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THE KLEIN SLEEP DECISION: SECTION 502(b)(6) LEASE DAMAGES CAP AS THE RULE, NOT THE EXCEPTION

Introduction

The recent 2nd Circuit decision in *Nostas Associates v. Costich (In re Klein Sleep Products, Inc.)* [*FN:* 78 F.3d 18 (2d Cir. 1996).] (hereinafter *Klein Sleep*) regarding the priority status of future damage claims arising out of the rejection of an assumed lease, has pushed to the forefront an interesting dilemma for the bankruptcy community. In *Klein Sleep*, the court held that the future damages from the rejection of a previously assumed lease are an administrative expense of the bankruptcy estate. Furthermore, the court held that the Code's section 502 lease future damages cap does not apply to such a claim. This ruling was based upon prior interpretation of what constitutes an administrative expense under section 503(b), and the court's interpretation of the Code's administrative claim allowances. The 2nd Circuit decision in *Klein Sleep* lends further credence to a rule whose effect alone makes doubtful its intent by the drafters of the Code, yet is a valid interpretation of the Code's claim allowance provisions. This Comment is submitted for the purpose of providing an argument for the congressional intent that future damages of an assumed lease rejection be limited, whether classified as either an unsecured or administrative claim. Part I of this Comment provides a brief overview of the Code's treatment of unexpired leases in bankruptcy. Part II discusses the reasoning of the *Klein Sleep* decision regarding the specific status of future damages liability upon rejection of an assumed lease. Part III examines the inconsistency of the Code, and discusses congressional intent to limit future damages upon rejection of assumed leases in the same manner as unassumed leases. Part IV concludes that although the *Klein Sleep* ruling on assumed lease liability is a valid interpretation of the Code, it should be avoided as contrary to the intent of Congress.

I. Leases within the Code

As evidenced by the *Klein Sleep* decision, leases in bankruptcy provide a unique situation for bankruptcy courts. Section 365 provides that the debtor−in−possession [*FN:* For the purposes of this Comment the term "debtor−in−possession" will refer to both the debtor−in− possession and the bankruptcy trustee, while the term "debtor" will be a reference to the pre−bankruptcy debtor.] as a lessee may reject an unexpired lease or assume it either for use by the estate or for assignment. [*FN:* See Orion Pictures Corp. v. Showtime Networks Inc. (*In re* Orion Pictures Corp.), 4 F.3d 1095, 1098 (2d Cir. 1993) (stating purpose of permitting assumption or rejection is to enable trustee to use valuable property of estate), *cert. denied* , 114 S. Ct. 1418 (1994).] The decision of the debtor−in−possession is, however, subject to the bankruptcy court's review, and court permission may depend upon the lease's benefit to the estate. [*FN:* See Allied Artists Pictures Corp. v. Allied Artists Television Corp. (*In re* Allied Artists Indus. Inc.), 35 B.R. 737, 740−41 (S.D.N.Y. 1983) (requiring court approval as protection for general creditors). The need for assumption or rejection subject to the court 's approval is predicated on protection of interests of the creditors of the estate, and the bankruptcy court 's duty to ensure an equitable distribution of the valuable assets of the estate. See Local Joint Executive Bd. v. Hotel Circle Inc., 613 F.2d 210, 216 (9th Cir. 1980) (holding court approval proper due to higher degree of judicial supervision and responsibility in bankruptcy); see also Sealy Uptown v. Kelly Lyn Franchise Co. Inc. (*In re* Kelly Lyn Franchise Co. Inc.), 26 B.R. 441, 445 (Bankr. M.D. Tenn. 1983) (finding purpose of court approval is to maximize value of estate), aff 'd, 33 B.R. 112 (D. Tenn. 1983).]

If the debtor−in−possession decides to reject the lease, [*FN:* See, *e.g.* , *In re* Italian Cook Oil Corp., 190 F.2d 994, 996 (3d Cir. 1951) (stating that trustee is under no obligation to complete executory contracts of debtor); Summit Land Co. v. Allen (*In re* Summit Land Co.), 13 B.R. 310, 315 (Bankr. D. Utah 1981) (stating that court allowance of rejection should be granted as a matter of course). Courts are split as to the justification necessary for the rejection of a lease. Some courts place no obligation on a trustee to assume, while others require only a good faith "business judgment" decision. See, e.g., Control Data Corp. v. Zelman (*In re* Minges), 602 F.2d 38, 43 (2d Cir. 1979) (rejecting rigid "burdensome" test for court approval of rejection for more flexible "business judgment" test). Still, others require that the

rejected lease was burdensome to the estate. See Michael T. Andrew, Executory Contracts in Bankruptcy : Understanding " Rejection, " 59 U. Col. L. Rev . 845, 897 (1988) (discussing case recognition of this minority view).] the termination will constitute a breach under section 365 for which the landlord is entitled to a claim for damages. [*FN:* See 11 U.S.C. § 502(g) (1994), which reads: (g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such a claim had arisen before the date of the filing of the petition. Id .] The Code provides that the rejection of an unassumed lease constitutes a breach immediately before the date of filing of the petition. [*FN:* See id. ; see also*In re* JAS Enters. Inc., 180 B.R. 210, 215 (Bankr. D. Neb. 1995) (noting effect of section 502(g)); Allied Tech. Inc. v. R.B. Brunneman and Sons (*In re* Allied Tech. Inc.), 25 B.R. 484, 497 (Bankr. D. Ohio 1982) (stating that rejection is treated as prepetition).] Consequently, the landlord's recovery will be in the form of an as unsecured claim against the estate. [*FN:* See Control Data Corp. v. Zelman (*In re* Minges), 602 F.2d 38, 41 (2d Cir. 1979) (stating rejection results in claim of general creditor for landlords); *In re* Orion Pictures Corp ., 4 F.3d at 1098 (same);*In re* JAS Enters. , Inc ., 180 B.R. at 215−16 (same). The claims of a landlord must be separated, so that the damage claim for breach will be provided with a prepetition claim, along with any additional prepetition claims. However, the use of the property during the postpetition election period will be entitled administrative expense priority. See Great W. Savs. Bank v. Orvco Inc. (*In re* Orvco Inc.), 95 B.R. 724, 727 (B.A.P. 9th Cir. 1989) (allowing administrative claim for reasonable value of use of lease during period of decision to assume or reject). But see *In re* Jartran Inc., 71 B.R. 938, 942 (N.D. Ill. 1987) (holding conversion of case relegated administrative expenses of prior case to prepetition claims of new case), aff 'd, 87 B.R. 525 (N.D. Ill. 1988), aff 'd, 886 F.2d 859 (7th Cir. 1989).] As an unsecured claim, however, these damages will fall under the section 502(b)(6) future damages cap, which generally limits future liability from one to three years of future rent. [*FN:* See 11 U.S.C. § 502(b)(6). In pertinent part this section provides that the claim of lessor for damages arising from the rejection of a real property lease will be limited to: (A) the rent reserved by such a lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of (i) the date of the filing of the petition; and (ii) the date on which such lessor repossessed, or the lessee surrendered, the lease property; . . . *Id.*; see also *In re* Mclean Enters. Inc., 105 B.R. 928, 933−36 (Bankr. W.D. Mo. 1989) (providing an excellent discussion on nature of section 502(b)(6) lease damages limitations). In its original form the Bankruptcy Act of 1898 made no mention of the provability of future rent claims. Courts, however, were, "virtually unanimous in deciding that rent destined to accrue after the filing of the petition was not capable of proof, since there was no fixed liability absolutely owing." Oldden v. Tonto Realty Corp., 143 F.2d 916, 918 (2d Cir. 1944). The 1938 amendments to the Bankruptcy Act for the first time made a landlord 's claim for future damages provable. The liability, however, was limited under a real estate lease to an amount not to exceed the rent reserved by the lease for the year following the date of either the surrender or reentry, plus the rent unpaid and accrued up to that date. See Vern Countryman, Executory Contracts in Bankruptcy: Part II , 58 Minn. L. Rev . 479, 537 n. 463 (1974).] The purpose of this lease damages cap is to prevent the disproportionate claim of a landlord from diluting recovery of the general unsecured creditors. [*FN:* See H.R. Rep. No . 95−595, at 353 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6308−10; S. Rep. No . 95−989, at 63 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5849. The purpose of this provision was set out in detail by the drafters of the Code. The purpose of the damages cap of section 502(b)(6) has been held to be two fold, "[f]irst, it ensures that other creditors recover more than the minimal portion of their claims they would receive if landlord claims resulting from termination of leases were allowed in full. Second, it ensures that lessors obtain a reasonable portion of the damages they suffered as a result of an abandonment of a lease by a debtor." F. E. Schwartz v. C.M.C. Inc. (*In re* Commercial Cent. Inc.), 106 B.R. 540, 543 (Bankr. N.D. Ill. 1989) (citing*In re* Goldblatt Bros. Inc., 66 B.R. 337, 346 (Bankr. N.D. Ill. 1986)).] Thus, the cap advances the Code's own goal of providing for an equitable recovery for all creditors. [*FN:* See Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No . 93−137, at 76−79 (1973); see also Allied Artist Pictures Corp. v. Allied Artist Television Corp. (*In re* Allied Artists Indus. Inc.), 35 B.R. 737, 740 (S.D.N.Y. 1983) (stating Code purpose of equitable distribution).]

