a Chapter 11 plan, it did so only after enumerating five specific sorts of provisions, all of which concern the debtor—its rights and responsibilities, and its relationship with its creditors—and each of which authorizes a bankruptcy court to adjust claims without consent only to the extent such claims concern the debtor; accordingly, pursuant to the "ejusdem generis" canon, the catchall cannot be fairly read to endow a bankruptcy court with the "radically different" power to discharge the debts of a non-debtor without the consent of affected non-debtor claimants. 11 U.S.C.A. § 1123(b)(6).

15. Statutes ⚿1132, 1153

In the context of statutory interpretation, the quintessentially context-dependent term "appropriate" often draws its meaning from surrounding provisions.

16. Bankruptcy ⚿2553

Bankruptcy court may approve a Chapter 11 plan resolving derivative claims because those claims belong to the debtor's estate. 11 U.S.C.A. § 1123(b)(3).

17. Corporations and Business Organizations ⚿2023, 2044

In a derivative action, the named plaintiff is only a nominal plaintiff; the substantive claim belongs to the corporation.

18. Statutes ⚿1064, 1077

No statute pursues a single policy at all costs, and question faced by court in construing a statute is how far Congress has gone in pursuing one policy or another.

19. Bankruptcy ⚿2124.1

Although bankruptcy law may serve to address some collective-action problems, it does not provide a bankruptcy court with a roving commission to resolve all such problems that happen its way, blind to the role other mechanisms play in addressing them, including, among others, legislation, class actions, multi-district litigation, and consensual settlements.

20. Bankruptcy ⚿2124.1

Bankruptcy court's powers are not limitless.

21. Statutes ⚿1154

When resolving a dispute about a statute's meaning, the Supreme Court sometimes looks for guidance not just in the statute's immediate terms, but in related provisions as well.

22. Bankruptcy ⚿2364, 3568(3)

Chapter 11 discharge releases the debtor from its debts and enjoins future efforts to collect them, even by those who do not assent to the debtor's reorganization plan. 11 U.S.C.A. §§ 524(a)(1), 524(a)(2), 1129(b)(1), 1141(a).

23. Bankruptcy ⚿3411, 3568(3)

Generally, the Bankruptcy Code reserves to the "debtor," that is, the entity that files for bankruptcy, the benefit of a Chapter 11 discharge. 11 U.S.C.A. §§ 524(e), 1141(d)(1)(A).

See publication Words and Phrases for other judicial constructions and definitions.

24. Bankruptcy ⚿3372.1, 3374(1)

Under the Bankruptcy Code, the discharge a debtor receives is not unbounded; it does not reach, for example, claims based on "fraud" or those alleging "willful and malicious injury." 11 U.S.C.A. §§ 523(a)(2), 523(a)(4), 523(a)(6).

25. Bankruptcy ⚿3555

For asbestos-related bankruptcies—and only for such bankruptcies—Congress has provided in the Bankruptcy Code that, notwithstanding the usual rule that a debtor's discharge does not affect the liabilities of others on that same debt, courts may issue an injunction barring any action directed against a third party under certain statutorily specified circumstances. 11 U.S.C.A. §§ 524(e), 524(g)(4)(A)(ii).

26. Bankruptcy ⚿2021.1

Because, when Congress enacted the Bankruptcy Code, it did not write "on a clean slate," pre-Code practice may sometimes inform court's interpretation of the Code's more "ambiguous" provisions.

27. Constitutional Law ⚿2500

Members of Congress, not the courts, enjoy the power, consistent with the Constitution, to make policy judgments about the proper scope of a bankruptcy discharge.

Syllabus *

Between 1999 and 2019, approximately 247,000 people in the United States died from prescription-opioid overdoses. Respondent Purdue Pharma sits at the center of that crisis. Owned and controlled by the Sackler family, Purdue began marketing OxyContin, an opioid prescription pain reliever, in the mid-1990s. After Purdue earned billions of dollars in sales on the drug, in 2007 one of its affiliates pleaded guilty to a federal felony for misbranding OxyContin as a less-addictive, less-abusable alternative to other pain medications. Thousands of lawsuits followed. Fearful that the litigation would eventually impact them directly, the Sacklers initiated a "milking program," withdrawing from Purdue approximately $11 billion—roughly 75% of the firm's total assets—over the next decade.

Those withdrawals left Purdue in a significantly weakened financial state. And in 2019, Purdue filed for Chapter 11 bankruptcy. During that process, the Sacklers proposed to return approximately $4.3 billion to Purdue's bankruptcy estate. In exchange, the Sacklers sought a judicial order releasing the family from all opioid-related claims and enjoining victims from bringing such claims against them in the future. The bankruptcy court approved Purdue's proposed reorganization plan, including its provisions concerning the Sackler discharge. But the district court vacated that decision, holding that nothing in the law authorizes bankruptcy courts to extinguish claims against third parties like the Sacklers, without the claimants' consent. A divided panel of the Second Circuit reversed the district court and revived the bankruptcy court's order approving a modified reorganization plan.

Held: The bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without the consent of affected claimants. Pp. 2081 – 2088.

(a) When a debtor files for bankruptcy, it "creates an estate" that includes virtually all the debtor's assets. 11 U.S.C. § 541(a). Under Chapter 11, the debtor must develop a reorganization plan governing the distribution of the estate's assets and present it to the bankruptcy court for approval. §§ 1121, 1123, 1129, 1141. A bankruptcy court's order confirming a reorganization plan "discharges the debtor"

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

of certain pre-petition debts. § 1141(d)(1)(A). In this case, the Sacklers have not filed for bankruptcy or placed all their assets on the table for distribution to creditors, yet they seek what essentially amounts to a discharge. No provision of the code authorizes that kind of relief. Pp. 2081 – 2087.

(1) Section 1123(b) addresses the kinds of provisions that may be included in a Chapter 11 plan. That section contains five specific paragraphs, followed by a catchall provision. The first five paragraphs all concern the debtor's rights and responsibilities, as well as its relationship with its creditors. The catchall provides that a plan "may" also "include any other appropriate provision not inconsistent with the applicable provisions of this title." All agree that the first five paragraphs do not authorize the Sackler discharge. But, according to the plan proponents and the Second Circuit, paragraph (6) broadly permits any term not expressly forbidden by the code so long as a judge deems it "appropriate." Because provisions like the Sackler discharge are not expressly prohibited, they reason, paragraph (6) necessarily permits them. That is not correct. When faced with a catchall phrase like paragraph (6), courts do not necessarily afford it the broadest possible construction it can bear. *Epic Systems Corp.* v. *Lewis*, 584 U.S. 497, 512, 138 S.Ct. 1612, 200 L.Ed.2d 889. Instead, we generally appreciate that the catchall must be interpreted in light of its surrounding context and read to "embrace only objects similar in nature" to the specific examples preceding it. *Ibid.* Here, each of the preceding paragraphs concerns the rights and responsibilities of the debtor; and they authorize a bankruptcy court to adjust claims without consent only to the extent such claims concern the debtor. While paragraph (6) doubtlessly confers additional authorities on a bankruptcy court, it cannot be read under the canon of *ejusdem generis* to endow a bankruptcy court with the "radically different" power to discharge the debts of a nondebtor without the consent of affected claimants. *Epic Systems Corp.*, 584 U.S. at 513, 138 S.Ct. 1612. And while the dissent reaches a contrary conclusion, it does so only by elevating its view of the bankruptcy code's purported purpose over the text's clear focus on the debtor. Pp. 2081 – 2084.

(2) The code's statutory scheme further forecloses the Sackler discharge. The code generally reserves discharge for a debtor who places substantially all of their assets on the table. § 1141(d)(1)(A); see also § 541(a). And, ordinarily, it does not include claims based on "fraud" or those alleging "willful and malicious injury." §§ 523(a)(2), (4), (6). The Sackler discharge defies these limitations. The Sacklers have not filed for bankruptcy, nor have they placed virtually all their assets on the table for distribution to creditors. Yet, they seek an order discharging a broad sweep of present and future claims against them, including ones for fraud and willful injury. In all of these ways, the Sacklers seek to pay less than the code ordinarily requires and receive more than it normally permits. Contrary to the dissent's suggestion, plan proponents cannot evade these limitations simply by rebranding their discharge a "release." Pp. 2084 – 2086.

(3) History offers a final strike against the plan proponents' construction of § 1123(b)(6). Pre-code practice, we have said, may sometimes inform the meaning of the code's more "ambiguous" provisions. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649, 132 S.Ct. 2065, 182 L.Ed.2d 967. And every bankruptcy law cited by the parties and their *amici*—from 1800 until the enactment of the present bankruptcy code in 1978—generally reserved the benefits of

discharge to the debtor who offered a "fair and full surrender of [its] property." *Sturges v. Crowninshield*, 4 Wheat. 122, 176, 4 L.Ed. 529. Had Congress meant to reshape traditional practice so profoundly in the present bankruptcy code, extending to courts the capacious new power the plan proponents claim, one might have expected it to say so expressly "somewhere in the [c]ode itself." *Dewsnup v. Timm*, 502 U.S. 410, 420, 112 S.Ct. 773, 116 L.Ed.2d 903. Pp. 2086 – 2087.

(b) In the end, the plan proponents default to policy. The Sacklers, they say, will not return any funds to Purdue's estate unless the bankruptcy court grants them the sweeping nonconsensual release and injunction they seek. Without the Sackler discharge, they predict, victims will be left without any means of recovery. But the U. S. Trustee disagrees. As he tells it, the potentially massive liability the Sacklers face may induce them to negotiate for *consensual* releases on terms more favorable to all the claimants. In addition, the Trustee warns, a ruling for the Sacklers would provide a roadmap for tortfeasors to misuse the bankruptcy system in future cases. While both sides may have their points, this Court is the wrong audience for such policy disputes. Our only proper task is to interpret and apply the law; and nothing in present law authorizes the Sackler discharge. Pp. 2086 – 2088.

(c) Today's decision is a narrow one. Nothing in the opinion should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan. Nor does the Court express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor. Additionally, because this case involves only a stayed reorganization plan, the Court does not address whether its reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated. Confining ourselves to the question presented, the Court holds only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants. Because the Second Circuit held otherwise, its judgment is reversed and the case is remanded for further proceedings consistent with this opinion. Pp. 2087 – 2088.

69 F.4th 45, reversed and remanded.

GORSUCH, J., delivered the opinion of the Court, in which THOMAS, ALITO, BARRETT, and JACKSON, JJ., joined. KAVANAUGH, J., filed a dissenting opinion, in which ROBERTS, C. J., and SOTOMAYOR and KAGAN, JJ., joined.

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For U.S. Supreme Court briefs, see:

2023 WL 6220096 (Resp.Brief)
2023 WL 8190847 (Reply.Brief)
2023 WL 8190850 (Reply.Brief)
2023 WL 7042626 (Resp.Brief)
2023 WL 7042630 (Resp.Brief)
2023 WL 6220089 (Pet.Brief)
2023 WL 6220101 (Resp.Brief)
2023 WL 7042562 (Resp.Brief)
2023 WL 7042625 (Resp.Brief)
2023 WL 7042400 (Resp.Brief)
2023 WL 7042396 (Resp.Brief)

Justice GORSUCH delivered the opinion of the Court.

[1] The bankruptcy code contains hundreds of interlocking rules about " 'the relations between' " a " 'debtor and [its] creditors.' " *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502, 513–514, 58 S.Ct. 1025, 82 L.Ed. 1490 (1938). But beneath that complexity lies a simple bargain: A debtor can win a discharge of its debts if it

proceeds with honesty and places virtually all its assets on the table for its creditors. The debtor in this case, Purdue Pharma L. P., filed for bankruptcy after facing a wave of litigation for its role in the opioid epidemic. Purdue's long-time owners, members of the Sackler family, confronted a growing number of suits too. But instead of declaring bankruptcy, they chose a different path. From the court overseeing Purdue's bankruptcy, they sought and won an order extinguishing vast numbers of existing and potential claims against them. They obtained all this without securing the consent of those affected or placing anything approaching their total assets on the table for their creditors. The question we face is whether the bankruptcy code authorizes a court to issue an order like that.

I

A

The opioid epidemic represents "one of the largest public health crises in this nation's history." *In re Purdue Pharma L. P.*, 69 F.4th 45, 56 (CA2 2023). Between 1999 and 2019, approximately 247,000 people in the United States died from prescription-opioid overdoses. *In re Purdue Pharma L. P.*, 635 B.R. 26, 44 (SDNY 2021). The U. S. Department of Health and Human Services estimates that the opioid epidemic has cost the country between $53 and $72 billion annually. *Ibid.*

Purdue sits at the center of these events. In the mid-1990s, it began marketing OxyContin, an opioid prescription pain reliever. 69 F.4th at 56. Because of the addictive quality of opioids, doctors had traditionally reserved their use for cancer patients and those "with chronic diseases." 635 B.R. at 42. But OxyContin, Purdue claimed, had a novel "time-release" formula that greatly diminished the threat of addiction. *Ibid.* On that basis, Purdue marketed OxyContin for use in " 'a much broader range' " of applications, including as a " 'first-line therapy for the treatment of arthritis.' " *Ibid.*

Purdue was a " 'family company,' " owned and controlled by the Sacklers. *Id.*, at 40. Members of the Sackler family served as president and chief executive officer; they dominated the board of directors; and they "were heavily involved" in the firm's marketing strategies. 69 F.4th at 86 (Wesley, J., concurring in judgment). They "pushed sales targets," too, and "accompanied sales representatives on 'ride along' visits to health care providers" in an effort to maximize OxyContin sales. 635 B.R. at 50.

Quickly, OxyContin became " 'the most prescribed brand-name narcotic medication' " in the United States. *Id.*, at 43. Between 1996 and 2019, "Purdue generated approximately $34 billion in revenue . . . , most of which came from OxyContin sales." *Id.*, at 39. The company's success propelled the Sacklers onto lists "of the top twenty wealthiest families in America," with an estimated net worth of $14 billion. *Id.*, at 40.

Eventually, however, the firm came under scrutiny. In 2007, a Purdue affiliate pleaded guilty to a federal felony for misbranding OxyContin as " 'less addictive' " and " 'less subject to abuse . . . than other pain medications.' " *Id.*, at 48. Thousands of civil lawsuits followed as individuals, families, and governments within and outside the United States sought damages from Purdue and the Sacklers for injuries allegedly caused by their deceptive marketing practices. 69 F.4th at 60.

Appreciating this litigation "would eventually impact them directly," *id.*, at 59, the Sacklers began what one family member described as a " 'milking' program," 635 B.R. at 57. In the years before the 2007 plea agreement, Purdue's distributions to

the Sacklers represented less than 15% of its annual revenue. *Ibid.* After the plea agreement, the Sacklers began taking as much as 70% of the company's revenue each year. *Ibid.* Between 2008 and 2016, the family's distributions totaled approximately $11 billion, draining Purdue's total assets by 75% and leaving it in "a significantly weakened financial" state. 69 F.4th at 59. The Sacklers diverted much of that money to overseas trusts and family-owned companies. 635 B.R. at 71.

B

In 2019, Purdue filed for Chapter 11 bankruptcy. Members of the Sackler family saw in that development an opportunity "to get [their own] goals accomplished." *In re Purdue Pharma L. P.*, No. 19–23649 (Bkrtcy. Ct. SDNY, Aug. 18, 2021), ECF Doc. 3599, p. 35 (testimony of David Sackler). They proposed to return to Purdue's bankruptcy estate $4.325 billion of the $11 billion they had withdrawn from the company in recent years. 69 F.4th at 61. But they offered to do so only through payments spread out over a decade. *Id.*, at 60. And, in return, they sought the estate's agreement on, and a judicial order addressing, two matters. First, the Sacklers wanted to extinguish any claims the estate might have against family members, including for fraudulently transferring funds from Purdue in the years preceding its bankruptcy. *In re Purdue Pharma L. P.*, 633 B.R. 53, 83–84 (Bkrtcy. Ct. SDNY 2021). Second, the Sacklers wanted to end the growing number of lawsuits against them brought by opioid victims (the Sackler discharge). *Ibid.*

The Sackler discharge they proposed comprised a release and an injunction. The release sought to void not just current opioid-related claims against the family, but future ones as well. It sought to ban not just claims by creditors participating in the bankruptcy proceeding, but claims by anyone who might otherwise sue Purdue. It sought to extinguish not only claims for negligence, but also claims for fraud and willful misconduct. 1 App. 193. And it proposed to end all these lawsuits without the consent of the opioid victims who brought them. To enforce this release, the Sacklers sought an injunction "forever stay[ing], restrain[ing,] and enjoin[ing]" claims against them. *Id.*, at 279. That injunction would not just prevent suits against the company's officers and directors but would run in favor of hundreds, if not thousands, of Sackler family members and entities under their control. *Id.*, at 117–190.

Purdue agreed to these terms and included them in the reorganization plan it presented to the bankruptcy court for approval. In that plan, Purdue further proposed to reorganize as a "public benefit" company dedicated primarily to opioid education and abatement efforts. 633 B.R. at 74. As for individual victims harmed by the company's products, Purdue offered, with help from the Sacklers' anticipated contribution, to provide payments from a base amount of $3,500 up to a ceiling of $48,000 (for the most dire cases, and all before deductions for attorney's fees and other expenses). See 1 App. 557–559, 573–585; 6 App. in No. 22–110 etc. (CA2), p. 1697. For those receiving more than the base amount, payments would come in installments spread over as many as 10 years. 7 *id.*, at 1805, 1812.

Creditors were polled on the proposed plan. Though most who returned ballots supported it, fewer than 20% of eligible creditors participated. 21 *id.*, at 6253, 6258. Thousands of opioid victims voted against the plan too, and many pleaded with the bankruptcy court not to wipe out their claims against the Sacklers without their consent. 635 B.R. at 35. "Our system of justice," they wrote, "demands that the

allegations against the Sackler family be fully and fairly litigated in a public and open trial, that they be judged by an impartial jury, and that they be held accountable to those they have harmed." *In re Purdue Pharma L. P.*, No. 7:21–cv–07532 (SDNY, Oct. 25, 2021), ECF Doc. 94, p. 21 (internal quotation marks omitted). The U. S. Trustee, charged with promoting the integrity of the bankruptcy system for all stakeholders, joined in these objections. So did eight States, the District of Columbia, the city of Seattle, and various Canadian municipalities and Tribes, each of which sought to pursue its own claims against the Sacklers. 635 B.R. at 35.

C

The bankruptcy court rejected the objectors' arguments and entered an order confirming the plan, including its provisions related to the Sackler discharge. 633 B.R. at 95–115. Soon, however, the district court vacated that decision. Nothing in the law, that court held, authorized the bankruptcy court to extinguish claims against the Sacklers without the consent of the opioid victims who brought them. 635 B.R. at 115.

After that setback, plan proponents, including Purdue, members of the Sackler family, and various creditors, appealed to the Second Circuit. While their appeal was pending, they also floated a new proposal. Now, they said, the Sacklers were willing to contribute an additional $1.175 to $1.675 billion to Purdue's estate if the eight objecting States and the District of Columbia would withdraw their objections to the firm's reorganization plan. 69 F.4th at 67. The Sacklers' proposed contribution still fell well short of the $11 billion they received from the company between 2008 and 2016. Nor did it begin to reflect the earnings the Sacklers have enjoyed from that sum over time. And the proposed contribution would still come in installments spread over many years. But the new proposal was enough to persuade the States and the District of Columbia to drop their objections to the plan, even as a number of individual victims, the Canadian creditors, and the U. S. Trustee persisted in theirs.

Ultimately, a divided panel of the Second Circuit reversed the district court and revived the bankruptcy court's order approving the estate's (now-modified) reorganization plan. Writing separately, Judge Wesley acknowledged that a bankruptcy court enjoys broad authority to modify debtor-creditor relations. But, he argued, nothing in the bankruptcy code grants a bankruptcy court the "extraordinary" power to release and enjoin claims against a third party without the consent of the affected claimants. *Id.*, at 89 (opinion concurring in judgment). The majority's contrary view, he added, "pin[ned the Second] Circuit firmly on one side of a weighty issue that, for too long, has split the courts of appeals." *Id.*, at 90.

After the Second Circuit ruled, the U. S. Trustee filed an application with this Court to stay its decision. We granted the application and, treating it as a petition for a writ of certiorari, agreed to take this case to resolve the circuit split Judge Wesley highlighted. 600 U. S. ——, 144 S.Ct. 44, 216 L.Ed.2d 1300 (2023).[1]

1. For examples of decisions on both sides of the split, compare *In re Pacific Lumber Co.*, 584 F.3d 229 (CA5 2009); *In re Lowenschuss*, 67 F.3d 1394 (CA9 1995); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592 (CA10 1990), with *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (CA3 2019); *In re Seaside Engineering & Surveying, Inc.*, 780 F.3d 1070 (CA11 2015); *In re Airadigm Communications, Inc.*, 519 F.3d 640 (CA7 2008); *In re Dow Corning Corp.*, 280 F.3d 648 (CA6 2002); *In re A. H. Robins Co.*, 880 F.2d 694 (CA4 1989).

II

[2–4] The plan proponents and U. S. Trustee agree on certain foundational points. When a debtor files for bankruptcy, it "creates an estate" that includes virtually all the debtor's assets. 11 U.S.C. § 541(a). Under Chapter 11, the debtor can work with its creditors to develop a reorganization plan governing the distribution of the estate's assets; it must then present that plan to the bankruptcy court and win its approval. §§ 1121, 1123, 1129, 1141. Once the bankruptcy court issues an order confirming the plan, that document binds the debtor and its creditors going forward—even those who did not assent to the plan. § 1141(a).

[5–7] Most relevant here, a bankruptcy court's order confirming a plan "discharges the debtor from any debt that arose before the date of such confirmation," except as provided in the plan, the confirmation order, or the code. § 1141(d)(1)(A). That discharge not only releases or "void[s] any past or future judgments on the" discharged debt; it also "operat[es] as an injunction . . . prohibit[ing] creditors from attempting to collect or to recover the debt." *Tennessee Student Assistance Corporation v. Hood*, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004) (citing §§ 524(a)(1), (2)). Generally, however, a discharge operates only for the benefit of the debtor against its creditors and "does not affect the liability of any other entity." § 524(e).

[8] The Sacklers have not filed for bankruptcy and have not placed virtually all their assets on the table for distribution to creditors, yet they seek what essentially amounts to a discharge. They hope to win a judicial order releasing pending claims against them brought by opioid victims. They seek an injunction "permanently and forever" foreclosing similar suits in the future. 1 App. 279. And they seek all this without the consent of those affected. The question we face thus boils down to whether a court in bankruptcy may effectively extend to *nondebtors* the benefits of a Chapter 11 discharge usually reserved for *debtors*.

A

[9] For an answer, we turn to § 1123. It addresses the "[c]ontents"—or terms—of the bankruptcy reorganization plan a debtor presents and a court approves in Chapter 11 proceedings. Some plan terms are mandatory, § 1123(a); others are optional, § 1123(b). No one suggests that anything like the Sackler discharge *must* be included in a debtor's reorganization plan. Instead, plan proponents contend, it is a provision a debtor *may* include and a court *may* approve in a reorganization plan.

Section 1123(b) governs that question. It directs that a plan "may":

> "(1)impair or leave unimpaired any class of claims, secured or unsecured, or of interests;
>
> "(2)... provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under [§ 365];
>
> "(3)provide for—
>
> "(A)the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
>
> "(B)the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;
>
> "(4)provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

"(5)modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

"(6)include any other appropriate provision not inconsistent with the applicable provisions of this title."

[10] We can easily rule out the first five of these paragraphs as potential sources of legal authority for the Sackler discharge. They permit a plan to address claims and property belonging to a debtor or its estate. §§ 1123(b)(2), (3), (4). They permit a plan to modify the rights of creditors who hold claims against the debtor or its estate. §§ 1123(b)(1), (5). But nothing in those paragraphs authorizes a plan to extinguish claims against third parties, like the Sacklers, without the consent of the affected claimants, like the opioid victims. If authority for the Sackler discharge can be found anywhere, it must be found in paragraph (6). That is the paragraph on which the Second Circuit primarily rested its decision below, and it is the one on which plan proponents pin their case here.[2]

As the plan proponents see it, paragraph (6) allows a debtor to include in its plan, and a court to order, *any* term not "expressly forbid[den]" by the bankruptcy code as long as a bankruptcy judge deems it "appropriate" and consistent with the broad "purpose[s]" of bankruptcy. 69 F.4th at 73–74; *post*, at 2109 – 2110 (KAVANAUGH, J., dissenting). And because the code does not expressly forbid a nonconsensual nondebtor discharge, the reasoning goes, the bankruptcy court was free to authorize one here after finding it an "appropriate" provision. See Brief for Sackler Family 19–21; Brief for Purdue 20; *post*, at 2094 – 2096.

[11–13] This understanding of the statute faces an immediate obstacle. Paragraph (6) is a catchall phrase tacked on at the end of a long and detailed list of specific directions. When faced with a catchall phrase like that, courts do not necessarily afford it the broadest possible construction it can bear. *Epic Systems Corp.* v. *Lewis*, 584 U.S. 497, 512, 138 S.Ct. 1612, 200 L.Ed.2d 889 (2018). Instead, we generally appreciate that the catchall must be interpreted in light of its surrounding context and read to "embrace only objects similar in nature" to the specific examples preceding it. *Ibid.* (internal quotation marks omitted). So, for example, when a statute sets out a list discussing "cars, trucks, motorcycles, or any other vehicles," we appreciate that the catchall phrase may reach similar landbound vehicles (perhaps including buses and camper vans), but it does not reach dissimilar "vehicles" (such as airplanes and submarines). See *McBoyle v. United States*, 283 U.S. 25, 26–27, 51 S.Ct. 340, 75 L.Ed. 816 (1931). This ancient interpretive principle, sometimes

2. The Sacklers suggest that, if 11 U.S.C. § 1123(b) does not permit a bankruptcy court to release and enjoin claims against a nondebtor without the affected claimants' consent, § 105(a) does. See Brief for Mortimer-Side Initial Covered Respondents 19 (Brief for Sackler Family). That provision allows a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of " the bankruptcy code. § 105(a). As the Second Circuit recognized, however, "§ 105(a) alone cannot justify" the imposition of nonconsensual third-party releases because it serves only to " 'carry out' " authorities expressly conferred elsewhere in the code. 69 F.4th 45, 73 (2023) (quoting § 105(a)); see also 2 R. Levin & H. Sommer, Collier on Bankruptcy ¶105.01[1], p. 105–6 (16th ed. 2023). Purdue concedes this point, Brief for Debtor Respondents 19, n. 5 (Brief for Purdue), as do several other plan proponents, see, *e.g.*, Brief for Respondent Ad Hoc Committee 29. Necessarily, then, our focus trains on § 1123(b)(6).

called the *ejusdem generis* canon, seeks to afford a statute the scope a reasonable reader would attribute to it.

[14] Viewed with that much in mind, we do not think paragraph (6) affords a bankruptcy court the authority the plan proponents suppose. In some circumstances, it may be difficult to discern what a statute's specific listed items share in common. See A. Scalia & B. Garner, Reading Law 207–208 (2012). But here an obvious link exists: When Congress authorized "appropriate" plan provisions in paragraph (6), it did so only after enumerating five specific sorts of provisions, all of which concern *the debtor*—its rights and responsibilities, and its relationship with its creditors. Doubtless, paragraph (6) operates to confer additional authorities on a bankruptcy court. See *United States v. Energy Resources Co.*, 495 U.S. 545, 549, 110 S.Ct. 2139, 109 L.Ed.2d 580 (1990). But the catchall cannot be fairly read to endow a bankruptcy court with the "radically different" power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants. *Epic Systems Corp.*, 584 U.S. at 513, 138 S.Ct. 1612; see also *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645–647, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012).

[15] The catchall's text underscores the point. Congress could have said in paragraph (6) that "everything not expressly prohibited is permitted." But it didn't. Instead, Congress set out a detailed list of powers, followed by a catchall that it qualified with the term "appropriate." That quintessentially "context dependent" term often draws its meaning from surrounding provisions. *Sossamon v. Texas*, 563 U.S. 277, 286, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011). And we know to look to the statute's preceding specific paragraphs as the relevant "context" here because paragraph (6) tells us so. It permits "any *other* appropriate provision"—that is, "other" than the provisions already discussed in paragraphs (1) through (5). (Emphasis added.) Each of those "other" paragraphs authorizes a bankruptcy court to adjust claims without consent only to the extent such claims concern the debtor. From this, it follows naturally that an "appropriate provision" adopted pursuant to the catchall that purports to extinguish claims without consent should be similarly constrained. See, *e.g.*, *Epic Systems Corp.*, 584 U.S. at 512–513, 138 S.Ct. 1612.

For its part, the dissent does not dispute that the *ejusdem generis* canon applies to § 1123(b)(6). *Post*, at 2105 – 2106; see also Brief for Sackler Family 44; Brief for Purdue 23. But it disagrees with our application of the canon for two reasons. First, the dissent claims, it "is factually incorrect" to suggest that all the provisions of § 1123(b) concern the debtor's rights and responsibilities. *Post*, at 2106. The dissent points out that a bankruptcy estate may settle creditors' "derivative claims" against nondebtors under paragraph (3). *Post*, at 2107 – 2108. And this "indisputable point," the dissent declares, "defeats the Court's conclusion that § 1123(b)'s provisions relate only to the debtor and do not allow releases of claims that victims and creditors hold against nondebtors." *Post*, at 2107; see Brief for Purdue 24–25.

[16, 17] But that argument contains a glaring flaw. The dissent neglects *why* a bankruptcy court may resolve derivative claims under paragraph (3): It may because those claims belong to the debtor's estate. See, *e.g.*, *In re Ontos, Inc.*, 478 F.3d 427, 433 (CA1 2007). In a derivative action, the named plaintiff "is only a nominal plaintiff. The substantive claim belongs to the corporation." 2 J. Macey, Corporation Laws § 13.20[D], p. 13–140 (2020–4 Supp.). And no one questions that Purdue may address in its own bankruptcy plan

claims "wherever located and by whomever held," § 541(a)—including those claims derivatively asserted by another on its behalf, see § 1123(b)(3). The problem is, the Sackler discharge is nothing like that. Rather than seek to resolve claims that substantively belong to Purdue, it seeks to extinguish claims against the Sacklers that belong to their victims. And precisely nothing in § 1123(b) suggests those claims can be bargained away without the consent of those affected, as if the claims were somehow Purdue's own property.[3]

[18–20] Having come up short on the text of § 1123(b), the dissent pivots to the statute's purpose. *Post*, at 2106. As the dissent sees it, our application of the *ejusdem generis* canon should focus less on the provisions preceding the catchall and more on the overall "purpose of bankruptcy law" in solving "collective-action problem[s]." *Post*, at 2090, 2106 – 2107; see also Brief for Purdue 21. But there is an obvious difficulty with this approach, too. As this Court has long recognized, "[n]o statute pursues a single policy at all costs." *Bartenwerfer v. Buckley*, 598 U.S. 69, 81, 143 S.Ct. 665, 214 L.Ed.2d 434 (2023). Always, the question we face is *how far* Congress has gone in pursuing one policy or another. See *ibid.*So, yes, bankruptcy law may serve to address some collective-action problems, but no one (save perhaps the dissent) thinks it provides a bankruptcy court with a roving commission to resolve all such problems that happen its way, blind to the role other mechanisms (legislation, class actions, multi-district litigation, consensual settlements, among others) play in addressing them. And here, the five paragraphs that precede the catchall tell us that bankruptcy courts may have many powers, including the power to address certain collective-action problems when they implicate the debtor's rights and responsibilities. But those directions also indicate that a bankruptcy court's powers are not limitless and do not endow it with the power to extinguish without their consent claims held by nondebtors (here, the opioid victims) against other nondebtors (here, the Sacklers).[4]

B

[21] When resolving a dispute about a statute's meaning, we sometimes look for guidance not just in its immediate terms but in related provisions as well. See, *e.g.*, *Turkiye Halk Bankasi A. S. v. United States*, 598 U.S. 264, 275, 143 S.Ct. 940, 215 L.Ed.2d 242 (2023). Paragraph (6) itself alludes to this fact by instructing that any plan term adopted under its auspices must not be "inconsistent with the applicable provisions of " the bankruptcy code. Following that direction and looking to Chapter 11 more broadly, we find at least three further reasons why § 1123(b)(6) cannot bear the interpretation the plan

3. In an effort to blur this distinction, the dissent points out that the Sackler discharge covers claims for which Purdue's conduct is a "legally relevant factor." *Post,* at 2105 – 2106 (quoting 69 F.4th at 80). But that does not alter the fact that the Sackler discharge would extinguish *the victims*' claims against *the Sacklers*. Those claims neither belong to Purdue nor are they asserted against Purdue or its estate. The dissent disregards these elemental distinctions. See, *e.g., post,* at 2114 (conflating the estate's power to settle its own fraudulent transfer claims against the Sacklers with the power to extinguish those of the victims against the Sacklers).

4. The dissent characterizes our analysis of paragraph (6) as "breez[y]," as if the analysis would be correct if only it were belabored. *Post,* at 2105 – 2106. And yet it is the dissent that relegates the text of the relevant statute, § 1123(b), to a pair of footnotes bookending a 25-page exposition on collective-action problems and public policy, one that precedes any effort to engage with our statutory analysis. See *post,* at 2091, n. 1, 2104 – 2105, n. 5.

proponents and the dissent would have us give it.

[22, 23] First, consider what is and who can earn a discharge. As we have seen, a discharge releases the debtor from its debts and enjoins future efforts to collect them—even by those who do not assent to the debtor's reorganization plan. §§ 524(a)(1)–(2), 1129(b)(1), 1141(a). Generally, too, the bankruptcy code reserves this benefit to "the debtor"—the entity that files for bankruptcy. § 1141(d)(1)(A); accord, § 524(e); see also §§ 727(a)–(b). The plan proponents and the dissent's reading of § 1123(b)(6) would defy these rules by effectively affording to a nondebtor a discharge usually reserved for the debtor alone.

[24] Second, notice how the code constrains the debtor. To win a discharge, again as we have seen, the code generally requires the debtor to come forward with virtually all its assets. §§ 541(a)(1), 548. Nor is the discharge a debtor receives unbounded. It does not reach claims based on "fraud" or those alleging "willful and malicious injury." §§ 523(a)(2), (4), (6). And it cannot "affect any right to trial by jury" a creditor may have "with regard to a personal injury or wrongful death tort claim." 28 U.S.C. § 1411(a). The plan proponents and the dissent's reading of § 1123(b)(6) transgresses all these limits too. The Sacklers have not agreed to place anything approaching their full assets on the table for opioid victims. Yet they seek a judicial order that would extinguish virtually all claims against them for fraud, willful injury, and even wrongful death, all without the consent of those who have brought and seek to bring such claims. In each of these ways, the Sacklers seek to pay less than the code ordinarily requires and receive more than it normally permits.

[25] Finally, there is a notable exception to the code's general rules. For asbestos-related bankruptcies—and only for such bankruptcies—Congress has provided that, "[n]otwithstanding" the usual rule that a debtor's discharge does not affect the liabilities of others on that same debt, § 524(e), courts may issue "an injunction . . . bar[ring] any action directed against a third party" under certain statutorily specified circumstances. § 524(g)(4)(A)(ii). That the code *does* authorize courts to enjoin claims against third parties without their consent, but does so in only *one* context, makes it all the more unlikely that § 1123(b)(6) is best read to afford courts that same authority in *every* context. See, *e.g.*, *Bittner v. United States*, 598 U.S. 85, 94, 143 S.Ct. 713, 215 L.Ed.2d 1 (2023); *AMG Capital Management, LLC v. FTC*, 593 U.S. 67, 77, 141 S.Ct. 1341, 209 L.Ed.2d 361 (2021).[5]

How do the plan proponents and the dissent reply to all this? Essentially, they ask us to look the other way. Whatever limits the code imposes on debtors and discharges mean nothing, they say, because the Sacklers seek a "release," not a

5. The dissent claims that, in making this observation, we defy § 524(g)'s directive that "[n]othing in [it], or in the amendments made by [its addition to the bankruptcy code], shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." 108 Stat. 4117, note following 11 U.S.C. § 524; see *post*, at 2111 – 2112. That charge misunderstands the point. We do not read § 524(g) to "impair" or "modify" authority previously available to courts in bankruptcy. To the contrary, we simply understand § 524(g) to illustrate how Congress might proceed if it intended to confer upon bankruptcy courts a novel and extraordinary power to extinguish claims against third parties without claimants' consent. See *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017).

"discharge." See, *e.g.*, *post*, at 2112 – 2113. But word games cannot obscure the underlying reality. Once more, the Sacklers seek greater relief than a bankruptcy discharge normally affords, for they hope to extinguish even claims for wrongful death and fraud, and they seek to do so without putting anything close to all their assets on the table. Nor is what the Sacklers seek a traditional release, for they hope to have a court extinguish claims of opioid victims without their consent. See, *e.g.*, J. Macey, Corporate Governance: Promises Kept, Promises Broken 152 (2008) ("settlements are, by definition, consensual"); accord, *Firefighters v. Cleveland*, 478 U.S. 501, 529, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986). Describe the relief the Sacklers seek how you will, nothing in the bankruptcy code contemplates (much less authorizes) it.

C

[26] If text and context supply two strikes against the plan proponents and the dissent's construction of § 1123(b)(6), history offers a third. When Congress enacted the present bankruptcy code in 1978, it did "not write 'on a clean slate.' " *Hall v. United States*, 566 U.S. 506, 523, 132 S.Ct. 1882, 182 L.Ed.2d 840 (2012) (quoting *Dewsnup v. Timm*, 502 U.S. 410, 419, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992)). Recognizing as much, this Court has said that pre-code practice may sometimes inform our interpretation of the code's more "ambiguous" provisions. *RadLAX Gateway Hotel*, 566 U.S. at 649, 132 S.Ct. 2065.

While we discern no ambiguity in § 1123(b)(6) for the reasons explored above, historical practice confirms the lesson we take from it. Every bankruptcy law the parties and their *amici* have pointed us to, from 1800 until 1978, generally reserved the benefits of discharge to the debtor who offered a "fair and full surrender of [its] property." *Sturges v. Crowninshield*, 4 Wheat. 122, 176, 4 L.Ed. 529 (1819); accord, *Central Va. Community College v. Katz*, 546 U.S. 356, 363–364, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006); see, *e.g.*, Bankruptcy Act of 1800, § 5, 2 Stat. 23 (repealed 1803); Act of Aug. 19, 1841, § 3, 5 Stat. 442–443 (repealed 1843); Act of Mar. 2, 1867, §§ 11, 29, 14 Stat. 521, 531–532 (repealed 1878); Bankruptcy Act of 1898, §§ 7, 14, 30 Stat. 548, 550 (repealed 1978). No one has directed us to a statute or case suggesting American courts in the past enjoyed the power in bankruptcy to discharge claims brought by nondebtors against other nondebtors, all without the consent of those affected. Surely, if Congress had meant to reshape traditional practice so profoundly in the present bankruptcy code, extending to courts the capacious new power the plan proponents claim, one might have expected it to say so expressly "somewhere in the [c]ode itself." *Dewsnup*, 502 U.S. at 420, 112 S.Ct. 773.[6]

III

Faced with so many marks against its interpretation of the law, plan proponents and the dissent resort to a policy argument. The Sacklers, they remind us, have signaled that they will not return any funds to Purdue's estate unless the bankruptcy court grants them the sweeping nonconsensual release and injunction they seek. Absent these concessions, plan pro-

6. The dissent declares pre-code practice irrelevant to the task at hand and insists the power to order nonconsensual releases has been settled by "decades" of bankruptcy court practice. *Post*, at 2089, 2090, 2091 – 2092, 2093 – 2094, 2114 – 2115. But in resisting the notion that pre-code practice may inform our work, the dissent defies our precedents. And in appealing to "decades" of lower court practice, the dissent seems to forget why we took this case in the first place: to resolve a longstanding and deeply entrenched disagreement between lower courts over the legality

ponents and the dissent emphatically predict, "there will be no viable path" for victims to recover even $3,500 each. Tr. of Oral Arg. 100; Brief for Sackler Family 27; see Brief for Respondent Official Committee of Unsecured Creditors of Purdue Pharma L. P. et al. 45–46; *post*, at 2089 – 2090, 2098 – 2103, 2115 – 2117.

The U. S. Trustee disputes that assessment. Yes, he says, reversing the Second Circuit may cause Purdue's current reorganization plan to unravel. But that would also mean the Sacklers would face lawsuits by individual victims, States, other governmental entities, and perhaps even fraudulent-transfer claims from the bankruptcy estate. So much legal exposure, the Trustee asserts, may induce the Sacklers to negotiate *consensual* releases on terms more favorable to opioid victims. Brief for Petitioner 47–48. The Sacklers may "want global peace," the Trustee acknowledges, but that doesn't "mea[n] that they wouldn't pay a lot for 97.5 percent peace." Tr. of Oral Arg. 26. After all, the Trustee reminds us, during the appeal in this very case, the Sacklers agreed to increase their contribution by more than $1 billion in order to secure the consent of the eight objecting States. If past is prologue, the Trustee says, there may be a better deal on the horizon.[7]

Even putting that aside, the Trustee urges us to consider the ramifications of this case for others. Nonconsensual third-party releases, he observes, allow tortfeasors to win immunity from the claims of their victims, including for claims (like wrongful death and fraud) they could not discharge in bankruptcy, and do so without placing anything approaching all of their assets on the table. Endorsing that maneuver, the Trustee says, would provide a "roadmap for corporations and wealthy individuals to misuse the bankruptcy system" in future cases "to avoid mass-tort liability." Brief for Petitioner 44–45.

[27] Both sides of this policy debate may have their points. But, in the end, we are the wrong audience for them. As the people's elected representatives, Members of Congress enjoy the power, consistent with the Constitution, to make policy judgments about the proper scope of a bankruptcy discharge. Someday, Congress may choose to add to the bankruptcy code special rules for opioid-related bankruptcies as it has for asbestos-related cases. Or it may choose not to do so. Either way, if a policy decision like that is to be made, it is for Congress to make. Despite the misimpression left by today's dissent, our only proper task is to interpret and apply the law as we find it; and nothing in present law authorizes the Sackler discharge.

IV

As important as the question we decide today are ones we do not. Nothing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. See,

of nonconsensual third-party releases. See n. 1, *supra*.

7. The parties likewise spar over whether, absent the Sacklers' discharge, the family could deplete the estate by asserting indemnification claims against the company. Plan proponents and the dissent point to a 2004 agreement that commits Purdue to cover certain liability and legal expenses the Sacklers incur. Brief for Purdue 10; *post*, at 2098 – 2101. But here again, the Trustee sees things differently. He underscores the plan proponents' concession that the 2004 agreement "does not apply if a court determines the Sacklers 'did not act in good faith.'" Reply Brief 16. And, he adds, bankruptcy courts have a variety of statutory tools at their disposal to disallow or equitably subordinate any potential indemnification claims the Sacklers might pursue. *Ibid.* (citing §§ 502(e)(1)(B), 510(c)(1)).

e.g., *In re Specialty Equipment Cos.*, 3 F.3d 1043, 1047 (CA7 1993). Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor. Additionally, because this case involves only a stayed reorganization plan, we do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated. Confining ourselves to the question presented, we hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants. Because the Second Circuit ruled otherwise, its judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KAVANAUGH, with whom THE CHIEF JUSTICE, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

Today's decision is wrong on the law and devastating for more than 100,000 opioid victims and their families. The Court's decision rewrites the text of the U. S. Bankruptcy Code and restricts the long-established authority of bankruptcy courts to fashion fair and equitable relief for mass-tort victims. As a result, opioid victims are now deprived of the substantial monetary recovery that they long fought for and finally secured after years of litigation.

Bankruptcy seeks to solve a collective-action problem and prevent a race to the courthouse by individual creditors who, if successful, could obtain all of a company's assets, leaving nothing for all the other creditors. The bankruptcy system works to preserve a bankrupt company's limited assets and to then fairly and equitably distribute those assets among the creditors—and in mass-tort bankruptcies, among the victims. To do so, the Bankruptcy Code vests bankruptcy courts with broad discretion to approve "appropriate" plan provisions. 11 U.S.C. § 1123(b)(6).

In this mass-tort bankruptcy case, the Bankruptcy Court exercised that discretion appropriately—indeed, admirably. It approved a bankruptcy reorganization plan for Purdue Pharma that built up the estate to approximately $7 billion by securing a $5.5 to $6 billion settlement payment from the Sacklers, who were officers and directors of Purdue. The plan then guaranteed substantial and equitable compensation to Purdue's many victims and creditors, including more than 100,000 individual opioid victims. The plan also provided significant funding for thousands of state and local governments to prevent and treat opioid addiction.

The plan was a shining example of the bankruptcy system at work. Not surprisingly, therefore, virtually all of the opioid victims and creditors in this case fervently support approval of Purdue's bankruptcy reorganization plan. And all 50 state Attorneys General have signed on to the plan—a rare consensus. The only relevant exceptions to the nearly universal desire for plan approval are a small group of Canadian creditors and one lone individual.

But the Court now throws out the plan—and in doing so, categorically prohibits non-debtor releases, which have long been a critical tool for bankruptcy courts to manage mass-tort bankruptcies like this one. The Court's decision finds no mooring in the Bankruptcy Code. Under the Code, all agree that a bankruptcy plan can nonconsensually release victims' and creditors' claims *against a bankrupt company*—here, against Purdue. Yet the Court today says that a plan can *never* release victims'

and creditors' claims *against non-debtor officers and directors of the company*—here, against the Sacklers.

That is true, the Court says, even when (as here) those non-debtor releases are necessary to facilitate a fair settlement with the officers and directors and produce a significantly larger bankruptcy estate that can be fairly and equitably distributed among the victims and creditors. And that is true, the Court also says, even when (as here) those officers and directors are indemnified by the company. When officers and directors are indemnified by the company, a victim's or creditor's claim against the non-debtors "is, in essence, a suit against the debtor" that could "deplete the assets of the estate" for the benefit of only a few, just like a claim against the company itself. *In re Purdue Pharma L. P.*, 69 F.4th 45, 78 (CA2 2023) (quotation marks omitted).

It therefore makes little legal, practical, or economic sense to say, as the Court does, that the victims' and creditors' claims against the debtor can be released, but that it would be categorically "inappropriate" to release their identical claims against non-debtors even when they are indemnified or when the release generates a significant settlement payment by the non-debtor to the estate.

For decades, bankruptcy courts and courts of appeals have determined that non-debtor releases can be appropriate and essential in mass-tort cases like this one. Non-debtor releases have enabled substantial and equitable relief to victims in cases ranging from asbestos, Dalkon Shield, and Dow Corning silicone breast implants to the Catholic Church and the Boy Scouts. As leading scholars on bankruptcy explain, "the bankruptcy community has recognized the resolution of mass tort claims as a widely accepted core function of bankruptcy courts for decades"—and they emphasize that a "key feature in every mass tort bankruptcy" has been the non-debtor release. A. Casey & J. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. Chi. L. Rev. 973, 974, 977 (2023).

No longer.

Given the broad statutory text—"appropriate"—and the history of bankruptcy practice approving non-debtor releases in mass-tort bankruptcies, there is no good reason for the debilitating effects that the decision today imposes on the opioid victims in this case and on the bankruptcy system at large. To be sure, many Americans have deep hostility toward the Sacklers. But allowing that animosity to infect this bankruptcy case is entirely misdirected and counterproductive, and just piles even more injury onto the opioid victims. And no one can have more hostility toward the Sacklers and a greater desire to go after the Sacklers' assets than the opioid victims themselves. Yet the victims unequivocally seek approval *of this plan*.

With the current plan now gone and non-debtor releases categorically prohibited, the consequences will be severe, as the victims and creditors forcefully explained. Without releases, there will be no $5.5 to $6 billion settlement payment to the estate, and "there will be no viable path to any victim recovery." Tr. of Oral Arg. 100. And without the plan's substantial funding to prevent and treat opioid addiction, the victims and creditors bluntly described further repercussions: "more people will die without this Plan." Brief for Respondent Official Committee of Unsecured Creditors of Purdue Pharma L. P. et al. 55.

In short: Despite the broad term "appropriate" in the statutory text, despite the longstanding precedents approving mass-tort bankruptcy plans with non-debtor releases like these, despite 50 state

Attorneys General signing on, and despite the pleas of the opioid victims, today's decision creates a new atextual restriction on the authority of bankruptcy courts to approve appropriate plan provisions. The opioid victims and their families are deprived of their hard-won relief. And the communities devastated by the opioid crisis are deprived of the funding needed to help prevent and treat opioid addiction. As a result of the Court's decision, each victim and creditor receives the essential equivalent of a lottery ticket for a possible future recovery for (at most) a few of them. And as the Bankruptcy Court explained, without the non-debtor releases, there is no good reason to believe that any of the victims or state or local governments will ever recover anything. I respectfully but emphatically dissent.

I

To map out this dissent for the reader: Part I (pages 5 to 18) discusses why non-debtor releases are often appropriate and essential, particularly in mass-tort bankruptcies. Part II (pages 18 to 31) explains why non-debtor releases were appropriate and essential in the Purdue bankruptcy. Part III (pages 31 to 52) engages the Court's contrary arguments and why I respectfully disagree with those arguments. Part IV (pages 52 to 54) sums up.

Throughout this opinion, keep in mind the goal of bankruptcy. The bankruptcy system is designed to preserve the debtor's estate so as to ensure fair and equitable recovery for creditors. Bankruptcy courts achieve that overarching objective by, among other things, releasing claims that otherwise could deplete the estate for the benefit of only a few and leave all the other creditors with nothing. And as courts have recognized for decades, especially in mass-tort cases, non-debtor releases are not merely "appropriate," but can be absolutely critical to achieving the goal of bankruptcy—fair and equitable recovery for victims and creditors.

A

Article I, § 8, of the Constitution affords Congress power to establish "uniform Laws on the subject of Bankruptcies throughout the United States" and to "make all Laws which shall be necessary and proper for carrying into Execution" that power.

Early in the Nation's history, Congress established the bankruptcy system. In 1978, Congress significantly revamped and reenacted the Bankruptcy Code in its current form. Bankruptcy Code of 1978, 92 Stat. 2549.

The purpose of bankruptcy law is to address the collective-action problem that a bankruptcy poses. T. Jackson, The Logic and Limits of Bankruptcy Law 12–13 (1986). When a company's liabilities exceed its ability to pay creditors, every creditor has an incentive to maximize its own recovery before other creditors deplete the pot. Without a mandatory collective system, the creditors would race to the courthouse to recover first. One or a few successful creditors could then recover substantial funds, deplete the assets, and drive the company under—leaving other creditors with nothing. See *id.*, at 7–19; D. Baird, A World Without Bankruptcy, 50 Law & Contemp. Prob. 173, 183–184 (1987); T. Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 Yale L. J. 857, 860–868 (1982).

Bankruptcy creates a way for creditors to "act as one, by imposing a *collective* and *compulsory* proceeding on them." Jackson, Logic and Limits of Bankruptcy Law, at 13. One of the goals of Chapter 11 of the Bankruptcy Code in particular is to fairly distribute estate assets among creditors

"in order to prevent a race to the courthouse to dismember the debtor." 7 Collier on Bankruptcy ¶1100.01, p. 1100–3 (R. Levin & H. Sommer eds., 16th ed. 2023). Chapter 11 is aimed at preserving an estate's value for distribution to creditors in the face of that collective-action problem.

The basic Chapter 11 case runs as follows. After the debtor files for bankruptcy under Chapter 11, the debtor's property becomes property of the bankruptcy estate. 11 U.S.C. § 541. Any litigation that might interfere with the property of the estate is subject to an automatic stay, thus preventing creditors from skipping the line by litigating in a separate forum against the debtor while the bankruptcy is ongoing. § 362.

With litigation paused, the parties craft a plan of reorganization for the debtor. The Code grants the bankruptcy court sweeping powers to reorganize the debtor company and ensure fair and equitable recovery for the creditors. For example, the plan may authorize selling or retaining the company's property; merging or consolidating the company; or amending the company's charter. § 1123(a)(5). The subsection at issue here, § 1123(b), also authorizes many other kinds of provisions that bankruptcy plans may include.[1] Most relevant for this case, as I will explain, the reorganization plan may impair and release "any class of claims" that creditors hold against the debtor. § 1123(b)(1). The plan may also settle and release "any claim or interest" that the debtor company holds against non-debtors. § 1123(b)(3). And the plan may include "any other appropriate provision not inconsistent with the applicable provisions" of the Bankruptcy Code. § 1123(b)(6).

To address any collective-action or holdout problem, the bankruptcy court has the power to approve a reorganization plan even without the consent of every creditor. If creditors holding more than one-half in number (and at least two-thirds in amount) of the claims in every class accept the plan, the court can confirm the plan. §§ 1126(c), 1129(a)(8)(A). A plan is "said to be confirmed consensually if all classes of creditors vote in favor, even if some classes have dissenting creditors." 7 Collier, Bankruptcy ¶1129.01, at 1129–13. That the bankruptcy system considers a plan with majority (even if not unanimous) support to be "consensual" underscores that the bankruptcy system is designed to benefit creditors collectively and prevent holdout problems.

Confirmation of the plan "generally discharges the debtor from all debts that arose before confirmation." *Id.*,

1. The full text of § 1123(b) provides that "a plan may—

"(1)impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

"(2)subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

"(3)provide for—

"(A)the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

"(B)the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

"(4)provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

"(5)modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

"(6)include any other appropriate provision not inconsistent with the applicable provisions of this title."

¶1100.09[2][f], at 1100–42 (citing § 1141(d)). And all creditors are bound by the plan's distribution, even if some creditors are not happy and oppose the plan. *Ibid.*

B

This is a mass-tort bankruptcy case. Mass-tort cases present the same collective-action problem that bankruptcy was designed to address. "Without a mandatory rule that consolidates claims in a single tribunal, tort claimants would rationally enter a race to the courthouse." A. Casey & J. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. Chi. L. Rev. 973, 997 (2023). And the "plaintiffs who bring successful suits earlier are likely to drain the firm's resources, while inconsistent judgments could result in inequitable payouts even among plaintiffs who ultimately do collect." *Id.*, at 994.

For many decades now, bankruptcy law has stepped in as a coordinating tribunal in significant mass-tort cases. When a company that is liable for mass torts files for bankruptcy, the bankruptcy system enables (and requires) the mass-tort victims who are seeking relief from the bankrupt company to work together to reach a fair and equitable distribution of the company's assets.

In many cases, there is no workable alternative other than bankruptcy for achieving fair and equitable recovery for mass-tort victims. "Outside of bankruptcy," victims face "significant administrative costs" of multi-district litigation, "which has limited coordination mechanisms and no tools for binding future claimants." *Id.*, at 1005. And multi-district litigation cannot "solve the collective action problem because dissenting claimants can opt out of settlements even when super majorities favor them." *Ibid.*

Bankruptcy, on the other hand, reduces administrative costs and allows all of the affected parties to come together, pause litigation elsewhere, invoke procedural safeguards including discovery, and reach a collective resolution that considers both current and future victims. Cf. Federal Judicial Center, E. Gibson, Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations 6 (2000) ("bankruptcy reorganizations provide an inherently fairer method of resolving mass tort claims" than alternative of class-action settlements).

In some cases—including mass-tort cases—it is not only the debtor company, but rather another closely related person or entity such as officers and directors (non-debtors), who may hold valuable assets and also be potentially liable for the company's wrongdoing.

But it may be uncertain whether the victims can recover in tort suits against the non-debtors due to legal hurdles or difficulty reaching the non-debtors' assets. In those cases, a settlement may be reached: In exchange for being released from potential liability for any wrongdoing, the non-debtor must make substantial payments to the company's bankruptcy estate in order to compensate victims. As long as the settlement is fair, the non-debtor's settlement payment will benefit victims "by enlarging the pie of recoverable funds" in the bankruptcy estate. Casey & Macey, 90 U. Chi. L. Rev., at 1001. And it will reduce administrative costs, because the victims' claims against both the debtor and the non-debtor may be resolved "at the same time and in the same tribunal." *Id.*, at 1002.

The non-debtor's settlement payment into the estate can also solve a collective-action problem. Bringing the non-debtor's assets into the bankruptcy estate enables those assets to be distributed fairly and

equitably among victims, rather than swallowed up by the first victim to successfully sue the non-debtor. *Id.*, at 1002–1003.

A separate collective-action problem can arise when the insolvent company's officers and directors are indemnified by the company for liability arising out of their job duties. In such cases, "a suit against the non-debtor is, in essence, a suit against the debtor." *In re Purdue Pharma L. P.*, 69 F.4th 45, 78 (CA2 2023) (quotation marks omitted). If not barred from doing so, the creditors could race to the courthouse against the indemnified officers and directors for basically the same claims that they hold against the debtor company. If successful, such suits would deplete the company's assets because a judgment against the indemnified officers and directors would likely come out of the debtor company's assets.

Another similar collective-action problem can involve liability insurance, a kind of indemnification relationship where the insurer is on the hook for tort victims' claims against the debtor company. See B. Zaretsky, Insurance Proceeds in Bankruptcy, 55 Brooklyn L. Rev. 373, 375–376 (1989). The insurance assets—meaning assets to the limits of the debtor's insurance coverage—are usually a key asset for the bankruptcy estate to compensate victims. But tort victims also "may have direct action rights against the insurance carrier, even, in some cases, bypassing the debtor-insured." 5 Collier, Bankruptcy ¶541.10[3], at 541–60. If victims brought their claims directly against the insurer for the same claims that they hold against the estate, one group of victims could obtain from the insurer the full amount of the debtor's coverage. That would obviously prevent the insurance money from being used as part of the bankruptcy estate. See Zaretsky, 55 Brooklyn L. Rev., at 376–377, 394–395.

To address those various collective-action problems, bankruptcy courts have long found non-debtor releases to be appropriate in certain complex bankruptcy cases, especially in mass-tort bankruptcies. Indeed, that is precisely why non-debtor releases emerged in asbestos mass-tort bankruptcies in the 1980s. See *id.*, at 405–414; Casey & Macey, 90 U. Chi. L. Rev., at 998–999; see, *e.g.*, *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (CA2 1988). And that is precisely why non-debtor releases have become such a well-established tool in mass-tort bankruptcies in the decades since.

For example, after A. H. Robins declared bankruptcy in 1985 in the face of massive tort liability for injuries from its defective intrauterine device, the Dalkon Shield, nearly 200,000 victims filed proof of claims. *In re A. H. Robins Co.*, 88 B.R. 742, 743–744, 747 (ED Va. 1988), aff'd, 880 F.2d 694 (CA4 1989). A plan provision releasing the company's directors and insurance company ensured that the estate would not be depleted through indemnity or contribution claims, or claims brought directly against the directors or insurer. 88 B.R. at 751; 880 F.2d at 700–702. Preventing the victims from engaging in "piecemeal litigation" against the non-debtor directors and insurance company was the only way to ensure "equality of treatment of similarly situated creditors." 88 B.R. at 751. Therefore, the Bankruptcy Court found (and the Fourth Circuit agreed) that the release was "necessary and essential" to the bankruptcy's success. *Ibid.*; see 880 F.2d at 701–702. The plan ultimately provided for the victims to recover in full, and they overwhelmingly approved the plan. *Id.*, at 700–701.

A non-debtor release provision was similarly essential to resolve hundreds of thousands of victims' tort claims against Dow Corning Corporation, which declared

bankruptcy in 1995 in the face of liability for its defective silicone breast implants. See *In re Dow Corning Corp.*, 287 B.R. 396, 397 (ED Mich. 2002). The non-debtor release provision prevented the victims from suing Dow Corning's insurers and shareholders for their tort claims—which would have depleted Dow Corning's shared insurance assets and other estate assets. *Id.*, at 402–403, 406–408. The non-debtor release provision was "essential" to the bankruptcy reorganization because the reorganization hinged "on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor." *In re Dow Corning Corp.*, 280 F.3d 648, 658 (CA6 2002); 287 B.R. at 410–413.

The need for such a tool to deal with complex bankruptcy cases has not gone away. Far from it. Indeed, without the option of bankruptcy with non-debtor releases, "tort victims in several recent high-profile cases would have received less compensation; the compensation would have been unfairly distributed; and the administrative costs of resolving their claims would have been higher." Casey & Macey, 90 U. Chi. L. Rev., at 979; see also Brief for Law Professors in Support of Respondents as *Amici Curiae* 21–25; Brief for Certain Former Commissioners of the American Bankruptcy Institute's Commission To Study the Reform of Chapter 11 as *Amici Curiae* 9–11; Brief for Association of the Bar of the City of New York as *Amicus Curiae* 9, 11–15.

Consider two recent examples that ensured recovery for the victims of torts committed by the Boy Scouts of America and by several dioceses of the Catholic Church. In both cases, a national or regional organization was the debtor in the bankruptcy. But that organization shared its liability and its insurance policy with numerous other legally separate and autonomous local entities. Without a coordinating mechanism, a victim's (or group of victims') recovery against one local entity could have eaten up all of the shared insurance assets, leaving all of the other victims with nothing. Brief for Boy Scouts of America as *Amicus Curiae* 9–14, 17–19; Brief for U. S. Conference of Catholic Bishops as *Amicus Curiae* 9–22.

Bankruptcy provided a forum to coordinate liability and insurance assets. A non-debtor release provision prevented victims from litigating outside of the bankruptcy plan's procedures. And the provision therefore prevented one victim or group of victims from obtaining all of the insurance funds before other victims recovered. As a result, in each case, the local entities were able to pool their resources to create a substantial fund in a single bankruptcy estate to compensate victims substantially and fairly. Brief for Boy Scouts of America as *Amicus Curiae* 11–12, 20–21; Brief for Ad Hoc Group of Local Councils of the Boy Scouts of America as *Amicus Curiae* 5–6; Brief for U. S. Conference of Catholic Bishops as *Amicus Curiae* 15–16.

As those examples show, in some cases where various closely related but distinct parties share liability or share assets (or both), bankruptcy "provides the *only* forum in the U. S. legal system where a unified and complete resolution of mass-tort cases can reliably occur in a manner that results in a fair recovery and distribution for all claimants." Brief for Association of the Bar of the City of New York as *Amicus Curiae* 15. And the bankruptcy system could not do so without non-debtor releases.

C

The Bankruptcy Code gives bankruptcy courts authority to approve non-debtor releases to solve the complex collective-action problems that such cases present. As

noted above, a Chapter 11 reorganization plan may release creditor claims against debtors. § 1123(b)(1). And a plan may settle and release debtor claims against non-debtors. § 1123(b)(3).

In addition, the plan may also include "any other appropriate provision not inconsistent with the applicable provisions of " the Code. § 1123(b)(6). Section 1123(b)(6) provides ample flexibility for the reorganization plan to settle and release creditor claims against non-debtors who are closely related to the debtor. For example, officers and directors may be indemnified by the debtor company; in those cases, creditor claims against indemnified non-debtors are essentially the same as creditor claims against the debtor business itself. Or the non-debtors may reach a settlement with the victims and creditors where the non-debtors pay a settlement amount to the estate, which in some cases may be the only way to ensure fair and equitable recovery for the victims and creditors. The non-debtor releases—just like debtor releases under § 1123(b)(1) and non-debtor releases under § 1123(b)(3)—can be essential to preserve and increase the estate's assets and can be essential to ensure fair and equitable victim and creditor recovery.

The key statutory term in § 1123(b)(6) is "appropriate." As this Court has often said, "appropriate" is a "broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *Michigan v. EPA*, 576 U.S. 743, 752, 135 S.Ct. 2699, 192 L.Ed.2d 674 (2015) (quotation marks omitted). Because determining propriety requires exercising judgment, the inquiry must include a degree of "flexibility." *Ibid.* The Court has explained on numerous occasions that the "ordinary meaning" of a statute authorizing appropriate relief "confers broad discretion" on a court. *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); see also, *e.g.*, *Sheet Metal Workers' Intern. Ass'n v. EEOC*, 478 U.S. 421, 446, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986) (plurality opinion) (Title VII "vest[s] district courts with broad discretion to award 'appropriate' equitable relief "); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) ("In directing the district court to impose an 'appropriate' sanction, Rule 11 itself indicates that the district court is empowered to exercise its discretion"). Because the "language is open-ended on its face," whether a provision is "appropriate is inherently context dependent." *Tanzin v. Tanvir*, 592 U.S. 43, 49, 141 S.Ct. 486, 208 L.Ed.2d 295 (2020) (quotation marks omitted).

By allowing "any other appropriate provision," § 1123(b)(6) empowers a bankruptcy court to exercise reasonable discretion. That § 1123 confers broad discretion makes eminent sense, given "the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 525, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984). Such flexibility is important to achieve Chapter 11's ever-elusive goal of ensuring fair and equitable recovery to creditors. See §§ 1129(a)(7), (b)(1).

The catchall authority in Chapter 11 therefore empowers a bankruptcy court to exercise its discretion to deal with complex scenarios, like the collective-action problems that plague mass-tort bankruptcies. Non-debtor releases are often appropriate—indeed are essential—in such circumstances.

And courts have therefore long found non-debtor releases to be appropriate in certain narrow circumstances under § 1123(b)(6). Indeed, courts have been approving such non-debtor releases almost as long as the current Bankruptcy Code

has existed since its enactment in 1978. See, *e.g.*, *In re Johns-Manville Corp.*, 68 B.R. 618, 624–626 (Bkrtcy. Ct. SDNY 1986), aff 'd, 837 F.2d at 90; *A. H. Robins Co.*, 88 B.R. at 751, aff 'd, 880 F.2d at 696. Historical and contemporary practice demonstrate that non-debtor releases are especially appropriate when (as here) non-debtor releases and corresponding settlement payments preserve and increase the debtor's estate and thereby ensure fair and equitable recovery for creditors.

Over those decades of practice, courts have developed and applied numerous factors for determining whether a non-debtor release is "appropriate" in a given case. § 1123(b)(6); see H. Friendly, Indiscretion About Discretion, 31 Emory L. J. 747, 771–773 (1982) (noting the common-law-like process by which factors important to a discretionary decision develop over time). Those factors reflect the fact that determining whether a non-debtor release is "appropriate" is a holistic inquiry that depends on the precise facts and circumstances of each case. And the factors have served to confine the use of non-debtor releases to well-defined and narrow circumstances—precisely those circumstances where the collective-action problems arise.

For instance, since the 1980s, the Second Circuit has been a leader on the non-debtor release issue. See, *e.g.*, *Johns-Manville Corp.*, 837 F.2d 89 (1988); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (1992); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2005). Over time, the Second Circuit has developed a non-exhaustive list of factors for determining whether a non-debtor release is appropriately employed and appropriately tailored in a given case.

First, and critically, the court must determine whether the released party is closely related to the debtor—for example, through an indemnification agreement—where "a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate." 69 F.4th at 78 (quotation marks omitted). Second, the court must determine if the claims against the non-debtor are "factually and legally intertwined" with claims against the debtor. *Ibid.* Third, the court must ensure that the "scope of the releases" is tailored to only the claims that must be released to protect the plan. *Ibid.* Fourth, even then, the court should approve the release only if it is truly "essential" to the plan's success and the reorganization would fail without it. *Ibid.* Fifth, the court must consider whether, as part of the settlement, the non-debtor party has paid "substantial assets" to the estate. *Ibid.* Sixth, the court should determine if the plan provides "fair payment" to creditors for their released claims. *Id.*, at 79. Seventh, the court must ensure that the creditors "overwhelmingly" approve of the release, which the Second Circuit defined as a 75 percent "bare minimum." *Id.*, at 78–79 (quotation marks omitted).[2]

Factors one through four ensure that the releases are necessary to solve collective-action problems that threaten the bankruptcy and prevent fair and equitable recovery for the victims and creditors. Factor five makes sure that the releases are not a free ride for the non-debtor. Factor six ensures that the victims and creditors receive fair compensation. Together, factors five and six assess whether

2. Other Courts of Appeals have used similar factors for evaluating non-debtor releases. See, *e.g., In re Seaside Engineering & Surveying, Inc.,* 780 F.3d 1070, 1079–1081 (CA11 2015); *National Heritage Foundation, Inc. v. Highbourne Foundation,* 760 F.3d 344, 347–351 (CA4 2014); *In re Dow Corning Corp.,* 280 F.3d 648, 658–661 (CA6 2002).

there has been a fair settlement given the probability of victims' and creditors' recovery from the non-debtor and the likely amount of any such recovery. And factor seven ensures that the vast majority of victims and creditors approve, meaning that the release is solving a holdout problem.

As the Courts of Appeals' comprehensive factors illustrate, § 1123(b)(6) limits a bankruptcy court's authority in important respects. A non-debtor release must be "appropriate" given all of the facts and circumstances of the case. And as the history of non-debtor releases illustrates, the appropriateness requirement confines the use of non-debtor releases to narrow and relatively rare circumstances where the releases are necessary to help victims and creditors achieve fair and equitable recovery.

As long as every class of victims and creditors supports the plan by a majority vote in number and at least a two-thirds vote in amount, the plan is "said to be confirmed consensually," "even if some classes have dissenting creditors." 7 Collier, Bankruptcy ¶1129.01, at 1129–13. And the Courts of Appeals have allowed non-debtor releases only when there is an even higher level of supermajority victim and creditor approval. In the mass-tort bankruptcy cases, most plans have easily cleared that bar and received close to 100 percent approval. *E.g.*, *Johns-Manville Corp.*, 68 B.R. at 631 (95 percent approval); *A. H. Robins Co.*, 880 F.2d at 700 (over 94 percent approval); *Dow Corning*, 287 B.R. at 413 (over 94 percent approval); 69 F.4th at 82 (over 95 percent approval here). So in reality, as opposed to rhetoric, the non-debtor releases in mass-tort bankruptcy plans, including this one, have been approved by all but a comparatively small group of victims and creditors.

In every bankruptcy of this kind, moreover, the plan nonconsensually releases victims' and creditors' claims *against the debtor*. The only difference with non-debtor releases is that they release victims' and creditors' claims not against the debtor but rather against non-debtors who are closely related to the debtor, such as indemnified officers and directors.

II

In this case, as in many past mass-tort bankruptcies, the non-debtor releases were appropriate and therefore authorized by 11 U.S.C. § 1123(b)(6) of the Code. The non-debtor releases were needed to ensure meaningful victim and creditor recovery in the face of multiple collective-action problems.

A

Purdue Pharma was a pharmaceutical company owned and directed by the extended Sackler family. Brothers Arthur, Mortimer, and Raymond Sackler purchased the company in 1952. Since then, Purdue has been wholly owned by entities and trusts established for the benefit of Mortimer Sackler's and Raymond Sackler's families and descendants, and those families also closely controlled Purdue's operations.

In the 1990s, Purdue developed the drug OxyContin, a powerful and addictive opioid painkiller. Purdue aggressively marketed that drug and downplayed or hid its addictive qualities. OxyContin helped people to manage pain. But the drug's addictive qualities led to its widespread abuse. OxyContin played a central role in the opioid-abuse crisis from which millions of Americans and their families continue to suffer.

Starting in the early 2000s, governments and individual plaintiffs began to sue Purdue for the harm caused by OxyContin. In 2007, Purdue settled large swaths of those

claims and pled guilty to felony misbranding of OxyContin.

But within the next decade, victims of the opioid crisis and their families, along with state and local governments fighting the crisis, began filing a new wave of lawsuits, this time also naming members of the Sackler family as defendants. Today, those claims amount to more than $40 *trillion* worth of alleged damages against Purdue and the Sacklers. (For perspective, $40 trillion is about seven times the total annual spending of the U. S. Government.)

As the litigation by victims and state and local governments mounted, the U. S. Government then brought federal criminal and civil charges against Purdue. The U. S. Government has not brought criminal charges against any of the Sacklers individually. Nor have any States brought criminal charges against any of the Sacklers individually.

As to the criminal charges against Purdue, the company pled guilty to conspiracy to defraud the United States, to violate the Food, Drug, and Cosmetic Act, and to violate the federal anti-kickback statute. As part of the global resolution of the charges, Purdue agreed to a $2 billion judgment to the U. S. Government that would be "deemed to have the status of an allowed superpriority" claim in bankruptcy. 17 App. in No. 22–110 etc. (CA2), p. 4804. The U. S. Government agreed not to "initiate any further criminal charges against Purdue." 16 *id.,* at 4798.

Unable to pay its colossal potential liabilities, Purdue filed for bankruptcy under Chapter 11 of the Bankruptcy Code. The ensuing case exemplified the flexibility and common sense of the bankruptcy system at work.

The proceedings were extraordinarily complex. The case involved "likely the largest creditor body ever," and the number of claims filed—totaling more than 600,000—was likely "a record." *In re Purdue Pharma L. P.*, 633 B.R. 53, 58 (Bkrtcy. Ct. SDNY 2021). Further complicating matters was the need to allocate funds between, on the one hand, individual victims and the hospitals that urgently needed relief and, on the other hand, government entities at all levels that urgently needed funds for opioid crisis prevention and treatment efforts. *Id.*, at 83.

Aided by perhaps "the most extensive discovery process" that "any court in bankruptcy has ever seen," the parties engaged in prolonged arms-length negotiations. *Id.*, at 85–86. They ultimately agreed on a multi-faceted compensation plan for the victims and creditors and reorganization plan for Purdue. Under that plan, Purdue would cease to exist and would be replaced with a new company that would manufacture opioid-abatement medications. And approximately $7 billion would be distributed among nine trusts to compensate victims and creditors and to fund efforts to abate the opioid crisis by preventing and treating addiction.

To determine how to allocate the $7 billion, the victims and creditors then engaged in a series of "heavily negotiated and intricately woven compromises" and devised a "complex allocation" of the funds to different classes of victims and creditors. *Id.*, at 83, 90. In the end, more than 95 percent of voting victims and creditors approved of the distribution scheme.

That plan would distribute billions of dollars to communities to use exclusively for prevention and treatment programs. And $700 to $750 million was set aside to compensate individual tort victims and their families. 1 App. 561. Opioid victims and their families would each receive somewhere between $3,500 and $48,000 depending on the category of claim and level

of harm. *Id.*, at 573–584; 6 App. in No. 22–110 etc. (CA2), at 1695.

B

Under the reorganization plan, victims' and creditors' claims *against Purdue Pharma* were released (even if some victims and creditors did not consent). As in other mass-tort bankruptcies described above, a related and equally essential facet of the Purdue plan was the non-debtor release provision. Under that provision, the victims' and creditors' claims *against the Sacklers* were also released. As a result, Purdue's victims and creditors could not later sue either Purdue Pharma or members of the Sackler family (the officers and directors of Purdue Pharma) for Purdue's and the Sacklers' opioid-related activities.

The non-debtor release provision prevented a race to the courthouse against the Sacklers. As a result, the non-debtor release provision solved two separate collective-action problems that dogged Purdue's mass-tort bankruptcy: (i) It protected Purdue's estate from the risk of being depleted by indemnification claims, and (ii) it operated as a settlement of potential claims against the Sacklers and thus enabled the Sacklers' large settlement payment to the estate. That settlement payment in turn quadrupled the amount in the Purdue estate and enabled substantially greater recovery for the victims.

