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Effect of Rejection; Good Faith Violations of the Discharge Injunction; Standards of Appellate Review; Pass-Through Transfers; the Fraud Discharge Exception; and Structured Dismissals:
Mission Product Holdings, Inc. v. Tempnology, LLC*; *Taggert v. Lorenzen*; *U.S. Bank Nat'l Assoc. v. Village at Lakeridge*; *Merit Management Group LP v. FTI Consulting, Inc.*; *Lamar, Archer & Cofrin, LLP. v. Appling*; and *Czyzewski v. Jevic Holding Corp.

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During the current 2018-2019 term, the Supreme Court granted certiorari in and decided *Mission Product Holdings, Inc. v. Tempnology, LLC*, no. 17-1657 (2019), addressing the effect of rejection in bankruptcy; and *Taggert v. Lorenzen*, no. 18-489 (2019), addressing good faith violations of the bankruptcy discharge. During the 2017-2018 term, the Supreme Court decided *U.S. Bank Nat'l Assoc. v. Village at Lakeridge*, 138 S. Ct. 960 (2018), addressing appellate standards of review; *Merit Management Group LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018), addressing the avoidability of pass-through transfers; and *Lamar, Archer& Cofrin, LLP. v. Appling*, 138 S. Ct. 1752 (2018), addressing the fraud discharge exception. During the 2016-2017 term, the Supreme Court decided *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), addressing structured dismissals in Chapter 11 cases. This paper examines these cases and decisions.

A. Tempnology and the Effect of Rejection

Section 365 of the Bankruptcy Code permits a trustee (or debtor-in-possession) in a bankruptcy case to reject an executory contract. The question raised in *Tempnology* is the effect of rejection. Does it simply mean that the trustee (or debtor) is excused from performing the contract and liable in damages for breach? Or does it also mean that the contract is effectively rescinded, taking away any rights it might have conferred on the non-rejecting party? The First Circuit concluded that the effect in the case was essentially to terminate the non-breaching party's rights.

Before filing for bankruptcy, Tempnology, LLC developed and patented certain cooling fabrics for use in athletic apparel and accessories. Tempnology granted a non-exclusive license to Mission Product Holdings to use Tempnology's marks and an exclusive right to distribute Tempnology's patented products within a certain territory. After Tempnology filed for bankruptcy, it rejected its agreement with Mission, planning to relicense the technology and distribute its products on more favorable terms. Mission argued that Tempnology's rejection of the contract did not terminate Mission's right to use the marks and distribute the products; it simply constituted breach of the agreement. Tempnology contended that rejection did indeed terminate Mission's rights, leaving Tempnology free to do business with someone else. As noted, the First Circuit agreed with Tempnology. On Mission's petition for certiorari, the Supreme Court granted review limited to the first question raised in the petition: whether rejection of a license agreement terminates the rights of the licensee. The Court declined review of Mission's second question: whether an exclusive right to sell is a right to intellectual property protected under section 365(n) of the Code.

This is not the first time that a court of appeals has ruled that the effect of rejection is to rescind an agreement, depriving the non-rejecting party of its rights. In 1985, the Fourth Circuit ruled in the *Lubrizol* case that the debtor's rejection of a technology license stripped the licensee of its right to use the technology. *See Lubrizon Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). In response to *Lubrizol*, Congress swiftly enacted section 365(n), which provides that, when a debtor rejects a license of "intellectual property," the licensee may nonetheless opt to retain its right to use the relevant technology. The trouble, however, lies in the

Code's definition of "intellectual property." The phrase includes patents and copyrights, but does not mention trademarks. Some have interpreted this to mean that trademarks are not protected and that rejection does indeed rescind the licensee's rights. Others have contended that section 365(n) represents a broad repudiation of *Lubrizol* and that licensees of trademarks are protected to the same extent as licensees of patents and copyrights, with the failure to include trademarks within the definition of intellectual property as perhaps just an oversight. Still others have contended that *Lubrizol* was simply wrong and that the only consequence of rejection is that the agreement is breached (as section 365(g) expressly provides); the licensee's right to continue using the mark is not ended regardless of what section 365(n) provides.

In its merits brief, Mission raised essentially three arguments why its rights were not terminated. First, it contended that, as section 365(g) expressly provides, rejection constitutes breach, not rescission, with only the ordinary consequences of breach. Notably, it argued that rejection is not an avoidance concept and thus cannot give the debtor greater rights than it would have outside of bankruptcy. Thus, its rights as a licensee are not terminated. Mission faulted the First Circuit for failing to apply these basic principles.

Second, Mission argued that rejection of the agreement did not otherwise revoke any of its licensing rights under the agreement, including its exclusive right to distribute the patented product and its non-exclusive right to use the Tempnology marks, because these are essentially forms of property rights that rejection does not reach. In making this argument, Mission construed both its right to use the Tempnology marks and its right to sell the Tempnology product as types of technology licenses (a characterization rejected by the First Circuit, which concluded that Mission's right to sell was simply the right of an ordinary distributor). Specifically, Mission argued that its exclusive right to sell encompassed the right to sell products "practicing Tempnology's patents and bearing its trademarks."

Third, Mission contended that section 364(n) does not support the inference that, because trademarks are not expressly included in the definition of "intellectual property," therefore they are not protected. Mission argued that there is no reason to treat trademarks differently from patents and copyrights. Finally, Mission argued that the reorganization policies of Chapter 11 do not justify treating rejection as an avoidance power.

In its merits brief, Tempnology presented essentially three responses. First, it contended that the treatment of Mission's exclusive right to sell was outside the singular question that the Court accepted for review. According to Tempnology, its agreement with Mission distinguished Mission's non-exclusive license to use Tempnology's intellectual property and Mission's exclusive product distribution rights. Tempnology noted that the Court had granted review only with respect to Mission's rights as a licensee and the effect of rejection thereon, and not with respect to Mission's additional question concerning its distribution rights. Tempnology contended further that, if Mission's distribution rights were not at issue, the case is moot because Mission's non-exclusive license to use Tempnology's intellectual property expired in 2016.

Assuming a live controversy, Tempnology next argued that a rejected contract is unenforceable against the debtor's estate, except to the extent the Bankruptcy Code otherwise provides. As a result, once a contract is rejected, the non-rejecting party's only recourse is to assert a claim for damages, not the debtor's performance of its obligations. Because Congress has not granted licensees of trademarks any special remedies, Mission's only remedy is to assert a claim for damages for breach. According to Tempnology, this is supported by the reality that the non-rejecting party to a rejected agreement has no right to have its claim treated as one entitled to administrative priority. In support of its position, Tempnology also argued that Mission's exclusive right to distribute Tempnology products is not a property right; it is simply a contract right to sell products that Tempnology manufactures, that incorporate Tempnology's patented processes or materials, or that bear the Tempnology marks. Nothing in section 365 protects such distribution rights.

Third, Tempnology argued that there are good reasons to treat trademarks differently from other kinds of intellectual property protected under section 365(n). Unlike patents and copyrights, trademarks and the goodwill accompanying them must always be owned by a single owner, who has the right to exercise control over the nature and quality of the relevant goods or services covered by the mark. A licensee simply does not acquire the rights of an owner, and thus does not acquire a property right in the same sense as the licensee of a copyright or patent. That is especially so where, as here, the licensee holds a non-exclusive license. In addition, Tempnology argued that treating Mission's rights in the manner endorsed by the First Circuit was essential to facilitate the reorganization of businesses like Tempnology.

Numerous amici filed briefs supporting Mission's position. Two amicus briefs were filed in support of neither party. No amicus brief was filed in support of Tempnology. Oral argument was conducted on February 20, 2019. On May 20, 2019, the Court issued its decision reversing and remanding. A copy of the Court's opinion is attached.

B. Taggert and the Effect of Good Faith in Addressing Violations of the Discharge Injunction

Section 524(a) provides that the grant of a discharge in a bankruptcy case "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor, whether or not discharge of such debt is waived . . . ." 11 U.S.C. § 524(a). Respondents (a group of individuals) sued petitioner (Taggert) in state court for wrongfully transferring their interests in a limited liability company without honoring their right of first refusal. On the eve of trial, Taggert filed for Chapter 7 bankruptcy relief and ultimately obtained a discharge. Thereafter, Taggert sought to be dismissed from the state-court litigation, owing to the discharge granted in his bankruptcy case. The trial court, however, refused, determining that Taggert was a necessary party, even though the parties had agreed not to pursue a money judgment against him. After respondents prevailed at trial, they sought attorneys' fees from Taggert, arguing that his post-bankruptcy participation in the case fell outside the reach of the discharge injunction.

In response, Taggert moved to reopen his bankruptcy case and sought to hold respondents in contempt for violating the discharge injunction. The issue was simultaneously litigated in both state and federal court. Ultimately, various courts determined that respondents had indeed violated the discharge injunction. The bankruptcy court in particular found the violation to be willful and determined (as is relevant here) that there is no "good faith belief" defense. The court awarded $5,000.00 in noneconomic damages and approximately $105,000.00 in fees and costs that Taggert had incurred. The court also added $2,000.00 in punitive damages for respondents' failure to timely vacate the state-court judgment against Taggert.

On appeal, the bankruptcy appellate panel reversed, concluding that the bankruptcy court had erred in determining that respondents' subjective or good faith beliefs were irrelevant. On further appeal, the Ninth Circuit affirmed the bankruptcy appellate panel, concluding that respondents could not be held in contempt because they believed in good faith that the discharge injunction was inapplicable. According to the Ninth Circuit, a creditor's good faith belief excuses a violation of the discharge injunction, even if the creditor's belief is unreasonable. Because it was uncontested that respondents possessed a good faith belief that the discharge injunction did not apply to their claims, their belief, even if unreasonable, protected them from contempt. In seeking certiorari review, Taggert contended that the Ninth Circuit's standard conflicts irreconcilably with that of the Eleventh Circuit as set forth in various cases, including *In re Hardy*, 97 F.3d 1384 (11th Cir. 1996), in which the court concluded that relief is available for violations of the discharge injunction irrespective of the creditor's good faith. Taggert likewise contended that the Ninth Circuit's standard conflicts with decisions from the First and Fourth Circuits. The Court granted certiorari on January 4, 2019 and conducted oral argument on April 24, 2019. The Court issued its decision vacating and remanding on June 3, 2019. A copy of the Court's opinion is attached.

C. Village at Lakeridge and Appellate Standards of Review

In a chapter 11 cram-down case, if a class of claims is impaired, at least one impaired class must vote in favor of the plan in order for the plan to be confirmed, excluding insider votes. 11 U.S.C. § 1129(a)(10). The Code defines insiders to include various persons (known as statutory insiders), but the list is not exhaustive. Others who are sufficiently close to the debtor may also be deemed to be insiders (known as non-statutory insiders). The issue the Supreme Court took for consideration is *not* the resolution of various disputes over the correct test for determining whether a creditor is a non-statutory insider, but rather the standard of review that an appellate court should use in reviewing the decision of a bankruptcy court applying the relevant criteria (whatever they are) to the facts of the case to determine whether the creditor is a non-statutory insider. Ordinarily, courts of appeals review questions of law *de novo*, and questions of fact under the clearly erroneous standard. When it comes to applying the law to the facts, however, some courts have characteristically reviewed the bankruptcy judge's *application* of the law to the facts (assuming the bankruptcy judge has stated the legal test correctly) under the clearly erroneous standard, while others have reviewed it *de novo*.

