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Christopher DiPompeo
Jones Day | Washington, D.C.

Irve J. Goldman
Pullman & Comley LLC | Bridgeport, Conn.

Prof. Margaret Howard
Washington & Lee University | Lexington, Va.

Hon. Christopher J. Panos
U.S. Bankruptcy Court (D. Mass.) | Boston

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UPDATE ON RECENT U.S. SUPREME COURT BANKRUPTCY CASES

Professor Margaret Howard
Law Alumni Association Professor of Law, Emerita
Washington & Lee University
Lexington, VA

HON. CHRISTOPHER J. PANOS
United States Bankruptcy Judge
United States Bankruptcy Court for the District of Massachusetts

Christopher DiPompeo
Jones Day
Washington, D.C.

Irve J. Goldman
Pullman & Comley
Bridgeport, CT

Truck Insurance Exchange v. Kaiser Gypsum, Inc., 144 S.Ct. 1414 (No. 22-1079, Decided June 6, 2024) (Opinion by Justice Sotomayor, Justice Alito not participating)

Facts: Truck Insurance Exchange (Truck) was the primary insurer for companies manufacturing and selling products containing asbestos. Two of those companies, Kaiser and Hanson, filed Chapter 11 and proposed a plan that created an asbestos trust under § 524(g). Truck was contractually obligated to defend each claim and indemnify Debtors up to $500,000 per claim. Debtors had to pay a $5,000 deductible per claim and cooperate in claim defenses. The plan treated insured and uninsured claims differently: insured claims were to be filed in the tort system for the benefit of the insurance coverage; and uninsured claims were to be submitted directly to the trust.

Truck sought to oppose the Plan under §1109(b), which permits any "party in interest" to "raise" and "be heard on any issue" in a Chapter 11 bankruptcy. Truck argued that the plan would expose it to millions of dollars in fraudulent claims by not requiring the same disclosures and authorizations for insured and uninsured claims, and that the plan impermissibly altered its contractual rights. The parties' disagreement centered on whether the plan should include "anti-fraud" disclosure provisions making it harder for claimants to submit duplicative claims against multiple asbestos companies.

Results Below: The District Court confirmed the plan. It held that Truck was not a "party in interest" within §1109(b), and thus had limited standing to object, because the plan was "insurance neutral"—it did not increase Truck's prepetition obligations or alter its contractual rights. The Fourth Circuit affirmed.

Question Presented: Whether an insurer with financial responsibility for a bankruptcy claim is a "party in interest" under §1109(b) that may object to a Chapter 11 plan of reorganization.

Holding: An insurer with financial responsibility for bankruptcy claims is a "party in interest" under § 1109(b). Reversed and remanded.

Reasoning: The text of §1109(b) is capacious, promoting the expansion of participatory rights and, thus, a fair and equitable reorganization process. Insurers with financial responsibility for bankruptcy claims are within the statute's reach because they can be directly and adversely affected by reorganization proceedings. Here, Truck will have to pay the vast majority of the trust's liabilities and, because of the channeling injunction protecting the Debtors, will stand alone in carrying that financial burden. The Debtors have little reason to police claimants' ability to recover from Truck, leaving Truck as the only entity with an incentive to identify problems with the plan.

The insurance neutrality doctrine, which looks at an entity's "quantum of liability," is conceptually wrong because it conflates the merits of an objection with the threshold "party in interest" inquiry. Section1109(b) asks whether reorganization proceedings might affect a prospective party, not how a particular plan actually affects that party. By focusing on the insurer's prepetition obligations and policy rights, the doctrine wrongly ignores all the other ways in which bankruptcy proceedings and reorganization plans can alter and impose obligations on insurers and debtors. The fact that Truck's financial exposure may be directly and adversely affected by a plan is sufficient to give it a right to voice its objections.

Financial Oversight & Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc., 143 S. Ct. 1176 (2023) (No. 22-96, Decided May 11, 2023) (Opinion by Justice Kagan, Justice Thomas dissenting)

Facts: The Puerto Rico Oversight, Management & Economic Stability Act (PROMESA), 48 U. S. C. §2101 et seq., created a system for dealing with Puerto Rico's financial crisis and provided protections similar to those in the Bankruptcy Code. It created the Board as an "entity within the territorial government" of Puerto Rico. Centro de Periodismo Investigativo, Inc. (CPI), an investigative media entity, sought documents pertinent to the Board's work. The Board refused and CPI sued in Puerto Rico District Court, citing a provision in the Commonwealth's Constitution guaranteeing access to public records. The Board sought dismissal on sovereign immunity grounds, relying on § 2126(a) of PROMESA.

Results Below: The District Court rejected the Board's defense and the First Circuit affirmed.

Question Presented: Whether § 2126(a)'s general grant of jurisdiction to the federal courts over claims against the Board and claims otherwise arising under PROMESA abrogates the Board's sovereign immunity with respect to all federal and territorial claims.

Holding: Assuming that Puerto Rico is immune from suit in federal District Court and that the Board shares that immunity, nothing in PROMESA—including its jurisdictional provision, § 2126(a)—categorically abrogates any sovereign immunity the Board enjoys from legal claims. Reversed and remanded.