Conversely, the assumption of a lease creates entirely new lease obligations between the landlord and the bankruptcy estate. [*FN:* See Samore v. Boswell (*In re* Multech, Corp.), 47 B.R. 747, 750 (Bankr. N.D. Iowa 1985) (noting legally distinct obligation of estate upon assumption); Cramer v. Mammoth Mart Inc. (*In re* Mammoth Mart Inc.), 536 F.2d 950, 954 (1st Cir. 1976) (same);*In re* Village Rathskeller Inc., 147 B.R. 665, 671 (S.D.N.Y. 1992) (reiterating that assumption creates obligations for estate); Pyramid Operating Auth. Inc. v. City of Memphis (*In re* Pyramid Operating Auth. Inc.), 144 B.R. 795, 808 (Bankr. W.D. Tenn. 1992) (going to great lengths to espouse upon assumption).] The landlord's rights under an assumed lease are strengthened in bankruptcy by the fact that he is dealing with the estate, and not with the debtor. [*FN:* See*In re* Mr. Gatti 's Inc., 162 B.R. 1004, 1011(Bankr. W.D. Tex. 1994) (discussing effect of assumption on landlord to be cause of action against estate, not prepetition claim against debtor);*In re* Washington Capital Aviation & Leasing, 156 B.R. 167, 172 (Bankr. E.D. Va. 1993) (stating assumption involves creation of obligation of estate); Texaco Inc. v. Louisiana Land and Exploration Co., 136 B.R. 658, 663 (M.D. La. 1992) (stating that assumption obligates the bankruptcy estate); Statewide Oilfield Constr. Inc. v. Career College Ass 'n, 134 B.R. 399, 402 (Bankr. E.D. Cal. 1991) (stating that assumption of contract makes it both an asset and liability of estate).] As such, prepetition defaults under the lease, aswell as the postpetition obligations incurred prior to assumption, will be granted administrative claim status [*FN:* See*In re* Italian Cook Oil Corp., 190 F.2d 994, 996 (3d Cir. 1951) (stating assumption requires taking an executory contract cum onere , if debtor receives benefits must adopt burdens); Continental Energy Assocs. Ltd. Partnership v. Hazleton Fuel Management Co. (*In re* Continental Energy Assocs. Ltd. Partnership), 178 B.R. 405, 408 (Bankr. M.D. Pa. 1995) (same). But see Memphis−Shelby County Airport Auth. v. Braniff Airways Inc. (*In re* Braniff Airways

Inc.), 783 F.2d 1283, 1286 (5th Cir. 1986) (stating that damages of lease not entitled administrative expense status due to lack of benefit to estate become unsecured claims);*In re* Airlift Int 'l Inc., 761 F.2d 1503, 1509 (11th Cir. 1985) (same); Phoenix Mutual Life Ins. Co. v. Greystone III Joint Venture (*In re* Greystone III Joint Venture), 995 F.2d 1274, 1281 (5th Cir. 1991) (same), *cert. denied* , 506 U.S. 821 (1992), *cert. denied* , 506 U.S. 822 (1992).] and are thus paid in full ahead of the general unsecured creditors. [*FN:* See 11 U.S.C. § 507(a)(1) (1994). The administrative expense claims recognized in 503(b) are entitled to first priority by the Code in section 507, and are classified as "against the estate." Id . Cf.*In re* Telesphere Communications Inc., 148 B.R. 525, 530 n.13 (Bankr. N.D. Ill. 1992) (describing payment procedure of administrative expenses).] However, this grant of priority status conflicts with the goal of equitable distribution for unsecured creditors, and therefore, courts in general will strictly scrutinize assumption by the debtor−in−possession. [*FN:* See, e.g., Memphis−Shelby County Airport Auth. v. Braniff Airways Inc. (*In re* Braniff Airways Inc.), 783 F.2d 1283, 1286 (5th Cir. 1986) (noting administrative expense disadvantages general creditors).]

Several reasons exist for the administrative expense priority. One explanation is the theoretical structure of the estate. Upon the commencement of a bankruptcy case the pre−bankruptcy debtor ceases to exist as a judicial entity. The control of its assets and obligations is transferred to the new and distinct legal entity, the estate. [*FN:* See Shopmen 's Local Union No. 455 v. Kevin Steel Prods. Inc., 519 F.2d 698, 704 (2d Cir. 1975) (stating trustee is not same entity as pre−bankruptcy debtor, but has own rights and duties); Samore v. Boswell (*In re* Multech, Corp.), 47 B.R. 747, 750 (Bankr. N.D. Iowa 1985) (distinguishing between obligations of debtor and estate); Cramer v. Mammoth Mart Inc. (*In re* Mammoth Mart Inc.), 536 F.2d 950, 954 (1st Cir. 1976) (noting transfer of control); Employee Transfer Corp. v. Grigsby (*In re* White Motor Corp.), 831 F.2d 106, 110 (6th Cir. 1987) (requiring postassumption concentration on estate, not prepetition debtor).] The dealings of the estate are generally provided administrative expense priority because those obligations will not have to be enforced against the debtor through bankruptcy. [*FN:* See, e.g., *In re* Mammoth Mart , Inc ., 536 F.2d at 954 (stating "fairness requires that any claim incident to the business be paid before those of creditors for whose benefit the continued operation of the business was allowed").] A somewhat related and more practical justification for the administrative expense status is that a concession by the Code has been created to encourage creditors to deal with the bankruptcy estate. [*FN:* See S. Rep. No . 90−749 (1967), reprinted in 1967 U.S.C.C.A.N. 2002, 2005−06. As noted by the Senate, "[u]nder the proposed amendment consideration has also been given to the rights of the other party or parties to the executory contract who have dealt with an officer of the court in the debtor relief proceeding." *Id.* This was also a policy recognized by the Bankruptcy Act of 1898, under sections 64a, 238, 378 and 483. See, e.g., Bankruptcy Act of 1898, § 238, ch. 541, 30 Stat. 544, amended by the Act of Nov. 22, 1967, Pub. L. No. 90−157 , 81 Stat. 511, 513, repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95−598, 92 Stat. 2549.] Due to the instability of thedebtor's business the Code drafters provided enticements for creditors willing to furnish the estate with the opportunities necessary for a successful reorganization. [*FN:* See *In re* Jartran Inc., 732 F.2d 584, 587 (7th Cir. 1984) (stating policy of priority requires inducement of creditor by debtor−in−possession);*In re* Mammoth Mart , Inc ., 536 F.2d at 954 (requiring inducement for administrative expense); *In re* Armorflite Precision Inc., 43 B.R. 14, 16 (Bankr. D. Me. 1984) (stating administrative expense payment is for creditors who benefit all other creditors), aff 'd, 48 B.R. 994 (D. Me. 1985).] The Code, however, expressly requires that an expense be both actual and beneficial to the estate to receive this priority claim status.

II. The Decision

The *Klein Sleep* decision arose out of a court−approved chapter 11 assumption of an unexpired ten year lease with four years remaining. [*FN:* See Nostas Assocs. v. Costich (*In re* Klein Sleep Prods. Inc.) , 78 F.3d 18, 21 (2d Cir. 1996) (explaining that Klein Sleep Inc. entered into a ten year lease agreement with Nostas in November of 1985, for store from Nostas in Paramus, New Jersey).] A year after the lease was assumed, a newly appointed chapter 11 trustee, assigned to liquidate the estate, rejected the lease and surrendered possession of the property to the landlord. [*FN:* See id. On June 7, 1991 Klein Sleep filed a petition for chapter 11. *Id.* On August 10, 1991 assumption of the Nostas lease agreement was approved by Judge Conrad, and on January 29, 1993 Costich, the newly appointed chapter 11 trustee, surrendered possession of the leased premises to Nostas. *Id.*] The landlord then filed an administrative expense claim for, *inter alia*, breach damages for the rent due under the remaining three years of the lease. [*FN:* See id . The damages sought by the landlord in Klein Sleep consisted of rent arrearages from November 1992 through January 1993, for future rent accruing after January 1993 and for attorneys ' and brokers ' fees incurred in connection with reletting the space. *Id.* The future damages sought had been mitigated by the landlord who relet the premises, and the landlord 's claim was for the difference between the assumed lease rent and the rent due under the new lease. Id .] Both the bankruptcy court and the district court [*FN:* See generally Nostas Assocs. v. Costich (*In re* Klein Sleep Prods. Inc.), 173 B.R. 296 (S.D.N.Y. 1994) (affirming Order of Bankruptcy Judge Joseph G. Conrad, sitting by special designation in United State Bankruptcy Court of Southern District of New York).] refused to grant administrative expense status for future damages because the expense of the future damages claim did not provide a benefit to the estate, and thus did not qualify for priority status. [*FN:* See id . at 299 (holding that unpaid rent and related expenses for period after surrender of lease, did not benefit estate and did not satisfy criteria for administrative status).] Instead, the landlord was

allowed a general unsecured claim for future damages, which would be limited by the lease damages cap of section 502(b)(6). [*FN:* See id . (noting landlord 's claim is limited to one year 's rent under lease due to section 502(b) (6) limitation).]

In reversing, the 2nd Circuit adopted the rule of *Samore v. Boswell (In re Multech, Corp.),* [*FN:* 47 B.R. 747 (Bankr. N.D. Iowa 1985).] in addition to providing additional support for granting administrative expense priority to assumed lease future damages. [*FN:* See *In re* Klein Sleep, 78 F.3d at 26.] The court began with the requirements for an administrative expense claim from section 503, concentrating on the "necessary, actual expenses and costs" provision, which is generally read by courts to require that an expense benefit the estate. [*FN:* See id . at 24−26.] As in *Multech*, the court found that this benefit requirement was not only satisfied independently by the benefit of the assumed lease rights, [*FN:* See id. at 26.] but also *per se* by the bankruptcy court's prior finding of benefit when allowing the debtor−in−possession to assume the unexpired lease. [*FN:* See id . at 25−26.] The court further reasoned that section 502(g)'s specification that "unassumed lease damages" constitute a prepetition unsecured claim, [*FN:* See 11 U.S.C. § 502(g) (1994);*In re* Klein Sleep, 78 F.3d at 26.] must mean that future damages of a previously assumed lease were intended to be treated differently, as administrative expenses. [*FN:* See*In re* Klein Sleep , 78 F.3d at 26.]

