Bartenwerfer and 11 U.S.C. §523(a)(2)(A)

Orange County Bankruptcy Forum
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Hon. Theodor C. Albert, Chief Judge, U.S. Bankruptcy Court, Central District of California
J. Scott Bovitz, Bovitz & Spitzer, Los Angeles
Anerio V. Altman, Lake Forest Bankruptcy, Program Chair

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Hon. Theodor C. Albert

Chief Judge, U.S. Bankruptcy Court, Central District of California (Santa Ana)

Appointed to bench (2005), Reappointed (2019)

Stanford University, B.A. (1975)

University of California, Los Angeles School of Law J.D. (1978)

Admitted to California Bar (1978)

Buchalter, Nemer, Fields & Younger, Newport Beach, California (1983-1995)

Co-founder, Albert, Weiland & Golden, Costa Mesa, California (1995-2005)

Peter M. Elliott Award for highest standard of ethics and scholarship (2000)

Scholarly work of Judge Albert

Studied Roman law from original sources at the Vatican.

Theodor C. Albert, ***The Insolvency Law Of Ancient Rome***, 28 Cal. Bankr. J. 365 (2006).

Bovitz, ***These Are a Few of My Favorite Things: Treasured Possessions of Bankruptcy Judges,***
American Bankruptcy Institute Journal, October 2018

> Hon. Theodor C. Albert is a law professor in a black robe. His favorite things are an unfinished schooner from his childhood, christened *Thermopylae*; a little fat lawyer figure with hands in his suspenders that sits on the bench; and pictures of his children during their many travels.

Thermopylae (a battle in antiquity)

https://en.wikipedia.org/wiki/Battle_of_Thermopylae

The Battle of Thermopylae ... was fought between an alliance of Ancient Greek city-states, led by King Leonidas I of Sparta, and the Achaemenid Empire of Xerxes I. It was fought in 480 BC over the course of three days, during the second Persian invasion of Greece. ... A Greek force of approximately 7,000 men marched north to block the pass in the middle of 480 BC. The Persian army was rumoured to have numbered over one million soldiers. ... Today, it is considered to have been much smaller. Scholars report various figures ranging between about 100,000 and 150,000 soldiers. The Persian army arrived at the pass in late August or early September. The vastly outnumbered Greeks held them off for seven days (including three of battle) before the rear-guard was annihilated in one of history's most famous last stands. During two full days of battle, the small force led by Leonidas blocked the only road by which the massive Persian army could pass. After the second day, a local resident named Ephialtes betrayed the Greeks by revealing a small path used by shepherds. It led the Persians behind the Greek lines. ... the Greeks fought to the death ... Plutarch recounts, in his *Sayings of Spartan Women*, upon his departure, Leonidas' wife Gorgo asked what she should do if he did not return, to which Leonidas replied, "Marry a good man and have good children."

Also see, **https://www.imdb.com/video/vi213123353?playlistId=tt0416449&ref_=tt_ov_vi** (trailer for the movie, "300").

J. Scott Bovitz

Senior partner, Bovitz & Spitzer (bovitz-spitzer.com, 1991-present)

Board Certified, Business Bankruptcy Law, American Board of Certification
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Certified Specialist, Bankruptcy Law, State Bar of California Board of Legal Specialization (californiaspecialist.org, 1993-present; past chair of Board of Legal Specialization)

Rated "AV Preeminent" by Martindale-Hubbell (martindale.com, AV rated 1993-present)

Selected Southern California "Super Lawyer" in Bankruptcy & Creditor/Debtor Rights (20 years)

Adjunct Professor of Law: Loyola Law School, Los Angeles (1982-1987); University of Nevada, Las Vegas, William S. Boyd School of Law (2022); California Western School of Law (2022-present)

Fellow, American College of Bankruptcy, Class XXXIV

Lawyer Representative, U.S. District Court, Central District of California, Ninth Circuit Judicial Conference (2018-2023)

Mediator (1995-present) and contributing editor, Bankruptcy Mediation News
(U.S. Bankruptcy Court, Central District of California, 2019-present)

Executive editor, ***Personal and Small Business Bankruptcy Practice in California*** (CEB.com, 2003-2006)

Past president, Los Angeles Bankruptcy Forum (labankruptcyforum.org, 2000-2001)

Education co-chair (2001) and conference co-chair (2004), California Bankruptcy Forum

Information Technology Committee, United States Bankruptcy Court, Central District of California (2012-present)

Columnist and coordinating editor, American Bankruptcy Institute Journal (abi.org, 2014-2021)

Webmaster, bankruptcydog.com (calendar site for bankruptcy professionals)

Musician, more than 647 songs from Bovitz and friends (bovitz.biz)

Neal v. Clark (1877) -- not a typo

In re Huh, 506 B.R. 257, 263 (B.A.P. 9th Cir. 2014)

> In ***Neal v. Clark,*** **95 U.S. 704, 24 L.Ed. 586 (1877),** the debtor had purchased assets from the executor of an estate. It later was determined that the executor had sold the assets in violation of his fiduciary duties.
>
> In spite of the debtor's discharge in bankruptcy, the Virginia state courts held that the **debtor still was liable vicariously for the executor's breach of fiduciary duty**. *Id.* at 704–05.
>
> The Supreme Court reversed in a unanimous decision authored by Justice John Marshall Harlan. In its decision, **the Supreme Court interpreted the term "fraud" to mean positive or active fraud, and not "implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality."** *Id.* at 709.

