Section 106's Waiver of Sovereign Immunity in the Bankruptcy Code: Does It Extend to Damages for Emotional Distress?

"It is arguable that such a narrow temporal approach is not appropriate. There is little reason to doubt that Congress could give to another governmental actor some degree of flexibility to interpret types of relief subject to Congressional waivers of immunity and to change those interpretations over time."[1]

I. INTRODUCTION

The United States Constitution specifically delegates to Congress the authority to establish "uniform [l]aws on the subject of [b]ankruptcies."[2] Congress has duly exercised this power, enacting bankruptcy legislation in 1800, 1841, and 1867.[3] Bankruptcy arose as a necessary tool in a capitalist economy to protect creditors and encourage the free investment of capital, especially as America moved away from an agrarian economy.[4] As time progressed, however, the system has increasingly become concerned with providing distressed debtors the opportunity for a fresh start.[5]

To further these goals, among others, Congress enacted the Bankruptcy Reform Act of 1994, which edited multiple provisions of the 11 U.S.C. (Bankruptcy Code), including § 106.[6] Section 106 now provides an express waiver of sovereign immunity and allows for "money recovery" against the federal government.[7] The question that remains unanswered, nearly twenty-six years after the initial amendment, is whether allowing for money recovery permits a debtor to recover for emotional distress damages against the United States.[8]

1. United States v. Rivera Torres (*In re* Rivera Torres), 432 F.3d 20, 26 (1st Cir. 2005).

2. *See* U.S. CONST. art. I, § 8, cl. 4 (delegating bankruptcy authority to Congress).

3. *See* David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 497 (1998) (noting extensive history of Congress amending bankruptcy laws). During the nineteenth century there were extensive amendments and "colorful" debates surrounding bankruptcy, involving proponents like Daniel Webster and critics including Thomas Jefferson and John Calhoun. *Id.* at 499.

4. *See* Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT'L & COMP. L. REV. 1, 8 (2005) (exploring history of bankruptcy in early America).

5. *See* Todd J. Zywicki, *Bankruptcy*, LIBR. ECON. & LIBERTY, https://www.econlib.org/library/Enc/Bankruptcy.html [https://perma.cc/V2MB-AE2Q] (recognizing bankruptcy provides debtors with fresh start).

6. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113, 108 Stat. 4106, 4117-18 (codified as amended at 11 U.S.C. § 106 (2018)) (amending United States' sovereign immunity).

7. *See* 11 U.S.C. § 106(a) (abrogating government's sovereign immunity).

8. *See* Hunsaker v. United States, 902 F.3d 963, 969 (9th Cir. 2018) (noting split with First Circuit). The court disagreed with the First Circuit's temporal approach to the Bankruptcy Code, holding that the sovereign

Absent legislative consent, sovereign immunity prevents lawsuits against a governmental body.[9] Even if the government does consent, the suit is only authorized to the extent the legislature expressly consented to suit.[10] Further, the scope of sovereign immunity is generally construed narrowly.[11]

The United States Court of Appeals for the First Circuit first considered the issue of whether the sovereign immunity waiver covers damages for emotional distress suffered by a party in *In re Rivera Torres*.[12] Although the bankruptcy court and the Bankruptcy Appellate Panel (BAP) both held that the waiver of sovereign immunity in § 106 also waives immunity for emotional distress claims, the First Circuit held that the waiver was more limited.[13] The First Circuit utilized what it called a temporal approach in determining the breadth of § 106's sovereign immunity waiver, arguing that the Supreme Court has endorsed such a construction.[14]

This decision was unchallenged for thirteen years before the Ninth Circuit readdressed the same issue.[15] In *Hunsaker v. United States*, with similar underlying facts, the Internal Revenue Service (IRS) was alleged to have willfully violated the Bankruptcy Code's automatic stay provision, and as a result, the debtor sought damages for emotional distress caused by the collection notices.[16] The Ninth Circuit specifically held that the temporal approach the First Circuit utilized was inappropriate given the lack of ambiguity in the sovereign immunity waiver.[17]

immunity waiver was unrestricted and clear on its face. *See id.* at 969-70; *see also* United States v. Rivera Torres (*In re* Rivera Torres), 432 F.3d 20, 26 (1st Cir. 2005) (adopting temporal approach to sovereign immunity).

9. *See* Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 456 (2005) (summarizing sovereign immunity's essential elements).

10. *See id.* (explaining how scope of waiver based on extent legislature expressly waived consent).

11. *See* Block v. North Dakota *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273, 287 (1983) (clarifying waiver construction). On the other hand, any statute of limitations should not be construed narrowly, but rather should be treated as a strict condition on a sovereign immunity waiver. *Id.*

12. *See* 432 F.3d at 23 (noting case one of first impression). The court confronted the question of whether a government agency can be found liable for emotional distress damages resulting from an intentional violation of the Bankruptcy Code's automatic stay provision. *Id.*

13. *See id.* at 22 (noting lower courts took different approach). The First Circuit noted that a temporal approach might not always be appropriate, but held that Congress endorsed the approach by saying that no new rights were intended under the Bankruptcy Code through the waiver of immunity. *Id.* at 26.

14. *See* United States v. Rivera Torres (*In re* Rivera Torres), 432 F.3d 20, 30 (1st Cir. 2005) (highlighting Supreme Court utilized legislative history in construing sovereign immunity waivers). The First Circuit noted that the Supreme Court has utilized two different approaches when determining the breadth of sovereign immunity waivers, but it determined that the most recent line of cases utilized legislative history. *See id.* at 29-30.

15. *See* Hunsaker v. United States, 902 F.3d 963, 970 (9th Cir. 2018) (rejecting First Circuit's temporal approach).

16. *See id.* at 965. The bankruptcy court awarded emotional distress damages, rejecting the government's argument that sovereign immunity barred the suit. *Id.* Nevertheless, the district court later reversed the bankruptcy court's decision, relying in particular on the ambiguity of "actual damages" and the surrounding context as used in § 362(k). *Id.* at 965-66.

17. *See id.* at 970 (rejecting temporal approach). The Ninth Circuit rejected this approach because the waiver's text was unambiguous, disagreeing with the First Circuit's reading of § 106(a)(5). *Id.* The Ninth Circuit noted that § 362(k) predated the operative text in § 106(a)(5). *Id.*

Although the circuit split deals with the waiver of sovereign immunity, it implicates how circuit courts read and understand the Bankruptcy Code.[18] Recently, the First Circuit expressly affirmed the temporal approach in *IRS v. Murphy*.[19] Adopting a uniform interpretive method will help avoid further circuit splits and will assist in guaranteeing equal enforcement of federal law.[20]

This Note begins by examining the history of bankruptcy law, the purpose behind it, and the forces that shaped the law into where it is today.[21] Then, this Note examines the interpretative frameworks utilized by the First and Ninth Circuits in determining whether the government waived sovereign immunity, as well as the breadth of that waiver.[22] The final Part of this Note argues that the "temporal approach" the First Circuit uses is unnecessary considering the unambiguity of the waiver in § 106, and therefore, the Bankruptcy Code allows for recovery of emotional distress damages.[23]

II. HISTORY

A. Bankruptcy's Historically Punitive Treatment of Debtors

1. The English Common Law Treatment of Bankrupt Debtors

Historically, the primary goal of bankruptcy legislation was not to protect the debtors' interests, but rather to provide a process for the creditors' benefit.[24] Indeed, bankruptcy primarily emerged as a useful tool in a capitalist society for encouraging the distribution of wealth and protecting creditors who made risky

18. *See id.* (establishing circuit split); *see also* Bill Rochelle, *Abundant Splits and Other Significant Bankruptcy Decisions*, AM. BANKR. INST. 20-22 (Oct. 25, 2016), http://inns.innsofcourt.org/media/144987/outline%20houston%202016%20materials.pdf [https://perma.cc/LT8J-K466] (noting multiple circuit splits on various Bankruptcy Code issues). The Bankruptcy Code produces an astounding number of circuit splits, in part because the circuits continue to disagree on the proper method for interpreting numerous statutory provisions. *See* Daniel A. Austin, *State Laws, Court Splits, Local Practice Make Consumer Bankruptcy Anything but "Uniform,"* AM. BANKR. INST. J., Dec./Jan. 2011, at 1, 1 (noting utilization of different interpretive tools results in splits). Additionally, numerous circuit splits occur when courts utilize state law when interpreting the Bankruptcy Code. *Id.*

19. 892 F.3d 29, 41 (1st Cir. 2018).

