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INSIDER "INCLUDES"? INCLUDE ME OUT

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Introduction

Insiders are suspects. They are in cahoots with debtors. They are subjected to longer preference periods. [1] Their votes are not counted in determining whether there is at least one impaired, accepting class of creditors to allow confirmation of a chapter 11 plan. [2] Their existence is ignored in determining whether an involuntary debtor has twelve or more creditors, and therefore requires three petitioning creditors. [3] Insiders cannot vote for a trustee, [4] be appointed as a trustee, [5] or be retained as a professional person by a trustee or a debtor in possession. [6] Their claims for services are subjected to extra scrutiny, [7] their customer claims against stockbrokers are automatically subordinated, [8] and their other claims against all types of debtors are putative candidates for equitable subordination, [9] or at least less favorable treatment. [10]

The Bankruptcy Code tells us who most insiders are, for example, relatives and general partners of individual debtors, [11] and officers and directors of corporate debtors. [12] The problem is that the Bankruptcy Code does not tells who all insiders are. It leaves room for considerable contests. Even though the definition of "insider" specifies eighteen types of relationships that qualify, [13] it begins "'insider' includes." [14] With the use of the word "includes," the Code tells us that the definition of "insider" is not limited, and that other relationships qualify. [15] Moreover, among the enumerated relationships are those involving "control," [16] which is also not defined.

The Senate and House Judiciary Committee reports accompanying the bills that ultimately became the Bankruptcy Reform Act of 1978 [17] provided an identical explanation of the open−ended definition of "insider": "An insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." [18] Numerous courts have relied on or adopted this explanation as determinative, and therefore have flexibly applied the term to include a broad range of parties with some kind of "close" relationship with the debtor. [19] Based upon the legislative history of the term "insider," courts have produced such non−enumerated insider relationships as a general partner of an officer and director of a corporation, [20] sister partnerships to the debtor partnership, [21] an advisor/consultant to a corporate debtor, [22] a plan proponent with access to confidential information in a corporate debtor's case, [23] a corporation that through its 28% ownership of debtor corporation's parent designated a member of the debtor's and its subsidiaries' board of directors, [24] a limited partnership whose principal had invested with general partners of a partnership debtor and which purchased some of that partnership debtor's debt, [25] an ex−brother−in−law of a corporate debtor's president [26] and an individual debtor's live−in girlfriend. [27]

Despite the legislative history's apparently authoritative gloss on the statutory definition, using that gloss as controlling is unsatisfactory for two reasons. First, as Justice Scalia has observed, the laws enacted by Congress are in the statutes themselves, not in the legislative materials that accompany the statutes. [28] If Congress wanted to adopt the definition in the Judiciary Committees' reports, it could easily have written that definition into the statute books. Second, as will be developed below, [29] the inclusion of persons with "a sufficiently close relationship" and "[not] dealing at arms length" excessively expands the definition, because

these concepts add persons who are distinguished from insiders in other parts of the statute, such as employees and attorneys. [30]

This article will consider the following questions in identifying insiders: Whom shall we include? Whom may we safely exclude? If a person is "included" as an insider for one purpose, is that person included as an insider for all purposes? Does it make a difference in what context the question of insider relationship arises? [31]

I. Whom to Include? An Adventure in Statutory Interpretation

The determination whether a particular relationship with a debtor is included as an insider relationship must begin with the interpretation of the statutory language, in particular, with the statutory definition. And the first tool in the toolbox of statutory construction is the "plain meaning" rule.

A. "Plain Meaning" Doesn't Help

The Supreme Court has repeatedly said that statutes, if unambiguous, are generally to be construed in accordance with their plain meaning. [32] For example:

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first cannon is also the last: "judicial inquiry is complete." [33]

It is difficult to imagine that the definition of "insider", with regards to the term "includes", could be considered ambiguous. If there were some doubt, it ought to be dispelled by the statutory construction of the word "includes," as "not limiting." [34] There are two recognized exceptions to the "plain meaning" rule; if applying the rule produces results that are demonstrably at odds with the legislature's intentions or applying it produces an absurd result. [35] Nevertheless, absent ambiguity, legislative drafting error, or absurdity, applying the "plain meaning" rule to the word "includes" yields no answer as to what non−enumerated relationships should be included.

B. Legislative History versus Holistic Construction and Avoidance of Surplusage

When the first tool in the toolbox is inadequate to accomplish the task, reach for another.

> Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statute is unclear. [36]

As quoted in the introduction, the legislative history is crystal clear. The Judiciary Committee reports of both Houses state that: "An insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." [37]

If this is correct, then any one with a fiduciary relationship to the debtor must be included. The most common statement of the standard of fiduciary conduct is the venerated description of Chief Judge Cardozo, "the punctilio of an honor most sensitive." [38] Fiduciaries owe a duty of care and a duty of loyalty. [39] The law therefore subjects the conduct and transactions of fiduciaries to stricter scrutiny than "those acting at arm's length" [40] with the debtor.

But did Congress really mean to make every fiduciary an insider? All agents are fiduciaries. [41] These duties are imposed because an agent is granted authority to act on another's behalf. [42] The list of who is an agent is a long one, including the professional persons enumerated in the Bankruptcy Code. [43] Consideration of two types of agent – attorneys and employees − shall be sufficient for the present purposes.

In a statutory construction contest between the legislative history and actual language of the statute, the actual language should prevail. [44] In addition, if the statutory term under examination is used elsewhere in the statute, in the disjunctive with a second term, the term under examination must mean something different from the second term. The reason for the difference in meaning is the conjunction of two canons of statutory construction that focus on the language of the statute. The first is the principle of "holistic" [45] construction, which holds that:

> A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. (citations omitted). [46]

The second is the principle requiring court to avoid reading any statutory language as surplusage:

> Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment. [47]

In its most recent bankruptcy case, the Supreme Court has used even stronger language with regard to rendering redundant the words of a statute, noting "the interpretive obligation to give meaning to all the statutory language." [48] To avoid rendering superfluous the second term in a statutory provision in the form "[term under examination] or [second term]," the term under examination cannot be interpreted to include the second term.

The term under examination in this article is "insider." In two places in the Bankruptcy Code relevant to the present discussion, the statutory language is "insider or [second term]." In section 303(b)(2) of the Bankruptcy Code, the language is "insider or employee." [49] In section 502(b)(4) of the Bankruptcy Code, the language is "insider or attorney." [50] To avoid rendering "employee" and "attorney" superfluous, "insider" may not automatically include employees and attorneys. [51]

The consequence of this conclusion goes beyond these two categories of agents or fiduciaries. An attorney is said to owe the "highest fiduciary duties imposed by law." [52] These duties have been held to extend to attorney−client fee arrangements as well. [53] If the relationship involving the closest scrutiny must escape the definition of "insider," it would be supremely anomalous and illogical that any lesser relationship that meets the legislative history's formulation of "sufficient close relationship . . . subject to closer scrutiny than those dealing at arms length with the debtor" could be held captive. [54] The result must be that the formulation of the definition of "insider" in the legislative history, although enlightening, must be rejected as the controlling formulation.

C. Continuity of Pre−Code Practice

After the Supreme Court was unable to resolve the issue of permissibility of lien stripping by applying the "plain meaning" of the phrase "allowed secured claim" in section 506(d) of the Bankruptcy Code, it turned to the following:

> When Congress amends the bankruptcy laws, it does not write "on a clean slate." Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre−Code practice that is not the subject of at least some discussion in the legislative history. [55]

The doctrine of continuity of pre−Code practice, absent a discussion in the legislative history of an intention to change the law, had been previously applied in cases in which a suggested interpretation of the Bankruptcy Code would place the bankruptcy laws at odds with fundamental policies in other areas of the law. [56]

The search for a pre−Code practice to continue in the pursuit of a rule for determining who is an insider is a vain one. There is no relevant pre−Code practice. As the separate House and Senate Judiciary Committee reports identically state: "'Insider' . . . is a new term." [57] Moreover, the principal provision of the Code that employ the term "insider" are new as well. Insider preferences are new. Under the Bankruptcy Act of 1898, there was no bifurcation of the four month preference period. [58] The origin of the concept of insider preference seems to be the 1973 Bankruptcy Commission Report, [59] which recommended substantial revisions to the preference provisions. [60] The Commission's proposed statute set the ordinary preference period at three months, for which the requirement that the recipient had "reasonable cause to believe" that the debtor was insolvent was dropped, and the debtor was presumed insolvent. [61] A longer preference period of one year was established for "a member of the immediate family, a partner, an affiliate, a director, an officer, of the managing agent of or for the debtor, who had reasonable cause to believe the debtor was insolvent." [62] The Commission's notes accompanying its proposed preference statute referred to the enumerated group of persons quoted above as "insiders," [63] a term its proposed statute did not define. [64] The Bankruptcy Reform Act of 1978 adopted the concept of a longer preference period for insiders, for whom the requirements of "reasonable cause to believe" and insolvency had to be proven by the trustee. [65] The "reasonable cause to believe" requirement was dropped from the Bankruptcy Code in 1984 [66] with little explanation. [67] The result of the foregoing is that there is no pre−Code practice concerning insider preferences that will assist in determining who is meant to be included in the definition of "insider." An investigation into the legislative purpose of the insider preference provision reveals an initial attempt to limit the group of insider preference defendants to those with special knowledge of the debtor's financial condition.

