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31st Annual
Duberstein Bankruptcy
Moot Court Competition
Saturday, March 4, 2023
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AMERICAN
BANKRUPTCY
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Competition Problem

Updated January 2023

31st ANNUAL
DUBERSTEIN BANKRUPTCY
MOOT COURT COMPETITION

March 4, 2023 – March 6, 2023

No. 22-0909

IN THE

Supreme Court of the United States

OCTOBER TERM, 2022

IN RE PENNY LANE INDUSTRIES, INC., DEBTOR,

ELEANOR RIGBY, PETITIONER

V.

PENNY LANE INDUSTRIES, INC., RESPONDENT.

THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED, LIMITED TO THE FOLLOWING QUESTIONS:

1. Whether a bankruptcy court has the authority to approve non-consensual releases of direct claims held by third parties against non-debtor affiliates as part a chapter 11 plan of reorganization.

2. Whether a corporate debtor proceeding under subchapter V of chapter 11 of the Bankruptcy Code may, pursuant to 11 U.S.C. § 1192, discharge debts of types specified in subparagraphs (1) through (19) of 11 U.S.C. § 523(a).

Written by Paul R. Hage and G. Ray Warner. Paul Hage is a Partner at Taft, Stettinius & Hollister, LLP in Detroit, Michigan. Ray Warner is a Professor of Law at St. John's University School of Law in Queens, New York. The authors express no opinion on the issues presented herein.

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Recommended for Full Text Publication

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

ELEANOR RIGBY,
APPELLANT,

CASE NO. 21-0803

V.

PENNY LANE INDUSTRIES, INC.,
APPELLEE.
____/

Direct Appeal from the United States
Bankruptcy Court for the District of Moot

Decided: March 7, 2022

Before: Harrison, Lennon and McCartney, Circuit Judges

OPINION

Harrison, Circuit Judge:

This is a mass tort chapter 11 case. It involves allegations that Penny Lane Industries, Inc. (the "Debtor") knowingly disposed of environmental pollutants on the property of its manufacturing facility located in the City of Blackbird, Moot and, in doing so, contaminated the area's ground water supply. Creditors, consisting primarily of residents of Blackbird and the neighboring communities, assert that they have suffered death and serious injuries due to the alleged conduct of the Debtor.

The Debtor filed this case under subchapter V of chapter 11 of the Bankruptcy Code[1] to deal with a veritable tsunami of litigation related to such allegations. Months of post-petition

[1] The Bankruptcy Code is set forth in 11 U.S.C. §§ 101 *et seq*. Specific sections of the Bankruptcy Code are identified herein as "section __."

mediation resulted in the filing by the Debtor of a nearly consensual *Plan of Reorganization* (the "Plan"), which provides for the creation of a creditors' trust that will make a substantial distribution to creditors. Such distribution was funded in large part by the Debtor's corporate parent, Strawberry Fields Foods, Inc. ("Strawberry Fields"). The funds did not come without strings though. In addition to a discharge of all claims against the Debtor, the Plan contemplates broad non-consensual releases of claims held by the Debtor and by third parties against Strawberry Fields.

Given what is at stake, it is not surprising that creditors have strong, albeit differing, opinions about how this case should be resolved. The appellant in this appeal, Eleanor Rigby, filed a complaint seeking a determination that her claim against the Debtor is non-dischargeable pursuant to sections 523(a)(6) and 1192. Ms. Rigby also objected to confirmation of the Plan, arguing that bankruptcy courts do not have authority to release third-party claims against non-debtor entities and, therefore, she should be able to pursue her direct claims against Strawberry Fields notwithstanding any bankruptcy discharge that the Debtor might obtain.

The Bankruptcy Court for the District of Moot dismissed Ms. Rigby's non-dischargeability action, concluding that the provisions of section 523 apply only in cases where the Debtor is an individual. The court also overruled Ms. Rigby's objection to the Plan, holding that it had authority to approve the releases contained therein. Ms. Rigby timely appealed both determinations. Having considered the compelling arguments of the parties, we affirm the bankruptcy court on both issues.

Factual Background and Procedural History

The Debtor's long and winding road into bankruptcy started years before the commencement of this case. Based in the City of Blackbird, Moot, the Debtor is a manufacturer of plastic, glass and metal food containers. The Debtor is a wholly owned subsidiary of Strawberry

Fields, a company that produces cereal and convenience foods and markets its products under several well-known brands sold in supermarkets throughout the country.

As noted, this case involves allegations that the Debtor knowingly disposed of industrial chemicals and pollutants at its manufacturing facility in Blackbird and, in doing so, contaminated the area's ground water supply. While the source of the contamination has not been conclusively determined, Federal and State authorities have determined that a sizable groundwater plume exists under the community of Blackbird.[2] Studies conducted by the United States Environmental Protection Agency and the Centers for Disease Control and Prevention have shown that, during the years 2013 through 2017, tens of thousands of local residents drank and bathed in water contaminated with toxins at concentrations 250 to 3,000 times the permitted level. Tragically, exposure to such toxins has been linked to sickness, birth defects and even death.

In 2017, Ms. Rigby, a resident of Blackbird since 1982, filed suit against the Debtor and Strawberry Fields asserting that her four-year old daughter died of leukemia caused by exposure to pollutants dumped by the Debtor. Ms. Rigby alleged that, for many years, the Debtor disposed of pollutants on its property as a cost saving measure, and that such pollutants made their way into the Liverpool River, which runs along the rear of the Debtor's property. Ms. Rigby further alleged that the Debtor's then Chief Executive Officer, Maxwell S. Hammer ("Hammer"),[3] was aware as early as 2014 that waste that the Debtor was disposing on its property had contaminated the community's water supply and could cause potentially serious injury to local residents. Finally,

[2] A groundwater plume is created when hazardous substances, pollutants or contaminants are present within an aquifer system. A plume of contaminated ground water may be formed when substances are released into ground water from above the surface. The contaminated plume can spread horizontally, vertically, and transversely through the aquifer system by means of infiltration, migration, interaquifer exchange, and interaction with surface water. This movement of contaminants throughout an aquifer usually, but not always, occurs in the direction of ground water flow.

[3] Mr. Hammer retired from the Debtor in 2016 and passed away in 2017.

Ms. Rigby alleges that Strawberry Fields is liable as well because, among other theories, it knew, or should have known, of its subsidiary's alleged misconduct.

Hundreds of similar lawsuits were subsequently filed against the Debtor by residents of Blackbird and the surrounding communities. Each of these lawsuits asserted damages related to death or injury caused by exposure to pollutants that had contaminated the local water supply. Many of the lawsuits named Strawberry Fields as a co-defendant.

The allegations set forth in these suits are disputed by the Debtor and Strawberry Fields. They assert that any waste dumped on the Debtor's property was disposed of in accordance with the applicable environmental laws and regulations that existed at the time. They deny having any knowledge that such waste allegedly infiltrated the groundwater supply. Finally, they assert that there is insufficient evidence to link the pollutants found in the water supply to any waste disposed by the Debtor, noting that there are dozens of other businesses with manufacturing facilities located upstream along the Liverpool River. No judicial determination has yet been made regarding the claims asserted against the Debtor or Strawberry Fields in any forum.