Despite these findings the court conceded that the Code was ambiguous on the issue of assumed lease liability claim status. [*FN:* See id .] Applying the rule of *Dewsnup v. Timm* [*FN:* 502 U.S. 410 (1992).] to resolve this ambiguity, the court relied on pre−Code practice under the Bankruptcy Act of 1898 [*FN:* See generally Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, amended by Act of June 22, 1938, ch. 575, 52 Stat. 840, amended by Act of Nov. 22, 1967, Pub. L. No. 90−157, 81 Stat. 511, repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95−598, 92 Stat. 2549. The provisions of the Bankruptcy Act of 1898 which will be dealt with in this comment are generally the result of legislative amendment, particularly in 1938 and 1967. However, for the purposes of literary economy the Act as amended will be broadly referred to as the Bankruptcy Act of 1898.] (hereinafter "the Act") in deciding to allow an administrative expense claim for future damages of assumed leases. [*FN:* See*In re* Klein Sleep, 78 F.3d at 28.] Having thus found the future damages to constitute an administrative expense, the court rejected the application of the section 502(b)(6) damages cap to assumed lease breach damages. The court further explained that as the section 502 damages cap applies

exclusively to claims filed under section 501, the section 503 administrative expense claim for future damages of an assumed lease will not fall under section 502. [*FN:* See id. (stating that sections 501 claims and 503 claims are distinct, and section 502 will not apply to administrative expense claims).]

III. Analysis of *Klein Sleep*

A. The Bankruptcy Act and Assumed Leases

Finding ambiguity within the Code on the matter of assumed lease future liability, the *Klein Sleep* court turned to the pre−Code practice under the Bankruptcy Act for guidance. [*FN:* See id. at 26−27.] This deference to the pre−Code practice is derived from the Supreme Court's acknowledgment in *Dewsnup v. Timm* that the Bankruptcy Code was not written "on a clean slate," and that pre−Code practice may provide insight to the intent of the drafters. [*FN:* See Dewsnup v. Timm, 502 U.S. 410, 419 (1992) (quoting Emil v. Hanley (*In re* John M. Russell Inc.), 318 U.S. 515, 521 (1943)).] Applying this rule, the court in *Klein Sleep* focused on section 238 of the Bankruptcy Act which provided that, "[w]hen a contract entered into or assumed in a superseded proceeding is rejected, the resulting liability would constitute a cost of administration of the superseded proceeding." [*FN:* See Act of Nov. 22, 1967, § 238, Pub. L. No. 90−157, 81 Stat. at 513. In full text the subsection read as follows: Any contract which is entered into or assumed by a debtor in possession, receiver, or trustee in a proceeding under this chapter and which is executory in whole or in part at the time of an entry of an order directing that bankruptcy be proceeded with shall be deemed to be rejected unless expressly assumed within sixty days after the entry of such order or the qualification of the trustee in bankruptcy, whichever is the late, but the court may for cause shown extend or reduce the time. When a contract entered into or assumed in a superseded proceeding is rejected, the resulting liability shall constitute a cost of administration of the superseded proceeding.Id . This amendment was meant to clarify the rights of those parties who dealt with the debtor prior to the conversion of a case, to ensure that administrative expense priority of their claims would not be lost. See*In re* Chugiak Boat Works Inc., 18 B.R. 292, 295 n. 5 (Bankr. D. Alaska 1982) (discussing section 238 amendment and its legislative history).] The *Klein Sleep* court found this provision to be conclusive of the Code's intended treatment of assumed lease future damages. [*FN:* See *In re* Klein Sleep, 78 F.3d at 27−28 (noting even before Congress added clarifying language to Bankruptcy Act of 1898, it was well−established in the 2nd Circuit that administrative priority was available either if trustee assumed executory contract or if estate received demonstrable benefits under contract).] Although this provision was interpreted under the Bankruptcy Act to extend to unexpired leases, [*FN:* See Bankruptcy Act of 1898, ch

541, 30 Stat. 541, amended by Act of June 22, 1938, § 406(4), ch. 575, 52 Stat. 840, 917, repealed by Bankruptcy Reform Act of 1978, 92 Stat. 2549 (defining "executory contracts" as including leases of real property); see also Control Data Corp. v. Zelman (*In re* Minges), 602 F.2d 38, 41 (2d Cir. 1979) (involving rejection of real property lease under Act).] its pertinence to future damagesis suspect due to a contemporary tempering provision for lease damages. Section 202 of the Act [*FN:* See Act of June 22, 1938, § 202, 52 Stat. at 893−94; see also id. § 63a(9).] provided for a general limitation on a landlord's claims based upon rejection of leases, much the same as today's section 502(b)(6) of the Code. [*FN:* Compare Act of Nov. 22, 1967, § 238, 81 Stat. at 513, with 11 U.S.C. § 365(b)(6) (1994).] Section 202 of the Act was a result of a 1934 amendment, which for the first time allowed for future damages claims for leases to be provable. [*FN:* See 3A Collier on Bankruptcy ¶ 63.01, at 1760 (James W. Moore *et al.* eds., 14th ed. 1975) (stating section 63a(9) allowed future damages to be proved, but for leases damages would be limited to one year).] Because the purpose of section 202 was to afford landlords partial recovery upon a claim previously barred, the Act made no distinction between assumed lease and unassumed lease landlords. [*FN:* See Vern Countryman, Executory Contracts in Bankruptcy: Part II , 58 Minn. L. Rev. 479, 553−54 nn. 541−42 (1974) (discussing concurrently Bankruptcy Act of 1898 sections 202 and 238, but making no reference to exception for assumed leases from section 202 limits); see also NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523 (1983) (adopting plain meaning of statute and recognizing lack of express exclusion indicates intent of Congress for statute to apply broadly).] Accordingly, the *Klein Sleep* court's reliance upon section 238 of the Act on the issue of assumed lease future damages is tenuous, because at the time it was added to the Act future damages liability for all leases was expressly limited to one year.

Furthermore, despite the *Dewsnup* rule, a completely contrary implication arises from the Bankruptcy Act's automatic administrative expense provision of section 238 and the ambiguity of the Code. The compelling absence of this unequivocal provision in the Code [*FN:* See, e.g., Bildisco , 465 U.S. at 523 (stating Congress knows how to express intended exception).] says more about the Code drafter's intent than its existence within the Act. Consequently, the holding of the 1987 decision *In re Jartran* completely contradicted the rule of section 238 of the Act. [*FN:* See *In re* Jartran Inc., 71 B.R. 938, 943 (Bankr. N.D. Ill. 1987), aff 'd, 87 B.R. 525 (N.D. Ill. 1988), aff 'd, 886 F.2d 859 (7th Cir. 1989).] In *Jartran*, the court held that a lease assumed in chapter 11 and then subsequently rejected under a new, superseding chapter 11 case constituted a prepetition claim of the new case and not an administrative expense. [*FN:* See id. (finding new chapter 11 case to be separate and distinct from original case, and therefore assumed contracts of original case constituted prepetition claims for new case); see also *In re* Johnston , Inc . , 164 B.R. 551, 556 (Bankr. E.D. Tex. 1994) (holding conversion from chapter 11 to chapter 7 allowed rejection of assumed lease to constitute an unsecured claim); Burlington N. R.R. Co. v. Dant and Russell Inc. (*In re* Dant & Russell Inc.), 67 B.R. 360, 363 (Bankr. D. Or. 1986) (holding that leases not assumed into bankruptcy estate remain prepetition unsecured claims against debtor), aff 'd in part and rev 'd in part, 853 F.2d 700 (9th Cir. 1988).] Additionally, the further distinctions made between contracts and leases by the Code's drafters undermine the persuasiveness of this pre−Code practice. [*FN:* See 11 U.S.C. § 365 (1994) (distinguishing leases from executory contracts); see also H.R. Rep. No . 95−595, at 353−54 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6309−10 (discussing history and new aspects of section 502(b)(6) damages caps, and narrowing meaning of term "lease"); S. Rep. No . 95−989, at 63−65 (1978), reprinted in U.S.C.C.A.N. 5787, 5849−51(same).] Those distinctions were a result of the Code drafters' recognitionof the special situation of leases in bankruptcy, and intent to treat leases differently. [*FN: Id.*] Therefore, contrary to the holding in *Klein Sleep*, this provision of the Act should not be determinative of this issue under the Code.

