FILED
United States Court of Appeals
Tenth Circuit

June 27, 2023

Christopher M. Wolpert
Clerk of Court

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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DAVID L. MILLER,

Plaintiff - Appellee,

v.

UNITED STATES OF AMERICA,

Defendant - Appellant.

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NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES,

Amicus Curiae.

No. 21-4135

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**APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF UTAH**
**(D.C. No. 2:20-CV-00248-BSJ)**

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Ivan C. Dale (David A. Hubbert, Deputy Assistant Attorney General, and Ellen Page DelSole with him on the briefs) Tax Division, Department of Justice, Washington D.C., for Defendant-Appellant.

Reid W. Lambert, Strong & Hanni, Salt Lake City, Utah, for Plaintiff-Appellee.

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Before **CARSON**, **BALDOCK**, and **EBEL**, Circuit Judges.

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**BALDOCK**, Circuit Judge.

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"All our work . . . is a matter of semantics."

Justice Frankfurter

As apposite here, § 544(b)(1) of the United States Bankruptcy Code provides that "the trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under" the Code. 11 U.S.C. § 544(b)(1). Subsection (b)(1) empowers a trustee to step into the shoes, so to speak, of an actual creditor with an unsecured claim and invoke the state law applicable to the transfer the trustee seeks to avoid. *Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996). At the same time, § 106(a) of the Bankruptcy Code provides in relevant part that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . . with respect to," among 58 other sections of the Code, "Section[] . . . 544[.]" 11 U.S.C. § 106(a)(1). Subsection (a) further provides "[t]he court may hear and determine any issue arising with respect to the application of such section[] to governmental units." *Id.* § 106(a)(2). The phrase "governmental unit" includes the "United States," a "department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under [Title 11])," and "a State." *Id.* § 101(27). In this appeal, we construe the scope of § 106(a)'s waiver of sovereign immunity as it bears upon the Trustee's avoidance powers under § 544(b)(1), and more particularly "under applicable law." Our jurisdiction arises under 28 U.S.C. § 158(d). Our review is de novo. *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1060 (10th Cir. 2019).

I.

This appeal arises out of a converted Chapter 7 bankruptcy filed in 2017. In 2014, the debtor, All Resorts Group, Inc., paid personal tax debts of two of its principals totaling $145,138.78 to the Internal Revenue Service. Plaintiff, the United States Trustee, brought an adversary proceeding in the bankruptcy court against the United States pursuant to Code § 544(b)(1) to avoid these transfers. The "applicable law" on which the Trustee relied was now-former § 25-6-6(1) of Utah's Uniform Fraudulent Transfer Act (amended 2017), presently codified at Utah Code Ann. § 25-6-203(1) as part of Utah's Uniform Voidable Transactions Act. The United States (Government) did not contest the substantive elements required for the actual creditor (in this case, an individual with an employment discrimination claim against the debtor) to establish a voidable transfer under § 25-6-6(1). The Government acknowledged that (1) the debtor had made the transfers, (2) an actual creditor had an unsecured claim against the debtor arising before the transfers, (3) the debtor did not receive a reasonably equivalent value in exchange for the transfers, and (4) the debtor was insolvent at the time of the transfers. The Government further acknowledged that the sovereign immunity waiver contained in Code § 106(a) made it amenable to the Trustee's § 544(b)(1) action. What the Government did contest was § 544(b)(1)'s "actual creditor requirement," *i.e.*, that an actual creditor could succeed against the Government in a suit brought under § 25-6-6(1) outside of bankruptcy.

According to the Government, the actual creditor could not avoid the debtor's tax payments made on behalf of its principals to the IRS because sovereign immunity would

bar such creditor's action against the Government outside of bankruptcy. Therefore, the Trustee could not satisfy § 544(b)(1)'s actual creditor requirement and avoid the debtor's tax payments. The Trustee did not disagree that outside of bankruptcy and apart from Code § 544(b)(1), sovereign immunity would bar the actual creditor's suit against the Government. But, according to the Trustee, the waiver contained in Code § 106(a) abrogated sovereign immunity not only as to his § 544(b)(1) adversary proceeding against the Government, but also as to the underlying Utah state law cause of action he invoked under subsection (b)(1) to avoid the transfers.

