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STUCK IN THE MIDDLE AGAIN!

How to Treat Straddle−Year Income Taxes in a Corporate Chapter 11 Reorganization

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Introduction

The resolution of when current−year federal income tax claims arise and what priority these claims receive opens a viperous nest of issues that accentuate potential conflicts in two formidable bodies of law. The answer to this question is not inconsequential to the reorganizational efforts of the debtor. In fact, the resolution of this issue has a serious impact on the viability of corporate reorganization under chapter 11 of the Bankruptcy Code.

The Bankruptcy Code identifies creditors as holding either secured or unsecured claims. [2] The status of claims is of primary import in determination of the treatment of the claims. A creditor's claim may be characterized as either a secured claim [3] or an unsecured claim. A holder of a secured claim is generally entitled to its collateral or the value of its collateral that secures the claim. [4] A holder of an unsecured claim may possess either a priority unsecured claim [5] or a general unsecured claim. Priority unsecured creditors are granted priority status over other unsecured claims and, thus, are paid according to priority. [6] They may insist on being paid in full before the general unsecured creditors are paid anything. [7]

However, not all priority claims are created the same. For example, there is a dramatic difference in treatment between administrative expense priority claims [8] and unsecured claims of governmental units. [9] If a debtor corporation's income taxes were deemed administrative expenses, then according to section 1129(a)(9)(A), a plan can only be confirmed if the debtor corporation paid, as of the effective date of the plan, cash equal to its income tax obligations. [10] However, if a debtor corporation's income taxes were designated as an unsecured priority claim of a governmental unit, then according to section 1129(a)(9)(C), the debtor corporation is allowed to confirm a plan of reorganization that purports to pay tax claims entitled to priority under section 507(a)(8) over six years from the date the tax was assessed. [11] Additionally, authority exists that holds that Bankruptcy Code section 1129(a)(9)(C) authorizes a bankruptcy court to confirm a plan of reorganization that purports to pay pre−petition tax claims entitled to priority under section 507(a)(8) in unequal installments over the term of the plan. [12] Courts embracing the majority view so hold even though unequal installment payments will necessarily result in large balloon payments toward the end of the payment schedule. Additionally, although interest only payments at the beginning of a payment schedule reduces the strain on the debtor's cash flow at its emergence from bankruptcy, large balloon payments at the end of the schedule may shift the risk of default under the plan of reorganization to the detriment of the taxing authority. Notwithstanding the majority view on the subject, a vocal minority of courts and the Internal Revenue Service (IRS) insist that section 1129(a)(9)(C) requires equal regular installment payments, foreclosing the ability to confirm a plan with a balloon payment term. [13]

Under section 507(a)(8)(A) of the Bankruptcy Code, certain delineated unsecured pre−petition income tax claims of governmental units are granted eighth priority status. [14] The chapter 11 treatment of these priority tax claims is regulated in part by section 1129(a)(9)(C). [15] Although often overlooked in the literature, section 1129(a)(9)(C) may present an obstacle to confirmation. The vague language of section 1129(a)(9)(C) has generated considerable confusion and disagreement over its scope and requirements. [16] One such point of debate concerns the meaning of the

phrase "deferred cash payments" contained in section 1129(a)(9)(C). [17] The "deferred cash payments" requirement has resulted in several areas of judicial turbulence. Although some courts collapse the inquiry, the phrase "deferred cash payments" subsumes three independent questions. First, the phrase requires an assessment of when payments on priority tax claims must be made. For example, may the plan contain terms that require the payments to be made monthly, quarterly, semiannually, annually, etc.? Second, what is the appropriate interest rate? For example, should the court employ a market rate of interest, the Internal Revenue Code (IRC) section 6621 deficiency rate, or the federal judgment rate? Third, the phrase is ambiguous and of little help in resolving the question of whether a plan term that provides for interest only payments for several years followed by a large series of balloon payments at the end of a payment schedule is permissible. Courts that have addressed these issues tend to migrate to one of two camps. [18] The majority camp holds that the phrase should be given a liberal gloss, permitting greater flexibility on the part of the debtor in treating priority tax claims pursuant to a plan of reorganization. [19] The opposing camp, including the IRS and state and local taxing authorities, insist upon a narrow reading of the phrase, thus requiring equal monthly installment payments at the applicable nonbankruptcy rate of interest. [20] The appropriate interest rate, although not as important as to the ability to reorganize as the applicability of balloon payments merits some attention. [21]

An example should help shed light on the controversy. GHS Corporation manufactures add−on parts for Sport Utility Vehicles in its MYSUV division and baby carriages that parents car use to go jogging in its Baby−&−Me division. Due to an unfortunate case of shin splints and traffic, GHS and its Baby−&−Me division has been the focus of some unfavorable media attention. In response, GHS has decided to shut down its Baby−&−Me division and focus solely on MYSUV. However, lingering effects from the Baby−&−Me accident have required GHS Corporation to undergo a chapter 11 reorganization. Imagine that GHS Corporation, a calendar year taxpayer, files for relief under chapter 11 of the Bankruptcy Code on September 21, 2000 ("Hypothetical"). This bankruptcy petition raises some interesting questions that occur daily in virtually every chapter 11 filing that occurs. When would GHS's income taxes arise if there were no bankruptcy? In bankruptcy, when would GHS's income taxes arise? Is it possible for GHS's income year to be split so that some of its taxes would be priority claims that arose pre−petition and other taxes would be administrative claims that arose post−petition?

This paper seeks to clarify a question that occurs in almost every corporate chapter 11 reorganization: Whether a corporation may apportion income taxes into pre−petition and post−petition taxes in a chapter 11 reorganization? In order to answer this question, a series of questions must be addressed.

Part I of this article will discuss when a federal income tax claim arises in the Internal Revenue Code. This section will analyze what the boundaries of a fiscal year and calendar year are. Lastly, Part I will explain that under the IRC an income tax for a particular period is "incurred" on the last day of the period. Part II of this article examines when a claim arises in bankruptcy. First, the article will explore the definition of claim and the legislative history of section 101(5). Then the article will explore the various Circuit Court tests for when a claim arises in bankruptcy. This includes the Accrual Test, Conduct Test, and Pre−petition Relationship Test. Part III investigates when current−year federal income tax claims arise under the Bankruptcy Code. The article will explore recent cases and holdings regarding current−year federal income tax claims. Then, Part III will analyze, using the tests for when a claim arises in bankruptcy, when an income tax claim arises in bankruptcy. Next, the article will analyze the inherent actual conflict between the IRC and the Bankruptcy Code by discussing relevant cases. Lastly, Part III will scrutinize the false conflict that is presented by IRC section 1398 and section 1399. Part IV of this article introduces the Claims−Focus Model to determine when current−year federal income tax claims arise under the Bankruptcy Code. This Model enables courts to focus on the relevant inquiries in determining when the tax claim arose instead of being bogged down in the argument of section 507(a)(8)(A)(iii).

I. When Does a Federal Income Tax Claim Arise Under the Internal Revenue Code?

To properly view income tax claims inside a corporate bankruptcy case, it is necessary to view when income taxes would normally arise outside of a bankruptcy case. Income taxes become "legally due and owing" on the date by which the return must be filed, which is determined without regard to extensions. [22] This principle is further spelled out in Internal Revenue Code ("IRC") section 6151; which governs the time and place for paying income tax shown on returns. [23] IRC section 6151 states that income taxes shall be paid at the time and place fixed for filing the return without any regard to extensions. [24]

A corporation may follow either the "calendar year" or "fiscal year" in defining its taxable year. If a corporation has elected a "calendar year" tax period then its tax year, according to IRC section 441(e), [25] runs for a period of 12 months beginning on January 1 and ending on December 31. [26] If a corporation's income tax return is made on a calendar year basis, then according to IRC section 6072(b), [27] that return must be filed on or before March 15 following the close of the tax year. [28] However, if a corporation has chosen to utilize the "fiscal year" for its taxes then its tax period, according to IRC section 441(e), runs for a period of 12 months beginning on an identifiable month and ending on the last day of any month other than December. [29] If a corporation uses the fiscal year, then according to IRC section 6072(b), its return must be filed on or before the 15th day of the third month following the close of its fiscal year. [30] For example, if a corporation uses a fiscal year beginning on April 1, 1999, then its tax year closes on March 31, 2000, and its return must be filed by June 15, 2000. However, if a corporation uses a calendar year then its taxable year would start January 1, 1999, and close on December 31, 1999, and its return must be filed by March 15, 2000.

An income tax for a particular period is "incurred" on the last day of the period. [31] Thus, the Internal Revenue Service ("IRS") has adopted the position that an income tax is not "incurred" until the last day of the tax period notwithstanding the fact that the taxable event giving rise to the tax occurred earlier. It is important to distinguish that while it is possible for a taxable event that may give rise to income to "occur," such as GHS Corporation selling a widget on February 2, 2000, no tax has yet been "incurred," that is because taxes are not "incurred" until the last day of the period, which for GHS Corporation ends on December 31, 2000. Thus on February 2, 2000, there is no tax owed, no right to payment for the IRS, and the IRS cannot take steps to collect this tax. The fact that a potential taxable event "occurred" on February 2, 2000, is not congruous with the "incurrence" of a tax liability.

When a taxable event "occurs," it is similar to being given the unsigned note. Under applicable non−bankruptcy law, no claim arises until the end of the year. [32] Additionally, signing the note is analogous to the "incurrence" of a tax. [33] This example elucidates the fact that the "occurrence" of a taxable event is not congruous with the "incurrence" of a tax liability. In summary, applicable non−bankruptcy law, the IRC, simply states that a tax claim arises at the end of the taxable year and is not related in any fashion to the taxable event which may or may not give rise to the tax liability.

Thus, the earliest the IRS says an income tax can be incurred for a calendar year taxpayer is at the close of the taxable year, which is December 31. Consequently, the IRS will assert that the full amount of the tax liability for the year was incurred on the last day of the relevant tax period. [34] In our hypothetical, in accordance with applicable non−bankruptcy laws, GHS will incur all of its current year income tax liabilities as of December 31, 2000. Therefore, according to the IRS, the full amount of GHS's income tax will be incurred on the last day of the tax period, December 31. Citing 26 U.S.C. § 1399, the IRS has maintained that an intervening bankruptcy filing does not disturb this result.

II. When Does a Claim Arise Under the Bankruptcy Code?

This section begins with an analysis of the language of section 101(5) of the Bankruptcy Code and its legislative history in an attempt to provide a framework for determining when a claim arises in bankruptcy. Next, the article inspects the three leading tests that circuit courts have formulated to determine when a claim arises in bankruptcy: 1) the Accrual test, 2) the Conduct test, and 3) the Pre−petition Relationship test. Lastly, these tests will be scrutinized to determine which test best harmonizes the scope of claim with overriding bankruptcy policies.

A. Section 101(5) and its Legislative History

Section 101(5) of the Code defines "claim" as a:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. [35]

It is unmistakable that a claim will exist when there is a right to payment, such as in a contract claim where breach and damage has occurred or in a tort scenario where an injury has already manifested. [36] However, the true difficulty in determining whether a claim exists is in the circumstances where the claim is based upon a contingent, unmatured, or unliquidated right to payment. At what moment does a contingent, unmatured, or unliquidated right to payment spring into existence?

Section 101(5) has been interpreted to define "claim" quite broadly. [37] The legislative history of section 101(5) clearly shows Congress' intent that the definition of claim in the Code is as broad as possible, stating:

By this broadest possible definition and by the use of the term throughout the title 11 . . .

the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court. [38]

There is a very strong fundamental bankruptcy policy to interpret claims as broadly as possible in order to further the reorganization goals of chapter 11. [39] Congress recognized that an all−encompassing definition of claim would "permit a complete settlement of the affairs of a bankrupt debtor, and a complete discharge and fresh start." [40] That is because defining a claim broadly helps to facilitate two main purposes of bankruptcy. First, a broad definition of claim increases the universe of people who are able to participate in the bankruptcy process. [41] Second, a broad definition of claim permits a more robust discharge. [42]

The broad scope of what constitutes a claim can be a double−edged sword. Creditors who do not want their claims discharged will object that the debtor's definition of claim is too broad and that their claim actually arose post−petition. This position raises peculiar consequences. It is not always against the best interests of a creditor for a court to determine that its claim arose post−petition. For example, a creditor in a corporate chapter 7 liquidation case generally seeks to assert that it possesses a pre−petition claim. [43] If a creditor in a corporate chapter 7 liquidation case does not hold a claim, then they are shut out of the distribution process. [44] In other words, only holders of claims may participate in the distribution of property of the estate under the Bankruptcy Code. This type of scenario defines the "*Kovacs*−dilemma."

In *Kovacs*, [45] Justice O'Connor questioned whether the restrictive attitude the creditor took toward its claim definition would be different if the bankruptcy was a chapter 7 liquidation and not a chapter 11 reorganization. Thus, in a chapter 7 liquidation the determination of whether the creditor holds a claim becomes an "all or nothing" question. The IRS, unlike other creditors, never worries. That is because the IRS never has to face the "*Kovacs*−dilemma" for current year income taxes because they will always hold a claim for full value of taxes. For the IRS, it is just a matter of whether they are paid in full in cash on the confirmation date of the plan [46] or if they are paid in full, plus interest, over the course of six years. [47] Although the article discusses in Part II the competing tests for determining when a claim arises in bankruptcy, the overriding common theme that runs through all of these tests is that when a claim arises under section 101(5) is a question of federal bankruptcy law.

B. *Circuit Approach*

Three leading tests have emerged from the circuit courts to determine when a claim based upon a contingent, unmatured, or unliquidated right to payment arises under the Bankruptcy Code. These tests are: (1) the Accrual Test, (2) the Conduct test, and (3) the Pre−petition Relationship Test.

1. Accrual Test

   Under the Accrual Test, a claim for bankruptcy purposes arises when the claim has "accrued" under state law prior to the commencement of the bankruptcy case. [48] For purposes of furthering the policies of chapter 11, the Accrual Test is the most restrictive of the three tests from a Bankruptcy Code perspective. Therefore, a claim under section 101(5) is more narrowly construed in the Third Circuit, the only jurisdiction following the Accrual Test, than under the other tests. [49] Consequently, the discharge under the Accrual Test is more limited than in those circuits that follow the other tests. This interpretation of when a claim arises strongly favors the

IRS's position that the Bankruptcy Code leaves undisturbed the IRC's determination that the last day of the tax year is when a tax claim arises.

In *In re M. Frenville Co.,* [50] the Third Circuit held that a claim not discernible under state law is not recognized in bankruptcy. [51] In *Frenville,* Avellino & Bienes ("A&B") was a certified public accounting firm hired by Frenville to prepare the company's financial statements. [52] In July 1980, Frenville's creditors filed an involuntary bankruptcy petition under chapter 7 of the Code. [53] Frenville had used the financial statements prepared by A&B in dealing with several banks. [54] Multiple banks that had relied on the financial statements A&B prepared for Frenville filed suit against A&B due to misrepresentations in the financial statements. [55] A&B sought relief from the automatic stay provision so they could include Frenville as a third−party defendant in the state proceedings and obtain indemnification or contribution from the Frenvilles for any losses suffered. [56] The issue in *Frenville* was whether the automatic stay provision applied to situations where the debtor's acts occurred before the filing of the bankruptcy petition yet the cause of action arising from those acts arose post−petition. [57] The Third Circuit held that the automatic stay did not apply to a third party cause of action against the debtor for contribution or indemnity that could not be filed before the petition's filing date. [58] The court distinguished the third party action at issue in the case from the classic example of a contingent claim in surety relationships. [59] The court reasoned that in the surety context the contingent right to payment exists when the parties sign the contract. [60] The court further reasoned that, "while federal law controls which claims are cognizable under the Code, the threshold question of when a right to payment arises . . . is to be determined by state law." [61] Thus, the Third Circuit adopted the "accrued state law claim test" for determining that a claim for bankruptcy purposes exists when the claim has "accrued" under state law prior to the commencement of the bankruptcy case. In other words, there is a claim where all elements of a cause of action under state law have occurred before the filing of the bankruptcy case. In *Frenville*, under state law, A&B had no right to seek indemnification from the debtor until a suit was filed against A&B and therefore, A&B's claim arose post−petition and A&B didn't hold a claim as defined in section 101(5).

In sum, the Accrual Test, employed solely in the Third Circuit, states that a claim arises for bankruptcy purposes when the claim has accrued under state law prior to the commencement of the bankruptcy case. Again, this test supports the IRS's assertion that a tax claim for current year income tax is incurred and arises as of last day of tax year. This view is seemingly consistent with at least one policies embodied in IRC section 1399. [62]

2. Conduct Test

Under the Conduct Test, a bankruptcy claim arises when the debtor's conduct giving rise to the alleged liability occurred. [63] For purposes of furthering the policies of chapter 11, the Conduct Test, espoused by the Fourth Circuit, is the least restrictive of all the tests. Therefore, a claim under section 101(5) is more broadly construed in the Fourth Circuit than under the other tests. [64] Consequently, the discharge under the Conduct Test is more sweeping than in those circuits that follow the other tests. Therefore, the Conduct Test supports the debtor's argument that a claim for pre−petition taxes arose when their conduct giving rise to the alleged liability occurred. [65] Therefore, the Conduct Test strongly supports the premise that a tax claim arises at the time of a taxable event, the underlying conduct, regardless of the fact that the tax claim, the manifestation of injury, is not incurred until the close of the tax year.

In *Grady v. A.H. Robins*, [66] the Fourth Circuit held that insertion of the Dalkon Shield in claimant prior to bankruptcy filing constituted a "claim" that arose before bankruptcy case even though injury from Dalkon Shield did not manifest until after commencement of the case. [67] In *A.H. Robins,* Robins manufactured and marketed the, now infamous, Dalkon Shield. [68] Mrs. Grady had inserted the intrauterine Dalkon Shield years before the bankruptcy filing. [69] Due to concerns regarding the safety of the Dalkon Shield, Robins discontinued production and subsequently filed for bankruptcy relief under chapter 11 on August 21, 1985. [70] As fate would have it, Mrs. Grady was admitted to a hospital complaining of numerous pains that very same day. [71] Mrs. Grady suffered numerous complications and attributed her injuries to the Dalkon Shield. [72] Mrs. Grady, relying on *In re Frenville,* argued that her claim arose post−petition because it did not accrue under the state law of California until her injuries manifested and therefore she should not be stayed by the automatic

stay provision of the Code. [73] The Fourth Circuit observed that no court outside of the Third Circuit followed the reasoning and holding of *Frenville* and therefore declined to follow its rationale. [74] Instead, the Fourth Circuit, articulated what is known as the "Conduct Test," [75] by stating a bankruptcy claim arises when the debtor's conduct giving rise to the alleged liability occurred. [76] Therefore, under the "Conduct Test," Mrs. Grady's claim was a pre−petition claim because all of the debtor's culpable acts occurred pre−petition.

In summary, under the Conduct Test, a bankruptcy claim arises when the debtor's conduct giving rise to the alleged liability occurred. The Conduct Test, employed by the Fourth Circuit, supports the debtor's assertion that tax claim arose when its conduct giving rise to the alleged liability occurred, not when the tax manifested itself at the close of the tax year.

3. Pre−petition Relationship Test

Under the Pre−petition Relationship Test, in order for a bankruptcy claim to arise there must be some pre−petition relationship, such as, contact, privity, or exposure between the debtor's pre−petition conduct and the creditor. [77] The Pre−petition Relationship Test is followed in the Second, Ninth, and Eleventh Circuits. [78] For purposes of furthering the policies of chapter 11, the Pre−petition Relationship Test is more restrictive that the Conduct Test and less restrictive than the Accrual Test from a Bankruptcy Code perspective. Therefore, a claim under section 101(5) is more narrowly construed in the Second, Ninth, and Eleventh Circuits than in the Fourth Circuit, and more broadly construed than in the Third Circuit. [79] Consequently, the discharge under the Pre−petition Relationship Test is more limited than in the Fourth Circuit that follows the Conduct Test and is more robust that in the Third Circuit which follows the Accrual Test. Therefore, the Pre−petition Relationship Test favors the premise that a tax claim arises at the time of a taxable event, the moment of contact, exposure, or privity, regardless of the fact that the tax claim is not incurred until the close of the tax year, provided there is some pre−petition relationship between the IRS and the debtor.

In *United States v. LTV Corp. (In re Chateaugay)*, [80] the Second Circuit held that recognition of claim requires a pre−petition act or omission and a pre−petition contact, privity, or other relationship. [81] In *In re Chateaugay*, the Second Circuit confronted the intersection of bankruptcy and environmental law. [82] The Committee of Equity Security Holders of LTV Corp. ("Equity Holders") appealed from a judgment of the District Court for the Southern District of New York, holding that the "response costs" incurred by the Environmental Protection Agency ("EPA") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") were pre−petition claims dischargeable in bankruptcy regardless of when such costs were incurred so long as the claims concern a release of hazardous materials that occurred before the debtor filed its chapter 11 petition. [83] LTV Corp. filed a chapter 11 bankruptcy on July 16, 1986. [84] The EPA filed a proof of claim of roughly $32 million for response costs incurred pre−petition at sites where LTV was identified as a potentially responsible party ("PRP") under CERCLA. [85] After reviewing existing law on when a claim arises, the Second Circuit held that response costs incurred by EPA under CERCLA were pre−petition claims regardless of when such costs were incurred so long as such costs concerned release of hazardous waste that occurred before the debtor filed for chapter 11 relief. [86]

In *California Dep't of Health Services v. Jensen (In re Jensen)*, [87] the Ninth Circuit held that California had sufficient pre−petition knowledge of debtors' potential liability to give rise to pre−petition contingent "claim" for cleanup costs. Thus, the claim had been discharged in bankruptcy. [88] In *Jensen*, Jensen Lumber Company filed a voluntary chapter 11 bankruptcy petition on December 2, 1983. [89] On January 25, 1984, several weeks after the petition was filed, an inspector from the California Water Board visited Jensen Lumber Company. [90] The California Water Board informed the Jensens that a large tank containing pollutants posed a danger and the Jensens had to rectify the danger promptly. [91] Unable to finance the cleanup themselves, the Jensens filed for protection under chapter 7 of the Bankruptcy Code. [92] The California Department of Health Services ("DHS") undertook the cleanup operations of the Jensen site and allocated ten percent of the cost to the Jensens. [93] The Jensens' sought a determination that their personal bankruptcy had discharged their share of the cleanup costs. [94] The bankruptcy court disagreed with the Jensens and held that California DHS's claim arose post−petition and was not discharged. [95] The BAP reversed the bankruptcy court's finding and held that California DHS's claim was discharged. [96] The Ninth Circuit adopted a "Fair Contemplation Test" that provides that pre−petition relationship may not be enough, but that the claim must have been within fair contemplation of parties prior to bankruptcy petition. [97] The court adopted this narrower view of the Pre−petition Relationship Test espoused in *Chateaugay* because it held that the overly broad definition of claim in C*hateaugay*,

undermine[s] the rationale for considering whether or not a relationship exits, namely "that a creditor with a relationship may anticipate its potential claim." [98]

Additionally, the court held that the Chateaugay "relationship" approach adopts "so broad a definition of claim so as to encompass costs that could not 'fairly' have been contemplated by the EPA or the debtor pre−petition." [99]

The court listed indicia of fair contemplation as: 1) knowledge by the parties of a site in which a PRP may be liable; 2) listing on the National Priorities List; 3) notification by EPA of PRP liability; 4) commencement of investigation and cleanup activities; and 5) incurrence of response costs. [100]

In *Jensen*, the Ninth Circuit imputed the California Water Board's knowledge of the potential hazards on the Jensen property to the California DHS. [101] Therefore, the Ninth Circuit concluded that the state of California had sufficient knowledge of the Jensens' potential liability before the Jensens' filed their bankruptcy case that their claims were discharged in their bankruptcy cases. [102]

In *Epstein v. Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp. (In re Piper Aircraft Corp.)*, [103] the Eleventh Circuit adopted a pre−petition relationship test for determining when a claim arises. In *Piper Aircraft*, Piper had manufactured and distributed aircrafts and aircraft parts for almost sixty years. [104] Piper was named a defendant in several product liability lawsuits. [105] On July 1, 1991, Piper filed a voluntary chapter 11 petition. [106] Piper sought to create a fund to pay off future liability claims with a legal representative, David G. Epstein, representing "future claimants." [107] The proposed class of future claimants was to be:

All persons, whether known or unknown, born or unborn, who may, after the date of confirmation of Piper's Chapter 11 plan of reorganization, assert a claim or claims for personal injury, property damages, wrongful death, damages, contribution and/or indemnification, based in whole or in part upon events occurring or arising after the Confirmation Date, including claims based on the law of products liability, against Piper or its successor arising out of or relating to aircraft or parts manufactured and sold, designed, distributed or supported by Piper prior to the Confirmation Date. [108]

The Eleventh Circuit sought to resolve whether any Future Claimants held claims against Piper as defined in section 101(5). [109] The Eleventh Circuit analyzed the question using the Accrual Test, the Conduct Test, and the Pre−petition Relationship Test. [110] The Eleventh Circuit, not fully satisfied, adopted a modified Pre−petition Relationship Test which they referred to as the "Piper test." [111] The "Piper test" asserts that an individual has a claim under section 101(5) if:

events occurring before confirmation create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor's product; and (ii) the basis for liability is the debtor's pre−petition conduct in designing, manufacturing and selling the allegedly defective or dangerous product. [112]

Congruous with this test, a debtor's pre−petition actions will give rise to a claim only if a pre−confirmation relationship is established between the claimant and the pre−petition conduct. [113] Therefore, in applying the "Piper test," the Eleventh Circuit held that the Future Claimants did not hold "claims" under section 101(5) because there was no pre−petition relationship between the future claimants and the debtor. [114]

In summary, using the Pre−petition Relationship Test a bankruptcy claim requires some pre−petition relationship, such as, contact, privity, or exposure between the debtor's pre−petition conduct and the creditor. The Second, Ninth, and Eleventh Circuits follow the Pre−petition Relationship Test. This test supports the debtor's assertion that tax claim arose when the taxable event occurred, when a pre−petition relationship, such as, contact, privity, or exposure existed between the debtor's pre−petition conduct and the IRS, not when the tax manifested itself at the close of the tax year.