B. A Per Se Administrative Expense?

The *Klein Sleep* court borrows the reasoning from the *Multech* decision that section 365(a)'s assumption approval by the bankruptcy court is in essence a *per se* beneficial finding, obviating section 503's administrative expense requirements. [*FN:* See Nostas Assocs. v. Costich (*In re* Klein Sleep Prods. Inc.) , 78 F.3d at 25−26 (2d Cir. 1996); see also Samore v. Boswell (*In re* Multech , Corp .), 47 B.R. at 751−752 (Bankr. N.D. Ill. 1985) (stating "because an executory contract has been scrutinized by court prior to assumption liabilities and expenses resulting from a subsequent rejection are automatically granted administrative expense priority that will not be subject to further limitation by section 503").] Although it may be true that the Code drafters envisioned that courts look for benefit to the estate when deciding both whether to permit assumption and what constitutes an "actual, necessary" expense, [*FN:* See 3 Collier on Bankruptcy ¶ 503.04, at 27 (Lawrence P. King *et al.* eds., 15th ed. 1996) (stating, "[t]he requirement that an administrative expense "benefit" the estate is not found in the statute but continues a standard found in pre−Code case law interpreting the predecessor section to section 503(b)(1)(a)"); see, e.g., American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A., 280 F.2d 119, 124 (2d Cir. 1960) (requiring benefit for priority).] the mere matching of these terms does not create a *per se* rule. [*FN:* See Great W. Savs. Bank v. Orvco Inc., (*In re* Orvco Inc.), 95 B.R. 724, 727 (B.A.P. 9th Cir. 1988) (holding section 365 inconclusive of administrative expense status, requiring section 503 be satisfied); *In re* Telesphere Communications Inc., 148 B.R. 525, 531 (Bankr. N.D. Ill. 1992) (holding section 365(d)(3) does not involve payment procedure, and requiring application for administrative expense through section 503).] In *Orion Pictures Corp. v. Showtime Networks Inc. (In re Orion Pictures Corp.),* [*FN:* 4 F.3d

1095 (2d Cir. 1993), *cert. denied* , 114 S. Ct. 1418 (1994).] the 2nd Circuit held that a bankruptcy court's approval of assumption did not have the effect of collateral estoppel, because the benefit sought in assumption approval is one of business judgment, not legal judgment. [*FN:* Id . at 1099 (stating that Motion to Assume is not time or place for prolonged discovery issues).] As indicated in the *Orion* decision, the types of benefits which are dealt within these two separate provisions are wholly different. Section 365 deals with the court's use of business judgment of what may prospectively be beneficial to the estate, [*FN:* See Orion Pictures Corp., v. Showtime Networks Inc. (*In re* Orion Pictures Corp .), 4 F.3d 1095, 1099 (2d Cir. 1993) (stating nature of business judgment is inability to control end result), *cert. denied* , 114 S. Ct. 1418 (1994); Data Control Corp. v. Zelman (*In re* Minges), 602 F.2d 38, 43 (2d Cir. 1979) (allowing for flexible test of business judgment).] while section 503 requires a court to decide in retrospect whether a benefit

to the estate was actual and necessary. [*FN:* See, e.g., Memphis−Shelby County Airport Auth. v. Braniff Airways Inc. (*In re* Braniff Airways Inc.), 783 F.2d 1283, 1286 (5th Cir 1986) (noting administrative expense claims are generally made after rejection, as that is when "actual benefit" can be determined).] As such these benefits are not the same, nor should they create a *per se* rule of administrative expense.

Additionally, section 365 of the Code provides that leases which are assumed and later rejected are deemed breached at the time of such rejection. [*FN:* See 11 U.S.C. § 365 (1994).] Similarly, section 502(g)'s exclusion of assumed lease damages from its grant of prepetition claim status for rejection implies the same. [*FN:* See 11 U.S.C. § 502(g).] As a result, the court in *Klein Sleep* argued that as a postpetition breach the landlord's future damages claim is necessarily entitled to administrative expense status. [*FN:* See Nostas Assoc. v. Costich (*In re* Klein Sleep Prods. Inc.), 78 F.3d 18, 22−24 (2d Cir. 1996). The reasoning of the*In re* Multech was adopted by the court in*In re* Pearson, 90 B.R. 638 (Bankr. D. N.J. 1988), which stated that "the assumption was an act of administration which created an obligation of the postpetition bankruptcy estate." *Id.* at 642. This reasoning is flawed for the reason that the section 503 priority is not based upon "acts of administration," but the "actual, necessary costs and expenses" of administration. See 11 U.S.C. § 503(1) (a).] This proposition was expressly rejected by the court in *In re Johnston.* [*FN:* See *In re* Johnston Inc., 164 B.R. 551, 556 (Bankr. E.D. Tex. 1994) (stating that carte blanche will not be given to a landlord based on assumption).] In this recent decision, the court cited to the Supreme Court decision in *NLRB v. Bildisco & Bildisco* [*FN:* 465 U.S. 513 (1984).] which stated that upon assumption of an executory contract, "the expenses and liabilities incurred may be treated as administrative expenses." [*FN:* Id . at 531−32.] The *Johnston* court held that the Supreme Court's use of the word "may" was based on the requirement that section 503 be satisfied before any administrative expense status be granted. [*FN:* See *In re* Johnston Inc. , 164 B.R. 551, 556 (Bankr. E.D. Tex. 1994) (noting if all expenses and liabilities flowing from rejection are automatically administrative expense, Supreme Court would have used "shall"). But see Nostas v. Costich (*In re* Klein Sleep Prods. Inc.), 78 F.3d 18, 24 (2d Cir. 1996) (stating courts should not attach significance to use of term "may").] This interpretation also serves an important rule of statutory construction by preventing section 365 from rendering section 503 superfluous. [*FN:* See *In re* Johnston Inc., 164 B.R. at 554; see also Connecticut Nat 'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (requiring statutory reading have no "positive repugnancy" whereby one provision precludes another); Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) (rejecting statutory interpretation attributing futile design to Congress ' drafting).] Furthermore, had Congress intended section 365 to be dispositive of section 503 it would have expressed such an intent, or at least alluded to the possibility within its drafting. [*FN:* See*In re* Tandem Group Inc., 61 B.R. 738, 742 (Bankr. C.D. Cal. 1986) (stating "[h]ad Congress intended to create a super−priority for subsection 365(d)(3) it would have done so by express statutory language"); see also NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522−23 (1983) (stating Congress knew how to draft an exception for collective bargaining contracts, and would have done so had it wanted to).]

C. Section 503 Requirements for Administrative Expense Priority

The administrative expense claims for future damages in *Klein Sleep* and all other cases, [*FN:* See In re Klein Sleep , 78 F.3d at 24−2; see, e.g., *In re* Johnston, 164 B.R. 551, 554−55 (Bankr. E.D. Tex. 1994) (discussing administrative expense claim for future damages); Samore v. Boswell (*In re* Multech, Corp.), 47 B.R. 747, 751−52 (Bankr. N.D. Iowa 1985) (same). However, section 503(b) 's enumeration of administration expenses is qualified by the term "including." See 11 U.S.C. § 503(b) (1994). This term as used within the Code is not intended to be limiting. See id. § 102(3). The Code 's construction of "including" derives from the drafters ' codification of Supreme Court decision which held that the use of "including" be nonexclusive, unless the legislative intent appears otherwise. See S. Rep. No . 95−989, at 28 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5814 (stating that section 103(b) (3) codified reasoning of American Surety Co. v. Marotta, 287 U.S. 513, 517−18 (1933), which held that statutory term "include" is generally a word of extension, unless Congress indicates another purpose). The use in section 503(b) may qualify as such an exception because Congress in its drafting noted that, "[s]ubsection (b) specifies the kinds of administrative expenses that are allowable in a case under the bankruptcy code." See S. Rep. No . 95−989, at 66 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5852 (emphasis added) . As such, it is unlikely that "including" is meant to allow for any type of claim other than those listed. See Burlington N. R.R. Co. v. Dant & Russell Inc. (*In re* Dant & Russell), 853 F.2d 700, 709

