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2024

SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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TRUCK INSURANCE EXCHANGE,)

Petitioner,)

v.) No. 22-1079

KAISER GYPSUM COMPANY, INC.,)

ET AL.,)

Respondents.)

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Pages: 1 through 83

Place: Washington, D.C.

Date: March 19, 2024

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Washington, D.C.
Tuesday, March 19, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:37 a.m.

APPEARANCES:

ALLYSON N. HO, ESQUIRE, Dallas, Texas; on behalf of the Petitioner.

ANTHONY A. YANG, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioner.

C. KEVIN MARSHALL, ESQUIRE, Washington, D.C.; on behalf of the Debtor Respondents.

DAVID C. FREDERICK, ESQUIRE, Washington, D.C.; on behalf of the Claimant Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:37 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-1079, Truck Insurance Exchange versus Kaiser Gypsum Company.

Ms. Ho.

ORAL ARGUMENT OF ALLYSON N. HO

ON BEHALF OF THE PETITIONER

MS. HO: Thank you, Mr. Chief Justice, and may it please the Court:

If anyone is a party in interest entitled to be heard in this Chapter 11 case, it's the insurer, Truck, who will pay virtually every dollar the debtors owe the asbestos claimants.

Yet, the Fourth Circuit's rule denies that insurer a voice. That rule, which my friends barely defend, violates the text, context, and history of 1109(b).

It also defies the practical reality that Chapter 11 cases are, as this Court has recognized, collaborative, working best when all stakeholders come together at the outset to hash things out.

Congress recognized that reality and

spoke expansively in 1109(b) to extend the right to be heard to any issue. Congress also gave courts a duty to ensure compliance with the code and invited broad participation to help discharge that duty. 1109(b)'s breadth is a feature, not a bug.

It's now common ground that a party in interest is one who could be directly and adversely affected by the case. That's Truck in at least two ways.

First, it's the insurer paying the vast bulk of claims against the debtors. In the government's terms, it's a contracting party. From the start then, Truck's rights could have been directly and adversely affected by this case. The proof of that pudding is in the plan finding, which resolved a key coverage dispute against Truck.

Second, Truck's a creditor for millions in insurance deductibles.

For both reasons, 1109(b)'s plain terms entitle Truck to be heard on any issue.

In silencing Truck, the Fourth Circuit violated those terms by limiting who a party in interest is and what issues they can raise.

I welcome the Court's questions.

JUSTICE THOMAS: Ms. Ho, at what point do you determine the status of party in interest?

MS. HO: Thank you, Justice Thomas. At the -- at the outset. Section 1109(b)'s text refers to be heard under any issue in this case. So we think that has to be an ex ante inquiry, in part because there are other provisions of the code apart from 1109(b) that affect parties in interest that don't depend on a specific plan or any plan.

JUSTICE THOMAS: Well, the -- in this case, the -- the determination at the end or -- or in -- was that Truck was not negatively affected. How could you determine that at the -- at the beginning of the proceedings?

MS. HO: Yes, Your Honor, because I think the question should be "could," could -- could the entity be affected by the Chapter 11 case. And as the insurer, there are any number of ways that Truck could have been affected. It could have been affected by a plan that -- that resulted in one, as we were seeking, with fraud prevention measures, or it could have resulted, as had happened, in a plan that didn't include those.

We -- we came into this Chapter 11 proceeding as a creditor. The proceeding could have resulted in our claims being impaired or unimpaired. And you don't know that until the end, but that doesn't -- the -- the language of 1109(b) speaks to a creditor. So, if you're a party in interest in the beginning with a right to be heard under 1109(b), then you're a party in interest all the way through --

CHIEF JUSTICE ROBERTS: What if --

MS. HO: -- Justice Thomas.

CHIEF JUSTICE ROBERT: I -- I -- I know there's -- we could have some back and forth about the facts, but in a hypothetical, let's assume that your client, whichever plan -- you know, there's three different plans on the table, and under every one, your client gets -- you know, his exposure is exactly the same. It makes no difference to him which particular creditors are going to get what. He's -- just given the factual situation, he's going to walk away with exactly what he has or what he doesn't have when it's all done.

In what sense does he have an interest in how his assets are distributed or -- or what the liabilities are? In other words, although he is -- you could identify where he is going to, you know, be on the hook or not on the hook, but at the end of the day, everybody agrees it's not going to make any difference.

Now does he get -- still get to participate because his assets are going to be used in some form or another?

MS. HO: Yes, Your Honor. And this goes -- Mr. Chief Justice, this goes to, I think, the colloquy I was having with Justice Thomas about the importance of the ex ante determination of who a party in interest is, right? It's somebody who could be directly and adversely affected. And I think one may --

CHIEF JUSTICE ROBERTS: Well, under my hypothetical, he -- he's going -- I guess my hypothetical, he's going to be adversely affected to exactly the same extent or not affected at all.

MS. HO: I think as long as -- as -- as -- as -- as in the course of the case that -- that entity is directly and adversely affected, and I think one -- one way that we know that, Mr. Chief Justice, is because, if you look at 1109(b), one of the entities that's expressly listed is a creditor.

And we also know that different provisions of the code, it matters whether you are impaired or unimpaired, right? So, in other words, you don't get a vote on a plan if your interests are not impaired.

CHIEF JUSTICE ROBERTS: Yeah, and we also know --

MS. HO: But that is different than being heard, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Yeah. We also know that in these proceedings, there are some creditors that are just not going to get anything because of their particular status and all that. Now I suppose you want to say these -- technically, under the rule, he can go in, and maybe that's a difference in this case. But is -- is a party in interest, is the same test for that Article III?

MS. HO: That's our position. Our -- our position, which is the position adopted by the Third Circuit, is that the test for that is

Article III, which -- which --

CHIEF JUSTICE ROBERTS: Well, under Article III, if you're not going to be injured at all because the proceedings -- you know you're not going to get any money or you know you're not going to have any left or whatever it is, I don't know that that would satisfy Article III. Just because people are going to be fighting about who gets your money, but the one thing that's clear, it's not going to be you.

MS. HO: Well, I think, though, you don't know that. You don't know that at the outset of -- of -- of -- of -- of the proceeding, right? So a creditor does not know, a party in interest or an equity holder does not know, and even the debtor doesn't know --

CHIEF JUSTICE ROBERTS: Okay. Well, that, I think, is --

MS. HO: -- until the very end.

CHIEF JUSTICE ROBERTS: -- is fighting my hypothetical. And, you know, maybe it's not a good hypothetical, but assume that that is the fact, that -- that they're not going to be affected one way or another. They're just so far down the line of, you know, people who can recover or so far down the line of people who are responsible that they're really not going to get anything else.

MS. HO: I do hate to fight your hypothetical, Mr. Chief Justice, but I -- I -- I do think such a person -- I think it's -- I guess maybe I'm fighting it because it's hard to know, it's maybe impossible to know at the outset of any proceeding whose ox is going to be gored and -- and how much. That is very much an open question.

That -- that is why Congress, in 1109(b), spread -- spread a -- set a big table so that all parties in interest can come and participate and be heard and work -- work out the negotiation among the parties who have a stake, who could be directly --

JUSTICE KAGAN: I guess I'm --

MS. HO: -- affected by the --

JUSTICE KAGAN: -- I'm not sure, Ms. Ho, how your "at the outset" rule fits with your Article III rule --

MS. HO: Mm-hmm.

JUSTICE KAGAN: -- because, as -- as you just suggested, at the outset, there's going to be a lot of things you don't know. You don't know what the plan is going to be. You don't know whether the plan is going to affect you, injure you or not. You don't know -- you know, all the things that we think of in the standing context: Is there imminent injury? Is there some traceability? At the outset, many people won't have the answers to those questions.

So I guess I can understand an "at the outset" rule, and I can understand an Article III rule, but I'm not sure I can understand both of them together.

MS. HO: Sure. Two points to that, Justice Kagan.

To start, you know, we -- we do think that party in interest is coextensive with Article III, but you -- you wouldn't -- you wouldn't have to agree with me on that to agree in terms of what -- who a party in interest is under -- under the statute.

But, secondly, I -- I do think there is a good fit --

JUSTICE KAGAN: So your first answer is you're willing to give up the Article III?

MS. HO: Well, I don't think my -- I

just wanted to make clear, Your Honor, I don't think -- you don't have to agree with me --

JUSTICE KAGAN: Yeah. That's -- that's a fine answer.

MS. HO: -- on -- on -- on -- on Article III. We do think it's -- it is -- it is coextensive, as the Third Circuit has held for a dozen years, and I don't -- I don't think there's any tension between that and ex-ante.

I think the way to think about it is it's -- it's -- it's basically do you have standing and does disaggregating that from the merits, right, what a plan will actually do or how the proceeding will actually unfold.

In the same way that this Court, you know, doesn't let the standing inquiry determine the merits, I think this -- it operates the same way in 1109(b) in the party in interest discussion and analysis is, that you're looking to see could -- could these proceedings directly and adversely affect it.

I think, as to traceability and redressability, I think those -- those requirements of Article III will virtually always be satisfied in -- in every case where there's a party in interest, right?

JUSTICE SOTOMAYOR: Can we -- can I --

MS. HO: Yes, Justice Sotomayor.

JUSTICE SOTOMAYOR: -- break this down?

There are various points at which you decide standing. One is at the beginning of the suit. And I think this is not an Article III court. This is an Article II court. And it's not even a full court because it can't do everything an Article III court can do.

It's closer, not quite, to an administrative proceeding. But it's an Article II court. And, generally, a party in interest is anyone that could be affected by a plan. The plan hasn't come into effect, but you could posit a thousand different ways that a plan could directly financially injure someone.

The Chief is positing a case where there's just not enough money, they're never going to reach down here, but you don't know that because you don't know what claims are going to be disallowed, whether some priority claims are not going to be accepted. There's just too -- that's what you're saying about the unknown?

MS. HO: Yes.

JUSTICE SOTOMAYOR: Now the question becomes when you get to the point that a plan -- and this is the point we're at -- when we get to the point that a plan is in place, now the question is who can object to that plan, correct? And now the question becomes what are the reasons you can object?

And you're saying, because this plan as structured not only violates the terms of our contract, it also violates the terms of the bankruptcy court. You're saying that there's a separate good faith and fair dealing, an equal treatment requirement under the Bankruptcy Code and that this plan violated that, correct?

MS. HO: Correct, Your Honor.

JUSTICE SOTOMAYOR: Now the net -- the net neutrality test doesn't answer that second question, correct?

MS. HO: Correct.

JUSTICE SOTOMAYOR: Because whether or not, if this plan in some way has treated you differently from the Debtors' other debts with no reasonable basis to do so, that could breach the Bankruptcy Code, good faith and fair dealing, correct?

MS. HO: Correct.

JUSTICE SOTOMAYOR: All right. So now it's possible after we go through all of this that the court below will say: No, it doesn't breach it, but you have a right to be heard on that. That's what you're saying. That's the standing, correct?

MS. HO: Yes, yes.

JUSTICE SOTOMAYOR: So that's the difference between you can't flip things and get to the merits in that way, you have to look at that standing issue on the basis of the moment the plan is there, I am being affected by the plan.

It's possible that that effect won't rise to the level of something that I will be given something to, but I have a right for them to hear me out on this, correct?

MS. HO: Correct.

JUSTICE JACKSON: Can I ask you about the difference between your view and the government's view? I understood the government's view to be narrower but that you would also be covered by it.

So do you reject their sort of contract-based determination here?

MS. HO: No, not at all, Justice Jackson. And I -- I -- I don't see the government's position as -- as a different -- as a different test. I --

JUSTICE JACKSON: Do you agree it's narrower than yours?

MS. HO: I think I -- I think I would. I think I would agree that it's -- that it's narrower.

JUSTICE JACKSON: So why is yours better?

MS. HO: I actually don't know that -- that one is -- is -- is -- is better or the other. I think what the government is saying is we -- we both agree that 1109(b), that the text is broad and expansive.

JUSTICE JACKSON: Right.

MS. HO: We -- we -- we both agree that we are -- we are a creditor --

JUSTICE JACKSON: Right.

MS. HO: -- and that we were entitled to be heard that way.

JUSTICE JACKSON: But setting aside the --

MS. HO: And I think -- I think the government's position is they're focusing on the -- anyone who holds an executory contract. And -- and we do.

JUSTICE JACKSON: Right.

MS. HO: So that -- that -- that brings us -- that brings us in. So I don't -- I don't see that as --

JUSTICE JACKSON: I guess what I'm worried about a little bit --

MS. HO: Yes.

JUSTICE JACKSON: -- is that if we go beyond people who hold a contract and just to anyone who's adversely affected, I guess you could imagine that a competitor in this environment would say, I'm adversely affected, you know, by what is happening with the bankruptcy of this other business.

Would -- would we be opening the door to allowing in the kinds of entities on the basis of your broad test that you would otherwise think Congress would not have wanted to be a party in interest?

MS. HO: No, Your Honor. And -- and -- and to be clear, we are -- we are more than happy to embrace a holding of this Court that we are a party in interest who can be heard on any issue because of the insurance contract that we hold. So I want to be clear on that.

But I think, to your point about the -- the floodgates argument that my friends raise, I don't think so, because I think the direct and adverse test which we believe is coextensive with Article III, it -- it has teeth. Again, it has been the rule in the Twelfth Circuit for over a dozen years. And I -- I -- my friends on the other side really can't point to any sort of chaos that has resulted from it.

So I -- I think our -- our test has teeth. And I -- and I also think that Congress, again, as I started by saying, I think the breadth is -- is a feature and not a bug here, that Congress wanted to bring stakeholders to the table, parties in interest who had a stake. And if anyone -- if anyone has a stake in this Chapter 11 proceeding, it is the insurer who will be paying the vast bulk of claims --

JUSTICE KAVANAUGH: Isn't that --

MS. HO: -- against the Debtors.

JUSTICE KAVANAUGH: -- this doesn't hurt your argument, but isn't it true that the insurer will, who's responsible for the claims, will always or almost always be a party in interest then in bankruptcies --

MS. HO: I -- I --

JUSTICE KAVANAUGH: -- mass tort bankruptcies?

MS. HO: I -- I -- I think that's -- I think that's right. And when -- when I sort of think through my -- to myself, you know, what -- who -- who else could be brought in under our test, I -- I -- I do think the -- the single largest group are the -- are -- are insurers and who will also often come in as creditors as well, as -- as we do -- as we do too.

JUSTICE GORSUCH: Counsel, just on the Article III point, I wonder whether we need to tangle or should tangle with it because I think of Article III as the -- the plaintiff coming to court has to establish an injury.

And -- and who the plaintiff is in a bankruptcy case, I don't know, maybe the petitioner, right, but normally we say someone objecting to relief under Bond, under Clapper, doesn't have to establish Article III standing. And that would seem to be a closer fit to a party or a group like yours seeking to object to a plan.

MS. HO: I certainly don't disagree that in -- in -- in the context where what you have is someone who is only objecting, right, to the relief being sought, and -- and that is us to a T, right? We are -- we are objecting to the plan.

I think there may be a different issue raised when you get to, say, appellate standing, but -- but in terms of 1109(b) party in interest, we -- we do -- we do agree that as we are -- we are opposing the -- yes, thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Sotomayor?

JUSTICE SOTOMAYOR: I'm assuming if we reach it on the government's theory or in your theory, that directly and adversely means an insured because they have a contract --

MS. HO: Yes.

JUSTICE SOTOMAYOR: -- is a party in interest --

MS. HO: Yes.

JUSTICE SOTOMAYOR: -- that should be heard, that we don't have to reach the creditor issue or the Article III issue?

MS. HO: That's correct, Your Honor.

JUSTICE SOTOMAYOR: Okay.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Kavanaugh?

Justice Barrett?

JUSTICE BARRETT: Well, let's see. It -- it seems to me that maybe we would have to at least say Article III doesn't apply because you're not -- because someone like the insurer is not the one invoking it.

I guess I'm -- I would be a little bit worried, as you say, if Congress is setting the table broadly and parties in interest cut broadly, it's speculative, right? I mean, it -- it's pretty speculative.

You might be able to articulate a way that the plan could adversely affect your interests, but it would be speculative. And so maybe we don't have to say whether Article III applies in Article I courts, but if I think you might have a problem satisfying Article III, I think I would still have to say you have statutory standing, right?

MS. HO: Yes. I -- I think there's no -- there -- I don't believe there's any dispute that we have Article III standing here and in the court below because we weren't heard, and so we're challenging that we -- we were not -- were not heard.

JUSTICE BARRETT: Yes.

MS. HO: I do think, in terms of the Article III issue, the Fourth Circuit did address our creditor issue in Article III terms, but I think what that court was really doing was it was reading any issue out of the statute.

So I think from this Court's perspective, I don't think there's any question about our Article III status. I think the question is, are we a party in interest? We -- we say --

JUSTICE BARRETT: Right.

MS. HO: -- that's directly and

adversely affected. The government says it's because we have an executory contract. Either way, I think we -- we satisfy the statutory standing and we also satisfy Article III.

JUSTICE BARRETT: Oh, I see what you're -- I mean, I get what you're saying. I'm just saying, if I don't want your test, if I don't want to say that the statutory standard is coextensive with Article III --

MS. HO: Yes.

JUSTICE BARRETT: -- that's -- that's the issue that I might have.

And then just very briefly, could you describe for me for the uninsured claims what exactly -- I mean, you know, the, you know, Kaiser and the -- the Claimants are fighting pretty hard to keep the insured claimants out.

So what exactly are the fraud protection measures that would apply to the uninsured claims, the ones that you want to apply to the insured claims as well?

MS. HO: Sure. There are essentially two, Justice Barrett. The first would require all claimants to disclose all known exposures --

JUSTICE BARRETT: Right.

MS. HO: -- right, to all defendants. And the second primary requirement or measure would be a release that would allow the trust to obtain information from the other trusts on that.

JUSTICE BARRETT: Okay. Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

Okay. Thank you, counsel.

MS. HO: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Yang.

ORAL ARGUMENT OF ANTHONY A. YANG
FOR THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING THE PETITIONER

MR. YANG: Mr. Chief Just -- Mr. Chief Justice, and may it please the Court:

Both counterparties to executory contracts and creditors are parties in interest that may be -- appear and be heard on any issue in a Chapter 11 bankruptcy case. If a party is a party in interest, they get a seat at the reorganization table, and once they're at the table, they can be heard on any issue in the case. And that status must be determined ex ante, that is, before the court considers the question, because the right is to be heard in advance.

That doesn't depend on the merits of the position, and it cannot be determined based on what a plan proposes because a party in interest under 1121(c) can itself propose a plan. Moreover, the plan is never final until all appellate proceedings have -- on the confirmation are ended. And so they can participate all the way through.

The code contemplates that every executory contract must either be assumed or rejected. Either way -- and I'd like to develop that in our conversation -- but either way, a party -- a counterparty is a party in interest.

I'd be happy to -- to follow up on that.

JUSTICE THOMAS: Mr. Yang, what's the difference between your view and -- or your approach to 1109 and Petitioner's?

MR. YANG: Well, I think Petitioner's view, while -- it appears to me that they are interpreting "party in interest" based on some older Interstate Commerce Act cases that borrowed some Article III concepts when interpreting "party in interest."

We just don't think that's a term of art. It's not clear to me that they actually say that you have to have Article III standing to raise an objection. I think it's more based on the term, and the -- the Article III ideas were incorporated by reference to the cases.

So I'm not sure we disagree about Article III. We just disagree about the interpretive method. Our interpretive method just goes to the text. The text is broad. It's not so broad as to get amici or, you know, people with very tangential views in the case.

But, in this case, it certainly applies expressly to creditors, and we say -- we think it applies to parties with executory contracts because, remember, executory contracts under 365 are either going to be assumed affirmatively or rejected, and if assumed, sometimes they're assigned to somebody else.

Now, if the debtor seeks to assume a contract, they have to satisfy Section 365's standards that protect the counterparty. If there has been some kind of breach, it has to be cured. Certain contracts cannot be assumed.

And the counterparty can object. Among other things, the counterparty has an interest in the debtor's ability to fulfill that contract going forward. And the debtor has to move to assume a contract. It has to show that the business judgment standard has been met. A counterparty can object.

Now, if the debtor wants to reject the contract -- Justice Kagan, your -- your opinion in Mission Products Holdings addresses this -- that results in a breach of contract. It results in a claim, and then the creditor is a claimant and not in a real good position because it's usually a pre-petition plain -- claim, and you get pennies on the dollar in most contexts.

Either way, assumed or rejected, they have an interest. Now that's reflected not only --

JUSTICE KAGAN: Mr. Yang, in an -- in an old case of ours, we used the term "adversely and directly affected." Do you accept that standard, or do you think we should not have a standard like that?

MR. YANG: You know, I'm not really sure where that standard comes from except unless you are drawing from Article III. We don't really object, I think, to the outcome of having some direct effect. Whether you're adversely affected, though, you don't -- I think it's the wrong question.

You have to have the potential to be adversely affected in a bankruptcy because that's what the reorganization is. You bring everybody in who has a potential to be affected and you work it out.

So going back to the pre-code Bankruptcy Act, and --

JUSTICE KAGAN: And -- sorry.

MR. YANG: Sure.

JUSTICE KAGAN: If I could just follow up. You -- you too -- and this is just like Ms. Ho -- said at the outset this is --

MR. YANG: Yeah.

JUSTICE KAGAN: What if you don't really know whether your -- you have any interest in this until the middle of the thing? I mean, I can imagine many -- many events taking place, including there's now a plan on the table and now you look at the plan on the table and you think: Oh, my gosh, I could be affected.

It just seems a strange thing in a bankruptcy proceeding, which is fluid and has many twists and turns, that you would say do this at the outset and -- and apparently only at the outset.

MR. YANG: Let me answer that, and I think it's easiest to answer it in the context of executory contracts and creditors, right? Executory contracts, they're always going to have potentially some effect. Maybe you just, you know, don't know what the effect is going to be, and a lot of people who could be parties in interest, just because it doesn't fit into the -- it doesn't make rational economic sense, they don't participate, right? They just don't participate until -- they have a right to, but they don't until it becomes relevant.

The pre-Bankruptcy Act -- Code Act labels executory contractors as parties in interest. Why? It's because they had to get advance notice of rejection. And there's a case called King versus Barrett in the Tenth Circuit, 1973, it explains that you're given notice in a hearing so that you can be heard.

Currently, the current code says that

the counterparty can seek an order to set a period to assume or reject. That's 365(d)(2). Other parties in interest may similarly set that same period, but they can only do so in the context of status conferences. That's 105(d)(2)(A). All of this is showing that parties in interest -- that -- that executory counter -- contract counterparties are parties in interest.

Now there's a few things that I'd like to address. One is there's a question about having a voice and not a vote. I think that goes to the question of being impaired. Impaired is what the plan under Section 1124 proposes. But there are other requirements for a plan. For instance, a plan needs to be feasible. So, if you're a creditor and the plan proposes satisfying everything, but it satisfies it in a way that's not likely to end up being implemented, you can object under 1129(a), I think it's (a)(11), that the plan's not feasible.

So the impairment just talks about the separate requirement that the classes vote. It doesn't address your right to be heard, which, by the way, is not only a right to be heard to object, but it's a right to be heard to support the plan, right? If you're not impaired, you may well want to come in and support the plan.

The floodgates question, it largely turns, I think, on the question of any issue, not the problem of party in interest. Like take, for instance, the vending contractor that -- that everyone's talking about. The problem is not that a vending contractor gets to come in and be a party in interest and participate with respect to the vending contract, whether it's assumed or rejected or interpreted in a way it doesn't like. The concern is that it's also heard on any issue.

But the text of 1109(b) and its history, the evolution of expanding those groups that can speak on any issue, foreclose any real textual ability to say, oh, you can only participate on certain issues. "Any issue" means what it says.

Secondly, the concerns about floodgates, I think, are totally overstated. Litigants make rational economic choices where they have a stake in reasonable arguments. The right to be heard doesn't impose on the court any burden to -- to speak at length if it doesn't think there's much to say about the issue.

And the court has to decide the question anyway in terms of confirmation because this Court, in United Student Aid Funds, determined that the court has to decide whether the plan complies with the code even if no one objects.

And, finally, sanctions deters any kind of bad-faith conduct. Ultimately, this is a balancing question, does it make sense to bring everybody in, we're going to weigh it against maybe some burden of having their voices heard, we're going to balance it against the waste of resources of trying to decide who gets to be heard, and Congress struck that choice in 1109(b).

JUSTICE KAVANAUGH: Does your position just boil down to the common-sense point that an insurer is on the hook for the claims in a mass tort bankruptcy as a party in interest?

MR. YANG: I think that's a subset of our point, and our -- our -- our primary point is --

JUSTICE KAVANAUGH: Well, all -- all we need is that subset. I mean, isn't that just kind of common -- I just thought that is the common-sense point.

MR. YANG: I agree. But I actually don't think it's that much different than saying that a counterparty to an executory contract is always going to have an interest.

JUSTICE JACKSON: Mr. Yang?

MR. YANG: I just don't think that that's different. And the idea was that Congress, the legislative history, reflects the idea here is to hear all sides of an issue and then let the court decide.

JUSTICE JACKSON: Mr. Yang --

JUSTICE KAVANAUGH: And the insurer is kind of obvious, right? That's your point.