III. When Does a Current−Year Income Tax Claim Arise Under the Bankruptcy Code? [115]

A. Existing Authorities

Part I of this paper described when GHS's corporate income tax claim would arise outside of bankruptcy. [116] It explained that GHS's corporate income tax claim would arise on the last day of the tax period, December 31, 2000. Part II of this paper described when a claim arises in bankruptcy. [117] It determined that the time a claim arises in bankruptcy depends on which of the three major methodologies is used. Accordingly, the next logical step is to analyze when a corporate income tax claim arises in a bankruptcy. We will analyze this question using our hypothetical where GHS has filed for chapter 11 protection on September 21, 2000.

The IRS will argue that GHS's income tax for 2000 is an administrative expense priority pursuant to section 507(a)(1). [118] Thus, GHS's income tax for 2000 will be an administrative expense if it fits within the definition of section 503(b)(1)(B)(i). [119] According to section 503(b)(1)(B)(i), there is a bipartite test in order to determine whether a claim is an administrative expense. [120] First, it must be incurred by the estate. Second, it must not be a tax specified in section 507(a)(8).

GHS Corporation, on the other hand, will argue that its corporate income tax is severable into pre−petition and post−petition income taxes. GHS will agree that its post−petition income tax falls squarely within section 503 (b)(1)(B)(i) and, therefore, is an administrative expense pursuant to section 507(a)(1). [121] However, GHS will argue that the income taxes attributable to its income from January 1, 2000, until September 20, 2000, are not administrative expense priorities. First, GHS will argue that since the estate is not created until the order for relief is granted the estate could incur no tax. Second, GHS will argue that those pre−petition taxes fit squarely under 11 U.S.C. § 507(a)(8)(A)(iii). [122] Therefore, GHS's pre−petition income should be apportioned eighth priority as an unsecured claim of the government for income taxes that were not assessed before but were assessable after the commencement of the case.

This debate may not be a matter of great import in a number of cases because there is no corporate income tax liability for the year that the chapter 11 is filed. However, in the minority of cases where this debate is applicable, its determination may be pivotal to the ability of the corporation to reorganize. The reason for this revolves around how the tax liability is treated. If it is determined that GHS's corporate income tax claim is an administrative expense then pursuant to section 1129(a)(9)(A), the IRS must receive cash equal to its claim on the effective date of the plan. [123] However, if it is determined that GHS's corporate income tax claim for the pre−petition taxes then pursuant to section 1129(a)(9)(C), GHS's reorganization could allow for the repayment of the pre−petition income tax liability over the course of six years. [124] The real world effect of this determination could be the difference between having cash available for reorganization and having a cash drain such that reorganization is impossible. Therefore, the possibility of a successful reorganization may hinge on the determination of whether a corporate income tax claim for a single tax year may be divided into pre−petition income taxes and post−petition income taxes.

In *In re O.P.M. Leasing Services*, [125] Judge Lifland, of the Southern District of New York held that Indiana's claim against a chapter 11 debtor's estate for taxes apportioned to pre−petition period was entitled to eighth priority. [126] In *In re O.P.M.*, the debtor filed for relief chapter 11 on March 11, 1981. [127] OPM's tax year ran from December 1 until November 30. [128] Therefore, the trustee did not pay any tax for the pre−petition portion of the tax year, from December 1 until March 10. [129] The issue presented to the court was whether an eighth priority claim arises for the pre−petition portion of income tax due when a corporation filed a bankruptcy petition in the middle of its fiscal year. [130] The court explained the bipartite test contained in 11 U.S.C. § 503 for determining when an administrative expense arises. [131] To permit administrative expense treatment, a tax claim must satisfy both parts of a "two−prong test":

(1) the tax must be incurred by the estate and

(2) the tax must not be specified in section 507(a)(8). [132]

The court dispatched the first prong by holding that the date when taxes are incurred is determined by the date the taxes accrue rather than the date of assessment. [133] The court also determined that the claim at issue fit squarely within the exception of section 507(a)(8)(A)(iii). [134]

The court pointed out that the legislative history to section 503(b)(1)(B) indicates that administrative expenses include taxes:

which the trustee incurs in administering the debtor's estate, including taxes on capital gains from sales of property by the trustee and taxes on income earned by the estate during the case. Interest on tax liabilities and certain tax penalties incurred by the trustee are also included in the first priority. [135]

Therefore, when income is earned pre−petition by the debtor, not earned by the estate during the pendency of the case, the income tax is not accorded administrative expense priority. [136] The court pointed out that pursuant to Indiana law a corporation is required to estimate its tax liability quarterly even though its exact tax liability will be unknown until the end of the year. [137] Therefore, the court held that since the claim at issue was for pre−petition income and could be estimated pursuant to Indiana law it was properly classified as a pre−petition claim not an administrative expense. [138]

In *In re Davidson Lumber Co.*, [139] the bankruptcy court held that although the tax claim arose after the commencement of the bankruptcy it was related to pre−petition corporate income tax and, thus, was not incurred by the estate and could not be given administrative expense priority. [140] In *Davidson*, a chapter 7 bankruptcy case was filed on March 2, 1982. [141] The IRS made an assessment against the debtor on August 27, 1984. [142] The court held that determination of a claim's priority depends on when the tax was incurred, meaning the date of accrual not assessment. [143] Therefore, the court held that although the claim arose post−petition, it was incurred pre−petition and thus should not be granted administrative expense priority. [144]

In *In re Prime Motors Inns, Inc.*, [145] the bankruptcy court held that income tax based on pre−petition sales of assets was not administrative expense. [146] In *Prime Motors*, the debtors sold assets on July 2, 1990, and filed for protection under chapter 11 on September 18, 1990. [147] The State of New Jersey argued that the taxes due to the state are administrative expense priority claims. [148] The Court held that a tax accrues on the date it is incurred, not on the date of assessment or date it is payable. [149] Therefore, the court held that since the sale occurred prior to the petition date the income was incurred pre−petition. [150] This is so even though the assessment and payment were not due until after the petition date. [151]

In *In re Bayly Corp.*, [152] the Tenth Circuit held that income taxes on income earned during a taxable year prior to bankruptcy petition constituted pre−petition claims, even though the taxes were not due and payable until post−petition. [153] In *Bayly*, the court based its holding that the income taxes constituted pre−petition claims on *In re OPM*. [154] The court continued, stating that a claim will not be considered an administrative expense solely because a tax becomes payable post−petition. [155]

Therefore, following *In re O.P.M.*, *In re Davidson Lumber Co.*, *In re Prime Motors Inns, Inc.*, and *In re Bayly Corp*., GHS's income tax claims for January 1, 2000, until September 20, 2000, should be pre−petition claims entitled to eighth priority. [156] Those courts held that the date when taxes are incurred was determined by the date the taxes accrue rather than the date of assessment, which occurs post−petition. This makes sense since the legislative history of section 503(b)(1)(B) indicates that administrative expenses should include taxes which are earned by the estate, not the income earned pre−petition by the debtor. [157]

At least one circuit has held that an income tax obligation was incurred on the last day of the tax period. In *In re Pacific−Atlantic Trading Co.*, [158] the Ninth Circuit held that the chapter 7 corporate debtor's federal income taxes were "incurred by the estate." [159] In *In re Pacific−Atlantic Trading Co. ("PATCO")*, an involuntary chapter 7 was filed against PATCO. [160] An order for relief was granted on October 31, 1988. [161] PATCO's taxable year ended on December 31, 1988. [162] The first issue in *PATCO* was whether the IRS's claim for PATCO's 1988 income taxes was an administrative expense. [163] The court held that the legislative history of section 503(b)(1)(B)(i) showed that the drafters intended for an income tax to be incurred on the last day of the taxable period. [164] The court recounted the legislative history regarding when a tax was incurred in bankruptcy. [165] "The initial discussions were begun in the House of Representatives, followed by debates in the Senate and ultimately concluded with the introduction of a compromise bill." [166] The Finance Committee recommended a "general definition of when a tax is 'incurred' for purposes of the various tax collection rules affecting the debtor and the estate." [167] Section 346(a)(1) amended proposal included that:

1. for purposes of this title − −

a tax on or measured by income or gross receipts for a taxable period shall be considered incurred on the last day of the taxable period [168]

However, after the Senate adopted the amendment and sent it back to the House a compromise bill had been agreed upon. [169] The definition of when a tax is incurred, that had been suggested by the Senate Finance Committee, was not included in the compromise bill. [170] However, the final statements of both House and Senate sponsors, Representative Edwards and Senator DeConcini, show that Congress intended the compromise bill to adopt the Senate Finance Committee's definition of "incurred." [171] Under the House amendment for section 547 preferences, an income tax for a particular period is "incurred" on the last day of the period. [172] For these reasons, the Ninth Circuit determined that income taxes are incurred on the last day of the tax period. [173]

Therefore, following the holding in *PATCO*, the IRS would argue that GHS's income tax claim would arise at the end of GHS's tax year, December 31, 2000. Accordingly, the IRS would argue that, since the tax claim is not incurred until post−petition, the tax claim is an administrative expense pursuant to section 503(b)(1)(B)(i).

However, even assuming arguendo that an income tax claim was incurred on the last day, it still has to meet the second prong of section 503(b) test. In *In re Pacific−Atlantic Trading Co.*, [174] the Ninth Circuit held that even though chapter 7 corporate debtor's federal income taxes were "incurred by the estate," the federal income tax liability was only entitled to eighth priority since tax was not assessed pre−petition, but was assessable post−petition. [175] In *Pacific−Atlantic Trading Co.* ("*PATCO*"), an involuntary chapter 7 was filed against PATCO. [176] An order for relief was granted on October 31, 1988. [177] PATCO's taxable year ended on December 31, 1988. [178]

As explained in the previous section, the Ninth Circuit determined that income taxes are incurred on the last day of the tax period. [179] The court did not address the distinction between IRC sections 1398 and 1399 because the court determined that the taxes are incurred at the close of the tax year and, thus, incurred by the estate. [180] However, the second requirement that must be satisfied to allow an administrative expense priority is that the tax must not be of a kind specified in section 507(a)(8). [181] Thus, even if a claim meets the first requirement of section 503(b)(1)(B), a claim must also meet the second requirement in order to be apportioned administrative expense priority. The court held that PATCO's liability for its 1988 income taxes fit within the narrow limits of section 507(a)(8)(A)(iii). [182] The court analyzed why PATCO's income taxes were assessable but not assessed. [183] The court explained that following *U.S. v. Ron Pair*, [184] a statute should be read literally. [185] Thus, the taxes were not of the kind specified in section 523 since that section only applies to individual, not corporate, debtors. [186]

Additionally, the income taxes were not assessed before the commencement of the bankruptcy but were assessable after the commencement of the case. [187]

The IRS objected to the court's interpretation of the section arguing that the court: (1) interpreted the subsection out of context, (2) rendered a portion of the statute superfluous, (3) contradicts legislative intent, and (4) leads to unintended consequences. [188] The court systematically dismissed each objection. [189] First, the court points out that subsections (i), (ii), and (iii) were provided as alternatives written in the disjunctive and, therefore, should constitute separate options. [190] Second, the court pointed out that the IRS's own interpretation of the statute is at odds with the plain language of the statute. [191] The court then dismissed the IRS's third argument of ambiguity because the IRS itself stated that PATCO's tax liability facially meets the requirement set forth in section 507(a)(8)(A)(iii). [192] Lastly, the court dismissed the IRS's argument that PATCO's interpretation of the statute will lead to unintended consequences. [193] The court explained that it would "not presume that Congress intended an absurd result." [194] Therefore, relying on the unambiguous terms of the statute the court concluded that PATCO's income taxes fell squarely within section 507(a)(8)(A)(iii). [195] Accordingly, since the income taxes are eighth priority claims, they are not administrative claims. [196]

In *In re L.J. O'Neill Shoe Co.*, [197] the Eighth Circuit held that the Missouri Department of Revenue ("MDOR") portion of income tax claims related to pre−petition income of debtors was a claim for tax assessed before, but not assessable after, commencement of case and therefore was entitled to eighth priority. [198] In *L.J. O'Neill*, MDOR appealed a determination that the debtors' pre−petition corporate income was not entitled to a first distribution priority as an administrative claim pursuant to sections 507(a)(1) and 503(b). [199] On January 24, 1991, INTERCO Inc., and its

affiliates, including L.J. O'Neill filed for protection under chapter 11. [200] MDOR has a claim for Missouri corporate income taxes. [201] Pursuant to Missouri law, the taxable year for corporate income taxes is the corporation's fiscal year, which in the debtors' case was from February 25, 1990, until February 23, 1991. [202] The issue left for appeal was whether the portions of MDOR's corporate income tax claims that relate solely to the income of the debtors earned before the petition date ("pre−petition income") qualify as administrative claims pursuant to section 503(b)(1)(B)(i). [203]

First it was necessary to determine what qualified as an administrative expense under section 503(b)(1)(B)(i) [204] . To permit administrative expense treatment a tax claim must satisfy both parts of a "two−prong test": (1) the tax must be "incurred by the estate" and (2) the tax must not be "specified in section 507(a)(8)." [205] The court determined that it is unnecessary to determine if the tax attributable to pre−petition income was "incurred by the estate," because the claim was for a tax of a kind specified in section 507(a)(8). [206]

The parties agreed that the only operative section of section 507(a)(8) was subsection (iii). [207] Therefore, the sole issue was whether corporate income taxes that the debtors owed for their 1990−91 tax year were "not assessed before" but were "assessable . . . after, the commencement of the case." [208] The lower courts found that the tax was of a kind specified in section 507(a)(8). [209] Thus, the taxes that relate to the pre−petition portion of income were not entitled to administrative expense priority. [210] MDOR argued that the lower courts had misread the statute. [211] MDOR argued that under the lower court's interpretation no taxes would ever be granted administrative expense priority. [212] MDOR's argument went overboard, however, failing to note that the lower courts had foreseen their worries and clearly stated that any interpretation that would allow taxes on post−petition earnings an eighth priority would be "absurd." [213] The Eighth Circuit still caught on to MDOR's position that the "plain meaning" of legislation should be conclusive. [214] However, the Eighth Circuit, following the guidelines set forth in the Supreme Court in *Ron Pair Enterprises*, [215] which stated that the, "plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters" [216] held that this instance was one of those rare cases where interpreting the plain meaning of the statute would produce an occurrence that was at odds with Congressional intent. [217]

The Eighth Circuit determined that a permissible interpretation of section 507(a)(8)(A)(iii) consistent with legislative intent was that it only addressed pre−petition taxable activity or events. [218] The court relied on the fact that subsections (i) and (ii) both addressed pre−petition taxable events. [219] The court also based its interpretation on *In re Preferred Door Co*., [220] which stated that section 507(a)(7) dealt with pre−petition taxes. [221] MDOR argued that the correct interpretation of the statute is for taxes fully assessable yet not assessed and remaining unassessed after the petition. [222] However, the court properly points out the overlooking of the temporal qualification of "after the commencement of the case" to "assessable." [223]

MDOR also argued that treating the income tax as a pre−petition tax claim is inconsistent with Internal Revenue Code ("IRC") section 1399. [224] section 1399 states:

Except in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under title 11 of the United States Code. [225]

Section 101(15) provides that the definition of entity "includes any person, estate, trust, governmental unit, and Unites States trustee." [226] Therefore, MDOR argued that the corporate tax year of L.J. O'Neill could not be split into pre−petition and post−petition tax years. [227] Instead, MDOR suggested that the income of L.J. O'Neill should be taxed as though they never filed bankruptcy. [228] MDOR based its argument on its interpretation that if the tax claim of L.J. O'Neill were split into pre−petition and post−petition portions it would be taxing the debtor as though it were two separate entities. [229] The court rebuked that analysis and explained that it was taxing the debtor as one continuous corporate entity. [230] The distinction was not which entity was paying the tax, but rather the priority granted to the holder of the tax claim. [231] Therefore, as it commonly occurs, one portion of MDOR's tax claim was an administrative expense and one portion was granted eighth priority distribution. [232] The court explained that this treatment maintains the need to tax one single corporate entity while the distinction only occurs in reference to the distribution of its claims. [233]

In *United States v. Hillsborough Holdings Corp.* (*In re Hillsborough Holdings*), [234] the Eleventh Circuit held that the IRS's claim for unpaid income taxes attributable to the pre−petition portion of taxes was not allowable as an administrative expense. [235] The Eleventh Circuit determined whether a corporate debtor's income tax year which straddled the filing of a chapter 11 allows for the pre−petition part of the income to be treated as an eighth priority claim. [236] Hillsborough Holdings Corporation and its thirty−two wholly owned subsidiaries had a fiscal tax year that ran from June 1 until May 31. [237] The Debtors filed for reorganization under chapter 11 on December 27, 1989. [238] The debtors paid in full the portion of their tax that they accredited to income earned during the post−petition time of the tax year (From December 27, 1989 through May 31, 1990). [239] The IRS sought to have the debtors' taxes attributable to pre−petition income treated as a first priority claim pursuant to sections 507(a)(1) and 503(b)(1)(B)(i). [240] The debtors argued that the taxes were not "incurred by the estate" and the bankruptcy court agreed. [241] The district court affirmed and the IRS appealed. [242]

Once again, the court went through the bipartite test for determining an administrative expense: (1) tax is incurred by the estate and (2) is not of a kind specified in section 507(a)(8). [243] The IRS argues that the entire year's taxes were incurred on the last day of the taxable year, relying on *In re PATCO*. [244] However, relying on *In re O.P.M. Leasing Servs. Inc.*, [245] the debtors responded that since the estate did not earn the pre−petition income taxes it is impossible that the estate could incur them. [246] The Eleventh Circuit left this question undecided and instead based its decision on the second part of the administrative expense test. [247]

The court began its assessment of section 507(a)(8) with the statutory language itself. [248] The court held that the unpaid income taxes of the debtor fit squarely within the plain language of section 507(a)(8)(A)(iii) because the taxes were not assessed before the petition was filed, but were assessable after the filing. [249] The IRS argued that the plain language interpretation of the statute would lead to absurd results. [250] The IRS believed that such an interpretation of the statute would exclude post petition income taxes from the administrative priority as well. [251] The court reasoned that the IRS's argument was ridiculous because debtors have uniformly admitted that the post petition income taxes will be treated as administrative priority claims. [252] The Eleventh Circuit, agreeing with the Eighth and Ninth Circuits, find the IRS's argument ludicrous. [253] The court adopted the rationale in *L.J. O'Neill* that:

We believe that subsection (iii) can be read, like the other subsections of § 507(a)(7)(A) [§ 507(a)(8)(A)] to address only prepetition taxable activity or events. . . Thus, we interpret section 507(a)(7)(A)(iii) [507(a)(8)(A)(iii)] to address taxes derived from prepetition events "not assessed before, but assessable . . . after, the commencement of the case." [254]

The IRS then argued that by allowing the debtor to create an administrative expense portion of taxes and a eighth priority tax portion subverts the tax Code. [255] The court responded that the division of tax into portions consistent with the Bankruptcy Code does not affect the total tax liability, the tax rate, nor the length of the debtors' tax year. [256] Therefore, the court's holding is entirely consistent with the tax Code.

These three circuit court decisions, *PATCO*, *L.J. O'Neill*, and *Hillsborough*, have concluded that even if a tax claim was not incurred until post petition it will not be treated as an administrative expense because it will fail the second part of the administrative expense test. Therefore, GHS's pre−petition income should be granted eighth priority status because regardless of when it was incurred it is of a kind specified in section 507(a)(8)(A)(iii) because it was not assessed before, but was assessable after the commencement of the case.

B. When Should a Current−Year Federal Income Tax Claim Arise in Bankruptcy?

The courts that have addressed the issue of when a current−year federal income tax claim arises in bankruptcy have reached the correct result for the wrong reasons. They have attempted to determine that the claim cannot be an administrative expense by relying on the definition of section507(a)(8) while in fact that interpretation is quite specious. [257] To be sure, at the time the taxable event had taken place there was no bankruptcy estate, but there was no tax. The tax is incurred, under applicable non−bankruptcy law, when there is a bankruptcy estate. [258] Instead of trying to parse the language of section 507(a)(8)(A)(iii) to determine the status of the claim, the courts should be interpreting the question of when the current−year federal income tax claim arises through the lens of when any claim arises in bankruptcy. If the courts are not obfuscated in their analysis they should conclude that when a current−year federal

income tax claim arises has already been answered. Once one determines that the federal income tax, for Bankruptcy Code purposes, arises pre−petition, then that bankruptcy tax claim is treated like any other pre−petition bankruptcy tax claim. [259] Presently, the circuit courts have adopted five tests to determine when a claim arises under section 101(5). They are the Accrual Test, [260] the Conduct Test, [261] the Pre−petition Relationship Test, [262] the Fair Contemplation Test, [263] and the Piper Test. [264] Analyzing these cases in the abstract and applying them to taxable events will enable us to determine whether a current−year federal income tax can be bifurcated into pre−petition and post−petition claims. The article will apply each competing theory to the hypothetical first seen in the introduction. Then the article will advance both the debtor's argument and the IRS's argument. [265]

Under the Third Circuit's Accrual Test adopted in *Frenville,* [266] a claim for bankruptcy purposes arises when the claim has "accrued" under state law prior to the commencement of the bankruptcy case. [267] In our Hypothetical, GHS Corporation, a calendar year taxpayer, filed its petition on September 21, 2000. The IRS will argue that its tax claim does not accrue under the federal law until December 31, 2000. Therefore, since the taxes for the year 2000 are not incurred until December 31, 2000, under the Accrual Test no claim would exist for bankruptcy purposes until the tax has been incurred on December 31, 2000. This supports the IRS's position that there is no claim for taxes until December 31, 2000, when taxes are incurred and, thus, are administrative expense priority claims pursuant to section 507(a)(1). Thus, even if the taxable event of selling products occurred on February 12, 2000, no tax exists at that time. The IRC is clear that until the last day of the tax year, no tax exists and, hence, under the Accrual Test no claim may accrue. Under the Fourth Circuit's Conduct Test adopted in *Grady,* [268] a bankruptcy claim arises when the debtor's conduct giving rise to the alleged liability occurred. [269] In our Hypothetical, GHS Corporation, a calendar year taxpayer, filed its petition on September 21, 2000. The debtor will argue that a claim for pre−petition taxes arose when their conduct giving rise to the alleged liability occurred. GHS Corporation will rely on the fact that a claim under section 101(5) is more broadly construed in the Fourth Circuit than under the other tests. This furthers the policies of chapter 11 by granting a discharge that is more sweeping than in those circuits that follow the other tests. Thus, GHS Corporation will analogize the insertion of the Dalkon Shield with the taxable event, which occurred pre−petition. Here, the tax will not be incurred until the last day of the tax year. This corresponds to *Grady* where the injury did not manifest until post−petition. [270] Similarly, just as the creditor in *Grady* held a pre−petition claim for post−petition injuries, the IRS will hold a pre−petition claim for those taxable events that occurred pre−petition. Therefore, the Conduct Test strongly supports the premise that a tax claim arises at the time of a taxable event, the underlying conduct, regardless of the fact that the tax claim, the manifestation of injury, is not incurred until the close of the tax year.

