Supreme Court of the United States

2023 BANKRUPTCY CASE REVIEW

LOU JONES

November 13, 2023

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CASE DECIDED IN THE LAST TERM

I. *Bartenwerfer v. Buckley*, 598 U.S. 69 (2023).

A. Issue: Whether an individual may be subject to liability for the fraud of another that is barred from discharge in bankruptcy under 11 U.S.C. § 523(a)(2)(A), by imputation, without any act, omission, intent or knowledge of her own?

11 U.S.C. § 523(a)(2)(A) provides:

> *A discharge under section 727, 1141, 1192, 1128(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—*
> *(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—*
> *(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.*

B. Factual Background:

1. Buckley purchased a home in San Francisco from David and Kate Bartenwerfer in 2008. Both sellers were on the title to the house, and had done substantial renovations prior to selling it. The Bartenwerfers were business partners under California law, meaning that each became the agent of the other within the scope of their business, sharing assets and liabilities, including liabilities for torts. In California, so long as one co-partner acts with the requisite fraudulent intent within the partnership's scope, and a third party relies on the misrepresentations to its detriment, all partners are equally liable for fraud, without further inquiry into each partner's knowledge or intent.

2. A jury found that Buckley reasonably relied on sworn representations and omissions that the sellers jointly made regarding the condition of the home. Following a 19-day trial (!), a jury found that the sellers failed to disclose material information in the sale of the property, and awarded damages to the buyer.

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3. The sellers jointly filed for bankruptcy protection under chapter 7. The bankruptcy court found that the debts were non-dischargeable: David had committed actual fraud, and that determination is no longer disputed; his fraud was imputed to Kate because an agency relationship existed based on the sellers' partnership with respect to the remodeling project.

4. The Bankruptcy Appellate Panel affirmed as to David's debt, but vacated and remanded as to Kate's. The BAP held that Kate's debt was dischargeable unless Kate "knew or had reason to know" of David's fraud.

5. On remand, the bankruptcy court held a trial solely on that issue, found that standard unmet, and held that Kate's debt was dischargeable. The BAP affirmed.

6. Relying on *Strang v. Bradner*, 114 U.S. 555 (1885), the Ninth Circuit reversed. Applying *Strang's* discussion of partnership principles (one partner cannot escape liability on grounds that another partner's misrepresentations were made without the former's knowledge), the Ninth Circuit found that the bankruptcy court applied the incorrect legal standard and found Kate's debt nondischargeable whether or not she knew of the fraud.

7. Kate sought certiorari, invoking a circuit conflict over the "knew or should have known" rule.

C. Petitioner Kate's Argument:

1. Section 523(a)(2)(A) only bars individual debtors from discharging debts obtained by their own fraud. When the individual lacks fraudulent intent, her debt is dischargeable.

    a) Bankruptcy offers a fresh start to honest debtors; discharge exceptions are limited to those "plainly expressed." *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013). Section 523(a)(2)(A) does not "plainly" hold

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individual debtors responsible for their partners' fraud. The lack of a clear statement on this point is dispositive.

b) The statute focuses on the "individual debtor," the only individual who could have "obtained" assets "by" fraud. "Obtained by" requires individual effort and "fraud" requires malintent.

c) Other subsections of section 523 confirm this interpretation: subsections (B) and (C) focus on the individual debtor's intent, and seven other exceptions use passive-voice formulations (similar to "obtained by" fraud), but plainly target only the individual. Other subsections expressly refuse to discharge a "judgment," "order" and the like—clear efforts to incorporate others' conduct.

d) This interpretation aligns with the Code's policy of relieving honest but unfortunate debtors.

2. The passive voice formulation "obtained by fraud" does not render the actor irrelevant. Other textual and contextual evidence show that only individual debtors can commit fraud. Congress did not need to mention the "individual debtor" in every subsection.

3. The modern Code is "debtor-friendly," and there is no reason to think the Code has grown more punitive over time, imposing sweeping responsibility for fraud, not just on "innocent" partners, but also spouses, agents, assignees and purchasers.

4. *Strang* does not dictate a different result. The 1867 Bankruptcy Act at issue in *Strang* expressly referred to "fraud . . . of the bankrupt" which, under Buckley's read, should have foreclosed the imputation of fraud from one to another. And *Strang* crafted a federal common law rule; judicial law-making was abrogated by *Erie R.R. Co. v. Tompkins*. In any event, Congress repealed the 1867 Act and repeatedly rewrote the fraud discharge provision. "Fresh start" would become the exception, not the rule, if *Strang's* reasoning lived on.

5. Other circuits reject the Ninth Circuit's view.[1]

D. Respondent Buckley's Argument:

1. Section 523(a)(2)(A) bars a debtor from discharging "any debt . . . for money . . . obtained by . . . actual fraud." It covers "any" and all such debts. The statute only asks (i) whether money or property was obtained by actual fraud and (ii) whether the debtor's liability arises therefrom. There is no unstated exception that allows discharge of *some* debts for money obtained by actual fraud—namely, where the fraud was perpetrated by the debtor's partner or agent without the debtor's knowledge (even though the debtor is liable for its partner's fraud under state law). This provision focuses on the character of the debt, not the culpability of the debtor.

2. *Strang* confirms the result. It rejected the argument that lack of knowledge is a basis to discharge a debt for the fraud of a co-partner. The 1867 Act required actual fraud "of the bankrupt" and *Strang* still determined that a debtor's vicarious liability for a partner's fraud *is* the actual fraud of the debtor for purposes of denying a discharge. Congress has since deleted the "of the bankrupt" language, which might have otherwise supported Kate's argument. *Strang* was not an exercise of judicial law-making, it was an exercise in statutory interpretation.