(9th Cir. 1988) (stating that Code alone sets requirements for priorities), aff 'd in part and rev 'd in part, 853 F.2d 700 (9th Cir. 1988). But see Reading Co. v. Brown, 391 U.S. 471, 483−484 (1968) (holding tort liability to qualify as administrative cost despite lack of justification in section 503);*In re* Toy & Sports Warehouse Inc., 38 B.R. 646, 648 (S.D.N.Y. 1984) (allowing recovery of creditors ' committee members ' expenses as administrative costs);*In re* George Worthington Co., 921 F.2d 626, 629 (6th Cir. 1990) (permitting reimbursement of creditors ' committee members as administrative expenses, despite lack of statutory authority).] have sought recognition within section 503(b)(1)(A) as "actual, necessary costs and expenses of preserving the estate." [*FN:* See 11 U.S.C. § 503(b)(1)(A) (1994).] Due to the Code's adoption of this language from the Bankruptcy Act, this "actual, necessary" claim has experienced extensive interpretation. [*FN:* See Bankruptcy Act of 1898, ch. 541, 30 Stat. at 544, amended by Act of June 22, 1938, § 64a(1), ch. 575, 52 Stat. 840, 874, repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95−598, 92 Stat. 2549. See, e.g., Trustees of Amalgamated Ins. Fund v. McFarlin 's Inc. 789 F.2d 98, 101 (2d Cir. 1986) (noting that section 503(b)(1)(A) of Code and section 64a(1) of Bankruptcy Act of 1898 are similar enough for interpretations under Act to be relevant).] Consequently, this claim is understood to require that an expense has been both "beneficial" and "supplied to" the estate. [*FN:* See Cramer v. Mammoth Mart Inc. (*In re* Mammoth Mart Inc.), 536 F.2d 950, 954 (1st Cir. 1976) (providing administrative expense status only to extent was supplied to and beneficial to debtor in possession).] However, this definition is not to be read to extend administrative expense status to situations where "there has technically been performance by the contract creditor during the reorganization period, . . . [but] the bankruptcy estate was not benefited in fact therefrom." [*FN:* Id .] Nor does the mere potential of benefit qualify. [*FN:* See Broadcast Corp. v. Broadfoot II, 54 B.R. 606, 611 (D. Ga. 1985) (stating mere potential for benefit not satisfy requirement of section 503);*In re* Rhymes Inc., 14 B.R. 807, 808 (Bankr. D. Conn. 1981) (stating claim for expense with potential for value upon future happening of event not a benefit);*In re* Kessler, 23 B.R. 722, 724 (S.D.N.Y. 1982) (same).] Also, thisinterpreted requirement of benefit should not be read to obviate the expressed requirement of actuality and necessity [*FN:* See United States v. Ron Pair Enters. Inc., 489 U.S. 235, 241 (1989) (applying plain meaning of legislative phrases); Walter A. Effross, Grammarians at the Gate: The Rehnquist Court 's Evolving "Plain Meaning" Approach to Bankruptcy Jurisprudence, 23 Seton Hall L. Rev. 1636, 1715−19 (1993) (discussing plain meaning rule in regards to Code).] because had Congress intended this well established standard of benefit to be the appropriate test of administrative expense it would have expressly so provided. [*FN:* See, e.g., NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522−23 (1983) (stating Congress knew how to draft exception for collective bargaining contracts, and would have done so had it wanted to).] In recognition of this, courts generally require an expense to be both actual and beneficial to the estate to qualify as a section 503 priority claim. [*FN:* See *In re* Carmichael, 109 B.R. 849, 851 (Bankr. N.D. Ill. 1990) (holding that section 503 terms "actual" and "necessary" not accidental, but impose requirement that estate is actually benefited); Mammoth Mart , 536 F.2d at 954 (discussing importance of "actual" and "beneficial" priority claim); In re Rhymes , Inc ., 14 B.R. at 808 (discussing insufficiency of potential value).] Furthermore, these priority requirements are to be narrowly construed, because such priority interferes with the goal of the bankruptcy estate to enhance the distribution for the unsecured creditors. [*FN:* See Nathanson v. NLRB, 344 U.S. 25, 29 (1952) (requiring that purpose for preferring one creditor over another be clear from statute);*In re* Johnston , Inc . , 164 B.R. 551, 554 (Bankr. E.D. Tex. 1994) (stating courts must narrowly construe statute to maximize value of estate);*In re* Atlantic Container Corp., 133 B.R. 980, 992 (Bankr. N.D. Ill. 1991) (stating administrative expenses are to be narrowly construed to allow for maximum recovery of unsecured creditors);*In re* Baldwin−United Corp., 43 B.R. 443, 451−52 (S.D. Ohio 1984) (urging narrow construction to keep administrative costs at minimum); Hassett v. Revlon Inc. (*In re* O.P.M. Leasing Servs. Inc.) 23 B.R. 104, 121 (S.D.N.Y. 1982) (same); cf .*In re* Armorflite Precision Inc., 43 B.R. 14, 16 (Bankr. D. Me. 1984) (stating administrative expense payment must be justified by statute), aff 'd, 48 B.R. 994 (D. Me. 1985); Walter A. Effross, supra note 75, at 1754−55 (discussing consideration of equity when interpreting Code).]

In its discussion of section 503, the court in *Klein Sleep* held the future damages of an assumed lease to be beneficial to the estate on the basis of the property rights received upon assumption. [*FN:* See Nostas Assocs. v. Costich (*In re* Klein Sleep Prods. Inc.), 78 F.3d at 25 (explaining that analogizing "new value" of lease rights to voidable preference justifies finding of benefit for purposes of administrative expense).] The fact that possession of lease rights is legally considered beneficial cannot be disputed. However, applying this legal concept to the Bankruptcy Code's granting of administrative expense is inappropriate due to the purpose behind the priority status. Consequently, the courts' broad definition of benefit substantially interferes with the Bankruptcy Code's policy of providing equitable recovery for all unsecured creditors. By affording administrative expense status to a claim for future damages which arose out of rejection of an unnecessary lease, a court is prioritizing the payment of an expense which was neither actual nor beneficial. Prior assumption does not change the fact that despite the trustee's hopes and court's belief, the lease is simply not benefiting the estate and must be rejected for the economy of the bankruptcy estate's assets. Had the property rights of theassumed lease alone been truly beneficial to the estate there would have been no need for rejection. Moreover, if the real purpose of such a rule is to teach a lesson to overzealous debtors−in−possession, it does so at the expense of the innocent unsecured creditors of the estate. Furthermore, despite the apparent injustice to landlords by the Code's niggardly grant of priority status, this policy is a direct result of the congressional intent that the bankruptcy estate not be unnecessarily burdened because its goal was to prevent injustice on a far greater scale.

Another important characteristic of administrative expense status is its intent to provide incentive for creditors to continue to do business with the bankruptcy estate. [*FN:* See, e.g., Employee Transfer Corp. v. Grigsby (*In re* White Motor Corp.), 831 F.2d 106, 110 (6th Cir. 1987).] In *In re Jartran*, the 7th Circuit noted that "administrative priority is granted to post−petition expenses so that third parties will be moved to provide services necessary for a successful reorganization." [*FN: In re* Jartran Inc., 732 F.2d 584, 588 (7th Cir. 1984).] The court reasoned that the Code's intent to provide administrative expense status as incentive to creditors requires that the postpetition transaction be "induced" by the debtor−in−possession to qualify for priority. [*FN:* See id. at 587; Cramer v. Mammoth Mart Inc. (*In re* Mammoth Mart Inc.), 536 F.2d 950, 954 (1st Cir. 1976). This recognition of inducement as the purpose of administrative priority, and therefore necessary for the grant of priority was also acknowledgment under the Act, in 1976 by the 1st Circuit in*In re* Mammoth Mart , Inc ., stating, When third parties are induced to supply goods or services to the debtor−in−possession to a contract that has not been rejected, the purposes of section 64a(1) plainly require that their claims be afforded priority. It is equally clear that a claimant who fully performs under a contract prior to the filing of the petition will not be entitled to first priority even though his services may have resulted in a direct benefit to the bankrupt estate after filing. Id . (emphasis added).] Accordingly, the *Jartran* court withheld administrative expense status from a creditor, stating, "[i]n the case before us, no inducement by the debtor−in−possession was required because the liability of the ads was irrevocably incurred before the petition." [*FN: In re* Jartran , 732 F.2d at 588.] Therefore, the mere fact that a prefiling contractual obligation bestows benefit upon the estate does not give rise to an administrative expense. [*FN:* See, e.g., *In re* Mammoth Mart Inc. , 536 F.2d at 954 (stating direct benefit to estate from contract made prior to filing not entitled priority) (citing Denton & Anderson Co. v. Induction Heating Corp., 178 F.2d 841 (2d Cir. 1949)).]

Like the prepetition contract to provide future services in *Jartran*, a prepetition lease agreement does not involve inducement on the part of the debtor−in−possession. So, despite the need to encourage postpetition association with the estate, a landlord under an assumed lease should not be treated the same as a party who freely elects to contract with the estate postpetition. [*FN:* Accord *In re* Baths Int 'l Inc., 31 B.R. 143, 145 (S.D.N.Y. 1983) (holding contract made prior to petition that merely continued to benefit estate not to constitute an administrative expense); see *In re* Jartran , Inc ., 732 F.2d at 588 (withholding administrative claim priority for advertisements because liability was incurred prepetition).] An assumed lease is not a new obligationof a landlord, but a continuation by the estate of a pre−existing property right of the debtor with the permission of the bankruptcy court. [*FN:* See supra note 13.] The landlord under an assumed lease has no option of dealing with the estate as he is contractually obligated by the prepetition lease agreement, and therefore, need not be induced by any broad grant of favor to deal with the estate. [*FN:* See generally Nostas Assocs . v . Costich (*In re* Klein Sleep Prods. Inc.), 78 F.3d 18 (2d Cir. 1996);*In re* Jartran Inc., 71 B.R. 938, 942 (N.D. Ill. 1987) (holding conversion of case relegated administrative expenses for assumed leases of prior case prepetition claims of new case), aff 'd, 87 B.R. 525 (N.D. Ill. 1988), aff 'd, 886 F.2d 859 (7th Cir. 1989).] However, a landlord under an assumed lease should be entitled to some claim advantage, because of the inevitable difficulties of reorganization and the concessions the landlord will be required to make.

D. The Section 502 Lease Damages Cap and Assumption

As eluded to by the court in *Klein Sleep*, the result of withholding administrative expense status from the future damages of an assumed lease is not general unsecured status, but is actually no recovery at all. [*FN:* See Nostas Assocs. v. Costich (*In re* Klein Sleep Prods. Inc.), 78 F.3d 18, 26 (2d Cir. 1996) (interpreting 502(g) timing provision).]This is due to the inability of such a claim to qualify for filing under section 501, [*FN:* See 11 U.S.C. § 501 (1994). Section 501 of the Code pertains to the filing of claims and interests against the estate in bankruptcy. The first three sections ((a), (b), and (c)) deal with claims which arose prior to the filing of the petition. The last section, (d), is included to "indicate that claims of the kind specified, which do not become fixed or do not arise until after the commencement of the case, must be treated differently for filing purposes such as the bar date foe filing claims." Sen. Rep. No . 95−989, at 66 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5848. Section 501(d) expressly allows for exceptions for sections 502(e)(2), 502(f), 502(g), 502(h) and 502(I), as claims that arise postpetition, but which will be treated as prepetition claims. See 11 U.S.C. § 501(d). The only one of these sections which pertains to leases is section 502(g), which provides a prepetition claim for the rejection of an unassumed lease. See 11 U.S.C. § 502(g). The exclusion in section 502(g) of leases which had been previously assumed results in the inability for claims on assumed leases to be filed under section 501.] which further precludes its allowance within section 502. [*FN:* See 11 U.S.C. § 502(a). Due to the inability to file a claim for assumed lease breach under section 501, see supra note 89, these claims do not fall within the allowance provisions of section 502. This exclusion is based on the express provision in section 502(a) that, "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed." Id .] This interpretation is compatible with the conceptual structure of the bankruptcy estate itself [*FN:* See supra notes 17−18 and accompanying text. (distinguishing property and obligations of debtor and estate).] because as the debtor and the estate are two distinct entities, [*FN:* See id .] claims upon obligations of the estate should not be provided the general unsecured status of prepetition claims against the debtor. However, future damagesclaims have been granted unsecured status as a result of rejection of an assumed lease. [*FN:* See*In re* Johnston , Inc . , 164 B.R. 551, 556 (Bankr. E.D. Tex. 1994) (providing unsecured claim for assumed lease future damages for rejection after