MR. YANG: Insurer's an obvious one. I mean, it -- it -- but it would have included even the vending contractor. Now the vending contractor might not have participated? Why? Because, you know what, it didn't matter, it's like small steaks, potatoes. The vending contractor is just not going to be participate.

There's a lot of people in the periphery that just don't participate. The 10 cent creditor, unimpaired, unsecured 10 cent creditor is expressly a party in interest, right?

JUSTICE JACKSON: What about an employee, you know? If we're going with your definition, which has to do with contracts --

MR. YANG: Yep.

JUSTICE JACKSON: -- I suppose an employee has a contract, so are you saying that they would be a party in interest?

MR. YANG: An -- an employee can be a party in interest as a party to an executory contract. Now there are certain code provisions that deal with employees and unions and things like that, but as a general matter, yes.

JUSTICE JACKSON: Okay.

MR. YANG: That's true.

JUSTICE JACKSON: And just in response to Justice Kagan, I -- I guess I didn't understand you to be making a statement that the parties couldn't be recognized on a rolling basis, right? Like, if someone determines or decides in the middle of it that they have an interest, they can ask to come in?

MR. YANG: Yes. But --

JUSTICE JACKSON: Is that right?

MR. YANG: Yes, I think that's true. The -- the -- the reality is is they've always had the interest to be potentially affected. They might not have realized it --

JUSTICE JACKSON: Right.

MR. YANG: -- until later --

CHIEF JUSTICE ROBERTS: Thank -- thank --

MR. YANG: -- but, when they realize it, they come in and, you know, they are given a right to be heard.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. YANG: Thank you.

CHIEF JUSTICE ROBERTS: Justice Thomas?

Justice Sotomayor?

JUSTICE SOTOMAYOR: Your -- in your brief, you say this case presents no occasion for the Court to determine the phrase -- the phrase's outermost -- party in interest's outermost boundaries.

And you repeat that today, that we should just say clearly insurers or people with executory contracts, et cetera.

But don't we have to say a little bit more? Don't -- don't we have to say something like directly and adversely affected to -- to quantify --

MR. YANG: I'm not sure --

JUSTICE SOTOMAYOR: -- to take away the employee who doesn't -- who doesn't have a contract with the Debtor, but the employee who has a contract with the Petitioner, Truck?

Could he sue and say my salaries and benefits are going to go down because this doesn't have an anti-fraud provision and the company's going to lose more money?

MR. YANG: Well, I don't --

JUSTICE SOTOMAYOR: So I'm going to make less?

MR. YANG: The Court might well want to say more. The Court -- but the Court certainly doesn't have to to resolve the issue with respect to whether Truck is a party in interest.

Now, if the Court wanted to explore

the text of party in interest more, I think what I would suggest is that the Court can explain that a party is a participant on one or -- one of the sides of an action or an affair.

It's not a person in interest. It's a party in interest. And context matters here. Bankruptcies are aggregations of individual controversies, and the participants there have an interest in the proceedings' exercise of jurisdiction over the debtor's property in the distribution.

If the proceeding has a potential to affect their interests, and it's not necessarily an interest in the entitlement to specific debtor properties, if the proceeding has the potential to affect their interests, that is enough to be a party in interest.

Now things that I think you're talking about kind of two orders of steps out have never been thought to be people who can come in with an interest. And -- and you --

JUSTICE SOTOMAYOR: But -- but how do I --

MR. YANG: Right.

JUSTICE SOTOMAYOR: I love asking this

question. How do I write this so that there is a difference between that employee and the truck company? I can write it to say the truck company because it's affected, but what -- but I have to say something more to take care of those two and three down.

MR. YANG: The employee of Truck?

JUSTICE SOTOMAYOR: Yeah.

MR. YANG: Well, certainly, the Court would have to decide how far it wants to go. I don't think you have to decide employees of Truck since the question before the Court is not employees of Truck.

But, if you wanted to, we don't object to the idea that the participants that have an interest in the proceeding have always been those that have a direct kind of not attenuated effect. It's not amici. It's not some law professor. It's not employees of somebody else. It's someone with a more direct effect.

I don't think that derives from Article III, but I think you can derive it from kind of looking more generally at -- at bankruptcy practice.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Kavanaugh?

Justice Barrett?

Justice Jackson?

Okay. Thank you, counsel.

MR. YANG: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Marshall.

ORAL ARGUMENT OF C. KEVIN MARSHALL

FOR THE DEBTOR RESPONDENTS

MR. MARSHALL: Mr. Chief Justice, and may it please the Court:

A party in interest is someone who has a legal interest in a debtor's bankruptcy estate, its property, not someone who is merely concerned about the debtor's bankruptcy more generally.

The list of parties in interest in Section 1109(b) shows this. Settled usage of the term in bankruptcy confirms it, and the government, at least in its brief, agrees with it.

At the outset of the case, the parties in interest will ordinarily be the debtor with its creditors and shareholders, those whom Section 1109(b) lists.

Others, as Justice Thomas was asking about, may come to have an interest in the estate and, thus, can show that the bankruptcy will directly affect their rights or obligations. For example, if a plan would breach an insurer's policy, altering its contract rights or obligations, then it would become a party in interest.

But, if a plan preserves the insurer's status quo, it is insurance neutral, in that case, the insurer is not a party in interest and it has no right to object to plan confirmation.

Here, the plan does not alter Truck's contract rights or obligations. It breaches nothing. It does not do anything to put Truck on the hook. That is what the lower courts uniformly found, and Truck here does not challenge that finding. Truck, therefore, has no right to challenge plan confirmation.

Truck invokes policy concerns that would supplant this settled clear rule with a novel expansive framework that would give insurers greater rights to challenge plan confirmation than even a creditor has. But bankruptcy law already addresses these concerns by allowing interested entities that are not parties in interest to pursue permissive intervention. Truck simply ignores that tool.

I welcome the Court's questions.

JUSTICE THOMAS: Mr. Marshall, at the beginning, at the outset of these proceedings, bankruptcy proceedings, Truck was a creditor and Truck certainly from its vantage point was a party in interest because of the -- being the one insurer for all the claims or many of the claims here.

So do you think we should look at the filing period as the point to determine party of interest, or should we do it at a later point?

It would seem that you can't do insurance neutrality at the beginning. I don't know how you would do that.

MR. MARSHALL: If one is in the list of entities in Section 1109(b), it's possible to answer that question at the outset.

JUSTICE THOMAS: So they would be a creditor?

MR. MARSHALL: They were -- they were a creditor, yes, but as to their status as an insurer, the question is, do they have an interest in the debtor's bankruptcy estate? And at the outset of the case, it was obviously a no, but then, when a plan is submitted and they want to claim that that would breach their policy rights and give them interest in the estate, then that would be the point at which --

JUSTICE THOMAS: Well, let me --

MR. MARSHALL: -- the threshold question would need to be decided.

JUSTICE THOMAS: Well, let me -- let's go back a second.

As a creditor, at the beginning, if they are considered a party in interest, can they raise any issue in the proceedings?

MR. MARSHALL: Under 1109(b), they generally can. In the context of a plan confirmation, if they're unimpaired, they don't have the right to object.

JUSTICE KAVANAUGH: Isn't it just common sense that an insurer at the outset is going to have an interest in this because how much the insurer will have to pay will be affected by how the plan is structured?

MR. MARSHALL: Justice Kavanaugh, they could be interested in the general sense of being concerned, which was the phrase Truck tended to use.

JUSTICE KAVANAUGH: No, not just concerned but how much they owe -- how much they're going to have to pay. It's not just I'm concerned about things. How much I'm going to have to pay.

MR. MARSHALL: And so then the question is, at what point do they come to have an interest in the estate? And if a plan is proposed that would -- that in their view, would breach their policy, they certainly have the right to be heard on whether it would, in fact, breach their policy rights. And they were heard here.

And the courts, all the courts, all three lower courts held their policy rights were not breached. And so there's nothing about the bankruptcy case that puts the insurer on the hook. That can happen in cases. It happened in a Ninth Circuit case that's in the briefs.

And if -- if the plan actually --

JUSTICE KAVANAUGH: But -- you're saying put them on the hook, but for how much they're going to be on the hook, that will be affected, right?

MR. MARSHALL: I'm not sure I followed that. Nothing about the bankruptcy case changes Truck's position. If the bankruptcy case were to -- to change an insurer's position, it would be a party in interest and have a right to object to the plan.

JUSTICE KAVANAUGH: But they want the fraud prevention provisions. What's your response to that as -- as, you know, their interest in having those established?

MR. MARSHALL: There's a threshold question whether they are a party in interest or not. And that depends on whether they have an interest in the bankruptcy estate. If they are a party in interest, then they would have the right to come in and raise the issues of concern, including the fraud prevention measures.

But it's a threshold question. Perhaps it's helpful to think of an analogy. A creditor, as we were discussing with Justice Thomas, has a right to raise any issue under 1109(b), but there's a threshold question whether you actually are a creditor. So you can come in and you can say you're a creditor. You don't actually have to move to intervene. And if somebody challenges that, then the court has to decide, are you a creditor or not? That's --

JUSTICE BARRETT: Why are you --

CHIEF JUSTICE ROBERTS: Well --

JUSTICE BARRETT: -- fighting this so hard? Why -- why do you want Truck to not even be heard? Just what is your motivation to be fighting this so hard?

MR. MARSHALL: We have a deal with the creditors. We think it's a valid deal and a good deal, and we want to be done with bankruptcy. And we don't -- Truck has -- Truck is coming in to try to blow up the deal that we have.

JUSTICE SOTOMAYOR: Can I stop you a moment? I am looking at the brief of amici American Prosperity Casualty Insurance, and on page 15, they explain that once the plan is approved, this plan, under your terms, it obtains a discharge, the debtor, and the protection of a channeling injunction, now all the claims are going to go through the trust and not to you.

The debtor has no ongoing incentive after the plan is approved to limit the cost of defending, paying claims, and any liability on those claims. You lose it. That's the benefit bankruptcy gives -- giving you. And the claimants, their incentive for this plan is that they don't want the antifraud provisions.

So who's protecting the insured? If -- if the -- the insured can't protect itself because you say it can't go to the bankruptcy court, how is it being heard?

MR. MARSHALL: Nothing --

JUSTICE SOTOMAYOR: Because what you're suggesting to us is that they don't have a right to say the plan is violating a bunch of other provisions of the code, 1129(a), or permitting the differential treatment of -- of people who are owed money or of claimants. I mean, I -- I just don't understand your argument.

MR. MARSHALL: They want --

JUSTICE SOTOMAYOR: I can argue that the plan is breached, and once they say the plan is not reached -- breached, I can't argue that the plan violates the code? I've just never heard of --

MR. MARSHALL: If --

JUSTICE SOTOMAYOR: -- parsing standing in that way.

MR. MARSHALL: Justice Sotomayor, if one is not a party in interest, there's no right to raise issues. Party-in-interest status is a threshold question.

And here, as to Truck as an insurer, they need to show they have an interest in the bankruptcy estate to get in, to answer the threshold question.

JUSTICE SOTOMAYOR: But they do.

MR. MARSHALL: And to --

JUSTICE KAGAN: But the question --

MR. MARSHALL: -- to do that --

JUSTICE KAGAN: -- Mr. Marshall, is I think what everybody is saying to you is, well, they do have an interest in these anti-fraud provisions. Not just a concern, they have an interest, a material interest. If they get the anti-fraud provisions, they're better off. If they don't get the anti-fraud provisions, they're worse off.

Now, what I hear you saying back is

they had no preexisting entitlement to the anti-fraud provisions, and your test is one that says if they're not being made worse off by the plan, then they're not an interested party. But I -- I don't know why that should be the test. If I look at the language, that's not the test. If I think about what the ordinary meaning of being a party who's interested is, that's not the test.

Why -- why is your test so long as they're not being made worse off, they're not an interested party?

MR. MARSHALL: Well, the test of whether I -- there is a benefit I would like to get out of the bankruptcy case, which is Truck's test, is unlimited. Any time you can imagine a hypothetical plan that would be better off for you --

JUSTICE KAGAN: Well, that's a practical concern.

MR. MARSHALL: Well, it -- it --

JUSTICE KAGAN: And I think, you know, the practical argument against it is it's pretty costly to enter into these proceedings, and nobody really does it unless they have a serious interest, and, anyway, bankruptcy courts have docket management techniques.

And, anyway, just putting aside the practical concerns, is this a floodgates problem or is it not a floodgates problem, I don't really see why your test, which is are you being made worse off or are you being made -- or is it -- you know, are you just being held to the bargain that you initially had, I don't see why anybody would think that that's the way to answer a question of whether you're interested in a proceeding.

MR. MARSHALL: "Party in interest" is a term of art that means you have an interest in the debtor's bankruptcy estate. That's been the meaning for 100 years. And so that's the way to start.

But if we're going to think in terms of seeking to obtain a benefit, in the context of causes of action, a Lexmark zone of interest, the question is always have you suffered a loss? If you've suffered a loss you come in and you try to get a remedy.

What Truck is saying here is I can come in, even though I'm suffering no loss at all to my legal rights, and just seek to obtain a benefit because it's very nice that this bankruptcy is here and maybe I can get something out of it.

But even if they don't have the right to come in, there's always permissive intervention. So there's the right to -- to come in as an interested entity that's not a party in interest. The benefit of that is it's in the discretion of the bankruptcy court. You have to show cause. The bankruptcy court can decide whether you come in for all issues or just some.

The question is who has the right to intervene in the case? And it --

JUSTICE JACKSON: So --

JUSTICE KAVANAUGH: Would you object to permissive intervention in a situation like this? Where the insurer is seeking fraud prevention?

MR. MARSHALL: We would have objected to their attempt to come in and object to the merits of the plan, but they certainly have the right --

JUSTICE KAVANAUGH: That wasn't my

question.

MR. MARSHALL: Yeah.

JUSTICE KAVANAUGH: The question was --

MR. MARSHALL: They -- they could have sought to pursue inter- -- permissive intervention under 2018 to get to the merits of the plan.

JUSTICE KAVANAUGH: Would you have objected to that?

MR. MARSHALL: We probably would have opposed that.

JUSTICE KAVANAUGH: Why?

MR. MARSHALL: For all the reasons that we're otherwise opposing.

JUSTICE KAVANAUGH: You just don't want them to be heard.

MR. MARSHALL: We want -- they have the right to be heard, to --

JUSTICE KAVANAUGH: You don't want the fraud prevention provisions, but you don't want them to be heard on that. Is that -- I mean, that's okay.

MR. MARSHALL: Well, the -- all the lower courts --

JUSTICE KAVANAUGH: I just want --

MR. MARSHALL: I mean, they were heard on that. All the lower courts ruled against them on the merits as well, both the bankruptcy and district court, although the Fourth Circuit didn't get to it.

It's good to keep in mind, if we're going to be talking about the policy concerns, that bankruptcy is just not about get everybody to the table. It's also about having an efficient and expeditious proceeding that makes it possible to resolve what is ultimately a question about the debtor and its creditors or, in some cases, its shareholders.

CHIEF JUSTICE ROBERTS: Well --

JUSTICE JACKSON: Can I --

CHIEF JUSTICE ROBERTS: -- it may not be about getting everybody at the table, but you do want all the creditors there, don't you?

MR. MARSHALL: Yes, you do want all the creditors there.

CHIEF JUSTICE ROBERTS: Well, they're a creditor.

MR. MARSHALL: As to the plan that's at issue here, they were an unimpaired creditor, and an unimpaired creditor does not have the right to object to a plan. That's 11 -- Section 1126(f).

JUSTICE BARRETT: Mr. Marshall --

JUSTICE JACKSON: But at the time --

JUSTICE BARRETT: Mr. Marshall, the -- the language -- you agree that they had an interest in the plan finding, right? About the good faith and about whether this was going to be collusive. Everybody said below that they had an interest in the plan finding.

MR. MARSHALL: The plan finding was a threshold question that they certainly had the right to litigate.

JUSTICE BARRETT: Right. And they did have an interest as a creditor because of the deductibles that were due, right?

MR. MARSHALL: They were a creditor. As to the plan at issue here, they were unimpaired --

JUSTICE BARRETT: Okay. But --

MR. MARSHALL: -- and didn't have the right to object.

JUSTICE BARRETT: -- that's looking ahead to the plan. I guess what I want to say is that 1109(b) says that "a party in interest," including our list, "may be heard on any issue" in a case under this chapter. So if they can be heard on the plan finding or if they're a creditor, I guess I don't understand why, on the text of that provision, they could be so limited and say, well, you can't bring up anything else, even though the text says "any issue." It doesn't limit it in that way.

MR. MARSHALL: I'll address that in two respects. So the plan finding, again, is the question of whether they are a party in interest in the first place. It's a threshold question. It's like deciding jurisdiction or statutory standing. And you have to get through that to get to the merits.

So as an insurer, nothing about the plan finding changes whether or not Truck is a party in interest. They're not. As to a creditor, we're talking about the right to object to a particular plan that leaves them unimpaired. And although 1109(b) has that general language, 1126(f) more specifically says that an unimpaired creditor is presumptively -- is conclusively presumed to --

JUSTICE BARRETT: Well, Mr. Marshall, maybe I'm not understanding about the plan finding. I mean, it's true that, at the end, the court said that Truck wasn't harmed. But, you know, what if the -- what if the court had decided otherwise? In the beginning, they don't know whether it's going to be collusive or violate Kaiser's duty of good faith, right?

Maybe I'm just misunderstanding. I mean, it went in your favor, but --

MR. MARSHALL: Party-in-interest status is a threshold question. You have the right to come in and litigate whether you're a party in interest or not. And that's all the plan finding did. It determined that their rights were not abridged and, therefore, they were not a party in interest.

JUSTICE JACKSON: So, Mr. Marshall --

MR. MARSHALL: If that had gone differently, then, yes, they could have objected to the rest of the plan, to the merits.

JUSTICE GORSUCH: Mr. Marshall, you have agreed that they were a party in interest, to the extent they were a creditor, right?

MR. MARSHALL: Yes.

JUSTICE GORSUCH: And normally a creditor or a party in interest can be heard on any issue. You agree with that?

MR. MARSHALL: That's the text of 1109(b).

JUSTICE GORSUCH: Okay. And you've been citing 1124 and 1126 to us, I understand and appreciate that, but that -- that governs who can vote, right?

MR. MARSHALL: That is what it explicitly says, yes.

JUSTICE GORSUCH: It doesn't talk about what they can argue about or be heard on, right?

MR. MARSHALL: It says they are conclusively presumed to have accepted the plan.

JUSTICE GORSUCH: Right.

MR. MARSHALL: And an inference from that is that it would be absurd to vote to -- in favor --

JUSTICE GORSUCH: So if you can't vote, you can't be heard; is that -- is that your argument then?

MR. MARSHALL: You can't be heard on the merits of the plan. And that's what the circuit courts have said. We cited cases and Truck cited some cases allegedly to the contrary, but they are actually not, because all they do is determine where -- whether the creditor that wants to object to the merits of the plan is actually impaired.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

JUSTICE THOMAS: No.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

Justice Kagan?

Justice Gorsuch?

JUSTICE GORSUCH: No.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

Justice Jackson?

JUSTICE JACKSON: Can I just ask one question? At the threshold you keep saying at the threshold they have no interest in the estate property.

Do you dispute that they have a potential to have an interest in the estate property, that insurers do? Because the plan isn't in existence yet. Do you -- do you dispute that they have the potential?

MR. MARSHALL: Borrowing from intervention law, the question would be when is their interest put at issue. And it's somewhat like the -- which would be is a plan proposed that would breach your contract and give you an interest in the estate. And it's analogous to what the actual history is with executory contracts.

So the -- the -- the -- the -- the statutory history that the government invokes actually says -- suggests you're a party in interest when there is a motion to reject an executory contract because that would create a claim, a breach, and make you a creditor.

JUSTICE JACKSON: I guess I don't understand your answer.

MR. MARSHALL: So when -- when it's put at issue.

JUSTICE JACKSON: When it is put -- why isn't it put --

MR. MARSHALL: If you're an insurer, you're not on the list. Nothing makes you --

JUSTICE JACKSON: Right --

MR. MARSHALL: -- a party in interest.

JUSTICE JACKSON: -- but this says "including," so we know there are things -- there are entities that may not be in the list, right?

MR. MARSHALL: Correct.

JUSTICE JACKSON: Okay. So the question is they come to the table at the beginning, and they say: We think we should be in the list because we have a potential through the reorganization plan that will be adopted to be affected.

And you say not party in interest because you're not already affected or it's not clear to us right now that you're affected. Is that your position?

MR. MARSHALL: If we're talking about Truck as insurer --

JUSTICE JACKSON: Yes.

MR. MARSHALL: -- yes.

JUSTICE JACKSON: All right.

MR. MARSHALL: But once a plan is proposed --

JUSTICE JACKSON: Right.

MR. MARSHALL: -- that would breach

your contract --

JUSTICE JACKSON: So can I ask you, if people who are not potentially affected are not parties in interest, I guess I don't understand Congress's suggestion that parties in interest should be a part of the reorganization.

In other words, the context in which there -- what -- what's valuable to them about being a party in interest is the fact that they then get to talk with everybody about how this is going to go.

And the problem I'm having with your argument is it suggests that it's only after we know or after they know that they're definitely affected that they get a seat at the table, but the whole point of it is that the parties in interest get to talk about it.

So it seems to me it would have to include people who have a clear potential for being affected by the plan that we're all hammering out in this discussion.

MR. MARSHALL: There's nothing in 1109(b) itself that says it has to be determined, once and for all, at the outset. And if we're talking about someone who's not in the list, the only way to know if you're a party in interest is do you have an interest in the bankruptcy estate?

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK

ON BEHALF OF THE CLAIMANT RESPONDENTS

MR. FREDERICK: Thank you, Mr. Chief Justice and may it please the Court:

There are a number of questions I would like to address that you posed this morning, but I want to start with one principle, which is that the Bankruptcy Code was not intended to protect insurers, except in a couple of places where asbestos-related trusts are created, those are in Section 524(g) principally, but in 109, Congress said an insurer can't invoke bankruptcy for protections under the code.

So, Justice Kavanaugh, to your question about the text and practicalities, Congress answered the question of whether an insurer should be permitted to butt into a debtor's bankruptcy and try to use it to protect its own financial interests. The bankruptcy process is designed to ensure that the debtor can maximize its assets for the benefit of creditors.

And so what the insurer as insurer is doing here is seeking to co-opt the debtor's bankruptcy for the purpose of protecting its own interests.

Justice Thomas, I can start with the timing question, if you like.

JUSTICE THOMAS: Well, let me -- well, you can start with that, but also I think that the -- their interest isn't so much in feathering their own nest per se, but, rather, that they be treated with the anti-fraud provisions the same way that the claims under the trust are being treated.

MR. FREDERICK: Yes. And let me start with -- I am going to call these pretrial disclosure requirements because Truck had six months of discovery to try to prove any fraud with the Kaiser claimants and came up with crickets.

What they are calling anti-fraud

prevention measures are really requirements to impose on state courts that before a claimant can file a claim, a claimant has to comply with what Truck wants for information that a state court might or might not require under state court rules of procedure.

So if you were to accept the idea that their nomenclature drives the outcome here, you're essentially saying bankruptcy courts have the authority to tell state courts how to do their discovery process.

And, Justice Barrett, that's why we're fighting this because the claimants shouldn't be required to impose on themselves and their families a lot of information that if Truck really wanted it, he could ask for it in state court discovery proceedings and state court judges could decide --

JUSTICE SOTOMAYOR: Mr. Frederick --

MR. FREDERICK: -- is that relevant or burdensome or not?

JUSTICE SOTOMAYOR: -- why do all these other circuits and other bankruptcy courts impose it? If they felt the same way that you're arguing, are they violating the

Bankruptcy Code by -- or disrespecting state courts because that's what they require?

MR. FREDERICK: No. The requirements here are only for a very small class of claims that are called extraordinary claims. And they are extraordinary claims, it's defined at JA 427, under the plan. These are not insured claims where the claimant is seeking to say that Kaiser was responsible for the vast bulk of its exposure to asbestos.

And in that very unusual circumstance, which actually in the implementation of this plan hasn't arisen yet, the requirement is for that claimant to come forward with proof of a negative, that it hadn't been exposed to asbestos by any other potential tortfeasor. And so we're talking about a very narrow class with a description for a very particularized purpose that Truck wants to appropriate and force so that claimants will have less of an opportunity to invoke their jury trial rights in state court, which are protected under the U.S. code.

JUSTICE SOTOMAYOR: But why -- why should you, as the debtor trust, have that advantage and not give it to them?

MR. FREDERICK: Because --

JUSTICE SOTOMAYOR: That's -- that's the different in treatment that they're claiming is contrary to the plan.

MR. FREDERICK: It's not, for this reason. The -- the treatment by Kaiser of Truck is exactly the same before bankruptcy as it was now. Truck agreed to --

JUSTICE SOTOMAYOR: But bankruptcy changes everyone. It changes who the debtor is to the trust. It -- by its own terms, it's extinguishing the debtor's obligation -- obligations to anyone, except under the extant contract, but the incentives are different. There is inherent change.