3. Respondent's reading reflects sound policy. Section 523(a)(2)(A) embodies a policy that protecting victims of fraud is more important than protecting debtors who are liable for defrauding them. This rule advances federalism, by deferring to state policy judgments about the circumstances in which a person should be held liable for

[1] *See, e.g., Sullivan v. Glenn*, 782 F.3d 378, 380 (7th Cir. 2015) ("Sullivan's 'debt not the debtor' theory is consistent with the language of the fraud exception to discharge, quoted above. But this just illustrates the limitations of literal interpretation of statutory language."). *See id.* at 381 ("In other words you can do nothing bad but still be denied a discharge in bankruptcy—no fresh start for the innocent. As Sullivan [the creditor-plaintiff] nostalgically remarks, 'Contrary to popular belief, bankruptcy was initially created for the benefit and protection of creditors, not debtors.' Yes, and debtors used to be sent to prison.").

a fraud perpetrated by another.

4. Petitioner abandoned the "knew or should have known" rule, showing that the Ninth Circuit was right to reject it. Kate now argues that knowledge is irrelevant and that § 523(a)(2)(A) does not apply if the individual debtor lacks any fraudulent intent herself or does not commit the fraud herself. She waived and forfeited that argument by failing to raise it below. No court of appeals has ever adopted this theory.

5. Other Code sections do not support adding an unwritten exception to § 523(a)(2)(A).

6. While Congress has made discharges more readily available over the years, it has also expanded the varieties of debts excepted from discharge. In 1867, there were only a few exceptions. By 1978, the list had grown to nine exceptions; currently § 523 includes 19 subsections.

E. Amici Arguments:

1. Congress' use of the phrase "actual fraud" signifies that loss of the discharge requires misconduct by the debtor, and not implied fraud. The Ninth Circuit's decision is contradicted by Supreme Court jurisprudence and is counter to the long-standing view that the discharge is central to the functioning of the American bankruptcy system and not only addresses a private need of the debtor but is a public necessity. (*Hon. Judith Fitzgerald, retired judges including Eugene Wedoff and certain law professors)*

2. The Ninth Circuit's rule threatens devastating consequences for innocent domestic partners, particularly victims of domestic violence. It is difficult to distinguish business relationships and personal ones. (*National Consumer Bankruptcy Rights Center and Professor Littwin)*

3. Section 523(a)(2)(A) does not implicate the "honest but unfortunate debtor" principle. It focuses not on the debtor's acts but on the nature of the debt. State law applies in bankruptcy unless federal

law displaces it. *(Law Professors Lawrence Ponoroff and Rafael Pardo)*

4. Petitioner's argument finds no foothold in text, context, history, or sound bankruptcy policy. *(United States)*

F. Opinion of the Court by Justice Barrett:

1. Written in the passive voice, § 523(a)(2)(A) turns on how the money was obtained, not who committed fraud to obtain it. The statute focuses on the event that occurs without reference to a specific actor.

2. Passive voice does not hide the relevant actor in plain sight, it pulls the actor off the stage.

3. The relevant legal context—the common law of fraud—has long maintained that fraud liability is not limited to the wrongdoer.

    a) Principals are liable for the frauds of their agents.

    b) Individuals are liable for frauds committed by their partners within the scope of the partnership.

4. Confining exceptions to discharge to those "plainly expressed" does not artificially narrow ordinary meaning.

5. When Congress amended the statute, it deleted "of the bankrupt" from the discharge exception for fraud, even though the Supreme Court had earlier ruled that a non-debtor's fraud could be imputed to its debtor-partner in *Strang v. Bradner*. This shows that Congress embraced *Strang's* holding.

6. The "fresh start" policy of the Bankruptcy Code does not mean the Code is focused on the unadulterated pursuit of the debtor's interest. Section 523 is proof of that. Any complaints about fairness should be directed at the underlying state law, which defines the scope of one person's liability for another's fraud.

G. Justices Sotomayor and Jackson Concur: clarifying that this case does not involve fraud by a person bearing no agency or partnership relationship to the debtor.

II. ***MOAC Mall Holdings LLC v. Transform Holdco LLC (In re Sears Holding Corp.)*, 598 U.S. 288 (2023)**

A. Issue:

Whether Bankruptcy Code section 363(m) limits the appellate court's jurisdiction over any sale order or other order deemed "integral" to a sale order, such that it is not subject to waiver, estoppel or forfeiture, including when a remedy could be fashioned that does not "affect the validity of the sale"?

11 U.S.C. § 363(m) provides:

> *The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.*

B. Factual Background:

1. Sears, a chapter 11 debtor, obtained bankruptcy court approval to sell a substantial portion of its assets to Transform pursuant to 11 U.S.C. § 363(b). The sale closed three days later, and the assets were conveyed to the buyer.
2. At the time, Sears leased a three-floor space in the Mall of America shopping center from MOAC. Sears' interest in the lease was not an asset transferred in the sale, but rather, the APA contemplated that Sears and Transform could, at a later date, seek court approval to assign to Transform one or more leases, including the mall lease. No aspect of the sale order or APA was contingent on the successful assignment of any lease; instead, the APA provided that leases could be rejected by Sears, and acknowledged that the bankruptcy court might not approve a proposed assignment.

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3. This was a two-step process because the Sears assets had to be sold quickly, or hundreds of Sears stores would have been forced to close and thousands of employees terminated. Consequently, Transform could not fully evaluate the economics of hundreds of store locations at the time of sale and had to defer the lease assumption process to a later date.