Facing mounting lawsuits, the Debtor filed this subchapter V chapter 11 case on January 11, 2021.[4] The Debtor owes less than $2 million to its trade creditors. Substantially all of the claims in this case are disputed, unliquidated tort claims related to the alleged dumping of pollutants. In total, nearly 10,000 claims asserting cumulative damages of nearly $400 million were filed.[5] Ms. Rigby filed an unsecured claim against the Debtor in the amount of $1 million.

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[4] Strawberry Fields is not a debtor in this case and has not itself filed a petition for relief under the Bankruptcy Code.

[5] Despite the sizable number and amount of claims asserted against the Debtor, the parties have stipulated that the Debtor is a "small business debtor" eligible for relief under subchapter V because its "aggregate noncontingent liquidated" debts were less than $7.5 million on the petition date and because it otherwise satisfies the requirements for a small business debtor set forth in section 1182.

To date, no objection to Ms. Rigby's claim has been filed.[6] Pending the filing of any objection, such claim is deemed allowed under applicable bankruptcy law. *See* 11 U.S.C. § 502.

A. The Non-dischargeability Action Dispute

Within weeks of the petition date, Ms. Rigby commenced an adversary proceeding against the Debtor seeking to have her $1 million claim deemed non-dischargeable pursuant to sections 523(a) and 1192(2). In her complaint, Ms. Rigby asserted that the amounts allegedly owed to her are non-dischargeable pursuant to section 523(a)(6), which excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."

The Debtor filed a motion to dismiss the complaint for failure to state a claim on which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure. The Debtor argued that the non-dischargeability provisions of section 523(a) are not applicable to business entities. The bankruptcy court ruled in favor of the Debtor, holding that the exceptions to discharge in section 523(a) do not apply in a case where the debtor is a corporation, even where such case was filed under subchapter V of chapter 11. The bankruptcy court granted the Debtor's motion to dismiss the adversary proceeding. Ms. Rigby timely filed a notice of appeal.

B. The Plan Dispute

Upon the commencement of this bankruptcy case, the automatic stay set forth in section 362(a) automatically stayed the commencement or continuation of all non-bankruptcy litigation against the Debtor. However, pending litigation against Strawberry Fields and other non-debtors was not automatically stayed. As such, shortly after the petition date, the Debtor sought and obtained a temporary injunction from the bankruptcy court halting all actions against the Debtor's

[6] Under the Plan, the claims resolution process was deferred until post-confirmation.

"current and former owners, officers, directors, employees and associated entities" related to the alleged conduct of the Debtor. As a result, all of the pending litigation, including litigation against Strawberry Fields, was temporarily stayed. The bankruptcy court concluded that such a temporary injunction was appropriate to facilitate negotiation of a global settlement by the Debtor, Strawberry Fields and a number of ad hoc creditor groups in mediation. The expiration date of the injunction has been extended several times while mediated negotiations, and this litigation, continued.

Through over two months of mediation, several stakeholders negotiated a complex settlement framework that was ultimately memorialized in the Plan.[7] The Plan provides for the establishment of a creditor trust that would be funded with: (a) the Debtor's disposable (net) income for five years, and (b) far more significantly, $100 million to be paid by Strawberry Fields. It is anticipated that such trust will result in creditors with allowed claims receiving a significant distribution (estimated at 30-40 cents on the dollar).

In exchange for funding the global settlement, Strawberry Fields demanded a broad release from all claims, including both estate claims and third-party direct claims.[8] Relevant to this appeal, the Plan expressly releases and discharges "any and all claims" that third parties "have asserted or might assert in the future against Strawberry Fields" to the extent that such claims are "based on or related to the Debtor's pre-petition conduct, its estate or this chapter 11 case." The Plan release is non-consensual; it binds parties regardless of whether they participated in the bankruptcy case and regardless of whether they voted in favor of, or against, the Plan. In summary, if the Plan is

[7] Ms. Rigby participated in the mediation process but did not join in the settlement reached therein.

[8] Direct claims are particularized claims that assert that a defendant harmed the claimant directly. Derivative claims, on the other hand, are claims that a debtor's estate could bring against a defendant, which may have indirectly caused harm to claimants. In bankruptcy, derivative claims become assets of the bankruptcy estate, 11 U.S.C. § 541(a), and, thus, cannot be pursued independently by a debtor's shareholders or creditors.

confirmed, parties will be precluded from pursuing claims against Strawberry Fields related to the Debtor's pre-petition conduct. Rather, their claims will be channeled into the creditors' trust.

Undeterred by the releases, the class of unsecured creditors overwhelmingly supported the Plan. Indeed, over 95 percent of the creditors who submitted ballots voted in favor of confirmation of the Plan. Nevertheless, two notable objections to confirmation were filed. First, Ms. Rigby objected to the Plan asserting that the non-consensual releases of third-party direct claims against Strawberry Fields are not permissible under applicable bankruptcy and non-bankruptcy law.

Second, an objection to the Plan was filed by Norwegian Wood Bank (the "Bank"), a secured creditor who was separately classified from other creditors under the Plan. *See* 11 U.S.C. §§ 1122(a), 1123(a). The Bank is owed approximately $3.5 million and holds a first priority security interest on the Debtor's manufacturing equipment. The Bank's claim was bifurcated under the Plan pursuant to section 506(a)(1). The Debtor valued the Bank's collateral at $1.5 million and proposed to grant the Bank an allowed secured claim in that amount, which claim would be secured post-confirmation by a continuing lien on the collateral and would be paid in full over a period of five years. The balance of the Bank's claim, $2 million, would be treated as an unsecured claim, and would be paid *pari passu* from the creditors' trust with other unsecured creditors. The Bank objected to the Plan, arguing that the value of its collateral was understated and, thus, the Plan was not "fair and equitable" as required by sections 1191(b) and 1129(b)(2)(A).[9]

[9] Because the Bank, who was necessarily separately classified under the Plan, voted against the Plan, the Debtor was unable to satisfy the requirements for confirmation of a consensual plan in section 1191(a), which requires satisfaction of various traditional chapter 11 plan confirmation requirements including, but not limited to, section 1129(a)(8) (requiring that each class of impaired claims has accepted the plan). In such cases, a debtor must seek confirmation of a non-consensual plan by utilizing the subchapter V "cramdown provisions" set forth in section 1191(b). That subsection provides, in pertinent part, that a plan can be confirmed notwithstanding the lack of acceptance by each class of impaired claims if the plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims … that is impaired under, and has not accepted, the plan." For a plan to be "fair and equitable" with respect to a secured claim, such as the Bank's secured claim, it must satisfy the confirmation requirements of section 1129(b)(2)(A).

After a four-day confirmation hearing, the bankruptcy court confirmed the Plan. With respect to Ms. Rigby's plan objection, the court acknowledged that non-consensual releases of third-party direct claims, such as the releases granted to Strawberry Fields, are permitted only in extraordinary cases. In the bankruptcy court's view, the present case fits that bill. The court noted the highly unusual and complex nature of the case, the significant monetary contribution being made by Strawberry Fields which resulted in a meaningful distribution to creditors, and the overwhelming creditor support for the Plan. The court found that the proposed distribution under the Plan is substantially greater than what creditors would receive if the Debtor was liquidated under chapter 7. Regarding the claims against Strawberry Fields, the court made detailed findings about the probability of success and collectability of any judgment that would be obtained. The court found that the $100 million contribution was substantially greater than any likely recovery from Strawberry Fields, representing a premium paid by Strawberry Fields to "buy peace" and avoid the negative publicity and reputational damage of further litigation.