Reasoning: If Congress intends to abrogate sovereign immunity, it must make that intent "unmistakably clear in the language of the statute." This Court has found that standard met in only two situations: when a statute says, in so many words, that it is stripping immunity from a sovereign entity; and when a statute creates a cause of action and authorizes suit against a government on that claim. PROMESA does not fit either of these categories.

CPI argued that the requisite clear statement is found in § 2126(a)'s establishment of a judicial review scheme, providing that any action against the Board or arising out of PROMESA "shall be brought" in the District Court for Puerto Rico and the statute's reference to "declaratory or injunctive relief against the Oversight Board." Those provisions serve a function even in the absence of a categorical abrogation of immunity, however—namely, when the Board's immunity has been waived or abrogated by other statutes, such as the Civil Rights Act.

Dissent: The decisions below were two-pronged: that the Board has state sovereign immunity; and that the immunity has been abrogated. This Court assumed the first and decided only the second. We should reach the antecedent question—whether the Board enjoys immunity in the first place—and decide that question negatively. The Eleventh Amendment's immunity provisions applies only to lawsuits brought against a State by citizens of another State, not by citizens of a territory against an entity within their own territorial government.

Lac Du Flambeau Band of Lake Superior Chippewa Indians v Coughlin, 143 S.Ct. 1689 (2023) (No. 22-227, Decided June 15, 2023) (Opinion by Justice Jackson, Justice Thomas concurring, Justice Gorsuch dissenting)

Facts: Petitioner Lac du Flambeau Band of Lake Superior Chippewa Indians (the Band) is a federally recognized Indian tribe. One of the Band's businesses, Lendgreen, extended respondent Brian Coughlin a payday loan. Shortly after receiving the loan, Coughlin filed for Chapter 13 bankruptcy, triggering an automatic stay under the Bankruptcy Code against further collection efforts by his creditors. But Lendgreen allegedly continued attempting to collect Coughlin's debt. Coughlin filed a motion in Bankruptcy Court to enforce the automatic stay and recover damages.

Results Below: The Bankruptcy Court dismissed the suit on tribal sovereign immunity grounds. The First Circuit reversed, concluding that the Code "unequivocally strips tribes of their immunity."

Question Presented: Whether the Bankruptcy Code "expresses unequivocally Congress's intent to abrogate the sovereign immunity of Indian tribes."

Holding: "[T}o "abrogate sovereign immunity, Congress must make its intent unmistakably clear in the language of the statute." "That is a high bar. But . . . we find it has been satisfied here." Affirmed.

Reasoning: §106(a) provides, "sovereign immunity is abrogated as to a ***governmental unit*** to the extent set forth in this section," including the automatic stay (emphasis added). §101(27) says "***governmental unit***" within the Bankruptcy Code "means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States . . . , a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or ***other foreign or domestic government***" (emphasis added). The §101(27) definition of "governmental unit" is "strikingly broad." "The pairing of 'foreign' with 'domestic' is of a piece with those other common expressions. For instance, if someone asks you to identify car manufacturers, 'foreign or domestic,' your task is to name any and all manufacturers that come to mind, without particular regard to where exactly the cars are made or the location of the companies' headquarters."

Other bankruptcy provisions support the plain meaning of the Bankruptcy Code's abrogation language, including the fresh start policy that protects debtor's assets from dismemberment and discharges and restructures debtor's debts—such protections sweep broadly, by their own terms and applies to all creditors, including governmental units.

A federally recognized tribe qualifies as a "governmental unit" under §106(a) because it exercises uniquely governmental functions—makes its own substantive laws, enforces those laws in its own forums, and taxes activities on the reservation—and both Congress and the Supreme Court have repeatedly characterized tribes as governments.

Justice Thomas's Concurrence: Distinguishes "off-reservation' conduct from conduct on a reservation.

Justice Gorsuch's Dissent: "Until today, there was not one example in all of history where this Court had found that Congress intended to abrogate tribal sovereign immunity without expressly mentioning Indian tribes somewhere in the statute." "The Court reads the phrase 'other foreign or domestic government' as synonymous with 'any and every government' . . . —all for the purpose of holding that §106(a) of the Bankruptcy Code abrogates tribal sovereign immunity. It is a plausible interpretation. But plausible is not the standard our tribal immunity jurisprudence demands."

Comment: PROMESA'S Section 106 is different in the context presented. "With one exception, PROMESA says nothing explicit about abrogating sovereign immunity. The exception is for Title III cases, and comes via the Federal Bankruptcy Code. PROMESA incorporates, as part of its mechanism for restructuring debt, the Code's express abrogation of sovereign immunity. See §2161(a) (incorporating 11 U. S. C. §106 for "case[s] under [Title III]")." "The immunity provision that PROMESA borrows from the Bankruptcy Code for Title III cases states: "[S]overeign immunity is abrogated as to a governmental unit," including a "Territory." 11 U. S. C. §106(a), incorporated by 48 U. S. C. §2161(a); 11 U. S. C. §101(27). Congress chose not to adopt similar language to govern other kinds of litigation involving the Board."