4. Months after the sale closed, Sears sought and obtained, over MOAC's objection, bankruptcy court approval to assign the mall lease to Transform pursuant to 11 U.S.C. § 365. MOAC appealed and sought a stay pending appeal, out of concern that Transform might argue on appeal that § 363(m) precluded appellate review of the order.

5. At the stay hearing, Transform told the bankruptcy court that § 363(m) did not apply to the order or appeal, which arose from an assignment request under § 365, and agreed that Transform would not raise a § 363(m) argument on appeal. The bankruptcy court relied on these statements in denying the stay request.

6. After full briefing on the merits in the appeal, the district court ruled in MOAC's favor, holding that Transform did not satisfy the statutory requirement that the assignee provide "adequate assurance of future performance" to the lessor.[2]

7. "Sandbagger!" Transform reversed course in a petition for rehearing, arguing for the first time that § 363(m) *did* apply, that it was a jurisdictional statute not subject to waiver, and that it deprived the district court of jurisdiction to hear the appeal. The district court stated that it was "appalled" by Transform's conduct, but nevertheless ruled "with deep regret," based on Second Circuit precedent, that § 363(m) deprived the court of jurisdiction. The Court of Appeals for the Second Circuit affirmed, finding that it was bound by Second Circuit precedent. The court of appeals found that the § 365 order was "integral" to the sale based on language in both the sale and assignment orders. The court of appeals issued a stay pending appeal to the U.S. Supreme Court.

[2] Section 365(b)(3) establishes heightened requirements for debtors seeking to assume and assign shopping center leases. Here MOAC argued that Transform could not satisfy these requirements because it was a non-retail entity that did not propose to occupy the premises, but rather to sublease the space to future subtenants.

C. Petitioner MOAC's Argument:

1. The Supreme Court established a bright-line test in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), requiring courts to find a statute jurisdictional only if Congress has "clearly stated" that it is jurisdictional. Absent a clear congressional statement, courts are instructed to treat a statute as non-jurisdictional.

2. By its own terms, § 363(m) does not speak to the jurisdiction of appellate courts. Rather, it eliminates a remedy the appellate courts might provide *after exercising* their jurisdiction: if the appellate court reverses or modifies the appealed order, the underlying sale to a good faith purchaser will not be invalidated absent a stay pending appeal. A limitation on remedies is not jurisdictional.

3. The Second Circuit is in the minority: most circuit courts that have considered the issue have determined that § 363(m) is not jurisdictional.[3]

4. Jurisdictional issues are not subject to waiver, estoppel or forfeiture. Yet Transform expressly disavowed any § 363(m) argument, successfully defeated a stay on that basis, and took a "wait and see" approach on appeal, raising the issue only after losing on the merits.

5. Even if § 363(m) were jurisdictional, it would not extend to this case or preclude the relief MOAC sought on appeal: the order here was entered under § 365, not § 363. Granting MOAC relief by vacating the lease assignment would not "affect the validity" of the earlier asset sale, even if the former order says the latter is "integral" to the other and vice versa.

    a) The Second Circuit never analyzed independently whether reversing the assignment order would "affect the validity" of the sale.

    b) The term "integral" is not used or defined in the Bankruptcy Code.

[3] *See, e.g., Trinity 83 Dev., LLC v. ColFin Midwest Funding, LLC*, 917 F.3d 599, 603 (7th Cir. 2019) ("*River West* is overruled [and] [a]ny other decision in this circuit that treats § 363(m) as making a controversy moot, rather than giving the purchaser or lessee a defense to a request to upset the sale or lease, is disapproved.").

c) Focusing instead on the statutory language has led the majority of circuits to independently analyze whether any relief can be granted without invalidating the sale.

d) Here Sears and Transform contractually agreed that denial of a request to assume and assign a lease would not affect the validity of the sale. An appellate order having the same effect cannot affect the validity of the sale either.

D. Respondent Transform's Argument:

1. The bankruptcy court no longer has jurisdiction over the *res* because the property was transferred out of the Sears estate. And because no avoidance action could bring the *res* back into the estate at this point, overturning the order would provide no meaningful benefit to MOAC, and there is no case or controversy under Article III. The Court should dismiss the petition as moot.

2. The leases to be assigned to Transform under the "designation" process were expressly included as purchased assets under the APA. The sale under the APA included all assets that would ultimately be transferred to Transform.

3. The transfer order was entered under both §§ 363 and 365, and the bankruptcy court determined that the assumption and assignment of the designated leases were integral to the APA.

4. As for the "sandbagging," counsel for Transform was "mistaken" when he said that § 363(m) did not apply.

5. Section 363(m) is jurisdictional. It is the codification of former Bankruptcy Rule 805, which in turn was declaratory of existing case law in which many courts dismissed appeals of sale orders for lack of subject matter jurisdiction. Congress codified the rule in § 363(m).

E. Amici Arguments:

1. Effect of the ruling is that owners of commercial real property may have valuable leases assigned to new tenants in violation of the requirements set by Congress in § 365(b) and yet will be unable to obtain appellate review by an Article III court. Transform did not obtain "appellate immunity" because of the intervening step of buying designation rights. Mootness has been "weaponized" to preclude effective appellate review of plans and sales under § 363.

"[B]ankruptcy law is developing with a notable lack of uniformity and without any Article III review despite the evident need for such." (*Hon. Judith Fitzgerald and certain law professors*)

2. Section 363(m) is not jurisdictional, it merely imposes a restriction on the remedies available to appellants. The doctrines of forfeiture, waiver, and estoppel apply. (*United States*)

F. Opinion of the Court by Justice Jackson:

1. The appeal is not moot. Court precedent disfavors such arguments, and the Court cannot say that no relief remains legally available. Court declines to act as a court of "first view, plumbing the Code's complex depths in the first instance" to assure itself that no relief is available.