The court found that "there existed no other reasonably conceivable means to achieve the result accomplished by the Plan" and, therefore, the settlements memorialized therein (including the releases) were fair and reasonable. Finally, the court reasoned that the failure to approve the settlement would likely result in complex and protracted litigation, with attendant risk, cost and delay, whereas the mediated settlement reflected in the Plan offered a significant and immediate benefit to creditors. Thus, the court overruled Ms. Rigby's plan objection.

The court also overruled the objection of the Bank, holding that the Debtor's treatment of the Bank's secured claim complied with the requirements of sections 1129(b)(2)(A) and 1191.[10]

[10] The Bank did not appeal the bankruptcy court's confirmation order and, thus, the court's determination with respect to the Bank's objection will not be addressed herein.

Having overruled both objections, the bankruptcy court confirmed the Plan, albeit with some apparent reluctance. The court stated that, in her view, the result in this case is "an extremely difficult pill to swallow," because the proposed distribution to creditors, while meaningful, could never compensate victims for the significant pain and suffering associated with the serious injuries, and even deaths, allegedly caused by the conduct of the Debtor and its parent.

Ms. Rigby timely appealed both of the bankruptcy court's rulings.[11] Upon the request of the parties, the disputes were certified for direct appeal to this court pursuant to 28 U.S.C. § 158(d) and, thereafter, consolidated in this appeal.

Discussion

I. Legal Standard

The parties do not dispute the facts as set forth herein. Rather, the issues that we address in this appeal involve questions of law. Thus, our review is *de novo*. *See, e.g.*, *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007). Under a *de novo* standard of review, the reviewing court decides an issue as if the court were the original trial court in the matter. *See, e.g.*, *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996) (quotation omitted).

II. Third-Party Releases May Be Included in Chapter 11 Plans

Chapter 11 is about maximizing the recoveries of creditors and preserving viable businesses. That is exactly what happened here. Ms. Rigby does not challenge the factual findings below, so the court can take as a given that she and all other tort claimants are receiving more under the Plan than they would otherwise be able to recover by prosecuting their claims against the Debtor and Strawberry Fields to conclusion. Beyond the quantum of recovery, the Plan ensures

[11] The parties stipulated to stay the effective date of the Plan pending resolution of these appeals in order to avoid the arguable application of the doctrine of equitable mootness. *See, e.g., Ochadleus v. City of Detroit, Michigan (In re City of Detroit, Michigan)*, 838 F.3d 792 (6th Cir. 2016).

that the claimants will receive compensation promptly, with none of the risk, delay, and expense attendant to pursuing litigation against multiple defendants. Further, the Plan allows the Debtor to continue its manufacturing business, thereby preserving substantial jobs in the local community. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."). The alternative, chapter 7 liquidation, would result in one more closed factory along the banks of the Liverpool River and shutter a major employer in the already economically challenged Blackbird community. Nothing in the Constitution or the Bankruptcy Code precludes such an efficient and beneficial global resolution of a mass tort environmental disaster that leaves all stakeholders, including Ms. Rigby, better off.

Ms. Rigby raises a number of challenges to the bankruptcy court's confirmation order. Several relate to the bankruptcy court's jurisdiction or its authority to issue a final order confirming a plan that resolves Ms. Rigby's claim against Strawberry Fields, a dispute between two non-debtor entities. These are easily disposed of. First, the federal bankruptcy jurisdiction is broad and extends to third-party disputes like this one that affect the estate and impact the debtor's restructuring options. *See, e.g., Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995). While Ms. Rigby's claim against Strawberry Fields is based on its alleged failings and is not solely derivative of her claim against the Debtor, the gravamen of the claims is the Debtor's alleged conduct, for which Strawberry Fields likely would have contribution and indemnification rights against the Debtor. *See SPV OSUS, Ltd. v. UBS AG*, 882 F.3d 333, 340 (2d Cir. 2018).

Additionally, the bankruptcy court had both statutory and constitutional authority to issue a final order confirming a plan with a third-party injunction because such a confirmation order is not only a core matter, but also a fundamental central aspect of this chapter 11 case's adjustment

of the debtor creditor relationship under *Stern v. Marshall*, 564 U.S. 462 (2011). *See, e.g., In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (3d Cir. 2019). Finally, Ms. Rigby's jury trial and due process challenges rest on her incorrect assertion that the bankruptcy court adjudicated her claim against Strawberry Fields. The court made no ruling on the merits of her claim, but merely approved the global settlement that channeled the claims and the settlement funds to the creditors' trust. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 91-92 (2d Cir. 1988).

Ms. Rigby does not ask us to measure the proposed injunction against any of the oft-stated standards of appropriateness, exceptionalness or necessity.[12] Her challenge, and the question before us today, is more fundamental. She asserts that, outside of the asbestos context, non-consensual releases of third-party claims can never be included in a chapter 11 plan. We disagree.

Although our circuit has not yet had an occasion to address this issue, almost every other circuit has, and the clear majority permit third-party releases in a chapter 11 plan in appropriate, narrow circumstances. *See, e.g., Deutsche Bank A.G. v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141 (2d. Cir. 2005)[13]; *In re Millennium Lab Holdings II, LLC*, 945 F.3d at 133-40; *In re Dow Corning Corp.*, 280 F.3d 648, 656-58 (6th Cir. 2002); *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying)*, 780 F.3d 1070, 1076-79 (11th Cir. 2015).

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[12] The dissent focuses on hypotheticals that could arise only if the "exceptional circumstances" requirement were disregarded. It ignores the most common and appropriate use of the global settlement mechanism, to pool all available insurance proceeds for equitable distribution through a chapter 11 plan, an approach the dissent's *per se* rule would prohibit. We are not required to victimize innocent claimants a second time by relegating them to the wastefully expensive, untimely, and unfair resolutions that would otherwise occur in a multiplicity of separate actions against the insurers where the available proceeds would be exhausted by the earliest judgments, leaving nothing for later-litigated or later-arising claims.

[13] We note that, as of this writing, this issue is again before the Second Circuit in the pending appeal from the order confirming a plan that included a third-party injunction. *See In re Purdue Pharma, L.P.*, No. 22-110-bk *et al*. (2d Cir. *appeal docketed* Jan. 18, 2022).

The essence of chapter 11 is its flexibility. Designed to apply to the entire spectrum of businesses and to address the wide range of business and financial problems they might face; chapter 11 does not shoehorn debtors into a single rigid restructuring model but instead leaves the plan design up to the debtor and its creditors. Can a chapter 11 plan include a provision like the global settlement provisions in this case that channel both the assets of third parties and the claims against them into a creditors' trust? One would expect the answer to be found in the section of the Bankruptcy Code that specifies which provisions must or can be included in a plan -- and it is. In addition to listing several common provisions that are permitted in plans, section 1123(b) states that "a plan may … include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). Statutory authority for including any imaginable provision in a plan could not be clearer. Only two limitations apply. The first, appropriateness, goes to the standard applied to global settlement provisions and is not at issue here. Thus, the only restriction on the type of provision permitted is that it not be inconsistent with other Bankruptcy Code provisions, a point we will address shortly.