conversion);*In re* Jartran Inc., 71 B.R. 938, 943 (Bankr. N.D. Ill. 1987) (same), aff 'd, 87 B.R. 525 (N.D. Ill. 1988), aff 'd, 886 F.2d 859 (7th Cir. 1989); Memphis−Shelby County Airport Auth. v. Braniff Airways Inc. (*In re* Braniff Airways Inc.) 783 F.2d 1283, 1286 (5th Cir. 1986) (same).] Although lacking statutory authority, this treatment is in line with the Code's equitable nature and the specific concerns of lease liability, in addition to providing landlords who have dealt with the estate an improved recovery. This improved recovery is found in that all of the landlord's preassumption claims and postassumption use claims are converted from general unsecured status to administrative priority merely as a result of the assumption. [*FN:* See 11 U.S.C. § 365(b)(1) (1994) (requiring all defaults under a lease be cured or provided adequate assurance of cure);*In re* Mushroom Transp. Co. Inc., 78 B.R. 754, 759 (Bankr. E.D. Pa. 1987) (noting that assumption makes all obligations, including pre−assumption, administrative expense); cf.*In re* Italian Cook Oil Corp., 190 F.2d 994, 996 (3d Cir. 1951) (stating assumption requires taking an executory contract cum onere , if debtor receives benefits must adopt burdens); Continental Energy Assocs. Ltd. Partnership v. Hazleton Fuel Management Co. (*In re* Continental Energy Assocs. Ltd. Partnership), 178 B.R. 405, 408 (Bankr. M.D. Pa. 1995) (same).] The landlord, in having part administrative and part unsecured status is actually better off than if the debtor−in−possession had rejected the lease outright.

If assumed lease future damages were not excluded from unsecured status, this debate might equitably end at the definition of administrative expense. Additionally, as an unsecured claim for assumed lease damages is not technically possible under the Code, as stated earlier, it is likely that courts may feel compelled to grant priority status. Due to this possibility an argument must be made to limit the administrative expense claims for future lease damages under section 502(b)(6). However, as section 502 applies exclusively to claims filed under section 501, [*FN:* See supra notes 89−90 (explaining inability of section 503 claims to fall under section 502 limits).] the assumed lease future damages are technically incapable of being limited as administrative expense claims. [*FN:* See United States v. Ron Pair Enters. Inc., 489 U.S. 235, 241 (1989) (stating as long as statutory scheme is coherent, generally no reason to go beyond plain meaning).] As a result, a court must choose between either providing a landlord with an unlimited administrative expense claim or no recovery at all. [*FN:* See*In re* Mclean Enters. Inc., 105 B.R. 928, 933−34 (Bankr. W.D. Mo. 1989). That court stated: A claim against the debtor based upon breach or rejection of a lease is not automatically disallowed if it falls beyond the scope of section 502(b) (6). The only consequence of finding section 502(b) (6) inapplicable to the transaction would be to allow the landlord to proceed unfettered against the debtor for the damages of an amount unlimited by statutory limitations. *Id.*] It is with an understanding of this draconian "all or nothing" outcome that

the Code's equitable nature must be considered. [*FN:* See Southwest Aircraft Servs. Inc. v. City of Long Beach (*In re* Southeast Aircraft Servs. Inc.) 831 F.2d 848, 854 (9th Cir. 1987) (rejecting an interpretation because its draconian effect deprived bankruptcy courts discretion to review circumstances), *cert. denied* , 487 U.S. 1206 (1988);*In re* Fred Sanders Co., 22 B.R. 902, 906 (Bankr. E.D. Mich. 1982) (requiring that lessor 's recovery have elementary notion of justice).] It is precisely these situations in which courts must look past the plain meaning of a statute to the drafter's intent. [*FN:* See Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (stating "[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statue, because not within its spirit, nor within the intention of the makers"); Philbrook, Comm'r, Dep't of Social Welfare v. Glodgett et al., 421 U.S. 707, 714 (1975) (holding construction invalid due to failure of consistency with overall pattern of statutory program); Griffin v. Oceanic Contractors Inc., 458 U.S. 564, 571 (1982) (stating "in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling").]

1. Birth and Purpose of Lease Limits

Perhaps the strongest argument against differentiating between previously assumed and unassumed leases for the purposes of the section 502(b)(6) damaged cap comes from the history of leases in bankruptcy. As mentioned *supra*, prior to 1934 the future damages claims were not mentioned within the Bankruptcy Act, and courts refused to allow them because they were contingent upon many factors and thus difficult to prove. [*FN:* See H.R. Rep. No . 95−595, at 353 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6309; S. Rep. No . 95−989, at 63 (1978), reprinted in U.S.C.C.A.N. 5787, 5849.] The 1934 amendment to the Act, however, expressly made future damages claims provable, but specified that landlord future damages for lease rejection would be limited to one year of future rent. [*FN:* See 3A Collier on Bankruptcy ¶ 63.01, at 1760 (James W. Moore *et al.* eds., 14th ed. 1975) (stating section 63a(9) allowed future damages to be proved, but for leases damages would be limited to one year).] The reason for providing lessors of real property with a claim for only one year was again due to the contingency of the future damages, in addition to the fact that after termination of a lease the landlord regains the benefit of the real estate. [*FN:* See H.R. Rep. No . 95−595, at 353 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6309; S. Rep. No . 95−989, at 63 (1978), reprinted in U.S.C.C.A.N. 5787, 5849; Oldden v. Tonto Realty Corp., 143 F.2d 916, 919 (2d Cir. 1944) (stating landlord should not be treated on par with other creditors because of ability to mitigate and rising rental values).] Neither the reasoning of the bankruptcy courts prior to 1934 nor that of Congress when drafting the 1934 amendments supply any support to the argument that assumed lease future damages should be treated differently than those of unassumed leases. The

future damages caps of both the Bankruptcy Act and Code were not based on limiting the claim of one type of landlord due to the timing of the lease agreement. Rather, they were promulgated on the belief that future damages limits in the case of a real property leases were necessary because the landlord future damages claims are too contingentand difficult to prove, as well as fair because a lessor regains the benefits of the real estate upon termination.

2. Intent within Legislative History

Further, congressional intent to limit assumed lease future damages exists in the legislative history of section 502(b)(6), which states that this provision does not limit "administrative expense claims for use of leased premises." [*FN:* See H.R. Rep. No . 95−595, at 353 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6309; S. Rep. No . 95−989, at 63 (1978), reprinted in U.S.C.C.A.N. 5787, 5849.] When read broadly this statement seems to be merely a reiteration of section 502's expressed scope. [*FN:* See supra note 90 (explaining section 502 applicability being limited to section 501 unsecured claims).] This interpretation was advanced by the *Klein Sleep* court to further support its finding that the section 502(b)(6) damage caps did not apply to assumed lease breach damages as an administrative claim. [*FN:* See Nostas Assocs. v. Costich (*In re* Klein Sleep Prods. Inc.), 78 F.3d 18, 28 (2d Cir. 1996); see also *In re* Johnston , Inc . , 164 B.R. 551, 555 (Bankr. E.D. Tex. 1994) (noting in dictum drafters ' notes preclude administrative expense limit).] Upon a closer reading, however, Congress' meaning does not appear to be a simple clarification of the scope of section 502. The qualification of excluding administrative expenses "*for use*" [*FN:* See H.R. Rep . 95−595, at 353 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6309.] of leased property cannot be extended to include future damages, because the very essence of a breach claim for futures damages is the refusal of the lessee to use the premises. Therefore, the *Klein Sleep* court's interpretation of this statement is clearly not the intent of the drafters.

Furthermore, Congress' employment of the distinction "*for use*" should not be taken lightly, as they were undoubtedly aware of the phrase's meaning. [*FN:* See Vern Countryman , Executory Contracts in Bankruptcy: Part II , 58 Minn. L. Rev . 479, 533 (1974). As noted by Vern Countryman in his seminal article on executory contracts, Executory Contracts in Bankruptcy: Part II , "[I]f the rejected contract was an expired lease, the lessor was also given a first priority claim for the reasonable value to the estate of the receiver 's use and occupancy of the leased premises from the time of the receiver was appointed until the time the property was surrendered to the lessor ." Id . (emphasis added).] Accordingly, another possible interpretation of this statement is that Congress did intend the 502(b)(6) limits to apply to administrative expense claims for future damages of an assumed lease, and only meant to exclude administrative expense claim "*for use*." Or in the alternative, perhaps Congress' classification of "administrative claims for the use" means that administrative expense status was not intended to extend to future liability. [*FN:* See supra Parts III(c)−III(d).] Unfortunately, however, neither of these readings intimates exactly how Congress intended assumed lease damages claims to

be qualified, but only that they were intended to fall within the section 502(b)(6) damages cap.

