
Bankruptcy 2023:
Views from the Bench

# Supreme Court Roundup

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**2023 View from the Bench**

**September 29, 2023**

**Supreme Court Roundup**

**Materials by Emony M. Robertson and Craig Goldblatt**

## Bankruptcy Highlights from SCOTUS' 2022 October Term

### *Bartenwerfer v. Buckley, 143 S. Ct. 665 (2023)*

This case presented the question "whether a debtor can be subject to liability for the fraud of another that is barred from discharge in bankruptcy … without any act, omission, intent or knowledge of her own."[1] The Court held that § 523(a)(2)(A) of the Bankruptcy Code precludes a debtor who is liable for another's fraud, regardless of that debtor's own culpability, from discharging that debt in bankruptcy.[2]

#### Factual and Procedural Background

A couple, Kate and David Bartenwerfer (the "Bartenwerfers," unless identified individually), acted as business partners in purchasing and renovating houses, one of which they sold to Kieran Buckley ("Buckley"). After discovering significant defects with the house, Buckley brought an action against the Bartenwerfers in a California superior court for breach of contract, negligence, and the non-disclosure of material facts. The jury found in favor of Buckley on the non-disclosure of material facts claim and awarded damages, which the superior court reduced following post-trial briefing to approximately $200,000. The judgment award coupled with other outstanding

[1] *Bartenwerfer v. Buckley*, 143 S. Ct. 665, 672 n.2 (2023) (internal quotation and citation omitted). *See also* 11 U.S.C. § 523(a)(2)(A).

[2] *Bartenwerfer v. Buckley*, 143 S. Ct. 665, 667, 671-676 (2023).

debts resulted in the Bartenwerfers filing a Chapter 7 petition in the United States Bankruptcy Court for the Northern District of California.[3]

During the Bartenwerfers' bankruptcy case, Buckley filed an adversary complaint requesting that the $200,000 award be excepted from discharge pursuant to § 523(a)(2)(A).[4] The Bartenwerfers argued that the award was dischargeable because both debtors lacked the requisite scienter for fraudulent representation.[5] David Bartenwerfer testified that he did not prepare the disclosure statements in connection with the sale of the house on Kate Bartenwerfer's behalf (contrary to the testimony that he provided in the superior court action). David also testified that even though Kate signed the supplemental disclosure statement, she did not possess the information necessary to prepare the document and, therefore, would not know of the fraudulent, or omission of material, facts.[6] The bankruptcy court held that the $200,000 award was non-dischargeable under § 523(a)(2)(A), with respect to both debtors, because David had actual knowledge of the fraudulent misrepresentations in the disclosure statements, and David's intent could be imputed to Kate through their partnership/agency relationship.[7]

The Bankruptcy Appellate Panel for the Ninth Circuit reversed the bankruptcy court's decision on the ground that the trial court's analysis should have gone further

[3] *In re Bartenwerfer*, No. 13-30827 (Bankr. N.D. Cal. filed Apr. 8, 2013).

[4] Complaint, *Buckley v. Bartenwerfer (In re Bartenwerfer)*, Adv. Proc. No. 13-03185 (Bankr. N.D. Cal. filed July 15, 2013); *see In re Bartenwerfer*, 549 B.R. 222 (Bankr. N.D. Cal. 2016).

[5] *In re Bartenwerfer*, 549 B.R. 222, 225 (Bankr. N.D. Cal. 2016).

[6] *In re Bartenwerfer*, 549 B.R. 222, 227-232 (Bankr. N.D. Cal. 2016).

[7] *Id.*

than identifying the existence of a partnership/agency relationship between David and Kate.[8] The panel instructed the bankruptcy court to continue its analysis of Kate's liability for the fraudulent debt by determining whether Kate "knew, or had reason to know," of David's fraud.[9] Upon finding that Kate did not know, or have reason to know, of David's non-disclosure of the house's material defects, the bankruptcy court held that the § 523(a)(2)(A) fraud-discharge exception did not bar Kate from discharging her liability for the $200,000 award.[10]

The Ninth Circuit reversed the bankruptcy court's decision and held that a specific debtor's culpability should not overcome a trial court's finding of fraud where a partnership/agency relationship exists.[11] The court explained that if fraudulent conduct is "performed on behalf of the partnership and in the ordinary course of business of the partnership," one partner's fraudulent intent can be imputed to another and, therefore, liability for the fraudulent debt will attach.[12]

[8] *In re Bartenwerfer*, 2017 WL 6553392, at *10 (B.A.P. 9th Cir. Dec. 22, 2017).

