Mid-Atlantic Bankruptcy Workshop

Recent Bankruptcy Appellate Decisions

G. David Dean, Moderator
Cole Schotz P.C. | Wilmington, Del.

Hon. Craig T. Goldblatt
U.S. Bankruptcy Court (D. Del.) | Wilmington

Noah A. Levine
WilmerHale | New York

Brittany J. Nelson
Quinn Emanuel Urquhart & Sullivan, LLP | Washington, D.C.

David I. Swan
Hirschler Fleischer, PC | Tysons, Va.

CONCURRENT SESSION

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Panelists:

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Mass Torts

Current developments in mass torts

1. Purdue Pharma and third-party releases

Developments in the *Purdue Pharma* bankruptcy could potentially bring greater clarity to the longstanding dispute over the permissibility of third-party releases. By way of overview, the U.S. Bankruptcy Court for the Southern District of New York confirmed the *Purdue Pharma* plan of reorganization, which contained broad third-party releases, in September 2021.[1] The confirmation order, however, was reversed in December of that year by the District Court for the Southern District of New York, in an opinion that held (notwithstanding seemingly contrary Second Circuit precedent) that the Bankruptcy Code does not authorize such releases.[2]

The Second Circuit heard argument in April 2022 on an appeal from the district court ruling. In May 2023, the Second Circuit reversed the district court.[3] In an opinion by Judge Lee, the court held that such releases may be granted in unusual cases, and articulating seven factors (broadly consistent with the principles applied in other circuits that authorize third-party releases in exceptional circumstances) that should guide courts in determining the propriety of such releases. Judge Wesley concurred, explaining that he agreed that the majority opinion correctly applied Second Circuit precedent, but emphasized the longstanding circuit split on the question and expressed doubt that such an exceptional power ought to be inferred

[1] *In re Purdue Pharma, L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021).

[2] *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021).

[3] *In re Purdue Pharma, L.P.*, 69 F.4th 45 (2d Cir. 2023).

from the general language of §§ 105(a) and 1123(b)(6) of the Bankruptcy Code on which the majority relied.

Significantly, on July 7, 2023, the United States Trustee moved the Second Circuit to stay its mandate. The U.S. Trustee explained that the Government intends to file a petition for certiorari on or before the August 28, 2023 deadline. The U.S. Trustee seeks a stay of the mandate on the ground that if the mandate were to issue and the plan were to become effective, it would at least give rise to an argument that the Government's cert petition should be denied on the ground that the case is equitably moot. As of this writing, that motion is not yet fully briefed, so the Second Circuit has not yet acted on it.

In view of the longstanding circuit split, the points made in Judge Wesley's concurrence, and the fact that the Solicitor General will be the petitioner, the likelihood that the Supreme Court may grant certiorari is very substantial. If the petition is filed in late August, oppositions to certiorari (if the respondents obtain only a standard 30-day extension) would be due in late October, which would make it likely that the Court would act on the cert petition in November 2023. Cases granted in November would typically be heard late in that Term (perhaps March 2024) and would be decided by no later than the end of June 2024.

It bears note that both Judge Wesley's concurrence and the merits portion of the Government motion to stay the mandate draw heavily on an approach to statutory construction that is very much in vogue in the current Supreme Court. The principle (reflected in the "major questions doctrine" is that statutes generally should

not be read to authorize broad and surprising authority in the absence of a clear statutory authorization. And while some might contend that this principle is one of administrative law that should not affect the Court's construction of the Bankruptcy Code, it is significant that at the end of last Term, several Justices went out of their way to emphasize that this principle is just an ordinary tool of statutory construction.[4] Were the Supreme Court to grant certiorari in *Purdue* and apply this principle to the construction of the Bankruptcy Code, the power of bankruptcy courts to grant non-consensual third-party releases would be very much in doubt.

2. LTL Management and the Texas two-step

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

The Third Circuit recently cast doubt on the viability of this gambit in *In re LTL Mgmt. LLC,*[5] holding that the guarantee given by NewCo to OldCo as part of the divisive merger (one that was presumably necessary to save the divisive merger from a fraudulent conveyance challenge) meant that OldCo was not in "financial distress" (as that term is used in Third Circuit caselaw to impose a requirement that chapter

[4] *See Biden v. Nebraska*, 143 S. Ct. 2355, 2376-2384 (2023) (Barrett, J., concurring); *id.* at 2398 n.3 (Kagan, J., dissenting).

[5] 58 F.4th 738 (3d Cir. 2023).

11 cases be filed in "good faith") and that the bankruptcy case should therefore be dismissed.

Interestingly, following the bankruptcy court's dismissal of the *LTL* case upon the issuance of the mandate from the Third Circuit, the company filed another bankruptcy petition. This time, however, LTL did not have the backstop commitment from J&J (the one that was presumably given in the first place to save the transaction from fraudulent conveyance challenge). Litigation over this issue is now proceeding in the Bankruptcy Court for the District of New Jersey. (In view of the fact that the third-party release for the benefit of NewCo is an essential element of the Texas Two-Step strategy, there is certainly some possibility that this set of issues will be overtaken by developments in *Purdue Pharma*, described above.)