I will now explain both of those important points in some detail.

First, and critical to a proper understanding of this case, the non-debtor release provision was essential to *preserve* Purdue's existing assets. By preserving the estate, the non-debtor release provision ensured that the assets could be fairly and equitably apportioned among all victims and creditors rather than devoured by one group of potential plaintiffs.

How? Pursuant to a 2004 indemnification agreement, Purdue had agreed to pay for liability and legal expenses that officers and directors of Purdue faced for decisions related to Purdue, including opioid-related decisions. See *In re Purdue Pharma L. P.*, 69 F.4th 45, 58–59 (CA2 2023). That indemnification agreement covered judgments against the Sacklers and related legal expenses.

As explained above, the Sacklers wholly owned and controlled Purdue, a closely held corporation. The Sacklers "took a major role" in running Purdue, including making decisions about "Purdue's practices regarding its opioid products." 633 B.R. at 93. In short, the Sacklers potentially shared much of the liability that Purdue faced for Purdue's opioid practices. See *In re Purdue Pharma, L. P.*, 635 B.R. 26, 87 (SDNY 2021) (claims against the Sacklers are "deeply connected with, if not entirely identical to," claims against Purdue (quotation marks omitted)); see also 633 B.R. at 108.

But due to the indemnification agreement, if victims and creditors were to sue the Sacklers directly for claims related to Purdue or opioids, the Sacklers would have a reasonable basis to seek reimbursement from Purdue for liability and litigation costs. So Purdue could potentially be on the hook for a substantial amount of the Sacklers' liability and litigation costs. In such indemnification relationships, "a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate." 69 F.4th at 78 (quotation marks omitted).

As a real-world matter, therefore, opioid-related claims *against the Sacklers* could come out of the same pot of Purdue money as opioid-related claims *against Purdue*. So releasing claims against the Sacklers is not meaningfully different from

releasing claims against Purdue itself, which the bankruptcy plan here of course also mandated. Both sets of releases were necessary to preserve Purdue's estate so that it was available for all victims and creditors to recover fairly and equitably. Otherwise, the estate could be zeroed out: A few victims or creditors could race to the courthouse and obtain recovery from Purdue or the Sacklers (ultimately the same pot of money) and thereby deplete the assets of the company and leave nothing for everyone else.

To fully understand why both sets of releases were necessary—against Purdue and against the Sacklers—suppose that the plan did *not* release the Sacklers from opioid- and Purdue-related liability. Victims' and creditors' opioid-related claims *against Purdue* would be discharged in Purdue's bankruptcy (even without their consent). But any victims or creditors could still sue *the Sacklers* for essentially the same claims.

Suppose that a State or a group of victims sued the Sacklers and received a large reward. The Sacklers "would have a reasonable basis to seek indemnification" from Purdue for judgments and legal expenses. *Id.*, at 72. Therefore, any liability judgments and litigation costs for certain plaintiffs in their suits *against the Sacklers* could "deplete the *res*" of *Purdue's* bankruptcy—meaning that there might well be nothing left for all of the other victims and creditors. *Id.*, at 80. Even if the Sacklers' indemnification claims against Purdue were unsuccessful, Purdue would "be required to litigate" those claims, which would likely diminish the *res*, "no matter the ultimate outcome of those claims." *Ibid.*

Every victim and creditor knows that a single judgment by someone else against the Sacklers could deplete the Purdue estate and leave nothing for anyone else. So every victim and creditor would have an incentive to race to the courthouse to sue the Sacklers. A classic collective-action problem.

The non-debtor releases of claims against the Sacklers prevented that collective-action problem in the same way that the releases of claims against Purdue itself prevented the identical collective-action problem. Both protected Purdue's assets from being consumed by the first to sue successfully. And the non-debtor releases were narrowly tailored to the problem. The non-debtor releases enjoined victims and creditors from bringing claims against the Sacklers only in cases where Purdue's conduct, or the victims' or creditors' claims asserted against Purdue, was a legal cause or a legally relevant factor to the cause of action against the Sacklers. 633 B.R. at 97–98 (defining the release to encompass only claims that "directly affect the *res* of the Debtors' estates," such as claims that would trigger the Sacklers' "rights to indemnification and contribution"); see also *id.*, at 105. In other words, the releases applied only to claims for which the Sacklers had a reasonable basis to seek coverage or reimbursement from Purdue.

The non-debtor release provision therefore released claims against the Sacklers that are essentially the same as claims against Purdue. Doing so preserved Purdue's bankruptcy estate so that it could be fairly apportioned among the victims and creditors.

Second, the non-debtor releases not only *preserved* the existing Purdue estate; those non-debtor releases also greatly *increased* the funds in the Purdue estate so that the victims and creditors could receive greater compensation.

Standing alone, Purdue's estate is estimated to be worth approximately $1.8 billion—a small fraction of the sizable claims

against Purdue. *Id.*, at 90; 22 App. in No. 22–110 etc. (CA2), at 6507. If that were all the money on the table, the Bankruptcy Court found, the victims and creditors "would probably recover nothing" from Purdue's estate. 633 B.R. at 109. That is because the United States holds a $2 billion "superpriority" claim, meaning that the United States would be first in line to recover ahead of all of the victims and other creditors. The United States' claim would wipe out Purdue's entire $1.8 billion value. "As a result, many victims of the opioid crisis would go without any assistance." 69 F.4th at 80.

So for the victims and other creditors to have any hope of meaningful recovery, Purdue's bankruptcy estate needed more funds.

Where to find those funds? The Sacklers' assets were the answer. After vigorous negotiations, a settlement was reached: In exchange for the releases, the Sacklers ultimately agreed to make significant payments to Purdue's estate—between $5.5 and $6 billion. Adding that substantial amount to Purdue's comparatively smaller bankruptcy estate enabled Purdue's reorganization plan to distribute an estimated $7 billion or more to the victims and creditors—thereby quadrupling the size of the estate available for distribution. With that enhanced estate, the plan garnered 95 percent support from the voting victims and creditors. That high level of support tends to show that this was a very good plan for the victims and creditors. Because it led to that high level of support, the Sacklers' multi-billion-dollar payment was critical to creating a successful reorganization plan.

That payment was made possible by heavily negotiated settlements among Purdue, the victims and creditors, and the Sacklers. Most relevant here, in exchange for the Sacklers agreeing to pay billions of dollars to the bankruptcy estate, the victims and creditors agreed to release their claims against the Sacklers. The settlement—exchanging releases for the Sacklers' $5.5 to $6 billion payment—enabled the victims and creditors to avoid "the significant risk, cost and delay (potentially years) that would result from pursuing the Sacklers and related parties through litigation." 1 App. 31.

Indeed, after a 6-day trial involving 41 witnesses, the Bankruptcy Court found that the settlement provided the best chance for the victims and creditors to ever see any money from the Sacklers. See 633 B.R. at 85, 90. (That is a critical point that the Court today whiffs on.) Indeed, the Bankruptcy Court found that the victims and creditors would be unlikely to recover from the Sacklers by suing the Sacklers directly due to numerous potential weaknesses in and defenses to the victims' and creditors' legal theories. See *id.*, at 90–93, 108. Even if the suits were successful, the Bankruptcy Court expressed "significant concern" about the ability to collect any judgments from the Sacklers due to the difficulty of reaching their assets in foreign countries and in spendthrift trusts. *Id.*, at 89; see also *id.*, at 108–109.

For those reasons, the Bankruptcy Court concluded that the $5.5 to $6 billion settlement payment and the releases were fair and equitable and in the victims' and creditors' best interest. *Id.*, at 107–109, 112. The settlement amount of $5.5 to $6 billion was "properly negotiated" and "reflects the underlying strengths and weaknesses of the opposing parties' legal positions and issues of collection." *Id.*, at 93.[3]

3. The Court implies that some victims could recover from the Sacklers in tort litigation up to the total of their combined assets, and that the Sacklers are somehow getting off easy by

From the victims' and creditors' perspective, "suing the Sacklers would have been a costly endeavor with a small chance of success. From the Sacklers' perspective, defending those suits would have been a costly endeavor with a very small chance of a large liability." A. Casey & J. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. Chi. L. Rev. 973, 1004 (2023). So as in many litigation settlements, the parties agreed to the $5.5 to $6 billion settlement in light of that "very small chance of a large liability." *Ibid.*

Importantly, the victims and creditors—who obviously have no love for the Sacklers—insisted on the releases of their claims against the Sacklers. Tr. of Oral Arg. 61, 93; Brief for Respondent Official Committee of Unsecured Creditors of Purdue Pharma L. P. et al. 10. Why did the releases make sense for the victims and creditors?

For starters, the releases were part of the settlement and enabled the Sacklers' $5.5 to $6 billion settlement payment. Moreover, without the releases, some of Purdue's victims and creditors—maybe a State, maybe some opioid victims—would sue the Sacklers directly for claims "deeply connected with, if not entirely identical to," claims that the victims and creditors held against Purdue. 635 B.R. at 87 (quotation marks omitted). To be sure, the Bankruptcy Court found that those suits would face significant challenges. But the victims and creditors were understandably worried, as they explained during the Bankruptcy Court proceedings, that the Sacklers would "exhaust their collectible assets fighting and/or paying ONLY the claims of certain creditors with the best ability to pursue the Sacklers in court." 1 App. 76. And if even a *single* direct suit against the Sacklers succeeded, the suit could potentially wipe out much if not all of the Sacklers' assets in one fell swoop—making those assets unavailable for the Purdue estate and therefore unavailable for all of the other the victims and creditors.

In sum, if there were no releases, and victims and creditors were therefore free to sue the Sacklers directly, one of three things would likely happen. One possibility is that no lawsuits against the Sacklers would succeed, and no victim or creditor would recover any money from them. And without the $5.5 to $6 billion settlement payment, there would be no recovery from Purdue either. Another possibility is that a large claim or claims would succeed, and the Sacklers would be indemnified by Purdue—thereby wiping out Purdue's estate for all of the other victims and creditors. Last, suppose that a large claim succeeded and that the Sacklers were not indemnified for that liability. Even in that case, only a few victims or creditors would be able to recover from the Sacklers at the expense of fair and equitable distribution to the rest of the victims and creditors.

As the Second Circuit stated, without the releases, the victims and creditors "would go without any assistance and face an uphill battle of litigation (in which a single claimant might disproportionately recover) without fair distribution." 69 F.4th at 80. Another classic collective-action problem.

In short, without the releases and the significant settlement payment, two separate collective-action problems stood in the way of fair and equitable recovery for the victims and creditors: (1) the Purdue estate would not be preserved for the victims

paying only $5.5 to $6 billion. But the Court's belief is not rooted in reality given the Bankruptcy Court's undisputed factual findings to the contrary: Large tort recoveries against any of the Sacklers were (and remain) far from certain—and in any event would produce recoveries for only a few and leave other victims with nothing.

and creditors to obtain recovery, and (2) the Purdue estate would be much smaller than it would be with the Sacklers' settlement payment. The releases and settlement payment solved those problems and ensured fair and equitable recovery for the opioid victims.

C

For those reasons, the Bankruptcy Court found that without the releases and settlement payment, the reorganization plan would "unravel." 633 B.R. at 107, 109. All of the "heavily negotiated and intricately woven compromises in the plan" that won the victims' and creditors' approval, *id.*, at 90, would "fall apart for lack of funding and the inevitable fighting over a far smaller and less certain recovery with its renewed focus on pursuing individual claims and races to collection." *Id.*, at 84. There simply would not be enough money to support a reorganization plan that the victims and creditors would approve.

Absent the releases and settlement payment, the Bankruptcy Court found, the "most likely result" would be liquidation of a much smaller $1.8 billion estate. *Id.*, at 90. In a liquidation, the United States would recover first with its $2 billion superpriority claim, taking for itself the whole pie. And the victims and other creditors "would probably recover nothing." *Id.*, at 109.

Given that alternative, it is hardly surprising that the opioid victims and creditors almost universally support Purdue's Chapter 11 reorganization plan and the non-debtor releases. That plan promised to obtain significant assets from the Sacklers, to preserve those assets from being depleted by litigation for a few, and to distribute those much-needed funds fairly and equitably.

As a result, the opioid victims' and creditors' support for the reorganization plan was *overwhelming*. Every victim and creditor had a chance to vote on the plan during the bankruptcy proceedings. And of those who voted, more than 95 percent approved of the plan. *Id.*, at 107.

Since then, even more victims and creditors have gotten on board. Now, all 50 States have signed on to the plan. The lineup before this Court is telling. On one side of the case: the tens of thousands of opioid victims and their families; more than 4,000 state, city, county, tribal, and local government entities; and more than 40,000 hospitals and healthcare organizations. They all urge the Court to uphold the plan.

At this point, on the other side of this case stand only a sole individual and a small group of Canadian creditors.[4]

Given all of the extraordinary circumstances, the Bankruptcy Court and Second Circuit concluded that the non-debtor releases here not only were appropriate, but were essential to the success of the plan. The Bankruptcy Court and Second Circuit thoroughly analyzed each of the relevant factors before reaching that conclusion: First, the released non-debtors (the Sacklers) closely controlled and were indemnified by the company. 69 F.4th at 79. Second, the claims against the Sacklers were based on essentially the same facts and legal theories as the claims against Pur-

4. The regional United States Trustee for three States, a Government bankruptcy watchdog appointed to oversee bankruptcy cases in those States, also opposes the plan for reasons that remain mystifying. The U. S. Trustee purports to look out for victims and creditors, but here the victims and creditors made emphatically clear that the "U. S. Trustee does not speak for the victims of the opioid crisis" and is indeed thwarting the opioid victims' efforts at fair and equitable recovery. Tr. of Oral Arg. 93.

due. *Id.*, at 80. Third, the releases were essential for the reorganization to succeed, because the releases protected the Purdue estate from indemnification claims and expanded the Purdue estate to enable victim and creditor recovery. *Id.*, at 80–81. Fourth, the releases were narrowly tailored to protect the estate from indemnification claims. *Ibid.* Fifth, the releases secured a substantial settlement payment to significantly increase the funds in the estate. *Id.*, at 81. Sixth, that enhanced estate allowed the plan to distribute "fair and equitable" payments to the victims and creditors. *Id.*, at 82 (quotation marks omitted). And seventh, for all those reasons, the victims and creditors do not just urgently and overwhelmingly approve of the releases, they all but demanded the releases. *Ibid.*

Congress invited bankruptcy courts to consider exactly those kinds of extraordinary circumstances when it authorized bankruptcy plans to include "any other appropriate provision" that is "not inconsistent" with the Code. § 1123(b)(6).

III

The Court decides today to reject the plan by holding that non-debtor releases are categorically impermissible as a matter of law. That decision contravenes the Bankruptcy Code. It is regrettable for the opioid victims and creditors, and for the heavily negotiated equitable distribution of assets that they overwhelmingly support. And it will harm victims in pending and future mass-tort bankruptcies. The Court's decision deprives the bankruptcy system of a longstanding and critical tool that has been used repeatedly to ensure fair and sizable recovery for victims—to repeat, recovery for *victims*—in mass torts ranging from Dalkon Shield to the Boy Scouts.

On the law, the Court's decision to reject the plan flatly contradicts the Bankruptcy Code. The Code explicitly grants broad discretion and flexibility for bankruptcy courts to handle bankruptcies of extraordinary complexity like this one. For several decades, bankruptcy courts have been employing non-debtor releases to facilitate fair and equitable recovery for victims in mass-tort bankruptcies. In this case, too, the Bankruptcy Court prudently and appropriately employed its discretion to fairly resolve a mass-tort bankruptcy.

At times, the Court seems to view the Sacklers' settlement payment into Purdue's bankruptcy estate as insufficient and the plan as therefore unfair to victims and creditors. If that were true, one might expect the fight in this case to be over whether the non-debtor releases and settlement amount were "appropriate" given the facts and circumstances of this case. 11 U.S.C. § 1123(b)(6).

Yet that is not the path the Court takes. The Court does not contest the Bankruptcy Court's and Second Circuit's conclusion that a non-debtor release was necessary and appropriate for the settlement and the success of Purdue's reorganization—the best, and perhaps the only, chance for victims and creditors to receive fair and equitable compensation. Indeed, no party has challenged the Bankruptcy Court's factual findings or made an argument that non-debtor releases were used inappropriately in this specific case.

Instead, the Court categorically decides that non-debtor releases are *never* allowed as a matter of law. The text of the Bankruptcy Code does not remotely support that categorical prohibition.[5]

As explained, § 1123(b)(6)'s catchall authority affords bankruptcy courts broad

5. To remind the reader of § 1123(b)'s lengthy text: A "plan may—

"(1)impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

discretion to approve "any other appropriate provision not inconsistent with the applicable provisions" of the Bankruptcy Code. Recall that § 1123(b)(1) expressly authorizes releases of victims' and creditors' claims against the debtor company—here, against Purdue. And recall that § 1123(b)(3) expressly authorizes settlements and releases of the debtor company's claims against non-debtors—here, against the Sacklers. Section 1123(b)(6)'s catchall authority is easily broad enough to allow settlements and releases of the same victims' and creditors' claims against the same non-debtors (the Sacklers), who are indemnified by the debtor and who made a large settlement payment to the debtor's estate. After all, the Second Circuit stated that in indemnification relationships "a suit against the non-debtor is, in essence, a suit against the debtor." *In re Purdue Pharma L. P.*, 69 F.4th 45, 78 (2023) (quotation marks omitted). And even when the officers and directors are not indemnified, the releases may enable a settlement where the non-debtor makes a sizable payment to the estate that can be fairly and equitably distributed to the victims and creditors, rather than being zeroed out by the first successful suit.

A

So how does the Court reach its atextual and ahistorical conclusion? The Court primarily seizes on the canon of *ejusdem generis*, an interpretive principle that "limits general terms that follow specific ones to matters similar to those specified." *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 294, 131 S.Ct. 1101, 179 L.Ed.2d 37 (2011) (quotation marks and alteration omitted). But the Court's use of that canon here is entirely misguided.

The *ejusdem generis* canon "applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics, as in *dogs, cats, horses, cattle, and other animals*." A. Scalia & B. Garner, Reading Law 199 (2012); see also *id.*, at 200–208 ("trays, glasses, dishes, or other tableware"; "gravel, sand, earth or other material"; and numerous other similar lists (quotation marks omitted)); W. Eskridge, Interpreting Law 77 (2016) ("automobiles, motorcycles, and other mechanisms for conveying persons or things" (quotation marks omitted)).

As a general matter, as Justice Scalia explained for the Court, a catchall at the end of the list should be construed to cover "matters not specifically contemplated—known unknowns." *Republic of Iraq v. Beaty*, 556 U.S. 848, 860, 129 S.Ct. 2183, 173 L.Ed.2d 1193 (2009). That is the "whole value of a generally phrased residual clause." *Ibid.* Or stated otherwise, the

> ''(2)subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;
>
> ''(3)provide for—
>
> ''(A)the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
>
> ''(B)the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;
>
> ''(4)provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;
>
> ''(5)modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and
>
> ''(6)include any other appropriate provision not inconsistent with the applicable provisions of this title.''

fact that "a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998) (quotation marks omitted).

The *ejusdem generis* canon can operate to narrow a broad catchall term in certain circumstances. The canon "parallels common usage," reflecting the assumption that when "the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage." Scalia & Garner, Reading Law, at 199. The canon in essence "implies the addition" of the term "similar" in the catchall so that the catchall does not extend so broadly as to defy common sense. *Ibid.* Rather, the catchall extends to similar things or actions that serve the same statutory "purpose." *Id.*, at 208.

Here, the Court applies the canon to breezily conclude that there is an "obvious link" through §§ 1123(b)(1)–(5) that precludes a non-debtor release provision being approved under § 1123(b)(6). *Ante*, at 2083. The obvious link, according to the Court, is that plan provisions must "concern *the debtor*—its rights and responsibilities, and its relationship with its creditors." *Ibid.*

As an initial matter, the Court does not explain why its supposed common thread excludes the non-debtor releases at issue here. Those releases obviously "concern" the debtor in multiple overlapping respects. *Ibid.* As explained, Purdue's bankruptcy plan released the Sacklers only for claims based on *the debtor's* (Purdue's) misconduct. See 69 F.4th at 80 (releasing only claims to which Purdue's conduct was "a legal cause or a legally relevant factor to the cause of action" (quotation marks omitted)). The releases therefore applied only to claims held by *the debtor's* victims and creditors. And the releases protected *the debtor* from indemnification claims. So the non-debtor releases here did not just "concern" the debtor, they were critical to the debtor's reorganization.

So the Court's purported "link" manages the rare feat of being so vague ("concerns the debtor"?) as to be almost meaningless—and if not meaningless, so broad as to plainly cover non-debtor releases. It is hard to conjure up a weaker *ejusdem generis* argument than the one put forth by the Court today.

In any event, even on its own terms, the Court's *ejusdem generis* argument is dead wrong for two independent reasons. First, the Court's purported common thread is factually incorrect as a description of (b)(1) to (b)(5). Second, and independent of the first point, black-letter law says that the *ejusdem generis* canon requires looking at the "evident purpose" of the statute in order to discern a common thread. Scalia & Garner, Reading Law, at 208; see Eskridge, Interpreting Law, at 78. And here, the Court's purported common thread ignores (and indeed guts) the evident purpose of § 1123(b).

First, the Court's purported common thread is factually incorrect. The Court says that the "obvious link" through paragraphs (b)(1) to (b)(5) is that all are limited to "*the debtor*—its rights and responsibilities, and its relationship with its creditors." *Ante*, at 2083. But in multiple respects, that assertion is not accurate.

For one thing, paragraph (b)(3) allows a bankruptcy court to modify the rights of debtors with respect to *non-debtors*. Under (b)(3), a bankruptcy court may approve a reorganization plan that settles, adjusts, or enforces "any claim" that the debtor holds against non-debtor third parties. That provision allows the debtor's estate to

enter into a settlement agreement with a third party, where the estate agrees to release its claims against the third party in exchange for a settlement payment to the bankruptcy estate. And the bankruptcy court has the power to approve such a settlement if it finds the settlement fair and in the best interests of the estate. The bankruptcy court may later enforce that settlement. See generally 7 Collier on Bankruptcy ¶1123.02[3] (R. Levin & H. Sommer eds., 16th ed. 2023).

Importantly, in some cases, including this one, the debtor's creditors may hold derivative claims against that same non-debtor third party for the same "harm done to the estate." 69 F.4th at 70 (quotation marks omitted). So when the debtor settles with the non-debtor third party, that settlement also extinguishes the creditors' derivative claims against the non-debtor. And the creditors' consent is not necessary to do so.

To connect the dots: A plan provision settling the debtor's claims against non-debtors under (b)(3) therefore *nonconsensually extinguishes creditors' derivative claims against those non-debtors*. That fact alone defeats the Court's conclusion that §§ 1123(b)(1)–(5) deal only with relations between the debtor and creditors. If a plan provision under (b)(3) can nonconsensually release some of the creditors' derivative claims against a non-debtor, a plan provision under the catchall in (b)(6) that nonconsensually releases some of the creditors' direct claims against those same non-debtors is easily of a piece—basically the same thing.

This case illustrates the point. Some of the more substantial assets of Purdue's estate are fraudulent transfer claims worth $11 billion that Purdue holds against the non-debtor Sacklers. *In re Purdue Pharma L. P.*, 633 B.R. 53, 87 (Bkrtcy. Ct. SDNY 2021). Under (b)(3), as part of its reorganization plan, Purdue settled the fraudulent transfer claims with the non-debtor Sacklers. The Bankruptcy Court approved that settlement as fair and equitable. *Id.*, at 83–95. That settlement resolved the claims that likely would have had "the best chance of material success among all of the claims against" the Sacklers. *Id.*, at 109; see also *id.*, at 83.

Notably, the result of that settlement was to also *nonconsensually* extinguish the victims' and creditors' derivative fraudulent transfer claims against the Sacklers. In the absence of the bankruptcy proceeding, victims and creditors could have litigated the fraudulent transfer claims themselves as derivative claims. But because Purdue settled the claims under § 1123(b)(3), the victims and creditors could no longer do so.

Moreover, not all victims and creditors consented to the release of those derivative claims. But no one disputes that the Bankruptcy Code authorized that nonconsensual non-debtor release of derivative claims. See 69 F.4th at 70 (that conclusion is "well-settled").

The plan therefore released both the estate's claims against the Sacklers *and* highly valuable derivative claims that the victims and creditors held against the Sacklers. Paragraph (b)(3) therefore demonstrates that § 1123(b) reaches beyond just creditor-debtor relationships, particularly when the relationship between creditors and other non-debtors can affect the estate. That indisputable point alone defeats the Court's conclusion that § 1123(b)'s provisions relate only to the debtor and do not allow releases of claims that victims and creditors hold against non-debtors.

The Court tries to sidestep that conclusion by distinguishing derivative claims from direct claims. Releases of derivative

claims, the Court says, are authorized by paragraph (b)(3) "because those claims belong to the debtor's estate." *Ante,* at 2083. No doubt. But the question then becomes whether releases of direct claims under (b)(6)'s catchall are relevantly similar to releases of derivative claims that all agree are authorized under (b)(3). The answer in this case is yes. Here, both the derivative and direct claims against the Sacklers are held by the same victims and creditors, and both the derivative and direct claims against the Sacklers could deplete Purdue's estate.

The Court's purported common thread is further contradicted by several other kinds of non-debtor releases that "are commonplace, important to the bankruptcy system, and broadly accepted by the courts and practitioners as necessary and proper" plan provisions under § 1123(b)(6). Brief for American College of Bankruptcy as *Amicus Curiae* 3.

Three examples illustrate the point: consensual non-debtor releases, full-satisfaction non-debtor releases, and exculpation clauses.

Consensual non-debtor releases are routinely included in bankruptcy plans even though those releases apply to claims by victims or creditors against non-debtors—just like the claims here. And it is "well-settled that a bankruptcy court may approve" such consensual releases. 69 F.4th at 70; see also Brief for American College of Bankruptcy as *Amicus Curiae* 5–7.

Consensual releases are uncontroversial, but they are not expressly authorized by the Bankruptcy Code. So the only provision that could possibly supply authority to include those releases in the bankruptcy plan is the catchall in § 1123(b)(6).

The Court today does not deny that consensual releases are routine in the bankruptcy context and that courts have long approved them. See *ante*, at 2087 – 2088. But where, on the Court's reading of the Bankruptcy Code, would the bankruptcy court obtain the authority to enter and later enforce that consensual release?

One suggestion is that the authority comes from the parties' consent and is akin to a "contractual agreement." Tr. of Oral Arg. 33. But that theory does not explain what provision of the Bankruptcy Code authorizes consensual releases *in bankruptcy plans*. After all, contracts are enforceable under state law, ordinarily in state courts. But in bankruptcy, consensual releases are routinely part of a reorganization plan with voting overseen by the bankruptcy court and conditions enforceable by the bankruptcy court. See Brief for American College of Bankruptcy as *Amicus Curiae* 4–7.

To reiterate, the only provision that could provide such authority is § 1123(b)(6). So if the Court thinks that a consensual release can be part of the plan, even the Court must acknowledge that § 1123(b)(6) can reach creditors' claims against non-debtors.

The Court's purported common thread is still further contradicted by yet another regular bankruptcy practice: full-satisfaction releases. Full-satisfaction releases provide full payment for creditors' claims against non-debtors and then release those claims. When a full-satisfaction release is included in a reorganization plan, the bankruptcy court exercises control over creditors' claims against non-debtors.

Again, the only provision that could possibly supply authority to include those full-satisfaction releases in a bankruptcy plan is the catchall in § 1123(b)(6). Any contract-law theory would not work for full-satisfaction releases, given that holdout creditors often refuse to consent to full-satisfaction releases. See, *e.g.*, *In re A. H. Robins Co.*, 880 F.2d 694, 696, 700, 702

(CA4 1989); *In re Boy Scouts of Am. and Del. BSA, LLC*, 650 B.R. 87, 115–116, 141 (D.Del. 2023). So if full-satisfaction releases are to be allowed, § 1123(b)(6) must be read to reach creditor claims against non-debtors, even without consent.

The Court does not deny that consensual non-debtor releases and full-satisfaction releases might be permissible under § 1123(b)(6). *Ante*, at 2087 – 2088. If they are permissible, then the Court's purported *ejusdem generis* common thread is thoroughly eviscerated because those releases involve claims by victims or creditors against non-debtors, just like here. (And if the Court instead means to hold open the possibility that consensual and full-satisfaction releases are actually impermissible, then its holding today is even more extreme than it appears.)

Exculpation clauses are yet another example. Exculpation clauses shield the estate's fiduciaries and other professionals (non-debtors) from liability for their work on the reorganization plan. See Brief for American College of Bankruptcy as *Amicus Curiae* 9. Without such exculpation clauses, "competent professionals would be deterred from engaging in the bankruptcy process, which would undermine the main purpose of chapter 11—achieving a successful restructuring." *Id.*, at 11; see also Brief for Highland Capital Management, L. P. as *Amicus Curiae* 3–5. For that reason, bankruptcy courts routinely approve exculpation clauses under § 1123(b)(6). For exculpation clauses to be allowed, however, § 1123(b)(6) must be read to reach creditor claims against non-debtors. So exculpation clauses further refute the Court's purported common thread.

The fact that plan provisions under § 1123(b)(6) can reach non-debtors finds still more support in this Court's only case to analyze the catchall authority in § 1123(b)(6), *United States* v. *Energy Resources Co.* The plan provision in *Energy Resources* ordered the IRS, a creditor, to apply the debtor's tax payments to trust-fund tax liability before other kinds of tax liability. *United States v. Energy Resources Co.*, 495 U.S. 545, 547, 110 S.Ct. 2139, 109 L.Ed.2d 580 (1990). Importantly, if the debtor did not pay the trust-fund tax liability, then non-debtor officers of the company would be on the hook. *Ibid.* So the plan provision served to protect the company's non-debtor officers from "personal liability" for those taxes. *In re Energy Resources Co.*, 59 B.R. 702, 704 (Bkrtcy. Ct. D.Mass. 1986). In exchange for that protection, a non-debtor officer contributed funds to the bankruptcy plan. *Ibid.*

Echoing the Court today, the IRS objected to that plan, arguing that the bankruptcy court exceeded its authority under (b)(6) in part because there was no provision in the Code that expressly supported the plan provision. *Energy Resources*, 495 U.S. at 549–550, 110 S.Ct. 2139. But this Court disagreed with the IRS and approved the plan based on the "residual authority" in (b)(6). *Id.*, at 549, 110 S.Ct. 2139.

The plan provision in *Energy Resources* operated akin to a non-debtor release: It reduced the potential liability of a non-debtor (the non-debtor's officers) to another non-debtor (the IRS). *Energy Resources* therefore further demonstrates that plan provisions under § 1123(b)(6) can affect creditor–non-debtor relationships.

In sum, the Court's statement that § 1123(b) reaches only "*the debtor*—its rights and responsibilities, and its relationship with its creditors," *ante,* at 2083, is factually incorrect several times over. Paragraphs 1123(b)(3) and (b)(6) already allow plans to affect creditor claims against non-debtors, such as through releases of creditors' derivative claims, con-

sensual releases, full-satisfaction releases, and exculpation clauses. And this Court's precedent in *Energy Resources* confirms the point. The Court's *ejusdem generis* argument rests on quicksand.

Second, independent of those many flaws, the Court's entire approach to *ejusdem generis* is wrong from the get-go. When courts face a statute with a catchall, it is black-letter law that courts must try to discern the common thread by examining the "evident purpose" of the statute. Scalia & Garner, Reading Law, at 208; see also *Begay v. United States*, 553 U.S. 137, 146, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008) (defining common thread "in terms of the Act's basic purposes"); Eskridge, Interpreting Law, at 78 ("statutory purpose" helps identify the common thread in *ejusdem generis*cases).[6]

Importantly, this Court has already explained that the purpose of § 1123(b) is to grant bankruptcy courts "broad power" to approve plan provisions "necessary for a reorganization's success." *Energy Resources*, 495 U.S. at 551, 110 S.Ct. 2139. *Energy Resources* demonstrates that the common thread of § 1123(b) is bankruptcy court action to preserve the estate and ensure fair and equitable recovery for creditors. See, *e.g.*, *Pioneer Investment Services Co. v. Brunswick Associates L. P.*, 507 U.S. 380, 389, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984); J. Feeney & M. Stepan, 2 Bankruptcy Law Manual § 11:1 (5th ed. 2023).

As explained at length above, to maximize recovery, the Court must solve complex collective-action problems. And for a bankruptcy court to solve all of the relevant collective-action problems, §§ 1123(b)(1)–(5) give the bankruptcy court broad power to modify parties' rights without their consent—most notably, to release creditors' claims against the debtor. § 1123(b)(1). Under that provision, the Purdue plan released the victims' and creditors' claims *against Purdue* in order to prevent a collective-action problem in distributing Purdue's assets—and thereby to preserve the estate and ensure fair and equitable recovery for victims and creditors.

The non-debtor release provision approved under § 1123(b)(6) does the same thing and serves that same statutory purpose. As discussed above, the victims' and creditors' claims against the non-debtor Purdue officers and directors (the Sacklers) are essentially the same as their claims against Purdue. The claims against the Sacklers rest on the same legal theories and facts as the claims against Purdue, largely the Sacklers' opioid-related decisions in running Purdue. And the Sacklers are indemnified by Purdue's estate for their liability. So any liability could potentially come out of the Purdue estate just like the claims against Purdue itself.

Therefore, the nonconsensual releases against the Sacklers are not only of a similar genus, but in effect *the same thing* as the nonconsensual releases against Purdue that everyone agrees § 1123(b)(1) already authorizes. Both were necessary to

6. The Court protests that we are looking to the "purpose" of the statute. But in *ejusdem generis* cases, courts are *required* to look at "purpose" in order to determine the common link, as Scalia and Garner and Eskridge all say, and as *Begay* indicated. That is longstanding black-letter law. And even outside the *ejusdem generis* context, the Court's allergy to the word "purpose" is strange. After all, "words are given meaning by their context, and context includes the purpose of the text. The difference between textualist interpretation" and "purposive interpretation is not that the former never considers purpose. It almost always does," but "the purpose must be derived from the text." A. Scalia & B. Garner, Reading Law 56 (2012).

preserve the estate and prevent collective-action problems that could drain Purdue's estate, and thus both were necessary to enable Purdue's reorganization plan to succeed and to equitably distribute assets. And without the releases, there would be no settlement, meaning no $5.5 to $6 billion payment by the Sacklers to Purdue's estate. That would mean either that no victim or creditor could recover anything from the Sacklers (or indeed from Purdue), or that only a few victims or creditors could recover from the Sacklers at the expense of fair and equitable distribution to everyone else.

The statute's evident purpose therefore easily answers the *ejusdem generis* inquiry here. Absent other limitations and restrictions in the Code, § 1123(b)(6) authorizes a bankruptcy court to modify parties' claims that could otherwise threaten to deplete the bankruptcy estate when doing so is necessary to preserve the estate and provide fair and equitable recovery for creditors.

In light of the "evident purpose" of § 1123(b) to preserve the estate and ensure fair and equitable recovery for creditors in the face of collective-action problems, Scalia & Garner, Reading Law, at 208; see Eskridge, Interpreting Law, at 78, the Court's *ejusdem generis* theory simply falls apart.

In sum, for each of two independent reasons, the Court's *ejusdem generis* argument fails. First, its common thread is factually wrong. And second, its purported common thread disregards the evident purpose of § 1123(b).

B

Despite the fact that non-debtor releases address the very collective-action problem that the bankruptcy system was designed to solve, the Court next trots out a few minimally explained arguments that non-debtor release provisions are "inconsistent with" various provisions of the Bankruptcy Code, including: (i) § 524(g)'s authorization of non-debtor releases in asbestos cases; (ii) § 524(e)'s statement that debtors' discharges do not automatically affect others' liabilities; and (iii) the Code's various restrictions on bankruptcy discharges. None of those arguments is persuasive.

First, the Court cites § 524(g), which was enacted in 1994 to expressly authorize non-debtor releases in a specific context: cases involving mass harm "caused by the presence of, or exposure to, asbestos or asbestos-containing products." § 524(g)(2)(B)(i)(I). From the fact that § 524(g) allows non-debtor releases in the asbestos context, the Court infers that non-debtor releases are prohibited in other contexts. *Ante,* at 2085 – 2086.

But the very text of § 524(g) *expressly precludes* the Court's inference. The statute says: "Nothing in [§ 524(g)] shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." 108 Stat. 4117, note following 11 U.S.C. § 524. Congress expressly authorized non-debtor releases in one specific context that was critically urgent in 1994 when it was enacted. But Congress also enacted the corresponding rule of construction into binding statutory text to "make clear" that § 524(g) did not "alter" the bankruptcy courts' ability to use non-debtor release mechanisms as appropriate in other cases. 140 Cong. Rec. 27692 (1994).

Keep in mind that Congress enacted § 524(g) in the early days of non-debtor releases, soon after bankruptcy courts began approving non-debtor releases in asbestos cases. See, *e.g.*, *In re Johns-Manville Corp.*, 68 B.R. 618, 621–622 (Bkrtcy. Ct. SDNY 1986), aff 'd, 837 F.2d 89, 90

(CA2 1988); *UNARCO Bloomington Factory Workers v. UNR Industries, Inc.*, 124 B.R. 268, 272, 278–279 (ND Ill. 1990). Section 524(g) set forth a detailed scheme sensitive to the specific needs of asbestos mass-tort litigation that was then engulfing and overwhelming American courts. For example, because asbestos injuries often have a long latency period, asbestos mass-tort bankruptcies needed to account for unknown claimants who could come out of the woodwork in the future. See Bankruptcy Reform Act of 1994, 108 Stat. 4114–4116; *In re Johns-Manville Corp.*, 68 B.R. at 627–629.

But as explained above, throughout the history of the Code and at the time § 524(g) was enacted, bankruptcy courts were also issuing non-debtor releases in other contexts as well, such as in the Dalkon Shield mass-tort bankruptcy case. *A. H. Robins Co.*, 880 F.2d at 700–702; see also, *e.g.*, *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (CA2 1992) (securities litigation context). Congress therefore made clear that enacting § 524(g) for the urgent asbestos cases did not disturb bankruptcy courts' preexisting authority to issue such releases in other cases.

Bottom line: The Court's reliance on § 524(g) directly contravenes the actual statutory text.

Second, the Court cites § 524(e), which states that a plan's discharge of the debtor "does not affect the liability of any other entity on . . . such debt." By its terms, § 524(e) does not purport to preclude releases of creditors' claims against non-debtors. (And were the rule otherwise, even consensual releases would be prohibited as well.)

Notably, Congress changed § 524(e) to its current wording in 1979. Before 1979, the statute arguably did preclude releases of claims against non-debtors who were co-debtors with a bankrupt company. See 11 U.S.C. § 34 (1976 ed.) (repealed Oct. 1, 1979) ("The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt *shall not* be altered by the discharge of such bankrupt" (emphasis added)). But Congress then changed the law. And the text now means only that the discharge of the debtor does not *itself* automatically wipe away the liability of a non-debtor. Section 524(e) does not speak to the issue of non-debtor releases or other steps that a plan may take regarding the liability of a non-debtor for the same debt. As the American College of Bankruptcy says, "Section 524(e) is agnostic as to third-party releases." Brief for American College of Bankruptcy as *Amicus Curiae* 6, n. 3; see also *In re Airadigm Communications, Inc.*, 519 F.3d 640, 656 (CA7 2008).

Third, citing §§ 523(a), 524(a), and 541(a), the Court says that the plan improperly grants a "discharge" to the Sacklers. *Ante,* at 2079, 2084 – 2086. And the Court suggests that giving the Sacklers a "discharge" in Purdue's bankruptcy plan in exchange for $5.5 to $6 billion allows the Sacklers to get away too easy—without filing for bankruptcy themselves, without having to comply with the Code's various restrictions, and without paying enough. See *ante,* at 2084 – 2086. That point also fails.

To begin, the premise is incorrect. The Sacklers did not receive a bankruptcy discharge in this case. Discharge is a term of art in the Bankruptcy Code. *Wainer v. A. J. Equities, Ltd.*, 984 F.2d 679, 684 (CA5 1993); J. Silverstein, Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations, 23 Emory Bkrtcy. Developments J. 13, 130 (2006). When a debtor in bankruptcy receives a discharge, most (if not all) of their

pre-petition debts are released, giving the debtor a fresh start. See § 1141(d)(1) (Chapter 11 discharge relieves the debtor "from any debt that arose before the date of " plan confirmation, with narrow exceptions); *Taggart v. Lorenzen*, 587 U.S. 554, 556, 558, 139 S.Ct. 1795, 204 L.Ed.2d 129 (2019). The Sacklers did not receive such a discharge.

As courts have always recognized, non-debtor releases are different. Non-debtor releases "do not offer the umbrella protection of a discharge in bankruptcy." *Johns-Manville Corp.*, 837 F.2d at 91. Rather, non-debtor releases are accompanied by settlement payments to the estate by the non-debtor. So non-debtor releases are simply one part of a settlement of pending or potential claims against the non-debtor that arise out of some torts committed by the debtor. They are in essence a traditional litigation settlement. They are not a blanket discharge for the non-debtor.

Here, therefore, the releases apply only to certain claims against the Sacklers—namely, those "that arise out of or relate to" Purdue's bankruptcy. *Ibid.*; see 69 F.4th at 80 (releasing the Sacklers only for claims to which Purdue's conduct was "a legal cause or a legally relevant factor to the cause of action" (quotation marks omitted)). And the non-debtor releases were negotiated in exchange for a significant settlement payment that enabled *Purdue's* bankruptcy reorganization to succeed.

In short, the releases do not grant discharges to non-debtors and cannot be disallowed on that basis.

Next, the Court suggests that the Sacklers must file for bankruptcy themselves in order to be released from liability. That, too, is incorrect. Nowhere does the Code say that a non-debtor may be released from liability only by filing for bankruptcy. On the contrary, § 1123(b)(3) of the Code already expressly allows a bankruptcy plan to release a non-debtor from liability to the debtor.

The Court's suggestion that a non-debtor must file for bankruptcy in order to be released from liability not only is directly at odds with the text of the Code, but also is at odds with reality. Non-debtor releases are often used in situations where it is not possible or practicable for the non-debtors to simply file for individual bankruptcies. This case is just one example. The "Sacklers are not a simple group of a few defendants" that could simply have declared one bankruptcy. 633 B.R. at 88. They are "a large family divided into two sides, Side A and Side B, with eight pods or groups of family members within those divisions," many of whom live abroad (beyond bankruptcy jurisdiction). *Ibid.* And their assets are spread across trusts that are likely beyond the jurisdiction of U. S. courts as well. *Ibid.*; see also *id.*, at 109.

Likewise, in many other mass-tort bankruptcy cases, released non-parties could not simply declare their own bankruptcies either. Insurers, for example, cannot declare bankruptcy just because a policy limit is reached. B. Zaretsky, Insurance Proceeds in Bankruptcy, 55 Brooklyn L. Rev. 373, 394–395, and n. 60 (1989). And in cases involving hundreds of affiliated entities who share liability and share insurance, such as the Boy Scouts and the Catholic Church, it would be almost impossible to coordinate assets and ensure equitable victim recovery across hundreds of distinct bankruptcies. Section § 1123(b)(6) provides bankruptcy courts with flexibility to deal with such situations by approving appropriate non-debtor releases. See Brief for Boy Scouts of America as *Amicus Curiae* 18–20; Brief for Ad Hoc Group of Local Councils of the Boy Scouts of America as *Amicus Curiae* 6; Brief for U. S. Conference of Catholic Bishops as *Amicus Curiae* 3–4, 17–22.

The Court next says that the non-debtor release allowed the Sacklers to bypass certain restrictions on discharges—for example, that individual debtors are generally not discharged for fraud claims, § 523(a). That argument fails for the same reason. Non-debtor releases are part of a negotiated settlement of potential tort claims. They are not a discharge. And nothing in § 523(a) prohibits a debtor's reorganization plan from *releasing* non-debtors for fraud claims. Indeed, it is undisputed that Purdue's bankruptcy could release the Sacklers from at least some fraud claims—namely, the fraudulent transfer claims—under § 1123(b)(3). No provision in the Code forbids releasing other fraud claims against the Sacklers, too. The Court's concern that the releases apply to claims for "fraud," *ante,* at 2085 – 2086, therefore falls flat.

In all of those scattershot arguments, the Court seems concerned that the Sacklers' $5.5 to $6 billion settlement payment was not enough. To begin with, even if that were true, it would not be a reason to *categorically* disallow non-debtor releases as a matter of law, as the Court does today. In any event, that concern is unsupported by the record and contradicted by the Bankruptcy Court's undisputed findings of fact. The Bankruptcy Court found that the creditors' and victims' ability to recover directly from any of the Sacklers in tort litigation was far from certain. So as in other tort settlements, the settlement amount here reflected the parties' assessments of their probabilities of success and the likely amount of possible recovery. The Court today has no good basis for its subtle second-guessing of the settlement amount.

And lest we miss the forest for the trees, keep in mind that the victims and creditors have no incentive to short their own recoveries or to let the Sacklers off easy. They despise the Sacklers. Yet they strongly support the plan. They call the settlement a "remarkable achievement." Brief for Respondent Ad Hoc Group of Individual Victims of Purdue Pharma, L. P. et al. 2. And given the high level of victim and creditor support, the Bankruptcy Court emphasized: "[T]his is *not* the Sacklers' plan," and "anyone who contends to the contrary" is "simply misleading the public." 633 B.R. at 82.

The Court today unfortunately falls into that trap. And it is rather paternalistic for the Court to tell the victims that they should have done better—and then to turn around and leave them with potentially nothing.

C

Finally, the Court suggests that non-debtor releases are not "appropriate" because they are inconsistent with history and practice. That, too, is seriously mistaken.

Importantly, Congress did not enact the current Bankruptcy Code—and with it, § 1123(b)(6)—until 1978. Bankruptcy Code of 1978, 92 Stat. 2549. For nearly the entire life of the Code, courts have approved non-debtor release provisions like this one. So for decades, Chapter 11 of the Code has been understood to grant authority for such releases when appropriate and necessary to the success of the reorganization.[7]

7. See, *e.g., In re Johns-Manville Corp.,* 68 B.R. 618, 624–626 (Bkrtcy. Ct. SDNY 1986), aff 'd, 837 F.2d 89, 90, 93–94 (CA2 1988); *In re A. H. Robins Co.,* 88 B.R. 742, 751 (ED Va. 1988), aff 'd, 880 F.2d 694, 700–702 (CA4 1989); *UNARCO Bloomington Factory Workers v. UNR Industries, Inc.,* 124 B.R. 268, 272, 278–279 (ND Ill. 1990); *In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285, 293 (CA2 1992); *In re Master Mortgage Inv. Fund, Inc.,* 168 B.R. 930, 938 (Bkrtcy. Ct. WD Mo. 1994); *In re Dow Corning Corp.,* 280 F.3d 648, 653

The Court's citations to pre-Bankruptcy Code cases are an off-point deflection and do not account for important and relevant changes made in the current Bankruptcy Code. For example, unlike the former Bankruptcy Act of 1898, the modern Bankruptcy Code grants courts jurisdiction over "suits between third parties which have an effect on the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307, n. 5, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995); see 28 U.S.C. §§ 157(a), 1334(b) (giving bankruptcy courts jurisdiction over any litigation "related to" the bankruptcy).

Under the current Bankruptcy Code, it is well settled that Chapter 11 bankruptcies can and do affect relationships between creditors and non-debtors who are intimately related to the bankruptcy. For example, under the modern Bankruptcy Code, bankruptcy courts routinely use their broad jurisdiction and equitable powers to stay any litigation—even litigation entirely between third parties—that would affect the bankruptcy estate. *Celotex*, 514 U.S. at 308–310, 115 S.Ct. 1493.

The longstanding practice of staying litigation that could affect the bankruptcy estate is similar in important respects to non-debtor releases. In each situation, a provision of the Code provides an explicit authority: to stay litigation involving the debtor, § 362, and to release claims involving the debtor, §§ 1123(b)(1), (3). And in each, the bankruptcy court invokes its broad jurisdiction and equitable power to "augment" that authority, extending it to litigation and claims against non-debtors that might have a "direct and substantial adverse effect" on the bankruptcy estate. *Celotex*, 514 U.S. at 303, 310, 115 S.Ct. 1493.

In short, the common and long-accepted practice of staying litigation that could affect the bankruptcy estate shows that under the modern Code, bankruptcy courts can and do exercise control over relationships between creditors and non-debtors. The Court's reliance on pre-Code practice is misplaced.[8]

IV

As I see it, today's decision makes little sense legally, practically, or economically. It upends the carefully negotiated Purdue bankruptcy plan and the prompt and substantial recovery guaranteed to opioid victims and creditors. Now the opioid victims and creditors are left holding the bag, with no clear path forward. To reiterate the words of the victims: "Without the release, the plan will unravel," and "there will be no viable path to any victim recovery." Tr. of Oral Arg. 100.

The Court does not say what should happen next. The Court seems to hope that a new deal is possible, with the Sacklers buying off the last holdouts.

But even if it were true that the parties could eventually reach a new deal, that outcome would likely come at a cost. Future negotiations and litigation would mean additional litigation expense that eats away at the recovery that the opioid victims and creditors have already negotiated, as well as years of additional delay

(CA6); *In re Airadigm Communications, Inc.*, 519 F.3d 640, 655–658 (CA7 2008); *In re Seaside Engineering & Surveying, Inc.*, 780 F.3d 1070, 1081 (CA11 2015); *In re Boy Scouts of Am. and Del. BSA, LLC*, 650 B.R. 87, 112, 135–143 (D.Del. 2023). I could add dozens more citations to this footnote. But the point is clear.

8. The Court insists that pre-Code practice "may inform our work." *Ante*, at 2086, n. 6. But pre-Code practice certainly does not play a role when that practice has been superseded by an express provision of the modern Bankruptcy Code.

even though victims and family members want and need relief *now*.

And more to the point, without non-debtor releases, a new deal will be very difficult to achieve. By eliminating nonconsensual non-debtor releases, today's decision gives every victim and every creditor an absolute right to sue the Sacklers. Some may hold out from any potential future settlement and instead sue because they want to have their day in court to hold the defendants accountable, or because they want to try to hit the jackpot of a large recovery that they can keep all to themselves. Moreover, because every victim and creditor knows that the Sacklers' resources are limited, they will now have an incentive to promptly sue the Sacklers before others sue. To be sure, the victims and creditors would face an uphill climb in any such litigation, the Bankruptcy Court found, so it may be that no one will succeed in tort litigation against the Sacklers, meaning that no one will get anything. But even if just one of the victims or creditors—say, a State or a group of victims—is successful in a suit against the Sacklers, its judgment "could wipe out all of the collectible Sackler assets," which in turn could also deplete Purdue's estate and leave nothing for any other victim or creditor. *Id.*, at 103. That reality means that everyone has an incentive to race to the courthouse to sue the Sacklers pronto—the classic collective-action problem.

Because some victims or creditors may hold out from any potential future settlement for any one of those reasons and instead still sue, the Sacklers are less likely to settle with anyone in the first place. Maybe the clouds will part. But in a world where nonconsensual non-debtor releases are categorically impermissible, any hope for a new deal seems questionable—indeed, the parties to the bankruptcy label it "pure fantasy." Brief for Debtor Respondents 4.

The bankruptcy system was designed to prevent that exact sort of collective-action problem. Non-debtor releases have been indispensable to solving that problem and ensuring fair and equitable *victim recovery* in multiple bankruptcy proceedings of extraordinary scale—not only opioids, but also many other mass-tort cases involving asbestos, the Boy Scouts, the Catholic Church, silicone breast implants, the Dalkon Shield, and others.

The Court's apparent concern that the Sacklers' settlement payment of $5.5 to $6 billion was not enough should have led at most to a remand on whether the releases were "appropriate" under 11 U.S.C. § 1123(b)(6) (if anyone had raised that argument here, which they have not). But instead the Court responds with the dramatic step of repudiating the plan and eliminating non-debtor releases altogether.

The Court's decision today jettisons a carefully circumscribed and critically important tool that bankruptcy courts have long used and continue to need to handle mass-tort bankruptcies going forward. The text of the Bankruptcy Code does not come close to requiring such a ruinous result. Nor does its structure, context, or history. Nor does hostility to the Sacklers—no matter how deep: "Nothing is more antithetical to the purpose of bankruptcy than destroying estate value to punish someone." A. Casey & J. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. Chi. L. Rev. 973, 1017 (2023). Gutting this longstanding bankruptcy court practice is entirely counterproductive, and simply inflicts still more injury on the opioid victims.

Opioid victims and other future victims of mass torts will suffer greatly in the wake of today's unfortunate and destabilizing decision. Only Congress can fix the

chaos that will now ensue. The Court's decision will lead to too much harm for too many people for Congress to sit by idly without at least carefully studying the issue. I respectfully dissent.

SECURITIES AND EXCHANGE COMMISSION, Petitioner

v.

George R. JARKESY, Jr., et al.
No. 22-859

Supreme Court of the United States.

Argued November 29, 2023

Decided June 27, 2024

Background: Investment adviser and his firm, a limited liability company (LLC), petitioned for review of final order of United States Securities and Exchange Commission (SEC), 2020 WL 5291417, affirming administrative law judge's (ALJ) imposition of civil penalty of $300,000 based on finding that advisor and firm had committed fraud under Securities Act of 1933, Securities Exchange Act of 1934, and Investment Advisers Act of 1940. The United States Court of Appeals for the Fifth Circuit, Elrod, Circuit Judge, 34 F.4th 446, granted petition and vacated final order. Certiorari was granted.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

(1) monetary penalties at issue were legal remedy, indicating SEC's claims were subject to Seventh Amendment right to jury trial in suits at common law;

(2) close relationship between SEC's claims and common-law fraud indicated claims were legal in nature for purposes of Seventh Amendment; and

(3) "public rights" exception to adjudication by Article III courts under Seventh Amendment did not apply to SEC's claims.

Affirmed; remanded.

Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined.

Justice Gorsuch filed concurring opinion, in which Justice Thomas joined.

Justice Sotomayor filed dissenting opinion, in which Justices Kagan and Jackson joined.

1. Securities Regulation ⚿149

The Securities and Exchange Commission (SEC) may levy civil penalties in an antifraud enforcement action even when no investor has actually suffered financial loss. Securities Act of 1933 § 8A, 15 U.S.C.A. § 77h-1(g); Securities Exchange Act of 1934 § 21B, 15 U.S.C.A. § 78u-2; Investment Advisers Act of 1940 § 203, 15 U.S.C.A. § 80b-3(i).

2. Jury ⚿31

The right to trial by jury, as is enshrined by the Seventh Amendment, is of such importance and occupies so firm a place in the history and jurisprudence of the United States that any seeming curtailment of the right should be scrutinized with the utmost care. U.S. Const. Amend. 7.

3. Jury ⚿12(1.1), 13(3)

The Framers of the Constitution used the term "common law" in the Seventh Amendment in contradistinction to equity, and admiralty, and maritime jurisprudence; the Amendment therefore embraces all suits which are not of equity or admiralty jurisdiction, whatever may be the

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Thomas B. McNamara

In re: ETG FIRE, LLC, Debtor.	Lead Bankruptcy Case No. 24-13446 TBM Chapter 11 (Subchapter V)
In re: ETG FIRE MIDCO, LLC, Debtor.	Bankruptcy Case No. 24-13447 TBM Chapter 11 (Subchapter V)
MARMIC FIRE & SAFETY CO., INC., and APS FIRECO, LLC, Plaintiffs, v. ETG FIRE, LLC, Defendant.	Adv. Pro. No. 24-1225 TBM

MEMORANDUM OPINION AND ORDER DENYING MOTION TO DISMISS

I. Introduction.

The Plaintiffs, Marmic Fire & Safety Co., Inc. ("Marmic") and APS FireCo, LLC ("APS") (together, the "Plaintiffs"), initiated this Adversary Proceeding against Debtor-Defendant, ETG Fire, LLC ("ETG Fire"), by filing a "Complaint to Determine Dischargeability of a Debt Pursuant to 11 U.S.C. § 523." (Docket No. 1, the "Complaint.")[1] As the title of the Complaint suggests, the Plaintiffs seek to establish the

[1] The Court uses the convention "Docket No. ___" to refer to documents filed in this Adversary Proceeding: *Marmic Fire & Safety Co., Inc. et al. v. ETG Fire, LLC*, Adv. Pro. No. 24-1225 (Bankr. D. Colo.). The Court uses the convention "ETG Docket No. __" to refer to documents filed in the main bankruptcy case captioned: *In re ETG Fire, LLC*, Bank. Case No. 24-13446 (Bankr. D. Colo.) Finally, Court uses the convention "Midco Docket No. __" to refer to documents filed in the main bankruptcy case captioned: *In re ETG Fire Midco,* LLC, Bankr. Case No. 24-13447 (Bankr. D. Colo.).

existence and amount of a debt allegedly owed to them by ETG Fire as well as the nondischargeability of such debt pursuant to 11 U.S.C. § 523(a)(6) of the Bankruptcy Code[2] as a debt for a "willful and malicious injury." ETG Fire responded by filing "Defendant's Motion to Dismiss Adversary Proceeding" (Docket No. 4, the "Motion to Dismiss"), requesting dismissal of all causes of action under Fed. R. Civ. P. 12(b)(6), as incorporated by Fed. R. Bankr. P. 7012(b), for failure to state a claim upon which relief can be granted. The Plaintiffs filed a "Response" to the Motion to Dismiss (Docket No. 5, the "Response") opposing dismissal. Thereafter, ETG Fire filed a "Reply" in support of the Motion to Dismiss. (Docket No. 7, the "Reply.")

Accepting all the facts alleged by the Plaintiffs in the Complaint as true, and having reviewed the Motion to Dismiss, Response, and Reply, the Court concludes that the Plaintiffs have alleged sufficient facts to properly state claims for relief under Fed. R. Civ. P. 12(b)(6), as incorporated by Fed. R. Bankr. P. 7012(b). Therefore, the Motion to Dismiss must be denied.

II. Jurisdiction and Venue.

The Court has jurisdiction over this Adversary Proceeding and the Motion to Dismiss pursuant to 28 U.S.C. § 1334. The dismissal contest is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) (matters concerning administration of the estate), (b)(2)(B) (allowance or disallowance of claims against the estate), (b)(2)(I) (determinations as to the dischargeability of particular debts), and (b)(2)(O) (other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor relationship). Venue is proper in the Court pursuant to 28 U.S.C. §§ 1408 and 1409. Neither the Plaintiffs nor ETG Fire has contested venue in this Court or this Court's jurisdiction to adjudicate the Motion to Dismiss, Response, and Reply.

III. Procedural Background.

On June 20, 2024, ETG Fire filed for protection under Chapter 11, Subchapter V of the Bankruptcy Code, commencing the case captioned: *In re ETG Fire, LLC*, Bankr. Case No. 24-13446 TBM (Bankr. D. Colo.) (the "ETG Fire Case"). A related entity, ETG Fire Midco, LLC ("Midco"), filed for protection under Chapter 11, Subchapter V, on the same day, commencing the case captioned: *In re ETG Fire Midco, LLC*, 24-13447 (Bankr. D. Colo.) (the "Midco Case"). (ETG Docket No. 1 and Midco Docket No. 1.)[3] Shortly thereafter, the Court ordered that the two main bankruptcy cases be jointly administered, with the ETG Fire Case serving as the lead case. (ETG Docket Nos. 56 and 62 and Midco Docket Nos. 57 and 58.)

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[2] 11 U.S.C. § 101 *et seq.* Unless otherwise indicated, all references to "Section" are to Sections of the Bankruptcy Code.

[3] The Court takes judicial notice of the dockets in the ETG Fire Case, the Midco Case, and the Adversary Proceeding for purposes of describing the current procedural status. *See St. Louis Baptist Temple, Inc. v. F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (a court may *sua sponte* take judicial notice of its docket)..

The Plaintiffs filed Proof of Claim No. 44-1 against ETG Fire, asserting a general unsecured claim in the amount of "not less than $5,447,788.36" (the "Plaintiffs' POC"). Subsequently, ETG Fire objected to the Plaintiffs' POC. (ETG Docket No. 229, the "POC Objection"). ETG Fire's POC Objection remains pending.

The ETG Fire Case and Midco Case have generated substantial disputes (including many between the Plaintiffs and ETG Fire and Midco). ETG Fire and Midco proposed a series of "Joint Subchapter V Plan[s] of Reorganization." (ETG Docket Nos. 197, 244, and 295.) The most recent "Joint Subchapter V Plan of Reorganization" is dated November 25, 2024 (the "Operative Plan"). (ETG Docket No. 295.) The Plaintiffs and several other creditors objected to the Operative Plan. (ETG Docket Nos. 332, 342 and 346.) According to the "Ballot Report" submitted by ETG Fire and Midco, "Class 4 [of the Operative Plan] is not presently an accepting class." (ETG Docket No. 351 at 3.) Thus, at least at this stage, ETG Fire and Midco appear to be prosecuting the Operative Plan on a nonconsensual basis under Section 1191(b). (ETG Docket Nos. 352 at 26 (arguing that "the [Operative] Plan complies with Section 1191(b)"); ETG Docket No. 353 at 2 ("the Debtors request that the Court confirm the Plan pursuant to 11 U.S.C. § 1191(b)"). The Operative Plan has not been confirmed.

Meanwhile, on September 30, 2024, the Plaintiffs filed the Complaint. In the Complaint, the Plaintiffs assert eleven counts against ETG Fire: (1) misappropriation of confidential information; (2) misappropriation of trade secrets in violation of the Defend Trade Secrets Act, 18 U.S.C. § 1831-1839; (3) misappropriation of trade secrets in violation of the Missouri Uniform Trade Secrets Act, Mo. Rev. Stat. § 417.450 - 417.467; (4) tortious interference with contract; (5) tortious interference with business expectancy; (6) aiding and abetting breach of fiduciary duty and duty of loyalty; (7) tortious interference with contractual and legal obligations; (8) violation of the Missouri Computer Tampering Act, Mo. Rev. Stat. § 537.525; (9) unfair competition; (10) unjust enrichment; and (11) "objection to discharge"[4] under Section 523(a)(6). In sum, through the Complaint, the Plaintiffs are attempting to prove the amount of the debt they assert is owed to them by the ETG Fire, as well as the nondischargeability of such debt.

ETG Fire did not answer the Complaint. Instead, ETG Fire filed the Motion to Dismiss, seeking dismissal of all claims in the Complaint pursuant to Fed. R. Civ. P. 12(b)(6), as incorporated by Fed. R. Bankr. P. 7012(b), on the ground that the Plaintiffs failed to state a claim upon which relief may be granted. The Plaintiffs presented the Response and ETG Fire filed the Reply. The dispute framed by the Motion to Dismiss, Response, and Reply is fully briefed and ready for decision.

[4] Although the Plaintiffs titled their eleventh count as "objection to discharge" (which typically suggests a claim under Section 727) the title, text and content of their eleventh count refers to Section 523(a)(6). Section 523(a)(6) is directed toward a determination of the nondischargeability of a particular debt, not a general objection to discharge.

IV. Standard for Evaluating Motions to Dismiss Under Fed. R. Civ. P. 12(b)(6).

The Court's analysis of the Motion to Dismiss, Response, and Reply starts with the applicable federal rules of procedure. In this case, ETG Fire asserts that the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), which is applicable per Fed. R. Bankr. P. 7012(b). Fed. R. Civ. P. 12(b)(6) provides:

> Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion . . . failure to state a claim upon which relief can be granted . . . .

When considering a motion to dismiss under Fed R. Civ. P. 12(b)(6) (as incorporated by Fed. R. Bankr. P. 7012(b)), the Court accepts as true all well-pleaded factual allegations in the complaint and views them in the light most favorable to the Plaintiffs. *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1235 (10th Cir. 2013). Under the refined pleading standard articulated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), a complaint will be dismissed unless it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). *See also Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (referring to clarified standard under *Twombly* and *Iqbal* as a "refined standard").

Under the "refined standard," a claim is considered "plausible" when the complaint contains facts which allow the Court "to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "Plausible" does not mean "probable," although the plaintiff must show that its entitlement to relief is more than speculative. *Id.*; *Twombly*, 550 U.S. at 555. If the allegations in a complaint "are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible." *Kansas Penn*, 656 F.3d at 1215. Put another way, "the complaint must give the Court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original).

"The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kansas Penn*, 656 F.3d at 1215; *see also Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). Thus, the Tenth Circuit has held that "the *Twombly/Iqbal* standard is 'a middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action, which the Court stated will not do.'" *Khalik v. United Airlines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (citing *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008)) (internal quotation marks and citations omitted in *Khalik*).

The Court is bound to accept only factual allegations as true and will not give deference to legal conclusions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 578. As a result, courts often begin their analysis by identifying allegations that are no more than conclusions and, therefore, not entitled to the "assumption of truth." *Id.* at 679. Legal conclusions must be supported by well-pleaded factual allegations, which can be assumed as true and evaluated as to whether they plausibly give rise to the requested relief. *Id.* This process is a context-specific task which depends on the elements of a particular claim and requires the Court to draw upon its judicial experience and common sense. *Burnett*, 706 F.3d at 1236 (quoting *Iqbal*, 556 U.S. at 679). Careful evaluation is necessary both to ensure that a defendant is sufficiently able to prepare his defense and to avoid "ginning up the costly machinery associated with our civil discovery regime on the basis of a largely groundless claim." *Kansas Penn*, 656 F.3d at 1215 (internal quotation omitted).

Ultimately, the critical question is: "assum[ing] the truth of all well-pleaded facts . . . and draw[ing] all reasonable inferences therefrom in the light most favorable to the plaintiffs," whether the compliant "raise[s] a right to relief above the speculative level.'" *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). It is a low threshold. "[G]ranting [a] motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias*, 567 F.3d at 1178 (quoting *Duran v. Carris,* 238 F.3d 1268, 1270 (10th Cir. 2001)). Thus, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236, (1974)).

V. Summary of Factual Allegations in Complaint.

The factual allegations of the Complaint (which must be accepted as true) may be summarized as follows:

A. Allegations Regarding Plaintiffs, Operations, and Confidential Information.

Marmic is a Missouri corporation with operations throughout the United States. (Compl. ¶ 9.) APS is a limited liability company organized under the laws of the State of Oklahoma with operations throughout the United States. (Compl. ¶ 10.) Marmic acquired APS on or about October 23, 2021, and APS remains a wholly-owned subsidiary of Marmic. (Compl. ¶ 11.) Marmic operates a full-service fire protection business, providing retail, medical, commercial, and industrial companies with hazard analysis, fire and personal safety products, fire suppression installations, and inspection services conforming to mandates from the Occupational Safety and Health Administration, government codes, and National Fire Protection Association standard. (Compl. ¶ 18.) APS provides inspection, design, and project services in the fire-protection industry as well as products and services relating to fire protection, including without limitation fire alarms, fire sprinklers, fire extinguishers, kitchen hood fire systems, and special hazard fire systems. (Compl. ¶ 19.)

The Plaintiffs' relationships, technical know-how, and customer goodwill are the result of The Plaintiffs' substantial investment and effort over extensive periods of time, and constitute business assets of significant and substantial value. (Compl. ¶ 21.) The Plaintiffs entrust their goodwill and their customers' preferences to a team of sales professionals who manage their relationships with key accounts and serve as Plaintiffs' face during their employment. (Compl. ¶¶ 20-21.) The Plaintiffs' sales representatives and management employees have access to confidential, proprietary, and valuable information about Plaintiffs' business, including bidding information; customer preferences and anticipated projects; CAD graphics; floor plans; business plans; market research and forecasts; marketing and advertising plans, techniques, and budgets; pricing strategies; cost sheets; supplier information; and product specifications, designs, inventions and techniques. (Compl. ¶ 22.) The Plaintiffs compensate their employees in exchange for their service to the Plaintiffs. (Compl. ¶ 20.)

To protect their confidential information from disclosure to third parties, including competitors, the Plaintiffs enacted company-wide policies, including a Confidential Company Information Policy. Under that policy, confidential information about the Plaintiffs' business, "including but not limited to information regarding Company finances, pricing, products and new product development, software and computer programs, marketing strategies, suppliers and customers and potential customers" must be kept confidential. Further, such confidential information must not be disclosed to the Plaintiffs' competitors. In addition, under the Confidential Company Information Policy, "any employee who improperly copies, removes (whether physically or electronically), uses or discloses confidential information to anyone outside of the Company may be subject to disciplinary action up to and including termination." (Compl. ¶ 24.) In addition, the Plaintiffs' Employee Code of Conduct requires employees to "comply with any federal, state or local laws" and to "show integrity and professionalism in the workplace," and provides that employees are expected to prevent potential conflicts of interest by "avoid[ing] any personal, financial or other interests that might impact their capability or willingness to perform their job duties, or alter their decisions." (Compl. ¶ 25.) The Plaintiffs' Employee Code of Conduct notifies employees that Plaintiffs "may take legal action in cases of corruption, theft, embezzlement or other unlawful behavior." (Compl. ¶ 26.) The Plaintiffs further protect their confidential information by maintaining all confidential information on Plaintiffs' secure and password-protected network and by requiring each employee to use unique login credentials to access information stored on Plaintiffs' computer network and systems. For sales-focused employees, the Plaintiffs maintain cloud-based databases of customer and sales information that can be accessed only by a limited set of employees who have a business need to access such information. (Compl. ¶ 27.)

B. Allegations Regarding ETG Fire.

ETG Fire is a direct competitor of the Plaintiffs. (Compl. ¶ 3.) ETG Fire was established in 2013 by its Founder and former President, Chris Vanderstokker ("Vanderstokker"). (Compl. ¶¶ 2-3.) Vanderstokker sold ETG Fire to Erdoni, LLC

("Erdoni"), pursuant to a Unit Purchase and Sale Agreement dated January 19, 2022 (the "PSA"). (Compl. ¶ 4.) Following Erdoni's purchase of ETG, Christopher Czarnowski ("Czarnowski") became the Chief Executive Officer of ETG Fire, and Vanderstokker remained employed by ETG Fire in a sales and consulting role. (Compl. ¶ 5.)

C. Allegations Regarding Certain of Plaintiffs' Employees and Their Employment Contracts.

APS hired Tyler Aebersold ("Aebersold") in October 2013. Following Marmic's acquisition of APS in 2021, Aebersold worked on behalf of both the Plaintiffs. When he was hired by APS in 2013, Aebersold signed an employment agreement that contained certain restrictive covenants. (Compl. ¶ 34.) On or about November 17, 2021, Aebersold signed a Confidentiality Agreement and Agreement Not to Compete with Marmic (the "Aebersold Agreement"). (Compl. ¶ 30.) The Aebersold Agreement provided:

> Whereas, it is agreed that the Employee, during the period of employment with Employer and for a period of 36 months following the termination of Employee's employment with the Employer will not either directly or indirectly call upon, solicit, divert or take away or attempt to solicit, divert or take away any of the customers, business or patrons of the Employer upon whom the Employee called or solicited or catered or became acquainted with while employed with the Employer. It is furthermore agreed that during the term of Employee's employment and for a period of 36 months after the termination of employment, the Employee will not participate directly or indirectly, personally or as the agent or Employee of another, in the ownership, management, operation or control of any business similar to the type of business conducted by the Employer at the time of the termination of this Agreement within a 100-mile radius of any location owned by Joplin Fire Protection Co., Inc. or Marmic Fire & Safety, Inc.

(Compl. ¶ 31.) The Aebersold Agreement further provided:

> Employee further agrees that the information gained by Employee in promoting Employer's business including, by way of illustration and without limitations, the names and addresses of the customers of the Employer and the marketing methods are confidential information and Employee shall not disclose to any parties such information during the period of his employment or for a period of 36 months thereafter.

(Compl. ¶ 32.) Finally, the Aebersold Agreement stated:

> Employee also agrees, during Employee's engagement with Employer and for a period of one (1) year after my employment ends for any reason, not to directly or indirectly, solicit, recruit, hire or otherwise interfere with the employment of Employer's employees.

Aebersold voluntarily resigned from his employment relationship with the Plaintiffs, effective on May 9, 2023. (Compl. ¶¶ 28, 95.) At the time of his resignation from employment with the Plaintiffs, Aebersold held the role of Sales Manager. (Compl. ¶ 28.) As Sales Manager, Aebersold was responsible for working directly with and developing and maintaining goodwill with Plaintiffs' customers, including customers focused on special fire hazard protection systems, which are fire protection system designed to protect a highly sensitive or valuable asset or to provide fire protection in areas where fire-sprinkler use is not a viable option. (Compl. ¶ 29.)

APS hired Gary Holmes in January 2015. On or about February 25, 2016, Holmes signed an "Employee Confidential Information, Non-Solicitation and Noncompete Agreement" (the "Holmes Agreement") with APS. Holmes worked for APS in the Tulsa County, Oklahoma area at the time he signed the Holmes Agreement and through the date of his voluntary resignation from employment on August 23, 2022. (Compl. ¶¶ 37 and 57.)

Paragraph 3 of Holmes Agreement states, among other things, that Holmes "understands and agrees that the confidential business and customer information of [the] Company is a valuable business asset belonging to the Company and [Holmes] will not, during the term of this Agreement or any time hereafter, directly or indirectly, copy, disseminate, or make use of such information for any purpose unrelated to Company's business, and will keep the same in the strictest of confidence." Paragraph 3 further outlines examples of "confidential information," and states that Holmes may "at no time, in any fashion, form, or manner directly or indirectly use, divulge or disclose such information to any third party without first obtaining the express written consent of the Company." Paragraph 3 of Holmes Agreement requires Holmes to "immediately return to Company any and all of Company's records, sales, materials, samples, forms, documents, vendor materials, sales records and all other property and documents of any nature whatsoever." (Compl. ¶ 38.) The Holmes Agreement also states that "upon [Holmes'] separation from employment," Holmes may not

> for any reason . . . directly or indirectly, personally or through any other person or business, seek to cause any other employees or independent representatives of Company to terminate their relationships with Company and will not, directly or indirectly, assist any other person or entity in seeking to do so.

(Compl. ¶ 39.) Finally, Paragraph 5 of Holmes Agreement prohibits Holmes from "[d]irectly solicit[ing] the Established Customers of the Company or of Company's related entities." (Compl. ¶ 40.)

At the time of his separation from the Plaintiffs on August 23, 2022, Holmes held the role of Director, Special Hazard & Alarm Systems. (Compl. ¶ 35.) As Director, Special Hazard & Alarm Systems, Holmes had access to the Plaintiffs' confidential information and trade secrets. Furthermore, he led and oversaw the Plaintiffs' special fire hazard protection business. He held a significant leadership role that required him to exercise business judgment on behalf of the Plaintiffs with respect to the special fire hazard protection business and that placed him in a position to develop close relationships with, and influence over, the Plaintiffs' employees and customers. (Compl. ¶ 36.)