3. The Section 502(b)(6) Semantic Challenge

A closer reading of the language of section 502 itself also provides support for the congressional intent of limiting assumed lease future damages. Section 502(b), containing the lease damages cap, begins by stating, "[e]xcept as provided in subsections . . . , (g), . . . of this section." [*FN:* See 11 U.S.C. § 502(b) (1994).] Section 502 contains only one subsection applicable to leases, the aforementioned lease damages cap of subsection (6). [*FN:* See 11 U.S.C. § 502(b)(6) (applying limitation on claims of landlord to greater of one year or fifteen percent of three years).] It seems illogical that section 502(g), which provides that unassumed leases be treated as prepetition claims, [*FN:* See 11 U.S.C. § 502(g).] would need to be excepted in any manner from the scope of 502(b). Had previously assumed leases not been intended to fall within the scope of section 502, the unassumed lease claims of (g) would be the only claims applicable to section 502(b)(6). [*FN:* Despite a best efforts review of the language of section 502(b) the purpose of excepting subsection 502(g) is still vague to this particular fan of congressional literature, but it is readily acknowledged that the interpretation suggested in the text is a self−serving one at best.] This situation seems to suggest that the damages cap of 502(b)(6) is meant to be applicable to claims other than just those of section 502(g), and the only other claims possible would be those of a previously assumed lease. Furthermore, the Code's specificity within (g) regarding unassumed leases, is at odds with the general "claim of a lessor" in (b)(6). [*FN:* See 11 U.S.C. § 502(b)(6).] This variance in the terms within the same Code section also implies that although (g) specifically deals with unassumed leases, the scope of the (b)(6) cap is not similarly limited.

E. Equitable purposes of the Code

As these instances suggest, Congress either 1) intended the previously assumed lease future damages to fall within the scope of 502(b)(6) and did a very poor job of providing for such, 2) did not intend future damages to be limited and did a poor job of explaining, or 3) simply failed to foresee or provide for previously assumed lease future damages. Therefore, the question as to the validity of the *Klein Sleep* decision comes down to whether Congress realized that by making section 502 applicable only to claims filed under section 501 it was creating unlimited lease liability for assumed leases. The drafting of the section 502(b)(6) damages cap, as well as the inability of future damages to clearly qualify for administrative expense priority seem to indicate that Congress simply failed to foresee or effectively providefor this situation. As such, courts should not attempt to hold Congress to any technically possible meaning, but rather should find a solution in line with the expressed purposes of the Code.

The *Klein Sleep* court makes only a passing reference to the policies of the Bankruptcy Code. [*FN:* See Nostas Assocs. v. Costich (*In re* Klein Sleep Prods. Inc.), 78 F.3d 18, 20 (2d Cir. 1996) (noting competing policies of promoting parity among creditors and granting of priority to claims of creditors who continue to do business with debtor); see generally Wayne United Gas Co. v. Owens−Ill. Glass Co., 300 U.S. 131, 136 (1937) (discussing doctrines of equity);*In re* Todem Homes Inc., 51 B.R. 883, 887− 88 (S.D.N.Y. 1985) (discussing equitable powers of bankruptcy courts).] However, due to the noted ambiguity of the Code in this matter, [*FN:* See Nostas Assocs. v. Costich (*In re* Klein Sleep Prods. Inc.), 78 F.3d at 27 (stating ambiguity arguably exists);*In re* Jartran Inc., 886 F.2d 859, 868−69 n. 11 (7th Cir. 1989) (stating current Code provisions are unclear as to assumption and administrative expense status.).] and the lack of persuasive prior practice under the Act, [*FN:* See supra notes 41−52 and accompanying text.] the equitable purposes of the Code should be relied upon for determining the intent of Congress on this issue. [*FN:* See supra note 114; cf . Sampsell v. Imperial Paper and Color Corp., 313 U.S. 215, 219 (1941) (stating bankruptcy court 's equitable power of subordination is complete);Taylor v. Lake (*In re* Cada Invs. Inc.), 664 F.2d 1158, 1161 (9th Cir. 1981) (applying equitable power of bankruptcy courts to set aside court order); Wayne United Gas Co. v. Owens−Ill. Glass Co. et al., 300 U.S. 131, 136 (1937) (stating that bankruptcy courts are courts of equity).] The twin aims of the Bankruptcy Code are to provide the debtor with a fresh start, [*FN:* See Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 93−137, at 79−81 (1973); Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1964) (stating interest of debtor 's fresh start has been "again and again emphasized").] and allow the unsecured creditors an equitable recovery of claims. [*FN:* See Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 93−137, at 76−79 (1973); cf . Sampsell , 313 U.S. at 219 (1941) (stating theme of Bankruptcy Act to be equity of distribution); Gilbert v. Shouse, 61 F.2d 398, 399 (5th Cir. 1932) (stating purposes of Act); Allied Artists Pictures Corp. v. Allied Artists Television Corp. (*In re* Allied Artists Indus. Inc.) 35 B.R. 737, 740 (S.D.N.Y. 1982) (same).] Because an equitable recovery by all the unsecured creditors is sought, it is unfair to allow a single creditor to be preferred or placed above the general class. [*FN:* See Cramer v. Mammoth Mart Inc. (*In re* Mammoth Mart Inc.), 536 F.2d 950, 953 (1st Cir. 1976) (requiring that in order for one claimant to be preferred over others there must be clear express provision in statute); Sampsell , 313 U.S. at 219 (requiring clear and convincing evidence of a creditors priority status); Memphis−Shelby County Airport Auth. v. Braniff Airways Inc. (*In re* Braniff Airways Inc.) 783 F.2d 1283, 1286 (5th Cir. 1986) (disadvantaging other unsecured creditors);*In re* Johnston , Inc . , 164 B.R. 551, 554 (Bankr. E.D. Tex. 1994) (stating courts must be wary of granting priority).] Although administrative expense status varies this general rule, [*FN:* See 11 U.S.C. §§ 503, 507 (1994). But see County Sanitation Dist. No. 2 of Los Angeles County v. Lober Indus. (In re Lober Indus.), 675 F.2d 1062, 1065 (9th Cir 1981) (requiring clear statutory grant for priority to be granted over other unsecured creditors); Nathanson v. National Labor Relations Bd., 344 U.S. 25, 29 (1952) (requiring that for priority of one claim is to be granted purpose must be clear from statute); Allied Artist Pictures Corp. v. Allied Artist Television Corp. (*In re* Allied Artists Indus. Inc.), 35 B.R. 737, 740 (S.D.N.Y. 1983) (noting administrative expense runs counter to Code goals).] it is itselfa means to the Code's goal of benefiting the unsecured creditors. Reorganization is designed for the purpose of providing for the recovery of the unsecured creditors, [*FN:* See Nicholas v. United States, 384 U.S. 678, 684−85 (1966) (stating reorganization rehabilitation is alternative to economically wasteful liquidation); Reading Co. v. Brown, 391 U.S. 471, 478 (1968) (discussing postponement of existing creditors claims is in hope of a larger recovery upon a successful rehabilitation);*In re* Mammoth Mart , Inc ., 536 F.2d at 954 (explaining debtor−in−possession operations costs are paid before creditors who benefit from them); R and O Elevator Co. Inc., v. Harmon, 93 B.R. 667, 671 (D. Minn. 1988) (stating Code attempts to provide for both economic reorganization and recovery of debtor) (citing Mazirow v. Grigby (*In re* White Motor), 44 B.R. 563, 568 (N.D. Ohio. 1988)).] and this priority status as an inducement for postpetition association is merely a vehicle used to benefit the unsecured creditors through reorganization. [*FN:* See supra note 20.] Accordingly, administrative expense claims are not a complete exception to the Code's emphasis on unsecured creditors, and dilution of the unsecured creditors' claims by way of a hefty administrative claim for future damages should be avoided as contrary to the purposes of the Code. [*FN:* See*In re* Grant Broad. Inc., 71 B.R. 891, 897 (Bankr. E.D. Pa. 1987) (requiring narrow construction of section 503(b)(1)(A) to keep administrative priority at minimum so to preserve necessarily scarce resources of estate); see generally Oldden v. Tonto Realty Corp., 143 F.2d 916, 920 (2d Cir. 1944).]

The Code drafters noted that the purpose of the 502(b)(6) damages cap is to protect the unsecured creditors from the unique and disproportionate claims of landlords. [*FN:* See H.R. Rep. No. 95−595, at 353 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6309; S. Rep. No. 95−989, at 63 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5849; Weeks v. Kinslow (*In re* Weeks), 28 B.R. 958, 960−61 (Bankr. W.D. Okla. 1983) (discussing compromise of limiting landlords ' claims); see also*In re* Mr. Gatti 's Inc., 162 B.R. 1004, 1009−10 (Bankr. W.D. Tex. 1994) (discussing section 502 lease damages cap history and intent).] It is only logical that the same protection would be intended from the higher priority claim of an administrative expense. [*FN:* See *In re* Johnston , Inc . , 164 B.R. 551, 555 (Bankr. E.D. Tex. 1994) (stating large administrative expense claim is inequitable and violates goals of Code).] Furthermore, this reduction of a landlord's claim, for the benefit of all unsecured creditors, is not only equitable but just, because unlike most creditors a landlord regains possession of his land and is capable of reletting. [*FN:* See H.R. Rep. No . 95−595, at 353 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6309; S. Rep. No . 95−989, at 63 (1978), reprinted in U.S.C.C.A.N. 5787, 5849 (stating one of historical reasons for lease limits was due to ability of real property landlord to regain benefit of land); Kuehner v. Irving Trust Co., 299 U.S. 445, 455 (1937) (differentiating between landlord and usual creditor); Oldden v. Tonto Realty Corp., 143 F.2d 916, 919 (2d Cir. 1944) (stating landlord should not be treated on par with other creditors because of ability to mitigate and rising rental values); cf.*In re* Carmichael, 109 B.R. 849, 852 (Bankr. N.D. Ill. 1990) (stating if property is not being used, landlord cannot wait to recover claim at expense of unsecured creditors who received no benefit from lease);*In re* Dixie Fuels Inc., 52 B.R. 26, 27 (Bankr. N. Ala. 1985) (advancing equitable principle to prevent unjust enrichment).] Therefore, in light of the extreme circumstance of bankruptcy, limiting future damages of an assumed lease landlord the same as an unassumed lease landlord is not unjust.