The facts of the case are colorful. MBP Equity Partners was the equity owner of the Village at Lakeridge, the debtor. U.S. Bank held an approximately $10 million claim against Lakeridge secured by a mortgage lien. MBP held an unsecured claims against Lakeridge in the amount of approximately $2.76 million. Lakeridge proposed to confirm a cram down plan that impaired the rights of U.S. Bank and needed at least one impaired class to vote in favor of the plan, but the claim it held was obviously the claim of an insider. So MBP, acting through one of its board members (Ms. Bartlett), sold its claim to an investor (Dr. Rabkin) for $5,000. Ms. Bartlett and Dr. Rabkin were romantically involved.

The bankruptcy court determined that Dr. Rabkin was not a non-statutory insider. The bankruptcy appellate panel reversed, and the Ninth Circuit reversed the bankruptcy appellate panel. The Ninth Circuit reasoned that it reviewed the bankruptcy court's determinations of fact under the clearly erroneous standard, and its conclusions of law *de novo*. Classifying the bankruptcy court's application of the law to the facts as falling within the scope of its clearly erroneous review, a majority of the three-judge panel concluded that the decision was not clearly erroneous (the bankruptcy court having more or less stated the correct legal standard).

In the Supreme Court, U.S. Bank argued that the bankruptcy judge's application of the law to the facts should be reviewed *de novo*, just like questions of law generally. U.S. Bank contended that, among other things, doing so offers important law-clarifying benefits. Lakeridge argued that the bankruptcy judge's application of the law to the facts should be reviewed under the clearly erroneous standard, just like pure questions of fact. Lakeridge argued that the application of the legal standard to the facts is essentially like determinations of fact that the bankruptcy judge is in the best position to assess. The United States filed an amicus brief siding with Lakeridge.

At oral argument, the Justices asked a number of far-ranging questions about method, the capacity of appellate judges to conduct appellate review, and the practical implications of one standard over the other. In rendering its decision, the Court decided for the debtor (and the United States), concluding that a clear error standard applied.

In conducting its analysis of the legal issue of what standard of review properly applies, the court first differentiated three distinct kinds of inquiry: those that are purely legal (*i.e.*, what is the relevant legal rule or test), those that are purely factual (*i.e.*, what happened in the case of relevance to that test), and those that that are a combination of the two (*i.e.*, how is the law to be applied to the particular facts). On the first question, the Court noted (without deciding its merits) that the Ninth Circuit applies a two-part test for non-statutory insider status: whether the person's relationship with the debtor was similar to those listed as statutory insiders, and whether the relevant transaction had been conducted at less than arm's length. The Court took this standard as the given test in deciding the case. Ordinarily such questions are reviewed *de novo*, but the Court did not grant certiorari on this purely legal question. Accordingly, the Court did not decide its merits (although several justices stated in concurrence that they doubted the Ninth Circuit's test was correct).

On the second question, the Court observed that the bankruptcy court made numerous "basic" or "historic" findings of facts regarding what actually happened in the case. The Court noted that the set of relevant facts in any particular instance will turn on the legal test used. In this case, the relevant factual determinations included those surrounding Rabkin's relationship with Bartlett, such as whether they lived together or paid each other's living expenses, and Rabkin's motives for purchasing the claim against the debtor. The Court observed that such determinations are ordinarily reviewed on appeal under the clearly erroneous standard, which affords great deference to the trial court's findings.

On the third question, which was the real bone of contention, the Court characterized the inquiry as involving so-called "mixed questions" of law and fact. Essentially, the third question involves considering whether the facts satisfy the legal test chosen for the resolution of the matter. As noted, the bankruptcy court had determined that the facts did not show the kind of transaction necessary to confer insider status. The question the Court was called up to answer was whether this determination should be reviewed *de novo* or for clear error.

The Court observed that, in general, there is no clear-cut answer to this question because mixed questions of law and fact are not all alike. Sometimes they require a court to expound on the law, such as when they require the elaboration of a legal standard. In such instances, the Court reasoned that appellate courts should review the trial court's determination *de novo*. In other instances, however, the determination is much more intensely factual. In such instances, the Court determined that appellate courts should review the trial court's determination under the highly deferential clearly erroneous rule.

In this case, the Court held that the determination of Rabkin's insider status under the relevant legal test was about as fact-bound as it gets. The nature of the inquiry was such that the bankruptcy court was required to take a raft of case-specific facts and make a determination of whether, on balance, they showed that the parties were acting more like strangers or more like insiders. Conversely, the Court reasoned that, in making its determination, the bankruptcy court was required to do relatively little legal work (other than selecting the correct legal standard). Rather, the bankruptcy court's work essentially involved characterizing the totality of the facts.

The Court's decision thus leaves it up to the lower appellate courts to figure out in each case what is more predominant in the application of the law to the fact—the law or the facts. In some instances, this is likely to be relatively straightforward. In others, it is likely to be more complex. For example, if the law is relatively unsettled, and the application of the law to the facts requires significant illustration of the kinds of things the law is intended to encompass, one would imagine the appellate court opting for *de novo* review. In more run-of-the mill cases in which factual analysis predominates, however, the appellate court is likely to opt for the clear error standard.

D. *Merit* and Pass-Through Transfers Under Section 546(e)

Section 546(e) of the Bankruptcy Code renders unavoidable a transfer "by or to (or for the benefit of)" a financial institution. 11 U.S.C. § 546(e). The issue addressed in the case is whether a transfer that simply passes through a financial institution is insulated from avoidance, or whether the section protects only those transfers in which a financial interest holds a beneficial interest. The Seventh Circuit, following the Eleventh Circuit, ruled that the section shelters only those transfers in which the financial institution holds a beneficial interest, and not where the financial institution serves merely as a conduit. In contrast, the Second, Third, Sixth, Eighth, and Tenth Circuits have held to the contrary.

The facts of the case, although layered, are straightforward. Valley View, the debtor, wanted to establish a racing track and casino in Pennsylvania, for which it needed both a racing license and a gaming license. Valley View was in competition with Bedford Downs for the last racing license in the state when the two decided to combine forces through a leveraged buyout in which Valley View agreed to buy the stock of Bedford Downs with borrowed funds from Credit Suisse and other lenders. The purchase money was escrowed at Citizens Bank. Merit Management, the owner of approximately thirty percent of Bedford Downs, surrendered its stock to Citizens Bank in exchange for approximately $16.5 million.

Unable to obtain a gaming license, Valley View filed for bankruptcy in 2009. FTI Consulting, as trustee under the litigation trust tasked with pursuing Valley View's avoidance actions, brought suit against Merit Management in Illinois under sections 544, 548, and 550 of the Bankruptcy Code. FTI's theory was that the $16.5 million transfer to Merit Management was a fraudulent conveyance. Merit Management argued that section 546(e) rendered the transfer unavoidable on the basis of the involvement of Credit Suisse as lender and Citizens Bank as escrow agent. The district court ruled in favor of Merit Management and FTI appealed to the Seventh Circuit.

The Seventh Circuit reversed. It determined that the relevant text of section 546(e) is ambiguous. It analogized the situation to one in which a person sends a postcard through the U.S. Postal Service. On the one hand, the sender can be thought of as sending the card by or through the mail. On the other hand, the postal service can be thought of as doing the sending. Because the language is ambiguous, the court looked to the section's history and purpose, as well as other indicia of meaning.

In particular, the court traced the history of section 546 through the course of three amendments. The first, in 1982, added protection for margin and settlement payments involving commodity brokers, forward contract merchants, stock brokers, and securities clearing agencies. The second, in 1984, added financial institutions to the list. The third, in 2006, added the "(or for the benefit of)" language. After reviewing the history, the court reasoned that the intent was to protect the named parties with respect to transfers in which they have a beneficial interest, not simply in situations in which they serve merely as conduits for others. The court acknowledged that its decision deepened a pre-existing circuit split.

The Supreme Court granted certiorari to address the conflict among the courts of appeals. In the Supreme Court, Merit Management understandably focused heavily on the text of section 546(e), contending that it literally applied to the relevant transfer in question. In contrast, FTI understandably focused on the history and purpose of the section, as well as its place in context with other provisions of the Code. During oral argument, Justice Ginsburg was particularly interested in the fact that Merit Management is not a financial institution. Justice Kagan inquired whether the focus ought to be on the transfer being avoided, rather than the path the transfer took. The justices otherwise asked a number of pointed questions about section 546(e) and its operation.

In affirming the Seventh Circuit, the Court nonetheless began by rejecting the lower court's determination that the statutory language is ambiguous. After summarizing the avoidance powers generally, the Court then turned to the limitations on those powers set forth in section 546(e). After quoting the section, the Court reviewed its history, particularly the various amendments adding various provisions, culminating in the current text. With that as background (and after summarizing the facts) the Court identified the relevant question as whether "the transfer between Valley View and Merit implicates the safe harbor exception because the transfer was 'made by or to (or for the benefit of) a . . . financial institution.'" *Merit*, 138 S. Ct. at 892. In answering this question, the Court reasoned that it first had to identify the nature of the relevant transfer. Rejecting Merits' argument that it should look at each component part of the transfer individually, the Court concluded that, as FTI argued, there was, in fact, only one overarching transfer—that between Valley View and Merit for $16.5 million. Because that transfer was not made by, to, or for the benefit of a financial institution, the safe harbor did not apply. The Court determined that this conclusion followed from the language of section 546(e), the context in which it is used, and the broader statutory structure of which section 546(e) is a part.

Beginning with the text, the Court reasoned that the very first clause of section 546(e)—"Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title"—suggests that the relevant inquiry is on the transfer the trustee seeks to avoid—here the $16.5 million from Valley View to Merit. Likewise the very last clause—"except under section 548(a)(1)(A) of this title"—suggests the same thing because it creates an exception to the exception for an actually fraudulent transfer, again focusing on the transfer in question that the trustee is seeking to avoid. Further supporting its interpretation, the Court noted that the statutory text provides that a transfer the "trustee may not avoid" is designated in as "a transfer that *is*" either a settlement payment or made in connection with a securities contract. The Court considered relevant that the statutory language did not say "a transfer that involves" or that "is connected with" such things, but rather a transfer that "is" those things.—further supporting its conclusion that what matters is the transfer the trustee is seeking to avoid, not its component parts.

The Court then turned to the relevant statutory structure. Here it adopted the reasoning of the Seventh Circuit—namely, that the system for avoiding transfers, together with the safe harbor from avoidance, are logically two sides of the same coin. Notably, the avoidance provisions designate the characteristics of transfers the trustee may avoid. Likewise, the safe harbor exception logically does the same. There is no reason, the Court concluded, "to examine the relevant component parts when considering a limit to the avoiding power, where that limit is defined by reference to an otherwise avoidable transfer, as is the case with § 546(e) . . . ." *Id.*, at 894-95.