3. Bestwall

In the case of *Bestwall LLC*,[6] the Fourth Circuit recently upheld a bankruptcy court's preliminary injunction barring the continuation of asbestos-related litigation against non-debtor Georgia-Pacific. In 2017, Georgia-Pacific LLC – a manufacturer of asbestos-containing products – underwent a divisional merger (much like the form of "Texas Two-Step" described above), separating its business into Bestwall LLC and New GP, leaving Bestwall with all of Georgia-Pacific's asbestos-related liabilities and New GP with the company's valuable assets. When Bestwall filed for bankruptcy, it sought a preliminary injunction enjoining all asbestos-related claims against New GP. The bankruptcy court granted the preliminary injunction. The Fourth Circuit

[6] 71F.4th 168 (4th Cir. 2023)

affirmed, holding that because the claims asserted against New GP are identical to those asserted against Bestwall, and because any damages incurred by New GP would affect its obligation to indemnify Bestwall, the bankruptcy court had "related-to jurisdiction" to enter the injunction.

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

4. *In re Aearo Technologies, LLC*

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

$240 million to fund a chapter 11 case. In exchange, Aearo would indemnify 3M for any liability incurred on account of MDL-related claims.

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

The bankruptcy court recently dismissed Aearo's case as a bad faith filing.[7] Adopting the Third Circuit's reasoning in LTL Management, the bankruptcy court held that the central question a court must ask when determining whether a case was filed in good faith is whether the bankruptcy filing serves a valid bankruptcy purpose. While Aearo is a named defendant in an MDL case, its funding agreement

[7] *See In re Aero Technologies, LLC*, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023).

with 3M offered Aearo a guarantee that it would be able to pay its creditors. The bankruptcy court also noted that the MDL claims were too speculative to support a finding of financial distress, and while those claims present a potential for peril, it is too early to conclude that these claims will result in the liquidation of Aearo.

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

Equitable Mootness

Mootness

1. Petition for Certiorari, *U.S. Bank, N.A.* v. *Windstream Holdings, Inc.*, No. 22-926 (U.S. Supreme Court)

   On March 15, 2023, U.S. Bank, N.A., acting as trustee for unsecured creditors, filed a petition for certiorari raising several issues regarding the doctrine of equitable mootness applied in bankruptcy cases, and especially concerning the application of the doctrine in the Second Circuit. In particular, at issue in the petition is the doctrine under which courts decline to consider the merits of appeals concerning consummated reorganization plans because it would be inequitable to upset the plan. In *Windstream*, the district court and Second Circuit dismissed U.S. Bank's appeal on equitable mootness grounds.

   In the first question presented, U.S. Bank argues that the equitable mootness doctrine applied in bankruptcy cases should be abolished for several reasons—because it departs from Congress's direction in the Bankruptcy Code that Article III courts hear bankruptcy appeals with only certain exceptions, because it contradicts federal courts' "virtually unflagging obligation" to exercise their jurisdiction, because the doctrine rests on faulty authority, as discussed by several courts or jurists (including Justice Alito when he was a Third Circuit judge) in decisions over the years, and because of the negative practical consequences of the doctrine, in which parties rush to implement plans of reorganization so they may avail themselves of the doctrine in any appeal.

   In the second and third questions presented, U.S. Bank seeks the Supreme Court's review of two particular applications of the equitable mootness doctrine in the Second Circuit—that court of appeals' consideration of one factor, whether the appellant diligently sought a stay, as a "chief consideration" and the court's placement of the burden on the appellant to show that an appeal is not equitably moot in circumstances when the reorganization plan has been substantially consummated. On both issues, the petition argues, the Second Circuit's decisions conflict with the decisions of other circuit courts.

   The petition is supported by a bankruptcy law professors amicus brief.

   In opposition, respondents contend that there is no reason for the Supreme Court to consider the first question presented, arguing principally that every circuit applies the doctrine, the Supreme Court has repeatedly and recently rejected certiorari petitions raising the same question and making the same arguments, the petition presents no changed circumstances since the court of appeals' decisions and the Supreme Court's rejections of certiorari petitions, and this particular case presents a poor vehicle for reconsidering the doctrine. Respondents also contend there is no reason for review of the second or third questions presented, arguing that they concern unimportant, narrow issues that rarely arise or determine the outcome of an appeal.

   Between the time of U.S. Bank's petition and its reply brief, the Supreme Court decided *MOAC Mall Holdings LLC* v. *Transform Holdco LLC* (discussed *infra*). In that decision, in addition to the primary question presented, the Supreme Court addressed a mootness argument (though not equitable mootness) made by

Transform. U.S. Bank's reply argues that the Supreme Court's rejection of Transform's mootness argument in *MOAC* only strengthens the case for review, given the Court's statement that it disfavors mootness arguments based on the asserted absence of a legal vehicle for effective relief.