APS hired Lynn Mullin in August 1998. (Compl. ¶ 41.) On or about December 8, 2016, Mullin signed an "Employee Confidential Information, Non-Solicitation and Noncompete Agreement" (the "Mullin Agreement") with APS. (Compl. ¶ 43.) The terms of the Mullin Agreement are virtually identical to the Holmes Agreement. (Compl. ¶¶ 44-46.) In March 2023, Mullin submitted her voluntary resignation to Plaintiffs. Mullin's resignation took effect in April 2023. (Compl. ¶ 92.) At the time of her separation, Mullin held the role of Project Sales Manager, focusing on the Plaintiffs' special fire hazard protection business. (Compl. ¶ 41.) In her role as Project Sales Manager, Mullin had access to the Plaintiffs' confidential information and trade secrets. Furthermore, Mullin's work for the Plaintiffs in its special fire hazard protection business division provided her with significant access to the Plaintiffs' customer relationships and confidential information about those customers. This access provided Mullin with an opportunity to develop close relationships with, and influence over, the Plaintiffs' customers. (Compl. ¶ 42.)

APS hired Catesa Smith in November of 2005. (Compl. ¶ 47.) On or about December 10, 2014, Smith signed an "Oklahoma Employee Confidential Information, Non-Solicitation, and Non-Compete Agreement" ("the Smith Agreement"). (Compl. ¶ 49.) The terms of the Smith Agreement are similar to the Holmes Agreement. (Compl. ¶ 50-52.) Smith worked for the Plaintiffs in the Tulsa County, Oklahoma area at the time she signed the Smith Agreement and through the date of her voluntary resignation from employment in August 2023. (Compl. ¶ 49.)

D. <u>Allegations Regarding Conspiracies Between ETG Fire, Aebersold, Holmes, and Mullin While Aebersold, Holmes, and Mullin Were Employed by Plaintiffs</u>.

Between August 2022 and August 2023, ETG Fire raided a large group of employees working for Plaintiffs, including in Plaintiffs' special fire hazard protection business division. (Compl. ¶ 53.) In addition to raiding Plaintiffs' employee base, ETG Fire engaged in efforts to obtain and use Plaintiffs' confidential information and trade

secrets so that ETG could divert customer projects and relationships from Plaintiffs to ETG Fire. (Compl. ¶ 54.)

At the time of ETG Fire's sale to Erdoni during January 2022, Marmic employed Aebersold, Holmes, Mullin, Smith, Joshua Westphal ("Westphal"), Joseph Smothermon ("Smothermon"), and other employees, in or near Tulsa, Oklahoma. In the course of their employment for Plaintiffs, Aebersold and Mullin prepared bids for the Plaintiffs to submit to customers, using Plaintiffs' proprietary cost sheets and other trade secrets and confidential information, including Plaintiffs' relationship with the customer and the customer's preferences, pricing strategies, supplier and vendor information and costs, and product specifications, designs, and techniques. (Compl. ¶ 64.) The bids constitute confidential and competitively valuable information that rises to the level of trade secret. (Compl. ¶ 64.)

Prior to the conclusion of Holmes' employment with the Plaintiffs in August 2022, he began performing services for ETG Fire, including carrying out efforts to divert Plaintiffs' customers to ETG Fire. (Compl. ¶ 57.) Holmes also emailed Plaintiffs' documents, including a third-party consulting report titled "Handbook," from his APS FireCo email to his personal email. (Compl. ¶ 79.) Holmes began officially working for ETG Fire as its Chief Operations Officer shortly after his separation from the Plaintiffs. (Compl. ¶¶ 57, 79.)

Prior to the date on which Holmes' voluntarily ended his employment with Plaintiffs, Vanderstokker, Troy Kinder (ETG Fire's Chief Information Officer) ("Kinder"), Holmes, Aebersold, Mullin, and employees of ETG Fire worked together to pursue the diversion of business from Plaintiffs to ETG Fire, including by preparing bids for customer projects on behalf of ETG Fire that had solicited bids from Plaintiffs — not from ETG Fire. Pursuant to this scheme, Mullin and Aebersold would prepare bids for Plaintiffs' customers on Plaintiffs' letterhead and send them to Vanderstokker and Kinder to be signed and submitted to customers on behalf of ETG Fire. (Compl. ¶¶ 58 and 62) Aebersold regularly communicated with Holmes and Vanderstokker, and Aebersold discussed ETG Fire's projects with the ETG Fire's customers, answered customer questions, and prepared revised bids. (Compl. ¶ 63.)

While Holmes, Aebersold, and Mullin remained employed with Plaintiffs, they engaged in a process they called "ETG-izing" the bids (meaning, to put the Plaintiffs' customer bids on ETG Fire letterhead). Vanderstokker and Kinder would share the "ETG-ized" bids with Plaintiffs' customers in an effort to divert the projects to ETG Fire, and they and multiple other officers of ETG Fire knowingly encouraged, aided, and abetted Holmes', Aebersold's, and Mullin's diversion of Plaintiffs' customers to ETG Fire as well as their use of Platiniffs' propriety and confidential information and trade secrets. (Compl. ¶¶ 59, 60, 61, 64, 65, 67, 68-77.)

Aebersold, Mullin, Holmes, Vanderstokker, Kinder, and other employees of ETG Fire knew that ETG Fire was not authorized by Plaintiffs to receive bids that were prepared by Plaintiffs' employees for Plaintiffs' customers, and furthermore knew that

they were not authorized to use those bids in order to prepare a lower-priced bid on behalf of ETG Fire. (Compl. ¶ 66.) Holmes, Mullin, and Aebersold took the foregoing actions with the goal of diverting clients and business opportunities from the Plaintiffs to ETG Fire prior to their separation from Plaintiffs, so that Holmes, Mullin, and Aebersold (along with other of Plaintiffs' employees that thereafter worked for ETG Fire) would have an established pipeline of commission-generating business upon their arrival at ETG Fire. (Compl ¶ 56.) ETG Fire's actions were undertaken with the encouragement, assistance, and direction of its Czarnowski, Vanderstokker, Kinder, and other high-ranking officers and employees of ETG Fire. At the highest level of the company, ETG Fire was fully aware and supportive of the scheme spearheaded by Czarnowski, Vanderstokker, and other ETG Fire employees. (Compl. ¶ 55.) ETG Fire subsequently won certain customer bids that it was competing with the Plaintiffs to win. (Compl. ¶ 61.)

E. <u>Allegations Regarding Continuation of the Conspiracies Between ETG Fire, Aebersold, Holmes, and Mullin After They Resigned from Their Positions With Plaintiffs</u>.

After Holmes resigned from his position with the Plaintiffs in August 2022, he began working for ETG Fire. (Compl. ¶ 78.) Thereafter, ETG Fire and Holmes continued to conspire and work with Mullin and Aebersold, who were both still employees of Plaintiffs, to divert customers and business opportunities from Plaintiffs to ETG Fire and to misappropriate trade secrets including proprietary design drawings; project files for Plaintiffs' customer projects and bids, including CAD graphics, floor plans, cost sheets, purchase orders, warranty letters, billing requests, job proposals, and project checklists owned by Plaintiffs; quotes Mullin had provided to Plaintiffs' customers, detailed information about Plaintiffs' projects, safety data sheets, plant layouts, and correspondence with Plaintiffs' customers. (Compl. ¶¶ 80, 81, 83, 112-137.)

After Holmes began working for ETG Fire, he solicited Plaintiffs' employees, including Aebersold, Mullin, and Westphal, to work for ETG Fire. (Compl. ¶¶ 83-87.) Holmes did so with Czarnowski's assistance and blessing. Indeed, Czarnowski sent Aebersold and Mullin each a laptop in February 2023, while they were still employed with Plaintiffs, to faciliate their misappropriation and misuse of Plaintiff's confidential and proprietary information and trade secrets. (Compl. ¶¶ 88-94.)

ETG Fire paid both Aebersold and Mullin commissions for bids they prepared for ETG Fire and helped win for ETG Fire while they was still employed by Plaintiffs. (Compl. ¶¶ 96-97.) Holmes was aware that these activities violated his contractual obligations, along with those Aebersold and Mullin owed to the Plaintiffs. (Compl. ¶ 82.) And ETG knew that its conduct breached Aebersold's, Mullin's, Holmes', and Smith's duties and contractual obligations owed to Plaintiffs. (Compl. ¶ 139.) ETG Fire injured the Plaintiffs by willfully and maliciously undertaking their scheme to misappropriate Plaintiffs' conidential and trade secret information, and to use that information to wrongfully solicit Plaintiffs' customers to do businss with ETG Fire to the detriment of Plaintiffs. (Compl. ¶ 212.) ETG Fire's actions, through its agents, were deliberate,

intentional, and premediated, and ETG intended to inflict harm on the Plaintiffs' business. (Compl. ¶¶ 213 and 214.)

F. Allegations Regarding Conspiracy Between ETG Fire and Smith.

While employed with Plaintiffs, Smith was privy to confidential information and/or trade secrets, including national account pricing, related to Plaintiffs' bid in a request for proposal ("RFP") for an established customer. (Compl. ¶ 99.) In December 2022, Smith forwarded the documents related to the RFP from her APS email to her personal email. She also emailed Holmes with an Excel spreadsheet identifying prospective customers for ETG Fire. Over 50 of the entries on the spreadsheet are active customers of Plaintiffs and Established Customers under the Smith Agreement. Holmes responded to the email, attaching a revised spreadsheet and information regarding salary, sales projections, and revenue estimates if she joined ETG Fire. (Compl. ¶¶ 100-102.)

Smith remained employed with the Plaintiffs until she resigned from her position on August 22, 2023. (Compl. ¶ 104.) She then became employed by ETG Fire, where she worked to solicit at least three of the Plaintiffs' established customers, including the customer to whom the Plaintiffs submitted a bid in connection with the RFP. In late 2023, Smith and Czarnowski communicated regarding efforts to solicit the business of the Plaintifs' established customers. ETG Fire continues to utilize confidential information and/or trade secrets taken by Smith to solicit and perform business. (Compl. ¶¶ 103-111.)

VI. The Motion to Dismiss and Response.

A. ETG Fire's Arguments in Favor of Dismissal of the Complaint.

Like a three leaf Shamrock, ETG Fire seeks dismissal of all claims in the Complaint on three related but independent grounds. First, ETG Fire contends that Section 523(a) "only exempts from discharge debts against individual debtors and not corporate debtors" in Subchapter V. (Mot. at 5.) Second, ETG Fire argues that even if Section 523(a) applies to exempt from discharge debts of corporate debtors, the Plaintiffs fail to state a claim under Section 523(a)(6) because Section 523(a)(6) requires a showing tha ETG Fire acted with a culpable state of mind, and the allegations in the Complaint show, at most, that individuals other than ETG Fire acted with the requisite state of mind. Third, ETG Fire contends that the claims are improperly brought in the Complaint and must be dealt with in the claims objection process (*i.e.,* the Plaintiffs' POC and ETG Fire's POC Objection) rather than in an adversary proceeding.

B. The Plaintiffs' Arguments Against Dismissal of the Complaint.

The Plaintiffs disagree with ETG Fire's reading of statutes which govern the applicabilty of Section 523(a) to the debts of corporate debtors in Subchapter V, and contend that Section 523(a) does apply to except from discharge certain debts of corporate debtors in Subchapter V cases. The Plaintiffs also disagree with the ETG

Fire's contention that the Plaintiffs fail in the Complaint to state a claim for relief that is plausible on its face. The Plaintiffs assert that the Complaint adequately alleges ETG Fire's improper intent under Section 523(a)(6). Further, the Plaintiffs take issue with the notion that, by filing the Complaint, they are attempting to circumvent the claims process, noting that the issue of nondischargeability is one which must be addressed through an adversary proceeding.

VII. Legal Analysis.

A. General Framework for Evaluation of Section 523(a) Claims.

In the Complaint, the Plaintiffs assert that ETG Fire is indebted to them as a result of its alleged wrongful conduct. The Plaintiffs further contend that the debt arising from ETG Fire's misconduct is nondischargeable under 11 U.S.C. § 523(a)(6). The Plaintiffs bear the burden of establishing nondischargeability of a particular debt under Section 523(a) by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) ("requiring the creditor to establish by a preponderance of the evidence that his claim is not dischargeable reflects a fair balance between these conflicting interests."); *Houston v. Munoz (In re Munoz)*, 536 B.R. 879, 884 (Bankr. D. Colo. 2015) (requiring creditor to prove Section 523(a) claims by a preponderance of the evidence). Additionally, exceptions to discharge under Section 523(a) "are to be narrowly construed, and because of the fresh start objectives of bankruptcy, doubt is to be resolved in the debtor's favor." *Bellco 1st Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358, 1361 (10th Cir. 1997). *See also Sawaged v. Sawaged (In re Sawaged)*, 2011 WL 880464, at *3 (Bankr. D. Colo. Mar. 15, 2011) (same).

The term "debt" is defined in Section 101(12) as "liability on a claim." And, under Section 101(5), a "claim" means a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . ." 11 U.S.C. § 101(5)(A).

Section 523(a) nondischargeability claims all require a two-part analysis. First, "the bankruptcy court must determine the validity of the debt under applicable law." *Hatfield v. Thompson (In re Thompson)*, 555 B.R. 1, 8 (10th Cir. BAP 2016). *See also Lang v. Lang (In re Lang)*, 293 B.R. 501, 513 (10th Cir. BAP 2003). This is referred to as the "claim on the debt" component. *Thompson*, 555 B.R. at 8. The claim on the debt component is decided based upon applicable non-bankruptcy law. *See Grogan*, 498 U.S. at 283 ("The validity of a creditor's claim is determined by rules of state law."); *New Mexico Department of Workforce Solutions v. Beebe (In re Beebe)*, 2016 WL 4945454, at *6 (Bankr. D.N.M. Sept. 14, 2016) ("Whether a debt exists is determined by looking to applicable law, frequently state law. To establish the claim on the debt under § 523(a)(2)(A), the claimant must establish that the debtor is liable on an enforceable obligation under applicable non-bankruptcy law, nothing more nor less.") Second, if there is a valid debt, "the bankruptcy court must determine the dischargeability of that debt under Section 523." *Id*. *See also Lang*, 293 B.R. at 513 ("bankruptcy law controls

with respect to the determination of nondischargeability"). This is referred to as the "dischargeability" component. *Thompson*, 555 B.R. at 8.

So, generally, the Court's first step in determining whether a plaintiff has stated a claim under Section 523(a)(6) is evaluating whether the facts pled in support of each claim for relief suffice to state a claim, based upon applicable non-bankruptcy law, for which the defendant may be liable, or indebted to the plaintiff. The next step requires the Court to determine whether the plaintiff has pled facts that could support a determination that any such debt is nondischargeable, based on bankruptcy law.

In this case, ETG Fire does not contest that the Complaint stated sufficient facts to satisfy the "claim on the debt'" component; instead, their arguments for dismissal relate *solely* to the second component: dischargeability — that is, ETG Fire contends that under the Bankruptcy Code, the debts of corporate debtors, including those in Subchapter V, cannot be deemed nondischargeable under Section 523(a).[5] ETG Fire further contends that the Plaintiffs cannot state a claim under Section 523(a)(6) because the acts of which the Plaintiffs complain are the acts of third parties (ETG Fire's management and employees), which cannot be imputed to ETG Fire. As such, ETG Fire asserts that it cannot be found to have acted with the requisite intent necessary to find any alleged debt nondischargeable. Finally, ETG Fire argues that Plaintiffs are limited to the claims allowance and disallowance process and cannot pursue an adversary proceeding to establish debt.

Given ETG Fire's discrete dischargeability arguments in the Motion to Dismiss, the Court assumes (without finally deciding) that ETG Fire has alleged sufficient facts to state a claim for relief with respect to the debt component. Thus, the Court will confine its analysis only to the issues raised by ETG on the dischargeability component.

B. Section 523(a) Is Applicable to Debts of Corporate Debtors in Subchapter V Cases.

About six years ago, Congress made a significant addition to Chapter 11 of the Bankruptcy Code: the Small Business Reorganization Act of 2019 (the "SBRA").[6] The SBRA (commonly referred to as "Subchapter V"), was designed to streamline the reorganization and rehabilitation process for small business debtors. Substantively, the SBRA lowered the Chapter 11 bar for confirmation of a plan of reorganization by permitting confirmation even if all classes of creditors reject the proposed plan and by eliminating the so-called "absolute priority rule." Procedurally, Congress simplified some of the more cumbersome aspects of standard Chapter 11 cases by eliminating unsecured creditors' committees and disclosure statements. Suffice it to say that the SBRA offers many potential advantages for qualifying Chapter 11 debtors.

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[5] The Court recognizes that ETG Fire disputed the amount and validity of the Plaintiffs' POC through the POC Objection. That issue is preserved. However, ETG Fire has not attacked the amount and validity of ETG Fire's alleged debt to the Plaintiffs in the Motion to Dismiss.

[6] Pub L. No. 116-54, 133 Stat. 1079 (mainly codified at 11 U.S.C. §§ 1181-1195).

ETG Fire elected to proceed under Subchapter V to secure such advantages. But, since the SBRA is still fairly new, there are some uncertainties. Both the Plaintiffs and ETG Fire recognize that there exists a split of legal authority regarding whether the Section 523(a) nondischargeability provisions (such as Section 523(a)(6)) apply to corporate debtors, including limited liability companies,[7] in Subchapter V cases where the proposed reorganization is nonconsensual.

"If a debtor's bankruptcy plan is confirmed as a consensual plan under § 1191(a), the dischargeability of its debts is governed by § 1141(d)." *Avion Funding, L.L.C. v. GFS Indus., L.L.C. (In the Matter of GFS Indus., L.L.C.)*, 99 F.4th 223, 227 (5th Cir. 2024).[8] The upshot is that a corporate entity successfully achieving confirmation of a consensual reorganization plan under Section 1191(a) may discharge almost all its debts irespective of the Section 523(a) nondischargeability provisions.[9]

In the Motion to Dismiss, ETG Fire stated: "it is not clear whether the [Operative] Plan will be confirmed under Section 1191(a) or 1191(b)." (Mot. at 7.) However, later, ETG Fire acknowledged that it is attempting to obtain confirmation of the Operative Plan on a nonconsensual basis under Section 1191(b). (ETG Docket No. 351 at 3 (per the "Ballot Report" submitted by ETG Fire and Midco, "Class 4 [of the Operative Plan] is not presently an accepting class."); ETG Docket No. 352 at 26 (arguing that "the [Operative]

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[7] Limited liability companies are included within the definition of "corporation" in the Bankruptcy Code. 11 U.S.C. § 101(9)(a).

[8] Section 114(d)(1) states:

> Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan —
> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not —
> (i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
> (ii) such claim is allowed under section 502 of this title; or
> (iii) the holder of such claim has accepted the plan; and
> (B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

[9] There is a narrow exception. Section 1141(d)(6) states:

> Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt —
> (A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or
> (B) for a tax or customs duty with respect to which the debtor —
> (i) made a fraudulent return; or
> (ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

This exception is targeted toward debt owed to "governmental unit[s]" – not general unsecured debt.

Plan complies with Section 1191(b)"); ETG Docket No. 353 at 2 ("the Debtors request that the Court confirm the Plan pursuant to 11 U.S.C. § 1191(b)").) The Operative Plan has not been confirmed.

Based on the foregoing, for purposes of the Court's decision, the Court assumes that ETG Fire is attempting to secure confirmation of the Operative Plan on a nonconsensual basis under Section 1191(b). ETG Fire asserts that the Section 523(a) nondischargeability provisions (such as Section 523(a)(6)) do not apply to corporate debtors (such as itself), in nonconsensual Subchapter V cases. The Plaintiffs disagree.

The disagreement between ETG Fire and the Plaintiffs is mirrored in Subchapter V caselaw. The disagreement arises mainly from differing interpretations of the interplay between the text of Section 1192(2) and the preamble of Section 523(a).

Section 1192(2), which specifically governs discharge in the context of nonconsensual Subchapter V reorganization, states:

> If the plan of the debtor is confirmed [non-consensually] under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, *the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title*, and all other debts allowed under section 503 of this title and provided for in the plan, *except any debt —*
>
> > (1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or
> >
> > (2) *of the kind specified in section 523(a)* of this title.

(emphasis added). Notably, Section 1192(2) makes no distinction between individual and corporate debtors — it applies to both. So, to simplify, individual and corporate Subchapter V debtors may discharge "all debts provided in Section 1141(d)(1)(A) "*except any debt . . . of the kind specified in section 523(a)*."

But there is a rub: the cross-reference to Section 523(a). Section 523(a) provides: "A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge *an individual debtor*" from a list of 20 specified categories of debts[10] (and subparts), including, under Section 523(a)(6), for "any debt . . . for willful

[10] Section 523(a) current contains 20 enumerated subsections. 11 U.S.C. § 523(a)(1)-(20). However, some caselaw states that there are 21 Section 523(a) categories. The slight discrepancy may

and malicious injury by the debtor to another entity or to the property of another entity." Recall that the Plaintiffs are seeking nondischargeability under Section 523(a)(6).

As ETG Fire correctly argues, most bankruptcy courts construing Sections 1192(2) and 523(a) have concluded — based mainly on the preable to Section 523(a) as well as policy considerations — that the 20 categories (and subparts) of nondischargeable debt under Section 523(a) apply only to *individual* Subchapter V debtors. Put another way, such bankruptcy courts believe creditors simply may not pursue nondischargeability under any of the Section 523(a) categories against *corporate* Subchapter V debtors. *See*, *e.g.*, *Spring v. Davidson (In re Davidson)*, 2025 WL 511226 (Bankr. N.D. Fla. Feb. 14, 2025); *Chicago & Vicinity Laborers' Dist. Council Pension Plan v. R&W Clark Constr., Inc. (In re R&W Clark Constr., Inc.)*, 656 B.R. 628 (Bankr. N.D. Ill. 2024), *rev'd*, 2024 WL 4789403 (N.D. Ill. Nov. 14, 2024); *Nutrien Ag Sols., Inc. v. Hall (In re Hall)*, 651 B.R. 62 (M.D. Fla. 2023); *BenShot, LLC v. 2 Monkey Trading, LLC (In re 2 Monkey Trading, LLC)*, 650 B.R. 521 (M.D. Fla. 2023) (appeal pending); *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC),* 647 B.R. 337 *(*Bankr. W.D. Tex. 2022), *rev'd,* 99 F.4th 223 (5th Cir. 2024); *Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, 2022 WL 1110072 (E.D. Mich. Apr. 13, 2022); *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications, LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021); *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd*, 36 F.4th 509 (4th Cir. 2022); *Gaske v. Satellite Rests., Inc. (In re Satellite Rests., Inc.)*, 626 B.R. 871 (Bankr. D. Md. 2021). The Bankruptcy Appellate Panel of the Ninth Circuit agrees: *Lafferty v. Off-Spec Sols., LLC (In re Off-Spec Sols., LLC)*, 651 B.R. 862 (9th Cir. BAP 2023).

But, save for *Off-Spec. Solutions*, 651 B.R. 862, the analysis used by most bankruptcy courts has not fared well on appeal. The only two Circuit Courts of Appeal to have addressed the issue have decided, uniformly, as a matter of statutory interpretation, that the discharge of both *individual* and *corporate* Subchapter V debtors under Section 1192(2) is subject to the discharge limitations contained in the Section 523(a) categories. *See Avion Funding v. GFS Indus., LLC (In re GFS Indus., LLC)*, 99 F.4th 223, 228 (5th Cir. 2024) (plain language of Section 1192(2) "subjects both corporate and individual Subchapter V debtors to the categories of debt discharge exceptions listed in Section exceptions listed in § 523(a)."); *Cantwell Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509, 517 (4th Cir. 2022) ("*all Subchapter V debtors* are textually subject to the discharge limitations, not just *individual* Subchapter V debtors.") (emphasis in original). And the only District Court appellate decision on the topic concurs. *Chicago & Vicinity Laborers' Dist. Council Pension Plan v. R&W Clark Constr., Inc. (In re R&W Clark Constr., Inc.)*, 2024 WL 4789403, at *7 (N.D. Ill. Nov. 14, 2024) ("Congress made a choice to change bankruptcy proceedings for small business debtors and chose to treat individual and corporate debtors the same. To hold that § 523(a) only applies to individuals discharging debt under § 1192 ignores the purposeful change Congress made to the

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be because some of the Section 523(a) subparts contain their own subparts. But, the exact number of nondischargeability provisions is not particularly germane to this dispute.

statutory language."). Two recent bankruptcy decisions also have followed along. *Christopher Class & Aluminum, Inc. v. Premier Glass Servs., LLC (In re Premier Glass Servs., LLC)*, 661 B.R. 939, 943 (N.D. Ill. 2024) ("This court finds the circuit courts' analyses persuasive."); *Ivanov v. Van's Aircraft, Inc. (In re Van's Aircraft, Inc.)*, 2024 WL 2947601, at *6 (Bankr. D. Or. Jun. 11, 2024) (holding that "[b]ecause the meaning of Section 1192(2) is clear both in isolation and when considering the other Code sections . . . . I am persuaded that the courts of appeals' decisions [*Cleary Packaging* and *GF Industries*] are correct"; implicitly rejecting *Off-Spec. Solutions*; and predicting that the Ninth Circuit "would likely agree with the Fourth and Fifth Circuits").

With due respect to the various Bankruptcy Courts who have ruled otherwise, this Court finds the traditional statutory analysis employed by the Fourth Circuit Court of Appeals (in *Cleary Packaging*, 36 F.4th 509) and the Fifth Circuit Court of Appeals (in *GF Industries*, 99 F.4th 223) far more compelling and persuasive. *See also Synergetic Oil Tools, Inc. v. Revelant Holdings, LLC (In re Revelant Holdings LLC)*, Case No. 21-CV-2213 (D. Colo. Mar. 28, 2023) (unpublished) ("The Court finds the Fourt Circuit's analysis persuasive and reverses and remands the case back to the Bankruptcy Court to reanalyze the issue in light of *In re Cleary Packaging, LLC*, 36 F.4th 509, 518 (4th Cir. 2022)).

In *Cleary Packaging,* the appellate court engaged in a thoughtful and thorough analysis of Sections 523(a), 1192(2), and 1141(d), and determined that "*all Subchapter V debtors* are textually subject to the discharge limitations, not just *individual* Subchapter V debtors." 36 F.4th at 517 (emphassis in original). The *Cleary Packaging* panel explained its rationale:

> § 1192(2) provides for granting *debtors* a discharge of all debts, subject to stated exceptions. For the purpose of Subchapter V, the term "debtor" was defined during the relevant time period to mean "a person engaged in commercial or business activities" that has debt of not more than $7.5 million. 11 U.S.C. § 1182(1) (2020) (emphasis added). "[P]erson" is in turn defined to include both individuals and corporations, *see id.* § 101(41), and "corporation[s]" include limited liability companies, *id.* § 101(9)(A). We thus conclude that § 1192(2) provides for the discharge of debts for both individual and corporate debtors.
>
> Still, even though § 1192(2) applies to both individual and corporate debtors, the question remains whether the exception to such discharges — based on § 1192(2)'s reference to § 523(a) — applies to both individuals and corporations or to only individuals. And that question arises because the introductory language in § 523(a) limits its discharge exceptions to individual debtors. Specifically,

> § 523(a) provides that § 1192, along with five other discharge sections of the Bankruptcy Code, "does not discharge an individual debtor" from a list of 21 specified debts, including "any debt ... for willful and malicious injury,"11 U.S.C. § 523(a)(6) (emphasis added), implying that corporations are not subject to the discharge exceptions.
>
> To address the question, we begin by focusing on § 1192(2) as the provision specifically governing discharges in a Subchapter V proceeding and on the scope of its incorporation of § 523(a). Section 1192(2) excepts from discharge "any debt . . . of the kind specified in section 523(a)." 11 U.S.C. § 1192(2) (emphasis added). The section's use of the word "debt" is, we believe, decisive, as it does not lend itself to encompass the "kind" of debtors discussed in the language of § 523(a). This is confirmed yet more clearly by the phrase modifying "debt"— i.e., "of the kind." Thus, the combination of the terms "debt" and "of the kind" indicates that Congress intended to reference only the list of non-dischargeable debts found in § 523(a) . . . . In short, while § 523(a) does provide that discharges under various sections, including § 1192 discharges, do not "discharge an individual debtor from any debt" of the kind listed, § 1192(2)'s cross-reference to § 523(a) does not refer to any kind of debtor addressed by § 523(a) but rather to a kind of debt listed in § 523(a). By referring to the kind of debt listed in § 523(a), Congress used a shorthand to avoid listing all 21 types of debts, which would indeed have expanded the one-page section to add several additional pages to the U.S. Code. Thus, we conclude that the debtors covered by the discharge language of § 1192(2) — i.e., both individual and corporate debtors — remain subject to the 21 kinds of debt listed in § 523(a).
>
> We add — to the extent that one might find tension between the language of § 523(a) addressing individual debtors and the language of § 1192(2) addressing both individual and corporate debtors — that the more specific provision should govern over the more general. . . . Thus, while § 523(a) references numerous discharge provisions of the Bankruptcy Code, § 1192(2) is the more specific, addressing only Subchapter V discharges.

Id. at 514-15 (internal citations omitted; emphasis in original). The court went on to explain that "[t]he context of § 1192(2) within the Bankruptcy Code and the Bankruptcy

Code's structure further supported" its conclusion that the debts of corporate debtors may be excepted from discharge under Section 523(a). *Id.* at 515-17.

The Fifth Circuit Court of Appeals agreed with the *Cleary Packaging* court in *GFS Industries,* 99 F.4th 223, ruling that the plain language of Section 1192(2) "subjects both corporate and individual Subchapter V debtors to the categories of debt discharge exceptions listed in Section exceptions listed in § 523(a)." *Id.* at 228 (citing *Cleary*, 36 F.4th at 515) and echoing that the *Cleary* court's conclusion was bolstered by reading Section 1192 within the larger context of the Bankruptcy Code. *Id.* at 230-231.

But, ETG Fire suggests that the Fourth and Fifth Circuits are wrong and, instead, the Court should adopt the approach used by the Ninth Circuit Bankruptcy Appellate Panel: *Off-Spec Solutions*, 651 B.R. 862. In *Off-Spec Solutions,* the appellate panel reasoned:

> Section 523(a) unambiguously applies only to individual debtors. The reference in § 1192 to debts "of the kind specified in section 523(a)" can reasonably be construed to mean the list of debts, but nothing in § 1192 obviates the express limitation in the preamble of § 523(a) or otherwise expands its scope to corporate debtors . . . .
>
> Moreover, as part of the Small Business Reorganization Act of 2019 ("SBRA"), Congress amended § 523(a) to add § 1192 to the list of discharge provisions to which it applies. Interpreting § 1192 to extract from § 523(a) only the list of nondischargeable debts, without its limitation to individuals, would render the amendment surplusage . . . .
>
> If § 1192 makes the debts specified in § 523(a) nondischargeable to all debtors, the concurrent amendment to § 523(a) has no meaning . . . .

Off-Spec Solutions, 651 B.R. at 867 (internal citations omitted). The *Off-Spec Solutions* court, concluded, therefore:

> Based on the language and context of the stuates, we believe that the better intperetation is that § 1192 reiterates § 523(a)'s application to debtors under subchapter V, and § 523(a) limits its applicability to individuals.

Id.

Again, ETG Fire urges the Court to adopt the *Off-Spec Solutions* approach and thereby determine that, as a matter of law, the Plaintiffs cannot state a claim under Section 523(a)(6) to establish that any debt that might be owed by ETG Fire to the

Plaintiffs is nondischargeable. As the *GFS Industries* court observed, "the issue is a close and interesting one." 99 F.4th at 226 n.1. However, while the *Off-Spec Solutions* decision is well-written and makes some important points, the Court, having reviewed the arguments of the parties and the case law, finds the analysis and determination of the *Cleary Packaging* and *GFS Industries* courts to be far more compelling and persuasive than that of the *Off-Spec Solutions* court.

In particular, the Court agrees with the *Cleary Packaging* appellate panel's conclusion that Section 1192(2), the more specific provision of the Bankruptcy Code which addresses both individual and corporate debtors, should govern over the more general preamble of Section 523(a), which does not refer to the kind of debt which is excepted from discharge. *Cleary*, 36 F.4th at 515; *GFS Indus.*, 99 F.4th at 228. As a matter of plain language statutory inyterpretation, the Court assesses that when Section 1192(2) refers to "any debt . . . of the kind specified in section 523(a)" that phrase is referring to the 20 categories (and subparts) of debt listed in Section 523(a) — nothing more or less.

This Court has conducted its own exhaustive and independent statutory interpretation of Sections 1192(2), 523(a), and 1141(d). However, the Court arrived at the exact same place as the Fourth and Fifth Circuits. The legal analysis set forth in *Cleary Packaging,* 36 F.4th 509, and in *GFS Industries,* 99 F.4th 223, is so clear and compelling that, as a matter of judicial humility, the Court refrains from restating the same thing again. Instead, the Court simply endorses those decisions. *See also Revelant Holdings*, Case No. 21-CV-2213 (D. Colo. Mar. 28, 2023) (Sweeney, D.J.) (unpublished) ("The Court finds the Fourt Circuit's analysis persuasive and reverses and remands the case back to the Bankruptcy Court to reanalyze the issue in light of *In re Cleary Packaging, LLC*, 36 F.4th 509, 518 (4th Cir. 2022); Robert J. Lundy*, Applicability of Discharge Exceptions to Corporate Debtors in Subchapter V: A "Death Blow" to Rescuing Small Businesses*, 17 J. BUS. ENTREPRENEURSHIP & LAW 1, 29 (Fall 2023 / Spring 2024) ("The legal analysis, rooted in rudimentary statutory analysis, supports excluding the § 523(a) debts from discharge for corporate debtors in Subchapter V"; but arguing as a matter of policy that Subchapter V should be amended so that Subchapter V corporate debtors will not be subject to Section 523(a) nondischargeability actions). It is not this Court's place to second guess Congress and certainly not to construe the Bankruptcy Code so as to impose policies which this Court might prefer but which Congress did not adopt.

Accordingly, the Court rejects ETG Fire's contention that, as a matter of law, the Plaintiffs cannot state a claim for relief under Section 523(a)(6) against ETG Fire.

C. <u>The Plaintiffs Adequately Alleged ETG Fire's Intent to Cause Willful and Malicious Injury</u>.

In the Motion to Dismiss, ETG Fire argues, next, that the Plaintiffs have not stated a claim for "willful and malicious injury" under Section 523(a)(6) because the allegations stated by the Plaintiffs in the Complaint do not suffice to show willful and

malicious injury *by the debtor.* More specifically, ETG Fire argues, the Plaintiffs' allegations amount to an attempt to hold ETG Fire liable based on the improper imputation of the intent of ETG Fire's management and employees (all co-defendants in non-bankruptcy litigation pending in Oklahoma state court and Missouri federal court) to ETG Fire, and on theories of secondary liability which are inapplicable in the Section 523(a)(6) context. The Plaintiffs disagree, contending that ETG Fire's intent can be derived from the intent of ETG Fire's agents, such that ETG's agents' intent can be imputed to ETG Fire in a nondischargeability case.

1. General Inquiry Under Section 523(a)(6).

Section 523(a)(6) excepts from a debtor's discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." As the text of the statute makes plain, nondischargeability under Section 523(a)(6) requires both a "willful injury" and a "malicious injury." *Panalis v. Moore (In re Moore)*, 357 F.3d 1125, 1129 (10th Cir. 2004) ("Without proof of *both* [willful and malicious injury], an objection to discharge under [Section 523(a)(6)] must fail.") (emphasis in original); *Glencove Holdings, LLC v. Bloom (In re Bloom)*, 2022 WL 2679049, at *7 (10th Cir. Jul. 12, 2022) (unpublished) ("to determine nondischargeability under § 523(a)(6) we must review whether Mr. Bloom caused both a willful and malicious injury"). Stated differently, Section 523(a)(6) "requires proof of two distinct elements — the injury must be both 'willful' *and* 'malicious.' Analyzing and applying 'willful' and 'malicious' separately is the better approach." *First Am. Title Ins. Co. v. Smith (In re Smith)*, 618 B.R. 901, 912 (10th Cir. BAP 2020) (emphasis in original).

According to the Supreme Court, to satisfy the willful injury part of Section 523(a)(6), a plaintiff must prove "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphasis in original). The focus is whether the debtor acted with the "actual intent to cause injury." *Id.* "Willful" injury is a higher standard than "'reckless' or 'negligent'" injury. *Id.* Thus, "debts arising [merely] from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Id*. at 64. Explaining further, the Supreme Court observed that:

> [T]he (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require the actor to intend "the *consequences* of an act," not simply "the act itself."

Id. at 61-62 (emphasis in original).

To establish a willful injury, a creditor may use "direct evidence that the debtor acted with the specific intent to harm a creditor or the creditor's property, or . . . indirect evidence that the debtor desired to cause the injury or believed the injury was substantially certain to occur." *Smith*, 618 B.R. at 912. *See also Moore,* 357 F.3d at

1129 ("to constitute a willful act under § 523(a)(6), the debtor must 'desire . . . [to cause] the consequences of his act or . . . believe [that] the consequences are substantially certain to result from it.'") (ellipses and brackets in original); *Cocoma v. Nigam (In re Nigam)*, 780 Fed. Appx. 559, 563 (10th Cir. 2019) (unpublished table decision) (reaffirming *Moore* formulation of willful injury); *Via Christi Reg'l Med. Ctr. v. Englehart (In re Englehart)*, 229 F.3d 1163, at *3 (10th Cir. 2020) (unpublished) ("§ 523(a)(6) turns on the state of mind of the debtor, who must have wished to cause injury or at least believed it was substantially certain to occur"). It is a subjective standard. *Smith*, 618 B.R. at 912. Per appellate precedent, "indirect evidence that the debtor desired to cause the injury or believed the injury was substantially certain to occur" satisfies the Section 523(a)(6) "willful injury" requirement. *Moore,* 357 F.3d at 1129; *Longley*, 235 B.R. at 657; *Smith*, 618 B.R. at 912; *Mitsubishi Motors Credit of Am., Inc. v Longley (In re Longley*), 235 B.R. 651, 657 (10th Cir. BAP 1999). The Tenth Circuit has referred to such principle as "subjective substantial certainty" which "extends the scope of intent well beyond the compass of evil motive, without extending it to so far as to include consequences entirely outside the actor's ken . . . ." *Englehart*, 229 F.3d 1163, at *3 (quoting RESTATEMENT (2D) OF TORTS § 8A (ALI 1965) with approval: "A has no desire to injure C, but knows that his act is substantially certain to do so. C is injured by [A's act]. A is subject to liability to C for an intentional tort.").

The standard for "malicious" injury is different than "willful" injury. Something else is required. But what? The most recent binding appellate decision on Section 523(a)(6) puts it this way:

> [M]alicious injury requires "evidence of the debtor's motives." *In re Smith*, 618 B.R. 901, 919 (B.A.P. 10th Cir. 2020) (quotation marks omitted). To be malicious, the debtor must have "acted with a culpable state of mind vis-à-vis the actual injury caused the creditor." *Id*. (quotation marks omitted). The malicious injury requires that the action be "wrongful and without just cause or excuse." *Id.*

Bloom, 2022 WL 2679049, at *7. *See also Smith*, 618 B.R. at 919. The Tenth Circuit also explained:

> [P]ersonal animus is not a requirement for malicious injury. *Smith*, 618 B.R. at 919 (describing the requirements for malicious injury); *see also Ball v. A.O. Smith Corp.*, 451 F.3d 66, 69 (2d Cir. 2006) (explaining malicious injury means "wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will (quoting *In re Stelluti*, 94 F.3d 84, 87 (2d Cir. 1996)).

Bloom, 2022 WL 2679049, at *7. So, malice can be shown if the injury was wrongful and inflicted "without just cause or excuse." *Wagner*, 492 B.R. at 55 (emphasis omitted); *Steward Software Co., LLC v. Kopcho (In re Kopcho)*, 2014 WL 3933657, at *6 (Bankr.

D. Colo. Aug. 12, 2014) (same). In assessing the presence or absence of "malicious injury," the totality of the circumstances must be examined. *Dorr, Bentley & Pecha, CPA's, P.C. v. Pasek (In re Pasek)*, 983 F.2d 1524, 1527 (10th Cir. 1993) (stating that "all the surrounding circumstances, including any justification or excuse offered by the debtor, are relevant to determine whether the debtor acted with a culpable state of mind" under Section 523(a)(6)); *Smith*, 618 B.R. at 919-20 (quoting *Pasek's* "all the surrounding circumstances" language; and examining "the totality of the circumstances . . . to determine if a wrongful state of mind was present" and whether the debtor committed malicious injury).

2. ETG Fire's Argument.

In the Motion to Dismiss and Reply, ETG Fire focuses on intent and asserts that the actions and intentions of third parties (*i.e.,* the management and employees of a company) cannot ever be imputed to any corporate debtor under Section 523(a)(6). In particular, ETG Fire contends that because Section 523(a)(6) "specifically require[] acts and/or intent 'by the debtor,' dischargeability cannot be based on imputed conduct." In support of this contention, ETG Fire points to the United States Supreme Court's decision in *Bartenwerfer v. Buckley*, 598 U.S. 69 (2023).

In *Bartenwerfer*, the Supreme Court ruled that a debt incurred on the basis of misrepresentations made by the debtor's husband, who was also her business partner, in connection with the sale of a home the debtor and her husband had remodeled as a business venture, was a "debt for money obtained by false pretenses, a false representation, or actual fraud" within the meaning of Section 523(a)(2)(A), such that the debt could be excepted from the debtor's discharge. The Supreme Court held: "Written in the passive voice, § 523(a)(2)(A) turns on how the money was obtained, not who committed fraud to obtain it." *Id.* at 670. In short, the Supreme Court ruled that because the debt arose from a sale obtained through fraudulent representations, it was a "debt for money . . . obtained by . . . false pretenses, a false representation, or actual fraud," even though the debtor herself had not made the misrepresentations, the debt was excepted from discharge under Section 523(a)(2)(A).

ETG Fire argues that Section 523(a)(6), unlike Section 523(a)(2), requires conduct and intent "by the debtor" to establish nondischargeability. ETG Fire further contends that any debt it might owe to the Plaintiffs cannot, as a matter of law, be deemed nondischargeable because the acts alleged in the Complaint are not acts of ETG Fire, but rather of third parties (*i.e.*, the management and employees of ETG Fire), and that such acts may not be imputed to the Debtor. (*See* Reply at 13, citing *In re Sharp*, 2024 WL 2819674, at *3 (Bankr. N.D. Ohio Jun 3, 2024).)

Contrary to ETG Fire's position, the Fourth and Fifth Circuits, this court, and several other courts, have determined that the debts of corporate debtors in Subchapter V cases may be excepted from discharge pursuant to Section 523(a)(6) and therefore have implicitly assumed that a corporate debtor may have the requisite intent to establish nondischargebility of its debts. *See Cleary*, 36 F.4th at 509 (finding that debts

of Subchapter V corporate debtors may be determined to be nondischargeable under Section 523(a)(6) and remanding case for further proceedings); *GFS Indus.*, 99 F.4th at 223 (agreeing with *Cleary* and remanding for further proceedings); *Premier Glass*, 661 B.R. 939 (concluding that the language of section 1192(2) is clear and that plaintiff seeking to except a corporate debtor's debt from discharge under Section 523(a)(6) had stated a claim such that a motion to dismiss should be denied pursuant to Rule 12(b)*; Van's Aircraft*, 2024 WL 2947601, at *6 (declining to dismiss Section 523(a)(6) claim against corporate Subchapter V debtor). However, no courts seem to have answered the question of *how* a corporate debtor's intent may be established under Section 523(a).

3. Actions and Intentions "of the Debtor".

ETG Fire construes the case law holding that the conduct of others cannot be imputed to a debtor for purposes of Section 523(a)(6) far too broadly. While the Court agrees that the acts of one natural person may not be imputed to another natural person for purposes of Section 523(a)(6) (a point on which ETG Fire and the Plaintiffs agree),[11] ETG Fire's contention that a *corporate debtor's* acts and intent cannot be determined by reference to the acts of its management and employees is simply not supported by case law. And, taken to its logical extreme, what ETG Fire is really suggesting is the wrongheaded proposition that corporations cannot have intent at all.

Because they are not natural persons, corporate entities, such as ETG Fire, "act only through 'the instrumentality of their officers or other duly authorized agents.'" *Secs. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Secs., LLC*, 650 B.R. 24, 35 (Bankr. S.D.N.Y. 2023) (quoting *John Lofts, LLC v. Meridian Cap. Grp., LLC (In re 45 John Lofts, LLC)*, 599 B.R. 730, 743 (Bankr. S.D.N.Y. 2019)). As such, an agent's knowledge and acts may properly be imputed to a corporate defendant. *Id.* at 35-36 (citing *John Lofts*, 599 B.R. at 743). *See also Knox v. 1st Sec. Bank of Utah*, 206 F.2d 823, 826 (10th Cir. 1953) ("It is, of course, true that a corporation can act only through its officers and agents and that knowledge of the officers is generally imputed to the corporation."); *In re Stat-Tech Secs. Litig.*, 905 F. Supp. 1416, 1422 (D. Colo. 1995) ("Generally, the acts and knowledge of an agent are imputed to the principal. Because a corporation can act only through its agents, the rule is that the actions of corporate officers and directors are attributable to the corporate entity."); *Am. Int'l Grp., Inc. v. Greenburg (In re Am. Int'l Grp. Inc., Consol. Derivative Litig.)*, 976 A.2d 872. 889-90 (Del. Ch. 2009) (noting that "a corporation must act through its human agents" and stating that "the agents' actions are the actions of the corporation itself"); *Satellite Fin. Planning Grp. v. 1st Nat'l Bank of*

[11] ETG Fire points to *Sharp*, 2024 WL 2819674, and myriad other cases, to support the proposition that the conduct of others cannot be imputed to a debtor for purposes of § 523(a)(6). *Sharp* does support this contention, but only with respect to imputing the intention of one natural debtor to another natural person. And ETG Fire is correct in concluding that the *Sharp* court construes *Bartenwerfer* to mean that a faultless individual cannot be held liable for another's debt absent a special relationship. However, the debtor in *Sharp* was a natural person (not a corporate entity), so the issue of whether and how a corporate entity's conduct and intentions are to be determined was not at issue in *Sharp*. In fact, none of the case law that ETG Fire cited addresses the corporate issue. This issue also generally does not arise in a standard Chapter 11 reorganization.

Wilmington, 633 F. Supp. 386, 400 (D. Del. 1986) ("Knowledge and action of a corporation's agent ordinarily are imputed to the corporation when the agent acts on the corporation's behalf."); *Lumbermens Mut. Cas. Co. v. Thornton*, 92 S.W. 3d. 259, 270 (Mo. Ct. App. 2002) ("normally, the acts of a corporation's agent are imputable to its principal") (citing *Miller v. Ernst & Young*, 938 S.W.2d 313, 315 (Mo. Ct. App. 1997)); *Webb Agency, Inc. v. Com. Std. Ins. Co.*, 333 F. Supp. 966, 968 (E.D. Mo. 1971) ("agent's malice is imputable to the corporation, making the latter liable for malicious, willful, or criminal torts of its agents or employees within the scope of their employment") (citing *State on Inf. of Taylor v. Am. Ins. Co.*, 200 S.W.2d 1 (Mo. 1946); *State ex rel. United Factories, Inc., v. Hostetter*, 126 S.W.2d 1173 (Mo. 1939); *Simmons v. Kroger Grocery & Baking Co.*, 104 S.W.2d 357 (Mo. 1937); 19 Am.Jur.2d Corporations § 1428; 19 C.J.S. Corporations § 1263, and other authority). *Cf. Meitav Dash Provident Funds & Pension Ltd. v. Spirit AeroSystems Holdings, Inc.,* 79 F.4th 1209, 1217 (10th Cir. 2023) (determining, in securities fraud action, that scienter can be imputed to a corporation where an official intentionally or recklessly approves a false statement to the public).

The same reasoning applies in the bankruptcy context. For example, in *Drivetrain, LLC v. DDE Partners, LLC (In re Cyber Litigation, Inc.)*, 2023 WL 6938144 (Bankr. D. Del. Oct. 19, 2023), the court put it this way:

> It is generally accepted that, in connection with a fraudulent conveyance claim, "[t]he only relevant intent is that of the debtor." Where the debtor is an individual, this analysis is straightforward; the individual's intent controls. Where the debtor is a corporation or other legal entity, however, the enquiry becomes more nuanced. Entities cannot themselves actually form an intent. Rather, as an extension of the general principle that entities can only act through their officers, directors, or agents, an entity's intent is determined by imputing the intent of its agents.
>
> . . . .
>
> [T]he Third Circuit explained, ". . . a corporation can speak and act only through its agents and so must be accountable for any acts committed by one of its agents within his actual or apparent scope of authority and while transacting corporate business." Thus, in the fraudulent conveyance context, so long as a corporation's agent had the requisite fraudulent intent when it caused the corporation to carry out the transaction, that intent is imputed to the corporation.

Id. at *7-8.

Based on such principles, the Court concludes that, for purposes of Section 523(a)(6), a corporate entity's intent may be determined by imputing to the entity the acts and intentions of the corporate entity's management and senior employees, acting within the scope of such agents' employment, in the entity's interest. If it were otherwise, no corporation could ever be convicted of a crime requiring intent or held liable for tortious misconduct requiring intent. Than cannot be. *See Bolsa Res., Inc. v. Martin Res., Inc.*, 2014 WL 4882132, at *9 (D. Colo. Aug. 28, 2014) (on default judgment, factual allegations were sufficient to establish that corporate defendant (Salzburg Holdings, LLC) had engaged in tortious interference with business relations, a claim requiring intent); *People v. Am. Health Care, Inc.*, 591 P.2d 1343 (Colo. App. 1979) (affirming conviction of corporate entity for theft, a crime requiring intent).

In this case, the Plaintiffs made numerous factual allegations (which must be accepted as true) showing that Vanderstokker and Czarnowski, both executives and officers of ETG Fire acting in the scope of their employment, engaged in numerous shenanigans. For example, they allegedly knowingly encouraged, aided, abetted, and participated in a scheme to divert the Plaintiffs' customers to ETG Fire and to use the Plaintiffs' propriety and confidential information and trade secrets for the benefit of ETG Fire to the detriment of the Plaintiffs' business. The Plaintiffs' factual allegations that officers and executives of ETG Fire (as well as numerous senior employees of ETG Fire) acted with such intention suffice to state a basis for finding that ETG Fire, through its agents, had knowledge of the Plaintiffs' rights and engaged in conduct violative of such rights since they knew that such actions would cause particularized "willful and malicious injury" to the Plaintiffs. Under the circumstances, the Court finds that the Plaintiffs have stated a claim for relief under Section 523(a)(6).

D. <u>The Complaint Need not Be Dismissed in Favor of the Claims Allowance Process</u>.

In the Motion to Dismiss, ETG Fire asserts that the Complaint should be dismissed because ETG Fire has objected to the Plaintiffs' claims in the ETG Case and initiated the claims allowance and disallowance process pursuant to Fed. R. Bankr. P. 3003.

Under Fed. R. 7001(f),[12] "a proceeding to determine whether a debt is dischargeable" is an adversary proceeding governed by the rules in Part VII of the Federal Rules of Bankruptcy Procedure, rather than Rule 3003. As explained previously, Section 523(a) nondischargeability claims all require a two-part analysis. First, "the bankruptcy court must determine the validity of the debt under applicable law." *Thompson*, 555 B.R. at 8. *See also Lang*, 293 B.R. at 513. This is referred to as the "claim on the debt" component. *Thompson*, 555 B.R. at 8. The claim on the debt component is decided based upon applicable non-bankruptcy law. *See Grogan*, 498 U.S. at 283. Second, if there is a valid debt, "the bankruptcy court must determine the

[12] Formerly, Fed. R. Bankr. P. 7001(6).

dischargeability of that debt under Section 523." *Lang*, 293 B.R. at 513. This is referred to as the "dischargeability" component. *Thompson*, 555 B.R. at 8.

So, determining the amount of a debt (the "claim on the debt" component) is central (even required) in a Section 523(a) nondischargeability action. That the debt may be in dispute (and subject to a claims objection) is certainly not a basis for dismissing a nondischargeability adversary proceeding.

Nothwithstanding, judicial efficiency suggests that since ETG Fire contests the validity and amount of the Plaintiffs' claims in this Adversary Proceeding as well as in the claims allowance and disalloawance process (through the POC Objection), such issues might best be joined together for trial. As the Plaintiffs note, Fed. R. Civ. P. 42(a) (made applicable to these proceedings by Fed. R. Bankr. P. 7042 and 9014(c)) may also allow for the consolidation of actions that involve common questions of law or fact such that the matters may be joined for hearing or trial. In any event, ETG Fire's argument does not warrant dismissal of the Complaint.

VIII. Conclusion and Order.

For the foregoing reasons, the Motion to Dismiss is DENIED pursuant to Fed. R. Civ. P. 12(b)(6), as incorporated by Fed. R. Bankr. P. 7012(b). ETG Fire shall file a pleading responsive to the Complaint within 14 days, consistent with Fed. Bankr. P. 7012(a)(6)(A).

Dated this 17th day of March, 2025.

BY THE COURT:

Thomas B. McNamara,
United States Bankruptcy Judge

In re Blixseth

United States Court of Appeals, Ninth Circuit. | August 14, 2024 | 112 F.4th 837 | 2024 WL 3803297

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Outline

Appended Content

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Petition for Certiorari Docketed by TIMOTHY L. BLIXSETH v. MONTANA DEPARTMENT OF REVENUE, U.S., March 3, 2025

112 F.4th 837
United States Court of Appeals, Ninth Circuit.

IN RE: Timothy L. BLIXSETH, Debtor,
State of Montana Department
of Revenue, Appellant,
v.
Timothy L. Blixseth, Appellee.

No. 22-60046
|
Argued and Submitted January
10, 2024 Pasadena, California
|
Filed August 14, 2024

Synopsis
Background: Debtor brought adversary proceeding against State of Montana, Department of Revenue, for costs and damages arising out of State's filing of involuntary petition against him. The United States Bankruptcy Court for the District of Nevada, Mike K. Nakagawa, J., denied State's motion to dismiss. State took interlocutory appeal. The United States Bankruptcy Appellate Panel for the Ninth Circuit dismissed appeal for lack of jurisdiction. State appealed.

Holdings: The Court of Appeals, Rawlinson, Circuit Judge, held that:

[1] Bankruptcy Appellate Panel and Court of Appeals had jurisdiction under collateral order doctrine to review bankruptcy court's order denying motion by State to dismiss adversary proceeding;

[2] debtor's claim against State for costs and damages arising out of filing involuntary petition against him was not equivalent of compulsory counterclaim when involuntary petition was filed;

[3] debtor's claim against State for costs and damages arising out of filing involuntary petition against him did not arise from same aggregate set of operative facts as State's involuntary petition;

[4] counsel for State could not and did not effect unequivocal waiver of State's sovereign immunity;

[5] bankruptcy court could not rely on provision of Bankruptcy Code in which Congress sought to abrogate state sovereign immunity with respect to proceedings brought to determine tax liability and dischargeability of debts; and

[6] State's assertion of sovereign immunity under Eleventh Amendment was properly invoked in debtor's adversary proceeding.

Reversed and remanded with instructions.

Procedural Posture(s): Interlocutory Appeal; Motion to Dismiss.

West Headnotes (17)

[1] **Bankruptcy** Conclusions of law; de novo review
51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 Conclusions of law; de novo review
Decisions of the Bankruptcy Appellate Panel (BAP) and questions of sovereign immunity are reviewed de novo.

[2] **Bankruptcy** Interlocutory orders; collateral order doctrine
51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3768 Interlocutory orders; collateral order doctrine
Bankruptcy Appellate Panel (BAP) and Court of Appeals had jurisdiction under collateral order doctrine to review

bankruptcy court's order denying motion by State of Montana, Department of Revenue, to dismiss adversary proceeding brought by debtor for costs and damages arising out of State's filing of involuntary petition against him based on sovereign immunity. U.S. Const. Amend. 11; 11 U.S.C.A. §§ 303(b), 303(i).

[3] **Federal Courts** Interlocutory and Collateral Orders

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(C) Decisions Reviewable
170BXVII(C)1 In General
170Bk3277 Interlocutory and Collateral Orders
170Bk3278 In general

Under "collateral order doctrine," case that is still ongoing may be appealed if case finally determines claim or claims collateral to claims asserted in underlying action and collateral claims are too important to be denied review and too independent of cause itself to require that appellate consideration be deferred until whole case is adjudicated.

[4] **Federal Courts** Interlocutory and Collateral Orders

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(C) Decisions Reviewable
170BXVII(C)1 In General
170Bk3277 Interlocutory and Collateral Orders
170Bk3278 In general

To come within the small class of appealable collateral orders described in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, the order being appealed must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

[5] **Bankruptcy** Dismissal
Bankruptcy Governmental claims; immunity waiver

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2184 Dismissal
51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

Debtor's claim against State of Montana, Department of Revenue, for costs and damages arising out of filing involuntary petition against him, was not equivalent of compulsory counterclaim when involuntary petition was filed, and therefore debtor could not overcome sovereign immunity on that basis, since claim filed under fee shifting provision could not arise out of same factual predicate that supported involuntary petition and eligibility for fees turned on merits of litigation as whole. U.S. Const. Amend. 11; 11 U.S.C.A. §§ 303(b), 303(i).

[6] **Bankruptcy** Assertion of claim against estate

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2058 Consent to or Waiver of Objections to Jurisdiction or Venue
51k2059 Assertion of claim against estate

He who invokes aid of bankruptcy court by offering proof of claim and demanding its allowance must abide by consequences of that procedure.

[7] **Bankruptcy** Governmental claims; immunity waiver

51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

When state becomes actor in a bankruptcy case and files claim against res, it waives any immunity which it otherwise might have had respecting adjudication of claim.

[8] **Bankruptcy** Governmental claims; immunity waiver

51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

When state or arm of state files proof of claim in bankruptcy proceeding, state waives its Eleventh Amendment immunity with regard to bankruptcy estate's claims that arise from same transaction or occurrence as state's claim. U.S. Const. Amend. 11.

[9] **Bankruptcy** Pleading; dismissal
Bankruptcy Governmental claims; immunity waiver

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2162 Pleading; dismissal
51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

The logical relationship test for compulsory counterclaims is applied to determine whether a claim against the state arises out of the same transaction or occurrence as the state's proof of claim, thereby overcoming sovereign immunity.

[10] **Bankruptcy** Pleading; dismissal
Bankruptcy Governmental claims; immunity waiver

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2162 Pleading; dismissal
51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

Under the logical relationship test for compulsory counterclaims, which is applied to determine whether a claim against the state arises out of the same transaction or occurrence as the state's proof of claim, thereby overcoming sovereign immunity, a logical relationship exists when the counterclaim arises from the same aggregate set of operative facts as the initial claim, in that the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights otherwise dormant in the defendant.

[11] **Bankruptcy** Governmental claims; immunity waiver

51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

Debtor's claim against State of Montana, Department of Revenue, for costs and damages arising out of filing involuntary petition against him did not arise from same aggregate set of operative facts as State's involuntary petition, and therefore debtor could not overcome sovereign immunity on that basis, since State's involuntary petition alleged debt of unpaid taxes from improper tax

deduction, but debtor sought relief based on consequences of having to defend against petition, rather than claims arising from factual predicate of his alleged tax deficiency. U.S. Const. Amend. 11; 11 U.S.C.A. §§ 303(b), 303(i).

[12] **Federal Courts** Waiver by State; Consent

Federal Courts Litigation conduct

170B Federal Courts
170BV Suits Against States; Eleventh Amendment and Sovereign Immunity
170Bk2372 Exceptions to Immunity
170Bk2375 Waiver by State; Consent
170Bk2375(1) In general
170B Federal Courts
170BV Suits Against States; Eleventh Amendment and Sovereign Immunity
170Bk2372 Exceptions to Immunity
170Bk2375 Waiver by State; Consent
170Bk2375(3) Implied or Constructive Waiver or Consent
170Bk2375(5) Litigation conduct

Generally, court will find waiver of sovereign immunity if state makes clear declaration that it intends to submit itself to court's jurisdiction; however, state's consent to suit must be unequivocally expressed.

[13] **Bankruptcy** Dismissal

Bankruptcy Governmental claims; immunity waiver

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2184 Dismissal
51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

Counsel for State of Montana, Department of Revenue, could not and did not effect unequivocal waiver of State's sovereign immunity, for purpose of debtor's claim against State for costs and damages arising out of filing involuntary petition against him, through counsel's statements to bankruptcy court, based on his understanding of current law, that State waived whatever sovereign immunity it might have with respect to damages, fines, or penalties that might accrue because of actions taken in that court. U.S. Const. Amend. 11; 11 U.S.C.A. §§ 303(b), 303(i).

[14] **Bankruptcy** Dismissal

Bankruptcy Governmental claims; immunity waiver

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2184 Dismissal
51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

Bankruptcy court, in proceeding for costs and damages arising out of State's filing of involuntary petition against debtor, could not rely on provision of Bankruptcy Code in which Congress sought to abrogate state sovereign immunity with respect to proceedings brought to determine tax liability and dischargeability of debts, since provision was not appropriate exercise of Congress' enforcement powers under Fourteenth Amendment. U.S. Const. art. 1, § 8, cl. 4; U.S. Const. Amends. 11, 14; 11 U.S.C.A. §§ 106(a), 303(b)(1), 303(i)(1)-(2).

[15] **Bankruptcy** Governmental claims; immunity waiver

51 Bankruptcy
51V The Estate

51V(G) Set-off
51k2679 Governmental claims; immunity waiver

Proceedings are at core of bankruptcy court's jurisdiction to which states acquiesced insofar as they further three critical features of every bankruptcy proceeding: exercise of exclusive jurisdiction over all of debtor's property; equitable distribution of that property among debtor's creditors; and ultimate discharge that gives debtor fresh start by releasing him, or her, or it from further liability for old debts.

[16] **Bankruptcy** Dismissal

Bankruptcy Governmental claims; immunity waiver

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2184 Dismissal
51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

State's assertion of sovereign immunity under Eleventh Amendment was properly invoked in debtor's adversary proceeding against State of Montana, Department of Revenue, for costs and damages arising out of State's filing of involuntary petition against him, since adversary proceeding was not necessary to effectuate jurisdiction of bankruptcy court, adversary proceeding did not concern property in res of bankruptcy estate, but rather compensation for having been subject of unsuccessful involuntary petition that could have created res but never did, and adversary proceeding did not further ultimate discharge that gave debtor fresh start by releasing him from further liability for old debts, but sought reimbursement of his costs incurred for undergoing bankruptcy proceedings. U.S. Const. Amend. 11; 11 U.S.C.A. § 303(i).

[17] **Bankruptcy** Dismissal

Bankruptcy Frivolity or bad faith; sanctions

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2184 Dismissal
51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 Frivolity or bad faith; sanctions

Bankruptcy Code creates remedial scheme that addresses costs and attorney fees for dismissed involuntary petitions and compensatory and punitive damages for involuntary petitions filed in bad faith.

11 U.S.C.A. § 303(i).

West Codenotes

Recognized as Unconstitutional

11 U.S.C.A. § 106(a)

***840** Appeal from the Ninth Circuit Bankruptcy Appellate Panel, Lafferty III, Taylor, and Gan, Bankruptcy Judges, Presiding, BAP No. 22-1160

Attorneys and Law Firms

Daniel Solomon (argued), Husch Blackwell LLP, Washington, D.C.; Lynn H. Butler, Husch Blackwell LLP, Austin, Texas; Ogonna M. Brown, Lewis Roca Rothberger Christie LLP, Las Vegas, Nevada; for Appellant.

Nathan A. Schultz (argued), Law Office of Nathan A. Schultz PC, Traverse City, Michigan; Brett A. Axelrod, Fox Rothschild LLP, Las Vegas, Nevada; for Appellee.

Before: Johnnie B. Rawlinson, Michael J. Melloy, * and Holly A. Thomas, Circuit Judges.

OPINION

RAWLINSON, Circuit Judge:

***841** The State of Montana Department of Revenue (State) brings an interlocutory appeal of the bankruptcy court's decision denying the State's motion to dismiss an action brought by Timothy Blixseth under 11 U.S.C. § 303(i)[1] for costs and damages arising out of the State's involuntary petition filed against Blixseth under 11 U.S.C. § 303(b)(1).[2]

[1] We have jurisdiction under 28 U.S.C. §§ 158(d)(1). We review decisions of the Bankruptcy Appellate Panel (BAP) and questions of sovereign immunity *de novo*. *See* *Leslie v. Mihranian (In re Mihranian)*, 937 F.3d 1214, 1216 (9th Cir. BAP 2019); *see also* *Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013), *as amended* (sovereign immunity). Because we conclude that sovereign immunity shields the State from Blixseth's action, we reverse the BAP decision denying sovereign immunity to the State.

I. Background

Following an audit of Blixseth and his business entities, the State of Montana Department of Revenue, Idaho State Tax Commission, and California Franchise Tax Board filed an involuntary bankruptcy petition against Blixseth for unpaid taxes. *See* *Montana Dept. of Revenue v. Blixseth*, 942 F.3d 1179, 1181-82 (9th Cir. 2019). The Yellowstone Club Liquidating Trust subsequently joined the action. *See* *id.* at 1182. After the Idaho State Tax Commission and California Franchise Tax Board settled with Blixseth, they withdrew as petitioning creditors. *See* *id.* The bankruptcy court then granted summary judgment in favor of Blixseth, finding that because the State's claim was the subject of a bona fide dispute as to the amount of liability, the State lacked standing to pursue the claim in bankruptcy court, and the petition could not be sustained based on the existence of only one remaining petitioning creditor (the Yellowstone Liquidating Trust). *See* *id.* at 1182-83.

The State appealed the bankruptcy court's decision to the district court, which affirmed. *See* *id.* at 1183. On appeal to this court, we also affirmed, agreeing that the State lacked standing as a petitioning creditor because its claim was subject to a bona fide dispute. *See* *id.* at 1187. On remand, the bankruptcy court dismissed ***842** the involuntary petition for want of prosecution.

During the pendency of the involuntary petition, the bankruptcy court held a hearing during which the parties discussed sovereign immunity. The following colloquy between the bankruptcy court and MDOR's counsel occurred:

> COURT: [A]s a preliminary matter. I saw in both the settlements with respect to the Idaho Taxation Department and The California Franchise Tax Board something that piqued my interest. I take it that all the petitioning creditors, even though they are sovereigns, they're waiving their sovereign immunity with respect to any liability they might have for this action, is that correct?
>
> COUNSEL: To the extent that is consistent with the United States Supreme Court's rulings over the last couple of years—
>
> COURT: No, No. I don't want it consistent. I want explicit on the record that by coming into this court you are exposing yourself to anything this Court might have to remedy [sic] anything that the Bankruptcy Court says needs to be remedied.
>
> COUNSEL: I believe that's a correct summation of the law, that the courts—the three state agencies have voluntarily submitted themselves to the jurisdiction of this court.
>
> COURT: All right. And I will tell you, I don't—I have no idea if we will get there, although I saw that—I saw obviously there was a waiver with respect to ... the Franchise Tax Board—I know from the debtor, but I also saw a request from the Debtor for 303(i) damages, and I just want to clear up front that it is my view at this point that, as you have stated, by commencing an action in this court, not only have they submitted to the jurisdiction of this Court, but they have

> waived whatever sovereign immunity they might have with respect to damages, fines, or penalties that might accrue because of actions taken in this Court.
>
> COUNSEL: I believe that's correct, Your Honor.

Blixseth subsequently brought an adversary proceeding against the State under § 303(i) seeking attorneys' fees and costs, proximate and punitive damages, and sanctions against counsel. The State moved to dismiss, asserting sovereign immunity. The bankruptcy court concluded that the State was not immune from liability. First, the bankruptcy court found that the State "voluntarily invoked the jurisdiction of [the bankruptcy] court by filing the [i]nvoluntary [p]etition." Next, the bankruptcy court concluded that the State's counsel "clear[ly] and unequivocal[ly] waive[d] [the State's] sovereign immunity under the Eleventh Amendment regarding any future Section 303(i) claims." Finally, the bankruptcy court found that an action under § 303(i) "is ancillary to the bankruptcy court's *in rem* jurisdiction" and that, "[t]o accept [the State's] argument would be to impermissibly read Section 106(a)(1) out of the [Bankruptcy] Code."

The State appealed the bankruptcy court's decision to the BAP, which dismissed the appeal on the ground that the collateral order doctrine did not apply.

II. Jurisdiction

[2] Citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), the BAP summarily concluded that the collateral order doctrine did not apply because the bankruptcy court's decision did not fit into "the small class which finally determine[s] ***843** claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

[3] **[4]** Normally, appeals under 28 U.S.C. § 158(d) are from "final decisions, judgments, orders, and decrees" of a district court or of the BAP. However, a case that is still ongoing may be appealed if the case finally determines a claim or claims collateral to claims asserted in the underlying action and the collateral claims are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546, 69 S.Ct. 1221. This doctrine is commonly referred to as the "collateral order doctrine." *See* *Security Pac. Bank Wash. v. Steinberg (In re Westwood Shake & Shingle, Inc.)*, 971 F.2d 387, 390 (9th Cir. 1992) (applying the collateral order doctrine to appeals brought under 28 U.S.C. § 158(d)). "To come within the small class [described in] *Cohen*, the order [being appealed] must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) (citation, alteration, and internal quotation marks omitted).

Both the United States Supreme Court and this court have applied *Cohen* and concluded that denials of sovereign immunity are immediately appealable under the collateral order doctrine. *See* *id.*; *see also* *Childs v. San Diego Family Hous. LLC*, 22 F.4th 1092, 1095-96 & n.2 (9th Cir. 2022) (same). Consequently, the BAP ruling that the State's appeal did not fit within the collateral order doctrine was erroneous.

III. Discussion

A. Ground One -Voluntary Invocation of Jurisdiction

[5] The bankruptcy court ruled that the State "voluntarily invoked the jurisdiction" of the bankruptcy court and waived its sovereign immunity by filing the involuntary petition, summarily concluding that "the logical relationship test [for compulsory counterclaims], to the extent applicable, is easily satisfied."

[6] **[7]** **[8]** "It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court *by offering a proof of claim and demanding its allowance* must abide by the consequences of that procedure...." *Gardner v. New Jersey*, 329 U.S. 565, 573, 67 S.Ct. 467, 91 L.Ed. 504 (1947) (citation omitted) (emphasis added). "When the State becomes the actor and *files a claim against the [res]* it waives any immunity which it otherwise might have had respecting the adjudication of the claim." *Id.* at 574, 67 S.Ct. 467 (citations omitted) (emphasis added). "*[W]hen a state or an 'arm of the state' files a proof of claim in a bankruptcy proceeding*, the state waives its Eleventh Amendment immunity with regard to the bankruptcy estate's claims that arise from the same transaction or occurrence as the state's claim...." *Lazar v. California (In re Lazar)*, 237 F.3d 967, 978 (9th Cir. 2001) (emphasis added).

[9] **[10]** The State never filed a proof of claim, so any litigation waiver must be predicated upon the existence of a claim arising out of the adversary proceeding brought by the State. *See id.* "To determine whether a claim against the state arises out of the 'same transaction or occurrence' as the state's proof of claim," ***844** thereby overcoming sovereign immunity, "we apply the 'logical relationship' test for compulsory counterclaims." *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1195-96 (9th Cir. 2005) (internal quotation marks omitted). Under that test,

> [a] logical relationship exists when the counterclaim arises from the same aggregate set of operative facts as the initial claim, in that the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights otherwise dormant in the defendant.

Id. (citation omitted).

We are not persuaded, however, that a § 303(i) claim is the equivalent of a compulsory counterclaim when an involuntary petition is filed under § 303(b) because, much like a common law malicious prosecution claim, a claim filed under § 303(i) cannot arise out of the same factual predicate that supports a § 303(b) claim. *See Hydranautics v. FilmTec Corp.*, 70 F.3d 533, 537 (9th Cir. 1995) ("[A] malicious prosecution claim cannot be asserted as a counterclaim to the original suit which furnishes its predicate....") (citation omitted). A § 303(i) claim arises from the fact of the filing of an involuntary petition under § 303(b), and therefore cannot satisfy the logical relationship test as a matter of law. *See* 11 U.S.C. § 303(i) (conditioning award of costs, fees, and damages on "the court dismiss[ing] a petition under this section other than on consent of all petitioners and the debtor"). Such an action is not a permissible "counterclaim to the original [involuntary petition] which furnishes its predicate." *Hydranautics*, 70 F.3d at 537.

Nor are we inclined to conclude that sanctions imposed under Rule 11 are a more apt analogy. Indeed, we have held that "§ 303(i) is a fee-shifting provision rather than a sanctions statute" and we have "contrast[ed]" § 303(i) with Rule 11. *Orange Blossom Ltd. P'ship v. S. Cal. Subelt Devs., Inc. (In re S. Cal. Sunbelt Devs., Inc.)*, 608 F.3d 456, 462 (9th Cir. 2010). Specifically, we observed that "[l]ike other fee shifting provisions, and in contrast to Rule 11, eligibility for fees [under § 303(i)] turns on the merits of the litigation as a whole, rather than on whether a specific filing is well founded." *Id.* (internal quotation marks omitted).

[11] Blixseth's allegations fail the logical relationship test in any event because Blixseth's claim does not arise from the same "aggregate set of operative facts" as the State's involuntary petition. *In re Pegasus Gold Corp.*, 394 F.3d at 1195-96. The States's involuntary

petition alleged a debt of unpaid taxes from an improper tax deduction. In contrast, Blixseth sought relief based on the consequences of having to defend against the petition, rather than claims arising from the factual predicate of his alleged tax deficiency. *See* *id.*

B. Ground Two - Counsel's Waiver of Sovereign Immunity

[12] **[13]** "Generally, [a court] will find a waiver [of sovereign immunity] ... if the State makes a clear declaration that it intends to submit itself to [the court's] jurisdiction." *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (citations and internal quotation marks omitted). A "state's consent to suit," however, "must be unequivocally expressed." *Id.* at 676, 119 S.Ct. 2219 (citation and internal quotation marks omitted). "[T]he 'unequivocal expression' of elimination of sovereign immunity that [the Supreme Court] insist[s] upon is an expression in statutory text...." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (citation omitted). ***845** Thus, MDOR's counsel could not and did not effect an "unequivocal" waiver of MDOR's sovereign immunity through his statements to the court. *Id.*

C. Ground Three - Ancillary Bankruptcy Jurisdiction (*Katz* Analysis)

[14] "The text of Article I, § 8, cl. 4, of the Constitution ... provides that Congress shall have the power to establish uniform Laws on the subject of Bankruptcies throughout the United States...." *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006) (internal quotation marks omitted). Pertinent to this appeal, Congress has established that:

> An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title ... by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount ...
>
> 11 U.S.C. § 303(b)(1).
>
> If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this section, the court may grant judgment--(1) against the petitioners and in favor of the debtor for--(A) costs; or (B) a reasonable attorney's fee; or (2) against any petitioner that filed the petition in bad faith, for--(A) any damages proximately caused by such filing; or (B) punitive damages.
>
> 11 U.S.C. § 303(i)(1)-(2).[3]

"Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth within this section with respect to ... [Section] 303 ..." 11 U.S.C. § 106(a)(1).