Similarly, another major substantive use of the term "insider" is in the context of the confirmation requirement, requiring that at least one impaired class accept plan for reorganization, "determined without including any acceptance of the plan by any insider." [68] This usage of the term is new. [69] Other provisions of the Bankruptcy Code that use the term "insider" either have no antecedent in the Bankruptcy Act, [70] or have an antecedent that specified the pertinent relationships. [71] Finally, the definition of "disinterested person," [72] which governs the ability to be appointed trustee or examiner, [73] or to be retained as a professional person to represent a trustee, [74] although not new, had a precise and limited group of disqualified persons. [75]

D. Legislative Purpose

With the preceding tools of statutory construction incapable of informing the decision whom to include – although holistic construction and the avoidance of surplusage provide some answers on whom to exclude – it is time to work with some of the tools less often employed. At the risk of taking out of order what has been recently described as "the last redoubt of losing causes," [76] the next tool of statutory construction to be considered is:

> In determining the meaning of a statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy. [77]

Or rather, its corollary:

> [T]he statute at hand should be construed liberally to achieve its purposes. [78]

The problem with this tool of construction is that the Bankruptcy Code is hardly a single−purpose statute. Indeed, what have long been recognized as the twin purposes of the bankruptcy laws – a fresh start for deserving debtors [79] and a fair distribution of the assets of an insolvent [80] – sometimes point in opposite directions. To construe the Bankruptcy Code liberally may sometimes require favoring debtors over creditors and may sometimes require the opposite. The issue at hand is a prime example. The term "insider" occurs in the discharge [81] and dischargeablity [82] sections,, which govern the fresh start, the preference section, [83] which promotes equality of distribution, [84] and the confirmation section, [85] which deals with both. Aiding the fresh start would counsel a limiting construction on the term "insider." Indeed, the Supreme Court has recently reaffirmed that exceptions to discharge are to be "confined to those plainly expressed." [86] Conversely, aiding equality of distribution would counsel a more expansive construction on the term "insider." [87] It therefore

appears that a (liberal) construction to effectuate the purposes of the Bankruptcy Code also gives no assistance to effort to find the boundary between insiders and non−insiders.

E. Shared Attributes of Items in a List, Noscitur a Sociis and Ejusdem Generis

The major tools of statutory construction having little utility, the minor implements must be examined. Since the open−ended definition "includes" an eighteen item enumeration, it appears useful to work with the implements that relate to lists. Such as:

> That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well. [88]

This doctrine is related to two others bearing Latin names: *noscitur a sociis*, which means that a word in a statute "gathers meaning from the words around it"; [89] and *ejusdem generis*, which provides that "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." [90] In the case of "insider," which is a definition, *noscitur a sociis* is not directly applicable, because "insider" does not appear in the middle of a list, and *ejusdem generis* also does not strictly apply, because "insider" does not appear at the end of a list. Nevertheless, all of these related doctrines convey the same common sense notion: the word at issue has to mean something not too different from the items in the list. [91]

To find the shared attribute of the enumerated insider relationships, it is tempting to use the legislative history's "sufficiently close relationship . . . subject to closer scrutiny than those dealing at arms length with the debtor." [92] That temptation must be resisted for the reason explained above: [93] the legislative history's formulation automatically includes fiduciaries, especially attorneys, thus impermissibly rendering the word "attorney" superfluous in Bankruptcy Code section 502(b)(4). [94] If attorneys, whose dealings with debtor clients are subjected to the closest scrutiny, must be excluded, then any relationship requiring lesser scrutiny must necessarily be excluded as well. The rejection of this formulation, whether as an authoritative interpretation found in the legislative history, or as the shared attribute of the enumerated relationships, also requires the rejection of two factors, which paraphrase the quotation from the Judiciary Committees' reports, recently developed by the case law for determining insiders in insider preference actions: (1) the closeness of the relationship between the transferee and the debtor; and (2) whether the transactions between the transferee and the debtor were conducted at arms' length. [95]

The search for a common attribute of the eighteen enumerated relationships, other than the one that must be rejected, is perhaps one worthy of a seeker with the tenacity of, and better success than, Ponce de Leon. An easier task is to limit the search for an attribute common to one or more of the enumerated relationships and the non−enumerated relationship at issue. An example of this exercise is found in a recent bankruptcy court decision holding that a limited liability company, of which an individual debtor was one of three members, was an insider. [96] The court found this non−enumerated relationship to share attributes of ownership and control with the enumerated relationships of "corporation of which the debtor is a director, officer or person in control" [97] with respect to an individual, and "affiliate," [98] because of a greater than 20% holding of voting interest by the debtor. [99]

Of all the principal canons of statutory construction examined, this method, looking for shared attributes between a putative insider relationship and one or more enumerated ones, actually yields a practical solution. It is also unobjectionable, because it runs afoul of no methodological injunction, such as rendering statutory language superfluous. It should therefore be selected as the method of determining whom to include as insider. The selection of the method accomplished, two questions remain: How closely must the candidate relationship resemble the listed one? And, is the degree of closeness the same no matter which statutory insider provision is used? The second of these two inquires is easier to address.

F. Reading the Same Word in Different Parts of One Statute the Same Way

Although there is nothing logically unsound about having different levels of inclusion for insider relationship for the different insider provisions, [100] and several cases suggest such an approach, [101] the notion of a statutory definition seems to mandate that the defined word mean the same thing each time it is used. Even in the absence of a definition, the normal rule of statutory construction is clear:

> [I]dentical words used in different parts of the same act are intended to have the same meaning. [102]

Explicit definitions strengthen the presumption. [103] The structure of the Bankruptcy Code strongly supports the general rule; the defined terms should be applied consistently throughout. [104] Significantly, when the Supreme Court read the phrase "allowed secured claim" differently in sections 506(a) and 506(d) of the Bankruptcy Code, it noted that it was not construing a definitional section. [105] Therefore, the analysis of whether a particular relationship is an insider relationship does not depend on the context in which the issue arises.

G. Strict Construction for Acts Imposing New Liabilities (in Derogation of Common Law)

The final tool of statutory construction to be selected for the task at hand is so rarely employed that this author's research cannot find a Supreme Court case that gives it its proper expression:

> If a statute creates a liability where otherwise none would exist, or increases a common law liability, it will be strictly construed. A statute, even when it is remedial, must be followed with strictness, where it gives a remedy against a person who would not otherwise be liable. The courts will not extend or enlarge the liability by construction; they will not go beyond the clearly expressed provisions of the act. [106]

This above is a corollary to a more familiar maxim that statutes in derogation of the common law are to be strictly construed, [107] and is the closest civil law counterpart to the criminal law rule of lenity, which strictly construes criminal statutes, [108] and "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." [109]

The statute creating the new civil liability, unknown at common law, to which the special tool of construction quoted above is to be applied, is the one creating the insider preference action. [110] The action is certainly new to the Bankruptcy Code. [111] Even the ordinary preference action is itself in derogation of both the common law right of insolvents to prefer certain creditors at the expense of others, [112] and the venerable common law rule of judgment lien enforcement, "the first in time is the first in right." [113] The liability to return the preference, unknown at common law, is therefore expanded to a new class of defendants, namely insiders. That class should therefore be strictly circumscribed if the rare rule of interpretation is to be regarded.

Support for the rule can be found in the procedure for adjudication of insider preference actions. Under recent Supreme Court decisions, unless a preference defendant has submitted a claim against the debtor's estate, that defendant is entitled to a jury trial. [114] Although the issue of statutory interpretation is the province of the court, [115] the question whether a particular relationship qualifies as an insider relationship, has been classified alternatively as one of fact, [116] one of law, [117] or a mixed question of law and fact. [118] Questions of fact are the province of the jury. [119] It is the function of the court to instruct the jury as to the proper legal test to apply. [120] The jury may determine a mixed question of fact and law, if it is properly instructed as to the applicable legal standards. [121]

Jury instructions must present the "controlling principles in a clear, concise, and forthright manner." [122] They must provide adequate guidance to enable the lay jury intelligently to determine the issues presented. [123] Thus, in an insider preference action, the submission to the jury of the issue whether the defendant is an insider necessarily imposes rigor on a loosely drawn statute. Unlike in a bench trial, where no test need be articulated a priori, in a jury trial the jury must be given a fixed standard against which the disputed facts are to be measured.

What sort of clear, concise instructions can be given that will provide adequate guidance to enable a lay juror intelligently to determine whether a particular relationship is included in the definition of insider? Since the shared attribute test has already been selected as the method for determining insiders, [124] the jury should be given one or more of the enumerated relationships and a measuring device for testing whether the relationship at issue and the listed relationships share enough attributes. Without deciding what that measuring device is, what necessarily emerges from this exercise is a much narrower band of inclusion than the current case law would permit. For example, it would be hard to imagine a clear and concise measuring device that would allow a reasonable jury to conclude that the proponent of a competing plan with access to confidential information who purchased claims to obtain the ability to block confirmation of the other plan shared sufficient attributes with any of the enumerated relationships to be an insider. [125] The courts' obligation to provide juries with an easy−to−apply test to determine who is an insider yields the same result as the last rule of statutory construction that began this portion of the discussion, a statute that imposes a new liability ought to receive a strict construction. Therefore, because "insider" is a definitional term, and must have the same meaning throughout the Bankruptcy Code, [126] it should be strictly construed.

Conclusion

The usual tools of statutory construction cannot shape the amorphous figure of the "included" insider. The "plain meaning" rule is useless to limit the inclusion. The legislative history's expansive formulation renders other words in the statute superfluous, and therefore oversteps the boundaries set by those words. There is no pre−Bankruptcy Code practice to continue, since the Bankruptcy Code introduced the term and many of the provisions employing it. And there is no single legislative purpose behind the term that could direct its application.

The odd tools are the ones that have utility. That items in a list share attributes suggests that the unlisted items must also share these attributes provides the framework That the definition must be applied consistently throughout the Bankruptcy Code allows the focusing on one appendage to bring the entire form into focus. The insider preference provision, which imposes a new liability unknown at common law, and which often requires a decision by a jury properly instructed on the standard before making that decision, requires a strict construction of "insider." Therefore, the band of inclusion in the definition must be a narrow one. The ghostly aura of the "included" insider cannot extend too far.

