No. 01-

IN THE
Supreme Court of the United States

A. ELLIOTT ARCHER AND CAROL A. ARCHER,
Petitioners,

v.

ARLENE L. WARNER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 523(a)(2) of the Bankruptcy Code provides that a debt for money obtained by means of fraud (and certain other categories of debt) is not dischargeable in bankruptcy. This case presents a question that has divided the courts of appeals: whether an otherwise nondischargeable debt becomes dischargeable if the parties enter into a settlement agreement resolving the amount of the debt.

PARTIES TO THE PROCEEDING

The only parties to this proceeding are identified in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS AND JUDGMENT BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE QUESTION WHETHER A SETTLE-MENT AGREEMENT EFFECTS A "NOVATION" THAT CONVERTS AN OTHERWISE NONDISCHARGEABLE DEBT INTO A DISCHARGEABLE ONE.	7
II. THE QUESTION PRESENTED IS AN IMPORTANT ONE THAT WARRANTS THIS COURT'S REVIEW.	10
CONCLUSION	15
APPENDIX A: Opinion of the United States Court of Appeals for the Fourth Circuit, decided March 8, 2002	1a
APPENDIX B: Memorandum Opinion of the United States District Court for the Middle District of North Carolina, Greensboro Division, filed September 27, 1999	17a

TABLE OF CONTENTS—Continued

Page

APPENDIX C: Order and Judgment of the United States District Court for the Middle District of North Carolina, filed September 27, 1999 .... 27a

APPENDIX D: Memorandum Opinion of the United States Bankruptcy Court for the Middle District of North Carolina, Greensboro Division, entered August 30, 1999.............................. 29a

APPENDIX E: Judgment of the United States Bankruptcy Court for the Middle District of North Carolina, Greensboro Division, entered August 30, 1999 .... 37a

APPENDIX F: Consent Order of the United States Bankruptcy Court for the Middle District of North Carolina, entered June 20, 1997........................ 39a

APPENDIX G: Statutory Provision, 11 U.S.C. § 523(a) 43a

TABLE OF AUTHORITIES

CASES

Pages

Brown v. Felsen, 442 U.S. 127 (1979) 5, 6, 10, 11
Cohen v. de la Cruz, 523 U.S. 213 (1998) 6, 8, 13
Field v. Mans, 516 U.S. 59 (1995) 12
Gonder v. Kelley, 372 F.2d 94 (9th Cir. 1967) 3, 14
Greenberg v. Schools, 711 F.2d 152 (11th Cir. 1983) 3, 9
Grogan v. Garner, 498 U.S. 279 (1991) 6, 8, 13
In re Anderson, 64 B.R. 331 (Bankr. N.D. Ill. 1986) 7
In re Bobofchak, 101 B.R. 465 (Bankr. E.D. Va. 1989) 7
In re Carnahan, 115 B.R. 697 (Bankr. D. Colo. 1990) 7
In re Detrano, 222 B.R. 685 (Bankr. E.D.N.Y. 1998), *rev'd*, 266 B.R. 282 (E.D.N.Y. 2001) 7
In re Detrano, 266 B.R. 282 (E.D.N.Y. 2001) 7
In re Fischer, 116 F.3d 388 (9th Cir. 1997) 3, 8
In re Francis, 226 B.R. 385 (6th Cir. B.A.P. 1998) 7
In re Fultz, 232 B.R. 709 (Bankr. N.D. Ill. 1999) 7
In re Guerrerio, 143 B.R. 605 (Bankr. S.D.N.Y. 1992) 7
In re Kelley, 259 F. Supp. 297 (N.D. Cal. 1965), *aff'd*, 372 F.2d 94 (9th Cir. 1967) 7
In re Kovacs, 42 B.R. 1 (Bankr. D. Mass. 1982) 7
In re Marceca, 129 B.R. 371 (Bankr. S.D.N.Y. 1991) 7
In re Morris, 230 B.R. 352 (Bankr. N.D. Ill.), *aff'd*, 240 B.R. 553 (N.D. Ill. 1999), *aff'd*, 223 F.3d 548 (7th Cir. 2000) 7
In re Pavelka, 79 B.R. 228 (Bankr. E.D. Pa. 1987) 7
In re Peters, 90 B.R. 588 (Bankr. N.D.N.Y. 1988) 7
In re Richardson, 221 B.R. 956 (D. Wyo. 1998) 7