In conducting its analysis, the Court also rejected Merit's argument that the phrase "(or for the benefit of)" added to section 546(e) in 2006 was intended to overrule the Eleventh Circuit's decision in *In re Munford, Inc.*, 98 F.3d 604, 610 (11th Cir. 1996), which held that the safe harbor was inapplicable to transfers in which a financial institution was only an intermediary. The Court reasoned that nothing in the text or its legislative history corroborated that proposition, and likewise that there was a simpler explanation: a number of avoidance provisions use this same language, so it made sense that Congress would add it to section 546(e) so that the provisions all matched. The Court likewise rejected Merit's argument that its interpretation was compelled by reference to the purpose of the safe harbor. Merit argued that section 546(e) was intended as a broad and comprehensive protection. The Court concluded, however, that Merit's purposive argument was unavailing because it conflicted with the plain language of the statute.

E. Lamar and the Fraud Discharge Exception

Section 523(a)(2)(A) excepts from discharge "any debt . . . for money, property [or] services . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud, *other than a statement respecting the debtor's . . . financial condition*." 11 U.S.C. § 523(a)(2) (emphasis added). If the creditor claims a debt should not be discharged under this provision owing to a false or fraudulent statement regarding the debtor's financial condition, section 523(a)(2)(B) additionally requires that the statement must be in writing and that the creditor must show the debtor's intent to deceive. In other words, there are heightened requirements for the non-dischargeabilty of a debt based on a statement respecting the debtor's financial condition. The issue in the case is whether a debtor's statement regarding a tax refund that the debtor anticipated receiving is a statement respecting the debtor's financial condition such that the additional requirements apply, or whether it is simply a statement regarding a particular asset that otherwise falls within the scope of section 523(a)(2)(A).

The creditor in the case is a law firm that did work for the debtor. After the firm became concerned that the debtor was not paying his bills, the firm inquired about the debtor's ability to pay. The debtor represented orally that he was going to get a large tax refund. In fact, the tax refund that the debtor anticipated receiving was less than he represented and, when the debtor received it, he used it to pay other debts, leaving the firm unpaid. After the debtor filed for bankruptcy relief, the firm moved to have its claim determined to be non-dischargeable. The bankruptcy and district courts ruled for the firm. The Eleventh Circuit, however, ruled in favor of the debtor. On certiorari review, the Supreme Court affirmed the Eleventh Circuit.

In reaching its decision, the Court zeroed in on the meaning of the phrase "statement respecting the debtor's financial condition." The Court asked: "Does a statement about a single asset qualify, or must the statement be about the debtor's overall financial condition?" The Court reasoned that the answer to this question matters because the statement at issue was just about a single asset—the tax refund. The Court concluded that the relevant statutory language, particularly the term "respecting," makes it plain that a statement about a single asset can be a "statement respecting the debtor's financial condition." Accordingly, if the statement is not in writing, the associated debt may be discharged, even if the statement was untrue.

The Court began by observing that, one of the main purposes of the Nation's bankruptcy laws is "to aid the honest but unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character." *Lamar*, 138 S. Ct. at 1758 (citations and marks omitted). In order to decide if the debt in this case is of such a "certain character," the Court determined that it had to closely examine the relevant text of section 523(a)(2) to see what it includes and excludes. The Court began its analysis by observing that there was no dispute regarding the meaning of the terms "statement" or "financial condition." What matters is the meaning of the "key word" that appears between these terms in the statutory text: the word "respecting." Rejecting Lamar's narrow reading of the term, the Court concluded that there was no basis to believe that the term had a meaning materially different from "about," "concerning," "with reference to," or "as regards." Because a statement regarding a single asset can be about or concerning or with reference to or as regards a debtor's financial condition, such a statement can also be one respecting a debtor's financial condition. Noting that the Court typically reads the word "respecting" broadly, it saw no reason to depart from that tradition in this setting—particularly where it concluded that adopting a more restricted interpretation would lead to anomalous results.

In further support of its analysis, the Court cited the legislative history. The relevant language has long been a part of the fraud discharge exception, and courts of appeals have long concluded that the language encompasses statements addressing just one or some of a debtor's assets or liabilities. Applying the canon that, when Congress uses the same language in a statute through multiple recodifications it presumably is aware of and intends to retain the judicial interpretations of it, the Court reasoned that this further bolstered its plain reading analysis. Finally, the Court rejected Lamar's argument that Appling's interpretation undermines the purpose of section 523(a)(3), or the general principle that bankruptcy relief is available only to the honest but unfortunate debtor. The Court noted that section 523(a)(2) attempts to balance debtor relief against a history of creditor abuse. As the Court observed, some finance companies had historically encouraged their borrower's falsity for the purpose of insulating their claims from discharge in bankruptcy. The Court's advice: creditors should ensure that the debtor's statements on which they rely in extending credit are in writing.

F. *Jevic* and Structured Dismissals

The Bankruptcy Code authorizes the dismissal of Chapter 11 bankruptcy cases and generally provides that, unless the court for cause orders otherwise, dismissal has the effect of returning the parties to the status quo immediately prior to the commencement of the case. *See* 11 U.S.C. §§ 349, 1112. Rather than return the parties to the status quo, however, some courts have approved "structured dismissals" that effectively distribute the value of the debtor's assets in various ways, approve the release of various parties, and/or settle various claims. These structured dismissals may or may not comply with the Code's priority rules. The question presented in *Jevic* was whether a structured dismissal that did not comply with absolute priority is something a bankruptcy court is authorized to approve and, if so, under what circumstances.

Jevic Transportation was in the trucking business. Prior to filing for bankruptcy, Jevic engaged in a leverage buyout transaction in which Sun Capital Partners acquired the company. Various lenders led by CIT financed the buyout and provided Jevic with an $85 million revolving line of credit. After Jevic's finances continued to deteriorate, the company decided to file for bankruptcy. It ceased operations, notified its employees of their impending termination, and commenced a Chapter 11 proceeding in Delaware. At the time, Jevic owed its lenders and Sun approximately $53 million secured by liens on the company's assets. It owed an additional $20 million to taxing authorities and general unsecured creditors. An official committee of unsecured creditors was appointed.

After the commencement of the bankruptcy case, a group of Jevic's terminated truck drivers filed a class action against Jevic and Sun, alleging violations of federal and state WARN acts, under which Jevic was supposed to provide 60 days' written notice before laying them off. In addition, the creditors' committee brought a fraudulent transfer action against CIT and Sun, alleging that Sun, with CIT's help, took over Jevic with essentially none of its own money in an ill-conceived transaction that placed Jevic in an unreasonably precarious financial position.

Several years later, the bankruptcy court granted in part and denied in part CIT's motion to dismiss the litigation. Thereafter, representatives of the committee, Sun, CIT, Jevic, and the drivers convened to negotiate a settlement. Previously, all of Jevic's assets had been liquidated to pay the lender group led by CIT. By the time of the settlement discussions, all that was left of Jevic was about $1.7 million in cash, which was subject to Sun's lien, and the fraudulent transfer action against CIT and Sun.

Eventually the committee, Jevic, CIT, and Sun reached a settlement agreement with four essential features. First, the parties would release each other, and the fraudulent transfer litigation would be dismissed. Second, CIT would pay $2 million to fund the payment of administrative expenses. Third, Sun would assign its lien on the $1.7 million in cash to pay tax and administrative creditors first, and then to distribute something to general unsecured creditors. Fourth, the bankruptcy case would be dismissed. In this way, the settlement contemplated a structured dismissal that provided for the distribution of Jevic's remaining assets. It left out, however, the drivers, who had asserted approximately $8.3 million in wage claims entitled to priority under section 507(a)(4) of the Code. Apparently the drivers had been unable to reach a settlement against Sun on their WARN act claims, and Sun was unwilling to agree to any distribution to the drivers so long as their litigation against Sun remained pending.

The drivers and the U.S. Trustee objected to the proposed settlement and structured dismissal. In particular, they claimed that the dismissal violated the Code's priority scheme by authorizing a distribution to general unsecured creditors while the drivers' priority wage claims received nothing. Rejecting these arguments, the bankruptcy court approved the settlement and the structured dismissal. The court reasoned that other courts has granted similar relief in other cases. The court also observed that dire circumstances existed and that, absent the settlement, there was no meaningful prospect of any distribution to anyone other than the secured creditors because completing a Chapter 11 bankruptcy was impractical, as was conversion to a Chapter 7 case. In essence, there was no cash available to fund any further bankruptcy proceedings because all of the available cash was encumbered by Sun's lien.

Although the bankruptcy court observed that Chapter 11 plans cannot violate absolute priority over the objection of creditors, it concluded that there was no similar restriction for settlements. The court found that the drivers' claims against Jevic were essentially worthless because there was no unencumbered cash that could be distributed to them. On appeal, the district court affirmed, as did the Third Circuit, which held that, in rare instances such as the present case, courts could approve structured dismissals. The Third Circuit believed that, in this case, there was no real alternative and observed that, although structured dismissals might not be used simply to evade the Code's procedural protections and safeguards, there was in this matter no prospect of either a confirmable plan or a viable Chapter 7 case. In addition, the court determined that, although skipping a priority class in favor of distributions to a junior class raises justifiable concerns, it could be done where there are specific and credible grounds that justify the deviation. In this matter, although the drivers were left out in the cold, the bankruptcy court concluded correctly, the court believed, that the settlement best served the interests of the estate and its creditors because further litigation would merely deplete the assets of the estate with little prospect of assisting anyone.

In the Supreme Court, the drivers argued that the absolute priority standard applied equally to settlements as well as plans of reorganization. The drivers reasoned that this was essential to effectuate Congress's policy choice in elevating certain creditors over others. Unlike financial creditors, employees are poor loss spreaders, hence their priority treatment, which should be respected.

In addition, the drivers noted, if they could be skipped over in this case, doing so would serve to open the door to further violations of absolute priority in the future. Settling parties, they noted, should not be permitted to get away with deviations from absolute priority simply because they claim they would not settle unless another creditor group is cut out. The drivers warned that, if approved, exceptional deviations from absolute priority would likely become commonplace. This, they contended, would have dire effects for the negotiation of Chapter 11 plans because it would effectively provide a green light for collusion and undermine the kind of predictability that adherence to absolute priority fosters. This, the drivers warned, would effectively marginalize creditors like the drivers in this case, who generally lack the clout of financial creditors.

In contrast, the several respondents argued that the concept of absolute priority does not superintend the approval of settlements. By the Code's terms, they argued, absolute priority has become codified in the confirmation provisions, but not the rules that govern settlements. Moreover, although a plan must comply with the Code's priority regime set forth in section 507, nothing in the Code mandates the same for settlement agreements.

Respondents also focused on the impossibility of alternative relief. Absent a settlement, there was likely to be nothing to distribute to anyone, other than the secured creditors. Simply put, the settlement was the best vehicle to maximize distributions to creditors. Further, as the bankruptcy court determined, the drivers' claims were essentially worthless because there was essentially no cash available to distribute to them. The distribution to the unsecured creditors simply took funds out of the secured creditors' pockets, so there was no harm to the drivers in any event.