[9] *In re Bartenwerfer*, 2017 WL 6553392, at *9-*10 (B.A.P. 9th Cir. Dec. 22, 2017).

[10] *In re Bartenwerfer*, 860 Fed. App'x 544, 546-547 (9th Cir. 2021).

[11] *In re Bartenwerfer*, 860 Fed. App'x 544, 546-547 (9th Cir. 2021).

[12] *In re Bartenwerfer*, 860 Fed. App'x 544, 546-547 (9th Cir. 2021) (citing *Strang v. Bradner*, 114 U.S. 555, 561 (1885); *In re Cecchini*, 780 F.2d 1440, 1444 (9th Cir. 1986)) (internal quotation omitted).

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SCOTUS' Review

**11 U.S.C. § 523(a)(2)(A)**

(a) A discharge under section 727 … does not discharge an individual debtor from any debt –

(2) for money … 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.

Justice Barrett began the *Bartenwerfer* analysis by addressing Kate's argument that the passive voice of § 523(a)(2)(A) signals that an individual debtor should be barred from discharging their liability resulting from their own fraudulent conduct. The backbone of the Court's interpretation of the fraud-discharge exception is predicated on its "relevant legal context—the common law of fraud." Under the common law of fraud, "individual debtors can be liable for fraudulent schemes they did not devise." Justice Barrett reasoned that the common law of fraud typically attaches liability to an innocent party when they have a special relationship with the fraudster, such as employer/employee, principal/agent, parent/child relationships. And even with the existence of a special relationship, one could employ defenses to ameliorate their personal liability for the fraud.

The Court opined that the passive voice of § 523(a)(2)(A)'s text conforms to the common law of fraud because it "takes the debt as it finds it." All states do not apply the common law of fraud the same and, as such, the fraud-discharge exception must be examined using the applicable state law and then the common law of fraud. For example, "if California did not extend liability to honest partners, § 523(a)(2)(A)

would have no role to play," David's fraudulent intent could not be imputed to Kate as a matter of state law, and Kate Bartenwerfer would be able to discharge any liability for the $200,000 award in the bankruptcy case.

Next, the Court studied the fraud-discharge exception as a matter of pre-Bankruptcy Code practice following its 1885 *Strang v. Bradner* decision. The *Strang* Court held that where a business partner lied to secure a promissory note for the overall partnership, a bankrupt (*i.e.*, a debtor) could not discharge their individual fraud liability, because the bankrupt "received and appropriated the fruits of the fraudulent conduct of their associate in business."[13] The fraud "of the bankrupt" (*i.e.*, the debtor), at issue in *Strang*, was neither present in the plain language of the Bankruptcy Act of 1898 nor any of its successors. "The unmistakable implication," as the *Bartenwerfer* Court described, is "that Congress embraced *Strang*'s holding" to both comport with the breadth of liability in the principal/agent context of the common law of fraud and the applicable state law.

And lastly, Kate Bartenwerfer argued that barring a debtor from discharging their liability because of their associate's fraudulent conduct was inconsistent with "the 'fresh start' policy of modern bankruptcy law." But the Court explained that "[n]o statute pursues a single policy at all costs," and, therefore, this argument "characterize[d] the Bankruptcy Code as focused on the unadulterated pursuit of the debtor's interest," ignoring the Bankruptcy Code's actual balance of competing interests of debtors and creditors.

[13] *Strang v. Bradner*, 114 U.S. 555, 561 (1885).

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The Supreme Court held in *Bartenwerfer v. Buckley* that an individual debtor is barred from discharging their personal liability for a debt obtained by another's fraudulent conduct pursuant to § 523(a)(2)(A) of the Bankruptcy Code.[14] Under the common law of fraud, "the fraud of one partner … is the fraud of all."[15] Justice Barrett reiterated the Court's 1885 decision in *Strang v. Bradner*, where the Court barred debtors from discharging their liability for a debt resulting from their partnership's fraud.