If I am to be sued for an insider preference, I would expect that my jury would be asked to find that my relationship with the debtor shares so many attributes with one of the enumerated relationships that it would be viewed, more likely than not, by a reasonable person as essentially the same thing. Or if my relationship with the debtor is alleged to resemble more that one of the listed relationships, then my jury should be asked to find that in any list of relationships that a reasonable person would draw up that included the two or more mentioned in the statute, mine would, more likely than not, be included. Instead of being sued for an insider preference, if my claim is to be equitably subordinated, or my votes are to be disqualified, or I am to be ineligible to serve as a trustee, examiner or professional person, because I am alleged to be an "included" insider, I would expect that the court would employ the same test in making that determination. If "insider" "includes" other things, include me out.

FOOTNOTES:

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[1] *See* 11 U.S.C. § 547 (b)(4)(B) (1994) (stating if creditor is "insider" then preference period is one year from date of filing bankruptcy petition as opposed to ninety days for disinterested parties).Back To Text

[2] *See* id. § 1129 (a)(10) (claiming insider's "acceptance" of chapter 11 plan is not included in that determination).Back To Text

[3] *See* id. § 303 (b)(2) (stating insiders as interested parties may not be considered as "holders" under this provision).Back To Text

[4] *See* id. §§ 702 (a)(3), 1104(b) (asserting insiders may have adverse interests).Back To Text

[5] *See* id. §§ 701(a)(1), 1104(d) (requiring appointment of trustee who is "disinterested person"). An insider cannot be a "disinterested person." Id. § 101(14)(A). Interestingly, however, there appears to be no prohibition against electing an insider as a chapter 7 trustee. *See* id. § 321.Back To Text

[6] *See* 11 U.S.C. § 327(a) (1994) (requiring professional persons retained by trustee to be disinterested persons). This provision is applicable to debtors in possession. *See* id. § 1107(a). The disinterestedness requirement does not apply to attorneys who previously represented the debtor, and are retained by a trustee or a debtor in possession for a special purpose. *See* id. § 327(e). Moreover, there seems to be no limitation on a creditor committee's hiring an insider. *See* id. § 1103(a), (b).Back To Text

[7] *See* id. § 502(b)(4) (noting if insider makes unreasonable claim for services, such claim will not be liberally deemed as "allowed" as claims made by disinterested parties).Back To Text

[8] *See* id. § 747(1) (preventing trustee from paying insider's equity claim until all other disinterested equity claims have been satisfied).Back To Text

[9] *See* id. § 510(c) (allowing courts to develop doctrine of equitable subordination). Upon a preliminary showing of unfairness, the insider bears the burden of proof to show the fairness of his claim. *See* 80 Nassau Assocs. v. Crossland Fed. Sav. Bank (In re 80 Nassau Assocs.), 169 B.R. 832, 839 & n.5 (Bankr. S.D.N.Y. 1994). Control of a debtor and inequitable conduct by a creditor are two criteria used by courts for equitable subordination. *See, e.g.*, United States v. Noland, 517 U.S. 535, 538 (1996); Benjamin v. Diamond (In re Mobile Steel Co.), 563 F.2d 692, 700 (5th Cir. 1977). *See generally* Andrew DeNatale & Prudence B. Abram, The Doctrine of Equitable Subordination as Applied to Nonmanagement Creditors, 40 Bus. Law. 417, 418, 421−29 (1985). Being an insider subjects a creditor to heightened scrutiny for control. *See* Stoumbos v. Kilimnik, 988 F.2d 949, 959 (9th Cir. 1993), cert. denied, 510 U.S. 867 (1993); Fabricators, Inc. v. Technical Fabricators, Inc. (In re Fabricators, Inc.), 926 F.2d 1458, 1465 (5th Cir. 1991); ABF Capital Management v. Kidder Peabody & Co. (In re Granite Partners, L.P.), 210 B.R. 508, 514−15 (Bankr. S.D.N.Y. 1997).Back To Text

[10] *See* Brinkley v. Chase Manhattan Mortgage & Realty Trust (In re LeBlanc), 622 F.2d 872, 879 (5th Cir. 1980) (upholding plan that separately classified insiders and gave them nothing); In re 11,111, Inc., 117 B.R. 471, 478 (Bankr. D. Minn. 1990) (relying on *LeBlanc* and classifying insiders separately).Back To Text

[11] *See* 11 U.S.C. § 101(14)(A)(i) (1994).Back To Text

[12] *See* id. § 101(14)(B)(i)−(ii).Back To Text

[13] The enumerated relationships, as set forth in the definition are:

> (A) if the debtor is an individual –
>
> (i) relative of the debtor or a general partner of the debtor;
>
> (ii) partnership in which the debtor is a general partner;
>
> (iii) general partner of the debtor; or
>
> (iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation –

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership –

(i) general partner in the debtor;

(ii) relative of a general partner in, general partner of, or person in control of the debtor;

(iii) partnership in which the debtor is a general partner;

(iv) general partner of the debtor; or

(v) person in control of the debtor;

(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor.

Id. § 101(14).

Two other definitions incorporated in the above list ought to be set forth.

"[A]ffiliate" means –

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities –

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities –

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

Id. § 101(2).

"relative" means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree.

Id. § 101(45).Back To Text

[14] Id. § 101(14).Back To Text

[15] *See* id. § 102(3), which is entitled "Rules of construction," and provides that "'includes' and 'including' are not limiting."Back To Text

[16] Id. §§ 101(14)(A)(iv), 101(14)(B)(iii), 101(14)(C)(v).Back To Text

[17] Pub. L. No. 95−598, 92 Stat. 2549 (1978) (hereafter "BRA"). Title I of BRA codified and enacted a new title 11 of the United States Code, which is referred to as the Bankruptcy Code.Back To Text

[18] H.R. No. 95−595, at 312 (1977); S. Rep. No. 95− 989, at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5810, 6269.Back To Text

[19] *See, e.g.*, In re Krehl, 86 F.3d 737, 741 (7th Cir. 1996); Wilson v. Huffman (In re Missionary Baptist Found. of Am., Inc.), 712 F.2d 206, 209−11 (5th Cir. 1983); Lingley v. Stuart Shaines, Inc. (In re Acme−Dunham, Inc.), 50 B.R. 734, 739 (D. Me. 1985); Schreiber v. Stephenson (In re Emerson), 235 B.R. 702, 706−07 (Bankr. D.N.H. 1999); In re Ingleside Assocs., 136 B.R. 955, 961 (Bankr. E.D. Pa. 1992); In re Sky Valley, Inc., 135 B.R. 925, 934 (Bankr. N.D. Ga. 1992).Back To Text

[20] *See* In re Missionary Baptist Found. of Amer., Inc., 712 F.2d at 209−11(finding general partner and director to be insider relationship); *see also* National Trust Co. v. Hideaway Beach, Inc. (In re Hideaway Beach, Inc.), 54 B.R. 548, 550 (Bankr. S.D. Fla. 1985) (discussing 11 U.S.C. § 510(c)(1)).Back To Text

[21] *See* In re Ingleside Assocs., 136 B.R. at 961; *see also* Concord Square Apartments of Wood County, Ltd. v. Ottowa Properties, Inc. (In re Concord Square Apartments of Wood County), 172 B.R. 71, 74 (Bankr. S.D. Ohio 1994) (explaining affiliate of debtor was insider).Back To Text

[22] *See* In re Sky Valley, Inc., 135 B.R. at 934 (examining retention of professionals case). The court relied on the advisor/consultant's description of his duties as follows: "Anglin [the advisor/consultant] would discuss matters with Dr. Mason [the sole shareholder and quasi−CEO], and would recommend to Dr. Mason a course of action; Dr. Mason would decide; then Anglin would coordinate efforts to execute Dr. Mason's decision." Id. at 934−35. The court equated the advisor/consultant's role to that of chief financial officer, and concluded that he was "in control" of the debtor. *See* id. at 935. *But see* Ellenberg v. William Goldberg & Co. (In re Sullivan Haas Coyle, Inc.), 208 B.R. 239, 246−47 (Bankr. N.D. Ga. 1997) (distinguishing *Sky Valley* and

holding that financial consultants were not insiders for preference purposes); In re Bloomindale Partners, 160 B.R. 93, 101 (Bankr. N.D. Ill. 1993) (finding law firm not to be insider).Back To Text

[23] *See* In re Allegheny Int'l, Inc., 118 B.R. 282, 298 (Bankr. W.D. Pa. 1990) (stating "[i]t is true, as Japonica [Partners, the purchaser of claims sufficient to block acceptance of a class of creditors in a competing plan] argues, that they did not have actual control or legal decision making power. However, it is also true that they attempted to influence, in not very subtle ways, decisions made by the debtor").Back To Text

[24] Committee of Creditors Holding Unsecured Claims v. Citicorp Venture Capital, Ltd. (In re Papercraft Corp.), 165 B.R. 980, 987−89 (Bankr. W.D. Pa. 1994) (granting partial summary judgment), rev'd on other grounds, 211 B.R. 813 (W.D. Pa. 1997), *aff'd sub nom.* Citicorp Venture Capital, Ltd. v. Committee of Creditors Holding Unsecured Claims, 160 F.3d 982 (3d Cir. 1998) (finding sufficiently close relationship with debtor to place party within statutory definition of insider); *see also* Blatstein v. 718 Arch St. Assoc., Ltd. (In re Main, Inc.), 213 B.R. 67, 81 (Bankr. E.D. Pa. 1997) (citing *In re Papercraft Corp*. in applying term "insider" to hold that friendly creditor may be insider of debtor); In re Holly Knoll Partnership, 167 B.R. 381, 385−88 (Bankr. E.D. Pa. 1994) (holding purchaser of impaired creditor's claim was insider and thus did not satisfy requirement that at least one impaired, non−insider class approve plan).Back To Text