Strang v. Bradner (1885)

In re Huh, 506 B.R. 257, 263-264 (B.A.P. 9th Cir. 2014)

> ... *Strang v. Bradner*, 114 U.S. 555, 5 S.Ct. 1038, 29 L.Ed. 248 (1885). In Strang, the question was whether the debts of all partners, based on one partner's fraud, were excepted from their discharge in bankruptcy. The record reflected that the other partners did not actively participate in their partner's fraud, but the proceeds from his fraud went into the partnership business. Id. at 558, 5 S.Ct. 1038.
>
> The decision of the Supreme Court again was unanimous and again was authored by Justice Harlan. While noting the continuing validity of its decision in Neal, the court ultimately concluded that the debts of the innocent partners were not dischargeable. ...
>
> Against this background**, the Strang court imputed fraud (and, thus, liability for exception to discharge purposes) based on general theories of partnership and agency. As was characteristic at the time, these theories were based on the common law rather than on any specific state statutes.**

11 U.S.C. §523(a)(2)(A)

(a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

> **(2)** for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> **(A)** false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition ...

False pretenses, a false representation, or actual fraud of whom?

Walker v. Citizens Bank (1984)

In re Huh, 506 B.R. 257, 265–266, 272 (B.A.P. 9th Cir. 2014)

... **Walker v. Citizens State Bank (In re Walker),** 726 F.2d 452 (8th Cir.1984).

In Walker, the Eighth Circuit held with regard to a principal/agent relationship, that before an agent's fraud can be imputed to a principal-debtor, proof was required that the principal "knew or should have known of the fraud." Id. at 454. ...

... we explicitly adopt the "knew or should have known" standard from Walker (hereinafter referred to as the "Walker Standard") as most legally and logically appropriate and most consistent with our prior published precedents and the direction of Supreme Court and Ninth Circuit decisions. ...

Based on the bankruptcy court's fact findings, we cannot conclude that Huh knew or should have known of the frauds of his agent, Kim, in this case. Accordingly, we hold, **applying the Walker Standard, that imputing Kim's fraud to Huh for exception to discharge purposes under § 523(a)(2)(A) where Huh did not know or have reason to know of his agent's fraud, is not consistent with the provisions or objectives of the Bankruptcy Code.**

In re Shart (Hon. B. Russell opinion)

In re Shart, 505 B.R. 13, 14–15 (Bankr. C.D. Cal. 2014), aff'd, 2014 WL 6480307 (B.A.P. 9th Cir. Nov. 19, 2014)

> I am of the firm belief that imputation of the fraud of John Shart to his wife Elke Gordon–Schardt is unwarranted under § 523(a)(2)(A) and is hostile to the well accepted principle that Congress intended to enact bankruptcy law "by which the honest citizen may be relieved from the burden of hopeless insolvency." *Neal v. Clark,* 95 U.S. 704, 709, 24 L.Ed. 586 (1877). ... The source of the imputation of fraud to an otherwise innocent person is *Strang v. Bradner,* 114 U.S. 555, 5 S.Ct. 1038, 29 L.Ed. 248 (1885), a five page opinion in which the U.S. Supreme Court held that under § 33 of the Bankruptcy Act of 1867, the fraud of one partner could be imputed to the other partner for the purpose of exceptions to discharge. The entire discussion of the imputation of fraud is found in the last paragraph of the decision. Unfortunately, it is purely conclusory. I have no quarrel with its statement that *outside of bankruptcy* a partner is liable for the fraud of another partner and its citations to cases standing for that general proposition. However, I strongly disagree with its conclusion and giant leap that, therefore, the fraud could be imputed to the partner for purposes of exceptions to discharge. This makes no sense to me. Of course the partners were liable for all partnership debts. However, there was no reason to equate liability with exceptions to discharge.

In re Shart, 505 B.R. 13, 27–28 (Bankr. C.D. Cal. 2014), aff'd, 2014 WL 6480307 (B.A.P. 9th Cir. Nov. 19, 2014)

> I conclude that due to the development of the law regarding exceptions to discharge, both statutory and decisions of the Supreme Court, that ***Strang v. Bradner,*** **is no longer good law and therefore the fraud of John Shart may not be imputed to his wife, Elke Gordon–Schardt** under § 523(a)(2)(A).
>
> Nevertheless, to the extent that *Strang* [Strang v. Bradner, 114 U.S. 555, 5 S.Ct. 1038, 29 L.Ed. 248 (1885)] is still viable, it should be strictly limited to its facts.
>
> Finally, even under *Tsurukawa II,* the facts do not support the imputation of Mr. Shart's fraud to his wife. The facts of this case highlight how inappropriate it is to impute the fraud of one person to another under § 523(a)(2)(A).
>
> **Having to sift through numerous facts under partnership principles, unrelated to any actual fraud by the debtor is a very slippery slope, and is clearly not what Congress had in mind when it enacted § 523(a)(2)(A).**

In re Huh (Hon. B. Russell, trial judge below)