***MOAC Mall Holdings LLC v. Transform Holdco LLC, 143 S. Ct. 927 (2023)***

The petitioner asked whether § 363(m) of the Bankruptcy Code was a jurisdictional provision that barred the appeal of a § 363(b) sale order that was not stayed pending appeal.[16] The Court held that § 363(m) does not "clearly state" any limitation on a court's adjudicatory power, and, therefore, is not jurisdictional.[17]

Factual and Procedural Background

Once Sears, Roebuck and Co. ("Sears" or the "debtors") filed its chapter 11 cases, its real property leases became property of the estates. Under § 363(b) of the Bankruptcy Code, the court approved the debtors' sale of its assets to Transform Holdco LLC ("Transform"), which included Sears' rights in its real property leases. The asset purchase agreement allowed Transform to designate the entity to which Sears would assign its leases after assumption.

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[14] *See* 143 S. Ct. 665, 676 (2023). *See also* 11 U.S.C. § 523(a)(2)(A).

[15] 114 U.S. 555 (1885).

[16] *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S. Ct. 927, 929 (2023). *See also* 11 U.S.C. § 363(m).

[17] *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S. Ct. 927, 929, 934-940 (2023).

One of the leases to be assumed by the debtors was owned by MOAC Mall Holdings LLC ("MOAC") for a space in the Mall of America in Minneapolis (a shopping center). MOAC objected to the debtors' motion to assign the lease to Transform on the ground that such assignment violated the adequate assurance of future performance requirements for shopping centers.[18] The bankruptcy court overruled the objection and authorized the assignment.

The district court affirmed. But two weeks after the district court issued its opinion, Transform filed a motion for rehearing. That motion "assert[ed] for the first time – albeit on the basis of facts known to it throughout the pendency of the appeal, but never revealed to [the] court – that [the district court] lacked jurisdiction," pursuant to § 363(m), because the bankruptcy court's assignment order was not stayed pending appeal.[19] MOAC argued in response that Transform's failure to raise § 363(m) to preclude the district court's jurisdiction thereby waived its protection,

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[18] *Compare* 11 U.S.C. § 365(f)(2)(B)

> The trustee may assign an … unexpired lease of the debtor only if … adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

*with* 11 U.S.C. §§ 365(b)(3)(A), (D)

> For purposes of … paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—
> (A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;
> …
> (D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

[19] *In re Sears Holdings Corp.*, 616 B.R. 615, 618 (S.D.N.Y. 2020).

and, therefore, judicially estopped from seeking vacatur on the ground of § 363(m). Had the parties informed the district court that § 363(m) was raised during the bankruptcy court's assignment hearing, before issuing its decision vacating the assignment order, the district court explained that its review would have been limited "to whether…assumption of the lease in the absence of a stay was done 'in good faith.'"[20]

The district court clarified that § 363(m), "a jurisdiction-depriving statute," prevented MOAC from raising affirmative defenses (waiver and estoppel) because not one could establish appellate jurisdiction.[21] "[T]he language of the statute does not exactly suggest that an appellate court lacks the power to reverse or modify an unstayed bankruptcy order … But it does say that such an order will, in the absence of bad faith, be ineffective to undo a sale or lease already consummated in the absence of a stay."[22]

MOAC appealed the district court's decision, but the Second Circuit was not persuaded by its arguments. Affirming the district court, the Second Circuit found that the assignment of the MOAC lease was integral to the debtors' sale transaction, because the assignment order and the sale order explicitly provided so, and § 363(m)'s

[20] *In re Sears Holdings Corp.*, 616 B.R. 615, 624 (S.D.N.Y. 2020).

[21] *In re Sears Holdings Corp.*, 616 B.R. 615, 621, 625 (S.D.N.Y. 2020). *See* 11 U.S.C. § 363(m):

> 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.

[22] *In re Sears Holdings Corp.*, 616 B.R. 615, 625 (S.D.N.Y. 2020).

"sale" threshold requirement had been satisfied. The court reiterated the district court's reasonings for MOAC's waiver and estoppel affirmative defenses being insufficient to grant appellate jurisdiction. In short, the Second Circuit held that "absent the entry of a stay (and excepting challenges to a purchaser's good faith), the District Court had no authority to reverse or modify a sale order in a way that affects the validity of a § 363 sale, regardless of the merit of the petitioner's appeal."[23]

SCOTUS' Review

**11 U.S.C. § 363(m)**

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.