In *Mitchell v. California Franchise Tax Board (In re Mitchell)*, 209 F.3d 1111, 1120 (9th Cir. 2000), *abrogation on other grounds recognized in* *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015), we held that § 106(a) is "an unconstitutional assertion of Congress's power."[4] Thus, the bankruptcy court improperly relied on § 106(a) as a basis for ruling that the State waived its sovereign immunity. *See* *id.*

Because § 106(a) does not support the bankruptcy court's ruling, we turn to the analysis set forth in *Katz* to determine whether the State is entitled to sovereign immunity.

In *Katz*, the Supreme Court held that Virginia institutions of higher education were "amenable" to "proceedings to recover preferential transfers." 546 U.S. at 379, 126 S.Ct. 990. To reach this conclusion, the Court observed that "states agreed in the plan of the [Constitutional Convention of 1787] not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to Laws on the subject of Bankruptcies." *Id.* at 377, 126 S.Ct. 990 (citation and internal quotation marks omitted). However, as the Supreme Court further explained, "[t]he scope of ***846** this consent was limited." *Id.* at 378, 126 S.Ct. 990. "In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy court." *Id.* (footnote reference omitted). This subordination also encompassed orders "ancillary to the bankruptcy courts' *in rem* jurisdiction." *Id.* at 373, 126 S.Ct. 990.

The Court thus considered whether 11 U.S.C. § 550, the section under which the universities' sought "to avoid and recover alleged preferential transfers" to the universities, *id.* at 360, 126 S.Ct. 990, was within the scope of the States' consent given during the Constitutional Convention. In concluding that proceedings brought under § 550 were within the scope of the States' consent given during the Convention, the Court reasoned that "those who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property." *Id.* at 372, 126 S.Ct. 990. The Court described the recovery of preferential transfers under § 550 as "a core aspect of the administration of bankrupt estates since at least the 18th century." *Id.*

[15] Proceedings are at the "core" of a bankruptcy court's jurisdiction (*i.e.*, within its *in rem* jurisdiction) to which the States acquiesced insofar as they further the three "[c]ritical features of every bankruptcy proceeding" as set forth in *Katz*: "[1] the exercise of exclusive jurisdiction over all of the debtor's property, [2] the equitable distribution of that property among the debtor's creditors, and [3] the ultimate discharge that gives the debtor a 'fresh start' by releasing him, or her, or it from further liability for old debts." *Id.* at 363-64, 126 S.Ct. 990 (citation omitted); *see also id.* at 362, 126 S.Ct. 990 ("Bankruptcy jurisdiction, at its core, is *in rem*....") (citation omitted).

In *Venoco LLC v. California (In re Venoco LLC)*, 998 F.3d 94, 99 (3d Cir. 2021), the Third Circuit "appl[ied] *Katz* to a bankruptcy adversary proceeding brought by a liquidating trustee for the debtors' assets." The trustee sought "compensation from the State of California and its Lands Commission for the alleged taking of a refinery that belonged to debtors." *Id.* The adversary proceeding was "primarily a claim for inverse condemnation, a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant." *Id.* at 100 (citation and internal quotation marks omitted).

In reaching its holding that the governmental defendants could not assert sovereign immunity, the Third Circuit concluded that the adversary proceeding furthered the first and second critical functions articulated in *Katz*. *See id.* at 106. The court explained that the adversary proceeding "further[ed] the Bankruptcy Court's exercise of jurisdiction over property of the Debtors and their estates," namely the refinery owned by the debtors. *Id.* The adversary proceeding also furthered the second critical function of "facilitating equitable distribution of the estate's assets." The Third Circuit observed that if the governmental defendants could assert sovereign immunity they would be able to recover from the Trust as creditors of the estate, while at the same time "preventing any judicial scrutiny over whether

they [could] use the [refinery] without payment." *Id.* In addition, the governmental defendants "would improve their status vis-à-vis other creditors solely owing to their status as a state that can invoke sovereign immunity, just the kind of result ***847** *Katz* wanted to avoid." *Id.* (citation omitted).

In *State of Florida Dept. of Revenue v. Diaz (In re Diaz)*, 647 F.3d 1073, 1079 (11th Cir. 2011), the Eleventh Circuit held that sovereign immunity shielded the Florida Department of Revenue and the Virginia Department of Social Services from the debtor's motion for contempt and sanctions for violation of the automatic bankruptcy stay and related discharge injunction.

The Eleventh Circuit acknowledged that "[t]he automatic stay is a fundamental procedural mechanism in bankruptcy that allows the court to carry out" the first and second critical functions identified in *Katz*, and was therefore necessary to effectuate the *in rem* functions of the bankruptcy court. *Id.* at 1085. However, the debtor did not file the contempt motion until four years after "the bankruptcy court had distributed the estate according to the Chapter 13 plan and entered a discharge order, which replaced the automatic stay with the discharge injunction." *Id.* at 1086. Because the contempt motion at that point no longer furthered the purpose of the bankruptcy stay, the Eleventh Circuit determined that the contempt motion "was filed too late to be considered essential to any *in rem* functions of the bankruptcy court." *Id.* The Eleventh Circuit concluded that "[t]he nexus between the [contempt] motion and the bankruptcy court's *in rem* jurisdiction [was] thus too remote to satisfy *Katz's* 'necessary to effectuate [the *in rem* jurisdiction of the bankruptcy court] standard.' " *Id.*

[16] **[17]** We agree with the Third and Eleventh Circuits that the critical functions delineated in *Katz* provide useful guidelines for discerning whether an adversary proceeding qualifies as a "proceeding[ ] necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." *Id.* (quoting *Katz*, 546 U.S. at 378, 126 S.Ct. 990). Applying these guidelines, we conclude that the adversary proceeding brought by Blixseth under § 303(i) was not "necessary to effectuate the jurisdiction of the bankruptcy court[ ]" in this case. *Id.* Section 303(i) creates a "remedial scheme" that "addresses ... costs and attorneys' fees for dismissed involuntary petitions [and] compensatory and punitive damages for involuntary petitions filed in bad faith." *Miles v. Okun (In re Miles)*, 430 F.3d 1083, 1090 (9th Cir. 2005). This remedial function is markedly distinct from the first two critical functions described in *Katz*: a bankruptcy court's exercise of exclusive jurisdiction over all of the debtor's property and the equitable distribution of that property among debtor's creditors. *See* *Katz*, 546 U.S. at 363-64, 126 S.Ct. 990.

Section 303(i) is also substantially different than § 550, the statute at issue in *Katz*, which "authorize[s] [bankruptcy] courts to avoid preferential transfers and to recover transferred property" that is part of the *res* of the bankruptcy estate. *Id.* at 372, 126 S.Ct. 990. As the Supreme Court explained, the authority "to avoid preferential transfers and to recover transferred property" of the estate "has been a core aspect of the administration of bankrupt estates since at least the 18th century." *Id.* (citations omitted). In contrast, an adversary proceeding brought under § 303(i) does not concern property in the *res* of the bankruptcy estate, but rather compensation for having been the subject of an unsuccessful involuntary petition that could have created a *res* but never did.

Neither does an adversary proceeding brought under § 303(i) further the third critical function, "the ultimate discharge that gives the debtor a fresh start by releasing him ... from further liability for old debts." *Katz*, 546 U.S. at 364, 126 S.Ct. 990 (citation and internal quotation marks omitted). Blixseth does not seek a "fresh ***848** start" with regard to "old debts," but reimbursement of his costs incurred for undergoing bankruptcy proceedings. *Id.*

Denying sovereign immunity in this context could have the effect of subjecting a state to litigation merely

because the state filed an involuntary bankruptcy petition. *See* Katz, 546 U.S. at 362-63, 126 S.Ct. 990 ("The ... Bankruptcy Clause ... was intended ... to authorize *limited* subordination of state sovereign immunity in the bankruptcy arena.") (emphasis added). For these reasons, we conclude that the State's assertion of sovereign immunity under the Eleventh Amendment was properly invoked.

IV. Conclusion

We have jurisdiction over this appeal under the collateral order doctrine. We are not persuaded that any of the grounds relied upon by the bankruptcy court to deny sovereign immunity to the State survive the *Katz* analysis. Rather, we conclude that under the reasoning and analysis in *Katz*, the State properly invoked sovereign immunity for Blixseth's claim brought under § 303(i).

We therefore reverse the BAP's order finding that the collateral order doctrine does not apply. We also reverse the bankruptcy court's denial of sovereign immunity, and remand with instructions to dismiss Blixseth's § 303(i) claim against the State as barred by sovereign immunity.

REVERSED AND REMANDED with instructions.

All Citations

112 F.4th 837, 2024 Daily Journal D.A.R. 7698

Footnotes

* The Honorable Michael J. Melloy, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

1 11 U.S.C. § 303(i) provides that:

> If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment--(1) against the petitioners and in favor of the debtor for--(A) costs; or (B) a reasonable attorney's fee; or (2) against any petitioner that filed the petition in bad faith, for--(A) any damages proximately caused by such filing; or (B) punitive damages.

2 11 U.S.C. § 303(b) provides that:

> An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title--(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount ...

3 This is the provision Blixseth used to support the claims in his adversary proceeding against the State.

4 *Hunsaker v. United States*, 902 F.3d 963 (9th Cir. 2018), does not negate our reasoning in *In re Mitchell*. *Hunsaker* concerned federal sovereign immunity rather than State sovereign immunity under the Eleventh Amendment. *See id.* at 967-68 (discussing the recovery of emotional distress damages against the federal government under a federal statute). For the

same reason, the bankruptcy court's reliance on *Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1011 (9th Cir. 2017), was misplaced.

End of Document

Filings (4)

Title	PDF	Court	Date	Type
1. State of Montana Department of Revenue's Reply Brief In re: Timothy L. BLIXSETH, Debtor. STATE OF MONTANA DEPARTMENT OF REVENUE, Defendant-Appellant, v. Timothy L. BLIXSETH, Plaintiff-Appellee. 2023 WL 4826333	—	C.A.9	July 19, 2023	Brief
2. Appellee's Answering Brief In re: Timothy L. BLIXSETH, Alleged, Debtor. STATE OF MONTANA DEPARTMENT OF REVENUE, Appellant, v. Timothly L. BLIXSETH, Appellee. 2023 WL 3901820	—	C.A.9	May 31, 2023	Brief
3. State of Montana Department of Revenue's Opening Brief In re: Timothy L. BLIXSETH, Debtor. STATE OF MONTANA DEPARTMENT OF REVENUE, Defendant-Appellant, v. Timothy L. BLIXSETH, Plaintiff-Appellee. 2023 WL 2784935	—	C.A.9	Mar. 31, 2023	Brief
4. Docket 22-60046 State of Montana Department of Revenue v. Timothy L. Blixseth	—	C.A.9	Nov. 01, 2022	Docket

History (10)

Direct History (2)

1. In re Blixseth
112 F.4th 837 , 9th Cir. , Aug. 14, 2024

Petition for Certiorari Filed

Petition for Certiorari Docketed by

2. TIMOTHY L. BLIXSETH v. MONTANA DEPARTMENT OF REVENUE
, U.S. , Mar. 03, 2025

Related References (8)

3. In re Blixseth
484 B.R. 360 , 9th Cir.BAP (Nev.) , Dec. 17, 2012 , appeal dismissed (9th Circ. 13-60007) (Mar 13, 2013)

4. Montana Dept. of Revenue v. Blixseth
2013 WL 5408668 , D.Nev. , Sep. 25, 2013

5. Montana Department of Revenue v. Blixseth
2016 WL 1183084 , D.Nev. , Mar. 28, 2016

6. Montana Department of Revenue v. Blixseth
581 B.R. 882 , D.Nev. , Dec. 15, 2017

Affirmed in Part and Remanded by

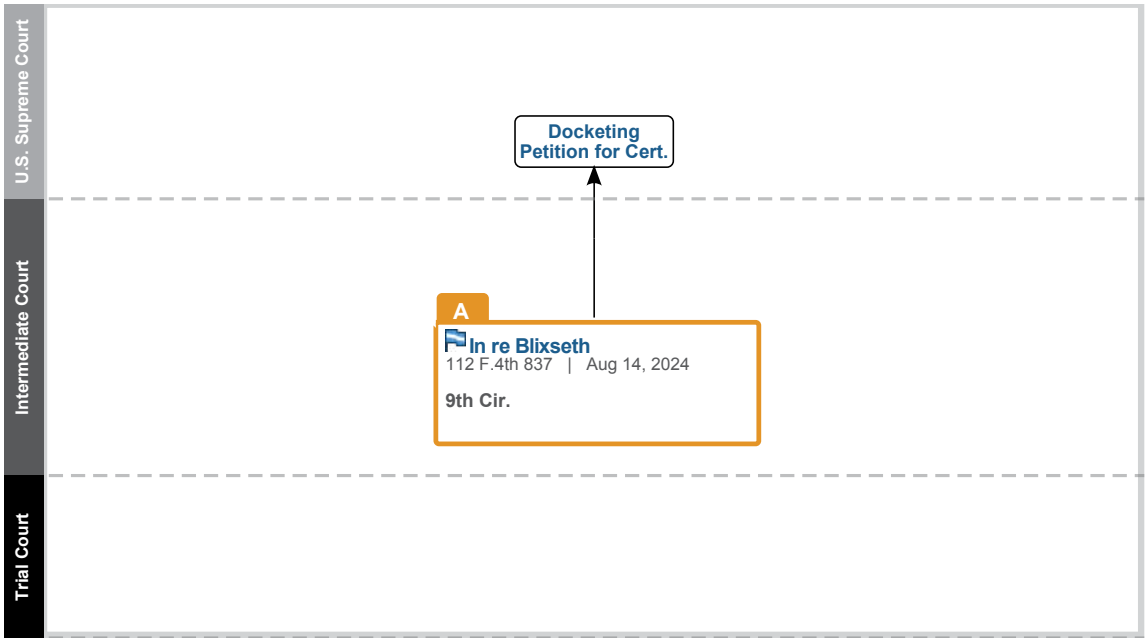
7. Department of Revenue v. Blixseth
942 F.3d 1179 , 9th Cir.(Nev.) , Nov. 26, 2019

On Remand to

8. In re Blixseth
2021 WL 3073789 , Bankr.D.Nev. , June 03, 2021

9. In re Blixseth
2021 WL 3074568 , Bankr.D.Nev. , June 03, 2021

10. In re Blixseth
655 B.R. 139 , Bankr.D.Nev. , Oct. 27, 2023



Citing References (32)

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	**1.** Sliwinski v. Gootkin 2025 WL 89225, *2 , D.Mont. Plaintiff Thomas Emil Sliwinski filed an Amended Complaint alleging violations of his constitutional rights. (Doc. 7.) The Amended Complaint was served on Defendants. (Doc. 8.)...	Jan. 14, 2025	Case		—
—	**2.** Validity of s 106(a) of Bankruptcy Code (11 U.S.C.A. s 106(a)) Providing Waiver of Governmental Immunity in Bankruptcy Proceedings 190 A.L.R. Fed. 453 Section 106(a) of the Bankruptcy Code (11 U.S.C.A. § 106(a)) provides for the abrogation of governmental units' sovereign immunity with respect to certain sections of the Code...	2003	ALR	—	14 F.4th
—	**3.** Asset Protection: Legal Planning, Strat. & Forms P 12.01, 12.01 OVERVIEW From its inception, asset protection planning should take into consideration the possible effects of bankruptcy. An individual facing bankruptcy has the following two overall...	2024	Other Secondary Source	—	15 16 17 F.4th
—	**4.** Bankruptcy Code Manual s 106:4, § 106:4. Constitution: Eleventh Amendment considerations There is substantial concern that portions of § 106(a) as currently applied may be in conflict with the Eleventh Amendment to the Constitution. Basically, the Eleventh Amendment...	2024	Other Secondary Source	—	16 F.4th
—	**5.** Bankruptcy Code Manual s 303:48, § 303:48. Section 303(i): core concept Section 303(i) provides the means by which a debtor, in certain circumstances, may obtain costs, reasonable attorney's fees, damages, or punitive damages against a petitioning...	2024	Other Secondary Source	—	5 17 F.4th
—	**6.** Bankruptcy Desk Guide s 25:6, § 25:6. Recoupment distinguished from setoff Although modern rules of pleading have diminished the importance of the common-law distinctions surrounding recoupment and setoff, in bankruptcy these distinctions remain...	2025	Other Secondary Source	—	9 10 F.4th
—	**7.** Bankruptcy Desk Guide s 6:78, § 6:78. Waiver of sovereign immunity of governmental units Notwithstanding an assertion of sovereign immunity, the Bankruptcy Code states that sovereign immunity is abrogated as to a governmental unit with respect to enumerated sections of...	2025	Other Secondary Source	—	2 14 F.4th
—	**8.** Bankruptcy Desk Guide s 11:98, § 11:98. Judgment against petitioner upon dismissal of involuntary petition If the court dismisses an involuntary petition, other than with the consent of all the petitioners and the debtor, the court may render judgment against the petitioner who...	2025	Other Secondary Source	—	5 11 17 F.4th

Treatment	Title	Date	Type	Depth	Headnote(s)
—	**9.** Bankruptcy Desk Guide s 17:32, § 17:32. Particular applications As successor to the rights of actual unsecured creditors, the trustee is entitled to assert the rights of an actual unsecured creditor under applicable state fraudulent transfer...	2025	Other Secondary Source	—	13 F.4th
—	**10.** Bankruptcy Desk Guide s 19:90, § 19:90. Generally Under certain conditions, state fraudulent transfer law may be utilized by the trustee, in the capacity as statutory successor to the debtor's creditors, in order to avoid...	2025	Other Secondary Source	—	2 F.4th
—	**11.** Bankruptcy Desk Guide s 25:30, § 25:30. Claims against a governmental unit Notwithstanding any assertion of sovereign immunity by a governmental unit, there must be offset against a claim or interest of a governmental unit any claim against such...	2025	Other Secondary Source	—	8 9 F.4th
—	**12.** Bankruptcy Desk Guide s 31:73, § 31:73. Collection of future income by trustee A confirmable Chapter 13 plan must provide for the submission of all or such portion of future earnings or of other future income of the debtor to the supervision and control of...	2025	Other Secondary Source	—	—
—	**13.** Bankruptcy Law Manual s 7:57, § 7:57. The automatic stay: consequences of violating the stay A number of consequences may result from either an intentional or unintentional violation of the stay. For example, as previously discussed, actions taken in violation of the stay...	2024	Other Secondary Source	—	13 F.4th
—	**14.** Bankruptcy Law Manual s 14:32, § 14:32. Liability of petitioning creditors for wrongful involuntary petitions Petitioning creditors should consider carefully whether to file an involuntary petition as there is a risk that they may be assessed damages and sanctions in the event that the...	2024	Other Secondary Source	—	5 11 17 F.4th
—	**15.** Bankruptcy Service Lawyers Edition s 12:870, § 12:870. Costs and fees Bankruptcy Code creates remedial scheme that addresses costs and attorney fees for dismissed involuntary petitions and compensatory and punitive damages for involuntary petitions...	2025	Other Secondary Source	—	5 F.4th
—	**16.** Bankruptcy Service Lawyers Edition s 13:317, § 13:317. Discretion of court Award of costs, fees and damages is not automatic or mandatory, but is committed to discretion of court. In context of a motion to dismiss an involuntary case as a bad-faith...	2025	Other Secondary Source	—	2 F.4th
—	**17.** Bankruptcy Service Lawyers Edition s 13:321, § 13:321. Waiver or consent Alleged debtor did not waive his objection to the District Court's application of the local rules regarding attorney fees and costs to his post-dismissal motion for fees and costs...	2025	Other Secondary Source	—	13 F.4th

Treatment	Title	Date	Type	Depth	Headnote(s)
—	**18.** Bankruptcy Service Lawyers Edition s 13:324, § 13:324. Entities against which recovery may be had Bankruptcy Appellate Panel (BAP) and Court of Appeals had jurisdiction under collateral order doctrine to review bankruptcy court's order denying motion by State of Montana,...	2025	Other Secondary Source	—	2, 5, 11 F.4th
—	**19.** California Practice Guide: Bankruptcy CH 1–B, Federal District Court Bankruptcy Jurisdiction California Practice Guide: Bankruptcy 1. [1:80] General Principles: Federal district courts have: Original and exclusive jurisdiction of all cases under Title 11 of the United States Code (i.e., all bankruptcy cases)...	2020	Other Secondary Source	—	9, 10 F.4th
—	**20.** California Practice Guide: Bankruptcy CH 5(I)–B, Commencing Involuntary Bankruptcy Proceedings California Practice Guide: Bankruptcy (1) [5:1060] Creditor's remedy: Involuntary bankruptcy is a creditor's remedy. It allows creditors holding the required amount and type of unsecured claims to force the debtor into...	2020	Other Secondary Source	—	5, 11, 17 F.4th
—	**21.** California Practice Guide: Bankruptcy HIGHLIGHTS, 2020 Update California Practice Guide: Bankruptcy These Highlights summarize significant developments over the past year. The paragraph numbers are keyed to the 2024 edition of the Practice Guide where the topics are discussed in...	2020	Other Secondary Source	—	2, 5, 11 F.4th
—	**22.** Federal Court of Appeals Manual s 14:4, § 14:4. When can you appeal interlocutory bankruptcy decisions? Federal Court of Appeals Manual The law on interlocutory bankruptcy appeals is not fully developed. The bankruptcy statute is poorly drafted and courts have not smoothed out all its rough spots. As discussed in...	2025	Other Secondary Source	—	2 F.4th
—	**23.** Federal Ninth Circuit Civil Appellate Practice (The Rutter Group Practice Guide) CH 14–A, Appeals in Bankruptcy Cases 1. [14:5] Overview: The Ninth Circuit processes appeals in bankruptcy cases like it does other civil appeals. However, as developed below (¶ 14:6 ff.), because of the unique...	2025	Other Secondary Source	—	1, 2 F.4th
—	**24.** Federal Ninth Circuit Civil Appellate Practice (The Rutter Group Practice Guide) HIGHLIGHTS, 2025 Update These Highlights summarize the most significant developments over the past year. The paragraph numbers are keyed to the 2025 edition of the Practice Guide where the topics are...	2025	Other Secondary Source	—	2 F.4th

Treatment	Title	Date	Type	Depth	Headnote(s)
—	**25.** 2024 No. 9 Norton Bankruptcy Law Adviser NL 1, Recent Decisions From The Appellate Courts Reyes-Colon v. Banco Popular De Puerto Rico, 110 F.4th 54 (1st Cir. 2024). The First Circuit affirmed in part, vacated in part, and remanded the District Court's decision (1)...	2024	Other Secondary Source	—	2 F.4th
—	**26.** Wright & Miller: Federal Prac. & Proc. s 4106, § 4106. The Bankruptcy Courts Wright & Miller: Federal Prac. & Proc. Under the Bankruptcy Act of 1898 the federal district courts served as the nation's bankruptcy courts. Actions in bankruptcy were heard by bankruptcy referees, who were appointed...	2025	Other Secondary Source	—	2 15 16 F.4th
—	**27.** Wright & Miller: Federal Prac. & Proc. s 3926.2, § 3926.2. Bankruptcy Appeals—Flexible Finality Wright & Miller: Federal Prac. & Proc. Virtually all decisions agree that the concept of finality applied to appeals in bankruptcy is broader and more flexible than the concept applied in ordinary civil litigation....	2025	Other Secondary Source	—	2 F.4th
—	**28.** CJS Federal Courts s 132, § 132. Waiver of sovereign immunity of states from suit in federal courts; consent CJS Federal Courts The immunity of states from suit in the federal courts, granted by the 11th Amendment to the Constitution of the United States, is a personal privilege which a state is not...	2025	Other Secondary Source	—	12 13 F.4th
—	**29.** Title Available on Document Page	—	Other Secondary Source	—	2 F.4th
—	**30.** Ninth Circuit: State's Filing of Involuntary Bankruptcy Petition Against Taxpayer with Disputed Business Tax Liabilities Did Not Affect Waiver of State's 11th Amendment Sovereign Immunity. [In re Blixseth, 112 F.4th 837 (9th Cir. 2024)]. In a potentially far-reaching published decision, the Ninth Circuit Court of Appeals held that a State's filing of an involuntary bankruptcy petition against a taxpayer with...	2024	Other Secondary Source	—	13 F.4th
—	**31.** Title Available on Document Page	—	Other Secondary Source	—	—
—	**32.** Title Available on Document Page	—	Other Secondary Source	—	—

Table of Authorities (21)

Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Examined	1. Central Virginia Community College v. Katz 126 S.Ct. 990, U.S., 2006 BANKRUPTCY - Avoidance. Proceeding to set aside alleged preferential transfers to state agencies was not barred by agencies' sovereign immunity.	Case			845+
Cited	2. Childs v. San Diego Family Housing LLC 22 F.4th 1092, 9th Cir.(Cal.), 2022 LITIGATION — Jurisdiction. Collateral order doctrine did not apply to permit immediate appeal of denial of motion to dismiss on basis of derivative sovereign immunity.	Case			843
Discussed	3. Cohen v. Beneficial Indus. Loan Corp. 69 S.Ct. 1221, U.S.N.J., 1949 Stockholder's derivative action by Hannah Cohen, executrix of the estate of Sol Cohen deceased, against Beneficial Industrial Loan Corporation and others wherein David E. Cohen,...	Case			842+
Cited	4. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. 119 S.Ct. 2219, U.S.N.J., 1999 Bank which sold deposit contracts for funding college education brought action against Florida Prepaid Postsecondary Education Expense Board alleging unfair competition under...	Case			844+
Discussed	5. Department of Revenue v. Blixseth 942 F.3d 1179, 9th Cir.(Nev.), 2019 BANKRUPTCY — Case Administration. Any dispute as to amount disqualifies creditor from filing involuntary petition.	Case			841+
Cited	6. Gardner v. State of N.J. 67 S.Ct. 467, U.S.N.J., 1947 Proceeding in the matter of the reorganization of the Central Railroad Company of New Jersey, wherein Walter P. Gardner was appointed trustee and the State of New Jersey filed a...	Case			843+
Distinguished	7. Hunsaker v. United States 902 F.3d 963, 9th Cir.(Or.), 2018 BANKRUPTCY — Debtor Protections. Sovereign immunity did not preclude emotional distress damages award against United States for willful violation of Bankruptcy Code's automatic...	Case			845+

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Cited	**8.** Hydranautics v. FilmTec Corp. 70 F.3d 533, 9th Cir.(Cal.), 1995 Patentee's competitor brought antitrust action against patentee after patent infringement judgment in favor of patentee was reversed on appeal. The United States District Court...	Case			844+
Distinguished	**9.** In re DBSI, Inc. 869 F.3d 1004, 9th Cir.(Idaho), 2017 BANKRUPTCY — Avoidance. Government's sovereign immunity did not bar strong-arm claim by trustee.	Case			845
Discussed	**10.** In re Diaz 647 F.3d 1073, 11th Cir.(Fla.), 2011 BANKRUPTCY - Debtor Protections. State agencies did not violate discharge injunction by attempting to collect past-due child support from debtor personally.	Case			847+
Cited	**11.** In re Lazar 237 F.3d 967, 9th Cir.(Cal.), 2001 BANKRUPTCY - Jurisdiction. State waived Eleventh Amendment immunity by filing proofs of claim.	Case			843+
Cited	**12.** In re Mihranian 937 F.3d 1214, 9th Cir., 2019 BANKRUPTCY — Case Administration. Notice to creditors of non-debtors was prerequisite to substantive consolidation.	Case			841
Cited	**13.** In re Miles 430 F.3d 1083, 9th Cir., 2005 BANKRUPTCY - Removal. State law claims against creditors filing involuntary petition were removable on “complete preemption” theory.	Case			847
Abrogation Recognized	**14.** In re Mitchell 209 F.3d 1111, 9th Cir.(Cal.), 2000 BANKRUPTCY - Jurisdiction. Bankruptcy Code provision purportedly waiving state sovereign immunity was unconstitutional exercise of congressional powers.	Case			845+
Discussed	**15.** In re Pegasus Gold Corp. 394 F.3d 1189, 9th Cir.(Nev.), 2005 BANKRUPTCY - Jurisdiction. Eleventh Amendment sovereign immunity precluded adversary proceeding brought against state.	Case			844+

Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Cited	**16.** In re Southern California Sunbelt Developers, Inc. 608 F.3d 456, 9th Cir.(Cal.), 2010 BANKRUPTCY - Case Administration. Award of punitive damages to alleged debtors following dismissal of involuntary petitions did not violate due process.	Case			844+
Discussed	**17.** In re Venoco LLC 998 F.3d 94, 3rd Cir.(Del.), 2021 BANKRUPTCY — Jurisdiction. State waived its sovereign immunity defense in liquidating trustee's action to recover compensation for alleged taking of debtors' oil refinery.	Case			846+
Cited	**18.** In re Westwood Shake & Shingle, Inc. 971 F.2d 387, 9th Cir.(Wash.), 1992 Law firm was appointed, in the United States Bankruptcy Court for the Western District of Washington, as special counsel to represent bankruptcy trustee in state court litigation,...	Case			843
Mentioned	**19.** Miller v. Wright 705 F.3d 919, 9th Cir.(Wash.), 2013 NATIVE AMERICANS - Sovereign Immunity. Tribal immunity was not preempted by federal antitrust laws.	Case			841
Cited	**20.** Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc. 113 S.Ct. 684, U.S.Puerto Rico, 1993 APPEAL - Collateral Order. States and state entities may appeal denial of Eleventh Amendment immunity under collateral order doctrine.	Case			843+
Cited	**21.** U.S. v. Nordic Village Inc. 112 S.Ct. 1011, U.S.Ohio, 1992 Chapter 7 trustee brought adversary proceeding to recover unauthorized postpetition transfer to Internal Revenue Service (IRS). The United States Bankruptcy Court for the...	Case			844+

Negative Treatment

There are no Negative Treatment results for this citation.

KeyCite Yellow Flag
Disagreed With by In re Off-Spec Solutions, LLC, 9th Cir.BAP (Idaho), July 6, 2023

36 F.4th 509
United States Court of Appeals, Fourth Circuit.

IN RE: CLEARY PACKAGING, LLC, Debtor.
Cantwell-Cleary Co., Inc., Plaintiff - Appellant,
v.
Cleary Packaging, LLC, Defendant - Appellee.
Public Justice Center; Legal Aid Justice Center; Mountain State Justice; North Carolina Justice Center; Casa; Centro de los Derechos del Migrante; National Black Worker Center; National Employment Law Project; Farm Labor Organizing Committee, AFL-CIO; United States of America, Amici Supporting Appellant.

No. 21-1981
|
Argued: March 10, 2022
|
Decided: June 7, 2022

Synopsis

Background: Judgment creditor filed adversary complaint against debtor, a limited liability company (LLC) that had elected to proceed under Subchapter V of Chapter 11 as a "small business debtor," seeking declaration that $4.7 million debt arising from its state-court judgment for intentional interference with contracts and tortious interference with business relations was nondischargeable as a debt for "willful and malicious injury." Debtor moved to dismiss for failure to state a claim. The United States Bankruptcy Court for the District of Maryland, Michelle M. Harner, J., 630 B.R. 466, granted motion. Judgment creditor appealed, and its appeal was certified for direct appeal to the Fourth Circuit.

[Holding:] Addressing a matter of apparent first impression for the court, the Court of Appeals, Niemeyer, Circuit Judge, held that the discharge exceptions in Subchapter V of Chapter 11 apply to both individual debtors and corporate debtors.

Reversed and remanded with instructions.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim; Motion for Summary Judgment; Request for Declaratory Judgment.

West Headnotes (16)

[1] **Bankruptcy** Construction and Operation

A limited liability company (LLC) is a "corporation" within the meaning of the Bankruptcy Code. 11 U.S.C.A. § 101(9)(A).

[2] **Bankruptcy** Debts and Liabilities Discharged

Section of the Bankruptcy Code setting forth the general exceptions to discharge applies to a range of Code discharge provisions and provides that discharges in those specified provisions do not discharge an "individual debtor" from a list of 21 types of debt. 11 U.S.C.A. § 523(a).

1 Case that cites this headnote

[3] **Bankruptcy** Effect as discharge

Section of Bankruptcy Code governing Subchapter V discharge applies to individual and corporate debtors alike, Code provides for court to grant Subchapter V debtor a discharge of all debts except "any debt" "of the kind specified in" section of Code setting forth the general exceptions to discharge, and although introductory language in that general provision limits its discharge exceptions to "individual" debtors, implying that corporations are not subject to the discharge exceptions, combination of terms "debt" and "of the kind" in Subchapter V discharge provision indicates that Congress intended to reference only the list of nondischargeable debts found in Code's general exception-to-discharge provision, not the class of debtors addressed therein, and to the extent there is tension between the two provisions, Subchapter V provision, as the more specific, governs. 11 U.S.C.A. §§ 101(41), 523(a), 1182(1), 1192(2).

14 Cases that cite this headnote

[4] **Bankruptcy** Fairness and Equity; "Cram Down."

In a traditional Chapter 11 proceeding, debtor submits and the court approves a plan of reorganization for distribution of debtor's estate; if creditors withhold their consent, any such plan must be fair and equitable in that it must comply with priority rules that establish a hierarchy of creditor classes for the order in which each class of creditor is to be paid.

1 Case that cites this headnote

[5] **Bankruptcy** Preservation of priority

Pursuant to the absolute priority rule, under any Chapter 11 plan to which creditors have not consented, higher priority creditors are to be paid in full before payment is made to lower priority creditors. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

1 Case that cites this headnote

[6] **Bankruptcy** Preservation of priority

As a general matter, any non-consensual Chapter 11 plan violating the absolute priority rule may not be approved, nor may a discharge of debts be granted. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

[7] **Bankruptcy** In general; nature and purpose

Congress enacted Subchapter V of Chapter 11 in the Small Business Reorganization Act of 2019 in order to streamline reorganizations for small business debtors. Pub. L. No. 116-54, 133 Stat. 1079.

1 Case that cites this headnote

[8] **Bankruptcy** Feasibility in general

One of the main features of a proceeding under Subchapter V of Chapter 11 is its authorization of plans that are not consented to by creditors and that depart from the Bankruptcy Code's absolute priority rule; instead, under the governing rules of a Subchapter V proceeding, the bankruptcy court need only find that such a plan provide that all of the debtor's projected disposable income is paid to creditors for a three-to-five-year period and that it be feasible, thus enabling the owners of a Subchapter V debtor to retain their equity in the bankruptcy estate despite creditors' objections. 11 U.S.C.A. §§ 1129(b), 1191(c)(2)(A) and (3).

3 Cases that cite this headnote

[9] **Bankruptcy** Effect as discharge

Under the specific rules for discharge provided in Subchapter V of Chapter 11, a court is required to grant discharge of all debts after approval of the plan except (1) any debt payable after the three-to-five-year period specified for payment, and (2) any debt "of the kind specified in" the section of the Bankruptcy Code setting forth the general exceptions to discharge. 11 U.S.C.A. §§ 523(a), 1192.

3 Cases that cite this headnote

[10] **Bankruptcy** Effect as discharge

Subchapter V of Chapter 11 of the Bankruptcy Code provides for the discharge of debts for both individual and corporate debtors. 11 U.S.C.A. § 1192(2).

13 Cases that cite this headnote

[11] **Statutes** General and specific terms and provisions; ejusdem generis

To the extent that tension exists between two statutory provisions, the more specific provision should govern over the more general.

2 Cases that cite this headnote

[12] **Bankruptcy** Discharge

In establishing the different Bankruptcy Code chapters, Congress conscientiously defined and distinguished the kinds of debtors covered by each provision; for example, Chapter 7 discharges are explicitly limited to individuals, as are Chapter 13 discharges. 11 U.S.C.A. §§ 109(e), 727(a)(1), 1328.

[13] **Bankruptcy** Effect as discharge

With respect to traditional Chapter 11 proceedings, Congress explicitly distinguished the discharges of individual debtors from the discharges of corporate debtors, excluding a different array of debts from discharge for each. 11 U.S.C.A. § 1141(d).

5 Cases that cite this headnote

[14] **Bankruptcy** Farmers

Under the Bankruptcy Code, Chapter 12 proceedings are limited to family farmers and family fishermen, whether they be individuals or corporations. 11 U.S.C.A. §§ 101(18), 101(19A).

[15] **Bankruptcy** In general; nature and purpose

Congress enacted Subchapter V of the Bankruptcy Code with the primary goal of simplifying Chapter 11 reorganizations for small businesses and reducing the administrative costs for those businesses. Pub. L. No. 116-54, 133 Stat. 1079.

2 Cases that cite this headnote

[16] **Bankruptcy** Preservation of priority

Bankruptcy Fairness and Equity; "Cram Down."

Subchapter V proceeding involves a non-consensual plan, that is, a "cram-down" proceeding, in which stakeholders in the bankruptcy estate are treated differently than they would be in traditional Chapter 11 proceedings under the absolute priority rule. 11 U.S.C.A. §§ 1129(b), 1191(c).

***511** Appeal from the United States Bankruptcy Court for the District of Maryland, at Baltimore. Michelle W. Harner, Bankruptcy Judge. (21-10765; 21-00056)

Attorneys and Law Firms

ARGUED: Justin Philip Fasano, MCNAMEE HOSEA, P.A., Greenbelt, Maryland, for Appellant. Robert Joel Branman, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus United States. Paul Sweeney, YUMKAS, VIDMAR, SWEENEY & MULRENIN, LLC, Columbia, Maryland, for Appellee. ON BRIEF: Steven L. Goldberg, MCNAMEE HOSEA, P.A., Greenbelt, Maryland, for Appellant. James R. Schraf, YUMKAS, VIDMAR, SWEENEY & MULRENIN, LLC, Columbia, Maryland, for Appellee. Michael R. Abrams, Murnaghan Appellate Advocacy Fellow, PUBLIC JUSTICE CENTER, Baltimore, Maryland, for Amici The Public Justice Center; The Legal Aid Justice Center; Mountain State Justice; The North Carolina Justice Center; CASA; Centro de los Derechos del Migrante; The Farm Labor Organizing Committee, AFL-CIO; The National Black Worker Center; and The National Employment Law Project. David A. Hubbert, Deputy Assistant Attorney General, Joan I. Oppenheimer, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Erek L. Barron, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Amicus United States.

Before NIEMEYER, MOTZ, and KING, Circuit Judges.

Opinion

Reversed and remanded with instructions by published opinion. Judge Niemeyer wrote the opinion, in which Judge Motz and Judge King joined.

NIEMEYER, Circuit Judge:

[1] When Cleary Packaging, LLC, filed a petition in bankruptcy under Subchapter V of Chapter 11 as a "small business debtor," seeking to discharge a $4.7 million judgment that Cantwell-Cleary Co., Inc. had obtained against it for intentional interference with contracts and tortious interference with business relations, Cantwell-Cleary opposed the effort. It argued that 11 U.S.C. § 1192(2), which falls within Subchapter V, provides that small business ***512** debtors are not entitled to discharge "any debt ... of the kind specified in section 523(a) of this title," *id.* § 1192(2), and that § 523(a) in turn lists 21 categories of debt that are non-dischargeable, including debts "for willful and malicious injury by the debtor to another entity or to the property of another entity," *id.* § 523(a)(6). Cleary Packaging

argued, however, that because § 523(a)'s list of exceptions to dischargeability is applicable only to "individual debtor[s]," its $4.7 million debt as the debt of a corporation was not covered by the exception contained in § 1192(2) and therefore was indeed dischargeable. [1] Cantwell-Cleary responded that because the language of § 1192(2) incorporates *only the list* of debts — debts "*of the kind* specified in section 523(a)" — and *not the class of debtors* addressed by § 523(a), the $4.7 million debt is non-dischargeable as a debt for willful and malicious injury.

The bankruptcy court, in a nicely crafted opinion, agreed with Cleary Packaging and concluded that its $4.7 million debt was indeed dischargeable, reasoning that the exceptions to dischargeability that were incorporated into § 1192(2) from § 523(a) applied only to *individual* debtors. The court relied heavily on the reasoning of *Gaske v. Satellite Restaurants Inc. Crabcake Factory USA (In re Satellite Restaurants Inc. Crabcake Factory USA)*, 626 B.R. 871 (Bankr. D. Md. 2021), which was dismissed on appeal. While the question is a close one, we nonetheless disagree with the bankruptcy court, as explained herein. Accordingly, we reverse the court's ruling and remand.

I

Cantwell-Cleary is a Maryland corporation engaged as a wholesaler of office-related products, particularly packaging supplies, janitorial and sanitation supplies, and paper products. Vincent Cleary Jr., who was on the board of directors of Cantwell-Cleary and its former president and CEO, left the company in June 2018 following a long-running family dispute involving divorce proceedings and internal disagreements over control of the company. He thereafter formed Cleary Packaging, LLC. He took with him numerous employees covered by noncompetition agreements and sensitive customer information and began the new business in competition with Cantwell-Cleary. Shortly thereafter, Cantwell-Cleary commenced an action in the Circuit Court for Anne Arundel County, Maryland, for intentional interference with contracts, tortious interference with business relations, and related claims. On the jury's verdict in favor of Cantwell-Cleary, the state court entered judgment in January 2021 against Cleary Packaging and Vincent Cleary Jr. in the aggregate amount of $4,715,764.98.

Cleary Packaging thereafter filed a petition under Chapter 11 of the Bankruptcy Code, electing to proceed under Subchapter V as a small business enterprise. In its plan for reorganization, it proposed to pay Cantwell-Cleary 2.98 percent of its judgment in biannual installments over a period of five years, for a total of $140,489.77. If the plan were to be approved, the remainder of Cleary Packaging's debt to Cantwell-Cleary would be discharged.

Cantwell-Cleary filed a complaint in the bankruptcy court, seeking a declaratory judgment that the $4.7 million judgment is not dischargeable under ***513** 11 U.S.C. §§ 1192(2) and 523(a). It also sought, by motion for summary judgment, a judgment giving preclusive effect in the bankruptcy court to its state judgment. On Cleary Packaging's motion, the bankruptcy court dismissed Cantwell-Cleary's declaratory judgment action, finding that the discharge exceptions in § 1192(2) and § 523(a) do not apply to *corporate* debtors because of limiting language in § 523(a). Specifically, it held that the § 523(a) list of exceptions to dischargeability applies only to *individual* debtors. Because Cleary Packaging was not an individual, but rather a corporation (in this case, a limited liability company), its debt was therefore not excepted from discharge under § 523(a). Consequently, the court also dismissed Cantwell-Cleary's motion for summary judgment as moot.

On Cantwell-Cleary's motion, the bankruptcy court certified a direct appeal to this court of its "Section 523 Opinion and Order," pursuant to 28 U.S.C. § 158(d)(2)(A)(i), and we authorized the appeal by order dated September 8, 2021. The sole question on appeal, therefore, is whether Cleary Packaging, as a Subchapter V corporate debtor, can discharge its $4.7 million debt to Cantwell-Cleary "for willful and malicious injury."

II

[2] In filing its Chapter 11 petition, Cleary Packaging elected to proceed under Subchapter V, and accordingly its discharge of debts is specifically governed by 11 U.S.C. § 1192(2). That section provides: "If the plan of the debtor is confirmed ... the court shall grant the debtor a discharge of all debts ... except any debt ... of the kind specified in section 523(a) of this title." Section 523(a), which applies to a range of bankruptcy code discharge provisions, including § 1192, provides that discharges in those specified sections "do[ ] not discharge an *individual debtor* from" a list of 21 types of debt, including a debt "for willful and malicious injury," *implying* that such

exceptions do not apply to corporate debtors. 11 U.S.C. § 523(a) (emphasis added).

The parties do not dispute that Cleary Packaging's $4.7 million debt created by entry of the state judgment was "for willful and malicious injury" and therefore would qualify as the type of debt that § 523(a) makes non-dischargeable. *See* 11 U.S.C. § 523(a)(6). Rather, the dispute centers on conflicting interpretations of the two relevant provisions — § 1192(2) and § 523(a) — relating to the *kind of debtor* subject to the discharge exceptions listed in § 523(a). Cleary Packaging, focusing on § 523(a), argues that it limits § 1192(2) discharges with respect to the 21 categories of debt only as to *individual debtors*, and therefore corporate debts of the kind listed remain dischargeable. Cantwell-Cleary, on the other hand, focuses on § 1192(2), which applies to both individual and corporate debtors, and argues that the section excludes from discharge *debts of the kind* listed in § 523(a), regardless of the *class of debtor*, whether individual or corporate. Because § 1192(2) is the specific provision governing discharges in Subchapter V proceedings, Cantwell-Cleary argues that if there is any inconsistency, we should give § 1192(2) precedence over the more general § 523(a) and thereby except Cleary Packaging's $4.7 million debt from a discharge, as it is a type of debt listed in § 523(a).

[3] While we recognize a certain lack of clarity in the relationship between § 1192(2) and § 523(a), we conclude, based on our textual review, the provisions' context in the Bankruptcy Code, and practical and equitable considerations, that Cantwell-Cleary makes the more persuasive argument.

***514** A

[4] **[5]** **[6]** First, by way of background, we note that in a traditional Chapter 11 proceeding, the debtor submits and the court approves a plan of reorganization for the distribution of the debtor's estate. And when the creditors withhold their consent, any such plan must be fair and equitable in that it must comply with priority rules that establish a hierarchy of creditor classes for the order in which each class of creditor is to be paid. Thus, higher priority creditors are paid in full before payment is made to lower priority creditors. The rule began with judicial construction and, beginning in 1978, was included in the Bankruptcy Code. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). Known as the "absolute priority rule," it requires that any plan, to which creditors have not consented, must provide that "a dissenting class of unsecured creditors [be paid] in full before any junior class can receive [payment]." *Id.* (citation omitted); *In re Maharaj*, 681 F.3d 558, 562 (4th Cir. 2012); 11 U.S.C. § 1129(b)(2)(B)(ii). And, as a general matter, any non-consensual plan violating the absolute priority rule may not be approved, nor may a discharge of debts be granted. *See* 11 U.S.C. § 1129(b)(2)(B)(ii). It can be readily recognized, however, that this strict priority rule could preclude reorganizations in which continuing management of the bankruptcy estate by a business's owners would be essential to a successful reorganization because such owners' retention of estate property would violate the priority rule.

[7] **[8]** Apparently in response to the problem, at least in part, Congress enacted Subchapter V in the Small Business Reorganization Act of 2019, Pub. L. No. 116–54, 133 Stat. 1079, to streamline reorganizations for small business debtors — defined during the relevant time period as those debtors whose debt is not more than $7.5 million, *see* 11 U.S.C. § 1182(1) (2020). One of the main features of a Subchapter V proceeding is its authorization of plans that are not consented to by creditors and that depart from the absolute priority rule of § 1129(b). Under the governing rules of a Subchapter V proceeding, the bankruptcy court need only find that such a plan provide that all of the debtor's projected disposable income is paid to creditors for a 3-to 5-year period and that it be feasible. 11 U.S.C. § 1191(c)(2)(A) and (3). Thus, the owners of a Subchapter V debtor are able to retain their equity in the bankruptcy estate despite creditors' objections.

[9] Subchapter V also provides specific rules for discharge, requiring a court to grant discharge of all debts after approval of the plan except (1) any debt payable *after* the 3- to 5-year period specified for payment, and (2) any debt "of the kind specified in section 523(a)." 11 U.S.C. § 1192.

B

[10] We now turn to the text of § 1192(2), which specifically governs Cleary Packaging's discharge, to determine the debts dischargeable under Subchapter V. First, we point out that § 1192(2) provides for granting *debtors* a discharge of all debts, subject to stated exceptions. For the purpose of Subchapter V, the term "debtor" was defined during the relevant time period to mean "a *person* engaged in commercial or business activities" that has debt of not more than $7.5 million. 11 U.S.C. § 1182(1) (2020) (emphasis added). "[P]erson" is in

turn defined to include both individuals and corporations, *see id.* § 101(41), and "corporation[s]" include limited liability companies, *id.* § 101(9)(A). We thus conclude that § 1192(2) provides for the discharge of ***515** debts for *both* individual and corporate debtors.

Still, even though § 1192(2) applies to both individual and corporate debtors, the question remains whether the exception to such discharges — based on § 1192(2)'s reference to § 523(a) — applies to both individuals and corporations or to only individuals. And that question arises because the introductory language in § 523(a) limits its discharge exceptions to *individual* debtors. Specifically, § 523(a) provides that § 1192, along with five other discharge sections of the Bankruptcy Code, "does not discharge *an individual debtor*" from a list of 21 specified debts, including "any debt ... for willful and malicious injury,"11 U.S.C. § 523(a)(6) (emphasis added), implying that corporations are not subject to the discharge exceptions.

To address the question, we begin by focusing on § 1192(2) as the provision specifically governing discharges in a Subchapter V proceeding and on the scope of its incorporation of § 523(a). Section 1192(2) excepts from discharge "any *debt ... of the kind* specified in section 523(a)." 11 U.S.C. § 1192(2) (emphasis added). The section's use of the word "debt" is, we believe, decisive, as it does not lend itself to encompass the "kind" of *debtors* discussed in the language of § 523(a). This is confirmed yet more clearly by the phrase modifying "debt"— i.e., "of the kind." Thus, the combination of the terms "debt" and "of the kind" indicates that Congress intended to reference only the *list of non-dischargeable debts* found in § 523(a). As the U.S. Government's amicus brief notes, this interpretation of "of the kind" is in line "with the ordinary meaning of the word 'kind' as 'category' or 'sort.' " (Citing American Heritage Dictionary of the English Language (online ed.) (" '[a] group of individuals or instances sharing common traits; a category or sort' "); Merriam-Webster Dictionary (online ed.) (" 'a group united by common traits or interests: CATEGORY' ")). In short, while § 523(a) does provide that discharges under various sections, including § 1192 discharges, do not "discharge *an individual debtor* from any debt" of the kind listed, § 1192(2)'s cross-reference to § 523(a) does not refer to any *kind of debtor* addressed by § 523(a) but rather to a *kind of debt* listed in § 523(a). By referring to the *kind of debt* listed in § 523(a), Congress used a shorthand to avoid listing all 21 types of debts, which would indeed have expanded the one-page section to add several additional pages to the U.S. Code. Thus, we conclude that *the debtors* covered by the discharge language of § 1192(2) — i.e., both individual and corporate debtors — remain subject to the 21 *kinds of debt* listed in § 523(a).

[11] We add — to the extent that one might find tension between the language of § 523(a) addressing individual debtors and the language of § 1192(2) addressing both individual and corporate debtors — that the more specific provision should govern over the more general. *See, e.g., S.W. Ga. Farm Credit, Aca v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, No. 09-1011, 2009 WL 1514671, at *2 (Bankr. M.D. Ga. May 29, 2009) ("If the two provisions may not be harmonized, then the more specific will control over the general" (quoting *Universal Am. Mortg. Co. v. Bateman (In re Bateman)*, 331 F.3d 821, 825 (11th Cir. 2003))). Thus, while § 523(a) references numerous discharge provisions of the Bankruptcy Code, § 1192(2) is the more specific, addressing only Subchapter V discharges.

C

[12] **[13]** The context of § 1192(2) within the Bankruptcy Code and the Bankruptcy Code's structure further support our interpretation. ***516** It is readily apparent from a review of different Bankruptcy Code chapters that Congress conscientiously defined and distinguished the kinds of debtors covered by each provision. For example, Chapter 7 discharges are explicitly limited to individuals, *see* 11 U.S.C. § 727(a)(1), as are Chapter 13 discharges, *see id.* §§ 109(e), 1328. More tellingly, as to traditional Chapter 11 proceedings, Congress explicitly distinguished the discharges of individual debtors from the discharges of corporate debtors in § 1141(d), excluding a different array of debts from discharge for each. *Compare id.* § 1141(d)(2), (5) (addressing the scope of discharge for individuals) *with id.* § 1141(d)(6) (addressing the scope of discharge for corporations). Yet Congress purposefully addressed both individual and corporate debtors when defining the right of discharge in Subchapter V proceedings. *Id.* § 1192.

Cleary Packaging's interpretation would also create difficulty in reconciling § 523(a) with § 1141(d)(6). Section 523(a) includes in its scope § 1141, just as it includes § 1192 and several other sections, and therefore under Cleary Packaging's interpretation, the list of exceptions to discharge in a traditional Chapter 11 proceeding would govern only individuals by reason of § 523(a)'s limiting language. Yet, § 1141 incorporates specified debts listed in § 523(a) to apply *to*

corporate debtors, excluding from discharge debts "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)." 11 U.S.C. § 1141(d)(6)(A). Cleary Packaging has been unable to reconcile its method for applying § 523(a) to § 1192 with any consistency as to how it would apply § 523(a) to § 1141(d)(6).

[14] Yet more telling is Congress's importation of language into Subchapter V from the conceptually similar Chapter 12 proceedings, which are limited to family farmers and family fishermen, whether they be individuals or corporations. *See* 11 U.S.C. § 101(18), (19A); *see also, e.g., In re Trepetin*, 617 B.R. 841, 848 (Bankr. D. Md. 2020) (recognizing that "[s]everal aspects of Subchapter V are premised on the provisions of chapter 12 of the Code for family farmers and fishermen").

In addressing the scope of discharge, Chapter 12 provides, in relevant part, that "the court shall grant the debtor a discharge of all debts provided for by the plan ... except any debt ... *of a kind specified in section 523(a)* of this title." 11 U.S.C. § 1228(a) (emphasis added). This language in Chapter 12 is virtually identical to the language included in § 1192(2).[2] Moreover, § 523(a) specifically references § 1228(a) discharges, just as it does § 1192 discharges. Yet, the courts construing the scope of § 1228(a) have concluded that § 1228(a)'s discharge exceptions apply *to both individual debtors and corporate debtors. See, e.g., Breezy Ridge Farms*, 2009 WL 1514671, at *1–2; *New Venture P'ship v. JRB Consol., Inc. (In re JRB Consol., Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995). Interpreting language virtually identical to that in § 1192(2), the bankruptcy court in *JRB Consolidated* stated that "[t]he wording in § 1228(a)(2) describing 'debts of the kind' specified in § 523(a) does not naturally lend itself to also incorporate the meaning 'for debtors of the kind' referenced in § 523(a)." 188 B.R. at 374. Instead, it stated, "[d]ebts of the kind easily seems to be limited to the subparagraphs of § 523(a) which identify the types of debts which are eligible to be excepted from discharge." *Id.*; *see also Breezy Ridge Farms*, 2009 WL 1514671, at *2 (finding that Congress used the reference to ***517** § 523(a) in § 1228 "as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals"). Thus, prior interpretations of § 1228(a) support our interpretation of § 1192(2)'s virtually identical language. *See Hall v. United States*, 566 U.S. 506, 519, 132 S.Ct. 1882, 182 L.Ed.2d 840 (2012) ("[I]dentical words and phrases within the same statute should normally be given the same meaning" (citations omitted)). To give different interpretations to the same language in the same statute would ignore the rationality of using the same language in describing a different proceeding of the Bankruptcy Code, as was done with the adoption of Subchapter V.

[15] Finally, our interpretation of § 1192(2) in Subchapter V makes particular sense when considering that subchapter's juxtaposition in Chapter 11 with traditional Chapter 11 provisions, reflecting its distinctive purpose within that Chapter. Congress enacted Subchapter V as part of the Small Business Reorganization Act of 2019 with the primary goal of simplifying Chapter 11 reorganizations for small businesses and reducing the administrative costs for those businesses. To do so, Congress deliberately altered the general provisions of traditional Chapter 11 proceedings by, among other things, eliminating the absolute priority rule and limiting the applicability of § 1141(d) to Subchapter V proceedings. Section 1141(d), in particular, sets forth debts that are eligible for discharge in a traditional Chapter 11 proceeding, making distinctions between individual debtors and corporate debtors. *See Breezy Ridge Farms*, 2009 WL 1514671, at *2; *cf. JRB Consol.*, 188 B.R. at 374. In contrast, § 1192 provides benefits to small business debtors, regardless of whether they are individuals or corporations. Thus, an important purpose for Subchapter V would be frustrated were we to adopt Cleary Packaging's interpretation of §§ 1192(2) and 523(a), which would treat individuals and corporations differently.

[16] And as to fairness and equity, it should be recognized that a Subchapter V proceeding involves a non-consensual plan — i.e., a "cram-down" proceeding — in which stakeholders in the bankruptcy estate are treated differently than they would be in traditional Chapter 11 proceedings under the absolute priority rule. Under a Subchapter V plan, owners of a debtor can retain ownership interests to continue conducting the reorganization at the expense of and over the objection of creditors. Given the elimination of the absolute priority rule, Congress understandably applied limitations on the discharge of debts to provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor. To this end, *all Subchapter V debtors* are textually subject to the discharge limitations described in § 523(a), not just *individual* Subchapter V debtors. To make a distinction between individuals and corporations for how Subchapter V is applied would not only undermine that balance, but would also make no sense and indeed would create perverse incentives. But most importantly, it would violate the text of § 1192(2).

III

At bottom, while we recognize that the relationship between § 523(a) and § 1192 might be a bit discordant — or perhaps more accurately, clumsy — we find more harmony from following a close textual analysis and contextual review of § 1192(2) and thus conclude that it provides discharges to small business debtors, *whether they are individuals or corporations*, except with respect to the 21 kinds of debts listed in § 523(a). We would find it difficult to conceive of giving § 523(a) the additional ***518** role of defining *the debtors* covered by § 1192(2) in conflict with § 1192(2)'s own language. That function is actually and better carried out by § 1192, which is the specific provision governing discharges in Subchapter V proceedings and which applies to individual and corporate debtors alike. Finally, we conclude that our interpretation serves fairness and equity in circumstances where *a small business corporate debtor* in particular is given greater priority over creditors than would ordinarily apply and thus should not especially benefit from the discharge of debts incurred in circumstances of fraud, willful and malicious injury, and the other violations of public policy reflected in § 523(a)'s list of exceptions.

* * *

Accordingly, we reverse the bankruptcy court's certified order and remand the case for further proceedings, including consideration of Cantwell-Cleary's motion for summary judgment.

REVERSED AND REMANDED

All Citations

36 F.4th 509

Footnotes

1 While, for convenience, we use the terms “individual debtor” and “corporate debtor” in a binary fashion, we recognize that Cleary Packaging is a limited liability company under Maryland law. The Bankruptcy Code, however, includes within its definition of “corporation” limited liability companies. *See* 11 U.S.C. § 101(9)(A).

2 There is one inconsequential difference — § 1228(a) refers to debt “of *a* kind specified,” while § 1192(2) refers to debt “of *the* kind specified.”

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United States Bankruptcy Court, D. Delaware.

IN RE: CRÉDITO REAL, S.A.B. DE C.V., SOFOM, E.N.R., [1] Debtor in a foreign proceeding.

Case No. 25-10208 (TMH)
|
Signed April 1, 2025

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OPINION

Thomas M. Horan, United States Bankruptcy Judge

***1** In its June 27, 2024 decision in Harrington v. Purdue Pharma, L.P., [2] the Supreme Court held that a chapter 11 plan of reorganization cannot provide for a nonconsensual third-party release of claims against a non-debtor. [3] Following that decision, the international insolvency community has debated whether, under chapter 15, a bankruptcy court nonetheless may enter an order enforcing a *foreign plan* containing such releases. [4] That is the question presented here. At the recognition hearing held in this chapter 15 case on March 11, 2025, in an oral bench ruling, this Court held that such an order is permissible after Purdue and granted enforcement of a Mexican plan containing such releases.

Section 1501 of title 11 of the United States Code (the "Bankruptcy Code") describes the "purpose and scope of application" of chapter 15. [5] When it enacted chapter 15, Congress sought to facilitate cooperation between the courts of the United States and the courts of foreign countries in cross-border insolvency cases and to empower a court exercising bankruptcy jurisdiction to render assistance to the foreign court. [6]

In this case, Robert Wagstaff, the foreign representative (the "Foreign Representative") of Crédito Real, S.A.B. de C.V., SOFOM, E.N.R. (the "Chapter 15 Debtor"), petitioned for entry of an order recognizing the Chapter 15 Debtor's Mexican bankruptcy case (the "Mexican Prepack Proceeding") as a foreign main proceeding. [7] That request was unopposed.

The Foreign Representative also asked this Court to render assistance to the Mexican court by recognizing and enforcing the plan that the Mexican court approved. The parties refer to that plan as the Concurso Plan [8] and the order approving it as the Concurso Order. [9]

***2** The United States International Development Finance Corporation (the "DFC") opposed this relief, arguing that the nonconsensual third-party releases contained in the Concurso Plan are not authorized under chapter 15 and would be "manifestly contrary to the public policy of the United States." [10] This Court overruled that objection and entered its Order Granting (I) Recognition of Foreign Main Proceeding, (II) Full Force and Effect to Concurso Plan and Certain Related Relief (the "Recognition Order"). [11] On March 25, 2024, the DFC filed its notice of appeal. [12] This is the Court's written opinion in support of the Recognition Order. [13]

I. Background [14]

The Chapter 15 Debtor was one of Mexico's largest non-bank financial lending institutions. [15] Its customers were located predominantly in Mexico, elsewhere in Latin America, and in the United States. [16] It is a Mexican company, and it held or holds direct or indirect equity interests in entities located in Mexico, the United States, Honduras, Panama, Turks and Caicos, Costa Rica, Nicaragua, Guatemala, and El Salvador. [17]

In 2021, amid a liquidity crisis, the Chapter 15 Debtor began discussions with its key creditors on a restructuring. [18] These negotiations failed, and in June 2022, an ad hoc group of unsecured creditors (the "Ad Hoc Group") filed an involuntary chapter 11 petition against the Chapter 15 Debtor (the "Involuntary Chapter 11 Case"). [19]

On June 28, 2022, one of the Chapter 15 Debtor's shareholders commenced a liquidation proceeding in the 52nd Civil State Court of Mexico City, Mexico (the "Mexican Liquidation Proceeding"). [20] The court appointed Fernando

Alonso-deFlorida Rivero as judicial liquidator (the "Mexican Liquidator"). [21]

Then, on July 14, 2022, the Foreign Representative filed a petition under chapter 15 in this Court (the "Prior Chapter 15 Case"), along with a petition for recognition of the Mexican Liquidation Proceeding as a foreign main proceeding. [22]

***3** Following these events, the Chapter 15 Debtor, the Mexican Liquidator, the Foreign Representative, and the Ad Hoc Group adjourned pending disputed matters in the Involuntary Chapter 11 Case and the Prior Chapter 15 Case to pursue settlement discussions. [23] These negotiations succeeded, and the Chapter 15 Debtor, the Mexican Liquidator, and the Ad Hoc Group entered into a restructuring support agreement (the "RSA") to implement a global restructuring of the Chapter 15 Debtor's assets and liabilities. [24] It was under the terms of the RSA that the Mexican Liquidator commenced the Mexican Prepack Proceeding. [25] The parties agreed that that Foreign Representative would seek recognition here of the Mexican Prepack Proceeding as a foreign main proceeding and an order giving full force and effect to the Concurso Plan. [26]

On October 6, 2023, the Chapter 15 Debtor commenced the Mexican Prepack Proceeding at the direction of the Mexican Liquidator by filing a voluntary petition with the Mexican court. [27] On November 13, 2023, the Mexican Court issued a judgment officially commencing the conciliation stage of the Mexican Prepack Proceeding (the "Concurso Judgment"). [28]

The Concurso Judgment imposed protective measures designed to preserve the Chapter 15 Debtor's estate, including a stay on all enforcement and collection actions against the Chapter 15 Debtor's assets and a prohibition on paying obligations due before the date of the commencement of the Mexican Prepack Proceeding. [29] Miguel Escamilla Villa was appointed as the Conciliator [30] of the Mexican Prepack Proceeding. [31] The Concurso Judgment was served on creditors and other parties through publication in a nationwide newspaper and in the Official Journal of the Federation; additionally, a summary of the judgement was registered in the Public Registry of Commerce to ensure that all interested parties, including foreign creditors, were adequately informed. [32]

On March 20, 2024, the Mexican Court issued a judgment of recognition that confirmed the ranking and classification of all the creditors' claims (the "Recognition Judgment"). [33]

On May 21, 2024, the Concurso Plan was presented to the creditors recognized under the Recognition Judgment, and on July 1, 2024, with the consent of the majority of the recognized creditors, the Conciliator formally submitted the plan to the Mexican Court. [34] On August 15, 2024, the Mexican Court issued the Concurso Order overruling all objections to the Concurso Plan and finding that the Concurso Plan satisfied all of the requirements of the Mexican Bankruptcy Law and did not violate Mexican public policy. [35] The Concurso Plan received support representing 56.55% of the aggregate outstanding unsecured claims. [36]

The Concurso Plan is consistent with the terms of the RSA and provides for the repayment of creditors who are located in the United States. [37] It establishes the creation of a special purpose vehicle through a Mexican trust, to which almost all of the Chapter 15 Debtor's remaining assets will be transferred. [38] Upon the monetization, sale, or assignment of such assets, the corresponding proceeds will be distributed according to the priority scheme set forth in the Mexican Bankruptcy Law, *pari passu* and *pro rata* among unsecured creditors. [39] Upon the distribution, the unsecured claims will be cancelled or extinguished in accordance with the Concurso Plan. [40]

***4** Clause 16 of the Concurso Plan contains exculpatory provisions that shield certain parties who played roles in the negotiation and implementation of the Chapter 15 Debtor's restructuring process, including the Ad Hoc Group, the Mexican Liquidator, the Chapter 15 Debtor's former directors and officers, the Indenture Trustee, and certain related parties (the "Release"). [41] These parties are exculpated for any actions or inactions taken during the restructuring process prior to the creditors' formal acceptance of the plan, subject to the Concurso Plan's carve-outs and exceptions. [42] Specifically, the Concurso Plan provides:

> In any event, [the Chapter 15 Debtor] and the Recognized Creditors agree not to bring any action, complaint, suit or claim, as the case

> may be, against the Participating Recognized Creditors nor [the Chapter 15 Debtor], respectively, as well as their shareholders, its former general manager Felipe Guelfi Regules, liquidator, directors, officers, secretaries, depositaries and officers, and The Bank of New Mellon, as trustee for [the Chapter 15 Debtor]'s foreign-denominated bonds denominated in U.S. dollars, legal tender in the United States of America, and euros, legal tender in the European Union as the case may be, for any act or omission incurred by them during the Bankruptcy Proceeding and at any time prior to the execution of this Agreement, except for actions, complaints, claims or demands, as the case may be, for acts or omissions of [the Chapter 15 Debtor] that have caused damage or impairment to the Bankruptcy Estate and that they have failed to declare or disclose to the Participating Recognized Creditors during the negotiations of this Settlement Agreement and up to the date of its execution. [43]

As written, the Release is customary in Mexican settlement agreements and is permitted under Mexican Bankruptcy Law. [44] Under the Concurso Order, the Mexican Court determined that the Concurso Plan and the Release are consistent with Mexican Bankruptcy Law and not in violation of the public or individual interest of any specific creditor. [45] The Concurso Order has not been subject to a stay in Mexico, so it remains in effect and is enforceable under Mexican law. [46]

The DFC was an active participant in the Mexican Prepack Proceeding. [47] It filed a proof of claim and objected to the approval of the Concurso Plan on grounds that were unrelated to the Release. [48] On November 21, 2024, the DFC appealed the Concurso Order, challenging, among other things, the Release. [49] On December 10, 2024, the Ad Hoc Group, the Chapter 15 Debtor, and the Conciliator each filed a reply to the DFC's appeal. [50] In their respective briefs, the Chapter 15 Debtor and Ad Hoc Group argued that the Release does not violate Mexican Bankruptcy Law, and they defended the propriety of the Release. [51] The DFC appeal remains pending. [52]

On February 7, 2025, the Foreign Representative filed the Verified Petition, commencing this chapter 15 case and seeking entry of an order recognizing the Mexican Prepack Proceeding and enforcing the Concurso Plan and Concurso Order. The DFC objected. [53]

***5** On March 11, 2025, this Court conducted an evidentiary hearing to consider the Verified Petition and concluded that it possessed the power to grant (i) recognition to the Mexican Prepack Proceeding as a foreign main proceeding, and (ii) comity and full force and effect to the Concurso Plan. The Court accordingly entered the Recognition Order. [54]

II. The DFC Objection

In the DFC Objection, the DFC argued that the Concurso Plan cannot be recognized in its current form because the Release is not authorized under Bankruptcy Code sections 1507 and 1521.

It contends that Bankruptcy Code section 1521(a) does not include third-party releases as relief available to a foreign debtor. Specifically, the DFC argues that the term "any appropriate relief" used in that section refers to relief available under the Bankruptcy Code. The DFC contends that non-consensual third-party releases are not available. Relatedly, it contends that Bankruptcy Code section 1507, which provides that a U.S. court may grant "additional assistance" to a foreign representative, also does not provide for such relief.

The DFC posits that the Foreign Representative wrongly relies on the catchall provisions of Bankruptcy Code section 1521(a)(7) and 1507 to justify enforcement of the Concurso Plan. In so doing, it points to Purdue. However, the DFC does not argue that Purdue's refusal to approve a non-consensual third-party release in that chapter 11 case means that such a release cannot be available in chapter 15. Instead, the DFC argues that Purdue offers a framework for thinking about statutory interpretation that means this Court lacks authority to order enforcement of the Release.

The DFC contends that this Court should read the catchall provisions of Bankruptcy Code sections 1521(a)(7) and 1507 in the same way the Purdue Court read Bankruptcy Code section 1123(b)(6), and therefore conclude that catchall provisions like these are limiting provisions that provide no authority for enforcement of the Release.

The DFC also argues that the Release is "manifestly contrary to the public policy of the United States" as provided in Bankruptcy Code section 1506.

III. Discussion

This is a core proceeding under 28 U.S.C. § 157(b)(2)(P) because it involves "matters under chapter 15 of title 11." The DFC did not contest that recognition of the Mexican Prepack Proceeding under Bankruptcy Code section 1517 was appropriate, and this Court entered an order granting recognition of the Mexican Prepack Proceeding as a foreign main proceeding. As a consequence of that recognition, this Court "shall grant comity or cooperation to the [F]oreign [R]epresentative." [55]

***6** Chapter 15 begins with a policy statement. Section 1501, which is titled "Purpose and scope of application," provides:

> (a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—
>
> (1) cooperation between—
>
> (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
>
> (B)) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
>
> (2) greater legal certainty for trade and investment;
>
> (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
>
> (4) protection and maximization of the value of the debtor's assets; and
>
> (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment. [56]

No other chapter of the Bankruptcy Code sets forth a similar statement about its purpose. The inclusion of this policy statement in section 1501 highlights that the Court should be guided by the main policy goals of chapter 15—cooperation and comity with foreign courts and deference to those courts within the confines established by chapter 15.

The importance of comity is reinforced in section 1507(b), which instructs that the provision of "additional relief" be "consistent with the principles of comity ...." [57] It is then further emphasized in section 1509(b)(3), which provides that when a U.S. court grants recognition of a foreign proceeding under Bankruptcy Code section 1517, it "shall grant comity or cooperation to the foreign representative." [58] Therefore, in deciding the issues presented here, this Court is mindful of the context in which it operates and considers the centrality of cooperation and comity in reaching its decision.

Upon recognition of a foreign main proceeding, the Court has broad discretion to order enforcement of orders entered in a foreign main proceeding, consistent with the guiding principles of comity. [59] These principles of comity are particularly compelling in the bankruptcy context, where "American courts have long recognized the need to extend comity to foreign bankruptcy proceedings, because the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding; if all creditors could not be bound, a plan of reorganization would fail." [60] Therefore, when considering whether to enforce an order entered in a foreign main proceeding, U.S. bankruptcy courts should aim to maximize assistance to the foreign court conducting the foreign main proceeding. [61]

***7** Two provisions through which a U.S. bankruptcy court may enforce orders entered in a foreign main proceeding are Bankruptcy Code sections 1521(a) and 1507. The Foreign Representative asked that this Court enforce the Concurso Plan under those sections. Section 1521(a) empowers bankruptcy courts to grant appropriate relief, whereas section 1507 empowers bankruptcy courts to provide additional assistance.

However, Bankruptcy Code section 1521(a)'s and 1507's broad grants of discretion are limited in multiple ways. A main limitation on the court's discretion under these sections is Bankruptcy Code section 1506. That section provides that the court may "refus[e] to take an action governed by [chapter 15] if the action would be manifestly contrary to the public policy of the United States." [62] Refusing to take an action under Bankruptcy Code section 1506 is an extraordinary act. That section should be "narrowly interpreted, as the word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." [63] As a consequence, that authority rarely is exercised. [64]

Under Bankruptcy Code section 1506, the Court's discretion to enforce orders of a foreign court is circumscribed by fundamental policies of fairness. Since before the enactment of chapter 15, for a U.S. bankruptcy court to enforce an order of a foreign court in an insolvency proceeding, courts have required that the foreign proceeding afford litigants the same fundamental protections that they would have received in a U.S. court. [65] Relief that is granted in a foreign proceeding does not have to be identical to relief that might be available in a U.S. proceeding. [66] Instead, the cases teach that we should look to the fairness of the foreign proceeding. [67] Therefore, as a matter of comity, if the forum of the foreign proceeding offers "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced. [68]

A. Statutory Interpretation of Bankruptcy Code Sections 1521(a) and 1507

***8** The DFC argues that the Supreme Court's analysis of Bankruptcy Code section 1123(b) in Purdue changes the way courts should interpret sections 1521(a) and 1507. It does not.

This section begins by recounting the DFC's argument in further detail. Next, it examines the plain meaning of the language in Bankruptcy Code sections 1521(a) and 1507. Then, it analyzes congressional intent through canons of statutory construction to confirm the plain meaning interpretation. As it proceeds through the plain language analysis and then the canons of construction analysis, it also compares the conclusions derived from sections 1521(a) and 1507 to section 1123(b)(6) and the conclusions the Supreme Court derived from that section. Because the power to enforce the Concurso Plan and the Concurso Order may only derive from Bankruptcy Code sections 1521(a)(7) or 1507(a) (the "Chapter 15 Catchalls"), the focus of this analysis is on those subsections.