The Pre−petition Relationship Test is a broad umbrella that covers numerous corollaries. This article clusters these tests under the Pre−petition Relationship umbrella while, in fact, there are important nuances that may be more or less favorable to the IRS's or the debtor's position. First among the tests is the Second Circuit's Pre−petition Relationship Test. This test, espoused by *In re Chateaugay,* [271] states that a bankruptcy claim requires a pre−petition act or omission coupled with pre−petition privity, contact, or exposure between the debtor and creditor. [272] In our Hypothetical, GHS Corporation, a calendar year taxpayer, filed its petition on September 21, 2000. The debtor will argue that the Pre−petition Relationship Test answers the question of when a current−year federal income tax claim arises in bankruptcy. Consequently, the court should investigate whether GHS Corporation, through contact, privity or exposure, had any pre−petition relationship with the IRS. First, the debtor must synchronize the pre−petition selling of products which gives rise to taxable income to the release of hazardous waste. This satisfies the pre−petition act requirement of the Pre−petition Relationship Test. Second, GHS Corporation must show pre−petition privity, contact, or exposure between itself and the IRS. GHS Corporation could produce ERISA payments, quarterly reports, quarterly taxes, and payroll taxes, as indicia that it had contact and exposure with the IRS. This supports GHS Corporation's position that taxes accrue pre−petition and, thus, are unsecured governmental priority claims pursuant to section 507(a)(8). Hence, just as the Second Circuit held that response costs incurred post−petition were pre−petition claims, [273] the current−year federal income tax claims arise pre−petition, to the extent that they represent the taxable event of selling products that occurred pre−petition. Thus, the fact that under the IRC the tax will not be incurred until December 31, 2000, does not nullify the analysis. Under the Pre−petition Relationship Test, even though no tax has been incurred, a claim has accrued so the IRS would hold an unsecured governmental priority claim pursuant to section 507(a)(8). [274]

Second among the Pre−petition Relationship Tests is the Ninth Circuit's "Fair Contemplation Test" espoused in *Jensen*. [275] The Ninth Circuit adopted a "Fair Contemplation Test" that provides that pre−petition relationship may not be enough, but that the claim must have been within fair contemplation of parties prior to bankruptcy petition. [276] In our Hypothetical, GHS Corporation filed its chapter 11 Reorganization on September 21, 2000. GHS Corporation will argue that, under the Ninth Circuit's Fair Contemplation Test, the IRS's current−year federal income tax claims should arise pre−petition in bankruptcy since they were within the fair contemplation of the IRS prior to the bankruptcy petition. In *In re Jensen*, the Ninth Circuit listed indicia of fair contemplation as knowledge by the parties of a site in which a PRP may be liable, listing on the National Priorities List, notification by EPA of PRP liability, commencement of investigation and cleanup activities, and incurrence of response costs. [277] Likewise, GHS Corporation will assert that ERISA payments, quarterly reports, quarterly taxes, and payroll taxes, suffice to prove that the IRS had fair contemplation of GHS Corporation's income sufficient to hold a pre−petition claim. While the actual amount of the tax due from GHS Corporation may not be determined until December 31, 2000, it is within the fair contemplation of the IRS that the business is earning money. Therefore, just as the Ninth Circuit imputed knowledge of the potential hazards to the California DHS, [278] the court should impute knowledge of GHS Corporation's current−year federal income taxes to the IRS. Accordingly, under the Fair Contemplation Test, the IRS would hold an unsecured governmental priority claim pursuant to section 507(a)(8).

Last among the Pre−petition Relationship cousins is the pre−confirmation relationship test known as the Piper Test. [279] The Piper Test, asserted in the Eleventh Circuit, asserts that an individual has a claim under section 101(5) if: 1) events occurring before confirmation create a relationship, such as contact, exposure, impact or privity between the claimant and the debtor's product; and 2) the basis for liability is the debtor's pre−petition conduct in designing, manufacturing and selling the allegedly defective or dangerous product. [280] Thus, under the Piper Test, a debtor's pre−petition actions will only give rise to a claim if a pre−confirmation relationship is established between the claimant and the pre−petition conduct. [281] Therefore, GHS Corporation's pre−confirmation relationship with the IRS, just as in the Fair Contemplation Test, is evidenced by ERISA payments, quarterly reports, quarterly taxes, and payroll taxes. Accordingly, when GHS Corporation was involved in conduct that gave rise to taxable income, the IRS held a pre−petition claim due to the pre−confirmation relationship that existed between itself and GHS Corporation. This is so even though the tax is not incurred until the close of the tax year. Taken in the abstract, the contact and privity requirement is very similar to the Fair Contemplation Test. Again, under the Piper Test, the IRS would hold an unsecured governmental priority claim pursuant to section 507(a)(8).

In summary, the law in determining when a claim arose for a current−year federal income tax is not self−evident. Several tests support this article's position [282] while at least one test favors the IRS's position. [283]

B. Actual Conflict between the IRC and Bankruptcy Code

1. Summary of Conflict

A frequent source of strain in a business bankruptcy case is the tension between the conflicting goals of the Bankruptcy Code and the Internal Revenue Code ("IRC"). The IRC focuses on maximizing the revenue to the government while the Bankruptcy Code has many goals such as the "fresh start" and "discharge" to allow for a clean slate for the debtor. [284] Therefore, it is no wonder that statutory conflicts abound. When these Codes come into conflict, which prevails?

At least in one instance, the Supreme Court has held that when necessary for reorganization the Bankruptcy Code trumps conflicting sections of the Internal Revenue Code. [285] There is no evidence that Congress intended to create a special exception for the IRS other than those listed in the Code. The Second Circuit has recognized the importance of the Bankruptcy Code in the face of other governmental forces. [286] However, the power of the Code is not without bounds. Several cases show that there are constraints on the breadth of the Code's potency. The Supreme Court has held that a bankruptcy trustee may not abandon property in contravention of state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards. [287] Additionally, the Second Circuit held that the bankruptcy court had no authority to interfere with the FCC's system of allocating spectrum licenses. [288] Thus, the answer to the question of which Code prevails, like most in law, is not clear−cut. However, the weight of authority seems to place a rebutable presumption that the Bankruptcy Code will govern.

2. Supremacy of Bankruptcy Policy

In *United States v. Energy Resources Co.*, [289] the court held that when necessary for reorganization the Bankruptcy Code trumps conflicting sections of the IRC. [290] In *Energy Resources*, trustees from separate chapter 11 cases sought to allocate IRS payments to pay off "trust fund" debts before paying off the "non−trust fund" portions of their liabilities. [291] The IRC requires that employers hold in trust for the United States money from their employee's paychecks representing personal income taxes and Social Security taxes. [292] If the employer fails to account for these "trust fund taxes" then the IRS may collect an equivalent sum directly from the people responsible for collecting the tax, who are referred to as "responsible" individuals. [293]

The Supreme Court conceded that the Bankruptcy Code does not explicitly empower the bankruptcy courts to approve reorganization plans designating tax payments as trust fund. [294] The IRS argued that bankruptcy courts had overstepped their equitable powers because payments made pursuant to a chapter 11 plan are involuntary and thus the taxpayer was unable to designate the tax liability to which the payment will apply. [295] The IRS was seeking assurances that if the reorganized debtor failed to pay its non−guaranteed taxes the responsible persons would still be liable for the trust fund taxes. [296] However, the Supreme Court observed that bankruptcy courts are granted residual power under the Code to approve reorganization plans including "any . . . appropriate provision not inconsistent with the applicable provisions of this title." [297] Additionally, the Code authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code. [298] Both sections105 and 1123 are congruous with the traditional understanding ("misunderstanding") that bankruptcy courts, as courts of equity, have broad authority to modify creditor−debtor relationships. [299] Sidestepping the issue that the Bankruptcy Code does not explicitly state that bankruptcy courts may approve the designation of tax payments as trust fund or non−trust fund, the Court held that, "a bankruptcy court has the authority to order the IRS to apply the payments to trust fund liabilities if the bankruptcy court determines that this designation is necessary to the success of a reorganization plan." [300] Therefore, the Supreme Court, J. White, in an 8−1 decision, reasoned that the Bankruptcy Code trumps conflicting sections of the Internal Revenue Code. [301]

However, the power of the Code is not without bounds. Several cases show that there are constraints on the breadth of the Code's potency. In *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, [302] the Supreme Court, Justice Powell, held that bankruptcy trustee may not abandon property in contravention of state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards. This case presented the question of whether section 554(a) of the Bankruptcy Code authorizes a trustee in bankruptcy to abandon property in contravention of state laws or regulations that are reasonably designed to protect the public's health or safety. [303] The trustees in two cases sought to abandon property that rendered a net burden to the bankruptcy estate. [304] The City and State of New York as well as the New Jersey Department of Environmental Protection ("NJDEP") objected to the abandonment contending that abandoning the property would threaten the public's health and safety. [305] The Third Circuit held that Congress had intended to codify the judge−made abandonment practice that had developed under the Bankruptcy Act. [306] Pursuant to that law, where state law or general equitable principles protected public interests those interests were not reversed by judge−made abandonment power. [307] There was also evidence that Congress did not intend to preempt all state regulation, only those policies outweighed by relevant federal interests. [308] Accordingly, the Supreme Court consolidated the cases and granted certiorari. [309]

Congress, by codifying the judicially developed rule of abandonment, had established that a trustee could not exercise his abandonment power in violation of certain state and federal laws. [310] According to the normal rule of statutory construction, if Congress intended legislation to change the interpretation of a judicially created concept, it would make that intent specific. [311] If Congress wished to grant the trustee an extraordinary exemption from non−bankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." [312] As the Court held in context of the National Labor Relations act, "the debtor−in−possession is not relieved of all obligations under the [Act] simply by filing a petition for bankruptcy." [313]

Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. [314] Accordingly, without reaching the question

whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, the Supreme Court held that a trustee may not abandon property in contravention of a state statute that is reasonably designed to protect the public health or safety from identified hazards. [315]

What general principles can be developed from these cases that may be of general use? *Midlantic* held that the bankruptcy court's power would be limited when it conflicts with a statute or regulation that was reasonably designed to protect the public health or safety from identified hazards. [316] However, *Energy Resources* more closely simulates the case at hand. In *Energy Resources*, the court ignored well−established federal income tax law in reaching its result. Even though the IRC was as clear as possible, the bankruptcy court shifted the risk from the debtor to the IRS in basing its decision solely on the Bankruptcy Code. [317] This is a strong indication that when a conflict between the Bankruptcy Code and the IRC exists and an important goal of bankruptcy could be implicated the Bankruptcy Code will win out.

Our Hypothetical requires us to confront another conflict between the IRC and the Bankruptcy Code: how to treat current−year federal income tax liabilities. Just like *Energy Resources*, the IRC is clear. The IRC states that current year income taxes arise on the last day of the tax year. Raising this example in abstraction, we can see how *Energy Resources* applies to our scenario. The determination of the existence of a claim greatly affects GHS Corporation's reorganizational efforts. Relying on *Energy Resources*, where the Bankruptcy Code and the IRC are in direct conflict the bankruptcy court is empowered to override the IRC if it determines that this designation is necessary to the success of a reorganization plan. As such, bankruptcy law, with the exception of the Accrual Test, would strongly suggest that the taxable event becomes the measuring date for determination of whether the claim arose pre−petition or post−petition. Consequently, given the facts of our Hypothetical, the bankruptcy court has been granted authority pursuant to *Energy Resources* to determine that the current−year federal income tax claims arise pre−petition.

B. **IRC Sections 1398** *and 1399 − A False Conflict*

What appears to be a conflict between section 1399 [318] and the Bankruptcy Code is actually a false conflict. The IRS has argued that if its tax claim were split into pre−petition and post−petition portions, as the debtor wishes, then it would be taxing the debtor as though it were two separate entities. [319] The IRS argues that this result is in direct violation of section 1399, which specifically states that no separate taxable entity should occur for corporations. [320] This argument seems to be valid on its face, but does not withstand closer inspection.

It is necessary to analyze section 1398 [321] in order to fully appreciate section 1399. Sections 1398 and 1399 are bankruptcy specific sections located in the Internal Revenue Code. IRC section 1398 creates a separate taxable entity for individual debtors in chapters 7 and 11, and allows the bifurcation of tax year. [322] The consequence of this separate entity is that some claims attach to the debtor, while some claims attach to the estate. Its main thrust, however, is not to identify which claims are pre−petition and which are post−petition. Rather, its purpose is to identify who is the liable taxpayer. As such, it overrides the assignment of income principles.

Likewise, section 1399 does not change when a claim arises under applicable non−bankruptcy law, the IRC. Nor does section 1399 change when a claim arises under section 101(5). Section 1399 simply clarifies that whoever was responsible for the tax pre−petition is still responsible for the tax post−petition. As such, there cannot be an assignment of income. Thus, what seemed to be a conflict between section 1399, stating that no separate entity is created, and apportioning taxes to pre−petition claims and post−petition claims is, in fact, a false conflict with the Bankruptcy Code. This is because it does not conflict with when the claim arises, since when a claim arises does not answer the question who is liable for that claim. Once we identify when a claim arises then, and only then, we look to other provisions of the Bankruptcy Code to determine what priority that claim may have.

Accordingly, the distinction is not what entity is paying the tax, but rather what priority is granted to the holder of the tax claim. Therefore, as it commonly occurs, one portion of GHS Corporation's tax claim is an administrative expense and one portion will be granted eighth priority distribution.

V. Claims−Focus Model

This article proposes that a more thorough and honest resolution of the issue of when a current−year federal income tax claim arises would focus exclusively on the body of law that defines when a claim arises under section 101(5). Accordingly, the article suggests the Claims−Focus Model. The Claims−Focus Model instructs the court not to get confused with the priority of the claim or what section 1399 says about who is responsible for the tax. Instead, the Claims−Focus Model simply asks when does a current−year federal income tax claim arise under the Bankruptcy Code. [323]

In abstraction, the Claims−Focus Model asks when does a claim based on pre−petition conduct or activity arise in bankruptcy. The Claims−Focus Model instructs the court not to be preoccupied with who pays the tax or what priority the tax receives. [324] Rather, the Claims−Focus Model directs the court to focus on the claims by asking the simple question of when does the current−year federal income tax claim arise in a chapter 11 bankruptcy case. In order to answer that question, the court needs to formulate the question in a more abstract and generally applicable fashion to see a very simple, yet not simplistic, resolution of the issue. Consequently, the question becomes one that is answered all the time in bankruptcies: When does a claim based on pre−petition conduct or activity arise under the Bankruptcy Code.

Under the Bankruptcy Code, using the Accrual Test, the IRS's claim would arise post−petition. [325] Therefore, it would be an administrative expense. [326] However, this test for when a claim arises is only followed in the Third Circuit. [327] Additionally, this test seems to be inconsistent with the language and the legislative history of section 101(5) that promotes a broad interpretation of claim to encourage a robust discharge. [328] Thus, the Third Circuit allows the *Kovacs*−dilemma to become a reality. [329] The more compelling analysis of when a claim arises is embodied in the Conduct Test [330] and Pre−petition Relationship Tests. [331] These tests suggest that the current−year federal income tax claim arises for purposes of the Bankruptcy Code at the time the taxable event takes place provided there is some pre−petition relationship between GHS Corporation and the IRS. [332] Consequently, if the taxable event occurs pre−petition, such as the generation of income, then the necessary pre−petition relationship between the IRS and GHS Corporation is established. GHS Corporation easily clears the hurdle of the Fair Contemplation Test because the IRS has received ERISA payments, payroll taxes, quarterly reports, and quarterly tax estimates sufficient to establish contact, exposure, and privity with GHS Corporation. Therefore, the IRS holds a pre−petition claim entitled to section 507(a)(8) priority. [333] Likewise, if the taxable event occurs post−petition, then it is an administrative expense under section 507(a)(1) entitled to be paid in full in cash on the effective date of the plan. [334]

Remember, there is an actual conflict between the Bankruptcy Code and the IRC on when a current−year federal income tax claim arises. The IRC is crystal clear that a tax is incurred on the last day of the tax period. However, the Bankruptcy Code's determination turns on when a claim arises under section 101(5), and pursuant to the Claims−Focus Model this determination should not be obscured by resorting to discussions on sections 507(a)(8) and 503(b). Instead, in the abstract, all the court needs to resolve is whether a claim arose under section 101(5). *Energy Resources* teaches us that in a conflict between the Bankruptcy Code and the IRC supremacy is with the Bankruptcy Code so long as the bankruptcy court determines that this designation is necessary to the success of a reorganization plan. [335] Consequently, the Bankruptcy Code will decide when a current year income tax arises in bankruptcy. [336]

FOOTNOTES:

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[2] Section 506(a) of the Bankruptcy Code states:

an allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to set off, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the

amount of such allowed claim.

11 U.S.C. § 506(a) (1994); see also In re Lorraine St. Assoc., 198 B.R. 16, 29−30 (Bankr. E.D.N.Y. 1996) (declaring secured claim may be in excess of collateral, however, there many not be an allowed secured claim in excess of value of collateral); In re BBT, 11 B.R. 224, 229 (Bankr. Nev. 1981) (describing secured and unsecured claims). Back To Text

[3] See 11 U.S.C. § 506(a) (stating allowed claim creditors secured by lien on property in which estate has interest is secured claim); see also Battan v. Transamerica Coummer. Fin. Corp., (In re Smith Home Furnishings), 2001 U.S. App. LEXIS 20382, * 30 (defining secured claim as value of creditor's collateral); Ryan v. Homecoming Fin. Network, 253 F.3d 778, 781 (4th Cir. 2001) (citing § 506(a) and defining secured claim as claim of creditor which is secured by lien on property equal to value of creditor's interest in property). Back To Text

[4] See 11 U.S.C. § 506(a) (1994) (stating allowed secured claim of creditor "is a secured claim to the extent of the creditor's interest in the estate's interest of such property, or to the extent of the amount subject to set off"); see also Associates Commer. Corp. v. Rash, 520 U.S. 953, 956 (1997) (explaining ACC's claim for balance owed on truck was secured only to extent of value of collateral); United States v. Haas (In re Haas), 162 F.3d 1087,1089 (11th Cir. 1998) (providing claims secured by liens on property of estate are secured claims only to extent of value of collateral). Back To Text

[5] See 11 U.S.C. § 507 (1994) (describing priorities of claim and expenses in bankruptcy proceeding); Cooper v. Internal Revenue, 167 F.3d 857, 858−59 (4th Cir. 1999) (discussing § 726(a) of Bankruptcy Code containing provision establishing hierarchy for payment of unsecured claims). See generally In re P.J. Nee Co., 36 B.R. 609, 611 (Bankr. MD 1983) (providing where claim of individual which arose from deposit of money for purchase which was not delivered to be unsecured and thus afforded priority). Back To Text

[6] See 11 U.S.C. § 726(a) (1994) (establishing hierarchy for payment of unsecured claims in chapter 7 liquidation as being priority claims first, and timely general claims and untimely general claims following thereafter); see also Demarah v. United States, 188 B.R. 426, 429 (Bankr. E.D. Cal. 1993) (explaining unsecured claims which are not provided priority of distribution under § 507(a) fall into residual category known as "general unsecured claims."); In re Reichert, 138 B.R. 522, 524 (Bankr. W.D.M.I. 1992) (restating § 507(a) establishes which expenses and claims receive priority). Back To Text

[7] See Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling Inc.), 258 F.3d 385, 387 (5th Cir. 2001) (stating administrative expenses under Bankruptcy Code are given priority in distribution such that they are generally paid in full before other unsecured non−priority claims); Morgan v. United States (In re Morgan), 182 F.3d 775, 777 (11th Cir. 1999) (explaining priority bankruptcy claims under § 507 are due to be paid in full under chapter 13 payment plan); Corestates Bank, N.A. v. United Chem. Tech., Inc., 202 B.R. 33, 40 (Bankr. E.D. Pa. 1996) (stating unless priority claimants are paid in full, other secured claimants may not receive distribution). Back To Text

[8] See 11 U.S.C. § 507(a)(1) (1994) (giving administrative expenses first priority); see also id. 11 § 503 (providing "an entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause."); id. (listing various administrative expenses); Zagata Fabrications, Inc. v. Superior Air Prod., 893 F.2d 624, 627 (3d Cir. 1990) (stating by placing creditors who are entitled to administrative expenses first in line, §§ 503 and 507 advance estates interest in survival above all other financial goals). Back To Text

[9] See 11 U.S.C. § 507(a)(8) (1994) (giving unsecured claims of governmental units eighth priority); see also In re Chateaugay Corp., 102 B.R. 335, 352 (Bankr. S.D.N.Y. 1989) (holding § 507 priorities should be narrowly construed). Back To Text

[10] 11 U.S.C. § 1129(a)(9)(A) (1994) (discussing confirmation of chapter 11 plan and stating in absence of holder of particular claim agreeing to different treatment, default rules provide with respect to claim under § 507(a)(1) or § 507(a)(2) that holder of claim will receive cash equivalent of claim); see United Food & Commer. Workers Union, Local 328 v. Almac's Inc., 90 F.3d 1, 3 n.2 (1st Cir. 1996) (reasoning creditor's administrative expense claim could not

be sustained because it would have to be paid before plan of reorganization could be approved under § 1129(a)(9)(A)); see also Small Bus. Admin. v. Preferred Door Co. (In re Preferred Door), 990 F.2d 547, 551 (10th Cir. 1993) (affirming district courts decision affirming bankruptcy court's decision to dismiss the chapter 11 proceeding because debtor was unable to pay post−petition interest and tax penalties (administrative expense) on date of confirmation). Back To Text

[11] 11 U.S.C. § 1129(a)(9)(C) (1994) (describing confirmation of chapter 11 plan and stating with respect to claim under § 507(a)(8), holder of claim will receive deferred cash payments up to six years equal to allowed claim); see In re BGNX, Inc., 76 B.R. 851, 852 (Bankr. S.D. Fla. 1987) (stating plan cannot be confirmed if it fails to meet requirements of 11 U.S.C. § 1129(a)(9)(C) which permits deferral of priority unsecured claims of governmental units provided payment not be deferred longer than six years "after the date of assessment of such claim"); see also In re Reichert, 138 B.R. 522, 529 (Bankr. W.D. Mich. 1992) (explaining § 507(a)(7) concerns priority treatment of unsecured tax claims only and § 1129(a)(9)(C) mandates six year time frame for payment of claims listed under § 507(a)(7)). Back To Text