Justice Jackson began *MOAC* addressing Transform's claim that absent the lease being avoided under § 549 and reconstituted as property of the debtors' estates (a right which Sears waived under the sale order that had, otherwise, expired), the Court could not provide effectual relief undoing the lease transfer, and, therefore, this case was moot.[24] The Court "decline[d] to act as a court of 'first view,' plumbing the [Bankruptcy] Code's complex depths in 'the first instance' to assure [itself] that Transform [was] correct about its contention that no relief remains legally

[23] *In re Sears Holdings Corp.*, 2021 WL 5986997, at *3 (2d Cir. 2021).

[24] *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 295 (2023).

available."[25] Opining that such mootness arguments were disfavored where, as in this case, the petitioner had a "concrete interest" in the Court reversing the appellate court's decision in hopes of the lower courts (the district court and the bankruptcy court) unwinding their decisions, the Court found that the relief MOAC sought was typical.[26] Turning to the question presented – whether § 363(m) was jurisdictional – the Court simply answered "no."

Statutes often incorporate precondition rules that give parties rights, and/or require parties to meet certain obligations, attached to the relief sought. Viewing § 363(m) as a "precondition[] to relief" (like deadlines, exhaustion requirements, statutory limitations, and the scope of a statute), the Court explained that precondition rules, while "important and mandatory," are not by happenstance jurisdictional rules.[27] A precondition rule that is also jurisdictional "pertain[s] to the power of the court rather than to the rights or obligations of the parties."[28] And given the harsh impact of a jurisdictional rule on the power of a court, the Court reasoned that Congress' likely intent for a precondition rule to be jurisdictional should not be

[25] *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 296 (2023) (internal quotation marks omitted) (quoting and citing *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)).

[26] *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 296 (2023) (citing *Chafin v. Chafin*, 568 U.S. 165, 173 (2013)).

[27] *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 297 (2023) (internal quotation marks omitted) (quoting and citing *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019); *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). *See also Hamer v. Neighborhood Housing Servs. of Chi.*, 138 S. Ct. 13, 17-18 (2017).

[28] *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 298 (2023) (internal quotation marks omitted) (quoting and citing *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010)).

enforced on a plausible reading or in the absence of "magic words."[29] The Court underscored that, using "traditional tools of statutory construction," courts should "only treat[s] a provision as jurisdictional if Congress 'clearly states' as much."[30]

Finding the plain language to remove constraints on the reversal or modification of an order allowing a sale or a lease, the Court was certain that § 363(m) read more like a statutory limitation dictating the procedural rights of a party following the entry such orders, rather than a "clear statement" affecting a court's jurisdiction over bankruptcy matters.[31] But also within the context of the Bankruptcy Code, the Court compared § 363(m)'s text to that of § 305(c) – a plainly jurisdictional provision – "which directs that certain judicial orders are not reviewable or otherwise by the court of appeals under § 158(d)."[32] The Court acknowledged that § 363(m) is an important and mandatory directive that has statutory limitations, but drew a bright line finding that, absent of a clear statement reflecting Congress' intent for § 363(m) to limit a court's power, the Court would continue its practice in "hold[ing] that congressional commands are nonjurisdictional despite emphatic directives."[33]

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[29] *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 297 (2023) (citing *Henderson v. Shinseki*, 562 U.S. 428, 435-436 (2011); *Boechler v. Commissioner*, 142 S. Ct. 1493, 1497 (2022)).

[30] *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 298 (2023) (quoting and citing *Boechler v. Commissioner*, 142 S. Ct. 1493, 1497 (2022)).

[31] *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 299-300 (2023).

[32] *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 300-301 & n.6 (2023).

[33] *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 301 (2023) (citing *Musacchio v. United States*, 577 U.S. 237, 246 (2016; *United States v. Kwai Fun Wong*, 575 U.S. 402, 416-417 (2015); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157-158 (2010); *Fort Bend Cnty. v. Davis*, 139 S. Ct. 43, 1849 (2019)).