The case is set for consideration at the Justices' September 26, 2023 conference.

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

The primary question in *MOAC* was not a mootness question, but rather a statutory question under 11 U.S.C. § 363(m). In particular, the Supreme Court considered whether the requirements of § 363(m) are jurisdictional, such that a party can neither waive them nor be judicially estopped from raising them. The district court and Second Circuit held that § 363(m) is jurisdictional, dismissing the appeal even though, in the Bankruptcy Court, Transform "had explicitly represented that it would not invoke § 363(m) against MOAC's appeal." 143 S.Ct. at 934. On this issue, the Supreme Court held that § 363(m) was not jurisdictional.

The Court also addressed a mootness argument made by Transform before reaching the § 363(m) issue above. Transform contended that by the time the case reached the Supreme Court, the property in question (a lease at the Mall of America) had left the estate via the assignment approved by the Bankruptcy Court and there was no longer any legal avenue by which the transfer could be unwound. As a result, Transform argued, no matter how the Supreme Court ruled on the § 363(m) issue, there was no way that MOAC could obtain any effective relief. The case was, Transform urged, accordingly moot.

The Supreme Court rejected Transform's argument, noting that "[o]ur cases disfavor these kinds of mootness arguments." 143 S.Ct. at 935. The Court reasoned that MOAC sought "typical appellate relief"—a reversal of the lower courts and a direction that they undo what they had done. The Court also refused to plumb the Bankruptcy Code to determine whether Transform was correct regarding the asserted unavailability of legal relief. *Id*. As in previous cases where the Supreme Court had rejected mootness arguments, it was enough that MOAC's arguments about available legal relief were "not so implausible that they are insufficient to preserve jurisdiction." *Id*. at 935 n.4.

Though the mootness issue and § 363(m) issues were different, in both circumstances, Transform raised arguments seeking to interpose obstacles to the appellate courts considering MOAC's merits arguments. The Supreme Court's resolution of both issues in favor of review can reasonably be argued to represent a consistent preference for appellate courts to reach the merits of the issues presented. At minimum, that is how U.S. Bank has presented the case in its *Windstream* petition. *See supra*.

Solvent Debtor Exception

Solvent-Debtor Exception

Perhaps surprisingly given the rarity of such cases, a handful of high-profile court rulings recently have addressed whether a solvent chapter 11 debtor is obligated to pay postpetition, pre-effective date interest to unsecured creditors to render their claims "unimpaired" under a chapter 11 plan and, if so, at what rate. While the default rule in bankruptcy is that interest ceases to accrue on most claims once a bankruptcy petition is filed, the default rule is not necessarily applied when a "solvent" debtor seeks bankruptcy protection. The exception was first created by eighteenth century English courts to require debtors to pay post-bankruptcy interest before the debtor could retain any equity. American courts subsequently adopted this common law doctrine and applied it under the predecessor to the Bankruptcy Code, the Bankruptcy Act of 1898 (the predecessor to the Bankruptcy Code).

In the last year, two separate circuit courts have ruled on whether the doctrine continues to apply in the modern context– the Ninth Circuit Court of Appeals in *In re PG&E Corp* and the Fifth Circuit Court of Appeals in *In re Ultra Petroleum.* These cases are summarized separately below. The issue is also currently on appeal to the United States Court of Appeals for the Third Circuit.

In re PGE, 2022 WL 3712478 (9th Cir. 2022), 46 F.4th 1047 (9th Cir. 2022), *reh'g denied*, No. 21-16043 (9th Cir. Oct. 5, 2022)

On August 29, 2022, the United States Court of Appeals for the Ninth Circuit held in *Ad Hoc Comm. of Holders of Trade Claims vs. Pacific Gas and Elec. Co. (In re PG&E Corp.)* that when a debtor is solvent, a creditor may be entitled to receive interest at the contract rate or state default rate of interest (subject to equitable considerations), rather than at the federal judgment rate.

Background

PG&E filed for chapter 11 protection in January 2019 with approximately $50 billion of known liabilities, including those arising from a series of wildfires that occurred in Northern California. It was undisputed that on the chapter 11 petition date, the Debtors' total assets exceeded their total amount of liabilities, and thus, the Debtors were "solvent at the time of filing" the bankruptcy petitions. The Debtors' plan of reorganization provided that unimpaired unsecured creditors would receive interest on their claims at the federal judgment rate of 2.59 percent. This interest rate was significantly lower than what unsecured creditors would have received their contract rates of interest or California state law, which could accrue at a rate of 10 percent. Indeed, by some estimates, the difference between the calculation of the two rates was approximately $200 million for unsecured creditors. The U.S. Bankruptcy Court for the Northern District of California held in favor of the Debtors, reasoning that existing Ninth Circuit precedent required that all unsecured creditors of a solvent debtor were only entitled to the federal judgment rate under the Bankruptcy Code. The district court affirmed the bankruptcy court's decision.