[12] See In re Trevarrow Lanes, 183 B.R. 475, 480 (Bankr. E.D. Mich.1995) (stating § 1129(a)(9)(C) imposes no requirement of equal monthly installment payments); United States v. Volle Elec., Inc. (In re Volle Electric), 139 B.R. 451, 455 (Bankr. C D. Ill.1992) (rejecting United State's interpretation of § 1129(a)(9)(C) as demanding equal monthly payments of principal and interest over entire course of plan); In re Ferguson, 134 B.R. 689, 690 (Bankr. S. Dist. Fla. 1991) (stating chapter 13 does not require priority tax claim payments be made in equal monthly installments from beginning of plans); In re Snowden's Landscaping Co., 110 B.R. 56, 61 (Bankr. S.D. Ala. 1990) (reasoning it would be counterproductive to require debtor to service its indebtedness to United States monthly or with equal quarterly payments). Back To Text

[13] See In re Mahoney, 80 B.R. 197, 200 (Bankr. S.D. Cal. 1987) (stating holding in In re Mason & Dixon Lines, Inc. that debtor is required to made monthly payments is persuasive); In re Mason & Dixon Lines, Inc., 71 B.R. 300, 302 (Bankr. M.D. N.C. 1987) (determining installment payments should be spread over six years with 72 equal monthly payments of principal and interest absent exceptional circumstances); see also In re Inventive Packaging Corp., 81 B.R. 74, 79 (Bankr. D. Col. 1987) (adopting general rule in In re Mason & Dixon Line, Inc. requiring debtor to make monthly installments under § 1129(a)(9)(C)). Back To Text

[14] Section 507(a)(8)(A) provides, in relevant part:

(a) The following expenses and claims have priority in the following order:

Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for−

A. a tax on or measured by income or gross receipts−

i for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

ii assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

iii other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case

11 U.S.C. § 507(a)(8)(A) (1994); see also In re O'Connell, 246 B.R. 332, 334−35 (8th Cir. 2000) (noting majority of courts look to 507 (a)(8)(A)(ii) to assess tax liability); In re Riley, 88 B.R. 906, 915 (Bankr. W.D. Wis. 1987) (recognizing certain unsecured claims are entitled to priority under 11 U.S.C. § 507). Back To Text

[15] Section 1129(a)(9)(C) provides:

The court shall confirm a plan only if all of the following requirements are met:

(9) Except to the extent that the holder of a particular claim has agreed to different treatment of such claim, the plan provides that−

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

11 U.S.C. § 1129(a)(9)(C) (1994); see also In re Volle Elec., Inc., 139 B.R. 451, 453 (Bankr. C.D. Ill. 1992) (pointing out in order to be in compliance with § 1129(a)(9)(C), courts must view proposed plan in light of surrounding circumstances); In re Mason & Dixon Lines, Inc., 71 B.R. 300, 303 (Bankr. M.D.N.C. 1987) (explaining term "deferred cash payments" to be within meaning of § 1129(a)(9)(C)). Back To Text

[16] See Marie P. Mariscalco, Recent Development in Bankruptcy Law: Reorganization − Chapter 11, 1 Bank. Dev. J. 370, 371 (1984) (stating inherent problem with § 1129(a)(9)(C) is "its ambiguity concerning recognition of the time value of money associated with deferred payments, and its failure to suggest the appropriate discount rate to be used for the present value technique."). See generally Waltraud S. Scott, Deferred Cash Payments to Secured Creditors in Cram Down of Chapter 11 Plans: A Matter of Interest, 63 Wash. L. Rev. 1041, 1041−42 (1988) (discussing ambiguity courts are faced with when determining proper interest rate to be applied under § 1129(a)(9)(C) of Bankruptcy Code). Back To Text

[17] See In re Volle Elec., Inc., 132 B.R. 365, 366 (Bankr. C.D. Ill. 1991) (stating "deferred cash payments" is not defined in Bankruptcy Code); In re Ferguson, 134 B.R. 689, 694 (Bankr. S.D. Fla. 1991) (rejecting presumption that deferred payments require equal monthly payments); Stephan W. Sather, Patricia L. Barsalou & Richard Litwin, Borrowing From the Taxpayer: State and Local Tax Claims in Bankruptcy, 4 Am. Bankr. Inst. L. Rev. 201, 221−22 (1996) (observing requirement of deferred cash payments imposed by § 1129(a)(9)(c) gives rise to several issues). Back To Text

[18] At present, case law on the issue of whether § 1129(a)(9)(C) permits balloon payments is unsettled. Those cases that hold yes allow a debtor greater flexibility in repayment, ostensibly promoting the reorganizational goals of chapter 11. In such cases, debtors may be permitted to make regular monthly payments that substantially reduce the IRS's claims against the debtor for pre−petition taxes and provided for a balloon payment at the end of the plan, In re Volle Elec. Inc., 132 B.R. 365, 368 (C.D. Ill. 1991), aff'd, 139 B.R. 451, 456 (C.D. Ill. 1992), pay priority tax claims in graduated quarterly payments, In re Snowden's Landscaping Co., 110 B.R. 56, 61 (Bankr. S.D. Ala. 1990), begin payments on priority tax claims one year after the plan's effective date, In re Gregory Boat Co., 144 B.R. 361, 366 (Bankr. E.D. Mich. 1992), or not make payments on the principal until the end of the plan term, In re Sanders Coal & Trucking, Inc., 129 B.R. 516, 522 (Bankr. E.D. Tenn. 1991). Those cases that hold no are very rigid in their requirements. In such cases, courts require that the debtor make equal monthly payments unless exceptional circumstances are presented. See In re Mason and Dixon Lines, Inc., 71 B.R. 300, 303 (Bankr. M.D. N.C. 1987) (requiring debtor to pay pre−petition priority tax claim in 72 equal monthly payments plus interest); In re Inventive Packaging Corp., 81 B.R. 74, 79 (Bankr. D. Colo. 1987) (stating term "deferred cash payments" requires "monthly installments unless special or unusual circumstances exist"); In re Mahoney, 80 B.R. 197, 200 (Bankr. S.D. Cal. 1987) (reaffirming debtor should make monthly cash payments unless circumstances require different arrangement). Back To Text

[19] In In re Volle Elec., Inc.,132 B.R. 365, 367−68 (Bankr. C.D. Ill. 1991), aff'd, 139 B.R. 451, 456 (C.D. Ill. 1992), the bankruptcy court upheld a plan that provided for regular, but unequal monthly payments that substantially reduced the IRS' priority tax claims against the debtor for pre−petition taxes but provided for a balloon payment at the end of the plan. In Volle Elec., the person in charge of financial operations for the debtor failed to pay pre−petition employment taxes. The debtor had attempted unsuccessfully to negotiate installment payments with the IRS. In response, the IRS levied against the debtor's bank account and threatened to seize other corporate assets in an effort to satisfy the tax claim. This caused the debtor to file for relief under chapter 11 of the Bankruptcy Code. Id. at 365. The issue in the case was whether § 1129(a)(9)(C) required equal monthly payments (equal as to principal and interest) or whether it

permitted regular equalized monthly payments, which substantially reduce the principal, but leave a balloon payment at the end of the plan. Id. Under the plan of reorganization, the debtor proposed to pay the IRS through forty−seven monthly payments of $822.54, concluding with a balloon payment in the forty−eighth month of $47,735.74. The forty−eight monthly payments called for under the plan were based on a ten−year amortization schedule. See id. at 366.

The IRS objected to its treatment under the plan. In re Volle Elec., Inc.,132 B.R. 365, 366 (Bankr. C.D. Ill. 1991), aff'd, 139 B.R. 451, 456 (C.D. Ill. 1992). Relying on In Re Mason and Dixon Lines, Inc., 71 B.R. 300 (Bankr. M.D. N.C. 1987), the IRS argued that § 1129(a)(9)(C) requires equal monthly payments. See In re Volle Elec., Inc., 132 B.R. at 366. In Mason and Dixon, the debtor proposed to satisfy its pre−petition tax obligation to the IRS by making annual payments of interest only the first six years, followed by a large balloon payment at the end of the sixth year to pay the claim in full. In re Mason & Dixon Lines, Inc., 71 B.R. at 301. The court found that this proposal would result in a forced loan to the debtor from the government of the full principal for six years. Thus, the IRS would incur the risk of nonpayment of the principal for six additional years. See id.at 302. Rejecting the debtor's proposal, the court held that § 1129(a)(9)(C) required 72 equal monthly payments of principal and interest. Id.

In Volle Elec., the court rejected the IRS' contention that Mason and Dixon controlled the resolution of the precise issue. In re Volle Elec., Inc.,132 B.R. 365, 367 (Bankr. C.D. Ill. 1991), aff'd, 139 B.R. 451, 456 (C.D. Ill. 1992). Rather, the court observed that Mason and Dixon suggested an ad hoc approach to the treatment of priority tax claims under § 1129(a)(9)(C), evaluating the particular facts and circumstances of each case. See id. The Volle Elec. court observed that, unlike the debtor in Mason and Dixon, the debtor's payments were reducing part of the principal, not just the interest. Id.

In Volle Elec., the IRS also asserted that In re Mahoney, 80 B.R. 197 (Bankr. S.D. Cal. 1987), precluded unequal installment payments. In re Volle Elec., Inc.,132 B.R. at 367. In Mahoney, the court rejected the debtor's proposal to pay priority tax claims in a lump sum at the end of his five−year plan. In re Mahoney, 80 B.R. at 204. The court held that the IRS could insist on equal monthly payments of its priority tax claims under § 1129(a)(9)(C). See id. at 200. The Volle Elec. court deftly distinguished Mahoney, observing that the debtor in the present case proposed to make regular monthly payments that reduced a portion of the principal as well as the interest. In re Volle Electric., 132 B.R. at 367. The IRS also argued that In re Inventive Packaging Corp., 81 B.R. 74 (Bankr. D. Colo. 1987), controlled the disposition of the case. See id. In Inventive Packaging, the court held that the appropriate installment period for payment of the IRS' deferred tax claim was monthly not semiannually. In re Inventive Packaging Corp., 81 B.R. at 79. There, the debtor was paying all creditors monthly and the IRS semi−annually. Id.at 75. In Volle Elec., the debtor was paying all of its creditors, including the IRS, monthly. In re Volle Elec., 132 B.R. at 366.

In rejecting the IRS' contention that § 1129(a)(9)(C) required equal monthly payments, the Volle Elec. court relied on In re Snowden's Landscaping, 110 B.R. 56 (Bankr. S.D. Ala. 1990). In re Volle Elec., 132 B.R. at 367. In Snowden's Landscaping, the court observed that the term "deferred cash payments" was not defined in the Bankruptcy Code. In re Snowden's Landscaping, 110 B.R. at 60. Thus, the court held that the phrase "deferred cash payments" suggested a flexible approach in determining whether a proposed plan complies with § 1129(a)(9)(C). Id.at 60−61 and n.7. The court further held that a chapter 11 plan proposing to pay priority tax claims in graduated quarterly payments complied with the Bankruptcy Code's requirement of "deferred cash payments." See id.at 61. In Snowden's Landscaping, the debtor proposed to pay the IRS quarterly installments with interest at the rate provided by 26 U.S.C. § 6621 over a five−year graduated period. Id.at 57. The debtor proposed to pay 5% of the claim in the first year, 15% in the second year, 26.66% in the third year, and 26.67% in the fourth and fifth years. Relying on Mason and Dixon Lines, the IRS argued that § 1129(a)(9)(C) required equal monthly payments. Id.at 60. Accord In re Inventive Packaging Corp., 81 B.R. 74, 79 (Bankr. D. Colo. 1987) (holding that appropriate installment period for payment of IRS' deferred tax claim was monthly not semiannually); In re Mahoney, 80 B.R. 197, 200 (Bankr. S.D. Cal. 1987) (rejecting debtor's proposal to pay priority tax claims in lump sum at end of his five year plan and holding that IRS was entitled to monthly payments of its priority tax claim). However, the court in Snowden's Landscaping held that the debtor's plan was distinguishable from that in Mason and Dixon, and, therefore, declined to hold that § 1129(a)(9)(C) required equal monthly payments in all circumstances. In re Snowden's Landscaping, 110 B.R. at 60−61 The court reasoned:

Common usage of deferred cash payments suggests a flexible, rather than restrictive approach to determine whether a proposed plan of reorganization complies with § 1129(a)(9)(C). Further, the legislative history underlying § 1129(a)(9)(C) does not indicate Congress intended that § 507(a)(7) [now § 507(a)(8)] creditors have their claims serviced solely on a monthly basis. Instead, Congress focused its concern on providing the debtor in possession with a breathing spell while contemporaneously ensuring that those creditors whose claims are proposed to be paid over the six year period following the date of assessment receive the present value of their claims.

Id. at 60 n.7; see also 124 Cong. Rec. 34006 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News at 5787, 6542. The court also stated that if the debtor were forced to service its indebtedness monthly or in equal quarterly payments it would likely hinder its reorganizational efforts, frustrating an important goal of chapter Id. 110 B.R. at 61. Higher plan payments upon emergence from chapter 11 could cause the debtor to be unable to service its secured obligations, resulting in the possible shutting down of operations. Such a result would actually increase potential plan default and decrease the available distribution that would be available to all creditors, including the IRS. See In re Gregory Boat Co., 144 B.R. 361, 363−64 (Bankr. E.D. Mich. 1992) (holding "deferred cash payments" does not require equal monthly payments on priority tax claims and chapter 11 plan that proposed payments on priority tax claims to begin one year after plan's effective date did not violate § 1129(a)(9)(C)). The court in Gregory Boat relied on the Supreme Court's indications that the Bankruptcy Code should be given its plain meaning. Id. According to the court, the plain meaning of § 1129(a)(9)(C) is that nothing suggests that payments on priority tax must be periodic or equal. See id.at 364. In fact, there is no indication that the language prohibits a single payment of principal and interest at the end of the six year time period. Congress easily could have stated the requirements as Mason and Dixon held, but, it did not, and it is inappropriate for a court to impose any limitation upon the flexibility of the current language. See In re Sanders Coal & Trucking, Inc., 129 B.R. 516, 520 (Bankr. E.D. Tenn. 1991) (rejecting presumption that monthly payments of principal and interest are required and holding that a chapter 11 plan that did not propose payments on the principal until the 37th month of plan had provided for deferred cash payments since term "deferred cash payments" was sufficiently broad to permit such construction). Based on the reasoning in Snowden's Landscaping, the court in Volle Elec. held that § 1129(a)(9)(C) did not require a debtor to make equal monthly payments of principal and interest to retire a priority tax claim. In re Volle Electric, 132 B.R. at 367−68.

In summary, cases like Volle Elec. and Snowden's Landscaping construe the "deferred cash payments" language in § 1129(a)(9)(C) to authorize unequal payments to retire priority tax claims upon a proper showing. Most courts in this camp appear to be persuaded that at least some portion of the payment is dedicated to retiring principal as well as interest. These courts may also be persuaded by the fact that flexibility in payment structure may increase the likelihood of a successful reorganization. Back To Text

[20] The seminal case holding that the "deferred cash payments" language in § 1129(a)(9)(C) requires equal monthly payments of principal and interest is In re Mason and Dixon Lines, Inc., 71 B.R. 300 (Bankr. M.D. N.C. 1987). In Mason and Dixon, the bankruptcy court held that § 1129(a)(9)(C) required 72 equal monthly payments of principal and interest. In re Mason & Dixon Lines, Inc., 71 B.R. at 302−03. In that case, the debtor proposed to satisfy its pre−petition tax obligation to the IRS by making annual payments of interest the first six years, followed by a large balloon payment at the end of the sixth year. See id.at 301. The court found that this proposal would result in a forced loan to the debtor of the full principal for six years and that the IRS would incur the risk of nonpayment of the principal for a six−year period following confirmation. Id.at 302.

The court interpreted "cash payments" to require the debtor to pay through installments. The court then held that installment payments should be spread over six years with seventy−two equal payments of interest and principal unless exceptional circumstances are presented. In re Mason & Dixon Lines, Inc., 71 B.R. at 302. The court observed that the debtor's plan gave the debtor a loan of the principal for six years, a result the court found unpalatable. Moreover, under the terms of the proposed plan, the IRS, as a nonconsensual creditor, bore an unreasonable risk of not receiving payment of principal of any kind for the entire six−year term. The court reasoned that Congress could not have intended to be that generous with taxpayers in bankruptcy. Id. The court further held that "deferred cash payments" in § 1129(a)(9)(C) means periodic payments where the payment cycle is determined by balancing a debtor's particular circumstances against a creditor's rights under applicable nonbankruptcy law and the Bankruptcy Code. Id. at 303. The court concluded that since the normal repayment schedule for a loan is monthly, the reasonable payment interval should also be monthly. Id; see also In re Mahoney, 80 B.R. 197, 200 (Bankr. S.D. Cal. 1987)

(rejecting the debtor's proposal to pay priority tax claims in lump sum at end of his five year plan and holding that IRS was entitled to monthly payments of its priority tax claim.); In re Inventive Packaging Corp., 81 B.R. 74, 79 (Bankr. D. Colo. 1987) (holding appropriate installment period for payment of IRS' deferred tax claim was monthly not semiannually). Back To Text

[21] In In re Architectural Design Inc., 59 B.R. 1019, 1021 (Bankr. W.D. Va. 1986), the court held that "value as of the effective date of the plan" as used in Bankruptcy Code means that creditor who is to receive deferred payments is authorized to receive interest such that the deferred payments are equivalent to the present value of claim.

'Value as of the effective date of the plan,' as used in . . . § 1129(a)(9) . . . indicates that the promise payment under the plan must be discounted to present value as of the effective date of the plan. The discounting should be based only on the unpaid balance of the amount due under the plan, until that amount, including interest, is paid in full.

5 U.S. Code Cong. & Ad. News 6364 (1978).

The court, in Architectural Design Inc., stated that tax liabilities are tax liabilities regardless if they arise from late or deferred payments. In re Architectural Design Inc., 59 B.R. at 1022. In either circumstance, the IRS is making an involuntary loan to the taxpayer. Consequently, the court held that there is no basis for distinguishing between late tax payments and deferred priority unsecured tax claims under bankruptcy laws. See id. at 1022. Therefore, the government should be paid an analogous rate of interest to make up for the loss of revenue. In Architectural Design, the debtors who filed a chapter 11 plan proposed to pay the federal judgment interest rate provided for in 28 U.S.C. § 1961. Id.at 1020. The IRS argued that the appropriate interest rate on priority tax claims is the IRS rate used for delinquent tax payments as established in 26 U.S.C. § 6621. See In re Architectural Design Inc., 59 B.R. 1019, 1020 (Bankr. W.D. Va. 1986). The court agreed with the IRS and held that the proper rate of interest was reflected in 26 U.S.C. § 6621 since it is based on the prime lending rate and is sensitive to the market fluctuations. Id.at 1022; see In re Mahoney, 80 B.R. 197, 199−200 (Bankr. S.D. Cal. 1987) (holding debtor's plan could not be confirmed unless it provided that applicable interest rate for deferred taxes was equal to rate on delinquent taxes in 26 U.S.C. § 6621.)

In In re Inventive Packaging Corp., 81 B.R. 74, 78 (Bankr. D. Colo. 1987), the court held that the appropriate interest rate to be used in determining the interest rate on deferred tax claims was the current yield on T−Notes of three years. In Inventive Packaging, the court held that the factors to be considered in determining the interest rate to be paid on the tax claim include historical financial performance of the debtor, the financial risk associated with debtor's projected income flows in its plan of reorganization, risk of default by debtor, quality of any security available to the creditor, and the length of the payout period of loan. In re Inventive Packaging Corp., 81 B.R. at 76. The court also held that the interest rate established by the Internal Revenue Code is not the interest rate referred to in the Bankruptcy Code requiring confirmation of chapter 11 plan. Id.at 77−79.

The Eighth Circuit, in In re Neal Pharmacal Co., 789 F.2d 1283, 1287 (8th Cir. 1986), held that the rate paid by taxpayers for delinquent tax claims is relevant to determination of proper interest rate on deferred payments of priority tax claim, but before concluding that such rate would provide government with the present value of its federal tax claim, the court must first consider the payment period, quality of any security, and the risk of default. The court noted that under § 1129(a)(9)(C) present value must be determined "as of the effective date of plan" and criticized the use of a variable rate because a determination of the feasibility of the plan is a prerequisite for confirmation and would be hard to determine if the interest rate changed over the life of the plan. In re Neal Pharmacal Co., 789 F.2d at 1286−87. See In re Camino Real Landscape Maint. Contractors, 818 F.2d 1503, 1507 (9th Cir. 1987) (holding interest rate set by 26 U.S.C. § 6621 was not necessarily interest rate required by 11 U.S.C. § 1129(a)(9)); In re General Dev. Corp., 147 B.R. 610, 618 (Bankr. S.D. Fla. 1992) (holding Florida statutory rate of interest irrelevant in determining prevailing market rate and appropriate interest rate on priority tax claims was rate of interest on medium quality, low risk, unsecured loan with approximate maturity of two years.); In re Milspec Inc., 82 B.R. 811, 820 (Bankr. E.D. Va. 1988) (holding while t−bill rate and rate set forth in § 6621 remain prima facie indicators of prevailing market rate, case−by−case approach is appropriate method to determine interest rate to apply to deferred payments of delinquent federal taxes); In re Connecticut Aerosols, 42 B.R. 706, 711 (Bankr. D. Conn. 1984) (applying § 1961(a) rate to § 1129(a)(9)(C) claims); In re Matter of Fi−Hi Pizza, 40 B.R. 258, 272 (Bankr. D. Mass. 1984) (applying interest rate 2.5% above § 6621 rate to § 1129(a)(9)(C) claim). Back To Text

[22] Maule, James E., Income Tax Liability: Concepts and Calculations, 507 Tax Mgmt. Portfolios at 121 (BNA 1994); see Fed. Deposit Ins. Corp. v. United States, 654 F. Supp. 794, 806 (N.D. Ga. 1986) (citing IRC § 6151) (stating "regardless of when federal taxes are actually assessed, the taxes are considered as due and owing, and constitute a liability as of the date of the tax return for the particular period is required to be filed."); see also United States v. Ressler, 433 F. Supp. 459, 463 (S.D. Fla. 1977) stating same), aff'd, 576 F.2d 650 (5th Cir. 1978). Back To Text

[23] IRC § 6151 states in relevant part:

(a) General Rule.− Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

. . . .

(c) Date fixed for payment of tax.− In any case in which a tax is required to be paid on or before a certain date, or within a certain period, any reference in this title to the date fixed for payment of such tax shall be deemed a reference to the last day fixed for such payment (determined without regard to any extension of time for paying the tax).