MR. FREDERICK: That's why the principle of insurance neutrality, which was developed 30 years ago in the courts of appeals and has actually followed in every single court of appeals that has addressed this question, has looked at whether the insurers' legal obligations are altered, and if they are not --

JUSTICE SOTOMAYOR: You're still -- then circle back to my initial question. Other bankruptcy codes have imposed these same requirements and they have done it. Are they breaching bankruptcy law? Are they stepping on state courts in an improper way?

What are they doing? And why are you fighting something that you admit your claimants in discovery might well have to give up?

MR. FREDERICK: Because it is up to the state court to decide that.

JUSTICE SOTOMAYOR: Why?

MR. FREDERICK: Because they are the ones that will be superintending discovery.

JUSTICE SOTOMAYOR: But what -- what does that have to do with the --

MR. FREDERICK: Because the --

JUST SOTOMAYOR: What does that have to do with anything? Meaning, you know, if -- if -- you eventually in -- in most jurisdictions will have to give up something like that because there is very few jurisdictions who would say they have to pay the entire cost if there's multiple exposures or they have to pay the entire cost if other people have paid you. That's all that's being sought.

MR. FREDERICK: It's more than that, Justice Sotomayor, which is why they're fighting so hard for it. And -- and I want to make this very clear, that the point of the extraordinary procedure is because the trust itself is having to pay the claims. They are not insured by definition. And to protect --

JUSTICE SOTOMAYOR: That's the whole point.

MR. FREDERICK: No.

JUSTICE SOTOMAYOR: You're trying to give yourself something more than you're giving someone else, and you want to reach into their pocket and say I'll give myself more than you.

MR. FREDERICK: Because the contract of insurance, which they litigated for 19 years in California state courts, definitively determined they will have to pay the claimants who are insured --

JUSTICE KAGAN: So I think I'm getting the equities of this, Mr. Frederick, as you describe it, is that they had a contract and they've been protected as to that contract, and they're just looking to get a better deal now and to kind of take advantage of the bankruptcy. So I'm getting the equities here.

I'm not getting where you derive from

the text the idea that they're not parties in interest because they have a material interest in what comes out of the bankruptcy proceeding, and they can improve their position materially in the bankruptcy proceeding.

MR. FREDERICK: The cases that we cite historically under the Transportation Act of 1920 make very clear that if you're just seeking a benefit, you don't get party-in-interest status. You have to show aggrievement and harm to your pre-position.

JUSTICE KAGAN: So those are some 1920s cases. Do you have anything in the text that can suggest that the text has incorporated that view?

MR. FREDERICK: We don't have anything like that, although I would point to the history that the Debtors' brief very helpfully lays out, which explains how the original -- origination of the Bankruptcy Code went through these iterations and accepted those principles for party in interest.

And I think that it makes sense from an Article III perspective too because the other side is essentially saying Article III has no role to play here, where a bankruptcy process is a multifaceted fight over a res. What is the debtor's estate? Who gets that property?

And so those claims are going to be somewhat flowing in and out. And it is imperative in the 524(g) context that you recognize Article III has a role to play. Why? Because the district court has to enter the final injunction. The bankruptcy court does not have the authority to do that under the statute.

JUSTICE GORSUCH: Mr. Frederick, I certainly get your arguments and why they might persuade a bankruptcy court to rule for you and not require these anti-fraud provisions.

But I think you've admitted that a court can do those provisions and they have done them in other cases lawfully, right?

MR. FREDERICK: For the trust's benefit, but not where there's an insurance neutrality --

JUSTICE GORSUCH: Okay.

MR. FREDERICK: -- clause.

JUSTICE GORSUCH: So -- so -- so the question becomes, can they be heard? That's the only question before us. Can they be heard at all? And I guess I'm struggling on that one.

We're not discussing the power of the court. We're not discussing what it might rule. We're only discussing who can be heard. And I think you -- you have to acknowledge that there are creditors who can be heard, even if it's a virtual certainty that they will get nothing or a virtual certainty they will get a hundred cents on the dollar.

MR. FREDERICK: Right.

JUSTICE GORSUCH: They still can be heard.

MR. FREDERICK: They can be heard until the point where their impairment is determined.

JUSTICE GORSUCH: Well, they -- they may not have a vote, but they can be heard on any issue. No?

MR. FREDERICK: Until their impairment has been determined, Justice Gorsuch. That's the key point. That's --

JUSTICE GORSUCH: Where do you get that from?

MR. FREDERICK: 1126(f).

JUSTICE GORSUCH: That's -- that's who

votes.

MR. FREDERICK: But the point of voting is who can hear, and the whole point of the chart which you can see the bankruptcy court's determination, is who's impaired or not because the bankruptcy court has to get to an end place. There were a dozen insurers here, and under their position, there is no limiting principle to any of those insurers who could continue to fight because they want to get benefits out of a bankruptcy process that Congress foreclosed to them.

JUSTICE GORSUCH: Do you agree on Article III that that's with respect to a plaintiff coming to court and not with respect to those who object under Bond?

MR. FREDERICK: No, I don't agree with that.

JUSTICE GORSUCH: You disagree with Bond and Clapper on that?

MR. FREDERICK: I think that -- I think Clapper is actually more helpful for our side, Justice --

JUSTICE GORSUCH: What about Bond?

MR. FREDERICK: Bond, I think that the

point is where the effort by the objector in this situation is seeking to get a benefit and must show under Article III that it has injury in fact that is redressable and traceable to the plan.

Here, Truck can't satisfy either because its redressability problem is really because they think state courts are not going to be adequate to police fraud, and they don't -- they are not able to trace their harm as insurer to the plan because of the insurance neutrality provision.

And so I think there's a very serious Article III question here that Truck is essentially guided by in this argument this morning, but I want to urge you to take that very seriously because it can't be the case that we have, like, a law school seminar or anybody who wants to come and talk gets to talk. The whole point of a bankruptcy proceeding is get to a confirmed plan, and the only way to do that is to weed out the people who have something that they want to say and to have different threshold provisions.

So, Justice Thomas, I wanted to get

back to your timing question. At the disclosure statement, the -- the debtor has to present a plan. That is where the issues of insurance neutrality typically are going to be addressed. And at confirmation, we are knowing then that the creditor is impaired or not impaired.

So those are the two key timing mechanisms. It can't be at the outset of a bankruptcy because there isn't enough known about the nature of the estate --

CHIEF JUSTICE ROBERTS: Well, if he's not impaired, doesn't have he have an interest in making sure that doesn't change?

MR. FREDERICK: He does, but that's where the confirmation of the plan comes in. And that's, why if you look at the chart, Mr. Chief Justice, there's a -- this group is unimpaired, this group is unimpaired because they are paid in full.

And Truck was paid in full for its premiums. So it is not an executory contract, which, under the Vern Countryman definition, was where there was un- -- lack of performance on both sides of the contract. Here, the debtor performed on the contract. The debtor paid all the premiums.

And so it is a non-executory contract, which I think helps give the lie to the government's position that calling something an executory contract is somehow going to solve the problem here, where you've got performance that is occurring at different levels and at different stages.

And that's why the DOJ policy manual itself says be very careful about invoking executory contracts because they're not defined in the bankruptcy code and it's very difficult to know how to administer them in practice.

And so for the government to be suggesting that you have a test here that is so malleable, where the interest of claimants and creditors is critically important to understanding how to weed out the various muckrakers, where the United -- and I would point you to the policyholders' brief, pages 12 to 14, which talks about just how long the insurers have an interest. Why? Delay is profit-maximizing. Every day insurers do not have to pay on their claims is a good day for the insurers, and so they have every incentive to tell their lawyers: Go in and object to everything because that will delay the process.

We could have had this plan confirmed five years ago. The only objector was Truck. Every other insurance company agreed to the plan. And so, by adopting some rule that everybody gets to be heard and everybody gets to participate --

JUSTICE BARRETT: Truck -- isn't Truck on the hook for the majority of claims?

MR. FREDERICK: Truck and other insurers.

JUSTICE BARRETT: But doesn't -- isn't Truck responsible for the lion's share?

MR. FREDERICK: That's what they say, and I have no reason to doubt it. But, Justice Barrett, where do you draw the line there? Do you say they're an insurer that's responsible for two-thirds gets it? We heard --

JUSTICE BARRETT: I was just saying that it means less that other insurers didn't object if they didn't have the same stake in the claims.

MR. FREDERICK: We don't know what the comparative issues are. The excess insurance part is under a confidentiality standard that I have not seen and I can't tell you in court what that entails.

JUSTICE BARRETT: Could you be a party in interest at the --

MR. FREDERICK: But what I can say, Justice Barrett, is that it can't be a size issue because there's no way to draw a line on a size issue. What do you say? It's a quarter is enough, or six insurance companies, that each have an equal stake, is enough? How do you -- there's no --

JUSTICE BARRETT: Can I ask you a timing question? Can you be a party in interest -- I'm just trying to understand your point about how things change as the -- as the plans develop.

Chief, do you want me to --

CHIEF JUSTICE ROBERTS: Sure. No.

JUSTICE BARRETT: -- stop?

CHIEF JUSTICE ROBERTS: Go ahead.

JUSTICE BARRETT: Can you be a party in interest at the beginning and then not be a party in interest as it becomes clear your interest isn't impaired? Is that what you're saying?

MR. FREDERICK: I'm saying that impairment is treated differently. So you can be a creditor --

JUSTICE BARRETT: Yeah.

MR. FREDERICK: -- and a party in interest, but you are not allowed then to vote on a plan and thereby exercise your voice through your vote.

JUSTICE BARRETT: Okay.

MR. FREDERICK: The -- the code treats that differently. And it's odd to suppose that an unenumerated party like an insurance company is treated better than an insurance -- than a -- than a creditor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

I just want to follow up. You were just making the point that you can't draw that line.

I mean the law does that all the time, right? I don't care where it is and it may be the majority or a significant part of it or whatever.

MR. FREDERICK: And -- and that's why

I think looking to the guidance of the courts of appeals is actually humbling at one level but also instructive.

For 30 years, courts of appeals have looked at this idea of insurance neutrality to determine whether a plan is materially altering preexisting legal obligations.

In those cases where the court has said yes, it is, insurance companies are allowed to be parties in interest. That's the Thorpe case out of the Ninth Circuit, the Global case out of the Third Circuit.

But in those situations where there is an insurance neutrality provision and the insurance company is not able to say with any proof that it's legal obligations are materially altered, the courts of appeals have said: You're not a party in interest.

CHIEF JUSTICE ROBERTS: Well, wouldn't Truck want to have something to say about the division that you have just cited?

MR. FREDERICK: And they do, Mr. Chief Justice, because that issue is litigated. When my friend was talking about this being at the threshold, the whole question is, is the insurance company's legal obligations, are they impaired or not? And that fight is a very vigorous fight --

CHIEF JUSTICE ROBERTS: But it's -- it -- that fight continues beyond what you're calling the threshold.

MR. FREDERICK: It -- it -- it does and it is. But at a point where the plan is confirmed and we know there will be insurance neutrality, and we know that their rights as a creditor are not giving them a right to vote, at that point, it should stop and the four years that we spent doing appellate litigation here ought not to be necessary.

CHIEF JUSTICE ROBERTS: Okay.

Justice Thomas?

Justice Sotomayor?

Justice Kagan?

Justice Gorsuch?

JUSTICE KAVANAUGH: Can I just ask because you called them muckrakers.

(Laughter.)

JUSTICE KAVANAUGH: The amicus brief for the professors on the other side, and you can just respond to this, says, "indeed, when an insurer faces millions of dollars in financial liability, like Petitioner does here, common sense and fundamental bankruptcy policy dictate that it be considered a party in interest in the bankruptcy proceeding."

So you can just -- I mean, this is repeating what you've said probably but that sounds different from muckrakers.

MR. FREDERICK: Well, what I would say, Justice Kavanaugh, is that a party in interest has extraordinary rights. They have the right to contest the trustee, the appointment, the powers of the trustee. They can object to the lifting of the automatic stay.

They can ask for the elimination of a plan. They can ask for the transformation of it from a Chapter 11 to a Chapter 7. And those powers are -- are -- are and all rights are very powerful and they take bankruptcy courts an enormous amount of time to thoughtfully and consciously work their way through.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: No.

CHIEF JUSTICE ROBERTS: Justice Jackson?

Thank you, counsel.

MR. FREDERICK: Thank you.

CHIEF JUSTICE ROBERTS: Ms. Ho, you have rebuttal.

REBUTTAL ARGUMENT OF ALLYSON N. HO

ON BEHALF OF THE PETITIONER

MS. HO: Thank you, Mr. Chief Justice. Three points. Two quick and one a little bit longer.

One, just to really underscore 1126(f), that is about voting. That is not about what 1109(b) about, which is being heard, two very different things.

Number 2, on intervention. Congress did away with the requirement that parties in interest must intervene when it replaced 206 and 207 with 1109(b).

And three, my -- my friends have talked a lot about the insurer in this case trying to get something out of the bankruptcy or seek a benefit.

Trying to stem the tide of over-inflated claims is not seeking a benefit.

It's just trying to make sure that the plan complies with the code as bankruptcy judges have an independent duty to ensure.

And even if you disagree with me on that, it's -- it's undisputed that Truck is going to pay the vast bulk of claims in this case, that the plan finding adjudicates Truck's insurance rights, that Truck is a creditor because the insurance deductible, so it really is a party in interest several times over. And I haven't heard from my friends on the other side any justification for reading any issues out of the text.

1109(b) gives stakeholders a voice, not a vote, and certainly not a veto. We would respectfully ask the Court to reverse and remand.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MS. HO: Thank you.

CHIEF JUSTICE ROBERTS: The case is submitted.

(Whereupon, at 12:50 p.m., the case was submitted.)

Toxins-Are-Us II

By Henry S. Rauschenberger[1]

The Disallowance of Claims for Future Remediation Costs

A Novel Approach Yields Typical Results

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In *In re Kaiser Gypsum Co.*, a creditor seeking contribution for remediation costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) attempted a novel "trick play" to get around the disallowance of claims for future remediation costs under § 502(e)(1)(B) of the Bankruptcy Code.[2] Although the creditor's gambit was ultimately unsuccessful, the U.S. Bankruptcy Court for the Western District of North Carolina's ruling in *Kaiser Gypsum* provides a stark reminder of the harsh and inequitable outcomes that can result from the interplay between CERCLA and § 502(e)(1)(B), and of the fundamental dissonance between the underlying polices of CERCLA and the Bankruptcy Code.

Disallowance of Claims for Future Remediation Costs

The longstanding tension between bankruptcy law and CERCLA has been the topic of considerable discussion by practitioners, legal scholars and the courts.[3] This tension arises from the inherent conflict between the Code's "fresh start" policy and CERCLA's aim of allocating the cost of remediating environmentally contaminated sites among all potentially responsible parties (PRPs).[4] In particular, this tension is apparent when it comes to claims for future remediation costs.

CERCLA provides for two distinct causes of action: "cost recovery" under 42 U.S.C. § 9607(a), commonly known as § 107(a); and "contribution" under 49 U.S.C. § 9613(f)(1), commonly known as § 113(f)(1). Section 107(a) "cost recovery" actions allow a party, such as a private-party landowner or the U.S. government, that has incurred cleanup and remediation costs at a contaminated site to seek full recovery of its expenses from any identifiable PRP. A § 113(f)(1) "contribution" action allows a PRP to seek contributions from other PRPs for the portion of their incurred remediation costs that exceed their share of liability for the contamination of the site. Accordingly, § 113(f)(1) claims require that the percentage of each PRP's liability for the contamination of the site be apportioned.[5]

When an identified PRP files for bankruptcy, any other PRP that has already incurred remediation costs that exceed its share of liability has a general unsecured claim for contribution against the bankruptcy estate.[6] Accordingly, if the remediation process for a site has already been completed, no conflict between CERCLA and the Bankruptcy Code arises, as any PRP that has incurred cleanup and remediation costs may still seek contribution from the estate of the bankrupt PRP. Conflict arises when a PRP files for bankruptcy while remediation is ongoing and/or has not yet begun. Due to the operation of § 502(e)(1)(B), in such a situation, solvent PRPs have a claim for any remediation costs that they have already incurred, but are left "holding the bag" for any future costs that might need to be incurred to complete the remediation of the site.[7]

Section 502(e)(1)(B) provides that "the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on ... the claim of a creditor, to the extent that ... such claim for reimbursement is contingent as of the time of allowance or disallowance of such claim." Section 502(e)(1)(B) serves the purpose of preventing competition between a creditor and a guarantor over the limited proceeds in the bankruptcy estate.[8] The determination of whether a claim is "contingent" is made at the time of allowance or disallowance of the claim and concerns both payment and liability.[9] As such, a claim for contribution is contingent until liability has been established *and* the co-debtor has paid the creditor.[10]

When addressing contribution claims for future remediation costs under CERCLA, courts have consistently disallowed such claims as contingent under § 502(e)(1)(B) because although liability may have been established, there has been no payment yet on the PRP's part seeking contribution.[11] This leads to some inequitable results, leaving some

1 The author thanks Olivia Guidry for her assistance revising and editing this article.
2 2020 Bankr. LEXIS 3208, at *8 (Bankr. W.D.N.C. Nov. 13, 2020).
3 *See, e.g.*, Arleen Elgart Mirsky, *et al.*, "The Interface Between Bankruptcy and Environmental Laws," 46 *Bus. Law.* 623 (1991).
4 Philippe J. Kahn, "Bankruptcy Versus Environmental Protection: Discharging Future CERCLA Liability in Chapter 11," 14 *Cardozo L. Rev.* 1999, 1999-2000 (1993).
5 *In re APCO Liquidating Tr.*, 370 B.R. 625, 632 (Bankr. D. Del. 2007) (citing 42 U.S.C. § 9613(f)(1)).
6 *Route 21 Assocs. of Belleville v. MHC Inc.*, 486 B.R. 75, 93 (S.D.N.Y. 2012).
7 11 U.S.C. § 502(e)(1)(B).
8 *Route 21*, 486 B.R. at 94.
9 *In re Drexel Burnham Lambert Grp.*, 148 B.R. 982, 986 (Bankr. S.D.N.Y. 1992).
10 *In re APCO Liquidating Tr.*, 370 B.R. at 636.
11 *See Route 21*, 486 B.R. at 98 (contribution claim for future remediation costs disallowed as contingent); *In re APCO Liquidating Tr.*, 370 B.R. at 636-37 (same); *In re Lyondell Chem. Co.*, 442 B.R. 236, 248 (Bankr. S.D.N.Y. 2011) (same).

PRPs on the hook for cleanup costs related to contaminated property for which they are not solely responsible.[12] Courts have justified these inequitable results under the theory that § 502(e)(1)(B) fosters CERCLA's purpose by promoting the expeditious cleanup of hazardous waste sites.[13] These courts theorize that § 502(e)(1)(B) will encourage PRPs to expend funds cleaning up a site sooner rather than later. As summarized by the court in *In re Eagle Picher Industries*:

> The bankruptcy court found that § 502(e)(1)(B) fosters the purpose of CERCLA, which is to promote the expeditious cleanup of hazardous waste sites by authorizing private parties who assume financial responsibility for a cleanup to seek contribution from other responsible parties before a determination of who necessitated the cleanup is made. The bankruptcy court noted that Congress believed this goal would be met and parties would be more willing to expend resources on a cleanup if they were assured of their right to seek contribution from others. The bankruptcy court found that § 502(e)(1)(B) furthers this goal by requiring those who seek contribution to incur the expense relating to a cleanup before stating an allowable claim.[14]

As interesting as this theory is, it still leaves claimants on the hook for a disproportionate amount of cleanup costs related to hazardous waste sites. Because of this, claimants (*e.g.*, the claimant in *Kaiser Gypsum*) have gotten creative in crafting their claims in an effort to avoid this inequitable result.

The *Kaiser Gypsum* Case

In *Kaiser Gypsum*, Glacier Northwest Inc. had filed multiple claims in the bankruptcy of Kaiser Gypsum Co. Inc. and its affiliate debtor, Hanson Permanente Cement Inc., seeking contribution under CERCLA and the Washington Model Toxics Control Act (MTCA) for costs that it had incurred in the ongoing remediation of the Lower Duwamish Waterway near the Port of Seattle.[15] Glacier is the current owner of approximately 18 acres (the "property"), which it uses as a wholesale bulk cement distribution terminal.[16]

Prior to Glacier's ownership, the property and the area in which it was located had a long history of extensive industrial activity dating back to the 1930s, resulting in its contamination with a number of pollutants.[17] Hanson had owned the property prior to Glacier, and it had also operated a wholesale bulk cement distribution terminal.[18]

In 1991, after discovering that the property that it had just purchased was contaminated, Glacier invited Hanson and other PRPs to join it in an investigation and cleanup effort.[19] This invitation was declined, prompting Glacier to file suit against one of the PRPs it had identified, Reichhold Chemicals Inc., under CERCLA and the MTCA.[20] However, Glacier did not file suit against Hanson at this juncture.[21] In 1995, Glacier and Reichhold settled, at which time both agreed to cooperate and share the costs of investigation and remediation, with Reichhold taking on 75 percent of the cost (and taking the lead in managing the effort) and Glacier taking on 25 percent of the cost.[22]

> **Hazardous waste sites generally take years, sometimes decades, to remediate.... In reality, there is no mechanism and no possibility for such a PRP to "hurry things up[.]"**

In 2001, the U.S. Environmental Protection Agency (EPA) added the entire lower five miles of the Lower Duwamish Waterway to the Superfund National Priorities List.[23] In 2014, the EPA issued a final CERCLA record of decision selecting the cleanup remedy for the site.[24] Both Glacier and Hanson were identified as PRPs in relation to the contamination of the site.[25] In 2010, Hanson received a CERCLA § 104(e) information request from the EPA in connection with the superfund site, to which it responded and confirmed its past ownership of the property.[26]

In 2014, Reichhold filed for chapter 11.[27] Glacier timely filed a proof of claim that was ultimately settled, with Glacier releasing all of its claim against Reichhold. Reichhold assigned to Glacier the right to recover from third parties all costs, fees and expenses incurred by Reichhold in responding to the contamination of the property.[28]

In 2016, Kaiser Gypsum and Hanson commenced a chapter 11 case in the U.S. Bankruptcy Court for the Western District of North Carolina in which Glacier asserted claims for contribution against both Kaiser Gypsum and Hanson under CERCLA and the MTCA.[29] Glacier subsequently withdrew its claims against Kaiser Gypsum and one of its claims against Hanson, but maintained its claim against Hanson seeking recovery of past response costs incurred in relation to the remediation of the upland part of the property.[30]

Glacier maintained that it and Reichhold (whose right to reimbursement had been assigned) had together incurred somewhere around $8.6 million in past remediation costs, and that Hanson should contribute an amount equal to 37.5 percent of that expenditure.[31] Hanson objected to Glacier's claim, arguing that it was unenforceable under

12 *See, e.g., Route 21*, 486 B.R. at 98 ("Route 21's predicament is a sympathetic one. It has spent much money remedying pollution that it did not cause, but is left with only a general unsecured claim for some $1 million.").
13 *In re Hemmingway Transp.*, 993 F.2d 915, 924-25 (1st Cir. 1993) ("Although on occasion section 502(e)(1)(B) may impede CERCLA's subsidiary policy of promoting equitable allocations of environmental cleanup costs among responsible parties, pre-'fixing' disallowance does not conflict with CERCLA's *primary* goal — encouraging targeted PRPs to initiate cleanup efforts as expeditiously as practicable in the expectation that their contingent claims may become 'fixed' in time for allowance against the debtor's estate." (emphasis in original)).
14 *In re Eagle Picher Indus.*, 164 B.R. 265, 268 (S.D. Ohio 1994).
15 *In re Kaiser Gypsum Co.*, 2020 Bankr. LEXIS 3208, at *6-7.
16 *Id.* at *8.
17 *Id.* at *19.
18 *Id.* at *21.
19 *Id.* at *34.
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.* at *31.
24 *Id.*
25 *Id.* at *32.
26 *Id.* at *31-32.
27 *Id.* at *36.
28 *Id.* at *36-37.
29 *Id.* at *6.
30 *Id.*
31 *Id.* at *37-38.

