

1 say doesn't comply with the absolute priority rule. So
2 it's the 363(b) discretion. That is the standard about
3 best interests of the estate. It's been phrased various
4 ways; that -- that's really a judicial gloss in the
5 language of the statute, and that's probably -- you
6 know, the absolute contours of 363(b) are not really
7 within the question presented here.

8 The question presented here really is: Are
9 we in a world where there is any discretion at all,
10 versus a world where the absolute priority rule applies
11 by its terms?

12 JUSTICE BREYER: Well, this 363(b) -- is
13 there -- I mean, this -- you would -- they say -- you're
14 just saying they did it the wrong way when they reached
15 the settlement; then this -- the -- the Petitioners here
16 should have gone to the bankruptcy judge and said,
17 Judge, you know, there is an odd thing about this
18 settlement. They're not only paying in \$3 million or
19 whatever, but they want to tell you how to distribute
20 it.

21 MR. LANDAU: And they --

22 JUSTICE BREYER: And they want to tell you
23 how to distribute it, and we want you to distribute it
24 according to the rules, and not according to what they
25 say.

1 That's what you say they should have done.

2 MR. LANDAU: Well, that's what they did do,
3 and exactly what they --

4 JUSTICE BREYER: Well, if that's what they
5 did do, what's the problem?

6 MR. LANDAU: Yes -- no, but they --

7 JUSTICE BREYER: And then you're saying they
8 have discretion there.

9 MR. LANDAU: Yes.

10 JUSTICE BREYER: So the question is: Do
11 they have discretion --

12 MR. LANDAU: Yes.

13 JUSTICE BREYER: -- to depart from -- okay.
14 I got it.

15 MR. LANDAU: And -- and they say --

16 JUSTICE BREYER: Do they have discretion
17 depart from the -- do they have discretion to depart
18 from the priorities as set by Congress?

19 MR. LANDAU: Exactly. What I'm saying is
20 that the -- you know --

21 JUSTICE BREYER: Over the objection of one
22 of the creditors.

23 MR. LANDAU: The basic dispute before this
24 Court in this case is --

25 JUSTICE BREYER: Okay. That's helpful.

1 MR. LANDAU: -- does the absolute priority
2 rule apply to distributions of plan assets -- of -- of
3 estate assets, excuse me -- before a plan? They say
4 yes, it does. We say no, it doesn't.

5 It -- you -- distribution of estate assets,
6 whether it's on the first day through a first-day order,
7 a critical vendor order, is all subject --

8 JUSTICE BREYER: Oh, well, once -- then I'm
9 back with Justice Kagan. I'm pretty worried about that
10 provision.

11 MR. LANDAU: Well -- but --

12 JUSTICE BREYER: And the reason I'm worried
13 about it is -- and you'll be worried about it, all you
14 have to do is represent some client or represent some --
15 a bank, for example, that thinks it has secured --
16 thinks it has a secured interest in something, and lo
17 and behold, there is a \$40 billion settlement, and they
18 make it conditional that the money go to the widows and
19 orphans --

20 MR. LANDAU: Okay, but -- but --

21 JUSTICE BREYER: -- so we reverse it here,
22 and then the --

23 MR. LANDAU: But, Your Honor, just to be
24 clear.

25 JUSTICE BREYER: Yeah.

1 MR. LANDAU: Discretion doesn't mean win.
2 And -- and I think the Second Circuit in Iridium and the
3 Third Circuit in this case were very, very clear that
4 the most important consideration for a court to look at
5 in -- in assessing a distribution of assets that doesn't
6 comfort with the priority rule is: Is there a
7 compelling reason why it doesn't? We --

8 CHIEF JUSTICE ROBERTS: But that's, I think,
9 where the -- the -- the issue comes down. I mean, the
10 reasonableness of your position is directly related to
11 how extraordinary the extraordinary circumstances have
12 to be.

13 I mean, you're -- you're -- you're
14 suggesting that the main criteria in approving under
15 363(b) is pretty much what the priorities are under --
16 under Chapter 11.

17 MR. LANDAU: Right.

18 CHIEF JUSTICE ROBERTS: Now, if there is a
19 very close requirement there, then, you know, what
20 you're asking for is not that extraordinary.

21 MR. LANDAU: It isn't -- I just --

22 CHIEF JUSTICE ROBERTS: If, however -- well,
23 if, however, that -- it -- it's -- that priority simply
24 informs the exercise of discretion by the judge under
25 363(b) and is not as tight a requirement, well, then,

1 it's -- you know, then it is pretty extraordinary.