The DFC specifically argues that the Chapter 15 Catchalls are analogous to the catchall provision of Bankruptcy Code section 1123(b)(6), so the Court should interpret them all the same way. [69] Section 1123(b) enumerates certain relief that a chapter 11 plan may provide. Subsection (6)—or, as the Supreme Court refers to it in Purdue, the "catchall"—provides that a chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." [70] The Purdue Court held that subsection (6) does not allow a chapter 11 plan to include nonconsensual third-party releases when interpreted in light of its surrounding context pursuant to the statutory canon of *ejusdem generis*. [71] It explained that the other provisions in section 1123(b) authorized relief that concerns the debtor, its rights and responsibilities, and its relationship with its creditors. [72] Because none of the other provisions in section 1123(b) consider a third-party's relationship with a creditor, the Supreme Court explained, subsection (6) must be interpreted in that context and should not extend to govern a third-party's relationship with a creditor by granting nonconsensual third-party releases. [73]

The DFC urges this Court to apply a similar analysis to sections 1521(a)(7) and 1507(a). It asserts that because those subsections are catchalls, like section 1123(b)(6), and because neither section 1521(a) nor 1507 discusses third-party relationships, then the Chapter 15 Catchalls should not extend to allow nonconsensual third-party releases. Neither the plain language nor canons of statutory interpretation support the DFC's arguments.

In determining how to interpret sections 1521(a) and 1507, "[o]ur interpretation ... starts 'where all such inquiries must begin: with the language of the statute itself.' " [74] If the text of the statute is unambiguous, we construe it according to its plain meaning. [75] If it is ambiguous, then we turn to legislative history and the canons of construction to determine congressional intent in enacting the statute. [76] However,

"[i]n any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation[.]" [77]

***9** Section 1521, subsection (a) provides:

> Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—
>
> (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
>
> (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
>
> (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
>
> (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
>
> (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;
>
> (6) extending relief granted under section 1519(a); and
>
> (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a). [78]

Meanwhile, section 1507 provides:

> (a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.
>
> (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—
>
> (1) just treatment of all holders of claims against or interests in the debtor's property;
>
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
>
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
>
> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns. [79]

The plain language of the two sections demonstrates that the DFC's interpretation is incorrect for multiple reasons. Beginning with section 1521, subsection (a) enumerates some relief that a bankruptcy court may grant at the request of a foreign representative. However, the section begins by explaining the court may grant "any" appropriate relief. Even though that statement is followed by a list of some relief a court may grant, the word "including" indicates that the enumerated relief is not a complete and exclusive list. Congress expressly addresses the term "including" at Bankruptcy Code section 102(3), providing that the word "'includes' and 'including' are not limiting." [80] This definition codifies the rule of statutory construction that the terms "includes" and "including" are illustrative, and not exclusive or limiting. [81]

***10** It is true that when comparing this "any ... including" language to that in section 1123(b), they are, at first blush, similar. Section 1521(a) allows a bankruptcy court to "grant any appropriate relief, including ... any additional relief" while section 1123(b) allows a plan to "include any other appropriate provision." But the critical difference lies in the language that qualifies "any ... including" in each section.

Section 1521(a) qualifies that language by explaining that any additional relief a court grants should be of the kind that is available to a trustee, [82] and then lists relief that a court should not grant. It is well-settled that enforcement of a third-party

release contained in a foreign plan is appropriate under that section. [83]

Meanwhile, section 1123(b) simply states that a court may include any "other" chapter 11 plan provision that is not "inconsistent with the applicable provisions of this title." In Purdue, the Supreme Court explained that the word "other" directs courts to look to the other provisions in section 1123(b) to determine what further relief a court could grant. [84] By looking at section 1123(b)(1)–(5), the Supreme Court thus concludes that subsection (6) should only grant similar relief, as in relief that concerns the debtor and its rights, responsibilities, and relationships. [85] However, section 1521(a) does not direct courts to look to the "other" provisions when providing relief under its catchall. [86] Instead, section 1521(a) allows courts to grant "any additional relief that may be available to a trustee." [87] Accordingly, section 1521(a) does not direct courts to limit its relief to the kind afforded in other provisions, but rather, to relief available to a trustee. Because the relief in question would be available to a trustee, it is permissible under section 1521(a)(7).

Second, section 1521(a)(7) qualifies its "any ... including" language by listing specific relief that a court is not permitted to grant under that section. [88] That list of prohibited relief does not include nonconsensual third-party releases. [89] By establishing explicit boundaries, Congress allowed relief that does not exceed those boundaries.

On the other hand, in section 1123(b), rather than provide specific prohibited relief, Congress directs courts to look to the whole of the Bankruptcy Code to determine if the requested provision is consistent with it. In Purdue, the Supreme Court framed this section as one that "set[s] out a detailed list of powers, followed by a catchall." [90] It explained, "Congress could have said in [section 1123(b)](6) that 'everything not expressly prohibited is permitted[ ]' " but instead limited it to "any other appropriate provision not inconsistent with the applicable provisions of this title." [91] In comparison, in section 1521(a)(7), Congress did expressly enumerate what it wanted to prohibit; in a chapter 15 case, a court cannot grant relief under sections 522, 544, 545, 547, 548, 550, and 724(a). By specifically enumerating relief that the court cannot grant under section 1521, Congress more concretely defined the outer bounds of what the court can grant, thus also more concretely defining what is included in what the court can grant, bearing in mind the guiding principles of comity and cooperation.

***11** Briefly turning to a canon of statutory construction before moving onto examining the plain language of section 1507, the canon of *expressio unius* confirms this reading of the express prohibitions established in section 1521(a)(7). "*Expressio unius est exclusio alterius*" stands for the proposition that the expression of one thing means the exclusion of another. [92] By establishing a list of relief that courts should not grant under section 1521(a)(7), the section implies that other forms of relief not expressly prohibited are permitted. Therefore, enforcing foreign orders providing for nonconsensual third-party releases is within the scope of authority that section 1521(a) provides.

Section 1507 similarly affords courts a broad grant of authority to provide relief while setting out express limitations. Section 1507 establishes that a court may provide "additional assistance to a foreign representative" if the court has recognized the proceeding. Notwithstanding that the term "additional assistance" is a broad term at the outset, it also suggests that even if a court cannot grant relief under section 1521(a)(7), it may grant relief under section 1507. Thus, section 1507 implies an even more expansive grant of power than already found in section 1521(a).

However, section 1507 does have limitations. First, it states that any assistance should be "[s]ubject to the specific limitations stated elsewhere in this chapter[.]" [93] Therefore, in determining whether relief may be granted as part of section 1507's "additional assistance," a court should look to the remainder of chapter 15 to guide its decision. Nevertheless, this instruction differs from section 1123(b)(6)'s instruction to look at subsections (1)–(5) to contextualize appropriate relief because chapter 15 covers a broader array of topics than section 1123(b)(1)–(5), which is limited to matters concerning and connected to the debtor. Section 1507's instruction also differs from section 1123(b)(6)'s other instruction that any other provisions not be inconsistent with applicable provisions of "this title" (as in, the Bankruptcy Code). Chapter 15 has a much different purpose and context —mainly to promote comity and international cooperation —thus entailing different limitations when compared to the Bankruptcy Code at large. [94] Accordingly, relief that is appropriate subject to limitations in chapter 15 must be different than relief that is not inconsistent with the applicable provisions of the Bankruptcy Code.

Second, section 1507(b) establishes a list of considerations for courts when determining whether to provide such additional assistance. Those factors, like much of chapter 15, focus on whether relief would be "consistent with principles of comity[.]" [95] They direct a court to confirm that any additional assistance would reasonably assure just treatment of creditors, protection of U.S. claim holders against prejudice, prevention of preferential or fraudulent transfers, equitable distribution of assets in accordance with the Bankruptcy Code, and the provision of an opportunity for a fresh start for the debtor. [96]

By adding this list of considerations, Congress again established boundaries for courts in granting relief under chapter 15 and directed courts on how to determine if it is appropriate to grant relief. And again, these express prohibitions provide a more explicit and fuller picture of the broad relief a court may grant, as compared to that in section 1123(b)(6), and they direct a court to focus on principles of comity when considering granting the relief. Because comity is central to chapter 15, the relief granted in the foreign court does not have to be available in U.S. courts under chapter 11. [97] In other words, U.S. courts do not have to reject relief solely because it would be unavailable in the United States. However, there must be metrics to assess whether the proposed relief is appropriate. Section 1507(b) solves that problem by providing these considerations while prioritizing comity to foreign courts.

***12** As with section 1521, section 1507 thus differs from section 1123(b) because section 1123(b) does not expressly establish specific boundaries; instead, it directs courts to look to the rest of the Bankruptcy Code to determine whether a provision is appropriate. Because Congress expressed specific prohibitions, courts do not need to read further into its words like they do for section 1123(b). [98] The plain language of section 1507 (and section 1521) already enumerates the boundaries unambiguously.

Here, the Mexican Prepack Proceeding provided all the protections set out in section 1507(b). [99] Therefore, section 1507 allows this Court to enforce the relief entered in the Mexican Prepack Proceeding.

Accordingly, the plain language of both section 1521(a)(7) and section 1507(a) permit a U.S. court to enforce a foreign order for nonconsensual third-party releases. Nevertheless, even if the Chapter 15 Catchalls are ambiguous, the legislative history and canons of statutory construction confirm this interpretation and corresponding Congressional intent. [100]

Congress enacted chapter 15 in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act to "provide effective mechanisms for dealing with cases of cross-border insolvency." [101] The legislative history of chapter 15 shows that a major purpose in its enactment was to promote comity for the orders of foreign courts. In fact, as discussed above, section 1501 explicitly establishes one of its purposes as promoting cooperation between U.S. courts and foreign courts. [102] Further, section 1508 directs courts "[i]n interpreting this chapter, [to] consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." [103] Thus, granting bankruptcy courts the authority to enforce nonconsensual third-party releases originating in foreign courts would promote chapter 15's goals of comity and providing assistance to foreign courts during foreign insolvency proceedings. [104]

***13** Moreover, in examining multinational laws, as chapter 15 directs, nonconsensual third-party releases are widely accepted by foreign courts. Courts have previously looked to multinational laws in interpreting chapter 15 and determining whether certain relief would comport with international insolvency norms and the UNCITRAL Model Law on Cross-Border Insolvency, on which chapter 15 is based. [105] Other countries recognize nonconsensual third-party releases in insolvency proceedings. [106] Most relevant here, Mexican law provides for such releases. [107] That Mexican law provides for such releases further encourages the authority of this Court to enforce such releases in comity with the Mexican court.

Additionally, the DFC is correct that the sections should be read in their context pursuant to the canon of *ejusdem generis*. The Supreme Court has repeatedly stated that "a 'fundamental canon of statutory construction' [is] that 'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' " [108] However, the DFC neglects the major differences between the contexts of chapters 11 and 15. Namely, chapter 15 exists to provide assistance to foreign courts by granting comity to their orders. [109] Doing so promotes the purpose of an insolvency proceeding, which is to provide for equitable and orderly distribution of a debtor's assets in a manner that is enforceable across borders. [110]

Of course, a court's ability to enforce a foreign court's order has limitations, but Congress specified such limitations in the Bankruptcy Code. It specified relief that a court cannot grant under section 1521(a)(7). [111] It provided protections to consider before granting relief under section 1507. [112] It established that if such relief is manifestly contrary to public policy or violates a U.S. citizen's fundamental rights or procedural fairness, then it is not available. [113] All these limitations provide boundaries for relief under chapter 15 and ensure that it can have far-reaching consequences, so long as it is within these boundaries. [114] Accordingly, enforcing nonconsensual third-party releases granted in a foreign insolvency proceeding under that country's laws and in a fair proceeding is within this Court's authority under the Bankruptcy Code.

B. The Third-Party Releases Are Not Manifestly Contrary to the Public Policy of the United States

***14** The DFC also contends that the Concurso Plan should not be enforced under the public policy exception of Bankruptcy Code section 1506. As explained above "[t]he public policy exception has been narrowly construed, because the 'word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States.' " [115] Therefore, courts should use this exception to deny enforcing foreign relief sparingly. [116]

"The public policy exception applies 'where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections' or where recognition 'would impinge severely a U.S. constitutional or statutory right.' " [117] The DFC did not object to the fairness of the proceedings, nor did it identify a constitutional or statutory right on which the Concurso Plan impinges. Nonetheless, the facts demonstrate that the Mexican proceeding comported with U.S. standards of procedural fairness, and the Concurso Plan does not violate any constitutional or statutory rights.

In the Mexican Prepack Proceeding, the DFC did not object to the Release and only raised the issue on appeal. There was an opportunity for objection, consistent with our own procedures, but the DFC did not avail itself of that opportunity. Article 164 of the Mexican Bankruptcy Law provides for an opportunity to object to a *concurso* plan, after which the Mexican court is to verify that the *concurso* plan complies with all the requirements for a valid plan and is not contrary to public policy; only then can a *concurso* plan be approved. [118] The DFC, having failed to object in the Mexican Prepack Proceeding, cannot contend that there was a procedural unfairness, and in fact, does not contend that the Mexican's courts procedures were unfair.

Even though the DFC does not argue the Mexican proceedings were unfair or identify any facts that would support a finding of unfairness, this Court finds that the Mexican proceedings offered "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting." [119]

U.S. courts frequently have recognized Mexican *concurso* plans as being the product of a fair process. [120] In so holding, those courts have found that the contested Mexican *concurso* plans embodied arms'-length agreements and conformed to the general distribution priorities established in the Bankruptcy Code. [121] Mexican law also provides for due process to consider objections to a plan. [122] After creditors have been given the opportunity to object, Mexican law provides that the court may verify the plan if it complies with all the requirements for a valid plan and is not contrary to public policy. [123]

***15** The present decision does not diverge from those prior decisions confirming the fairness of Mexican proceedings. The uncontroverted evidence before the Court is that the Concurso Plan's Release is customary and permitted under Mexican law; the Release is the product of arms'-length negotiations among the Chapter 15 Debtor, the Recognized Creditors, and the Shareholders; and the Concurso Plan was approved by a majority of the Recognized Creditors. [124]

It also is undisputed that the DFC played an active role in the Mexican Prepack Proceeding. [125] The DFC filed a proof of claim asserting that it was a privileged creditor. [126] The Mexican Court instead allowed the DFC's claim as an unsecured creditor and granted the DFC status as a Recognized Creditor. [127] The DFC has appealed that ruling, and the appeal remains pending. [128] The DFC did not object

to the Release but did object to the Concurso Plan on other grounds. [129] The Mexican Court overruled the DFC's plan objection and entered the Concurso Order approving the Concurso Plan. In so doing, the Mexican Court found that the Concurso Plan complied with Mexican law and "neither the public interest nor the individual interest of any specific creditor is violated, since the terms agreed to will apply to all creditors equally ...." [130] The extent of the DFC's participation and the Mexican court's finding that the Concurso Plan would not violate the public interest or the interests of any creditors both emphasize the DFC's opportunity (of which it did not avail itself) to object to the Release before the approval of the Concurso Plan. The Mexican court provided the DFC with a full and fair opportunity to be heard, which is a central tenet of U.S. procedural fairness. [131]

Therefore, in consideration of the fairness of this proceeding, the procedural safeguards typical under Mexican law, and the fact that the DFC has not identified an example of lack of fairness, this Court finds that the Mexican proceeding was procedurally fair.

Likewise, the DFC has identified no constitutional or statutory right upon which the Concurso Plan impinges. Its only argument is that nonconsensual third-party releases are manifestly contrary to U.S. public policy because the Purdue decision prohibits them in most chapter 11 plans. [132] However, far from being "manifestly contrary to the public policy of the United States," nonconsensual third-party releases are expressly permitted under Bankruptcy Code section 524(g) in the context of asbestos cases. Furthermore, in Purdue, the Supreme Court noted that while it held that nonconsensual third-party releases are not permitted under chapter 11 (except in the asbestos context under Bankruptcy Code section 524(g)), Congress could have authorized them. [133] Indeed, the Supreme Court framed this issue in terms of the policy choices that Congress is authorized to make. To be manifestly contrary to U.S. public policy, the contested relief must impinge on some constitutional or statutory right; if a nonconsensual third-party release impinged on some constitutional right, the Supreme Court would not have said that Congress could provide for it. Accordingly, Congress has authorized nonconsensual third-party releases before, and the Supreme Court has explicitly said that it could do so again in the context of chapter 11 if it so desired. Lack of specific availability in U.S. courts does not equate to manifest contrariness to U.S. public policy, especially where, as here, the contested relief is available in other contexts and could be made available more broadly by a simple act of Congress. [134]

***16** The In re Vitro S.A.B. de C.V. court makes a similar point. While the Fifth Circuit denied enforcement of a Mexican plan's third-party release provisions, it noted that "although our court has firmly pronounced its opposition to [nonconsensual third-party] releases, relief is not thereby precluded under § 1507, which was intended to provide relief not otherwise available under the Bankruptcy Code or United States law." [135] Thus, it found that it could not deny the relief simply on the basis that third-party releases were not available in its jurisdiction. [136] Instead, the In re Vitro court only declined to enforce the plan in that case because of the role in the approval process of the votes of insiders holding intercompany claims. [137]

Simply put, if permitting third-party releases is a policy decision that Congress can and has made, it cannot also be true that enforcing such releases where principles of cooperation and comity so require in chapter 15 would be "manifestly contrary to the public policy of the United States." The simple fact that a U.S. court could not grant such releases in a typical chapter 11 plan does not make them manifestly contrary to U.S. public policy so as to require this Court to prohibit enforcement of the Release in this chapter 15 case. The DFC's public policy exception argument fails.

CONCLUSION

Accordingly, chapter 15 authorizes this Court to enforce nonconsensual third party releases ordered by foreign courts. The plain language of Bankruptcy Code sections 1521(a) and 1507 give this Court a broad grant of discretion to aid foreign courts in accordance with principles of comity. Nothing in the plain language of these statutes or the legislative history or canons of construction indicates that Congress intended to diverge from this policy of comity to prohibit enforcing releases entered by foreign courts. The Mexican Prepack Proceeding was fair, and the Concurso Plan and the Concurso Order are not manifestly contrary to U.S. public policy. Therefore, this Court enforces the Concurso Plan and the Concurso Order in their entirety.

All Citations

--- B.R. ----, 2025 WL 977967

Footnotes

1 The last four identifying digits of the tax number and the jurisdiction in which the Chapter 15 Debtor pays taxes is Mexico – 6815. The Chapter 15 Debtor's corporate headquarters is located at Avenida Insurgentes Sur No. 730, 20th Floor, Colonia del Valle Norte, Alcaldía Benito Juárez, 03103, Mexico City, Mexico.

2 603 U.S. 204, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024).

3 Id. at 226–27, 144 S.Ct. 2071 ("Confining ourselves to the question presented, we hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants.").

4 See, e.g., Joshua Kieran-Glennon, Restructuring Update: Third-Party Releases after Purdue Pharma – Solutions in Irish Law, McCann FitzGerald (Nov. 7, 2024), available at https://perma.cc/HR72-YR79; Michelle McGreal, Douglas Deutsch, & Robert Johnson, Purdue Pharma Bankruptcy Ruling Sidesteps Chapter 15 Implications, Bloomberg (July 10, 2024), available at https://perma.cc/5U5G-CXBF.

5 11 U.S.C. § 1501.

6 Id.; see also In re ABC Learning Ctrs. Ltd., 728 F.3d 301, 304–05 (3d Cir. 2013) (examining Congress's purpose in enacting chapter 15 and explaining the objectives of the legislation); In re Irish Bank Resol. Corp., No. 13-12159 (CSS), 2014 WL 9953792, at *9–10 (Bankr. D. Del. Apr. 30, 2014), aff'd, 538 B.R. 692 (D. Del. 2015).

7 Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the "Verified Petition") [D.I. 2].

8 Foreign Rep. Ex 7.

9 Foreign Rep. Ex. 8.

10 11 U.S.C. § 1506.

11 D.I. 51.

12 D.I. 58.

13 See Del. Bankr. L.R. 8003-2 ("Any bankruptcy Judge whose order is the subject of an appeal may file a written opinion that supports the order being appealed or that supplements any earlier written opinion or recorded oral bench ruling or opinion within 7 days after the filing date of the notice of appeal.").

14 This background section is based on the (i) Verified Petition;, (ii) the Declaration of Juan Pablo Estrada Michel Pursuant to 28 U.S.C. § 1746 in Support of the Petitioner's Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief

Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the "Estrada Dec.") [D.I. 3] (Foreign Rep. Ex. 2); and (iii) the Supplemental Declaration of Juan Pablo Estrada Michel Pursuant to 28 U.S.C. § 1746 in Support of the Petitioner's Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the "Estrada Supp. Dec.") [D.I. 41] (Foreign Rep. Ex. 11). The Verified Petition, Estrada Dec., and Estrada Supp. Dec. were admitted without objection. Messrs. Wagstaff and Estrada were not cross-examined.

15 Verified Petition ¶ 1.

16 Id.

17 Id. ¶ 4.

18 Id. ¶ 11.

19 Id. ¶ 12; In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R., Case No. 22-10696 (TMH) (formerly Case No. 22-10842 (DSJ) in the United States Bankruptcy Court for the Southern District of New York).

20 Id. ¶ 13.

21 Estrada Dec. ¶ 48.

22 Verified Petition ¶ 14; In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R., Case No. 22-10630 (TMH).

23 Verified Petition ¶ 15.

24 Id. ¶ 20; Foreign Rep. Ex. 9.

25 Verified Petition ¶ 20.

26 Id.

27 Id. ¶ 21; Foreign Rep. Ex. 4.

28 Foreign. Rep. Ex. 5.

29 Estrada Dec. ¶ 55.

30 Under Mexican bankruptcy law, the court appoints the Conciliator to work with the debtor and its recognized creditors on an agreement about the debtor's restructuring. See id. ¶ 29 for a description of the role of the Conciliator.

31 Id. ¶ 56.

32 Id. ¶ 57.

33 Id. ¶ 58; Foreign Rep. Ex. 6.

34 Estrada Dec. ¶ 60.

35 Id. ¶ 61; see also Ley de Concursos Mercantiles [LCM] (Bankruptcy Law) art. 64, Diario Oficial de la Federación [DOF] 12-5-2000, últimas reformas DOF 14-1-2014 (Mex.) (establishing the requirements for a plan to obtain approval under Mexican Bankruptcy Law).

36 Estrada Dec. ¶ 62.

37 Id. ¶ 63.

38 Id.

39 Id.

40 Id.

41 Id. ¶ 66; Concurso Plan, Clause 16.

42 Concurso Plan, Clause 16.

43 Concurso Plan Clause 16.

44 See Estrada Supp. Dec. ¶ 17.

45 Id. ¶ 25.

46 Id.

47 Id. ¶ 22.

48 Id. ¶¶ 23–24.

49 Id. ¶ 26.

50 Id. ¶ 27.

51 Id.

52 Id. ¶ 23.

53 See Objection of United States International Development Finance Corporation to Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant To 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the "DFC Objection") [D.I. 30].

54 Following entry of the Recognition Order, this Court entered orders dismissing the Involuntary Chapter 11 Case and the Prior Chapter 15 Case.

55 11 U.S.C. § 1509(b)(3) (directing a court to grant comity if it has granted recognition under section 1517 and subject to any limitations consistent with the policy of chapter 15).

56 11 U.S.C. § 1501(a). The language of this section closely tracks the Preamble of the UNCITRAL Model Law of Cross-Border Insolvency, which provides that:

> The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:
>
> (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
>
> (b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) Protection and maximization of the value of the debtor's assets; and

(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

57 11 U.S.C. § 1507(b).

58 11 U.S.C. § 1509(b)(3).

59 See In re Energy Coal S.P.A., 582 B.R. 619, 626–27 (Bankr. D. Del. 2018) (quoting In re Daebo Int'l Shipping Co., 543 B.R. 47, 52–53 (Bankr. S.D.N.Y. 2015)) (explaining that the Bankruptcy Code gives courts "broad discretion" and instructs them to be "guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief"); In re Grant Forest Prods., Inc., 440 B.R. 616, 621 (Bankr. D. Del. 2010) (stating that this broad power is designed to promote cooperation between U.S. courts and foreign courts in cross-border insolvency cases); In re Elpida Memory, Inc., No. 12-10947 CSS, 2012 WL 6090194, at *7–8 (Bankr. D. Del. Nov. 20, 2012) (reiterating the broad discretion certain sections of chapter 15 accord, consistent with principles of comity). See generally Hilton v. Guyot, 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895) (defining comity as the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws").

60 In re Energy Coal S.P.A., 582 B.R. at 627 (quoting In re Atlas Shipping A/S, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009)) (internal quotation marks and alterations omitted). See generally In re ABC Learning Ctrs. Ltd., 728 F.3d at 304–07 (discussing the origins of chapter 15 and emphasizing the role of comity in bankruptcy proceedings).

61 See In re ABC Learning Ctrs. Ltd., 728 F.3d at 306 (explaining that chapter 15 directs U.S. courts to act "in aid of the main proceedings, in preference to a system of full bankruptcies ... in each state where assets are found" (quoting H.R. Rep. No. 109–31(1), at 109 (2005) reprinted in 2005 U.S.C.C.A.N. 88, 171)).

62 11 U.S.C. § 1506.

63 In re Ephedra Prods. Liab. Litig., 349 B.R. 333 (S.D.N.Y. 2006) (citing H.R. Rep. No. 109–31(I) at 109, reprinted in 2005 U.S.C.C.A.N. 88, 172).

64 See In re PT Bakrie Telecom Tbk, 628 B.R. 859, 890–91 (Bankr. S.D.N.Y. 2021) (reading the public policy exception narrowly because the word "manifestly" restricts it to the "most fundamental" U.S. policies and finding that, prior to Purdue, non-consensual third-party releases were not manifestly contrary to U.S. public policy); In re Sino-Forest Corp., 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013) (emphasizing that courts should construe this section narrowly and finding that, prior to Purdue, non-consensual third-party releases were not manifestly contrary to U.S. public policy); In re Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) (construing the section narrowly and finding that, prior to Purdue, U.S. bankruptcy courts could enforce non-consensual third-party releases because they were not manifestly contrary to U.S. public policy). Compare In re Rede Energia S.A., 515 B.R. 69, 98 (Bankr. S.D.N.Y. 2014) (stating that section 1506 should be construed narrowly and used sparingly and finding that to enact the Brazilian plan would not be manifestly contrary to the public policies of the United States because "Brazilian bankruptcy law meets our fundamental standards of fairness and accords with the course of civilized jurisprudence"), with In re Toft, 453 B.R. 186, 198 (Bankr. S.D.N.Y. 2011) (finding that while a difference in U.S. law from the foreign law does not

necessarily preclude enforcement under chapter 15, the plan component at issue was affirmatively banned under U.S. law, enforcement would subject the enforcer to criminal liability, and enforcement would directly compromise privacy rights established in a comprehensive statutory scheme and based on constitutional rights).

65 Courts are divided on the statutory source of this limitation, but they agree that it is a central tenet of whether to afford foreign orders comity in insolvency proceedings, and it has remained so throughout multiple iterations of the Bankruptcy Code and the U.S. bankruptcy system itself. See Vertiv, Inc. v. Wayne Burt PTE, Ltd., 92 F.4th 169, 180 (3d Cir. 2024) (holding that a court should examine the foreign proceeding's fairness pursuant to principles of comity); In re Irish Bank Resol. Corp., 2014 WL 9953792 at *18 (explaining that a court must examine the procedural fairness of the foreign proceedings pursuant to the public policy exception of section 1506); In re PT Bakrie Telecom Tbk, 628 B.R. at 884 (clarifying that the considerations of fairness a court must examine in its determination of whether to enforce an order of a foreign court overlap with the considerations of Bankruptcy Code sections 1521 and 1507, all combining to "assure the just treatment and protection against prejudice of claim holders in the United States through adequate procedural protections"); In re Rede Energia S.A., 515 B.R. at 90 (holding that Bankruptcy Code section 1507 establishes the fairness considerations that courts must examine in determining whether to grant comity to a foreign court's order); In re Sino-Forest Corp., 501 B.R. at 662–63 (emphasizing the importance of ensuring fairness in the foreign proceeding when determining whether to grant a foreign order comity under chapter 15); In re Atlas Shipping A/S, 404 B.R. at 733 (explaining that before Congress enacted chapter 15, Bankruptcy Code section 304 required bankruptcy courts, when considering whether to enforce foreign orders, to determine that such enforcement would not prejudice the rights of U.S. citizens); Phila. Gear Corp. v. Phila. Gear de Mex., S.A., 44 F.3d 187, 193–94 (3d Cir. 1994) (directing the District Court, in determining whether to grant comity to a Mexican proceeding, to make findings on certain considerations of fairness, including whether the Mexican court was a duly authorized tribunal, whether the plan provided for equal treatment of creditors, whether recognition would be inimical to the U.S. policy of equality, and whether the U.S. creditor would be prejudiced); Canada S. Ry. Co. v. Gebhard, 109 U.S. 527, 536, 3 S.Ct. 363, 27 L.Ed. 1020 (1883) (considering whether to afford comity to a Canadian insolvency plan and determining that the Canadian proceedings did not deprive creditors of their property without due process of law).

66 In re Metcalfe, 421 B.R. at 697 (explaining that enforcement of relief in a foreign plan does not require identical relief to be available in the United States); In re Toft, 453 B.R. at 198 (emphasizing that the mere fact that U.S. law differs from the law of the foreign main proceeding does not preclude enforcement as "manifestly contrary" to U.S. public policy).

67 See In re Elpida Memory, Inc., 2012 WL 6090194, at *7–8 (explaining that comity is limited to instances where U.S. parties are provided the same fundamental protections that litigants in the United States would receive and finding that Bankruptcy Code section 1520(a) requires U.S. Bankruptcy Courts to apply the standard for a sale of assets under Bankruptcy Code section 363 to comport with this limitation); In re Agrokor d.d., 591 B.R. 163, 184 (Bankr. S.D.N.Y. 2018) (construing section 1506 to allow deference to the foreign court so long as the foreign proceedings are procedurally fair and not manifestly contrary to U.S. public policy); In re Atlas Shipping A/S, 404 B.R. at 733 ("Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy.").

68 Hilton v. Guyot, 159 U.S. 113, 202–03, 16 S.Ct. 139, 40 L.Ed. 95 (1895); accord In re Metcalfe, 421 B.R. at 698; see also In re Elpida Memory, Inc., 2012 WL 6090194, at *7 (requiring, for enforcement of the foreign plan, that the foreign proceeding afford the litigants the same fundamental protections that they would receive in the United States); In re PT Bakrie Telecom Tbk, 628 B.R. at 878–79 (looking to Hilton and other cases for

factors of fairness in determining whether to grant comity). In examining the procedural fairness of a foreign main proceeding, courts have also looked at:

> (1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to the debtors' potential claimants; (5) whether there are provisions for creditors' meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.

Vertiv, Inc. v. Wayne Burt PTE, Ltd., 92 F.4th at 181 (internal alterations omitted); accord In re PT Bakrie Telecom Tbk, 628 B.R. at 879 (quoting Allstate Life Ins. v. Linter Grp., 994 F.2d 996, 999 (2d Cir. 1993)); In re Sino-Forest Corp., 501 B.R. at 662–63 (quoting Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 249 (2d Cir. 1999)).

69 DFC Objection at 4.

70 11 U.S.C. 1123(b)(6).

71 Purdue, 603 U.S. at 217–18, 144 S.Ct. 2071.

72 Id. at 218, 144 S.Ct. 2071.

73 Id.

74 Ransom v. FIA Card Services, N.A., 562 U.S. 61, 69, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011) (quoting United States v. Ron Pair Enters., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)); see also In re Phila. Newspapers, LLC, 599 F.3d 298, 304 (3d Cir. 2010), as amended (May 7, 2010) ("It is the cardinal canon of statutory interpretation that a court must begin with the statutory language.").

75 See Jensen v. Pressler & Pressler, 791 F.3d 413, 418 (3d Cir. 2015) ("Our interpretive task begins and ends with the text of the statute unless the text is ambiguous or does not reveal congressional intent with sufficient precision to resolve our inquiry." (internal quotations omitted)); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); In re Smale, 390 B.R. 111, 113 (Bankr. D. Del. 2008) ("[T]he starting point is to examine the plain meaning of the text of the statute.... '[W]hen a statute's language is plain, the sole function of the courts, at least where the disposition by the text is not absurd, is to enforce it according to its terms.' " (quoting Hartford Underwriters Ins. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000))).

76 See In re WW Warehouse, Inc., 313 B.R. 588, 591 (Bankr. D. Del. 2004) ("If, after a studied examination of the statutory context, the natural reading of a provision remains elusive, the statute is ambiguous and the Court must seek guidance beyond the statutory text." (internal quotations omitted)); In re Smale, 390 B.R. at 114 ("[A]pplying the plain meaning of the statute is the default entrance—not the mandatory exit.").

77 Conn. Nat'l Bank v. Germain, 503 U.S. at 253, 112 S.Ct. 1146.

78 11 U.S.C. § 1521(a).

79 11 U.S.C. § 1507.

80 11 U.S.C. § 102(3).

81 See, e.g., Am. Sur. Co. v. Marotta, 287 U.S. 513, 517, 53 S.Ct. 260, 77 L.Ed. 466 (1933) (overruling lower court that found the word "includes" in section 1(9) of the Bankruptcy Act of 1898 to be one of limitation); Friedman v. P+P, LLC (In re Friedman), 466 B.R. 471, 482, n.20 (B.A.P. 9th Cir. 2012) (explaining and providing sources to support the proposition that "including" is not a word of limitation).

82 The term "trustee" is defined in chapter 15 as "includ[ing] a trustee [and] a debtor in possession in a case under any chapter of this title ...." 11 U.S.C. § 1502(6).

83 See, e.g., In re Arctic Glacier Int'l, Inc., 901 F.3d 162 (3d Cir. 2018) (enforcing third party releases in a Canadian plan of arrangement); In re Avanti Commc'ns Grp. PLC, 582 B.R. at 618 (finding that it had the power to enforce third-party releases under either section 1521(a)(7) or section 1507(a)).

84 Purdue, 603 U.S. at 218, 144 S.Ct. 2071.

85 Id. at 218–19, 144 S.Ct. 2071.

86 11 U.S.C. § 1521(a)(7).

87 Id.

88 11 U.S.C. § 1521(a)(7) ("except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)").

89 Id.

90 Purdue, 603 U.S. at 218, 144 S.Ct. 2071.

91 Id.; 11 U.S.C. § 1123(b)(6).

92 In re Thompson, 217 B.R. 375, 378 n.5 (B.A.P. 2d Cir. 1998).

93 11 U.S.C. § 1507(a).

94 See 11 U.S.C. § 1501 (establishing the scope and purpose of chapter 15).

95 11 U.S.C. § 1507(b).

96 Id.

97 In re Metcalfe, 421 B.R. at 697.

98 See Kaufman v. Allstate N.J. Ins., 561 F.3d 144, 155 (3d Cir. 2009) ("In interpreting a statute, the Court looks first to the statute's plain meaning and, if the statutory language is clear and unambiguous, the inquiry comes to an end." (citing Conn. Nat'l Bank v. Germain, 503 U.S. at 253–54, 112 S.Ct. 1146)).

99 For a fuller discussion of the fairness of the Mexican proceeding, see infra section B on section 1506's public policy considerations.

100 Even where the plain language of a statute is ambiguous, courts will often examine the congressional intent to confirm their interpretation, especially for chapter 15 cases. See In re Elpida Memory, Inc., 2012 WL 6090194, at *5 ("[I]n interpreting Chapter 15, 'the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.' " (quoting 11 U.S.C. § 1508)); In re Premier Int'l Holdings, Inc., 423 B.R. 58, 63–64 (Bankr. D.

Del. 2010) ("Moreover, regardless of whether the text is plain or ambiguous, it is appropriate to identify, if possible, a congressional purpose consistent with the Court's interpretation.").

101 In re ABC Learning Ctrs. Ltd., 728 F.3d at 304.

102 11 U.S.C. § 1501.

103 11 U.S.C. § 1508.

104 See In re ABC Learning Ctrs. Ltd., 728 F.3d at 306 (finding that chapter 15 directs courts to act in aid of main proceeding and to maximize assistance).

105 See In re Servicos de Petroleo Constellation S.A., 600 B.R. 237, 273–74 (Bankr. S.D.N.Y. 2019) ("[I]t is therefore appropriate for U.S. bankruptcy courts to consider interpretations from other international jurisdictions that have adopted the Model Law." (citing In re Fairfield Sentry Ltd., 714 F.3d 127, 136 (2d Cir. 2013)).

106 See In re Avanti Commc'ns Grp. PLC, 582 B.R. at 618 (finding such schemes common under United Kingdom law); In re Metcalfe, 421 B.R. at 699 (explaining that a Canadian court had the power to enter such relief).

107 See supra note 35, 44–46 and accompanying text (explaining that the Mexican court here found the releases to be valid under Mexican law); Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.), 701 F.3d 1031, 1039–40 (5th Cir. 2012) (explaining that a Mexican court approved the releases at issue and that relief available in a foreign court need not be identical to or available under U.S. law).

108 United States v. Miller, 604 U.S. ——, ——, 145 S.Ct. 839, —— L.Ed.2d —— (2025) (quoting Davis v. Mich. Dept. of Treasury, 489 U. S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)).

109 See In re ABC Learning Ctrs. Ltd., 728 F.3d at 306 (explaining courts should "maximize assistance").

110 See In re Energy Coal S.P.A., 582 B.R. at 627 (quoting In re Atlas Shipping A/S, 404 B.R. at 733) (explaining how comity to foreign court orders in the bankruptcy context is particularly important to promote the goals of bankruptcy).

111 See 11 U.S.C. § 1521(a)(7) ("except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)").

112 See 11 U.S.C. § 1507(b).

113 See 11 U.S.C. § 1506.

114 See In re Atlas Shipping A/S, 404 B.R. at 741 (acknowledging the boundaries for discretionary relief that Congress set in chapter 15).

115 In re ABC Learning Ctrs. Ltd., 728 F.3d at 308 (quoting H.R. Rep. No. 109–31(1), at 109 reprinted in 2005 U.S.C.C.A.N. 88, 172).

116 In re ENNIA Caribe Holding N.N., 594 B.R. 631, 640 (Bkrtcy.S.D.N.Y. 2018) (citing In re Toft, 453 B.R. at 193).

117 In re ABC Learning Ctrs. Ltd., 728 F.3d at 310 (quoting In re Qimonda AG Bankr. Litig., 433 B.R. 547, 570 (E.D. Va. 2010)).

118 Estrada Supp. Dec. ¶ 25.

119 Hilton v. Guyot, 159 U.S. at 202–03, 16 S.Ct. 139. Some courts have held that even where a claimant does not object to the fairness of the foreign proceeding, the bankruptcy court should nevertheless make a finding that the foreign proceeding was fair. See In re PT Bakrie Telecom Tbk, 628 B.R. at 884 (finding that, to enforce a foreign plan, a bankruptcy court must make a finding that the foreign proceeding abided by fundamental standards of procedural fairness).

120 See, e.g., In re Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 114–17 (Bankr. S.D.N.Y. 2012) (finding a Mexican insolvency proceeding fair); In re Metrofinanciera, S.A.P.I. de C.V., Sociedad Financiera de Objeto Multiple, E.N.R., No. 10-20666, 2010 WL 10075953, *3–4 (Bankr. S.D. Tex. Sept. 24, 2010) (same); JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 428 (2d Cir. 2005) (same).

121 See, e.g., In re Metrofinanciera, 2010 WL 10075953, at *3.

122 See, e.g., id.

123 Ley de Concursos Mercantiles [LCM] (Bankruptcy Law) art. 64, Diario Oficial de la Federación [DOF] 12-5-2000, últimas reformas DOF 14-1-2014 (Mex.); see also Estrada Supp. Dec. ¶ 25 (confirming the availability under Mexican law).

124 Estrada Supp. Dec. ¶¶ 15–21.

125 Id. ¶ 22.

126 Id. ¶ 23.

127 Id.

128 Id. It bears noting that should the Mexican appellate court determine that the Release is impermissible, the Release would become ineffective here. This Court is not granting the Release. Instead, it is simply enforcing the Concurso Plan. If the Release provision of the Concurso Plan is later altered as a result of the DFC's appeal, the Release would only be enforceable in the United States—if at all—to the extent provided by the Concurso Plan.

129 Id. ¶ 24.

130 Concurso Order at 60.

131 Cf. Vertiv, Inc., 92 F.4th at 181 ("[A] United States court is well within its discretion to deny the extension of comity to foreign proceedings that deny 'notice and opportunity to be heard' to a party opposing comity.").

132 But see In re Metcalfe, 421 B.R. at 697 (explaining that even if relief in a foreign order is not typically available in a U.S. proceeding, it may be available in a chapter 15 proceeding pursuant to principles of comity).

133 See Purdue, 603 U.S. at 222, 144 S.Ct. 2071 (noting that "the [Bankruptcy Code] *does* authorize courts to enjoin claims against third parties without their consent, but does so in only *one* context" (emphasis in original)).

134 See In re Metcalfe, 421 B.R. at 697 (so holding); In re Rede Energia S.A., 515 B.R. at 91 (holding the same and emphasizing that the "public policy exception is clearly drafted in narrow terms and the few reported cases that have analyzed section 1506 at length recognize that it is to be applied sparingly" (internal quotations and alterations omitted)); In re ABC Learning Ctrs., 728 F.3d at 311 (finding that although Australian insolvency law used a different prioritization scheme from U.S. bankruptcy law, recognizing and enforcing the Australian proceeding would not be manifestly contrary to U.S. public policy, and in fact, refusing to recognize and

enforce it would allow claimants to circumvent the Australian courts and undermine U.S. public policies of ordered proceedings and equal treatment).

135 In re Vitro, 701 F.3d at 1062.

136 Id.

137 Id. at 1067. Because the court decided that case on other grounds, it did not rule on whether third-party releases would be manifestly contrary to public policy under section 1506. Id. at 1069–70

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Only the Westlaw citation is currently available.
United States Bankruptcy Court, N.D. Florida, Pensacola Division.

IN RE: Karen DAVIDSON,
Blok Industries, Inc., Debtors.
Franklin J. Spring, Individually and d/b/a Spring Trading Group, LLC, Robert Bretherton, Martin Meeks, and BTEC Enterprises, Inc., Plaintiffs,
v.
Karen Davidson, Blok Industries, Inc., Defendants.

Case Nos: 23-30018, 23-30019
|
Adversary Case No. 23-3005-JCO
|
Signed February 14, 2025

Chapter 11, Sub V

MEMORANDUM OPINION AND ORDER

JERRY C. OLDSHUE, JR., U. S. BANKRUPTCY JUDGE

***1** The above-styled Adversary Proceeding came before this Court on the Motion to Dismiss filed by Defendants, Karen Davidson and Blok Industries, Inc., Plaintiff's Response, Defendant's Reply, Plaintiff's Response to Reply, and Plaintiff's Supplemental Response. (AP Docs. 26, 34, 39, 48, 85). Proper notice of hearing was given and appearances were noted on the record. Upon consideration of the pleadings, briefs, arguments of counsel, and record, this Court finds that the Motion to Dismiss is due to be GRANTED as to Blok Industries Inc. and DENIED WITHOUT PREJUDICE as to Karen Davidson for the reasons below. [1]

JURISDICTION

This Court has jurisdiction to hear these matters pursuant to 28 U.S.C. §§ 1334 and 157, the Order of Reference by the District Court dated June 5, 2012, and General Order 2024-O entered by the Eleventh Circuit Judicial Council on August 8, 2024. Determinations regarding the dischargeability of debts are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(i).

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

In August 2020, Franklin Spring, Spring Trading Group, LLC, Robert Bretherton, Martin Meeks, and BTEC Enterprises, Inc. (collectively "the Spring Creditors") initiated "State Court Litigation" against Karen Davidson, ("Davidson"), Block Industries Inc.("Blok"), and numerous other Defendants in the Superior Court of Fulton County, Georgia. [2] (AP 23-3004, doc. 1-2.) Karen Davidson filed a Chapter 11 Subchapter V Voluntary Petition on January 9, 2023("Individual BK").(Bankr. N.D. Fla. Case No. 23-30018). Davidson's bankruptcy schedules reflect her 100% interest in Blok Industries, Inc. and the pre-petition litigation claims asserted by the Spring Creditors.(Individual BK doc.39 at 5, 12,13). Blok Industries, Inc. filed a Chapter 11 Subchapter V Voluntary Petition on January 9, 2023.("Corporate BK").(Bankr. N.D. Fla.23-30019). Blok's schedules also reflect pre-petition litigation claims asserted by the Spring Creditors. (Corporate BK doc.19 at 6-8). On January 11, 2023, this Court granted the Debtors' Motion to jointly administer the Individual and Corporate Bankruptcy Cases. (Individual BK, doc 14; Corporate BK, doc. 12).

On April 6, 2023, Blok and Davidson removed the pre-petition State Court Litigation to this Court. (AP 23-3004, doc. 1-2.). The State Court Litigation "Case Information" sheet attached to the Notice of Removal reflects that an array of pleadings and discovery had been filed and various orders had been entered during the three years that the State Court Litigation had been pending. (AP 23-3004, doc.1-1 at 131 et seq.). This Court abstained from adjudicating the Removed Action and granted the parties relief to pursue the state court claims to final disposition. (AP 23-3004, doc. 36). The June 5, 2024 Abstention Order explained that abstention and remand was warranted because: state law issues predominated, the state-law claims had no independent basis for federal jurisdiction; the state-law claims were not core proceedings; the state court action had been pending for 31 months; the Georgia Superior Court possessed the requisite expertise to adjudicate the matters; a jury trial was demanded, the presence of non-debtor parties, forum nonconveniens, comity, and judicial economy. [3] *Id.*

***2** On April 24, 2023, the Spring Creditors filed the above-styled Adversary Complaint against Karen Davidson and Blok Industries, Inc., to Determine Dischargeability of Debt under 11 U.S.C. § 523. (AP doc. 1). The Plaintiffs' amended Complaint seeks to have their claims declared nondischargeable as to Davidson and Blok based on allegations of false representation and actual fraud under 11 U.S.C. 523(a)(2); fiduciary fraud/embezzlement under 523(a)(4) and willful and malicious injury under 11 U.S.C. 523(a)(6). (AP doc. 33). The Plaintiffs also assert various theories of recovery against Davidson and Blok under Georgia Law. [4] (*Id.*). The Defendants' Motion to Dismiss and Reply to the Amended Complaint assert that: (1) Blok should be dismissed because corporate debtors that receive a discharge under § 1192 are not subject to 523(a); (2) fraud is not plead with the requisite particularity; (3) Plaintiffs have not articulated the existence of a technical or express trust and any fiduciary duties, if any, owed by Davidson; (4) the allegations pertaining to the Plaintiffs' ability to collect upon their debt, are insufficient under Section 523(a)(6); (5) Plaintiffs lack standing to pursue such claims for alter ego, breach of fiduciary duty, and wrongful dissolution because such claims are derivative claims that are property of the estate in Blok's bankruptcy case; and; (6) the remaining causes of action mirror the allegations in the Removed Action.(AP docs. 26, 39).

ANALYSIS

To survive a Motion to Dismiss, allegations in an adversary complaint must state a claim upon which relief can be granted. *FRCP12(b)(6)*; *Bankr. R 7012; 5200 Enterprises Ltd. v. City of New York,* 22 F.4th 970 (11th Cir. 2022)(citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)(*explaining that a plaintiff's complaint must allege facts sufficient to state a claim to relief that is plausible on its face)). Thus, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and the court "must accept as true all of the allegations contained in a complaint." *Id.* A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *In re Johannessen*, 76 F.3d 347, 349 (11th Cir. 1996). With this framework in mind, this Court will first address the legal issue of whether the discharge exceptions under § 523(a) apply to Subchapter V corporate debtors under § 1192.

The Discharge Exceptions Set Forth In 11 U.S.C. § 523(a) Are Only Applicable to Individual Subchapter V Debtors Under 11 U.S.C.1192(b).

Section 1192 was added to the Bankruptcy Code with the enactment of the Small Business Reorganization Act of 2019 ("SBRA"), which created Subchapter V. It provides for discharge of Subchapter V debtors upon a non-consensual confirmation and states,

> If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt--
>
> (1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or
>
> (2) of the kind specified in section 523(a) of this title....
>
> *11 U.S.C. § 1192*

Section 523 of the Bankruptcy Code provides that, " a discharge under section 727, 1141, 1192 1228(a), 1228(b), or 1328(b) of this title does not discharge an *individual* debtor from any debt ..." that is enumerated in the 20 categories of debts listed therein. *11 U.S. C. § 523(a)*. The juxtaposition of § 1192(2) and the reference to "individual debtor" in § 523(a)'s preamble has resulted in differing opinions on the issue of whether the § 523 exceptions to discharge apply to corporate debtors. See *Matter of GFS Indus., LLC.*, 99 F.4th 223 (5th Cir. 2024); *In re Cleary Packaging, LLC*, 36 F.4th 509, 517 (4th Cir. 2022); *R & W Clark Constr., Inc.*, 24 CV 1463, 2024 WL 4789403 (N.D. Ill. Nov. 14, 2024); *In re Off-Spec Sols., LLC*, 651 B.R. 862 (BAP. 9th Cir. 2023); *In re 2 Monkey Trading, LLC*, 650 B.R. 521 (Bankr. M.D. Fla. 2023); *In re Hall*, 651 B.R. 62 (Bankr. M.D. Fla. 2023); *In re Rtech Fabrications, LLC*, 635 B.R. 559 (Bankr. D. Idaho 2021).

***3** The Court of Appeals for the Fourth and Fifth Circuits and the Northern District of Illinois have held that *both* individual and corporate debtors covered by § 1192 are subject to the discharge exceptions of § 523(a). *Matter of GFS Indus*., LLC., 99 F.4th 223 (5th Cir. 2024); *In re Cleary Packaging*, LLC, 36 F.4th 509, 517(4th Cir. 2022); *Chi. & Vicinity Laborers' Dist. Council Pension Plan, et al., v. R & W Clark Constr., Inc.*, 24 CV 1463, 2024 WL 4789403 (N.D. Ill. Nov. 14, 2024). The Fourth Circuit was the first Court of Appeals to address this issue in *In re Cleary Packaging, LLC.* 36 F.4th 509. In analyzing the statutory language of § 1192 which excepts from discharge "any debt" ... "of the kind specified in section 523(a)", the Fourth Circuit reasoned that, "[t]he section's use of the word 'debt' is, we believe, decisive, as it does not lend itself to encompass the 'kind' of debtors discussed in the language of § 523(a) and "[t]his is confirmed yet more clearly by the phrase modifying 'debt'— i.e., 'of the kind'." *Id.* at 515. Thus, it concluded that the combination of the terms 'debt' and 'of the kind' indicates that Congress intended to reference *only the list* of non-dischargeable debts found in § 523(a)." *Id.* Further, the Fourth Circuit added that, " — to the extent that one might find tension between the language of § 523(a) addressing individual debtors and the language of § 1192(2) addressing both individual and corporate debtors — that the more specific provision should govern over the more general." *Id.* (citing, *In re Breezy Ridge Farms, Inc.,* No. 09-1011, 2009 WL 1514671, at 2 (Bankr. M.D. Ga. May 29, 2009)("If the two provisions may not be harmonized, then the more specific will control over the general" (quoting *In re Bateman*, 331 F.3d 821, 825 (11th Cir. 2003)). Upon such reasoning, the Fourth Circuit concluded that § 1192(2) provides discharges to small business debtors, whether they are individuals or corporations, *except* with respect to the kinds of debts listed in § 523(a). *Id.* at 518.

Although the Fifth Circuit noted the complicated "textual awkwardness in the Bankruptcy Code, it ultimately sided with the Fourth Circuit's holding of *In re Cleary*, finding that in non-consensual Subchapter V proceedings, both corporate and individual debtors are subject to the § 523 exceptions to discharge. *Matter of GFS Indus ., L.L.C.*, 99 F.4th 223 (5th Cir. 2024). The Fifth Circuit explained that since the statutory language of § 523(a) enumerates categories or "kinds" of non-dischargeable debts, "the most natural reading of § 1192(2) is that it subjects both corporate and individual Subchapter V debtors to the categories of discharge exceptions listed in § 523." *Id.* at 228. The Court reasoned that, "the combination of the terms 'debt' and 'of the kind' indicates that Congress intended to reference only the list of non-dischargeable debts found in § 523(a)."). *Id.* The Court further stated that,

> ... § 1192(2) does not say: "kind of debtor." Congress could have enacted those words in § 1192 but instead chose "kind of debt." That text cannot be read to incorporate a distinction between "individual" and "corporate" debtors. Rather, as the Fourth Circuit correctly reasoned, the reference to "kind[s]" of debt in § 1192 serves as "a shorthand to avoid listing all 21 types of debts" in § 523(a), "which would indeed have expanded the one-page section to add several additional pages to the U.S. Code."... In addition, to the extent §§ 523(a) and 1192(2) clash, § 1192(2) governs as the more specific provision. Section 1192 deals directly with Subchapter V discharges, whereas § 523(a) cuts across various Bankruptcy Code provisions. See § 523(a) (listing "section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title"). As the Fourth Circuit observed, "to the extent that one might find tension" between the two sections, "the more specific provision should govern over the more general ...
>
> *Id.*

Thus, the Fourth and the Fifth Circuit have disregarded the reference to "individual debtor" in § 523's preamble and construed the discharge exceptions to apply to both individual and corporate debtors under § 1192(2). However, this issue is not well-settled as other courts have construed the same statutory provisions differently.

The Ninth Circuit Bankruptcy Appellate Panel and other bankruptcy courts, including those in the Eleventh Circuit, have held that the § 523 non-dischargeability provisions apply only to individual Subchapter V debtors. *In re Off-Spec Sols., LLC*, 651 B.R. 862 (BAP. 9th Cir. 2023); *In re 2 Monkey Trading, LLC*, 650 B.R. 521 (Bankr. M.D. Fla. 2023); *In re Hall*, 651 B.R. 62 (Bankr. M.D. Fla. 2023); *In re Rtech Fabrications, LLC*, 635 B.R. 559 (Bankr. D. Idaho 2021). These courts have found that the better interpretation of § 1192 is that it incorporates § 523(a)'s limited applicability to individuals. They reasoned that: (1) when the statute's language is plain, the sole function of the courts—at least where the disposition required by the texts is not absurd—is to enforce it according to its terms; (2) courts may look to other sources to determine congressional intent, such as the canons of construction or the statute's legislative history; and (3) effect should be given to all provisions of a statute, so that no part will be inoperative or superfluous, void or insignificant. See *Off-Spec* at 866 (citing *Hartford Underwriters Ins. Co. v.*

Union Planters Bank., N.A., 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000); *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004)). In *Off-Spec.*, the Ninth Circuit BAP stated that,

> ***4** Section 523(a) unambiguously applies only to individual debtors. The reference in § 1192 to debts "of the kind specified in section 523(a)" can reasonably be construed to mean the list of debts, but nothing in § 1192 obviates the express limitation in the preamble of § 523(a) or otherwise expands its scope to corporate debtors. (citation omitted.) ("[W]e presume, absent clear indications to the contrary, that Congress did not intend to change preexisting bankruptcy law or practice in adopting [or amending] the Bankruptcy Code ...."); *Cohen v. de la Cruz*, 523 U.S. 213, 221, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998) (refusing to read the Bankruptcy Code as departing from past bankruptcy practice without a clear indication that Congress intended to do so.

Id. at 867.

The Ninth Circuit BAP further explained that as the Small Business Reorganization Act of 2019 ("SBRA") amended § 523(a) by adding § 1192 to the list of discharge provisions to which it applies, extracting only the list of nondischargeable debts from § 523(a) without its limitation to individuals, would render the amendment surplusage. *Id.* (citing *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386, 133 S.Ct. 1166, 185 L.Ed.2d 242 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.")

The Ninth Circuit BAP disagreed with the rule of statutory construction applied in *Cleary*[5] explaining that it only applies when statutes cannot be reconciled. *Off-Spec at* 868. Instead, it found it appropriate to harmonize the statutes and that, "Section 1192 incorporates the types of debts that are nondischargeable under a nonconsensual subchapter V plan, and § 523(a) limits the scope of nondischargeability to individual debtors." *Id.* (citing *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)(explaining courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is their duty, absent a clearly expressed congressional intention to the contrary, to regard each as effective); *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 698 (D.C. Cir. 2014)("Absent congressional intent to the contrary, it is the court's duty to harmonize statutory provisions to render each effective.")).

Further, the Ninth Circuit BAP, found that its interpretation was consistent with the purpose of Subchapter V and the limited scope of discharge exceptions applicable to corporate debtors prior to Subchapter V. *Id.* at 868. It recognized that the SBRA was created as an expedited process for small business debtors to efficiently reorganize, remains part of Chapter 11, and should be interpreted in accordance with the overall statutory scheme. The *Off-Spec* Court also noted that, when establishing chapter 11 under the Bankruptcy Code in 1978, Congress made an intentional decision to depart from pre-Code practice and eliminate exceptions to discharge for corporate debtors based on public policy considerations, it has limited corporate discharge only once by enacting § 1141(d)(6)[6] and since then, the corporate discharge has been strenuously protected. *Id.* at 868, 869 (citing *In re Rtech Fabrications, LLC*, 635 B.R. 559, 565 (Bankr. D. Idaho 2021); see also, *In re Am. Dental of LaGrange, LLC*, No. 24-10485-RMM, 2025 WL 384536, at 6 (Bankr. M.D. Ga. Feb. 3, 2025)(explaining that as a general matter, § 523(a) exceptions do not apply to a corporate debtor, and a corporate debtor's discharge under § 1141(d) encompasses debts of the kind identified in § 523(a) (citing *In re Spring Valley Farms, Inc.*, 863 F.2d 832, 834 (11th Cir. 1989)(" 'It is almost undebatable and universally held that a corporate Chapter 11 debtor is not subject to the dischargeability provisions of 11 U.S.C.A. § 523."); *In re BFW Liquidation, LLC*, 471 B.R. 652, 667 (Bankr. N.D. Ala. 2012) (" If the debtor is not an individual, no proper question can be raised in a Chapter 11 case as to the dischargeability of a particular debt."). Consistent with the SBRA's purpose and limited application of § 523 to individual debtors prior to its enactment, the Ninth Circuit noted that, "the suggestion that Congress incorporated 19 new exceptions to discharge for small corporations in a bill that was introduced in April 2019, and signed into law by the President in April 2019, seems not only improbable but also contradicts years of bankruptcy law and policy." *Off-Spec* at 869 (citing *In re Rtech* at 566). Thus, the Ninth Circuit BAP held that § 523(a) does not apply to corporate debtors under § 1192(b). Recent bankruptcy decisions in the Eleventh Circuit have reached the same conclusion. See *In re Hall*, 651 B.R. 62, 68 (Bankr. M.D. Fla. 2023)("The Court reaches this conclusion primarily because the SBRA amended the language of § 523(a) to add a reference to § 1192. If Congress intended for § 523(a) exceptions to apply

to corporations receiving a discharge under § 1192, then this addition was unnecessary"); *In re 2 Monkey Trading, LLC*, 650 B.R. 521, 523 (Bankr. M.D. Fla. 2023), motion to certify appeal granted, No. 6:22-BK-04099-TPG, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023)(agreeing with courts holding that § 523(a) applies only to individuals, and not to corporations proceeding under Subchapter V).

***5** Upon consideration of the conflicting case law on this issue, this Court finds the reasoning of the Ninth Circuit BAP and the bankruptcy courts in the Eleventh Circuit, holding the exceptions to discharge under § 523(a) apply only to individual debtors under § 1192(2), convincing. Such decisions provide the best statutory interpretation of § 1192's incorporation of 523(a) by giving effect to all the statutory language, recognizing the long-standing application of § 523(a) to only individual debtors, and comporting with the overall purpose of the SBRA. Accordingly, this Court finds that the exceptions to discharge under § 523(a) only apply to individuals in Subchapter V. Thus, the Spring Creditors' non-dischargeability claims under § 523(a) fail to state a claim against Blok Industries, Inc. upon which relief can be granted.

It Is Appropriate To Hold Dischargeability Proceedings In Abeyance Until Conclusion Of Pending State Court Proceedings Adjudicating Liability

This Court's Order of June 5, 2024, abstained from exercising jurisdiction over the Plaintiffs' claims against the Defendants (including Davidson) and remanded the matter to the Superior Court of Fulton County, Georgia for disposition of the substantive claims which had been pending since 2020. The facts and theories of liability set out in the Plaintiffs' State Court Complaint and this Adversary are essentially the same: fraud, breach of fiduciary duty, wrongful dissolution of partnership, alter-ego, breach of contract, intentional interference with contractual relationship, and Georgia RICO. Although the phrasing or titles may differ, the substantive basis of the Plaintiffs' allegations against Davidson in the above-styled adversary proceeding stem from the same nucleus of operative facts that serve as the basis for the State Court Litigation. While the court recognizes that the Plaintiffs seek to preserve their ability to contest dischargeability, they must first establish the existence of a debt. See *In re Miller*, 589 B.R. 550, 560–61 (Bankr. S.D. Miss. 2018). This Court has already determined that the appropriate forum for such adjudication is the Superior Court of Fulton County, Georgia. Plaintiffs are not entitled to simultaneously pursue claims based on the same facts and allegations in two separate actions. As the doctrines of res judicata, collateral estoppel, and issue preclusion prevent parties from obtaining multiple bites at the same apple, it is not necessary or appropriate for this Court to undertake a dual track of parallel litigation related to the substantive merits of the Plaintiffs' purported claims against Davidson. Additionally, duplicative proceedings would waste judicial resources and offend the notions of comity with the state court. Thus, this Court concludes that it is appropriate to hold this Adversary Proceeding in abeyance pending the outcome of the State Court Litigation. [7]

CONCLUSION

For the reasons above, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. The Defendants' Motion to Dismiss is GRANTED as to ***Blok Industries* Inc**. *and* DENIED WITHOUT PREJUDICE as to **Karen Davidson**.

2. The Plaintiffs' non-dischargeability claims under 11 U.S.C. § 523(a) against Defendant, Karen Davidson in this Adversary Proceeding are held in abeyance pending the outcome of the State Court Litigation.

3. Counsel for the parties are directed to notify this Court promptly upon adjudication of the Plaintiffs' claims against Davidson in the State Court Litigation.

***6** 4. If the Plaintiffs seek to continue to pursue non-dischargebility claims against Davidson upon the conclusion of the State Court Litigation, they must promptly amend their Adversary Complaint accordingly. Upon any such amendment, Defendant may file a subsequent Motion to Dismiss, if warranted.

All Citations

Slip Copy, 2025 WL 511226

Footnotes

1 The Court reserves the determination of whether the claims against Karen Davidson are non-dischargeable until disposition of the related pending state court litigation.

2 Business Case Division No. 4, Case No 2020CV339777. The Spring Plaintiffs' Complaint demanded a jury trial and set out various counts including, Georgia Uniform Fraudulent Transfer Act/Injunctive Relief, Fraud, Georgia RICO (Racketeer Influence and Corrupt Organizations), Civil Conspiracy, Unjust Enrichment, Breach of Fiduciary Duty, Wrongful Dissolution of Partnership, Breach of Contract, Intentional Interference with Contractual Relationships, Intentional Interference with Business Relationships, Respondeat Superior and/or Vicarious Liability, Alter Ego, Accounting, Punitive Damages, and Attorney's Fees.

3 This Court's June 5, 2024, Abstention Order is incorporated by reference herein.

4 These include: Alter Ego, Breach of Fiduciary Duty, Wrongful Dissolution of Partnership, Breach of Contract, Intentional Interference with Contractual Relationships, Racketeer Influence and Corrupt Organizations action.(AP doc. 33).

5 "... that the more specific provision should govern over the more general." *In re Cleary Packaging, LLC* at 509.

6 An exception in which it did so expressly and only after it took eight years to enact. *In Re Ritech*, n.5 (Section 1141(d)(6) was first introduced in 1998 as part of the Consumer Bankruptcy Reform Act of 1998. H.R. 3150, 105th Cong. (1998). It did not become law until 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. P.L. 109-8, 119 Stat. 126 (2005)).

7 In this regard, the Court strongly suggests that the parties seek to obtain a ruling from the State Court that is clear with respect to the standards of non-dischargeability under § 523(a); if the State Court's ruling is not clear regarding the standards of non-dischargeability under § 523(a), the burden of proof will remain with the Spring Plaintiffs to prove that any award of damages is in fact nondischargeable.

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KeyCite Yellow Flag
Declined to Follow by Matter of GFS Industries, L.L.C., 5th Cir.(Tex.), April 17, 2024

651 B.R. 862
United States Bankruptcy Appellate Panel of the Ninth Circuit.

IN RE: OFF-SPEC SOLUTIONS, LLC, Debtor.
Kristina Jayn Lafferty, Appellant,
v.
Off-Spec Solutions, LLC; CVF Capital Partners, Inc.; Kevin Choate; Cool Mountain Transport; CVF Capital Partners, Inc., Appellees.

BAP No. ID-23-1020-GCB
|
Bk. No. 22-00346-NGH
|
Adv. No. 22-06020-NGH
|
Filed July 6, 2023

Synopsis

Background: Creditor filed nondischargeability complaint against corporate debtor proceeding under Subchapter V of Chapter 11. The United States Bankruptcy Court for the District of Idaho, Noah G. Hillen, J., granted debtor's motion to dismiss for failure to state a claim. Creditor appealed.

[Holding:] The Bankruptcy Appellate Panel, Gan, J., held that as matter of first impression, nondischargeability provisions were not applicable to corporate debtor in Subchapter V of Chapter 11.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

West Headnotes (13)

[1] **Bankruptcy** Conclusions of law; de novo review

Bankruptcy Appellate Panel (BAP) reviews de novo a bankruptcy court's order granting a motion to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

[2] **Bankruptcy** Conclusions of law; de novo review

Bankruptcy Appellate Panel (BAP) reviews de novo a bankruptcy court's interpretation of the Bankruptcy Code.

[3] **Bankruptcy** Conclusions of law; de novo review

"De novo" means review is independent, with no deference given to the bankruptcy court's conclusion.

[4] **Statutes** Language

To resolve question of statutory construction, court begins with language of statute itself.

[5] **Statutes** Superfluousness

Court construes statute to give effect to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.

[6] **Statutes** Purpose and intent; determination thereof

Statutes Plain, literal, or clear meaning; ambiguity

If statutory language is ambiguous, court may look to other sources to determine congressional intent, such as canons of construction or statute's legislative history.

[7] **Statutes** What constitutes ambiguity; how determined

Statutory language is ambiguous only if it gives rise to more than one reasonable interpretation.

[8] **Bankruptcy** Debts and Liabilities Discharged

Bankruptcy Effect as discharge

Exceptions to discharge in bankruptcy applied to discharge under Subchapter V, but only as to individual debtors. 11 U.S.C.A. §§ 523(a), 1192.

11 Cases that cite this headnote

[9] **Statutes** General and specific statutes

While it is commonplace of statutory construction that the specific governs the general, this canon is valid only where statutes cannot be reconciled.

[10] **Statutes** Construing together; harmony

Absent clearly expressed congressional intent to the contrary, it is court's duty to harmonize statutory provisions and render each effective.

[11] **Bankruptcy** Debts and Liabilities Discharged

Bankruptcy Effect as discharge

Bankruptcy Code's nondischargeability provisions were not applicable to corporate debtor that confirmed a nonconsensual plan under Subchapter V of Chapter 11. 11 U.S.C.A. §§ 523(a), 1192.

7 Cases that cite this headnote

[12] **Constitutional Law** Judicial rewriting or revision

Statutes Superfluousness

Redundancies are common in statutory drafting, sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication, and redundancy in one portion of a statute is not a license for a court to rewrite or eviscerate another portion of the statute contrary to its text.

1 Case that cites this headnote

[13] **Statutes** Language

When interpreting a statute, court must presume that Congress says in a statute what it means and means in a statute what it says there.

***863** Appeal from the United States Bankruptcy Court for the District of Idaho Noah G. Hillen, Bankruptcy Judge, Presiding

Attorneys and Law Firms

Ronald Walter Brilliant argued for appellant;

Matthew T. Christensen of Johnson May, PLLC argued for appellees Off-Spec Solutions, LLC and Cool Mountain Transport.

Before: GAN, CORBIT, and BRAND, Bankruptcy Judges.

OPINION

GAN, Bankruptcy Judge:

INTRODUCTION

This appeal requires us to decide, as a matter of first impression, whether the nondischargeability provisions of § 523(a) [1] are applicable to corporate debtors who confirm nonconsensual plans under subchapter V of chapter 11.

Appellant Kristina Jayn Lafferty ("Appellant") filed a § 523(a)(6) complaint against debtor Off-Spec Solutions, LLC ("Debtor"), and cited the Fourth Circuit's holding in *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022), for the proposition that debts specified in § 523(a) are not dischargeable by any debtor, corporate or individual, in a subchapter V case confirmed under § 1191(b).

***864** The bankruptcy court was not persuaded by *Cleary*, and relied on its prior decision, *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications, LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021), and *Avion Funding, LLC v. GFS Industries, LLC*

(In re GFS Industries, LLC), 647 B.R. 337 (Bankr. W.D. Tex. 2022), to hold that § 1192 does not make the debts specified in § 523(a) nondischargeable for corporate debtors.

Although the bankruptcy court's construction leads to discordance between a discharge under § 1192 and a discharge under a consensual confirmation, its reasoning is sound and more persuasive than that offered by Appellant and *Cleary*. We agree that the language and context of the relevant statutes indicate Congress's intent to make § 523(a) applicable in subchapter V only to individual debtors. Accordingly, we AFFIRM.

FACTS [2]

In August 2022, Debtor filed a chapter 11 petition as a corporate debtor. [3] Debtor indicated it was eligible to be a debtor under § 1182(a), and it elected to proceed under subchapter V.

In December 2022, Appellant filed a proof of claim and an adversary complaint against Debtor, its owners, and its parent company, asserting a nondischargeable claim under § 523(a)(6). Appellant alleged that, while employed by Debtor, she was sexually harassed and discriminated against by her manager. According to Appellant, despite notifying Debtor and its owners, they took no corrective action, and instead, retaliated by firing her. Appellant made a claim of discrimination to the Idaho Human Rights Commission ("IHRC") and the Equal Employment Opportunity Commission. The IHRC found probable cause that Appellant suffered sexual harassment, discharge based on retaliation, and discharge based on sex. After Debtor filed its bankruptcy petition, the IHRC administratively dismissed the case and gave Appellant notice of her right to bring a private action against the defendants.

In response to Appellant's complaint, Debtor filed a motion to dismiss pursuant to Civil Rule 12(b)(6), made applicable by Rule 7012. Debtor argued that Appellant failed to state a cognizable claim for relief because, as the court previously held in *Rtech Fabrications*, § 523(a) applies in subchapter V only to individual debtors. Debtor acknowledged the Fourth Circuit's subsequent decision in *Cleary* but maintained that the reasoning and analysis in *GFS Industries* demonstrated that *Cleary* was incorrectly decided.

Appellant opposed the motion and argued that § 1192 applies to both corporate and individual debtors and excepts the types of debts specified in § 523(a) without regard to the type of debtor. [4]

***865** The bankruptcy court rendered an oral ruling granting Debtor's motion to dismiss, holding that § 523(a) does not apply to corporate debtors in subchapter V. The court reasoned that the interpretation offered by *Cleary* fails to give effect to the plain language of § 523(a), which specifically states that its provisions are applicable to individual debtors who receive a discharge under § 1192. The bankruptcy court entered an order dismissing the complaint, and Appellant timely appealed. [5]

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

ISSUE

Did the bankruptcy court err by interpreting § 1192 to except debts specified in § 523(a) from discharge for only individual debtors?

STANDARDS OF REVIEW

[1] **[2]** **[3]** We review de novo a bankruptcy court's order granting a motion to dismiss under Civil Rule 12(b)(6). *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012) (en banc). We also review de novo a bankruptcy court's interpretation of the Bankruptcy Code. *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362, 365 (9th Cir. BAP 2011). De novo means review is independent, with no deference given to the bankruptcy court's conclusion. *See First Ave. W. Bldg., LLC v. James (In re Onecast Media, Inc.)*, 439 F.3d 558, 561 (9th Cir. 2006).

DISCUSSION

The bankruptcy court's dismissal of the adversary complaint turns purely on the legal question whether a corporate debtor

under subchapter V can be liable for debts specified in § 523(a). Neither this Panel nor the Ninth Circuit Court of Appeals has addressed the question.

Bankruptcy courts that have confronted the issue have uniformly concluded, as the court did here, that § 1192 does not make § 523(a) applicable to corporate debtors. *See, e.g.*, *BenShot, LLC v. 2 Monkey Trading, LLC (In re 2 Monkey Trading, LLC)*, 650 B.R. 521 (Bankr. M.D. Fla. 2023); *Nutrien Ag Sols., Inc. v. Hall (In re Hall)*, 651 B.R. 62 (Bankr. M.D. Fla. 2023); *In re GFS Indus.*, 647 B.R. 337; *Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, Case No. 21-31500-jda, 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022); *In re Rtech Fabrications, LLC*, 635 B.R. 559; *Cantwell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd*, 36 F.4th 509 (4th Cir. 2022); *Gaske v. Satellite Rests. Inc. (In re Satellite Rests. Inc.)*, 626 B.R. 871 (Bankr. D. Md. 2021).

Appellant urges us to reverse the bankruptcy court's decision based on the reasoning articulated in *Cleary*. Although the bankruptcy court's construction inevitably leads to a broader discharge for subchapter V debtors under nonconsensual plans than under consensual ones, we find its ***866** interpretation more reasonable and more harmonious with other bankruptcy statutes than the interpretation offered by Appellant.

A. Statutory construction of §§ 1192 and 523

[4] **[5]** To resolve a question of statutory construction, we begin "where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989); *see also Lamie v. United States Tr.*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the texts is not absurd—is to enforce it according to its terms." (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank., N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000)). We construe a statute to give effect "to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004).

[6] **[7]** If the language is ambiguous, we "may look to other sources to determine congressional intent, such as the canons of construction or the statute's legislative history." *United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) (citing *Jonah R. v. Carmona*, 446 F.3d 1000, 1005 (9th Cir. 2006)). Statutory language is ambiguous only if it "gives rise to more than one reasonable interpretation." *Woods v. Carey*, 722 F.3d 1177, 1181 (9th Cir. 2013) (quoting *DeGeorge v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 219 F.3d 930, 939 (9th Cir. 2000)); *see also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").

The statutes governing discharge in a nonconsensual subchapter V are §§ 1192 and 523(a). [6] Section 1192 provides in pertinent part:

> If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all [plan] payments ... the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt ... (2) of the kind specified in section 523(a) of this title.

Section 523(a) provides that "[a] discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt" defined in the subsequent subparagraphs of § 523(a).

Facially, these sections appear to conflict because § 523(a) refers to individual debtors, while § 1192 provides for discharge of both individual and corporate debtors and does not distinguish between them when excepting debts "of the kind specified in section 523(a)." In *Cleary*, the Fourth Circuit held that § 1192 refers to ***867** the types of debts, not the types of debtors, and consequently, makes those types of debts nondischargeable to all debtors under § 1192. 36 F.4th at 515.