The Ninth Circuit's Decision

On appeal, a majority of the Ninth Circuit panel reversed the lower courts' decision, and held that, subject to equitable considerations, solvent debtors may be required to pay unsecured creditors at the rates of interest under their contracts to render such creditors unimpaired for purposes of Section 1124 of the Bankruptcy Code.

In reaching this conclusion, the Ninth Circuit first addressed whether its prior decision in *In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002) was controlling in the case before it. Both the bankruptcy and district courts below held that *Cardelucci* established a broad rule that all unsecured claims in a solvent-debtor bankruptcy are entitled only to post-petition interest at the federal judgment rate, regardless of impairment status. The Ninth Circuit disagreed, constructing *Cardelucci* narrowly. The panel reasoned that "*Cardelucci* merely held that the phrase 'interest at the legal rate' in § 726(a)(5) refers to the federal judgment rate as defined by 28 U.S.C. § 1961(a)." Section "726(a)(5) only applies to impaired Chapter 11 claims via the best-interests test. *Cardelucci* therefore does not tell us what rate of post-petition interest must be paid on plaintiffs' unimpaired claims."

The Ninth Circuit then focused on the question of whether the "solvent-debtor exception" had been abrogated by the enactment of the Bankruptcy Code in 1978. In arguing that the solvent debtor exception did not survive the enactment of the Bankruptcy Code, the Debtors had relied on recent precedent, notably from Delaware in *Wells Fargo Bank, N.A. v The Hertz Corp (In re The Hertz Corp.)*, 637 B.R. 781, 800–01 (Bankr. D. Del. 2021). In that case, Judge Walrath, the courts had found that the solvent debtor exception only survived the enactment of the Bankruptcy Code in two limited aspects: first, under Section 506(b) for oversecured creditors and second, for impaired unsecured creditors under Section 726(a)(5). These courts found that a debtor's solvency did not waive application of Section 502(b)(2), and thus there is no entitlement to interest for unimpaired creditors beyond the federal judgment rate. This case is currently on appeal to the United States Court of Appeals for the Third Circuit.

The Ninth Circuit disagreed with Judge Walwrath's reasoning. The Court found that even though the "solvent-debtor exception" was not explicitly codified in the Bankruptcy Code or its predecessor, there was no evidence of Congressional intent to displace that common law exception that had existed before the enactment of the current Bankruptcy Code. The Ninth Circuit rejected the argument that Section 502(b) mandated a different result. Instead, the Ninth Circuit concluded that Section 502(b)(2) of the Bankruptcy Code did not compel a different conclusion. The rationale for such a conclusion that that section 502(b)(2) disallows claims for unmatured interest, the Court found it significant that debtors also had the power to disallow such claims under the Bankruptcy Act of 1898. Since under the Bankruptcy Act of 1898, courts still employed the solvent debtor exception, the presence of section 502(b) provided no evidence that Congress intended to displace the solvent debtor exception.

Dissenting Opinion

Judge Ikuta of the Ninth Circuit issued a dissenting opinion, which disagreed with the majority's position that unimpaired, unsecured creditors are entitled to post-petition interest on their claims at the contract rate when the debtor is solvent. Judge Ikuta argued that Congress' failure to codify the "solvent-debtor exception" indicates that there is no basis for providing unimpaired creditors with post-petition interest at the contract or state default rates.

In re Ultra Petroleum 51 F.4th 138 (5th Cir. 2022) (*affirming In re Ultra Petroleum Corp.*, 624 B.R. 178 (Bankr. S.D. Tex. 2020)), *reh'g denied*, No. 21-20008 (5th Cir. Nov. 15, 2022).

Only a month after the *PG&Ed* decision, on October 14, 2022, the United States Court of Appeals of the Fifth Circuit issued its decision in *Ultra Petroleum*, addressing a similar issue. There, a divided court granted favorable outcomes to "unimpaired" creditors that challenged the company's plan of reorganization and argued for payment (i) of a ~$200 million make-whole and (ii) post-petition interest at the contractual rate, not the federal rate. Writing for the majority, U.S. Circuit Court Judge Jennifer Walker Elrod held that "the solvent-debtor exception is alive and well" and that Ultra was obligated to pay the make-whole amount "even though … it is indeed otherwise disallowed unmatured interest." Given Ultra's solvency, the Fifth Circuit majority also ruled that Ultra is obligated to pay postpetition interest to its noteholders and certain other unsecured creditors at the agreed-upon contractual default rate.

Background

At issue on appeal was the Chapter 11 plan proposed by the "massively solvent" debtors—Ultra Petroleum Corp. and its affiliates, including subsidiary Ultra Resources, Inc.—which provided for the payment of all unsecured claims, including the subsidiary noteholders an creditors, in full and in cash, with all accrued pre-petition outstanding interest to be paid at the contractual rate, and all post-petition accruing interest to be paid at the federal judgment rate. Ultra deemed such creditors unimpaired under the plan. The plan did not, however, provide for payment of post-petition interest at the contractual default rate or of a make-whole amount triggered upon the filing of the bankruptcy.