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***Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689 (2023)***

The issue in *Lac du Flambeau* was whether § 106(a) abrogated tribal sovereign immunity in bankruptcy. Unlike state sovereign immunity, which is subject to the restrictions of the Eleventh Amendment, Congress has plenary authority to abrogate tribal sovereign immunity. The Court has nevertheless held that Congress should not be presumed to intend such an abrogation in the absence of a clear statement in the statutory text.

In *Lac du Flambeau*, an Indian tribe sought to collect an $1,100 prepetition debt from an individual debtor, in violation of the automatic stay, 11 U.S.C. § 362. The bankruptcy court dismissed the claim for damages on the ground that the tribe enjoyed sovereign immunity. The First Circuit reversed, holding that such sovereign immunity was abrogated by § 106(a) of the Bankruptcy Code.

SCOTUS' Review

| **11 U.S.C. § 101(27)** |
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| The term "governmental unit" means United States; State; Commonwealth; District; Territory; 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. |
| **11 U.S.C. § 106(a)** |
| Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section… |

In an opinion by Justice Jackson, the Supreme Court affirmed. The opinion focused on the broad language in the definition of governmental unit. While acknowledging that it does not specify Indian Tribes, the Court ruled that the

requirement of a "clear statement" did not require the use of any particular "magic words." "The clear-statement question is simply whether, upon applying 'traditional' tools of statutory interpretation, Congress's abrogation of tribal sovereign immunity is 'clearly discernable' from the statute itself."[34]

The Court went on to hold that § 106(a) and the definition of "governmental unit" did make it sufficiently clear that Congress intended to abrogate tribal sovereign immunity. Interestingly, the Court focused on the references to "other foreign or domestic government." "Few phrases in the English language express all-inclusiveness more than the pairing of two extremes. 'Rain or shine' is a classic example: If an event is scheduled to occur rain or shine, it will take place whatever the weather that day might be. Same with the phrase 'near and far': If people are traveling from near and far, they are coming from all over the map, regardless of the particular distance from point A to point B."[35]

The Court thus held that the language was sufficiently clear to satisfy the clear statement rule and operate to abrogate tribal sovereign immunity. Justice Gorsuch, dissenting, emphasized that Indian tribes were neither foreign nor domestic governments, and as such could not be considered within the scope of the abrogation under the clear statement principle.

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[34] *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689, 1696 (2023).

[35] *Id.*

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**Different Analytic Approaches of Bankruptcy Courts v. Reviewing Courts**

***Czyzewski v. Jevic Holding Corp., 580 U.S. 451 (2017)***

*Jevic* holds that a bankruptcy court may not authorize, through a structured dismissal, a distributional scheme that conflicts with that set forth in the Bankruptcy Code. Jevic was a failed trucking company whose bankruptcy case was administratively insolvent. A class of former truckers held claims under the WARN Act that were entitled to priority treatment under the Code. As such, those claims were required to be paid in full before any distribution could be made to unsecured creditors.

The unencumbered assets of the company were insufficient to pay that claim in full (unless the company prevailed on a fraudulent conveyance claim against its prepetition lender and equity sponsor, arising out of a leveraged buyout). Efforts to reach a consensual resolution that would satisfy the WARN Act claimants were unsuccessful. The parties (except for the WARN Act claimants) thus reached a resolution under which the fraudulent conveyance claim would be settled and released, with the proceeds distributed to unsecured creditors under a structured dismissal, thus skipping the priority WARN Act claimants.

The bankruptcy court approved this settlement, concluding that the WARN Act claimants were unlikely to recover in any event (since the estate lacked the resources to pursue fraudulent conveyance litigation), and this settlement that generated some value for unsecured creditors, which was better than any of the available alternatives. The district court and Third Circuit affirmed, largely adopting the bankruptcy court's reasoning.

The Supreme Court reversed. In an opinion by Justice Breyer, the Court emphasized that the Bankruptcy Code's priority scheme was a central pillar of the statute, and that it would undermine congressional intent to authorize such an end run around its provisions. The Court also rejected the proposition that the Code provided "flexibility" for deviations from its requirements in "rare cases" in which bankruptcy courts believed such deviations better served the statute's purposes.