[8] Based on the language and context of the statutes, we believe that the better interpretation is that § 1192 reiterates

§ 523(a)'s application to debtors under subchapter V, and § 523(a) limits its applicability to individuals.

Section 523(a) unambiguously applies only to individual debtors. The reference in § 1192 to debts "of the kind specified in section 523(a)" can reasonably be construed to mean the list of debts, but nothing in § 1192 obviates the express limitation in the preamble of § 523(a) or otherwise expands its scope to corporate debtors. [7] *See In re GFS Indus., Inc.*, 647 B.R. at 341-42; *see also Pac. Gas & Elec. Co. v. California*, 350 F.3d 932, 943 (9th Cir. 2003) ("[W]e presume, absent clear indications to the contrary, that Congress did not intend to change preexisting bankruptcy law or practice in adopting [or amending] the Bankruptcy Code ...."); *Cohen v. de la Cruz*, 523 U.S. 213, 221, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998) (refusing to read the Bankruptcy Code as departing from past bankruptcy practice without a clear indication that Congress intended to do so).

Moreover, as part of the Small Business Reorganization Act of 2019 ("SBRA"), Congress amended § 523(a) to add § 1192 to the list of discharge provisions to which it applies. Interpreting § 1192 to extract from § 523(a) only the list of nondischargeable debts, without its limitation to individuals, would render the amendment surplusage. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386, 133 S.Ct. 1166, 185 L.Ed.2d 242 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.").

If § 1192 makes the debts specified in § 523(a) nondischargeable to all debtors, the concurrent amendment to § 523(a) has no meaning. Appellant offers no explanation why her interpretation does not render the amendment surplusage.

In *Cleary*, the Fourth Circuit suggested that "to the extent that one might find tension between the language of § 523(a) addressing individual debtors and the language of § 1192(2) addressing both individual and corporate debtors," the more specific provision of § 1192 should govern over the more general provision of § 523(a). 36 F.4th at 515.

[9] **[10]** We disagree with the Fourth Circuit's application of the general/specific ***868** canon for two reasons. First, while "it is a commonplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), this canon is valid only where the statutes cannot be reconciled, *see Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 698 (D.C. Cir. 2014). "Absent clearly expressed congressional intent to the contrary, it is our duty to harmonize the provisions and render each effective." *Adirondack Med. Ctr.*, 740 F.3d at 698-99 (citing *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)).

[11] Our construction harmonizes the statutes. Section 1192 incorporates the types of debts that are nondischargeable under a nonconsensual subchapter V plan, and § 523(a) limits the scope of nondischargeability to individual debtors.

Second, the Fourth Circuit reasoned that § 1192 is more specific because it applies only to subchapter V debtors under nonconsensual confirmations, while § 523(a) applies to several discharge provisions. But "[w]hat counts for application of the general/specific canon is not the *nature* of the provisions' prescriptions but their *scope*." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 648, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012). Section 523(a) limits the scope of discharge under § 1192 by specifically excepting from discharge certain debts for individuals. If we were unable to reconcile these statutes, the general/specific canon would countenance an interpretation that § 523(a) controls § 1192.

B. Context supports our interpretation that the debts in § 523(a) are nondischargeable under subchapter V for only individual debtors.

Subchapter V of chapter 11 was created with the passage of the SBRA to create an expedited process for small business debtors to efficiently reorganize. Consistent with this policy goal, debtors under subchapter V enjoy certain benefits: they do not pay United States Trustee fees; they are not required to file a disclosure statement; and competing creditors' plans are not permitted. Subchapter V also permits a debtor to confirm a nonconsensual plan without satisfying the "absolute priority rule" of § 1129(b)(2)(B). [8]

But subchapter V remains a part of chapter 11, and its discharge provisions should be interpreted consistent with the overall statutory scheme in chapter 11. *See Rtech Fabrications, LLC*, 635 B.R. at 565-66.

In establishing chapter 11 under the Bankruptcy Code in 1978, Congress made an intentional decision to depart from pre-Code practice and eliminate exceptions to discharge for corporate debtors. *See In re Cleary Packaging LLC*, 630 B.R. at 474 (citing Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 764-65 & n.46-49 (2005)); *see also In re Exide Techs.*, 601 B.R. 271, 280-81 (Bankr. D. Del. 2019), *aff'd*, 613 B.R. 79 (D. Del. 2020) ("Congress initially intended that all nineteen of the § 523(a) discharge exceptions for individual debtors ... should also apply to corporate debtors. However, based on public policy considerations, Congress ***869** ultimately limited the scope of the discharge exceptions for corporate debtors." (citations omitted)). Since then, the corporate discharge has been "strenuously protected." *In re Rtech Fabrications, LLC*, 635 B.R. at 565 (citing *In re Cleary Packaging LLC*, 630 B.R. at 474).

Congress has limited the corporate discharge in chapter 11 once, by enacting § 1141(d)(6),[9] and it did so by expressly stating that certain debts are excepted from discharge for corporate debtors. As noted by the bankruptcy court in *Rtech Fabrications*, this narrow limitation to the corporate discharge took eight years to become law. *Id.* at 565, n.5. We agree that "the suggestion that Congress incorporated 19 new exceptions to discharge for small corporations in a bill that was introduced in April 2019, and signed into law by the President in April 2019, seems not only improbable but also contradicts years of bankruptcy law and policy." *Id.* at 566 (quoting *In re Cleary Packaging LLC*, 630 B.R. at 475).

The Fourth Circuit found the reference in § 1141(d)(6) to debts "of a kind specified in ... 523(a)" supportive of its interpretation. *In re Cleary Packaging LLC*, 36 F.4th at 516-17. It reasoned that the bankruptcy court's construction would create difficulty in reconciling § 523(a) with § 1141(d)(6) because § 523(a) also expressly applies to discharges under § 1141, and thus, it would seem to conflict with the language of § 1141(d)(6) making debts "of a kind specified" in § 523(a) nondischargeable for corporate debtors. *Id.* at 516.

We have no difficulty reconciling our interpretation with the language of § 1141(d)(6). Section 1141(d)(6) is clear that it makes certain debts nondischargeable for corporate debtors. This express statement is necessary because § 523(a) is plainly limited to individual debtors.

Unlike § 1141(d)(6), § 1192 does not purport to change the application of § 523(a). Section 1192 does not refer to specific subparagraphs of § 523(a) and it does not expressly make those types of debts applicable to corporate debtors. Instead, it echoes what § 523(a) already says: a discharge under § 1192 does not discharge an individual debtor from the debts listed in § 523(a).

The context of other discharge provisions within the overall statutory scheme of the Bankruptcy Code confirms that § 1192 restates § 523(a)'s applicability without changing it. Section 523(a) applies to discharges granted under §§ 727, 1141, 1192, 1228(a), 1228(b), and 1328(b), yet each of these discharge provisions contains a similar reference to § 523. *See* 11 U.S.C. § 727(b) ("Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor ...."); 11 U.S.C. § 1141(d)(2) ("A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title."); 11 U.S.C. § 1228(a) ("the court shall grant the debtor a discharge of all debts ... except any debt ... (2) of a kind specified in section 523(a) of this title ...."); 11 U.S.C. § 1228(c) ("A discharge granted under ***870** subsection (b) of this section discharges the debtor from all unsecured debts ... except any debt ... (2) of a kind specified in section 523(a) of this title ...."); 11 U.S.C. § 1328(c) ("A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts ... except any debt ... (2) of a kind specified in section 523(a) of this title.").

Because § 103(a) makes the provisions of chapter 5 applicable to chapters 7, 11, 12, and 13, and § 523(a) specifically excepts debts from discharge under the referenced discharge statutes, it is not strictly necessary for any of the discharge provisions to refer to § 523 to render the debts nondischargeable. Each of the references to § 523(a) in these discharge provisions merely reiterates that the debts listed in § 523(a) are not dischargeable for individual debtors under the specified discharge provision.

[12] We recognize that the references to § 523(a) are redundant, but "redundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication." *Barton v. Barr*, —— U.S. ——, 140 S. Ct. 1442, 1453, 206 L.Ed.2d 682 (2020); *see also Rimini St., Inc. v. Oracle USA, Inc.*, —— U.S. ——, 139 S. Ct. 873, 881, 203 L.Ed.2d 180 (2019) ("Redundancy is not a silver bullet .... Sometimes the better overall reading of the statute contains some redundancy."). And, "[r]edundancy in

one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text." *Barton*, 140 S. Ct. at 1453.

Rather than resulting in a mere redundancy, the *Cleary* interpretation creates a "positive repugnancy" between the statutes and results in § 523(a) having no effect under § 1192 despite its express applicability to that section. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both" (internal citation omitted)).

We are also unpersuaded that "Congress's importation of language into Subchapter V from the conceptually similar Chapter 12 proceedings" reflects an intent to make nondischargeable debts applicable to corporate debtors. *In re Cleary Packaging, LLC*, 36 F.4th at 516. The Fourth Circuit suggested that the language of § 1228(a), which excepts from discharge debts "of a kind specified in section 523(a)," should be interpreted the same as the virtually identical language in § 1192(2). *Id.* at 516-17. We agree the phrases should be interpreted similarly, but neither provision expands the scope of § 523(a) to apply to corporate debtors.

Cleary cites two cases for the proposition that § 523(a) applies to corporate debtors under chapter 12: *Southwest Georgia Farm Credit, Aca v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms Inc.)*, Case No. 08-12038-JDW, 2009 WL 1514671 (Bankr. M.D. Ga. May 29, 2009) and *New Venture Partnership v. JRB Consolidated, Inc. (In re JRB Consolidated, Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995). Like *Cleary*, both cases rely on the general/specific canon of construction, which we find inapposite for the reasons stated above, and neither case offers an explanation why this interpretation does not render surplusage § 523(a)'s specific application to § 1228(a).

More importantly, the phrase "of a kind specified in section 523(a)" appears to have ***871** been taken directly from § 1328(c). *See Foulston v. BDT Farms, Inc. (In re BDT Farms, Inc.)*, 21 F.3d 1019, 1021 n.3 (10th Cir. 1994) ("Chapter 12 was closely modeled after Chapter 13."). Section 1328(b) provides for a "hardship discharge" under chapter 13. In contrast to the typical discharge under § 1328(a)—which incorporates some but not all the provisions of § 523(a)—the entirety of § 523(a) is made applicable to chapter 13 debtors receiving a hardship discharge under § 1328(b).

Notwithstanding the fact that § 523(a) expressly applies to § 1328(b), Congress provided in § 1328(c): "A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts ... except any debt— (2) of a kind specified in section 523(a) of this title." Section 109(e) states that only individuals can be debtors under chapter 13, thus, § 1328(c)'s reference to debts "of a kind specified in section 523(a)" must be a reiteration of § 523(a)'s applicability.

Absent some indication to the contrary, we see no reason why Congress's replication of § 1328(c)'s language in § 1228(a), and later in § 1192, would carry a different meaning or serve a different purpose. The language in each of these sections clarifies that each discharge provision is limited by § 523(a), which makes debts nondischargeable for individual debtors.

The context of other discharge provisions, including those with substantially similar language, confirm that Congress included the reference in § 1192 to debts "of the kind specified in section 523(a)" to reiterate § 523(a)'s application to individual debtors under subchapter V.

C. Policy considerations

In a consensual confirmation under subchapter V, discharge is governed by § 1141. Section 1141(d)(6) also provides that a corporate debtor cannot discharge any debt: (1) of a kind specified in § 523(a)(2)(A) or (a)(2)(B) owed to a domestic governmental unit, or owed to a person as a result of an action under the False Claims Act, 31 U.S.C. § 3729, or similar state statute; or (2) for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat such tax or customs duty. Because § 1141 does not apply to discharges under § 1192, the limitations to corporate discharge found in § 1141(d)(6) are not applicable under nonconsensual plans in subchapter V.

[13] Appellant argues that our construction leads to an absurd result because a debtor with False Claims Act liability or tax fraud liability could discharge such debt under a nonconsensual plan, but not under a consensual plan. We too are puzzled by this result,[10] but "[w]e must presume that Congress says in a statute what it means and means in a statute what it says there." *Rotkiske v. Klemm*, —— U.S. ——, 140 S. Ct. 355, 360, 205 L.Ed.2d 291 (2019) (cleaned up).

The apparent difference between the discharge provisions does not entice us to reject the language and context of the ***872** statutes in favor of an interpretation that alters the long-standing operation of § 523(a) without an express indication by Congress—in the statute or otherwise—that it intended to do so.

The Fourth Circuit presumed that "[g]iven the elimination of the absolute priority rule, Congress understandably applied limitations on the discharge of debts to provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor." *In re Cleary Packaging, LLC*, 36 F.4th at 517. We appreciate the plausibility of this idea, but we question whether elimination of the absolute priority rule is really in "balance" with making the full complement of nondischargeable debts applicable to corporate debtors, and we question whether doing so would comport with the purpose of facilitating reorganization of small businesses.

Small business cases where confirmation is not likely to be consensual are precisely the types of cases where the provisions of the SBRA serve their intended purpose. The absolute priority rule and the threat of competing plans have little bearing on consensual confirmations. Debtors with consenting creditors can achieve quick and efficient reorganizations without need of subchapter V and without the added administrative expense of a subchapter V trustee.

In nonconsensual confirmations, elimination of the absolute priority rule permits more small businesses reorganizations largely because equity owners are often active managers and successful reorganization depends on their continued service. *See* Bonapfel, *supra* note 7, at 231. Equity interests in insolvent small businesses typically have little value and contribution of equivalent "new value" likely provides only a marginal benefit to unsecured creditors.

While elimination of the absolute priority rule may slightly reduce the benefit to unsecured creditors, making debts nondischargeable for corporate debtors does not provide a commensurate benefit. Rendering certain debts nondischargeable is more likely to harm most general unsecured creditors by steering small businesses with nondischargeable debts toward liquidation. *See In re GFS Indus., LLC*, 647 B.R. at 349-50.

Because § 1192 applies only to nonconsensual plans, and acceptance of a plan is determined by classes of creditors, *see* 11 U.S.C. §§ 1191; 1126, a creditor who asserts a claim that would be nondischargeable under § 523(a) may nevertheless have its claim discharged if all classes accept the plan. Thus, even the benefit to a creditor with a potentially nondischargeable claim is diminished unless that creditor is sufficiently situated to assure a nonconsensual confirmation.

Finally, even if a creditor could prove a nondischargeable claim, and cause its class to reject the plan, its claim will be nondischargeable only if the debtor obtains a nonconsensual confirmation. Pursuant to Rule 1020(a), a small business debtor elects whether to proceed under subchapter V by making the designation in its petition. Rule 1009(a) provides that "[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." *See also* Rule 1020(b) (providing for a deadline to object to a debtor's designation no later than 30 days after the meeting of creditors "or within 30 days after any amendment to the statement, whichever is later.").

Under the *Cleary* interpretation, a small business debtor with potentially nondischargeable debts is incentivized to elect subchapter V and force creditors to spend resources to prove their claims, only to ***873** then amend its election and proceed under chapter 11 where those claims will be discharged upon confirmation.

The policy rationales suggested by Appellant and *Cleary* to support their interpretation are unavailing. Construing § 1192 to make debts nondischargeable for corporate debtors offers little benefit to unsecured creditors in small business cases and poses serious obstacles to the stated purpose of the SBRA to make reorganization efficient and expeditious for small business debtors.

It is vexing that our interpretation means that a corporate debtor gets a slightly broader discharge under § 1192 than under a consensual plan, but it is more difficult to believe that Congress intended to make § 523(a) applicable to corporate debtors through an opaque reference rather than an express statement. We agree with Judge Bonapfel that:

> [I]t is difficult to conclude that, in enacting a statute universally proclaimed to have the purpose of facilitating reorganization of small businesses, by among other things eliminating the absolute priority rule

> in a cramdown situation, Congress in 2019 intended to re-introduce all the problems with exceptions to the discharge of a corporation that it eliminated over 50 years earlier.

Bonapfel, *supra* note 7, at 237.

CONCLUSION

We hold that § 1192 does not make debts specified in § 523(a) applicable to corporate debtors in subchapter V. Based on the foregoing, we AFFIRM the bankruptcy court's order dismissing Appellant's complaint.

All Citations

651 B.R. 862, 23 Cal. Daily Op. Serv. 10,412

Footnotes

1 Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

2 We exercise our discretion to take judicial notice of documents electronically filed in the main case and adversary proceeding. *See Atwood v. Chase Manhattan Mortg. Co. (In re Atwood)*, 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

3 The definition of "corporation" in § 101(9) includes unincorporated limited liability companies. *See Vill. at Lakeridge, LLC v. U.S. Bank N.A. (In re Vill. at Lakeridge, LLC)*, BAP Nos. NV-12-1456-PaKiTa, NV-12-1474-PaKiTa, 2013 WL 1397447, at *4 n.8 (9th Cir. BAP Apr. 5, 2013) (citation omitted), *aff'd sub nom. U.S. Bank N.A. v. Vill. at Lakeridge, LLC (In re Vill. at Lakeridge, LLC)*, 814 F.3d 993 (9th Cir. 2016), *aff'd sub nom. U.S. Bank N.A. ex rel. CW Cap. Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, —— U.S. ——, 138 S. Ct. 960, 200 L.Ed.2d 218 (2018).

4 Appellant also argued that, because Title VII of the Civil Rights Act of 1964 imposes strict liability on an employer for its supervisory employee's sexual harassment, and the individual who perpetrates the harassment cannot be held liable, the bankruptcy court should consider Debtor to be an "individual" for purposes of the claim. Appellant does not make this argument on appeal, and we do not consider it.

5 The bankruptcy court dismissed the complaint as to all defendants after determining that the claims against non-debtors were not related to the bankruptcy case. The dismissal of claims against non-debtors is not at issue in this appeal. However, we note that, to the extent Appellant asserts claims against non-debtors, such claims will not be affected by Debtor's discharge.

6 If all creditor classes accept a subchapter V plan, the bankruptcy court confirms the case under § 1191(a), and the discharge provisions of § 1141 apply. Section 1181(a) makes § 1141 generally applicable under subchapter V (except for § 1141(d)(5)). Section 1181(c) clarifies that if a plan is confirmed under § 1191(b), the discharge provisions of § 1141(d) do not apply, except as provided in § 1192. Thus, under a nonconsensual confirmation, discharge is governed exclusively by § 1192.

7 Though our analysis does not require us to resort to legislative history, we note that bankruptcy courts and commenters who have consulted the history find no indication of congressional intent to expand the application of § 523(a) to corporate debtors. *See In re Satellite Rests. Inc.*, 626 B.R. at 878 (discussing

the Report of the Judiciary Committee of the House of Representatives, 290 H.R. Rep. No. 116-171, at p.8 (2019), which states that the new § 1192 discharge excepts "any debt that is otherwise nondischargeable" and reasoning that this phrase logically refers to the existing form of § 523(a)); *In re GFS Indus.*, 647 B.R. at 344 n.6 (citing Hon. Paul W. Bonapfel, GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT of 2019, (Rev. June 2022), https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf, at 204-05, and noting that if Congress "intended to make a seismic change to existing Chapter 11 law, one would expect the House Judiciary Committee Report to have pointed out this change.").

8 Section 1129(b)(2)(B) requires that, under a nonconsensual confirmation in chapter 11, a holder of a claim or interest junior to a class of unsecured claims cannot receive or retain any property under the plan on account of such claim or interest. *See also, Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106, 60 S.Ct. 1, 84 L.Ed. 110 (1939) (discussing the new value corollary to the absolute priority rule); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988) (same).

9 Section 1141(d)(6) provides:

> Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt—
>
> (A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute or;
>
> (B) for a tax or customs duty with respect to which the debtor—(i) made a fraudulent return; or (ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

10 We note that § 1141(d)(6) claims rarely arise in reported bankruptcy cases. Additionally, most liability under the False Claims Act does not require the specific intent to deceive necessary to render such debts nondischargeable under § 523(a)(2). *Compare,* § 523(a)(2)(A) and (B) (each requiring intent to deceive), *with* 31 U.S.C. § 3731(a), (c) (describing liability for any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment and approval" and defining "knowingly" to "require no proof of specific intent to defraud"). Despite the relative paucity of these claims, we would expect them to be nondischargeable for corporate debtors regardless of whether confirmation is consensual or nonconsensual.

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99 F.4th 223
United States Court of Appeals, Fifth Circuit.

In the MATTER OF GFS INDUSTRIES, L.L.C. Debtor,
Avion Funding, L.L.C., Appellant,
v.
GFS Industries, L.L.C., Appellee.

No. 23-50237
|
FILED April 17, 2024

Synopsis

Background: Creditor filed adversary complaint, seeking determination that debt owed by "Subchapter V" Chapter 11 debtor, a Texas limited liability company (LLC), was excepted from discharge as a debt for money obtained by a materially false financial statement. Debtor moved to dismiss. The United States Bankruptcy Court for the Western District of Texas, Craig A. Gargotta, Chief Judge, granted debtor's motion, 647 B.R. 337, and subsequently granted creditor's motion to certify order for direct appeal, 2023 WL 1768414.

[Holding:] Addressing a matter of apparent first impression for the court, the Court of Appeals, Duncan, Circuit Judge, held that in Subchapter V proceedings, both corporate and individual debtors are subject to the list of discharge exceptions set forth in the Bankruptcy Code.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

West Headnotes (21)

[1] **Bankruptcy** Preservation of priority

"Subchapter V" seeks to streamline the Chapter 11 reorganization process for certain small business debtors by, inter alia, relieving such debtors from the absolute priority rule for repaying creditors, which was thought to unduly complicate their reorganization. 11 U.S.C.A. §§ 1181 et seq., 1191(c).

[2] **Bankruptcy** Debts and Liabilities Discharged

Bankruptcy Preservation of priority

Under Subchapter V of Chapter 11 of the Bankruptcy Code, in exchange for the benefit of relieving small business debtors from the absolute priority rule for repaying creditors, those debtors cannot discharge certain "kinds" of debt listed in the section of the Code governing exceptions to discharge. 11 U.S.C.A. §§ 523(a), 1181 et seq., 1191(c).

3 Cases that cite this headnote

[3] **Contracts** Loans and advances

Agreement whereby a financing company gives a business funding in exchange for a specified amount of the business's future receivables is known as a "merchant cash advance."

[4] **Bankruptcy** Scope of review in general

When directly reviewing an order of the bankruptcy court, the Court of Appeals applies the same standard of review that would have been used by the district court.

[5] **Bankruptcy** Conclusions of law; de novo review

Dismissals by a bankruptcy court for failure to state a claim are reviewed de novo. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012(b).

[6] **Bankruptcy** Effect as discharge

If a Subchapter V Chapter 11 debtor's bankruptcy plan is confirmed as a consensual plan, the dischargeability of its debts is governed by subsection of the section of the Bankruptcy Code governing effect of confirmation of a Chapter 11 plan. 11 U.S.C.A. §§ 1141(d), 1191(a).

1 Case that cites this headnote

[7] **Bankruptcy** Debts and Liabilities Discharged

Bankruptcy Effect as discharge

If a Subchapter V Chapter 11 debtor's plan is confirmed as a nonconsensual plan, the dischargeability of its debts is governed by the section of the Bankruptcy Code governing Subchapter V discharge. 11 U.S.C.A. §§ 1191(b), 1181(c), 1192.

4 Cases that cite this headnote

[8] **Bankruptcy** Debts and Liabilities Discharged

Bankruptcy Effect as discharge

In proceedings under Subchapter V of Chapter 11, both corporate and individual debtors are subject to list of discharge exceptions set forth in the Bankruptcy Code; although preamble to Code section listing discharge exceptions states that discharge under enumerated sections of Code, including that governing Subchapter V discharge, does not discharge "individual debtor" from any debt, placing controlling weight on word "individual" disregards plain language of the more specific Code section governing Subchapter V discharge, which applies to both individual and corporate debtors and excepts from discharge "any debt" of "kind specified" in Code section listing discharge exceptions, nowhere does Code section governing Subchapter V discharge say "kind of debtor" as might indicate distinction between individual and corporate Subchapter V debtors, and section instead serves as "shorthand" to avoid reiterating all 21 types of debts named in Code section listing discharge exceptions. 11 U.S.C.A. §§ 523(a), 1192, 1192(2).

6 Cases that cite this headnote

[9] **Bankruptcy** Debts and Liabilities Discharged

Bankruptcy Effect as discharge

Section of the Bankruptcy Code governing Subchapter V discharge applies to both individual and corporate debtors; it does not distinguish one from the other. 11 U.S.C.A. § 1192.

3 Cases that cite this headnote

[10] **Bankruptcy** Construction and Operation

Court must apply the precise language of the Bankruptcy Code as written.

1 Case that cites this headnote

[11] **Statutes** General and specific terms and provisions; ejusdem generis

To the extent that one might find tension between two sections of a statute, the more specific provision should govern over the more general.

2 Cases that cite this headnote

[12] **Statutes** General and specific terms and provisions; ejusdem generis

The specific/general canon of statutory interpretation is especially applicable where Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.

[13] **Statutes** Statute as a Whole; Relation of Parts to Whole and to One Another

If possible, every word and every provision of a statute is to be given effect, and none should be ignored.

[14] **Statutes** Superfluousness

In interpreting a statute, the preference for avoiding surplusage constructions is not absolute.

[15] **Statutes** Relationship to statute amended; clarification or change of meaning

Whether Congress has modified statutory language via a "mere conforming amendment"

may be a relevant consideration when court engages in statutory interpretation.

1 Case that cites this headnote

[16] **Bankruptcy** Dischargeable Debtors

Chapter 7 discharges are available only to individual debtors. 11 U.S.C.A. § 727(a)(1).

1 Case that cites this headnote

[17] **Bankruptcy** Discharge

Chapter 13 discharges are available only to individual debtors. 11 U.S.C.A. §§ 109(e), 1328(b).

[18] **Constitutional Law** Particular Issues and Applications

Court construing a section of the Bankruptcy Code cannot add words that Congress did not enact.

[19] **Bankruptcy** Preservation of priority

In a traditional Chapter 11 case, a nonconsensual plan is subject to the "absolute priority rule," under which classes of unsecured creditors are fully paid before any junior class. 11 U.S.C.A. § 1129(b)(1), (2)(B)(ii).

[20] **Bankruptcy** Preservation of priority

Because the Bankruptcy Code places equity holders at the bottom of the priority list, the absolute priority rule may preclude reorganizations in which continuing management of the bankruptcy estate by a business's owners would be essential to a successful reorganization because such owners' retention of estate property would violate the priority rule. 11 U.S.C.A. § 1129(b)(1), (2)(B)(ii).

[21] **Bankruptcy** Preservation of priority

Subchapter V of Chapter 11 abrogates the absolute priority rule for small business debtors, allowing equity owners to retain their interests even though junior creditors are not paid in full; the plan need only ensure that debtor's disposable income is paid to creditors for three to five years. 11 U.S.C.A. § 1191(c), 1191(c)(2)(A), 1191(c)(3).

***225** Appeal from the United States Bankruptcy Court for the Western District of Texas, USBC No. 22-05052, Craig A. Gargotta, Chief Judge

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Before Higginbotham, Higginson, and Duncan, Circuit Judges.

Opinion

Stuart Kyle Duncan, Circuit Judge:

[1] **[2]** In this appeal, we consider a 2019 addition to the Bankruptcy Code known as "Subchapter V," which seeks to streamline the Chapter 11 reorganization process for

certain small business debtors. *See* 11 U.S.C. § 1181 *et seq.* Subchapter V ***226** relieves small business debtors from the absolute priority rule for repaying creditors, which was thought to unduly complicate their reorganization. *Compare id.* § 1129(b)(2) *with id.* § 1191(c). In exchange for that benefit, however, those debtors cannot discharge certain "kinds" of debt listed in § 523(a) of the Code. *See id.* §§ 1192(2), 523(a). The issue we address here is whether those discharge exceptions apply to both corporate and individual Subchapter V debtors (as the Fourth Circuit has ruled) or only to individual debtors (as some bankruptcy courts have ruled). *See generally Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022). Although the question is complicated by a certain textual awkwardness in the Bankruptcy Code, we ultimately side with the Fourth Circuit and rule that, in Subchapter V proceedings, both corporate and individual debtors are subject to the list of § 523(a) discharge exceptions. [1]

Accordingly, we REVERSE and REMAND.

I.

[3] GFS Industries is a Texas limited liability corporation that provides commercial cleaning services. Seeking financing to expand operations, GFS entered into an agreement with Avion Funding on April 6, 2022. Avion would give GFS $190,000 in exchange for $299,800 of GFS's future receivables. [2] GFS represented it had not filed, nor did it anticipate filing, any Chapter 11 bankruptcy petition. Nonetheless, on April 21, 2022, two weeks after signing the agreement, GFS petitioned for voluntary Chapter 11 bankruptcy in the Western District of Texas. GFS elected to proceed under Subchapter V, which Congress enacted in 2019 as part of the Small Business Reorganization Act ("SBRA"), Pub. L. No. 116–54, 133 Stat. 1079 (2019).

On July 25, 2022, Avion filed an adversary complaint in GFS's bankruptcy. As relevant here, Avion claimed GFS obtained Avion's financing by misrepresenting whether it anticipated filing for bankruptcy. Avion sought a declaration that GFS's debt to Avion was therefore nondischargeable. In response, GFS moved to dismiss Avion's complaint, arguing that the Bankruptcy Code section on which Avion relied, 11 U.S.C. § 523(a), applies only to individual debtors and that, as a result, GFS's debt was dischargeable.

The bankruptcy court agreed with GFS. It reasoned that "in the Subchapter V context, only individuals, not corporations, can be subject to § 523(a) dischargeability actions." *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 647 B.R. 337, 342 (Bankr. W.D. Tex. 2022). In doing so, the court followed the reasoning of four bankruptcy courts. [3] It declined to ***227** follow the Fourth Circuit's recent decision in *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509, 517–18 (4th Cir. 2022) [*Cleary*], which held that the Subchapter V discharge exceptions apply to both individual and corporate debtors. Accordingly, the bankruptcy court ruled GFS's debt to Avion was dischargeable and dismissed Avion's complaint. Avion timely appealed to the district court. The bankruptcy court subsequently granted Avion's motion to certify a direct appeal to our court under 28 U.S.C. § 158(d)(2). *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 2023 WL 1768414, at *4 (Bankr. W.D. Tex. Feb. 3, 2023).

II.

[4] **[5]** "When directly reviewing an order of the bankruptcy court, we apply the same standard of review that would have been used by the district court." *Drive Fin. Servs., L.P. v. Jordan*, 521 F.3d 343, 346 (5th Cir. 2008). Dismissals under Rule 12(b)(6) for failure to state a claim are reviewed *de novo*. *See Norsworthy v. Hous. Indep. Sch. Dist.*, 70 F.4th 332, 336 (5th Cir. 2023).

III.

[6] **[7]** GFS proceeds under Subchapter V, enacted in 2019 to streamline Chapter 11 reorganizations for small business debtors whose debt does not exceed $7.5 million. *See* 11 U.S.C. § 1181 *et seq.*; *id.* § 1182(1); *see also In re Free Speech Sys., LLC*, 649 B.R. 729, 735 (Bankr. S.D. Tex. 2023) ("Subchapter V only applies when a debtor elects to proceed under it." (citing 11 U.S.C. § 103(i))). If a debtor's bankruptcy plan is confirmed as a consensual plan under § 1191(a), the dischargeability of its debts is governed by § 1141(d). *See* 11 U.S.C. § 1181(a) (only § 1141(d)(5) concerning individual debtors is inapplicable to Subchapter V consensual plan discharge provisions). By contrast, GFS's plan was confirmed as a nonconsensual plan under § 1191(b), so the dischargeability of its debts is governed by § 1192. *See id.* § 1181(c) ("If a plan is confirmed under section 1191(b)

of this title, section 1141(d) of this title shall not apply, except as provided in section 1192 of this title.").

As § 1192 provides, after the debtor completes the required payments, the bankruptcy court

> shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A)[4] of this title, and all other debts allowed under section 503 of this title and provided for in the plan, *except any debt*--
>
> (1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or
>
> (2) *of the kind specified in section 523(a) of this title.*

Id. § 1192 (emphasis added). The cross-referenced § 523(a) lists various types of non-dischargeable debts—for instance, debts for certain "tax or customs [ ] dut[ies]," for "domestic support obligation[s]," or for failing "to pay fines or penalties imposed under Federal election ***228** law." *See id.* § 523(a)(1), (5), (14B). The category relevant here is a debt for money obtained by a "materially false" written statement "respecting the debtor's ... financial condition." *Id.* § 523(a)(2)(B)(i)–(ii).

[8] The textual conundrum in this case arises from § 523(a)'s preamble: "A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge *an individual debtor* from any debt ...." *Id.* § 523(a) (emphasis added). In ruling for GFS, the bankruptcy court deemed this preamble "critical to the analysis." Specifically, the court reasoned that § 523(a)'s "limiting language" means that, in a Subchapter V proceeding, the listed non-dischargeability exceptions apply only to an "individual debtor." But they do not apply to a limited liability company like GFS—meaning its debt to Avion, even if procured by misrepresenting its financial condition, could still be dischargeable. On appeal, Avion contests the bankruptcy court's understanding of the interplay between § 523(a) and § 1192(2). We consider each of its arguments in turn.

A.

Avion argues that placing controlling weight on the word "individual" in § 523(a) disregards the plain language of § 1192(2). We agree.

[9] To begin with, § 1192 governs discharging debts of a "debtor," plain and simple. *See* 11 U.S.C. § 1192 (requiring court to "grant *the debtor* a discharge" of all specified debts (emphasis added)). A Subchapter V "debtor" means "a person engaged in commercial or business activities" with debts not exceeding $7.5 million. *Id.* § 1182(1)(A). " '[P]erson' is in turn defined to include both individuals and corporations, *see id.* § 101(41), and 'corporation[s]' include limited liability companies, *id.* § 101(9)(A)." *Cleary*, 36 F.4th at 514 (citations omitted). So, putting all this together, § 1192 applies to both individual and corporate debtors. *Id.* at 514–15. It does not distinguish one from the other.

[10] Next, § 1192 excepts from discharge "any *debt ... of the kind* specified in section 523(a)." 11 U.S.C. § 1192(2) (emphasis added). We must apply this precise language as written. *See Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011) ("[I]nterpretation of the Bankruptcy Code starts ... with the language of the statute itself." (quotation marks and citation omitted)). Section 523(a) enumerates 21 categories or "kinds"[5] of non-dischargeable debts. *See* § 523(a)(1)–(20) (including (14), (14A), and (14B)). So, the most natural reading of § 1192(2) is that it subjects both corporate and individual Subchapter V debtors to the categories of debt discharge exceptions listed in § 523(a). *See Cleary*, 36 F.4th at 515 ("[T]he combination of the terms 'debt' and 'of the kind' indicates that Congress intended to reference only the *list of non-dischargeable debts* found in § 523(a).").

Consider, moreover, what § 1192(2) does not say: "kind of *debtor*." Congress could have enacted those words in § 1192 but instead chose "kind of *debt*." That text cannot be read to incorporate a distinction between "individual" and "corporate" debtors. Rather, as the Fourth Circuit correctly reasoned, the reference to "kind[s]" of debt in § 1192 serves as "a shorthand to avoid listing all 21 types of debts" in § 523(a), "which would indeed have expanded the one-page section to add several ***229** additional pages to the U.S. Code." *Cleary*, 36 F.4th at 515.

[11] **[12]** In addition, to the extent §§ 523(a) and 1192(2) clash, § 1192(2) governs as the more specific provision. Section 1192 deals directly with Subchapter V discharges, whereas § 523(a) cuts across various Bankruptcy Code provisions. *See* § 523(a) (listing "section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title"). As the Fourth Circuit observed, "to the extent that one might find tension" between the two sections, "the more specific provision

should govern over the more general." *Cleary*, 36 F.4th at 515; *see also, e.g., RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012) (observing "[i]t is a commonplace of statutory construction that the specific governs the general" and applying the canon to the Bankruptcy Code (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992))). The specific/general canon is especially applicable where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX*, 566 U.S. at 645, 132 S.Ct. 2065 (citation omitted); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 185 (2012) ("The specific provision does not negate the general one entirely, but only in its application to the situation that the specific provision covers."). Subchapter V fits that bill: it legislates specific reorganization options for small business debtors.

[13] **[14]** GFS counters (echoing the bankruptcy court) that this interpretation of § 1192(2) makes the word "individual" in § 523(a) superfluous. *See* 11 U.S.C. § 523(a) ("A discharge under section ... 1192 ... of this title does not discharge an *individual* debtor ...") emphasis added)). This argument has some force because, "[i]f possible, every word and every provision [of a statute] is to be given effect," and "none should be ignored." Scalia & Garner, *supra*, at 174. At the same time, though, the "preference for avoiding surplusage constructions is not absolute." *Lamie v. U.S. Tr.*, 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001) (noting "[t]he canon requiring a court to give effect to each word '*if possible*' is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute' " (citation omitted)).

[15] We agree with *amicus curiae* United States that the anti-surplusage canon does not win the day here. To begin with, the reference to § 1192 was added to § 523(a) via a "conforming amendment." *See* Br. of *Amicus Curiae* United States at 21 (citing H.R. Rep. No. 116-171, at 9 (2019)); *see also* Pub. L. No. 116–54, 133 Stat. 1079, 1085–86 (2019). That would be an awkward way of modifying § 1192(2)'s straightforward "kind of debt" language. *See Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 431, 138 S.Ct. 1061, 200 L.Ed.2d 332 (2018) ("Congress does not make 'radical—but entirely implicit—change[s]' through 'technical and conforming amendments.' " (quoting *Dir. of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 324 (2001))). In other words, it would be no "minor tweak" to § 1192(2), *id.* at 430, 138 S.Ct. 1061, to change "kind of debt" to "kind of debtor." It is unlikely Congress would have done such a thing through a cross-reference in a "mere conforming amendment." *Ibid.* (cleaned up).

[16] **[17]** This interpretation gains traction when we examine other statutory ***230** cross-references in § 523(a)'s preamble. Some are themselves superfluous. For example, § 523(a) refers to § 727 even though Chapter 7 discharges are already available only to individual debtors. *See* 11 U.S.C. § 727(a)(1). So, the term "individual" as applied to § 727 is entirely redundant. *See id.* § 727(b). The same applies to § 523(a)'s reference to § 1328(b): Chapter 13 discharges are also available only to individual debtors. *See id.* §§ 109(e), 1328(b).

Other problems emerge when we consider § 523(a)'s cross-reference to § 1141. Part of that section, § 1141(d)(6), provides that traditional Chapter 11 discharges will not discharge a *corporate* debtor from certain kinds of debts in § 523(a). *See id.* § 1141(d)(6)(A) (providing "a debtor that is a corporation" is not discharged from debts "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)"). But if we read "individual" in § 523(a)'s preface to control all the cross-referenced statutes, that would erase the corporate debtor discharge exceptions in § 1141(d)(6). *See Cleary*, 36 F.4th at 516 (observing that this interpretation "would ... create difficulty in reconciling § 523(a) with § 1141(d)(6)"). This is yet another reason not to read the word "individual" in § 523(a) to implicitly modify § 1192(2).

B.

Avion's argument gains greater force when we situate § 1192 in the larger context of the Bankruptcy Code. *See, e.g., In re Lively*, 717 F.3d 406, 409 (5th Cir. 2013) (reading "the language of the statute taken in the context of the Bankruptcy Code of which it is a part" (citing *RadLAX*, 132 S. Ct. at 2070–71)). Other Code provisions explicitly limit discharges to "individual" debtors.[6] Even traditional Chapter 11 proceedings distinguish discharges for individual and corporate debtors.[7]

[18] By contrast, § 1192 provides dischargeability simply for "the debtor"—which, as noted, the Code defines as encompassing both individual and corporate debtors. *See also*

Cleary, 36 F.4th at 515–16 (distinguishing § 1192 from other provisions that "conscientiously defined and distinguished the kinds of debtors covered"). We cannot add words to § 1192 that Congress did not enact. *See Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

Avion also draws our attention to the Chapter 12 discharge provision, covering family farmers or fishermen, which is virtually identical to § 1192. *See* 11 U.S.C. § 1228(a). Chapter 12 allows "the debtor" a discharge of all specified debts "except any debt ... *of a kind specified in section 523(a) of this title.*" *Ibid.* (emphasis added). As the Fourth Circuit recognized, "courts construing the scope of § 1228(a) have concluded that [its] discharge exceptions apply *to both individual debtors and corporate debtors.*" *Cleary*, 36 F.4th at 516 (citing ***231** *Sw. Ga. Farm Credit, Aca v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, 2009 WL 1514671, at *1–2 (Bankr. M.D. Ga. May 29, 2009); *New Venture P'ship v. JRB Consol., Inc. (In re JRB Consol., Inc.)*, 188 B.R. 373, 374 (Bankr. W.D. Tex. 1995)).

In particular, the *JRB Consolidated* bankruptcy court reasoned that "[t]he wording in § 1228(a)(2) describing '*debts* of the kind' specified in § 523(a) does not naturally lend itself to incorporate the meaning 'for *debtors* of the kind' referenced in § 523(a)." 188 B.R. at 374 (emphasis added). [8] We see no reason why this sound analysis of § 1228(a)'s text would not apply equally to the substantively identical phrase in § 1192(2). *Accord Cleary*, 36 F.4th at 517 ("[I]dentical words and phrases within the same statute should normally be given the same meaning." (quoting *Hall v. United States*, 566 U.S. 506, 519, 132 S.Ct. 1882, 182 L.Ed.2d 840 (2012))). Moreover, § 1228(a) is also referenced in § 523(a)'s preamble along with § 1192. *See* § 523(a) (referencing "[a] discharge under section ... 1192 [and] 1228(a)"). So, if we adopted the restrictive reading of § 1192 urged by GFS, it would undermine bankruptcy courts' interpretation of § 1228(a). *Accord Cleary*, 36 F.4th at 516. We decline to do so. [9]

C.

Finally, GFS contends that our interpretation of § 1192 will frustrate Congress's purposes in enacting Subchapter V. We disagree.

First of all, GFS's argument relies on vague assertions in the SBRA's legislative history. But the history GFS cites does not speak to, or even mention, the individual-vs-corporate debtor issue before us. GFS merely quotes a committee report's statement that Subchapter V sought to "streamline the bankruptcy process" for "small business debtors." [10] Even if one were inclined to consult legislative history, such generalities are no help in resolving the concrete interpretive issue we address today. *See Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 139 S. Ct. 2356, 2364, 204 L.Ed.2d 742 (2019) (noting the Supreme Court "has repeatedly refused to alter" statute's "plain terms on the strength only of arguments from legislative history"); *Hubbard v. United States*, 514 U.S. 695, 708, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995) ("Courts should not rely on inconclusive statutory history as a ***232** basis for refusing to give effect to the plain language of an Act of Congress[.]").

[19] **[20]** Second, and more importantly, GFS misunderstands the compromises Congress made in Subchapter V. In a traditional Chapter 11 case, a nonconsensual plan is subject to the "absolute priority rule," under which classes of unsecured creditors are fully paid before any junior class. *See In re Lively*, 717 F.3d 406, 410 (5th Cir. 2013); *see also In re Pac. Lumber Co.*, 584 F.3d 229, 244 (5th Cir. 2009); 11 U.S.C. § 1129(b)(1), (2)(B)(ii). Because "the Code places equity holders at the bottom of the priority list," *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 457, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017), however, the absolute priority rule "could preclude reorganizations in which continuing management of the bankruptcy estate by a business's owners would be essential to a successful reorganization because such owners' retention of estate property would violate the priority rule." *Cleary*, 36 F.4th at 514.

[21] In the SBRA, Congress sought to help small business debtors by abrogating the absolute priority rule, allowing equity owners to retain their interests even though junior creditors are not paid in full. *See* 11 U.S.C. § 1191(c). The plan needs only ensure that the debtor's disposable income be paid to creditors for three to five years. *Cleary*, 36 F.4th at 514 (citing *id.* § 1191(c)(2)(A) and (3)). Congress did not stop there, though. To counterbalance that benefit to debtors, Congress excepted from discharge "any debt ... of the kind

specified in section 523(a)." *Id.* § 1192(2). In other words, like most legislation, Subchapter V is a compromise: affording small business debtors unique benefits while subjecting them to § 523(a)'s dischargeability exceptions. *See Cleary*, 36 F.4th at 517 ("Given the elimination of the absolute priority rule, Congress understandably applied limitations on the discharge of debts to provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor.").

To agree with GFS's argument here would be to rewrite that compromise—at least insofar as small business corporate debtors are concerned—in the face of § 1192(2)'s plain language and context. We have no authority to do so, especially based on statements in legislative history that Congress never enacted in the statute. [11]

IV.

In sum, we agree with the Fourth Circuit that 11 U.S.C. § 1192(2) subjects both corporate and individual Subchapter V debtors to the categories of debt discharge exceptions listed in § 523(a). Accordingly, the judgment of the bankruptcy court is REVERSED and REMANDED for further proceedings consistent with this opinion.

All Citations

99 F.4th 223

Footnotes

1 To be sure, the issue is a close and interesting one—as shown by the fact that it was recently the subject of a national bankruptcy moot court competition. *See* Paul R. Hage & G. Ray Warner, *31st Annual Conrad B. Duberstein National Bankruptcy Moot Court Competition*, 32 NORTON J. BANKR. L. & PRAC. art. 1 (Feb. 2023).

2 Such an agreement is known as a "Merchant Cash Advance."

3 *See Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022) (ruling that corporate debtors proceeding under Subchapter V are not subject to § 523(a) actions); *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications, LLC)*, 635 B.R. 559, 568 (Bankr. D. Idaho 2021) (same); *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 630 B.R. 466, 468 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022) (same); *In re Satellite Rests. Inc. Crabcake Factory USA*, 626 B.R. 871, 873 (Bankr. D. Md. 2021) (same). In July 2023, a bankruptcy appellate panel of the Ninth Circuit arrived at the same conclusion. *See generally Lafferty v. Off-Spec Sols., LLC (In re Off-Spec Sols., LLC)*, 651 B.R. 862 (B.A.P. 9th Cir. 2023). In addition, some leading bankruptcy scholars agree with these authorities. *See generally* Paul W. Bonapfel & Robert Schaaf, *Do § 523(a) Exceptions to Discharge Apply to the Discharge of a Corporation in a Subchapter V Case After "Cramdown" Confirmation Under § 1191(b)?*, 32 NORTON J. BANKR. L. & PRAC. art. 1 (Dec. 2023); Richard P. Cook, *Discharges in Subchapter V*, 41 AM. BANKR. INST. J. 24 (2022).

4 This subpart refers, as relevant here, to "any debt that arose before the date of such [plan] confirmation." 11 U.S.C. § 1141(d)(1)(A).

5 *See, e.g., Kind*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/kind [https://perma.cc/QBX6-ZB94] (last visited Mar. 19, 2024) ("[A] group united by common traits or interests: CATEGORY."); *Kind*, CAMBRIDGE DICTIONARY (4th ed. 2013) ("[A] group with similar characteristics, or a particular type.").

6 *See* 11 U.S.C. § 727(a)(1) (in Chapter 7 proceedings, "[t]he court shall grant the debtor a discharge, unless ... the debtor is not an individual"); *id.* § 109(e) ("Only an individual with regular income ... may be a debtor under chapter 13 of this title.").

7 *Id.* § 1141(d)(2) (denying § 523 dischargeability for a "debtor who is an individual"); *id.* § 1141(d)(5) (limiting dischargeability when "the debtor is an individual"); *id.* § 1141(d)(6) (same for "a debtor that is a corporation").

8 *See also Breezy Ridge Farms*, 2009 WL 1514671, at *2 (explaining that, "[a]lthough 523(a) applies only to individuals, Congress has used it as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals").

9 Like the bankruptcy court, GFS would distinguish *JRB Consolidated* on the ground that Chapter 11's discharge provisions are "narrower" than Chapter 12's. That may have been an accurate statement in 1995, when *JRB Consolidated* was decided. But in 2005 Congress broadened Chapter 11's discharge exception provisions such that corporate debtors are now subject to dischargeability complaints under § 1141(d)(6). *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, 109th Cong. § 708 (2005); Pub. L. No. 109-8, 119 Stat. 23, 126–27 (2005) (adding 11 U.S.C. § 1141(d)(6)). Accordingly, like the Fourth Circuit, we fail to see any relevant difference in scope between the Chapter 11 and 12 discharge provisions. *See Cleary*, 36 F.4th at 516–17.

10 *Amicus curiae* National Association of Bankruptcy Trustees ("NABT") similarly relies on one vague assertion from the legislative history that § 1192(2) pertains only to debt "that is otherwise nondischargeable." *See* H.R. Rep. No. 116-171, at 8 (2019). At the same time, NABT concedes that in 72 pages of legislative history, discussion of § 523(a) "appears only once." Accordingly, this one isolated reference does not outweigh the evidence from the statutory texts enacted by Congress. *See Azar v. Allina Health Servs.*, 587 U.S. 566, 139 S. Ct. 1804, 1814, 204 L.Ed.2d 139 (2019) (explaining that "legislative history is not the law").

11 *Amicus* NABT worries that subjecting corporate debtors to § 523(a)'s exceptions will frustrate Subchapter V's efficiency goals by, for instance, incentivizing creditors to promiscuously file § 523(a) complaints against debtors. But these arguments are grounded in policy considerations, not statutory text or structure. And, in any event, the Bankruptcy Code already provides remedies for abusive complaints. *See* FED. R. BANKR. P. 9011(c) (sanctions).

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Office of United States Trustee v. John Q. Hammons Fall 2006, LLC

Supreme Court of the United States. | June 14, 2024 | 602 U.S. 487 | 144 S.Ct. 1588

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Outline

Appended Content

KeyCite Yellow Flag - Negative Treatment
Distinguished by United States v. Trump, S.D.Fla., July 15, 2024

144 S.Ct. 1588
Supreme Court of the United States.

OFFICE OF the UNITED STATES TRUSTEE, Petitioner
v.
JOHN Q. HAMMONS FALL 2006, LLC, et al.

No. 22-1238
|
Argued January 9, 2024
|
Decided June 14, 2024

Synopsis

Background: Chapter 11 debtors moved for determination of extent of their liability for United States Trustee (UST) quarterly fees, contending that statutory amendment increasing the cap and significantly raising the amount of such fees in large Chapter 11 cases was unconstitutional. The United States Bankruptcy Court for the District of Kansas, Robert D. Berger, J., 618 B.R. 519, denied motion. Debtors appealed. On direct appeal, the United States Court of Appeals for the Tenth Circuit, Phillips, Circuit Judge, 15 F.4th 1011, reversed, finding that statute permitting nonuniform fees violated the Bankruptcy Clause, and remanded for calculation of refund. Following the Supreme Court's decision in *Siegel v. Fitzgerald*, 142 S.Ct. 1770, the Tenth Circuit's opinion was vacated, but the Court of Appeals ultimately reinstated it, 2022 WL 3354682. Certiorari was granted.

[Holding:] The Supreme Court, Justice Jackson, held that the appropriate remedy for the short-lived and small disparity created by the bankruptcy fee statute held unconstitutional in *Siegel* was prospective parity, not a refund or retrospective raising of fees.

Reversed and remanded.

Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, and Kavanaugh joined.

Justice Gorsuch filed a dissenting opinion in which Justices Thomas and Barrett joined.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Other.

West Headnotes (14)

[1] Bankruptcy Trustees
51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)1 In General
51k3152 Trustees

Congress designed the United States Trustee Program, which is one of the two programs that administer the federal bankruptcy system, to be entirely self-funded by user fees paid by debtors; in contrast, Congress supports the other program, the Bankruptcy Administrator Program, through its general appropriation for the Judiciary, with fees used only to offset that funding. 28 U.S.C.A. §§ 589a(b), 1930(a)(7).

[2] Bankruptcy Uniformity requirement
51 Bankruptcy
51I In General
51I(B) Constitutional and Statutory Provisions
51k2013 Validity of Bankruptcy Laws
51k2014 Uniformity requirement

The Bankruptcy Clause requires that laws established by Congress on the subject of bankruptcies be uniform. U.S. Const. art. 1, § 8, cl. 4.

[3] **Bankruptcy** Uniformity requirement

51 Bankruptcy
51I In General
51I(B) Constitutional and Statutory Provisions
51k2013 Validity of Bankruptcy Laws
51k2014 Uniformity requirement

The Bankruptcy Clause confers broad authority on Congress, including the flexibility to enact geographically limited bankruptcy laws if it is responding to a geographically limited problem. U.S. Const. art. 1, § 8, cl. 4.

[4] **Civil Rights** Judgment and relief in general

78 Civil Rights
78III Federal Remedies in General
78k1448 Judgment and relief in general

Across remedial contexts, the nature of the constitutional violation determines the scope of the remedy.

1 Case that cites this headnote
More cases on this issue

[5] **Bankruptcy** Uniformity requirement

51 Bankruptcy
51I In General
51I(B) Constitutional and Statutory Provisions
51k2013 Validity of Bankruptcy Laws
51k2014 Uniformity requirement

Following determination that bankruptcy fee statute permitting nonuniform fees violated the Bankruptcy Clause, task of the Supreme Court was to remedy the disparity, not necessarily to reduce the complained-of higher payments. U.S. Const. art. 1, § 8, cl. 4; 28 U.S.C.A. §§ 1930(a)(6), 1930(a)(7).

More cases on this issue

[6] **Civil Rights** Judgment and relief in general

78 Civil Rights
78III Federal Remedies in General
78k1448 Judgment and relief in general

Touchstone for any decision about remedy for constitutional flaw in statute is legislative intent.

More cases on this issue

[7] **Civil Rights** Judgment and relief in general

78 Civil Rights
78III Federal Remedies in General
78k1448 Judgment and relief in general

Key question in determining how to remedy a constitutional violation wrought by the legislative process is always what the legislature would have willed had it been apprised of the constitutional infirmity.

More cases on this issue

[8] **Civil Rights** Judgment and relief in general

78 Civil Rights
78III Federal Remedies in General
78k1448 Judgment and relief in general

In cases involving unequal treatment, answering question of how to remedy a constitutional violation wrought by the legislative process generally leads to a focus on two considerations: Congress's intensity of commitment to the more broadly applicable rule, and the degree of potential disruption of the statutory scheme that would occur if the court were to extend the exception.

More cases on this issue

[9] **Civil Rights** Judgment and relief in general

78 Civil Rights
78III Federal Remedies in General
78k1448 Judgment and relief in general

In determining how to remedy a constitutional violation wrought by the legislative process, court is cognizant that Congress likely would not have intended relief that is impractical or unworkable.

More cases on this issue

[10] **Civil Rights** Judgment and relief in general

78 Civil Rights
78III Federal Remedies in General
78k1448 Judgment and relief in general

In determining how to remedy a constitutional violation wrought by the legislative process, court must keep in mind that its ultimate aim is to remedy the constitutional wrong consistent with congressional intent, not to provide the complaining parties' preferred form of relief.

1 Case that cites this headnote
More cases on this issue

[11] **Bankruptcy** Uniformity requirement

Bankruptcy Trustees

51 Bankruptcy
51I In General
51I(B) Constitutional and Statutory Provisions
51k2013 Validity of Bankruptcy Laws
51k2014 Uniformity requirement
51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)1 In General
51k3152 Trustees

Was appropriate remedy for constitutional violation prospective parity, not a refund?

Yes

Material Facts

- Constitutional violation identified by court was nonuniformity, not high fees
- Disparity created by bankruptcy fee statute was short-lived, subjecting large debtors to, at most, three years and three months of nonuniform treatment
- Disparity was small, affecting 2% of relevant cases
- Imposition of equal fees in all districts going forward comported with congressional intent, corrected the constitutional wrong, and complied with due process
- Ordering refund would have undermined Congress's goal of keeping United States Trustee (UST) program self-funded and cost taxpayers $326 million

Causes of Action

Challenge to Constitutionality > Bankruptcy Clause

Restitution

Appropriate remedy for monetary disparity created by bankruptcy fee statute held unconstitutional in *Siegel v. Fitzgerald*, 142 S.Ct. 1770, which statute had increased fees for debtors in large Chapter 11 cases in United States Trustee (UST) districts but not for identical debtors in Bankruptcy Administrator (BA) districts, was prospective parity, not a refund for debtors charged higher fees or retrospective raising of fees in BA districts; constitutional violation identified by the Court was nonuniformity, not high fees, disparity was short-lived, subjecting large debtors to, at most, three years and three months of nonuniform treatment, and disparity was small, affecting 2% of relevant cases, imposing equal fees in all districts going forward comported with congressional intent, corrected the constitutional wrong, and complied with due process, and ordering a refund would have undermined Congress's goal of keeping UST program self-funded and cost taxpayers $326 million. U.S. Const. art. 1, § 8, cl. 4; U.S. Const. Amend. 5; 28 U.S.C.A. §§ 1930(a)(6), 1930(a)(7).

2 Cases that cite this headnote
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[12] **Civil Rights** Judgment and relief in general

78 Civil Rights
78III Federal Remedies in General
78k1448 Judgment and relief in general

When seeking to remedy an unconstitutional disparity, court generally looks to the intent of the legislature, rather than divining the right answer itself or picking a party's preferred form of relief, which may make the disparity worse.

More cases on this issue

[13] **Bankruptcy** Trustees
Constitutional Law Bankruptcy

51 Bankruptcy
51IX Administration
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Due process did not require refund of higher United States Trustee (UST) quarterly fees imposed by amended bankruptcy fee statute, which, in violation of the Bankruptcy Clause, had increased fees for debtors in large Chapter 11 cases in UST districts but not for identical debtors in Bankruptcy Administrator (BA) districts; debtors that paid the higher fees had opportunity to challenge their fees before they paid them, remedy of refund to those that successfully challenged their fees was not guaranteed by Bankruptcy Code, and there was no other existing statutory remedy of which the government had deprived the debtors. U.S. Const. art. 1, § 8, cl. 4; U.S. Const. Amend. 5; 28 U.S.C.A. §§ 1930(a)(6), 1930(a)(7).

2 Cases that cite this headnote

[14] **Civil Rights** Judgment and relief in general

78 Civil Rights
78III Federal Remedies in General
78k1448 Judgment and relief in general

Court cannot remedy an old constitutional problem by creating a new one.

More cases on this issue

West Codenotes

Prior Version Recognized as Unconstitutional

28 U.S.C.A. § 1930(a)(6)(B), (a)(7).

****1590** *Syllabus* [*]

***487** Two Terms ago, in *Siegel v. Fitzgerald*, 596 U.S. 464, 142 S.Ct. 1770, 213 L.Ed.2d 39, the Court held that a statute violated the Bankruptcy Clause's uniformity requirement because it permitted different fees for Chapter 11 debtors depending on the district where their case was filed. In this case, the Court is asked to determine the appropriate remedy for that constitutional violation. As noted in *Siegel*, there are three options: (1) refund fees for the thousands of debtors charged higher fees in districts administered by the U. S. Trustee Program, (2) retroactively extract higher fees from the small number of debtors charged lower fees in districts administered by the Bankruptcy Administrator Program, or (3) require only prospective fee parity. See *id.*, at 480, 142 S.Ct. 1770.

As in *Siegel*, this case arises from a case filed in a U. S. Trustee district. In 2016, 76 legal entities filed for Chapter 11 bankruptcy in the District of Kansas. In 2018, under the amended fee statute the Court later found unconstitutional in *Siegel*, the debtors began paying higher fees than they would have if their case had been filed in a Bankruptcy Administrator district. In 2020, the debtors challenged the constitutionality of those fees. The Bankruptcy Court found no constitutional violation, but the Tenth Circuit, anticipating *Siegel*, reversed. To remedy the constitutional violation, the Tenth Circuit ordered a refund of the debtors' quarterly fees to the extent they exceeded the lower fees paid in the Bankruptcy Administrator districts. This Court vacated that judgment and remanded the case in light of *Siegel*, and the Tenth Circuit reinstated its original opinion without alteration.

Held: Prospective parity is the appropriate remedy for the short-lived and small disparity created by the fee statute held unconstitutional in *Siegel*. Pp. —— – ——.

(a) Across remedial contexts, "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554. Three aspects of the Court's holding in *Siegel* are relevant here. First, the violation identified was nonuniformity, not high fees. Second, the fee disparity was short lived, lasting only from 2018 to 2021. Third, the disparity was small: 98% of the relevant class of debtors still paid uniform fees. Pp. —— – ——.

***488** (b) To determine the appropriate remedy for this short-lived and small disparity, the Court asks "what the legislature would have willed had it been apprised of the constitutional infirmity." *Sessions v. Morales-Santana*, 582 U.S. 47, 74, 137 S.Ct. 1678, 198 L.Ed.2d 150. In cases involving unequal treatment, the Court focuses on two considerations: Congress's "intensity of commitment" to the more broadly applicable rule, and "the degree of potential disruption of the statutory scheme that would occur" if the Court were to extend the exception. *Id.*, at 75, 137 S.Ct. 1678. Here, faced with the short-lived and small fee disparity created by the constitutional violation identified in *Siegel*, Congress would have wanted prospective parity, not a refund or retrospective raising of fees.

To start, Congress has demonstrated intense commitment to the more broadly applicable rule, higher fees in U. S. Trustee districts. That commitment stems from Congress's desire for the U. S. Trustee program to "be funded in its entirety by user fees." *Siegel*, 596 U.S. at 469, 142 S.Ct. 1770. In light of this desire, it is not surprising that, in the 2017 fee statute at issue in *Siegel*, Congress chose to address a funding shortfall for the U. S. Trustee program by raising fees on the largest Chapter 11 debtors. In 2021, when Congress amended the fee statute to require uniform fees, it kept fees at an elevated level "to further

the long-standing goal of Congress of ensuring that the bankruptcy system is self-funded." § 2(b), 134 Stat. 5086.

Now consider the disruption that would follow from extending the exception, lower fees in Bankruptcy Administrator districts. Retrospectively lowering fees for all relevant debtors in U. S. Trustee districts would cost approximately $326 million. Thus, in mandating a refund, this Court would transform a program Congress designed to be self-funding into an enormous bill for taxpayers. On top of that, respondents' proposed refund would almost certainly exacerbate the existing fee disparity.

The only remaining question, then, is whether Congress would have wanted to retrospectively impose higher fees on debtors in Bankruptcy Administrator districts. The best evidence that Congress would not want such a remedy is that Congress itself chose not to pursue that course when amending the fee statute in 2021. Congress's choice makes sense. Retrospectively raising fees in Bankruptcy Administrator districts would do nothing to achieve Congress's goal of keeping the U. S. Trustee program self-funding. What is more, there are serious practical challenges to a retrospective imposition of higher fees, including the logistical problems with locating all the former debtors or their successors who would owe the higher fees. Pp. ——— – ———.

(c) Relying on a series of cases involving unconstitutional state taxes, respondents and the dissent claim that due process requires overriding Congress's clear intent. See, *e.g.*, ***489** *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17; *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74. These cases, respondents contend, stand for the proposition that unless an "exclusive" predeprivation remedy is both "clear and certain," *Newsweek, Inc. v. Florida Dept. of Revenue*, 522 U.S. 442, 443–444, 118 S.Ct. 904, 139 L.Ed.2d 888 (*per curiam*), due process requires "meaningful backward-looking relief," *McKesson*, 496 U.S. at 31, 110 S.Ct. 2238. And, they claim, the predeprivation remedy here was neither exclusive nor clear and certain.

The tax cases, assuming that they are even applicable here, do not entitle respondents to relief. In those cases, the Court held that the existence of a predeprivation hearing would be enough to satisfy the Due Process Clause. See *Harper*, 509 U.S. at 101, 113 S.Ct. 2510. Respondents acknowledge that they had the opportunity to challenge their fees before they paid them, so due process is satisfied. Respondents misread this Court's later decisions on bait-and-switch schemes as displacing that basic holding. To be sure, due process may sometimes constrain the Court's remedial options. In this case, though, due process does not mandate any particular remedy. Thus, as the tax cases themselves advise, the Court must "implement what the legislature would have willed." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427, 130 S.Ct. 2323, 176 L.Ed.2d 1131. Pp. ——— – ———.

15 F.4th 1011, reversed and remanded.

JACKSON, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, SOTOMAYOR, KAGAN, and KAVANAUGH, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which THOMAS and BARRETT, JJ., joined.

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Opinion

Justice JACKSON delivered the opinion of the Court.

***490** ****1592** Two Terms ago, in *Siegel v. Fitzgerald*, 596 U.S. 464, 142 S.Ct. 1770, 213 L.Ed.2d 39 (2022), we held that a statute violated the Bankruptcy Clause's uniformity requirement because it permitted different fees for Chapter 11 debtors depending on the district where their case was filed. See *id.*, at 479–480, and n. 2, 142 S.Ct. 1770. Today, we are asked to determine the remedy for that constitutional violation. We agree with the Government that the appropriate remedy is prospective parity. Requiring equal fees for otherwise identical Chapter 11 debtors going forward comports with congressional intent, corrects the constitutional wrong, and complies with due process.

Resisting this conclusion, respondents, a group of Chapter 11 debtors, argue that they are entitled to a refund. But, as respondents forthrightly concede, adopting their preferred remedy would require us to undercut congressional intent and transform, by judicial fiat, a program that Congress designed to be self-funding into an estimated $326 million bill for taxpayers. Neither remedial principles nor due process requires that incongruous result. We reverse.

I

A

The federal bankruptcy system is administered by two programs. See *id.*, at 468–470, 142 S.Ct. 1770. The U. S. Trustee Program, housed within the Department of Justice, administers 88 of the 94 bankruptcy districts. The six remaining districts, all in Alabama and North Carolina, are administered by the Bankruptcy Administrator Program, which the Administrative Office of the U. S. Courts runs under the supervision of the Judicial Conference.

***491** ****1593** [1] For our purposes, the most salient difference between these two programs is their funding. Congress designed the U. S. Trustee Program to be entirely self-funded by user fees paid by debtors. See 28 U.S.C. § 589a(b). By contrast, Congress supports the Bankruptcy Administrator Program through its general appropriation for the Judiciary, with fees used only to offset that funding. See § 1930(a)(7).

Despite these different funding schemes, the fees charged to debtors in U. S. Trustee and Bankruptcy Administrator districts were identical between 2001 and 2018. See *Siegel*, 596 U.S. at 470, 142 S.Ct. 1770. During that almost two-decade period, Congress would set the filing and quarterly fees for U. S. Trustee districts, and then the Judicial Conference, pursuant to a standing order, would require Bankruptcy Administrator districts to match them. See *ibid.* (citing Report of the Proceedings of the Judicial Conference of the United States 46 (Sept./Oct. 2001) (Report Proceedings)).

In 2017, facing a funding shortfall for the U. S. Trustee Program, Congress amended the fee statute to raise fees in U. S. Trustee districts. See 596 U.S. at 470–471, 142 S.Ct. 1770. Specifically, Congress increased quarterly fees for new and pending Chapter 11 cases in which debtors disbursed $1 million or more in that quarter. See Div. B, 131 Stat. 1232 (2017 Act). Consistent with its goal of maintaining a self-funding U. S. Trustee Program, Congress made the fee increase for large debtors conditional on the operating fund for the program falling below $200 million in the prior fiscal year. See *Siegel*, 596 U.S. at 470–471, 142 S.Ct. 1770. That threshold was met in 2017, so, starting in January 2018, fees increased for large Chapter 11 debtors in U. S. Trustee districts. See *ibid.*

Despite the Judicial Conference's standing order, though, fees did not immediately increase in Bankruptcy Administrator districts. See *ibid.* For reasons that remain obscure, it was not until October 2018 that the Judicial Conference increased fees for newly filed cases in Bankruptcy Administrator districts. See Report Proceedings 11–12 (Sept. 13, ***492** 2018). And fees for already pending large Chapter 11 cases in Bankruptcy Administrator districts remained at their 2017 level until Congress mandated equal fees in 2021. See Pub. L. 116–325, § 3(d)(2), 134 Stat. 5088 (2021 Act). In the interim, a disparity emerged between the fees paid by large Chapter 11 debtors in U. S. Trustee districts and those paid by large Chapter 11 debtors in Bankruptcy Administrator

districts. See *Siegel*, 596 U.S. at 478–479, 142 S.Ct. 1770.

B

In *Siegel*, we traced the origin of that disparity to a single statutory word. See *id.*, at 479–480, 142 S.Ct. 1770. The fee statute passed by Congress, and in effect at the time of the 2017 increase, read: "[T]he Judicial Conference of the United States *may* require the debtor in a case under chapter 11 of title 11" in a Bankruptcy Administrator district "to pay fees equal to those imposed" on otherwise identical debtors in U. S. Trustee districts. 28 U.S.C. § 1930(a)(7) (emphasis added). That permissive language, we explained, violated the Constitution's Bankruptcy Clause. *Siegel*, 596 U.S. at 480, n. 2, 142 S.Ct. 1770.

[2] **[3]** The Bankruptcy Clause empowers Congress "[t]o establish ... Laws on the subject of Bankruptcies throughout the United States," but it requires that such laws be "uniform." Art. I, § 8, cl. 4. Though the Clause "confers broad authority on Congress," including the flexibility to "enact geographically limited bankruptcy laws ... if it is responding to a geographically limited problem," we concluded that the Clause's grant of power did not extend ****1594** to the disparate fees facilitated by the permissive language in the fee statute. *Siegel*, 596 U.S. at 476–477, 142 S.Ct. 1770. As we explained, Congress could not constitutionally "treat identical debtors differently based on an artificial funding distinction that Congress itself created." *Id.*, at 479–480, 142 S.Ct. 1770.

Having found a constitutional wrong, we then faced the question of how to remedy it. We acknowledged three options: (1) refund fees for those charged more in U. S. Trustee districts, (2) retroactively extract higher fees from those ***493** charged less in Bankruptcy Administrator districts, or (3) require only prospective parity. See *id.*, at 480, 142 S.Ct. 1770. The final option, we noted, was already in effect: By the time *Siegel* reached our Court, Congress had replaced the permissive "may" in the fee statute with a mandatory "shall," resulting in equal fees for U. S. Trustee and Bankruptcy Administrator districts as of April 2021. *Id.*, at 471, 142 S.Ct. 1770 (quoting Pub. L. 116–325, § 3(d)(2), 134 Stat. 5088). But, because the remedial question had not been passed on below, we remanded for the Fourth Circuit to address it in the first instance. See *Siegel*, 596 U.S. at 481, 142 S.Ct. 1770.

C

As in *Siegel*, this case arises from a Chapter 11 case filed in a U. S. Trustee district. Cf. *id.*, at 471, 142 S.Ct. 1770. In 2016, a group of 76 legal entities related to a chain of hotels and resorts filed for bankruptcy in the District of Kansas. Starting in January 2018, the debtors were subjected to increased quarterly fees under the amended fee statute. In March 2020, the debtors challenged the constitutionality of those fees, seeking both a refund of fees already paid and a reversion of future fees to their 2017 level. See Debtors' Motion To Determine Extent of Liability for Quarterly Fees Payable in No. 16–21142 (Bkrtcy. Ct. Kan., Mar. 3, 2020), ECF Doc. 2823. Finding no constitutional violation, the Bankruptcy Court did not reach the remedial question. See *In re John Q. Hammons Fall 2006, LLC*, 618 B.R. 519, 525–526 (Bankr. D.Kan. 2020).

The Tenth Circuit reversed. See *In re John Q. Hammons Fall 2006, LLC*, 15 F.4th 1011, 1016 (2021). It anticipated our holding in *Siegel* and found that the fee statute permitting nonuniform fees violated the Bankruptcy Clause. See *id.*, at 1025. To remedy that violation, the panel then ordered a refund of the debtors' quarterly fees so that they equaled the lower fees the debtors would have paid had their case been filed in a Bankruptcy Administrator district. See *id.*, at 1025–1026. The U. S. Trustee sought certiorari. After deciding *Siegel*, we granted the petition, vacated the Tenth ***494** Circuit's judgment, and remanded for further consideration. 596 U. S. ——, 142 S.Ct. 2810, 213 L.Ed.2d 1036 (2022). The Tenth Circuit sought supplemental briefing, but ultimately

reinstated its original opinion without alteration. See *In re John Q. Hammons Fall 2006, LLC*, 2022 WL 3354682, *1 (Aug. 15, 2022). After rehearing was denied, the U. S. Trustee again petitioned for review.

We granted certiorari to answer the remedial question left open in *Siegel*. 600 U. S. ——, 144 S.Ct. 480, 216 L.Ed.2d 1312 (2023).

II

[4] Across remedial contexts, "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); see also *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) ("Generally speaking, when confronting a constitutional flaw ****1595** in a statute, we try to limit the solution to the problem"). Accordingly, before we can determine the appropriate remedy for the Bankruptcy Clause violation in this case, we must bear down upon the particulars of the constitutional violation we identified in *Siegel*. Three aspects of our holding are worth highlighting.

[5] First, the violation we identified was nonuniformity, not high fees. There was no doubt raised in *Siegel* about Congress's power to raise fees for large Chapter 11 debtors. The constitutional issue arose only because the fee statute's permissive language effectively "exempted debtors in" Bankruptcy Administrator districts from paying the new rates, resulting in a disparity in fees between the two types of bankruptcy districts. *Siegel*, 596 U.S. at 468, 142 S.Ct. 1770. Though respondents understandably complain about their higher payments, our task is not necessarily to reduce them; it is to remedy the disparity. [1]

***495** Second, the fee disparity at issue here was short lived. It began in January 2018. By October 2018, the Judicial Conference required newly filed Chapter 11 cases in Bankruptcy Administrator districts to pay the higher fees. And starting in April 2021, Congress required uniform fees for pending cases too. Due to these policy shifts by the Judicial Conference and Congress, a large Chapter 11 debtor was subject to, at most, three years and three months of nonuniform treatment.

Finally, the disparity was small. The Government estimates (and respondents do not dispute) that, during the relevant period, only about 50 out of the more than 2,000 cases involving large Chapter 11 debtors were filed in Bankruptcy Administrator districts—a mere 2%. See Brief for Petitioner 11; Reply Brief 16–19. Therefore, even when the statute unconstitutionally permitted the complained-of fee disparity, 98% of the relevant class of debtors still paid uniform fees.

In short, the constitutional violation we identified in *Siegel* created a monetary disparity in bankruptcy fees that was short lived and small. With the limited nature of the constitutional problem in mind, we now turn to the question of how to remedy it.