Office of U.S. Trustee v. John Q. Hammons Fall 2006 LLC, 144 S.Ct. 1588 (No. 22-1238, Decided June 14, 2024) (Opinion by Justice Jackson, joined by The Chief Justice and Justices Alito, Sotomayor, Kagan, and Kavanaugh, Justice Gorsuch dissenting, joined by Justices Thomas and Barrett)

Facts: Affiliated debtors led by John Q. Hammons Fall 2006, LLC ("Hammons"), owners of a chain of hotels and resorts, invoked the Bankruptcy Clause of the Constitution, which authorizes Congress to establish uniform laws on the subject of bankruptcies, to challenge the constitutionality of a 2017 statutory increase in U.S. trustee fees for chapter 11 debtors that disburse $1 million or more per quarter, for the 88 out of 94 bankruptcy districts in the country that are administered under the U.S. Trustee Program (the "UST Districts"). In contrast, chapter 11 debtors in the other six districts, which are all in Alabama and North Carolina and are administered under the Bankruptcy Administrator Program ("Administrator Districts"), paid lesser fees because they were not subject to the same statutory increase for a period of up to three years and three months. The UST Districts are designed to be self-funded by quarterly fees paid by chapter 11 debtors, whereas the Administrator Districts, which are run by the Administrative Office of the U.S. Courts, are funded by Congress's general appropriation for the Judiciary, with fees used only to offset the funding.

In addition to challenging the constitutionality of the law, Hammons also sought a refund of the more than $2.5 million in U.S. trustee fees it paid that it would not have been required to pay if it had filed in an Administrator District. Although they brought a challenge to the fee statute in 2020, they continued to pay the higher fees because failure to do so would have precluded confirmation of their chapter 11 plan. The Government estimated that on an aggregate basis, the disparity in fees which were paid by all chapter 11 debtors in UST Districts (meeting the threshold disbursement requirement), as compared to fees paid in Administrator Districts, was approximately $326 million, which was the estimated cost of the refunds it would be required to make if the Court imposed that relief as the remedy for the constitutional violation.

The question of the law's constitutionality was resolved two terms earlier in *Siegel v. Fitzgerald*, 142 S.Ct. 1770 (2022), which held that the 2017 statutory increase violated the Bankruptcy Clause by virtue of the different and more favorable treatment of chapter 11 debtors in the Administrator Districts simply based on their geography. *Siegel*, however, left open the remedy, which the Court in *Hammons* granted certiorari to decide. Parenthetically, the disparate fee treatment that was held to be unconstitutional in *Siegel* resulted from the difference in the effective date of the fee increase, which for UST Districts was January 1, 2018 and for Administrator Districts was October 2018 by fiat of the Judicial Conference. In addition, the fee increase for Administrator Districts initiated in October 2018 only applied to newly filed cases, whereas in the UST Districts it applied to pending and newly filed cases. In 2021, however, Congress mandated equal fees for pending and newly filed cases in both Districts, but up until that time, fees for already pending large Chapter 11 cases in Administrator Districts remained at their 2017 level.

The three remedies under consideration were: (i) a refund of amounts "overpaid" by chapter 11 debtors in the UST Districts, (ii) requiring chapter 11 debtors in the Administrator Districts to pay the difference between what they actually paid and what they would be required to pay as if they were in a UST District since the statutory increase was initiated, or (iii) maintain the status quo of the 2021 law that established parity going forward between the two Districts.

Results Below: The Tenth Circuit Court of Appeals in *In re John Q. Hammons Fall 2006, LLC,* 15 F.4th 1011 (2021), ordered a refund of debtors' quarterly fees so that they equaled the lower fees the debtors would have paid had their case been filed in a Bankruptcy Administrator District. After granting the UST's petition for certiorari, the Supreme Court vacated the Tenth Circuit's judgment and remanded for further consideration in light of *Siegel*. The Tenth Circuit then reinstated its original decision, *In re John Q. Hammons Fall 2006*, LLC, 2022 WL 3354682 (Aug. 15, 2022), and the Supreme Court thereafter granted certiorari.

Question Presented: What is the appropriate remedy for the violation of the Bankruptcy Clause that was found in *Siegel v. Fitzgerald*, 142 S.Ct. 1770 (2022)?

Holding: The remedy of providing for uniform fees going forward, *i.e.*, prospective parity, as Congress provided in the 2021 Act, Pub. L. 116-325, § 3(d)(2), 134 Stat. 5088, is the appropriate remedy for the constitutional violation. Reversed.

Reasoning: Characterizing the constitutional violation as "short lived and small," the Court's analysis focused on what it viewed as the key question for fashioning a remedy for a constitutional violation, which was "what the legislature would have willed had it been apprised of the constitutional infirmity." For this, it looked to Congressional intent that the UST Program be funded 100% by U.S. trustee fees and when the program became underfunded, its raising of the fees in 2017 and in 2021, enacting the law creating parity among the UST Districts and Administrator Districts, which Congress noted was to make the bankruptcy system "self-funded, at ***no cost to the taxpayer***" (emphasis added). The Court took from this that Congress would not want the remedy of a refund, because it would have cost the taxpayer approximately $326 million and would be "diametrically opposed to clear congressional intent." The Court further pointed out that if respondents were granted a refund, it would add to the past uniformity by increasing the tiny percentage of debtors – currently 2% (based on it finding that only 50 out of more than 2,000 cases involving large chapter 11 debtors were filed in the Administrator Districts) – who paid lower fees (and also noting that even if 95% of debtors in UST Districts received a refund, it would still create a disparity greater than what results from prospective parity alone).