20. *See* Karen M. Gebbia, *Certiorari and the Bankruptcy Code: The Statutory Interpretation Cases*, 90 AM. BANKR. L.J. 503, 503, 510 (2016) (noting Supreme Court considers circuit splits when granting certiorari for Bankruptcy Code statutory interpretation); *see also* Layne & Bowler Corp. v. W. Well Works, Inc., 261 U.S. 387, 388 (1923) (stating Supreme Court renders decisions to create uniformity in federal law).

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part IV.

24. *See* DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 27-28 (2d ed. 1990) (documenting bankruptcy's initial goal of protecting creditors). Indeed, creditors often treated English debtors with contempt, as failing to pay debts could lead to imprisonment. *See* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 327, 328 n.15 (1991) (noting debtors imprisoned in medieval England). Imprisonment was common because gathering debtors and creditors together presented many difficulties during this time period. *Id.* at 328.

loans.[25] Prior to England's first bankruptcy law, Parliament's primary concern was protecting creditors, because debtors often attempted to evade collection efforts by making fraudulent conveyances or by hiding themselves.[26] Accompanying these concerns, creditors were often frustrated by prebankruptcy law as well, because the early laws helped protect individual creditors, not the class as a whole.[27]

These developments led to Parliament enacting the first bankruptcy law in England in 1542.[28] Although Parliament amended the law several times over the next 150 years, its core principles and tenets remained in effect.[29] In 1705, Parliament passed the Statute of 4 Anne.[30] The statute was again made primarily with creditors' interests in mind, but the provisions indicate the first time that Parliament was also concerned with the treatment of debtors under bankruptcy law.[31] Despite the many revisions to English bankruptcy law since the Statute of 4 Anne's initial enactment, the statute was a turning point for bankruptcy and introduced all the elements of modern English bankruptcy law.[32]

2. American Adoption of English Bankruptcy Law

By the time the states ratified the United States Constitution, bankruptcies in England had become so common that the Constitution expressly granted Congress the ability to enact legislation concerning bankruptcies.[33] Congress waited

25. *See* Martin, *supra* note 4, at 3 (describing bankruptcy's usefulness in encouraging entrepreneurialism and consumer spending). One developmental theory behind the bankruptcy institution is that it protects creditors' interests in preventing a race to the courthouse. *See* Tabb, *supra* note 24, at 328-30 (documenting first English bankruptcy law's origins).

26. *See* Tabb, *supra* note 24, at 328 (explaining various problems with early collection law).

27. *See id.* (documenting development of collective-based bankruptcy laws). Even if a creditor was able to gather the debtor's property and collect money, other creditors were often left with nothing. *See id.* This led to a general sense of inequity among creditors, leading to one later reform to English bankruptcy laws—ensuring equal treatment to similarly-situated creditors. *See id.* at 329-30.

28. *Id.* at 329. Parliament passed an act at the behest and in the interest of creditors as a collective class. *See id.* This quasi-criminal act was punitive towards debtors by referring to them as "offenders" and not offering a debt discharge provision. *Id.* at 329-31. Further, the debtor was not entitled to begin a bankruptcy case; bankruptcy existed only as a legislative tool for creditors to equitably distribute the debtor's assets. *See id.* at 330. The early laws were more concerned with the creditors' well-being than with providing relief to the debtor. *See id.*

29. *See id.* at 331-33 (noting different amendments to 1542 law). The new laws were all concerned with protecting creditors' interests, as opposed to those of the offending debtor. *See id.* at 331. During this time, bankruptcy completion did not grant the debtor a debt discharge. *See id.* at 332.

30. *See* An Act to Prevent Frauds Frequently Committed by Bankrupts, 4 Ann. c. 17 (1705) (Eng.) (giving benefit of act to bankrupts). This was the first time that a debtor could have prebankruptcy debts completely forgiven. *See* Tabb, *supra* note 24, at 333. Nevertheless, the discharge still required that the debtor conform to the law by surrendering his assets and fully disclosing all his financial affairs. *See id.* at 334.

31. *See* Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 19 (1919) (theorizing motivation behind Statute of 4 Anne). Granting a discharge to honest debtors seems to accompany a similar recognition—namely that a creditor must take some responsibility for loaning to an insolvent debtor. *Id.*

32. *See id.* at 20 (recognizing purpose of later changes to bankruptcy jurisprudence).

33. U.S. CONST. art. I, § 8, cl. 4 (granting Congress authority to enact laws on bankruptcies). The Framers thought the ability to enact bankruptcy laws was necessary at the time; they were concerned that debtors might

eleven years before passing the first federal bankruptcy law, the short-lived Bankruptcy Act of 1800.[34] Congress enacted two more short-lived bankruptcy laws in the nineteenth century, one in force from 1841 to 1843 and the other in effect from 1867 to 1878.[35] In 1898, however, Congress finally enacted the first long-standing bankruptcy law in U.S. history.[36]

B. Bankruptcy Since 1898 and Debtors' Protections

1. The 1898 Bankruptcy Act

The 1898 Bankruptcy Act (1898 Act) was the first time in U.S. history that Congress took power away from creditors and let statutory directives guide the bankruptcy process.[37] The 1898 Act took away the requirement that creditors consent or that debtors pay a minor dividend, and it made discharge much easier, recognizing the overwhelming public interest in providing relief to unfortunate

fraudulently utilize differences between state laws to avoid obligations. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995) (explaining motivation behind expressly granting Congress power to legislate bankruptcy laws). The clause passed with little debate; the only vote against it came from Roger Sherman of Connecticut, who was concerned with debtors being punished by death, as was the case in England at the time. *Id.* Most members of the Constitutional Convention voted in favor of the clause, recognizing the importance of having uniform federal laws that could affect interstate commerce. *Id.*

34. *See* Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248 (describing first U.S. bankruptcy law). The law was strikingly similar to its parent law in England, and was similarly designed to primarily further creditors' interests. *See* Tabb, *supra* note 33, at 14 (noting similarities between laws). The law was primarily used as a temporary fix to the Panic of 1797 and was scheduled to sunset in five years. *See id.* In the end, however, the Act was repealed after only three years. *See id.* Bankruptcy law continued to suffer a similar fate for the next century in the United States; Congress enacted many temporary laws, which were nearly immediately repealed. *See id.* at 13.

35. *See* Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614; *see also* Bankruptcy Act of 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99. Bankruptcy statutes were short-lived in the nineteenth century and used only to cure economic downturns. *See* Tabb, *supra* note 33, at 14 (noting importance of economic downturns in spurring bankruptcy legislation).

36. *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (creating new bankruptcy law). At the time it passed, many critics saw the law as unduly friendly to debtors due to the liberal discharge provisions and the lack of mechanisms to punish fraudulent debtors. *See* Henry G. Newton, *The United States Bankruptcy Law of 1898*, 9 YALE L.J. 287, 291 (1900) (lamenting debtor's ability to discharge debts in certain circumstances). Some contemporary critics supposed that this new bankruptcy law would have a similar fate to past bankruptcy acts—repealed after just a few years of enactment. *See id.* at 296.

37. *See* Tabb, *supra* note 24, at 364 (explaining historical importance of removing creditors' consent for prerequisite to bankruptcy). This shift was the beginning of a "'modern' American pro-debtor discharge policy." *Id.* The change in the law is indicative of an ushering in of the modern era of bankruptcy discharge policy. *See id.* (explaining law's revolutionary nature). The government began to see bankruptcy as a process not primarily concerned with coercing debtors to cooperate with creditors, but rather as a fundamental issue of public policy. *See id.* (elaborating on historical importance). The government began to embrace the theory that society as a whole benefits when an "honest but unfortunate" debtor is overburdened by debt and unable to contribute to society. *See id.* (quoting Stefan A. Riesenfeld, *The Evolution of Modern Bankruptcy Law*, 31 MINN. L. REV. 401, 406 (1947)). Allowing honest debtors to discharge their debts permits debtors to resume their place as productive members of society and benefits everyone. *See id.* at 364-65.

debtors.[38] Nevertheless, the new law made life harder for debtors in some ways, namely by increasing the types of debts that could be excepted from discharge.[39]

Perhaps predictably, creditors began to push back against the 1898 Act after its implementation.[40] Congress's first amendments to bankruptcy law came in the early 1930s as it attempted to allow for more reorganizations, increasing the pool of assets available to pay creditors as opposed to simply liquidating a debtor's assets.[41] This flurry of bankruptcy legislation peaked in 1938 with the passage of the Chandler Act, which essentially reformed all substantive and procedural elements of bankruptcy law.[42] One of the most important goals of the Chandler Act was the policy decision to prefer reorganizations over strict liquidations.[43] For the next forty years, Congress amended bankruptcy law dozens of times, but only a few of these amendments were significant.[44]

38. *See id.* (documenting reduced grounds for discharge denied). Section 14b of the 1898 Act only provided two grounds for denying discharge; it essentially prevented the debtor from committing a bankruptcy crime or from acting fraudulently. *See id.* at 365-66. Some commentators believed that Congress went too far in providing for liberal discharges, and many commentators lamented the fact that bankruptcy law was increasingly concerned with protecting debtors as opposed to creditors. *See id.* at 366. Five years later, Congress amended the 1898 Act to provide additional grounds for denying discharge. *See id.* at 366-67.