III

A

[6] **[7]** **[8]** **[9]** **[10]** "[T]he touchstone for any decision about remedy is legislative intent." *Ayotte*, 546 U.S. at 330, 126 S.Ct. 961. Thus, the key question in determining how to remedy a constitutional violation wrought by the legislative process is always " 'what the legislature would have willed had it been apprised of the constitutional infirmity.' " *Sessions v. Morales-Santana*, 582 U.S. 47, 73–74, 137 S.Ct. 1678, 198 L.Ed.2d 150 (2017) (quoting ***496** *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427, 130 S.Ct. 2323, 176 L.Ed.2d 1131 (2010)). In cases involving unequal treatment, answering this question generally leads to a focus on two considerations: Congress's " ' "intensity of commitment" ' " to the more broadly applicable rule, and " ' "the degree of potential disruption of the statutory scheme that would occur" ' " if we were to extend the exception. ****1596** *Morales-Santana*, 582 U.S. at 75, 137 S.Ct. 1678 (quoting *Heckler v. Mathews*, 465 U.S. 728,

739, n. 5, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984)). In light of our limited institutional competence, we are also cognizant that Congress likely would not have intended relief that is impractical or unworkable. See, *e.g.*, *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197, 236–237, 140 S.Ct. 2183, 207 L.Ed.2d 494 (2020) (opinion of ROBERTS, C. J.); *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 718–723, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). And we must keep in mind that our ultimate aim is to remedy the constitutional wrong consistent with congressional intent, not to provide the complaining parties' preferred form of relief. See, *e.g.*, *Barr v. American Assn. of Political Consultants, Inc.*, 591 U.S. 610, 634–635, 140 S.Ct. 2335, 207 L.Ed.2d 784 (2020) (opinion of KAVANAUGH, J.); *Morales-Santana*, 582 U.S. at 77, n. 29, 137 S.Ct. 1678.

[11] As respondents acknowledge, "Congress's intentions here were unmistakable." Brief for Respondents 31. Faced with the constitutional violation we identified in *Siegel*, Congress would have wanted prospective parity, not a refund or retrospective raising of fees. In other words, to remedy the fee disparity, Congress would have wanted to impose equal fees in all districts going forward. This conclusion is clear from the intensity of Congress's commitment to raising fees in U. S. Trustee districts, the extreme disruption a refund would cause to the bankruptcy system, and Congress's own decision to remedy the wrong we face by imposing equal fees going forward. We discuss each of these considerations in turn.

Start with Congress's commitment to higher fees in U. S. Trustee districts. Congress designed the U. S. Trustee Program to "be funded in its entirety by user fees." ***497** *Siegel*, 596 U.S. at 469, 142 S.Ct. 1770. Chapter 11 cases play a central role in achieving that goal. Congress required 100% of Chapter 11 quarterly fees to be deposited in the U. S. Trustee's operating fund. § 589a(b)(5).[2] By 2017, almost two-thirds of the U. S. Trustee Program's funding came from Chapter 11 fees alone. See H. R. Rep. No. 115–130, p. 7, n. 26 (2017). It is not surprising, then, that when there was a funding shortfall for the U. S. Trustee Program, Congress chose to address it by raising fees on the largest Chapter 11 debtors. See *Siegel*, 596 U.S. at 470, 142 S.Ct. 1770.

In 2021, when Congress amended the fee statute, it removed any doubts about its commitment to raising fees in order to keep the U. S. Trustee Program self-funded. The statute specifically stated that the purpose of keeping fees at an elevated level was "to further the long-standing goal of Congress of ensuring that the bankruptcy system is self-funded, at no cost to the taxpayer." 2021 Act § 2(b); see also § 2(a)(1). Respondents point to nothing—in the history of the bankruptcy system, the design of the U. S. Trustee Program, or the 2017 or 2021 Acts—that cuts against Congress's stated commitment to having higher fees for large Chapter 11 debtors in U. S. Trustee districts.

Now consider the flipside of this clear congressional commitment: the disruption that would follow from granting respondents' request to refund their fees. Our imposition of a refund would significantly undermine Congress's goal of keeping the U. S. Trustee Program self-funded. Respondents do not dispute that refunding all ****1597** large Chapter 11 debtors in U. S. Trustee districts would be expensive; the Government estimates it would cost approximately $326 million. See Brief for Petitioner 35–36; see also Brief for Respondents 21, and n. 6. If the Government's estimate is even close ***498** to correct, the cost of the refund would greatly exceed the $200 million threshold Congress selected in 2017 to signal fiscal distress in the U. S. Trustee Program and trigger higher fees. See *Siegel*, 596 U.S. at 470–471, 142 S.Ct. 1770. Thus, in mandating such a remedy, we would transform a program Congress designed to be self-funding into an enormous bill for taxpayers. It is hard to imagine a remedy more diametrically opposed to clear congressional intent.

On top of that, respondents' proposed refund would almost certainly exacerbate the small fee disparity we are attempting to remedy. As already noted, respondents are among the 98% of large Chapter 11 debtors who paid higher fees starting in 2018, just as Congress wanted. By refunding them, we would add to the past nonuniformity by increasing the tiny

percentage of debtors—currently 2%—who paid lower fees. As the Government aptly notes, even if 95% of the debtors in U. S. Trustee districts that paid higher fees received a refund, we would still end up creating a greater overall disparity than what resulted from Congress's requirement of prospective parity. See Brief for Petitioner 40.

Of course, it is true that the disparity could be entirely eliminated if all the debtors who paid higher fees were given a refund. But that theoretical possibility blinks reality. The Government estimates that 85% of the large Chapter 11 cases subject to higher fees between January 2018 and April 2021 have closed, and some of those debtors have been liquidated or otherwise ceased to exist. See Reply Brief 20. Respondents offer no meaningful path to reducing the small existing disparity through refunds. Instead, they encourage us to defy congressional intent, disrupt the U. S. Trustee Program's self-funding mandate, and divert the attendant costs to taxpayers—all to give them a remedy that will make the disparity caused by the constitutional violation worse.

The only real question, then, is whether Congress would have wanted to retrospectively impose higher fees on debtors in Bankruptcy Administrator districts. The best evidence ***499** that Congress did not intend such a remedy is that Congress itself chose not to pursue that course. In the 2021 Act, as respondents acknowledge, "Congress revised the fee scheme to address this very issue, and it did so by mandating equal fees *prospectively only*." Brief for Respondents 31 (citing Pub. L. 116–325, §§ 3(d)(2), 3(e)(2)(B), 134 Stat. 5088–5089); see also 28 U.S.C. § 1930(a)(6)(B)(ii)(II).

Congress's choice makes sense. Because fees collected in Bankruptcy Administrator districts go toward offsetting the Judiciary's appropriation, not to supporting the U. S. Trustee Program, retrospectively raising fees in Bankruptcy Administrator districts would do nothing to achieve Congress's goal of keeping the U. S. Trustee Program self-funding. See § 1930(a)(7). Thus, with the 2021 Act, Congress evinced a clear desire to comply with the constitutional mandate of uniformity by requiring prospective parity, but it reasonably chose not to impose higher fees retrospectively in Bankruptcy Administrator districts.

What is more, there are serious practical challenges to a retrospective imposition of higher fees. As in U. S. Trustee districts, many of the debtors who paid lower fees in Bankruptcy Administrator districts have exited bankruptcy or ceased to exist. See Brief for Respondents 38–39. Indeed, the Government estimates that only 10 of the ****1598** roughly 50 cases involving debtors who paid lower fees are still open. See Reply Brief 17–18. Moreover, locating all the former debtors or their successors would not end the practical problems. The Government would be forced to extract fees from funds that might already be disbursed, inevitably prompting additional litigation and even the unwinding of closed cases. See *ibid.* And all that effort would be directed against parties who followed the law and complied with the fee schedule imposed by the Judicial Conference under the 2017 Act.

Our remedial principles do not require us to follow that unintended, impractical course. Faced with far more serious dignitary harms than those implicated by a small and ***500** short-lived disparity in bankruptcy fees for large debtors, we have deemed prospective parity sufficient to remedy unconstitutional differences in treatment. See *Heckler*, 465 U.S. at 740, n. 8, 104 S.Ct. 1387 ("[W]e have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others"); see also, *e.g.*, *Morales-Santana*, 582 U.S. at 77, 137 S.Ct. 1678 (sex discrimination); *Manhart*, 435 U.S. at 721, 98 S.Ct. 1370 (same). Here, Congress would have wanted prospective parity, and that remedy is sufficient to address the small, short-lived disparity caused by the constitutional violation we identified in *Siegel*.

B

[12] The dissent offers three primary responses to our analysis thus far. First, the dissent argues that congressional intent is irrelevant, and we should simply defer to the plaintiffs' request for damages. See *post,* at ——, —— (opinion of GORSUCH, J.).

For their part, respondents do not claim that this is how our remedial precedent works; as already noted, they agree that "courts crafting constitutional remedies consult 'the legislature's intent.' " Brief for Respondents 31 (quoting *Morales-Santana*, 582 U.S. at 73, 137 S.Ct. 1678). That's for good reason: The dissent's argument turns on a misapprehension of the constitutional wrong at issue here. The remedial question before us is not whether to pay damages or not; it is how to address a short-lived and small disparity. "How equality is accomplished—by extension or invalidation of the unequally distributed benefit or burden, or some other measure—is a matter on which the Constitution is silent." *Levin*, 560 U.S. at 426–427, 130 S.Ct. 2323. So, when seeking to remedy an unconstitutional disparity, rather than divining the right answer ourselves or picking a party's preferred form of relief (which may, as in this case, make the disparity worse), we generally look to the intent of the Legislature. See *id.*, at 427–428, 130 S.Ct. 2323.

Second, the dissent argues that, if we are to rely on congressional intent, it actually points to a refund. See ***501** *post*, at —— – ——. For support, the dissent cites only to the fiscal year 2020 appropriations law. See *post,* at —— (citing 133 Stat. 2398). But, again, there is a reason that respondents do not advance this argument; in fact, they concede that "Congress ... address[ed] this very issue" and mandated prospective equalization of fees. Brief for Respondents 31. The dissent cites boilerplate language that simply allows the U. S. Trustee to respond effectively to commonplace overpayments by debtors. See Pub. L. 116–93, 133 Stat. 2398 ("[D]eposits ... and amounts herein appropriated shall be available in such amounts as may be necessary to pay refunds due depositors"). Such statements have been part of every appropriations law for years, including before the disparity at issue here came into existence. See, *e.g.*, 131 Stat. 195 (2017 appropriations law); 129 Stat. 2298 (2016 appropriations ****1599** law). Far from confirming a congressional intent to authorize an estimated $326 million refund here, the broader provision the dissent invokes underscores that a refund would send the U. S. Trustee Program into fiscal freefall, contradicting Congress's intent to have the program be self-funding. See 133 Stat. 2398 (estimating fee revenue and structuring appropriations "so as to result in a final fiscal year 2020 appropriation from the general fund estimated at $0").

Finally, the dissent suggests we need not address congressional intent at all, because the Government actually promised these respondents a refund. See, *e.g.*, *post*, at ——, —— – ——, —— – ——, n. 7. Once again, the dissent relies on an argument respondents have not advanced in this Court. And, once again, the dissent might have done better following respondents' cue. The relied-upon passage in the Government's bankruptcy court filing is nothing more than a request by the Government not to be forced to provide any remedy until after it has exhausted all appeals. See Objection of the United States to Debtor's Motion To Determine Extent of Liability for Quarterly Fees Payable in No. 16–21142 (Bkrtcy. Ct. Kan., Apr. 27, 2020), ECF Doc. 2868, pp. 59–61. ***502** Read fairly, the Government promised only what you would expect: that it would comply with a final judgment. See *ibid.*; see also Reply Brief 7, n. 1 ("Although the government does not believe a refund is the appropriate remedy, if it is subject to a judgment directing it to pay a refund, it will of course comply").

In sum, while the dissent invents new arguments to arrive at its favored outcome, we prefer to stick with the parties and our controlling precedent.[3]

IV

[13] Respondents and the dissent ask us to override Congress's clear intent because, they claim, due process requires it. See *post*, at —— – ——. To advance this argument, they rely on a series of cases involving unconstitutional state taxes. See, *e.g.*, *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993); *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994); *Newsweek, Inc. v. Florida Dept. of Revenue*, 522 U.S. 442, 118 S.Ct. 904, 139 L.Ed.2d 888 (1998) (*per curiam*). In respondents' view, these

cases stand for the proposition that "due process requires 'meaningful backward-looking relief ' unless an 'exclusive' predeprivation remedy is both 'clear and certain.' " Brief for Respondents 22 (first quoting Brief for Petitioner 29, in turn quoting *McKesson*, 496 U.S. at 31, 110 S.Ct. 2238, then quoting *Newsweek*, 522 U.S. at 443–444, 118 S.Ct. 904; capitalization and boldface deleted). Respondents claim that because the predeprivation remedy here was neither exclusive nor clear and certain, they are entitled to a refund. See Brief for Respondents 22–28.

***503** We disagree. To start, we note that the tax cases arrived at their holdings only after scrutinizing close to a century of tax-specific jurisprudence and carefully analyzing the unique interests the taxation context involves, including the Government's ****1600** "exceedingly strong interest in financial stability" and the attendant need for prompt payment and postdeprivation protections. See *McKesson*, 496 U.S. at 37, 110 S.Ct. 2238; see also *id.*, at 32–38, 110 S.Ct. 2238. The dissent does not dispute this, nor does it adequately explain why we deemed such history and context so central to our holdings in the tax cases. See *post*, at —— – ——. For their part, respondents simply ignore this context entirely. Instead, they replace the word "tax" with "fee," see Brief for Respondents 22, and assert that the constitutional holding of the tax cases applies to any case involving "monetary injury," including those arising from the voluntary, fee-for-service bankruptcy system, *id.*, at 9.

No matter, though. Even assuming that the tax cases apply, respondents are not entitled to relief under them. We held in those cases that if there was " 'a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing,' the 'availability of a predeprivation hearing constitute[d] a procedural safeguard ... sufficient by itself to satisfy the Due Process Clause.' " *Harper*, 509 U.S. at 101, 113 S.Ct. 2510 (quoting *McKesson*, 496 U.S. at 38, n. 21, 110 S.Ct. 2238). Here, respondents acknowledge that they had the opportunity to challenge their fees before they paid them. See Brief for Respondents 25 ("[T]he same bankruptcy procedures are open and available before or after paying an invalid fee. Both are equally acceptable for a party to assert and preserve its rights"). Under the tax cases, then, respondents are not entitled to any particular remedy.

Respondents and the dissent misread our later decisions as displacing that basic holding. In subsequent cases, we addressed situations where a State "reconfigure[d] its scheme, unfairly, in *mid-course*—to 'bait and switch' " taxpayers ***504** out of a refund remedy guaranteed under state law. *Reich*, 513 U.S. at 111, 115 S.Ct. 547; see also *Newsweek*, 522 U.S. at 444, 118 S.Ct. 904. We held that States could not hold open a postdeprivation refund remedy to encourage payment and then take it away after taxpayers paid. See *Reich*, 513 U.S. at 111–112, 115 S.Ct. 547; *Newsweek*, 522 U.S. at 444–445, 118 S.Ct. 904. In this case, though, there was neither a guaranteed refund remedy nor a bait and switch. Nothing in the Bankruptcy Code promises a refund to those who successfully challenge their fees. And respondents point to no previously available statutory remedy of which the Government has now deprived them. So those later cases do not help respondents either.

[14] With all that said, nothing we say here should be taken to diminish or depart from the holdings of the tax cases as they apply in the tax context. Nor do we mean to suggest that congressional intent is an entirely unchecked guide in our remedial analysis for constitutional violations. We cannot remedy an old constitutional problem by creating a new one, so due process and other constitutional protections undoubtedly will limit the possible remedies in many cases. See *Barr*, 591 U.S. at 633, 140 S.Ct. 2335. Here, though, due process does not mandate any particular remedy. Therefore, as the tax cases themselves advise, we must, "within the bounds of [our] institutional competence, ... implement what the legislature would have willed." *Levin*, 560 U.S. at 427, 130 S.Ct. 2323.

* * *

Faced with the unconstitutional nonuniformity we recognized in *Siegel*, Congress would have

provided for uniform fees going forward. That remedy cures the constitutional violation, and due process does not require another result. The judgment of the Court of Appeals for the Tenth Circuit **1601 is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GORSUCH, with whom Justice THOMAS and Justice BARRETT join, dissenting.

*505 What's a constitutional wrong worth these days? The Court's answer today seems to be: not much. Between 2018 and 2020, the government charged fees to bankruptcy debtors that varied arbitrarily from region to region, leaving some debtors millions of dollars worse off than others. Two years ago, we held that this geographically discriminatory treatment violated the Constitution's Bankruptcy Clause—a provision that, we stressed, was not "toothless." *Siegel v. Fitzgerald*, 596 U.S. 464, 468, 142 S.Ct. 1770, 213 L.Ed.2d 39 (2022). Today, however, the Court performs a remedial root canal, permitting the government to keep the cash it extracted from its unconstitutional fee regime.

The path the Court follows is as striking as its destination. Never mind that a refund is the traditional remedy for unlawfully imposed fees. Never mind that the government promised to supply precisely that relief if the debtors in this case prevailed, as they have, in their constitutional challenge. Never mind that backtracking on that promise raises separate due process concerns. As the majority sees it, supplying meaningful relief is simply not worth the effort. Respectfully, that alien approach to remedies has no place in our jurisprudence.

I

A

Certainty is the lifeblood of bankruptcy. For the system to function, a debtor must be certain that putting all his assets on the table for creditors will afford him a fresh start. So too must a creditor have certainty about what priority his loan may or may not enjoy in the event of a borrower's bankruptcy. Recognizing as much, our Constitution grants Congress power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Art. I, § 8, *506 cl. 4; see 3 J. Story, Commentaries on the Constitution of the United States §§ 1101–1103, pp. 4–8 (1833). That provision affords Congress some "flexibility" in drafting bankruptcy laws, but it does not tolerate laws that treat parties in bankruptcy differently based on the "arbitrary" happenstance of their "geograph[y]." *Siegel*, 596 U.S. at 476, 142 S.Ct. 1770. Laws like those, this Court has held, do not apply "uniform[ly] ... throughout the United States."

Our case arises from a violation of that uniformity requirement. In much of the country, the United States Trustee Program, housed in the Department of Justice, handles administrative tasks once handled by bankruptcy courts. *Id.*, at 468, 142 S.Ct. 1770. The Trustee Program is funded by quarterly fees paid principally "by debtors who file cases under Chapter 11 of the Bankruptcy Code." *Id.*, at 469, 142 S.Ct. 1770; see 28 U.S.C. § 1930(a)(6)(A). Thanks to a quirk of history, however, six federal judicial districts are not in the Trustee Program. Instead, they are part of the so-called Administrator Program, overseen by the Judicial Conference of the United States and "funded by the Judiciary's general budget." *Siegel*, 596 U.S. at 469, 142 S.Ct. 1770. In those districts, Congress did not require debtors to pay fees "at all." *Ibid.* That is, until a lower court highlighted the disparity and held it violated the Bankruptcy Clause. *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1529–1532 (CA9 1994).

**1602 In 2000, Congress implemented a fix. It provided that "the Judicial Conference of the United States may require" debtors in Administrator Program districts "to pay fees equal to those" debtors pay in Trustee Program districts. 114 Stat. 2412 (enacting § 1930(a)(7)). Although the statutory language ("may require") was permissive, the Judicial Conference took the hint and began charging the same fees as those levied in Trustee Program districts, thus

putting all debtors on equal footing. *Siegel*, 596 U.S. at 470, 142 S.Ct. 1770.

The solution didn't last. Come 2017, Congress enacted temporary measures to boost Trustee Program funding. There, Congress directed that, whenever Trustee Program ***507** funds dropped below $200 million, certain bankruptcy estates had to pay new and much higher quarterly fees (where some once paid $30,000, for example, the law now required them to pay up to $250,000). § 1004, 131 Stat. 1232; see *Siegel*, 596 U.S. at 470, 142 S.Ct. 1770. The 2017 Act "applied to all pending cases" in Trustee Program districts. *Id.*, at 471, 142 S.Ct. 1770. But for reasons not entirely clear from the record before us, the Judicial Conference didn't immediately follow suit. It waited until October 2018 to implement those changes in Administrator Program districts—and even then applied them "only to newly filed cases." *Ibid.*

Ultimately, Congress had to intercede again. At the close of 2020, Congress withdrew its direction to the Judicial Conference providing that it "may require" debtors in Administrator Program districts to pay the same fees as debtors in Trustee Program districts. In its place, Congress issued a more emphatic instruction, telling the Judicial Conference that it "shall" ensure that quarterly fees remain "consistent across all Federal judicial districts." §§ 2–3, 134 Stat. 5086, 5088.

But if that solved the problem going forward, it left another question unanswered: what to do about Trustee Program debtors who had paid more in fees between 2018 and 2020 than did their similarly situated Administrator Program counterparts. Many Trustee Program debtors brought challenges alleging that the fees they had paid violated the uniformity requirement of the Bankruptcy Clause. And in 2022, we agreed with them, holding that the debtors before us had been subject to "arbitrary geographically disparate" fees in violation of the Constitution. *Siegel*, 596 U.S. at 476, 142 S.Ct. 1770. After reaching that conclusion, we remanded the case then before us for a lower court to determine "the appropriate remedy ... in the first instance." *Id.*, at 480–481, 142 S.Ct. 1770.

B

John Q. Hammons Hotels & Resorts found itself in the middle of this mess. In 2016, various entities affiliated with ***508** Hammons filed Chapter 11 bankruptcy petitions in the District of Kansas, a Trustee Program district. *In re John Q. Hammons Fall 2006, LLC*, 15 F.4th 1011, 1018 (CA10 2021). The cases remained pending after the 2017 Act kicked in and before the 2020 Act mandated fee uniformity across the Nation. So Hammons was charged higher quarterly fees than debtors in Administrator Program districts.

Hammons did not challenge the fee disparity immediately. That would have come at a heavy cost: Until Hammons paid its fees in full, the bankruptcy court could not confirm Hammons's plan of reorganization, a vital step in the Chapter 11 process. See 11 U.S.C. § 1129(a)(12). Worse, as a debtor defaulting on its fees, Hammons would also have run the risk of being kicked out of the Chapter 11 process entirely. §§ 1112(b)(1), (b)(4)(K).

****1603** So Hammons waited until early 2020. By that time the bankruptcy court had confirmed its plan. See Debtors' Motion To Determine Extent of Liability for Quarterly Fees in No. 16–21142 (Bkrtcy. Ct. Kan., Mar. 3, 2020), ECF Doc. 2823, p. 5. But by that time Hammons had also "paid over $2.5 million more in quarterly fees than [it] would have paid had [it] filed in" an Administrator Program district. 15 F.4th at 1018. Arguing that this discriminatory treatment was unconstitutional under the Bankruptcy Clause, Hammons sought a refund of those excess payments. ECF Doc. 2823, at 8.

The U. S. Trustee opposed the request. But he promised that "[i]f [Hammons] prevail[ed] after all levels of review on [its] claim that [the fee disparity] is unconstitutional, the government [would] refund fees to the extent they were overpaid." Objection of the United States to Debtor's Motion to Determine Extent of Liability for Quarterly Fees in No. 16–21142 (Bkrtcy. Ct. Kan., Apr. 27, 2020), ECF Doc. 2868, p. 59. As reassurance, the U. S. Trustee stressed that Congress had "authorized payments of refunds ... in its

most recent annual appropriation law." *Id.*, at 59–60 (citing 133 Stat. 2398).

***509** This long-promised payment eventually came due. Anticipating our decision in *Siegel* by a year, in 2021 the Tenth Circuit held that Hammons had been subjected to an arbitrary and geographically disparate fee forbidden by the Bankruptcy Clause. 15 F.4th at 1023. By way of remedy, that court held the Trustee to his promise, ordering him to pay Hammons a refund of the fees it had paid in excess of those it would have owed in an Administrator Program district during the same period. *Id.*, at 1026. This Court granted certiorari to address what remedy is due debtors, like Hammons, who were charged unconstitutional fees between 2018 and 2020—the question we left open in *Siegel*, 600 U. S. ——, 144 S.Ct. 480, 216 L.Ed.2d 1312 (2023).

II

A

Where does that leave us? Before this Court, the U. S. Trustee does not question Hammons suffered a constitutional injury in having to pay nonuniform fees. That much was settled by *Siegel*. Nor does the U. S. Trustee dispute he promised to refund Hammons its overpayments should it prevail—as it has now prevailed—on the merits of its constitutional claim. Everyone agrees those fees total approximately $2.5 million. Even more than that, it is undisputed Congress has already taken the affirmative step of appropriating funds for refunds in cases just like this one. With all that beyond dispute, the next step should be too: Just as the Tenth Circuit held, the U. S. Trustee should be ordered to make Hammons whole for its injury and pay the promised refund.

Traditional remedial principles command that result. No one argues, for example, that sovereign immunity bars this suit or others like it. Nor is there a question Hammons sought a refund in a timely fashion. As the U. S. Trustee puts it, Congress has allowed "[t]he amounts of the payments [to] be litigated at the time of the budget submission; by filing ***510** an adversary proceeding to challenge fees at any time while the bankruptcy case is ongoing; or by filing a district court action after the case has terminated." Brief for Petitioner 5–6. And Hammons brought its fee challenge while its bankruptcy case was still ongoing. It is long since settled, too, that where (as here) Congress has provided "a general right to sue" for the invasion of a legal right but has not specified any particular form of relief, "federal courts may use any available remedy to make good the ****1604** wrong done." *Barnes v. Gorman*, 536 U.S. 181, 189, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002) (internal quotation marks omitted). And where (as here), someone pays money—or has money withheld from him—because of invalid government action, the most appropriate remedy is monetary relief.

Centuries of judicial practice confirm as much. This Court has long said that the "[a]ppropriate remedy" for "duties or taxes erroneously or illegally assessed ... is an action of assumpsit for money had and received." *Philadelphia v. Collector*, 5 Wall. 720, 731, 72 U.S. 720, 18 L.Ed. 614 (1867). We have held that "the law ... will compel restitution or compensation" "if a county obtains the money or property of others without authority." *City of Louisiana v. Wood*, 102 U.S. 294, 299, 26 L.Ed. 153 (1880) (internal quotation marks omitted). And on the theory that "the appropriate remedy" for unconstitutional discrimination "is a mandate of equal treatment," *Heckler v. Mathews*, 465 U.S. 728, 740, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984) (emphasis deleted), we have "regularly ... affirmed District Court judgments ordering that welfare benefits be paid to members of an unconstitutionally excluded class," *Califano v. Westcott*, 443 U.S. 76, 90, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979).

Our longstanding precedents should make short work of this case. Hammons remitted to the U. S. Trustee more than $2.5 million in "overpayments." *Siegel*, 596 U.S. at 472, 142 S.Ct. 1770 (internal quotation marks omitted). Those overpayments were exacted in violation of the Bankruptcy Clause. To remedy the violation, Hammons is entitled to a refund—the relief the U. S. Trustee promised from the start.

***511** B

Despite all this, the government now tries to backtrack. Yes, it promised to pay should Hammons prove a constitutional injury. Yes, Hammons has now done exactly that, consistent with *Siegel*. Yes, Congress has appropriated sums to make Hammons and others like it whole. And, yes, traditional remedial principles would seem to dictate just that form of relief. Still, the government insists, it should not be forced to pay. It's an astonishing claim, made all the more astonishing by the fact a majority of the Court goes along with it.

How do they get there? To determine the appropriate remedy for Hammons's constitutional injury, the government and majority reason, we "must adopt the remedial course Congress likely would have chosen had it been apprised of the constitutional infirmity." Brief for Petitioner 14 (internal quotation marks omitted). And, they continue, had Congress known in 2017 that the disparate fee arrangement was unconstitutional, it would have responded by imposing higher fees on debtors in the Administrator Program districts. *Id.*, at 14–15. And, the government and majority say, "[t]he most appropriate way to effectuate that remedy is on a purely prospective basis"—ensuring that fees are "uniform going forward." *Id.*, at 20. Of course, Congress already provided just this prospective relief in the 2020 Act. So really, the government and majority conclude, that means "no further relief is required." *Ibid.*; see *ante*, at —— – ——. Presto: No refund for Hammons. It is a line of reasoning as bold as it is untenable. [1]

***512** ****1605** 1

Start with the government and majority's major premise: the notion that our only proper role is to speculate about—and then give effect to—the course of action Congress would have taken to address the constitutional injury its fee regime imposed had it been warned in advance. Consider what that would mean in a more familiar context. Suppose you suffered some form of arbitrary and unlawful discrimination in the workplace and sued your employer for damages. In response, suppose your employer reassured you that, had it known beforehand what the incident would mean for its wallet, it would have taken steps to avoid the incident—and it promises to do better in the future. In what world does your employer's promise of a *prospective-only* remedy do anything to redress your *past* injuries? And why would it matter what the employer might have done differently?

None of that comports with traditional remedial principles. A promise of fee uniformity going forward may prevent future discrimination between debtors. But it does nothing to remedy fees unlawfully exacted in the past. Far from an "appropriate remedy," the majority's *prospective* remedy for a *past* injury is no remedy at all. By overlooking the (obvious) distinction between prospective and retrospective relief, the majority defies this Court's teaching that, in cases like this one, "effective relief consists of damages, not an injunction." *Tanzin v. Tanvir*, 592 U.S. 43, 51, 141 S.Ct. 486, 208 L.Ed.2d 295 (2020).

Nor is it sensible to ask what remedy the government might prefer. This Court has long held that, in our legal system, it is the plaintiff, not the defendant, who "has a right to choose" what form of legally permissible relief he will seek. *Twist v. Prairie Oil & Gas Co.*, 274 U.S. 684, 689, 47 S.Ct. 755, 71 L.Ed. 1297 (1927). And for just as long we have considered irrelevant a defendant's plea that, if he had known what he was doing was wrong, "he would have pursued a different course of action within the law." *Corsicana Nat. Bank of Corsicana v. Johnson*, 251 U.S. 68, 88, 40 S.Ct. 82, 64 L.Ed. 141 (1919). Entertaining that kind ***513** of "hypothesis," we have explained, "would be an unwarranted resort to fiction in aid of a wrongdoer, and at the expense of the party injured." *Ibid.*

Seeking a way around these problems and following the government's lead, the majority points to cases in which plaintiffs sought prospective equitable relief from an unconstitutional law. See Brief for Petitioner 14–15. [2] And in *that* posture, those cases indicate, the Court has sometimes thought it appropriate to ask how much of the challenged statute it should declare inoperative going forward: Should the whole statute, or only parts of it, be held unenforceable in the future?

That question, the Court has sometimes said, poses one of "severability." *Barr v. American Assn. of Political Consultants, Inc.*, 591 U. S. 610, 614, 140 S.Ct. 2335, 207 L.Ed.2d 784 (2020) (opinion of KAVANAUGH, J.); see ****1606** *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 331–332, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006). Sometimes, Congress will include an express severability clause providing that the unconstitutionality of any one provision will not preclude the enforcement of others going forward. *Barr*, 591 U.S. at 623, 140 S.Ct. 2335. But what happens when a statute contains no such provision? In cases like that, this Court has, from time to time, resorted to asking the hypothetical question: What would Congress "have willed" about the law's future application had it foreseen its constitutional defect? *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427, 130 S.Ct. 2323, 176 L.Ed.2d 1131 (2010).

So, for example, in *Sessions v. Morales-Santana*, 582 U.S. 47, 137 S.Ct. 1678, 198 L.Ed.2d 150 (2017), the Court faced a statute that supplied a faster path to citizenship for children born abroad to American mothers than for those born abroad to American fathers. ***514** *Id.*, at 51, 137 S.Ct. 1678. The Court held that law violated the Equal Protection Clause. *Id.*, at 72, 137 S.Ct. 1678. To resolve how the law should operate going forward consistent with the Constitution, the Court asked whether Congress would have preferred the " 'withdrawal of benefits' " from children of American mothers or the " 'extension of benefits' " to children of American fathers, and chose the former option. *Id.*, at 73, 137 S.Ct. 1678.[3]

None of that, however, has anything to do with our case. Hammons seeks damages to remedy a past violation. The company does not seek from us any form of prospective relief. As a result, we have no occasion to take a scalpel to Congress's work. We do not face anything like the question whether to extend or withdraw benefits to ensure a statute's constitutional operation going forward. Indeed, attempting to do so in this case would be utterly pointless, for in 2020 Congress *already* modified the challenged provision to remove its constitutional infirmity going forward. And just because *future* parties will not be injured does nothing to erase the fact that parties injured by *past* misconduct are entitled to relief.

The decisions the majority relies upon only confirm the point. Take *Morales-Santana*. While the Court consulted hypothetical legislative intent to resolve a question about the scope of prospective relief, it also acknowledged limits on ***515** the propriety of that course. It observed, for example, that legislative intent is "irrelevant" when "a defendant [is] convicted under a law classifying on an impermissible basis"; for that past harm, he is entitled to relief "without regard to the manner in which" Congress might have wanted to "cure the infirmity." *Id.*, at 74, n. 24, 137 S.Ct. 1678. The Court stressed, too, that we "loo[k] to Justice Harlan's concurring opinion in *Welsh v. United States*," 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970), when considering remedies for discriminatory treatment. 582 U.S. at 75, 137 S.Ct. 1678. ****1607** And that opinion is wholly inconsistent with the majority's approach today. Guessing how the legislature would have fixed a statute had it known of a constitutional defect might be appropriate "in an action for a declaratory judgment or an action in equity," Justice Harlan wrote. *Welsh*, 398 U.S. at 363–364, 90 S.Ct. 1792 (opinion concurring in result) (internal quotation marks omitted). But, he added, that course is *not* "appropriate" in cases, like the one before him, where the plaintiff sought relief for a past harm and the result of guesswork about legislative intentions could leave him "remediless." *Id.*, at 362, 90 S.Ct. 1792.

The few decisions the majority cites addressing requests for retrospective relief make a similar point. Consider *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), a case alleging unlawful discrimination under Title VII of the Civil Rights Act of 1964. See *ante*, at ——. That statute, the Court observed, provides that "retroactive relief 'may' be awarded if it is 'appropriate.' " 435 U.S. at 719, 98 S.Ct. 1370. Despite the permissive statutory language, the Court recognized the traditional "presumption in favor of " money damages to remedy past discrimination. *Ibid.* This presumption, *Manhart* continued, was

so strong it "can seldom be overcome." *Ibid.* Exactly so.[4]

***516** 2

Turn now to the minor premise of the majority's argument and a second, independent problem emerges. Relying on severability precedents, the majority reasons that Congress would not have wanted to issue refunds in cases like this one. But even assuming speculation about Congress's wishes has anything to do with the scope of retrospective relief, it would still require a refund here.

When searching for congressional intent, we have said, there is no better place to look than "existing statutory text." *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). Even in severability cases, we have taken pains to stress that courts may not elevate judicial guesswork about "Congress's hypothetical intent" over "statutory text," which is "the definitive expression of Congress's will." *Barr*, 591 U.S. at 624–625, 140 S.Ct. 2335 (opinion of KAVANAUGH, J.).

Follow those directions here and we end up at a refund. As the government has admitted, existing statutory text reveals that "Congress [has] authorized payments of refunds" ***517** from appropriated funds. ECF ****1608** Doc. 2868, at 59–60; see 133 Stat. 2398. This fact is as sure a sign as any that Congress didn't believe refunds would cause the sort of " 'disruption of the statutory scheme' " the majority worries over. *Ante*, at ——. The law gives us our answer—refunds—no guesswork necessary.

How does the majority respond? It points to Congress's decision in the 2020 Act to " 'mandat[e] equal fees *prospectively*.' " *Ante*, at ——. And that decision, the majority asserts, is "[t]he best evidence that Congress did not intend" for us to permit refunds. *Ibid.* But the majority never explains why that inference is a good, let alone the best, inference to draw from the 2020 Act's silence about retroactive relief. Given that Congress had already legislated to provide for refunds, why would it need to repeat itself in the 2020 Act? Cf. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986) ("We ordinarily presume that Congress intends the executive to obey its statutory commands"). And, particularly in those circumstances, why wouldn't the better inference be that Congress assumed courts would apply their ordinary rules and recognize that refunds are the appropriate remedy for illegal fees already exacted?[5]

***518** III

A

Traditional remedial principles guarantee Hammons a refund. Nothing the majority offers begins to suggest otherwise. Still, even if we could somehow put all that aside, this Court's due process precedents would demand the same result.

Those precedents contemplate cases like this one. We have held that, if an individual "reasonably relie[s] on the apparent availability of a postpayment refund when paying" a contested fee, the government may not later "declare, only after the disputed [fees] have been paid, that no such remedy exists." *Newsweek, Inc. v. Florida Dept. of Revenue*, 522 U.S. 442, 444–445, 118 S.Ct. 904, 139 L.Ed.2d 888 (1998) (*per curiam*) (internal quotation marks omitted). This due process rule holds true even when the individual had the option of pursuing a "prepayment remedy" but chose instead to take the "apparent[ly] availab[le]" postpayment route. *Id.*, at 443, 445, 118 S.Ct. 904. It does because due process prevents the government from engaging in a " 'bait and switch' " by later refusing to honor any remedial path it previously held open to the plaintiff. *Reich v. Collins*, 513 U.S. 106, 111, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994).

The majority's failure to supply a refund violates that rule. Start with the bait the government offered. As constitutional challenges like Hammons's began trickling in, U. S. Trustees across the country urged courts against awarding injunctive relief or setoffs to parties contesting their disparate ****1609** fee assessments. That kind of relief was unnecessary, the government contended, precisely "because the

statute appropriating funds to the United States Trustee Program ... permits refunds from the U. S. Trustee System Fund ... according to standard procedures." Memorandum of Law in Support of Defendants' Motion for Summary Judgment in *In re MF Global Holdings Ltd.*, No. 19–01379 (Bkrtcy. Ct. SDNY, Nov. 21, 2019), ECF Doc. 13, pp. 48–49. With representations ***519** like these—representations the government would repeat in Hammons's own bankruptcy proceeding, see Part I–B, *supra*—who could doubt that the opportunity to seek a postpayment refund was anything less than " 'clear and certain' "? *Reich*, 513 U.S. at 111, 115 S.Ct. 547. Or that Hammons's decision to choose this route rather than delay its plan confirmation to pursue a prepayment challenge was anything other than "reasonabl[e]"? *Newsweek*, 522 U.S. at 445, 118 S.Ct. 904.

Now the impermissible switch. Even as it continues to maintain that "[t]he amounts of the payments can be litigated ... at any time," Brief for Petitioner 5–6, the U. S. Trustee asks us to "declare, only after the disputed [fees] have been paid, that no such remedy exists," *Reich*, 513 U.S. at 108, 115 S.Ct. 547. Try as litigants might, the government now insists, they cannot in fact secure "refunds from the U. S. Trustee System Fund" under *any* "procedures." ECF Doc. 13, at 49.

That bait and switch violates due process, plain and simple. We should not be in the business of tolerating such "contrived and self-serving" changes in position. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 42, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). Rather, our precedents "requir[e] the [government] to provide the remedy it has promised." *Alden v. Maine*, 527 U.S. 706, 740, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999); accord, *Newsweek*, 522 U.S. at 445, 118 S.Ct. 904; see *McKesson*, 496 U.S. at 31, 110 S.Ct. 2238 (government "obligate[d]" to supply "meaningful backward-looking relief").

B

How does the majority answer this latest problem? On its telling, the only bait and switch our due process precedents guard against arises when the government holds open the possibility of a postpayment refund and then removes that option by statute or regulation after a party has paid the fee it wishes to contest. *Ante*, at —— – ——. So, yes, the Trustee promised that litigants could pay now and litigate for a refund later. But, the majority insists, Hammons ***520** should have disregarded those representations and seized "the opportunity" always provided by statute to seek injunctive relief "before [it] paid" the challenged fees. *Ante*, at ——. [6]

This argument, too, misreads our precedents. The availability of "predeprivation remedies," we have explained, is "beside the point" when a party reasonably relies on the apparent availability of a postpayment remedy. *Reich*, 513 U.S. at 113, 115 S.Ct. 547. Nor is it the case that an impermissible bait and switch can be accomplished only through statutory or regulatory changes. In *Newsweek* and *Reich*, for example, this Court held that a state-court ****1610** decision violated due process by robbing the taxpayer of a postpayment remedy that appeared available until the court ruled otherwise. *Newsweek*, 522 U.S. at 443–445, 118 S.Ct. 904; *Reich*, 513 U.S. at 111–113, 115 S.Ct. 547. Indeed, *Newsweek* summarily reversed a lower court for "fail[ing] to consider" this point. 522 U.S. at 443, 118 S.Ct. 904. The case before us is therefore no different from those we've considered before, except in one respect: In *Newsweek* and *Reich*, this Court cured the lower courts' due process violation; here, the Court itself creates one by robbing Hammons of a postpayment remedy that until this moment appeared available.

With nowhere left to go, the majority tries to suggest that our due process precedents are limited to the tax context. *Ante*, at ——. It's the "[g]overnment's exceedingly strong interest in" prompt tax payments, the majority reasons, that brings with it the "postdeprivation protections" discussed in our tax cases. *Ibid.* (internal quotation marks omitted). But the majority does not explain why, as a matter of due process, the government's promises about the

availability of ***521** postdeprivation procedures must be honored only in the tax context. Nor could it. If there's anything unique about our tax decisions, it's our treatment of "the field of taxation" as an area where we've "afforded [governments] great flexibility in satisfying the requirements of due process." *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 587, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995). In other words, we have long treated the procedural protections described in our tax cases as some of the most government-friendly due process will tolerate. See *Londoner v. City and County of Denver*, 210 U.S. 373, 385–386, 28 S.Ct. 708, 52 L.Ed. 1103 (1908). And if a bait and switch is impermissible in the tax context, surely it must be in others.

This is hardly a new message. Reprimanding the Georgia Supreme Court for announcing there was no postpayment remedy only after the plaintiffs had paid a contested tax in reliance on that remedy, this Court in *Reich* explained that the case before it bore "a remarkable resemblance to *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 [, 78 S.Ct. 1163, 2 L.Ed.2d 1488] (1958)." 513 U.S. at 112, 115 S.Ct. 547. And *Patterson* concerned a challenge to a state court's contempt holding, not anything having to do with a tax. There, the Court held that, if "nothing 'suggest[s]' " a particular procedural route " 'is the *exclusive* remedy,' " due process prohibits a government from later penalizing an individual for pursuing one available route rather than another. 513 U.S. at 113, 115 S.Ct. 547. Precisely the same reasoning and rule apply here —another inconvenient fact the majority prefers to ignore. See *ante*, at —— (asserting there's no "dispute" that *McKesson* and its progeny apply only to taxes). In choosing this path, however, the majority sends a clear message to lower courts and litigants: Next time the government asks you to hold off on pursuing a remedy on the promise you can always pursue it later, its representations are worth no more than the relief the Court awards Hammons today. [7]

***522** ****1611** IV

The government's final salvo has to do with an appeal to public policy. Because there are fewer Administrator Program debtors who paid lower fees between 2018 and 2020 than there are Trustee Program debtors who paid arbitrarily higher fees during that period, the government reasons it is preferable either to try to recoup money from Administrator Program debtors or to do nothing at all. Brief for Petitioner 37–40. A refund to Trustee Program debtors, the government warns, would "transfe[r] to taxpayers substantial costs." Reply Brief 2; see Brief for Petitioner 35. The majority echoes these concerns. Providing a refund, it says, would be "enormous[ly]" "disrupti[ve]," in part because reimbursing debtors in Trustee Program districts "would be expensive." *Ante*, at ——. [8]

These concerns may be animated by prudent fiscal policy, but that is not how remedies work. Declining to pay an injured plaintiff will *always* be the cheapest option for the defendant. But when a refund is "otherwise available" as a matter of law, "the cost of [the] refund" cannot "justify a ***523** decision to withhold it." *McKesson*, 496 U.S. at 51, n. 35, 110 S.Ct. 2238. Consider how different, for example, our equality jurisprudence would look were it any other way. In the 1970s, pointing to the price tag associated with extending equal benefits to men and women was a favorite tactic of the federal government. See, *e.g.*, Brief for Appellant in *Weinberger v. Wiesenfeld*, O. T. 1974, No. 731892, p. 22 (extending " 'mother's benefits' to fathers" might lead to "over $300 million" in costs, equivalent to many times more than that amount today). Should this Court have balked at the sticker price for remedying this "monetary disparity"? *Ante*, at ——. More recently, the government argued that a "damages remedy against federal employees" for religious discrimination was too costly to count as " 'appropriate relief,' " Brief for Petitioners in *Tanzin* v. *Tanvir*, O. T. 2020, No. 1971, p. 30, even though damages were "the *only* form of relief that [could] remedy some ... violations," *Tanzin*, 592 U.S. at 51, 141 S.Ct. 486. Should we have stopped to perform a cost-benefit analysis there, too? [9]

V

I struggle to understand why today the majority so readily dismisses any remedy ****1612** in this case—all to save the government from the trouble of issuing funds the Legislature has ***524** appropriated and the Executive has promised to pay. As I see it, two possible lines of thinking may explain this unusual outcome, neither reassuring.

One possibility is that the majority views Bankruptcy Clause violations as less worthy of relief than other constitutional violations. The majority nods in that direction when it compares today's decision to others involving what it calls "far more serious dignitary harms." *Ante*, at ——. But if that's the reason, it is hardly a convincing one. After all, the majority describes its "What would Congress have done?" approach to remedies as universally applicable—governing questions of retrospective relief in sex discrimination and free exercise cases no less than those arising under the Bankruptcy Clause. See *ante*, at ——. Nor do we as judges have any warrant to play favorites among the Constitution's provisions, exalting some while relegating others to the status of "a second-class right." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1, 70, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022) (internal quotation marks omitted).

The other possibility is no better. Perhaps the majority thinks supplying relief isn't worth the trouble because the constitutional violation at issue here was, as the majority puts it, "short-lived and small." *Ante*, at ——. After all, the violation began in 2018 and ended in 2020. But on what account does a multiyear violation of the Constitution count as "short-lived"? And how does that violation count as "small" when it cost Hammons $2.5 million and, as the majority itself emphasizes, cost others millions more? Cf. *Culley v. Marshall*, 601 U. S. 377, 411–412, 144 S.Ct. 1142, —— L.Ed.2d —— (2024) (SOTOMAYOR, J., joined by KAGAN and JACKSON, JJ., dissenting) (months-long deprivation of a car is a harm of constitutional proportions); *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 703, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015) (ROBERTS, C. J., dissenting) (insisting there is no " '*de minimis*' " exception for constitutional "incursion[s]"). Consider, too, what that kind of thinking could mean for those seeking retrospective relief for other constitutional violations. It's ***525** not hard to imagine today's decision receiving a warm welcome from those who seek to engage in only a dash of discrimination or only a brief denial of some other constitutionally protected right. The rest of us can only hope that the Court corrects its mistake before it metastasizes too far beyond the bankruptcy context. [10]

Respectfully, I dissent.

All Citations

602 U.S. 487, 144 S.Ct. 1588, 219 L.Ed.2d 210, 73 Bankr.Ct.Dec. 149, 2024 Daily Journal D.A.R. 5152, 30 Fla. L. Weekly Fed. S 272

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Notably, even with the 2017 Act's increase, large Chapter 11 debtors in U. S. Trustee districts often paid lower fees, relative to their disbursements, than much smaller debtors. For example, fees for those with disbursements over $1 million, like respondents, were capped at 1% of disbursements, while fees for those debtors disbursing $15,000 or less were set at a flat rate of

$325, for a minimum of about 2.2%. See § 1004(a)(2), 131 Stat. 1232, 28 U.S.C. § 1930(a)(6)(A).

2 As part of the 2017 Act, Congress committed 98% of the money that the fee increase generated to funding the U. S. Trustee Program; the remaining 2% was deposited in the general fund of the Treasury. See § 1004, 131 Stat. 1232.

3 The dissent attempts, in various additional ways, to cabin, qualify, or contradict our analysis, including by wrongly suggesting that it rests on the party presentation principle. See *post*, at ——, n. 4. Readers are reminded that the dissent is "just that." *National Pork Producers Council v. Ross*, 598 U.S. 356, 389, n. 4, 143 S.Ct. 1142, 215 L.Ed.2d 336 (2023) (opinion of GORSUCH, J.).

1 In the alternative, the government contends, the Court should "direct the Judicial Conference to ... collect increased fees from" debtors in Administrator Program districts that did not pay the increased fees. Brief for Petitioner 34. Rightly, the Court declines this invitation. See *ante*, at ——— ——. The Judicial Conference is not a party to this case, so we lack power to enter an order that would bind it. And shaking down debtors—many of whom are no longer in Chapter 11 proceedings—for additional fees many years after the fact would raise serious due process concerns.

2 See *Barr v. American Assn. of Political Consultants, Inc.*, 591 U. S. 610, 617, 140 S.Ct. 2335, 207 L.Ed.2d 784 (2020) (opinion of KAVANAUGH, J.) (seeking a declaration); *Sessions v. Morales-Santana*, 582 U.S. 47, 77, 137 S.Ct. 1678, 198 L.Ed.2d 150 (2017) (grant of citizenship); *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 325, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (declaration and injunction); *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 419, 130 S.Ct. 2323, 176 L.Ed.2d 1131 (2010) (same).

3 Proceeding this way—asking what a hypothetical Congress might have done (but didn't do)—has drawn its fair share of criticism, including from Members of today's majority, as beyond the scope of the judicial power. See, *e.g.*, *Murphy v. National Collegiate Athletic Assn.*, 584 U.S. 453, 486–488, 138 S.Ct. 1461, 200 L.Ed.2d 854 (2018) (THOMAS, J., concurring); *Barr*, 591 U.S. at 625, 140 S.Ct. 2335 (KAVANAUGH, J., joined by ROBERTS, C. J., and ALITO, J.) ("[C]ourts are not well equipped to imaginatively reconstruct a prior Congress's hypothetical intent"); *id.*, at 652–653, 140 S.Ct. 2335 (GORSUCH, J., concurring in judgment in part and dissenting in part); *United States v. Arthrex, Inc.*, 594 U.S. 1, 32–35, 141 S.Ct. 1970, 210 L.Ed.2d 268 (2021) (GORSUCH, J., concurring in part and dissenting in part). Even those who have *advocated* for the practice agree it "is essentially legislative." R. Ginsburg, Some Thoughts on Judicial Authority To Repair Unconstitutional Legislation, 28 Clev. St. L. Rev. 301, 317 (1979); accord, *ante*, at ——.

4 With so much against it, the majority replies that I have "misapprehen[ded]" the "constitutional wrong at issue here." *Ante*, at ——. That charge is misdirected. Everyone appreciates that the question before us is how to remedy a past violation of the Bankruptcy Clause. It is only the majority that steadfastly refuses to recognize what remedy our cases call for when that kind of past wrong is established: damages. Trying another line of response, the majority seeks to characterize our centuries-old precedents concerning retrospective relief and the irrelevance of the severability decisions on which it relies as "new arguments." *Ante*, at ——. But this reply is no more persuasive. The majority proceeds as if Hammons didn't argue that it had a " 'legal right to recover the amount of the funds unlawfully exacted of it,' " Brief for Respondents 11 (brackets omitted); that the cases cited by the government concerned "principles of *severability*,

not backward-looking remedies," *id.*, at 19; or that it was entirely unilluminating to consider the intent of the "Congress [that] created the statutory scheme that resulted in th[e] constitutional infirmity," Brief in Opposition 20. Still, if the majority wishes to rest its holding today on the lack of party presentation of these arguments, I will not stand in its way, for it means debtors who have more forcefully pressed the arguments the majority overlooks need not join Hammons on the remedial trash-heap. Courts below remain free to consider those arguments.

5 Alternatively, in places, the majority seems to suggest that we should dismiss Congress's authorization of moneys for refunds as "boilerplate language," *ante*, at ———as if an appropriation were a meaningless formality rather than an act of constitutional magnitude, see Art. I, § 9, cl. 7; *Consumer Financial Protection Bureau v. Community Financial Services Assn. of America, Ltd.*, 601 U.S. 416, —— S.Ct. ——, --- L.Ed.2d —— (2024). In other places yet, the majority seems to suggest that the party-presentation principle somehow allows the Court to ignore Congress's authorization of refunds entirely, see *ante*, at ———a proposition that runs headlong into the settled rule that no party may " 'waiv[e]' " the proper interpretation of the law by "fail[ing] to invoke it." *EEOC v. FLRA*, 476 U.S. 19, 23, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986) (*per curiam*); see also, *e.g.*, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 56, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006).

6 Pause to notice that, under the majority's logic, debtors who did choose to "withhol[d] the unconstitutional fees" and brought *pre*payment challenges may not now be ordered to hand over that money. Brief for MF Global Holdings Ltd. as *Amicus Curiae* 5 (boldface and capitalization deleted); see *ante*, at —— (courts "cannot remedy an old constitutional problem by creating a new one").

7 Failing all else, the majority tries to reconceive the government's promise to pay as a representation merely that the government "would comply with a final judgment." *Ante*, at ——. But why the government would need to state this obvious point goes unexplained. And try as the majority might, what the government *actually* wrote leaves little room for reimagination: "If Debtors prevail after all levels of review on their claim that the 2017 amendment does not apply to this case or is unconstitutional, the government will refund fees to the extent they were overpaid." ECF Doc. 2868, at 59. Nor does the majority even attempt to explain away the government's concession before this Court that "[t]he amounts of the payments can be litigated ... at any time." Brief for Petitioner 5–6.

8 At times, the majority appears so eager to inflate the consequences of supplying meaningful relief that it contradicts the government's more moderate position. It asserts, for example, that the statute authorizing refunds somehow proves that "refund[s] would send the U. S. Trustee program into fiscal freefall." *Ante*, at ——. But the majority does not supply whatever back-of-the-napkin calculation leads it to contradict the U. S. Trustee's more informed representation that the program's hundreds of millions of dollars in funds are more than sufficient to reimburse Hammons and others. See Part I–B, *supra*.

9 Besides emphasizing the cost to the fisc as a ground for its decision, the majority also cites the fact that granting Hammons a refund will not guarantee the past disparities will "be entirely eliminated." *Ante*, at ——. Why? Because not every overpaying debtor in a Trustee Program district has sought reimbursement. *Ibid.* But, as best I can tell, this Court has never before declined to remedy a plaintiff 's constitutional harm on the theory that other would-be plaintiffs forfeited or waived their right to seek similar relief. Such a rule would be dangerous indeed for those seeking to vindicate their constitutional rights. As the government concedes, too, "there is a putative class action on

behalf of all affected debtors pending in the Court of Federal Claims." Brief for Petitioner 36. Given the weight the majority places on Hammons's inability to recover for all affected debtors, it's far from clear what the impact of today's decision is on that action.

10 One might wonder as well: By declining to supply a damages remedy for a constitutional violation even when statutory law authorizes it, what is left of the mistaken notion that the Constitution demands a damages remedy for its violation even in the absence of statutory authority? See *Egbert v. Boule*, 596 U.S. 482, 508–509, 142 S.Ct. 1793, 213 L.Ed.2d 54 (2022) (SOTOMAYOR, J., joined by, *inter alios*, KAGAN, J., concurring in judgment and dissenting in part); *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 338, 135 S.Ct. 1378, 191 L.Ed.2d 471 (2015) (SOTOMAYOR, J., joined by, *inter alios*, KAGAN, J., dissenting).

Negative Treatment

Negative Citing References (1)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by	1. United States v. Trump MOST NEGATIVE 740 F.Supp.3d 1245 , S.D.Fla. CRIMINAL JUSTICE — Indictment and Information. Special Counsel's appointment violated Appointments Clause thereby requiring dismissal of superseding indictment charging former...	July 15, 2024	Case		4 S.Ct.

History (38)

Direct History (20)

1. In re John Q. Hammons Fall 2006, LLC
618 B.R. 519 , Bankr.D.Kan. , July 27, 2020

Reversed and Remanded by

2. In re John Q. Hammons Fall 2006, LLC
15 F.4th 1011 , 10th Cir.(Kan.) , Oct. 05, 2021

Certiorari Granted, Judgment Vacated by

3. Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC
142 S.Ct. 2810 , U.S. , June 13, 2022

On Remand to

4. In re John Q. Hammons Fall 2006, LLC
2022 WL 3354682 , 10th Cir.(Kan.) , Aug. 15, 2022

Certiorari Granted by

5. Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC
144 S.Ct. 480 , U.S. , Sep. 29, 2023

AND Vacated by

6. In re John Q. Hammons Fall 2006, LLC
2024 WL 3468941 , 10th Cir.(Kan.) , July 16, 2024

7. In re John Q. Hammons Fall 2006, LLC
15 F.4th 1011 , 10th Cir.(Kan.) , Oct. 05, 2021

Reinstated by

8. In re John Q. Hammons Fall 2006, LLC
2022 WL 3354682 , 10th Cir.(Kan.) , Aug. 15, 2022

Certiorari Granted by

9. Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC
144 S.Ct. 480 , U.S. , Sep. 29, 2023

AND Vacated by

10. In re John Q. Hammons Fall 2006, LLC
2024 WL 3468941 , 10th Cir.(Kan.) , July 16, 2024

11. In re John Q. Hammons Fall 2006, LLC
15 F.4th 1011 , 10th Cir.(Kan.) , Oct. 05, 2021

Reversed and Remanded by

12. Office of United States Trustee v. John Q. Hammons Fall 2006, LLC
602 U.S. 487 , U.S. , June 14, 2024

On Remand to

13. In re John Q. Hammons Fall 2006, LLC
2024 WL 3468941 , 10th Cir.(Kan.) , July 16, 2024

AND On Remand to

14. In re John Q. Hammons Fall 2006, LLC
2024 WL 3497761 , 10th Cir.(Kan.) , July 22, 2024

15. In re John Q. Hammons Fall 2006, LLC
15 F.4th 1011 , 10th Cir.(Kan.) , Oct. 05, 2021

Affirmed in Part, Vacated in Part by

16. In re John Q. Hammons Fall 2006, LLC
2024 WL 3497761 , 10th Cir.(Kan.) , July 22, 2024

17. In re John Q. Hammons Fall 2006, LLC
618 B.R. 519 , Bankr.D.Kan. , July 27, 2020

Reversed and Remanded by

18. In re John Q. Hammons Fall 2006, LLC
2022 WL 3354682 , 10th Cir.(Kan.) , Aug. 15, 2022

Certiorari Granted by

19. Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC
144 S.Ct. 480 , U.S. , Sep. 29, 2023

AND Vacated by

20. In re John Q. Hammons Fall 2006, LLC
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22. In re John Q. Hammons Fall 2006, LLC
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32. In re John Q. Hammons Fall 2006, LLC
612 B.R. 779 , Bankr.D.Kan. , Jan. 03, 2020 , as amended (Jan 21, 2020)

On Reconsideration

33. In re John Q. Hammons Fall 2006, LLC
614 B.R. 371 , Bankr.D.Kan. , Apr. 29, 2020

34. In re John Q. Hammons Fall 2006, LLC
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35. In re John Q. Hammons Fall 2006, LLC
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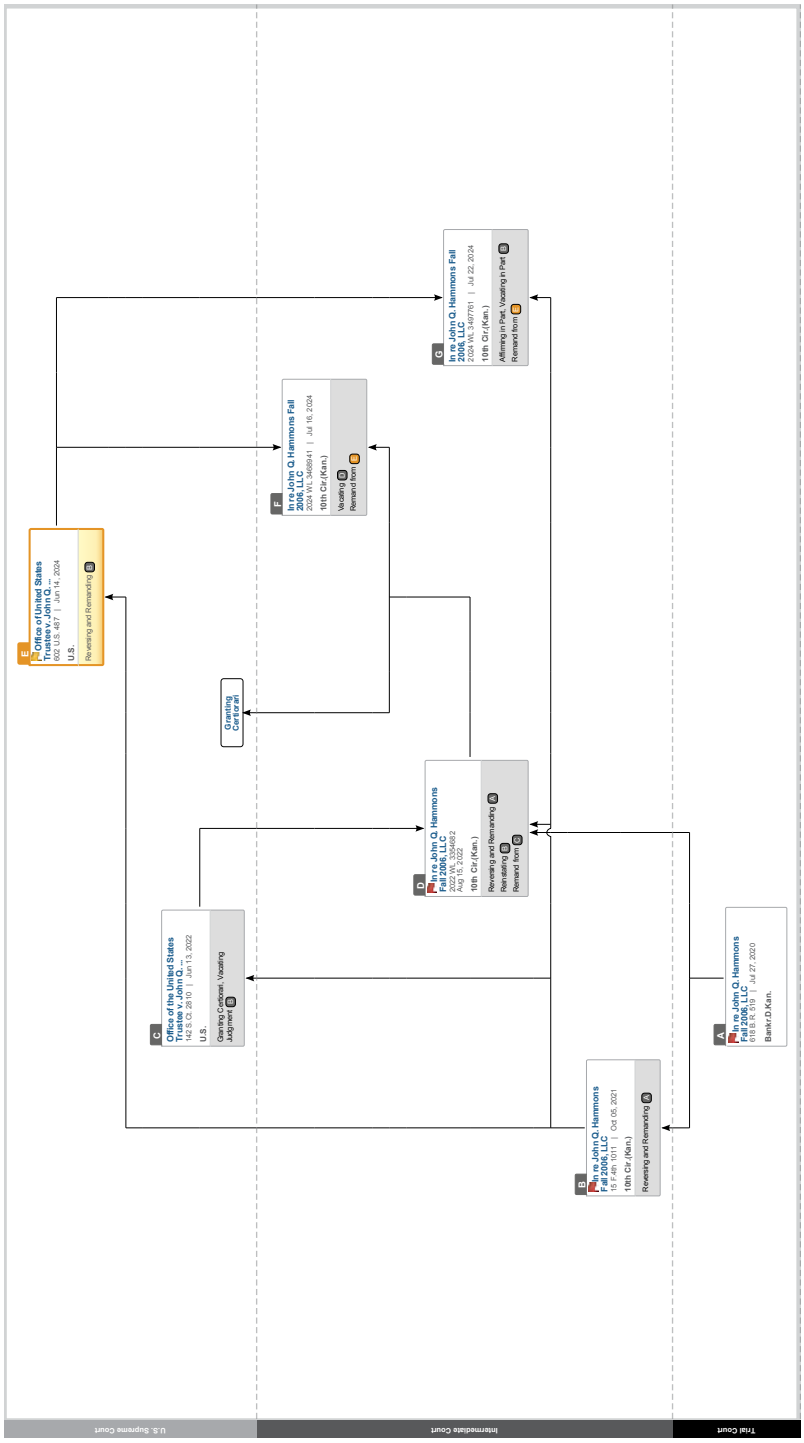
36. In re John Q. Hammons Fall 2006, LLC
2021 WL 2523979 , Bankr.D.Kan. , Apr. 29, 2021

Affirmed in Part, Reversed in Part and Remanded by

37. JWJ Hotel Holdings, Inc. v. Revocable Trust of John Q. Hammons Dated December 28, 1989 as Amended and Restated
638 B.R. 163 , D.Kan. , Jan. 18, 2022

38. Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC
144 S.Ct. 376 , U.S. , Nov. 06, 2023

Office of United States Trustee v. John Q. Hammons Fall 2006, LLC, 602 U.S. 487



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Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Cited	1. Alden v. Maine 119 S.Ct. 2240, U.S.Me., 1999 GOVERNMENT - Immunity. Congress could not subject state to suit in state court under Fair Labor Standards Act.	Case			1609
Cited	2. Armstrong v. Exceptional Child Center, Inc. 135 S.Ct. 1378, U.S., 2015 HEALTH - Medical Assistance. States' obligation to provide sufficient Medicaid reimbursement rates cannot be privately enforced through injunctive relief.	Case			1612
Discussed	3. Ayotte v. Planned Parenthood of Northern New England 126 S.Ct. 961, U.S., 2006 FAMILY LAW - Abortion. Proper remedy for constitutional flaw in law limiting access to abortions is not always invalidating law in its entirety.	Case			1594+
Cited	4. Barnes v. Gorman 122 S.Ct. 2097, U.S., 2002 CIVIL RIGHTS - Damages. Punitive damages are not recoverable under the ADA or the Rehabilitation Act.	Case			1604
Discussed	5. Barr v. American Association of Political Consultants, Inc. 140 S.Ct. 2335, U.S., 2020 CIVIL RIGHTS — Free Speech. Debt-collection exception to TCPA's "robocall" restriction violates the First Amendment but is severable from remainder of statute.	Case			1596+
Cited	6. Bowen v. Michigan Academy of Family Physicians 106 S.Ct. 2133, U.S.Mich., 1986 Association of family physicians and individual doctors brought suit challenging validity of medicare regulation authorizing payment of benefits in different amounts for similar...	Case			1608
Cited	7. Califano v. Westcott 99 S.Ct. 2655, U.S.Mass., 1979 Action was brought challenging constitutionality of that section of aid to families with dependent children program providing benefits to families whose dependent children have...	Case			1604

Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Discussed	**8.** City of Los Angeles, Dept. of Water and Power v. Manhart 98 S.Ct. 1370, U.S.Cal., 1978 Class action was brought challenging, under Title VII of the 1964 Civil Rights Act, city department's requirement that female employees make larger contributions to its pension...	Case			1596+
Cited	**9.** City of Louisiana v. Wood 1880 WL 18918, U.S.Mo., 1880 That the bonds in question are invalid, is conceded. Such is the effect of Anthony v. County of Jasper (101 U. S. 693), decided at the last term. It is equally true that the...	Case			1604
Cited	**10.** City of Philadelphia v. The Collector 1866 WL 9425, U.S.Pa., 1866 ERROR to the Circuit Court for Eastern Pennsylvania; the case being thus: The Judiciary Act of 1789 limits the jurisdiction of the Federal courts, so far as determined by...	Case			1604
Cited	**11.** Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited 144 S.Ct. 1474, U.S., 2024 COMMERCIAL LAW — Consumer Protection. Funding mechanism for the Consumer Financial Protection Bureau complies with the Appropriations Clause.	Case			1608
Cited	**12.** Corsicana Nat. Bank of Corsicana v. Johnson 40 S.Ct. 82, U.S.Tex., 1919 In Error to the United States Circuit Court of Appeals for the Fifth Circuit. Action by the Corsicana National Bank of Corsicana against Samuel Wistar Johnson. From a judgment for...	Case			1605+
Cited	**13.** Culley v. Marshall 144 S.Ct. 1142, U.S., 2024 GOVERNMENT — Forfeitures. Due process requires timely forfeiture hearing but not separate preliminary hearing, in cases involving civil forfeiture of personal property.	Case			1612
Cited	**14.** E.E.O.C. v. Federal Labor Relations Authority 106 S.Ct. 1678, U.S.Dist.Col., 1986 Federal agency sought judicial review of Federal Labor Relations Authority order requiring it to bargain over union proposal that it comply with guidelines for contracting out of...	Case			1608

Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Cited	**15.** Egbert v. Boule 142 S.Ct. 1793, U.S., 2022 GOVERNMENT — United States. Causes of action under Bivens would not be implied for excessive force and First Amendment retaliation.	Case			1612
Declined to Extend	**16.** Harper v. Virginia Dept. of Taxation 113 S.Ct. 2510, U.S.Va., 1993 Retirement Benefits. United States Supreme Court's Davis decision against state income tax exemption for state and local retirement benefits applies retroactively.	Case			1590+
Cited	**17.** Heckler v. Mathews 104 S.Ct. 1387, U.S.Ala., 1984 Retiree brought class action alleging that application of pension offset provision to him and other nondependent men but not to similarly situated nondependent women violated due...	Case			1596+
Reversed and Remanded	**18.** In re John Q. Hammons Fall 2006, LLC 15 F.4th 1011, 10th Cir.(Kan.), 2021 BANKRUPTCY — Case Administration. Statutory amendment increasing quarterly Chapter 11 disbursement fees solely for large debtors in Trustee districts violated the Bankruptcy...	Case			1590+
Cited	**19.** In re John Q. Hammons Fall 2006, LLC 2022 WL 3354682, 10th Cir.(Kan.), 2022 This matter is before the court following our receipt of the United States Supreme Court's order granting certiorari, vacating our judgment, and remanding for further consideration...	Case			1594
Cited	**20.** In re John Q. Hammons Fall 2006, LLC 618 B.R. 519, Bkrtcy.D.Kan., 2020 BANKRUPTCY — Professionals. Increase in quarterly fees payable to United States Trustee did not have impermissible retroactive effect in previously filed cases.	Case			1594
Cited	**21.** Lamie v. U.S. Trustee 124 S.Ct. 1023, U.S., 2004 BANKRUPTCY - Attorney Fees. Chapter 7 debtor's attorney may not be compensated from estate.	Case			1607
Discussed	**22.** Levin v. Commerce Energy, Inc. 130 S.Ct. 2323, U.S., 2010 TAXATION - Jurisdiction. Comity required taxpayers' complaint alleging discriminatory state taxation to proceed originally in state court.	Case			1590+

Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Cited	**23.** Londoner v. City and County of Denver 28 S.Ct. 708, U.S.Colo., 1908 IN ERROR to the Supreme Court of the State of Colorado to review a decree which reversed a decree of the District Court of Arapahoe County, in that state, granting the relief...	Case			1610
Declined to Extend	**24.** McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida 110 S.Ct. 2238, U.S.Fla., 1990 Wholesale liquor distributors filed suit, challenging the Florida excise tax that gave preferential treatment to beverages that were manufactured from Florida-grown citrus and...	Case		”	1590+
Cited	**25.** Murphy v. National Collegiate Athletic Association 138 S.Ct. 1461, U.S., 2018 GOVERNMENT - Gambling. Federal law making it unlawful for States to authorize sports gambling violates anticommandeering doctrine.	Case			1606
Cited	**26.** National Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson 78 S.Ct. 1163, U.S.Ala., 1958 Suit against association to oust it from state and enjoin it from conducting further activities, wherein the association was adjudged in contempt for noncompliance with order...	Case			1610+
Cited	**27.** National Pork Producers Council v. Ross 143 S.Ct. 1142, U.S., 2023 COMMERCIAL LAW — Industry Regulation. Law barring sales of whole pork meat from animals confined in manner inconsistent with California standards did not violate dormant Commerce...	Case			1599
Cited	**28.** National Private Truck Council, Inc. v. Oklahoma Tax Com'n 115 S.Ct. 2351, U.S.Okla., 1995 Courts. Section 1983 provided no basis for courts to issue injunctive or declaratory relief in state tax cases when there was adequate remedy at law.	Case		”	1610
Cited	**29.** New York State Rifle & Pistol Association, Inc. v. Bruen 142 S.Ct. 2111, U.S., 2022 CIVIL RIGHTS — Right to Bear Arms. New York's proper-cause requirement for granting an unrestricted license to carry a handgun in public violates Second and Fourteenth Amendments.	Case			1612

Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Declined to Extend	**30.** Newsweek, Inc. v. Florida Dept. of Revenue 118 S.Ct. 904, U.S.Fla., 1998 TAXATION - Refunds. Florida could not deprive magazine publisher of its postdepriviation remedy after successful challenge to imposition of sales tax on magazines, but not on...	Case			1590+
Cited	**31.** Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC 142 S.Ct. 2810, U.S., 2022 On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the...	Case			1594
Mentioned	**32.** Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC 144 S.Ct. 480, U.S., 2023 Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit granted.	Case			1594+
Declined to Extend	**33.** Reich v. Collins 115 S.Ct. 547, U.S.Ga., 1994 Postdeprivation Remedy. State could not hold out what plainly appeared to be clear and certain postdeprivation remedy for unconstitutionally collected taxes and then declare, only...	Case			1599+
Cited	**34.** Seila Law LLC v. Consumer Financial Protection Bureau 140 S.Ct. 2183, U.S., 2020 GOVERNMENT — United States. For-cause removal restriction for Consumer Financial Protection Bureau's single Director violates separation of powers but it is severable.	Case			1596
Examined	**35.** Sessions v. Morales-Santana 137 S.Ct. 1678, U.S., 2017 IMMIGRATION - Citizenship. Gender-based differential in acquisition of citizenship by certain children born abroad violated equal protection guarantees.	Case			1590+
Examined	**36.** Siegel v. Fitzgerald 142 S.Ct. 1770, U.S., 2022 BANKRUPTCY — Professionals. Significant fee increase for large Chapter 11 cases, which exempted debtors in two states, violated the Bankruptcy Clause's uniformity requirement.	Case			1590+

Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Cited	**37.** St. Angelo v. Victoria Farms, Inc. 38 F.3d 1525, 9th Cir.(Cal.), 1994 In Chapter 11 case, the Bankruptcy Court ordered debtor to pay United States Trustee $400 in fees, calculated by excluding sale proceeds from debtor's farm. United States Trustee...	Case			1601
Cited	**38.** Swann v. Charlotte-Mecklenburg Bd. of Ed. 91 S.Ct. 1267, U.S.N.C., 1971 School desegregation cases. The United States District Court for the Western District of North Carolina, 311 F.Supp. 265, rendered judgment from which parties on both sides...	Case		”	1590+
Cited	**39.** Tanzin v. Tanvir 141 S.Ct. 486, U.S., 2020 CIVIL RIGHTS — Religion. Religious Freedom Restoration Act (RFRA) permits litigants to obtain money damages against federal officials in their individual capacities.	Case		”	1605+
Cited	**40.** Twist v. Prairie Oil & Gas Co. 47 S.Ct. 755, U.S.Okla., 1927 On Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. Suits by Edward C. Twist and others against the Prairie Oil & Gas Company. To review a judgment...	Case			1605
Cited	**41.** U. S. v. Detroit Timber & Lumber Co. 26 S.Ct. 282, U.S.Ark., 1906 CROSS APPEALS from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree of that court which, on appeal from a decree of the Circuit Court for the...	Case			1590
Cited	**42.** United States v. Arthrex, Inc. 141 S.Ct. 1970, U.S., 2021 PATENTS — Judges. Unreviewable authority wielded by Administrative Patent Judges during inter partes review violated Appointments Clause.	Case			1606
Cited	**43.** Wellness Intern. Network, Ltd. v. Sharif 135 S.Ct. 1932, U.S., 2015 BANKRUPTCY - Jurisdiction. Bankruptcy courts may adjudicate Stern claims with the parties' knowing and voluntary consent.	Case			1612
Discussed	**44.** Welsh v. U.S. 90 S.Ct. 1792, U.S.Cal., 1970 Petitioner was convicted in the United States Cistrict Court for the Central District of California for refusing to submit to induction into Armed Forces. The Court of Appeals,...	Case		”	1606+

United States v. Miller

Supreme Court of the United States. | March 26, 2025 | 604 U.S. ---- | 145 S.Ct. 839

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Outline

Appended Content

145 S.Ct. 839
Supreme Court of the United States.

UNITED STATES, Petitioner
v.
David L. MILLER

No. 23-824
|
Argued December 2, 2024
|
Decided March 26, 2025

Synopsis

Background: Chapter 7 trustee, in his capacity as creditor holding allowable unsecured claim, brought strong-arm proceeding to avoid payments that corporate debtor had made to the Internal Revenue Service (IRS) on personal tax obligations of two of its principals. The United States moved, in effect, for summary judgment on sovereign immunity and preemption grounds, and trustee filed cross-motion. The United States Bankruptcy Court for the District of Utah, R. Kimball Mosier, J., 617 B.R. 375, granted trustee's motion, denied government's motion, and avoided the transfers. Government appealed. The District Court, Bruce S. Jenkins, Senior District Judge, 2021 WL 5194698, affirmed. Government appealed. The United States Court of Appeals for the Tenth Circuit, Baldock, Circuit Judge, 71 F.4th 1247, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Justice Jackson, held that the Bankruptcy Code abrogates sovereign immunity only with respect to the federal cause of action created by the subsection of the Code enabling a bankruptcy trustee to step into the shoes of a creditor and avoid certain transfers that would be "voidable under applicable law," not with respect to the underlying state-law claims that supply the "applicable law" for that federal cause of action.