2. Footnote: "We need not take a definitive position on the correct resolution of Transform's elaborate mootness argument to be confident that MOAC's disagreement is not frivolous."

3. Court only treats a provision as jurisdictional if Congress "clearly states" as much. "Magic words" need not be used, but the statement must be clear.

4. Nothing in the text purports to govern a court's adjudicatory capacity. Rather, § 363(m) reads like a statutory limitation. Section 363(m) is separated from the Code's jurisdictional provisions.

5. Transform's arguments about § 363(m)'s relationship to traditional *in rem* jurisdiction merely offers a "reason to think" Congress intended § 363(m) to be jurisdictional. That is not enough. In any event, § 363(m) specifically contemplates that a court *can* touch and affect the validity of certain sales or leases after the property has left the estate.

6. Transform cannot rely on pre-Code rules or cases because they predate the Court's effort to "bring some discipline" to the use of the term "jurisdictional."

III. *Lac du Flambeau Band of Lake Superior Chippewa Indians et al. v. Coughlin,* 599 U.S. 382 (2023)

A. Issue:

Whether the Bankruptcy Code expresses unequivocally Congress' intent to abrogate the soveriegn immunity of Indian tribes.

11 U.S.C. § 106(a) provides:

"Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section." [including the automatic stay]

11 U.S.C. § 101(27) provides that a "governmental unit":

"means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government."

B. Factual Background:

1. Petitioner Lac du Flambeau Band of Lake Superior Chippewa Indians is a federally recognized tribe that wholly owns several business entities.

2. In 2019, one of the Band's businesses, Lendgreen, loaned respondent Brian Coughlin $1,100 in a high-interest, short-term loan. Coughlin filed for Chapter 13 bankruptcy before he fully repaid the loan, triggering the automatic stay.

3. Lendgreen continued its efforts to collect the debt, even after it was reminded of the bankruptcy filing. Coughlin filed a motion in bankruptcy court seeking to enforce the stay against Lendgreen, its parent corporations and the Band, seeking damages for emotional distress, costs and attorneys' fees under § 362(k).

4. Petitioners moved to dismiss, arguing that the Bankruptcy Court lacked subject matter jurisdiction because the Band and its subsidiaries enjoyed tribal immunity from suit. The Bankruptcy Court agreed, holding that Congress did not clearly express Congress' intent to abrogate tribal sovereign immunity.

5. In a divided opinion, the Court of Appeals for the First Circuit reversed, holding that the Bankruptcy Code "unequivocally strips tribes of their immunity."

6. This holding deepened a circuit split: *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1061 (9th Cir. 2004) (holding that the Bankruptcy Code abrogates tribal sovereign immunity); *In re Greektown Holdings, LLC*, 917 F.3d 451, 460-61 (6th Cir. 2019) (concluding that tribal sovereign immunity was not abrogated).

C. Petitioners' Argument:

1. To abrogate sovereign immunity, Congress must make its intent unmistakably clear in the language of the statute. This is the "clear-statement" rule.

2. Indian tribes are separate sovereigns that existed before the Constitution and continue to exercise their historic sovereign authority.

3. The Bankruptcy Code expressly abrogates the sovereign immunity of a "governmental unit," but the Code does not expressly refer to Indian tribes, the method Congress has used time and time again in other statutory contexts. (Neither respondent nor the United States can cite a single example in which Congress has abrogated tribal sovereign immunity without referencing tribes.)

4. The Court's clear-statement precedents reject the notion that Congress might express an intention to abrogate in a roundabout manner when a straightforward alternative exists.

5. Abrogation of tribal sovereign immunity is an issue of unambiguous congressional intent, not dictionary definitions of component words

in isolation, or analogies to similar-sounding terms, precisely because Indian tribes cannot be neatly categorized as wholly "foreign" or "domestic."

6. Whether an Indian tribe can be regarded as "domestic" in a geographic sense does not answer the question whether "other domestic government" provides certainty that Congress intended to capture tribes. Not enough to say that a tribe "could" be domestic.

D. Respondent's Argument:

1. The phrase "other foreign or domestic governments" unambiguously includes Indian tribes. Tribes are "governments," that are "domestic" because their territory is within the United States and because they are subject to the authority of the United States.

2. Even Justice Marshall's phrase "domestic dependent nations" establishes that tribes have the basic indicia of domestic status. Use of the words "or" and "other" demonstrate a broad meaning.

3. Congress need not use "magic words" or "special phrases" to make its meaning clear.

E. Amici Arguments:

1. The Court should not lower the "unequivocal" standard and read terms like "Indian" or "tribe" into the definition of "governmental units" when no such terms appear anywhere in the Bankruptcy Code. (Navajo Nation and other tribes)

2. The First Circuit panel majority combined dictionary definitions, "historical context," and references to "structure" and "policy" to justify abrogating tribal sovereign immunity. But the question is not whether the Bankruptcy Code might plausibly be read to abrogate immunity or whether federal judges think it might be good policy to do so, the question is whether Congress unequivocally expressed its intention to abrogate it. (Indian law professors)

3. Reading "foreign or domestic government" to exclude tribes would make tribes the lone category of creditors not subject to the stay. This issue is of particular importance to low-income consumers because tribal sovereignty has increasingly been invoked in connection with payday and other predatory loans. In many cases, non-tribal entities have connected with tribes to establish lending operations and thereby avoid, or make more difficult, any lawsuits (National Consumer Law Center, et al.)