26 U.S.C. § 6151 (1994); see also Pan American Van Lines v. United States, 607 F.2d 1299, 1304 (9th Cir. 1979) (finding where taxpayers underlying tax liability was discharged as "legally due and owing" three years prior to bankruptcy, then interest on such liability must also be discharged as "legally due and owing" on same date); Hartman v. Lauchi, 238 F.2d 881, 887 (8th Cir. 1957) (stating "[b]y the terms of the internal revenue code income tax liability matures on the day the return is required to be filed, and the correct amount of the tax liability becomes due at that time, regardless of when the deficiency assessment may be made.") (emphasis in original). Back To Text

[24] Id.; see 26 U.S.C. § 6081 (1994) (providing methods for extension of time for filing returns). Back To Text

[25] Id. at § 441(e). Back To Text

[26] See id. (defining fiscal year as period of twelve months ending on last day of any month other than December); Anthony Polito, Accounting Periods, 574 Tax Mgmt. (BNA) at A−2 (1997) [hereinafter Polito, Accounting Periods]. See generally Dublin v. Commissioner, 70 F.2d 828, 831 (6th Cir. 1934) (holding accounting ending on fifteenth day of month is not within definition of fiscal year). Back To Text

[27] 26 U.S.C. § 6072(b) (1994). Back To Text

[28] See id. (providing in pertinent part that "[r]eturns of corporations . . . made on the basis of the calendar year shall be filed on or before the 15th day of March following the close of the calendar year"); see also Streng, Choice of Entity, 700−2d Tax Mgmt. (BNA) at A−87 [hereinafter Streng, Choice of Entity]. Back To Text

[29] See 26 U.S.C. § 441(e) (1994) (stating "[f]or purposes of this subtitle, the term "fiscal year" means a period of 12 months ending on the last day of any month other than December."); Polito, Accounting Periods, supra note 25 at A−2; Millette & Assoc. Inc. v. Commissioner, 594 F.2d 121, 123−25 (5th Cir. 1979) (holding corporate taxpayer liable for deficiency on federal tax return because taxpayer did not have reasonable cause for failure file timely return). Back To Text

[30] 26 U.S.C. § 6072(b) (1994) (providing in pertinent part that "returns made on the basis of a fiscal year shall be filed on or before the 15th day of the third month following the close of the fiscal year."); see also Streng, Choice of Entity, supra note 27 at A−87. Back To Text

[31] See 124 Cong. Rec. H11,113 (daily ed. Sept. 28, 1978); S 17, 430 (daily ed. Oct. 6, 1978); see also Towers for Pacific−Atlantic Trading Co. v. United States (In re Pacific−Atlantic Trading Co.), 64 F.3d 1292, 1299−1300 (9th Cir. 1995) (finding income taxes are incurred on last day of taxable period for purposes of Bankruptcy Code). Back To

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[32] See United States v. Hillsbourough Holdings Co. (In re Hillsbourough Holdings Co.), 116 F.3d 1391, 1394 (11th Cir. 1997) (accepting government's argument that tax liability incurred on last day of tax period); Missouri Dep't. of Revenue v. L.J. O'Neill Shoe Co. (In re L.J. O'Neill Shoe Co.), 64 F.3d 1146, 1149 (8th Cir. 1995) (accepting government's position that tax liability incurred on the last day of tax period); In re Pacific−Atlantic Trading Co., 64 F.3d at 1391 (ruling income tax was incurred, and thus liability established, on last day of tax period). Back To Text

[33] See supra note 31. Back To Text

[34] See In re Pacific−Atlantic Trading Co., 64 F.3d at 1300 (finding income tax was incurred on last day of tax period). Back To Text

[35] 11 U.S.C. § 101(5) (1994) (defining claim); see also In re Holloway, 2001 WL 1249053, *3 (N.D. Ill. 2001) (noting definition of claim); In re Commercial Financial Serv., Inc., 2001 WL 1246409, *13 at n.27−8 (Bankr. N.D. Okla. 2001) (referring to definition of claim). Back To Text

[36] See Sitlington v. Fulton, 281 F.2d 552, 556 (10th Cir. 1960) (dealing with situation where buyers had damage claim for partial breach for sellers' delay and sellers had damage claim for total breach for buyers' refusal to perform remainder of contract); see also Klingbiel v. Commercial Credit Co., 439 F.2d 1303, 1307 (10th Cir. 1971) (finding repossession of car was conversion as well as breach of contract giving rise to claim for each); D.L. Fair Lumber Co. v. Weems, 16 So.2d 770, 773 (Miss. 1944) (determining destruction of fence was tort as well as breach of contract thus giving rise to both claims). Back To Text

[37] See Johnson v. Home State Bank, 501 U.S. 78, 83 (1991) (explaining Congress intended to incorporate broadest definition of "claim"); Robinson v. McGuigan (In re Robinson), 776 F.2d 30, 35 (2d Cir. 1985) (characterizing scope of term "claim" as broad, very broad, extremely broad, could not be broader, broad as possible), rev'd on other grounds, 479 U.S. 36 (1986); Avellino & Bienes v. M. Frenville Co., Inc. (In re M. Frenville Co., Inc.), 744 F.2d 332, 336 (3d Cir. 1984) (noting Congress intended definition of claim to be read very broad). Back To Text

[38] See H.R. Rep. No. 595, 95th Cong., 2d Sess. 309 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6266; S. Rep. No. 989, 95th Cong., 2d Sess. 21−2 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5807−08. Back To Text

[39] See Ohio v. Kovacs, 469 U.S. 274, 279 (1985) (reasoning it is apparent Congress desired broad definition of "claim"); Lugo v. Paulsen, 886 F.2d 602, 605 (3d Cir. 1989) (recognizing Congress' intent to permit broad relief in bankruptcy); In re M. Frenville Co., 744 F.2d 332, 226 (3d Cir. 1984) (explaining Congress intended definition of claim to be very broad). Back To Text

[40] See H.R. Rep. No. 95−595, at 180 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6141; see also Rafael Ignacis Pardo, Bankruptcy Court Jurisdiction and Agency Action: Resolving the Next Wave of Conflict, 76 N.Y.U.L. Rev. 945, 947 n.15 (June 2001) (referring to debtor protection under bankruptcy law, to allow debtor an opportunity to attempt repayment, reorganization or to be relieved of overbearing financial burdens). Back To Text

[41] See In re Motley, 2001 WL 1200490, *2 (Bankr. C.D. Cal. 2001) (recognizing broad definition of claim to include personal guarantee within scope of definition); see also Travelers Ins. Co. v. Cambridge Meridian Group (In re Erin Food Services), 980 F.2d 792, 796 (1st Cir. 1992) (noting definition of claim is "greatly broadened" thus encompassing "contingent claims for contribution, reimbursement or indemnification"); In re Hemingway Transport, Inc., 954 F.2d 1, 8 (1st Cir. 1992) acknowledging claim definition is broad enough to include unliquidated, contingent right to payment under pre−petition indemnification agreement executed by debtor). Back To Text

[42] See In re Motley, 2001 WL 1200490, at *2 (recognizing many cases upheld discharge of personal guarantees although challenged under § 523 which provides certain debts are not dischargeable); see also I.T.T. Commercial Finance v. Osborne (In re Osborne), 257 B.R. 14, 24 (Bankr. C.D. Cal. 2000) (discharging debt of guarantee of corporate loan); First American Bank v. Bodnerstein (In re Bodnerstein), 168 B.R. 23, 28−35 (Bankr. E.D.N.Y. 1994)

(discharging personal guaranty in face of challenges under §§ 523 and 727). Back To Text

[43] See 11 U.S.C. § 727 (b) (1994) (providing "[d]ischarge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter "); see also In re Speece, 159 B.R. 314, 322 (Bankr. E.D. Cal. 1993) (stating rule of chapter 7 discharge inasmuch as all debts arising before date of order for relief under chapter 7 are discharged); In re Tall, 79 B.R. 291, 294 (Bankr. S.D. Ohio 1987) (finding debt was property discharged under § 727(b)). Back To Text

[44] See 11 U.S.C. § 101(10) (1994) (defining "creditor" to include holders of pre−petition claims against debtor); see also In re American Properties, Inc., 30 B.R. 247, 249 (Bankr. Kan. 1983) (emphasizing term "creditor" refers to "an entity that has a claim"); In re La Bante, 13 B.R. 887, 891 (Bankr. Kan. 1981) (turning to legislative history and statutory language to point out that to be creditor within meaning of Bankruptcy Code, one must hold a claim). Back To Text

[45] Ohio v. Kovacs, 469 U.S 274 (1985). Back To Text

[46] 11 U.S.C. § 1129(a) (9) (A) (1994) (providing, in part, holder of claim will receive full cash amount equal to allowed amount of claim); see also Chateaugay Corp., 10 F.3d at 960−61 (explaining 11 U.S.C. § 1129(a)(9)(A) "requires full cash payment of all administrative claims."); Small Business Admin. v. Preferred Door Co. (In re Preferred Door Co.), 990 F.2d 547,550 (10th Cir. 1993) (stating chapter 11 reorganization plan will be authorized only if claim holders receive "cash equal to the allowed amount of such claim."). Back To Text

[47] 11 U.S.C. § 1129 (a) (9) (C) (1994) (providing, in part, that holder of claim will receive installments for six−year period equal to allowed amount of claim); see also Hollytex Carpet Mills v. Oklahoma Employment Sec. Comm'n (In re Hollytex Carpet Mills, Inc.), 73 F.3d 1516, 1517 (10th Cir. 1996) (approving reorganization plan with installment payments, pursuant to 11 U.S.C. § 1129(a)(9)(C)); Stephen W. Sather, Tax Issues in Bankruptcy, 25 St. Mary's L.J. 1364, 1374 (1994) (explaining "priority tax claims must be paid in full, including interest, within six years after such taxes are assessed."). Back To Text

[48] See Avellino & Bienes v. M. Frenville Co., Inc. (In re M. Frenville Co., Inc.), 744 F.2d 332, 337 (3d Cir. 1984) (holding third party indemnity action, based on pre−petition activities, did not "accrue" under state law prior to filing of petition and thus automatic stay did not bar such action); see also Jones v. Chemetron Corp., 212 F.3d 199, 206 (3d Cir. 2000) (applying rule in Frenville, that claim accrues according to state law, therefore tort claims that accrued prior to bankruptcy were barred because plaintiffs' failure to file claim before bar date); In re Penn Central Transportation Co., 71 F.3d 1113, 1114−15 (3d Cir. 1995) (holding indemnity and contribution claims against bankrupt not to be barred because although activity giving rise to such claims occurred pre−petition, claims accrued according to state law, when appellants paid out on judgment giving rise to claims at issue). Back To Text

[49] See In re Johns−Manville Corp., 57 B.R. 680, 688 (Bankr. S.D. Fla. 1985) (stating that by following accrual test, one participates in "strained, narrow analysis [and] limits by judicial fiat a broad, legislatively mandated definition of the term 'claim.'"); see also Grady v. A.H. Robins Co. (In re Grady), 839 F.2d 198, 201 (4th Cir. 1998) (indicating there are no cases outside third circuit accept accrual test). Back To Text

[50] 744 F.2d 332 (3d Cir. 1984), cert. denied, 469 U.S. 1160 (1985). Back To Text

[51] See id. at 337; see also Chemetron Corp., 212 F.3d at 206 (applying Frenville rule that claim arises for bankruptcy purposes at same time state law cause of action accrues); In re Penn Central Transp. Co., 71 F.3d at 1114−15 (also applying Frenville Rule). Back To Text

[52] See In re M. Frenville Co., Inc., 744 F.2d at 333. Back To Text

[53] See id. Back To Text

[54] See id. Back To Text

[55] See id. (listing Chase Manhattan Bank, N.A., Fidelity Bank, Fidelity International Bank and Girard International Bank as banking institutions that filed suit against defendant). Back To Text

[56] See id. at 333−34 Back To Text

[57] See id. at 334. Back To Text

[58] See id. at 335 (holding "[o]nly proceedings that could have been commenced or claims that arose before the filing of the bankruptcy petitions are automatically stayed."); see also id. at 335 (recognizing that for purpose of § 362(a) where harm is separated from underlying act, Congress has focused on harm as opposed to act); Turner Broad. Sys., Inc. v. Sanyo Elec., Inc., 33 B.R. 996, 999 (N.D. Ga. 1983) (explaining "[t]he plain language of [section 362(a)] makes clear that it encompasses only proceedings which were instituted or could have been instituted before the petition in bankruptcy was filed."), aff'd, 742 F.2d 1465 (11th Cir. 1984); cf. In re Anderson, 23 B.R. 174, 175 (Bankr. N.D. Ill. 1982) (stating "[t]he fact that a contract was executed among the parties [pre−petition] is not sufficient basis to hold that the claim arose prior to filing."). Back To Text

[59] In re M. Frenville Co., 744 F.2d at 336−37 (explaining classic surety relationship to be when parties agree in advance that one will indemnify other in event of certain occurrence and there exists contingent right to payment − in this case, there is no specific agreement at hand); see also In re THC Financial Corp., 686 F.2d 799, 802−04 (9th Cir. 1982) (exemplifying classic contingent claim in surety relationship where contingent indemnification claim was found to have existed when indemnification agreement was entered into); In re All Media Properties, Inc., 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980) (indicating classic contingent liability of guarantor of promissory note executed by third party). Back To Text

[60] See In re M. Frenville Co., 744 F.2d at 337 (reasoning in surety context right to payment exists upon signing though dependent on occurrence of future event); Employees' Ret. Sys. of the State of Haw. v. Osborne (In re THC Financial Corp.), 686 F.2d 799, 802−04 (9th Cir. 1982) (explaining though indemnification claim did not mature until future event, claim existed as contingent claim when agreement was entered into); All Media Properties, Inc. v. Best (In re All Media Properties, Inc.), 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980) (exploring case of classic contingent liability of guarantor of promissory note executed by third party where right to payment arises upon signing though obligation arises only upon such default), aff'd, 646 F.2d 193 (5th Cir. 1981). Back To Text

[61] In re M. Frenville Co., 744 F.2d at 337 (3d Cir. 1984); see also Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946) (stating "[w]hat claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of overruling federal law, is to be determined by reference to state law."); In re McMeekin, 16 B.R. 805, 808 (D. Mass. 1982) (noting "federal court, in determining validity of obligation on a claim, could normally make reference to law of state applicable to debt in question."). Back To Text

[62] 26 U.S.C. § 1399 (1994); see also In re Towers for Pacific−Atlantic Trading Co. v. United States (In re Pacific−Atlantic Trading Co.), 64 F.3d 1292, 1300 (9th Cir. 1995) (indicating 26 U.S.C. § 1399 prohibits corporations from creating two separate taxable entities by declaring short tax year and in contrast § 1398(2)(d) provides individual with election to close his or her tax year on day before bankruptcy case commences); Hansen, Jones & Leta, P.C. v. Segal, 220 B.R. 434, 453 (D. Utah 1998) (observing Internal Revenue Code, § 1399, does not treat estate as separate taxable entity distinct from pre−bankruptcy corporation − under tax law, corporation treated as same taxable entity). Back To Text

[63] See Grady v. A.H. Robins Co., Inc., 839 F.2d 198, 203 (4th Cir. 1988) (focusing on conduct giving rise to liability); In re Jason Pharms. Inc., 224 B.R. 315, 319 (Bankr. D. Md. 1998) (dictating right to payment arises at time when acts giving rise to alleged liability occurred); In re Johns−Mansville Corp., 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986) (asserting focus should be on time when acts giving rise to liability occur). Back To Text

[64] See Grady, 839 F.2d at 200 (interpreting congressional intent and noting courts recognition as broad definition of claims); In re Jason Pharms. Inc., 224 B.R. at 319 (asserting under federal bankruptcy law within Fourth Circuit, right

to payment vests at time when acts giving rise to alleged liability were performed). Cf. In re M. Frenville Co., 744 F.2d at 335 (asserting where harm is separated from underlying act, Congress has focused on harm as opposed to act in determining claim). Back To Text

[65] See Grady, 839 F.2d at 203 (determining bankruptcy claim by focusing on when conduct giving rise to liability occurred); In re Jason Pharms. Inc., 224 B.R. at 319 (asserting right to payment arises at time when acts giving rise to alleged liability were performed); In re Johns−Mansville Corp., 57 B.R. at 690 (considering time when acts giving rise to liability occur in determining claim). Back To Text

[66] 839 F.2d 198 (4th Cir. 1988). Back To Text

[67] See id. at 203. Back To Text

[68] Id. at 199. Back To Text

[69] See id. Back To Text

[70] See id. at 199; see also Sheldon Engelmayer & Robert Wagman, Lord's Justice: One Judge's Battle to Expose the Deadly Dalkon Shield I.U.D., 99 Har. L. Rev. 875, 876 (1986) (explaining concerns in medical field about "wicking" tendencies of Shield tailstring − bacteria would gather around Shield tailstring and eventually work its way into sterile uterus, which would cause painful pelvic inflammatory disease…[i]t is these concerns that caused Dalkon Shield to be permanently removed from worldwide market on August 8, 1975). Back To Text

[71] See Grady, 839 F.2d at 199. Back To Text

[72] See id. Back To Text

[73] See id. at 200−01. Back To Text

[74] See id. at 201 (holding "[w]e have found no court outside the Third Circuit which has followed the reasoning and holding of Frenville . . . [a]ll of the cases coming to our attention which have considered the issue have declined to follow Frenville's limiting definition of claim."); see also Acevedo v. Van Dorn Plastic Machinery Co., 68 B.R. 495, 497 (Bankr. E.D.N.Y. 1986) (asserting "Frenville mistakenly applied state law rather than federal bankruptcy law, to determine when creditor's claim arose, counter to Supreme Court holding in Vanston."); In re Johns−Manville Corp., 57 B.R. 680, 688 (Bankr. S.D.N.Y. 1986) (observing "Frenville with a strained, narrow analysis limits by judicial fiat a broad, legislatively−mandated definition of the term 'claim.'"). Back To Text

[75] In re Johns−Manville Corp., 57 B.R. at 690 illustrate the conduct test as:

Procedural and extraneous factors such as the timing of the filing of a summons and complaint by a third party [in the case of an indemnity claim], which is not associated with the underlying nature of the cause of action . . . simply should not determine the existence or nonexistence of a 'claim.' Rather the focus should be on the time when the acts giving rise to the alleged liability were performed . . . Thus, for federal bankruptcy purposes, a pre−petition 'claim' may well encompass a cause of action that, under state law, was not cognizable until after the bankruptcy petition was filed.

Id; see also Epstein V. Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp. (In re Piper Aircraft Corp.), 58 F.3d 1573, 1576−77 (11th Cir. 1995) (explaining right to payment arises when conduct giving rise to liability occurs in conduct test); 5 Collier on Bankruptcy ¶ 553.03 (Lawrence P. King et al. Eds. 15th ed. Revised 1997) (stating "[t]he conduct test focuses primarily on whether the liability underlying the claim arose from conduct that occurred primarily before the commencement of the debtor's bankruptcy case. If it has, the claim may be pre−petition in nature under the test."). Back To Text

[76] See Grady, 839 F.2d at 199 (focusing on timing of conduct giving rise to liability to determine bankruptcy claim); In re Jason Pharms. Inc., 224 B.R. 315, 319 (Bankr. D. Md. 1998) (considering time when acts giving rise to alleged liability occurred); In re Johns−Mansville Corp., 57 B.R. at 690 (considering time when acts giving rise to liability occur). Back To Text

[77] See California Dep't of Health Servs. v. Jensen (In re Jensen), 995 F.2d 925, 929 (9th Cir. 1993) (examining date of bankruptcy claim as arising upon establishment of relationship between debtor and creditor); In re Piper Aircraft Corp., 162 B.R. 619, 627 (Bankr. S.D. Fla. 1994) (requiring some pre−petition relationship such a contact , exposure, impact, or privity between debtor's pre−petition conduct and claimant in order for claimant to hold § 101(5) claim), aff'd, 58 F.3d 1573 (11th Cir. 1995); Roach v. Edge (In re Edge), 60 B.R. 690, 705 (Bankr. M.D. Tenn. 1986) (holding claim resulting from debtor's pre−petition misconduct arises at earliest point in relationship between victim and wrongdoer). Back To Text

[78] See Epstein v. Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp. (In re Piper Aircraft Corp.), 58 F.3d 1573, 1577 (11th Cir. 1995) (requiring some event occurring before confirmation to create a relationship such as contact, exposure, impact, or privity, between claimant and debtor's product); In re Jensen, 995 F.2d at 931 (establishing pre−petition relationship by imputing sufficient knowledge of potential liability to give rise to contingent claim); see also United States v. LTV Corp. (In re Chateaugay Corp.), 944 F.2d 997, 1005 (2d Cir. 1991) (examining relationship between debtor's pre−petition conduct and creditor). Back To Text

[79] See In re M. Frenville Co., 744 F.2d at 336 (discussing how broad Congress intended definition of claim to be under Code); see also United States v. LTV. Corp (In re Chateaugay), 944 F.2d 997, 1000 (2d Cir. 1991) (applying only one part of Bankruptcy Code's definition of claim); Grady v. A.H. Robbins, 839 F.2d 198, 201 (4th Cir. 1988) (declining to follow Frenville and going with much more narrow definition). Back To Text

[80] 944 F.2d 997 (2d Cir. 1991). Back To Text

[81] See id. at 1005 (applying pre−petition relationship test); see also Olin Corp. v. Riverwood Int'l Corp. (In re Manville Forest Prod. Corp.), 209 F.3d 125, 128−29 (2d Cir. 2000) (asserting claim will have arisen pre−petition if there was relationship between debtor and creditor at that time); In re National Gypsum Co., 139 B.R. 397, 405 (N.D. Tex. 1992) (holding there is claim if legal obligation exists between debtor and creditor). Back To Text

[82] See In re Chateaugay, 944 F.2d at 999 (recognizing case involves both bankruptcy and environmental law). Back To Text

[83] See id. Back To Text

[84] See id. Back To Text

[85] See id. Back To Text

[86] See id. at 1005−08 (recognizing even if costs occur post−petition, claim is dischargeable if conduct occurred pre−petition); see also In re Allen Care Centers, 96 F.3d 1328, 1331 (9th Cir. 1996) (assigning cost of redressing health and safety laws to trustee as an administrative expense). See generally In re Hexcel Corp., 234 B.R. 564, 572 (N.D. Cal. 1999) (holding preliminary duty of bankruptcy court is to ascertain when conduct occurs, because if claim is in post−petition − it may not be discharged). Back To Text

[87] 995 F.2d 925 (9th Cir. 1993). Back To Text

[88] Id. at 931 Back To Text

[89] Id. at 926. Back To Text

[90] Id. Back To Text

[91] Id. Back To Text

[92] See id.; see also 11 U.S.C. § 701 (1994) (requiring court to appoint interim trustee promptly after order of relief is issued). Back To Text

[93] In re Jensen, 995 F.2d at 927. Back To Text

[94] See id. Back To Text

[95] See Cal.Dep't of Health Serv. v. Jensen (In re Jensen), 995 F.2d 925, 927 (9th Cir.1993) (explaining procedural history of case); In re Jensen, 114 B.R.700, 707 (Bankr. E.D. Cal. 1990) (stating clean up claim "arose post−petition and is not subject to discharge."). Back To Text

[96] See In re Jensen, 995 F.2d at 927. Back To Text

[97] See id. at 930−31; see also In re Hexcel Corp., 234 B.R. 564, 566 (N.D. Cal. 1999) (affirming use of fair contemplation test); In re Ritter Ranch Dev., L.L.C., 255 B.R. 760, 765 (Bankr. C.D. Cal. 2000) (holding Ninth Circuit had adopted fair contemplation test). Back To Text

[98] See In re Jensen, 995 F.2d at 930 (explaining court's adoption of narrower view of pre−petition relationship test); Kevin J. Saville, Discharging CERCLA Liability in Bankruptcy, 76 Minn. L. Rev. 327, 353 (1991) (arguing against broad definition of relationship because it weakens rationale for considering whether or not relationship exists). Back To Text

[99] In re Jensen, 995 F.2d at 931 (criticizing the broad way in which the In re Chateaugay court defined claim and quoting In re National Gypsum, 139 B.R. at 407). Back To Text

[100] See id. at 930. Back To Text

[101] Id. at 931. Back To Text

[102] See id. Back To Text

[103] 58 F.3d 1573 (11th Cir. 1995). Back To Text

[104] See In re Piper Aircraft Corp., 58 F.3d at 1575 (noting Piper had been in aircraft manufacturing business since1937). Back To Text