39. *See id.* at 367-68 (listing categories of excepted debts). It is clear that Congress did not intend for the 1898 Act to discharge all debtors, but it still marked a turning point in the United States, as bankruptcy law became more concerned with the broader public policy implications as opposed to creditors' rights. *See id.* at 364, 368.

40. *See* Tabb, *supra* note 33, at 27 (highlighting reasons why credit industry not infatuated with 1898 Act). Unfortunately for the credit industry, it conducted most of its lobbying efforts in the late 1920s and early 1930s. *See id.* During this time, the Great Depression was beginning, causing bankruptcies to increase. *See* Thomas A. Garrett, *100 Years of Bankruptcy: Why More Americans Than Ever Are Filing*, BRIDGES, Spring 2006, at 8, 8, https://www.stlouisfed.org/~/media/files/pdfs/publications/pub_assets/pdf/br/2006/br_sp_06.pdf [https://perma.cc/H2BB-V5U8] (explaining historical trends in bankruptcy filings). Even though bankruptcy filings increased more rapidly during the 1960s, as early as the Great Depression's arrival at the end of the 1920s, bankruptcy filings were on the rise. *See id.* at 9.

41. *See* Tabb, *supra* note 33, at 27-29 (documenting tumultuous history of bankruptcy amendments during late 1920s and 1930s). Congress pushed for more reorganizations in the midst of the Great Depression. *See id.* at 28. During this time, both Congress and President Roosevelt were engaged in a legislative battle with the Supreme Court, as the Supreme Court commonly invalidated substantial new legislation. *See* William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN (May 2005), https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/ [https://perma.cc/MGS2-FFFR] (documenting history of President Roosevelt's battle with Supreme Court). Only amid threats that President Roosevelt would increase the number of justices on the Supreme Court did the Court begin to approve of more legislation passed by Congress. *See id.*

42. Chandler Act, ch. 575, 52 Stat. 840 (1938) (amending 1898 Act); *see* Tabb, *supra* note 33, at 29-30 (describing Chandler Act's goals).

43. *See* David S. Kennedy & Erno Lindner, *The Bankruptcy Amendatory Act of 1938 / The Legacy of the Honorable Walter Chandler*, 41 U. MEM. L. REV. 769, 776-79 (2011) (describing history and context of Chandler Act). The Chandler Act added three sections dealing specifically with corporate restructuring, along with a section to deal with individual restructuring. *See id.* at 777 (explaining Chandler Act's restructuring elements). Once again, the terms of the Act made clear that Congress intended to protect debtors. *See id.* at 779 (noting congressional intent). Congress enacted these sections to combat the increasing trend of low-income individuals sliding into poverty. *See id.* at 778.

44. *See* Tabb, *supra* note 33, at 30-31 (describing content of amendments during forty years after Chandler Act). Many of the amendments made during the period alleviated some of the harsher measures imposed on debtors; for example, Congress limited the amount of tax debts which were non-dischargeable. *See id.* at 31.

2. The Bankruptcy Reform Act of 1978

Eighty years after its enactment, the 1898 Act was replaced with the Bankruptcy Code.[45] Overall, commentators thought the Bankruptcy Reform Act of 1978 (1978 Act) struck a fairly even balance between creditors' and debtors' interests.[46] Despite its relative ambivalence in favoring either creditors or debtors, the 1978 Act still made important steps towards protecting debtors, such as making it more difficult for the affirmation of existing debts to be legally binding.[47] The 1978 Act overhauled the existing statutory scheme and was the first bankruptcy legislation Congress enacted without the motivation of a severe economic downturn.[48]

3. Amendments Since the 1978 Act

Congress enacted a set of amendments in 1986 designed primarily to help protect farmers during bankruptcy.[49] One of the important provisions of the 1986 amendments was the creation of Chapter 12—an entire chapter devoted to protecting the family farmer during bankruptcy.[50] Less than ten years later,

The amendments mostly affected bankruptcy administration procedures, and few of the amendments made any fundamental changes to bankruptcy law. *See generally* Act of June 25, 1948, ch. 645, 62 Stat. 818 (defining terms); Act of June 3, 1946, ch. 280, 60 Stat. 230 (providing farmers temporary relief); Act of July 28, 1939, ch. 393, 53 Stat. 1134 (allowing postponement or modification of debts for railroad corporations).

45. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-112 (2018)) (replacing prior bankruptcy law with Bankruptcy Code). The Bankruptcy Code is still in effect today, albeit with numerous amendments. *See* Tabb, *supra* note 33, at 32 (documenting historical context). The Bankruptcy Code was the first time in the nation's history that a bankruptcy law was not enacted in response to a recent economic depression. *See id.* Congress's decision to enact the Bankruptcy Code in the absence of economic turmoil shows that bankruptcy law was increasingly becoming a general issue of public policy, and not simply an emergency lever used to solve quick crises. *See id.*

46. *See* Tabb, *supra* note 33, at 36 (describing changes benefitted and harmed both creditors and debtors). The 1978 Act was a great compromise between different bills debated in both the House of Representatives and the Senate. *See id.* at 33. As such, many alterations to the law were made, and many issues ended with compromise between the two congressional chambers. *See id.* at 33-34.

47. *See id.* at 36 (discussing regulation of affirmation agreements).

48. *See id.* at 32, 34-36 (documenting differences between 1898 Act and 1978 Act); *see also* Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941, 942 (1979) (explaining history surrounding 1978 Act and providing framework for its interpretation). Like previous iterations of bankruptcy law, the 1978 Act was "surrounded by controversy and intrigue[,]" so one author documented the legislative history to assist in interpreting the statute. *See* Klee, *supra*, at 942. Indeed, the 1978 Act had an incredibly confusing and convoluted history, and the author suggests consulting nine different sources before considering congressional hearings or markup sessions. *See id.* at 957-58.

49. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 255, 100 Stat. 3088, 3105-14 (codified as amended at 11 U.S.C. §§ 1201-1231 (2018)) (amending Bankruptcy Code to benefit farmers).

50. *See* William W. Horlock, Jr., Note, *Chapter 12: Relief for the Family Farmer*, 5 BANKR. DEV. J. 229, 229-30 (1987) (explaining how Congress intended amendments to aid financially distressed family farmers). After Congress enacted the amendments, courts noted Congress intended to help family farmers stay in business. *See In re* Tart, 73 B.R. 78, 79-80 (Bankr. E.D.N.C. 1987) (noting Congress passed law with intent to aid family farmers). The court refused to construe the text broadly, holding the language itself and committee reports showed an intent to aid family farmers. *See id.* at 81.

Congress again amended the Bankruptcy Code by enacting the Bankruptcy Reform Act of 1994 (1994 Act).[51] The 1994 Act established the National Bankruptcy Review Commission and introduced substantive as well as procedural and administrative changes to the Bankruptcy Code.[52]

Congress last amended the Bankruptcy Code in 2005 when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).[53] The BAPCPA primarily addressed the growing concern among legislators and creditors that debtors were using bankruptcy as a forum to avoid paying debts they were entirely capable of paying.[54] As some scholars predicted at the time Congress enacted it, the BAPCPA seems to merely disincentivize debtors from filing relief under Chapter 13 and instead encourages more liquidations, which leaves unsecured creditors and debtors in a worse position overall.[55]

51. *See generally* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (making amendments concerning procedure and administration of bankruptcy cases). The 1994 Act was favorable to creditors in some respects, and especially favorable to special interest groups who lobbied for exceptions and made it more difficult to discharge credit card debt. *See* Karen M. Gebbia, *The Keepers of the Code: Evolution of the Bankruptcy Community*, 91 AM. BANKR. L.J. 183, 259 (2017) (documenting special interest influence on amendments); *see also* Tabb, *supra* note 33, at 37 (explaining special interest groups influence Bankruptcy Code). Despite the 1994 Act's considerable overhaul of substantive bankruptcy law, the amendment is still remembered for its special emphasis on improving bankruptcy administration. *See* Tabb, *supra* note 33, at 42 (commending 1994 Act for resolving issues under Bankruptcy Code).