***In re LTL Management LLC, 58 F.4th 738 (3d Cir. 2023)***

Much attention has been devoted to the "Texas Two-Step," a strategy under which a company employs a "divisive merger" to separate its valuable operating company from legacy liabilities. The notion is that the "NewCo" that is left with the liabilities can "reorganize" in bankruptcy, while the "OldCo" that retains the valuable assets receives (in exchange for a contribution that is used to pay the legacy liabilities) a third-party release.

The Third Circuit recently cast doubt on the viability of this gambit in *In re LTL Management LLC,*[36] holding that the guarantee given by NewCo to OldCo as part of the divisive merger (one that was presumably necessary to save the divisive merger from a fraudulent conveyance challenge) meant that OldCo was not in "financial distress" (as that term is used in Third Circuit caselaw to impose a requirement that chapter 11 cases be filed in "good faith") and that the bankruptcy case should therefore be dismissed. In so holding the Third Circuit relied on a long line of authority holding that "good faith" is an implicit requirement under § 1112(b)

[36] 58 F.4th 738 (3d Cir. 2023).

of the bankruptcy code, and that the debtor being in "financial distress" is an element of good faith.

Interestingly, following the bankruptcy court's dismissal of the *LTL* case upon the issuance of the mandate from the Third Circuit, the company filed another bankruptcy petition. This time, however, LTL did not have the backstop commitment from J&J (the one that was presumably given in the first place to save the transaction from fraudulent conveyance challenge). The bankruptcy court, however, nevertheless dismissed the petition following the rationale of the Third Circuit in its prior opinion.

***In re Bestwall LLC*, 71 F.4th 168 (4th Cir. 2023)**

In the case of *Bestwall LLC*,[37] the Fourth Circuit recently upheld a bankruptcy court's preliminary injunction barring the continuation of asbestos-related litigation against non-debtor Georgia-Pacific. In 2017, Georgia-Pacific LLC – a manufacturer of asbestos-containing products – underwent a divisional merger (much like the form of "Texas Two-Step" described above), separating its business into Bestwall LLC and New GP, leaving Bestwall with all of Georgia-Pacific's asbestos-related liabilities and New GP with the company's valuable assets. When Bestwall filed for bankruptcy, it sought a preliminary injunction enjoining all asbestos-related claims against New GP. The bankruptcy court granted the preliminary injunction. The Fourth Circuit affirmed, holding that because the claims asserted against New GP are identical to those asserted against Bestwall, and because any damages incurred by New GP

[37] 71 F.4th 168 (4th Cir. 2023)

would affect its obligation to indemnify Bestwall, the bankruptcy court had "related-to jurisdiction" to enter the injunction.

The dissent would have reversed the bankruptcy court's injunction on the grounds that the parties colluded to fabricate the court's subject-matter jurisdiction. As the dissent explained, the only reason claims against New GP affect Bestwall's estate is because of New GP's contractual obligation to indemnify Bestwall, an obligation that the parties negotiated prior to the bankruptcy filing. If New GP wants the protection of bankruptcy, the dissent argues, then it should file for bankruptcy itself. Instead, New GP purposefully created privity between a debtor and a non-debtor in an attempt to improperly manufacture federal jurisdiction, which is prohibited by 28 U.S.C. § 1359.

***In re Aearo Technologies, LLC***

Many of these same points also arise in the *Aearo Technologies* bankruptcy case, which was filed by a subsidiary of 3M that is saddled with liability arising out of an allegedly defective earplug product. As of the petition date, the debtor itself had not participated in the multi-district litigation in which plaintiffs sought to recover on account of earplug-related injuries. Instead, 3M had borne all defense costs relating to the proceedings. 3M also made a $1.24 billion funding commitment to Aearo, which included a $1 billion commitment to resolve MDL-related actions and $240 million to fund a chapter 11 case. In exchange, Aearo would indemnify 3M for any liability incurred on account of MDL-related claims.

After the petition date, Aearo moved to extend the automatic stay to enjoin MDL-related actions against 3M or, alternatively, for an injunction barring such

claims. The bankruptcy court declined to extend the automatic stay to protect 3M, noting that the Seventh Circuit has not yet had the opportunity meaningfully to address whether the automatic stay may be extended to non-debtors. The bankruptcy court also refused to enjoin the claims against 3M because it believed that it did not have subject matter jurisdiction to issue such an injunction. According to the court, the resolution of claims against 3M would not have a conceivable effect on Aearo's bankruptcy because, while Aearo is obligated to indemnify 3M for all liabilities incurred on account of the MDL claims, 3M is similarly obligated to reimburse Aearo for payments made on account of these claims. The economic reality of the situation is that Aearo is no worse off if the actions against 3M are stayed or allowed to continue. In either case, Aearo has a funding agreement from which it can be made whole.