TABLE OF AUTHORITIES—Continued

Page

In re Rieder, 178 B.R. 373 (Bankr. S.D.N.Y. 1995), *aff'd*, 194 B.R. 734 (S.D.N.Y. 1996), *aff'd*, 116 F.3d 465 (2d Cir. 1997) 7
In re Rush, 33 B.R. 97 (Bankr. D. Me. 1983) 7
In re Shervin, 112 B.R. 724 (Bankr. E.D. Pa. 1990) 7
In re Turner, 179 B.R. 273 (Bankr. D. Colo. 1995) 7
In re Warner, --- F.3d ---, 2002 WL 369926 (4th Cir. 2002) .... *passim*
In re West, 22 F.3d 775 (7th Cir. 1994) 3, 14
In re Williams, No. 93 CV 74258, 1994 WL 930884 (E.D. Mich. May 31, 1994) 7
Maryland Casualty Co. v. Cushing, 171 F.2d 257 (7th Cir. 1948) 3
United States v. Spicer, 57 F.3d 1152 (D.C. Cir. 1995) 3, 5, 9, 10

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, § 8, cl. 4 14
11 U.S.C. § 523(a) .... *passim*
11 U.S.C. § 727 8
28 U.S.C. § 158(a)(1) 4
28 U.S.C. § 1254(1) 2

ARTICLES

David Zelikoff, *Fraud By Any Other Name Is Still Fraud: Settling A Potential Fraud Claim Under The Bankruptcy Code*, 64 Geo. Wash. L. Rev. 866 (1996) 10

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PETITION FOR A WRIT OF CERTIORARI

Petitioners A. Elliott Archer and Carol Archer respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS AND JUDGMENT BELOW

The opinion of the Court of Appeals, --- F.3d ---, 2002 WL 369926 (4th Cir. 2002), (Pet. App. 1a-16a) is not yet reported. The opinions of the district court (Pet. App. 17a-25a), and of the bankruptcy court (Pet. App. 29a-36a) are not reported.

JURISDICTION

The opinion of the Court of Appeals was issued on March 8, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 523(a)(2)(A) of Title 11, United States Code (the "Bankruptcy Code") provides: "A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud . . . ." 11 U.S.C. § 523(a)(2)(A). Section 523(a)(6) of the Bankruptcy Code further excepts from the discharge debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The complete text of Section 523(a) of the Bankruptcy Code is set forth at Pet. App. 43a-48a.

STATEMENT OF THE CASE

Section 523(a) of the Bankruptcy Code provides that certain categories of debt, including debt for money obtained by means of fraud, are not dischargeable in bankruptcy. This case presents a question that has divided the courts of appeals: whether an otherwise nondischargeable debt becomes dischargeable if the parties enter into a settlement agreement resolving the amount due, in which a release of the underlying claim is given in exchange for a promise to pay the agreed debt.

In this case, a divided panel of the Fourth Circuit ruled that a settlement agreement effects a "novation," so that the debt due under the settlement agreement is no longer considered a debt for money obtained by means of fraud. Rather, the court concluded, the debt is an ordinary contract debt, fully dischargeable in bankruptcy. (*See* Pet. App. 7a-

10a.) In so ruling, the Fourth Circuit followed the reasoning of the Seventh and Ninth Circuits. *See In re Fischer*, 116 F.3d 388 (9th Cir. 1997); *In re West*, 22 F.3d 775 (7th Cir. 1994); *Gonder v. Kelley*, 372 F.2d 94 (9th Cir. 1967) (per curiam); *Maryland Cas. Co. v. Cushing*, 171 F.2d 257 (7th Cir. 1948).

As the Fourth Circuit acknowledged, however, the D.C. Circuit and the Eleventh Circuit have reached the opposite conclusion, holding that the congressional policy of excepting certain debts from the discharge requires bankruptcy courts to inquire into the underlying source of the debt at issue to determine whether it is dischargeable. *See United States v. Spicer*, 57 F.3d 1152 (D.C. Cir. 1995); *Greenberg v. Schools*, 711 F.2d 152 (11th Cir. 1983). This Court should review the decision below to resolve this important and recurring issue of federal bankruptcy law that has divided the courts of appeals.