52. *See* Tabb, *supra* note 33, at 42-43 (documenting 1994 Act's historical importance). Congress took aim at overruling a number of court decisions under the Bankruptcy Code. *See id.* at 42. The 1994 Act is also noteworthy for its failure to include Chapter 10, a chapter that Congress considered creating to protect small business debtors. *See id.*

53. *See generally* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (amending Bankruptcy Code to prevent consumer abuse). The most significant change the BAPCPA made to the Bankruptcy Code was the introduction of the "means test," a statutory test used to restrict certain individual debtors from being able to file Chapter 7 liquidations and confined them to Chapter 13 reorganizations. *See* Kent Durning, *BAPCPA 10 Years Later: The Effectiveness and Necessity of Bankruptcy Reforms Remain in Question*, LEXOLOGY (Feb. 5, 2016), https://www.lexology.com/library/detail.aspx?g=4304e377-0fad-47a0-976f-47f882d4364c [https://perma.cc/88EL-VQTT] (discussing method for computing debtor's "means" to repay debts, and thus determining appropriate bankruptcy chapter); *see also* William Houston Brown, *Taking Exception to a Debtor's Discharge: The 2005 Bankruptcy Amendments Make It Easier*, 79 AM. BANKR. L.J. 419, 445-50 (2005) (explaining significant, amended barriers to debtor). The BAPCPA amended more than half of the exceptions to discharge in one way or another. *See* Brown, *supra*, at 420. Additionally, the section governing the denial of discharge, § 727(a), was expanded in multiple ways; the BAPCPA expanded the time in which a denial of discharge could be issued for multiple filings, from six years to eight years, and also added two entirely new grounds for denying debtor discharge. *See id.* at 422.

54. *See* Durning, *supra* note 53 (discussing history and motivation behind BAPCPA). The legislature was particularly concerned with the growing number of bankruptcies, specifically consumer bankruptcies, being filed each year and enacted BAPCPA as a method to curb them. *See id.* More than ten years after Congress enacted the BAPCPA, bankruptcy filings have increased, much to Congress's dismay. *See id.* Rather than incentivizing debtors to not file for bankruptcy and pay off their debts, the majority of debtors are simply waiting for a longer period of time before filing for bankruptcy. *See id.*

55. *See* Brown, *supra* note 53, at 451 (predicting how BAPCPA will impact consumer bankruptcy filings). Judge Brown's theory regarding the BAPCPA's impact proved to be prophetic when compared to the data gathered more than ten years after BAPCPA was enacted. *See* Durning, *supra* note 53 (discussing data concerning bankruptcy filings since BAPCPA enacted). As Judge Brown suggested, the average amount a Chapter 13 debtor was able to pay their creditors decreased, as debtors waited longer before filing for bankruptcy. *See id.* The net

C. The Sovereign Immunity Doctrine

1. The Implicit Adoption of Sovereign Immunity in the United States

When the states ratified and adopted the Constitution, its ratification carried an assumption that the newly-formed government would be immune from suit, as was the English standard.[56] The Supreme Court first tackled the sovereign immunity issue in *Chisholm v. Georgia*.[57] Although the Court debated whether Article III, Section 2 of the Constitution allowed individual plaintiffs to bring suit against states in federal court, the Court said in dicta that the federal government is immune from suit.[58]

Later Supreme Court decisions have continued to recognize sovereign immunity and that lawsuits against either the federal or state governments are only authorized to the extent immunity has been waived.[59] Only two years after the *Chisholm* decision, Congress passed the Eleventh Amendment to supersede the Court's holding.[60] While the doctrine of federal sovereign immunity had a frenetic beginning, it is now a well-established principle of law that the federal government is immune from suit unless it consents.[61]

2. Manifesting Intent to Waive Sovereign Immunity

Sovereign immunity dictates that a governmental entity can only be sued to the extent that it consents to suit, but the extent to which consent must be manifested has remained a constant question.[62] There are two lines of cases and two

result seems to have been a higher number of encumbered debtors and less successful individual reorganizations. *See id.*

56. *See* Sisk, *supra* note 9, at 443-46 (explaining historical accounts and explanations for why United States adopted sovereign immunity). There are two generally accepted opinions concerning why the Framers adopted sovereign immunity: some believe that the sovereign immunity doctrine was well established, but others believe that there is no evidence the Framers believed sovereign immunity was so fundamental so as to rise to the level of being unalterable. *See id.* at 443-44. Although scholars dispute how fundamental the sovereign immunity doctrine was to the Framers, there seems to be a consensus that sovereign immunity was well-established in England and the Framers were well aware of the doctrine, with some even writing about the doctrine in the Federalist Papers. *See id.* at 443-45.

57. 2 U.S. (2 Dall.) 419, 425-27 (1793) (exploring extent sovereign immunity applies to individual states).

58. *See id.* at 425 (stating federal government immune from suit). The principles the Supreme Court used to derive its conclusions clearly flow from English law principles. *See id.* at 435.

59. *See* Alden v. Maine, 527 U.S. 706, 723-24 (1999) (supporting principle Framers intended to preserve states' immunity from private suits). In *Alden*, the Supreme Court stated that four Justices declaring that states were amenable to suit in *Chisholm* did not necessarily mean that the nation's citizens generally agreed. *See id.* Indeed, the quick adoption of the Eleventh Amendment supports the proposition that the nation generally did not expect states to be amenable to suit. *See id.*

60. U.S. CONST. amend. XI (restricting citizens' ability to bring suit against states in federal court).

61. *See* Sisk, *supra* note 9, at 446 (documenting sovereign immunity's permanence throughout recent history).

62. *See* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 836 (explaining why interpreting sovereign immunity waiver's scope presents difficult question). Courts take different approaches in construing the extent of a sovereign immunity waiver, which presents issues when courts interpret the same or similar waivers differently. *See* Robert A. McDonald, Note, *Does Bankruptcy*

different approaches to interpreting sovereign immunity waivers; the first is based off the logic in *United States v. Shaw*.[63] Although the *Shaw* interpretation is disfavored among many courts, some courts still advocate for its use and occasionally utilize the *Shaw* interpretation.[64] As opposed to the older approach of allowing claims against the government whenever justice is served, many courts now apply the stricter rule of sovereign immunity, where it is assumed unless it has been expressly waived.[65]

D. Sovereign Immunity in the Bankruptcy Code

1. Section 106 of the Bankruptcy Code

Section 106 of the Bankruptcy Code clearly and unequivocally waives the federal government's sovereign immunity in certain situations.[66] The remaining question, however, is to what extent has sovereign immunity been waived, especially in subsection (a)(3).[67] The problematic term in subsection (a)(3) is "money recovery," which is not defined in the Bankruptcy Code.[68] Notably, subsection (a)(3) authorizes the award of a money recovery but not an award of punitive damages.[69]

2. First Circuit: In re Rivera Torres

The first case to deal with interpreting the phrase money recovery was *In re Rivera Torres*, a First Circuit case from 2005 that considered whether a debtor in bankruptcy can recover damages from the IRS for a willful violation of the

Code Section 106 Authorize a Waiver of Sovereign Immunity for Emotional Distress Claims?, 30 W. NEW ENG. L. REV. 265, 269-71 (2007) (analyzing different court approaches to sovereign immunity waivers).

63. *See* 309 U.S. 495, 501 (1940) (holding courts should liberally apply immunity rule when sense of justice so justifies).

64. *See* John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121, 1129 (1993) (criticizing strict application of sovereign immunity doctrine). Justice Stevens believed that the sovereign immunity doctrine was judicially created, and was deserving of criticism and reform. *See id.*

65. *See* Sisk, *supra* note 9, at 464-65 (explaining Supreme Court's consistent rulings over fifteen years); *see also* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) (explaining need for express waivers of sovereign immunity, never implied). The Supreme Court's position on constructions of sovereign immunity waivers still presents difficulty to commentators. *See* Sisk, *supra* note 9, at 465 (explaining different constructions of same waiver). The contrasting decisions in *Shaw* and *Irwin* leave federal courts with little guidance. *See id.* at 464-65 (documenting conflicting guidance from Supreme Court).

66. 11 U.S.C. § 106 (2018) (abrogating federal government's sovereign immunity).

67. *See id.* § 106(a)(3) (authorizing court to order money recovery against governmental unit). The precise problem the First and Ninth Circuits faced was determining what "monetary recovery" entailed. *See* United States v. Rivera Torres (*In re* Rivera Torres), 432 F.3d 20, 30 (1st Cir. 2005) (narrowly construing term money recovery); *see also* Hunsaker v. United States, 902 F.3d 963, 967 (9th Cir. 2018) (rejecting First Circuit's interpretation of money recovery).

68. *See* 11 U.S.C. § 101 (defining commonly-used terms within Bankruptcy Code).