The Court also rejected the remedy of retrospectively imposing higher fees on debtors in the Administrator Districts. It reasoned that such relief would go toward offsetting the Judiciary's appropriation and would do nothing to achieve Congress's goal of keeping the U.S. Trustee Program self-funded. It further found indicative of Congressional intent that by the 2021 Act, Congress evinced a desire to remedy the non-uniformity by requiring prospective parity and not imposing higher fees retrospectively on Administrator Districts. And there are many practical problems with forcing BA debtors to pay higher fees.

The Court also held that due process does not require a refund. The debtors had a meaningful pre-deprivation remedy—they could have withheld the fees and challenged their constitutionality before paying them—but they chose not to do so. And the debtors' reliance on tax cases requiring refunds is misplaced, as the Court has never held that the rules apply outside of the tax context.

Dissent (Justice Gorsuch, joined by Justices Thomas and Barrett): There is no question that the debtors suffered a constitutional injury by paying higher fees than they should have. Centuries of judicial practice confirm that where (as here) someone pays money because of invalid government action, the most appropriate remedy is monetary relief. Prospective-parity may prevent future discrimination, but it does nothing to remedy the harm suffered by the individual plaintiff. And asking what remedy Congress would prefer makes no sense—Congress would always prefer not to pay monetary relief. Due process also requires a refund because the U.S. Trustee promised it would refund overpaid fees if they were found to be unconstitutional and Congress itself had appropriated money for the refunds. In any event, even if the debtors here cannot obtain a refund because they did not use a pre-deprivation remedy, the majority's reasoning means that debtors who withheld the unconstitutional fees while challenging them cannot now be required to pay the fees.

Bartenwerfer v. Buckley, 143 S.Ct. 655 (No. 21-908, Decided Feb. 22, 2023) (unanimous opinion by Justice Barrett)

Facts: Kate Bartenwerfer and David Bartenwerfer owned a house together in San Francisco that they decided to renovate and sell for a profit. David led the renovation, and Kate was largely uninvolved. Kieran Buckley ultimately purchased the renovated property. As part of the sale, both Kate and David attested that they had disclosed all material defects with the property. After the sale closed, however, Buckley found several significant defects that Kate and David failed to disclose. He sued both Kate and David in California state court for breach of contract, negligence, and nondisclosure of material facts, and he obtained a $200,000 judgment against them. Kate and David then filed for chapter 7 bankruptcy, hoping to obtain a discharge of the judgment. During the bankruptcy case, Buckley argued that the debt was nondischargeable under § 523(a)(2)(A) because it was a debt "obtained by fraud." The bankruptcy court agreed, finding that David knowingly concealed the house's defects from Buckley. The court imputed David's fraudulent intent to Kate because the two had formed a legal partnership and David was Kate's agent with respect to the renovation, thus also denying a discharge to Kate.

Results Below: On appeal, the Ninth Circuit BAP affirmed as to David but reversed as to Kate. It held that § 523(a)(2)(A) could only bar her discharge if she knew or had reason to know of David's fraud. On remand from the BAP, the bankruptcy court found that Kate lacked the requisite knowledge of David's fraud and so allowed her a discharge. The BAP affirmed, but the Ninth Circuit reversed, holding that a debtor who is liable for her partner's fraud cannot discharge that debt in bankruptcy, regardless of her own culpability.

Question Presented: Can a debtor discharge a debt in bankruptcy under 11 U.S.C. § 523(a)(2)(A) if the debt was incurred by fraud, even if the debtor was not personally involved in the fraudulent conduct?

Holding: A debt incurred through fraud is nondischargeable in bankruptcy under 11 U.S.C. § 523(a)(2)(A), even if the debtor was not personally involved in the fraudulent conduct. Affirmed.

Reasoning: The plain text of § 523(a)(2)(A) precludes Kate from discharging her liability for the state-court judgment. Section 523(a)(2)(A) bars a discharge of any debt "to the extent obtained by—(A) false pretenses, a false representation, or actual fraud . . . ." 11 U.S.C. § 523(a)(2)(A). The phrase "to the extent obtained by" is in the passive voice, and thus does not specify who the fraudulent actor must be or require that it be the debtor. The use of the passive voice means that the debt must result from someone's fraud, but Congress was agnostic about who committed it.

Moreover, the statute's relevant legal context—the common law of fraud—does *not* limit liability to the wrongdoer, but instead traditionally held principles liable for the fraud of their agents. Likewise, the rule that exceptions to discharge should be narrowly construed does not help Kate because the Court has never used this rule to narrow the Bankruptcy Code's ordinary meaning. And the fact that other exceptions to discharge in § 523(a)(2) require action by the debtor herself, if anything, suggests that Congress' use of the passive voice in subsection (a)(2)(A) was deliberate.