In re Huh, 506 B.R. 257, 259, 261 (B.A.P. 9th Cir. 2014, *en banc*)

> In light of the Supreme Court's recent decision in *Bullock v. BankChampaign, N.A.,* ––U.S. ––––, 133 S.Ct. 1754, 185 L.Ed.2d 922 (2013), we voted to hear this appeal en banc to reconsider the Panel's prior published opinions on the question of when, if ever, it is appropriate to impute vicarious liability in an exception to discharge action based on fraud. ...
>
> ... **the bankruptcy court announced its conclusion that imputed liability of a principal for the active fraud of an agent would not support an exception to discharge under § 523(a)(2)(A). Although it reiterated its finding that Kim was Huh's agent, the bankruptcy court declined to impute Kim's fraud to Huh.**
>
> **Accordingly, the bankruptcy court found in favor of Huh on Sachan's claim and directed counsel for Huh [Bovitz] to prepare findings of fact and conclusions of law and a judgment in favor of Huh consistent with its rulings**.

Bartenwerfer (Hon. Blumenstiel, N.D. California)

In re Bartenwerfer, 549 B.R. 222, 224 (Bankr. N.D. Cal. 2016), aff'd in part, vacated in part, remanded, 2017 WL 6553392 (B.A.P. 9th Cir. Dec. 22, 2017)

> This matter came on for trial on January 19 and 22, 2016 on Plaintiff Kieran Buckley's complaint to determine the dischargeability of debt pursuant to 11 U.S.C. § 523(a)(2)(A). The sole issue at trial was whether Defendants David and Kate Bartenwerfer fraudulently omitted disclosing material defects plaguing real property sold by the Bartenwerfers to Mr. Buckley. ... **Iain Mac[d]onald** ... appeared for the Bartenwerfers.

In re Bartenwerfer, 549 B.R. 222, 225, 230 (Bankr. N.D. Cal. 2016), aff'd in part, vacated in part, remanded, 2017 WL 6553392 (B.A.P. 9th Cir. Dec. 22, 2017)

> **The Bartenwerfers bought and extensively remodeled a home located at 549 28th Street, San Francisco, California (the "Property"), which they subsequently sold to Mr. Buckley. ... Post-sale, Mr. Buckley discovered undisclosed defects and ultimately sued the Bartenwerfers** in San Francisco County Superior Court to recoup damages under a number of theories. ...
>
> Mr. Buckley requests a finding of non-dischargeability under section 523(a)(2)(A) as to the damages awarded by the state court for non-disclosure of issues ...
>
> Considering the totality of the circumstances, including those surrounding the other material non-disclosures, **the Court finds that the Bartenwerfers omitted information about the status of permits up through the time of the close of escrow with the intent to deceive Plaintiff.**

Bartenwerfer (BAP, 2017)

In re Bartenwerfer, 2017 WL 6553392, at *9-10 (B.A.P. 9th Cir. Dec. 22, 2017)

> The Bartenwerfers contend the bankruptcy court erred in denying Mrs. Bartenwerfer's motion for judgment on partial findings, because there was **no evidence in the record that she "knew or should have known" of Mr. Bartenwerfer's alleged fraud**. ... Recognizing that a marital relationship by itself is insufficient to impute the fraud of one spouse to the other, the bankruptcy court determined that a business or agency relationship existed between the Bartenwerfers; thus, Mr. Bartenwerfer's fraud could be imputed to Mrs. Bartenwerfer. ...
>
> However, **the court erred by imputing Mr. Bartenwerfer's fraudulent intent to Mrs. Bartenwerfer on the basis of agency alone**. To deny Mrs. Bartenwerfer's Civil Rule 52(c) motion, the court had to also find that she "knew or had reason to know" of Mr. Bartenwerfer's fraudulent omissions. **Sachan v. Huh (In re Huh)**, 506 B.R. 257, 271–72 (9th Cir. BAP 2014) (en banc). The court made no such finding. Accordingly, we REMAND this issue for further findings as to Mrs. Bartenwerfer's actual knowledge.

Bartenwerfer (on remand to Blumenstiel)

In re Bartenwerfer, 596 B.R. 675, 681 (Bankr. N.D. Cal. 2019), aff'd, 2020 WL 1970506 (B.A.P. 9th Cir. Apr. 23, 2020), aff'd in part, rev'd in part and remanded, 860 F. App'x 544 (9th Cir. 2021)

> ... Mrs. Bartenwerfer's testimony ... She never lived in the renovated Property; she never saw and did not possess or maintain the construction permits; she never interacted with contractors, laborers, architects, or consultants; she never asked for or reviewed construction plans or drawings; and she never asked for or reviewed invoices or estimates for construction work. According to Mrs. Bartenwerfer's testimony, Mr. Bartenwerfer served as her sole source for information concerning the Property, other than what she could verify visually. ...
>
> ... the court believes that Mrs. Bartenwerfer told the truth on the stand. She answered questions earnestly, taking care to ask for clarification when needed. And she consistently, clearly, and credibly maintained – perhaps to her detriment – that, **when confronted with a question concerning the Property about which she had no personal knowledge and as to which she could not determine an answer based on her visual inspection, she asked Mr. Bartenwerfer and relied unflinchingly on whatever he told her.**