69. *Id.* § 106(a)(3) (preventing recuperation of punitive damages from governmental unit stemming from Bankruptcy Code violation).

automatic stay imposed by bankruptcy.[70] The district court and the BAP both held that § 106 of the Bankruptcy Code permits monetary recovery against a governmental unit for a willful violation of the automatic stay.[71] The First Circuit reviewed the history of the Bankruptcy Code, and recognized both that § 106 clearly abrogates the government's sovereign immunity and that subsection (a)(3) authorizes recovery of a money judgment.[72] The court then utilized what it termed a temporal approach, attempting to determine what types of relief would have been available under the enumerated subsections of § 106 when it was last amended in 1994.[73]

The First Circuit advanced several reasons for applying the temporal approach: the Supreme Court utilizes the approach; the approach follows the principle that Congress should be presumed to know the background law against which it legislates; the approach gives meaning to the term money judgment; and the approach avoids the presumption that a debtor has the same remedies against both the government and private parties.[74] The court then analyzed its former

70. *See In re Rivera Torres*, 432 F.3d at 31 (holding § 106 of Bankruptcy Code does not authorize recovery in specific situation).

71. *See id.* at 22 (explaining case's procedural posture).

72. *See id.* at 24 (recognizing clear sovereign immunity waiver). Although the court recognized that subsection (a)(3) authorized money recovery, the court did not believe the term even encompassed recovery of "money damages," much less money damages arising from emotional distress. *See id.* at 29.

73. *See* United States v. Rivera Torres (*In re* Rivera Torres), 432 F.3d 20, 25 (1st Cir. 2005) (explaining temporal approach of construing sovereign immunity waivers). The First Circuit utilized the temporal approach for multiple reasons, one of which was because it believed that the approach is primarily endorsed by the Supreme Court. *See id.* at 26-27 (listing six reasons for adopting temporal approach). The First Circuit also utilized the temporal approach because it did not believe the waiver in § 106 totally and expressly waived the government's sovereign immunity in bankruptcy cases, even though other courts had recognized that § 106 allows for suits as long as a source outside of § 106 entitles a plaintiff to relief. *See id.* at 25-26; Franklin Sav. Corp. v. United States (*In re* Franklin Sav. Corp.), 385 F.3d 1279, 1290 (10th Cir. 2004) (allowing for § 106 suit if cognizable claim outside of bankruptcy).

74. *See In re Rivera Torres*, 432 F.3d at 25-26 (explaining why temporal approach better than other interpretative methods); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 711 (2004) (utilizing temporal approach). Although the government argued that § 105 never authorized emotional distress damages, the court was occupied with the narrower issue of what background law Congress was presumed to know in 1994 when it waived immunity to the enumerated sections. *See In re Rivera Torres*, 432 F.3d at 26. The First Circuit relied heavily on two cases prior to the 1994 amendments to determine that Congress generally would have presumed § 105(a) did not encompass an award for monetary damages. *See id.* at 27; *see also* Bowen v. Massachusetts, 487 U.S. 879, 897 (1988) (describing lack of evidence for meaning outside of ordinary understanding of "money damages"). *See generally* McBride v. Coleman, 955 F.2d 571 (8th Cir. 1992) (refusing to grant monetary damages because no express waiver of sovereign immunity); Burd v. Walters (*In re* Walters), 868 F.2d 665 (4th Cir. 1989) (holding award for emotional distress damages improper contempt sanction). In *In re Walters*, the debtor's attorney received payments without the bankruptcy court's approval. *See* 868 F.2d at 666. Eventually, the court held the attorney in civil contempt for failing to return the unauthorized fees and ordered him to pay back the $14,000 from the debtor. *Id.* at 666-67. Additionally, the court ordered the attorney to pay his client certain money damages for lost interest, travel, time investment, and emotional distress. *See id.* at 670. The first three categories of damages were permissible, but the emotional distress damages were not authorized by the Bankruptcy Code or in a bankruptcy judge's general authority to issue civil contempt under § 105 and § 106 of the Bankruptcy Code. *See id.* The court in *McBride* considered a similar issue to *In re Walters*, albeit not in a bankruptcy context. *See McBride*, 955 F.2d at 576. The court considered whether the government, whose official was held in civil contempt, could be held liable for damages assessed to the plaintiffs absent an express sovereign immunity waiver

cases, holding that § 105 of the Bankruptcy Code did not authorize actual damages for violations of § 524 of the Bankruptcy Code.[75] The court noted that only one circuit court had considered whether § 105 authorizes a debtor to recover emotional distress damages against the IRS, answering in the negative.[76]

After determining that recovery of monetary damages against the government for emotional distress was not established by precedent, the court held that the term money recovery also does not authorize recovery against the government for emotional distress damages.[77] Relying on the legislative history and temporal approach, the First Circuit held that the Bankruptcy Code does not waive sovereign immunity concerning a governmental unit's liability for violating § 524.[78]

3. Ninth Circuit's Interpretation

The issue in *In re Rivera Torres* was not revisited by another circuit court for thirteen years, when the Ninth Circuit finally considered the same issue in *Hunsaker v. United States.*[79] Here, the court encountered a similar factual scenario, came to the opposite conclusion of *In re Rivera Torres*, and thus created a circuit split.[80] The primary issue the Ninth Circuit had with the First Circuit's holding was the First Circuit's use of the temporal approach.[81]

The Ninth Circuit advanced more reasons for construing the waiver of sovereign immunity as broadly as it did, including that subsection (a)(5) did not mandate a temporal reading and that § 362(k) predated the operative text of § 106.[82]

to transfer "money awards" in that situation. *See id.* at 576-77. The court answered that the United States was not liable because the plaintiffs' injuries did not flow from the government's action. *Id.* at 577. The court did express doubt, however, that the sanction power was appropriately utilized in the procedural history leading up to its decision. *See id.* at 576-77. Notably, the court used the terms "money awards" and "monetary sanctions" to refer to the emotional distress damages the plaintiffs allegedly suffered—terms that would later be used in the Bankruptcy Code. *See id.* at 576.

75. *See In re Rivera Torres*, 432 F.3d at 27 (explaining statutory sanction provision).

76. *See id.* (reiterating reasoning behind earlier court's opinion).

77. *See id.* at 29-31 (reasoning legislative history does not support interpreting money judgment broadly).

78. *See id.* at 31 (overruling lower courts and holding sovereign immunity not expressly waived).

79. *See* 902 F.3d 963, 971 (9th Cir. 2018) (holding § 106 of Bankruptcy Code waives sovereign immunity for emotional distress claims).

80. *See id.* at 970-71 (recognizing creation of circuit split).

81. *See id.* at 970 (rejecting temporal approach). The Ninth Circuit primarily rejected the temporal approach because it believed that the sovereign immunity waiver was unambiguous. *See id.*

82. *See id.* at 970-71 (explaining why First Circuit's reasoning unpersuasive). In 2004, however, the Ninth Circuit had already held that § 362(k) authorizes recovery of emotional distress damages. *Id.* at 970 (explaining background law of § 362(k)). Other courts had also already held that the IRS was amenable to a judgment against it under § 105. *See* Hardy v. United States (*In re* Hardy), 97 F.3d 1384, 1391 (11th Cir. 1996) (declaring 1994 Act waives sovereign immunity). In *In re Hardy*, the Eleventh Circuit determined the extent of the statutory sanction power under the Bankruptcy Code. *See id.* at 1389-90. Although the Eleventh Circuit did not use § 106 as the basis of its order, the court held that the IRS could be amenable to a judgment under § 105, which dictates the court's power. *See id.* The court remanded the case back to the district court to determine whether the IRS knew the automatic stay was invoked and whether the IRS intended the violative action. *See id.* at 1390-91. If

Further, if "awarding a money recovery" means "recovery of money unlawfully in the government's possession[,]" then the "punitive damages carve-out" is repetitive, and would render part of the Bankruptcy Code meaningless.[83] The Ninth Circuit framed its decision as relying solely on the plain meaning of § 106, declining both to adopt a temporal approach and to consider the operative text's legislative history.[84]

The court in *Hunsaker* concluded its analysis by determining that the sovereign immunity waiver was unambiguous, but the court in *In re Rivera Torres* concluded that the waiver was ambiguous and continued its analysis.[85] The First Circuit's conclusion that a narrower approach was appropriate led it to read the waiver with a temporal approach, in an attempt to understand the waiver as Congress would have understood the waiver in 1994, when it last amended § 106.[86] One First Circuit judge concurred in the judgment, but reasoned that considering legislative history was unnecessary because the waiver's text itself was sufficiently restrictive to hold, independently, that the sovereign immunity waiver did not apply to a governmental unit that willfully violates the automatic stay.[87]

the district court, on remand, answered those two questions affirmatively, then the IRS would have been liable under the court's statutory power. *See id.* at 1391.