Countering the drivers' policy concerns, respondents argued that siding with the drivers would grant recalcitrant priority creditors too much leverage by encouraging them to demand payment even when doing so would destroy any hope of maximizing value through the settlement process. Although the drivers might have that leverage in the plan process, respondents argued that they do not have it in the settlement context.

Ruling for the drivers, the Supreme Court held that a distribution scheme ordered in the context of a structured dismissal cannot, without the consent of the affected parties, deviate from the ordinary priority rules applicable to distributions under the Bankruptcy Code. The Court noted that the Bankruptcy Code's priority scheme "constitutes a basic underpinning of business bankruptcy law." The Court reasoned that, because of the centrality of this scheme, if Congress had intended to depart from the existing priority rules in the context of the approval of dismissals under section 349, one would expect some affirmative indication of this intent, observing "Congress … does not … hide elephants in mouseholes."

Based on its review of the Code, the Court found nothing demonstrating such intent. Nor did the Court believe that precedent supported respondents' position. The Court distinguished situations in which lower courts have approved *interim* distributions that violate absolute priority where these distributions have served Code-related objectives, including various first-day orders. The Court observed that those kinds of distributions are commonly justified as enabling a successful reorganization. In contrast, a structured dismissal involves a final disposition that does not serve the same goal. In particular, it does not preserve the debtor as a going concern, offer the prospect of making disfavored creditors better off, promote the possibility of a confirmable plan, restore the status quo, or protect the reliance interests of creditors who have obtained interests during the course of the bankruptcy case.

Finally, the Supreme Court flatly rejected a "rare case" exception based on "sufficient reasons" in particular cases. The Court was blunt in holding that "it is difficult to give precise content to the concept [of] 'sufficient reasons,'" and expressed the concern that a rare case exception could turn into a more general rule. Specifically, the Court stated that "Congress did not authorize a 'rare case' exception …. [and w]e cannot 'alter the balance struck by the statute'… not even in "rare cases."[1]

[1] Justice Thomas authored a dissent, joined by Justice Alito. The dissent noted that the Court had granted certiorari on a particular question, but the Petitioners had argued (and the Court decided) another question. Given the switch, the dissent would have dismissed the writ of certiorari as improvidently granted.

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

TAGGART *v.* LORENZEN, EXECUTOR OF THE ESTATE OF BROWN, ET AL.

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

No. 18–489. Argued April 24, 2019—Decided June 3, 2019

Petitioner Bradley Taggart formerly owned an interest in an Oregon company. That company and two of its other owners, who are among the respondents here, filed suit in Oregon state court, claiming that Taggart had breached the company's operating agreement. Before trial, Taggart filed for bankruptcy under Chapter 7 of the Bankruptcy Code. At the conclusion of that proceeding, the Federal Bankruptcy Court issued a discharge order that released Taggart from liability for most prebankruptcy debts. After the discharge order issued, the Oregon state court entered judgment against Taggart in the prebankruptcy suit and awarded attorney's fees to respondents. Taggart returned to the Federal Bankruptcy Court, seeking civil contempt sanctions against respondents for collecting attorney's fees in violation of the discharge order. The Bankruptcy Court ultimately held respondents in civil contempt. The Bankruptcy Appellate Panel vacated the sanctions, and the Ninth Circuit affirmed the panel's decision. Applying a subjective standard, the Ninth Circuit concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief if unreasonable." 888 F. 3d 438, 444.

Held: A court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. Pp. 4–11.

(a) This conclusion rests on a longstanding interpretive principle: When a statutory term is "'obviously transplanted from another legal source,'" it "'brings the old soil with it.'" *Hall* v. *Hall*, 584 U. S. ___, ___. Here, the bankruptcy statutes specifying that a discharge order "operates as an injunction," 11 U. S. C. §524(a)(2), and that a court may issue any "order" or "judgment" that is "necessary or appropriate" to "carry out" other bankruptcy provisions, §105(a), bring with them the "old soil" that has long governed how courts enforce injunctions. In cases outside the bankruptcy context, this Court has said that civil contempt "should not be resorted to where there is [a] fair ground of doubt as to the wrongfulness of the defendant's conduct." *California Artificial Stone Paving Co.* v. *Molitor*, 113 U. S. 609, 618. This standard is generally an objective one. A party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable. Subjective intent, however, is not always irrelevant. Civil contempt sanctions may be warranted when a party acts in bad faith, and a party's good faith may help to determine an appropriate sanction. These traditional civil contempt principles apply straightforwardly to the bankruptcy discharge context. Under the fair ground of doubt standard, civil contempt may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope. Pp. 5–7.

(b) The standard applied by the Ninth Circuit is inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. Taggart, meanwhile, argues for a standard that would operate much like a strict-liability standard. But his proposal often may lead creditors to seek advance determinations as to whether debts have been discharged, creating the risk of additional federal litigation, additional costs, and additional delays. His proposal, which follows the standard some courts have used to remedy violations of automatic stays, also ignores key differences in text and purpose between the statutes governing automatic stays and discharge orders. Pp. 7–11.

888 F. 3d 438, vacated and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 18–489

BRADLEY WESTON TAGGART, PETITIONER *v.* SHELLEY A. LORENZEN, EXECUTOR OF THE ESTATE OF STUART BROWN, ET AL.

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

[June 3, 2019]

JUSTICE BREYER delivered the opinion of the Court.

At the conclusion of a bankruptcy proceeding, a bankruptcy court typically enters an order releasing the debtor from liability for most prebankruptcy debts. This order, known as a discharge order, bars creditors from attempting to collect any debt covered by the order. See 11 U. S. C. §524(a)(2). The question presented here concerns the criteria for determining when a court may hold a creditor in civil contempt for attempting to collect a debt that a discharge order has immunized from collection.

The Bankruptcy Court, in holding the creditors here in civil contempt, applied a standard that it described as akin to "strict liability" based on the standard's expansive scope. *In re Taggart*, 522 B. R. 627, 632 (Bkrtcy. Ct. Ore. 2014). It held that civil contempt sanctions are permissible, irrespective of the creditor's beliefs, so long as the creditor was "'aware of the discharge'" order and "'intended the actions which violate[d]'" it. *Ibid.* (quoting *In re Hardy*, 97 F. 3d 1384, 1390 (CA11 1996)). The Court of Appeals for the Ninth Circuit, however, disagreed with that standard. Applying a subjective standard instead, it concluded that a court cannot hold a creditor in civil contempt if the creditor has a "good faith belief" that the discharge order "does not apply to the creditor's claim." *In re Taggart*, 888 F. 3d 438, 444 (2018). That is so, the Court of Appeals held, "even if the creditor's belief is unreasonable." *Ibid.*

We conclude that neither a standard akin to strict liability nor a purely subjective standard is appropriate. Rather, in our view, a court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.

I

Bradley Taggart, the petitioner, formerly owned an interest in an Oregon company, Sherwood Park Business Center. That company, along with two of its other owners, brought a lawsuit in Oregon state court, claiming that Taggart had breached the Business Center's operating agreement. (We use the name "Sherwood" to refer to the company, its two owners, and—in some instances—their former attorney, who is now represented by the executor of his estate. The company, the two owners, and the executor are the respondents in this case.)

Before trial, Taggart filed for bankruptcy under Chapter 7 of the Bankruptcy Code, which permits insolvent debtors to discharge their debts by liquidating assets to pay creditors. See 11 U. S. C. §§704(a)(1), 726. Ultimately, the Federal Bankruptcy Court wound up the proceeding and issued an order granting him a discharge. Taggart's discharge order, like many such orders, goes no further than the statute: It simply says that the debtor "shall be granted a discharge under §727." App. 60; see United

States Courts, Order of Discharge: Official Form 318 (Dec. 2015), http://www.uscourts.gov/sites/default/files/form_b318_0.pdf (as last visited May 31, 2019). Section 727, the statute cited in the discharge order, states that a discharge relieves the debtor "from all debts that arose before the date of the order for relief," "[e]xcept as provided in section 523." §727(b). Section 523 then lists in detail the debts that are exempt from discharge. §§523(a)(1)–(19). The words of the discharge order, though simple, have an important effect: A discharge order "operates as an injunction" that bars creditors from collecting any debt that has been discharged. §524(a)(2).

After the issuance of Taggart's federal bankruptcy discharge order, the Oregon state court proceeded to enter judgment against Taggart in the prebankruptcy suit involving Sherwood. Sherwood then filed a petition in state court seeking attorney's fees that were incurred *after* Taggart filed his bankruptcy petition. All parties agreed that, under the Ninth Circuit's decision in *In re Ybarra*, 424 F. 3d 1018 (2005), a discharge order would normally cover and thereby discharge postpetition attorney's fees stemming from prepetition litigation (such as the Oregon litigation) *unless* the discharged debtor "'returned to the fray'" after filing for bankruptcy. *Id.*, at 1027. Sherwood argued that Taggart had "returned to the fray" postpetition and therefore was liable for the postpetition attorney's fees that Sherwood sought to collect. The state trial court agreed and held Taggart liable for roughly $45,000 of Sherwood's postpetition attorney's fees.

At this point, Taggart returned to the Federal Bankruptcy Court. He argued that he had not returned to the state-court "fray" under *Ybarra*, and that the discharge order therefore barred Sherwood from collecting postpetition attorney's fees. Taggart added that the court should hold Sherwood in civil contempt because Sherwood had violated the discharge order. The Bankruptcy Court did not agree. It concluded that Taggart had returned to the fray. Finding no violation of the discharge order, it refused to hold Sherwood in civil contempt.

Taggart appealed, and the Federal District Court held that Taggart had not returned to the fray. Hence, it concluded that Sherwood violated the discharge order by trying to collect attorney's fees. The District Court remanded the case to the Bankruptcy Court.

The Bankruptcy Court, noting the District Court's decision, then held Sherwood in civil contempt. In doing so, it applied a standard it likened to "strict liability." 522 B. R., at 632. The Bankruptcy Court held that civil contempt sanctions were appropriate because Sherwood had been "'aware of the discharge'" order and "'intended the actions which violate[d]'" it. *Ibid.* (quoting *In re Hardy*, 97 F. 3d, at 1390). The court awarded Taggart approximately $105,000 in attorney's fees and costs, $5,000 in damages for emotional distress, and $2,000 in punitive damages.

Sherwood appealed. The Bankruptcy Appellate Panel vacated these sanctions, and the Ninth Circuit affirmed the panel's decision. The Ninth Circuit applied a very different standard than the Bankruptcy Court. It concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." 888 F. 3d, at 444. Because Sherwood had a "good faith belief" that the discharge order "did not apply" to Sherwood's claims, the Court of Appeals held that civil contempt sanctions were improper. *Id.*, at 445.

Taggart filed a petition for certiorari, asking us to decide whether "a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt." Pet. for Cert. I. We granted certiorari.

II

The question before us concerns the legal standard for holding a creditor in civil contempt when the creditor attempts to collect a debt in violation of a bankruptcy discharge order. Two Bankruptcy Code provisions aid our efforts to find an answer. The first, section 524, says that a discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset" a discharged debt. 11 U. S. C. §524(a)(2). The second, section 105, authorizes a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." §105(a).