Further authority for the global settlement included in the Plan comes from the section 1123(a)(5) requirement that a plan "provide adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). Since the global settlement feature is permitted in the Plan, section 1123(a)(5) not only authorizes, but requires, the inclusion of provisions such as the releases and the channeling injunction that are crucial to securing the Strawberry Fields contribution that is necessary for the Plan's implementation. Further statutory authority for such provisions comes from section 105(a), which authorizes the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Thus, bankruptcy courts have broad equitable powers to approve settlements containing releases and injunctions, such as the global

settlement here. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934) ("[C]ourts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.").

Against these clear grants of broad statutory authority, Ms. Rigby cites no provision of the Bankruptcy Code that prohibits releases or channeling injunctions or is incompatible with them. She relies on section 524(e), but that section is merely a savings clause clarifying that the debtor's discharge does not *by itself* discharge claims of others. "524(e) says nothing about the authority of the bankruptcy court to release a nondebtor from a creditor's claims." *Seaside Eng'g*, 780 F.3d at 1078. Had Congress meant to limit the powers of bankruptcy courts, it would have done so clearly. *Airadigm Comm's., Inc. v. F.C.C. (In re Airadigm Comm's., Inc.)*, 519 F.3d 640, 656 (7th Cir. 2008). Ms. Rigby's reading of section 524(e) is also inconsistent with section 524 as a whole. Section 524(g), which sets forth special rules for third-party releases in plans involving asbestos liabilities, is not an exception to section 524(e) but instead imposes additional requirements on asbestos-related releases. Further both section 524(h), which applies to already confirmed asbestos plans, and the statute's legislative history negate any argument that the addition of asbestos-specific provisions infers that third-party injunctions were not previously permissible.[14]

III. The Section 523(a) Exceptions to Discharge Apply Only to Individual Debtors

We also reject Ms. Rigby's assertion that corporate debtors do not receive a complete discharge in subchapter V under a non-consensual plan. Humans and corporations are treated very differently under the Bankruptcy Code. Nowhere is that distinction clearer than in the Bankruptcy Code's discharge provisions. The justification for discharge, its effect and its implications are very different for humans than for artificial entities.

[14] The House Report specifically states, "[T]he special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan of reorganization." H.R. Rep. No. 103-834 (1994). The dissent conveniently ignores this express rejection of its concocted conclusion that Congress "believed" it was creating an exception to section 524(e).

To understand how discharge works in the Bankruptcy Code, it is, perhaps, best to start by looking at chapter 7's discharge provisions. No debts of a corporation are discharged in a chapter 7 case, but most debts of an individual are. *See* 11 U.S.C. § 727(a)(1). Although broad, the individual's chapter 7 discharge is not complete. Various categories of debt are excepted from the discharge under section 523(a). This section excludes from discharge debts arising from the debtor's bad acts and, thus, reflects the traditional human-focused justification for the discharge – to "relieve the *honest debtor* from the weight of oppressive indebtedness." *Williams v. United States Fid. & Guar. Co.*, 236 U.S. 549, 550 (1915) (emphasis added).[15] At least seven of the categories can only apply to humans. *See*, *e.g.*, 11 U.S.C. §§ 523(a)(5), (15) (domestic support obligations and marital property settlements). These differences reflect fundamental differences between humans and corporations. A corporation is merely an aggregation of assets and needs no discharge following its liquidation in chapter 7. A human lives on and needs a fresh start, but unlike a corporation, has moral agency and should remain responsible for some past conduct.

Conversely, the focus of chapter 11 is reorganization – continuation of the business and the restructuring of its debt. While chapter 11 can be used by individual debtors, the discharge considerations for individuals do not change in chapter 11 and neither does the scope of their discharge. *See* 11 U.S.C. § 1141(d)(2). For corporations, the situation is reversed, and a virtually complete discharge is granted. 11 U.S.C. § 1141. This is driven not by the human-focused fresh start policy but, rather, by the realities of corporate reorganization. In enacting the Bankruptcy Code, Congress rejected prior law and made a carefully considered decision to grant corporations a complete discharge in chapter 11. *See* Ralph Brubaker, *Taking Exception to the New Corporate*

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[15] Other moral failings of the individual debtor might lead to a complete denial of discharge. *See* 11 U.S.C. §§ 727(a)(2), (3), (4), (5), (6), (7), (12).

Discharge Exceptions, 13 Am. Bankr. Inst. L. Rev. 757, 764–66 (2005). This is because viable corporations simply could not be restructured under the prior law if significant non-dischargeable debts remained after confirmation waiting to strike a death blow as soon as the reorganized company emerged from bankruptcy.[16] Further, unlike the case of a human debtor, where an exception to discharge prevents the individual from escaping responsibility for their moral agency, discharge exceptions in corporate cases simply shift the burden onto other innocent creditors – essentially prioritizing the non-dischargeable claim over all others. Only once has Congress deviated from the complete corporate discharge principle, and then only after 8 years of consideration. *See* 11 U.S.C. § 1141(d)(6). Further, Congress expressed that intent in clear and unmistakable language - "confirmation of a plan does not discharge a debtor *that is a corporation* from any debt [with specified characteristics]." *Id.* (emphasis added).

Against this backdrop, Ms. Rigby asks us to conclude that ambiguous cross-references in the recently enacted section 1192(2) and in section 523(a) demonstrate that Congress intended to reject a half century of settled doctrine and silently add approximately two dozen new categories of non-dischargeable debts for chapter 11 debtors in subchapter V cases.[17] The referenced statutory provisions simply cannot bear that weight.

Statutory construction is arduous work. As faithful agents of the legislature, the courts' fundamental objective is to determine and carry out the intent of Congress. Where the statutory language is susceptible of only one reasonable reading, our task is done. Unfortunately, the

[16] A liquidating corporate chapter 11 does not present this problem so no discharge is available. 11 U.S.C. § 1141(d)(3).

[17] For an overview of subchapter V of the Bankruptcy Code, *see generally*, Hon. Paul W. Bonapfel, *Guide to the Small Business Reorganization Act of 2019* (2020) (updated 2022), *available at* https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf.

relationship between sections 1192(2) and 523(a) is not clear[18] and the text supports two reasonable readings that lead to opposite conclusions. The reported opinions on both sides of this question rely primarily on a textualist or plain language approach. Most courts have ruled that the exceptions to discharge in section 523(a) apply only to individual debtors. *See Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 2022 WL 16858009 (Bankr. W.D. Tex. Nov. 10, 2022); *Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, 2022 WL 1110072 (Bankr. E.D. Mich. April 13, 2022); *Catt v. RTECH Fabrications, LLC (In re RTECH Fabrications, LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021); *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA)*, 626 B.R. 871 (Bankr. D. Md. 2021). Stripped to the core, each view rests on a single term. Cases favoring the Debtor's position rely upon the term "individual debtor" in the introductory clause of section 523(a); while Ms. Rigby's position is based on the word "debt" in section 1192(2). The Debtor's reading is the better one.