On cross-motions for summary judgment, the bankruptcy court, in a thorough opinion, ruled in favor of the Trustee and avoided the transfers. The court held the Trustee had satisfied Code § 544(b)(1)'s actual creditor requirement because "§ 106(a)(1) unequivocally waives the federal government's sovereign immunity with respect to the underlying state law cause of action incorporated through § 544(b)[.]" *In re All Resorts Group, Inc.*, 617 B.R. 375, 394 (Bankr. D. Utah 2020). Accordingly, the bankruptcy court awarded the Trustee a judgment against the Government pursuant to 11 U.S.C. §§ 106(a)(3) and 550(a) in the amount of $145,138.78. On appeal to the district court, the court adopted the bankruptcy court's decision and affirmed its judgment. *United States v. Miller*, No. 20-CV-248-BSJ, Order (D. Utah Sept. 8, 2021). The Government subsequently appealed to this Court to address an issue—the scope of Code § 106(a)'s waiver of sovereign immunity as it bears on Code § 544(b)(1)—that has split our sister circuits. *Compare In re Equip. Acquisition Res., Inc.* ("*EAR*"), 742 F.3d 743 (7th Cir. 2014) (holding § 106(a)'s waiver did not extend to an Illinois state law cause of action

under § 544(b)(1)), *with In re DBSI, Inc.*, ("*DBSI*") 869 F.3d 1004 (9th Cir. 2017) (holding § 106(a)'s waiver extended to an Idaho state law cause of action under § 544(b)(1)), *and In re Yahweh Ctr., Inc.*, ("*Yahweh*") 27 F.4th 960 (4th Cir. 2022) (holding in the alternative that § 106(a)'s waiver extended to a North Carolina state law cause of action under § 544(b)(1)). For reasons that follow, we too rule in favor of the Trustee and affirm.

II.

That Congress may waive the sovereign immunity of the Government is beyond dispute. Therefore, we turn to an interpretation of the Bankruptcy Code that necessarily begins—and for the most part ends where sovereign immunity is at stake—with the wording of the statutes at issue. *FAA v. Cooper*, 566 U.S. 284, 290 (2012). Although the Government discusses Code § 544(b)(1) at length in its briefing, both parties agree as to what § 544(b)(1) means and how it operates—at least in a vacuum. Rather, notwithstanding the Government's insistence to the contrary, the present dispute is about the scope of the waiver of sovereign immunity contained in Code § 106(a), and more specifically, whether such waiver reaches the underlying state law cause of action that § 544(b)(1) authorizes the Trustee to rely on in seeking to avoid the transfers at issue. And so it is that we focus our attention on § 106(a).

Before turning to the text of § 106(a) itself, a brief background discussion about Congressional waivers of sovereign immunity that informs our statutory construction is in order. The Supreme Court has oft repeated, most recently just this Term, that "[t]o abrogate sovereign immunity, Congress must make its intent unmistakably clear in the

language of the statute." *LAC du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. ___, ___ (2023) (slip. op. at 3) (internal ellipses and quotation marks omitted). "This clear-statement rule is a demanding standard." *Id.* at ___ (slip op. at 4). Thus, we must construe ambiguities regarding the waiver's scope in favor of the sovereign. *Cooper*, 566 U.S. at 291. A waiver is ambiguous if a plausible interpretation of the statute's text exists that would not authorize suit against the sovereign. *Id.* at 290–91. In such case, "Congress has not unambiguously expressed the requisite intent" to waive immunity. *Coughlin*, 599 U.S. at ___, (slip op. at 4). Moreover, though many inferior federal courts have been unable to withstand the temptation, we should *not*, the Supreme Court says, rely on legislative history to assist us in construing a congressional waiver of sovereign immunity. "Legislative history cannot supply a waiver that is not clearly evident from the language of the statute." *Cooper*, 566 U.S. at 290.