[105] See id. (explaining Piper had been a named defendant in other lawsuits); see also J. Meade Williamson v. Piper Aircraft Corp. 968 F.2d 380, 383 (3d Cir. 1992) (involving plane crash designed and manufactured by Piper Aircraft in Pittsburgh, Pennsylvania); Carlucci v. Piper Aircraft Corp., 775 F.2d 1440, 1441 (11th Cir. 1985) (assessing wrongful death action resulting from plane crash of Piper manufactured aircraft). Back To Text

[106] See In re Piper Aircraft Corp., 58 F.3d at 1575. Back To Text

[107] See id. Back To Text

[108] See id. Back To Text

[109] See id. at 1576. Back To Text

[110] Id. at 1576−77. Back To Text

[111] See id. at 1577. Back To Text

[112] See Epstein v. Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp. (In re Piper Aircraft Corp.), 58 F.3d 1573, 1577 (11th Cir. 1995); see also Kewanee Boiler Corp. v. Smith (In re Kewanee Boiler Corp.), 198 B.R. 519, 533 (Bankr. N.D. Ill. 1996) (stating "the "Piper Test" as the court of appeals called it, requires a pre−petition relationship between the injured person and debtor plus certain culpable conduct by the debtor pre−petition."). Back To Text

[113] See In re Piper Aircraft, 58 F.3d at 1577; see also In re Kewanee Boiler Corp., 198 B.R. 519, 528 (Bankr. N.D. Ill. 1996) (stating post−confirmation injuries do not give rise to pre−petition claims regardless of whether an item causing injury was manufactured pre−confirmation). Back To Text

[114] See In re Piper Aircraft, 58 F.3d at 1578. Back To Text

[115] The Bankruptcy Reform Act of 1994 changed § 507(a)(7) to § 507(a)(8). Therefore, for the ease of understanding all further references in cases that were decided using seventh priority will be substituted with the current law, eighth priority. Back To Text

[116] See supra Part I of this article. Back To Text

[117] See supra Part II of this article. Back To Text

[118] See 11 U.S.C. § 507(a)(1) (1994) (stating "[t]he following expenses and claims have priority in the following order: . . . First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28."). Back To Text

[119] See 11 U.S.C. § 503(b)(1)(B)(i) (1994) (stating "[a]fter notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including . . .any tax . . . incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title"). Back To Text

[120] See id.; see also In re Wang Zi Cashmere Products, Inc., 202 B.R.228, 230 (Bankr. Md. 1996) (finding employee's benefits must have been incurred by estate to be characterized as administrative expense); In re Garfinckels, 203 B.R. 814, 823 (Bankr. D.C. 1996) (allowing tax claims to be administrative expenses). Back To Text

[121] See supra note 118 and accompanying text. Back To Text

[122] 11 U.S.C. § 507(a)(8)(A)(iii) (1994) states:

The following expenses and claims have priority in the following order: . . Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for− . . . a tax on or measured by income or gross receipts− . . . other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

Id. Back To Text

[123] 11 U.S.C. § 1129(a)(9)(A) (1994) states:

The court shall confirm a plan only if all of the following requirements are met: . . . Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that− . . . with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

Id.; see also In re Bowling, 64 B.R. 710, 716 (Bankr. W.D. Mo. 1986) (setting due date for cash payments). See generally In re Digital Impact, 223 B.R. 1, 7 (Bankr. N.D. Okla. 1998) (setting requirements for waiver of payment of administrative expenses). Back To Text

[124] 11 U.S.C. § 1129(a)(9)(C) (1994) states:

The court shall confirm a plan only if all of the following requirements are met: . . . Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that− . . .with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

Id. ; see also In re Lewis Industries, 75 B.R. 862, 868 (Bankr. D. Mo. 1987) (declining to apply 26 U.S.C. § 6621 to § 1129 (a)(9)(C)). See generally Hollytex Carpet Mills v. Okla. Employment Sec. Comm'n (In re Hollytex Carpet Mills), 73 F.3d 1516, 1517 (10th Cir. 1996) (explaining application of § 1129(a)(9)(C)). Back To Text

[125] 68 B.R. 979 (Bankr. S.D.N.Y. 1987). Back To Text

[126] Id. at 986. Back To Text

[127] See id. at 981. Back To Text

[128] In re O.P.M. Leasing Services, 68 B.R. at 981. Back To Text

[129] See Id. Back To Text

[130] See Id. at 982 Back To Text

[131] See id. Back To Text

[132] Id.; see also 11 U.S.C. § 507 (a)(8) (1994) (defining seven categories of "unsecured claims of governmental units" as priority claims, including, among others, income taxes, property taxes, excise taxes, claims to trust fund taxes, and customs duties); In re Higgins, 29 B.R. 196, 201 (Bankr. N.D. Iowa 1983) (setting forth same test as In re O.P.M. Leasing Services, 68 B.R. at 981). Back To Text

[133] See In re O.P.M., 68 B.R. at 983 (citing Redmond, Scrap Disposal, Overly−Hautz, and Davidson Lumber); see also United States v. Redmond, 36 B.R. 932, 934 (Bankr. D. Kan. 1984) (holding date tax accrues rather than date of assessment controls in determining when tax is incurred); In re Westhold Mfg., Inc., 20 B.R. 368, 371 (Bankr. D. Kan. 1982) (stating "a tax…predicated on pre−petition liability incurred by debtor before filing of petition should not be promoted to first priority administrative expense merely because it is assessed after petition is filed."). Back To Text

[134] See In re O.P.M. Leasing Services, Inc., 68 B.R. 979, 983 (Bankr. S.D.N.Y. 1987) (stating claim fits within exception to 11 U.S.C. § 507 (a)(7)(A)(iii) (1994)); see also id. § 507 (a)(8)(A)(iii) (stating exception to eighth order of priority which allowed unsecured claims of governmental units only to extent that such claims are for tax on or measured by income or gross receipts−other than tax of kind specified in § 523 (a)(1)(B) or 523 (a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement after the commencement of the case); 4 Collier On Bankruptcy ¶ 507.10 [2] [c], at 66 (Lawrence P. King et al. eds., 15th ed. Rev. 1997) (providing two examples of tax claim that was not assessed before, but is assessable after the commencement of case is tax liability that is still under audit and tax claim for tax year that has not ended as of time of commencement of case). Back To Text

[135] See In re O.P.M., 68 B.R. at 984 (citing S. Rep.No. 989, 95th Cong., 2d sess. 66 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5852); see also In re Interco., Inc., 143 B.R. 707, 712 (Bankr. E. D. Mo. 1992) (noting although legislative history of 11 U.S.C. § 503(b)(1)(B)(i) suggests income is "incurred" on last day of taxable period, plain meaning of § 507(a)(7)(A)(iii) precludes finding such income to be administrative expense). See generally In re Pacific−Atlantic Trading Co., 64 F.3d at 1299−1301 (providing detailed account of legislative history of 11 U.S.C. §§ 503, at 507). Back To Text

[136] See In re O.P.M, 68 B.R. at 984 (commenting on nature of debtors pre−petition income and stating pre−petition income is not accorded administrative expense priority); see also 11 U.S.C. § 503 (b)(1)(B)(i) (1994) (stating there shall be allowed administrative expense for any tax incurred by the estate with the exception of a tax of a kind specified in § 507 (a) (8)); 4 Collier, supra note 133, ¶ 503.07 [2] [a], at 52 (stating one factor in making determination of whether income taxes are entitled to administrative expense status is whether tax was measured on income earned pre−petition or post−petition). Back To Text

[137] See In re O.P.M., 68 B.R. at 984 (citing Ind. Code Ann. §§ 6−2.1−5−1; 6−3−4−4(c) and while observing Indiana law court stated manner in which corporation is required to estimate its tax liability); see also Ind. Code Ann. § 6−2.1−5−1 (1984) requiring, with certain exceptions, taxpayers to file gross income tax returns and pay gross income tax liabilities quarterly); id.§ 6−3−4−4(c) (requiring corporations to "report and pay quarterly an estimated tax equal to twenty−five percent [25%] of such corporation's estimated adjusted gross income tax liability for the taxable year…."). Back To Text

[138] See In re O.P.M., 68 B.R. at 984 (holding claim was not administrative expense); see also In re L.J. O'Neill Shoe Co., 64 F.3d 1146, 1148−49 (8th Cir. 1995) (recognizing well settled principle whereby administrative expense priority should be narrowly construed since it is contrary to Bankruptcy Code's general goal of equal distribution); In re Interco Inc., 143 B.R. 707, 713 (Bankr. E.D. Mo. 1992) (agreeing with O.P.M. court inasmuch tax year which began and ended after petition date should be characterized as seventh level priority as opposed to administrative expense). Back To Text

[139] 47 B.R. 597 (Bankr. S.D. Fla. 1985). Back To Text

[140] In re Davidson Lumber Co., 47 B.R. at 599 (holding claim is not administrative expense of estate). Back To Text

[141] See id. at 598. Back To Text

[142] See id. Back To Text

[143] See In re Davidson Lumber Co., 47 B.R. at 598−99 (citing In re Scrap Disposal, Inc., 24 B.R. 178, 180 (Bankr. S.D. Cal. 1982) and concluding that determination of priority depends on when tax is incurred which is the date of accrual rather than date of assessment); see also In re Pacific−Atlantic Trading Co., 64 F.3d at 1304 (holding taxes which accrue pre−petition but are assessed post−petition are with 11 U.S.C § 507(a)(7)(A)(iii), and are therefore not entitled to administrative priority pursuant to 11 U.S.C. § 503); In re Interco Inc., 143 B.R. at 714 (holding 11 U.S.C. § 507(a)(7)(A)(iii) requires seventh level priority status to be afforded to taxes on pre−petition income). Back To Text

[144] See In re Davidson Lumber Co., 47 B.R. 597, 599 (Bankr. S.D. Fla. 1985) (holding although claim arose post−petition it was incurred pre−petition, and should not be granted administrative expense priority). Back To Text

[145] 144 B.R. 554 (Bankr. S.D. Fla. 1992). Back To Text

[146] See In re Prime Motors, Inc., 144 B.R at 555 (concluding tax obligations constitute pre−petition sales). See generally Schneider & Reiff v. William Schneider, Inc. (In re William Schneider, Inc.), 175 B.R. 769, 773 (Bankr. S.D. Fla. 1994) (discussing various contexts in which tax liability is deemed to have "incurred" when it accrued as opposed to when it was assessed). Back To Text

[147] See In re Prime Motors, Inc., 144 B.R. at 555. Back To Text

[148] See id. at 554−55. Back To Text

[149] See id. at 555 (citing In re Davidson Lumber, 47 B.R. 597 and holding tax accrues on date it is incurred rather than on date of assessment or date it is payable); see also In re Bondi's Valu−King, Inc., 102 B.R. 108, 110 (Bankr. N.D. Oh. 1989) (stating "[a] tax is incurred on the date it accrues, not on the date of the assessment or the date on which it is payable."); United States v. Redmond, 36 B.R. 932, 934 (Bankr. D. Kan. 1984) (stating "[f]or purposes of determining

when the taxes where incurred, it is the date the taxes accrued rather than the date of assessment which controls."). Back To Text

[150] See In re Prime Motors Inns, Inc., 144 B.R. 554, 555 (Bankr. S.D. Florida 1985) (concluding since income was earned prior to petition date income was pre−petition income); see also In re O.P.M. Leasing Services, Inc., 68 B.R. 979, 983−85 (holding tax liability from pre−petition portion of debtor's fiscal year was not administrative expense, even though determined and paid post−petition); cf. In re Johnson, 190 B.R. 724, 727−28 (Bankr. D. Mass. 1995) (holding doctrine which proclaims taxes on income earned pre−petition are not administrative expenses applies to individual, non−corporate debtors as well). Back To Text

[151] See In re Prime Motors Inns, Inc., 144 B.R. at 555 (citing In re Overly−Hautz, 57 B.R. 932, 937 and claiming although sale occurred prior to petition date, income was incurred pre−petition even though assessment and payment were not due until after petition date); see also Costello Bros. v. Pawtucket Institution for Savings (In re Melino Cigar & Candy Co.), 22 B.R. 703, 705 (Bankr. D.R.I. 1982) (concluding since stamps were bought and affixed to cigarettes before petition was filed tax liability was incurred at time stamps were bought which was before filing date and as result tax is not administrative expense); In re Scrap Disposal, Inc., 24 B.R. 178, 181 (Bankr. S.D. Cal. 1982) (holding tax incurred pre−petition but only correctly assessed post−petition was not incurred in administration of estate thereby rendering tax ineligible for administrative status). Back To Text

[152] 163 F.3d 1205 (10th Cir. 1998). Back To Text

[153] See In re Bayly Corp.,163 F.3d at 1209 (concluding income taxes on income earned during a taxable year prior to the commencement of bankruptcy proceedings constitutes pre−petition claims irrespective of the fact that the taxes are not due and payable until post−petition); see also In re Prime Motors Ins. Inc., 144 B.R. at 555 (holding income was incurred pre−petition even though taxes were not assessed or due until after petition); In re O.P.M., 68 B.R. at 983−85 (holding tax liability on pre−petition income not entitled to administrative expense priority even if tax becomes due post−petition). Back To Text

[154] See id. at 1209 (citing In re O.P.M. Leasing Servs., Inc., 68 B.R. 979, 983−85 (Bankr. S.D.N.Y. 1987) and stating any tax liability on income earned by pre−petition debtor is not entitled to administrative expense priority). Back To Text

[155] See In re Bayly Corp., 163 F.3d at 1210 (citing In re PATCO, 160 B.R. 136, 139 and stating it is not sufficient tax merely becomes payable post−petition in order to qualify as administrative expense); see also In re Northeastern Ohio General Hosp. Ass'n., 6 B.R. 513, 515 (Bankr. N.D. Ohio 1991) (explaining § 503(b)(1)(B) "has been interpreted to preclude administrative claim status for taxes not incurred in post−petition operation of a debtor's business."). But see In re Schatz Fed. Bearings Co., 5 B.R 549, 555 (Bankr. S.D.N.Y. 1980) (holding vacation pay arising under assumed collective bargaining agreement qualified only to extent it was attributable to post−petition service). Back To Text

[156] See In re Bayly Corp. 163 F.3d 1205 (10th Cir. 1998); In re Prime Motors Inns, Inc., 144 B.R. 554 (Bankr. S.D. Fla. 1992); In re O.P.M. Leasing Services, Inc., 68 B.R. 979 (Bankr. S.D.N.Y. 1987); In re Davidson Lumber Co. 47 B.R. 597 (Bankr. S.D. Fla. 1985). Many courts have also determined that other types of taxes were incurred pre−petition and thus not entitled to administrative expense priority even though the tax had not yet been determined. See Generally West Virginia State Dep't of Tax & Revenue v. Internal Revenue Serv. (In re Columbia Gas Transmission Corp.), 37 F.3d 982, 986 (3d Cir. 1994) (holding that property taxes were incurred pre−petition and therefore were not entitled to administrative expense priority even though amount of tax had yet to be determined) cert. denied 514 U.S. 1082 (1995); Midland Central Appraisal District v. Midland Industrial Service Corp. (In re Midland Indust. Serv. Corp.), 35 F.3d 164, 167 (5th Cir. 1994) (holding ad valorem tax claim is incurred on date it accrues not when it is assessed or becomes payable and taxes were incurred pre−petition thereby rendering them not entitled to administrative expense priority); In re Northeastern Ohio General Hosp. Assn., 126 B.R. 513, 515 (Bankr. N.D. Ohio 1991) (holding that tax claim is incurred on date it accrues rather than date it is assessed or becomes payable citing); In re Overly−Hautz Co., 57 B.R. 932, 937 (Bankr. N.D. Ohio 1986) (holding to determine when tax is entitled to administrative expense status under § 503, tax is incurred as it accrues rather than on date it is payable or is assessed and that excise taxes were incurred pre−petition and therefore were not entitled to administrative expense

status even though returns assessment and payment were not due until after petition was filed) aff'd. 81 B.R. 434 (N.D. Ohio 1987). Back To Text

[157] See 11 U.S.C. § 503 (b)(1)(B) (1994) (stating allowance of administrative expense status for any tax incurred by estate with exception of tax specified in § 507 (a)(8)); In re O.P.M. Leasing Serv., Inc., 68 B.R. at 984 (citing S. Rep.No. 989, 95th Cong., 2d sess. 66 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5852 and explaining that legislative history to § 503(b)(1)(B) states that administrative expenses should include taxes which trustee incurs in administering debtor's estate and supports conclusion that pre−petition taxes are not entitled to administrative expense priority); see also Towers for Pacific−Atlantic Trading Co. v. United States (In re Pacific Atlantic Trading Co.) 64 F.3d 1292, 1294, 1299 (9th Cir. 1995) (commenting court must look to legislative history of statute to glean Congressional intent and concluding claim at issue was not administrative expense because it accrued prior to creation of bankruptcy estate). Back To Text

[158] 64 F.3d 1292 (9th Cir. 1995). Back To Text

[159] See id. at 1301−02; see also In re L.J. O'Neill Shoe Co., 64 F.3d 1146 (8th Cir. 1995) (asserting for tax to qualify as administrative expense, it must satisfy two−prong test; "incurred by the estate" being one prong). See generally 11 U.S.C. § 303(b)(1)(B)(i) (1994) (stating administrative expenses include certain taxes "incurred by the estate."). Back To Text

[160] In re Pacific Atlantic Trading Co., 64 F.3d at 1294. Back To Text

[161] See id. at 1294−95. Back To Text

[162] See id. at 1295. Back To Text

[163] See id. at 1297. Back To Text

[164] See id. at 1298 −3000 (discussing commission on bankruptcy laws of United States' recommendations regarding tax aspect of bankruptcy); see also 11 U.S.C. § 503 (b) (1994) (describing what is included under "administrative expenses"); Stackhouse v. Hudson (In re Hudson), 859 F.2d 1418, 1421 (9th Cir. 1993) (explaining when terms in statute are unambiguous, judiciary must not conduct any further inquiry). Back To Text

[165] See Towers for Pacific−Atlantic Trading Co. v. United States (In re Pacific−Atlantic Trading Co.), 64 F.3d 1292, 1299 (9th Cir. 1995) (explaining slow shift in balance between Tax Code and Bankruptcy Code); see also In re Swolski, 97 B.R. 348, 350 (Bankr. N.D. Ohio 1989) (explaining allowance of interest on post−petition taxes as administrative expense was removed from final version); In re Patch Press, Inc., 71 B.R. 345, 348 (Bankr. W.D. Wis. 1987) (stating same). Back To Text

[166] See In re Pacific−Atlantic Trading Co. at 1299 (citing Hy−Test, Inc. v. Missouri Dep't of Revenue (In re Interco, Inc.), 143 B.R. 707 (Bankr. E.D. Mo. 1992)); see also In re Lumara Foods of America, Inc., 50 B.R. 809, 814−15 (Bankr. N.D. Ohio 1985) (laying out differences in versions of bill with respect to administrative priorities); In re Stack Steel & Supply Co., 28 B.R. 151, 156 (Bankr. W.D. Wash. 1983) (same). Back To Text

[167] See id. at 1299 (citing S. Rep. No. 1106−95, at 7−8 (1978)); see also In re Int'l Power Sec. Corp., 109 F.Supp. 544, 545 (D. N.J. 1953) (finding trustee liable not only for principal amount but also interest, where under provisions of local law, interest is assessable against taxpayer upon failure to pay tax within time prescribed). See generally In re Interco Inc., 143 B.R. 707, 711 (Bankr. E.D. Mo. 1992) (stating amendment contains definition of when tax incurred). Back To Text

[168] See In re Pacific−Atlantic Trading Co., 64 F.3d at 1299−1300 (citing S. Rep. No. 2266−95 § 346(a) (October 5, 1978)). Back To Text

[169] See In re Pacific−Atlantic Trading Co. 64 F.3d at 1300 (discussing proposals and amendments as to when taxes are "incurred."). Back To Text

[170] See id. (citing In re Interco Inc., 143 B.R 707, 711 (Bankr. E.D. Missouri 1992)); see also In re Overly−Hautz Co., 57 B.R. 932, 937 (Bankr. N.D. Ohio 1986) (stating "a tax is incurred on the date it accrues, not on the date of the assessment or the date it is payable."); 124 Cong. Rec. H32416, 95th Cong. (September 28, 1978) and 124 Cong. Rec. S34016, 95th Cong. (October 5, 1978) (discussing how bill adopted substance of definition in Senate amendment of when taxes are considered incurred). Back To Text

[171] See In re Pacific−Atlantic Trading Co. 64 F.3d at 1300 (citing Beiger v. Internal Revenue Serv., 496 U.S. 53, 64 n.5 (1990) and stating "[b]ecause of the absence of a conference and the key roles played by Representative Edwards and his counterpart floor manager Senator DeConcini, we have treated their floor statements on the Bankruptcy Reform Act of 1978 as persuasive evidence of congressional intent."). See generally Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 351 (1985) (discussing statements of floor manager of Act having "effect of a conference report."). Back To Text

[172] See In re Pacific−Atlantic Trading Co. 64 F.3d at 1300 (citing 124 Cong. Rec. H32416, 95th Cong. (September 28, 1978); 124 Cong. Rec. S34016, 95th Cong. (October 5, 1978)); see also Bellus v. United States, 125 F.3d 821, 823 (9th Cir. 1997) (upholding decision in Pacific−Atlantic Trading Co. in reference to conclusion that income taxes are incurred on the last day of taxable period); In re Garfinckels, Inc., 203 B.R. 814, 820 (Bankr. D. Colo. 1996) (referring to Pac. Atl. Trading Co. court finding income tax was incurred on last day of taxable period). Back To Text

[173] In re Pacific−Atlantic Trading Co. 64 F.3d at 1300−01. Back To Text

[174] In re Pacific−Atlantic Trading Co. 64 F.3d 1292 (9th Cir. 1995). Back To Text

[175] See id. at 1301−02; see also In re Interco, Inc., 143 B.R. 707, 714 (Bankr. E.D. Mo. 1992) (concluding taxes on pre−petition income accorded seventh priority status, while taxes on post−petition income considered administrative expenses); see also United States v. Friendship College, Inc., 737 F.2d 430, 431 (4th Cir. 1984) (discussing differences between phrases "for which the debtor is liable" and "incurred by the estate."). Back To Text

[176] In re Pacific−Atlantic Trading Co. 64 F.3d at 1294. Back To Text

[177] See id. at 1294−95. Back To Text

[178] See id. at 1295. Back To Text

[179] See id. at 1300 (stating "Congress intended for a tax on income to be considered 'incurred' on the last day of the income period."). Back To Text

[180] In re Pacific−Atlantic Trading Co. 64 F.3d at 1300−01 Back To Text

[181] See id. at 1301; see also 11 U.S.C. § 507 (a) (8) (1994) (giving eighth priority status to allowing unsecured claims of governmental units); In re Soltan, 234 B.R. 260, 270 (Bankr. E.D.N.Y. 1999) (explaining that § 503(b) provides administrative expense shall be allowed for any tax incurred by estate except for those listed in § 507(a)(8)(B)). Back To Text

[182] See In re Pacific−Atlantic Trading Co., 64 F.3d at 1302; see also 11 U.S.C. § 507 (a) (8) (1994) (permitting unsecured claims for governmental units after commencement of case). Back To Text

[183] See In re Pacific−Atlantic Trading Co., 64 F.3d at 1301. Back To Text

[184] 489 U.S. 235, 242 (1989). Back To Text

[185] See Ron Pair, 489 U.S. at 242 (stating plain meaning of legislation should be conclusive); see also In re Pacific−Atlantic Trading Co., 64 F.3d at 1302 (stating court's analysis should begin by reading statute literally); United States v. Ledlin 886 F.2d 1101, 1105 n.7 (9th Cir. 1989) (stating it is unnecessary to examine legislative history when language of statute is clear). Back To Text

