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Survey of the Supreme Court's Recent and Lasting Decisions

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Life After Jevic: How will the Supreme Court's decision affect chapter 11 practice?

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LIFE AFTER JEVIC: HOW WILL THE SUPREME COURT'S DECISION AFFECT CHAPTER 11 PRACTICE?

BY JEFFREY N. POMERANTZ[1]

"Once again, the Supreme Court screws up our bankruptcy world". That is how one commentator[2] has characterized the recent decision in *Czyzewski v. Jevic Holding Corp.,* 137 S. Ct. 973, 197 L. Ed. 2d 398 (2017).

Whether one agrees or disagrees with this description of *Jevic*, the decision indisputably raises more questions than it answers. Its application to structured dismissals with different fact patterns and its potential impact on numerous other, more common, aspects of a case—from first day motions to asset sales—will only unfold over time through decisions, published and unpublished, by courts across the country.

The Case

The United States Supreme Court issued the *Jevic* decision on March 22, 2017, effectively reversing decisions of the bankruptcy court, the district court and the Third Circuit Court of Appeals. At its core, *Jevic* holds that a court cannot approve a structured dismissal[3] which provides for distributions different from the standard priority scheme in a chapter 11 or chapter 7 case without the consent of affected parties.

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[2] In re Jevic: Once Again the Supreme Court Screws up our Bankruptcy World—And Justice Thomas is Wise in his Dissent, Donald L. Swanson, Mediatbankry (March 30, 2017), https://mediatbankry.com/2017/03/30/. The reference to previous times the Supreme Court "screwed up" the bankruptcy system is primarily to *Stern v. Marshall*, 564 U.S. 462 (2011).

[3] "Structured dismissals" are mechanisms to conclude a chapter 11 case which provide for distributions and address other issues without a plan or a conversion to chapter 7. They are most commonly used following a sale of assets which leaves the chapter 11 estate with insufficient assets to distribute to general unsecured creditors.

Factual Background

Jevic Transportation, Inc. ("Jevic"), a New Jersey trucking company, was acquired by Sun Capital Partners ("Sun") in 2006 through a leveraged buyout financed by the CIT Group ("CIT"). Within less than two years, Jevic ceased operations, terminated its employees and commenced a case under chapter 11 of the Bankruptcy Code, owing $53 million to senior secured creditors Sun and CIT and in excess of $20 million to the taxing authorities and general unsecured creditors.

Two lawsuits were filed in the bankruptcy case. First, ex-employee truck drivers filed suit alleging violations of state and federal Worker Adjustment and Retraining Notification ("WARN") Acts. The Bankruptcy Court granted judgment in favor of the truck drivers in the amount of $12.4 million, $8.3 million of which constituted a priority wage claim under Bankruptcy Code §507(a)(4).

Second, the Official Committee of Unsecured Creditors appointed in the Jevic chapter 11 filed a fraudulent conveyance action on behalf of the bankruptcy estate against Sun and CIT, alleging that they had "'hastened Jevic's bankruptcy by saddling it with debts that it couldn't service'". The Committee and Sun and CIT reached agreement for the following structured dismissal of Jevic's chapter 11 case: (1) the fraudulent conveyance action would be dismissed with prejudice; (2) CIT would deposit $2 million in a segregated account earmarked to pay the Committee's legal fees and administrative expenses; (3) Sun would assign its lien on the debtor's remaining $1.7 million of cash to a trust; (4) thereby permitting the trust to use the funds to pay taxes and administrative expenses, with the remainder to be distributed pro rata among general unsecured creditors; and (5) Jevic's bankruptcy case would be dismissed. *Jevic,* 137 S. Ct. at 981. However, no funds were permitted to be paid to the WARN plaintiffs on account of their judgement, including on account of their wage claims which held priority over general unsecured

creditors. Sun insisted on this provision in order to deprive the ex-employees of funds to bankroll further litigation against Sun.[4] *Id*.

The Lower Court Decisions

While acknowledging the proposed settlement's divergence from the Code's priority scheme, the bankruptcy court approved the settlement, including the structured dismissal embedded therein, in recognition of the "dire circumstances" present in the case, finding that neither priority nor general unsecured creditors would receive any recovery absent approval of the settlement. *See id*. at 981-82. The district court and the Third Circuit both affirmed, with the Third Circuit holding that Congress had only "'codified the absolute priority rule . . . in the specific context of plan confirmation'" and that in "'rare instances'" such as these, structured dismissals which did not adhere to the Bankruptcy Code's priority scheme could be approved. *Id.* at 9.