Notably, however, "the clear-statement rule is not a magic-words requirement." *Coughlin*, 599 U.S. at ___ (slip op. at 10). "[T]he sovereign immunity canon is a tool for interpreting the law and . . . does not displace the other traditional tools of statutory construction." *Cooper*, 566 U.S. at 291 (internal brackets and quotation marks omitted). The Supreme Court has "never required that Congress use magic words" or "state its intent in any particular way" to establish that it intended to waive a sovereign's immunity from suit. *Id*. What the Supreme Court does require is that "the scope of Congress' waiver be clearly discernible from the statutory text in light of traditional interpretive tools" of statutory construction. *Id.* "As long as Congress speaks unequivocally, it

passes the clear-statement test—regardless of whether it articulated its intent in the *most* straightforward way." *Coughlin*, 599 U.S. at ___ (slip op. at 10).

Turning to the text of Code § 106(a), its relevant language says that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is *abrogated* as to a governmental unit . . . *with respect to* . . . Section[] . . . 544 . . . of this title." 11 U.S.C. § 106(a)(1) (emphasis added). Because the Bankruptcy Code does not define the key word "abrogated" or the key phrase "with respect to," we look to their ordinary meanings. *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018). Webster defines "abrogate" as "to abolish by authoritative, official, or formal action," "to put an end to," or "do away with." Webster's Third New Int'l Dictionary 6 (1981); s*ee also* Black's Law Dictionary 8 (10th ed. 2014). But for our purpose, to what extent has subsection (a)(1) abolished or done away with sovereign immunity?

Supreme Court precedent, by which we are bound, answers the question. The Court has told us that Congress's use of the word "respecting"—a synonym for the phrase "with respect to" according to Word Office 365's friendly thesaurus—"generally has a broadening effect, ensuring that the scope of a [statutory] provision covers not only its subject but also matters relating to that subject." *Appling* 138 S. Ct. at 1760 (interpreting Code § 523(a)(2)(B) which prohibits a debtor from discharging a debt obtained by a materially false "statement . . . respecting the debtor's . . . financial condition," if made in writing). In *Appling*, the Court observed that Congress "characteristically employs" words and phrases with similarly "expansive" meanings such as "concerning," "with reference to," "relating to" and the like "*to reach any subject*

*that has* '*a connection with*' . . . *the topics the statute enumerates*." *Id.* at 759–60 (emphasis added) (quoting *Coventry Health Care v. Nevils*, 581 U.S. 87, 96 (2017)); *see also Nevils*, 581 U.S. at 95–96 ("We have repeatedly recognized that the phrase 'relate to' in a preemptive clause expresses a broad pre-emptive purpose." (internal brackets and quotation marks omitted)).

Applying *Appling*'s teachings here, the Government's sovereign immunity defense to the Utah state law the Trustee invokes under Code § 544(b)(1) seems to us a "subject" that Code § 106(a)(1) has "a connection with" because a "topic" that § 106(a)(1) "enumerates" is the waiver of the Government's sovereign immunity "with respect to . . . Section[] . . . 544," a federal statute authorizing the Trustee's reliance on state law. In other words, the critical phrase "with respect to" in § 106(a)(1) clearly expresses Congress's intent to abolish the Government's sovereign immunity in an avoidance proceeding arising under § 544(b)(1), regardless of the context in which the defense arises. This is not surprising considering that Congress enacted the current and entirely new version of Code § 106(a)(1) in 1994 in direct response to two Supreme Court decisions that decided Congress, in the respective contexts presented, had not expressly declared its intent in the prior version of § 106 to abrogate sovereign immunity. *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 361 n.2 (2006) (citing *Hoffman v. Connecticut Dept. of Income Maint.*, 492 U.S. 96 (1989) and *United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1992)).

Reinforcing our interpretation of § 106(a)(1)'s waiver of sovereign immunity is the similarly broad language of § 106(a)(2). Subsection (a)(2) tells us a court "may hear

and determine *any* issue arising *with respect to* the application of" § 544. 11 U.S.C. § 106(a)(2) (emphasis added). That Congress would authorize a court to "hear and determine any issue arising with respect to" § 544's application as part of a statute waiving the Government's sovereign immunity surely presumes subject-matter jurisdiction. But sovereign immunity deprives a court of subject-matter jurisdiction. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."). The authority which subsection (a)(2) plainly confers would be substantially curtailed if Congress had intended an assertion of sovereign immunity to preclude a bankruptcy court from considering whether a trustee has satisfied the substantive elements of an underlying state law cause of action invoked pursuant to § 544(b)(1).