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applicable law, and contented that if the claim were allowed, the amount of the claims should be *de minimus*.[32] Ultimately, the bankruptcy court found that Hanson was liable for response costs incurred to address the contamination, then it turned its attention to the equitable allocation of this liability under CERLA and the MTCA.[33]

Glacier had initially asserted, then withdrew, a direct claim for future remediation costs, knowing that such a claim would be disallowed pursuant to § 502(e)(1)(B).[34] However, Glacier still was not ready to completely abandon its potential recovery of future remediation costs. In a novel move, Glacier argued that Hanson should be apportioned a greater share of liability for the costs already incurred in remediating the property to make up for the fact that Hanson was going to escape paying for the remediation costs going forward.[35] In essence, Glacier suggested to the court that the future costs it would incur in its continued remediation of the property should be factored into the court's determination of Hanson's allocable share of liability for the remediation costs already incurred.[36]

As creative as this suggestion was, it was ultimately rejected by the court on the grounds that § 502(e)(1)(B) prohibits allowing claims for future environmental costs. Thus, taking such future costs into account in the allocation liability for past remediation costs would effectively be an "end-run around section 502(e)(1)(B) to achieve the outcome it expressly prohibits."[37] Ultimately, the court (after applying the *Gore* factors) allocated to Hanson only a 5.42 percent share of the past remediation costs related to the property.[38] Applying this percentage to Glacier's allowed recoverable costs of $6,737,599.34, the court allowed Glacier an unsecured claim against Hanson for $365,177.89.[39]

An Inequitable Result

The result in *Kaiser Gypsum* is a perfect illustration of the inequitable results that can occur at the intersection of environmental and bankruptcy law. In *Kaiser Gypsum*, a party (Glacier) that took proactive steps to begin the process of investigating and remediating the environmental contamination of a piece of property, incurring in the process millions of dollars of costs and expenses, is on the hook for future remediation costs, while Hanson, a party that failed to participate in ongoing remediation activities, is getting to walk away from these future costs. This harsh outcome faced by Glacier is a direct result of the inherent conflict between the underlying policy of CERCLA to hold PRPs accountable for environmental contamination and its remediation, and the Bankruptcy Code's countervailing policy of providing debtors a "fresh start."[40] In *Kaiser Gypsum*, Hanson got its "fresh start," while Glacier was left "holding the bag."

As inequitable as the result in *Kaiser Gypsum* might be, it is no surprise, given the history of bankruptcy courts' treatment of such claims. The result in *Kaiser Gypsum* illustrates the falsity of the theory that while § 502(e)(1)(B) might conflict with CERCLA's subsidiary goal of promoting equitable allocations of environmental cleanup costs, it does not conflict with CERCLA's primary goal of encouraging PRPs to act expeditiously to initiate cleanup efforts.

In *Kaiser Gypsum*, Glacier acted proactively and responsibly, and began incurring investigation and remediation costs without significant delay. In contrast, Hanson took no proactive steps and, apparently, actively declined to participate in the remediation of the site. Yet, by the court's decision, Glacier is the party that is effectively penalized. Ultimately, decisions like *Kaiser Gypsum* illustrate the truth that § 502(e)(1)(B) does little to further CERCLA's primary goal and often only operates to cause manifestly unfair allocations of the financial responsibility for cleaning up hazardous waste sites.

Hazardous waste sites generally take years, sometimes decades, to remediate.[41] Even when a particular PRP expeditiously begins investigation and cleanup activities, such as Glacier in *Kaiser Gypsum*, that PRP still faces years of near-guaranteed work and expenditure. In reality, there is no mechanism and no possibility for such a PRP to "hurry things up" to ensure that all of its contribution claims against its co-PRPs become "fixed" and noncontingent. Accordingly, until there is some change in the Bankruptcy Code, § 502(e)(1)(B) will remain a significant roadblock to the equitable allocations of environmental cleanup costs among PRPs under CERCLA and will continue to leave proactive PRPs unjustly "holding the bag," no matter how creatively they argue for a more just result. abi

32 *Id.* at *44-45.
33 *Id.* at *51-52.
34 *Id.* at *69.
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.* at *84.
39 *Id.* at *97.

40 Brian A. Cahalane, "CERCLA and the Fresh Start: Quelling the Eternal Conflict," 4 *ABI L. Rev.* 265 (Spring 1996), *available at* abi.org/members/member-resources/law-review (unless otherwise specified, all links in this article were last visited on May 25, 2021).
41 *See, e.g.*, John Myers, "Arrowhead Refinery Site in Hermantown Finally Removed from Superfund List," *Duluth New Tribune* (May 17, 2021), *available at* duluthnewstribune.com/news/science-and-nature/7032437-Arrowhead-Refinery-site-in-Hermantown-finally-removed-from-Superfund-list.

MARCH 21, 2024

Supreme Court Hears Argument on Who Has Standing in Bankruptcy Cases

> The Supreme Court may decide that standing in bankruptcy cases is more flexible and that Article III standards don't apply in chapter 11 cases.

The Supreme Court heard oral argument on March 19 in *Truck Ins. Exch. v. Kaiser Gypsum Co.*, the third bankruptcy case of the term. To resolve a split of circuits, the high court will decide whether any creditor or "party in interest" may object to confirmation of a chapter 11 plan, even if the creditor has no financial stake underpinning the objection.

In other words, may creditors object to provisions in plans that do not affect them?

As usual, the outcome is impossible to determine based on the justices' questions from the bench. It appears to this writer that the justices were struggling with several questions:

(1) Are Article III standards for constitutional standing applicable in chapter 11 cases?

(2) In a bankruptcy case, is standing established on filing, or sometime later in the case?

(3) Can a creditor with standing at the outset lose standing later in the case?

(4) Is standing as defined in Section 1109(b) coterminous with constitutional standing?

(5) Can Section 1109(b) be unconstitutional as applied if the section grants standing to someone who does not have constitutional standing?

(6) Do creditors and other "parties in interest" under Section 1109(b) have standing throughout the case to object to anything, even issues that do not affect them financially?

The justices recognized that bankruptcy cases are different from ordinary civil litigation, where principles of constitutional standing were developed. When deciding whether an order from a bankruptcy court is final and appealable, the Court developed a flexible approach.

Will the justices adopt a similarly flexible approach in fashioning standing requirements for bankruptcy cases? Or, are bankruptcy cases inflexibly bound by traditional Article III "case or controversy" standards?

However the Court rules about standing in chapter 11 cases, will the same rules apply in cases under chapters 7, 12 and 13, where Section 1109(b) is not applicable?

The Chapter 11 Plan Was 'Insurance Neutral'

For a more thorough discussion of the facts in *Truck Insurance*, **click here** to read the ABI story published when the Court granted *certiorari*.

Briefly, the debtor's "asbestos" chapter 11 plan was "insurance neutral." That is, the plan preserved all of the rights that the insurer, Truck Insurance, held under the insurance policies it had issued before bankruptcy. The insurance company nonetheless objected to confirmation because it wanted the plan to include additional protections warding off fraudulent claims.

The Fourth Circuit held that the insurer had standing to contest the finding of insurance neutrality. Once the appeals court decided that the plan indeed was insurance neutral, the Fourth Circuit decided that the insurer had no standing to object to other features of the plan because its contractual rights were not affected. *Truck Insurance Exchange v. Kaiser Gypsum Co. (In re Kaiser Gypsum Co.)*, 60 F.4th 73 (4th Cir. Feb. 14, 2023), *cert. granted sub nom. Truck Ins. Exch. v. Kaiser Gypsum Co.*, No. 22-1079 (Oct. 13, 2023). To read ABI's report on the Fourth Circuit's decision, **click here**.

To be handed down before the end of the term in late June, the decision by the Supreme Court revolves around Section 1109(b), which says:

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

Apart from Section 1109(b), a litigant typically establishes Article III or constitutional standing by showing (1) an injury in fact that is concrete, particularized and actual or imminent; (2) an injury fairly traceable to the defendant's conduct; and (3) an injury that can be addressed by a favorable decision. In many chapter 11 cases with deeply insolvent debtors, shareholders or subordinated creditors might not be able to show Article III standing.

As a matter of statutory interpretation, did Congress mean that a "party in interest" in Section 1109(b) also must have constitutional standing? Did

Congress intend by Section 1109(b) to broaden standing in chapter 11 cases beyond parties with constitutional standing? Does Congress have the right to expand standing in bankruptcy cases beyond that which Article III permits? Does constitutional standing even *apply* in bankruptcy cases?

Lastly, does a deeply subordinated creditor or a shareholder have standing when the debtor is so insolvent that nothing under the plan will go in the direction of shareholders or deeply subordinated creditors?

Oral Argument

Arguing first, the insurance company took the position that anyone at the outset of the case who falls within one of the categories in Section 1109(b) will have standing throughout. Several justices were skeptical, suggesting that someone not a "party in interest" at the outset might gain standing by occurrences taking place later.

Early in argument, Chief Justice John G. Roberts, Jr. asked how the insurance company could have an interest in who receives policy proceeds, when it was clear that the insurer would receive none of the proceeds. He also asked whether "party in interest" is "the same test for Article III?"

Justice Sonia Sotomayor was searching for a loophole to expand standing in chapter 11 cases beyond parties with constitutional standing. Because the bankruptcy court is an Article I court and a bankruptcy case is akin to an administrative proceeding, was Congress free to enact broader standing?

In contrast, Justice Ketanji Brown Jackson worried about an expansive notion of standing. She seemed concerned that one of a debtor's competitors could have standing under a broad interpretation of standing, even though the competitor was not a creditor.

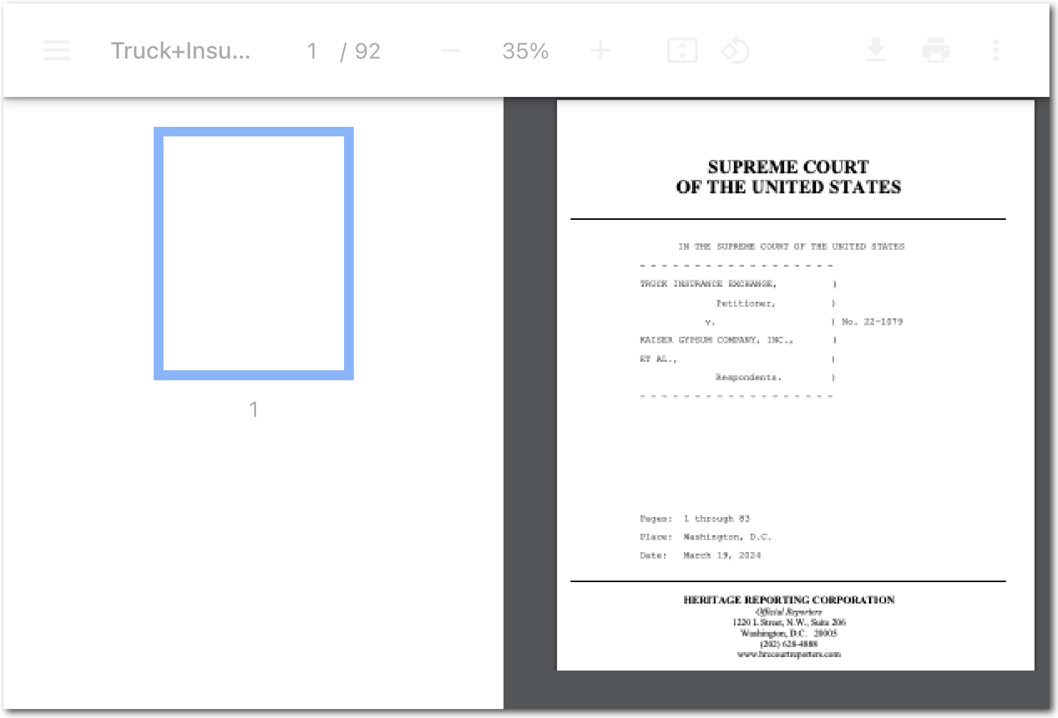
Justice Neil M. Gorsuch wondered whether Article III even applies in bankruptcy. In ordinary civil litigation, he said that the plaintiff alone must show standing. If creditors are similar to defendants who aren't required to show standing, perhaps creditors always have standing.

Justices Sotomayor and Elena Kagan both questioned how the constitutional standard of "directly and adversely affected" applies to standing in bankruptcy cases. Justice Kagan seemed to think that a party might have interests in a bankruptcy case beyond its own pecuniary interests.

Even though the insurer's contractual interests were not impaired by the plan, Justice Kagan seemed to believe that the insurer might have standing because the insurer wanted the plan to improve its financial situation. In a somewhat similar vein, Justice Gorsuch said he was "struggling" with the question of why the insurer could not be heard to object to the plan.

Opinion Link

PREVIEW



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SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

TRUCK INSURANCE EXCHANGE,)
Petitioner,)
v.) No. 22-1079
KAISER GYPSUM COMPANY, INC.,)
ET AL.,)
Respondents.)

Pages: 1 through 83
Place: Washington, D.C.
Date: March 19, 2024

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Case Details

Case Citation	Truck Ins. Exch. v. Kaiser Gypsum Co., 22-1079 (Sup. Ct.)
Case Name	Truck Ins. Exch. v. Kaiser Gypsum Co.
Case Type	Business
Court	Supreme Court
Bankruptcy Tags	Plan Confirmation Venue/Jurisdiction Business Reorganization Mass Torts

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FEBRUARY 20, 2024

Shareholder Standing Scrutinized in a Case that Presages Truck Insurance

> Can Section 327(c) be unconstitutional as applied if it deprives shareholders of standing when the estate might be solvent?

A debtor's shareholders do not have standing to object to the retention of a chapter 7 trustee's professionals, for reasons explained by Bankruptcy Judge Craig T. Goldblatt of Delaware.

Judge Goldblatt's February 1 opinion touches on some of the issues raised in the third bankruptcy case to be heard this term in the Supreme Court. *See Truck Insurance Exchange v. Kaiser Gypsum Co. (In re Kaiser Gypsum Co.)*, 60 F.4th 73 (4th Cir. Feb. 14, 2023). *cert. granted sub nom. Truck Ins. Exch. v.*

Kaiser Gypsum Co., No. 22-1079, 2023 WL 6780372 (Oct. 13, 2023). To read ABI's reports on the Fourth Circuit's decision and the grant of *certiorari*, **click here** and **here**.

To be argued in the Supreme Court on March 19, *Truck Insurance* will explore the role that Article III of the Constitution plays in deciding who has standing in bankruptcy cases.

Shareholders Sued for Receipt of Fraudulent Transfers

The trustee for a corporate debtor in chapter 7 had sued some of the debtor's shareholders for receipt of fraudulent transfers. More specifically, the trustee alleged that the shareholders had received transfers of the debtor's property for no consideration. The shareholders defended by alleging that the debtor was solvent when they received dividends.

Later, the trustee filed an application to approve retention of a firm to be substituted as the trustee's general counsel. The shareholders objected to the retention application.

To address the objection, Judge Goldblatt began "with the presumption that the objecting defendants, who hold equity in the debtor, are parties-in-interest in the bankruptcy case and have standing to appear and be heard on any dispute that might affect the value of their equity interests in the debtor."

Despite the broadest view of standing, Judge Goldblatt said that Section 327(c) "addresses who may object to the retention of counsel on account of that counsel's representation of a creditor."

Section 327(c)

In cases under chapters 7, 11 and 12, Section 327(c) says that "a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, *unless there is objection by another creditor or the United States trustee*, in which case the court shall disapprove such employment if there is an actual conflict of interest." [Emphasis added.]

Judge Goldblatt said that the statute "expressly and unambiguously limits standing to object to a retention in these circumstances to other creditors or the United States trustee." He went on to say that the objectors "hold equity in the debtor but are not creditors. They therefore lack standing to raise this objection."

To salvage their status as creditors, the defendant shareholders relied on Section 502(h), which provides:

> A claim arising from the recovery of [a preference or a fraudulent transfer] shall be determined, and shall be allowed . . . or disallowed . . . the same as if such claim had arisen before the date of the filing of the petition.

Judge Goldblatt said that Section 502(h) "does not *create* a claim, it merely addresses *when* a claim that might come into being as a result of the trustee's recovery of property would arise." [Emphasis in original.]

Section 502(h) would benefit preference defendants and make them creditors, because payment of a preference would give rise to a claim in the amount of the recovered preference. However, the objecting defendants were not being sued for a preference.

Because the defendants were being sued for recovery of a fraudulent transfer, they would have no claim even if the trustee were to make a recovery, because the defendants paid nothing for the property they received.

Judge Goldblatt was careful to say that Section 502(h) "might have some application" to a fraudulent transfer if the defendants had paid something for transferred property that was worth more than they paid. But that was not the case before him.

"[D]espite being given every opportunity to offer a theory," Judge Goldblatt said that the "objecting defendants . . . have made no suggestion that there is any circumstance in which they would hold a claim against the debtor."

"Under the plain language of § 327(c)," Judge Goldblatt overruled the objection to the retention application because the objecting defendants "are not creditors" and "may not object to the trustee's motion."

Observations

Assume that Judge Goldblatt had made a finding that the debtor would be insolvent no matter what the trustee might recover. Depending on what the Supreme Court says in *Truck Insurance*, shareholder-defendants might have no standing even if Section 327(c) wasn't on the books.

Why's that?

Article III of the Constitution limits federal courts' subject matter jurisdiction to circumstances in which there is a case or controversy. If shareholders are "out of the money," can they be a party to a controversy that does not affect them? If shareholders couldn't advance a controversy to which they were parties, they might lack constitutional standing even without Section 327(c).

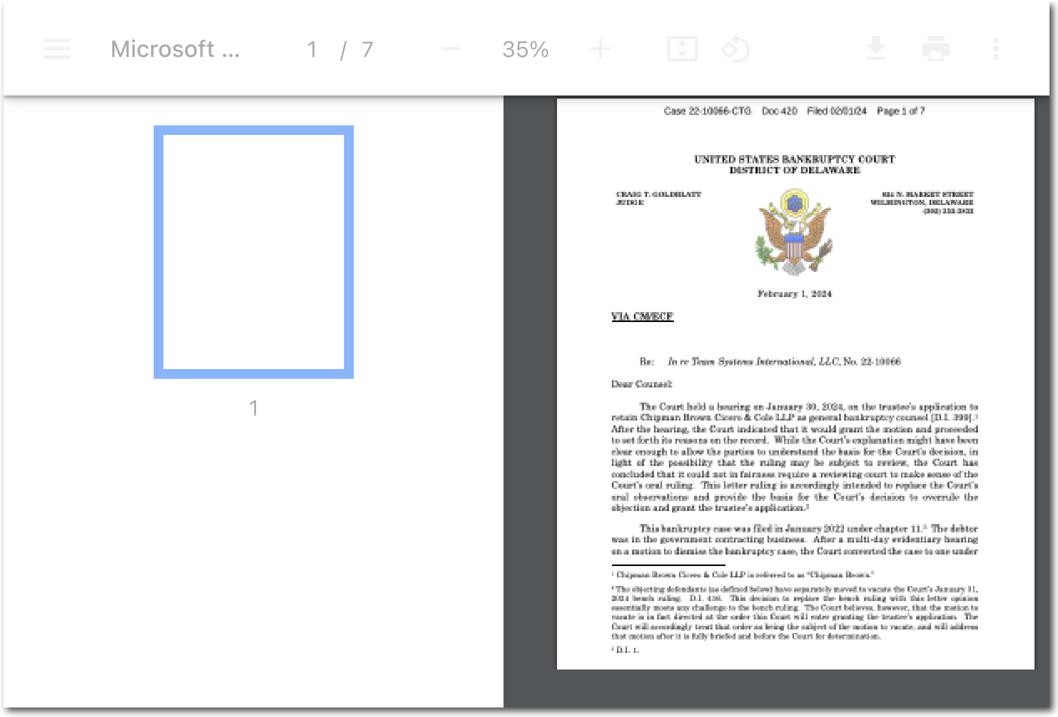
Conversely, assume that Judge Goldblatt had found the debtor to be solvent. Could shareholders object to a retention application despite Section 327(c)?

Given solvency, shareholders would appear to be parties to a controversy because the outcome might affect their recoveries. In such a circumstance, could Section 327(c) be unconstitutional as applied, given that shareholders would be taking sides on a controversy that affects them?

Truck Insurance may tell us whether Congress has the right to bestow standing on parties who wouldn't have constitutional standing (*e.g.*, Section 1109(b)) or deprive parties of standing when they have constitutional standing.

Opinion Link

PREVIEW



Case 22-10066-CTG Doc 420 Filed 02/01/24 Page 1 of 7

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

CRAIG T. GOLDBLATT
JUDGE

824 N. MARKET STREET
WILMINGTON, DELAWARE

February 1, 2024

VIA CM/ECF

Re: *In re Team Systems International, LLC*, No. 22-10066

Dear Counsel:

The Court held a hearing on January 30, 2024, on the trustee's application to retain Chipman Brown Cicero & Cole LLP as general bankruptcy counsel [D.I. 398].[1] After the hearing, the Court indicated that it would grant the motion and proceeded to set forth its reasons on the record. While the Court's explanation might have been clear enough to allow the parties to understand the basis for the Court's decision, in light of the possibility that the ruling may be subject to review, the Court has concluded that it could not in fairness require a reviewing court to make sense of the Court's oral ruling. This letter ruling is accordingly intended to replace the Court's oral observations and provide the basis for the Court's decision to overrule the objection and grant the trustee's application.[2]

This bankruptcy case was filed in January 2022 under chapter 11.[3] The debtor was in the government contracting business. After a multi-day evidentiary hearing on a motion to dismiss the bankruptcy case, the Court converted the case to one under

[1] Chipman Brown Cicero & Cole LLP is referred to as "Chipman Brown."

[2] The objecting defendants (as defined below) have separately moved to vacate the Court's January 31, 2024 bench ruling. D.I. 436. This decision to replace the bench ruling with this letter opinion essentially moots any challenge to the bench ruling. The Court believes, however, that the motion to vacate is in fact directed at the order this Court will enter granting the trustee's application. The Court will accordingly treat that order as being the subject of the motion to vacate, and will address that motion after it is fully briefed and before the Court for determination.

[3] D.I. 1.

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Case Details

Case Citation	In re Teams Systems International LLC, 22-10066 (Bankr. D. Del. Feb. 1, 2024)
Case Name	In re Teams Systems International LLC
Case Type	Business
Court	3rd Circuit Delaware
Bankruptcy Tags	Ethics Practice and Procedure Professional Compensation/Fees Business Reorganization

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FEBRUARY 27, 2023

Fourth Circuit Says an Insurer Has No Right to Negotiate an 'Asbestos' Plan

> The Fourth Circuit wrote a scholarly (and dense) opinion differentiating among bankruptcy standing, bankruptcy appellate standing and constitutional standing.

In an appeal dealing with an "insurance neutral" chapter 11 plan resolving asbestos claims, the Fourth Circuit explored the differences among standing in bankruptcy court under Section 1109(b), standing to appeal in bankruptcy cases and constitutional or Article III standing.

The February 14 opinion is perhaps most significant because it holds that an insurer has no right to participate in negotiations dealing with the insurance policy, as long as the plan ends up being "insurance neutral."

The opinion by Circuit Judge G. Steven Agee teaches us that an insurance company found by the bankruptcy court to have no standing does have standing to appeal the denial of standing to object to confirmation of the chapter 11 plan. On the other hand, if the appeals court confirms that the plan is "insurance neutral," then the insurance company has no standing in the bankruptcy court or on appeal to object to the merits of the plan pertaining to any other aspects of the plan.

The 'Asbestos' Case

Faced with 14,000 pending lawsuits, the corporate debtor proposed a chapter 11 plan under Section 524(g) to create a trust dealing with present and future asbestos claims. All asbestos claims were to be channeled to the trust.

The principal asset for the trust was the debtor's primary insurance policy, with a coverage limit of $500,000 per claim. The insurer was obliged by the policy to defend and indemnify the debtor, even if the claim were false or fraudulent. The policy had no maximum aggregate limit, and it was non-eroding, meaning that defense costs were not counted against the policy limit for each claim.

The plan divided asbestos claims into two classes: (1) those covered by the policy; and (2) those not covered by the policy. Uninsured claims were to be paid entirely by the trust.

Claims covered by insurance were to be litigated in the tort system, nominally against the debtor but subject to the coverage limit for each claim. The trust would pay the $5,000 deductible for each claim.

The claims covered by insurance remained subject to the insurer's prepetition coverage defenses.

The uninsured claims were subject to antifraud provisions under the plan to protect the trust by requiring the claimants to provide disclosures designed to avoid fraud and duplicate claims. The plan had no antifraud provisions for insured claims.

Unsecured creditors were to be paid in full.

The asbestos claimants, the only class impaired by the plan, voted unanimously in favor of the plan. The only confirmation objection came from the insurer.

The insurer contended that the plan was not proposed in good faith and that the plan was not insurance neutral. The bankruptcy court wrote an opinion recommending that the district court approve the plan, finding that it was insurance neutral and filed in good faith. Because the plan was insurance neutral, the bankruptcy court concluded that the insurer was not a party in interest under Section 1109(b) and thus lacked standing to challenge the plan.

The district court confirmed the plan, adopting the bankruptcy court's findings *in toto* after *de novo* review.

The insurer appealed to the circuit.

Bankruptcy Standing

The debtor contended that the insurer had no standing to appeal because the plan was insurance neutral.

In the Fourth Circuit, the concept of bankruptcy appellate standing requires that the appellant be a "person aggrieved" who is directly and adversely affected in a pecuniary sense.

The former Bankruptcy Act had a provision specifically imposing the "person aggrieved" test for appellate standing. The textual limitation was omitted alongside adoption of the Bankruptcy Code in 1978, but Judge Agee noted how circuit courts continued imposing the "person aggrieved" test.

Judge Agee described the differences between standing in bankruptcy court and standing to appeal.

For standing in bankruptcy court, distinguished from standing to appeal, the insurer's standing was governed by Section 1109(b), which confers on "[a] party in interest, including . . . a creditor . . . . ," the right to "appear and be heard on any issue" in the chapter 11 case.

Judge Agee held that the insurer "indisputably [had] standing to appeal the district court's conclusion that it lacked § 1109(b) standing, either as an insurer or as a creditor, to challenge the Plan in the first instance." He pointed to the Third Circuit for having held that standing to appeal the substance of the bankruptcy court's decision is distinct from the right to appeal "bankruptcy standing" under Section 1109(b).