In what circumstances do these provisions permit a court to hold a creditor in civil contempt for violating a discharge order? In our view, these provisions authorize a court to impose civil contempt sanctions when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order.

A

Our conclusion rests on a longstanding interpretive principle: When a statutory term is "'obviously transplanted from another legal source,'" it "'brings the old soil with it.'" *Hall* v. *Hall*, 584 U. S. ___, ___ (2018) (slip op., at 13) (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947)); see *Field* v. *Mans*, 516 U. S. 59, 69–70 (1995) (applying that principle to the Bankruptcy Code). Here, the statutes specifying that a discharge order "operates as an injunction," §524(a)(2), and that a court may issue any "order" or "judgment" that is "necessary or appropriate" to "carry out" other bankruptcy provisions, §105(a), bring with them the "old soil" that has long governed how courts enforce injunctions.

That "old soil" includes the "potent weapon" of civil contempt. *Longshoremen* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64, 76 (1967). Under traditional principles of equity practice, courts have long imposed civil contempt sanctions to "coerce the defendant into compliance" with an injunction or "compensate the complainant for losses" stemming from the defendant's noncompliance with an injunction. *United States* v. *Mine Workers*, 330 U. S. 258, 303–304 (1947); see D. Dobbs & C. Roberts, Law of Remedies §2.8, p. 132 (3d ed. 2018); J. High, Law of Injunctions §1449, p. 940 (2d ed. 1880).

The bankruptcy statutes, however, do not grant courts unlimited authority to hold creditors in civil contempt. Instead, as part of the "old soil" they bring with them, the bankruptcy statutes incorporate the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction.

In cases outside the bankruptcy context, we have said that civil contempt "should not be resorted to where there is [a] *fair ground of doubt* as to the wrongfulness of the defendant's conduct." *California Artificial Stone Paving Co.* v. *Molitor*, 113 U. S. 609, 618 (1885) (emphasis added). This standard reflects the fact that civil contempt is a "severe remedy," *ibid.*, and that principles of "basic fairness requir[e] that those enjoined receive explicit notice" of "what conduct is outlawed" before being held in civil contempt, *Schmidt* v. *Lessard*, 414 U. S. 473, 476 (1974) (*per curiam*). See *Longshoremen*, *supra*, at 76 (noting that civil contempt usually is not appropriate unless "those who must obey" an order "will know what the court intends to require and what it means to forbid"); 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2960, pp. 430–431 (2013) (suggesting that civil contempt may be improper if a party's attempt at compliance was "reasonable").

This standard is generally an *objective* one. We have explained before that a party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable. As we said in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187 (1949), "[t]he absence of wilfulness does not relieve from civil contempt." *Id.*, at 191.

We have not held, however, that subjective intent is always irrelevant. Our cases suggest, for example, that civil contempt sanctions may be warranted when a party acts in bad faith. See *Chambers* v. *NASCO, Inc.*, 501 U. S. 32, 50 (1991). Thus, in *McComb*, we explained that a party's "record of continuing and persistent violations" and "persistent contumacy" justified placing "the burden of any uncertainty in the decree . . . on [the] shoulders" of the party who violated the court order. 336 U. S., at 192–193. On the flip side of the coin, a party's good faith, even where it does not bar civil contempt, may help to determine an appropriate sanction. Cf. *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 801 (1987) ("[O]nly the least possible power adequate to the end proposed should be used in contempt cases" (quotation altered)).

These traditional civil contempt principles apply straightforwardly to the bankruptcy discharge context. The typical discharge order entered by a bankruptcy court is not detailed. See *supra*, at 2–3. Congress, however, has carefully delineated which debts are exempt from discharge. See §§523(a)(1)–(19). Under the fair ground of doubt standard, civil contempt therefore may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope.

B

The Solicitor General, *amicus* here, agrees with the fair ground of doubt standard we adopt. Brief for United States as *Amicus Curiae* 13–15. And the respondents stated at oral argument that it would be appropriate for courts to apply that standard in this context. Tr. of Oral

Arg. 43. The Ninth Circuit and petitioner Taggart, however, each believe that a different standard should apply.

As for the Ninth Circuit, the parties and the Solicitor General agree that it adopted the wrong standard. So do we. The Ninth Circuit concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." 888 F. 3d, at 444. But this standard is inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. It also relies too heavily on difficult-to-prove states of mind. And it may too often lead creditors who stand on shaky legal ground to collect discharged debts, forcing debtors back into litigation (with its accompanying costs) to protect the discharge that it was the very purpose of the bankruptcy proceeding to provide.

Taggart, meanwhile, argues for a standard like the one applied by the Bankruptcy Court. This standard would permit a finding of civil contempt if the creditor was aware of the discharge order and intended the actions that violated the order. Brief for Petitioner 19; cf. 522 B. R., at 632 (applying a similar standard). Because most creditors are aware of discharge orders and intend the actions they take to collect a debt, this standard would operate much like a strict-liability standard. It would authorize civil contempt sanctions for a violation of a discharge order regardless of the creditor's subjective beliefs about the scope of the discharge order, and regardless of whether there was a reasonable basis for concluding that the creditor's conduct did not violate the order. Taggart argues that such a standard would help the debtor obtain the "fresh start" that bankruptcy promises. He adds that a standard resembling strict liability would be fair to creditors because creditors who are unsure whether a debt has been discharged can head to federal bankruptcy court and obtain an advance determination on that question before trying to collect the debt. See Fed. Rule Bkrtcy. Proc. 4007(a).

We doubt, however, that advance determinations would provide a workable solution to a creditor's potential dilemma. A standard resembling strict liability may lead risk-averse creditors to seek an advance determination in bankruptcy court even where there is only slight doubt as to whether a debt has been discharged. And because discharge orders are written in general terms and operate against a complex statutory backdrop, there will often be at least some doubt as to the scope of such orders. Taggart's proposal thus may lead to frequent use of the advance determination procedure. Congress, however, expected that this procedure would be needed in only a small class of cases. See 11 U. S. C. §523(c)(1) (noting only three categories of debts for which creditors must obtain advance determinations). The widespread use of this procedure also would alter who decides whether a debt has been discharged, moving litigation out of state courts, which have concurrent jurisdiction over such questions, and into federal courts. See 28 U. S. C. §1334(b); Advisory Committee's 2010 Note on subd. (c)(1) of Fed. Rule Civ. Proc. 8, 28 U. S. C. App., p. 776 (noting that "whether a claim was excepted from discharge" is "in most instances" not determined in bankruptcy court).

Taggart's proposal would thereby risk additional federal litigation, additional costs, and additional delays. That result would interfere with "a chief purpose of the bankruptcy laws": "'to secure a prompt and effectual'" resolution of bankruptcy cases "'within a limited period.'" *Katchen* v. *Landy*, 382 U. S. 323, 328 (1966) (quoting *Ex parte Christy*, 3 How. 292, 312 (1844)). These negative consequences, especially the costs associated with the added need to appear in federal proceedings, could work to the disadvantage of debtors as well as creditors.

Taggart also notes that lower courts often have used a standard akin to strict liability to remedy violations of automatic stays. See Brief for Petitioner 21. An automatic stay is entered at the outset of a bankruptcy proceeding. The statutory provision that addresses the remedies for violations of automatic stays says that "an individual injured by any willful violation" of an automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U. S. C. §362(k)(1). This language, however, differs from the more general language in section 105(a). *Supra*, at 5. The purposes of automatic stays and discharge orders also differ: A stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period. These differences in language and purpose sufficiently undermine Taggart's proposal to warrant its rejection. (We note that the automatic stay provision uses the word "willful," a word the law typically does not associate with strict liability but "'whose construction is often dependent on the context in which it appears.'" *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 57 (2007) (quoting *Bryan* v. *United States*, 524 U. S. 184, 191 (1998)). We need not, and do not, decide whether the word "willful" supports a standard akin to strict liability.)

III

We conclude that the Court of Appeals erred in applying a subjective standard for civil contempt. Based on the traditional principles that govern civil contempt, the proper standard is an objective one. A court may hold a creditor in civil contempt for violating a discharge order where there is not a "fair ground of doubt" as to whether the creditor's conduct might be lawful under the discharge order. In our view, that standard strikes the "careful balance between the interests of creditors and debtors" that the Bankruptcy Code often seeks to achieve. *Clark* v. *Rameker*, 573 U. S. 122, 129 (2014).

Because the Court of Appeals did not apply the proper standard, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

MISSION PRODUCT HOLDINGS, INC. *v.* TEMPNOLOGY, LLC, NKA OLD COLD LLC

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

No. 17–1657. Argued February 20, 2019—Decided May 20, 2019

Petitioner Mission Product Holdings, Inc., entered into a contract with Respondent Tempnology, LLC, which gave Mission a license to use Tempnology's trademarks in connection with the distribution of certain clothing and accessories. Tempnology filed for Chapter 11 bankruptcy and sought to reject its agreement with Mission. Section 365 of the Bankruptcy Code enables a debtor to "reject any executory contract"—meaning a contract that neither party has finished performing. 11 U. S. C. §365(a). It further provides that rejection "constitutes a breach of such contract." §365(g). The Bankruptcy Court approved Tempnology's rejection and further held that the rejection terminated Mission's rights to use Tempnology's trademarks. The Bankruptcy Appellate Panel reversed, relying on Section 365(g)'s statement that rejection "constitutes a breach" to hold that rejection does not terminate rights that would survive a breach of contract outside bankruptcy. The First Circuit rejected the Panel's judgment and reinstated the Bankruptcy Court's decision.

Held:

1. This case is not moot. Mission presents a plausible claim for money damages arising from its inability to use Tempnology's trademarks, which is sufficient to preserve a live controversy. See *Chafin* v. *Chafin*, 568 U. S. 165, 172. Tempnology's various arguments that Mission is not entitled to damages do not so clearly preclude recovery as to render this case moot. Pp. 6–7.

2. A debtor's rejection of an executory contract under Section 365 of the Bankruptcy Code has the same effect as a breach of that contract outside bankruptcy. Such an act cannot rescind rights that the contract previously granted. Pp. 7–16.

Syllabus

(a) Section 365(g) provides that rejection "constitutes a breach." And "breach" is neither a defined nor a specialized bankruptcy term—it means in the Code what it means in contract law outside bankruptcy. See *Field* v. *Mans*, 516 U. S. 59, 69. Outside bankruptcy, a licensor's breach cannot revoke continuing rights given to a counterparty under a contract (assuming no special contract term or state law). And because rejection "constitutes a breach," the same result must follow from rejection in bankruptcy. In preserving a counterparty's rights, Section 365 reflects the general bankruptcy rule that the estate cannot possess anything more than the debtor did outside bankruptcy. See *Board of Trade of Chicago* v. *Johnson*, 264 U. S. 1, 15. And conversely, allowing rejection to rescind a counterparty's rights would circumvent the Code's stringent limits on "avoidance" actions—the exceptional cases in which debtors may unwind pre-bankruptcy transfers that undermine the bankruptcy process. See, *e.g.*, §548(a). Pp. 8–12.