The essence of Ms. Rigby's argument is that the section 1192(2) phrase "any debt … of the kind specified in section 523(a)" incorporates only the specific subcategories listed in the 21 subsections and does not incorporate the introductory language limiting section 523 to individual debtors. This leap of logic is based on the false premise that "kind" of debt limits the focus to only the legal or factual basis of the claim and excludes consideration of other factors such as the type of debtor. "Kind" means sharing "common traits," MERRIAM-WEBSTER DICTIONARY (online ed.), and those traits can include the nature of the entity owing the debt. For example, one kind of debt

[18] As the Fourth Circuit acknowledged in *Cantwell-Cleary Co. v. Cleary Packaging, LLC* (*In re Cleary Packaging, LLC*), 36 F.4th 509, 512 (4th Cir. 2022), "the question is a close one."

is consumer debt, which is defined in the Bankruptcy Code using two common traits – the nature of the debtor as an individual and the purpose of the obligation. 11 U.S.C. § 101(8). The kind of debt specified in section 523(a) also has two common traits -- the debtor must be an individual and the obligation must arise out of circumstances specified in one of the subsections. The requirement that the debtor be an individual can be removed only by severing the section's introductory clause from the detailed subsections and that is exactly what Congress did in the only exception to chapter 11's complete discharge of corporate debtors, section 1141(d)(6).[19] Our reading also gives meaning to every term of both sections 523(a) and 1192(2), *see Duncan v. Walker*, 533 U.S. 167, 174 (2002) ("It is [the court's] duty to give effect, if possible, to every clause and word of a statute."), whereas Ms. Rigby's interpretation renders the cross reference to section 1192 in section 523(a) mere surplusage.

Ms. Rigby, and the dissent, also rely on two chapter 12 cases interpreting similar language in section 1228(a)(2). *Southwest Ga. Farm Credit, ACA v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *New Venture P'ship v. JRB Consol. (In re JRB Consol., Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995). We find those cases unpersuasive for several reasons and note that even the court that decided *In re JRB Consol, Inc.* rejects Ms. Rigby's reading of it. *See In re GFS Indus., LLC*, 2022 WL 16858009 at *6-7. First and foremost, those opinions add nothing to the analysis because they rely on the same misreading of "kind" as Ms. Rigby's primary argument. Even if correctly decided, the inference that similar terms have identical meanings in different chapters of the Bankruptcy Code is a weak one. *See*

[19] Congress knows how to limit the scope of the corporate debtor chapter 11 discharge and did so using clear and unmistakable language in section 1141(d)(6). *See FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 302 (2003) (when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly").

Dewsnup v. Timm, 502 U.S. 410 (1992) (rejecting the argument that the same term necessarily has the same meaning in the same section).[20]

Such transplantation is particularly inappropriate here for three reasons. Unlike chapter 11, chapter 12 does not distinguish an individual debtor from a corporate debtor. *United States v. Hawker Beechcraft, Inc. (In re Hawker Beechcraft, Inc.)*, 515 B.R. 416, 430-31 (S.D.N.Y. 2014). Further, chapter 12's coverage of corporations is limited to a very narrow class of family-owned farming corporations, 11 U.S.C. § 101(18), where there is often little practical distinction between the farmer and the corporation so that subjecting both to identical discharge rules makes sense. While subchapter V of chapter 11 includes similar owner-operator corporations, it also covers most other non-publicly traded corporations, like the Debtor, where such considerations do not apply. *See In re GFS Indus., LLC*, 2022 WL 16858009 at *7. Most importantly, however, is that the similar section 1228(a)(2) language did not originate with chapter 12. Instead, it was borrowed from chapter 13. *See* 11 U.S.C. § 1328. Chapter 13 does not apply to corporations, 11 U.S.C. § 109(e), so the suggestion that Congress used that language to extend the individual discharge exceptions to corporations is nonsensical – especially when Congress used very different language in chapter 11 when it did intend to achieve that goal.

While the textural analysis and linguistic cannons of construction favor our interpretation, two substantive cannons of construction tip the balance decidedly in favor of a broad corporate discharge. The first is the presumption that Congress does not make a fundamental change in settled law without clearly signaling that intention. As the Supreme Court stated in *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001), "Congress ... does not alter the fundamental

[20] Two trial court level decisions in the unique chapter 12 context hardly constitute the type of longstanding and well-established judicial interpretation necessary to raise any presumption regarding Congress use of similar language in a very different chapter of the Bankruptcy Code. *See Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752, 1762 (2018) (interpreting section 523).

details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *See also Penn. Pub. Welfare Dep't. v. Davenport*, 495 U.S. 552, 563 (1990) ("We will not read the Bankruptcy Code to erode past ... practice absent a clear indication that Congress intended such a departure"). The ambiguous language of section 1192(2), which is contradicted by the cross reference in section 523(a), is insufficient to rebut that presumption. Nor is there any indication in the legislative history that Congress intended such a radical change; indeed, the House Report suggests no change was intended. *See* H.R. Rep. No. 116-171, at 8 (2019).

The Bankruptcy Code's overarching goal of providing a fresh start gives rise to a strong presumption against exceptions to discharge. *See Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998). Thus, discharge exceptions must be strictly construed to give maximum effect to the rehabilitative policy of bankruptcy. While neither presumption overrides a clear statutory command, both provide the guidance we need in a close case like this.

While couched as a linguistic analysis, our sister circuit's disagreement with our approach in *Cleary* is driven by perceived equitable concerns. *See In re Cleary Packaging LLC*, 36 F.4th at 514 & 517-18. Subchapter V eliminates the absolute priority rule, which had been a major impediment to the reorganization of corporate debtors. Under that rule, the owner of a corporation could not retain its ownership under a chapter 11 plan unless all classes of creditors were paid in full (which is rarely possible) or voted to accept the plan. Subchapter V replaced the absolute priority rule with a requirement that the debtor must pay into the plan all of its "disposable income" for a period of years if any class of creditors rejects the plan. 11 U.S.C. §§ 1191(b), (c)(2). Thus, under such a non-consensual subchapter V corporate debtor's plan, the owner can retain its ownership interest in the corporation without paying creditors in full and over their objection.

With no support whatsoever, *Cleary* concludes that Congress eliminated the complete corporate discharge under non-consensual subchapter V plans to "provide an additional layer of fairness and equity to creditors to balance against the altered priority that favors the debtor." *In re Cleary Packaging LLC*, 36 F.4th at 517. *Cleary's* balance construct is not only purely speculative; it is naïvely erroneous. Such a balance would exist only if the creditor that is owed an otherwise nondischargeable debt also controlled whether the plan was consensual; but that is not how subchapter V works. Whether a plan is consensual or non-consensual turns on class voting, and not the actions of a specific creditor. 11 U.S.C. § 1126. The supposed protection and balance is illusory because the holder of an otherwise non-dischargeable claim may be outvoted by other creditors in their class who do not hold non-dischargeable claims. Or, as in this case, Ms. Rigby's debt suddenly becomes nondischargeable by happenstance of a completely unrelated class's (here, the Bank's) rejection of the plan.