2 And -- and it -- it makes a difference.

3 Under -- under the -- the Chapter 11 regime,
4 people's leverage in negotiating the plan depends to
5 some extent on their priorities. Under the -- the --
6 the settlement regime, it's, you know, the -- the
7 leverage is reshuffled, and it's more or less who can
8 gang up on who but who else.

9 MR. LANDAU: Right. But Congress drew a
10 line --

11 CHIEF JUSTICE ROBERTS: I'm sorry. Could
12 you answer my concerns?

13 MR. LANDAU: Just -- Congress drew a line
14 that the absolute priority rule as such applies to
15 plans. When you're talking about distributions of
16 assets other than plans, you're in that discretionary
17 regime.

18 That -- the question presented to this Court
19 by the petition is the dispute between AWECO on the one
20 and Iridium on the other, which is, is it -- is it the
21 absolute priority rule that governs preplan
22 distributions, or is it this discretionary regime?

23 One can, in other cases, work on the --
24 the -- and so you can resolve this case by simply saying
25 they are wrong to say the absolute priority rule applies

1 outside the context of plan.

2 The extent to which you get into the
3 exercise of discretion is something that they didn't
4 present in the question presented. They didn't say the
5 Third Circuit erred --

6 CHIEF JUSTICE ROBERTS: Right, but if we are
7 concerned about --

8 MR. LANDAU: -- in applying the
9 discretionary Iridium standard.

10 CHIEF JUSTICE ROBERTS: If -- if we are
11 concerned about how extraordinary the extraordinary
12 circumstances are -- in other words, your position looks
13 more reasonable the tighter the extraordinariness
14 requirement is -- what -- what type of language would
15 you require -- I mean, you're saying, oh, well, just say
16 you can do this and then it will work out over time how
17 extraordinary it is.

18 But what would you say if you want -- if you
19 felt an obligation to tighten the extraordinary
20 requirement?

21 MR. LANDAU: I don't think I could improve
22 on the language that the Second Circuit used in Iridium
23 and the Third Circuit used here, saying that it is
24 the -- the most important consideration is conformity
25 with the absolute priority rule. So that if there is a

1 confirmable plan that is -- is -- that -- that where the
2 person complaining that they were cut out would actually
3 get something in the absolute prior -- through the
4 application of the absolute priority rule, that would be
5 almost implausible to think that it could ever be
6 approved.

7 The -- the fundamental problem --

8 JUSTICE KAGAN: But then doesn't that run
9 into -- this is what Ms. Harrington ended her remarks by
10 saying, is that you're just saying the plans that the
11 Bankruptcy Code declare not confirmable are, in fact,
12 going to be confirmed through this alternative
13 procedure?

14 MR. LANDAU: No, Your Honor. Again, the --
15 now we are talking about the means for terminating
16 Chapter 11 plans, which is a little bit different than
17 the question presented, which is all about the
18 distribution of assets. But just -- just to be clear,
19 so Section 1112 of the Code says that if a -- if Chapter
20 11 plan can't be confirmed, you have two alternatives.
21 You either go to Chapter 7 conversion or to dismissal.
22 Chapter -- there are specific findings here that Chapter
23 7 conversion made no sense because the -- the
24 trustee would -- the -- the estate did not have the
25 money to pursue the claim on its own and nobody would

1 bring this case on a contingency basis.

2 Now, the -- the -- the Petitioners here were
3 participating at that hearing in the bankruptcy court
4 where this was done. They didn't raise their hands and
5 say, hey, we'd be willing to pursue this on a
6 contingency basis, which is why it's somewhat
7 farfetched, to say the least, that they're now
8 suggesting that theoretically well, they -- they were
9 deprived of this opportunity to pursue this claim
10 outside of bankruptcy. They were given the opportunity
11 to pursue the claim on behalf of the estate in
12 bankruptcy, and nobody wanted to do that.

13 JUSTICE SOTOMAYOR: Mr. Landau, is there a
14 difference, in your mind, because there might be in
15 mine, between a settlement that settles an individual
16 claim, the emergency creditor claim that your -- that
17 your opponent spoke about, where there is not a total
18 distribution of the assets of the company, from a plan
19 that's really just an alternative plan, because that's
20 what this structured settlement was?

21 In my mind, something that would be an
22 extraordinary circumstance --

23 MR. LANDAU: Right.

24 JUSTICE SOTOMAYOR: -- would be something
25 that did something like the first thing, and not

1 necessarily the second.