(b) Tempnology's principal counterargument rests on a negative inference drawn from provisions of Section 365 identifying categories of contracts under which a counterparty may retain specified rights after rejection. See §§365(h), (i), (n). Tempnology argues that these provisions indicate that the ordinary consequence of rejection must be something different—*i.e.*, the termination of contractual rights previously granted. But that argument offers no account of how to read Section 365(g) (rejection "constitutes a breach") to say essentially its opposite. And the provisions Tempnology treats as a reticulated scheme of exceptions each emerged at a different time and responded to a discrete problem—as often as not, correcting a judicial ruling of just the kind Tempnology urges.

Tempnology's remaining argument turns on how the special features of trademark law may affect the fulfillment of the Code's goals. Unless rejection terminates a licensee's right to use a trademark, Tempnology argues, a debtor must choose between monitoring the goods sold under a license or risking the loss of its trademark, either of which would impede a debtor's ability to reorganize. But the distinctive features of trademarks do not persuade this Court to adopt a construction of Section 365 that will govern much more than trademark licenses. And Tempnology's plea to facilitate reorganizations cannot overcome what Section 365(a) and (g) direct. In delineating the burdens a debtor may and may not escape, Section 365's edict that rejection is breach expresses a more complex set of aims than Tempnology acknowledges. Pp. 12–16.

879 F. 3d 389, reversed and remanded.

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

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 17–1657

MISSION PRODUCT HOLDINGS, INC., PETITIONER *v.* TEMPNOLOGY, LLC, NKA OLD COLD LLC

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

[May 20, 2019]

JUSTICE KAGAN delivered the opinion of the Court.

Section 365 of the Bankruptcy Code enables a debtor to "reject any executory contract"—meaning a contract that neither party has finished performing. 11 U. S. C. §365(a). The section further provides that a debtor's rejection of a contract under that authority "constitutes a breach of such contract." §365(g).

Today we consider the meaning of those provisions in the context of a trademark licensing agreement. The question is whether the debtor-licensor's rejection of that contract deprives the licensee of its rights to use the trademark. We hold it does not. A rejection breaches a contract but does not rescind it. And that means all the rights that would ordinarily survive a contract breach, including those conveyed here, remain in place.

I

This case arises from a licensing agreement gone wrong. Respondent Tempnology, LLC, manufactured clothing and accessories designed to stay cool when used in exercise. It marketed those products under the brand name "Coolcore," using trademarks (*e.g.,* logos and labels) to distinguish the gear from other athletic apparel. In 2012, Tempnology entered into a contract with petitioner Mission Product Holdings, Inc. See App. 203–255. The agreement gave Mission an exclusive license to distribute certain Coolcore products in the United States. And more important here, it granted Mission a non-exclusive license to use the Coolcore trademarks, both in the United States and around the world. The agreement was set to expire in July 2016. But in September 2015, Tempnology filed a petition for Chapter 11 bankruptcy. And it soon afterward asked the Bankruptcy Court to allow it to "reject" the licensing agreement. §365(a).

Chapter 11 of the Bankruptcy Code sets out a framework for reorganizing a bankrupt business. See §§1101–1174. The filing of a petition creates a bankruptcy estate consisting of all the debtor's assets and rights. See §541. The estate is the pot out of which creditors' claims are paid. It is administered by either a trustee or, as in this case, the debtor itself. See §§1101, 1107.

Section 365(a) of the Code provides that a "trustee [or debtor], subject to the court's approval, may assume or reject any executory contract." §365(a). A contract is executory if "performance remains due to some extent on both sides." *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 522, n. 6 (1984) (internal quotation marks omitted). Such an agreement represents both an asset (the debtor's right to the counterparty's future performance) and a liability (the debtor's own obligations to perform). Section 365(a) enables the debtor (or its trustee), upon entering bankruptcy, to decide whether the contract is a good deal for the estate going forward. If so, the debtor will want to assume the contract, fulfilling its obligations while benefiting from the counterparty's performance. But if not, the debtor will want to reject the contract, repudiating any further performance of its duties. The bankruptcy court will generally approve that choice, under the deferential "business judgment" rule. *Id.,* at 523.

According to Section 365(g), "the rejection of an executory contract[ ] constitutes a breach of such contract." As both parties here agree, the counterparty thus has a claim against the estate for damages resulting from the debtor's nonperformance. See Brief for Petitioner 17, 19; Brief for Respondent 30–31. But such a claim is unlikely to ever be paid in full. That is because the debtor's breach is deemed to occur "immediately before the date of the filing of the [bankruptcy] petition," rather than on the actual post-petition rejection date. §365(g)(1). By thus giving the counterparty a pre-petition claim, Section 365(g) places that party in the same boat as the debtor's unsecured creditors, who in a typical bankruptcy may receive only cents on the dollar. See *Bildisco*, 465 U. S., at 531–532 (noting the higher priority of post-petition claims).

In this case, the Bankruptcy Court (per usual) approved Tempnology's proposed rejection of its executory licensing agreement with Mission. See App. to Pet. for Cert. 83–84. That meant, as laid out above, two things on which the parties agree. First, Tempnology could stop performing under the contract. And second, Mission could assert (for whatever it might be worth) a pre-petition claim in the bankruptcy proceeding for damages resulting from Tempnology's nonperformance.

But Tempnology thought still another consequence ensued, and it returned to the Bankruptcy Court for a declaratory judgment confirming its view. According to Tempnology, its rejection of the contract also terminated the rights it had granted Mission to use the Coolcore trademarks. Tempnology based its argument on a negative inference. See Motion in No. 15–11400 (Bkrtcy. Ct. NH), pp. 9–14. Several provisions in Section 365 state that a counterparty to specific kinds of agreements may keep exercising contractual rights after a debtor's rejection. For example, Section 365(h) provides that if a bankrupt landlord rejects a lease, the tenant need not move out; instead, she may stay and pay rent (just as she did before) until the lease term expires. And still closer to home, Section 365(n) sets out a similar rule for some types of intellectual property licenses: If the debtor-licensor rejects the agreement, the licensee can continue to use the property (typically, a patent), so long as it makes whatever payments the contract demands. But Tempnology pointed out that neither Section 365(n) nor any similar provision covers trademark licenses. So, it reasoned, in that sort of contract a different rule must apply: The debtor's rejection must extinguish the rights that the agreement had conferred on the trademark licensee. The Bankruptcy Court agreed. See *In re Tempnology, LLC*, 541 B. R. 1 (Bkrtcy. Ct. NH 2015). It held, relying on the same "negative inference," that Tempnology's rejection of the licensing agreement revoked Mission's right to use the Coolcore marks. *Id.,* at 7.

The Bankruptcy Appellate Panel reversed, relying heavily on a decision of the Court of Appeals for the Seventh Circuit about the effects of rejection on trademark licensing agreements. See *In re Tempnology, LLC*, 559 B. R. 809, 820–823 (Bkrtcy. App. Panel CA1 2016); *Sunbeam Products, Inc.* v. *Chicago Am. Mfg., LLC*, 686 F. 3d 372, 376–377 (CA7 2012). Rather than reason backward from Section 365(n) or similar provisions, the Panel focused on Section 365(g)'s statement that rejection of a contract "constitutes a breach." Outside bankruptcy, the court explained, the breach of an agreement does not eliminate rights the contract had already conferred on the non-breaching party. See 559 B. R., at 820. So neither could a rejection of an agreement in bankruptcy have that effect. A rejection "convert[s]" a "debtor's unfulfilled obligations" to a pre-petition damages claim. *Id.,* at 822 (quoting *Sunbeam*, 686 F. 3d, at 377). But it does not "terminate the contract" or "vaporize[ ]" the counterparty's rights. 559 B. R., at 820, 822 (quoting *Sunbeam*, 686 F. 3d, at 377). Mission could thus continue to use the Coolcore trademarks.

But the Court of Appeals for the First Circuit rejected the Panel's and Seventh Circuit's view, and reinstated the Bankruptcy Court decision terminating Mission's license. See *In re Tempnology, LLC*, 879 F. 3d 389 (2018). The majority first endorsed that court's inference from Section 365(n) and similar provisions. It next reasoned that special features of trademark law counsel against allowing a licensee to retain rights to a mark after the licensing agreement's rejection. Under that body of law, the majority stated, the trademark owner's "[f]ailure to monitor and exercise [quality] control" over goods associated with a trademark "jeopardiz[es] the continued validity of [its] own trademark rights." *Id.,* at 402. So if (the majority continued) a licensee can keep using a mark after an agreement's rejection, the licensor will need to carry on its monitoring activities. And according to the majority, that would frustrate "Congress's principal aim in providing for rejection": to "release the debtor's estate from burdensome obligations." *Ibid.* (internal quotation marks omitted). Judge Torruella dissented, mainly for the Seventh Circuit's reasons. See *id.,* at 405–407.

We granted certiorari to resolve the division between the First and Seventh Circuits. 586 U. S. ___ (2018). We now affirm the Seventh's reasoning and reverse the decision below.[1]

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[1] In its briefing before this Court, Mission contends that its exclusive distribution rights survived the licensing agreement's rejection for the same reason as its trademark rights did. See Brief for Petitioner 40–44; *supra,* at 2. But the First Circuit held that Mission had waived that argument, see 879 F. 3d, at 401, and we have no reason to doubt that conclusion. Our decision thus affects only Mission's trademark rights.

II

Before reaching the merits, we pause to consider Tempnology's claim that this case is moot. Under settled law, we may dismiss the case for that reason only if "it is impossible for a court to grant any effectual relief whatever" to Mission assuming it prevails. *Chafin* v. *Chafin*, 568 U. S. 165, 172 (2013) (internal quotation marks omitted). That demanding standard is not met here.

Mission has presented a claim for money damages—essentially lost profits—arising from its inability to use the Coolcore trademarks between the time Tempnology rejected the licensing agreement and its scheduled expiration date. See Reply Brief 22, and n. 8. Such claims, if at all plausible, ensure a live controversy. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8–9 (1978). For better or worse, nothing so shows a continuing stake in a dispute's outcome as a demand for dollars and cents. See 13C C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3533.3, p. 2 (3d ed. 2008) (Wright & Miller) ("[A] case is not moot so long as a claim for monetary relief survives"). Ultimate recovery on that demand may be uncertain or even unlikely for any number of reasons, in this case as in others. But that is of no moment. If there is any chance of money changing hands, Mission's suit remains live. See *Chafin*, 568 U. S., at 172.