83. *See Hunsaker*, 902 F.3d at 969 (construing statute to avoid rendering portion superfluous). The court relied heavily on both *United States v. Nordic Village, Inc.* and later legislative amendments to construe the term money recovery. *See id. See generally* United States v. Nordic Vill., Inc., 503 U.S. 30 (1992). In *Nordic Village*, the Supreme Court considered a case where the IRS had improperly received property that legally was part of the bankrupt's estate and was supposed to be equally distributed among the debtor's different creditors. *See id.* at 31. The bankruptcy trustee brought an adversary proceeding against the IRS seeking to recover the $20,000, which was given to the IRS as payment for the officer's personal tax liabilities. *See id.* Although the bankruptcy court, district court, and the Sixth Circuit all held in favor of the bankruptcy trustee, the Supreme Court determined that the waiver in the older version of the Bankruptcy Code did not expressly waive the government's immunity from a trustee's claim for monetary relief. *See id.* at 31-32, 39. The *Hunsaker* court utilized a different interpretation when reviewing the new waiver. *See* 902 F.3d at 969. The Ninth Circuit reasoned that such an exception would be unnecessary if the term money recovery only referred to money unlawfully in government possession. *See id.*

84. *See Hunsaker*, 902 F.3d at 970-71 (declining to adopt temporal approach and holding based on text's plain meaning).

85. *See* Hunsaker v. United States, 902 F.3d 963, 968 (9th Cir. 2018) (declaring Hunsakers may recover emotional distress damages because of unambiguous waiver); United States v. Rivera Torres (*In re* Rivera Torres), 432 F.3d 20, 31 (1st Cir. 2005) (declaring sovereign immunity waiver too ambiguous to warrant emotional distress damages against IRS). The First Circuit considered the possibility that the court's power to issue an "order, process, or judgment" might sufficiently waive sovereign immunity to award damages for willfully violating the automatic stay, but the court ultimately reasoned that this analysis rested upon too broad of a reading of the waiver. *See In re Rivera Torres*, 432 F.3d at 24 (quoting 11 U.S.C. § 106(a) (2018)).

86. *See In re Rivera Torres*, 432 F.3d at 30 (declaring preference for considering legislative history when construing waivers). Although the First Circuit recognized there were two lines of cases dealing with the construction of sovereign immunity waivers, the court chose to follow the approach that reflected the most recent line of Supreme Court jurisprudence at the time. *See id.*

87. *See id.* at 32 (Torruella, J., concurring) (rejecting majority's utilization of legislative history when construing waiver). Judge Torruella read the waiver strictly in the sovereign's favor according to general statutory interpretation rules, and determined that although another reading of the waiver was plausible, sovereign immunity was not expressly waived regarding the type of relief sought. *See id.* at 32-33.

III. ANALYSIS

A. Analytical Framework

As a threshold issue, using a temporal approach to determine the breadth of a sovereign immunity waiver is unnecessary in light of the clarity of the waiver in § 106.[88] The proper first step in any suit against a governmental unit is to determine whether sovereign immunity has been waived, and, as the First Circuit unequivocally declared, "[t]here is no doubt that § 106 is an express waiver of sovereign immunity."[89] When construing the breadth of that sovereign immunity waiver, courts generally must "start with the plain meaning of the statute's text."[90]

Turning to the statute's text, § 106's main clause provides that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section."[91] The first subsection then provides the fifty-nine Bankruptcy Code sections to which the waiver applies, and the second subsection provides that "[t]he court may hear and determine any issue arising with respect to the application of such sections to governmental units."[92] The third subsection states that "[t]he court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages."[93] In both *Hunsaker* and *In re Rivera Torres*, plaintiffs sued the IRS for violating the automatic stay, and sought damages under § 106 and § 362, both of which waived sovereign immunity in subsection (a)(1) of § 106.[94]

88. *See* 11 U.S.C. § 106(a)(3) (declaring court may issue judgment awarding "money recovery" against governmental unit).

89. *In re Rivera Torres*, 432 F.3d at 24; *see supra* notes 66-69 and accompanying text (explaining waiver's clarity).

90. *See* Father M. v. Various Tort Claimants (*In re* Roman Catholic Archbishop), 661 F.3d 417, 432 (9th Cir. 2011) (stating general standard for courts interpreting plain text). The court in *In re Rivera Torres* noted this rule of statutory construction, but this rule did not persuade the court. *See* 432 F.3d at 29 (refusing to apply similar definition when similar wording used without considering context). The way the First Circuit framed the issue was whether the term "money recovery," as a matter of plain textual reading, can include emotional distress damages. *See id.*

91. 11 U.S.C. § 106(a) (2018).

92. *Id.* § 106(a)(1)-(2) (abrogating sovereign immunity and extending bankruptcy court's equitable powers). Both the First and Ninth Circuits recognized the government's clear sovereign immunity waiver; the only question was to what extent the immunity was waived. *See supra* notes 70-84 and accompanying text (discussing how both courts recognized abrogated sovereign immunity, but scope needed determination).

93. 11 U.S.C. § 106(a)(3) (listing moneys assessable against governmental units).

94. *See id.* § 106(a)(1) (abrogating sovereign immunity in specific sections of Bankruptcy Code); *id.* § 362(k)(1) (providing relief for debtor injured by willful violation of automatic stay); *see also* Hunsaker v. United States, 902 F.3d 963, 965 (9th Cir. 2018) (identifying violation of Bankruptcy Code's automatic stay); United States v. Rivera Torres (*In re* Rivera Torres), 432 F.3d 20, 21 (1st Cir. 2005) (recognizing IRS sent collection notices despite discharge injunction).

B. First Circuit's Determination: Three Distinct Faults

1. Overview

The First Circuit's temporal approach depends heavily on the construction of § 106(a)(5), which Congress amended in 1994 to state that "[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law."[95] By using the temporal approach, the First Circuit contorted normal rules of statutory construction—ignoring what relief was reasonably available under the Bankruptcy Code in 2005 when *In re Rivera Torres* was decided—and instead attempted to determine what relief was properly available to debtors in 1994 when Congress amended § 106.[96] Nevertheless, the First Circuit's analysis falls short for three reasons: words should be accorded their plain meaning; Congress should be presumed to be aware of the background law against which it legislates; and § 106(a)(5) does not endorse a temporal restriction.[97] Although two of these principles are rules of statutory construction that the First Circuit expressly espoused, the court did not properly consider the rules in a wider context.[98]

2. The Waiver Is Unambiguous and Clear in Context

The Ninth Circuit in *Hunsaker* had one primary contention with the *In re Rivera Torres* holding, which was that the sovereign immunity waiver was unambiguous, and therefore no further analysis was required.[99] The statute clearly

95. 11 U.S.C. § 106(a)(5) (proclaiming amendment does not create new substantive grounds for relief).

96. *See In re Rivera Torres*, 432 F.3d at 25 (explaining how court will attempt to determine what relief available in 1994). The First Circuit stated, "we are not here resolving any question as to the types of relief that are *now* available to private parties under any of the enumerated sections." *Id.* It elaborated, emphasizing that "[w]e ask not about present understandings, but about what Congress understood in 1994, at the time of the amendment of § 106, to be the content of its waiver for 'orders, processes, or judgments' under § 105 and the other enumerated sections." *Id.*

97. *See id.* at 25-26 (explaining reasons for temporal approach); *see also Hunsaker*, 902 F.3d at 970 (elaborating why not adopting First Circuit interpretive method); McDonald, *supra* note 62, at 285 (explaining plain meaning principle of statutory interpretation). The First Circuit's first reason for utilizing the temporal approach appears to be that the approach was endorsed by the Supreme Court in prior cases. *See In re Rivera Torres*, 432 F.3d at 25; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 711 (2004) (utilizing temporal approach); Bowen v. Massachusetts, 487 U.S. 879, 897 (1988) (inquiring how Congress understood term at time of enactment).

98. *See In re Rivera Torres*, 432 F.3d at 25-26 (enumerating reasons for reading sovereign immunity waiver temporally).