2 MR. LANDAU: I think Your Honor is making a
3 very important point, which is, the application of the
4 363(b) discretion may well vary depending on the
5 circumstances of the case and, just -- and your first
6 hypothetical, maybe -- you know that -- that -- that
7 is -- now we are talking about, you know, the way that
8 that 363(b) analysis applies, and it may apply
9 differently --

10 JUSTICE SOTOMAYOR: So would you tell --

11 MR. LANDAU: -- on the first day of the
12 bankruptcy versus the last day of the bankruptcy.

13 JUSTICE SOTOMAYOR: -- me why Sun Life --
14 Sun Life cared?

15 If it got its settlement -- i.e., it was
16 going to pay \$2 million and get all the claims against
17 it released -- what was its reason for not wanting the
18 proceeds to be distributed according to the absolute
19 priority rule?

20 MR. LANDAU: It wanted a global settlement
21 of all claims and they got that with all other
22 creditors. The -- the -- the creditors -- the
23 Petitioners here refused to settle their WARN claims
24 that their -- those are their claims outside the context
25 of this claim get settled, for less than a hundred cents

1 on the dollar. So they were -- they were holdouts,
2 essentially, refusing to join the global settlement of
3 everything.

4 JUSTICE SOTOMAYOR: Well, I'm -- I'm sorry.
5 Does this mean that the junior creditors wouldn't have
6 agreed to this settlement because the senior creditors
7 could have? What did the senior creditors, who were in
8 line -- in line care about how much was left over to
9 junior creditors, including Sun Life?

10 MR. LANDAU: Well, I think that the point is
11 that Sun would not have entered into the settlement at
12 all unless -- which -- which benefited all the
13 creditors, including the junior creditors --

14 JUSTICE SOTOMAYOR: But why?

15 MR. LANDAU: Why --

16 JUSTICE SOTOMAYOR: Why does it care?

17 MR. LANDAU: Why does Sun? Well, for --

18 JUSTICE SOTOMAYOR: Why does Sun Life care?

19 MR. LANDAU: In the absence of a global
20 settlement of this WARN claim outside of the -- against
21 Sun, Sun didn't want to have a settlement that -- that
22 funded the litigation against it. Now, it --

23 JUSTICE SOTOMAYOR: No, the settlement would
24 have been the one that occurred.

25 MR. LANDAU: No, because it --

1 JUSTICE SOTOMAYOR: If it --

2 MR. LANDAU: There's two different claims.
3 The claim that was settled was the estate's fraudulent
4 conveyance claim. These particular Petitioners had a
5 separate WARN claim against Sun and the debtor. And it
6 was -- in the context of settling the fraudulent
7 conveyance claim against the estate, Sun only wanted to
8 have a global settlement to put this whole litigation
9 behind it. And they said, we're not going to settle the
10 fraudulent conveyance claim in a way that funds
11 the prepetition --

12 JUSTICE SOTOMAYOR: So do you think they can
13 still sue you for those fraudulent conveyance claims?

14 MR. LANDAU: Not for the fraudulent --

15 JUSTICE SOTOMAYOR: Not you; Sun Life.

16 MR. LANDAU: Not -- they can certainly sue
17 the -- the -- they can certainly pursue their WARN
18 claims, and they did. That was their choice not to
19 participate in the settlement --

20 JUSTICE SOTOMAYOR: The fraudulent-transfer
21 claim?

22 MR. LANDAU: No. The fraudulent-transfer
23 claim was ended. But I think the key point, there are
24 findings here that the fraudulent-transfer claim was
25 essentially worthless to them, because there was no

1 money to pursue it, and --

2 JUSTICE SOTOMAYOR: You don't understand.

3 My basic question was --

4 MR. LANDAU: Okay.

5 JUSTICE SOTOMAYOR: -- what did Sun Life
6 care if the fraudulent conveyance claim was going to be
7 resolved and released?

8 MR. LANDAU: Because --

9 JUSTICE SOTOMAYOR: Why did it care to
10 exclude these truck drivers from receiving whatever they
11 demanded?

12 MR. LANDAU: Because that would have funded
13 the truck drivers to pursue their separate WARN claims
14 against us. So we didn't want them --

15 JUSTICE SOTOMAYOR: But that eventually --
16 you had already --

17 MR. LANDAU: No.

18 JUSTICE SOTOMAYOR: Sun Life had already won
19 that.

20 MR. LANDAU: No. We only won later.
21 That -- it's -- it's the timing of that, I think, Your
22 Honor, that really gets to the point.