The Court's precedent also supports this result. In *Strang v. Bradner*, 114 U.S. 555 (1885), the Court held the debt of an innocent partner could not be discharged under a predecessor to the Bankruptcy Code even though the statute required the debt to be created by the fraud "of the bankrupt." Congress' removal of that requirement is strong evidence that it intended to maintain *Strang*'s rule.

Finally, the "fresh start" policy of bankruptcy cannot help Kate. The Bankruptcy Code is not solely focused on the debtor's interests. It balances multiple, often competing interests. Congress evidently concluded that creditors' interest in recovering full payment of debts obtained by fraud outweigh debtors' interest in a complete fresh start, and it is not the Court's role to second-guess that judgment.

Harrington v. Purdue Pharma, L.P., et al., No. 23-124, 2024 WL 318799 (June 27, 2024) (Opinion by Justice Gorsuch) (joined by Thomas, Alito, Barrett, and Jackson, JJ)

Facts: Beginning in the mid-1990s with its production and marketing of OxyContin, an opioid prescription pain reliever, Purdue Pharma became a major contributor to the opioid epidemic which has plagued the nation since at least 1999. Purdue was a family company owned and controlled by the Sackler family, members of which dominated its board and were officers. Certain of the Sacklers were heavily involved in the marketing of OxyContin, which they touted as less addictive due to its time-release formula. This turned out not to be true, as it was highly addictive and largely contributed to the deaths of approximately 247,000 people in the U.S. from 1999 to 2019. The marketing included "speaking fees" to doctor-prescribers and other sales tactics designed to maximize OxyContin sales. Ultimately, OxyContin became the most prescribed brand-name narcotic in the U.S. Between 1996 and 2019, Purdue generated approximately $34 billion in revenue, most of which was derived from sales of OxyContin.

As OxyContin's dangerous effects became more manifest and widespread, a Purdue affiliate was indicted and pled guilty in 2007 to a federal felony for misbranding OxyContin as less addictive and less subject to abuse. Thousands of suits against Purdue and the Sacklers from victims and state and local governments followed. Anticipating they would be sued after the 2007 plea agreement, the Sacklers began what they called a "milking program" whereby they systematically took large distributions from Purdue's revenues. From 2008 through 2016, they withdrew approximately $11 billion in distributions, which was about 70% of Purdue's revenue, as compared to past distributions which had been less than 15% of revenue annually.

Purdue filed for chapter 11 on Sept. 15, 2019. After multiple rounds of mediations, a plan was presented in which the Sackler family (divided into "Side A" and "Side B") would contribute $4.325 billion to fund the plan, which combined with Purdue's own assets in excess of $1 billion, would be payable over a nine-year period in exchange for nonconsensual third-party releases of any claims, present and future, against them. Under the plan, Purdue would become a "public benefit' company whose activities would be focused on opioid education and abatement treatments. Plan distributions were structured to go to various creditor constituencies through nine trusts (including for the benefit of state governments, local governments, including municipalities, hospitals, third-party payors, Indian tribes and victims). Opioid victims were to receive between $3500 and $48,000 depending on the level of harm. At the time of confirmation, the third-party release was narrowed by the Bankruptcy Court to apply only where Purdue's conduct was the legal cause or a legally relevant factor to the cause of action against the Sacklers.

During the bankruptcy case, the federal government brought criminal charges against Purdue, in response to which the company pled guilty to conspiracy to defraud the U.S., to violate the Food, Drug and Cosmetic Act and to violate the federal anti-kickback statute. As part of a global resolution, Purdue agreed to a $2 billion judgment in favor of the U.S. which would have the status of a superpriority claim. The government agreed, however, that if at least $1.775 billion of plan funding was used for opioid abatement purposes, it would reduce its claim by that amount.

At the time of plan confirmation, the only parties opposing the plan were eight states, the District of Columbia, the United States Trustee, a few *pro se* victims and some Canadian municipalities. Approximately 95% of all creditors voting on the plan voted to accept it. The plan was confirmed by the bankruptcy court, but confirmation was reversed and vacated by the District Court on appeal. *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. Dec. 16, 2021). While on appeal to the Second Circuit, the dissenting states settled with the Sacklers for an additional contribution to the estate (as well as a portion to them directly) of approximately $1.175 billion with a potential of up to $1.675 billion, bringing the total Sackler contribution to between $5.5 and $6 billion payable over many years. The United States Trustee and others continued on with the appeal.

Results Below: The Second Circuit Court of Appeals reversed the District Court and reinstated the confirmed plan, holding that nonconsensual third-party releases are authorized by the Bankruptcy Code under sections 1123(b)(6) and 105(a). *In re Purdue Pharma, L.P.*, 69 F.4th 45 (2d Cir. 2023). The U.S. Trustee moved to stay the decision and the Supreme Court, treating it as a writ of certiorari, agreed to take the case.

Question Presented: Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent?