Finally, a discharge exception does not promote fairness in the corporate non-consensual subchapter V context. Indeed, the opposite is true. If Ms. Rigby's debt is not discharged, then it must be paid in full by the Debtor after it emerges from bankruptcy. That expense reduces, dollar for dollar, the funds available to pay other identical tort claimants. Contrary to fundamental principles of bankruptcy law, Ms. Rigby will receive a higher distribution than other similarly situated creditors. *Howard Delivers Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006) ("The Bankruptcy Code aims, in the main, to secure equal distribution among creditors."). And, if the non-dischargeable claims are large enough, the plan will not be confirmable,[21] and the debtor will be liquidated to the detriment of all stakeholders. These problems were solved by Congress

[21] All chapter 11 plans must be feasible. 11 U.S.C. § 1129(a)(11). An even higher standard applies to non-consensual subchapter V plans. 11 U.S.C. § 1191(c)(3)(A) (requiring that "the debtor will be able to make all payments under the plan").

back in 1978 when it provided for a complete corporate discharge in chapter 11. We will not unsolve them.

Conclusion

For the reasons set forth herein, we AFFIRM the decisions of the bankruptcy court below.

McCartney, Circuit Judge, dissenting:

With due respect to my colleagues, their rulings today are contrary to both the statutory text and sound bankruptcy policy. Accordingly, I must dissent.

I. Non-consensual Third-Party Releases Are Not Permitted by Bankruptcy Law

The majority's opinion approving non-consensual third-party releases ignores the plain text of the Bankruptcy Code and tramples on the constitutional rights of Ms. Rigby. Because the settlement incorporated into the Plan puts a significant amount of money in creditors' pockets and allows the Debtor to continue to operate, the majority says: "Let it Be." But the job of a court is not to pick and choose outcomes that it may believe are desirable. Rather, it is to follow the law as written. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000) ("[C]ourts do not sit to assess the relative merits of different approaches to various bankruptcy problems. Achieving a better policy outcome … is a task for Congress, not the courts.").

The "great unsettled question" in chapter 11 today is whether a bankruptcy court – or any court – is authorized to grant non-consensual third-party releases. *See, e.g., In re Purdue Pharma, L.P.*, 635 B.R. 26, 37 (S.D.N.Y. 2021). In recent years, litigation regarding the permissibility of non-consensual third-party releases has brought bankruptcy law to the front pages of the national newspapers, particularly in mass tort cases involving Purdue Pharmaceutical, USA Gymnastics,

Boy Scouts of America and the Catholic dioceses.[22] Such releases have come under increased scrutiny because of the perception that they have become far too commonplace and have been improperly utilized by bad actors. *Id.*; *see also Patterson v. Mahwah Bergen Retail Group, Inc.*, 636 B.R. 641 (E.D. Va. 2022).

While the majority is correct that such releases have been approved by a number of our sister circuits in so-called rare[23] cases where exceptional circumstances exist,[24] such releases are largely prohibited in the Fifth, Ninth and Tenth Circuits. *See Bank of N.Y. Trust Co. v. Off. Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009); *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *Landsing Diversified Props. II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990). I would join these circuits in prohibiting the practice.

As with all bankruptcy disputes, my analysis begins with the language of the Bankruptcy Code. *See U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judiciary inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). Section 524(e), which deals with the discharge of

[22] In some cases, third-party releases are *consensual*, and creditors affirmatively "opt in" or "opt out" to granting such releases in the chapter 11 plan. I take no issue with such practice. The dispute in this case, however, involves the *non-consensual* release of third-party claims.

[23] There is no principled basis for a "rare case" rule. Either authority for non-consensual third-party releases exists under the statute, or it does not. Indeed, the Supreme Court recently held that there is no "rare case" rule in bankruptcy that allows a court to trump the Bankruptcy Code. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 986 (2017).

[24] It is fair to question whether bankruptcy courts have adhered to the "exceptional circumstances" requirement for these releases. Plans releasing non-debtors from third-party claims are no rarity. Indeed, such releases are now commonplace in chapter 11 cases, both large and small, and particularly so in the mass tort context. As one court recently noted, "When every case is unique, none is unique." *See In re Purdue Pharma, L.P.*, 635 B.R. 26, 37 (S.D.N.Y. 2021).

debts in bankruptcy, provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). In my view, section 524(e) expressly and unambiguously prohibits the release of any person or entity by the bankruptcy court where that person or entity is not itself the subject of a bankruptcy discharge. Sound bankruptcy policy supports this reading of the statute. Bankruptcy, and the discharge provided therein, exists to help troubled debtors. To obtain a discharge in bankruptcy, debtors are required to disclose their assets and subject themselves to a rigorous and transparent process dictated by the Bankruptcy Code. Non-consensual third-party releases are, I submit, the functional equivalent of a debtor discharge. They permit non-debtors to obtain the benefits of bankruptcy without bearing its corresponding responsibilities and burdens.

There is, of course, a statutory exception to section 524(e) in section 524(g). But that exception, by its plain terms, only applies in asbestos cases. *See* 11 U.S.C. § 524(g). In such cases, section 524(g) permits releases and channeling injunctions protecting non-debtors where the legal requirements of section 524(g)(2)(B) are met. Section 524(g) was enacted in 1994 in the wake of the *Johns-Manville* asbestos bankruptcy cases. It is not applicable in the present case. If anything, the fact that Congress authorized third-party releases and channeling trusts in the asbestos context nearly thirty years ago but has not extended such remedies to other types of cases suggests that Congress did not intend for such remedies to be available in such cases. *See, e.g.*, *In re Lowenschuss*, 67 F.3d at 1401-2. Moreover, the language of section 524(g)(4)(A)(ii) ("Notwithstanding the provisions of section 524(e)…") plainly indicates that Congress believed that section 524(g) was creating an exception to what would otherwise be the applicable rule of law. Such language suggests that that the type of injunction Congress was authorizing in section 524(g) would be barred by section 524(e) in the absence of the statute.

The majority disagrees, concluding that section 524(e) does not prohibit non-consensual third-party releases. Moreover, it states that sections 105(a), 1123(a)(5) and 1123(b)(6) provide statutory authority for such releases. But it goes too far to say that the above-referenced general statutory provisions authorize a bankruptcy court to approve these releases. Section 105(a) simply states that a court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). It is well-settled that section 105(a) does not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.)*, 351 F.3d 86, 92 (2d Cir. 2003) (citations omitted). Rather, section 105(a) merely authorizes a court to issue orders that implement remedies provided elsewhere in the Bankruptcy Code.

Sections 1123(a)(5) and (b)(6) likewise do not authorize the releases at issue. Section 1123(a)(5) provides that a plan shall "provide adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). Section 1123(b)(6) states that a plan may include any "appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). These provisions merely state that the components of a plan set forth in section 1123 are not exclusive; they do not create any substantive rights or confer any special powers. Certainly, they cannot reasonably be interpreted as permitting a bankruptcy court to take jurisdiction over, and release, claims that do not belong to the debtors in violation of a litigant's constitutional rights.