The Supreme Court Decision

The Supreme Court first considered and dismissed the argument that the WARN claimants did not have standing. Noting that even a small financial interest is sufficient to establish standing, the Court found that if the present settlement was not approved a different settlement which provided a recovery to the WARN claimants remained a "reasonable possibility" and that appellants might be able to find an attorney to pursue the fraudulent conveyance action on a contingency basis. *Id*. at 982-83.

Addressing the merits, the Supreme Court turned to the core issue of the case: can a bankruptcy court approve a structured dismissal providing for distributions that deviate from the

[4] Separate from the WARN claims filed against the *Jevic* estate, the WARN plaintiffs also asserted state court claims against Sun on the grounds that Sun was a statutory employer. Sun was not willing to allow the WARN plaintiffs to receive part of the distribution being made through the bankruptcy estate while at the same time retaining their rights to pursue the WARN claims against Sun in state court. Because Sun and the WARN plaintiffs could not reach a global resolution, the settlement contemplated distributions skipping over the priority WARN claims. Subsequently, Sun prevailed in the state court action with the WARN plaintiffs.

ordinary priority rules of the Bankruptcy Code without the consent of the affected party. The Court's "simple answer to this complicated question" was "'no'". *Id.* at 983. The Court noted that the Code's distribution priority scheme was "fundamental," and that something more than "simple statutory silence"-- an "affirmative indication of intent"-- would be expected if Congress intended to permit dismissals which allow for a major departure from the scheme. *Id.* at 984.

The Court then addressed respondent's contention that Code §349(b), which authorizes a bankruptcy judge to dismiss a case "for cause," permits courts to approve a dismissal which does not comport with the standard priority distribution scheme. The Court concluded that this provision, "read in context", merely granted courts the "flexibility to 'make the appropriate orders to protect rights acquired in reliance on the bankruptcy case'". *Id.* at 984 (citation to legislative history omitted). As nothing in the Code authorizes a court to make "end-of-case" distributions of estate assets that violate the chapter 11 and chapter 7 priority schemes, that do not restore the *status quo ante* as is normally required in a dismissal and that do not protect "reliance interests acquired in the bankruptcy", the Court held that "the word 'cause' is too weak a reed upon which to rest so weighty a power." *Id.* at 984-85.

The Supreme Court's basic ruling appears to be unequivocal, though limited:

> A distribution scheme ordered in connection with the dismissal of a Chapter 11 case cannot, without the consent of the affected parties, deviate from the basic priority rules that apply under the primary mechanisms the Code establishes for final distributions of estate value in business bankruptcies.

Id. at 978.

However, in what one bankruptcy court has termed "dicta" (*see* discussion of *In re Fryar*, below) *Jevic* also contrasts the structured dismissal before the Court with certain permissible wage and critical vendor payments, and even lender "roll-ups" which allow lenders who provide postpetition financing to be paid first on their prepetition claims, all of which have been approved by courts:

> We recognize that *Iridium* is not the only case in which a court has approved interim distributions that violate ordinary priority rules. But in such instances one can generally find significant Code-related objectives that the priority-violating distributions serve. Courts, for example have approved "first-day" wage orders that allow payment of employees' prepetition wages, "critical vendor" orders that allow payment of essential suppliers' prepetition invoices, and "roll-ups" that allow lenders who continue financing the debtor to be paid first on their prepetition claims [citations omitted]. In doing so, these courts have usually found that the distributions at issue would "enable a successful reorganization and make even the disfavored creditors better off." *In re Kmart Corp,* 359 F.3d 866, 872 (CA7 2004)…. By way of contrast…[the structured dismissal] does not preserve the debtor as a going concern; it does not make the disfavored creditors better off; it does not promote the possibility of a confirmed plan; it does not help to restore the *status quo ante*; and it does not protect reliance interest.

Id. at 985-86.