1. A corporation formed by Petitioners A. Elliott and Carol Archer bought the assets of Warner Manufacturing, Inc., for $685,000 from its principals, Leonard L. Warner and Respondent Arlene Warner. The sale closed on May 22, 1992. Despite representations made by the Warners that the underlying business was a very profitable one, upon taking possession of the assets the Archers discovered that the financial statements provided to them by the Warners, along with other representations made by the Warners in connection with the sale, were materially false, and that the business was in fact losing substantial sums of money. The Archers accordingly brought suit against the Warners and Warner Manufacturing in state court in North Carolina asserting various claims, including common law fraud.

After much discovery, the parties (on the eve of trial) entered into a settlement agreement under which the Archers would receive $300,000, consisting of a $200,000 cash payment and a secured promissory note for $100,000 payable in two installments over a year. In the settlement agreement,

the Archers granted the Warners a standard release of any and all claims the Archers may have had against the Warners. The Warners defaulted on the first payment under the promissory note, due on November 11, 1995. The Archers brought suit in state court in North Carolina to recover on account of the debt due to them, arising from the underlying fraud allegations, reflected in the promissory note.

2. While the state court action was pending, Leonard and Arlene Warner filed for relief under chapter 13 of the Bankruptcy Code. Their case was subsequently converted to chapter 7. The Archers brought an adversary proceeding in the bankruptcy case against the Warners, seeking a declaratory judgment that the debt was nondischargeable on the ground, *inter alia*, that it was for money owed on account of fraud. 11 U.S.C. § 523(a)(2).[1] Leonard Warner did not contest the issue of dischargeability in bankruptcy court, which entered a consent judgment against him. (Pet. App. 39a-41a.) Arlene Warner did contest dischargeability, and the bankruptcy court held a trial on the question whether the debt she owed to the Archers would be discharged.

After trial, the bankruptcy court concluded, following decisions of the Seventh and Ninth Circuits, that the settlement agreement effected a "novation," such that the debt due by Arlene Warner to the Archers was no longer a debt due on account of fraud, but instead simply a debt due on a contract. (Pet. App. 33a-35a.)[2] The district court

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[1] The Archers subsequently sought to amend their complaint to allege that the settlement agreement was procured by means of fraud. The bankruptcy court denied the motion for leave to amend the complaint. In the district court and the court of appeals, the Archers contended that the bankruptcy court abused its discretion in denying such leave. The Archers do not press that issue before this Court.

[2] Because a consent judgment had been entered against Leonard Warner, the bankruptcy court's final disposition of the claims against Arlene Warner represented a final judgment, (Pet. App. 39a), appealable to the district court under 28 U.S.C. § 158(a)(1).

affirmed, agreeing with the bankruptcy court that because the underlying fraud claim had been settled and a general release given, further inquiry into the nature of the underlying debt was prohibitted. The remaining debt was, as a matter of law, simply a claim on the note, and not a debt for money obtained by means of fraud. (Pet. App. 20a-25a.)

3. A divided panel of the Court of Appeals affirmed. The panel majority expressly acknowledged that "there is a split among the circuits concerning this issue," but – like the bankruptcy and district courts – it adopted the "novation theory" embraced by the Seventh and Ninth Circuits. The court explained that its approach would encourage settlement: "Under this theory, parties willing to settle disputes over fraud, misrepresentation, or like tort claims may do so by way of settlement through contract, and such contractual claims are then dischargeable in bankruptcy. Otherwise the incentive to settle is gone." (Pet. App. 8a.)

Judge Traxler dissented, urging that the approach taken by the D.C. and Eleventh Circuits better serves the underlying congressional judgment that certain debts should not be discharged in bankruptcy. He wrote that "a fraudulent debtor may not escape nondischargeability, imposed as a matter of public policy by Congress . . . merely by altering the *form* of his debt through a settlement agreement." (Pet. App. 12a (quoting *Spicer*, 57 F.3d at 1156) (omission and emphasis in original).) "[I]f, as the Supreme Court has declared, 'the mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the true nature of the debt' . . . then I see no reason why the mere fact that a conscientious creditor has previously reduced his claim to settlement should bar such an inquiry." (Pet. App. 15a (quoting *Brown v. Felsen*, 442 U.S. 127, 138 (1979)).)