Tempnology makes a flurry of arguments about why Mission is not entitled to damages, but none so clearly precludes recovery as to make this case moot. First, Tempnology contends that Mission suffered no injury because it "never used the trademark[s] during [the post-rejection] period." Brief for Respondent 24; see Tr. of Oral Arg. 33. But that gets things backward. Mission's non-use of the marks during that time is precisely what gives rise to its damages claim; had it employed the marks, it would not have lost any profits. So next, Tempnology argues that Mission's non-use was its own "choice," for which damages cannot lie. See *id.,* at 26. But recall that the Bankruptcy Court held that Mission *could not* use the marks after rejection (and its decision remained in effect through the agreement's expiration). See *supra,* at 4. And although (as Tempnology counters) the court issued "no injunction," Brief for Respondent 26, that difference does not matter: Mission need not have flouted a crystal-clear ruling and courted yet more legal trouble to preserve its claim. Cf. 13B Wright & Miller §3533.2.2, at 852 ("[C]ompliance [with a judicial decision] does not moot [a case] if it remains possible to undo the effects of compliance," as through compensation). So last, Tempnology claims that it bears no blame (and thus should not have to pay) for Mission's injury because all it did was "ask[ ] the court to make a ruling." Tr. of Oral Arg. 34–35. But whether Tempnology did anything to Mission amounting to a legal wrong is a prototypical merits question, which no court has addressed and which has no obvious answer. That means it is no reason to find this case moot.

And so too for Tempnology's further argument that Mission will be unable to convert any judgment in its favor to hard cash. Here, Tempnology notes that the bankruptcy estate has recently distributed all of its assets, leaving nothing to satisfy Mission's judgment. See Brief for Respondent 27. But courts often adjudicate disputes whose "practical impact" is unsure at best, as when "a defendant is insolvent." *Chafin*, 568 U. S., at 175. And Mission notes that if it prevails, it can seek the unwinding of prior distributions to get its fair share of the estate. See Reply Brief 23. So although this suit "may not make [Mission] rich," or even better off, it remains a live controversy—allowing us to proceed. *Chafin*, 568 U. S., at 176.

III

What is the effect of a debtor's (or trustee's) rejection of a contract under Section 365 of the Bankruptcy Code?

The parties and courts of appeals have offered us two starkly different answers. According to one view, a rejection has the same consequence as a contract breach outside bankruptcy: It gives the counterparty a claim for damages, while leaving intact the rights the counterparty has received under the contract. According to the other view, a rejection (except in a few spheres) has more the effect of a contract rescission in the non-bankruptcy world: Though also allowing a damages claim, the rejection terminates the whole agreement along with all rights it conferred. Today, we hold that both Section 365's text and fundamental principles of bankruptcy law command the first, rejection-as-breach approach. We reject the competing claim that by specifically enabling the counterparties in some contracts to retain rights after rejection, Congress showed that it wanted the counterparties in all other contracts to lose their rights. And we reject an argument for the rescission approach turning on the distinctive features of trademark licenses. Rejection of a contract—any contract—in bankruptcy operates not as a rescission but as a breach.

A

We start with the text of the Code's principal provisions on rejection—and find that it does much of the work. As noted earlier, Section 365(a) gives a debtor the option, subject to court approval, to "assume or reject any executory contract." See *supra,* at 2. And Section 365(g) describes what rejection means. Rejection "constitutes a breach of [an executory] contract," deemed to occur "immediately before the date of the filing of the petition." See *supra*, at 3. Or said more pithily for current purposes, a rejection is a breach. And "breach" is neither a defined nor a specialized bankruptcy term. It means in the Code what it means in contract law outside bankruptcy. See *Field* v. *Mans*, 516 U. S. 59, 69 (1995) (Congress generally meant for the Bankruptcy Code to "incorporate the established meaning" of "terms that have accumulated settled meaning" (internal quotation marks omitted)). So the first place to go in divining the effects of rejection is to nonbankruptcy contract law, which can tell us the effects of breach.

Consider a made-up executory contract to see how the law of breach works outside bankruptcy. A dealer leases a photocopier to a law firm, while agreeing to service it every month; in exchange, the firm commits to pay a monthly fee. During the lease term, the dealer decides to stop servicing the machine, thus breaching the agreement in a material way. The law firm now has a choice (assuming no special contract term or state law). The firm can keep up its side of the bargain, continuing to pay for use of the copier, while suing the dealer for damages from the service breach. Or the firm can call the whole deal off, halting its own payments and returning the copier, while suing for any damages incurred. See 13 R. Lord, Williston on Contracts §39:32, pp. 701–702 (4th ed. 2013) ("[W]hen a contract is breached in the course of performance, the injured party may elect to continue the contract or refuse to perform further"). But to repeat: The choice to terminate the agreement and send back the copier is for the *law firm*. By contrast, the *dealer* has no ability, based on its own breach, to terminate the agreement. Or otherwise said, the dealer cannot get back the copier just by refusing to show up for a service appointment. The contract gave the law firm continuing rights in the copier, which the dealer cannot unilaterally revoke.

And now to return to bankruptcy: If the rejection of the photocopier contract "constitutes a breach," as the Code says, then the same results should follow (save for one twist as to timing). Assume here that the dealer files a Chapter 11 petition and decides to reject its agreement with the law firm. That means, as above, that the dealer will stop servicing the copier. It means, too, that the law firm has an option about how to respond—continue the contract or walk away, while suing for whatever damages go with its choice. (Here is where the twist comes in: Because the rejection is deemed to occur "immediately before" bankruptcy, the firm's damages suit is treated as a pre-petition claim on the estate, which will likely receive only cents on the dollar. See *supra,* at 3.) And most important, it means that assuming the law firm wants to keep using the copier, the dealer cannot take it back. A rejection does not terminate the contract. When it occurs, the debtor and counterparty do not go back to their pre-contract positions. Instead, the counterparty retains the rights it has received under the agreement. As after a breach, so too after a rejection, those rights survive.

All of this, it will hardly surprise you to learn, is not just about photocopier leases. Sections 365(a) and (g) speak broadly, to "any executory contract[s]." Many licensing agreements involving trademarks or other property are of that kind (including, all agree, the Tempnology-Mission contract). The licensor not only grants a license, but provides associated goods or services during its term; the licensee pays continuing royalties or fees. If the licensor breaches the agreement outside bankruptcy (again, barring any special contract term or state law), everything said above goes. In particular, the breach does not revoke the license or stop the licensee from doing what it allows. See, *e.g., Sunbeam*, 686 F. 3d, at 376 ("Outside of bankruptcy, a licensor's breach does not terminate a licensee's right to use [the licensed] intellectual property"). And because rejection "constitutes a breach," §365(g), the same consequences follow in bankruptcy. The debtor can stop performing its remaining obligations under the agreement. But the debtor cannot rescind the license already conveyed. So the licensee can continue to do whatever the license authorizes.

In preserving those rights, Section 365 reflects a general bankruptcy rule: The estate cannot possess anything more than the debtor itself did outside bankruptcy. See *Board of Trade of Chicago* v. *Johnson*, 264 U. S. 1, 15 (1924) (establishing that principle); §541(a)(1) (defining the estate to include the "interests *of the debtor* in property" (emphasis added)). As one bankruptcy scholar has put the point: Whatever "limitation[s] on the debtor's property [apply] outside of bankruptcy[ ] appl[y] inside of bankruptcy as well. A debtor's property does not shrink by happenstance of bankruptcy, but it does not expand, either." D. Baird, Elements of Bankruptcy 97 (6th ed. 2014). So if the not-yet debtor was subject to a counterparty's contractual right (say, to retain a copier or use a trademark), so too is the trustee or debtor once the bankruptcy petition has been filed. The rejection-as-breach rule (but *not* the rejection-as-rescission rule) ensures that result. By insisting that the same counterparty rights survive rejection as survive breach, the rule prevents a debtor in bankruptcy from recapturing interests it had given up.

And conversely, the rejection-as-rescission approach would circumvent the Code's stringent limits on "avoidance" actions—the exceptional cases in which trustees (or debtors) may indeed unwind pre-bankruptcy transfers that undermine the bankruptcy process. The most notable example is for fraudulent conveyances—usually, something-for-nothing transfers that deplete the estate (and so cheat creditors) on the eve of bankruptcy. See §548(a). A trustee's avoidance powers are laid out in a discrete set of sections in the Code, see §§544–553, far away from Section 365. And they can be invoked in only narrow circumstances—unlike the power of rejection, which may be exercised for any plausible economic reason. See, *e.g.,* §548(a) (describing the requirements for avoiding fraudulent transfers); *supra,* at 2–3. If trustees (or debtors) could use rejection to rescind previously granted interests, then rejection would become functionally equivalent to avoidance. Both, that is, would roll back a prior transfer. And that result would subvert everything the Code does to keep avoidances cabined—so they do not threaten the rule that the estate can take only what the debtor possessed before filing. Again, then, core tenets of bankruptcy law push in the same direction as Section 365's text: Rejection is breach, and has only its consequences.

B

Tempnology's main argument to the contrary, here as in the courts below, rests on a negative inference. See Brief for Respondent 33–41; *supra,* at 3–4. Several provisions of Section 365, Tempnology notes, "identif[y] categories of contracts under which a counterparty" may retain specified contract rights "notwithstanding rejection." Brief for Respondent 34. Sections 365(h) and (i) make clear that certain purchasers and lessees of real property and timeshare interests can continue to exercise rights after a debtor has rejected the lease or sales contract. See §365(h)(1) (real-property leases); §365(i) (real-property sales contracts); §§365(h)(2), (i) (timeshare interests). And Section 365(n) similarly provides that licensees of some intellectual property—but not trademarks—retain contractual rights after rejection. See §365(n); §101(35A); *supra,* at 4. Tempnology argues from those provisions that the ordinary consequence of rejection must be something different—*i.e.,* the termination, rather than survival, of contractual rights previously granted. Otherwise, Tempnology concludes, the statute's "general rule" would "swallow the exceptions." Brief for Respondent 19.