Indeed, there are significant due process and jurisdictional concerns associated with non-consensual third-party releases. When a court directs that a creditor's claim against a non-debtor be released, it takes away a property interest that belongs to that creditor, without affording the creditor due process. In addition to violating fundamental principles of constitutional law, this

practice is contrary to the generally understood limitations on judicial power. A court generally may not force parties to forego claims and may not dictate settlement terms. Rather, the judicial power is limited to adjudicating claims brought before a court by the parties on the merits. This is true, even though the release of the third-party claim might help achieve an important bankruptcy objective, such as maximizing the return to creditors or allowing a business to reorganize.

Non-consensual third-party releases raise jurisdictional concerns as well. Bankruptcy courts have *in rem* jurisdiction over a debtor's property. They also have jurisdiction over "cases and proceedings" that "arise under" the Bankruptcy Code, or that "arise in" or are "related to" bankruptcy cases. 28 U.S.C. § 1334. Direct claims held by creditors against non-debtors, such as the claims against Strawberry Fields, do not fall within the scope of these jurisdictional grants. Such claims do not impact the bankruptcy estate. They do not appear to be related – much less integral - to the restructuring of the debtor-creditor relationship. *See Patterson v. Mahwah Bergen Retail Group, Inc.,* 636 B.R. at 670.

Even if "related to" jurisdiction does exist, the Supreme Court recently taught us in *Stern v. Marshall,* 564 U.S. 462, 471-72 (2011), that, in the absence of consent, a bankruptcy court does not have constitutional authority to render a final decision in a dispute involving a pure state law tort claim that was not necessarily resolved in determining a claim against the estate and did not stem from the bankruptcy itself.[25] Relying on the Third Circuit's opinion in *In re Millennium Lab Holdings II, LLC*, the majority's answer to this problem is that the bankruptcy court had constitutional authority to approve the releases because such releases were incorporated into a plan of reorganization. But nothing in *Stern* suggests that a party otherwise entitled to have a matter

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[25] For a thoughtful discussion of the issues addressed in *Stern v. Marshall, see* Richard Lieb, *The Supreme Court, in Stern v. Marshall, by Applying Article II of the Constitution Further Limited the Statutory Authority of Bankruptcy Courts to Issue Final Orders,* 20 J. Bankr. L. & Prac. 4 Art. 1 (2011).

adjudicated by an Article III court forfeits that constitutional right if the matter is disposed of as part of a plan. If that were the case, parties could manufacture a bankruptcy court's *Stern* authority simply by inserting the resolution of otherwise non-core matters into a plan.

In this case, and in most chapter 11 cases where non-consensual third-party release provisions contained in chapter 11 plans have been approved, the court does not have jurisdiction, much less constitutional authority, to adjudicate the released claims because, by their very nature, such claims involve a state law dispute between two non-debtors. It strains credibility to hold that a bankruptcy court can compel a release with respect to a claim (thereby extinguishing the claim) when it could not have rendered a decision on the merits of such claim. *See, e.g., In re Aegean Marine Petroleum Network, Inc.*, 599 B.R. 717, 723-27 (Bankr. S.D.N.Y. 2019).

The overarching theme of the majority's opinion is one of equity; the releases contained in the Plan are permissible because the settlement maximizes the recoveries of creditors and preserves the Debtors' business and corresponding jobs. But equitable principles, to the extent they still exist in bankruptcy at all, *see Law v. Siegel*, 571 U.S. 415, 421 (2014), cut both ways here. In this case, if confirmation of the Plan is allowed, Strawberry Fields, who has never filed for bankruptcy, will get the equivalent of a discharge of any liabilities related to the tragedy that occurred in Blackbird. It will get the benefits of bankruptcy without having to subject itself to the bankruptcy process. The Plan's release of Strawberry Fields will bind all claimants, regardless of their consent, and Strawberry Fields will get to walk away from the crises that it allegedly helped create. Conversely, plaintiffs, such as Ms. Rigby who asserts very serious claims against Strawberry Fields related to the death of her child, will be denied their opportunity to have their day in court, and the justice (win or lose) that derives therefrom. This outcome is decidedly not equitable. Nor, in my judgment, is it tolerable in our legal system. Accordingly, I respectfully dissent.

II. The Discharge Exceptions Apply to Corporate Debtors in Subchapter V Cases

In addition to objecting to the Plan's non-consensual release of her direct claims against Strawberry Fields, Ms. Rigby opposes the effort of the Debtor to discharge her claims against it under the Plan. She asserts that her claim is non-dischargeable pursuant to section 523(a)(6), which excepts from discharge, any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."[26] The bankruptcy court dismissed Ms. Rigby's non-dischargeability action, holding that the non-dischargeability provisions of section 523(a) are not applicable to corporate (in contrast to individual) debtors. While that may be true in traditional chapter 11 cases, cases filed under subchapter V are different.

When it filed its chapter 11 petition, the Debtor voluntarily elected to proceed under subchapter V, which was enacted in 2019 to help make it easier for small business debtors to reorganize in bankruptcy. There are a number of benefits to subchapter V for debtors. Notably, the "absolute priority rule," which generally provides that existing equity of a debtor may not retain their equity interest over the objection of a class of unsecured creditors unless the unsecured class is paid in full, is not applicable in subchapter V cases. As long as a subchapter V debtor contributes its "disposable income" for a period of three to five years, it can confirm a plan, and old equity holders, such as Strawberry Fields, can retain their equity interest. *See* 11 U.S.C. § 1191(c).

Section 1141(d) governs discharge in a traditional chapter 11 case. Except for subsection (d)(5), all of that section remains applicable in subchapter V cases when the court confirms a consensual plan under section 1191(a). *See* 11 U.S.C. § 1181(a). Thus, section 1141(d)(2), which clarifies that a chapter 11 discharge does not discharge an individual debtor from any debt of the

[26] The merits of Ms. Rigby's asserted non-dischargeability action are not before the Court. Rather, the only issue before the Court is whether Ms. Rigby should be permitted to pursue a non-dischargeability action at all under section 523(a)(6) against this subchapter V corporate debtor.

type set forth in section 523, is applicable in subchapter V cases when plan confirmation is consensual. *See* 11 U.S.C. § 1141(d)(2).

Conversely, where confirmation of the plan is achieved through a cramdown (*i.e.* through section 1191(b)), the statute makes clear that section 1141(d) does not govern discharge. Rather, section 1181(c) establishes a "Special Rule for Discharge" in such cases and clarifies that section 1192, not section 1141(d), governs discharge. Section 1192 provides, in pertinent part:

> If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments …, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title … except any debt—
>
> * * *
>
> (2) of the kind specified in section 523(a) of this title.

11 U.S.C. § 1192. The upshot of this language is that, where a non-consensual confirmation occurs under section 1191(b), the twenty-one *kinds* of debt that are excepted from discharge in section 523(a) are excepted from the subchapter V debtor's discharge. Unlike section 1141(d)(2), which makes the section 523(a) exceptions applicable after a consensual confirmation only to an individual, section 1192(2) does not limit the applicability of such exceptions to individuals.

In today's opinion, the majority concludes that the language of section 523(a) leads to a different conclusion. Specifically, the majority points to the introductory language to that section, which states that a discharge under five Bankruptcy Code provisions (sections 727, 1141, 1192, 1228(a), 1228(b), and 1328(b)), including section 1192, does not discharge "an individual debtor" from the type of debts listed in section 523(a). 11 U.S.C. § 523(a). The majority infers that, because section 1192 is specifically referenced in the introductory language of section 523(a), section 1192(2)'s exception to discharge for debts "of a kind specified in section 523(a)" must apply only to individual debtors.