F. The Klein Sleep Rule in Reality

To appreciate the purposes of the Code it is perhaps best to consider the *Klein Sleep* rule's effect on the administration of a bankruptcy case. As the *Klein Sleep* court noted in dictum, the existence of unlimited breach liability will have the effect of discouraging courts from allowing the assumption of leases. [*FN:* See Nostas Assocs. v. Costich (*In re* Klein Sleep) , 78 F.3d 18, 29 (2d Cir. 1996) (stating courts will rarely find assumption to be in best interest of estate and therefore block assumption in all but unusual cases).] This certainly will be a result of the difficulty in finding a lease whose benefit can outweigh the prohibitive risk of subsequent rejection, as well as the likely strong opposition to assumption by the general unsecured creditors whose claims will be jeopardized by a later rejection. So, this rule adversely effects not only those cases in which rejection of an assumed lease occurs, but also cases in which an estate is foreclosed from assumption by a court. [*FN:* See id. (stating that only in unusual situations when rental terms are highly advantageous will courts allow assumption).] As a result, the cost of this rule is not only large administrative expense claims, but also the prevention of the opportunities necessary for a successful reorganization. Further, the *Klein Sleep* court makes no reference to the difficulty created for bankruptcy courts in the case of a landlord who refuses to accept surrender of the lease or to mitigate by reletting. [*FN:* See id. at 21−22 (existing circumstances in Klein Sleep involved landlord who had already mitigated, so issue never arose).] If the section 502 claim allowances limitations do not apply to administrative expense claims, what is there to prevent a near defunct estate from having to pay accelerated unmitigated rent damages on a lease whose value is nonexistent for lack of business. Like the assumed lease limitations, the Code does not technically provide for this situation outside of section 502. [*FN:* See 11 U.S.C. §§ 502(b)(1), (c) (1994). The Bankruptcy Code provides for equitable remedies for breach in section 502(c), and disallowance of unmatured or contingent claims in section 502(b)(1), but they are inapplicable to administrative expense claims for the same reason as the section 502(b)(6) damages cap. Consequently, if a court is to follow a strict technical reading of the Klein Sleep decision it is unlikely that a landlord can be forced to mitigate within the Code. See*In re* Destroy Inc., 40 B.R. 927, 928 (Bankr. N.D. Ill. 1984) (mitigating claim, regardless of actual reletting). But see R and O Elevator Co. Inc. v. Harmon, 93 B.R. 667, 673 (D. Minn. 1988) (holding no duty to mitigate on noncompetition contract, despite section 502(b)(1) 's provision for disallowing claims "unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason or than that because such a claim is contingent or unmatured").]

A solution from within the Code provisions, however, has been proffered by the *Klein Sleep* court. [*FN:* See *In re* Klein Sleep, 78 F.3d at 29 (noting benefits of allowing liberal extension to prevent unwise assumption).] The proposed solution is to have bankruptcy courts liberally extend the period during which the debtor−in−possession has to assume or reject alease. [*FN:* See 11 U.S.C. § 365 (1994) (election allowance at courts discretion); Williamette Waterfront, Ltd. v. Victoria Station Inc. (*In re* Victoria Station Inc.), 875 F.2d 1380, 1383 (9th Cir. 1989) (construing section 365(d)(4) election period extensions with eye toward rehabilitative goal of Code). But see Anthony Michael Sabino, Esq. and Nancy Eileen Susca, Esq., The Demise of the "Shopping Center Amendments" to the Bankruptcy Code and a Proposal for Revitalizing Bankruptcy Code Section 365(d)(4) , 68 U. Det. L. Rev . 375, 388− 91 (1991) (discussing courts ' extension of election period despite 1984 Amendments).] To suppose, however, that Congress had this use of extension in mind when it decided to provide unlimited assumed lease liability is, logically speaking, a little suspect. As an alternative to assumption with unlimited liability, extension will entitle the estate to the same rights over the property, but results in a wholly different future damages liability. Such an option makes assumption not only unnecessary, but

unattractive. Moreover, this solution is quite possibly an even greater nightmare for both the landlord, and the estate. Under this solution the debtor−in−possession will be unable to provide the bankruptcy estate and reorganization business with any substance for effective recovery, [*FN:* See supra notes 12−16 and accompanying text.] while a landlord may be strung along indefinitely without the benefit and protection of a lease. [*FN:* See Sabino and Susca, supra note 133, at 406 (discussing negative effects on landlord of liberally allowing extension of election period).] Another reason that landlord's are disadvantaged by such a liberal extension, is that during the period in which a debtor−in−possession is deciding whether to assume or reject a landlord is entitled to an administrative expense claim for only the reasonable value of the leasehold, [*FN:* See 11 U.S.C. § 365(d)(3) (1994). The 1984 "Shopping Center Amendments" substantially limited the discretion of the bankruptcy courts for determining the estate 's liability to the landlord for use during the election period, by requiring that the "trustee shall timely perform all the obligations of the debtor, . . . until such lease is assumed or rejected." Id . The effect of this amendment is that the lessee is required to pay the contracted lease rate as an obligation of the lease. However, courts have undermined this pro− lessor provision by strictly interpreting the scope to "during the election period" and upon rejection allowing only the reasonable value of the use. See Great W. Savs. Bank v. Orvco Inc., (*In re* Orvco Inc.), 95 B.R. 724, 727 (B.A.P. 9th Cir. 1988) (holding only reasonable value owed upon rejection of lease); Memphis−Shelby County Airport Auth. v. Braniff Airways Inc. (*In re* Braniff Airways Inc.) 783 F.2d 1283, 1286 (5th Cir. 1986) (allowing landlord only recovery for reasonable value of use);*In re* Fred Sanders Co., 22 B.R. 902, 906 (Bankr. E.D. Mich. 1982) (allowing recovery for lease during section 365 election period for value of lease not benefit to estate).] which may not necessarily be the rent set by the lease. [*FN:* See*In re* Grant Broad. Inc., 71 B.R. 891, 897 (Bankr. E.D. Pa. 1987) (adopting rule of liability for only use and occupation); Mohawk Indus. Inc. v. Related Indus. Inc. (*In re* Mohawk Indus. Inc.), 64 B.R. 667, 669 (D. Mass. 1986) (presuming terms in lease reasonable and applying them as fair rental value of leased premises); Elliot v. Leouness (*In re* William J. Brittingham Inc.), 39 B.R. 575, 577−78 (Bankr. D. De. 1984) (stating administrative claim for use during election period will be for value of use). But see, e.g.,*In re* Fred Sanders Co., 22 B.R. 902, 907 (Bankr. E.D. Mich. 1982) (providing that lease price is presumptively reasonable).]

Perhaps another option of the court for providing some control over the administrative expense claims for future damages would be an application of thepower of the court provided in section 105(a). [*FN:* See 11 U.S.C. § 105(a). Which provides: (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte , taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. Id .] Section 502(b) provides the bankruptcy court shall determine the amount of claims against the debtor, [*FN:* See 11 U.S.C. § 502(b).] and this must be equally true for the administrative expense claims of section 503. Therefore, when determining the amount of the claim the court may find it necessary and proper under section 105 to apply the same types of claim allowances as set out in the otherwise inapplicable section 502. This constructive use of the provisions of section 502 is justifiable, because the well thought−out methods expressly provided within the Code are tailor made for such a situation.

G. The Need for Revision

Although, as stated above, the intent of Congress to limit the extent of assumed lease breach liability appears to be implicit, if not ambiguously expressed, the practical and equitable demands of the Code would be best served by an alteration of the existing claim allowance provisions. Practically speaking this may effectively be accomplished by expressly providing unsecured status to the future liability of an assumed lease within section 502(g). However, this allowance would be constructive at best, due to its obvious conflict with the conceptual structure of a bankruptcy estate. To avoid such incompatibility, section 503 may be amended to expressly incorporate the 502(b)(6) damages cap for administrative expense claims for the future damages of an assumed lease. By simply amending section 503, instead of trying to reorganize 502(b)(6) to extend to administrative expense claims, much unnecessary tinkering of section 502 can be avoided. Additionally, the effect of providing a limited administrative expense claim to landlords of assumed lease is the most equitable of alternatives, because it awards priority status to a landlord who has had to deal with the estate during the bankruptcy without substantially interfering with the equitable distribution of the Code.

IV. Conclusion

The policy concerns of the section 502(b)(6) lease damages cap for the equitable distribution for unsecured creditors are not limited to unassumed leases. Furthermore, the *Klein Sleep* court's grant of an unlimited administrative expense claim for future damages of an assumed lease creates a situation which not onlyexcessively interferes with the Bankruptcy Code's aim of equitable distribution, but also substantially hampers the reorganization process. As a result, until an amendment clarifying the Code's position on assumed lease future liability is made, a technical reading

of the Code's claim allowances provision should be avoided due to its inconsistency with the Code drafters' intent.

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