Were a creditor unable to appeal denial of bankruptcy standing under Section 1109(b), Judge Agee again cited the Third Circuit for the proposition that an erroneous finding of a lack of bankruptcy standing would preclude the creditor from appealing the erroneous finding.

In sum, Judge Agee said that the insurer had standing to appeal the district's decision that it did not have bankruptcy standing under Section 1190(b). In a footnote, he also said that the insurer had Article III, or constitutional, standing to challenge the finding of insurance neutrality.

Insurance Neutrality

If the plan was truly insurance neutral, then the insurer would have no bankruptcy standing. Judge Agee reviewed the neutrality findings *de novo*.

Following the Third Circuit, Judge Agee said that a plan is insurance neutral if it does not increase the insurer's prepetition obligations or impair the insurer's prepetition rights under the policy. He found the plan to be neutral, in part because it preserved the insurer's coverage defenses.

The insurer had other arguments. Primarily, the insurer contended that the plan was not insurance neutral because the debtor precluded the insurer from negotiating the plan.

Judge Agee found "nothing in the policy provision [that] suggests that the Debtors' assistance-and-cooperation obligations extend to bankruptcy-plan negotiations." More particularly, he said that the debtor's assistance obligations under the policy involve "traditional litigation activities, as opposed to activities typically undertaken in a bankruptcy proceeding."

The insurer also contended that the plan was not neutral because insured claims were not subjected to the antifraud provisions that applied to uninsured claims. Judge Agee rejected the argument, because "those alleged rights never existed under the policies."

Having found that the plan indeed was insurance neutral, Judge Agee held that the insurer, but only in its capacity as an insurer, did not have bankruptcy standing as a party in interest under Section 1109(b).

Bankruptcy Appellate Standing

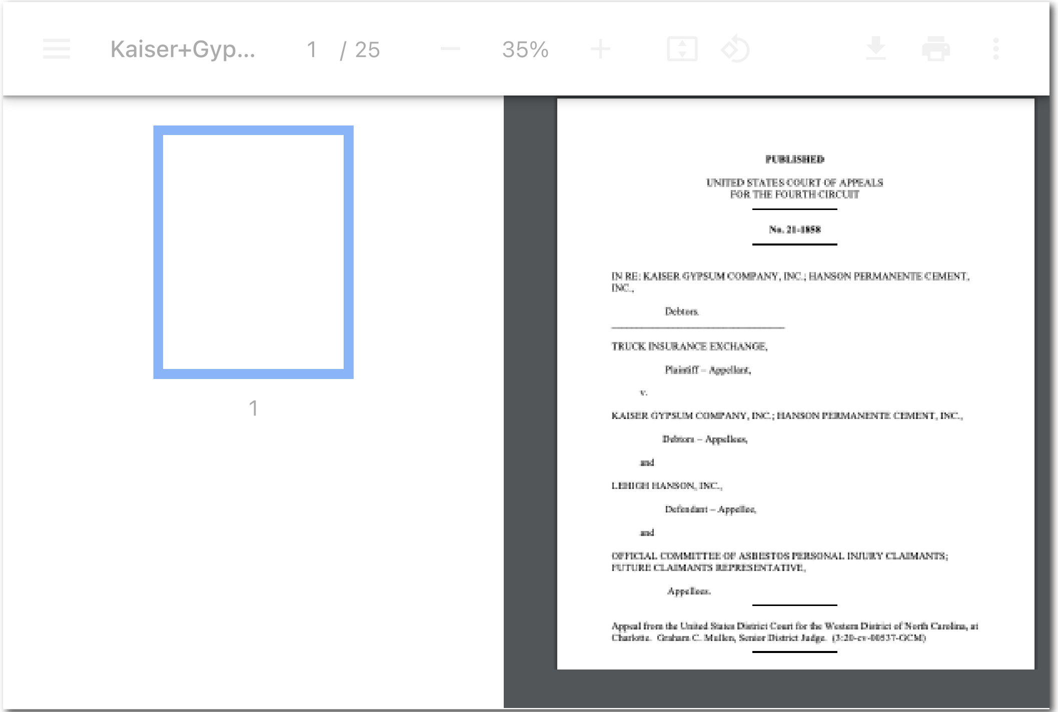
The insurer argued that it also had standing on appeal to challenge other provisions of the plan, such as good faith, because it also was a creditor on account of unpaid deductibles. In that respect, Judge Agee said that the insurer, in its capacity as a creditor, was subject to the strictures of Article III standing, also known as constitutional standing. That is to say, was there a case or controversy?

As a creditor, the insurer was unimpaired and had no objections to its treatment as a creditor. Thus, Judge Agee said, the insurer alleged no injury in fact as a creditor. Consequently, the insurer had no Article III standing "to object to aspects of a reorganization plan that in no way relate to its status *as a creditor* but instead implicate only the rights of third parties (who actually *support* the Plan)." [Emphasis in original.]

Judge Agee affirmed the district court's judgment because (1) insurance neutrality left the insurer bereft of bankruptcy standing under Section 1109(b), and (2) the insurer had no Article III standing as a creditor to object to other aspects of the plan.

Opinion Link

PREVIEW



PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1858

IN RE: KAISER GYPSUM COMPANY, INC.; HANSON PERMANENTE CEMENT, INC.,

Debtors.

TRUCK INSURANCE EXCHANGE,

Plaintiff – Appellant,

v.

KAISER GYPSUM COMPANY, INC.; HANSON PERMANENTE CEMENT, INC.,

Debtors – Appellees,

and

LEHIGH HANSON, INC.,

Defendant – Appellee,

and

OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS; FUTURE CLAIMANTS REPRESENTATIVE,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Graham C. Mullen, Senior District Judge. (3:20-cv-00537-GCM)

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Case Details

Case Citation	Truck Insurance Exchange v. Kaiser Gypsum Co. (In re Kaiser Gypsum Co.), 21-1858 (4th Cir. Feb. 14, 2023).
Case Name	Truck Insurance Exchange v. Kaiser Gypsum Co. (In re Kaiser Gypsum Co.)

Case Type	Business
Court	4th Circuit
Bankruptcy Tags	Plan Confirmation Venue/Jurisdiction Business Reorganization Mass Torts

[+] FEEDBACK

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BARTENWERFER *v.* BUCKLEY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 21–908. Argued December 6, 2022—Decided February 22, 2023

Kate and David Bartenwerfer decided to remodel the house they jointly owned in San Francisco and to sell it for a profit. David took charge of the project, while Kate remained largely uninvolved. They eventually sold the house to respondent Kieran Buckley. In conjunction with the sale, Kate and David attested that they had disclosed all material facts related to the property. After the purchase, Buckley discovered several defects that the Bartenwerfers had failed to disclose. Buckley sued in California state court and won, leaving the Bartenwerfers jointly responsible for more than $200,000 in damages. Unable to pay that judgment or their other creditors, the Bartenwerfers filed for Chapter 7 bankruptcy. Buckley then filed an adversary complaint in the bankruptcy proceeding, alleging that the debt owed him on the state-court judgment was nondischargeable under the Bankruptcy Code's exception to discharge of "any debt . . . for money . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud." 11 U. S. C. §523(a)(2)(A). The Bankruptcy Court found that David had committed fraud and imputed his fraudulent intent to Kate because the two had formed a legal partnership to renovate and sell the property. The Bankruptcy Appellate Panel disagreed as to Kate's culpability, holding that §523(a)(2)(A) barred her from discharging the debt only if she knew or had reason to know of David's fraud. On remand, the Bankruptcy Court determined that Kate lacked such knowledge and could therefore discharge her debt to Buckley. The Bankruptcy Appellate Panel affirmed. The Ninth Circuit reversed in relevant part. Invoking *Strang* v. *Bradner,* 114 U. S. 555, the court held that a debtor who is liable for her partner's fraud cannot discharge that debt in bankruptcy, regardless of her own culpability.

Held: Section 523(a)(2)(A) precludes Kate Bartenwerfer from discharging in bankruptcy a debt obtained by fraud, regardless of her own culpability. Pp. 3–12.

(a) Kate (hereinafter, Bartenwerfer) disputes a straightforward reading of §523(a)(2)(A)'s text. Bartenwerfer argues that an ordinary English speaker would understand that "money obtained by fraud" means money obtained by the *individual debtor's* fraud. This Court disagrees. The passive voice in §523(a)(2)(A) does not hide the relevant actor in plain sight, as Bartenwerfer suggests—it removes the actor altogether. Congress framed §523(a)(2)(A) to "focu[s] on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." *Dean* v. *United States,* 556 U. S. 568, 572. It is true that context can confine a passive-voice sentence to a likely set of actors. See, *e.g., E. I. du Pont de Nemours & Co.* v. *Train,* 430 U. S. 112, 128–129. But the legal context relevant to §523(a)(2)(A)—the common law of fraud—has long maintained that fraud liability is *not* limited to the wrongdoer. Understanding §523(a)(2)(A) to reflect "agnosticism" as to the identity of the wrongdoer is consistent with the age-old rule of fraud liability.

Bartenwerfer points out that "'exceptions to discharge should be confined to those plainly expressed.'" *Bullock* v. *BankChampaign, N. A.,* 569 U. S. 267, 275. The Court, however, has never used this principle to artificially narrow ordinary meaning, invoking it instead to stress that exceptions should not extend beyond their stated terms. See, *e.g., Gleason* v. *Thaw,* 236 U. S. 558, 559–562.

Bartenwerfer also seeks support from §523(a)(2)(A)'s neighboring provisions in subparagraphs (B) and (C), both of which require some culpable action by the debtor herself. Bartenwerfer claims that these neighboring provisions make explicit what is unstated in (A). This argument turns on its head the rule that "'[w]hen Congress includes particular language in one section . . . but omits it in another section of the same Act,'" the Court generally takes "the choice to be deliberate." *Badgerow* v. *Walters*, 596 U. S. ___, ___. If there is an inference to be drawn here, the more likely one is that (A) excludes debtor culpability from consideration given that (B) and (C) expressly hinge on it. Bartenwerfer suggests it would defy credulity to think that Congress would bar debtors from discharging liability for fraud they did not personally commit under (A) while allowing debtors to discharge debt for (potentially more serious) fraudulent statements they did not personally make under (B). But the Court offered a possible answer for this disparity in *Field* v. *Mans*, 516 U. S. 59, 76–77. Whatever the rationale, it does not defy credulity to think that Congress established differing rules for (A) and (B). Pp. 3–8.

(b) Any remaining doubt about the textual analysis is eliminated by this Court's precedent and Congress's response to it. In *Strang* v. *Bradner,* 114 U. S. 555, the Court held that the fraud of one partner should be imputed to the other partners, who "received and appropriated the fruits of the fraudulent conduct." *Id.,* at 561. The Court so held despite the fact that the relevant 19th-century discharge exception for fraud disallowed the discharge of debts "created by the fraud or embezzlement *of the bankrupt*." 14 Stat. 533 (emphasis added). And when Congress next overhauled bankruptcy law, it deleted the phrase "of the bankrupt" from the discharge exception for fraud. The unmistakable implication is that Congress embraced *Strang*'s holding. See *Ysleta Del Sur Pueblo* v. *Texas*, 596 U. S. ___, ___. Pp. 8–10.

(c) Finally, Bartenwerfer insists that the preclusion of faultless debtors from discharging liabilities run up by their associates is inconsistent with bankruptcy law's "fresh start" policy. But the Bankruptcy Code is not focused on the unadulterated pursuit of the debtor's interest, and instead seeks to balance multiple, often competing interests. Bartenwerfer's fairness-based critiques also miss the fact that §523(a)(2)(A) does not define the scope of one's liability for another's fraud. Section 523(a)(2)(A) takes the debt as it finds it, so if California did not extend liability to honest partners, §523(a)(2)(A) would have no role here. And while Bartenwerfer paints a picture of liability being imposed on hapless bystanders, fraud liability generally requires a special relationship to the wrongdoer and, even then, defenses to liability are available. Pp. 10–12.

860 Fed. Appx. 544, affirmed.

BARRETT, J., filed an opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which JACKSON, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 21–908

KATE MARIE BARTENWERFER, PETITIONER *v.* KIERAN BUCKLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 22, 2023]

JUSTICE BARRETT delivered the opinion of the Court.

The Bankruptcy Code strikes a balance between the interests of insolvent debtors and their creditors. It generally allows debtors to discharge all prebankruptcy liabilities, but it makes exceptions when, in Congress's judgment, the creditor's interest in recovering a particular debt outweighs the debtor's interest in a fresh start. One such exception bars debtors from discharging any debt for money "obtained by . . . fraud." 11 U. S. C. §523(a)(2)(A). The provision obviously applies to a debtor who was the fraudster. But sometimes a debtor is liable for fraud that she did not personally commit—for example, deceit practiced by a partner or an agent. We must decide whether the bar extends to this situation too. It does. Written in the passive voice, §523(a)(2)(A) turns on how the money was obtained, not who committed fraud to obtain it.

I

In 2005, Kate Bartenwerfer and her then-boyfriend, David Bartenwerfer, jointly purchased a house in San Francisco. Acting as business partners, the pair decided to remodel the house and sell it at a profit. David took charge of the project. He hired an architect, structural engineer, designer, and general contractor; he monitored their work, reviewed invoices, and signed checks. Kate, on the other hand, was largely uninvolved.

Like many home renovations, the Bartenwerfers' project was bumpier than anticipated. Still, they managed to get the house on the market, and Kieran Buckley bought it. In conjunction with the sale, the Bartenwerfers attested that they had disclosed all material facts relating to the property. Yet after the house was his, Buckley discovered several defects that the Bartenwerfers had not divulged: a leaky roof, defective windows, a missing fire escape, and permit problems. Alleging that he had overpaid in reliance on the Bartenwerfers' misrepresentations, Buckley sued them in California state court. The jury found in Buckley's favor on his claims for breach of contract, negligence, and nondisclosure of material facts, leaving the Bartenwerfers jointly responsible for more than $200,000 in damages.

The Bartenwerfers were unable to pay Buckley, not to mention their other creditors. Seeking relief, they filed for Chapter 7 bankruptcy, which allows debtors to get a "fresh start" by discharging their debts. *Marrama* v. *Citizens Bank of Mass.*, 549 U. S. 365, 367 (2007) (internal quotation marks omitted). While that sounds like complete relief, there is a catch—not all debts are dischargeable. The Code makes several exceptions to the general rule, including the one at issue in this case: Section 523(a)(2)(A) bars the discharge of "any debt . . . for money . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud."

Buckley filed an adversary complaint alleging that the money owed on the state-court judgment fell within this exception. After a 2-day bench trial, the Bankruptcy Court decided that neither David nor Kate Bartenwerfer could discharge their debt to Buckley. Based on testimony from the parties, real-estate agents, and contractors, the court found that David had knowingly concealed the house's defects from Buckley. And the court imputed David's fraudulent intent to Kate because the two had formed a legal partnership to execute the renovation and resale project.

The Ninth Circuit's Bankruptcy Appellate Panel agreed as to David's fraudulent intent but disagreed as to Kate's. As the panel saw it, §523(a)(2)(A) barred her from discharging the debt only if she knew or had reason to know of David's fraud. It instructed the Bankruptcy Court to apply that standard on remand, and, after a second bench trial, the court concluded that Kate lacked the requisite knowledge of David's fraud and could therefore discharge her liability to Buckley. This time, the Bankruptcy Appellate Panel affirmed the judgment.

The Ninth Circuit reversed in relevant part. *In re Bartenwerfer*, 860 Fed. Appx. 544 (2021). Invoking our decision in *Strang* v. *Bradner*, 114 U. S. 555 (1885), it held that a debtor who is liable for her partner's fraud cannot discharge that debt in bankruptcy, regardless of her own culpability. 860 Fed. Appx., at 546. Kate thus remained on the hook for her debt to Buckley. *Id.*, at 546–547. We granted certiorari to resolve confusion in the lower courts on the meaning of §523(a)(2)(A).[1] 596 U. S. ___ (2022).

II

A

"[W]e start where we always do: with the text of the statute." *Van Buren* v. *United States*, 593 U. S. ___, ___ (2021) (slip op., at 5). Section 523(a)(2)(A) states:

[1] See, *e.g.*, *In re M.M. Winkler & Assoc.*, 239 F. 3d 746, 749 (CA5 2001) (debts that arise from fraud cannot be discharged); *In re Ledford*, 970 F. 2d 1556, 1561 (CA6 1992) (no discharge if the debtor benefited from the fraud); *Sullivan* v. *Glenn*, 782 F. 3d 378, 381 (CA7 2015) (a debt is nondischargeable only if the debtor knew or should have known of the fraud); *In re Walker*, 726 F. 2d 452, 454 (CA8 1984) (same); *In re Villa*, 261 F. 3d 1148, 1151 (CA11 2001) (a debt cannot be discharged when fraud is imputed to the debtor under agency principles).

> "A discharge under section 727 . . . 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."

By its terms, this text precludes Kate Bartenwerfer from discharging her liability for the state-court judgment. (From now on, we will refer to Kate as "Bartenwerfer.") First, she is an "individual debtor." Second, the judgment is a "debt." And third, because the debt arises from the sale proceeds obtained by David's fraudulent misrepresentations, it is a debt "for money . . . obtained by . . . false pretenses, a false representation, or actual fraud."

Bartenwerfer disputes the third premise. She admits that, as a grammatical matter, the passive-voice statute does not specify a fraudulent actor. But in her view, the statute is most naturally read to bar the discharge of debts for money obtained by *the debtor's* fraud.[2] To illustrate, she offers the sentence "Jane's clerkship was obtained through hard work." According to Bartenwerfer, an ordinary English speaker would understand this sentence to mean that *Jane's* hard work led to her clerkship. Brief for Petitioner

[2] Buckley contends that Bartenwerfer has forfeited this argument because in her petition for a writ of certiorari and in the lower courts, she asserted that §523(a)(2)(A) bars discharge when the debtor "knew or should have known" of her partner's fraud. We disagree. The question presented is 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." Pet. for Cert. i. Bartenwerfer's current argument—that the debt must arise from the debtor's own fraud—is "fairly included" within that question and her position in the lower courts. Supreme Court Rule 14.1(a); *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992).

20. Section 523(a)(2)(A) supposedly operates the same way: An ordinary English speaker would understand that "money obtained by fraud" means money obtained by the *individual debtor's* fraud. Passive voice hides the relevant actor in plain sight.

We disagree: Passive voice pulls the actor off the stage. At least on its face, Bartenwerfer's sentence conveys only that *someone's* hard work led to Jane's clerkship—whether that be Jane herself, the professor who wrote a last-minute letter of recommendation, or the counselor who collated the application materials. Section 523(a)(2)(A) is similarly broad. Congress framed it to "focu[s] on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." *Dean* v. *United States*, 556 U. S. 568, 572 (2009); B. Garner, Modern English Usage 676 (4th ed. 2016) (the passive voice signifies that "the actor is unimportant" or "unknown"). The debt must result from someone's fraud, but Congress was "agnosti[c]" about who committed it. *Watson* v. *United States*, 552 U. S. 74, 81 (2007).

It is true, of course, that context can confine a passive-voice sentence to a likely set of actors. *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112, 128–129 (1977). If the dean of the law school delivers Bartenwerfer's hypothetical statement to Jane's parents, the most natural implication is that Jane's hard work led to the clerkship. But in the fraud-discharge exception, context does not single out the wrongdoer as the relevant actor. Quite the opposite: The relevant legal context—the common law of fraud—has long maintained that fraud liability is *not* limited to the wrongdoer. *Field* v. *Mans*, 516 U. S. 59, 70–75 (1995) (interpreting §523(a)(2)(A) with reference to the common law of fraud). For instance, courts have traditionally held principals liable for the frauds of their agents. *McCord* v. *Western Union Telegraph Co.*, 39 Minn. 181, 185, 39 N. W. 315, 317 (1888); *Tome* v. *Parkersburg Branch R. Co.*, 39 Md. 36, 70–71 (1873); *White* v. *Sawyer*, 82 Mass. 586, 589 (1860); J. Story, Commentaries on the Law of Agency 465–467 (1839). They have also held individuals liable for the frauds committed by their partners within the scope of the partnership. *Tucker* v. *Cole*, 54 Wis. 539, 540–541, 11 N. W. 703, 703–704 (1882); *Alexander* v. *State*, 56 Ga. 478, 491–493 (1876); *Chester* v. *Dickerson*, 54 N. Y. 1, 11 (1873); J. Story, Commentaries on the Law of Partnership 161, 257–259 (1841). Understanding §523(a)(2)(A) to reflect the passive voice's usual "agnosticism" is thus consistent with the age-old rule that individual debtors can be liable for fraudulent schemes they did not devise.

Searching for a way to defeat the natural breadth of the passive voice, Bartenwerfer points to our observation that "'exceptions to discharge "should be confined to those plainly expressed."'" *Bullock* v. *BankChampaign, N. A.*, 569 U. S. 267, 275 (2013) (quoting *Kawaauhau* v. *Geiger*, 523 U. S. 57, 62 (1998)). This does not get her far. We have never used this principle to artificially narrow ordinary meaning, which is what Bartenwerfer asks us to do. Instead, we have invoked it to stress that exceptions should not extend beyond their stated terms. In *Gleason* v. *Thaw*, we held that "liabilities for obtaining property" did not include an attorney's services because services are not property. 236 U. S. 558, 559–562 (1915). In *Kawaauhau*, we concluded that medical malpractice attributable to negligence or recklessness did not amount to a "willful and malicious injury." 523 U. S., at 59. And in *Bullock*, interpreting the discharge exception "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny," we applied the familiar *noscitur a sociis* canon to hold that the term "defalcation" possessed a *mens rea* requirement akin to those of "fraud," "embezzlement," and "larceny." 569 U. S., at 269, 274–275. In each case, we reached a result that was "plainly expressed" by the text and ordinary tools of interpretation. Our interpretation in this case, which rests on basic tenets of grammar, is more of the same.

Bartenwerfer also seeks support from §523(a)(2)(A)'s neighboring provisions, which both require action by the debtor herself. Section 523(a)(2)(B) bars the discharge of debts arising from the "use of a statement in writing—(i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable . . . reasonably relied; and (iv) that *the debtor caused to be made or published with intent to deceive*." (Emphasis added.) Similarly, §523(a)(2)(C) presumptively bars the discharge of recently acquired "consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services *incurred by an individual debtor*" and "cash advances aggregating more than $750 . . . *obtained by an individual debtor*." §523(a)(2)(C)(i) (emphasis added). Unlike subparagraph (A), the discharge exceptions in subparagraphs (B) and (C) expressly require some culpable act on the part of the debtor. According to Bartenwerfer, these provisions make explicit what goes without saying in (A): The debtor's own fraud must have given rise to the debt.

This argument flips the rule that "'[w]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act,' we generally take the choice to be deliberate." *Badgerow* v. *Walters*, 596 U. S. ___, ___ (2022) (slip op., at 8) (quoting *Collins* v. *Yellen*, 594 U. S. ___, ___ (2021) (slip op., at 23)). As the word "generally" indicates, this rule is not absolute. Context counts, and it is sometimes difficult to read much into the absence of a word that is present elsewhere in a statute. See, *e.g.*, *Field*, 516 U. S., at 67–69. But if there is an inference to be drawn here, it is not the one that Bartenwerfer suggests. The more likely inference is that (A) excludes debtor culpability from consideration given that (B) and (C) expressly hinge on it.

Bartenwerfer retorts that it would have made no sense for Congress to set up such a dichotomy, particularly between (A) and (B). These two provisions are linked: (A) carves out fraudulent "statement[s] respecting the debtor's or an insider's financial condition," while (B) governs such statements that are reduced to writing. In Bartenwerfer's view, it "defies credulity" to think that Congress would bar debtors from discharging liability for mine-run fraud they did not personally commit while simultaneously allowing debtors to discharge liability for (potentially more serious) fraudulent statements they did not personally make. Brief for Petitioner 23.

But in *Field*, we offered a possible answer for why (B) contains a more debtor-friendly discharge rule than (A): Congress may have "wanted to moderate the burden on individuals who submitted false financial statements, not because lies about financial condition are less blameworthy than others, but because the relative equities might be affected by practices of consumer finance companies, which sometimes have encouraged such falsity by their borrowers for the very purpose of insulating their own claims from discharge." 516 U. S., at 76–77. This concern may also have informed Congress's decision to limit (B)'s prohibition on discharge to fraudulent conduct by the debtor herself. Whatever the rationale, it does not "def[y] credulity" to think that Congress established differing rules for (A) and (B). Brief for Petitioner 23.

B

Our precedent, along with Congress's response to it, eliminates any possible doubt about our textual analysis. In the late 19th century, the discharge exception for fraud read as follows: "[N]o debt created by the fraud or embezzlement *of the bankrupt* . . . shall be discharged under this act." Act of Mar. 2, 1867, §33, 14 Stat. 533 (emphasis added). This language seemed to limit the exception to fraud committed by the debtor herself—the position that Bartenwerfer advocates here.