4. Sovereign immunity from *in personam* adjudication does not thwart a federal court's *in rem* bankruptcy or admiralty jurisdiction. The automatic stay is ancillary to the *in rem* bankruptcy case. (Hon. Eugene Wedoff, Hon. Steven Rhodes, Legal Aid Chicago)

F. Opinion of the Court by Justice Jackson:

1. To abrogate sovereign immunity, Congress must make its intent unmistakably clear in the language of the statute.

2. The definition of "governmental unit" "exudes comprehensiveness." The catchall phrase "other foreign or domestic governments" expresses all-inclusiveness.

3. By coupling "foreign" and "domestic," and placing the pair at the end of an extensive list, "Congress unmistakably intended to cover all governments in § 101(27)'s definition, whatever their location, nature, or type." Tribes undeniably fit that description because tribes are governments. The Court does not decide whether tribes qualify as purely "domestic" governments.

4. Policy choices in the Bankruptcy Code support this conclusion. The Code offers debtors a "fresh start," and the automatic stay provisions support that goal. Governmental entities already enjoy exceptions to this and other rules, including the police and regulatory power, certain tax-related activities by governments, and the exception from discharge of certain debts for fines, penalties or forfeitures owed to governmental units. Reading the sovereign immunity statute to carve out a subset of governments risks upending the policy choices in the Code.

5. The Court's conclusion is not changed because the statute does not specifically mention "tribes." "As long as Congress speaks unequivocally, it passes the clear-statement test—regardless of whether it articulated its intent in the *most* straightforward way." That Congress has specifically referenced tribes in other statutes does not foreclose it from using different language to accomplish the same goal in other statutory contexts.

6. The statute does not impose a rigid division between foreign governments on the one hand and domestic governments on the other, leaving out any governmental entity that may have both foreign and domestic characteristics (like tribes). Section 102(5) of the Bankruptcy Code instructs that the word "or" is "not exclusive."

G. Concurring Opinion by Justice Thomas:

1. To the extent that tribes possess sovereign immunity at all, that immunity does not extend to suits arising out of a tribe's commercial activities conducted beyond its territory.

2. Because the stay-enforcement motion arose from petitioners' off-reservation commercial conduct, petitioners lack sovereign immunity regardless of the Bankruptcy Code's abrogation provision.

3. The Court should simply abandon its judicially created tribal sovereign immunity doctrine.

H. Dissenting Opinion by Justice Gorsuch:

1. Reading the phrase "other foreign or domestic government" as synonymous with "any and every government" is a plausible interpretation, but Congress must unequivocally express its intent to achieve that result.

2. Tribes are neither foreign nor domestic governments. They are constitutional hybrids, resembling states in certain respects and foreign nations in others, and they have some features found in neither.

3. Tribes are nowhere mentioned in the statute. Territories, on the other hand, which are neither foreign nor domestic, are expressly listed. The statute flunks the clear-statement rule.

CASES SET FOR ARGUMENT IN THIS TERM

I. *Harrington v. Purdue Pharma L.P.,* No. 23-124 (Oral Argument set for December 4, 2023)

A. Issue:

Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11, a release that extinguishes claims held by non-debtors against non-debtor third parties, without the claimants' consent.

B. Factual Background:

1. The case concerns the reorganization of Purdue Pharma and its affiliates, stemming from their role in allegedly fueling the opioid epidemic in the United States. In approving the debtor's plan, the court of appeals relied on residual provisions of the Code to validate a sweeping non-consensual release of non-debtors' claims against other non-debtors, namely the Sackler family and other associated individuals and entities.

2. The release extends to claims based on fraud and other willful misconduct that likely would not have been dischargeable even if the Sacklers themselves had filed for bankruptcy protection.

3. Purdue Pharma manufactured, sold and distributed OxyContin and other medications that contributed to the opioid epidemic. Until 2018, Purdue was controlled by members of the Raymond and Mortimer Sackler families. Members of those families also held various director and officer positions throughout the company.

4. The opioid epidemic spawned extensive litigation against Purdue and the Sacklers. The U.S. Trustee alleges that the Sackler family, between 2008 and 2016, began distributing to the Sackler family a significant proportion of the company's revenue—approximately $11 billion in total—to Sackler family trusts and holding companies. The U.S. Trustee alleges that many of these assets were placed in spendthrift trusts, sometimes in offshore trusts, in an effort to insulate them from creditors.

5. Purdue sought bankruptcy protection in 2019, but the Sacklers did not. The bankruptcy court immediately enjoined almost 3,000 actions against the debtors and over 400 actions against the Sacklers, comprised of demands exceeding $40 trillion.

6. Under the Purdue plan, Purdue would become a public-benefit company dedicated to opioid abatement. The estate's remaining funds would be used to pay administrative expenses before being distributed to various creditor trusts, with the bulk of the distributions going into abatement.

7. To obtain payment, personal-injury claimants are required to submit records establishing the use of Purdue-branded opioids, and if the claim is allowed, a victim might receive between $3,500 and $48,000, minus yet-to-be-determined deductions and holdbacks, including payments for attorneys' fees and costs for operation of the personal-injury trust, for committees and other groups.

8. The Sacklers agreed to fund the plan by contributing $4.325 billion through payments spread over nearly a decade. In exchange, the plan includes a series of provisions that would extinguish virtually all Purdue-related opioid claims against the Sacklers and associated non-debtors without the consent of all affected claimants (the "Sackler Release"). The released parties include hundreds and potentially thousands of non-debtors, including many members of the Sackler family such as spouses, children and grandchildren of several listed individuals.

9. The release covers any civil claim of any kind or character, and expressly includes claims for fraud and willful misconduct. It does not require affirmative consent through an opt-in requirement, and applies even to claimants who objected to it.