In re Bartenwerfer, 596 B.R. 675, 681 (Bankr. N.D. Cal. 2019), aff'd, 2020 WL 1970506 (B.A.P. 9th Cir. Apr. 23, 2020), aff'd in part, rev'd in part and remanded, 860 F. App'x 544 (9th Cir. 2021)

> ... it became clear that **the parties no longer seriously dispute that Mrs. Bartenwerfer had no actual knowledge of Mr. Bartenwerfer's fraud. They remain in dispute as to whether she "should have known" of his fraud**. ... The Remanded Issue is limited to whether Mrs. Bartenwerfer knew or should have known of her husband's fraud, such that it can be imputed to her for purposes of section 523(a)(2)(A).
>
> The **seminal case** in the Ninth Circuit on the issue of imputation of fraud is **In re Huh**, 506 B.R. 257 (9th Cir. BAP 2014) (en banc).

In re Bartenwerfer, 596 B.R. 675, 686 (Bankr. N.D. Cal. 2019), aff'd, 2020 WL 1970506 (B.A.P. 9th Cir. Apr. 23, 2020), aff'd in part, rev'd in part and remanded, 860 F. App'x 544 (9th Cir. 2021)

> Nothing in Huh, Walker, or any of the other relevant caselaw requires a debtor to independently verify each and every representation made by his or her agent. If debtors were held to such a standard, it would render debtors liable for all misrepresentations made by their agents – a standard the BAP has rejected. Huh, 506 B.R. at 266.
>
> **The Walker standard implicitly acknowledges that a principal must be able to trust and rely on his or her agent unless the principal knows or has reason to know of cause not to, and rightfully so. Otherwise, there would be little point to principal-agent relationships.**
>
> It is only where a debtor learns of facts that require investigation into the agent's conduct but fails to undertake such an inquiry that a court can find that the debtor "should have known" of the agent's fraud and can impute such fraud to the debtor. Mr. Buckley failed to prove that Mrs. Bartenwerfer knew of any such facts.

Bartenwerfer (Ninth Circuit)

In re Bartenwerfer, 860 F. App'x 544, 546-547 (9th Cir. 2021), cert. granted sub nom. Bartenwerfer v. Buckley, 142 S. Ct. 2675, 212 L. Ed. 2d 761 (2022)

> In his appeal, Buckley argues that the bankruptcy court erred by failing to apply binding Supreme Court and Ninth Circuit precedent to the question of whether to impute Mr. Bartenwerfer's fraud onto his partner, Mrs. Bartenwerfer, and by holding that the fraud was not imputed. Buckley is correct. ... "... if, in the conduct of partnership business, ... **one partner makes false or fraudulent misrepresentations of fact to the injury of innocent persons, ... his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge." ... Strang v. Bradner**, 114 U.S. 555, 561, 5 S.Ct. 1038, 29 L.Ed. 248 (1885) ...
>
> Mrs. Bartenwerfer's debt is nondischargeable regardless of her knowledge of the fraud**. By rejecting Strang** and Cecchini, in favor of the "knew or should have known" standard, **the bankruptcy court applied the incorrect legal standard for imputed liability** in a partnership relationship. We reverse the bankruptcy court's judgment regarding imputed liability against Mrs. Bartenwerfer under § 523(a)(2)(A), and we remand to the bankruptcy court with instructions to enter judgment in favor of Buckley and against Mrs. Bartenwerfer.

Writ of certiorari (2022)

Bartenwerfer v. Buckley, 142 S. Ct. 2675, 212 L. Ed. 2d 761 (2022)

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit **granted**.

Supreme Court Rule 37

An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. **An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored**. ...

An amicus curiae brief in a case before the Court for oral argument may be filed if it reflects that written consent of all parties has been provided, or if the Court grants leave to file under subparagraph 3(b) of this Rule.

SCOTUS blog

Jul 19 2022	**Brief of petitioner Kate Bartenwerfer filed.**
Jul 19 2022	**Joint appendix filed. (Statement of costs filed)**
Jul 21 2022	**Brief amici curiae of The Hon. Judith Fitzgerald (Ret.), et al. filed.**
Jul 26 2022	**Brief amici curiae of National Consumer Bankruptcy Rights Center, et al. filed.**
Jul 26 2022	**Brief amicus curiae of Robert E. Zuckerman filed.**
Jul 26 2022	**Brief amici curiae of Law Professors filed.**

Fitzgerald (judges and law professors) amicus

Amicus Curiae Brief Of

The Hon. Judith Fitzgerald (Ret.), The Hon. Robert Gerber (Ret.), The Hon. Eugene Wedoff (Ret.)

and Law Professors Ingrid Hillinger, George Kuney, Juliet Moringiello, **Nancy Rapoport**, Walter Taggart, Ray Warner, and Jack Williams

In Support Of The Petitioner

The principal case upon which the Ninth Circuit relied was *Strang v. Bradner*, 114 U.S. 555 (1885). **The decision in *Strang* has been widely criticized, ignored by some courts, and apologetically but reluctantly used by other courts; causing a leading commentator to urge its outright reversal**.

Strang has since been superseded by key Congressional changes to § 523(a)(2)(A) and the case law from this Court emphasizing that the **relevant exceptions to discharge in § 523 require culpable conduct by the debtor herself**. ...