The bankruptcy court recently dismissed Aearo's case as a bad faith filing.[38] Adopting the Third Circuit's reasoning in *LTL Management*, the bankruptcy court held that the central question a court must ask when determining whether a case was filed in good faith is whether the bankruptcy filing serves a valid bankruptcy purpose. While Aearo is a named defendant in an MDL case, its funding agreement with 3M offered Aearo a guarantee that it would be able to pay its creditors. The bankruptcy court also noted that the MDL claims were too speculative to support a finding of financial distress, and while those claims present a potential for peril, it is too early to conclude that these claims will result in the liquidation of Aearo.

[38] *See In re Aearo Tech., LLC*, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023).

The bankruptcy court did, however, certify this issue for direct appeal to the Seventh Circuit, noting that all parties would benefit from a more definitive standard from the Court of Appeals on what constitutes a good faith filing.

# Faculty

**Joshua D. Branson** is a partner with Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C. in Washington, D.C., who regularly serves as lead counsel in high-stakes trial, appellate and regulatory matters. Drawing on skills he honed as a record-setting, national-champion collegiate debater, Mr. Branson has successfully represented clients in a range of contentious disputes worth billions of dollars. His experience as lead counsel includes civil terrorism-funding lawsuits, copyright litigation, shareholder disputes, commercial contract cases, whistleblower litigation and telecommunications matters. He also has significant experience in antitrust, securities and foreign exchange, and defamation litigation. Mr. Branson has tried multiple cases to judgment, including a nearly billion-dollar interstate-water dispute in the U.S. Supreme Court. At the appellate level, he is undefeated in the five U.S. Courts of Appeals cases in which he was primary counsel. He also has drafted many additional briefs — including merits, *certiorari* and *amicus* briefs — in the U.S. Supreme Court and U.S. Courts of Appeals. His appellate representations have spanned a range of topics, including bankruptcy, terrorism, antitrust, telecommunications and ERISA. He also has advised multiple litigation-funders and represented clients in regulatory proceedings before the Federal Communications Commission. Mr. Branson has been quoted discussing his cases in many media outlets, including the *Wall Street Journal*, the *New York Times*, *Reuters* and Bloomberg. In 2022, the *American Lawyer* named him the national Litigator of the Week for his D.C. Circuit appellate victory in *Atchley v. AstraZeneca*, No. 20-2077 (D.C. Cir. Jan. 4, 2022), which unanimously reversed the dismissal of a high-profile lawsuit on behalf of Gold Star Families and other Americans harmed by terrorism in Iraq. He also received recognition in David Lat's weekly *Original Jurisdiction* newsletter for the same victory. In 2022, Mr. Branson was named among *Lawdragon 500*'s Leading Litigators in America. He also has delivered a guest lecture on complex litigation at Georgetown University Law Center. Mr. Branson received his J.D. *magna cum laude* from Harvard Law School and clerked for Hon. Diana Gribbon Motz on the U.S. Court of Appeals for the Fourth Circuit in Baltimore. Before law school, he was a championship policy debater at Northwestern University, where he broke the then-record for best individual performance at the 2006 National Debate Tournament.

**Hon. Craig T. Goldblatt** is a U.S. Bankruptcy Judge for the District of Delaware in Wilmington, appointed in April 2021. Prior to his appointment, he was a bankruptcy litigator in the Washington, D.C. office of WilmerHale, where his practice primarily involved the representation of financial institutions and other commercial creditors in complex bankruptcy litigation and appeals. Earlier in his career, Judge Goldblatt clerked for Hon. Richard D. Cudahy of the U.S. Court of Appeals for the Seventh Circuit and Hon. David H. Souter of the U.S. Supreme Court. He is a Conferee in the National Bankruptcy Conference (for which he serves as Secretary) and is a vice president of the American College of Bankruptcy. He also has been active on the Business Bankruptcy Committee of the American Bar Association's Business Law Section. Judge Goldblatt has served on the Education Committee of the National Conference of Bankruptcy Judges and as an adjunct professor at Georgetown University Law Center and George Washington University Law School, where he teaches classes focused on bankruptcy law. He received his Bachelor's degree *magna cum laude* from Georgetown University in 1990 and his J.D. with honors from the University of Chicago Law School in 1993, where he served as comment editor of the *University of Chicago Law Review*.