10. The U.S. Trustee, eight States, the District of Columbia, a ground of Canadian creditors, and some individual claimants specifically objected to the Sackler Release. The bankruptcy court confirmed the plan and the Sackler Release.

11. The district court vacated the confirmation order containing the release, concluding that the Bankruptcy Code does not authorize courts to extinguish, without consent, direct claims held by non-debtors against other non-debtors. The court rejected Purdue's reliance on general Code provisions affording bankruptcy courts

residual equitable authority over bankruptcy proceedings, such as 11 U.S.C. §§ 105(a) and 1123(b)(6).

12. While the appeals were pending before the court of appeals, the eight objecting States and the District of Columbia reached an additional deal with debtors and the Sacklers, requiring the Sacklers to increase their contribution to the bankruptcy estate by an additional $1.75 billion in guaranteed payments and up to $500 million in contingent payments. The States and the District did not oppose Purdue's appeal and agreed not to file a brief before the Supreme Court if the case reached there.

13. A divided panel of the Court of Appeals for the 2nd Circuit reversed the district court's order, holding that the bankruptcy court had subject-matter jurisdiction over third-party direct claims against non-debtors because it was "likely" that the resolution of the released claims would directly impact the *res*. Notably, the third-party claims were similar to the estate's claims against the Sacklers, and it was possible that some of the released parties could seek indemnification from the debtors based on the released claims. The court of appeals also held that the claims encompassed by the Sackler Release are non-core under *Stern v. Marshall*, meaning that the district court, rather than the bankruptcy court, would need to exercise *de novo* review before approving the release.

14. On the merits, the court of appeals held that two provisions of the Bankruptcy Code, read together, authorize courts sitting in bankruptcy to approve non-consensual third-party releases: § 105(a) and § 1123(b)(6). The majority interpreted § 1123(b)(6) to permit a bankruptcy court to take any action not expressly forbidden by the Code, and because the Code does not expressly prohibit the approval of non-consensual third-party releases, such releases are authorized.

15. The majority also held that the affected claimants had been afforded constitutionally sufficient notice, and that the lack of an opt-out clause did not violate due process.

16. Lastly, the court of appeals adopted a seven-factor balancing test to govern approval of third-party releases, and concluded that the Sackler Release satisfies the test:

    a) there is an identity of interests between debtors and released parties;

b) the released claims are factually and legally intertwined with claims against the debtor;

c) the breadth of the release is necessary to the plan;

d) the release is essential to the reorganization;

e) the released non-debtors contributed substantial assets to the reorganization;

f) the affected claimants expressed overwhelming support for the plan; and

g) the plan provides for the fair payment of enjoined claims.

17. Judge Wesley concurred in the judgment, "reluctantly" agreeing that, under "binding" Second Circuit precedent, a bankruptcy court has authority to approve non-consensual third-party releases. But he expressed considerable skepticism of the reasoning in those earlier cases, which he viewed as being "without any basis in the Code."

18. Judge Wesley also concluded that the majority erred by inferring "a power that is nothing short of extraordinary" from what is effectively "silence" in § 1123(b)(6). He believes that the residual equitable authority granted by that provision is authority to "modify creditor-debtor relationships."

19. The Court of Appeals declined to issue a stay, but the Supreme Court did so in August, putting Purdue's plan on hold.

C. Petitioner's Argument (incl. Respondents in support of Petitioner):

1. The Court need not consider the U.S. Trustee's standing because at least one other party with standing is seeking the same relief. But, in any event, the U.S. Trustee has standing under Article III and by statute. Six courts of appeal have held that U.S. Trustees have statutory authority to "raise" and "be heard" on any issue, and therefore have the right to appeal.

2. The Sackler Release is not authorized by the Bankruptcy Code. First, the Code provides no express authority to release non-debtors from personal liability to other non-debtors. Second, there is no basis to infer a vast power from the residual provisions in §§ 105 and 1123(b)(6). The power to "approve appropriate provisions" would swallow the Code's more limited, specific authorizations.

3. Third, the broader statutory context demonstrates that the Sackler Release is not authorized:

    a) it grants the functional equivalent of a discharge to a non-debtor;

    b) provides a full release to the Sacklers without requiring them to use substantially all their assets to compensating their creditors;

    c) releases the Sacklers from fraud claims that could not otherwise be discharged by them; and

    d) extinguishes jury trial rights against the Sacklers.

4. The Supreme Court has specifically held under the Bankruptcy Act of 1898 that courts lack power to enjoying non-debtors from pursuing state-law claims against other non-debtors.

5. Congress' narrow allowance for asbestos trusts in § 524(g) demonstrates that the Sackler Release is impermissibly broad. Section 524(g) provides substantive protection for the value of released claims as well as procedural protections.

6. The residual authority to modify creditor-debtor relationships provides no license to transform the relationship between non-debtors.

7. The court of appeals' decision raises serious constitutional questions:

    a) The Sackler Release allows federal courts to wield great power over state-law causes of action, a form of private property;

    b) The Sackler Release extinguishes non-parties' causes of action, with res judicata effect, without providing an opportunity to opt out; and

    c) Neither § 105(a) nor § 1123(b)(6) contains the exceedingly clear language needed to overcome the canon of constitutional avoidance.

8. Appeals to policy cannot replace statutory authorization, and the public interest strongly supports holding third-party releases unlawful because they enable tortfeasors to obtain legal immunity

from the claims of their victims without assuming the obligations required by the Bankruptcy Code.