The Dissent

Justice Thomas, joined by Justice Alito, dissented in favor of dismissing the writ granted by the Court, because the majority "answer[ed] a novel and important issue of bankruptcy law…without the benefit of any reasoned opinions on the dispositive issue from the court of appeals…and with briefing on that issue from only one of the parties." *Id*. at 987. Justice Thomas was upset at what he thought was a bait and switch by the appellant. The Supreme Court granted certiorari to decide "whether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme." With respect to that issue there was a clear circuit split. However, in the briefing to the Supreme Court the appellants reframed the question to be "whether a Chapter 11 case may be terminated by a 'structured dismissal' that distributes estate property in violation of the Bankruptcy Code's priority scheme." With respect to that issue there was no circuit split. Justice Thomas noted that the field of structured dismissals was "rapidly developing" and that the Court would benefit from further lower court opinions on the topic before taking up the issue. Justice Thomas objected to the

Court permitting the appellant to change the question presented to the Court, especially since respondents appropriately "declined to brief the question that the majority" decided. *Id*. at 988. Accordingly, the Court was prematurely deciding a "novel and important issue" with insufficient input regarding the issues involved.

Decisions Subsequent to *Jevic*

Three opinions have cited the "priority" portion[5] of *Jevic* in reaching decisions. Notably, none of them relates to structured dismissals, demonstrating that *Jevic*'s application will likely extend to many other issues which arise in a case.

In *In re Pioneer Health Services*, 2017 Bankr. LEXIS 939 (Bankr. S.D. Miss., Apr. 4, 2017), a Mississippi bankruptcy court cited *Jevic* in determining that increased scrutiny was required in assessing a request to pay prepetition amounts owing to alleged critical vendors. Noting that the Supreme Court distinguished critical vendor motions from structured dismissals, the bankruptcy court quoted *Jevic*'s contrast of the structured dismissal before the Supreme Court with other, permissible, deviations from standard distribution priorities, but understanding *Jevic* to require "increased scrutiny" of even these permissible deviations. *Pioneer*, 2017 Bankr. LEXIS 939 at *14-15.

"Mindful of the increased scrutiny required by *Oxford Management, CoServ,* and *Kmart*, and, apparently, by *Jevic*", the court found that the debtor hospital had failed to establish that payments to three emergency room doctors qualified as critical vendor payments because the debtor had presented no evidence that the doctors were irreplaceable or that they would leave if prepetition amounts owing to them were not paid. *Id*. at *15-17. The bankruptcy court further noted that if the debtor could establish that the doctors were leaving because the debtor would

[5] Several other cases have cited *Jevic* for its holding regarding standing.

not pay them prepetition amounts owing, the debtor could threaten the doctors with an action for violating the automatic stay for failure to perform under their employment agreements. *Id*.[6]

In *In re Hansen*, 2017 Bankr. LEXIS 1120 (Bankr. D. N.H., Apr. 25, 2017), the chapter 7 trustee brought a motion to sell certain patent assets which involved the settlement of litigation and which the court deemed to be a compromise of controversy. The trustee accepted an offer which compromised litigation and provided funds for payment in full of all prepetition claims, but left no surplus for the debtor. *Hansen*, 2017 Bankr. LEXIS 1120 at *4. The objections to the sale-settlement argued that the trustee should instead have opted for a different offer which contemplated pursuing, rather than settling, pending litigation, because success in the litigation could result in a surplus for the debtor.

In overruling the objections to the settlement, the court cited *Jevic* for the unremarkable proposition that the Code gives priority to payment of creditors over payment of debtors. *Id.* at *32. The court described *Jevic* as holding that a bankruptcy court may not approve structured dismissals which "do not follow the Bankruptcy Code's ordinary priority rules without the affected creditors' consent". *Id*. at fn. 17.

Finally, in *In re Fryar*, 2017 Bankr. LEXIS 1123, 64 Bankr. Ct. Dec. 8 (Bankr. E.D. Tenn., Apr. 25, 2017), a motion seeking approval of the sale of real property which included a compromise of controversy was denied where (1) the settlement distribution scheme did not follow ordinary Code priorities, (2) three creditors and the Office of the United States Trustee objected, which required the court to consider whether significant Code-related objectives existed to justify deviation from ordinary Code priorities, and (3) the debtor failed to establish sufficient Code-related objectives.

[6] If this logic is accepted, it might prohibit debtors from including anyone working pursuant to an employment agreement in a first day motion, though this factor is only one among several mentioned by the *Pioneer Health* decision.