But we held otherwise in *Strang* v. *Bradner*. In that case, the business partner of John and Joseph Holland lied to fellow merchants in order to secure promissory notes for the benefit of their partnership. 114 U. S., at 557–558. After a state court held all three partners liable for fraud, the Hollands tried to discharge their debts in bankruptcy on the ground that their partner's misrepresentations "were not made by their direction nor with their knowledge." *Id.*, at 557, 561. Even though the statute required the debt to be created by the fraud "of the bankrupt," we held that the Hollands could not discharge their debts to the deceived merchants. *Id.*, at 561. The fraud of one partner, we explained, is the fraud of all because "[e]ach partner was the agent and representative of the firm with reference to all business within the scope of the partnership." *Ibid.* And the reason for this rule was particularly easy to see because "the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business." *Ibid.*

The next development—Congress's post-*Strang* legislation—is the linchpin.[3] "This Court generally assumes that, when Congress enacts statutes, it is aware of this Court's relevant precedents." *Ysleta Del Sur Pueblo* v. *Texas*, 596 U. S. ___, ___ (2022) (slip op., at 13). Section 523(a)(2) is no exception to this interpretive rule. *Lamar, Archer & Cofrin, LLP* v. *Appling*, 584 U. S. ___, ___–___ (2018) (slip op., at

[3] Bartenwerfer asserts that we should ignore *Strang* because, as a product of the *Swift* v. *Tyson* era, it turned on the Court's understanding of the general common-law rule rather than its interpretation of the statutory text. 16 Pet. 1 (1842). This argument is a detour we need not take. Whatever *Strang*'s rationale, it constituted an important part of the background against which Congress drafted the current discharge exception for fraud.

10–11). So if Congress had reenacted the discharge exception for fraud without change, we would assume that it meant to incorporate *Strang*'s interpretation. *Appling*, 584 U. S., at ___–___ (slip op., at 10–11); *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978).

But Congress went even further than mere reenactment. Thirteen years after *Strang*, when Congress next overhauled bankruptcy law, it deleted "of the bankrupt" from the discharge exception for fraud, which is the predecessor to the modern §523(a)(2)(A). Act of July 1, 1898, §17, 30 Stat. 550 ("A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another"). By doing so, Congress cut from the statute the strongest textual hook counseling against the outcome in *Strang*. The unmistakable implication is that Congress embraced *Strang*'s holding—so we do too.

C

In a last-ditch effort to persuade us, Bartenwerfer invokes the "fresh start" policy of modern bankruptcy law. Precluding faultless debtors from discharging liabilities run up by their associates, she says, is inconsistent with that policy, so §523(a)(2)(A) cannot apply to her. A contrary holding would be a throwback to the harsh days when "debtors faced 'perpetual bondage to their creditors,' surviving on 'a miserable pittance [and] dependent upon the bounty or forbearance of [their] creditors.'" Brief for Petitioner 16 (quoting 3 J. Story, Commentaries on the Constitution of the United States 5 (1833)). The same Congress that "champion[ed]" the fresh start could not also have shackled honest debtors with liability for frauds that they did not personally commit. Brief for Petitioner 37.

This argument earns credit for color but not much else.

To begin, it characterizes the Bankruptcy Code as focused on the unadulterated pursuit of the debtor's interest. But the Code, like all statutes, balances multiple, often competing interests. Section 523 is a case in point: Barring certain debts from discharge necessarily reflects aims distinct from wiping the bankrupt's slate clean. Perhaps Congress concluded that these debts involved particularly deserving creditors, particularly undeserving debtors, or both. Regardless, if a fresh start were all that mattered, §523 would not exist. No statute pursues a single policy at all costs, and we are not free to rewrite this statute (or any other) as if it did. *Azar* v. *Allina Health Services*, 587 U. S. ___, ___ (2019) (slip op., at 15).

It also bears emphasis—because the thread is easily lost in Bartenwerfer's argument—that §523(a)(2)(A) does not define the scope of one person's liability for another's fraud. That is the function of the underlying law—here, the law of California. Section 523(a)(2)(A) takes the debt as it finds it, so if California did not extend liability to honest partners, §523(a)(2)(A) would have no role to play. Bartenwerfer's fairness-based critiques seem better directed toward the state law that imposed the obligation on her in the first place.

And while Bartenwerfer paints a picture of liability imposed willy-nilly on hapless bystanders, the law of fraud does not work that way. Ordinarily, a faultless individual is responsible for another's debt only when the two have a special relationship, and even then, defenses to liability are available. For instance, though an employer is generally accountable for the wrongdoing of an employee, he usually can escape liability if he proves that the employee's action was committed outside the scope of employment. Restatement (Third) of Agency §7.07 (2006); D. Dobbs, P. Hayden, & E. Bublick, Law of Torts §425 (2022). Similarly, if one partner takes a wrongful act without authority or outside the ordinary course of business, then the partnership—and by extension, the innocent partners—are generally not on the hook. Uniform Partnership Act §305 (2013). Partnerships and other businesses can also organize as limited-liability entities, which insulate individuals from personal exposure to the business's debts. See, *e.g.*, §306(c) (limited-liability partnerships); Uniform Limited Partnership Act §303(a) (2013) (limited partnerships); Uniform Limited Liability Company Act §304(a) (2013) (limited-liability companies).

Individuals who themselves are victims of fraud are also likely to have defenses to liability. If a surety or guarantor is duped into assuming secondary liability, then his obligation is typically voidable. Law of Suretyship and Guaranty §6:8 (2022); Restatement (Third) of Suretyship & Guaranty §12 (1996). Likewise, if a purchaser unwittingly contracts for fraudulently obtained property, he may be able to rescind the agreement. 27 R. Lord, Williston on Contracts §69:47 (4th ed. 2022). Thus, victims have a variety of antecedent defenses at their disposal that, if successful, protect them from acquiring any debt to discharge in a later bankruptcy proceeding.

All of this said, innocent people are sometimes held liable for fraud they did not personally commit, and, if they declare bankruptcy, §523(a)(2)(A) bars discharge of that debt. So it is for Bartenwerfer, and we are sensitive to the hardship she faces. But Congress has "evidently concluded that the creditors' interest in recovering full payment of debts" obtained by fraud "outweigh[s] the debtors' interest in a complete fresh start," *Grogan* v. *Garner*, 498 U. S. 279, 287 (1991), and it is not our role to second-guess that judgment.

III

We affirm the Ninth Circuit's judgment that Kate Bartenwerfer's debt is not dischargeable in bankruptcy.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 21–908

KATE MARIE BARTENWERFER, PETITIONER *v.* KIERAN BUCKLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 22, 2023]

JUSTICE SOTOMAYOR, with whom JUSTICE JACKSON joins, concurring.

The Court correctly holds that 11 U. S. C. §523(a)(2)(A) bars debtors from discharging a debt obtained by fraud of the debtor's agent or partner. Congress incorporated into the statute the common-law principles of fraud, *Husky Int'l Electronics, Inc.* v. *Ritz*, 578 U. S. 356, 360 (2016) (citing *Field* v. *Mans*, 516 U. S. 59, 69 (1995)), which include agency and partnership principles, *ante*, at 5–6. This Court long ago confirmed that reading when it held that fraudulent debts obtained by partners are not dischargeable, *Strang* v. *Bradner*, 114 U. S. 555, 559–561 (1885), and Congress "embraced" that reading when it amended the statute in 1898, *ante,* at 10.

The Bankruptcy Court found that petitioner and her husband had an agency relationship and obtained the debt at issue after they formed a partnership. Because petitioner does not dispute that she and her husband acted as partners, the debt is not dischargeable under the statute.

The Court here does not confront a situation involving fraud by a person bearing no agency or partnership relationship to the debtor. Instead, "[t]he relevant legal context" concerns fraud only by "agents" and "partners within the scope of the partnership." *Ante,* at 5–6. With that understanding, I join the Court's opinion.

Consumer Corner

By Kaila D. Spivey

After *Bartenwerfer*, What Is an "Honest Debtor"?

Kaila D. Spivey
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The Bankruptcy Code provides a fresh start to the honest-but-unfortunate debtor.[1] An "honest debtor" is one who accurately discloses necessary information and abides by the Code.[2] However, after the U.S. Supreme Court's ruling in *Bartenwerfer v. Buckley*, an honest business partner, obligor, spouse, friend or any other similarly situated individual in a relationship involving a shared obligation is at risk of the wrongdoer's actions being imputed on the innocent. Thus, this article briefly discusses the Court's *Bartenwerfer* decision and its potential effects on honest debtors, and discusses two recent bankruptcy court opinions analyzing the decision.

The *Bartenwerfer* Decision

The Supreme Court in *Bartenwerfer* was faced with the question of whether to declare the creditor's claim against the debtor dischargeable under § 523(a)(2)(A) for her husband's fraud.[3] The debtor and her husband jointly owned the property at issue and decided to renovate it. The husband controlled the renovation process, while the debtor remained uninvolved. Once the renovations were complete, the couple sold the property to the creditor. The creditor sued the couple in state court after discovering many defects on the property. The state court ruled in the creditor's favor, awarding her more than $200,000 in damages. Because of their inability to pay, the couple jointly filed for chapter 7. In response, the creditor filed an adversary complaint against the couple seeking to declare the judgment nondischargeable under § 523(a)(2)(A).[4]

The bankruptcy court determined that the claim was nondischargeable under § 523(a)(2)(A), finding the husband directly liable and imputing the husband's culpability on the debtor. The bankruptcy appellate panel (BAP) remanded the case back to the bankruptcy court and found that the debtor did not have the requisite knowledge required under § 523(a)(2)(A) to be held liable. On remand, the bankruptcy court agreed with the BAP discharging the creditor's claim as to the debtor. The matter was sent back to the BAP, which affirmed. The Ninth Circuit reversed, finding both the husband and debtor liable despite the debtor's lack of culpability. The Supreme Court granted *certiorari*.[5]

The Supreme Court found the debtor liable and determined the creditor's debt as to the debtor nondischargeable under § 523(a)(2)(A). In reaching its decision, the Court noted that the Bankruptcy Code's purpose is to "strike ... a balance between the interests of insolvent debtors and their creditors."[6] Despite the general allowance of dischargeability of debts to honest debtors, the Court notes that § 523(a)(2)(A) is a specific Code provision where "the creditor's interest in recovering a particular debt outweighs the debtor's interest in a fresh start."[7]

The Supreme Court determined that Congress's intent of favoring creditors in § 523(a)(2)(A) is demonstrated by the passage being written in passive voice.[8] The debtor argued that despite the section being written in passive voice, § 523(a)(2)(A) is commonly interpreted as the wrongdoer's own culpability.[9] The Court disagreed, noting that the common law does not limit fraud to the wrongdoer alone but also imputes liability on the wrongdoer's agents.[10] The Supreme Court found that the debtor and her husband established a partnership when they decided to renovate and sell the property.[11] As a partner in the transaction, the debtor was vicariously liable for her husband's fraud.[12]

The Potential *Bartenwerfer* Problem

Simply put, in terms of § 523(a)(2)(A) liability, *Bartenwerfer* stands for the proposition that innocent partners in a partnership are deemed guilty by association for the wrongdoing of another partner. As pondered in another article on this case, "[t]he Supreme Court's decision could force thousands of individual debtors into 'permanent or at least indefinite pauperism,' and could do so in the context of

1 *Grogan v. Garner*, 498 U.S. 279, 289 (1991).
2 Andrew F. Emerson, "Identifying the Honest Debtor: Section 727(a)(4)(a) of the Bankruptcy Code and the Need for Consistency in Denial of Discharge Proceedings," 89 *Am. Bankr. L.J.* 607, 609 (2015).
3 *Bartenwerfer v. Buckley*, 143 S. Ct. 665 (2023).
4 *Id.* at 670-71. Section 523(a)(2)(A) declares debts nondischargeable if due to false pretense, false representation or fraud:

> (a) A discharge under section 727, 1141, 11921 1228(a), 1228(b), or 1328(b) ... 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.

5 *Bartenwerfer* at 671.
6 *Id.* at 670.
7 *Id.*
8 *Id.* at 670 and 672.
9 *Id.* at 671-72.
10 *Id.* at 672.
11 *Id.* at 674-75.
12 *Id.* at 676.

a marital relationship where an innocent spouse loses a discharge because of the wrongdoing of the other spouse."[13]

How far will the *Bartenwerfer* holding extend? With the Supreme Court's decision, it appears as though creditors have another route to reach seemingly honest obligors in a joint obligation if they do not recoup their debt from the wrongdoer. Whether these concerns are valid or not, the more pressing issue is this: How will courts apply the *Bartenwerfer* decision?

Recent Case Law Analyzing *Bartenwerfer*

Two bankruptcy courts recently analyzed *Bartenwerfer*. The first, *In re Rassbach*, applied *Bartenwerfer* in reaching its decision on a motion to dismiss.[14] The wife and husband jointly owned and operated a concrete business. The creditor hired the couple's concrete business to complete a project at his home. The husband provided a price estimate for the project and completed the project himself without the wife. The creditor was unsatisfied with the finished product and initiated suit against the husband and the concrete business in state court.

The state court ruled in the creditor's favor, awarding him $22,775.05 in damages and attorneys' fees. The state court also found liability as to the husband and the concrete business only, but not the wife. As a result of the judgment, the couple filed for chapter 7. In response, the creditor filed an adversary complaint against the couple seeking to declare the judgment nondischargeable under § 523(a)(2)(A). The couple moved to dismiss the adversary for failure to state a claim under Rule 12(b)(6) and argued for the wife to be dismissed from the proceeding.[15]

The bankruptcy court denied the couple's motion to dismiss and their request to remove the wife from the adversary. In ruling on the motion to dismiss, the court found that the creditor sufficiently pled enough allegations under § 523(a)(2)(A) to state a plausible claim for relief. The court further denied the couple's request to remove the wife from the adversary, finding that it could later be determined that the wife was personally liable for the debt under § 523(a)(2)(A).

Following the guides of *Bartenwerfer*, the bankruptcy court noted the similarities between the couples in *Rassbach* and *Bartenwerfer*: Both were husband and wife who co-owned a business, with the husband seemingly running the operation and the wife not being involved. The bankruptcy court stated that it is plausible after *Bartenwerfer* that the wife could be liable for the husband's wrongdoing as a co-owner to the concrete business, and thus denied the request for her removal.[16]

In *Matter of Colquitt*, the bankruptcy court found that the debtor's liability to the bank was not due to the friend's vicarious liability but to the debtor's own direct liability.[17] The debtor's friend owned a concrete business and asked the debtor to help finance the business, to which the debtor agreed. The debtor and the friend developed a financing arrangement where the two would enter into a loan agreement per a business transaction involving the friend's concrete business.

For each transaction, the debtor would receive roughly 30 percent of the loaned amount. The debtor would then provide the friend a check inclusive of the agreed-upon price in the loan agreement, and the friend would deposit the check into his account. For repayment, the friend would provide the debtor a check to deposit in his account. The debtor opened an account with the bank for this purpose and other similar arrangements.[18]

One day, the friend deposited three checks totaling $550,000 into the debtor's account at the bank. Due to the debtor being out of town, the debtor's wife and the friend signed several loan agreements involving different transactions totaling $535,000. After confirming with a bank representative that the previously deposited $550,000 was available to disperse, the representative wrote a cashier's check in the amount of $535,000, and the friend subsequently deposited the amount into his account.

A few days later, the bank charged back the $550,000 to the debtor's account, causing his account to be overdrawn. The debtor informed the friend of the chargeback, to which the friend promised to resolve the issue within a few weeks. Following the friend's promise, the debtor signed a promissory note and security agreement with the bank for payment on the overdrawn amount. Despite several extensions by the bank on the note, the friend could not fulfill his promise, and the account remained in default.[19]

The debtor filed suit against the friend in state court, which was later stayed due to the friend filing for bankruptcy. The debtor then filed suit against the bank in state court claiming damages for breach of contract and negligence. The creditor counterclaimed and sought judgment on the note. The state court ruled in the bank's favor, awarding judgment on the note. The debtor filed for bankruptcy, which prompted the bank to initiate an adversary proceeding against him. The bank sought a determination that because the debt resulted from a check-kiting scheme, it was nondischargeable under § 523(a)(2)(A). The bank also argued that under *Bartenwerfer*, the debtor was liable for the debt.[20]

First, the bankruptcy court rejected the bank's argument that the debtor was part of a check-kiting scheme with the friend. The court noted the many successful transactions between the debtor and friend up until the end.[21] Second, the bankruptcy court rejected the bank's *Bartenwerfer* argument against the debtor, stating:

> In the case at bar, [the debtor's] liability to [the bank] does not arise from the fraud of another for which he is vicariously liable. Rather, his liability is a direct liability on the note that he signed to cover the overcharge to

13 David R. Kuney, "Supreme Court's Vicarious Liability Approach to Discharge Needs Congressional Reform," XLII *ABI Journal* 4, 22-23, 74-76, April 2023, *available at* abi.org/abi-journal (quoting Prof. Steven H. Resnicoff, "Is It Morally Wrong to Depend on the Honesty of Your Partner or Spouse: Bankruptcy Dischargeability of Vicarious Debt," 42 *Case W. Rsrv. L. Rev.* 147 (1992)).

14 *Clinton v. Rassbach (In re Rassbach)*, 2023 WL 2482726, at *7 (Bankr. W.D. Wis. March 13, 2023).

15 *Id.* at *1-*2.

16 *Id.* at *7-*8. The bankruptcy court also noted that if the judgment debt is later found to be dischargeable as to the wife, she could still be responsible under Wisconsin law, which is a community property state, thus any of the couple's community property would be used to cover the debt.

17 *Matter of Colquitt*, 2023 WL 2361103, at *8 (Bankr. M.D. Ga. March 2, 2023).

18 *Id.* at *1-*2.

19 *Id.* at *2-*3.

20 *Id.* at *3.

21 *Id.* at *7.

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Consumer Corner: After Bartenwerfer*, What Is an "Honest Debtor"?*

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> his account. Accordingly, [the bank] had to prove that this debt was incurred by actual fraud committed by [the debtor]. Nothing in *Bartenwerfer* changes this.[22]

The bankruptcy court denied the bank's request and declared the debt dischargeable as to the debtor.

Conclusion

Is there no such thing as an honest debtor after *Bartenwerfer*? No. Despite the Bankruptcy Code's overall goal of helping the honest debtor discharge its debts, there is no fundamental or constitutional right to a discharge in bankruptcy even for these debtors. As concluded in *Bartenwerfer*, there are instances that even the most honest of debtors cannot get out of, and § 523(a)(2)(A) is one. In the § 523(a)(2)(A) context, the Court empathizes with the *Bartenwerfer* debtor, along with other innocent debtors who will likely be affected by its decision. However, the Court upholds the separation of powers by affirming Congress's favoring creditors over debtors in § 523(a)(2)(A), even the honest ones. abi

22 *Id.* at *8.

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The Supreme Court Expands the Fraud Exception to Discharge — Maybe

Committee: Commercial Fraud

Michael D. Napoli

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Date Created: Fri, 2023-12-01 11:10

The Supreme Court may have expanded the types of debts that are exempt from discharge under § 523 of the Code. In *Bartenwerfer v. Buckley* [1], the Court held that § 523 bars the discharge of a debt arising from fraud committed by the debtor's business partner. While this result appears to be both straightforward and uncontroversial, the broad language used by the Court raises the possibility of expanded objections to dischargeability under § 523.

The facts of *Bartenwerfer* are simple. The debtor, Kate Bartenwerfer, and her then-boyfriend (now husband) [2] had formed a partnership to renovate and flip a house in San Francisco [3]. They sold the house to Buckley representing that the house had no undisclosed defects. In fact, the house had several significant defects, including a bad roof [4]. Buckley sued for fraud, recovering a $200,000 judgment against the debtor and her business partner [5]. The lower courts found, and the Supreme Court accepted, that the debtor was not personally involved in the fraud and had no knowledge that any of the representations made to Buckley were untrue [6]. Yet, while she may have been personally innocent of the fraud, the debtor was vicariously liable for her partner's fraud.

Analyzing the issue, the Supreme Court started with the text of the statute. It noted that § 523(a)(2)(A) precludes an individual debtor from discharging a debt "for money ... obtained by ... false pretenses, a false representation, or actual fraud." To the Court, § 523(a)(2)(A) was written in the passive voice and does not specify that an actor was decisive. In the Court's words, "Passive voice pulls the actor off the stage. " [7] Congress framed the statute to "focu[s] on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." [8] The Court concluded that the "debt must result from someone's fraud, but Congress was 'agnosti[c]' about who committed it." [9]

To support its textual analysis, the Court then turned to its 1885 opinion in *Strang v. Bradner*. [10] At the time that *Strang* was decided, the bankruptcy statute precluded the discharge of debt "created by the fraud or embezzlement *of the bankrupt*." [11] As in *Bartenwerfer*, the *Strang* debtor was vicariously liable for his partners' fraud, even though the misrepresentations were made without his authorization or knowledge [12]. Despite the statute's requirement that the debt be created by the bankrupt's fraud, the Supreme Court in *Strang* held that the debt could not be discharged because the "fraud of one partner, we explained, is the fraud of all because '[e]ach partner was the agent and representative of the firm with reference to all business within the scope of the partnership.'" [13]

After *Strang*, Congress enacted a new bankruptcy statute (the Bankruptcy Act of 1898) that deleted "of the bankrupt" from the discharge exception for fraud [14]. The "unmistakable implication" of the 1898 Act was that "Congress embraced *Strang*'s holding," which supports the Court's textual analysis. [15]

Finally, the Court made short work of the debtor's "innocence," reasoning that her true complaint was not with the Code but with the California law that made her vicariously liable for her partner's debt. It noted that she could have avoided this problem by forming a limited liability company or limited partnership instead of a general partnership [16].

What is the impact of *Bartenwerfer*? Is it, as Justice Sotomayor's concurrence argues [17], limited to situations involving fraud committed by partners or agents? Or is it somewhat broader? Justice Sotomayor is certainly correct that the facts of *Bartenwerfer* involve a formal partnership. But the majority's language is much broader: In § 523(a)(2)(A), the person committing the fraud is "off the stage," and Congress was "agnostic" as to who committed the fraud. The majority's language suggests that anytime a debtor has incurred a debt arising from someone's fraud, the debt cannot be discharged.

This occurs quite frequently in cases involving Ponzi schemes. In these situations, payments to investors of fake profits are deemed to be intentionally fraudulent transfers and subject to recovery by bankruptcy trustees and receivers [18]. The investors are innocent, but their debts resulted from someone's fraud.

If, as the majority's reasoning suggests, Congress was truly agnostic as to who committed the fraud, these investors cannot discharge those debts. This is, no doubt, far afield of the facts of *Bartenwerfer*, but as Justice Sotomayor warned, it may well be within its reasoning.

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[1] 598 U.S. ___; 143 S. Ct. 665 (2023).

[2] The debtor's subsequent marriage to her business partner has created confusion. Her liability and her inability to discharge the fraud debt arose not from her marriage to the active tortfeasor, but from her pre-existing business partnership with him. *Bartenwerfer* is not a traditional innocent-spouse case.

[3] *Bartenwerfer*, 143 S. Ct. at 670.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 671.

[7] *Id.* at 672.

[8] *Id.* (quoting *Dean v. United States*, 556 U.S. 568, 572 (2009)).

[9] *Id.* (quoting *Watson v. United States*, 552 U.S. 74, 81 (2007)).

[10] 114 U.S. 555 (1885).

[11] *Bartenwerfer*, 143 S. Ct. at 674 (citing Act of Mar. 2, 1867, § 33, 14 Stat. 533) (emphasis in original).

[12] *Id.*

[13] *Id.* (quoting *Strang*, 114 U.S. at 561).

[14] *Id.* at 675.

[15] *Id.*

[16] *Id.* at 676.

[17] *Id.* at 677 (Sotomayor, J., concurring).

[18] E.g., *Janvey v. Brown*, 767 F.3d 430, 441-43 (5th Cir. 2014); *Donell v. Kowell*, 533 F.3d 762 (9th Cir. 2008).

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ABI EXCLUSIVE

OCTOBER 20, 2023

Fifth Circuit Expands Bartenwerfer to Saddle Alter Egos with Nondischargeable Debts

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> An alter ego may be of the same ilk as a partnership or agency, so there may be no inconsistency between the Fifth Circuit opinion and the Bartenwerfer concurrence.

The Fifth Circuit expanded *Bartenwerfer* by holding a debt to be nondischargeable when the debtor was neither a partner nor an agent nor the person who himself committed the fraud.

The October 16 opinion might not be a big deal because the debtor was found to be the *alter ego* of the corporation that committed the fraud. Perhaps *alter ego* rises to the same level as a partner or agent.

The Fifth Circuit's decision brings into question whether the "understanding" in the *Bartenwerfer* concurring opinion will hold water. Justices Sonia Sotomayor and Ketanji Brown Jackson concurred, based on the belief that a debtor who did not commit fraud would be saddled with a nondischargeable debt under Section 523(a)(2)(A) only in cases of partnership and agency.

Misappropriated Construction Funds

A contractor who files bankruptcy after not paying subcontractors is begging to be sued for a declaration that the debt is nondischargeable. That's what happened here.

To build his home, a homeowner hired the construction company owned by the debtor. When all was said and done, it turned out that the debtor's construction company had taken down $761,000 in draws from the owner but had paid subcontractors only $193,000. The subcontractors filed liens for nonpayment. On giving draw requests to the owner, the debtor's corporation's bookkeeper had issued certificates saying that the subcontractors' bills would be paid.