9. Third-party releases violate Section 524(e)'s prohibition against non-debtor discharges.

D. Respondents' Arguments (Debtors, Committee, etc.):

1. Bankruptcy law has always granted courts the authority and flexibility needed to safeguard the bankruptcy estate. Section 1123(b)(6) reflects this tradition as it unambiguously covers third-party releases as long as they are "appropriate" and "not inconsistent with" other provisions of the Code.

2. Such releases have limits; they must at least be necessary to the reorganization, necessary to protect the *res*, supported by creditors, and must be approved by both the bankruptcy court and an Article III court.

3. The catchall sweeps in matters that Congress did not specify, and there is no conflict with other provisions of the Code. The constitutional avoidance canon does not apply because § 1123(b)(6) is unambiguous and there is no constitutional problem to avoid.

4. Neither § 307 nor Article III confers standing on the U.S. Trustee to appeal. Only "injury" is trustee's view that the law should prohibit third-party releases. The U.S. Trustee is an "interloper" who has no standing and no right to destroy a plan that the actual victims crafted and overwhelmingly support. Therefore, the Court should dismiss the writ of certiorari as improvidently granted.

5. The U.S. Trustee cannot simultaneously condemn third-party releases and support consensual releases. Victims of the opioid crises are being spared years of difficult litigation and ensured a fair, equitable and timely distribution. The litigation alternative would be far worse; creditors would receive materially less. No creditor has been identified that is *harmed* by the third-party release.

6. Reversing the court of appeals would open the floodgates of litigation, and would invite a "race to the courthouse."

E. Amici Arguments (more than 20 of them):

1. Courts have no power to approve such releases, which contravene the separation of powers limitation embedded in the Bankruptcy

Clause, which gives Congress the exclusive power to authorize discharge of indebtedness. It is also an unconstitutional exercise of substantive federal common lawmaking, in violation of the federalism and separation of powers constraints established by *Erie R.R. Co. v. Tompkins*. And lastly, the process by which the Sackler Release was negotiated, proposed and approved violates non-consenting claimants' constitutional due-process rights and jury-trial rights. (Professors Ralph Brubaker, et al.)

2. Portions of the Sackler Release fall outside the subject matter jurisdiction of federal courts because the release captures claims that have not ripened into actual litigation and therefore do not satisfy Article III's requirement of a "case" or "controversy." (Adam Levitin)

3. *Purdue* represents the quintessential case of Chapter 11 forum shopping and judge picking. Debtor's headquarters are in Stamford, CT, but Purdue chose White Plains, NY, where Judge Robert Drain was the only sitting judge. Judge Drain had previously opined on third-party releases in two separate cases. The Court should ensure that its ruling does not exacerbate the problem of venue shopping in bankruptcy cases. (Commercial Law League of America and Nat'l. Bankruptcy Venue Reform Committee)

4. Third party releases are crucial to achieving fair compensation for claimants, particularly in mass tort cases. Particularly given the stringent requirements for class treatment under FRCP 23, the alternative will usually be resource-depleting marathons of litigation. The necessity of such releases has been recognized by bankruptcy courts for decades. (Ad Hoc Group of Local Councils of the Boy Scouts of America)

5. Whatever the Court's ruling, it must make clear that its ruling in this case does not affect other chapter 11 plans that have already become effective like the Boy Scouts' plan. (Boy Scouts of America)

II. *U.S. Trustee v. John Q. Hammons Fall 2006, LLC*, No. 22-1238 (Petition Granted September 29, 2023; Oral Argument TBD)

A. Issue:

Whether the appropriate remedy for the constitutional uniformity violation found by this Court in *Siegel v. Fitzgerald* is to require the United States Trustee to grant retrospective refunds of the increased fees paid by debtors in U.S. Trustee districts during the period lacking uniformity, or is instead either to deem sufficient the prospective remedy adopted by Congress or to require the collection of additional fees from a much smaller number of debtors in the Bankruptcy Administrator districts.

B. Factual Background:

1. In 2016, a group of companies affiliated with John Q. Hammons Hotels and Resorts filed for bankruptcy protection. Because the proceedings took place in Kansas, the companies paid the regular administrative fees for the trustee program.

2. In 2020, they asked the court for a partial refund, on grounds that the discrepancy between the fees for the trustee program and the administrator program violated the Constitution.

3. Bankruptcy Court rejected the request, but Court of Appeals for the 10th Circuit reversed, holding that the higher fees in trustee districts were unconstitutional, and because it could not issue a ruling that increased the fees in Alabama and North Carolina, the solution was for the government to refund the difference between the fees they paid and what they would have paid under the administrator program.

4. The Court's decision in *Seigel* did not address the remedy for the constitutional violation.

C. Government's Position:

1. The Court rarely grants requests for retroactive relief, and should not do so here.

2. This is especially so when Congress made clear that it only intended to provide a remedy going forward by amending the law to require administrator districts to charge debtors the same fees as those levied in trustee districts, with no mention of providing a refund to debtors in trustee districts who had paid higher fees in the past.

III. ***Truck Ins. Exchange v. Kaiser Gypsum Co.*, No. 22-1079 (Petition granted October 13, 2023; Oral Argument TBD)**

A. Issue:

Whether an insurer with financial responsibility for a bankruptcy claim is a "party in interest" that may object to a plan of reorganization under Chapter 11 of the Bankruptcy Code.

B. Factual Background:

1. The case involves an insurance company's attempt to block its insured's Chapter 11 reorganization plan, which establishes a trust for certain current and future asbestos personal-injury liabilities.

2. The plan treats holders of insured and uninsured asbestos personal injury claims differently. Insured claims would be brought against the insurance company subject to the insurer's pre-existing rights, but uninsured claims would be submitted directly to the trust.