REASONS FOR GRANTING THE WRIT

The Court should grant the petition to resolve a square, acknowledged, and mature split among the circuits on an important and recurring question of federal law. Section 523(a) of the Bankruptcy Code reflects the balance Congress has struck between the interest in providing debtors with a "fresh start," and the rights of certain classes of creditors to continue to collect their debts notwithstanding the debtor's bankruptcy. The question presented in this case is whether a debt that would otherwise be nondischargeable becomes dischargeable if the parties enter into a settlement agreement resolving the amount due on account of the fraud. The court of appeals below, joining the Seventh and Ninth Circuits, held that a settlement on an otherwise nondischargeable debt is a "novation" that renders the debt dischargeable – like an ordinary commercial debt. The D.C. and Eleventh Circuits have reached the opposite conclusion, holding that a settlement should be treated no differently from a judgment.

The decision below, prohibitting courts from inquiring into the underlying nature of a settled debt, is incorrect. Just as this Court's decision in *Brown v. Felsen*, 442 U.S. 127 (1979), requires a bankruptcy court to look behind a judgment to determine if the underlying debt arose on account of fraud, so too should a bankruptcy court look behind a settlement agreement to determine whether the underlying debt is properly dischargeable under the Bankruptcy Code. As Judge Traxler explained in dissent below, referring to this Court's decisions in *Brown*; *Cohen v. de la Cruz*, 523 U.S. 213 (1998); and *Grogan v. Garner*, 498 U.S. 279 (1991): "the message delivered by a unanimous Supreme Court on three separate occasions has been clear. In deciding cases dealing with the fraud exceptions to dischargeability, courts should effectuate congressional policy objectives by conducting the fullest possible inquiry into the nature of the debt and limiting relief to the honest but unfortunate debtor." (Pet. App. 15a.)

I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE QUESTION WHETHER A SETTLEMENT AGREEMENT EFFECTS A "NOVATION" THAT CONVERTS AN OTHERWISE NONDISCHARGE-ABLE DEBT INTO A DISCHARGEABLE ONE.

Both the majority and dissenting opinions of the Court of Appeals observed that the decision below creates a 3-2 circuit split on the question presented. As Judge Traxler observed in dissent, there are "two competing views" on the question presented (Pet. App. 11a), each of which has been fully developed in thoughtful opinions of the courts of appeals – not to mention the numerous opinions of the bankruptcy and district courts on this issue.[3]

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[3] Following the D.C. and Eleventh Circuit approach: *In re Francis*, 226 B.R. 385, 391 (6th Cir. B.A.P. 1998); *In re Detrano*, 266 B.R. 282 (E.D.N.Y. 2001), *reversing* 222 B.R. 685 (Bankr. E.D.N.Y. 1998), *In re Richardson*, 221 B.R. 956 (D. Wyo. 1998); *In re Turner*, 179 B.R. 273 (Bankr. D. Colo. 1995); *In re Williams*, No. 93 CV 74258, 1994 WL 930884 (E.D. Mich. May 31, 1994); *In re Guerrerio*, 143 B.R. 605, 611 (Bankr. S.D.N.Y. 1992); *In re Marceca*, 129 B.R. 371 (Bankr. S.D.N.Y. 1991); *In re Carnahan*, 115 B.R. 697 (Bankr. D. Colo. 1990); *In re Bobofchak*, 101 B.R. 465 (Bankr. E.D. Va. 1989); *In re Peters*, 90 B.R. 588 (Bankr. N.D.N.Y. 1988); *In re Pavelka*, 79 B.R. 228 (Bankr. E.D. Pa. 1987); *In re Kovacs*, 42 B.R. 1 (Bankr. D. Mass. 1982); *In re Rush*, 33 B.R. 97 (Bankr. D. Me. 1983).

Following the Fourth, Seventh, and Ninth Circuit approach: *In re Kelley*, 259 F. Supp. 297 (N.D. Cal. 1965), *aff'd*, 372 F.2d 94 (9th Cir. 1967); *In re Fultz*, 232 B.R. 709 (Bankr. N.D. Ill. 1999); *In re Morris*, 230 B.R. 352 (Bankr. N.D. Ill. 1999); *In re Detrano*, 222 B.R. 685 (Bankr. E.D.N.Y. 1998), *rev'd*, 266 B.R. 282 (E.D.N.Y. 2001); *In re Rieder*, 178 B.R. 373 (Bankr. S.D.N.Y. 1995) (dicta), *aff'd*, 194 B.R. 734 (S.D.N.Y. 1996), *aff'd*, 116 F.3d 465 (2d Cir. 1997); *In re Anderson*, 64 B.R. 331 (Bankr. N.D. Ill. 1986).