The owner sued the debtor and his corporation in state court for, among other things, breach of contract, fraud and violation of the Texas Construction Trust Fund Act, which says that construction payments are "trust funds" and that an "owner" who has control of trust funds "is a trustee of the funds."

While the suit was pending, the debtor filed a chapter 7 petition. The debtor withdrew the state court suit to bankruptcy court.

The owner responded to the bankruptcy by filing an adversary proceeding to declare that the debt was nondischargeable under Section 523(a)(2)(A) and (a)(4). The former makes a debt nondischargeable for "any debt . . . for money, property [or] services . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud."

Under Section 523(a)(4), a debt is nondischargeable for "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny."

The debtor invoked an arbitration clause and sent the removed state court suit to arbitration. After a four-day hearing with witnesses, the arbitrator awarded the owner about $370,000 in damages, plus $200,000 in attorneys' fees.

The arbitrator found the corporation liable for fraudulent misrepresentations but found insufficient evidence to hold the owner liable for misrepresentations. Nonetheless, the arbitrator concluded that the owner was the corporation's *alter ego*, making him personally liable for the misrepresentations.

The bankruptcy court confirmed the arbitration award. On cross motions for summary judgment, the bankruptcy court decided that the debt was dischargeable. The district court reversed, prompting the debtor's appeal to the Fifth Circuit.

The *Per Curiam* Opinion

In a *per curiam* opinion, the Fifth Circuit panel said it was "greatly assisted by the Supreme Court's recent decision in *Bartenwerfer v. Buckley*, 589 U.S. 69 (2023). There, the Court confirmed that § 523(a)(2)(A) can extend to liability for fraud that a debtor did not personally commit."

The appeals court went on to note that the Supreme Court had focused "'on how the money was obtained, not who committed fraud to obtain it.' *Bartenwerfer*, 598 U.S. at 72."

Similarly, the panel noted how Texas corporate law does not limit the liability of an owner who has used a corporation to perpetrate actual fraud for the direct, personal benefit of the owner. To that, the circuit court added the arbitrator's finding that the owner should be held personally liable for the corporate misrepresentation on account of his *alter ego* status.

"[G]iven the arbitrator's determination of [the owner's] liability for [the corporation's] misrepresentations," the Fifth Circuit held that "*Bartenwerfer* supports § 523(a)(2)(A)'s application here" to render the debt nondischargeable under Section 523(a)(2)(A).

Nondischargeable Under Section 523(a)(4)

Focusing on defalcation as grounds for nondischargeability under Section 523(a)(4), the circuit court referred to *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 273–74 (2013), where the Supreme Court held that defalcation requires "an intentional wrong."

The appeals court referred to the arbitrator's finding that the owner misapplied trust funds intentionally, knowingly and with intent to defraud and thus demonstrates "that [the owner] had the requisite scienter."

The circuit court therefore also ruled that the debt was nondischargeable under Section 523(a)(4).

Observations

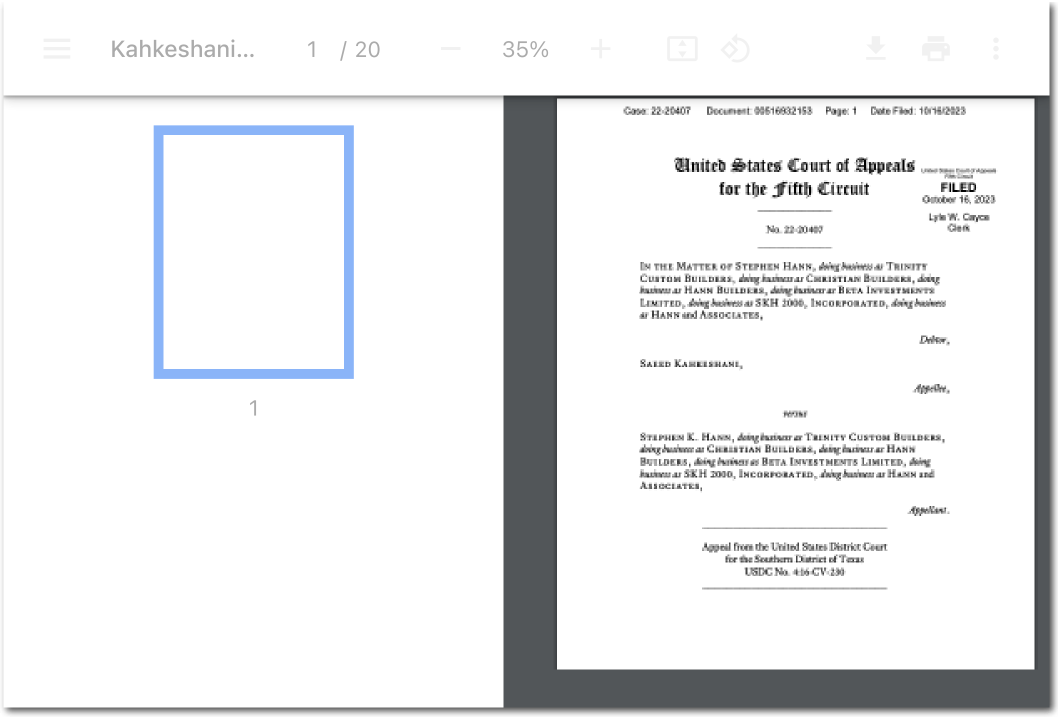
Justices Sotomayor and Jackson based their concurrence in *Bartenwerfer* on the "understanding" that fraud is imputed only to "agents" and "partners within the scope of the partnership." *Bartenwerfer*, *supra*, 143 S. Ct. at 677.

Notably, the Fifth Circuit's opinion did not mention the *Bartenwerfer* concurrence. Because the concurrence is not law, the appeals court had no obligation to deal with the concurrence.

The Fifth Circuit opinions gives rise to two questions: (1) Will other courts follow the *Bartenwerfer* concurrence; and (2) is an *alter ego* finding the equivalent of partnership or agency or an even more proper basis for finding nondischargeability?

Opinion Link

PREVIEW



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Case: 22-20407 Document: 00516932153 Page: 1 Date Filed: 10/16/2023

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals Fifth Circuit
FILED
October 16, 2023
Lyle W. Cayce
Clerk

No. 22-20407

In the Matter of Stephen Hann, *doing business as* Trinity Custom Builders, *doing business as* Christian Builders, *doing business as* Hann Builders, *doing business as* Beta Investments Limited, *doing business as* SKH 2000, Incorporated, *doing business as* Hann and Associates,

Debtor,

Saeed Kahkeshani,

Appellee,

versus

Stephen K. Hann, *doing business as* Trinity Custom Builders, *doing business as* Christian Builders, *doing business as* Hann Builders, *doing business as* Beta Investments Limited, *doing business as* SKH 2000, Incorporated, *doing business as* Hann and Associates,

Appellant.

Appeal from the United States District Court for the Southern District of Texas USDC No. 4:16-CV-230

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Case Details

Case Citation	Kahkeshani v. Hann (In re Hann), 22-20407 (5th Cir. Oct. 16, 2023
Case Name	Kahkeshani v. Hann (In re Hann)
Case Type	Consumer
Court	5th Circuit
Bankruptcy Tags	Fraud Fraudulent Transfers Consumer Bankruptcy Discharge/Dischargeability

THE U.S. SUPREME COURT ILLUMINATES THE BASIS OF VICARIOUS LIABILITY

Daniel Harris*

In February 2023, the U.S. Supreme Court unanimously held that a bankrupt debtor could not discharge a debt she incurred as a result of a fraud perpetrated by her husband and business partner, even though the debtor was personally innocent of the fraud and her liability was purely vicarious. The decision sheds light on why the law imposes vicarious liability; that is, why the law holds one person responsible for the misdeeds of another, just as if the wrongdoer and the defendant were the same person.

The preferred academic justification of vicarious liability, endorsed by Dean William Prosser's treatise on torts, is the justice of shifting losses from hapless tort victims to deep pocket employers with the ability to spread the losses to the community at large by raising their prices. There are many decisions, including the recent ruling of the Supreme Court, that are inconsistent with this theory. This Article argues that a better explanation of the doctrine of vicarious liability lies in the concept of agency: the notion that the employment of agents by an employer or principal involves a voluntary extension of the principal's legal personality, such that it is fair to treat the actions of agents, within the scope of their agency, as the actions of the agents' principal. In other words, vicarious responsibility is the responsibility of a principal for the actions of the principal's voluntarily expanded legal self. The shifting of losses to deep pocket employers is a frequent result of vicarious liability and sometimes a motive to construe vicarious responsibility expansively. It is not the doctrine's true purpose, justification, or rationale.

* Adjunct Professor of Agency Law, Chicago-Kent College of Law.

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INTRODUCTION

In February 2023, the U.S. Supreme Court held that Kate Bartenwerfer could not secure a bankruptcy discharge of a debt of more than $200,000 that she incurred because of a fraud by her husband and business partner, even though her liability was purely vicarious; that is, the debt was not based on her own fault but on that of her partner.[1]

The decision illustrates that vicarious liability is not limited to deep pocket employers, is not based on the defendant's ability to pass the cost of compensation on to society at large in the form of higher prices, and does not have the liberal, risk-spreading rationale ascribed to it by leading scholars.[2]

Instead, this Article will argue vicarious liability is a much more formal and much less equitable doctrine. The true rationale of vicarious liability is that the employment of agents or partners involves an expansion of the legal personality of the employer or principal, so that the actions of the agents or partners within the scope of their agency are attributed to the principal.[3]

The practical import of this jurisprudential point is that vicarious liability can happen to anyone who employs an agent or takes on a partner. Therefore, it is prudent for people to do business through corporations or other limited liability entities, so the entity can act as the principal and absorb any vicarious liability arising from the torts of agents. Form matters. The law is not imposing vicarious liability because of the defendant's ability to pay. Rather, vicarious liability is imposed on principals to hold them responsible for the actions of their voluntarily expanded legal selves.[4]

To make these points, this Article will proceed in three parts. Part I will discuss the recent U.S. Supreme Court decision in *Bartenwerfer v. Buckley*. Part II will discuss the deep-pocket, risk-spreading rationale for vicarious liability and how it does not explain the *Bartenwerfer* case. Part III will discuss the agency rationale for vicarious liability and how it makes sense of the *Bartenwerfer* case. The Conclusion will return to the main jurisprudential thesis and its practical lesson.

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[1] *See* Bartenwerfer v. Buckley, 598 U.S. 69, 83 (2023) (holding Kate Bartenwerfer's debt could not be discharged because the creditor's interest in recovering the full amount of the debt obtained through fraud took precedence over Kate Bartenwerfer's interest in a fresh start, even though she did not personally commit the fraud).

[2] *See, e.g.*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 459 (Jesse H. Choper et al., 4th ed. 1971).

[3] *See id.* at 460.

[4] *See* Daniel Harris, *The Lost Rationale of Agency Law*, 3 BUS. & FIN. L. REV. 1, 2–3 (2019).

I. *Bartenwerfer v. Buckley*

A. The Ill-Fated House Sale

The case before the Supreme Court arose out of a house sale that went terribly wrong. In 2005, Kate Bartenwerfer and her then-boyfriend, later-husband, David Bartenwerfer, jointly purchased a house in San Francisco.[5] They decided to remodel the house and sell it for a profit.[6]

Although the Bartenwerfers never signed anything formal creating a partnership,[7] their joint action in this enterprise made them business partners under a California law that defines partnership as "an association of two or more persons to carry on as coowners a business for profit."[8] That same statute makes each partner an agent of the partnership for actions taken in apparent furtherance of the partnership business[9] and, in general, makes all partners personally liable for all partnership obligations.[10] David took charge of the project, hiring an architect, structural engineer, designer, and general contractor and then monitored their work, reviewed invoices, and signed checks.[11] "Kate, on the other hand, was largely uninvolved."[12] Eventually, the remodeled house was sold to Kiernan Buckley.[13] In connection "with the sale, the Bartenwerfers attested that they had disclosed all material facts relating to the property."[14] That turned out not to be true.

After buying the house, Buckley discovered defects that the Bartenwerfers had not disclosed: a leaky roof, defective windows, a missing fire escape, and permit problems.[15] Buckley sued the Bartenwerfers in California state court and prevailed in a jury trial, leaving the Bartenwerfers jointly and severally liable for more than $200,000 in damages.[16]

B. Bankruptcy Litigation in the Lower Courts

Unable to pay this and other debts, the Bartenwerfers filed for bankruptcy under chapter 7 of the Bankruptcy Code, which generally allows debtors to get a "fresh start" by discharging their debts.[17] Unfortunately for the Bartenwerfers, there are

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5 *See Bartenwerfer*, 598 U.S. at 72.
6 *See id.*
7 *See In re* Bartenwerfer, No. AP 13-03185, 2017 WL 6553392, at *10 (B.A.P. 9th Cir. Dec. 22, 2017).
8 *See id.* at *9 (quoting CAL. CORP. CODE § 16101(9) (2013)).
9 *See* CAL. CORP. CODE § 16301(1) (West 2013).
10 *See id.* § 16306.
11 *See Bartenwerfer*, 598 U.S. at 72.
12 *Id.*
13 *See id.*
14 *Id.*
15 *Id.*
16 *See id.* at 73–74.
17 *See id.* at 73.

exceptions to the discharge of debts under chapter 7. Buckley invoked one of them, section 523(a)(2)(A), which bars the discharge of "any debt . . . for money . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud . . . ."[18]

After a bench trial, the Bankruptcy Court ruled in favor of Buckley, finding that David Bartenwerfer had knowingly concealed the house's defects from Buckley, and that David's fraudulent intent was imputable to Kate because the two had formed a partnership to execute the renovation and resale project.[19] On appeal, the Ninth Circuit's Bankruptcy Appellate Panel agreed as to David, but reversed as to Kate, holding that her discharge was barred by section 523(a)(2)(A) only if she knew or had reason to know of David's fraud.[20]

Following a second bench trial, the Bankruptcy Court found that Kate lacked the requisite knowledge of David's fraud and so granted her a discharge.[21] This ruling was affirmed on appeal by the Bankruptcy Appellate Panel,[22] but then reversed by the U.S. Court of Appeals for the Ninth Circuit.[23] In reversing, the Court of Appeals relied on an 1885 decision of the U.S. Supreme Court[24] that held that a debtor who is liable for a partner's fraud cannot discharge that debt in bankruptcy, regardless of the debtor's own culpability.[25] As a result of this decision, Kate Bartenwerfer remained personally liable to Buckley. That liability was not just for half the debt, but for the entire debt resulting from David's fraud.

C. The Supreme Court's Decision

The U.S. Supreme Court granted review of the case and unanimously affirmed in an opinion by Justice Amy Coney Barrett.[26] The primary reason was the language of the law. Speaking in the passive voice, section 523(a)(2)(A) bars the discharge of debts "for money . . . obtained by . . . false pretenses, a false representation, or actual fraud . . . ."[27] There is no requirement that the debtor be personally responsible for the fraud, and the Supreme Court declined to read such a requirement into the statute.[28]

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[18] 11 U.S.C. § 523(a)(2)(A) (2018).

[19] *See In re* Bartenwerfer, 549 B.R. 222, 225 n.3, 232 (N.D. Cal. 2016) ("The Court denied the motion for a directed verdict, finding that an agency relationship existed between Mr. and Mrs. Bartenwerfer based on their partnership with respect to the remodel project . . . .").

[20] *See In re* Bartenwerfer, No. AP 13-03185, 2017 WL 6553392, at *10 (B.A.P. 9th Cir. Dec. 22, 2017).

[21] *See In re* Bartenwerfer, 596 B.R. 675, 686 (Bankr. N.D. Cal. 2019).

[22] *See In re* Bartenwerfer, No. 3:13-AP-03185, 2020 WL 1970506 (B.A.P. 9th Cir. Apr. 23, 2020).

[23] *See* Bartenwerfer v. Bartenwerfer (*In re* Bartenwerfer), 860 Fed. App'x 544 (9th Cir 2021).

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

[25] *See In re* Bartenwerfer, 860 Fed. App'x. at 546–47.

[26] *See* Bartenwerfer v. Buckley, 598 U.S. 69, 71 (2023).

[27] 11 U.S.C. § 523(a)(2)(A) (2018).

[28] *See Bartenwerfer*, 598 U.S. at 74–76 ("Congress framed [section 523(a)(2)(A)] to 'focu[s] on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability.'").

The Court explained that while sometimes words are read into statutes to make them compatible with background legal rules, there was no reason to do so in this case.[29] On the contrary, the Court noted, the common law of fraud "has long maintained that fraud liability is *not* limited to the wrongdoer."[30] For instance, "courts have traditionally held principals liable for the frauds of their agents."[31] In addition, courts "have also held individuals liable for the frauds committed by their partners within the scope of their partnership."[32]

A second reason for the Supreme Court's decision was that the language that Kate Bartenwerfer wished to read into the statute—requiring personal culpability on the part of the debtor—was missing for a reason.[33] A late nineteenth century version of the law had barred the discharge of any debt "created by the fraud or embezzlement *of the bankrupt* . . . ."[34] In 1885, the U.S. Supreme Court essentially read the words "*of the bankrupt*" out of law by holding that bankrupts could not discharge debts incurred as a result of the fraud of one of their partners, on the theory that the fraud of one partner in service of the partnership business was the fraud of all.[35] Congress responded to the 1885 Supreme Court decision by dropping the words "*of the bankrupt*" from the statute, thus effectively endorsing the Supreme Court's ruling, and conforming the text of the statute thereto.[36]

Finally, the U.S. Supreme Court rejected Kate Bartenwerfer's argument that it was fundamentally unfair to hold her responsible for David Bartenwerfer's misconduct.[37] The Court noted that the federal statute did not create her debt; the underlying liability was the result of California state law, so her "fairness-based critiques seem[ed] better directed toward the state law that imposed the obligation on her in the first place."[38]

Moreover, the Court noted, the applicable state law principles were not all that unreasonable.[39] While Kate Bartenwerfer "paints a picture of liability imposed on hapless bystanders," the Supreme Court noted, "the law of fraud does not work that way."[40] The Court explained: "Ordinarily, a faultless individual is responsible for another's debt only when the two have a special relationship, and even then, defenses to liability are available."[41] For instance, "though an employer is generally accountable for the wrongdoing of an employee, [the employer] usually can escape

[29] *See id.* at 77.
[30] *Id.* at 76.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 79, 81.
[34] *Id.* at 79.
[35] *Id.*
[36] *See id.* at 80–81. The 1885 U.S. Supreme Court decision was *Strang v. Bradner*, 114 U.S. 555 (1885).
[37] *See id.* at 81.
[38] *Id.* at 82.
[39] *See id.* (countering petitioner's unfairness argument by highlighting the "variety of antecedent defenses" against liability provided to innocent debtors under California law).
[40] *Id.*
[41] *Id.*

liability if [the employer] proves that the employee's action was committed outside the scope of employment."[42] Similarly, "if one partner takes a wrongful act without authority or outside the ordinary course of business, then the partnership—and by extension, the innocent partners—are generally not on the hook."[43] In addition, the Court noted, "Partnerships and other businesses can also organize as limited-liability entities, which insulate individuals from personal exposure to the business's debts."[44]

The Supreme Court concluded that "innocent people are sometimes held liable for fraud they did not personally commit, and, if they declare bankruptcy, section 523(a)(2)(A) bars discharge of that debt."[45] The opinion went on to say that, although the Court was "sensitive to the hardship" that Kate Bartenwerfer was facing, it was not the Court's role to "second-guess" the judgment of Congress to limit bankruptcy discharge in this way.[46]

Justice Sotomayor wrote a concurring opinion, joined by Justice Jackson, which emphasized that the decision was based on principles of agency and partnership law and should not be read to bar discharge for innocent debtors outside that context.[47] Agreeing that the Court's decision was correct because Kate Bartenwerfer "and her husband acted as partners," the opinion by Justice Sotomayor went on to note: "The Court here does not confront a situation involving fraud by a person bearing no agency or partnership relationship to the debtor."[48] Justice Sotomayor then quoted language from the Court's opinion indicating that "'[t]he relevant legal context' concerns fraud only by 'agents' and 'partners within the scope of that partnership.'"[49] Justice Sotomayor said she joined the Court's opinion based on her understanding that the Court's opinion did not go beyond this agency or partnership context.[50]

D. Philosophical Questions

Whatever its correctness as a matter of law, the harsh result of the Supreme Court's opinion in *Bartenwerfer v. Buckley* leaves the reader with questions about the moral basis of the underlying legal rules. Why should Kate Bartenwerfer be jointly responsible for the entire fraud liability? Why isn't her liability limited to disgorgement of the monies she personally received? As a matter of common sense, that seems to be as far as her liability should go. Under what theory of justice is it legitimate to hold Kate Bartenwerfer vicariously responsible for the misdeeds of David Bartenwerfer? How can the law possibly deem it fair to blame an innocent

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[42] *Id.* (citations omitted).
[43] *Id.* (citation omitted).
[44] *Id.* (citations omitted).
[45] *Id.* at 83.
[46] *Id.*
[47] *See id.* (Sotomayor, J. concurring).
[48] *Id.* at 84 (Sotomayor, J. concurring).
[49] *Id.* (Sotomayor, J. concurring) (quoting *Bartenwerfer*, 598 U.S. at 76).
[50] *See id.* (Sotomayor, J. concurring).

person for the actions of someone else? What is the basis of the doctrine of vicarious liability followed by the courts?

II. The Deep Pocket Rationale for Vicarious Liability

The standard academic account of vicarious liability is not much help in answering these questions. The rationale favored by scholars is best understood as a vision of what academics believe the law should be. The theory is inconsistent with much of the case law and does not explain why the law is the way it is.

Scholars start from the premise that law is a pragmatic tool for improving society,[51] so legal rules should be evaluated and reshaped based on whether they produce socially beneficial results.[52] Applying this theoretical framework to vicarious liability, scholars focus on cases in which the doctrine is used to shift losses from hapless tort victims to deep pocket corporations.[53] Seeing this equitable redistribution of losses as socially beneficial—indeed, as an exemplary example of the law forcing those with the ability to pay to help those who are in need—scholars rationalize vicarious liability as designed to achieve this consequence.[54]

For example, the 1971 edition of Dean William Prosser's treatise on torts said: "[T]he modern justification for vicarious liability" is the policy decision that "it is just" that enterprise related losses "are placed upon that enterprise itself, as a required cost of doing business," rather than on the "innocent injured plaintiff."[55] This is because the enterprise owner profits from the underlying activity and is better able to absorb the losses "and to distribute them, through prices, rates or liability insurance . . . and so to shift them to society, to the community at large."[56] The 1984 edition of the treatise made the point more bluntly, stating: "In hard fact, the reason for the employers' liability is the damages are taken from a deep pocket."[57]

Other scholars have endorsed the notion that vicarious liability is justified because enterprise owners can pass the cost of compensating tort victims to their customers, and thereby spread the risk of harm to society at large. As a 2019 article put it: "Tort theorists have advanced risk spreading as a primary justification for

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[51] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 956 (1987); *see generally* STEPHEN B. PRESSER, LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW 14, 317 (1st ed. 2017).

[52] *See* William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. PA. L. REV. 1823, 1831 (2019).

[53] *See generally* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (finding oil tycoon Exxon Shipping liable for over $500 million in punitive damages resulting from an oil spill caused by the reckless actions of one of its ship captains).

[54] *See, e.g.*, Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 126–27 (1916).

[55] PROSSER, *supra* note 2, at 459.

[56] *Id.*

[57] *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 500 (5th ed. 1984) (quoting T. BATY, VICARIOUS LIABILITY: A SHORT HISTORY OF THE LIABILITY OF EMPLOYERS, PRINCIPALS, PARTNERS, ASSOCIATIONS AND TRADE-UNION MEMBERS WITH A CHAPTER ON THE LAWS OF SCOTLAND AND FOREIGN STATES 154 (Oxford Univ. Press 1916)).

holding an employer liable without fault for the torts of its employees."[58] Indeed, the academic justification of vicarious liability has become the foundation for the claim that the entire tort system is based on the strict enterprise liability, risk-spreading principle.[59] As a 2020 article expressed the combined idea: "[H]olding corporations strictly liable for employee wrongdoing" is often justified by the "risk-spreading principles of liability [that] constitute the bedrock of civil tort law . . . ."[60]

While favored by tort theorists, the deep pocket, risk-spreading rationale for vicarious liability is more prescriptive than descriptive.[61] The theory articulates a vision of what the law should be; it is not designed to explain how the law works in practice. Anyone seeking to use the rationale for that purpose will be disappointed.

For example, the deep pocket rationale does not explain why someone like Kate Bartenwerfer should be saddled with personal liability for David Bartenwerfer's wrongdoing. If the justification of vicarious liability is that it shifts losses to those with the ability to pay in the first instance and then pass the cost along to the community at large, then it makes no sense to impose vicarious liability on people like Kate Bartenwerfer. Nor does it make any sense under the risk-spreading rationale that Kate Bartenwerfer should be personally liable for the entire debt (not just half, but all of it) resulting from David Bartenwerfer's fraud.