[25] *See* Three Flint Hill Ltd. Partnership v. Prudential Ins. (In re Three Flint Hill Ltd. Partnership), 213 B.R. 292, 298−99 (Bankr. D. Md. 1997) (finding partnership that had agreed to purchase portion of debtor's trade obligations and to vote trade claims in favor of debtor's proposed plan could be regarded as insider). *See generally* Dag E. Ytreberg, Who May Accept or Reject a Plan, 9B Am. Jur. 2d Bankruptcy § 2446 (1991) (discussing *In re* Three Flint Hill Ltd. Partnership in detail).Back To Text

[26] Rush v. Riddle (In re Standard Stores, Inc.), 124 B.R. 318, 324−25 (Bankr. C.D. Cal. 1991) (finding brother−in−law was not insider but ultimately holding him to be one because he was general manager of debtor−business); *see also* In re Montanino, 15 B.R. 307, 310 (Bankr. D.N.J. 1981) (determining parents of woman with whom debtor lived were insiders when debtor held them out to be relatives). *But see* In re Hollar, 100 B.R. 892, 893 (Bankr. D. Ohio 1989) (finding fiancee was not insider because no evidence was presented to show insider status beyond relationship itself).Back To Text

[27] Freund v. Heath (In re McIver), 177 B.R. 366, 368−69 (Bankr. N.D. Fla. 1995) (holding girlfriend was insider for purposes of avoiding alleged preference); *see also* Gennet v. Docktor (In re Levy), 185 B.R. 378, 384−85 (Bankr. S.D. Fla. 1995) (determining girlfriend was insider and that transaction at issue arose due to special relationship between debtor and defendant). *But see* Matson v. Strickland (In re Strickland), 230 B.R. 276, 285 (Bankr. E.D. Va. 1999) (finding mother's then boyfriend was neither relative nor insider of debtor).Back To Text

[28] *See* Beiger v. IRS, 496 U.S. 53, 67 (1990) (Scalia, J., concurring) (disagreeing with portion of majority opinion because such holding was based upon congressional statements which were neither controlling nor relevant); *see also* Town of Bedford v. Raytheon Co., 755 F. Supp. 469, 475 (D. Mass. 1991) (finding legislative history provided no reliable indication of intended definition of "State" in Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)); In re Pan Am Corp., 125 B.R. 372, 376 (Bankr. S.D.N.Y. 1991) (citing Justice Scalia's concurring opinion, which argued that statements in congressional record were of minimal value).Back To Text

[29] *See* infra notes 36−54 and accompanying text.Back To Text

[30] 11 U.S.C. § 303(b)(2) (noting that employee or insider is excluded from determination of whether debtor has fewer than twelve creditors); id. § 502(b) (disallowing unreasonable claims "for services of an insider or attorney of the debtor").Back To Text

[31] Although this article tackles the issue of the definition of insiders under the Bankruptcy Code, the issue is also relevant to both the federal fraudulent transfer statute, which is found at chapter 176 of the Judicial Code,

28 U.S.C. §§ 3001−3308, and which is entitled "Federal Debt Collection Procedure," as well as its state equivalent, the Uniform Fraudulent Transfer Act. *See* Uniform Fraudulent Transfer Act §§ 1(7), 5(b), 7A U.L.A. 643 (1985). These statutes were drafted to resemble the Bankruptcy Code's insider preference provision as it existed prior to the Bankruptcy Code's 1984 amendment, which deleted the requirement that the transferee have reasonable cause to believe the debtor was insolvent at the time of the transfer. *See* infra notes 61−67 and accompanying text. These statutes define "insider" in a manner that closely resembles the definition in the Bankruptcy Code, including its "includes" language. *See* 28 U.S.C. §§ 3001(a)(5), 3304(a) (1994); *see also* Lisa Sommers Gretchko, *Uniform Fraudulent Transfer Act Makes Insider Preferences Creatures of State Law,* Am. Bankr. Inst. J., Sept. 1999, at 29, 36−37 (discussing similarities and differences between two statutes).Back To Text

[32] *See, e.g.*, Patterson v. Shumate, 504 U.S. 753, 757−58 (1992) (using "plain language" of § 541(c)(2) of Bankruptcy Code to determine if ERISA−qualified pension plan constitutes restriction on transfers); Union Bank v. Wolas, 502 U.S. 151, 155−56 (1991) (asserting use of legislative history to support "literal reading" of statute); Toibb v. Radloff, 501 U.S. 157, 160 (1991) (accepting use of "plain language" of statute in deciding whether non−business debtor may reorganize under chapter 11); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1990) (claiming that plain language should always be used when reading statutes).Back To Text

[33] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253−54 (1992).Back To Text

[34] 11 U.S.C. § 102(3) (1994); *see also* American Sur. Co. v. Marotta, 287 U.S. 513, 516−17 (1993) (noting "shall include" is not same thing as "includes only," therefore is used to expand, not limit); Downtown Properties, Inc. v. North Am. Sav. Bank, F.S.B. (In re Downtown Properties, Inc.), 162 B.R. 244, 248 (Bankr. W.D. Mo. 1993) (mentioning that reasons to allow chapter 11 dismissal not limited to factors enumerated in bankruptcy statute).Back To Text

[35] *See* Hubbard v. United States, 514 U.S. 695, 703 (1995) (stating "[i]n the ordinary case, absent any 'indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it.'" (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 570 (1994) (Souter, J., dissenting)); *see also* Wolas, 502 U.S. at 163 (Scalia, J., concurring) (finding plain text governed, since "there was no contention of a 'scrivener's error' producing an absurd result"); 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 [its purpose]"; in those situations courts may use restricted meaning of words).Back To Text

[36] Toibb v. Radloff, 501 U.S. 157, 162 (1991) (quoting Blum v. Stenson, 465 U.S. 886, 896 (1984)).Back To Text

[37] *See* supra note 18 and accompanying text.Back To Text

[38] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).Back To Text

[39] Although numerous duties have been ascribed to fiduciaries, the courts and the commentators have separated these duties into two major categories: the duty of care and the duty of loyalty. *See* Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 264 (2d Cir. 1984) (discussing two−prong corporate fiduciary duty); *see also* Revised Uniform Partnership Act, § 404 (a) (1997) (explaining only duties that partner owes to partnership and other partners is duty of loyalty and duty of care); Restatement (Second) of Trusts, §§ 170, 174 (1959) (explaining trustee's duties of loyalty and care); Daniel B. Bogart, *Liability of Directors of Chapter 11 Debtors in Possession: "*Don't Look Back −− Something May Be Gaining On You, 68 Am. Bankr. L.J. 155, 168−77, 188−200 (1994) (asserting that fiduciary duties of corporate officers and bankrupt's fiduciaries are separated into distinctive duties of care and loyalty). Many of the seminal bankruptcy cases on fiduciary duty treat aspects of the duty of care. *See* In re Gorski, 766 F.2d 723, 727 (2d Cir. 1985) (discussing that trustee breaches his fiduciary duties when he acts negligently or intentionally). For discussion of the

bankruptcy trustee's duty of loyalty, *see* Mosser v. Darrow, 341 U.S. 267, 271 (1951) (asserting that reorganization trustee can not have interests adverse to trust); *see also* United States Trustee v. Bloom (In re Palm Coast, Matanza Shores Ltd. Partnership), 101 F.3d 253, 258 (2d Cir. 1996) (explaining that duty of loyalty prohibits bankruptcy trustee from having adverse interests to trust).Back To Text

[40] Meinhard, 164 N.E. at 546 (stating "[m]any forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place").Back To Text

[41] *See* Chemtool, Inc. v. Lubrication Technologies, Inc., 148 F.3d 742, 747 (7th Cir. 1998) (explaining under Illinois law agent owes fiduciary duty to principal as matter of law); Costos v. Coconut Island Corp., 137 F.3d 46, 48 (1st Cir. 1998) (stating under Maine law agency is fiduciary relationship); Evtex Co. v. Hartley Cooper Assocs. Ltd., 102 F.3d 1327, 1332 (2d Cir. 1996) (applying New York agency law that requires agent to exercise reasonable diligence when acting within fiduciary relationship); Chemical Bank v. Security Pacific Nat'l Bank, 20 F.3d 375, 377 (9th Cir. 1994) (explaining that under California law "[t]he very meaning of being an agent is assuming fiduciary duties to one's principal).Back To Text

[42] *See* Restatement (Second) of Agency § 1 (1958) (stating "[a]gency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control.").Back To Text

[43] *See* 11 U.S.C. § 327(a) (1994) (listing attorneys, accountants, appraisers, auctioneers, and other professional persons as possible agents for trustee).Back To Text

[44] *See* Brown v. Gardner, 513 U.S. 115, 118 (1994) (stating "[a]mbiguity is a creature not of definitional possibilities but of statutory context"); Barnhill v. Johnson, 503 U.S. 393, 401 (1992) (stating "appeals to statutory history are well taken only to resolve 'statutory ambiguity.") (quoting Toibb v. Radloff, 501 U.S. 157, 162 (1991)); King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) (stating "the meaning of statutory language, plain or not, depends on context"). The point of the present argument is that even though the Code may be ambiguous as to which relationships "insider" includes, it is clear that there are certain relationships "insider" excludes.Back To Text