Two groups of creditors, both the noteholders and an ad hoc committee of unsecured creditors, appealed the order confirming the plan. The creditors argued that they were, in fact, impaired, because the plan did not provide for the payment of make-whole amounts that became due upon Ultra's bankruptcy filing, nor did it provide for the payment of post-petition interest at the contractual "default rate," which was significantly higher than the federal rate.

Fifth Circuit Holding

In its opinion, the Fifth Circuit affirmed the decision of the Bankruptcy Court for the Southern District of Texas, holding that, while section 502(b)(2) of the Bankruptcy Code precludes claims for make-whole amounts, as these amounts constitute unmatured interest or its economic equivalent, the solvent-debtor exception that existed prior to enactment of the Bankruptcy Code survived such that Ultra was obligated to pay the make-whole amounts and post-petition interest at the contractual rate.

In doing so, the Court rejected Ultra's argument that, in enacting the Bankruptcy Code, Congress abrogated the solvent-debtor exception. In making this determination, the Fifth Circuit looked to the Supreme Court, which has instructed that longstanding historical practice continues apace unless expressly abrogated, unmistakably, by Congress (i.e., in this instance, by the codification of the current Bankruptcy Code in 1978). The majority opinion, here, found that the solvent-

debtor exception remained alive and well even after the code was enacted, since clear intent from Congress was lacking.

Unlike the Ninth Circuit, the Fifth Circuit majority ruled that the appropriate rate of postpetition interest is the default contract rate rather than the federal judgment rate. The majority explained that unimpaired creditors cannot be treated less favorably under a chapter 11 plan than impaired creditors, who are entitled to "not less than" what they would have received in a chapter 7 liquidation under section 1129(a)(7)'s best interests test, which, in a solvent-debtor case, includes interest at "the legal rate" under section 726(a)(5). The majority acknowledged that most courts have construed "the legal rate" to mean the federal judgment rate. However, the decision held that "the legal rate" specified in section 726(a)(5) "only sets a floor—not a ceiling—for what an impaired creditor may receive and thus the contractual rate of interest was permissible.

Dissenting Opinion

In a dissenting opinion, Circuit Judge Andrew S. Oldham agreed with the majority that the make-whole amount "is unmatured interest in disguise," but argued that it should be disallowed because the solvent-debtor exception did not survive enactment of the Bankruptcy Code. Like the dissent in the Ninth Circuit, he found that it was "unmistakably clear that" section 502(b)(2) is "incompatible with the pre-existing solvent-debtor exception." *Id.* Judge Oldham explained that, unlike section 502(b)(2), the former Bankruptcy Act did not preclude unmatured interest, and the majority misconstrued the relevant statutory provisions in concluding otherwise. He wrote that "[n]either the solvent-debtor exception's historical pedigree nor its policy underpinnings—no matter how compelling—can overcome Congress's clear, and clearer-than-ever, command on this point."

Tribunal Immunity

ABI PANEL

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

On June 15, 2023, the United States Supreme Court held in an 8-1 decision, that the Bankruptcy Code unambiguously abrogates the sovereign immunity of all governments, including federally recognized Indian tribes.

A. The Dispute

The Lac du Flambeau Band of Lake Superior Chippewa Indians is a federally recognized Indian tribe that owns several business including an internet payday lender named Lendgreen. In 2019, Lendgreen provided a $1,100 high-interest short-term loan to Brian Coughlin. After Mr. Coughlin filed bankruptcy under Chapter 13, Lendgreen ignored the automatic stay and continued efforts to collect on the loan. Mr. Coughlin filed a motion to enforce the automatic stay, alleged that Lendgreen caused him emotional stress to the point where he attempted suicide, and sought damages under section 362(k) of the Bankruptcy Code.

Lac du Flambeau appeared in the Massachusetts bankruptcy court and argued that the Band and its subsidiaries enjoyed tribal sovereign immunity from the enforcement proceeding. Mr. Coughlin argued that Congress abrogated the sovereign immunity of all governmental units, including Indian tribes and their tribal entities, pursuant to section 106(a) of the Bankruptcy Code. The Bankruptcy Court agreed with Lac du Flambeau and dismissed the proceeding, finding that the Bankruptcy Code did not clearly express Congress's intent to abrogate tribal sovereign immunity. The First Circuit on direct appeal reversed, finding that the Bankruptcy Code unequivocally abrogates tribal sovereign immunity.

B. The Relevant Bankruptcy Code Provisions

1. Section 106(a) of the Bankruptcy Code states: "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:"

   Part (1) of 106(a) then lists no less than 59 sections of the Bankruptcy Code, including section 362.