III.

In *EAR*, the Seventh Circuit was the first federal appeals court to address the interplay between Code §§ 106(a) and 544(b)(1). The court, however, never meaningfully addressed the scope of § 106(a) as reflected in its text. In deciding that § 106(a)(1) does not modify the actual creditor requirement of § 544(b)(1), the court took a two-tiered approach adopted from the Supreme Court's contextually distinct decision in *Meyer*. *See Meyer*, 510 U.S. 480–87 (deciding a statutory waiver of sovereign immunity as to the FSLIC in a "sue-and-be-sued" clause extended to plaintiff's constitutional tort claim but refusing to extend a federal common law *Bivens* action to federal agencies). The court first acknowledged that § 106(a)(1) constituted a waiver of sovereign immunity as to the § 544(b)(1) proceeding brought by EAR, a Chapter 11 debtor-in-possession exercising the powers of a trustee, against the Government. *See* 11 U.S.C. § 1107(a).

The court then asked whether the source of the substantive law upon which EAR relied, namely the Illinois Uniform Fraudulent Transfer Act, provided EAR an avenue for relief against the Government. According to the Seventh Circuit, "[*t*]*hat* question is the crux of this appeal." *EAR*, 742 F.3d at 747.

The Seventh Circuit summarily concluded that "Congress did not alter § 544(b)'s substantive requirements merely by stating that the federal government's immunity was abrogated 'with respect to' this provision." *Id.* But "[t]o be clear," the court explained: "we do not need to rely on the presumption against waiver [of sovereign immunity] to resolve this dispute. We find the substantive requirements of § 544(b)(1) unambiguous, and those requirements are simply not met with respect to EAR's action." *Id.* at 750–51. What the Seventh Circuit's decision in *EAR* effectively accomplishes is a total ban on actions under Code § 544(b)(1) to set aside avoidable transfers against a "governmental entity" as defined in Code § 101(27) absent a second waiver of sovereign immunity by way of Congress or a state legislature as to the underlying state law cause of action.

Perhaps the Seventh Circuit's decision may be explained at least in part based on its view of federal tax policy. The court *hypothesized* that if the trustee's view prevailed, the states could "render[] federal tax revenue . . . more vulnerable to unexpected recovery actions" by extending the applicable statute of limitations (typically four years) or relaxing criteria for what constitutes an avoidable transfer under state law. *Id.* at 750. Of course, any such policy rationale, especially where based on a fictitious scenario unlikely to come to fruition, runs head on into the Supreme Court's admonition that when a court asks whether Congress intended to waive the Government's sovereign immunity,

references to policy, like legislative history, are unavailing. *Hoffman*, 492 U.S. at 104, *superceded by amendment to* 11 U.S.C. § 106. Policy rationales are "not based in the text of the statute and so, too, are not helpful in determining" whether the statute satisfies the Supreme Court's command that to abrogate sovereign immunity Congress "must make its intention 'unmistakably clear in the language of the statute.'" *Id*. at 101, 104.

Unlike the Seventh Circuit's decision in *EAR*, the Ninth Circuit's decision in *DBSI* is faithful to the text of Code § 106(a). In *DBSI*, the court held "Section 106(a)(1)'s abrogation of sovereign immunity is absolute with respect to Section 544(b)(1) and thus necessarily includes the derivative state law claim on which a Section 544(b)(1) claim is based." *DBSI*, 869 F.3d at 1010. Consistent with Supreme Court precedent, *see supra* at 5–7, the Ninth Circuit began its analysis by relying on "well-settled canons of statutory interpretation that inform [an] understanding of the interplay between Section 106(a)(1) and Section 544(b)(1)." *DBSI*, 869 F.3d at 1010. The court looked to the language of Code § 106(a) as well as to the design of the statute as a whole and concluded: "[W]e cannot read the plain text of Section 544(b)(1)—i.e., the [actual] creditor requirement—devoid of the declaration in Section 106(a)(1) that "'sovereign immunity is abrogated as to a governmental unit . . . with respect to . . . Section[] . . . 544.'" *Id*.