[45] *See* United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (stating "[s]tatutory construction . . . is a holistic endeavor"); *accord* United States Nat'l Bank v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 455 (1993).Back To Text

[46] Timbers of Inwood Forest Assocs., 484 U.S. at 371; *accord* Bailey v. United States, 516 U.S. 137, 146 (1995); *see also* King v. St. Vincent's Hospital, 502 U.S. at 221 ("'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used'") (quoting NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941)).Back To Text

[47] *See* Pennsylvania Welfare Dep't v. Davenport, 495 U.S. 552, 562 (1990) (describing another instance in which court rejects statutory interpretation which results in certain terms being mere surplusage); *see also* Bailey v. United States, 516 U.S. at 146 (arguing that Congress did not intend words "use" and "carry" to be redundant); Ratzlaf v. United States, 510 U.S. 135, 140−41 (1994) (warning judges to not treat words in statute as surplusage especially if words describe element of offense).Back To Text

[48] Bank of America v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1421 (1999) (indicating that having words in statute being redundant goes against basic rules of statutory analysis); *accord* Moskal v. United States, 498 U.S. 103, 109−10 (1990) (rejecting argument which would make certain words of statute have "no meaning"); United States v. Menasche, 348 U.S. 528, 538−39 (1955) (supporting argument that every word in statute should have meaning rather that to "emasculate an entire section").Back To Text

[49] 11 U.S.C. § 303(b)(2) (disqualifying certain creditors from determination whether debtor has fewer than twelve creditors).Back To Text

[50] Id. § 502(b)(4) (disallowing claims for services in excess of reasonable value of such services).Back To Text

[51] This is not to say that attorneys and employees may never be insiders. For example, attorneys or employees who are officers or directors of a debtor corporation are insiders. *See* 11 U.S.C. § 101 (31)(B)(i)−(ii) (specifically listing officers and directors as insiders). Rather, an attorney−client relationship or employee−employer relationship does not automatically subject the attorney or the employee to the status of insider. *See* Miller v. Schuman (In re Schuman), 81 B.R. 583, 586 (B.A.P. 9th Cir. 1987) (arguing that term "includes" is "not limiting"). An additional connection to the debtor must be present. *See* Ellenberg v. William Goldberg & Co., Inc. (In re Sullivan Haas Coyle, Inc.), 208 B.R. 239, 244 (Bankr. N.D. Ga 1997) (explaining that attorney is not automatically considered "insider"). An additional connection to the debtor must be present. Id. at 244 (attorney not automatically included).Back To Text

[52] The Andy Warhol Found. for Visual Arts, Inc. v. Hayes (In re Hayes), 183 F.3d 162, 168 (2d Cir. 1999) (arguing that attorney−client relationship is fiduciary relationship even if there is not express trust); *see also* Fowler Bros. v. Young (In re Young), 91 F.3d 1367, 1373 (10th Cir 1996) (describing New Mexico's enhanced requirement of disclosure to any client with who attorney enters into business relationship); In re Cooperman, 633 N.E.2d 1069, 1071 (N.Y. 1994) ("This unique fiduciary reliance . . . is imbued with ultimate trust and confidence").Back To Text

[53] *See* In re Hayes, 183 F.3d at 169 (indicating that attorney regulation of attorney−client relationship shows that fiduciary obligation created by attorney−client relationship extends to process of creating relationship); Jacobsen v. Sassover, 489 N.E.2d 1283, 1284 (N.Y. 1985) (discussing need for attorney to avoid ambiguity in retainer agreements).Back To Text

[54] *See* supra note 18 and accompanying text.Back To Text

[55] Dewsnup v. Timm, 502 U.S. 410, 419 (1992).Back To Text

[56] Kelly v. Robinson, 479 U.S. 36, 44 (1986) (stating criminal restitution obligations not discharged in chapter 7 under 11 U.S.C. § 523(a)(7)); Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 501 (1986) (noting abandonment power under 11 U.S.C. § 554(a) limited by environmental law requirement to clean up sites posing imminent threat to health). This rule of statutory construction is subordinate to the "plain meaning" rule, or the resolution of the issue based on the language itself. In *Pennsylvania Welfare Dep't v. Davenport*, in holding that criminal restitution obligations were dischargeable in chapter 13, the Court declined to retreat from *Kelly*, but held that the statutory language and structure, namely the definition of "claim" in 11 U.S.C. § 101(4)(A) (now 11 U.S.C. § 101(5)(A)), and failure to incorporate the exception found in 11 U.S.C. § 523(a)(7) into the chapter 13 discharge in 11 U.S.C. § 1328(a), were sufficient to resolve the issue. Davenport, 495 U.S. 552, 563 (1990).Back To Text

[57] *See* supra note 18 and accompanying text.Back To Text

[58] Bankruptcy Act of 1898 § 60a(1) (former 11 U.S.C. § 96(a)(1)) (repealed 1977).Back To Text

[59] Report of Commission on the Bankruptcy Laws of the United States, H.R. Doc. 93−137 (1973) (hereinafter 1973 Commission Report).Back To Text

[60] *See* id. pt. I at 201 (stating Commission sought "to simplify the preference provisions, reduce litigation, and more fully effectuate the goals of the preference provisions").*Back To Text*

[61] *See* id. pt. I at 201 (stating debtor presumed insolvent during three month period prior to date of petition); id. pt. II at 166−70 (including proposed preference statutes for Bankruptcy Act of 1973 [§§ 4−607(a)(1), 4−607(f)]).Back To Text

[62] *See* id. pt. I at 166 (setting forth proposed preference provision § 4−607(a)(2) for insiders); *see also* id., pt. I, at 201 (proposing that preferences between one year and three months of date of bankruptcy petition apply to members of immediate family, partners, affiliates, directors, officers and managing agents); Allen W. Bird et al., *The* Bankruptcy Reform Act of 1994, 17 U. Ark. Little Rock L.J. 387, 397 (1995) (explaining that Commission's proposal of one year limit for preference to insiders was first proposal to treat insiders and non−insiders differently); Vern Countryman, *The Concept of Voidable Preference in* Bankruptcy, 38 Vand. L. Rev. 713, 726 (1985) (noting Commission's suggestion that insiders of debtor from one year to three months before bankruptcy should have voidable preferences).Back To Text

[63] *See* 1973 Commission Report, supra note 59, pt. II, at 170 (noting that requirement of "reasonable cause to believe" is retained for "insiders" in proposed § 60a(1)); *see also* 8 Norton Bankr. L. & Prac. 2d 50 (William J. Norton, Jr. et al. eds., 2d ed. 1997) (stating that Commission's proposed statute used "concept" of insider to refer to those with close relationship to debtor); Countryman, supra note 62, at 726 n.93 (pointing out that Commission meant preference provision to apply to group of people enumerated in text).Back To Text

[64] *See* 1973 Commission Report, supra note 59, pt. II, at 3 (detailing proposed definition provision of Bankruptcy Act of 1973 § 1−102 but excluding definition of "insider"); *see also* 8 Norton, supra note 63, at 50 (noting Commission's failure to define "insider" despite using concept in its proposed statute).Back To Text

[65] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95−598, § 547(b), 92 Stat. 2549 (1978) (amended 1984) (approving one year preference limit for insiders and requiring trustee to prove reasonable cause to believe debtor was insolvent and fact of insolvency); *see also* Bird, supra note 62, at 397 (asserting that Commission Report required trustee to carry burden of proof on issue of insolvency and prove reasonable cause to believe debtor was insolvent); Melissa M. Cowan, *Determining Insider Status Under Bankruptcy Code Section 547(b)(4)(B): When "I Resign"* May Not Be Enough to Terminate Insider Status, 41 UCLA L. Rev. 1541, 1548 (1994) (acknowledging that burden on trustee to show creditor had reasonable cause to believe debtor was insolvent is heavy burden); Joseph A. Friedman, Comment, *Lender Exposure Under Sections 547 and 550: Are Outsiders Really Insiders?*, 44 Sw. L.J. 985, 995 (1990) (providing reason why 1978 Act retained "reasonable cause to believe" requirement). As a principal commentator explained:

> In this instance, where transactions further away from bankruptcy with insiders are involved, equality of distribution is not the most important issue. An insider's position enables overreaching as against other creditors. . . . [C]ertain transactions with insiders should be brought under greater scrutiny. Congress has used the reasonable−cause−to−believe test as the indicator of when an insider may be acting with his interest in mind, ahead of the debtor's and creditors' interests.