We urge this Court to confirm that the text and context of § 523(a)(2)(A) preserve the core principles that protect honest debtors who should not be denied a discharge where they have not engaged in fraud or other wrongdoing, and neither knew or should have known of a fraud perpetrated by a "partner."

National Consumer Bankruptcy Rights Center

https://www.ncbrc.org/about/

The National Consumer Bankruptcy Rights Center (NCBRC) is a 501(c)(3) organization dedicated to protecting the integrity of the bankruptcy system and preserving the rights of consumer bankruptcy debtors. Created in 2010, NCBRC was founded by the Board of the National Association of Consumer Bankruptcy Attorneys to provide assistance to consumer debtors and their counsel in cases likely to impact consumer bankruptcy law. ...

NCBRC provides assistance either by working directly with debtors' attorneys or by filing amicus briefs in courts throughout the country. An a*micus curiae* is an entity or person, not party to a case, who volunteers information to assist courts in deciding matters before it. Appellate cases are normally limited to the factual record and arguments from the lower court case under appeal, and the debtors' attorneys focus on the facts and arguments most favorable to their clients. Where resolution of a particular case may impact consumer debtors throughout the country, *amicus curiae* briefs are a way to introduce those broader concerns, so that the larger legal effects of courts' decisions will not depend solely on the parties directly involved in the case.

... in domestic partnerships ... important personal decisions—what to drive, where to live, and what to buy—often require significant amounts of consumer debt. Empirical research suggests that **over half of victims of domestic violence may be forced to incur debt they do not want or have debt fraudulently taken out in their names**.

And partnered women filing for bankruptcy are many times likelier than the rest of the corresponding population to have recently experienced domestic violence. Refusing to allow those victims to discharge their debts in bankruptcy proceedings would pile on adverse consequences from domestic abuse—and make it that much harder to escape abusive relationships.

When *Strang* was decided, the bankruptcy laws excluded from discharge "debt created by the fraud or embezzlement of the bankrupt," not the bankrupt or those in an agency relationship with him. 1867 Bankruptcy Act, § 33, 14 Stat. at 517, 533.

Strang rested on the common-law principle that partners, innocent or not, should be liable for the debts incurred by their fellow partners "for the benefit of [the] firm." 114 U.S. at 561–62.

Amicus from a second group of law professors

A state court's final judgment as to the existence of party's fraud does not control "the interpretation of exceptions to discharge under the [Code], while informed by relevant state law, ultimately is a matter of federal law." *In re Huh*, 506 B.R. 257, 272 (B.A.P. 9th Cir. 2014).

Although Section 523(a)(2)(A) stems from Section 17 of the 1898 Act and its predecessor, Section 33 of the 1867 Act, **the current version of the Code, which Congress enacted in 1978 "embodies a shift in the fundamental polices and purposes of bankruptcy law." *In re Huh*, 506 B.R. at 264**. In addition to "other changes, the concept of discharge under the current [Code] is much more expansive." *Id.* The Ninth Circuit, therefor, erred in following *Strang*. *Strang* did not interpret a provision of the Code. Instead, it interpreted a provision of the 1867 Act, which Congress expressly repealed in 1878, and eventually replaced in 1978 when it enacted the Code. *See* Tabb, supra, at 356-370. The 1867 Act is readily distinguishable from the current version of the Code. Unlike the current version of the Code, the exceptions to discharge under the 1867 Act were not liberally construed in favor of the debtor. *In re Huh*, 506 B.R. at 264.

Petitioner's opening brief (Iain Angus Macdonald, Reno Fernandez, and White & Case)

White & Case? How did this law firm get involved?

Question presented

May an individual be subject to liability for the fraud of another that is barred from discharge in bankruptcy under 11 U.S.C. § 523(a)(2)(A), by imputation, without any act, omission, intent or knowledge of her own?

Bankruptcy once meant consigning families to Dickensian debtors' prisons until the paterfamilias repaid every farthing. Congress has long since broken from that past. The 1978 Bankruptcy Code enshrined today's modern federal bankruptcy scheme, whose overarching mission is to extend a "fresh start in life" to the "honest but unfortunate debtor." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1758 (2018) (citations omitted).

This case involves section 523(a)(2)(A), which bars "an individual debtor" from "discharg[ing] … any debt … for money, property, services, or … credit, to the extent obtained by … false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). All agree—and this Court has long held—that these fraud-based torts require an intent to defraud, among other elements.

The question here is whose fraud counts.

Must the individual debtor commit the fraud and possess the requisite intent? Or does the Code forever saddle innocent and unwitting debtors with debts arising from someone else's fraud?

Buckley instead contends that section 523(a)(2)(A) bars even honest debtors from discharging debts arising from *anyone's* fraud. He theorizes that Congress imposed that draconian result by using the passive voice to describe the relevant debts ("obtained by" fraud) and by omitting an express, debtor-specific mens rea requirement. Br. in Opp. 9-11. This Court refuses to read such rules into the Code by "negative inference." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1659 (2019).

Further, across contexts, **this Court has repeatedly refused to overread the passive voice that way. Placing dispositive weight on Congress' references to "the debtor" is particularly nonsensical given that the Code alternates between referring to the debtor herself and employing the passive voice without rhyme or reason**. And Buckley's theory that the Code penalizes even innocent debtors for others' fraud would defy the modern Code's emphasis on giving innocent debtors a fresh start.

