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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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