99. *See Hunsaker*, 902 F.3d at 970 (holding sovereign immunity waiver unambiguous and clear). Construing sovereign immunity waivers presents precedent issues, as the Supreme Court has used different standards in different cases for when a waiver is read into a statute. *See* Nagle, *supra* note 62, at 796-99 (attempting to give meaning to conflicting Supreme Court decisions). Courts have utilized a variety of different interpretative techniques to give meaning to Congress's actions, but when the waiver's text is unambiguous, most courts end their analysis without considering legislative history. *See id.* at 800. Nevertheless, different courts demand different levels of ambiguity before determining that sovereign immunity has been waived and legislative history may be

abrogates sovereign immunity, stating that the court "may issue against a governmental unit an order, process, or judgment . . . including an order or judgment awarding a money recovery."[100] When according words their ordinary and normal meaning, a natural reading of the statute authorizes a court to issue a monetary "order, process, or judgment" against a unit or branch of the federal government.[101] The only term that suggests ambiguity is "money recovery," but when those words are accorded their normal meanings, the most plausible interpretation is that the statute authorizes a court to issue an order, process, or judgment that awards money as a damage, as opposed to awarding specific performance or injunctive relief.[102]

On the other hand, the First Circuit held that the term money recovery was ambiguous, stating that courts should afford the term a definition different than what a plain reading would supply.[103] As the *In re Rivera Torres* court noted, when considering precedent and even construing § 106 in the most restrictive way possible, the most likely interpretation of the term is that Congress wanted to allow a trustee to recover money wrongfully in the government's possession.[104] This reading is only possible, however, when interpreting a sovereign immunity waiver while solely and expressly considering *Nordic Village* and no other precedential cases—an interpretation that still goes against the primary interpretive rule that words should be accorded their average and everyday meaning.[105] Perhaps most importantly, as the *Hunsaker* court noted, giving the term money recovery the definition provided by the First Circuit renders the prefatory clause "but not including an award of punitive damages" completely

properly considered. *See* McDonald, *supra* note 62, at 269-71 (describing different interpretations of sovereign immunity waiver).

100. 11 U.S.C. § 106(a)(3) (2018) (waiving sovereign immunity). The First Circuit held that the term "money recovery" was ambiguous, and therefore utilized the legislative history of the 1994 amendments to determine what Congress meant to include in the term. *See* United States v. Rivera Torres (*In re* Rivera Torres), 432 F.3d 20, 29-30 (1st Cir. 2005) (evaluating how to determine meaning of "money recovery").

101. *See* 11 U.S.C. § 106(a)(3) (abrogating sovereign immunity and defining scope); McDonald, *supra* note 62, at 285 (advocating for giving words their plain meaning).

102. *See* Hunsaker v. United States, 902 F.3d 963, 967-68 (9th Cir. 2018) (holding "money recovery" plainly includes compensatory damages).

103. *See In re Rivera Torres*, 432 F.3d at 31 (considering contextual backdrop of 1994 amendments to construe wording); *see also* United States v. Nordic Vill., Inc., 503 U.S. 30, 39 (1992) (construing old sovereign immunity waiver in sovereign's favor and preventing monetary recovery). The 1994 amendments to the Bankruptcy Code, specifically the amendment allowing for the court to award a money recovery, were likely reactions to the Supreme Court's reasoning and holding in *Nordic Village*. *See Hunsaker*, 902 F.3d at 968-69 (considering Court's holding in *Nordic Village* in interpreting § 106 amendment); *In re Rivera Torres*, 432 F.3d at 31 (summarizing impact of § 106 amendment in Supreme Court cases); McDonald, *supra* note 62, at 275-76 (stating § 106 amendment directly intended to overrule *Nordic Village*).

104. *See Hunsaker*, 902 F.3d at 969 (explaining why restrictive reading of money recovery not necessitated by prior cases).

105. *See id.* at 968 (explaining nothing more necessary when statute unambiguous); *see also Nordic Village*, 503 U.S. at 39 (taking textualist approach to determining sovereign immunity waiver). The very case the First Circuit relied on to champion its temporal interpretation expressly rejected such an interpretation, and instead read the text as it was plainly understood. *See Nordic Village*, 503 U.S. at 39.

superfluous.[106] The term money recovery must encompass compensatory damages, because otherwise the prohibition on punitive damages would be completely useless, as punitive damages are generally not awarded absent compensatory damages.[107] When considering the context of where the term money recovery appears in the statute, and construing the term according to its ordinary and plain meaning, there is no ambiguity.[108] Absent such ambiguity, there is no need for the temporal approach, and thus the First Circuit's analysis should have ended before getting to that point.[109]

3. Congress Should Be Presumed to Be Aware of the Background Law

Although the First Circuit reiterated the principle that courts should presume Congress is aware of the background law against which it legislates, one could argue that the court did not consistently adhere to this principle in applying all the precedential case law.[110] The court adhered to this principle when it assumed that Congress was aware of *Nordic Village* when it amended § 106 in 1994, but the court did not apply the same principle when considering prior circuit court cases that had held the Bankruptcy Code did not authorize emotional distress damages.[111] If the amendments from 1994 are to be analyzed with the presumption that Congress was aware of the circuit courts' precedent in awarding emotional distress damages and deciding on sovereign immunity, it is consistent to assume Congress was aware of circuit court cases holding that the Bankruptcy Code does not authorize emotional distress damages.[112] Indeed, some

106. *See Hunsaker*, 902 F.3d at 969 (explaining carve-out clause unnecessary if given construction accorded by First Circuit). Therefore, when considering the term money recovery in its statutory context, there is only one plausible reading of the term: an order, process, or judgment which awards money. *See id.* This comports with the canon of statutory interpretation that a statute should be read to prevent a portion of it from becoming superfluous. *See id.*

107. *See id.* (noting First Circuit's superfluous construction).

108. *See* Hunsaker v. United States, 902 F.3d 963, 970-71 (9th Cir. 2018) (holding term money recovery unambiguous and creating circuit split with First Circuit).

109. *See id.* at 970 (arguing First Circuit's analysis should have ended with reading waiver's text).

110. *See* United States v. Rivera Torres (*In re* Rivera Torres), 432 F.3d 20, 25 (1st Cir. 2005) (reiterating general principle stating courts should presume Congress knows background law behind legislation). The First Circuit used this principle as a reason for why it was appropriate to consider what Congress understood in 1994 when it amended the statute. *See id.* at 26.

111. *See id.* at 27 (explaining emotional distress damages generally not authorized prior to 1994). Prior to the 1994 Act, *In re Walters* was the only circuit court decision to address whether the Bankruptcy Code authorized emotional distress damages. Burd v. Walters (*In re* Walters), 868 F.2d 665, 670 (4th Cir. 1989) (holding no emotional distress damages). The Eleventh Circuit had already held that bankruptcy courts had the statutory authority to issue monetary relief to a debtor for a willful violation of the automatic stay by the IRS, but this case did not touch on the issue of emotional distress damages. *See* Hardy v. IRS (*In Re* Hardy), 97 F.3d 1384, 1389-90 (11th Cir. 1996).

112. *See In re Rivera Torres*, 432 F.3d at 27 (arguing background law supports conclusion emotional distress damages still not authorized). Congress should be held to a heightened sense of awareness considering the *In re Walters* and *McBride* holdings. *See* McBride v. Coleman, 955 F.2d 571, 577 (8th Cir. 1992) (refusing use of contempt power to award emotional distress damages); *In re Walters*, 868 F.2d at 670 (refusing enforcement of civil contempt emotional distress damage awards).

commentators have argued that, when analyzing the legislative intent behind the 1994 Act and its amendments, it is exceedingly likely that Congress intended to broadly and unequivocally waive sovereign immunity to prevent the very confusion that bankruptcy courts endured prior to the amendments.[113] Even though commentators are well aware that Congress took issue with *Nordic Village*, there is reason to presume that Congress was also trying to overrule some of the earlier decisions that narrowly restricted bankruptcy courts' powers.[114] Therefore, the First Circuit should have presumed that Congress was aware that the older version of the Bankruptcy Code did not allow bankruptcy courts to issue damages for emotional distress, it should have acknowledged that § 106 had been held to prevent recoveries by the government against a bankruptcy trustee, and it should have recognized that the term money recovery was previously used by other courts to refer to emotional distress damages.[115]

Having established that *In re Walters*, *McBride*, and *Nordic Village* restrictively construed the bankruptcy courts' power to issue awards or judgments against the government, Congress likely would have clarified § 106(a)(3) if it only intended for the waiver to apply to money wrongfully in government possession.[116] The First Circuit determined that *McBride*'s and *In re Walters*'s refusal to recognize that the Bankruptcy Code or civil contempt authorized emotional distress damages was evidence that awards of emotional distress damages should not be allowed, even after amendments had substantively changed the

113. *See* McDonald, *supra* note 62, at 286-87 (explaining history of amendments and legislative context). The House Report on the 1994 amendments stated that the amendments' purpose was to subject both state and federal governments to sovereign immunity waivers in bankruptcy proceedings. *See id.* at 286. One way to interpret the added words in the 1994 amendments is that now, "[i]n bankruptcy cases, government actors should be liable for compensatory damage awards." *See id.* at 287.