The problem with the majority's view is that the statutory language of section 1192(2), which applies to both individual and corporate debtors, incorporates only the list of debts (debts "of the kind specified in section 523(a)"), and not the entirety of section 523(a). More specifically, section 1192(2) excludes from discharge debts of the kind listed in section 523(a) regardless of the type of debtor, whether individual or corporate. If Congress intended to limit the scope of section 1192 to individual debtors, one would think it would have stated as much in section 1192 itself, as it did in the traditional chapter 11 discharge section, section 1141. *See* 11 U.S.C. §§ 1141(d)(2), (6) (distinguishing the scope of the discharge between individual and corporate debtors).

Notably, the only other court of appeals that has addressed this issue held that subchapter V corporate debtors can be subject to non-dischargeability claims where, as here, confirmation of their plan was achieved through cramdown. In *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022), the Fourth Circuit interpreted the statutory language as follows:

> In short, while § 523(a) does provide that discharges under various sections, including § 1192 discharges, do not "discharge *an individual debtor* from any debt" of the kind listed, § 1192(2)'s cross-reference to § 523(a) does not refer to any *kind of debtor* addressed by § 523(a) but rather to a *kind of debt* listed in § 523(a). By referring to the *kind of debt* listed in § 523(a), Congress used a shorthand to avoid listing all 21 types of debts, which would indeed have expanded the one-page section to add several additional pages to the U.S. Code. Thus, we conclude that *the debtors* covered by the discharge language of § 1192(2) — *i.e.*, both individual and corporate debtors — remain subject to the 21 *kinds of debt* listed in § 523(a).

Id. at 515 (emphasis in original).

To the extent there is any tension between sections 1192 and 523(a), the cannons of statutory interpretation provide guidance to the correct result. *See, e.g., Lena v. Pena,* 518 U.S. 187, 211 (1996) ("[Courts] appropriately rely on canons of construction as tie breakers to help us discern Congress' intent when its message is not entirely clear."). One such cannon dictates that

more specific statutory provisions should govern over more general ones. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general…."). Here, to the extent there is any inconsistency between section 1192 and section 523(a), the more specific provision (section 1192, which applies only in subchapter V cases) should be given precedence over the more general provision (section 523(a), which is applicable, to some extent, in most bankruptcy cases).

The majority's interpretation of section 1192(2) bizarrely incentivizes corporate debtors to pursue non-consensual plans, instead of consensual ones. If the court confirms a consensual plan under section 1191(a), a corporate debtor receives a traditional section 1141 discharge of all debts, subject to section 1141(d)(6) which prevents corporate debtors from discharging debts owed to governmental units arising under the False Claims Act, for filing fraudulent tax returns, and for attempting to evade taxes. *See* 11 U.S.C. § 1141(d)(6). But, if a court confirms a non-consensual plan, then section 1141(d) "shall not apply, except as provided in section 1192." 11 U.S.C. § 1181(c). Under the majority's interpretation, none of the discharge exceptions apply to corporations. The net result, under the majority's interpretation, is that a corporate debtor in subchapter V with debts falling within the scope of section 1141(d)(6) cannot discharge those debts by securing support for a consensual plan, but it can discharge them by persuading the court to confirm a non-consensual plan. Such an absurd result could not have been intended by Congress.

The majority points to the lack of legislative history, stating that if Congress intended to provide for a substantially different chapter 11 corporate discharge in subchapter V cases, then there surely would be some reference to that change in the legislative history. While not wholly without merit, the problem with this argument is that Congress seems to have intended to make the subchapter V cramdown discharge the same as the discharge in chapter 12 (a different chapter

of the Bankruptcy Code applicable to family farmers and fishermen).[27] Notably, the chapter 12 discharge provision, section 1228, contains substantially the same language as section 1192, and the prefatory language of section 523(a) refers to section 1228 and section 1192 in the same way.

The Supreme Court has repeatedly reminded us that, when enacting legislation, Congress is presumed to be aware of existing law. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 524 (1984) ("Congress is presumed to be aware of judicial interpretations of a statute."); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("[w]e assume that Congress is aware of existing law when it passes legislation."). At the time of the enactment of subchapter V, the only two published bankruptcy opinions addressing section 1228 had both held that the section 523(a) exceptions are applicable to a section 1228 discharge of a corporation. *See S.W. Ga. Farm Credit, ACA v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *New Venture P'ship. v. JRB Consol., Inc. (In re JRB Consol., Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995). In such cases, as here, the corporate debtors contended that the section 523(a) exceptions to the chapter 12 discharge did not apply to them because section 523(a) states that it only excepts debts of an individual. Both courts ruled that the section 523(a) exceptions applied to the chapter 12 discharge of a corporation. In *In re Breezy Ridge Farms, Inc.*, the court reasoned:

> Although § 523(a) applies only to individuals, Congress has used it as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals. Thus, it is appropriate to rely on § 523(a) to determine whether a debt is included in the discharge, even when the debtor is a corporation. Even if the two provisions could not be harmonized, § 1228 would control because it is more specific, applicable only in Chapter 12, than § 523(a), which applies regardless of chapter.

In re Breezy Ridge Farms, Inc., 2009 WL 1514671, at *2 (Bankr. M.D. Ga. 2009). Given this chapter 12 caselaw, which existed in 2019 when subchapter V was enacted, I assume that Congress

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[27] Courts have recognized that several aspects of subchapter V are premised on the provisions of chapter 12 of the Bankruptcy Code. *See, e.g., In re Trepetin*, 617 B.R. 841, 848 (Bankr. D. Md. 2020).

understood and intended that substantially similar language contained in subchapter V would be interpreted similarly. *See Hall v. United States,* 566 U.S. 506, 519 (2012) ("[I]dentical words and phrases within the same statute should normally be given the same meaning.").

Finally, there is also a policy reason for excepting the kinds of debts specified in section 523(a) from discharges obtained by corporate subchapter V debtors via cramdown. As noted, subchapter V is extremely beneficial to a corporate debtor in that it allows the debtor's existing ownership to confirm a chapter 11 plan without strict adherence to the "absolute priority rule." Creditors need not be paid in full in order for old equity (in this case Strawberry Fields) to retain its ownership interest. Consequently, creditors (such as Ms. Rigby) are afforded fewer tools to challenge confirmation of a plan. The tradeoff is that although a subchapter V debtor (whether individual or corporate) may be able to obtain confirmation of its plan and reorganize over the objection of a dissenting creditor, it will not be able to discharge section 523(a) debts owed to that creditor.

In the end, the better interpretation of the statutory text is that section 1192(2) provides discharges to subchapter V debtors, both individuals and corporations, in cramdown cases except with respect to the kinds of debts listed in section 523(a). This result is fair, as well. The Debtor, and only the Debtor, elected to take advantage of the provisions of subchapter V. In doing so, it must accept the corresponding burdens, including the narrower scope of the discharge. Accordingly, I would reverse the bankruptcy court and hold that Ms. Rigby is entitled to seek to have her claim against the Debtor deemed non-dischargeable pursuant to section 523(a)(6).