Oral argument at the U.S. Supreme Court in December 2022

https://www.supremecourt.gov/oral_arguments/live.aspx
(live oral argument audio)

Bartenwerfer v. Buckley, 598 U.S. __, 2023 WL 2144417, at *3 (U.S. Feb. 22, 2023)

[Justice Barrett for the unanimous court.]

The Bankruptcy Code strikes a balance between the interests of insolvent debtors and their creditors. It generally allows debtors to discharge all prebankruptcy liabilities, but it makes exceptions when, in Congress's judgment, the creditor's interest in recovering a particular debt outweighs the debtor's interest in a fresh start. One such exception bars debtors from discharging any debt for money "obtained by ... fraud." 11 U.S.C. § 523(a)(2)(A). The provision obviously applies to a debtor who was the fraudster.

But sometimes a debtor is liable for fraud that she did not personally commit—for example, deceit practiced by a partner or an agent. We must decide whether the bar extends to this situation too. It does.

Written in the passive voice, § 523(a)(2)(A) turns on how the money was obtained, not who committed fraud to obtain it.

Bartenwerfer v. Buckley, 598 U.S. __, 2023 WL 2144417, at *4 (U.S. Feb. 22, 2023).

> We granted certiorari to resolve confusion in the lower courts on the meaning of § 523(a)(2)(A).
>
> [Footnote 1] See, *e.g.*, *In re M.M. Winkler & Assoc.*, 239 F.3d 746, 749 (CA5 2001) (debts that arise from fraud cannot be discharged); *In re Ledford*, 970 F.2d 1556, 1561 (CA6 1992) (no discharge if the debtor benefited from the fraud); *Sullivan v. Glenn*, 782 F.3d 378, 381 (CA7 2015) (a debt is nondischargeable only if the debtor knew or should have known of the fraud); *In re Walker*, 726 F.2d 452, 454 (CA8 1984) (same); *In re Villa*, 261 F.3d 1148, 1151 (CA11 2001) (a debt cannot be discharged when fraud is imputed to the debtor under agency principles).

Bartenwerfer v. Buckley, 598 U.S. __, 2023 WL 2144417, at *4 (U.S. Feb. 22, 2023)

"[W]e start where we always do: with the text of the statute." *Van Buren* v. *United States*, 593 U. S. ——–, ———, 141 S.Ct. 1648, 1654, 210 L.Ed.2d 26 (2021).

Section 523(a)(2)(A) states:

> "A discharge under section 727 ... of this title does not discharge an individual debtor from any debt ...
> "(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
> "(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."

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

Bartenwerfer v. Buckley, 598 U.S. __, 2023 WL 2144417, at *4-5 (U.S. Feb. 22, 2023)

> [Kate Bartenwerfer] admits that, as a grammatical matter, the passive-voice statute does not specify a fraudulent actor. But in her view, the statute is most naturally read to bar the discharge of debts for money obtained by *the debtor's* fraud. …
>
> We disagree: Passive voice pulls the actor off the stage. … The debt must result from someone's fraud, but Congress was "agnosti[c]" about who committed it. *Watson v. United States*, 552 U.S. 74, 81, 128 S.Ct. 579, 169 L.Ed.2d 472 (2007).

Bartenwerfer v. Buckley, 598 U.S. __, 2023 WL 2144417, at *5 (U.S. Feb. 22, 2023)

> The relevant legal context—the common law of fraud—has long maintained that fraud liability is *not* limited to the wrongdoer. *Field v. Mans*, 516 U.S. 59, 70–75, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995) (interpreting §523(a)(2)(A) with reference to the common law of fraud).
>
> For instance, courts have traditionally held **principals liable for the frauds of their agents**. *McCord v. Western Union Telegraph Co.*, 39 Minn. 181, 185, 39 N.W. 315, 317 (1888); *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 70–71 (1873); *White v. Sawyer*, 82 Mass. 586, 589 (1860); J. Story, Commentaries on the Law of Agency 465–467 (1839).
>
> They have also held individuals liable for the **frauds committed by their partners within the scope of the partnership**. *Tucker v. Cole*, 54 Wis. 539, 540–541, 11 N.W. 703, 703–704 (1882); *Alexander v. State*, 56 Ga. 478, 491–493 (1876); *Chester v. Dickerson*, 54 N.Y. 1, 11 (1873); J. Story, Commentaries on the Law of Partnership 161, 257–259 (1841).
>
> Understanding § 523(a)(2)(A) to reflect the passive voice's usual “agnosticism” is thus consistent with the age-old rule that individual debtors can be liable for fraudulent schemes they did not devise.

Bartenwerfer v. Buckley, 598 U.S. __, 2023 WL 2144417, at *5 (U.S. Feb. 22, 2023)

In *Gleason* v. *Thaw*, we held that "liabilities for obtaining property" did not include an attorney's services because services are not property. 236 U.S. 558, 559–562, 35 S.Ct. 287, 59 L.Ed. 717 (1915).

In *Kawaauhau*, we concluded that medical malpractice attributable to negligence or recklessness did not amount to a "willful and malicious injury." 523 U.S. at 59, 118 S.Ct. 974.