2. Section 101(27) of the Bankruptcy Code states: "The term 'governmental unit' means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

C. The Circuit Split

By deciding in favor of Mr. Coughlin, the First Circuit agreed with the Ninth Circuit, which held almost 20 years ago that Section 106(a) abrogated tribal immunity. *Krystal Energy Co. v. Navajo Nation,* 357 F.3d 1055 (9th Cir. 2004). In 2019, the Sixth Circuit went the other way, upholding tribal immunity. *In re Greektown Holdings, LLC,* 917 F.3d 451 (6th Cir. 2019). The *Greektown* case, however, settled while the *certiorari* petition was pending. *Cert. dismissed sub nom. Buchwald Cap. Advisors LLC v. Sault Ste. Marie Tribe,* 140 S. Ct. 2638 (2020).

D. The Majority Opinion, delivered by Justice Jackson

The Supreme Court's decision in Lac du Flambeau turned on the meaning of "governmental unit" and in particular the final clause in Section 101(27): "or other foreign or domestic government." Initially, the Court acknowledged the well-settled rule that to abrogate sovereign immunity, Congress must make its intent "unmistakably clear" in the language of the statute. If there is a plausible interpretation of the statute that preserves sovereign immunity, then Congress has not unambiguously expressed the requisite intent. The Court held that Congress met the unmistakably clear standard because the governmental unit definition "exudes comprehensiveness from beginning to end" -- providing a "long list of governments that vary in

geographic location, size and nature", and concluding with the broad catchall phrase: "foreign or domestic", which is all-inclusive.

The Court also considered other purposes and aspects of the Bankruptcy Code, which "offers debtors a fresh start by discharging and restructuring their debts in an orderly and centralized fashion", the automatic stay which "keeps creditors from dismembering the estate while the bankruptcy case proceeds," and plan confirmation provisions which bind each creditor to whatever repayment plan the bankruptcy court approves. If a subset of governments were carved out from those various broadly sweeping protections, the Court reasoned, then it would "risk upending the policy choices that the Code embodies."

E. The Dissent, Justice Gorsuch

The Court's lone dissenter opined that Congress's intent was not unmistakably clear because "other foreign or domestic government" could either mean foreign, domestic, and every government in between; or it could mean purely foreign governments and purely domestic governments. Indian tribes "occupy a unique status" that is neither exclusively foreign nor exclusively domestic, territorially or politically. Moreover, instead of attempting to interpret Section 106 in the context of broad policies underlying the Bankruptcy Code, it is only the Court's job to interpret the particular statutes at issue.

F. Impacts of the Decision (actual and potential)

1. The most clear and obvious result of this Supreme Court decision is that Indian tribes and their businesses have no immunity from litigation in bankruptcy cases. Of course, as a governmental unit, tribes will generally have a longer period of time to file a proof of claim than the general deadline for other creditors.

2. The broad reach of section 106(a) abrogation extends to "any and every" government. The example the Supreme Court used of another hybrid domestic/foreign government was the International Monetary Fund. More common in bankruptcy court are situations, when a state or state agency attempts to claim immunity under the 11th Amendment.

3. The majority opinion observed that "Congress ushered in a new, unprecedented era in bankruptcy practice" when it enacted the Bankruptcy Code in 1978, including revisions to the definition of governmental unit and the abrogation of sovereign immunity. While this may be true, there are a number of issues that continue to turn on pre-Code bankruptcy practice and precedent.

4. For a conservative Supreme Court that often focuses only on the statutory text, it was interesting that the majority opinion considered, and in part based its decision on bankruptcy principles that "generally apply to all creditors." This broad sweep approach could impact decisions on other bankruptcy issues the Court decides in the future.