But that argument pays too little heed to the main provisions governing rejection and too much to subsidiary ones. On the one hand, it offers no account of how to read Section 365(g) (recall, rejection "constitutes a breach") to say essentially its opposite (*i.e.,* that rejection and breach have divergent consequences). On the other hand, it treats as a neat, reticulated scheme of "narrowly tailored exception[s]," *id.,* at 36 (emphasis deleted), what history reveals to be anything but. Each of the provisions Tempnology highlights emerged at a different time, over a span of half a century. See, *e.g.,* 52 Stat. 881 (1938) (real-property leases); §1(b), 102 Stat. 2538 (1988) (intellectual property). And each responded to a discrete problem—as often as not, correcting a judicial ruling of just the kind Tempnology urges. See Andrew, Executory Contracts in Bankruptcy, 59 U. Colo. L. Rev. 845, 911–912, 916–919 (1988) (identifying judicial decisions that the provisions overturned); compare, *e.g., In re Sombrero Reef Club, Inc.*, 18 B. R. 612, 618–619 (Bkrtcy. Ct. SD Fla. 1982), with, *e.g.,* §§365(h)(2), (i). Read as generously as possible to Tempnology, this mash-up of legislative interventions says nothing much of anything about the content of Section 365(g)'s general rule. Read less generously, it affirmatively refutes Tempnology's rendition. As one bankruptcy scholar noted after an exhaustive review of the history: "What the legislative record [reflects] is that whenever Congress has been confronted with the consequences of the [view that rejection terminates all contractual rights], it has expressed its disapproval." Andrew, 59 U. Colo. L. Rev., at 928. On that account, Congress enacted the provisions, as and when needed, to reinforce or clarify the general rule that contractual rights survive rejection.[2]

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[2] At the same time, Congress took the opportunity when drafting those provisions to fill in certain details, generally left to state law, about the post-rejection relationship between the debtor and counterparty. See, *e.g.,* Andrew, Executory Contracts in Bankruptcy, 59 U. Colo. L. Rev. 845, 903, n. 200 (1988) (describing Congress's addition of subsidiary rules for real property leases in Section 365(h)); Brief for United States as *Amicus Curiae* 29 (noting that Congress similarly set out detailed rules for patent licenses in Section 365(n)). The provisions are therefore not redundant of Section 365(g): Each sets out a remedial scheme embellishing on or tweaking the general rejection-as-breach

Consider more closely, for example, Congress's enactment of Section 365(n), which addresses certain intellectual property licensing agreements. No one disputes how that provision came about. In *Lubrizol Enterprises* v. *Richmond Metal Finishers,* the Fourth Circuit held that a debtor's rejection of an executory contract worked to revoke its grant of a patent license. See 756 F. 2d 1043, 1045–1048 (1985). In other words, *Lubrizol* adopted the same rule for patent licenses that the First Circuit announced for trademark licenses here. Congress sprang into action, drafting Section 365(n) to reverse *Lubrizol* and ensure the continuation of patent (and some other intellectual property) licensees' rights. See 102 Stat. 2538 (1988); S. Rep. No. 100–505, pp. 2–4 (1988) (explaining that Section 365(n) "corrects [*Lubrizol*'s] perception" that "Section 365 was ever intended to be a mechanism for stripping innocent licensee[s] of rights"). As Tempnology highlights, that provision does not cover trademark licensing agreements, which continue to fall, along with most other contracts, within Section 365(g)'s general rule. See Brief for Respondent 38. But what of that? Even put aside the claim that Section 365(n) is part of a pattern—that Congress whacked Tempnology's view of rejection wherever it raised its head. See *supra*, at 13. Still, Congress's repudiation of *Lubrizol* for patent contracts does not show any intent to *ratify* that decision's approach for almost all others. Which is to say that no negative inference arises. Congress did nothing in adding Section 365(n) to alter the natural reading of Section 365(g)—that rejection and breach have the same results.

Tempnology's remaining argument turns on the way special features of trademark law may affect the fulfillment of the Code's goals. Like the First Circuit below, Tempnology here focuses on a trademark licensor's duty to

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rule.

monitor and "exercise quality control over the goods and services sold" under a license. Brief for Respondent 20; see *supra,* at 5. Absent those efforts to keep up quality, the mark will naturally decline in value and may eventually become altogether invalid. See 3 J. McCarthy, Trademarks and Unfair Competition §18:48, pp. 18–129, 18–133 (5th ed. 2018). So (Tempnology argues) unless rejection of a trademark licensing agreement terminates the licensee's rights to use the mark, the debtor will have to choose between expending scarce resources on quality control and risking the loss of a valuable asset. See Brief for Respondent 59. "Either choice," Tempnology concludes, "would impede a [debtor's] ability to reorganize," thus "undermining a fundamental purpose of the Code." *Id.,* at 59–60.

To begin with, that argument is a mismatch with Tempnology's reading of Section 365. The argument is trademark-specific. But Tempnology's reading of Section 365 is not. Remember, Tempnology construes that section to mean that a debtor's rejection of a contract terminates the counterparty's rights "unless the contract falls within an express statutory exception." *Id.,* at 27–28; see *supra,* at 12. That construction treats trademark agreements identically to most other contracts; the only agreements getting different treatment are those falling within the discrete provisions just discussed. And indeed, Tempnology could not have discovered, however hard it looked, any trademark-specific rule in Section 365. That section's special provisions, as all agree, do not mention trademarks; and the general provisions speak, well, generally. So Tempnology is essentially arguing that distinctive features of trademarks should persuade us to adopt a construction of Section 365 that will govern not just trademark agreements, but pretty nearly every executory contract. However serious Tempnology's trademark-related concerns, that would allow the tail to wag the

Doberman.

And even putting aside that incongruity, Tempnology's plea to facilitate trademark licensors' reorganizations cannot overcome what Sections 365(a) and (g) direct. The Code of course aims to make reorganizations possible. But it does not permit anything and everything that might advance that goal. See, *e.g.*, *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U. S. 33, 51 (2008) (observing that in enacting Chapter 11, Congress did not have "a single purpose," but "str[uck] a balance" among multiple competing interests (internal quotation marks omitted)). Here, Section 365 provides a debtor like Tempnology with a powerful tool: Through rejection, the debtor can escape all of its future contract obligations, without having to pay much of anything in return. See *supra,* at 3. But in allowing rejection of those contractual duties, Section 365 does not grant the debtor an exemption from all the burdens that generally applicable law—whether involving contracts or trademarks—imposes on property owners. See 28 U. S. C. §959(b) (requiring a trustee to manage the estate in accordance with applicable law). Nor does Section 365 relieve the debtor of the need, against the backdrop of that law, to make economic decisions about preserving the estate's value—such as whether to invest the resources needed to maintain a trademark. In thus delineating the burdens that a debtor may and may not escape, Congress also weighed (among other things) the legitimate interests and expectations of the debtor's counterparties. The resulting balance may indeed impede some reorganizations, of trademark licensors and others. But that is only to say that Section 365's edict that rejection is breach expresses a more complex set of aims than Tempnology acknowledges.

IV

For the reasons stated above, we hold that under Section 365, a debtor's rejection of an executory contract in bankruptcy has the same effect as a breach outside bankruptcy. Such an act cannot rescind rights that the contract previously granted. Here, that construction of Section 365 means that the debtor-licensor's rejection cannot revoke the trademark license.

We accordingly reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 17–1657

MISSION PRODUCT HOLDINGS, INC., PETITIONER *v.* TEMPNOLOGY, LLC, NKA OLD COLD LLC

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

[May 20, 2019]

JUSTICE SOTOMAYOR, concurring.

I agree with the Court that a debtor's choice to reject an executory contact under 11 U. S. C. §365(a) functions as a breach of the contract rather than unwinding the rejected contract as if it never existed. *Ante*, at 8–10. This result follows from traditional bankruptcy principles and from the general rule set out in §365(g) of the Bankruptcy Code. I also agree that no specific aspects of trademark law compel a contrary rule that equates rejection with rescission. I therefore join the Court's opinion in full. I write separately to highlight two potentially significant features of today's holding.

First, the Court does not decide that every trademark licensee has the unfettered right to continue using licensed marks postrejection. The Court granted certiorari to decide whether rejection "terminates rights of the licensee that would survive the licensor's breach under applicable nonbankruptcy law." Pet. for Cert. i. The answer is no, for the reasons the Court explains. But the baseline inquiry remains whether the licensee's rights would survive a breach under applicable nonbankruptcy law. Special terms in a licensing contract or state law could bear on that question in individual cases. See *ante*, at 9–10; Brief for American Intellectual Property Law Association as *Amicus Curiae* 20–25 (discussing examples of contract terms that could potentially lead a bankruptcy court to limit licensee rights postrejection).

Second, the Court's holding confirms that trademark licensees' postrejection rights and remedies are more expansive in some respects than those possessed by licensees of other types of intellectual property. Those variances stem from §365(n), one of several subject-specific provisions in the Bankruptcy Code that "embellis[h] on or twea[k]" the general rejection rule. *Ante*, at 13, n. 2. Section 365(n)—which applies to patents, copyrights, and four other types of intellectual property, but not to trademarks, §101(35A)—alters the general rejection rule in several respects. For example, a covered licensee that chooses to retain its rights postrejection must make all of its royalty payments; the licensee has no right to deduct damages from its payments even if it otherwise could have done so under nonbankruptcy law. §365(n)(2)(C)(i). This provision and others in §365(n) mean that the covered intellectual property types are governed by different rules than trademark licenses.

Although these differences may prove significant for individual licensors and licensees, they do not alter the outcome here. The Court rightly rejects Tempnology's argument that the presence of §365(n) changes what §365(g) says. As the Senate Report accompanying §365(n) explained, the bill did not "address or intend any inference to be drawn concerning the treatment of executory contracts" under §365's general rule. S. Rep. No. 100–505, p. 5 (1988); see *ante*, at 14. To the extent trademark licensees are treated differently from licensees of other forms of intellectual property, that outcome leaves Congress with the option to tailor a provision for trademark licenses, as it has repeatedly in other contexts. See *ante,* at 13–14.

With these observations, I join the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 17–1657

MISSION PRODUCT HOLDINGS, INC., PETITIONER *v.* TEMPNOLOGY, LLC, NKA OLD COLD LLC

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

[May 20, 2019]

JUSTICE GORSUCH, dissenting.

This Court is not in the business of deciding abstract questions, no matter how interesting. Under the Constitution, our power extends only to deciding "Cases" and "Controversies" where the outcome matters to real parties in the real world. Art. III, §2. Because it's unclear whether we have anything like that here, I would dismiss the petition as improvidently granted.

This case began when Mission licensed the right to use certain of Tempnology's trademarks. After Tempnology entered bankruptcy, it sought and won from a bankruptcy court an order declaring that Mission could no longer use those trademarks. On appeal and now in this Court, Mission seeks a ruling that the bankruptcy court's declaration was wrong. But whoever is right about that, it isn't clear how it would make a difference: After the bankruptcy court ruled, the license agreement expired by its own terms, so nothing we might say here could restore Mission's ability to use Tempnology's trademarks.

Recognizing that its original case seems to have become moot, Mission attempts an alternative theory in briefing before us. Now Mission says that if it prevails here it will, on remand, seek money damages from Tempnology's estate for the profits it lost when, out of respect for the bankruptcy court's order, it refrained from using the trademarks while its license still existed.

But it's far from clear whether even this theory can keep the case alive. A damages claim "suffices to avoid mootness only if viable," which means damages must at least be "legally available for [the alleged] wrong." 13C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3533.3, p. 22 (3d ed. 2008). Yet, as far as Mission has told us, Tempnology did nothing that could lawfully give rise to a damages claim. After all, when Tempnology asked the bankruptcy court to issue a declaratory ruling on a question of law, it was exercising its protected "First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 741 (1983). And petitioning a court normally isn't an actionable wrong that can give rise to a claim for damages. Absent a claim of malice (which Mission hasn't suggested would have any basis here), the ordinary rule is that "'no action lies against a party for resort to civil courts'" or for "the assertion of a legal argument." *Lucsik* v. *Board of Ed. of Brunswick City School Dist.*, 621 F. 2d 841, 842 (CA6 1980) (*per curiam*); see, *e.g.*, *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757, 770, n. 14 (1983); *Russell* v. *Farley*, 105 U. S. 433, 437–438 (1882).

Maybe Mission's able lawyers will conjure something better on remand. But, so far at least, the company hasn't come close to articulating a viable legal theory on which a claim for damages could succeed. And where our jurisdiction is so much in doubt, I would decline to proceed to the merits. If the legal questions here are of sufficient importance, a live case presenting them will come along soon enough; there is no need to press the bounds of our constitutional authority to reach them today.