23 I think the fundamental point here is we're
24 really talking about a rule where they're saying the
25 absolute priority rule in flexibly and invariably

1 applies even before a plan.

2 Our position, on the other hand, is that the
3 use/sale of assets at any point before the plan is
4 governed by 363(b). There are -- that's a discretionary
5 regime. And as the Second Circuit said in Iridium and
6 the Third Circuit said here, it is absolutely critical
7 to look at making sure that it's not an evasion of the
8 plan.

9 But -- but -- but the question that this
10 Court was asked to resolve is, is it the -- the rigid
11 and unyielding absolute priority rule or the 363(b)?
12 And the Code answers this question. And -- and so I
13 think in this case that the --

14 JUSTICE BREYER: What the Code in 363(b)
15 says is the trustee can sell a suit. Okay? That's what
16 it says. It says nothing about --

17 MR. LANDAU: Yes, but --

18 JUSTICE BREYER: It says nothing about what
19 the terms are. It says nothing about what the
20 settlement is. And the question for us, I guess, is, in
21 those words, which make no reference to it --

22 MR. LANDAU: But --

23 JUSTICE BREYER: -- can you settle it on
24 terms that will, in fact, take these assets that belong
25 to the company and distribute them in a way that is

1 contrary to 1, 2, 3, 4, 5?

2 MR. LANDAU: But -- but the distribution is
3 a use of the estate assets, Your Honor. So again, it
4 goes to, can you -- what are the constraints on using
5 the estate assets?

6 And I -- I really encourage you to look at
7 the very tight way in which the Second Circuit in
8 Iridium said, we want to be super careful in this. To
9 say we want to be super careful is not to say -- is just
10 to say that the Fifth Circuit overstated it by saying
11 you can never do it. In other words, the Fifth Circuit
12 has an absolute bright-line rule. We don't care how
13 Pareto-optimal --

14 JUSTICE BREYER: Right.

15 MR. LANDAU: -- this is.

16 And I think the basic point was made by the
17 bankruptcy court here. The Bankruptcy Code is not a
18 suicide pact. So if, in fact, you have a situation
19 where the settlement or -- and the distribution proposed
20 makes others better without making these folks worse
21 off, there is nothing in the Code that prohibits that.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 MR. LANDAU: Thank you.

24 CHIEF JUSTICE ROBERTS: Two minutes,
25 Ms. Spinelli.

1 REBUTTAL ARGUMENT OF DANIELLE SPINELLI

2 ON BEHALF OF THE PETITIONERS

3 MS. SPINELLI: Respondents' position fails
4 because Section 363(b) is not a means of distributing
5 estate assets. The -- the 363(b) discretion that
6 Mr. Landau referred to is discretion to approve a
7 settlement or a sale of an estate asset, not to
8 distribute the settlement or sale proceeds in violation
9 of priority.

10 Assets are distributed under Chapter 11
11 through a Chapter 11 plan. That's it. And our
12 fundamental point here is that those assets cannot be
13 distributed on account of prepetition claims in
14 violation of priority.

15 To the extent there is a potential exception
16 for the Doctrine of Necessity, that's hotly disputed.
17 Courts disagree about whether that exception exists.
18 And that's not an issue this Court needs to resolve
19 because the Doctrine of Necessity, by its nature, is
20 designed for situations in which a payment to
21 prepetition creditors is necessary to the reorganization
22 of the debtor. There is no dispute that that wasn't the
23 case here. And as for our first-day order paying the
24 wages of the drivers, that was consented to, and no one
25 is saying that you're not allowed to consent to a

1 priority violation.

2 The only point we are making about
3 structured dismissals is that there is no superpower
4 associated with structured dismissals that provides for
5 an exception to that general rule that one cannot
6 distribute estate property on account of prepetition
7 claims in violation of priority.

8 Respondents' rule would wreak havoc on the
9 basic process of bankruptcy. If debtors could
10 distribute estate property to creditors at any time
11 without regard to the priority scheme before a plan,
12 there wouldn't be much left of the scheme. Debtors
13 could simply reach a deal with junior creditors and
14 distribute property leaving inadequate resources to pay
15 senior creditors.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 The case is submitted.

18 (Whereupon, at 11:05 a.m., the case in the
19 above-entitled matter was submitted.)

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