And in *Bullock*, interpreting the discharge exception "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny," we applied the familiar *noscitur a sociis* canon to hold that the term "defalcation" possessed a *mens rea* requirement akin to those of "fraud," "embezzlement," and "larceny." 569 U.S. at 269, 274–275, 133 S.Ct. 1754.

In each case, we reached a result that was "plainly expressed" by the text and ordinary tools of interpretation. Our interpretation in this case, which rests on basic tenets of grammar, is more of the same.

Bartenwerfer v. Buckley, 598 U.S. __, 2023 WL 2144417, at *6 (U.S. Feb. 22, 2023)

> In the late 19th century, the discharge exception for fraud read as follows: "[N]o debt created by the fraud or embezzlement *of the bankrupt* ... shall be discharged under this act." Act of Mar. 2, 1867, § 33, 14 Stat. 533 (emphasis added). This language seemed to limit the exception to fraud committed by the debtor herself—the position that Bartenwerfer advocates here.
>
> But we held otherwise in *Strang* v. *Bradner*. In that case, the business partner of John and Joseph Holland lied to fellow merchants in order to secure promissory notes for the benefit of their partnership. 114 U.S. at 557–558, 5 S.Ct. 1038. After a state court held all three partners liable for fraud, the Hollands tried to discharge their debts in bankruptcy on the ground that their partner's misrepresentations "were not made by their direction nor with their knowledge." *Id.*, at 557, 561, 5 S.Ct. 1038. Even though the statute required the debt to be created by the fraud "of the bankrupt," we held that the Hollands could not discharge their debts to the deceived merchants. *Id.*, at 561, 5 S.Ct. 1038. **The fraud of one partner, we explained, is the fraud of all because "[e]ach partner was the agent and representative of the firm with reference to all business within the scope of the partnership."** *Ibid*. And the reason for this rule was particularly easy to see because "the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business." *Ibid*.

Bartenwerfer v. Buckley, 598 U.S. __, 2023 WL 2144417, at *7 (U.S. Feb. 22, 2023)

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

Bartenwerfer v. Buckley, 598 U.S. __, 2023 WL 2144417, at *7 (U.S. Feb. 22, 2023)

> … the Code, like all statutes, balances multiple, often competing interests.
>
> Section 523 is a case in point: Barring certain debts from discharge necessarily reflects aims distinct from wiping the bankrupt's slate clean. Perhaps Congress concluded that these debts involved particularly deserving creditors, particularly undeserving debtors, or both. Regardless, if a fresh start were all that mattered, § 523 would not exist. No statute pursues a single policy at all costs, and we are not free to rewrite this statute (or any other) as if it did. *Azar* v. *Allina Health Services*, 587 U. S. –––, ––––, 139 S.Ct. 1804, 1815, 204 L.Ed.2d 139 (2019).

Bartenwerfer v. Buckley, 598 U.S. __, 2023 WL 2144417, at *8 (U.S. Feb. 22, 2023)

> … if one partner takes a wrongful act without authority or outside the ordinary course of business, then the partnership—and by extension, the innocent partners—are generally not on the hook. Uniform Partnership Act § 305 (2013).
>
> Partnerships and other businesses can also organize as limited liability entities, which insulate individuals from personal exposure to the business's debts. See, *e.g.*, § 306(c) (limited-liability partnerships); Uniform Limited Partnership Act § 303(a) (2013) (limited partnerships); Uniform Limited Liability Company Act § 304(a) (2013) (limited-liability companies).

Bartenwerfer v. Buckley, 598 U.S. __, 2023 WL 2144417, at *8 (U.S. Feb. 22, 2023)

> All of this said, innocent people are sometimes held liable for fraud they did not personally commit, and, if they declare bankruptcy, § 523(a)(2)(A) bars discharge of that debt.
>
> So it is for Bartenwerfer, and we are sensitive to the hardship she faces. But Congress has "evidently concluded that the creditors' interest in recovering full payment of debts" obtained by fraud "outweigh[s] the debtors' interest in a complete fresh start," *Grogan v. Garner*, 498 U.S. 279, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991), and it is not our role to second-guess that judgment.
>
> We affirm the Ninth Circuit's judgment that Kate Bartenwerfer's debt is not dischargeable in bankruptcy.

Bartenwerfer v. Buckley, 598 U.S. __, , 2023 WL 2144417, at *8–9 (U.S. Feb. 22, 2023)

Justice SOTOMAYOR, with whom Justice JACKSON joins, concurring.

The Court correctly holds that 11 U.S.C. § 523(a)(2)(A) bars debtors from discharging a debt obtained by fraud of the debtor's agent or partner. …

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

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

Bill Rochelle (American Bankruptcy Institute)

Justice Sotomayor's understanding of the opinion, if adopted by other courts, may affect the application of Section 523(a)(19). That subsection bars the discharge of judgments by state or federal courts for violation of state or federal securities laws, but it too is in the passive voice and does not in its language demand a violation committed by the debtor.

Presumably, a court influenced by Justice Sotomayor's concurrence would make a debt nondischargeable as to an innocent debtor only if there were an agency or partnership. …

With respect, this writer sees the Court as being selective in citing nineteenth century precedent for the idea that innocent individuals can be saddled with nondischargeable debts.