3. Importantly, only the persons bringing uninsured claims would be required to provide disclosures to ensure the trust paid only valid, non-duplicative claims. For insured claims, that insurer would have to seek the same information in litigation on a case-by-case basis.

4. Petitioner Truck Insurance Exchange says it is a "party-in-interest" and is entitled to "raise" and "be heard on any issue" in a Chapter 11 proceeding, and should be permitted to intervene and argue that it is entitled to similar protections.

5. The bankruptcy court found that the insurer was not a party-in-interest because the plan left its rights under the insurance contracts where it found them; that is, the plan was "insurance-neutral." The district court affirmed.

6. The Court of Appeals for the 4th Circuit affirmed, because the plan did not alter the insurer's policy rights, and the rights the insurer was asserting never existed under the policies.

COURT OF APPEALS FOR THE SEVENTH CIRCUIT

***Mann v. LSQ Funding Group, L.C. (In re Engstrom, Inc.)*, 71 F.4th 640 (7th Cir. 2023), *petition for cert. filed* October 16, 2023, No. 23-425.**

A. Facts:

1. Engstrom provided staffing services to nuclear power plants, and in the ordinary course of its business, contracted with invoice-factoring company LSQ Funding Group, L.C. By January 2020, Engstrom was indebted to LSQ in an amount exceeding $10 million.

2. The Chapter 7 trustee, Doug Mann, alleges that Engstrom and its CEO were engaged in a massive fraud, creating phony accounts to induce LSQ to factor against bogus invoices—a Ponzi scheme that created the appearance of a flourishing business.

3. Millennium asserts that LSQ caught onto the fraud and terminated its agreement with Engstrom in January 2020. Then, weeks before Engstrom filed for bankruptcy protection, Engstrom's CEO orchestrated a payoff agreement between LSQ and a new lender, Millennium Funding.

4. Millennium paid Engstrom's debt to LSQ, and LSQ released its security interest in Engstrom's accounts so the accounts could be pledged to Millennium. The transaction swapped Millennium for LSQ as Engstrom's secured creditor, and paid LSQ in full.

5. Millennium quickly discovered the fraud, and within three months of the creditor-swap, Engstrom filed for bankruptcy protection.

6. Following conversion of the case to Chapter 7, the trustee sued LSQ to avoid the payoff as a preferential or fraudulent transfer. The trustee alleges that the accounts Millennium purchased were worthless and that LSQ conspired with Engstrom to leave Millennium with the phony accounts and keep the Ponzi scheme running longer.

7. The bankruptcy court entered summary judgment for LSQ, holding that the payoff agreement was not avoidable because it did not qualify as a transfer of "an interest of the debtor in property." In so doing, the court applied the well-known "earmarking doctrine" to conclude that the payoff funds from Millennium were "earmarked" for LSQ, a creditor of the debtor, and that Engstrom never had control of the funds.

8. The district court affirmed.

B. 7th Circuit opinion by Judge St. Eve (Ripple, Scudder, St. Eve):

1. We need not focus on the "earmarking doctrine" because a careful reading of the Bankruptcy Code's text and the application of precedent resolve this case.

2. The purpose of the preference and fraudulent transfer provisions in the Code is to preserve the property includable within the bankruptcy estate—the property available for distribution to creditors.

3. To determine whether a transfer affects an "interest of the debtor in property," courts ask whether the debtor can exercise control over the funds transferred, and whether the transfer diminishes the property of the estate. The goal is to determine whether the transfer took something from the pool of assets that would otherwise have gone to creditors.

4. A debtor exercises control over funds when it determines the disposition of the funds and designates the creditor to whom

payment is made. Here, a jury could find that Engstrom chose LSQ as the beneficiary of the new Millennium financing and insisted on the payment to perpetuate the Ponzi scheme. But there is little evidence that the debtor (rather than Millennium or LSQ) had the ultimate ability to determine the disposition of the funds or the accounts themselves.

5. We do not need to decide the exact question of control here, because the diminution of the estate analysis shows "plainly" that the transaction at issue did not involve a "transfer of an interest of the debtor in property." Neither the $10 million nor the accounts sold would have been part of the debtor's estate. The funds never passed through the debtor's accounts, and the swap of creditors was instantaneous. The transaction had no adverse effect on other creditors of the debtor.

6. The same rationale applies in the fraudulent transfer analysis under § 548: just like § 547, § 548 permits the trustee to avoid transfers of "an interest of the debtor in property." Identical words used in different parts of the same act are intended to have the same meaning.

7. Without some evidence connecting the transfer to the Debtor's estate, the only way to reverse the payoff agreement is to return the $10 million to Millennium. That is to say, avoiding the transfer would benefit the allegedly defrauded creditor and no others.

8. Other circuits have concluded that, even in the context of a Ponzi scheme, outright fraud alone cannot bring a transaction within the avoiding powers of the Bankruptcy Code.

9. If fraud occurred, Millennium's relief should come from damages in a separate fraud suit.

C. Petition for a Writ of Certiorari:

1. Question presented is: when a debtor defrauds a new creditor into making payment of an existing creditor’s claims, whether the trustee seeking to avoid the fraudulent transfer also must demonstrate “diminution” or “harm” to the estate or creditors generally.

2. The trustee argues there is a circuit split on the question, with both the Second and Fourth Circuits having held that transfers made with actual intent to hinder, delay or defraud a creditor are avoidable without the need to establish economic harm to the estate.

3. The law of the Seventh and Eleventh Circuits is squarely at odds with the law in the Second and Fourth Circuits on an important and recurring question of fundamental bankruptcy law — whether recovery of transfers made with intent to hinder, delay or defraud requires a non-statutory showing of diminution or harm.