Reversed.

Chief Justice Roberts and Justices Thomas, Alito, Sotomayor, Kagan, Kavanaugh, and Barrett joined.

Justice Gorsuch filed a dissenting opinion.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion for Summary Judgment.

West Headnotes (40)

[1] **Bankruptcy** Trustee as representative of debtor or creditors

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 Trustee as representative of debtor or creditors

Bankruptcy Code empowers a bankruptcy trustee to "avoid," or set aside, certain transfers of a debtor's assets in order to recover those assets for the benefit of the bankruptcy estate. 11 U.S.C.A. § 544(b).

[2] **Bankruptcy** Trustee as representative of debtor or creditors

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 Trustee as representative of debtor or creditors

Bankruptcy trustee's avoidance powers help the trustee maximize the value of the bankruptcy estate by enabling the trustee to recover assets that otherwise would have been lost.

[3] **Bankruptcy** Trustee as representative of debtor or creditors

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General

51k2704 Trustee as representative of debtor or creditors

Bankruptcy trustee's avoidance powers help the trustee equalize the distribution of the debtor's assets among creditors by preventing the debtor from offloading assets to preferred creditors outside of the formal bankruptcy process.

[4] **Bankruptcy** Statutory Liens

51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2580 Statutory Liens
51k2580.1 In general

Bankruptcy Code permits a bankruptcy trustee to avoid the transfer of certain statutory liens. 11 U.S.C.A. § 545.

[5] **Bankruptcy** Preferences

51 Bankruptcy
51V The Estate
51V(E) Preferences
51k2601 In general

Bankruptcy Code's preferences provision allows a bankruptcy trustee to invalidate transfers that the debtor made immediately before bankruptcy proceedings began. 11 U.S.C.A. § 547(b).

[6] **Bankruptcy** Fraudulent conveyances in general

51 Bankruptcy
51V The Estate
51V(F) Fraudulent Transfers
51k2641 Fraudulent conveyances in general

Bankruptcy Code permits a bankruptcy trustee to set aside certain fraudulent transfers, such as those made for the purpose of delaying or impeding the repayment of creditors. 11 U.S.C.A. § 548.

[7] **Bankruptcy** Trustee as representative of debtor or creditors

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 Trustee as representative of debtor or creditors

Term "applicable law," as used in the subsection of the Bankruptcy Code enabling a bankruptcy trustee to step into the shoes of a creditor and avoid certain transfers that would be "voidable under applicable law," can technically refer to any state or federal law outside of the Code, although trustees typically rely on state statutes to supply the "applicable law" for avoidance suits under that provision. 11 U.S.C.A. § 544(b).

[8] **Fraudulent Conveyances** Protection of creditors

Fraudulent Conveyances Intent

Fraudulent Conveyances Insolvency element of fraud

Fraudulent Conveyances Sufficiency in general

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(A) Grounds of Invalidity in General
186k2 Statutory Provisions
186k3 Protection of creditors
186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(A) Grounds of Invalidity in General
186k7 Elements of Fraud as to Creditors
186k9 Intent
186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(E) Insolvency of Grantor
186k61 Insolvency element of fraud
186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(G) Consideration
186k77 Sufficiency in general

State fraudulent transfer laws aim to prevent debtors from hiding or shielding their assets from creditors; most do so by providing creditors with a cause of action to invalidate any transfer that a debtor made with the intent to defraud creditors, and creditors may also typically invoke such laws to void "constructive fraudulent transfers"—that is, transfers made without an actual intent to defraud, such as an insolvent debtor's sale or transfer of assets for something less than their equivalent value.

[9] **Bankruptcy** Time of making transfer

51 Bankruptcy
51V The Estate
51V(F) Fraudulent Transfers
51k2644 Time of making transfer

Statute of limitations, or "lookback period," of the Bankruptcy Code's fraudulent-transfer provision is only two years. 11 U.S.C.A. § 548(a)(1).

[10] **Bankruptcy** Trustee as representative of debtor or creditors

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 Trustee as representative of debtor or creditors

To show that a debtor's transfer is "voidable under applicable law," within meaning of the subsection of the Bankruptcy Code enabling a bankruptcy trustee to step into the shoes of a creditor and avoid certain transfers that would be "voidable under applicable law," the trustee must identify the actual creditor or creditors who could have set aside the transaction in question under applicable law; if there is no creditor against whom the transfer is voidable under the applicable law, the trustee is powerless to act. 11 U.S.C.A. § 544(b).

[11] **Bankruptcy** Trustee as representative of debtor or creditors

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 Trustee as representative of debtor or creditors

"Actual creditor" requirement of the subsection of the Bankruptcy Code enabling a bankruptcy trustee to step into the shoes of a creditor and avoid certain transfers that would be "voidable under applicable law" serves as an important check on the trustee's avoidance powers; absent the requirement, a trustee could use that provision of the Code to unwind transactions that would never actually be at risk of invalidation outside of bankruptcy proceedings. 11 U.S.C.A. § 544(b).

[12] **Bankruptcy** Trustee as representative of debtor or creditors

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 Trustee as representative of debtor or creditors

"Actual creditor" requirement of the subsection of the Bankruptcy Code enabling a bankruptcy trustee to step into the shoes of a creditor and avoid certain transfers that would be "voidable under applicable law" mitigates the disruptive potential of the trustee's avoidance power by ensuring that the trustee has no greater rights of avoidance than the actual creditor would have if that creditor were asserting invalidity on its own behalf. 11 U.S.C.A. § 544(b).

[13] **Fraudulent Conveyances** Insolvency element of fraud

Fraudulent Conveyances Sufficiency in general

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(E) Insolvency of Grantor
186k61 Insolvency element of fraud
186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(G) Consideration
186k77 Sufficiency in general

Under Utah's fraudulent-transfer statute, a creditor may void a debtor's transfer of assets if the debtor was insolvent at the time of the transfer and received less than equal value in return. Utah Code Ann. § 25-6-6 et seq.

More cases on this issue

[14] **Bankruptcy** Governmental claims; immunity waiver

51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

Bankruptcy Code waives the government's sovereign immunity for certain claims arising under the Code. 11 U.S.C.A. § 106(a).

[15] **Bankruptcy** Governmental claims; immunity waiver

Bankruptcy Trustee as representative of debtor or creditors

51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver
51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 Trustee as representative of debtor or creditors

In waiving the government's sovereign immunity "with respect to" the section of the Bankruptcy Code setting forth a bankruptcy trustee's avoidance powers as lien creditor and as successor to certain creditors and purchasers, the Code abrogates sovereign immunity only with respect to federal cause of action created by the subsection of the Code enabling a bankruptcy trustee to step into the shoes of a creditor and avoid certain transfers that would be "voidable under applicable law," not with respect to the underlying state-law claims that supply the "applicable law" for that federal cause of action; operating like any other waiver of sovereign immunity, the Code's abrogation provision is merely jurisdictional and does not establish any substantive rights against the government by providing a waiver of immunity that would not otherwise exist under the external source of "applicable law." 11 U.S.C.A. §§ 106(a), 106(a)(5), 544, 544(b).

[16] **United States** Waiver of Immunity; Consent to Suit

393 United States
393II Liabilities of and Claims Against United States
393II(B) Immunity in General
393k422 Waiver of Immunity; Consent to Suit
393k423 In general

Waivers of sovereign immunity are jurisdictional provisions that empower courts to hear claims against the government but do not themselves typically create any new substantive rights against the government.

More cases on this issue

[17] **United States** Necessity of waiver or consent

393 United States
393II Liabilities of and Claims Against United States
393II(B) Immunity in General
393k422 Waiver of Immunity; Consent to Suit
393k424 Necessity of waiver or consent

Sovereign immunity is jurisdictional in nature and deprives courts of the power to hear suits against the United States absent Congress's express consent.

More cases on this issue

[18] **United States** Necessity of waiver or consent

393 United States
393II Liabilities of and Claims Against United States
393II(B) Immunity in General
393k422 Waiver of Immunity; Consent to Suit
393k424 Necessity of waiver or consent

In providing Congress's consent to hear suits against the United States, waivers of sovereign immunity function simply as "prerequisites for jurisdiction"; they do not create any new substantive rights or alter any pre-existing ones.

More cases on this issue

[19] **United States** Wrongful levy or collection of taxes

393 United States
393II Liabilities of and Claims Against United States
393II(B) Immunity in General
393k459 Particular Claims and Actions
393k466 Internal Revenue and Taxation
393k466(4) Wrongful levy or collection of taxes

Outside of bankruptcy proceedings, the United States may invoke the defense of sovereign immunity to bar any lawsuit seeking to invalidate a federal tax payment under a state's fraudulent-transfer law.

More cases on this issue

[20] **United States** Waiver of Immunity; Consent to Suit

United States Rights of Action Against United States or Federal Officers

393 United States
393II Liabilities of and Claims Against United States
393II(B) Immunity in General
393k422 Waiver of Immunity; Consent to Suit
393k423 In general
393 United States
393II Liabilities of and Claims Against United States
393II(D) Actions in General
393k492 Rights of Action Against United States or Federal Officers
393k493 In general

Question whether there has been a waiver of sovereign immunity is analytically distinct from question whether the source of substantive law upon which the claimant relies provides an avenue for relief.

More cases on this issue

[21] **Bankruptcy** Trustee as representative of debtor or creditors

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 Trustee as representative of debtor or creditors

In contrast to the subsection of the Bankruptcy Code enabling a bankruptcy trustee to step into the shoes of a creditor and avoid certain transfers that would be "voidable under applicable law," the subsection permitting a trustee to invalidate certain transfers that "could have" been voided by a lien creditor, whether or not such a creditor exists,

has no actual-creditor requirement. 11 U.S.C.A. §§ 544(a), 544(b).

[22] **Bankruptcy** Trustee as representative of debtor or creditors

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 Trustee as representative of debtor or creditors

Defendants in suits brought under the subsection of the Bankruptcy Code enabling a bankruptcy trustee to step into the shoes of a creditor and avoid certain transfers that would be "voidable under applicable law" are entitled to raise the same defenses against the trustee that they would have been able to raise against the relevant creditor under applicable state law. 11 U.S.C.A. § 544(b).

[23] **Bankruptcy** Trustee as representative of debtor or creditors

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 Trustee as representative of debtor or creditors

If, in a suit brought under the subsection of the Bankruptcy Code enabling a bankruptcy trustee to step into the shoes of a creditor and avoid certain transfers that would be "voidable under applicable law," the creditor is deemed estopped to recover upon a claim, or is barred from recovery because of the running of a statute of limitations prior to the commencement of the case, the trustee is likewise estopped or barred. 11 U.S.C.A. § 544(b).

[24] **Bankruptcy** Trustee as representative of debtor or creditors

Bankruptcy Judgment or order; relief

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 Trustee as representative of debtor or creditors
51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)2 Proceedings
51k2729 Judgment or order; relief

If the "applicable" state law allows a prevailing party to recover attorney fees, then a defendant who wins a suit brought under the subsection of the Bankruptcy Code enabling a bankruptcy trustee to step into the shoes of a creditor and avoid certain transfers that would be "voidable under applicable law" can typically recover such fees from the bankruptcy estate. 11 U.S.C.A. § 544(b).

[25] **United States** Mode and sufficiency of waiver or consent

393 United States
393II Liabilities of and Claims Against United States
393II(B) Immunity in General
393k422 Waiver of Immunity; Consent to Suit
393k427 Mode and sufficiency of waiver or consent

Congress must use unmistakable language to abrogate sovereign immunity.

[26] **United States** Construction of waiver or consent in general

393 United States
393II Liabilities of and Claims Against United States
393II(B) Immunity in General
393k422 Waiver of Immunity; Consent to Suit

393k428 Construction of waiver or consent in general

Courts must construe any ambiguities in the scope of a waiver of sovereign immunity in favor of the sovereign.

More cases on this issue

[27] **United States** Construction of waiver or consent in general

393 United States
393II Liabilities of and Claims Against United States
393II(B) Immunity in General
393k422 Waiver of Immunity; Consent to Suit
393k428 Construction of waiver or consent in general

General rule is that waivers of sovereign immunity are to be read narrowly.

More cases on this issue

[28] **Statutes** Context

Statutes Statutory scheme in general

361 Statutes
361III Construction
361III(E) Statute as a Whole; Relation of Parts to Whole and to One Another
361k1153 Context
361 Statutes
361III Construction
361III(G) Other Law, Construction with Reference to
361k1210 Other Statutes
361k1212 Statutory scheme in general

A fundamental canon of statutory construction is that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.

[29] **Statutes** Context

Statutes Statutory scheme in general

361 Statutes
361III Construction
361III(E) Statute as a Whole; Relation of Parts to Whole and to One Another
361k1153 Context
361 Statutes
361III Construction
361III(G) Other Law, Construction with Reference to
361k1210 Other Statutes
361k1212 Statutory scheme in general

Fundamental canon of statutory construction providing that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme carries particular force when construing phrases that govern conceptual relationships—like "with respect to"—whose meanings inherently depend on their surrounding context.

[30] **United States** Mode and sufficiency of waiver or consent

393 United States
393II Liabilities of and Claims Against United States
393II(B) Immunity in General
393k422 Waiver of Immunity; Consent to Suit
393k427 Mode and sufficiency of waiver or consent

No amount of legislative history can supply a waiver of sovereign immunity that is not clearly evident from the language of the statute.

More cases on this issue

[31] **Bankruptcy** Governmental claims; immunity waiver

51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

Section of the Bankruptcy Code providing for abrogation of sovereign immunity as to a governmental unit is understood to provide only a limited waiver of sovereign

immunity in bankruptcy cases. 11 U.S.C.A. § 106(a).

[32] **Bankruptcy** Governmental claims; immunity waiver

51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

At the time of its enactment, the section of the Bankruptcy Code providing for abrogation of sovereign immunity as to a governmental unit was understood by Congress to preserve a basic symmetry between bankruptcy and nonbankruptcy proceedings. 11 U.S.C.A. § 106(a).

[33] **Bankruptcy** Governmental claims; immunity waiver

51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

Immunity waiver contained in the section of the Bankruptcy Code providing for abrogation of sovereign immunity as to a governmental unit reaches monetary judgments entered against the government. 11 U.S.C.A. § 106(a).

[34] **Bankruptcy** Trustee as representative of debtor or creditors

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 Trustee as representative of debtor or creditors

Under the Bankruptcy Code, a bankruptcy trustee may set aside certain transfers —specifically, transfers of certain liens —without identifying an actual creditor capable of invalidating those transfers under state law. 11 U.S.C.A. § 544(a).

[35] **Internal Revenue** Liens

220 Internal Revenue
220XXIII Liens
220k4765 In general

Federal tax law provides that tax liens held by the federal government may be invalidated under particular circumstances. 26 U.S.C.A. § 6323.

More cases on this issue

[36] **Bankruptcy** Taxes

Bankruptcy Trustee as representative of debtor or creditors

51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2580 Statutory Liens
51k2582 Taxes
51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 Trustee as representative of debtor or creditors

Bankruptcy trustee can avoid transfers of certain tax liens under the Bankruptcy Code without identifying an actual creditor and without needing to identify a waiver of immunity to sustain a claim under the Internal Revenue Code. 11 U.S.C.A. § 544(a); 26 U.S.C.A. § 6323.

[37] **Bankruptcy** Governmental claims; immunity waiver

51 Bankruptcy
51V The Estate
51V(G) Set-off
51k2679 Governmental claims; immunity waiver

Bankruptcy Code abrogates sovereign immunity not just for the federal

government, but for any "governmental unit," which includes any state. 11 U.S.C.A. §§ 101(27), 106(a).

[38] **United States** Mode and sufficiency of waiver or consent

393 United States
393II Liabilities of and Claims Against United States
393II(B) Immunity in General
393k422 Waiver of Immunity; Consent to Suit
393k427 Mode and sufficiency of waiver or consent

If Congress establishes a cause of action that—by its own explicit terms—authorizes suits against the government, then Congress need not also enact an independent waiver of sovereign immunity.

More cases on this issue

[39] **United States** Mode and sufficiency of waiver or consent

393 United States
393II Liabilities of and Claims Against United States
393II(B) Immunity in General
393k422 Waiver of Immunity; Consent to Suit
393k427 Mode and sufficiency of waiver or consent

A waiver of sovereign immunity must be unmistakably clear in the language of the statute.

More cases on this issue

[40] **Federal Courts** Presentation of Questions Below or on Review; Record; Waiver

Federal Courts Briefs and oral argument

170B Federal Courts
170BXVI Supreme Court
170BXVI(D) Presentation of Questions Below or on Review; Record; Waiver
170Bk3181 In general
170B Federal Courts
170BXVI Supreme Court
170BXVI(E) Proceedings
170Bk3202 Briefs and oral argument

Did appellate court consider argument?

No

Material Facts

- Argument turned on readings of both state and federal law that no other court had ever considered
- Respondent had not raised argument below
- Argument posed question that had not been adequately briefed and argued before Supreme Court

The Supreme Court would decline to address an argument that turned on readings of both state and federal law that no other court had ever considered, that respondent had not raised below, and that posed a question that had not been adequately briefed and argued before the Court.

More cases on this issue

***843** *Syllabus* [*]

This case concerns the powers given a bankruptcy trustee under § 544(b) of the Bankruptcy Code to set aside, or "avoid," certain fraudulent transfers of a debtor's assets. See 11 U.S.C. §§ 544(b)(1). Respondent is the bankruptcy trustee of a failed Utah-based business whose shareholders misappropriated $145,000 in company funds to satisfy their personal federal tax liabilities. Respondent filed an "avoidance" suit against the United States seeking to claw back the misappropriated funds for the benefit of the bankruptcy estate. He filed the action pursuant to § 544(b), which allows a trustee to "avoid any transfer of an interest of the debtor ... that is voidable under applicable law by a creditor holding an unsecured claim." But to prevail under § 544(b), a trustee must identify an "actual creditor" who could have voided the transaction under applicable law outside of bankruptcy proceedings. In this case, respondent invoked Utah's fraudulent-transfer statute —which gives creditors a cause of action to invalidate certain transfers by a debtor—as the "applicable law" underlying his § 544(b) claim. The Government argued that respondent's § 544(b) claim failed because respondent could not identify an "actual creditor" that could have voided the fraudulent transfer because sovereign immunity would bar any such Utah cause of action against the Government. The Bankruptcy Court disagreed, concluding that § 106(a) of the Bankruptcy Code—which waives the Government's sovereign immunity "with respect to" some 59 Bankruptcy Code provisions including § 544 —also waives immunity for the Utah cause of action nested within the § 544(b) claim. The District Court adopted the Bankruptcy Court's decision and the Tenth Circuit affirmed.

Held: Section 106(a)'s sovereign-immunity waiver applies only to a § 544(b) claim itself and not to state-law claims nested within that federal claim. Pp. 848-856.

(a) This dispute turns on the interplay between § 106(a) and § 544(b) of the Bankruptcy Code. Section 106(a)(1) provides that the Government's "sovereign immunity is abrogated ... with respect to" a list of Code provisions, including § 544. Respondent contends that § 106(a) also waives sovereign immunity with respect to whatever state-law cause of action a trustee might invoke as the source of "applicable law" for his or her § 544(b) claim. But that result would transform § 106(a) from a jurisdiction-creating provision into a liability-creating provision, which conflicts with the Court's traditional understanding of sovereign-immunity waivers. As the Court's precedents explain, "[s]overeign immunity is jurisdictional in nature" and operates to deprive courts of the power to hear suits against the United States absent Congress's express consent. *FDIC v. Meyer*, 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308. Waivers of sovereign immunity function simply as "prerequisite[s] for jurisdiction"—they do not create any new substantive rights or alter any pre-existing ones. *United States v. Mitchell*, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580. Respondent's attempt to leverage § 106(a)'s waiver of immunity—*i.e.*, the statute's grant of jurisdiction—into an affirmative expansion of the trustee's avoidance powers under § 544(b) conflicts with the Court's understanding of sovereign-immunity waivers. Pp. 848-850.

(b) Section 106(a)'s text, context, and structure make clear that it does not operate to modify § 544(b)'s substantive requirements. Indeed, § 106(a)(5) expressly provides that "[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing" under some other source of law. That language directly refutes respondent's argument that § 106(a)'s sovereign-immunity waiver extends to "[b]oth the cause of action [§ 544(b) establishes] and its elements." Brief for Respondent 18. Construing § 106(a) to modify the "elements" of a § 544(b) claim would give the trustee a substantive claim for relief against the

Government that does not "otherwise exis[t]" under § 544(b) or Utah law in direct conflict with § 106(a)(5).

Section 544's text and structure reinforce this conclusion. Unlike § 544(b), § 544(a) has no actual-creditor requirement and thus permits a trustee to invalidate certain transfers that a lien holder could have voided "whether or not such a creditor exists." §§ 544(a)(1), (2). This contrast reflects Congress's deliberate choice to tie the trustee's rights under subsection (b) to the rights of an actual creditor under "applicable law." Eliminating the actual-creditor requirement would upend decades of practice and precedent recognizing that § 544(b) merely empowers a trustee to step into the shoes of a creditor, subject to the same limitations and defenses that would apply to that creditor outside bankruptcy.

Finally, even if the language and logic of § 544 and § 106(a) permitted respondent's broad reading of the sovereign-immunity waiver, the Court's precedents would still foreclose that reading. The Court's precedents require construing sovereign-immunity waivers narrowly, with any ambiguities resolved in favor of the sovereign. See, *e.g.*, *FAA v. Cooper*, 566 U.S. 284, 291, 132 S.Ct. 1441, 182 L.Ed.2d 497. Pp. 850-852.

(c) Respondent asserts that § 106(a)(1)'s use of the phrase "with respect to" shows Congress's intent to abrogate sovereign immunity for "all subjects that concern or regard" the listed provisions, including the meaning of "applicable law" in § 544(b). Respondent's reliance on dictionary definitions and cases that adopt capacious readings of phrases similar to "with respect to" cannot support his argument, as those authorities all examine those terms in very different statutory contexts. Respondent's textual argument thus flouts the "fundamental canon of statutory construction" that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891. This canon carries particular force when construing phrases that govern conceptual relationships—like "with respect to"—whose meanings inherently depend on their surrounding context. See, *e.g.*, *Dubin v. United States*, 599 U.S. 110, 119, 143 S.Ct. 1557, 216 L.Ed.2d 136 (noting that such phrases are "context sensitive"). As set forth above, context cuts decidedly against respondent's broad reading of § 106(a)(1).

Respondent's appeal to § 106(a)'s enactment history is similarly unavailing. Since its adoption in 1978, § 106 has always been understood to provide a "limited waiver of sovereign immunity in bankruptcy cases," designed to "achieve approximately the same result that would prevail outside of bankruptcy." S. Rep. No. 95–989, at 29; H. R. Rep. No. 95–595, at 317. Nothing in the 1994 amendments to § 106 dislodged that original understanding. And in any event, legislative history cannot supply a waiver where the language of the statute does not clearly do so. See *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42, 49, 144 S.Ct. 457, 217 L.Ed.2d 361. Pp. 852-854.

(d) Respondent's remaining arguments lack merit. First, the Court's interpretation does not render § 106(a)'s waiver meaningless with respect to § 544. Section 106(a) enables trustees to prevail against the Government under § 544(a), which has no actual-creditor requirement. Because federal tax law separately provides that tax liens held by the Federal Government may be invalidated under particular circumstances, see 26 U.S.C. § 6323, § 106(a) allows trustees to avoid transfers of these tax liens. Section 106(a) also grants federal courts jurisdiction to hear § 544(b) claims against state governments that have consented to being sued under their fraudulent-transfer statutes.

Second, the Court rejects respondent's argument that because § 106(a)(1) refers to § 544 as a whole (rather than by subsection), the waiver must be construed to give substantive effect to all of § 544's

subsections. Many of the other 58 Bankruptcy Code provisions listed "as a whole" in § 106(a)(1) include subsections that plainly do not implicate sovereign immunity at all.

Third, respondent's reliance on *Kirtz*, 601 U.S. 42, 144 S.Ct. 457, 217 L.Ed.2d 361, to support his argument that Congress sometimes waives sovereign immunity while simultaneously establishing a new substantive right, is unavailing. *Kirtz* involved a statute that bears little resemblance—in text, structure, or operation—to § 106(a), and indeed explicitly authorized claims against the Government. Nothing in *Kirtz* suggests that courts should presume, in the absence of explicit statutory language, that Congress has waived the Government's sovereign immunity.

Finally, the Court declines respondent's invitation to affirm on alternative grounds, leaving it to the courts below to decide whether respondent may pursue these arguments on remand. Pp. 854-856.

71 F.4th 1247, reversed.

JACKSON, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, SOTOMAYOR, KAGAN, KAVANAUGH, and BARRETT, JJ., joined. GORSUCH, J., filed a dissenting opinion.

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Opinion

Justice JACKSON delivered the opinion of the Court.

***846** **[1]** The Bankruptcy Code empowers a bankruptcy trustee to set aside, or "avoid," certain transfers of a debtor's assets in order to recover those assets for the benefit of the bankruptcy estate. This case concerns the trustee's avoidance powers under § 544(b) of the Code. Under that provision, a trustee may avoid certain transfers that would be "voidable under applicable law"—that is, voidable outside of bankruptcy proceedings. 11 U.S.C. § 544(b)(1). Trustees typically rely on state statutes to supply the "applicable law" when suing under § 544(b) to avoid a debtor's transfer of assets.

In this dispute, a trustee invoked Utah law as the basis for a § 544(b) suit seeking to claw back a debtor's federal tax payment. Ordinarily, the Federal Government's sovereign immunity would bar any suit against it under Utah law. But the Bankruptcy Code contains a sovereign-immunity waiver, § 106(a), that abrogates the Government's sovereign immunity "with respect to" § 544. § 106(a)(1). This case requires us to determine the scope of that waiver.

Specifically, we must decide whether § 106(a) abrogates sovereign immunity *only* with respect to the federal cause of action created by § 544(b) or whether it *also* abrogates sovereign immunity with respect to the underlying state-law claims that supply the "applicable law" for that federal cause of action. We hold that § 106(a)'s sovereign-immunity waiver applies only to the § 544(b) claim itself and not to any state-law claims nested within that federal claim. Section 106(a) is properly understood as a jurisdictional provision that empowers courts to hear § 544(b) claims against the Government to the extent such claims are otherwise available under state law; it does not alter the substantive meaning of §

544(b)'s "applicable law" clause. We therefore reverse the decision below.

I

A

[2] [3] Bankruptcy trustees have long had the power to invalidate, or "avoid," certain transfers of assets made by a debtor. These "avoidance powers" serve multiple ends. Most obviously, they help the trustee maximize the value of the bankruptcy ***847** estate by enabling the trustee to recover assets that otherwise would have been lost. The avoidance powers also help the trustee equalize the distribution of the debtor's assets among creditors by preventing the debtor from offloading assets to preferred creditors outside of the formal bankruptcy process.

[4] [5] [6] Today, the avoidance powers are codified in Chapter 5 of the Bankruptcy Code, which delineates the specific types of transfers that trustees are empowered to set aside. Section 545 of the Code, for instance, permits a trustee to avoid the transfer of certain statutory liens. Meanwhile, § 547(b) allows a trustee to invalidate transfers that the debtor made immediately before bankruptcy proceedings began. And § 548 permits a trustee to set aside certain fraudulent transfers, such as those made for the purpose of delaying or impeding the repayment of creditors.

[7] This case involves the trustee's avoidance powers under § 544(b). That provision allows a trustee to "avoid any transfer of an interest of the debtor ... that is voidable under applicable law by a creditor holding an unsecured claim." § 544(b)(1). Although the term "applicable law" can technically refer to any state or federal law outside of the Bankruptcy Code, trustees typically rely on state statutes to supply the "applicable law" for avoidance suits under § 544(b).

[8] [9] The state statutes that trustees most often invoke are known as "fraudulent transfer" laws. 5 Collier on Bankruptcy ¶544.06[2], p. 544–27 (R. Levin & H. Sommer eds., 16th ed. 2022). These laws—which generally employ the same language from State to State—aim to prevent debtors from hiding or shielding their assets from creditors. See *ibid.* (explaining that 46 States have adopted either the Uniform Fraudulent Transfer Act or its successor, the Uniform Voidable Transactions Act). To that end, most fraudulent-transfer statutes provide creditors with a cause of action to invalidate any transfer that a debtor made with the intent to defraud creditors. Creditors may also typically invoke these laws to void "constructive" fraudulent transfers—that is, transfers made without an actual intent to defraud, such as an insolvent debtor's sale or transfer of assets for something less than their equivalent value. 2 Bankruptcy Law Manual § 9:29, pp. 779–780 (5th ed. 2024). [1]

[10] Notably, to show that a transfer is "voidable under applicable law," a bankruptcy trustee must "identify the actual creditor or creditors who could have set aside the transaction in question under applicable law." 5 Collier, Bankruptcy ¶544.06[1], at 544–25. "If there is no creditor against whom the transfer is voidable under the applicable law, the trustee is powerless to act." *Ibid.*

[11] [12] This "actual creditor" requirement serves as an important check on the trustee's § 544(b) powers. Absent the actual-creditor requirement, a trustee could use § 544(b) to unwind transactions that would never actually be at risk of invalidation outside of bankruptcy proceedings. The actual-creditor requirement thus mitigates the disruptive potential of a trustee's avoidance power by ensuring that the trustee ***848** has "no greater rights of avoidance than the actual creditor would have if that creditor were asserting invalidity on its own behalf." *Id.*, ¶544.06[3], at 544–29.

B

This case arises from the collapse of a Utah-based transportation business called All Resort Group. The company fell into insolvency in 2013 as the result of poor management and financial malfeasance. As the company struggled financially, two of its shareholders began misappropriating company funds for their own personal use, including to pay off personal debts. In

2014, they transferred roughly $145,000 in company funds to the Internal Revenue Service to satisfy their personal income-tax obligations. The company received nothing in return for paying off these shareholders' debts.

Three years later, the company filed for bankruptcy. Respondent was appointed as trustee of the bankruptcy estate. He filed this suit against the United States under § 544(b) shortly after his appointment, seeking to avoid the 2014 tax payments.

[13] Respondent invoked Utah's fraudulent-transfer statute as the source of "applicable law" for his § 544(b) claim. Like most fraudulent-transfer laws, Utah's statute allows a creditor to void a debtor's transfer of assets if the debtor was insolvent at the time of the transfer and received less than equal value in return. Utah Code § 25–6–6 *et seq.* (2014). [2]

The parties cross-moved for summary judgment in Bankruptcy Court. The Government did not contest respondent's allegation that All Resort Group was insolvent when it made the 2014 tax payments on behalf of its shareholders. Nor did it dispute that the company received nothing of value in exchange for making those payments. Instead, the Government asserted that respondent's claim failed because he could not satisfy § 544(b)'s actual-creditor requirement. Specifically, the Government argued, respondent could not identify any creditor capable of prevailing in a fraudulent-transfer suit against the Government under Utah law because, outside of bankruptcy, any such suit would be barred by sovereign immunity.

[14] The Bankruptcy Court rejected that argument and entered judgment for respondent. *In re All Resort Group, Inc.*, 617 B.R. 375, 379 (Bkrtcy. Ct. D.Utah 2020). The court based its decision on § 106(a) of the Bankruptcy Code, which waives the Government's sovereign immunity for certain claims arising under the Code. *Id.*, at 386. In particular, § 106(a)(1) provides that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to" 59 different provisions of the Code, including § 544. § 106(a)(1). [3]

The Bankruptcy Court construed § 106(a) as waiving the Government's sovereign immunity not only as to the trustee's § 544(b) claim but also "as to the underlying state law cause of action" nested within the § 544(b) claim. 617 B.R. at 386. Accordingly, the court held that "sovereign immunity does not preclude [respondent] from satisfying the actual creditor requirement." *Id.*, at 391.

The District Court adopted the Bankruptcy Court's decision and the Tenth Circuit ***849** later affirmed. 71 F.4th 1247 (2023). Like the Bankruptcy Court, the Tenth Circuit concluded that § 106(a) "expresses Congress's intent to abolish the Government's sovereign immunity in an avoidance proceeding arising under § 544(b)(1), regardless of the context in which the defense arises." *Id.*, at 1253.

The Tenth Circuit's decision reinforced a conflict among the Courts of Appeals regarding whether § 106(a) abrogates sovereign immunity with respect to a state-law claim that supplies the "applicable law" for a trustee's § 544(b) claim. We granted certiorari to resolve that conflict. See 602 U. S. ——, 144 S.Ct. 2678, 219 L.Ed.2d 1297 (2024).

II

This dispute turns on the interplay between § 106(a) and § 544(b) of the Bankruptcy Code. The parties here agree that § 106(a) waives the Government's sovereign immunity with respect to the federal cause of action created by § 544(b). But respondent contends that § 106(a) goes further than that by also waiving sovereign immunity with respect to whatever state-law cause of action a trustee might invoke as the source of "applicable law" for his or her § 544(b) claim.

[15] **[16]** As explained below, we hold that § 106(a) does not sweep as broadly as respondent maintains. Waivers of sovereign immunity are jurisdictional provisions that empower courts to hear claims against the Government but do not themselves typically create any new substantive rights against the Government. Here, statutory text, context, and structure all demonstrate that § 106(a) fits squarely within that mold. For that reason, we conclude that § 106(a) does not alter the substantive meaning of § 544(b)'s "applicable law" clause by providing a waiver of immunity that would not otherwise exist under that external source of law.

A

[17] **[18]** Before discussing § 106(a) itself, it is helpful to recall how waivers of sovereign immunity operate in general. As our precedents explain, "[s]overeign immunity is jurisdictional in nature" and deprives courts of the power to hear suits against the United States absent Congress's express consent. *FDIC v. Meyer*, 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). In providing that consent, waivers of sovereign immunity function simply as "prerequisite[s] for jurisdiction"—they do not create any new substantive rights or alter any pre-existing ones. *United States v. Mitchell*, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983).

That is precisely the role that § 106(a) plays within the Bankruptcy Code. Section 106(a)(1) provides that the Federal Government's "sovereign immunity is abrogated ... with respect to" several dozen provisions of the Code, thereby granting courts the power to hear claims against the Government under those provisions. That includes the power to hear claims under § 544, which is among the listed provisions. At the same time, § 106(a)(5) expressly provides that "[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law." In this way, § 106(a)'s text, read as a whole, makes clear that it operates like any other waiver of sovereign immunity: It is "merely jurisdictional" and does not establish any substantive rights against the Government. *United States v. Testan*, 424 U.S. 392, 400, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976).

***850** **[19]** Respondent's reading of § 106(a) departs from that conventional understanding of sovereign-immunity waivers. Under respondent's view, § 106(a) does not simply give courts jurisdiction to hear § 544(b) claims against the Government; it also alters the substantive requirements of the claim itself. It is undisputed that, outside of bankruptcy proceedings, the United States could invoke the defense of sovereign immunity to bar any lawsuit seeking to invalidate a federal tax payment under a State's fraudulent-transfer law. That barrier to state-law liability would ordinarily doom a trustee's § 544(b) claim by making it impossible for the trustee to show that the tax payment at issue is "voidable under applicable law" by an actual creditor. But, respondent contends, § 106(a) vitiates that barrier by abrogating the Government's sovereign immunity with respect to *both* the § 544(b) claim *and* the state-law claim nested within it. As respondent puts it, "Section 106(a)'s clear waiver 'with respect to' section 544 applies equally to the trustee's section 544(b) cause of action and the applicable law that provides the elements of that cause of action." Brief for Respondent 2.

[20] Respondent's reading of § 106(a) would thus transform that statute from a jurisdiction-creating provision into a liability-creating provision. But we have declined to read sovereign-immunity waivers in that way. Rather, we have said that the question "whether there has been a waiver of sovereign immunity" is " 'analytically distinct' " from the question "whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Meyer*, 510 U.S. at 484, 114 S.Ct. 996; see,

e.g., *United States v. Navajo Nation*, 556 U.S. 287, 290, 129 S.Ct. 1547, 173 L.Ed.2d 429 (2009) ("Neither the Tucker Act nor the Indian Tucker Act creates substantive rights; they are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law"). Respondent conflates these two questions by seeking to leverage § 106(a)'s waiver of immunity—*i.e.*, the statute's grant of jurisdiction—into an affirmative expansion of the trustee's avoidance powers under § 544(b).

Construing § 106(a) to modify the elements of a § 544(b) claim would thus reflect a highly unusual understanding of sovereign-immunity waivers. That alone casts doubt on respondent's reading of § 106(a). But even if that reading did not conflict with our normal understanding of sovereign-immunity waivers, it would remain untenable as a basic matter of text and structure.

B

The text and structure of § 106 and § 544 make clear that § 106(a)'s waiver of sovereign immunity does not operate to modify § 544(b)'s substantive requirements.

As noted above, § 106(a) expressly states that it does *not* "create any substantive claim for relief or cause of action not otherwise existing" under some other source of law. § 106(a)(5). That language plainly refutes the notion that § 106(a)'s sovereign-immunity waiver extends to "[b]oth the cause of action [that § 544(b) establishes] and its elements." Brief for Respondent 18. Indeed, construing § 106(a) to modify the "elements" of a § 544(b) claim would necessarily give the trustee a substantive claim for relief against the Government that does not "otherwise exis[t]" under § 544(b) or Utah law.[4] Section 106(a)'s text thus confirms ***851** that it does not alter § 544(b)'s substantive requirements.

So, too, does the list of Bankruptcy Code provisions identified in § 106(a) itself. Notably, § 106(a) does not meaningfully alter the substantive obligations of trustees under any of the 58 other provisions that appear on the list alongside § 544. So far as we are aware, the other avoidance provisions on the list retain the same substantive elements regardless of whether the trustee is suing the Government or a private entity. Given that § 106(a) leaves the substantive elements of those avoidance provisions untouched, it would be odd to read the provision as modifying the elements of § 544(b).

[21] Section 544's own text and structure reinforce that conclusion. Recall that § 544(b) requires a trustee to identify an actual creditor capable of voiding the transfer at issue under "applicable law." That actual-creditor requirement—which restricts the universe of transactions a trustee can invalidate—is unique to § 544(b). Section 544's only other subprovision—subsection (a)—conspicuously eschews any such requirement. Instead, subsection (a) permits a trustee to invalidate certain transfers that "could have" been voided by a lien creditor, "*whether or not* such a creditor exists." §§ 544(a)(1), (2) (emphasis added). That contrast in structure reflects a deliberate congressional choice to tie the trustee's rights under subsection (b) to the rights of an actual creditor under "applicable law." We doubt that Congress meant to supplant that choice when it opted to include § 544 on the lengthy list of provisions it inserted into § 106(a).

What is more, eliminating the actual-creditor requirement would upend decades of practice and precedent. Section 544(b) was expressly "derived" from § 70e of the Bankruptcy Act of 1898, which had long been understood to give trustees the same rights as creditors under state law. S. Rep. No. 95–989, p. 85 (1978); H. R. Rep. No. 95–595, p. 370 (1977). As one widely cited lower court decision put it, § 70e

"clothe[d] the trustee with no new or additional right ... over that possessed by a creditor"; it merely placed the trustee "in the shoes of " the creditor, "subject to the same limitations and disabilities that would have beset the creditor in the prosecution of the action on his own behalf." *Davis v. Willey*, 263 F. 588, 589 (ND Cal. 1920).

[22] **[23]** **[24]** Section 544(b) carried forward that same understanding of the trustee's role. That is why, for example, defendants in § 544(b) suits are entitled to raise the ***852** same defenses against the trustee that they would have been able to raise against the relevant creditor under applicable state law. Thus, "if the creditor is deemed estopped to recover upon a claim, or is barred from recovery because of the running of a statute of limitations prior to the commencement of the case, the trustee is likewise estopped or barred." 5 Collier, Bankruptcy ¶544.06[3], at 544–29. Similarly, if the "applicable" state law allows a prevailing party to recover attorney's fees, then a defendant who wins a § 544(b) suit can typically recover such fees from the bankruptcy estate. *Id*., at 544–27. This long-settled understanding of the trustee's § 544(b) powers—and their limits—underscores why it would be so anomalous to treat § 106(a) as expanding the trustee's rights beyond those of an actual creditor. [5]

[25] **[26]** Even if the language and logic of § 544 and § 106(a) permitted respondent's broad reading of the sovereign-immunity waiver, we note further that our precedents would still foreclose that reading. "Under long-settled law, Congress must use unmistakable language to abrogate sovereign immunity." *Financial Oversight and Management Bd. for P. R. v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 342, 143 S.Ct. 1176, 215 L.Ed.2d 321 (2023). That means that we must "construe any ambiguities in the scope of a waiver in favor of the sovereign." *FAA v. Cooper*, 566 U.S. 284, 291, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012). Here, § 106(a)'s language unmistakably waives sovereign immunity for the federal cause of action created by § 544(b). But, for all of the reasons just given, we cannot say that it does the same for the state-law claims nested within § 544(b)'s "applicable law" clause.

III

A

Respondent interprets § 106(a) differently. He asserts that § 106(a)(1)'s use of the phrase "with respect to" requires a broad reading of the statute's sovereign-immunity waiver, citing dictionary definitions and cases that adopt capacious readings of similar phrases. These sources, he says, evince Congress's intent to abrogate sovereign immunity for "all subjects that concern or regard" the listed provisions, including the meaning of "applicable law" in § 544(b). Brief for Respondent 16.

[27] The authorities respondent invokes, however, cannot bear the weight he foists upon them. Even setting aside that many of his authorities concern different statutory terms, they all examine those terms in very different statutory contexts. For instance, he cites our observation in *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 717, 138 S.Ct. 1752, 201 L.Ed.2d 102 (2018), that the "[u]se of the word 'respecting' in a legal context generally has a broadening effect." But the statute at issue in *Lamar* used the term "respecting" in a quite dissimilar setting—as part of the technical phrase "statement[s] respecting the debtor's or an insider's financial condition." § 523(a)(2)(A). Giving breadth to a discrete statutory term like "financial condition" is a far cry from expanding a sovereign-immunity waiver, especially ***853** when our "general rule" is "that waivers of sovereign immunity are to be read *narrowly*." *Meyer*, 510 U.S. at 480, 114 S.Ct. 996 (emphasis added).

[28] **[29]** Respondent's textual argument thus flouts a "fundamental canon of statutory construction": that "the words of a statute must be read in their context and with a view to their place

in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). That canon carries particular force when construing phrases that govern conceptual relationships—like "with respect to"—whose meanings inherently depend on their surrounding context. Cf. *Dubin v. United States*, 599 U.S. 110, 119, 143 S.Ct. 1557, 216 L.Ed.2d 136 (2023) (explaining that the phrase " '[i]n relation to' " is "context sensitive").

Here, context cuts decidedly against the broad reading respondent advances. As explained, construing § 106(a) to reach the elements of § 544(b) would not only run counter to our traditional understanding of sovereign-immunity waivers as purely jurisdictional, but also contravene the text and structure of § 106(a) and § 544(b), and defy our established rule that sovereign-immunity waivers must be construed narrowly. Section 106(a)'s use of a malleable phrase like "with respect to" cannot blunt the countervailing force of those contextual considerations and interpretive principles. Cf. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 504, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992) (rejecting a broad reading of the phrase " 'with respect to voting' " in the Voting Rights Act where doing so "would work an unconstrained expansion of its coverage").

[30] Respondent resists the force of those contextual considerations by appealing to § 106(a)'s enactment history. He emphasizes that Congress purposefully expanded the scope of § 106(a)'s immunity waiver in 1994 by adding the list of 59 specific provisions, including § 544, to the statute. But "no amount of legislative history can 'supply a waiver that is not clearly evident from the language of the statute.' " *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42, 49, 144 S.Ct. 457, 217 L.Ed.2d 361 (2024) (quoting *FAA*, 566 U.S. at 290, 132 S.Ct. 1441). And, even if legislative history could serve that function, respondent's account of § 106(a)'s history is incomplete at best.

[31] **[32]** Since its adoption in 1978, § 106 has always been understood to provide only a "limited waiver of sovereign immunity in bankruptcy cases." S. Rep. No. 95–989, at 29; H. R. Rep. No. 95–595, at 317. The House and Senate Reports accompanying the 1978 legislation both expressly stated: "Though Congress has the power to waive sovereign immunity for the Federal government completely in bankruptcy cases, the policy followed here is designed to achieve approximately the *same result that would prevail outside of bankruptcy*." S. Rep. No. 95–989, at 29 (emphasis added); H. R. Rep. No. 95–595, at 317 (emphasis added). This suggests that, at the time of enactment, Congress understood the statute to preserve a basic symmetry between bankruptcy and nonbankruptcy proceedings—not to expand transferee liability within the bankruptcy system.

[33] Nothing in the 1994 amendments to § 106 dislodged that original understanding. When Congress adopted § 106(a)'s current language in 1994, it did so with the narrow aim of overturning two of this Court's decisions: *United States v. Nordic Village, Inc.*, 503 U.S. 30, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992), and ***854** *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 109 S.Ct. 2818, 106 L.Ed.2d 76 (1989). Those decisions —neither of which involved § 544(b) itself—had held that § 106's immunity waiver did not reach monetary judgments entered against the Government. The 1994 amendments served to clarify that § 106 does, in fact, "expressly provid[e] for a waiver of sovereign immunity ... with respect to monetary recoveries." H. R. Rep. No. 103–835, p. 42 (1994). But the amendments did not expand § 106's scope beyond what Congress envisioned in 1978. Rather, their goal was "to make section 106 *conform* to the Congressional intent of the Bankruptcy Reform Act of 1978." *Ibid.* (emphasis added).

In sum, § 106(a)'s enactment history—to the extent it plays any role here—undercuts respondent's broad reading of § 106(a) and reaffirms what the statute's text makes evident: that in waiving sovereign immunity "with respect to" § 544, Congress did not alter the substantive elements of § 544 itself.

B

Respondent gains slightly more traction in arguing that the Government's reading of § 106(a) would blunt the impact of Congress's decision to include § 544 on the list of provisions subject to § 106(a)'s immunity waiver. After all, respondent says, if sovereign immunity bars every state-law claim capable of furnishing the "applicable law" for a § 544(b) suit, then—as a practical matter—no trustee could ever win such a suit against the Government. Thus, respondent asserts, the Government's reading of § 106(a) effectively robs the immunity waiver of any meaningful purpose with respect to § 544; it simply grants federal courts jurisdiction over a set of inherently unwinnable claims.

[34] **[35]** **[36]** We are not persuaded that the Government's reading extinguishes § 106(a)'s effect with respect to § 544. For one thing, even if § 106(a) does not enable trustees to prevail against the Government under § 544(b), they might still prevail against the Government under § 544's other subprovision—subsection (a). As noted above, subsection (a), unlike subsection (b), does not contain an actual-creditor requirement. A trustee can therefore use subsection (a) to set aside certain transfers—specifically, transfers of certain liens—without identifying an actual creditor capable of invalidating those transfers under state law. And federal tax law separately provides that tax liens held by the Federal Government may be invalidated under particular circumstances. See 26 U.S.C. § 6323. As a result, a trustee can avoid transfers of certain tax liens under § 544(a) without identifying an actual creditor and without needing to identify a waiver of immunity to sustain a claim under the Internal Revenue Code. By giving courts jurisdiction to hear those types of claims against the Government, then, § 106(a) serves a clear purpose "with respect to" § 544.

Respondent rejects that understanding of § 106(a), insisting that the waiver must be construed to give substantive effect to *all* of § 544's subsections—not just subsection (a). He stresses that § 106(a)(1)'s list of provisions refers to § 544 as a whole, without demarcating any specific subsections. But the same is true of the 58 other Bankruptcy Code provisions on the list, many of which include subsections that plainly do not implicate sovereign immunity at all. Section 303, for example, appears on the list even though subsection (a) of that provision authorizes a kind of action—involuntary bankruptcy petitions—that cannot be filed against the Government. The list also includes § 106 itself, despite the obvious incongruity of applying § 106(a) to its own waiver of sovereign ***855** immunity. The sheer number of provisions on the list with subsections that cannot plausibly be the subject of an immunity waiver rebuts respondent's strained reading of § 106(a).

[37] It is also noteworthy that, in addition to the role that § 106(a) plays with respect to § 544(a), the waiver provision serves an independent function with respect to § 544(b): It grants federal courts jurisdiction to hear § 544(b) claims brought against *state* governments. As outlined earlier, § 106(a) abrogates sovereign immunity not just for the Federal Government, but for any "governmental unit," which includes any "State." § 101(27). At the time Congress enacted § 106(a), a handful of States had chosen to subject themselves to potential liability under their own fraudulent-transfer statutes.[6] Section 106(a) thus granted federal courts jurisdiction to hear § 544(b) suits against those states—jurisdiction that those courts would have otherwise lacked.

C

Respondent's argument also lacks support in our precedent. Respondent cites our recent decision in *Kirtz*, 601 U.S. 42, 144 S.Ct. 457, 217 L.Ed.2d 361, as evidence that Congress sometimes waives sovereign immunity while simultaneously establishing a new substantive right against the Government. But the statutory provision at issue in *Kirtz* bears little resemblance—in text, structure, or operation—to § 106(a).

[38] In *Kirtz*, we held that a provision of the Fair Credit Reporting Act that "explicitly permitted consumer claims for damages against the government" also functioned as a waiver of sovereign immunity for those claims. *Id.*, at 51, 144 S.Ct. 457. Our decision rested on the straightforward proposition that "a cause of action authorizing suit against the government may waive sovereign immunity even without a separate waiver provision." *Id.*, at 53, 144 S.Ct. 457. That proposition is hardly controversial. If Congress establishes a cause of action that—by its own explicit terms—authorizes suits against the Government, then Congress need not also enact an independent waiver of sovereign immunity.

[39] That logic, however, has no bearing on the question at issue here: namely, whether Congress waived sovereign immunity for a *state* cause of action that does *not* explicitly authorize suits against the Government. Nothing in *Kirtz* suggests that courts should presume, in the absence of explicit language to the contrary, that Congress has waived the Federal Government's sovereign immunity for such claims. If anything, *Kirtz* counsels in the opposite direction. Our opinion there reaffirmed that "a waiver of sovereign immunity must be 'unmistakably clear in the language of the statute.' " *Id.*, at 49, 144 S.Ct. 457. And, once again, for all of the reasons previously discussed, § 106(a) does not contain an "unmistakably clear" waiver of immunity for state-law claims nested within § 544(b)'s "applicable law" clause.

D

Finally, we decline respondent's invitation to affirm on other grounds. As an alternative basis for ruling in his favor, respondent proposes a novel reading of § 544(b) that would purportedly allow a trustee to set aside a federal tax payment without ever triggering the Federal Government's sovereign immunity. Per that reading, the trustee could satisfy the actual-creditor ***856** requirement by showing that "applicable" state law would permit a creditor to void the tax payment by suing someone *other* than the United States. Respondent claims that he can do that here because Utah law would (in theory) permit an All Resort Group creditor to void the 2014 tax payments by suing the two shareholders who orchestrated those payments, neither of whom is protected by sovereign immunity.

[40] We will not address this argument because it turns on readings of both Utah law and § 544(b) that no other court has ever considered. Furthermore, respondent failed to raise this argument below. See *Cameron v. EMW Women's Surgical Center, P. S. C.*, 595 U.S. 267, 275, 142 S.Ct. 1002, 212 L.Ed.2d 114 (2022) ("[I]f a non-jurisdictional argument was not raised below, we generally will not consider it as an alternative ground for affirmance"). Additionally, "the question [this argument] poses has not been adequately briefed and argued" here. *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 38, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989). We therefore leave it to the courts below to decide whether respondent may pursue this argument on remand. [7]

* * *

Section 106(a) of the Bankruptcy Code abrogates sovereign immunity for the federal cause of action created by § 544(b). It does not take the additional step of abrogating sovereign immunity for whatever state-law claim supplies the "applicable law" for a

trustee's § 544(b) claim. Accordingly, the decision of the Tenth Circuit is reversed.

It is so ordered.

Justice GORSUCH, dissenting.

The Court has often warned against " 'confus[ing] the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action.' " *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 112, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (quoting *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 692–693, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949)). Yet, to my eyes, the Court's decision today "suffers a like confusion." 465 U.S. at 112, 104 S.Ct. 900.

Three statutory provisions are relevant here. First is 11 U.S.C. § 106(a)(1), which waives the government's sovereign immunity "with respect to" § 544 of the Bankruptcy Code. Second is § 544(b)(1), which empowers a bankruptcy trustee to invoke the rights of "a creditor holding an unsecured claim" to set aside any transfer "that is voidable under applicable law." And third is Utah's fraudulent-transfer statute, which here supplies the "applicable law" for purposes of § 544(b)(1). Utah Code § 25–6–203(1) (2025). [1]

As I see it, those three provisions play out this way. Under the Utah statute, a transfer is "voidable" if, after a creditor's claim arose against the debtor, the debtor (1) "made the transfer" (2) "without receiving a reasonably equivalent value in exchange," and (3) "was insolvent at the time." Notably, no one before us disputes that these conditions are satisfied here and a good fraudulent-transfer claim exists. ***857** 71 F.4th 1247, 1251 (CA10 2023). Thus, under "applicable law," the relevant transfers are "voidable," and the bankruptcy trustee can use § 544(b)(1) to set them aside. That remains true even though the trustee must sue the United States to void the relevant transfers, because § 106(a)(1) bars the government from raising a sovereign-immunity defense in the trustee's action.

The Court worries that my line of thinking would "modify the elements of a § 544(b) claim." *Ante*, at 850. More exactly, the Court observes that, if a creditor sued the government directly under Utah's fraudulent-transfer statute, the government could interpose a successful sovereign-immunity defense, and the creditor would lose. And, the Court fears, reading § 106(a)(1) to allow a bankruptcy trustee to bring the same claim under § 544(b)(1) would impermissibly "give the trustee a substantive claim for relief against the Government that does not 'otherwise exist.' " *Ante*, at 850 (quoting § 106(a)(5); alterations omitted); *ante*, at 850 – 851, n. 4 (expressing concern that my reading would alter "a core substantive requirement of the underlying § 544(b) claim").

It seems to me, however, that the Court conflates two different things. Whether pursued by a private creditor or a bankruptcy trustee, a good substantive claim for relief exists. No one disputes that a fraudulent transfer took place. The question before us is a distinct one: Can the federal government defeat the claim by raising the affirmative defense of sovereign immunity? With respect to a private creditor pursuing relief in state court, the answer is yes. With respect to a trustee pursuing relief in a federal bankruptcy proceeding, the answer—thanks to § 106(a)(1)—is no. Admitting that much does not "modify the elements" of any claim or " 'create any substantive claim for relief ' " that did not " 'otherwise exist.' " *Ante,* at 850 – 851 (quoting § 106(a)(5); alterations omitted). It merely acknowledges that in one setting, but not another, Congress has chosen to waive an affirmative defense to an otherwise valid claim.

For these reasons, I agree with the majority of circuits to have considered the question that bankruptcy trustees may avoid fraudulent transfers to the United States under § 544(b). See 71 F.4th at 1251–1252; *In re DBSI, Inc.*, 869 F.3d 1004 (CA9 2017); *In re Yahweh Center, Inc.*, 27 F.4th 960 (CA4 2022). As the Court concludes otherwise, I respectfully dissent.

All Citations

604 U.S. ----, 145 S.Ct. 839, 2025 Daily Journal D.A.R. 2607

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 As noted above, the Bankruptcy Code contains its own fraudulent-transfer provision in § 548. Although that provision resembles most States' fraudulent-transfer laws, its statute of limitations is only two years. § 548(a)(1). For that reason, a trustee who seeks to invalidate a fraudulent transfer that occurred more than two years before the bankruptcy petition was filed will ordinarily bring a § 544(b) action—instead of a § 548 action—and point to an "applicable" state law with a longer lookback period.

2 Utah amended and recodified its fraudulent-transfer statute after the transfer at issue here. The changes to the statute are immaterial to the question presented in this case.

3 The Code defines "governmental unit" to include the "United States" and any "department, agency, or instrumentality of the United States." 11 U.S.C. § 101(27). The definition also includes any "State." *Ibid.*

4 The dissent takes issue with our suggestion that respondent's reading of § 106(a) would modify the "elements" of a § 544(b) claim. But that is not just our characterization of respondent's reading—that is how respondent himself describes his position. See, *e.g.*, Brief for Respondent 27 ("Congress had no reason to waive immunity in the first place unless the waiver applied to the elements of the cause of action"); Tr. of Oral Arg. 39 ("[T]he waiver of sovereign immunity with respect to [§]544 just on its face textually applies to the elements, to the same extent grammatically, logically that it applies to the claim. You can't waive a claim without waiving the elements"). In any event, the dissent's attempt to recast § 106(a) as merely "waiv[ing] an affirmative defense"—but not altering the elements of § 544(b)—underscores the inherent tension in respondent's position. *Post*, at 856-857 (opinion of GORSUCH, J.). Nobody disputes that § 106(a) precludes the Government from raising an affirmative *jurisdictional* defense to a § 544(b) claim. But the issue in this case is whether § 106(a) also bars the Government from raising a *merits* defense to that claim. Put differently, the question here is not whether the Government can invoke sovereign immunity to prevent a court from hearing a trustee's § 544(b) claim. Rather, the question is whether § 106(a) prevents the Government from relying on sovereign immunity to demonstrate that the trustee cannot establish a core substantive

requirement of the underlying § 544(b) claim—namely, that the challenged transfer is "voidable under applicable law" by an actual creditor.

5 Some of respondent's *amici* assert that this understanding of the trustee's powers is belied by the fact that, in certain cases, a trustee may recover more money from a fraudulent transfer than an actual creditor would be able to recover. But that exception, which derives from this Court's decision in *Moore v. Bay*, 284 U.S. 4, 52 S.Ct. 3, 76 L.Ed. 133 (1931), relates to the trustee's power to *recover* assets from an invalid transfer—not to the scope of the trustee's power to *avoid* the transfer in the first place. It is unsurprising, then, that respondent himself does not rely on *Moore* for support here.

6 See, *e.g.*, Ill. Comp. Stat., ch. 705, § 505/8(a) (West 1992); N. Y. Ct. Clms. Act Law Ann. § 8 (West 1989); Ohio Rev. Code Ann. § 2743.02(A) (Lexis 1989).

7 We express no view on the merits of this argument, and we likewise decline to address the Government's alternative arguments concerning preemption and the Appropriations Clause.

1 As the majority notes, recent amendments to Utah's fraudulent-transfer statute "are immaterial to the question presented." *Ante*, at 848, n. 2.

End of Document

History (5)

Direct History (5)

1. In re All Resort Group, Inc.
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2. USA v. Miller
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Affirmed by

3. Miller v. United States
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Certiorari Granted by

4. United States v. Miller
144 S.Ct. 2678 , U.S. , June 24, 2024

AND Reversed by

5. United States v. Miller
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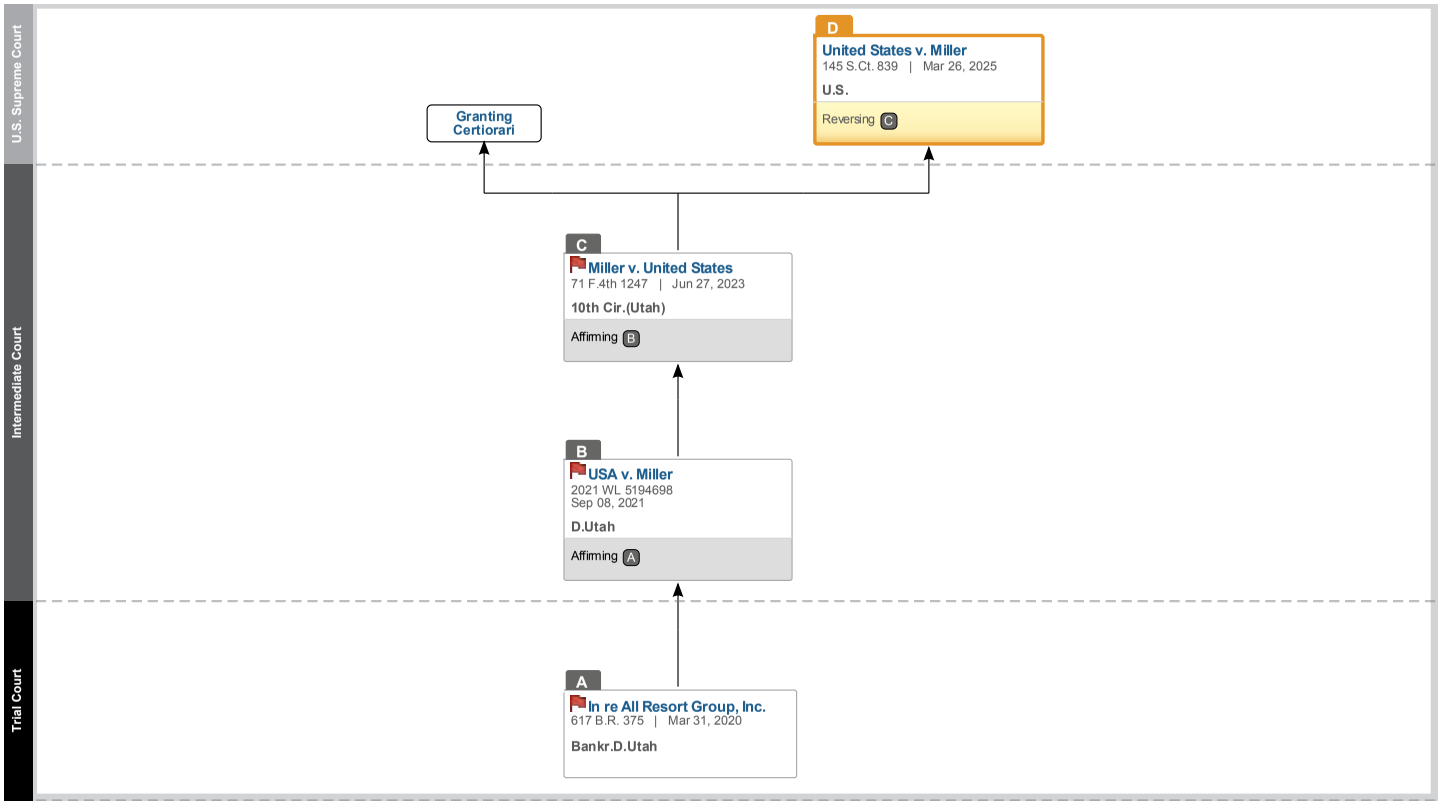

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Cited by	5. En Banc Brief of Defendant-Appellee, United States PERCIPIENT.AI, INC., Plaintiff-Appellant, v. UNITED STATES, CACI, Inc.-Federal, Defendant-Appellees. 2025 WL 1067657, *1+ , Fed.Cir. (Appellate Brief)	Apr. 04, 2025	Brief		26 27 S.Ct.
Cited by	6. Defendants' Reply to Plaintiffs' Opposition to Motion to Dismiss under Rule 12(b)(1) for Lack of Jurisdiction David JONES, Keith Wilcox and Keely Vondell, Individually and on Behalf of Oneida Nation Enterprises LLC 401(k) Plan and on Behalf of all the Similarl... 2025 WL 1099345, *1+ , N.D.N.Y. (Trial Motion, Memorandum and Affidavit)	Apr. 04, 2025	Motion		38 39 S.Ct.
—	7. SOVEREIGN IMMUNITY STOPS TRUSTEE FROM CLAWING BACK TAXES, SCOTUS RULES Bankruptcy Court Decisions Weekly News & Comments The IRS can keep $145,000 in taxes paid by an insolvent Utah company for the benefit of two of its principals before the company's bankruptcy filing, the U.S. Supreme Court ruled...	2025	Other Secondary Source	—	—
—	8. SOVEREIGN IMMUNITY STOPS TRUSTEE FROM CLAWING BACK TAXES, SCOTUS RULES Bankruptcy Court Decisions Weekly News & Comments Case name: United States v. Miller, 74 BCD 91, 2025 WL 906502 (U.S. 2025). Ruling: The IRS can keep $145,000 in taxes paid by an insolvent Utah company for the benefit of two of...	2025	Other Secondary Source	—	—

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—	**10.** SOVEREIGN IMMUNITY PREVENTS TRUSTEE FROM USING STATE LAW TO CLAW BACK TAXES Consumer Bankruptcy News Case name: United States v. David L. Miller, 35 CBN 207, 2025 WL 906502 (U.S. 3/26/25). Ruling: The U.S. Supreme Court reversed the U.S. 10th Circuit Court of Appeals ruling...	2025	Other Secondary Source	—	—
—	**11.** Sovereign immunity stops trustee from clawing back taxes, SCOTUS rules WESTLAW Bankruptcy Daily Briefing	—	Other Secondary Source	—	—
—	**12.** Bankruptcy trustee can't claw back taxes, SCOTUS rules WESTLAW Bankruptcy Daily Briefing	—	Other Secondary Source	—	—
—	**13.** High Court Clarifies Scope of Code's Sovereign-Immunity Waiver West's Bankruptcy Newsletter The Bankruptcy Code abrogates sovereign immunity only with respect to the federal cause of action created by 11 U.S.C.A. § 544(b), the subsection of the Code enabling a bankruptcy...	2025	Other Secondary Source	—	10 15 S.Ct.
—	**14.** 22 Westlaw Journal Bankruptcy 01, Sovereign immunity stops trustee from clawing back taxes, SCOTUS rules 22 Westlaw Journal Bankruptcy 01	—	Westlaw Journal	—	—

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Cited	2. Davis v. Michigan Dept. of Treasury 109 S.Ct. 1500, U.S.Mich., 1989 Former federal employee brought suit seeking refunds of state taxes paid on his federal retirement benefits. The Michigan Court of Claims denied relief. On appeal, the Michigan...	Case			843+
Cited	3. Davis v. Willey 263 F. 588, N.D.Cal., 1920 At Law. Action by John C. Davis, trustee in bankruptcy by Charles F. Willey, against E. T. Willey. Judgment for defendant.	Case			851
Declined to Extend	4. Department of Agriculture Rural Development Rural Housing Service v. Kirtz 144 S.Ct. 457, U.S., 2024 COMMERCIAL LAW — Consumer Credit. The Fair Credit Reporting Act (FCRA) waives the federal government's sovereign immunity from suits seeking money damages.	Case			843+
Cited	5. Dubin v. United States 143 S.Ct. 1557, U.S., 2023 CRIMINAL JUSTICE — False Personation. Defendant “uses” means of identification “in relation to” predicate offense for aggravated identity theft when use is at crux of criminal...	Case			843+
Cited	6. F.A.A. v. Cooper 132 S.Ct. 1441, U.S., 2012 GOVERNMENT - Records. Privacy Act's sovereign immunity waiver for “actual damages” does not extend to nonpecuniary damages for emotional distress.	Case			843+
Discussed	7. F.D.I.C. v. Meyer 114 S.Ct. 996, U.S.Cal., 1994 Bivens. Bivens action cannot be brought against federal agency.	Case			843+

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Cited	**9.** Granfinanciera, S.A. v. Nordberg 109 S.Ct. 2782, U.S.Fla., 1989 Chapter 11 trustee brought action against Colombian defendants to void allegedly fraudulent transfers. Defendants moved for jury trial and further moved to dismiss on grounds of...	Case			856
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Mentioned	**13.** In re Yahweh Center, Inc. 27 F.4th 960, 4th Cir.(N.C.), 2022 BANKRUPTCY — Avoidance. Debtor's tax penalty obligations to the IRS were not avoidable as constructively fraudulent.	Case			857
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Reversed	**16.** Miller v. United States 71 F.4th 1247, 10th Cir.(Utah), 2023 BANKRUPTCY — Avoidance. Bankruptcy Code waived sovereign immunity both as to trustee's avoidance proceeding under § 544(b)(1) and the underlying state-law cause of action.	Case			843+
Declined to Extend	**17.** Moore v. Bay 52 S.Ct. 3, U.S.Cal., 1931 On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. In the matter of the bankruptcy of Sassard & Kimball, Incorporated. An order of the...	Case			852+
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Cited	**20.** U. S. v. Detroit Timber & Lumber Co. 26 S.Ct. 282, U.S.Ark., 1906 CROSS APPEALS from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree of that court which, on appeal from a decree of the Circuit Court for the...	Case			843
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Cited	**23.** U.S. v. Navajo Nation 129 S.Ct. 1547, U.S., 2009 GOVERNMENT - Immunity. Indian tribe failed to identify substantive source of law establishing specific fiduciary duties on government.	Case		”	850
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Cited	**25.** United States v. Miller 144 S.Ct. 2678, U.S., 2024 Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit granted.	Case			849

Faculty

Deborah R. Chandler is the president of Anderson & Karrenberg in Salt Lake City and represents debtors, creditors and trustees in all aspects of title 11 work, including subchapter V cases. She also is frequently called upon to represent defendants in various adversary proceedings, including avoidance actions and nondischargeability proceedings. In addition to successfully reorganizing companies in chapter 11, Ms. Chandler also represents debtors in private restructurings and state court dissolution proceedings. She has represented receivers and defended actions brought by receivers. In addition to her bankruptcy practice, Ms. Chandler maintains a diverse commercial and civil litigation practice. One of her specialties is probate litigation, including both guardianships and conservatorships. Ms. Chandler is routinely selected by her peers as a member of Utah's Legal Elite and has been a frequent speaker on such topics as notice requirements under § 363. She received her B.S. *cum laude* in marketing and finance from the University of Utah in 2004 and her J.D. in 2008 from the University of Utah S.J. Quinney College of Law, where she received the CALI Award for highest grade in intellectual property and the College of Law Award for second-highest grade in corporate finance.

P. Matthew Cox is Of Counsel with Spencer Fane in Salt Lake City and represents financial institutions and other lenders in their efforts to protect their collateral and loan rights in federal and state courts, including bankruptcy courts. He focuses on defending these lenders and other clients against avoidance, preference and fraudulent-transfer claims made by trustees and receivers. He also assists creditors in obtaining relief from the bankruptcy automatic stay and in prosecuting objections to confirmation. Mr. Cox defends clients against claims from borrowers or customers related to the Fair Debt Collection Practices Act, the Fair Credit Reporting Act and the Utah Consumer Sales Practice Act, as well as against claims asserted in bankruptcy court for the return of funds received by creditors. In these matters, he has represented law firms, hospitals, businesses and collection agencies. Mr. Cox works closely with banks and lenders to help create robust loan and loan-modification documents for compliance with federal and state guidelines to forestall litigation. He also works closely with real estate professionals and related parties in negotiating purchase contracts, leases, options and litigation. For nearly a decade, Mr. Cox has devoted much of his time to defending dozens of trustee preference, fraudulent-transfer and other avoidance actions, with total damages in excess of $45 million, revolving around the C.W. Mining Bankruptcy case. He currently represents well-known national auto lenders in numerous consumer bankruptcy cases each month, and he maintains a significant practice assisting the owners of commercial properties in unlawful detainer or eviction proceedings against defaulting tenants. Mr. Cox received his B.S. in 2000 from the University of Utah and his J.D. in 2003 from the University of Utah College of Law.

David H. Leigh is a shareholder with Ray Quinney & Nebecker P.C. in Salt Lake City, where his practice is concentrated in bankruptcy, creditors' rights and civil/commercial litigation. He represents various parties, including secured creditors, unsecured creditors, official committees of unsecured creditors, and trustees in chapter 7, 11, 12, 13 and 15 bankruptcy cases. Mr. Leigh also has experience representing commercial debtors in chapter 11 proceedings, as well as plaintiffs and defendants in general commercial litigation matters, including out-of-bankruptcy workouts and other debt restructurings, collection litigation, contract disputes, real and personal property liens and lien disputes, and business torts. He is a past president, the current vice president, and a longstanding trustee board

member of the Utah Bankruptcy Lawyers Forum. He also is a member of the Wyoming Bankruptcy & Creditors' Rights Section Council. Mr. Leigh serves on the National Board of Governors and the National Bankruptcy Executive Counsel, and he co-chairs the National Bankruptcy Section Legislative Committee for the Commercial Law League of America and is the current regional chair for North America for the Lex Mundi International Insolvency, Bankruptcy and Restructuring Practice Group. Mr. Leigh currently serves on the Local Rules Committee for the U.S. Bankruptcy Court for the District of Utah. He has routinely been included in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law and in *Mountain States Super Lawyers* in the categories of Bankruptcy: Business and Bankruptcy & Creditor/Debtor Rights. He also has been voted by his peers throughout the state as one of Utah's "Legal Elite," as published in *Utah Business Magazine*. Mr. Leigh was recently selected as the Attorney of the Year for 2024 by The Banking and Finance Law Section of the Utah State Bar. He received his B.A. in communications in 1998 from Brigham Young University and his J.D. in 2002 from the University of Oregon School of Law, where he served as managing editor of the *Journal of Environmental Law and Litigation* and received the Distinguished Service Award.

Hon. Cathleen D. Parker is Chief U.S. Bankruptcy Judge for the District of Wyoming in Cheyenne, appointed on June 2, 2015. She also serves as a bankruptcy judge on the U.S. Bankruptcy Court for the District of Colorado. Prior to her appointment, she was an attorney with the Wyoming Attorney General's Office for 16 years, where she primarily represented the Wyoming Departments of Revenue and Audit in front of administrative tribunals, the Wyoming State Courts and the Wyoming Supreme Court. At the time of her appointment, she was the supervisor of the Revenue Section of the Civil Division and was the head of the Attorney General's Bankruptcy Unit. Prior to joining the Office of the Attorney General, Judge Parker worked as an attorney in private practice in Colorado, handling both civil and criminal matters. She also sits on the Tenth Circuit Bankruptcy Appellate Panel. Judge Parker received her J.D. with honors from the University of Wyoming College of Law in 1998.

Bailey C. Pompea is an attorney with Allen Vellone Wolf Helfrich & Factor P.C. in Denver, where she practices general civil litigation in both state and federal courts in Colorado, with a focus in bankruptcy, commercial, insurance and construction litigation. Prior to joining the firm, she practiced civil litigation in the Bay Area of California, where she was successful in litigating complex cases and negotiating favorable settlements in both court and arbitral proceedings. Since moving back to Denver, Ms. Pompea primarily represents individuals and small businesses in all phases of commercial and bankruptcy litigation, including through arbitration and trial. Her bankruptcy practice focuses on representation of both debtors and creditors in chapter 11 reorganization cases and chapter 7 liquidations. In particular, she handles adversary, avoidance and dischargeability litigation, as well as litigation concerning chapter 11 plans of reorganization. Ms. Pompea is admitted to practice in Colorado and California, and is a member of ABI, the Colorado, California and Denver Bar Associations, and the Colorado Trial Lawyers Association. She received her B.A. in 2010 from Austin College and her J.D. and LL.M. from the University of Denver Sturm College of Law in 2014.