**Laura Davis Jones** is a named partner and management committee member of Pachulski Stang Ziehl & Jones LLP in Wilmington, Del., and is the managing partner of the firm's Delaware office. She gained national recognition as debtor's counsel in the *Continental Airlines* bankruptcy case and has represented numerous debtors, creditors' committees, bank groups, acquirers and other significant constituencies in national chapter 11 cases and workout proceedings. Ms. Jones participates as a speaker at national bankruptcy and litigation seminars, and she has authored numerous articles. She was named "Deal Maker of the Year" by *The American Lawyer* in 2002, which also has profiled her. Ms. Jones has been named continuously by her peers as one of the *The Best Lawyers in America*" and as one of the "Best Lawyers in Delaware," and was selected as one of the top 10 lawyers in Delaware by *Delaware Super Lawyers*. She is a Fellow of the American College of Bankruptcy and a *Chambers USA* "Star Individual," the highest honor a lawyer can receive. Ms. Jones has been recognized in the *K&A Restructuring Register* and the *Lawdragon 500* since their inception, has been named repeatedly to the *International Who's Who of Insolvency and Restructuring Lawyers*, and is AV-rated by Martindale-Hubbell. In 2018, she received the prestigious "Women Leadership" award at Global M&A Network's Turnaround Atlas Awards, which honors the achievement of influential women leaders in the restructuring and turnaround communities. She started her career as a judicial law clerk in the U.S. Bankruptcy Court for the District of Delaware. Ms. Jones is admitted to practice in Delaware and the District of Columbia. She received her undergraduate degree from the University of Delaware and her J.D. from Dickinson School of Law, where she was on the board of editors and business manager for the *Dickinson Law Review* and served on the Appellate Moot Court Board.

**Emony M. Robertson** is a Financial Restructuring associate with Akin Gump Strauss Hauer & Feld LLP in New York. Prior to joining Akin, she clerked for Hon. Craig T. Goldblatt of the U.S. Bankruptcy Court for the District of Delaware. Ms. Robertson received her B.S. with honors from Cornell University and her J.D. from Howard University School of Law. She received the Best Advocate Award, in addition to securing First Place, in the 30th Annual Conrad B. Duberstein National Bankruptcy Moot Court Competition, and in the 2021 American College of Bankruptcy Fourth Circuit Moot Court Competition, she was awarded Best Oral Advocate and her team came in Second Place. She also won the Best Oral Advocate in the ACB's 2020 moot court competition.

**Hon. Brendan L. Shannon** is a U.S. Bankruptcy Judge for the U.S. Bankruptcy Court for the District of Delaware in Wilmington, appointed in 2006. He manages a full chapter 11 docket and also handles all chapter 13 consumer bankruptcy cases filed in Delaware. He served as Chief Judge from 2014-18. Prior to his appointment to the bench, Judge Shannon was a partner with Young Conaway Stargatt & Taylor, LLP in Wilmington, Del., where he primarily represented corporate debtors and official committees in chapter 11 cases. He is an adjunct professor in the Bankruptcy LL.M. Program at St. John's University School of Law in New York, and at Widener School of Law in Delaware. He also serves on the board of editors of *Collier on Bankruptcy* (16th ed.) and is a contributing author for *Collier Forms* and for several chapters covering the Federal Rules of Bankruptcy Procedure. In addition, he serves on the editorial board of the *American Bankruptcy Institute Law Review*. In 2011, Judge Shannon was appointed to serve as a member of the National Bankruptcy Conference. In 2020, he was inducted as a member of the American College of Bankruptcy. Judge Shannon is a member of the Delaware State Bar Association, the American Bar Association, ABI and the Rodney Inns of Court in Wilmington, Del. He is also a member of the board of directors of the Delaware Council on Economic Education. Judge Shannon received his undergraduate degree from Princeton University and his J.D. from the Marshall-Wythe School of Law at the College of William and Mary.