Supreme Court Decisions

RECENT SUPREME COURT DECISIONS INVOLVING BANKRUPTCY ISSUES

Case Name	Holding
Bartenwerfer v. Buckley (2023)	Section 523(a)(2)(A) precludes a debtor's spouse from discharging in bankruptcy a debt obtained by fraud, regardless of her own culpability.
Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin (2023)	The Bankruptcy Code expresses unequivocally Congress' intent to abrogate the sovereign immunity of Indian tribes.
Siegel v. Fitzgerald (2022)	Congress' enactment of a significant U.S. Trustee fee increase that exempted debtors in bankruptcy administrator states violated the uniformity requirement of the bankruptcy clause.
City of Chicago, Ill. v. Fulton (2021)	The mere retention of estate property after filing of bankruptcy petition does not violate the automatic stay.
Fin. Oversight and Mgmt. Bd. for Puerto Rico v. Aurelius Investment, LLC (2020)	The appointment of the Puerto Rico Oversight Board did not violate the Appointments Clause.
Ritzen Group Inc. v. Jackson Masonry, LLC (2020)	A bankruptcy court's order unreservedly denying relief from the automatic stay constitutes a final, immediately appealable order under § 158(a).
Rodriguez v. Fed. Deposit Ins. Corp. (2020)	Federal courts may not employ federal common law to decide who owns a tax refund when a parent holding company files a tax return but a subsidiary generated the losses giving rise to the refund.
Mission Product Holdings Inc. v. Tempnology, LLC (2019)	Rejection of an executory trademark license does not bar the licensee from continuing to use the mark.
Taggart v. Lorenzen (2019)	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.
Obduskey v. McCarthy & Holthus LLP (2019)	A business engaged in no more than nonjudicial foreclosure proceedings is not a "debt collector" under the FDCPA, except for the limited purpose of enforcing security interests under 15 U.S.C. § 1692f(6).
Merit Mgmt. Grp., LP v. FTI Consulting, Inc. (2018)	The only relevant transfer for purposes of the § 546(e) safe harbor is the transfer that the trustee seeks to avoid.
U.S. Bank Nat'l Assoc. v. Village at Lakeridge (2018)	The standard of review for determining non-statutory insider status is the clear error standard of review.
Lamar, Archer & Cofrin, LLP v. Appling (2018)	A false statement about an asset must be in writing to provide grounds for rendering a debt nondischargeable under § 523(a)(2).
Midland Funding, LLC v. Johnson (2017)	Filing a claim barred by the statute of limitations does not violate the FDCPA because it is not false, deceptive, or misleading.
Henson v. Santander Consumer USA, Inc. (2017)	A debt collector who purchases a debt for its own account is not a debt collector covered by the FDCPA.
Czyzewski v. Jevic Holding Corp. (2017)	A bankruptcy court, without consent from affected parties, cannot approve so-called structured dismissals that "deviate from the basic priority rules," not even in rare cases.
Husky Int'l Electronics, Inc. v. Ritz (2016)	"Actual fraud" in § 523(a)(2)(A) encompasses fraudulent conveyance schemes, even when those schemes do not involve a false representation.

Puerto Rico v. Franklin California Tax-Free Trust (2016)	The Bankruptcy Code preempts a Puerto Rico statute creating a mechanism for the commonwealth's public utilities to restructure their debts.
Baker Botts LLP v. ASARCO LLC (2015)	Section 330(a)(1) does not permit bankruptcy courts to award fees to § 327(a) professionals for defending fee applications.
Wellness Int'l Network, Ltd. v. Sharif (2015)	Article III permits bankruptcy judges to adjudicate Stern claims with the parties' knowing and voluntary consent.
Bullard v. Hyde Park Savings Bank (2015)	A bankruptcy court's order denying confirmation of a debtor's proposed repayment plan is not a final order that the debtor can immediately appeal.
Harris v. Viegelahn (2015)	A debtor who converts to chapter 7 is entitled to return of any post-petition wages not yet distributed by the chapter 13 trustee.
Bank of America v. Caulkett (2015)	A chapter 7 debtor may not void a junior mortgage lien under § 506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral if the creditor's claim is both secured by a lien and allowed under § 502.
Clark v. Rameker (2014)	Inherited IRAs are not shielded from creditors in bankruptcy proceedings.
Executive Benefits Ins. Agency v. Arkison (2014)	Bankruptcy court may issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court in a "core" proceeding under 28 U.S.C. § 157(b).
Law v. Siegel (2014)	A bankruptcy court may not contravene express provisions of the Bankruptcy Code by ordering that the debtor's exempt property be used to pay administrative expenses incurred as a result of the debtor's misconduct.
Bullock v. BankChampaign, N.A. (2013)	Trustee was improperly denied a discharge based on fiduciary defalcation under § 523(a)(4) since the trustee repaid loans for the trustee's personal gain from a trust with interest and there was no finding of wrongful intent, or gross recklessness, as required to find defalcation.
Radlax Gateway Hotel v. Amalgamated Bank (2012)	Debtors may not obtain confirmation of a chapter 11 cramdown plan that proposes to sell substantially all of the debtors' property at an auction, free and clear of the Bank's lien, using the sale proceeds to repay the Bank, but that does not permit the Bank to credit-bid at the sale.
Hall v. United States (2012)	The federal income tax liability resulting from a post-petition farm sale was not "incurred by the estate" under § 503(b).
Ransom v. F.I.A. Card Servs., N.A. (2011)	A chapter 13 debtor who owns a car outright may not take a means testing ownership deduction.
Stern v. Marshall (2011)	Although a bankruptcy court had authority under 28 U.S.C. § 157(b)(2)(C) to enter judgment on a debtor's core counterclaim, it lacked authority under Article III to do so since the bankruptcy court was not subject to the constitutional assurances of independence which would allow adjudication of the debtor's state common law claim.