See also In re Shervin, 112 B.R. 724, 735 n.8 (Bankr. E.D. Pa. 1990) (noting dispute and collecting cases).

Individual debtors in chapter 7 bankruptcy cases typically will receive, at the end of their bankruptcy proceedings, a discharge of debts owed as of the filing of their bankruptcy petitions. 11 U.S.C. § 727. The Bankruptcy Code, however, "has long prohibited debtors from discharging liabilities incurred on account of their fraud, embodying the basic policy of the Code to afford relief only to an 'honest but unfortunate debtor.'" *Cohen*, 523 U.S. at 217 (quoting *Grogan*, 498 U.S. at 287). Most other debts, such as debts for money borrowed to purchase goods or obtain services, are discharged in bankruptcy.

The question presented here is whether, under Section 523(a), a settlement agreement resolving an otherwise nondischargeable claim (such as a claim for money obtained by means of fraud), containing a standard general release, should be read to effect a "novation," converting the underlying (nondischargeable) debt, such as one for fraud, into a "new" (and dischargeable) ordinary commercial debt. Even before the decision below, the Seventh and Ninth Circuits had answered this question in the affirmative. Those courts had held that when a settlement is reached with respect to an otherwise nondischargeable debt, in which the plaintiff grants the defendant a general release in exchange for a promise to pay the agreed debt, such agreement creates a new debt that is no longer traceable to its underlying source, such as fraud. Rather, the settlement agreement represents a new and separate contract. As the Ninth Circuit explained the point, when a promissory note "by express agreement is given and received, as a discharge of the original obligation or tort action, then the execution of the note extinguishes the tort action and it would be error for the court to look behind the note." *Fischer*, 116 F.3d at 390 (citation omitted). The panel majority below adopted this line of reasoning:

> We agree with the district court and the bankruptcy court that the better reasoned decisions are those of the Seventh and Ninth Circuits, rather than those of

> the District of Columbia and Eleventh Circuits. So we follow *West*, *Md. Casualty*, and *Fischer*. We are of the opinion that Congress did not intend that 11 U.S.C. § 523(a) be construed, as a reversal here would require, so as to discourage the settlement of claims because they might be subject to freedom from discharge under § 523(a).

(Pet. App. 8a.)

The D.C. and Eleventh Circuits have reached the opposite conclusion, holding that as a matter of federal bankruptcy law, a court is required to look behind the note to determine whether the underlying debt that was settled is a nondischargeable debt under Section 523(a) of the Bankruptcy Code. Those courts have held that a debt that "originates from the debtor's fraud should not be discharged simply because the debtor entered into a settlement agreement." *Greenberg*, 711 F.2d at 156; *Spicer*, 57 F.3d at 1155. As the D.C. Circuit explained in *Spicer*, "[a] debtor's 'fresh start' is not absolute." 57 F.3d at 1156 (citation omitted). "Congress has unmistakably mandated in Section 523(a)(2)(A) that [debtors] may not get a fresh start at the expense of defrauded third parties." *Id.* (citations omitted).

Indeed, even before the Fourth Circuit issued the opinion below, the D.C. Circuit had already observed in *Spicer* that the Seventh Circuit's opinions in *West* and *Maryland Casualty* adopting the "novation" theory "cannot be reconciled," *id.*, with the Eleventh Circuit's *Greenberg* decision, which the D.C. Circuit itself followed.

> Following *Greenberg v. Schools*, we look beyond the form of the settlement agreement to the substance of the underlying obligation, and conclude that Spicer's debt to the government did indeed 'originate from' and 'derive from' his fraudulent conduct. Although the subsequent settlement agreement alters the legal form of that

> obligation, it does not transmogrify its essential nature so as to immunize it from the command of § 523(a)(2)(A) that debt for money or property obtained by fraud is not dischargeable in bankruptcy.