The deep pocket theory also does not explain why, as the Supreme Court noted in the *Buckley v. Bartenwerfer* decision, vicarious liability is generally limited to torts committed by agents or partners within the scope of the agency or partnership relationship (that is, while the agent is on the job and trying to do the assigned job)—a limitation on vicarious liability that the Supreme Court has itself repeatedly insisted on in other cases.[62]

If the doctrine was designed to shift losses to enterprises that created the danger, profited from the underlying activity, and spread the cost to the community at large in the form of higher prices, then limiting vicarious liability to torts of agents committed within the scope of their agency does not make sense. Rather, vicarious liability for deep pocket defendants should be much broader, encompassing all foreseeable or characteristic harms associated with the defendant's enterprise.

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[58] Erin L. Sheley, *Tort Answers to the Problem of Corporate Criminal Mens Rea*, 97 N.C. L. REV. 773, 816 (2019).

[59] *See* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1315 (2001) (describing "[t]he scholarly march of enterprise liability"). In an excellent 2017 article, Professor Keating makes the moral argument in favor of requiring enterprises to pay for the harms caused by their characteristic activities. *See* Gregory C. Keating, *Products Liability As Enterprise Liability*, J. TORT L. 41, 41–97 (2017). The author thanks Professor Keating for his comments on an earlier draft of this Article.

[60] Robert Luskin, *Caring About Corporate "Due Care": Why Criminal Respondeat Superior Liability Outreaches Its Justification*, 57 AM. CRIM. L. REV. 303, 304 (2020).

[61] *See* Daniel Harris, *The Rival Rationales of Vicarious Liability*, 20 FLA. ST. U. BUS. REV. 49, 64–65 (2021).

[62] *See, e.g.*, Vance v. Ball State Univ., 570 U.S. 421, 430–31 (2013) (holding that employers are not vicariously liable under Title VII of the Civil Rights Act of 1964 for hostile environment sexual harassment by non-supervisors); United States v. BestFoods, 524 U.S. 51, 61 (1998) (holding that a parent corporation is generally not vicariously responsible for the actions of its subsidiary).

Indeed, many years ago, major academic proponents of the deep pocket, risk-spreading theory proposed just such an expansion of liability to bring the law in line with their theory.[63]

The discrepancies between the actual law and the deep pocket rationale for vicarious liability indicate that courts are not following the deep pocket rationale but instead are basing their decisions on some other theory of justice. What is that theory of justice?

III. The Agency Basis of Vicarious Liability

A. The Basics of Agency and Partnership

Vicarious liability has its origins and justification in the law of agency,[64] the body of precedent used in cases of alleged representation to determine whether one person's actions should be attributed to another.[65] Agency law is not part of tort law. Instead, it belongs to the law of persons.[66] Its role is to determine what it means for one person (an agent) to represent another (a principal)[67] and when the thoughts, words, or deeds of an alleged agent should be attributed to a possible principal.[68] By performing this function, agency law gives the individualistic Anglo-American common law a way of dealing with people operating in teams or through others, and thereby provides the conceptual foundation for corporations, partnerships, employment, vicarious liability, and the practice of law.[69]

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[63] *See* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 544–47 (1961) ("The similarities between workmen's compensation and respondeat superior have led some writers to urge that the 'scope of employment' rule of respondeat superior be read as broadly as the 'arising out of and in the course of employment' test of workmen's compensation."); *see also* William O. Douglas, *Vicarious Liability and the Administration of Risk I*, 38 YALE L.J. 584, 593–94, 604 (1929) (stipulating that "[o]nly when some such attempt is made can the study of these rules of law in their social and economic background be effected").

[64] *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 185–87 (1995) (arguing that vicarious liability is really agency law).

[65] *See* Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1188 (2003).

[66] *See* Gerard McMeel QC, *Agency Theory Revisited and Practical Implications*, *in* INTERMEDIARIES IN COMMERCIAL LAW 89, 105 (Paul S. Davies and Tan Cheng-Han eds., Hart Publishing 2022); *see also id.* at 107 ("Without agency there can be no artificial legal persons, such as companies. Agency is a central component of the law of persons, and is not subservient to contract, tort or unjust enrichment reasoning.").

[67] *See id.* at 103.

[68] *See* Deborah A. DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035, 1039 (1998) ("[A]gency doctrine defines the legal consequences of choosing to act through another person in lieu of oneself."). The author thanks Professor DeMott for her comments on an earlier draft of this Article.

[69] *See* Daniel Harris, *Corporate Responsibility for* Rogue Agents, 37 NOTRE DAME J.L., ETHICS & PUB. POL'Y, 121, 124 (2023).

Agency law stems from two legal inventions that were introduced into English law in or about the fourteenth century.[70] The first invention was to make personhood or legal personality into a legal construct, rather than an immutable natural fact.[71] The second innovation was to empower both natural people and artificial persons (such as corporations) to act as principals and expand their legal personalities[72] by employing agents to act on their behalf.[73] In this way, corporations could operate in the real world through representation by human agents,[74] individuals could become larger legal persons by including in themselves the agency of others, and a group of people could attain the legal unity of a single person.[75]

The triggering event for the expansion of the principal's legal personality is the creation of an actual or apparent agency relationship.[76] One way this can occur is if both principal and agent manifest assent that the agent will act on the principal's behalf, for the principal's benefit, and subject to the principal's control.[77] No formalities are required and the parties' characterization of their relationship does not control.[78] Moreover, a "principal's manifestation of assent to an agency relationship may be informal, implicit, and nonspecific."[79]

Parties may also slip into an agency relationship through forming a partnership.[80] The Revised Uniform Partnership Act, in what is essentially a continuation of the

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70 *See* Harris, *supra* note 4, at 7–8; Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 518 n.87 (2011).

71 *See* J.P. Canning, *The Corporation in the Political Thought of the Italian Jurists of the thirteenth and fourteenth Centuries*, 1 HIST. POL. THOUGHT 9, 15 (1980) (discussing how the concept of legal personhood became part of the law).

72 *See* Deborah A. DeMott, *The Domains of Loyalty: Relationships Between Fiduciary Obligation and Intrinsic Motivation*, 62 WM. & MARY L. REV. 1137, 1159 (2021) ("[T]he point of the relationship is the extension, through the agent, of the principal's 'legal personality.'").

73 *See* Gabriel Rauterberg, *The Essential Roles of Agency Law*, 118 MICH. L. REV. 609, 612, 653 (2020); *see generally* Rachel Leow, *Understanding Agency: A Proxy Power Definition*, 78 CAMBRIDGE L.J. 99 (2019).

74 *See* Daniel Harris, *Corporate Intent and the Concept of Agency*, 27 STAN. J.L., BUS. & FIN. 133, 138 (2022); Great Minds v. FedEx Off. & Print Servs., 886 F.3d 91, 95 (2d Cir. 2018) ("The concept of an agency relationship is a sine qua non in the world of entities like corporations and public school districts, which have no concrete existence . . . [and therefore] must act solely through the instrumentality of their officers or other duly authorized agents.") (citation omitted).

75 *See* E. Merrick Dodd, Jr., *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 981 (1929) ("[The early common law] required a theory by which the group could be regarded as a unit and as the kind of unit to which the formal rules of the medieval common law could readily by applied. Persons the common law knew, and the canonist view of the corporation as a fictitious person seemed to solve the problem."); *id.* at 984 ("[G]radually expanding ideas of agency . . . enabled certain authorized individuals to act for the group . . . .").

76 *See* F.E. Dowrick, *The Relationship of Principal and Agent*, 17 MOD. L. REV. 24, 35 (1954).

77 *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

78 *See id.* § 1.02.

79 *See id.* § 1.01 cmt. d.

80 *See id.* at cmt. c.

common law,[81] provides that, in general, "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership."[82] Unless the parties go through the formalities of creating a limited partnership, each partner is an agent of the partnership and personally liable for the obligations of the partnership, so effectively the partners are principals and agents of each other.[83] The common law came to this result more directly by making all partners agents of each other for actions taken in the course of the partnership business.[84]

B. The Concept of Agency

By employing agents, principals gain power but lose autonomy. Because agents act as extensions of their principal's legal personality, the agent does not simply act for the principal. Within the scope of the agency, the agent acts as the principal.[85] While acting as agent, the agent becomes the principal's alter ego[86]—the principal's other self—so that the thoughts, words, and deeds of the agent are attributed to the principal just as if the two were the same person.[87] In other words, within the scope of the agency (that is, when the agent is playing the role of the principal's alter ego) the agent becomes the principal's substitute.[88]

The power of agents to act as the principal's substitute is the key to understanding the basis of vicarious responsibility. The word *vicarious* comes from a Latin word that means *substitute*.[89] Thus, vicarious responsibility is responsibility for one's legal substitute. The theory is that, because principals have chosen to expand their legal personalities by employing agents to act as their substitutes, and because the law deems the actions of agents while performing this substitutive role (that is, while the agents are trying to do their assigned jobs) to be the actions of their principals, it is

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[81] *See, e.g.*, Ward v. Thompson, 63 U.S. 330, 333 (1859) ("A contract of partnership is where parties join together their money, goods, labor, or skill, for the purposes of trade or gain, and where there is a community of profits.").

[82] UNIF. P'SHIP ACT § 202(a) (UNIF. L. COMM'N amended 2013).

[83] *See id.* §§ 305–06; *see also* Lawrence Ponoroff, *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 TUL. L. REV. 2515, 2526 (1996) ("A partnership is a mutual general agency, and both the original and the recently approved Revised Uniform Partnership Acts make each general partner liable for the wrongful acts and omissions of other partners acting in the ordinary course of the business . . . .").

[84] *See* Stockwell v. United States, 80 U.S. 531, 547–48 (1871).

[85] *See* Floyd R. Mechem, *The Nature and Extent of an Agent's Authority*, 4 MICH. L. REV. 433, 437 (1906).

[86] *See id.* at 436–37 (1906) ("By the creation of the agency, the principal bestows upon the agent a certain character. For some purpose, during some time and to some extent, the agent is to be the *alter ego*,—the other self, of the principal.").

[87] *See* O. W. HOLMES, JR., THE COMMON LAW 232 (Univ. Press: John Wilson and Son, Cambridge 1881) ("[T]he characteristic feature which justifies agency as a title of the law is the absorption *pro hac vice* of the agent's legal individuality in that of his principal.").

[88] *See* Everett V. Abbot, *Of the Nature of Agency*, 9 HARV. L. REV. 507, 507 (1896); O. W. Holmes, Jr., *Agency, I*, 4 HARV. L. REV. 345, 349–50 (1891).

[89] *See* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 132 (Univ. of Cal. Press 1967).

fair to hold principals responsible for the conduct of their voluntarily expanded legal selves in the same way that natural persons have to bear responsibility for their actions.[90]

This formal theory is reinforced by other considerations. The public interest in effective regulation requires that society's most powerful actors—entities operating through agents—be held accountable for what they do.[91] Legal accountability gives these entities an incentive to take precautions against inflicting harm on others. Without accountability, the entities would likely engage in unduly risky activities, to the overall detriment of society.[92] Consequently, the powers of these entities should be accompanied by legal responsibility.[93] Moreover, since individual humans are held responsible for their actions, fundamental fairness demands that artificially enlarged legal persons should bear comparable responsibility.[94]

The classic expression of the idea behind vicarious liability—namely, that the actions of agents within the scope of their agency are to be equated with actions of their principal—is the Latin maxim upon which agency law was founded: *Qui facit per alium, facit per se* (which can be translated as "he who acts through another, acts himself").[95] An import from canon law,[96] the maxim was given wider and wider scope over the centuries.[97] By 1927, the U.S. Supreme Court could say: "'*Qui facit per alium, facit per se,*' is of universal application, both in criminal and civil cases."[98] The maxim was recognized by American courts as the basis of vicarious liability.[99]

In accordance with the *qui facit* concept of agency, the actions of agents within the scope of their agency are imputed to their principals.[100] A good example is the U.S. Supreme Court's 1885 decision in *Strang v. Bradner*,[101] the decision the U.S. Supreme Court essentially reaffirmed in *Buckley v. Bartenwerfer*.

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[90] *See* Harris, *supra* note 4, at 5; *see also* J. Dennis Hynes, *Chaos and the Law of Borrowed Servant: An Argument for Consistency*, 14 J.L. & COMM. 1, 17 (1995).

[91] *See* St. Louis, Alton & Chicago R.R. Co. v. Dalby, 19 Ill. 353, 368–69 (1857).

[92] *See* Philadelphia and Reading Railroad Co. v. Derby, 55 U.S. 468, 487 (1852).

[93] *Cf.* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 465 (2015) ("[I]n this world, with great power there must also come – great responsibility[.]") (citation omitted).

[94] *See* W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. U. L. REV. 477, 484 (2018) ("[C]ourts endeavored to treat all persons equally, but at a minimum sought not to discriminate against individual persons in favor of corporate persons.").

[95] *See* Harris, *supra* note 4, at 7.

[96] *See* R.H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297, 321 (1999) (acknowledging that canon law "provided that a legal duty could not be evaded by putting property into the hands of a nominee.").

[97] See THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 102 (Oxford 3d ed. 1886).

[98] Ford v. United States, 273 U.S. 593, 624 (1927) (quoting Town of Barkhamsted v. Parsons, 3 Conn. 1, 8 (Conn. 1819)).

[99] *See* Blake v. Ferris, 5 N.Y. 48, 57 (1851); *see also* Bibb's Adm'r v. Norfolk & W.R. Co., 14 S.E. 163, 167 (Va. 1891) ("[T]he author quotes with approbation the remark of Baron Rolfe in Hobbit v. Railway Co., 4 Exch., 255, that 'the liability of any one other than the party actually guilty of any wrongful act proceeds on the maxim *qui facit per alium facit per se*.'") (quoting MECHEM ON AGENCY § 747).

[100] *See* Harris, *supra* note 4, at 4 (discussing that the metaphor of agency "builds a legal foundation for ideals like faithful representation, legitimate authority, and loyalty").

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

In *Strang,* the Court held that two people filing for bankruptcy—John and Joseph Holland—could not discharge a debt they incurred as a result of a fraud perpetrated during and in furtherance of a partnership business by Strang, one of their partners, because the law barred the discharge of debts incurred as a result of a fraud by the bankrupt.[102] Even though the Hollands had no personal involvement in the Strang's fraud, the Court reasoned that "[e]ach partner was the agent and representative of the firm with reference to all business within the scope of the partnership," so Strang's "fraud is to be imputed, for purposes of the action, to all members of his firm."[103] The Court went on: "This is especially so when, as in the case before us, the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business."[104] Thus, the Hollands remained personally liable for a fraud perpetrated by a partner because their partner had been acting as an extension of their legal personalities, as their legal substitute, when engaged in the wrongdoing, so his fraud became their fraud.[105]

It is worth noting that judicial reliance on this agency construct—that is, the notion that the actions of agents within the scope of their agency are the actions of the principal—has drawn sharp academic criticism.[106] Nevertheless, as the *Bartenwerfer* decision illustrates, the agency construct remains the basis of vicarious liability law.

C. Making Sense of the Bartenwerfer *Decision*

Once the agency basis for vicarious liability is understood, the application of vicarious liability to Kate Bartenwerfer makes a great deal more sense. Vicarious liability applies to poor defendants such as Kate Bartenwerfer as well as to deep pocket corporations because the doctrine is not designed to shift losses from those in need to those with the ability to pay. It is not about the equitable redistribution or spreading of risks. It is not even about forcing disgorgement of ill-gotten gains. Rather, vicarious liability simply holds people responsible for the actions of their voluntarily expanded legal selves.

The agency basis for vicarious liability also makes the limitations on vicarious liability referenced by the Supreme Court in *Bartenwerfer v. Buckley* more understandable. The key question is not whether the plaintiff needs compensation that

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[102] *See id.* at 560–61 ("[T]he statute expressly declares that a discharge is subject . . . to the limitation that no debt *created by the fraud* of the bankrupt shall be discharged by the proceedings in bankruptcy . . . .") (emphasis added).
[103] *Id.* at 561.
[104] *Id.*
[105] *See id.*
[106] *See, e.g.*, David R. Kuney, *Supreme Court's Vicarious Liability Approach to Discharge Needs Congressional Reform*, 42 AM. BANKR. INST. J., Apr. 2023 at 22, 74 (criticizing vicarious liability for its potential implications on marital relationships*); see also* Laski, *supra* note 54, at 107 (1917) (questioning why a master can be held liable when "no authorization can be shown, or where express prohibition of an act exists").

the defendant can afford to pay, but whether the actions of the wrongdoer are attributable to the defendant. Consequently, vicarious liability generally[107] requires an agency or partnership relationship between the defendant and the wrongdoer and the commission of a wrong within the scope of that relation because otherwise it would not be fair to attribute the actions of the wrongdoer to the defendant's voluntarily expanded legal personality.

The agency rationale for vicarious liability also explains why the Supreme Court said that parties can protect themselves by doing business through "limited-liability entities, which insulate individuals from personal exposure to the business's debts."[108] Under the agency rationale, vicarious liability depends on the defendant's legal relationship with the wrongdoer, and not (as it would under the deep pocket rationale) on the defendant's ability to pay and pass the costs along.

Thus, for example, if the Bartenwerfers had transferred their house to a limited liability entity and then had that entity sell the property, then that entity would have been David Bartenwerfer's principal and the vicarious liability for his misconduct would have flowed to the entity and stopped there. Kate Bartenwerfer would not have been personally liable for David's misconduct or for the partnership obligation resulting from David's misconduct because she would not have been David's partner or principal. This all may seem formalistic, but that is true of a great deal of business law.[109]

Conclusion

Vicarious liability is not reserved to deep pocket corporations. It can happen to anyone who acts as a principal. The results can be surprisingly harsh. A practical lesson is that doing business as a sole proprietor or through general partnership can be dangerous. It is much safer to set up a corporation or other limited liability entity to act as principal.

This practical lesson leads to a jurisprudential insight. Vicarious liability was not created in order to impose liability on big corporations. Rather, those corporations were created in order to absorb the vicarious liability that would otherwise flow through to enterprise owners.

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[107] Liability may also be imposed on a theory of apparent authority. *See* Harris, *supra* note 68, at 154–57 (2023).

[108] *See* Bartenwerfer v. Buckley, 598 U.S. 69, 82 (2023).

[109] *See* Rauterberg, *supra* note 72, at 613 (2020) (discussing asset partitioning rules); *see also* Alan Schwartz and Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 618 (2003) (arguing in favor of literal interpretation of business contracts).

Faculty

Hon. Kevin R. Anderson is a U.S. Bankruptcy Judge for the District of Utah in Salt Lake City, appointed on Sept. 4, 2015. Previously, he served for 17 years as the standing chapter 13 trustee for the District of Utah, administering more than 70,000 chapter 13 cases. Judge Anderson served as president of the National Association of Chapter 13 Trustees (NACTT), and he served on several national committees regarding chapter 13 legislation, rules, forms and policy. He has frequently written and presented on chapter 13 issues, including for the *Norton Bankruptcy Law Advisor*, the *ABI Journal*, the *NACTT Quarterly* and the *NACTT Academy for Consumer Bankruptcy Education*. He also is a Fellow in the American College of Bankruptcy. Prior to his appointment as chapter 13 trustee, Judge Anderson practiced for 13 years as a commercial litigator with an emphasis on civil fraud, real property, and representing chapter 11 and 7 trustees. He also clerked for Hon. David N. Naugle, U.S. Bankruptcy Judge for the Central District of California. Prior to law school, Judge Anderson worked for two years as a data systems specialist testing military and commercial jet engines for General Electric. He received his J.D. *cum laude* from the J. Ruben Clark Law School at Brigham Young University.

Hon. Peggy Hunt is a U.S. Bankruptcy Judge for the District of Utah in Salt Lake City, appointed in March 2023. Previously, she spent approximately 25 years practicing bankruptcy and receivership law, and at the time of her appointment was the co-managing shareholder of the Salt Lake City office of Greenberg Traurig, LLP. Judge Hunt started her career as a law clerk to Justice Robert J. Callahan of the Connecticut Supreme Court. She served two other clerkships, one for Hon. Glen E. Clark, Chief Bankruptcy Judge for the District of Utah, and the other as one of the first law clerks for several judges on the Bankruptcy Appellate Panel for the Tenth Circuit. Judge Hunt serves on the board of directors of the American College of Bankruptcy and on the College's Standing Committee on Diversity, Equity, and Inclusion. She also is an American Bar Foundation Fellow, and prior to her appointment served as a commissioner on the Utah Securities Commission, chair of the Leadership Committee of And Justice For All, and as president or board member of numerous professional and community organizations, including the Utah Bar Foundation, Women Lawyers of Utah, the Utah Chapter of the Federal Bar Association, Utah Women's Forum, the Board of Advisors for the Utah Museum of Natural History and The Sharing Place. Judge Hunt co-founded the Utah Women's Giving Circle of the Community Foundation of Utah, which she chaired for several years. Judge Hunt received her B.A. in economics and political science from Washington and Jefferson College and her J.D. from the University of Pittsburgh School of Law, where she was also head notes and comments editor of the *University of Pittsburgh Law Review*.

Jordan E. O'Connell is an associate with Buechler Law Office, LLC in Denver and experienced as both a consumer and commercial bankruptcy. As a law student, she worked for a small firm doing mostly chapter 7 work. She now focuses on creditor/debtor relations, commercial bankruptcy, and financial restructuring. Ms. O'Connell also has experience with international law; she holds a certificate in international law and participated in the Willem C. Vis Moot International Commercial Arbitration competition in 2022 and 2023. In addition, she is experienced in CISG, international investment arbitration, international sales and international business transactions.

Hon. Cathleen D. Parker is Chief U.S. Bankruptcy Judge for the District of Wyoming in Cheyenne, appointed on June 2, 2015. Prior to her appointment, she was an attorney with the Wyoming Attorney General's Office for 16 years, where she primarily represented the Wyoming Departments of Revenue and Audit in front of administrative tribunals, the Wyoming State Courts and the Wyoming Supreme Court. At the time of her appointment, she was the supervisor of the Revenue Section of the Civil Division and was the head of the Attorney General's Bankruptcy Unit. Prior to joining the Office of the Attorney General, Judge Parker worked as an attorney in private practice in Colorado, handling both civil and criminal matters. She also sits on the Tenth Circuit Bankruptcy Appellate Panel. Judge Parker received her J.D. with honors from the University of Wyoming College of Law in 1998.

Hon. Michael E. Romero is a U.S. Bankruptcy Judge in the District of Colorado in Denver, initially appointed in 2003 and appointed Chief Judge from July 2014-June 2021. He is also Chief Judge of the Tenth Circuit Bankruptcy Appellate Panel. Since becoming a judge, Judge Romero has served on numerous committees and advisory groups for the Administrative Office of the U.S. Courts, is the past chair of the Bankruptcy Judges Advisory Group and has served as the sole bankruptcy court representative/observer to the Judicial Conference of the United States, the governing body for the federal judiciary. He is a past president of the National Conference of Bankruptcy Judges and actively participates in several of its committees. He also serves on the Executive Board of Our Courts, a joint activity between the Colorado Judicial Institute and the Colorado Bar Association that provides programs to further public understanding of the federal and state court systems. Judge Romero is a member of the Colorado Bar Association, ABI, the Historical Society of the Tenth Circuit and the Colorado Hispanic Bar Association. He received his undergraduate degree in economics and political science from Denver University in 1977 and his J.D. from the University of Michigan in 1980.

Hon. Joseph G. Rosania, Jr. is a U.S. Bankruptcy Judge for the District of Colorado in Denver. Previously, he was a shareholder of Connolly, Rosania & Lofstedt, P.C. (CR&L), where he focused on bankruptcy-related litigation, and he clerked for Hon. Jay L. Gueck, former U.S. Bankruptcy Judge for the District of Colorado. He also ran a successful solo law practice concentrating on bankruptcy and related litigation. Judge Rosania was a member of the Panel of Private Trustees for the District of Colorado from 1985-2015. He also served as a chapter 7 and 11 trustee, an examiner in three cases including a securities fraud case, and as counsel to unsecured creditors' committees in several cases, and he represented chapter 11 debtors. A frequent speaker, Judge Rosania has taught business law classes at the University of Colorado and Colorado State University. He received his J.D. from the University of Colorado School of Law, where he was in the top 20 percent of his class.

Hon. Kimberley H. Tyson is Chief U.S. Bankruptcy Judge for the District of Colorado in Denver, initially appointed to the bench in May 2017 and appointed Chief Judge in 2021. Prior to that, she was in private practice, where she concentrated in workouts, bankruptcy and related commercial litigation. From March 2011 until her appointment to the bench, Judge Tyson served as a chapter 7 trustee. She has served as the Tenth Circuit representative on the National Conference of Bankruptcy Judge's Board of Governors, and she is a member of the Colorado Bar Association's Bankruptcy Subcommittee and its former chair. Judge Tyson is an active ABI member and has served on the advisory board of its annual Rocky Mountain Bankruptcy Conference since 2003. After law school she clerked for Hon. John K. Pearson of the U.S. Bankruptcy Court for the District of Kansas and Hon. Jerry G. Elliot of the Kansas Court of Appeals. Judge Tyson received her B.A. at Smith College and her J.D. at the University of Kansas School of Law.