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Faculty

G. David Dean heads Cole Schotz, P.C.'s Wilmington, Del., office and serves as deputy co-chair of the firm's Bankruptcy & Corporate Restructuring Department, and as a member of its Litigation Department. He focuses in the areas of complex chapter 11 bankruptcy restructuring and litigation. Mr. Dean regularly serves as lead counsel to debtors, official committees of unsecured creditors, and other major parties in chapter 11 bankruptcy cases. He has represented clients in a variety of industries, including retail, health care, oil and gas, technology, manufacturing, real estate, advertising, and events and entertainment. Mr. Dean was appointed by the Office of the U.S. Trustee to serve as a chapter 11 trustee. He is also experienced in representing companies in disputes involving the expert valuation of businesses and other assets, as well as injunctive remedies, and he has experience counseling clients through mass torts and international issues. Mr. Dean is an active ABI member and serves on the advisory boards of its Mid-Atlantic Bankruptcy Workshop and Views from the Bench conference. He also handles a number of *pro bono* representations each year and is an active member of the Delaware Bankruptcy American Inn of Court and the Delaware State Bar Association. Mr. Dean is regularly recognized for his work by *Chambers USA*, *The Best Lawyers in America* and *Super Lawyers*, which named him a "Rising Star," and he was named in The M&A Advisor's "40 Under 40 Legal Advisors" list. He received his B.A. in 1999 from the University of Maryland and his J.D. *summa cum laude* in 2002 from the University of Baltimore.

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

Noah A. Levine is a partner and head of the Commercial Litigation Group of WilmerHale in New York, where he represents clients in a diverse range of litigation matters, including class actions and appeals. He has defended businesses in consumer class actions under federal banking statutes, life insurance statutes, federal and state consumer protection laws and antitrust laws, and has litigated data breach, privacy and other complex commercial matters. Mr. Levine's litigation practice is divided between appellate and trial work. On the appellate side, he has prepared merits briefs, petitions for *certiorari* and *amicus* briefs before the U.S. Supreme Court and numerous federal appellate courts in cases involving arbitration, banking, constitutional, commercial, insurance, intellectual property

and securities matters. Mr. Levine has presented oral argument in many of the same cases, in the U.S. Courts of Appeals for the Second, Eighth, Ninth and Federal Circuits. On the trial side, he frequently represents financial institutions in class actions and other complex commercial litigation involving banking, life insurance, consumer protection, data breach, privacy, intellectual property and constitutional matters. Prior to joining WilmerHale, Mr. Levine was associated with a law firm in Seattle and spent one year at the U.S. Department of Justice as a Bristow Fellow in the Office of the Solicitor General. He was recognized by *Chambers USA* from 2019-23 for his work in financial services regulation and consumer finance litigation, named a "Litigation Star" in New York for securities, appellate and commercial by *Benchmark Litigation* in 2021 and 2023, and recommended by *The Legal 500 United States* in 2016 and 2018 for his dispute-resolution and general commercial litigation practice. Mr. Levine received his A.B. in 1993 *summa cum laude* from Dartmouth College and his J.D. in 1997 from Columbia University, where he served as executive managing editor of the *Columbia Law Review*.

Brittany J. Nelson is a partner and a litigation attorney with Quinn Emanuel Urquhart & Sullivan, LLP in Washington, D.C. She regularly represents clients in high-stakes bankruptcy litigation, including most recently Shiloh Industries, Pier 1, Toys "R" Us, Sears, GST Autoleather and Intelsat, S.A. Ms. Nelson regularly represents unsecured creditors' committees, ad hoc committees, shareholders, chapter 7 and chapter 11 trustees, and federal court-appointed receivers in a variety of bankruptcy matters. She also has experience representing individuals, officers and directors, businesses, financial institutions, corporations, partnerships and other entities involved in commercial transactions and large bankruptcy and litigation matters, including retail, airline, automotive, coal, fraud and Ponzi scheme matters. Ms. Nelson's practice includes restructuring work and complex commercial litigation cases in state and federal courts throughout the U.S. and internationally. Previously, she was a litigation associate with Patton Boggs, LLC and clerked for the District Court of the U.S. Virgin Islands. Ms. Nelson is admitted to practice in Virginia, the District of Columbia and Utah. She received her A.B. *cum laude* in history 2000 from Harvard University, where she was a Harvard National Scholar, and her J.D. *cum laude* in 2003 from Georgetown University Law Center, where she was a senior articles and notes editor for the *American Criminal Law Review*.

David I. Swan is partner with Hirschler Fleischer, PC in Tysons, Va., and has more than 25 years of experience in bankruptcy. His expertise includes litigation and transactional matters, providing critical path strategies, and achieving successful results. Prior to joining Hirschler, Mr. Swan was a partner with McGuireWoods. In addition to his representative debtor, trustee and committee engagements, he has served as creditors' rights counsel to Sprint in a number of highly publicized cases in and outside bankruptcy court. Mr. Swan has been listed in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law from 2013-23, and in *Chambers USA America's Leading Lawyers for Business* for Bankruptcy/Restructuring in Virginia from 2015-22. He also was named among the "Legal Elite" by *Virginia Business* from 2010-12, and was named one of *Super Lawyers* "Pennsylvania Rising Stars" for Bankruptcy and Creditor/Debtor Rights in 2005. Mr. Swan received his B.S.B.A. from West Virginia Wesleyan College and his J.D. from the University of Pittsburgh School of Law.