[186] See In re Pacific−Atlantic Trading Co., 64 F.3d at 1302 (citing Yamaha Motor Corp. v. Shadco., Inc., 762 F.2d 668, 670 (8th Cir. 1985) and explaining § 523 (a) applies to individual debtors only); see also 11 U.S.C. § 523 (a) (1994) (listing instances that do not discharge an individual debtor from debt); Savoy Records Inc. v. Trafalgar Assocs. (In re Trafalgar Assoc.), 53 B.R. 693, 696 (Bankr. S.D.N.Y. 1985) (holding § 523 (a) only covers individual debtors, not corporate debtors). Back To Text

[187] See 11 U.S.C. § 507 (a)(7) (1994) (granting seventh priority to certain tax claims) (currently codified at 11 U.S.C. § 507 (a)(8) (1994)); Towers for Pacific−Atlantic Trading Co. v. United States (In re Pacific−Atlantic Trading Co.), 64 F.3d 1292, 1302 (1995) (explaining taxes "not assessed before" but "assessable … after commencement of the case."). Back To Text

[188] See id. (stating literal application of words in § 507(a)(7)(A)(iii) would be improper); In re Oceanside Mission Assoc., 192 B.R. 232, 235 (Bankr. S.D. Cal. 1996) (explaining statutes should be interpreted without making any parts superfluous); see also In re Loretto Winery Ltd. v. Andrew, 898 F.2d 715, 722 (9th Cir. 1990) (describing accepted rules of statutory construction and giving language its ordinary meaning to achieve "reasonable result."). Back To Text

[189] See In re Pacific−Atlantic Trading Co., 64 F.2d at 1302 (stating court rejects governments arguments). Back To Text

[190] See id. (explaining how subsection (i), (ii), and (iii) are separated by, or thus should be interpreted as separate alternatives); see also Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) (explaining construing statutes obligates giving effect to each word Congress used); Tillema v. Long, 253 F.3d 494, 500 (9th Cir. 2001) (stating statutory construction requires "terms connected by a disjunctive be given separate meanings unless context dictates otherwise."). Back To Text

[191] See In re Pacific−Atlantic Trading Co., 64 F.2d at 1303 (describing how IRS interpretation should be rejected because does not conform to plain language of statute). See generally In re Hillsborough Holdings Corp., 116 F.3d 1391, 1395 (11th Cir. 1997) (stating government's interpretation must be rejected because it stretches statutory language far from its plain meaning). Back To Text

[192] See In re Pacific−Atlantic Trading Co., 64 F.3d at 1303 (describing how government conceded tax "on its face" would satisfy requirement). See generally 11 U.S.C. § 507(a)(8)(A)(iii) (1994) (explaining eighth priority claim as tax not specified in § 523(a)(1)(c) assessable after commencement of case). Back To Text

[193] See In re Pacific−Atlantic Trading Co., 64 F.3d at 1303 (stating government argued plain language interpretation would never all for corporate income tax to be administrative expense). Back To Text

[194] Id.; see also George Henry Heintz v. Carey, 198 B.R. 581, 588 (9th Cir. 1996) (explaining Congress would not intend "absurd result"). Back To Text

[195] See 11 U.S.C. § 507(a)(8)(A)(iii) (1994) (describing eighth priority given to taxes when of a kind other than § 523(a)(1)(B) or 523(a)(1)(C) and assessable after commencement of case); In re Pacific−Atlantic Trading Co., 64 F.3d at 1304 (explaining taxes fit into § 507(a)(7)(A)(iii)); O.P.M. Leasing Serv., Inc., 68 B.R. 979, 983 (Bankr. S.D.N.Y. 1987) (stating taxes on pre−petition income assessed post−petition "fit squarely within section 507(a)(7)(A)(iii)."). Back To Text

[196] See In re Pacific−Atlantic Trading Co., 64 F.3d at 1304 (noting tax specified in § 507(a)(7), therefore, not administrative expense); In re Hillsborough Holdings Corp., 1995 WL 795113, *1 (Bankr. M.D. Fla. 1995) (holding

claim as eighth priority thus not considered administrative expense), aff'd, 116 F.3d 1391 (11th Cir. 1997). Back To Text

[197] 64 F.3d 1146 (8th Cir. 1995). Back To Text

[198] Id. at 1149 (stating tax claims not entitled to priority of administrative expense, thus seventh priority); In re Hillsborough Holding Corp., 116 F.3d 1391, 1394−95 (discussing § 507(a)(7) of Bankruptcy Code); In re O.P.M. Leasing Serv., Inc., 68 B.R. 979, 983 (Bankr. S.D.N.Y. 1987) (explaining taxes were "not assessed before, but were assessable . . . after the commencement of the case."). Back To Text

[199] See 11 U.S.C. § 507 (1994) (laying out expense and claim priority order); id. (providing for allowance of administrative expenses); Mo. Dep't of Revenue v. L.J. O'Neill Shoe Co. (In re L.J. O'Neil Shoe Co.), 64 F.3d 1146, 1147 (8th Cir. 1995) (holding certain tax claims were not entitled to first distribution priority as administrative expenses). Back To Text

[200] In re L.J. O'Neil Shoe Co., 64 F.3d at 1147. Back To Text

[201] See id. Back To Text

[202] See In re L.J. O'Neil Shoe Co., 64 F.3d at 1147; see also 26 U.S.C. § 441 (1994) (explaining taxable year as fiscal year if period of 12 months ending on last day of any month other than December). Back To Text

[203] See In re L.J. O'Neil Shoe Co., 64 F.3d at 1148; see also 11 U.S.C. § 503 (1994) (stating allowance of administrative expenses); In re Hillsborough Holding Corp., 1995 WL 795113, *1 (Bankr. M.D. Fla. 1995) (explaining pre−petition taxes not responsibility of estate because estate did not exist). Back To Text

[204] See 11 U.S.C. § 503(1)(B)(i) (1994) (stating administrative expenses allowed if incurred by estate and not specified in § 507(a)(8)); id. § 507(a)(8) (noting eighth priority unsecured claims of governmental units). Back To Text

[205] See id. (stating eighth priority claims); In re L.J. O'Neil Shoe Co., 64 F.3d at 1149 (laying out components of test); In re Hillsborough Holdings Corp., 156 B.R. 318, 320 (Bankr. M.D. Fla.1993) (describing two requirements that must be established to allow claim for administrative expense), aff'd 116 F.3d 1391 (11th Cir. 1997). Back To Text

[206] See supra note 204 (noting both requirements need not be examined since second requirement for administrative expense qualification failed). Back To Text

[207] See 11 U.S.C. § 507(a)(8)(iii) (1994) (describing eighth priority claim when tax not of kind in § 523(a)(1)(B) or § 523(a)(1)(B) and assessed after commencement of case); In re L.J. O'Neil Shoe Co., 64 F.3d at 1150 (examining only subsection (iii) of § 507(a)(8)). Back To Text

[208] See id. at 1150. Back To Text

[209] See supra note 204. Back To Text

[210] See In re L.J. O'Neil Shoe Co., 64 F.3d at 1149 (finding tax claims were not entitled to be first priority administrative expenses); In re Hillsborough Holding Corp., 156 B.R. 318 at 320, (defining administrative expense, chapter 11 cases, as taxes incurred during administration of estate), aff'd, 116 F.3d 1391 (11th Cir. 1997). Back To Text

[211] See In re L.J. O'Neil Shoe Co., 64 F.3d at 1149. Back To Text

[212] See id; In re Pacific−Atlantic Trading Co., 64 F.3d at 1303 (arguing plain language application of statute would make every corporate income tax ineligible as administrative expense). Back To Text

[213] See In re L.J. O'Neil Shoe Co., 64 F.3d at 1150. Back To Text

[214] See id. at 1150 (acknowledging Supreme Court's decision for conclusiveness of certain statute's "plain meaning"); see also United States v. Ron Pair Enterprises, 489 U.S. 235, 241 (1989) (stating when disputes over statute meanings arise, all inquiries must begin with statute's plain meaning and in some instances end there); Caminetti v. United States, 242 U.S. 470, 485 (1917) (asserting meaning of statute must be sought in language in which "the act is framed, and if that is plain, and if the law is within the constitutional authority of the law−making body which passed it, the sole function of the courts is to enforce it according to its terms."). Back To Text

[215] 489 U.S. 235 (1989). Back To Text

[216] Id. at 242 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)), on remand 685 F.2d 139 (5th Cir. 1982)). Back To Text

[217] See In re L.J. O'Neill Shoe Co., 64 F.3d at 1150 (explaining 11 U.S.C. § 503 (b)(1)(B) would be made "superfluous"); see also Ron Pair Enterprises, 489 U.S. 235, 242 (1989) (opining that in certain instances where "plain meaning" conflicts with intention of drafters, intention will control); Commissioner v. Brown, 380 U.S. 563, 571 (1965) (reserving some "scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning ... would thwart the obvious purpose of the statute.'") (quoting Helvering v. Hammel, 311 U.S. 504, 510−11 (1941)). Back To Text

[218] See In re L.J. O'Neill Shoe Co., 64 F.3d at 1151 (arguing this other permissible interpretation is compatible with rest of law); see also United Savings Ass'n Ltd. v. Timbers of Inwood Forest, 484 U.S. 365, 371 (1985) (reasoning provisions which may seem ambiguous in isolation are 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 one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."). See generally 11 U.S.C. § 507 (a)(8)(A)(iii) (1994) (covering taxes that are "assessable" after "commencement of the case"). Back To Text

[219] See In re L.J. O'Neill Shoe Co., 64 F.3d at 1151(standing for proposition that § 507 (a)(7)(A)(iii) of Bankruptcy Code can be read as other two subsections of § 507(a)(7)(A), to "address only pre−petition taxable activity or events"); see also 11 U.S.C § 507(a)(7)(A)(i) (1994) (stating pre−petition tax year ends on or before filing date); id. § 507(a)(7)(A)(ii) (stating tax assessed within 240 days prior to filing). Back To Text

[220] Small Business Administration v. Preferred Door Co., Inc. (In re Preferred Door Co.), 990 F.2d 547 (10th Cir. 1993). Back To Text

[221] See Id. at 549 (excluding pre−petition taxes of § 507(a)(7) as administrative expenses); see also In re L.J. O'Neill Shoe Co., 64 F.3d at 1151 (interpreting § 507(a)(7)(A)(iii) to address taxes derived from pre−petition events which was found consistent with related section of 507(a)(7)(A)). Back To Text

[222] In re L.J. O'Neill Shoe Co., 64 F.3d at 1151 n.6. Back To Text

[223] See id. at 1151. Back To Text

[224] See id. Back To Text

[225] 26 U.S.C. § 1399 (1994). Back To Text

[226] 11 U.S.C. § 101 (1994). Back To Text

[227] See In re L.J. O'Neill Shoe Co., 64 F.3d at 1151. Back To Text

[228] See id. Back To Text

[229] See id. at 1151−52. Back To Text

[230] See id.at 1152. Back To Text

[231] See id. Back To Text

[232] See In re L.J. O'Neill Shoe Co., 64 F.3d at 1152. Back To Text

[233] See id. Back To Text

[234] See United States v. Hillsborough Holdings Corp. (In re Hillsborough Holdings), 116 F.3d 1391 (11th Cir. 1997). Back To Text

[235] See id. at 1396. Back To Text

[236] See In re Hillsborough Holdings, 116 F.3d. at 1392. Back To Text

[237] See id. Back To Text

[238] See id. at 1392−93. Back To Text

[239] See id. at 1393. Back To Text

[240] See id. Back To Text

[241] See id. at 1392 (citing In re Hillsborough Holdings Corp., 156 B.R. 318, 320 (Bankr. M.D. Fla. 1993). Back To Text

[242] See In re Hillsborough Holdings Corp., 116 F.3d at 1393. Back To Text

[243] See Id. at 1394 (explaining bipartite test defining administration expense). See generally 11 U.S.C § 503(b)(1)(B)(i) (1994) (providing bipartite test); In re Chateaugay Corp., 115 B.R. 760, 772 (Bankr. S.D.N.Y. 1990) (explaining bipartite test is premised upon two basic policies of federal bankruptcy law, equality of distribution and rehabilitation of debtor's business). Back To Text

[244] In re Hillsborough Holdings Corp., 116 F.3d at 1394. Pre−petition taxes are incurred by the estate on the last day of the taxable year when a company still exists on the last day of the taxable year. See In re Pacific−Atlantic Trading Co., 64 F.3d 1292, 1301−02 (9th Cir. 1995) (concluding taxes were incurred by estate and legislative intent demonstrates that income tax should be treated as 'incurred' during final days of tax period). Back To Text

[245] In re O.P.M. Leasing Servs. Inc., 68 B.R. 979, 985 (Bankr. S.D.N.Y. 1987) (asserting when such "…proceeding is for corporate income taxes owing on income earned prior to the commencement of bankruptcy administration, the claim is not for taxes incurred by the estate."). Back To Text

[246] In re Hillsborough Holdings Corp., 116 F.3d at 1394. Back To Text

[247] Id. (stating court assumes part one of test is fulfilled but must decide whether or not part two is fulfilled). Back To Text

[248] Id. (citing 11 U.S.C. § 507(a)(7) (1994) (current version at 11 U.S.C. § 507 (a)(8) (West Supp. 2001). Back To Text

[249] See In re Hillsborough Holdings Corp., 116 F.3d at 1395. Back To Text

[250] Se id. Back To Text

[251] See id. Back To Text

[252] The plain meaning argument is ridiculous because taxes that begin and end post petition would be excluded from the administrative priority. See In re Hillsborough Holdings Corp., 116 F.3d at 1395. The U.S. Supreme Court has said that the plain meaning should be used when construing the Bankruptcy Code unless it will result in a way inconsistent with congressional intent. See In re L.J. O'Neill, 64 F.3d 1146, 1150 (8th Cir. 1995). A literal application of terms in a statute are inconsistent with congressional intent. See In re Pacific−Atlantic Trading Co., 64 F.3d at 1303. Back To Text

[253] See In re Hillsborough Holdings Corp., 116 F.3d at 1395. Back To Text

[254] See id. (citing In re L.J. O'Neill, 64 F.3d at 1151). Back To Text

[255] See id. at 1396. Back To Text

[256] See id. Back To Text

[257] See 11 U.S.C. § 507(a)(8) (1994) (concerning administrative expenses). Back To Text

[258] See generally In re Mirman, 98 B.R. 742, 745 (E.D.VA. 1989) (describing Bankruptcy Tax Act of 1980 which added specific rules pertaining to individual debtor and provides that separate entity is created in which each entity must file separate income tax returns for period of proceeding); In re Miller Ready Mix Koncrete Corp., 348 F.Supp. 401, 404−05 (D. Utah 1972) (holding obligation for payment of withholding taxes arises concurrently with payment of wages and congressional establishment of fourth priority which deals specifically with taxes demonstrates Congress' intent to give preference for tax claims). But see Bellus v. United States, 125 F.3d 821,823 (9th Cir. 1997) (stating courts, for non−bankruptcy purposes have held that income tax withholding and FICA tax liability are incurred upon payment of wages). Back To Text

[259] In re Carlisle Court, Inc., 36 B.R. 209, 217 (Bankr. D.C. 1983) (stating bankruptcy tax claims arising pre−petition treated like any other pre−petition bankruptcy tax claim); Marion County Treasurer v. Blue Lustre Prod. (In re Blue Lustre Prod.), 214 B.R. 188, 191−92 (S.D. Ind. 1997) (holding as long as tax arose prior to petition date, it will be afforded pre−petition status); 4 Collier on Bankruptcy P507.10[3][c] (15th ed. 1997) (claiming "[s]o long as the tax was assessed prior to the petition date, it will be eligible for priority."). Back To Text

[260] The Accrual Test is a method for determining a claim for bankruptcy purposes whereby all of its elements have occurred prior to the filing of the bankruptcy case. See supra note Part II(B)(i). This test has been adopted by the Third Circuit. See In re M. Frenville Co., 744 F.2d 332, 337 (3d Cir. 1984) (arguing "a claim for contribution or indemnification does not accrue at the time of the commission of the underlying act, but rather at the time of the payment of the judgment flowing from the asset.") cert. denied, 469 U.S. 1160 (1985). It would appear that this test is consistent with I.R.C. § 1399. See 26 U.S.C.§ 1399 (1994) (declaring § 1399 effective as to any bankruptcy case after March 25, 1981). Back To Text

[261] See supra Part II(B)(ii) (stating "Conduct Test" adopted by Fourth Circuit broadly construes § 101(5) of Bankruptcy Code so bankruptcy claims arise when debtor's conduct brings about alleged liability occurred); see also Epstein v. Estate of Piper Aircraft Corp. (In re Piper Aircraft Corp.), 58 F.3d 1573, 1577 (11th Cir. 1995) (pointing out under conduct test, right to payment arises when conduct resulting in alleged liability occurs); Hexcel Corp. v. Stepan Co. (In re Hexcel Corp.), 239 B.R. 564, 568 (Bankr. N.D. Cal. 1999) (determining conduct test allows automatic discharge of creditor claims if conduct occurred pre−petition, "even if the creditor had no way of knowing the claim at the time.") (emphasis in original). Back To Text

[262] See Supra Part II(B)(iii) (explaining "Pre−petition Relationship Test" adopted by Second, Ninth, and Eleventh Circuits is one where some pre−petition relationship must exist between debtor's pre−petition conduct and creditor for

bankruptcy claim to arise); see also In re Piper Aircraft Corp., 58 F.3d at 1577 (explaining "the pre−petition relationship test, as adopted by the bankruptcy court and district court, requires 'some pre−petition relationship, such as contact, exposure, impact, or privity, between the debtor's pre−petition conduct and the claimant,' in order for the claimant to hold a section 101(5) claim."); In re Piper Aircraft Corp., 168 B.R. 434, 439 (Bankr. S.D. Fla. 1994) (noting several courts have decided pre−petition relationship test more appropriate in determining whether "claim" exists). Back To Text

[263] See Supra Part II(B)(iii) (showing Ninth Circuit focused "Pre−petition Relationship Test" to form "Fair Contemplation Test"); see also In re Jensen 995 F.2d 925, 930−31 (9th Cir. 1993) (adopting "Fair Contemplation Test," which provides, notwithstanding some pre−petition relationship, claim must have been within fair contemplation of parties prior to bankruptcy petition). Back To Text

[264] See Supra Part II (B)(iii) (explaining "Piper Test" permits individuals to have claims under 11 U.S.C. § 101(5) if: "events occurring before confirmation create a relationship, such as contact, exposure, impact or privity between the claimant and the debtor's pre−petition conduct in designing, manufacturing and selling the allegedly defective or dangerous product.") (quoting In re Piper Aircraft Corp., 58 F.3d 1573, 1577 (11th Cir. 1995)); Hassanally v. Republic Bank (In re Hassanally), 208 B.R. 46, 52 (Bankr. C.D. Cal. 1997) (opining most authorities consider "Jenson Fair Contemplation Test" equivalent to "conduct plus," or "Piper Test"). Back To Text

[265] This article will focus on arguments between the debtor and the IRS. However, there are numerous reasons that other parties in interest might participate. Another party in interest might participate because the size of their recovery could be affected by the court's decision. An example would be a priority creditor who holds a priority higher than § 507(a)(8). This creditor would be paid before the IRS's claim, if the IRS's tax claim was relegated to § 507(a)(8), while the same creditor might receive less, if any, if the IRS's claim is treated as an administrative expense under § 507(a)(1). Back To Text

[266] See In re M. Frenville Co., Inc., 744 F.2d 332, 337 (3d Cir. 1984), cert. denied, 469 U.S. 1160 (1985). Back To Text

[267] See supra note 260. Back To Text

[268] Grady v. A.H. Robbins, 839 F.2d 198, 199 (4th Cir. 1988), cert. denied, 487 U.S. 1260 (1988). Back To Text

[269] See id. at 199 (affirming bankruptcy court's determination that plaintiff's tort and breach of warranty claims against debtor−pharmaceutical company arose upon plaintiff's use of debtor's intrauterine contraceptive device, not upon manifestation of harm caused by use of the device); see also In re Piper Aircraft Corp., 58 F.3d 1573, 1576−77 (11th Cir. 1995) (stating "[u]nder the conduct test, a right to payment arises when the conduct giving rise to the alleged liability occurred.") (citing Grady, 839 F.2d at 199); In re Zeitler, 255 B.R. 172, 177 (E.D.N.C. 1999) (stating "[p]ursuant to [the conduct test], if the right to payment arises from conduct which took place prior to the petition date, there is a claim within the meaning of section 101 (5).") (citing Grady, 839 F.2d at 203). Back To Text

[270] See Grady, 839 F.2d at 198−99 (explaining plaintiff's injuries, which plaintiff alleged resulted from her use of debtor−pharmaceutical company's intrauterine contraceptive device, manifested after debtor filed petition for reorganization under chapter 11 of Bankruptcy Code, 11 U.S.C. § 1101 et seq., on August 21, 1985). Back To Text

[271] 944 F.2d 997 (2d Cir. 1991). Back To Text

[272] See id. at 1005 (stating relationship between environmental regulating agencies and parties subject to regulation provides sufficient contemplation of contingencies to bring most maturing payment obligations based on pre−petition conduct within Bankruptcy Code's definition of "claims"); see also In re Piper Aircraft, Corp., 58 F.3d at 1577 (articulating pre−petition relationship test); In re Pettibone Corp., 90 B.R. 918, 931 (Bankr. N.D. Ill. 1988) (holding tort plaintiff had no claim against debtor−forklift manufacturer because there was no pre−bankruptcy privity, contact, impact, or hidden harm (forklift was purchased post−petition, and accident and resulting injuries occurred post−petition)). Back To Text

[273] See In re Chateaugay, 944 F.2d at 999 (holding Environmental Protection Agency's incurred response costs are pre−petition "claims" under Bankruptcy Code "regardless of when such costs are incurred, as long as they concern release or threatened released of hazardous substances that occurred before debtor filed its chapter 11 petition."); see also Midatlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494, 507 (1986) (holding Bankruptcy Court does not have authorization power for abandonment, unless Bankruptcy Court first formulates adequate public health and safety protection). Back To Text

[274] See 11 U.S.C. § 507(a)(8)(C) (1994) (designating allowed unsecured claims of governmental units as priority claims, "to the extent that such claims are for a tax required to be collected or withheld and for which the debtor is liable in whatever capacity."). Back To Text

[275] 995 F.2d 925 (9th Cir. 1993); see also In re Nat'l Gypsum, 139 B.R. 397, 409 (Bankr. N.D. Tex. 1992) (providing "all future response and natural resource damages cost based on pre−petition conduct can be fairly contemplated by the parties at the time of [d]ebtor's bankruptcy, are claims under Code."). See generally In re Ritter Ranch Dev., L.L.C., 255 B.R. 760, 765 (9th Cir. 2000) (applying "Fair Contemplation Test"). Back To Text

[276] See Id. at 930−31 (applying "fair contemplation test" in holding that California State's claim for cleanup costs against Jensen was discharged because state agencies had sufficient knowledge of debtor's potential liability to give rise to contingent claim before debtor filed bankruptcy petition); see also In re Cool Fuel, Inc., 210 F.3d 999, 1007 (9th Cir. 2000) (holding California State's claim was allowable contingent claim because state had knowledge of debtor's pre−petition conduct and could fairly contemplate it would lead to cause of action) (citing In re Jensen, 995 F.2d 925); In re National Gypsum Co., 139 B.R. 397, 409 (N.D. Tex. 1992) (holding "all future response and natural resource damages cost based on pre−petition conduct that can be fairly contemplated by the parties at the time of debtors' bankruptcy are claims under the Code."). Back To Text

[277] 995 F.2d at 930 (quoting In re National Gypsum Co., 139 B.R. at 408). Back To Text