Id. at 1157; *see also* David Zelikoff, *Fraud By Any Other Name Is Still Fraud: Settling A Potential Fraud Claim Under The Bankruptcy Code*, 64 Geo. Wash. L. Rev. 866, 874 (1996) ("The fraudulent debtor cannot escape liability by using the Bankruptcy Code to his advantage, because it is the substance that underlies the creditor's claim, not the current form of the debtor's debt that will determine applicability of the fraud exception.").

The merits of the competing positions have been amply developed in the various court of appeals decisions, as well as in the many decisions of the bankruptcy and district courts on this point. This Court should grant certiorari to resolve the circuit split.

II. THE QUESTION PRESENTED IS AN IMPORTANT ONE THAT WARRANTS THIS COURT'S REVIEW.

The decision below is incorrect. If allowed to stand, it would have potentially wide ranging consequences throughout bankruptcy law, and threatens to open a gaping hole in this Court's repeated admonition that the discharge is available only to the "honest but unfortunate" debtor, and that bankruptcy courts must make full inquiry into an underlying debt to determine whether it is dischargeable.

First, the decision cannot be reconciled with this Court's holding in *Brown*, 442 U.S. at 127, that when a matter is litigated to a judgment, the bankruptcy court should look behind the pleadings to determine whether the underlying debt is properly dischargeable under the Bankruptcy Code. The specific holding of *Brown* is that the doctrine of *res judicata* does not prevent the bankruptcy court from looking

beyond the face of the underlying judgment itself. Rather, it would be the role of the bankruptcy court to examine the underlying nature of the claim and "make an accurate determination whether [the debtor] in fact committed . . . fraud." *Id.* at 138. "They are the type of question Congress intended that the bankruptcy court would resolve." *Id.*

The decisions of the Fourth, Seventh, and Eleventh Circuits clash sharply with this principle announced in *Brown* that Congress intended bankruptcy courts to "make an accurate determination whether [the debtor] in fact committed . . . fraud . . . . " *Id.* While these courts have suggested that a settlement agreement effects a "novation," such that the debt being enforced is no longer based on the underlying claim of fraud, but rather the "new" claim on a contract, it is difficult to see why an action to enforce a settlement agreement should be any "newer" than an action to enforce a judgment. By the same token, bankruptcy law should presumably treat a general release, in a matter that is settled, just as it treats the *res judicata* effect of a judgment entered by a court. The *Brown* decision holds that notwithstanding the doctrine of *res judicata*, a plaintiff who has won a judgment may argue in bankruptcy court that the underlying debt was for money owed on account of fraud, even if that fact is not revealed in the underlying pleadings. *Id.* at 134-39. The same should be true where the underlying lawsuit is settled and a release is given. In both cases, the principles that undergird Section 523(a) suggest that a bankruptcy court should make its own inquiry into whether the underlying debt is or is not dischargeable under the Bankruptcy Code. In any event, there is no basis for treating a settlement differently from a judgment in this regard.

Second, contrary to the statement of the court of appeals below, the rule that now controls in the Fourth, Seventh, and Ninth Circuits stands as an obstacle to settlement of any fraud claim whenever the plaintiff perceives any risk that the defendant may subsequently seek bankruptcy protection. Any well-advised plaintiff to a fraud action would appreciate

that if the matter were litigated to a judgment, that judgment would be exempt from discharge in bankruptcy if the underlying debt was for money owed on account of fraud.

The court of appeals suggested that the rule it adopted was necessary to encourage settlement. "[P]arties willing to settle disputes over fraud, misrepresentation, or like tort claims may do so by way of settlement through contract, and such contractual claims are then dischargeable in bankruptcy. Otherwise, the incentive to settle is gone." (Pet. App. 8a.) To be sure, the court of appeals' rule does make settlement more attractive to the *defendant* in a fraud action, who is now able to convert an otherwise nondischargeable debt into a dischargeable one. But by the same token, it makes settlement that much *less* attractive to the *plaintiff*, who by settling gives up the right to have a claim that would otherwise survive the debtor's bankruptcy. Indeed, because the plaintiff will never have the same quality and quantity of information regarding the defendant's financial position and intention to file for bankruptcy as will the defendant, the net effect of this rule is likely to chill settlement even in cases in which the defendant did not, in fact, intend to seek bankruptcy protection. Moreover, insofar as the rule does encourage settlements, it will encourage settlements in which a debtor, before filing for bankruptcy, secures a release of a fraud claim from an unsuspecting creditor, in exchange for what is, in effect, an empty promise to pay the debt.