Holding: The Bankruptcy Code does not authorize a bankruptcy court to approve, as part of a plan of reorganization under Chapter 11, a release and injunction that extinguishes claims against non-debtor third parties without the consent of affected claimants

Reasoning: In interpreting section 1123(b)(6)'s catchall provision permitting a plan to "include any other appropriate provision not inconsistent with the applicable provisions of " the Bankruptcy Code, the cannon of statutory construction, *ejusdem generis*, must be applied. It provides that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed. Since the preceding subsections (1)-(5) of section 1123(b) all provide for specific sorts of provisions that concern the debtor and its rights, responsibilities and relationships with its creditors, the catchall provision cannot be construed to permit "the radically different" power to discharge the debts of a nondebtor without the consent of the nondebtor claimant.

Moreover, interpreting the catchall provision to authorize the nonconsensual third-party releases at issue would be inconsistent with related provisions of the Bankruptcy Code, to wit, (i) by providing a discharge of debts of the nondebtor, it would conflict with the discharge provisions of sections 1141 and 524 which provide for a discharge of debts of the debtor, (ii) discharging fraud debts of a nondebtor conflicts with the nondischargeability provisions of section 523(a)(2), (4) and (6) , and (iii) there is a specific provision authorizing nondebtor third-party releases in asbestos cases, but no others.

Finally, although the Court does not find section 1123(b)(6) to be ambiguous, pre-code practice, which may inform the analysis of ambiguous Bankruptcy Code provisions, said nothing about the discharge of claims brought by nondebtors against nondebtors. If such a radical change was intended, we would have expected Congress to say so expressly somewhere in the Code itself.

Dissent (Opinion by Justice Kavanaugh) (joined by Justices Roberts, Sotomayor and Kagan):

The Collective-Action Problem: Bankruptcy is designed to benefit creditors collectively and prevent holdout issues, as evidenced by the voting thresholds required to render a plan accepted and deemed consensual. Because mass-tort bankruptcies present the same collective action problem – caused by the prospect of claimants winning the race to the courthouse against nondebtors and draining assets that could be used for all claimants collectively, a nondebtor's settlement into the estate solves the collective-action problem by enabling the settlement assets to be distributed fairly and ratably rather than swallowed by the first successful victim. This is particularly so where the settling officers and directors are indemnified by the company for liability arising out of their job duties, because their indemnity claims would likely come out of the debtor's assets. Nonconsensual third-party releases should be construed as an "appropriate" provision under section 1123(b)(6) to solve the collective-action problem as it comports with the polices of flexibility and equity built into chapter 11.

The Collective-Action Problem as Applied to Purdue: The third-party releases in Purdue were necessary to protect the estate from being depleted by Sackler indemnification claims and increased the pool available for all as a settlement of potential claims against the Sacklers. Releasing claims against the Sacklers is not meaningfully different from releasing claims against Purdue, inasmuch as their indemnification claims resulting from claims brought against them by Purdue creditors would come out of the same pot of Purdue money as would creditors' claims against Purdue. Both sets of releases (of claims against Purdue and the Sacklers) were necessary to preserve the estate, distribute the acquired assets fairly and equitably and protect the settlement assets from being consumed by the first to sue successfully. The victims and other creditors themselves wanted the releases because they enabled the large settlement and protected them against a holdout creditor suing the Sacklers and exhausting their collectible assets.

Statutory Analysis: Application of the *ejusdem generis* cannon of construction to section 1123(b)(6) should not result in prohibiting third-party releases. To use the majority's formulation, the releases "concern" the debtor because the Sacklers are released only for claims based on Purdue's misconduct and therefore the releases apply only to claims held by Purdue's victims and creditors.

Nonconsensual third-party releases are also similar in effect to releases by the estate of estate claims against nondebtors under section 1123(b)(3) and therefore meet the criteria of *ejusdem generis* as applied to section 1123(b)(6). Under section 1123(b)(3), the estate can and did settle creditors' derivative claims against the Sacklers, such as fraudulent transfer clams against the Sacklers to recover the $11 billion in distributions they took. The result of the settlement was to nonconsensually extinguish the derivative claims. Even accepting, as the majority notes, that derivative claims belong to the estate, releases of direct claims under the catchall provision ((b)(6)) are relatively similar in that both derivative claims and direct claims against the Sacklers are held by the same creditors and victims and both sets of claims could deplete the Purdue estate.

Moreover, no one disputes that consensual third-party releases, as well as exculpation provisions releasing estate and other retained professionals and "full satisfaction" releases, are permissible in bankruptcy plans. Yet, the only provision that could provide authority for them is section 1123(b)(6). If they are permissible, *ejusdem generis* cannot be used to disable the use of nonconsensual third-party releases because those consensual or "full satisfaction" releases involve claims by victims or creditors against nondebtors.

Further support for nonconsensual third-party releases is provided by the Court's decision in *U.S. v. Energy Resources Co.*, 495 U.S. 545 (1990). In that case, the Court found the bankruptcy court to have "residual authority" under the sections 1123(b)(5) (later renumbered to (b)(6)) and 105(a) to approve a plan provision requiring installments payments on account of federal tax liability to be applied first to the "trust fund" portion of the tax, thereby reducing and eventually extinguishing the personal liability of the debtor's officer for the trust-fund portion of the liability.