Richard B. Levin, *An Introduction to the* Trustee's Avoiding Powers, 53 Am. Bankr. L.J. 173, 185 (1979). Back To Text

[66] *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98−353, § 42, 98 Stat. 333, 378 (1984) (removing requirement that trustee must prove that creditor had reasonable cause to believe debtor was insolvent); *see also* David Adelman, *Who is an "Insider" After the 1984 Amendments to Section 547(b)(4)(B)?*, 5 Bankr. Dev. J. 195, 199 (1987) (stating that 1984 amendments to Bankruptcy Code removed "reasonable cause to believe" requirement for trustee); Lissa Lamkin Broome, Payments on Long−Term Debt as Voidable Preferences: The Impact of the 1984 Bankruptcy Amendments, 1987 Duke L.J. 78, 79 n.6 (referring to 1984 amendments and elimination of reasonable cause requirement); Harry M. Fletchtner, Preferences, Post−Petition Transfers, and Transactions Involving a Debtor's Downstream Affiliate, 5 Bankr. Dev. J. 1, 9 n.35 (1987) (noting that 1984 amendments removed "last vestige" of reasonable cause requirement).Back To Text

[67] *See* Countryman, supra note 62, at 732−33 n.115 (discussing legislative history of 1984 amendments and arguing that failure to maintain reasonable cause requirement might have been "legislative accident"); Janet E. Byrne Thabit, Ordinary Business Terms: Setting the Standard for 11 U.S.C. § 547(c)(2)(C), 26 Loy. U. Chi. L.J. 473, 484 n.77 (1995) (observing that legislative history surrounding 1984 amendments is sparse). The pertinent legislative history on the amendment to the preference provisions concerns the easing of the ordinary course defense in 11 U.S.C. § 547(c)(2). *See* 130 Cong. Rec. S.8897 (daily ed. June 29, 1984). The Supreme Court did not rely on this legislative history in construing the effect of this amendment on Union Bank v. Wolas, 502 U.S. 151, 157−58 (1991). *See* A. Ari Afilalo, *The Impact of Union Bank v. Wolas On the Ordinary Course of Business Defense to a* Trustee's Avoiding Powers, 72 B.U. L. Rev. 625, 634 (1992) (arguing that Supreme Court's approach in *Wolas* was "flawed because it effectively required that Congress include in legislative history that which the plain language of the statute explicitly states"); Lawrence Ponoroff & Julie C. Ashby, *Desperate Times and Desperate Measures: The Troubled State of the Ordinary Course of Business Defense—And What to Do About It*, 72 Wash. L. Rev. 5, 23−24 (1997) (explaining that Supreme Court used plain meaning approach to statutory interpretation in determining Congressional intent in enacting § 547(c)(2)). Nevertheless, the Court's declining to discuss it drew criticism from Justice Scalia. See Wolas, 502 U.S. at 163 (Scalia, J., concurring); Afilalo, supra, at 634 n. 45 (acknowledging Justice Scalia's regret regarding approach taken by majority opinion pertaining to legislative history of § 547(c)(2)).Back To Text

[68] 11 U.S.C. § 1129(a)(10) (1994); *see also* In re United Marine, Inc., 197 B.R. 942, 945 (Bankr. S.D. Fla. 1996) (holding that § 1129(a)(10) was satisfied where non−insider, impaired class accepted reorganization plan); In re Gilbert, 104 B.R. 206, 212 (Bankr. W.D. Mo. 1989) (finding that under § 1129 (a)(10) impaired class of insiders may have their votes in favor of reorganization plan counted when there is at least one other impaired class without insiders which favors plan).Back To Text

[69] There is no antecedent provision in any of the three reorganization chapters of the Bankruptcy Act, X, XI and XII. *See* Bankruptcy Act §§ 221, 366, 472 (former 11 U.S.C. §§ 621, 766, 872) (repealed 1977). There is also no similar provision in the 1973 Bankruptcy Commission's proposed Bankruptcy Act of 1973. See 1973 Commission Report, supra note 59, pt. II, at 252−53 (proposed Bankruptcy Act of 1973, § 7−310). Finally, the initial version of H.R. 8200, the 1977 House bill, which ultimately became the BRA, contained no such provision. *See* H.R. 8200, 95th Cong. § 1129(a) (1977) (outlining requirements for court approval of plan).Back To Text

[70] For example, *compare* 11 U.S.C. § 303(b)(2) (outlining who may commence involuntary case against person by filing petition) *with* Bankruptcy Act § 3 (former 11 U.S.C. § 21) (repealed 1977). *Compare* 11 U.S.C. § 502(b)(4) (noting court will not allow claim if for services of insider or attorney of debtor where claim exceeds reasonable value of such services) *with* Bankruptcy Act §§ 57, 63 (former 11 U.S.C. §§ 93, 107) (repealed 1977).Back To Text

[71] For example, *compare* 11 U.S.C. § 523(a)(2)(A) (exempting individual debtor from debt discharge where false pretenses, false representation, or actual fraud found regarding "insider's financial condition") *with* Bankruptcy Act § 14c(3) (former 11 U.S.C. § 32(c)(3) (repealed 1977).Back To Text

[72] 11 U.S.C. § 101(14) (defining as person who is not creditor, equity security holder, insider, investment banker for outstanding security of debtor, or attorney in connection with sale, offer, or issuance of security to debtor). Back To Text

[73] *See* id. U.S.C. § 701(a)(1) (explaining that disinterested person will be appointed as interim trustee after chapter 11 relief is ordered); id. § 1104(d) (providing that disinterested person be appointed where prior trustee dies, resigns, or is removed or fails to qualify as trustee during chapter 11 case).Back To Text

[74] *See* id. § 327(a) (preventing employment by trustee of professional persons who are not disinterested persons and who hold or represent interest adverse to estate). The disinterestedness requirement does not apply to attorneys retained for a specified special purpose under 11 U.S.C. § 327(e).Back To Text

[75] Bankruptcy Act § 158 (former 11 U.S.C. § 558) (repealed 1977) deemed someone to be "disinterested" unless –

> (1) he is a creditor or stockholder of the debtor; or
>
> (2) he is or was an underwriter of any of the outstanding securities of the debtor or within five years prior to the date of the filing of the petition was the underwriter of any securities of the debtor; or
>
> (3) he is, or was within two years prior to the date of the filing of the petition, a director, officer, or employee of the debtor or any such underwriter, or an attorney for the debtor or such underwriter; or
>
> (4) it appears that he has, by reason of any other direct or indirect relationship to, connection with, or interest in the debtor or such underwriter, or for any reason an interest materially adverse to the interests of any class of creditors or stockholders.

It should be noted that this provision had application in chapter 10 only to the appointment of trustees and attorneys for trustees. Bankruptcy Act §§ 156−157 (former 11 U.S.C. §§ 556−557) (repealed 1977).Back To Text

[76] Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 135 (1995) (referring to requirement giving remedial statutes liberal construction).Back To Text

[77] Crandon v. United States, 494 U.S. 152, 158 (1990).Back To Text

[78] Newport News Shipbuilding & Dry Dock Co., 514 U.S. at 135.Back To Text

[79] *See* Perez v. Campbell, 402 U.S. 637, 650−52 (1971) (holding unconstitutional two statutes that frustrated policy of Congress of giving discharged debtors fresh start); Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (noting one primary purpose of Bankruptcy Code is to give debtor fresh start); Williams v. United States Fidelity & Guar. Co., 236 U.S. 549, 554−55 (1915) (stating purpose of Bankruptcy Act is to relieve debtor of weight of oppressive indebtedness and allow for fresh start).Back To Text

[80] *See* Young v. Higbee Co., 324 U.S. 204, 210 (1945) (noting one historical purpose of Bankruptcy law was to bring about ratable distribution of debtor's assets among creditors); Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941) (stating theme of Bankruptcy Code is equality of distribution); Moore v. Bay (In re Estate of Sassard & Kimball, Inc.), 284 U.S. 4, 5 (1931) (noting circuits agree, and language of Bankruptcy Code implies, that there should be equal distribution of debtor's assets, except were claims are secured or priority).Back To Text

[81] *See* 11 U.S.C. § 727(a)(7) (1994).Back To Text

[82] *See* id. § 523(a)(2).Back To Text

[83] *See* id. § 547(b)(4)(B) (stating that trustee may avoid transfer of interest of debtor in property between ninety days and one year before filing of petition, if certain conditions are met).Back To Text

[84] *See* Union Bank v. Wolas, 502 U.S. 151, 160−61 (1991) (reasoning that preference allows creditor to receive payment of greater percentage of his claim against debtor than he would have received had he not opted for preference and participated in distribution of debtor's estate); In re Enserv Co., 64 B.R. 519, 521 (B.A.P. 9th Cir. 1986) (asserting that § 547 was enacted to deter creditors from filing claims).Back To Text

[85] *See* 11 U.S.C. §§ 1129(a)(5)(B), 1129(a)(10).Back To Text

[86] *See* Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998) (noting exceptions to discharge should be strictly construed); Gleason v. Thaw, 236 U.S. 558, 562 (1915) (same).Back To Text

[87] *But see* Levin, supra note 65 (noting that in original version of insider preference provisions, equality of distribution was of lesser significance than avoidance of overreaching by insiders with "reasonable cause to believe" debtor was insolvent). The "reasonable cause to believe" requirement was deleted in 1984. *See* Wolas, 502 U.S. at 159 (asserting that removal of requirement substantially enlarged trustee's power to avoid preferential transfers).Back To Text

[88] *See* Beecham v. United States, 511 U.S. 368, 372 (1994) (stating that plain−meaning rule must be applied with respect to entire statute rather than isolated portions); *accord* Dole v. United Steelworkers of America, 494 U.S. 26, 36 (1990) (same).Back To Text

[89] *See* Babbitt v. Sweet Home Chapter, Inc., 515 U.S. 687, 702 (1995) (defining and utilizing *noscitur a sociis*); Dole, 494 U.S. at 36 (same).Back To Text

[90] Norfolk & Western R. Co. v. American Train Dispatchers Assoc., 499 U.S. 117, 129 (1991) (defining and utilizing *ejusdem generis*).Back To Text

[91] *See* Jahn v. Economy Car Leasing, Inc. (In re Henderson), 96 B.R. 820, 825−26 (Bankr. E.D. Tenn. 1989) The court stated that:

> One way to undertake this analysis, if the insider examples cited in the statute are to provide any guidance, is to consider whether the relationship at issue is similar to or has characteristics of any of the relationships defined as insider relationships . . . If it does, insider status may well be present, depending of the degree of similitude.

Id.; In re Blesi, 43 B.R. 45, 48 (Bankr. D. Minn. 1984) (noting that "[t]he statutory definition says an insider 'includes' certain people. This could mean that persons not specifically defined but *of similar type* could also be insiders." (emphasis added)).