Scotus Blog

Ronald Mann, Justices narrow bankruptcy relief from debts incurred by fraud, SCOTUSblog (Feb. 23, 2023, 10:05 AM), https://www.scotusblog.com/2023/02/justices-narrow-bankruptcy-relief-from-debts-incurred-by-fraud/

This case will make no big waves in bankruptcy jurisprudence or elsewhere. Some might wish that the justices showed more sympathy to Bartenwerfer's plight, but it is hard to doubt that they gave a fair reading to the statute Congress adopted.

Volokh Conspiracy

John Blackman, Justice Barrett's Delightfully Nerdy Opinion in Bartenwerfer v. Buckley, https://reason.com/volokh/2023/02/22/justice-barretts-delightfully-nerdy-opinion-in-bartenwerfer-v-buckley (February 22, 2023)

For the longest time, I considered Justice Scalia the best writer on the Court, with a two-way tie for second between the Chief Justice and Justice Kagan. Since Scalia's passing, I have leaned towards Kagan as my favorite writer. She writes in a plain style that reads conversational, without having to try too hard. When humor is called for, she uses it subtly. When she has to drop the hammer, she bludgeons brutally. And there is never any doubt what she is saying. The prose is clean. When the Chief writes alone, it is a joy to read. You can tell he is really having fun. … Who is currently number three on the list? Justice Barrett may be the Court's fastest writer, by a large margin. She is also climbing up my ranks for the Court's best writer. I had the joy today of reading *Bartenwerfer v. Buckley*. And I truly mean, *joy*. It was a joy to read. The substance would usually make my eyes glaze over: the Bankruptcy Code. But Barrett wrote a crisp, fun, unanimous opinion. It read like an impromptu lecture the former professor would have delivered in her statutory interpretation class. And it involves a nerdy analysis of grammar, with a relatable hypothetical.

Forbes

Jay Adkisson, Purely Passive Investor Hit With Liability And Denial Of Discharge By U.S. Supreme Court In Bartenwerfer, https://www.forbes.com/sites/jayadkisson/2023/02/27/purely-passive-investor-hit-with-liability-and-denial-of-discharge-by-us-supreme-court-in-bartenwerfer/?sh=146637b220c7 (February 27, 2023)

The first lesson of this case is a biggie: Even passive investors in deals can get caught up in any liability that arises from them. If you are thinking that, "I'm at no risk because I only put money into the deal," you would be quite wrong. Even worse, as in Kate's case, if somebody involved in the deal commits a fraud, then not only will you suffer a liability, but that liability will not be dischargeable even if you are totally and completely innocent. The reason for this is explained by the Court: When people get into business deals, even as passive investors, they are agents of each other and thus have agency liability. Equally as bad, in the absence of other legal structuring (described below), what happens is that the deal creates a general partnership — whether anybody realizes it or not — and thus everybody in the deal is the partner of everybody else and shares partnership liability. … In this case, had David and Kate first formed a California corporation, limited partnership or limited liability company, and contributed the house and any other moneys into the entity before they sold it, at least Kate would have been completely shielded from Buckley's claim. David would still have liability to Buckley from his representations, since an entity does not protect a person from their own fraud or negligence), but Kate as a passive investor who made no representations to Buckley would have gotten off with no more than the loss of her investment.

California Lawyers Association

Leonidas G. Spanos, Kathleen A. Cashman-Kramer, https://calawyers.org/business-law/bartenwerfer-v-buckley-no-21-908-slip-opinion-506-u-s-___-2023/

(1) Textualism trumps contextualism. The Supreme Court focused on §523(a)(2)(A)'s failure to specify the actor committing the fraud and refused to read into the statute that Congress was referring to the "debtor's" fraud. …

(2) Policy of "*competing interests"* takes precedence over "*fresh start*." The Supreme Court gave short rift to the argument that "[t]he same Congress that 'championed' the fresh start could not also have shackled honest debtors with liability for frauds that they did not personally commit." … In its place, the Supreme Court focused on competing interests, citing §523 as an example where "Barring certain debts from discharge necessarily reflects aims distinct from wiping the bankrupt's slate clean." *Bartenwerfer*, slip op., at 11.

(3) Caveat Debtor. *Bartenwerfer* clears the way for creditors to seek non-dischargeability actions against non-culpable debtors based on a theory of imputed intent. This may result in increased litigation – or threats of litigation – and counsel must take this into account when advising debtors of potential risks and in determining appropriate fees.

Bovitz asks…

Should a lawyer ever represent a couple (married or not) when one party appears to be a classic innocent spouse?

Is Tsurakawa still good law? In re Tsurukawa, 287 B.R. 515, 527 (B.A.P. 9th Cir. 2002)
("We have held, therefore, that in order to impute fraud to a spouse, there must be a 'partnership or other agency relationship.' *Tsurukawa I,* 258 B.R. at 198. *See also Luce v. First Equip. Leasing Corp. (In re Luce),* 960 F.2d 1277, 1284 n. 10 (5th Cir.1992) (per curiam) (holding where there are no facts showing individual culpability on the part of an 'innocent' spouse, fraud can still be imputed under partnership or agency principles if that spouse is also a business partner of the fraudulent spouse). We adhere to that view.").

Closing thoughts?