The majority's entire approach to *ejusdem generis* is also wrong. In determining whether there is a common thread among the listing of things in a statute, courts must examine the evident purpose of the statute. Here, the purpose of the statute is to provide the bankruptcy court with broad authority to modify parties' rights without their consent, including releasing creditors' claims against the debtor, in order to prevent a collective-action problem in disturbing Purdue's assets. The nondebtor release provision does the same thing and serves the same statutory purpose. The claims of victims and creditors against the Sacklers are essentially the same claims they have against Purdue, as they rest on the same facts and legal theories – the Sacklers opioid-related decisions in ruining Purdue. And because the Sacklers are indemnified, any potential personal liability could potentially come out of the Purdue estate just like claims against Purdue itself. Therefore, the nonconsensual releases in favor of the Sacklers are similar to the nonconsensual releases of Purdue, which all agree are authorized by section 1123(b)(1). Both sets of releases are necessary to preserve the estate and prevent collective-action problems that could drain the estate and both were necessary to the reorganization plan and to equitably distribute assets.

The existence of section 524(g), which authorizes nonconsensual third-party releases in asbestos cases, does not alter the result and does not allow for the inference that releases in other cases are not permitted. In an unpublished law accompanying section 524(g), it provides: "Nothing in [§ 524(g)] shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization. 108 Stat. 4117, note following 11 U.S.C.§ 524(g). Considering that section 524(g) was passed to address an urgent and discrete problem in the asbestos industry, while at the time, nonconsensual third-party releases were being used in other cases, the unpublished law that accompanied section 524(g) evinces Congress's intent that any other authority for nonconsensual third party releases ***in other cases*** was to be left undisturbed.

Contrary to the majority's major premise, the Sacklers were not receiving a "discharge," which is a term of art under the Bankruptcy Code. The releases they received were of claims for which Purdue's conduct was a legal cause or legally relevant factor. This does not provide a blanket discharge of debts of the type provided by the Bankruptcy Code.

In closing, "[o]nly Congress can fix the chaos that will now ensue. The Court's decision will lead to too much harm for too many people for Congress to sit idly by without at least carefully studying the issue."

Faculty

Christopher DiPompeo is a partner with Jones Day in Washington, D.C., and his practice focuses on complex litigation and appellate advocacy in the context of business restructurings and chapter 11 bankruptcies. He has significant experience across a variety of industries, including financial services, government contracts, gaming and municipal government. Mr. DiPompeo regularly counsels clients in connection with issues relating to bankruptcy jurisdiction and venue, the automatic stay, post-petition financing and complex commercial contracts. In 2013 and 2014, he was a member of the Jones Day team representing the City of Detroit in its historic chapter 9 bankruptcy case. He played a significant role in many aspects of the chapter 9 case, including litigation over the city's eligibility for bankruptcy, its request to obtain post-petition financing, and confirmation of its plan of adjustment. Most recently, Mr. DiPompeo has represented major creditors of Energy Future Holdings Corp., Caesars Entertainment Operating Company, General Motors and the Commonwealth of Puerto Rico. From 2014-19, he served as co-lead counsel for The American Legion in its successful defense of a World War I memorial against an Establishment Clause challenge; he was the principal architect of the legal strategy that ultimately led to the Legion's landmark victory at the U.S. Supreme Court in *The American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019). Prior to joining Jones Day, Mr. DiPompeo clerked for Chief Justice John G. Roberts Jr. at the U.S. Supreme Court and for Judge Paul V. Niemeyer of the U.S. Court of Appeals for the Fourth Circuit. He is a 2020 ABI "40 Under 40" honoree, and in 2019 was named a D.C. Rising Star by *The National Law Journal*. he also was named a "Rising Star" in *Washington DC Super Lawyers* from 2016-20, and in 2009 he received the Burton Distinguished Writing Award for an article on federal hate crime laws. Mr. DiPompeo received his B.A. in economics *magna cum laude* in 2004 from the University of Maryland Baltimore County and his J.D. *summa cum laude* in 2009 from the University of Pennsylvania Carey Law School, where he was admitted to the Order of the Coif and served as editor-in-chief of the *University of Pennsylvania Law Review*.

Irve J. Goldman is a member of Pullman & Comley LLC in Bridgeport, Conn., and chairs its Bankruptcy, Creditors' Rights and Financial Restructuring practice. He has practiced in the areas of bankruptcy law and commercial litigation for more than 30 years. In 1993, Mr. Goldman was the first attorney in Connecticut to become Board Certified in Business Bankruptcy and has represented a diversity of interests in bankruptcy proceedings, including companies reorganizing under chapter 11, secured creditors, equipment lessors, franchisees, landlords and other creditor groups and asset-purchasers in § 363 sales. He has represented companies in reorganization proceedings ranging in size from large retail businesses to smaller-sized concerns, such as a marina in St. Thomas, Virgin Islands, a regional hardware chain, a vintage car company and a cross section of other businesses and individuals. He also has served as a chapter 11 trustee and represented chapter 11 and 7 trustees in various bankruptcy cases. In a case that has received national attention, he represented the State of Connecticut and a group of other states in the chapter 11 case of *In re Purdue Pharma, L.P. et al.* A frequent author on topical bankruptcy issues, Mr. Goldman has published articles in the *ABI Journal* dealing with standing issues in bankruptcy, prejudgment asset-freeze injunctions and executory contracts; in the *Connecticut Bar Journal* on the status of lien-stripping under bankruptcy law; and in the *Quinnipiac Law Revie*w's annual summary of decisions from the Second Circuit. At the First Annual Connecticut Bankruptcy Conference in 2019, he moderated a panel on third-party releases in chapter