The Ninth Circuit next made two additional observations based on established canons of statutory construction. The court observed that Congress enacted § 106(a)(1) subsequent to § 544(b)(1). And that "when Congress waived sovereign immunity with respect to Section 544, Congress understood that Section 544(b)(1) codified a trustee's power to invoke state law." *Id*. at 1011; *see Cannon v. Univ. of Chicago*, 441 U.S. 677,

696–97 (1979) ("It is always appropriate to assume our elected representatives . . . know the law."). The court also observed, as we have, that adopting the Government's position would render § 106(a)(1) alone largely meaningless with respect to § 544(b)(1) because a trustee would *always* need to demonstrate that a "governmental unit" as defined in Code § 101(27) provided for a separate waiver of sovereign immunity with respect to any "'applicable law.'"[1] *DBSI*, 869 F.3d at 1011–12; *see also id.* at 1011 ("[T]he interpretation offered by the government would essentially nullify Section 106(a)(1)'s effect on Section 544(b)(1), an interpretation we should avoid.").

IV.

We conclude by making short work of the Government's alternative argument that if sovereign immunity does not bar the Trustee's § 544(b)(1) action, field preemption, a subset of implied preemption, does so by way of the Internal Revenue Code's (IRC) interest in tax collection. As the Trustee points out, the obvious problem is that § 544(b)(1) is a federal statute, enacted by the United States Congress, the same legislative body that the Government now asserts has preempted its operation. If Congress believed a trustee's invocation of a state law cause of action under § 544(b)(1)

[1] In *Yahweh*, the Fourth Circuit adopted the Ninth Circuit's view that § 106(a)(1)'s waiver of sovereign immunity extends to a state law cause of action underlying a trustee's § 544(b)(1) action. 27 F.4th at 966. The court further reasoned that § 106(b) waived the Government's sovereign immunity in that case. *Id.* Subsection (b) provides "[a] governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." 11 U.S.C. § 106(b). Suffice to say that in our case, the Trustee does not rely on § 106(b) to support its waiver argument.

posed an obstacle to its objectives under the IRC, Congress surely would have added an express preemption provision to § 544(b) exempting the Government from its operation just as it provided an exemption for a transfer of charitable contributions in subsection (b)(2). 11 U.S.C. § 544(b)(2) (stating that § 544(b)(1) has no application to a defined charitable contribution and "[a]ny claim to recover [such] contribution . . . under Federal or State law . . . shall be preempted[.]"). As the Supreme Court recently recognized, the Bankruptcy Code "is finely tuned to accommodate essential governmental functions like tax administration and regulation." *Coughlin*, 599 U.S. at ___, (slip op. at 8). Congress's silence on this question, coupled with its certain awareness of § 106(a)'s ramifications when it broadened the statute's reach in 1994 is "powerful evidence" that Congress did not intend what the Government now says. *Wyeth v. Levine*, 555 U.S. 555, 575 (2009). The argument for field pre-emption based on federal tax collection policy is surely rather weak where Congress is aware of the operation of state law in a field of federal interest, *i.e.*, bankruptcy law, and has decided to place the policy of equal distribution and fairness among creditors on equal footing and tolerate whatever tension exists between the two policies. *Id*. at 574–75 (2009). Where Congress has announced consent to suit in the plain language of a statute, the Supreme Court has never permitted us to add to the rigor of sovereign immunity by refinement of construction based upon improper policy considerations. *See Block v. Neal*, 460 U.S. 289, 298 (1983).

* * *

We hold that Code § 106(a) waives the Government's sovereign immunity both as to the Trustee's proceeding under Code § 544(b)(1) and the underlying Utah state law

cause of action subsection (b)(1) authorizes the Trustee to rely on to avoid the debtor's tax transfers made on behalf of its principals in this case. The judgment of the district court is

AFFIRMED.