[278] See id. at 931. Back To Text

[279] See In re Piper Aircraft Co., 58 F.3d 1573, 1577 (11th Cir. 1995) (stating "[w]e therefore modify the [pre−petition relationship] test used by the district court and adopt what we call the 'Piper test.'"); see also In re Hassanally, 208 B.R. 46, 52 (9th Cir. 1997) (equating "Piper Test" with "Fair Contemplation Test"); In re Hexcel Corp., 239 B.R. 564, 567 (Bankr. N.D. Cal. 1999) (discussing use of "Piper Test" when "evaluating the dischargeability of future claims."). Back To Text

[280] Id.; see also In re Emelity, 281 B.R. 151, 156 (Bankr. S.D. Cal. 2000) (noting "Piper test" has frequently been applied to tort and statutory environmental claims, and test requires "some pre−petition relationship. . . between the debtor's pre−petition conduct and the claimant in order for a future claimant to have a claim under the Code."); In re Hexelrod Corp., 239 B.R. 564, 568 (Bankr. N.D. Cal. 1999) (observing "test appears to incorporate, at least implicitly, the notion that a future claim must be within the reasonable contemplation of the parties."). Back To Text

[281] Id.; see also In re Russell, 193 B.R. 568, 571 (Bankr. S.D.Cal. 1996) (concluding "where debtor committed the act or omission complained of prior to filing bankruptcy, and the claimant has a relationship to the act or omission at the time . . . the claim arose, at that point of time, even if there has been no indication or manifestation of the consequences of the act or omission."). But see In re Kewanee Boiler Corp., 198 B.R. 519, 532 (Bankr. N.D.Ill. 1996) (recognizing shortcomings of test in identifying all parties who are potential claimants of manufacturing debtor seeking chapter 11 relief). Back To Text

[282] The Conduct Test, Pre−Petition Relationship Test, Fair Contemplation Test, and Piper Test, discussed supra. Back To Text

[283] The Accrual Test, discussed supra. Back To Text

[284] See Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (stating Bankruptcy Code's purpose has been emphasized "as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."); Williams v. United States Fid. & Guar. Co., 236 U.S. 549, 554−55 (1915) (stating "[i]t is the purpose of the Bankrupt Act to convert assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.") (citing Wetmore v. Markoe, 196 U.S. 68, 77 (1904)); Davis v. United States, 961 F.2d 867, 879 (9th Cir. 1992) ("[S]traightjacketing the IRS into its initial allocation decisions would be inconsistent with the goal of maximizing tax revenues."); Thomas v. United States, No. 96−1488, 1998 U.S. Dist. LEXIS 11539 at *17 (C.D. Ill. 1998) (stating "[t]his application also comports with the IRS's revenue maximization goal. The primary purpose of [I.R.C.] section 6672 is to ensure that the tax which is unquestionably owed the government is paid."). Back To Text

[285] See United States v. Energy Resources Co., 495 U.S. 545, 546, 551 (1990) (holding bankruptcy court has authority to order IRS to treat tax payments made by chapter 11 debtor corporations as trust fund payments where bankruptcy court determines that this designation is necessary for success of reorganization plan); see also In re M.C. Tooling Consultants, 165 B.R. 590, 591 (Bankr. D.S.C. 1993) (stating "[i]t is not disputed that the Bankruptcy Court now has the authority to Order the IRS to apply payments it receives under a debtor's Plan of Reorganization first to the Trust liability and then to the non−Trust liability if it is necessary to an effective reorganization.") (citing Energy Resources Co., 495 U.S. 545); In re Peter Delgrande Corp., 138 B.R. 458, 464 (Bankr. D.N.J. 1992) (stating Bankruptcy Court has authority to determine IRS payment allocations in order to effect provisions of Bankruptcy Code) (relying on Energy Resources Co., 495 U.S. at 545). Back To Text

[286] See In re Parr Meadows Racing Ass'n, 880 F.2d 1540, 1542 (2d Cir. 1989) (stating "[o]n this bankruptcy appeal we must balance two important competing interests: a creditor's interest in recovering as much of its claim as possible from a bankrupt debtor, and a local government's interest in obtaining payment of its property taxes."); United States v. Whiting Pools, Inc., 674 F.2d 144, 145 (2d Cir. 1982) (stating "[t]he issue is of importance to the successful reorganization of debtors, on the one hand, and to the interest of the United States in the quick collection of tax revenues, on the other."). Back To Text

[287] See Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Prot., 474 U.S. 494, 507 (1986) (granting certiorari to issue of whether trustee may abandon property used by debtor in processing waste oil, and holding before such abandonment may be authorized, court must require implementation of precautionary measures which will protect public health and safety). Back To Text

[288] In re Nextwave Pers. Communications, Inc., 200 F.3d 43, 54−55 (2d Cir. 1999) (arguing FCC is not reduced to status of creditor, subject to limitations and scrutiny of Code, merely by virtue of auctioning FCC licenses in furtherance of Congressional objectives). Back To Text

[289] 495 U.S. 545 (1990). Back To Text

[290] See id. at 546, 551 (holding bankruptcy court has authority to order IRS to treat tax payments made by chapter 11 debtor corporations as trust fund payments where bankruptcy court determines this designation is necessary for success of reorganization plan); see also In re M.C. Tooling Consultants, 165 B.R. 590, 591 (Bankr. D.S.C. 1993) (stating "[i]t is not disputed that the bankruptcy court now has the authority to order the IRS to apply payments it receives under a debtor's plan of reorganization first to the trust liability and then to the non−trust liability if it is necessary to an effective reorganization.") (citing Energy Resources Co., 495 U.S. 545 (1990)); In re Peter Delgrande Corp., 138 B.R. 458, 464 (Bankr. D.N.J. 1992) (stating bankruptcy court has authority to determine IRS payment allocations in order to effect provisions of Bankruptcy Code) (relying on Energy Resources Co., 495 U.S. at 545). Back To Text

[291] 495 U.S. at 547−48. Back To Text

[292] See id. at 546; see also 26 U.S.C. § 3102(a) (1994) (stating "[t]he tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid."); id. § 3402(a) (stating "[e]very employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary."); id. § 7501(a) (stating "[w]henever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States."). Back To Text

[293] See Energy Resources Co., 495 U.S. at 546−47; see also 26 U.S.C. § 6672 (stating "[a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."); Slodov v. United States, 436 U.S. 238, 246 n.7 (1978) (stating "[t]he cases which have been decided under section 6672 generally refer to the 'person required to collect, truthfully account for, and pay over any tax imposed by this title' by the shorthand phrase 'responsible person.'"). Back To Text

[294] See Energy Resources Co., 495 U.S. at 549. Back To Text

[295] Id. at 548−49. Back To Text

[296] Id. at 550. Back To Text

[297] See 11 U.S.C. § 1123 (b) (5) (1994); Energy Resources Co., 495 U.S. at 549. Back To Text

[298] 11 U.S.C. § 105 (1994). (while this section has been referred to by some as "the last refuge of scoundrels" the author disagrees and sees valuable uses for the bankruptcy court's equity power). See generally Marcis S. Krieger, "The Bankruptcy Court is a Court of Equity": What does that Mean?, 50 S.C. L. Rev. 275, 306−07 (1999) (discussing extent which § 105 has been relied upon by some courts to justify as "exercise of equitable powers," actions which otherwise be deemed abuse of discretion.); Mary E. Kors, Altered Egos: Deciphering Substantive Consolidation, 59 U. Pitt. L. Rev. 381, 383 n. 13 (1998) (explaining "[s]ubstantive consolidation has been generally accepted since the Supreme Court's 1941 decision in . . . and is typically said to be authorized through the bankruptcy court's general equitable powers under section 105 of the Bankruptcy Code."). Back To Text

[299] See Pepper v. Litton, 308 U.S. 295, 307−08 (1939) (stating bankruptcy court, in exercising its equitable jurisdiction, has power to alter circumstances surrounding any claim); see also Katchen v. Landy, 382 U.S. 323, 334−35 (1966) (stating it is within bankruptcy court's equitable jurisdiction to order return of preference on allowance and disallowance of claims); United States National Bank v. Chase National Bank, 331 U.S. 28, 36 (1947) (noting equitable considerations are significant components in determining validity of waiver or forfeiture). Back To Text

[300] 495 U.S. at 545 (1990). Back To Text

[301] Accord United States v. Whiting Pools, 462 U.S. 198, 209 (1983) (holding reorganization estate of debtor included property of debtor which had been seized by IRS prior to filing of petition for reorganization). In Whiting Pools, the taxpayer−debtor had owed $92,000 in Federal Insurance Contribution Act ("FICA") taxes and trust fund taxes. Id. at 199. Pursuant to 26 U.S.C. § 6321 of the Internal Revenue Code ("IRC"), a tax lien attached to all of Whiting's property. Whiting Pools, 462 U.S. at 200. Pursuant to the IRC § 6331 the IRS seized Whiting's tangible personal property including vehicles, inventory, and equipment. Id. at 200. The next day Whiting Pools filed for relief under chapter 11. Id. at 200. The IRS, seeking to sell the seized property, sought a declaration that the stay was inapplicable to the IRS or in the alternative sought relief from the automatic stay pursuant to § 362. Id. at 201. Whiting Pools sought to have the IRS turnover seized property pursuant to § 542(a) of the Bankruptcy Code. Whiting Pools, 462 U.S. at 201.

The Supreme Court held that the property of the bankruptcy estate includes property of the debtor that had been seized by a creditor prior to filing of the petition. Whiting Pools, 462 U.S. at 209. The Court continued in stating that there is no difference who the creditor is, including the IRS. Id. The Court stated that, "[n]othing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy a tax lien." Id. In fact, the term "entity" used in § 542(a) is defined in § 101(14) and includes governmental unit. Id.

In fact, Congress carefully considered the effect of the new Bankruptcy Code on tax collection. See generally S.Rep. No. 95−989, pp. 14−15 (1978) (providing report of Senate Finance Committee), and decided to provide protection to tax collectors, such as the IRS, through grants of enhanced priorities for unsecured tax claims, § 507(a)(8), and by the non−dischargeability of tax liabilities, § 523(a)(1). . Nothing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy tax liens. In Whiting Pools, the property seized prior to the filing of the petition was brought back into the chapter 11 reorganization. Whiting Pools, 462 U.S. at 211 However, the IRS still retains its status as a secured creditor and its tax lien is still remaining. Id. However, the Court held that Bankruptcy Code § 542(a) requires the IRS to seek protection of its interest pursuant to the congressionally established bankruptcy procedures, rather than through the congressionally established IRC. Id. at 212. Back To Text

[302] 474 U.S. 494, 505 (1986). Back To Text

[303] Id. at 496. Back To Text

[304] Id. at 497−500. Back To Text

[305] See id. Back To Text

[306] See id. at 499. Back To Text

[307] See Midlantic Nat'l. Bank, 474 U.S. at 499. Back To Text

[308] See id. Back To Text

[309] See id. at 500. Back To Text

[310] See id. at 501. Back To Text

[311] See id. (citing Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266−67 (1979)) (discussing rules for statutory construction, specifically when Congress intends to change interpretation of judicially created concept, they will speak with clear voice.); see also Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 572 (1990) (finding "enactment of [section 523 of the Code] does little to demonstrate clear congressional intent to change traditional pre−Code practice."); In re SLC Ltd., 137 B.R. 847, 853 (Bankr. D. Utah 1992) (observing "congressional silence regarding codification of the new value exception cannot be interpreted as eliminating substantial, judicially created exception to the absolute priority rule especially when section 1129(b)(2) is not ambiguous on its face."). Back To Text

[312] See 474 U.S. at 501 (quoting Swarts v. Hammer, 194 U.S. 441, 444 (1904)). Back To Text

[313] See 474 U.S. at 502 (quoting NLRB v. Bildisco & Bildisco, 465 U.S. 513, 534 (1984)) (stating trustee does not have unlimited power, they are still bound by statutory obligations and yield to governmental interests in public health and safety). Back To Text

[314] See H.R.Rep. No. 95−595, p.340 (1977); U.S.Code Cong. & Admin. News 1978, pp. 5787; S.Rep. No. 95−989, p. 54 (1978); Id. at 5838, 6299. Back To Text

[315] See 474 U.S. at 507; In re NextWave, 200 F.3d 43, 46 (2d Cir. 1999) (holding by Second Circuit that bankruptcy court had no authority to interfere with FCC's system of allocating spectrum licenses). NextWave was the winning bidder in an auction for "C−block licenses" for wireless communications. Id. The market value of the licenses that NextWave had won had fallen to less than 25% of what NextWave had bid by the time NextWave was to pay for the licenses. Id. at 47. Due to its precarious situation NextWave filed a chapter 11 petition and sought to avoid its obligations to the FCC by arguing that the transaction by which it acquired the Licenses was a fraudulent conveyance pursuant to § 544 of the Bankruptcy Code. Id. at 48. NextWave's argument was that if the effective date of the contract was not the date of the bidding but the date when the licenses were granted then the amount of the obligation was for a far greater amount then market and therefore the obligation above market was constructively fraudulent and therefore avoidable. Id. at 49−50. The Second Circuit concluded that the obligations that NextWave wants to avoid arose no latter than at the announcement of the winning bid. Id. at 61. Further, the court held that the bankruptcy court lacked jurisdiction to decide the question of whether chapter 11 debtor had satisfied the regulatory conditions placed by the FCC. Id. at 54. Back To Text

[316] 474 U.S. at 507 (holding trustee may not abandon property that violates state regulations involving public health and safely); see also In re Wall Tube & Metal Products Co., 831 F. 2d 118, 123 (6th Cir. 1987) (stating trustee cannot abandon debtor's property when public heath and safety laws are in violation); In re Guterl Special Steel Corp., 198 B.R. 128, 133 (Bankr. W.D. Pa. 1996) (denying trustee's motion to abandon, where property contained hazardous material). Back To Text

[317] Energy Sources, 495 U.S. at 546 (deciding "a bankruptcy court has the authority to order the IRS to treat tax payments made by chapter 11 debtor corporations as trust fund payments…."); see also In re Energy Resources Co., 871 F.2d 223, 227 (1st Cir. 1989) (holding bankruptcy court does have power to order IRS to allocate tax payments to support reorganizations plan). Back To Text

[318] 26 U.S.C. § 1399 (1994) (stating "except in any case to which 1378 applies, no separate taxable entity shall result from the commencement of the case under Title 11 of the United States Code."); see also Hansen, Jones & Leta, PC. v. Segal, 220 B.R., 434, 453 (Bankr. N.D. Utah 1998) (explaining estate is not treated as separate taxable entity distinct from pre−bankruptcy corporation under Internal Revenue Code); Bellus v. U.S., 198 B.R. 792, 798 (N.D. Cal. 1995) (holding bankruptcy estate is not separate taxpayer for employment tax purposes). Back To Text

[319] See In re L. J. O'Neill Shoe Company, 64 F.3d 1146, 1151−52 (8th Cir. 1995) (arguing dividing tax claim into pre−petition and post−petition portions results in treating debtor and estate as separate taxable entities); see also In re Hillsborough Holdings Corp., 156 B.R. 318, 319 (Bankr. M.D. Fla. 1993) (calculating pre−petition and post−petition portions of tax liability). Back To Text

[320] 26 U.S.C. § 1399 (1994). Back To Text

[321] 26 U.S.C. § 1398 (1994) (explaining tax liability in chapter 7 and chapter 11 cases); see also In re Ryan, 261 B.R. 867, 872 (Bankr. E.D. Va. 2001) (applying transfer provision of § 1398); Moore v. IRS (In re Moore), 132 B.R. 533, 534 (Bankr. W.D. Pa. 1991) (interpreting election provision of § 1398) Back To Text

[322] See 11 U.S.C. § 1398 (1994); see also Kiesner v. IRS (In re Kiesner), 194 B.R. 452, 458 (Bankr. E.D. Wis. 1996) (examining separate taxable entities under § 1398); In re Michaelson, 200 B.R. 862, 866 (Bankr. Minn. 1996) (analyzing bifurcation under 1398). Back To Text

[323] But see In re Combustion Equip. Assoc., Inc., 67 B.R. 709, 712 (S.D.N.Y. 1986) (noting "[a]lthough the bankruptcy code…defines 'claim' for purposes of bankruptcy law, the Code does not clearly establish when a right to payment arises…[a]nd as a general matter, there is a debate over the law to be applied in determining when a claim arises in the bankruptcy context.") (emphasis added). See, e.g., In re Kilen, 129 B.R. 538, 548 (Bankr. N.D. Ill. 1991) (noting I.R.S. had claim against debtor even though it had not yet determined amount of trust fund liability, or even that it would assess Debtor for unpaid trust fund taxes, and that claim was "exactly the kind of obligation Congress wanted to have resolved within the bankruptcy process when it reformulated the definition of 'claim.'"). Back To Text

[324] See generally 11 U.S.C. § 507 (a) (1994) (detailing order of priority given to enumerated expenses and claims in bankruptcy). The author suggests that this prioritization is not necessary under Claims−Focus model espoused in article. Back To Text

[325] See supra notes 49−50 and accompanying text; see also Jones v. Chemetron Corp., 212 F.3d 199, 206 (3d Cir. 2000) (recognizing "[the court] is cognizant of criticism Frenville decision has engendered, but it remains the law of this circuit."); Avellino & Bienes v. M. Frenville Co., Inc. (In re M. Frenville Co., Inc.), 744 F.2d 332, 337 (3d Cir. 1984) (applying "accrued state law claim test" and holding claim for bankruptcy purposes exists when all elements of cause of action under state law have occurred before filing of bankruptcy case). Back To Text

[326] See 11 U.S.C. § 503(b)(1)(B)(i) (1994) (providing "[a]fter notice and a hearing, there shall be allowed, administrative expenses…including…any tax…incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title…."); see also In re Bill's Coal Co., Inc. 124 B.R. 827, 830 (D. Kan. 1991) (stating "the cost of complying with the law should be considered an administrative expense even if the cost is noncompensatory" and disregarding argument that since estate does not benefit from treating environmental penalties as administrative expense they do not qualify as "an actual and necessary cost of preserving the estate."); In re Lissner Corp., 119 B.R. 143, 144 (N.D. Ill 1990) (stating "[a]dministrative expenses include the costs of preserving the estate during the pendency of the bankruptcy proceeding" and "[i]n general, administrative expense claims are given first priority over all other unsecured claims."). But see Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 5 (2000) (noting "[a]dministrative expenses, however, do not have priority over secured claims"). Back To Text

[327] See Jones v. Chemetron Corp., 212 F.3d 199, 206 (3d Cir. 2000) (recognizing "[this court] is cognizant of the criticism the Frenville decision has engendered, but it remains the law of this circuit."); In re M. Frenville Co., 744 F.2d at 337 (holding though Code defines "claim", it does not define when right to payment arises and "[t]hus, while federal law controls which claims are cognizable under the Code, the threshold question of when a right to payment arises, absent overriding federal law, is to be determined by reference to state law."). See generally Ralph R. Mabey & Annette W. Jarvis, In re Frenville: A Critique by the National Bankruptcy Conference's Committee on Claims and Distributions, 42 Bus. Law. 697, 703 (1987) (noting "[i]n Frenville, the Third Circuit adopts a very narrow reading of the automatic stay's application to a proceeding that was or could have been commenced before the commencement of the case and to a claim that arose before the commencement of the case" and therefore represents "a misunderstanding of the policy behind the Bankruptcy Code, the Code itself, prior case law, and the interrelationship of various Code sections."). Back To Text

[328] See 11 U.S.C. § 101(5) (1994) defining claim as:

"(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured" or "(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured"

Id.; see also In re Phillips, 175 B.R. 901, 905 (Bankr. E.D. Tex. 1994) (noting legislative history of Code "demonstrates that Congress intended the term 'claim' to be given broad interpretation…."); In re Johns−Manville Corp., 36 B.R. 743, 754 n.6 (Bankr. S.D.N.Y. 1984) (stating "[i]n enacting the Bankruptcy Code, Congress specifically intended to afford the broadest possible scope to the definition of 'claim' so as to enable chapter 11 to provide pervasive and comprehensive relief to debtors."); see note 41 and accompanying text (discussing legislative history of "claim" under Code). Back To Text

[329] See In re Michigan−Wisconsin Transp. Co., 161 B.R. 628, 632 (Bankr.W.D.Mich.1993) (clarifying distinction between concepts of "priority" and "administrative expense status": Whereas "[p]riority addresses the order in which claims…are paid, [c]laims are generally entitled to first priority of payment under section 507(a)(1) only to the extent that they qualify as administrative expenses under section 503(b). Administrative expenses are normally post−petition costs which are necessary to sustain the debtor's business."). But see Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 5 (2000) (noting "[a]dministrative expenses, however, do not have priority over secured

claims"). Back To Text

[330] See generally Grady v. A.H. Robbins Co., Inc., 839 F.2d 198, 202−03 (4th Cir. 1988) (holding "contingent" nature of Plaintiff's claim precludes requirement that "there must be a right to the immediate payment of money…when the acts constituting [the claim] have occurred prior to the filing of the [bankruptcy] petition"), cert. denied, 487 U.S. 1260 (1988). Back To Text

[331] See In re Piper Aircraft Corp., 162 B.R. 619, 627 (Bankr. S.D. Fla. 1994) (applying "relationship test" and holding "that in order for a future claimant to have a 'claim' under section 101(5), there must be some pre−petition relationship, such as contact, exposure, impact, or privity, between the debtor's pre−petition conduct and the claimant."). See, e.g., United States v. LTV Corp. (In re Chateaugay), 944 F.2d 997, 1005 (2d Cir. 1991) (holding even though relationship between Debtor LTV and petitioner United States EPA is not that of typical debtor and claimant, "EPA is acutely aware of LTV and vice versa" and, more generally, that "[t]he relationship between environmental regulating agencies and those subject to the regulation provides sufficient 'contemplation' of contingencies to bring most ultimately maturing obligations based on pre−petition conduct within the definition of 'claims.'"); In re Phillips, 175 B.R. 901, 906 (Bankr. E.D. Tex.) (citing plaintiff's eight and one−half year marriage to debtor as "indisputable" proof that "[she] and debtor had an extensive pre−petition relationship" and therefore she was fully aware of debtor's bankruptcy and fact that "any potential claim she had against the debtor could be affected by the debtor's plan of reorganization."). Back To Text

[332] See cases cited supra note 328. Back To Text

[333] See 11 U.S.C. § 507 (a)(8)(C) (1994) (providing eighth priority expenses and allowances are those that are "allowed unsecured claims of governmental units, only to the extent that such claims are for…a tax required to be collected or withheld and for which the debtor is liable in whatever capacity"). Back To Text

[334] See id. § 507(a)(1) (providing that first expenses and claims to receive priority are "administrative expenses allowed under section 503(b) of this title …."). Back To Text

[335] See United States v. Energy Resources Co., Inc. 495 U.S. 545, 548−49 (1990) (holding "whether or not the payments at issue are rightfully considered to be involuntary, a bankruptcy court has the authority to order the IRS to apply the payments to trust fund liabilities if the bankruptcy court determines that this designation is necessary to the success of a reorganization plan."); see also Id. at 549 (noting "[t]he Code also states that bankruptcy courts may 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions' of the Code" and "that [t]hese statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor−debtor relationships."). Note to practitioners: If, after evidentiary hearing, there is finding by bankruptcy court that classification of claim as pre−petition claim furthers reorganizational efforts of debtor, then debtor's argument appears to carry day. This echoes holding in Energy Resources, where Supreme Court relied on fact that [bankruptcy court's] decision was necessary for successful reorganizational efforts of debtor and therefore conflict must be resolved in favor of debtor. Back To Text

[336] But see Jones v. Chemetron Corp., 212 F.3d 199, 206 (3d Cir. 2000) (stating notwithstanding "criticism that the Frenville decision has engendered, it remains the law of [the third] circuit."); In re M. Frenville Co., Inc., 744 F.2d 332, 337 (3d Cir. 1984) (holding "while federal law controls which claims are cognizable under the Code, the threshold question of when a right to payment arises, absent overriding federal law, is to be determined by reference to state law.") (emphasis added). Back To Text