11 plans, and for the Fourth Annual Connecticut Bankruptcy Conference in 2021, he prepared the materials for credit bidding in § 363 sales and selling assets in chapter 11 when the estate is administratively insolvent. In addition to his bankruptcy experience, Mr. Goldman has handled a wide variety of commercial disputes in both state and federal court, including actions involving civil RICO, breach of fiduciary duty, other business torts and debtor/creditor issues. He is admitted to practice before the U.S. District Courts for the District of Connecticut and the Eastern, Northern and Southern Districts of New York, before the U.S. Courts of Appeals for the Second and Third Circuits, and before the U.S. Supreme Court. Mr. Goldman received his B.B.A. in 1980 from Temple University and his J.D. in 1984 from Western New England University School of Law, where he was a member of the *Western New England Law Review*.

Prof. Margaret Howard is a professor of law at Washington & Lee Law School in Lexington, Va., where she teaches courses in contracts, bankruptcy and secured transactions. She began her teaching career at St. Louis University and has also been a member of the faculty of Vanderbilt Law School. In 1999, she was the recipient of Vanderbilt Law School's Hartman Award for Excellence in Teaching. At Washington & Lee, she has won awards for both teaching and scholarship. She has also visited at Emory, Duke, Washington University and the University of North Carolina Law Schools. Prof. Howard was the Charles E. Tweedy, Jr. Visiting Professor of Law at the University of Alabama in 2005, and the Bruce W. Nichols Visiting Professor of Law at Harvard during the spring of 2001. During the spring of 2002, she was ABI's Scholar in Residence, and she previously served as ABI's Vice President-Research Grants. Prof. Howard has written a number of articles on bankruptcy, one of which — "Shifting Risk & Fixing Blame: The Vexing Problem of Credit Card Obligations in Bankruptcy," 75 Am. Bankr. L.J. 63 (2001) — won the *American Bankruptcy Law Journal*'s Editors' Prize. Her casebook on bankruptcy, published by West, is now in its sixth edition. Prof. Howard is a frequent speaker on bankruptcy topics, and testified before the National Bankruptcy Review Commission on discharge in consumer bankruptcy. She is past chair of the Section on Creditors' and Debtors' Rights of the Association of American Law Schools and has served on the faculties of the American Board of Certification and the Association of Certified Turnaround Professionals. She currently serves on the editorial board of *The Journal of Bankruptcy Law and Practice*, and has formerly served on the editorial boards of *The Business Lawyer*, *Business Law Today* and the *American Bankruptcy Law Journal*, for which she remains a peer reviewer. In December 2015, Prof. Howard became the inaugural recipient of ABI's Jean Braucher Memorial Award for leadership in the field of consumer bankruptcy. She received her undergraduate degree from Duke University, her J.D. and M.S.W. from Washington University in St. Louis, and her LL.M. from Yale Law School. She is a member of the Order of the Coif and is listed in *Who's Who of American Women*.

Hon. Christopher J. Panos is a U.S. Bankruptcy Judge for the District of Massachusetts in Boston, initially appointed on Sept. 21, 2015. He served as Chief Judge from 2018-22 and sits on the Bankruptcy Appellate Panel for the First Circuit. In 2022, the Chief Justice of the U.S. appointed Judge Panos to serve a three-year term on the Judicial Conference Committee on the Administration of the Bankruptcy System. Prior to his appointment as a bankruptcy judge, he had practiced at Craig and Macauley in Boston for more than 25 years and served as its managing director until 2014, when attorneys at that firm joined Partridge Snow & Hahn LLP to open its Boston office. He served as partner in charge of the Boston office until his appointment to the bench. Judge Panos had a diverse practice focusing on business restructuring and insolvency, mergers and acquisitions, commercial finance, business litigation, and general business law. He represented public and privately held companies, individuals, banks, hedge funds and private-equity funds in many different business areas, including financial services, life sciences, energy, pharmaceuticals, manufacturing, retail and real estate development. He was regularly recognized in peer-review publications such as *Chambers USA* and *The Best Lawyers in America*, and which named him Boston "Lawyer of the Year" for bankruptcy and restructuring in 2012 and 2016. *Law & Politics* and *Boston* magazine named him a "Super Lawyer" each year of publication of that list and several times named him a "Top 100 Attorney" in Massachusetts and New England. Judge Panos was elected as a Fellow of the American College of Bankruptcy in 2008 and served on its First Circuit council from 2012-15. He served as chair of the Bankruptcy Law Section of the Boston Bar Association and on the Board of Trustees of the Boston Bar Foundation. Judge Panos received his undergraduate degree from Georgetown University in 1985 and his J.D. *cum laude* from Boston University School of Law in 1989, where he taught courses in legal research, writing and advocacy.