In *Helvering v. Morgan's, Inc.*, the Supreme Court, in a footnote, provided an explanation of a possible difference between "means" and "includes" in a statutory definition, noting that "[t]he natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particulars are those specified in the definition." 293 U.S. 121, 125 n.1 (1934). Too much emphasis should not be placed on this explanation, because the Court did not adopt it as controlling. *See* id. at 125−27. The Court found that the term "includes" in the definition of "taxable year," which referred to a fractional year for which a separate tax return was filed, was sufficiently ambiguous, since "taxable year," was also defined to "mean" "the calendar year, or the fiscal year ending during such calendar year," that the issue whether to count full years or partial ones to determine the maximum period for a tax loss carryforward, had to be resolved by reference to the context of the term "taxable year" in the carryforward provision, and the purpose of the statute. Id. Nevertheless, the case provides additional support for the notion that a shared attribute analysis is an appropriate statutory construction tool to determine whom to include as an insider. *See* In re Henderson, 96 B.R. at 825.Back To Text

[92] *See* supra notes 17−18 and accompanying text; *see also* Wilson v. Huffman (In re Missionary Baptist Foundation of America) 712 F.2d 206, 210 (5th Cir. 1983) (suggesting that Congress' use of word "includes" reflects expansive view of definition, requiring determination based on particular facts).Back To Text

[93] *See* supra notes 37−54 and accompanying text.Back To Text

[94] *See* 11 U.S.C. § 502(b)(4) (disallowing claims for "services of insider or attorney of debtor that exceeds reasonable value of such services"); *c.f.* Towers v. United States (In re Pacific−Atlantic Trading Co.) 64 F.3d

1292, 1303 (9th Cir. 1995) (requiring that statute be interpreted so as not to render any portion superfluous); Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1432 (9th Cir. 1991) (stating that statutory interpretation must give effect to each word in enactment).Back To Text

[95] *See* Browning Interests v. Allison (In re Hollowly), 955 F.2d 1008, 1011 (5th Cir. 1992) (finding that ex−wife of twenty years met two factors to qualify as insider); Schreiber v. Stephenson (In re Emerson, 235 B.R. 702, 707 (Bankr. D.N.H. 1999) (discussing facts such as friendship between parties, unsecured loans and joint business ventures as among those requiring classification as insider); Matson v. Strickland (In re Strickland), 230 B.R. 276, 285 (Bankr. E.D. Va. 1999) (stating that step−father making undocumented loans qualified as insider). The court in *In re Emerson* further refined these factors, by considering eleven factual elements (and supporting each element with at least one case citation):

> 1. Whether the loan made to the debtor was documented (e.g., promissory note, mortgage, and specified repayment terms);
>
> 2. Whether the loans were made on an unsecured basis and without inquiring into the debtor's ability to repay the loans;
>
> 3. Whether the transferee knew that the debtor was insolvent at the time the debtor made the loans or recorded the security agreements;
>
> 4. Whether there were numerous loans between the parties;
>
> 5. Whether there were any strings attached as to how the debtor could use loan proceeds;
>
> 6. Whether the loans were commercially motivated;
>
> 7. Whether the transferee had an ability to control or influence the debtor;
>
> 8. Whether there was a personal, business, or professional relationship between the transferee and the debtor allowing the transferee to gain an advantage such as that attributable simply to affinity;
>
> 9. Whether the transferee had authority to make business decisions for the debtor;
>
> 10. Whether there is evidence of a desire to treat the transferee differently from all other general unsecured creditors; [and]
>
> 11. Whether there was an agreement among the parties to share profits and losses from business transactions.

In re Emerson, 235 B.R. at 707 (citations omitted) (denying transferee's motion for summary judgment in insider preference action where debtor and transferee were "good friends"). Although these factual elements, and indeed the two factors to which these elements are addressed, have ample support in the case law, they all suffer from the same infirmity: Every agency or fiduciary relationship becomes an insider relationship. *See*, *e.g.*, Meeks v. Bank of Risen (In re Armstrong), 231 B.R. 746, 749−50 (Bankr. E.D. Ark. 1999). Moreover, if these factors truly determine an insider relationship, then by substituting "extension of credit" for the words "loan" or "loans" in the eleven elements above, any important supplier who seeks to help a financially troubled customer work out of its problems, by providing additional extensions of credit, is rendered an insider, because that supplier satisfies nearly all of these elements. *See* id. A supplier of lesser importance may nevertheless be deemed an insider, because it still satisfies most of these elements. Id. Indeed, a debtor's principal lender that, although undersecured, nevertheless continues to extend credit beyond the insolvent debtor's borrowing base, while exerting substantial influence over the debtor's operations, would be a prime candidate for an insider, based on the above elements, were it not for the courts' universally recoiling from

considering banks to be insiders on policy grounds. *See* id.Back To Text

[96] *See* Solomon v. Barman (In re Barman), 237 B.R. 342, 348−49 (Bankr. E.D. Mich. 1999) (finding limited liability companies "sufficiently analagous" to corporations such that similar insider principles should be applied).Back To Text

[97] 11 U.S.C. § 101(31)(A)(iv) (1994); *see also* In re Barman 237 B.R. at 348.Back To Text

[98] Id. §§ 101(2)(B), 101(31)(E).Back To Text

[99] *See* In re Barman, 237 B.R. at 348−49. The court did not address the issue whether a limited liability corporation is itself "included" in the definition of "corporation," under 11 U.S.C. § 101(9)(A)(ii), which "includes" a "partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association." *See also* Broyhill v. DeLuca (In re DeLuca), 194 B.R. 65, 74 (Bank. E.D. Va. 1996); 2 Collier on Bankruptcy ¶ 101.09, at 101−50 (Lawrence P. King et al. eds., 15th ed. rev. 1999) (recognizing issue).Back To Text

[100] For example, it seems that the confirmation provision requiring disclosure of information concerning insiders, 11 U.S.C. § 1129(a)(5)(B), could be read expansively with little objection, since no one's rights are determined, and more disclosure rather than less is generally viewed as beneficial to the confirmation process. A somewhat less expansive reading of insider could be employed in the definition of "disinterested person," id. § 101(14)(A), since that provision governs eligibility to be appointed trustee or examiner, or to be retained as a professional person. *See* id. §§ 327(a), 701(a), 1104(d). Again, no one's rights are affected, and the integrity of the bankruptcy process is at stake. Too broad a disqualification provision, however, unnecessarily deprives the system of talented persons, who, despite their relationships to the debtor could render valuable and cost efficient service. *See generally*, G. Ray Warner, *Of Grinches, Alchemy and Disinterestedness: The Commission's Magically Disappearing Conflicts of Interest*, 5 Am. Bankr. Inst. L. Rev. 423, 425 (1997) (discussing Recommendation 3.3.3 of National Bankruptcy Review Commission, National Bankruptcy Review Commission, Bankruptcy: The Next Twenty Years, Final Report 869 (1977), which would permit debtor in possession to retain professional, notwithstanding such professional's holding "an insubstantial unsecured claim against or equity interest in the debtor."). A somewhat narrower construction could be employed for determining insiders when the issue is the acceptance of an impaired class of claims, excluding acceptances by insiders. *See* 11 U.S.C. § 1129(a)(10). This provision has been described as the "statutory gatekeeper barring access to cram down where there is absent even one impaired class accepting the plan." In re 266 Washington Assocs., 141 B.R. 275, 287 (Bankr. E.D.N.Y.), *aff'd sub nom.* 266 Washington Assocs. v. Citibank, N.A. (In re Washington Assocs.), 147 B.R. 827 (E.D.N.Y. 1992). An intermediate level of inclusion would serve the purpose of promoting reorganizations over liquidations, since they preserve asset values and jobs while discouraging the manipulation of voting. *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1983); H.R. Rep. No. 95−595 at 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963. *See, e.g.*, Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture), 948 F.2d 134, 139 (5th Cir. 1991) (stating "thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan."). A much narrower reading of insider would make sense for those provisions that, if satisfied, would impair the debtor's fresh start. *See* 11 U.S.C. §§ 523(a)(2), 727(a)(7); Kawaauhau v. Geiger, 523 U.S 57, 61 (noting that exceptions to discharge should be narrowly construed). Finally, as will be developed below, *see* infra notes 106−113 and accompanying text, the imposition of a liability (unknown at common law) on a creditor for the return of an insider preference (which presumably represented the payment of a just debt), should argue for the narrowest construction possible under the statutory language. In any event, if Congress wanted different levels of inclusion in the definition of "insider" for the different provisions using the term, it could have drafted the statute to express such an intention.Back To Text

[101] *See, e.g.*, Ellenberg v. William Goldberg & Co. (In re Sullivan Hass Coyle, Inc.), 208 B.R. 239, 247 (Bankr. N.D. Ga. 1997) (noting that some courts conclude that term "insider" may not mean same thing in every Code section but choosing not to determine whether approach is correct); Oliver v. Kolody (In re Oliver), 142 B.R. 486, 489 (Bankr. S.D. Fla. 1992) (explaining term "insider" is used in several places in

Bankruptcy Code and is interpreted broadly); Rush v. Riddle, 124 B.R. 318, 324 (Bankr. C.D. Cal. 1991) (stating legislative history of § 101(30) does not address whether "insider" has same meaning in each section of Bankruptcy Code).Back To Text

[102] Commissioner v. Lundy, 516 U.S. 235, 250 (1996) (quoting Sullivan v. Stroop, 496 U.S. 478, 484 (1990)); *accord* Commissioner v. Keystone Indus., Inc., 508 U.S. 152, 159 (1993); United States Nat'l Bank v. Independent Ins. Agents, 508 U.S. 439, 460 (1993); Atlantic Cleaners & Dryers, Inc. v. United States, 286 U.S. 427, 433 (1932).Back To Text