Third, the decisions of the Fourth, Seventh, and Ninth Circuits threaten to open a gaping hole in a fundamental principle of bankruptcy law, often repeated in decisions of this Court, that the discharge in bankruptcy is intended to be limited to honest but unfortunate debtors. In *Grogan*, for example, this Court held that nondischargeability need be proven by the creditor by the preponderance of the evidence standard. The Court observed that "it is unlikely that Congress, in fashioning the standard of proof that governs the applicability of these provisions, would have favored an interest in giving the perpetrators of fraud a fresh start over

an interest in protecting the victims of fraud." 498 U.S. at 287. In *Field v. Mans*, 516 U.S. 59 (1995), a case establishing the "justifiable reliance" standard for determining whether a debt is for money obtained by means of fraud, the Court similarly noted that the exceptions to the discharge to debts obtained by fraud are not congressional "innovations," but date back to Section 17(a) of the Bankruptcy Act of 1898. *Id.* at 65-66. Finally, in *Cohen*, which holds that treble damages owed on account of fraud are nondischargeable, the Court further emphasized "the historical pedigree of the fraud exception, and the general policy underlying the exceptions to the discharge." 523 U.S. at 223. Moreover, insofar as the rule established by the Fourth, Seventh, and Ninth Circuits, as it is intended, encourages defendants approaching bankruptcy to enter into settlement agreements – the effect of which would be to render dischargeable otherwise nondischargeable debt – it would actively undermine these policy objectives that Congress sought to achieve in establishing exceptions to the discharge, and that this Court has regularly noted.

Fourth, there is no principled basis to limit the court of appeals' rule to debt obtained by fraud. Section 523(a) of the Bankruptcy Code lists 18 separate exceptions to the discharge, each reflecting a congressional judgment that creditors owed those types of debt should retain their ability to seek repayment as against a debtor notwithstanding the discharge. These include debts due to a former spouse or child for alimony, maintenance, or support, 11 U.S.C. § 523(a)(5); for death or personal injury caused by drunken driving, 11 U.S.C. § 523(a)(9); for certain state or federal income taxes due, 11 U.S.C. § 523(a)(1); and for money due under educational loans, 11 U.S.C. § 523(a)(8). Because each of these types of debt may be subject to bona fide dispute, parties will commonly enter into settlement agreements resolving such disputes, liquidating the debts, and granting general releases.

Indeed, the debt at issue in this case arises not only out of Respondent's alleged fraud, but also seeks "emotional distress/personal-injury-type damages" asserted "in a case involving prosecution of a legal suit or action based upon tort or tort-type rights," (Pet. App. 9a-10a), and may be excepted from the discharge under Section 523(a)(6) (excepting from the discharge debt for "willful and malicious injury by the debtor to another entity or to the property of another entity"). The Seventh Circuit's decision in *West*, moreover, involved a settlement regarding debt for money that was embezzled, and thus – but for the settlement agreement in which the embezzler agreed to repay the amounts stolen – nondischargeable under Section 523(a)(4). *In re West*, 22 F.3d 775, 777 (7th Cir. 1994).

The reasoning of the Fourth, Seventh, and Ninth Circuits, however, requires that such a settlement agreement – whether it arises out of a debt for alimony and support, money obtained by fraud, embezzlement, or income taxes due – be deemed a "novation" that converts the underlying debt, whatever its original source, into an ordinary contract debt. "[S]uch contractual claims are then dischargeable in bankruptcy." (Pet. App. 8a.) "This conclusion can result only from blind adherence to strict legal principles. Thus, while it is true that a 'new' legal obligation has arisen, the fact is inescapable that its origin lay in the old one; and to ignore the obvious 'instead of subserving the fundamental purposes of the statute . . . rather tends to bring about unfortunate if not irrational results.'" *Gonder v. Kelley*, 372 F.2d 94, 95 (9th Cir. 1967) (Koelsch, J., dissenting) (quoting *McIntyre v. Kavanaugh*, 242 U.S. 138, 141 (1916)).

Because the decision below has far-reaching consequences, and in light of the constitutional mandate that bankruptcy law be "uniform," U.S. Const. art. I, §8, cl. 3, this Court should grant certiorari to resolve the square, and mature conflict among the courts of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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