114. *See id.* at 286 (explaining should read sovereign immunity waiver broadly). The First Circuit's narrow focus on *Nordic Village* prevented it from reading the waiver in light of all the legislative history. *See id.*

115. *See* United States v. Nordic Vill., Inc., 503 U.S. 30, 39 (1992) (declaring § 106 does not allow bankruptcy trustee recovery of monetary relief from government); *McBride*, 955 F.2d at 577 (denying award of emotional distress damages through civil contempt power); *In re Walters*, 868 F.2d at 669-70 (discussing background law prior to 1994 Act). The First Circuit considered these three cases, but it held that *McBride* and *In re Walters* necessitated a holding that emotional distress damages were not covered—and therefore not altered—at the time of the 1994 amendments. *See In re Rivera Torres*, 432 F.3d at 27. While the First Circuit acknowledged that the judiciary should presume Congress is aware of the background law against which it legislates, it failed to consider that the 1994 amendments might have been an attempt to supersede the holdings from the earlier two cases as well. *See id.* at 25 (explaining background law presumption). As one commentator stated, "The purpose of the 1994 amendments was to clarify the confusion regarding the allowable remedies by making the waiver of sovereign immunity more explicit." *See* McDonald, *supra* note 62, at 286.

116. *See* 11 U.S.C. § 106(a)(3) (2018) (abrogating sovereign immunity in Bankruptcy Code); *see also* United States v. Rivera Torres (*In re* Rivera Torres), 432 F.3d 20, 27 (1st Cir. 2005) (arguing how prior understanding should influence current interpretation). While the First Circuit considered precedent, it did not apply the cases in a uniform fashion. *See In re Rivera Torres*, 432 F.2d at 27 (presuming Congress intended retention of precedent holdings). When considering *Nordic Village*, the First Circuit acknowledged that Congress amended § 106 specifically to prevent the result from *Nordic Village*, but the First Circuit did not apply the same logic when analyzing the *McBride* and *In re Walters* holdings. *See id.* at 27, 31 (assuming *Nordic Village* meant overruled, but *In re Walters* and *McBride* affirmed).

governing statutory provision.[117] The First Circuit even noted that, by 2005, the Eleventh Circuit indirectly held twice in favor of emotional distress recovery because § 106(a) waived sovereign immunity for court-ordered monetary damages under § 105(a).[118] If the First Circuit remained consistent in its reasoning that Congress was aware of the governing background law and was attempting to materially alter it, the First Circuit would have held that the 1994 amendments were a purposeful decision to overrule *McBride*, *In re Walters*, and *Nordic Village*.[119]

4. Section 106(a)(5) Does Not Mandate a Temporal Reading of the Waiver

Section 106(a)(5) provides that "[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law."[120] The First Circuit held that this statement necessitated a temporal reading, and the Ninth Circuit in *Hunsaker* elaborated on this strained interpretation by the First Circuit, holding that the language only mandated that no new substantive rights to relief were created under that subsection that did not already exist elsewhere.[121] The First Circuit erred by concluding that the statement "no new rights" were to be created somehow mandated a temporal reading, when the statute is simply saying that no new rights were to be created which did not already exist under the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.[122]

117. *See In re Rivera Torres*, 432 F.3d at 27 (holding background law militates against allowing recovery for emotional distress damages).

118. *See* 11 U.S.C. §§ 105(a), 106 (governing money recovery against government); *In re Rivera Torres*, 432 F.3d at 27-28 (disagreeing with Eleventh Circuit interpretation); Hardy v. United States (*In re* Hardy), 97 F.3d 1384, 1391 (11th Cir. 1996) (allowing recovery against IRS). If Congress enacted the 1994 Act with the intent that its amendments merely allow bankruptcy courts to recover money wrongfully in the government's possession, it has failed to enact any further legislation to achieve this directive since the Eleventh Circuit first held that § 106 waived sovereign immunity and allowed for recovery of emotional distress damages under § 105. *See In re Hardy*, 97 F.3d at 1387.

119. *See* McDonald, *supra* note 62, at 286 (noting 1994 amendments likely meant to correct plethora of decisions).

120. 11 U.S.C. § 106(a)(5).

121. *See* Hunsaker v. United States, 902 F.3d 963, 970 (9th Cir. 2018) (construing subsection according to its express terms); *In re Rivera Torres*, 432 F.3d at 25-26 (enumerating reasons for temporal approach). The court in *In re Rivera Torres* determined that the subsection endorsed the temporal approach. *See* 432 F.3d at 26. Nevertheless, other courts already held that § 106(a)(5) was nothing more than a congressional declaration that no new substantive rights were to be created under the subsection that were not found elsewhere—not an endorsement that courts read the text within the framework of the 1994 Congress. *See* Franklin Sav. Corp. v. United States (*In re* Franklin Sav. Corp.), 385 F.3d 1279, 1286 (10th Cir. 2004) (explaining congressional intent behind amendment); *In re Hardy*, 97 F.3d at 1388 (declaring relief must come from substantive provision outside § 106). The *In re Franklin Savings Corp.* court noted that "[b]y its express terms, however, Bankruptcy Code § 106 does not provide a substantive or independent basis for asserting a claim against the government." 385 F.3d at 1286.

122. *See Hunsaker*, 902 F.3d at 970-71 (explaining variety of reasons to reject First Circuit's interpretation); United States v. Rivera Torres (*In re* Rivera Torres), 432 F.3d 20, 26 (1st Cir. 2005) (arguing Congress "clearly endorsed" temporal approach).

Specifically, the First Circuit relied on two Supreme Court cases, which can be easily distinguished.[123] First, in *Bowen*, immediately following *In re Rivera Torres*, the Court returned to the principle that the plain meaning of the text should control its interpretation.[124] Second, in *Sosa*, the Court did not endorse a temporal approach generally; rather, the court utilized a temporal approach to ensure that a scheme of federal jurisdiction would not vary from state to state.[125] Even if one accepts the proposition that *Sosa* supports a temporal reading of sovereign immunity waivers, the Supreme Court's approach still gave the words at issue their ordinary meaning at the time they were written.[126] The First Circuit utilized a different approach by refusing to read § 106 according to its plain meaning at the time it was written; it instead read the waiver in the context of the 1994 amendments, not how the words should have been reasonably understood in 1994.[127]

IV. CONCLUSION

The First Circuit considered how broadly to construe a sovereign immunity waiver in the Bankruptcy Code. Every court that has considered the waiver agrees that the government has waived its sovereign immunity for cases arising under the Bankruptcy Code. The only question the First Circuit and Ninth Circuit discussed was whether the waiver was broad enough to encompass emotional distress damages suffered as a result of the government violating the automatic stay. The First Circuit's holding that the waiver was not broad enough to cover emotional distress damages was erroneous because a plain reading of the waiver necessitates an interpretation that the government has waived its sovereign immunity, because "money recovery" is plainly read to authorize payment for compensatory damages.

Further, even if the temporal approach is correct, the First Circuit erred by adding meaning to terms not supplied in the text instead of reading the words as they would have been understood in 1994 when they were written. Because the English language has not drastically shifted since the 1994 amendments, the text should have been read during both times to authorize the court to issue a monetary judgment against a governmental unit or body.

The Ninth Circuit adhered to the principle that the Supreme Court and many other legal authorities have espoused, including the First Circuit; statutes should

123. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 711-12 (2004) (using temporal approach to decline idea Congress intended "jurisdictional variety"); Bowen v. Massachusetts, 487 U.S. 879, 897-98 (1988) (affirming congressional intent controlling inquiry).

124. *See Bowen*, 487 U.S. at 897-98 (holding plain meaning of text primary method of statutory interpretation).

125. *See Sosa*, 542 U.S. at 711 (documenting reasons for utilizing temporal approach in present case).

126. *See In re Rivera Torres*, 432 F.3d at 25 (construing Supreme Court precedent).

127. *See* 11 U.S.C. § 106(a)(1) (2018) (documenting sections waiving sovereign immunity); *In re Rivera Torres*, 432 F.3d at 25 (questioning congressional understanding in 1994).

be read to accord words their ordinary meaning. The Ninth Circuit's interpretation also makes more sense in light of precedential cases where courts had denied the award of emotional distress damages against the government. Subsequent amendments, by Congress, can only be presumed as responses to cases where courts have held sovereign immunity had not been waived for the award of emotional distress damages. The Ninth Circuit's refusal to utilize the temporal approach is sensible in terms of its application in the *Hunsaker* case, but it is still more important for how the Ninth Circuit plans to interpret the Bankruptcy Code in cases to come. Perhaps it is time for the Supreme Court to clarify the issue once and for all so that a very important federal law can have equal application to every American.

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