[103] *See* Sorenson v. Secretary of Treasury, 475 U.S. 857, 860 (explaining normal rule of statutory construction).Back To Text

[104] Section 101 of the Bankruptcy Code is entitled, "Definitions," and begins with the phrase, "In this title." 11 U.S.C. § 101. That the definitional provisions are to be used throughout the Bankruptcy Code is made clear in section 103, which is entitled, "Applicability of chapters." Id. § 103. Section 101, which is contained in chapter 1, applies throughout the Bankruptcy Code. *See* id. §§ 103(a), 103(e).Back To Text

[105] *See* Dewsnup v. Timm, 502 U.S. 410, 415 (1992). *But see* In re Sullivan Haas Coyle, Inc., 208 B.R. at 247 (citing Dewsnup to support proposition that "insider" could "include" different relationships in different contexts).Back To Text

[106] Berger v. City of New York, 260 A.D. 402, 404, 22 N.Y.S.2d 1006, 1009 (2d Dep't 1940) (quoting Sutherland on Statutory Construction § 371), aff'd per curiam, 285 N.Y. 723, 34 N.E.2d 894 (1941); *see* Wood v. White, 97 F.2d 646, 648 (D.C. Cir. 1938) (stating "where a statute imposes a[n] . . . obligation in derogation of the common law, and affects substantial rights, it cannot be extended by implication to include persons who do not come within its terms, but instead must be strictly construed."); Hardy Bros. Body Shop, Inc. v. State Farm Mut. Auto. Ins. Co., 848 F. Supp. 1276, 1287 (S.D. Miss. 1994) (explaining "[t]he jurisprudence of statutory construction counsels that legislation creating liability where no such liability existed at common law should be construed most favorably to the person or entity subjected to such liability. Accordingly, such liability should not be extended beyond that which is clearly indicated by the express terms or by the necessary implication from the language used."); Camden v. Harris, 109 F. Supp. 311, 313 (W.D. Ark. 1953) (noting "[t]he statute is in derogation of common right, must be strictly construed, and cannot be extended by implication to include persons not coming within its terms.") (quoting Flynn v. Kramer, 271 Mich. 500, 504−05, 261 N.W. 77, 78 (1935)); Morrow v. Asher, 55 F.2d 365, 367 (N.D. Tex. 1932) (stating "when a lawmaking body passes a statute which . . . subjects a person to a liability to which he was not theretofore subject, the statute should be strictly construed."); Prewitt v. Walker, 231 Miss. 860, 867, 97 So. 2d 514, 516 (1957) ("[L]egislation creating a liability where no liability existed at common law should be construed most favorably to the person or entity subjected to the liability, and against the claimant for damages."); *see also* Brunswick Terminal Co. v. National Bank of Baltimore, 192 U.S. 386, 390 (1904) ("The additional liability . . . depends on the terms of the statute creating it, and as it is in derogation of the common law, the statute cannot be extended beyond the words used.").Back To Text

[107] *See* Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 304 (1959) (stating "[a]ny such rule of law, being in derogation of the common law, must be strictly construed, for '[n]o statute is to be construed as altering the common law, farther than its words import.'") (quoting Shaw v. North Pennsylvania R. Co., 101 U.S. 557, 565 (1880)); *see also* Badaracco v. Commissioner of Internal Revenue, 464 U.S. 386, 403 n.3 (1983) (Stevens, J., dissenting) (explaining "it is axiomatic that statutes in derogation of the common law should be narrowly construed.").Back To Text

[108] *See, e.g.*, United States v. Lanier, 520 U.S. 259, 270 (1997) (stating that strictly construing criminal statutes ensures fair warning and eliminates ambiguity); Liparota v. United States, 471 U.S. 419, 427 (1985) (applying rule of lenity to provide fair warning of illegal conduct and balance branches of government).Back To Text

[109] Lanier, 520 U.S. at 270.Back To Text

[110] *See* 11 U.S.C. § 547(b) (1994) (providing that trustee may avoid transfers of interest of debtor in property). The expanded period applicable to insiders in contained in the same provision. *See* id. at § 547(b)(4)(B).Back To Text

[111] *See* supra notes 57−67 and accompanying text.Back To Text

[112] *See* Coder v. Arts, 213 U.S. 223, 244−45 (1909) (holding that preferential grant of land by insolvent debtor is valid under common law, as well as under Bankruptcy Act, if transfer was made in good faith); Huntley v. Kingman & Co., 152 U.S. 527, 532 (1894) (recognizing that debtor, acting in good faith, might prefer one or more creditors); *In re* Hall, 4 Am. Bankr. Rep. 671, 679 (Bankr. W.D.N.Y 1900) (noting introduction of preference statute in England as criminal law, with fraudulent intent requirement). *See generally* Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 Vand. L. Rev. 713 (1985).Back To Text

[113] *See* United States v. McDermott, 507 U.S. 447, 449 (1993) (noting that absent contrary provision, priority under federal law is to be determined by common law principle of "first in time, first in right"). *See generally* Rankin & Schatzell v. Scott, 25 U.S. (12 Wheat) 177, 179 (1827) (stating universal principle that prior lien gives prior claim which is entitled to prior satisfaction).Back To Text

[114] *See* Langenkamp v. Culp, 498 U.S. 42, 45 (1990) (observing that "a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate" (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58−59 (1989))); *see also* Katchen v. Landy, 382 U.S. 323, 325 (1966) (holding bankruptcy court has summary jurisdiction to order surrender of voidable preferences put forth and proved by trustee in response to claim by creditor receiving such preferences); Schoenthal v. Irving Trust Co., 287 U.S. 92, 95 (1932) (noting that preference suit cannot be brought in equity where such claim has adequate remedy at law).Back To Text

[115] *See* Chandris, Inc. v. Latsis, 515 U.S. 347, 369 (1995) (stating that where statutory terms are at issue, it is question of law for which court will define appropriate standard); *see also* Columbia Gas System, Inc. v. United States, 70 F.3d 1244, 1246 (Fed. Cir. 1995) (noting proper statutory interpretation is question of law).Back To Text

[116] *See* In re Missionary Baptist Found. of Am., Inc., 712 F.2d 206, 210 (5th Cir. 1983) (opining that question of insider status is question of fact); *see also* Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman), 126 B.R. 63, 67 (B.A.P. 9th Cir. 1991) (same); In re UVAS Farming Corp., 89 B.R. 889, 892 (Bankr. D.N.M. 1988) (same).Back To Text

[117] *See* Browning Interests v. Allison (In re Holloway), 955 F.2d 1008, 1014 (5th Cir. 1992) (opining that once underlying facts have been resolved insider status is ultimately question of law); *see also* In re Emerson, 235 B.R. 702, 706 (Bankr. D.N.H. 1999) (same).Back To Text

[118] *See* In re Krehl, 86 F.3d 737, 742 (7th Cir. 1996) (explaining that determination of insider status is properly characterized as mixed question of law and fact); *see also* Ellenberg v. William Goldberg & Co. (In re Sullivan Haas Coyle, Inc.), 208 B.R. 239, 242 (Bankr. N.D. Ga. 1997); Miller v. Schuman (In re Schuman), 81 B.R. 583, 586 n.1 (B.A.P. 9th Cir. 1987).Back To Text

[119] *See* U.S. CONST. amend. VII (observing in suits at common law, right to jury shall be preserved and no fact tried by jury can be re−examined in any court of United States); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 624−25 (1991) (noting "[i]n the federal system, the Constitution itself commits the trial of facts in a civil cause to the jury.").Back To Text

[120] *See* Chandris, Inc., 515 U.S. at 369 (stating "[i]f reasonable persons, applying the proper legal standard, could differ [as to whether a particular employee qualified as a "member of the crew" as defined in the Jones Act], it is a question for the jury").Back To Text

[121] *See* Simms v. Village of Albion, 115 F.3d 1098, 1110 (2d Cir. 1997) (noting probable cause is mixed question of fact and law in action under § 1983).Back To Text

[122] 9 James Wm. Moore et al., Moore's Federal Practice ¶ 51.10[1] (3d ed. 1999); *see also* Christopher v. Cutter Lab., 53 F.3d 1184, 1194 (11th Cir. 1995) (observing purpose of jury instructions is to give clear and concise statement of law applicable to case at bar).Back To Text

[123] *See* Shad v. Dean Witter Reynolds, Inc., 799 F.2d 525, 532 (9th Cir. 1986) (accepting that instructions must give jury adequate guidance to intelligently determine questions presented); *see also* Werbungs v. Collector's Guild, Ltd., 930 F.2d 1021, 1026 (2d Cir. 1991) (noting that court properly guided jury in interpreting contract at issue); Fiorito Bros., Inc. v. Fruehauf Corp., 747 F.2d 1309, 1316 (9th Cir. 1984) (observing in reviewing jury instructions, court must look to whether trial judge gave adequate instructions on each element of case to insure that jury fully understood issues at bar).Back To Text

[124] *See* supra notes 99−100 and text accompanying.Back To Text

[125] *Cf.* In re Allegheny Int'l, Inc. 118 B.R. 282, 288 (Bankr. W.D. Pa. 1989) (indicating § 1126(e) and predecessor were intended to enable court to disqualify votes of parties that are not in good faith); In re Gilbert, 104 B.R. 206, 216 (Bankr. W.D. Mo. 1989) (noting good faith test is whether creditor's cast their vote with "ulterior purpose" aimed at gaining some advantage to which they would otherwise not be entitled). *But see* In re P−R Holding Corp. 147 F.2d 895, 897 (2d Cir. 1945) (observing mere fact that purchase of creditor's interest for purposes of securing approval or rejection of plan does not of itself amount to bad faith). Back To Text

[126] *See* supra notes 100−105 and accompanying text.Back To Text