In simplification of a complicated fact pattern, the following are the relevant facts: Pinnacle Bank was an undersecured creditor. Part of the unsecured portion of its claim was being paid concurrently with the sale under the settlement, when other unsecured claims, and even a priority claim, was not. The court found that even though a sound business purpose exists for the sale of the property, because the "sale also involve[s] a settlement and a payment of one unsecured creditor ahead of other prior parties and other unsecured creditors, the court must also review the standards for approval of a settlement" and determine whether the compromise is "fair and equitable". *Fryar*, 2017 Bankr. LEXIS 1123 at *8-10.

The bankruptcy court reviewed case law in the area, noting that the Fifth Circuit holds that a settlement cannot be used to circumvent the Code priority scheme but that the Second Circuit is more flexible, allowing "a settlement reordering distribution from some assets [where] necessary to allow the estate to pursue its most significant assets and where the nature and extent of the estate and the priorities were not fully resolved." *Id*. at *11.

Turning to *Jevic* and its holding regarding structured dismissals, the bankruptcy court noted that courts sometimes allow distributions other than in accordance with the priority scheme under a chapter 11 plan or in a chapter 7 case, as in the case of certain first day orders regarding wages and critical vendors, but only where the distributions would assist in a reorganization and make even dissenting creditors better off. As the court noted, Pinnacle jumping ahead "might be acceptable if all of the creditors were consenting; however, three creditors and the U.S. Trustee have objected, so the court must consider whether there are Code-related objectives being served that are so significant that deviation is justified." *Id*. at *14. But the debtor failed to demonstrate promotion of significant Code-related objectives. Thus, even though the failure to approve the compromise may result in unsecured creditors ultimately receiving nothing, the court held that it is "their decision to make if they want to see if they can find a better deal". *Id*. at *16.

The court directly based its ruling on *Jevic*:

> In light of the Supreme Court's recent ruling in *Jevic*, parties who seek approval of settlements that provide for a distribution in a manner contrary to the Code's priority scheme should be prepared to prove that the settlement is not only "fair and equitable" based on the factors to be considered by the Sixth Circuit, *Bauer*, 859 F.2d at 441, but also that any deviation from the priority scheme for a portion of the assets is justified because it serves a significant Code-related objective. The proposed settlement should state that objective, such as enabling a successful reorganization or permitting a business debtor to reorganize and restructure its debt in order to revive the business and maximize the value of the estate. The proposed settlement should state how it furthers that objective and should demonstrate that it makes even the disfavored creditors better off.

Id. at *16-17.

The Third Circuit's *LifeCare* Decision

At about the same time that the Third Circuit was deciding *Jevic* it also decided *In re LCI Holdings Co*., 802 F. 3d 547 (3d Cir. 2015) ("*LifeCare").* In *LifeCare*, the Third Circuit affirmed an order of United States District Court for the District of Delaware, granting a 363 motion for the sale of the debtor's property which included the payment of claims outside the standard Code distribution scheme. The stalking horse (and winning) bid was made by the (under)secured creditor, which credit bid 89% of the amount of its debt and deposited funds into an escrow to pay legal and accounting fees of the Committee. The Committee objected to the sale because the proceeds were insufficient to provide a recovery to unsecured creditors or even to pay all administrative expenses. The United Sates objected because it would be owed $24 million of capital gains taxes as an administrative claim if the sale were to be consummated, but all cash from the sale was to be used solely to pay other administrative expenses (fees of the Committee's professionals) with which its claim had equal priority. Eventually the Committee withdrew its objection when the secured creditor agreed to escrow monies to fund a partial return to general unsecured creditors. Not surprisingly, the United States now objected to payment of

not only other, *pari passu*, administrative claimants to its exclusion, but also to lower-in-the-priority-scheme general unsecured creditors.

The bankruptcy court overruled the government's objection and approved the sale, finding that the credit bid was the best and only bona fide bid, and that the alternative to the sale was a liquidation of assets which could endanger patients and would provide no recovery whatsoever to any creditor including the government. *LifeCare,* 802 F. 3d at 551. Moreover, the court found that because the escrowed funds came directly from the secured creditor/purchaser and never passed through the estate, such funds were not sales proceeds and thus not property of the estate. *Id*. Accordingly, the Code distribution priorities did not apply to them.

In affirming, the Third Circuit rejected the government's argument that the Committee itself had conceded that its settlement with the purchaser "'allocate[d] proceeds from the sale'" and therefore implicated property of the estate, declining to "elevate form over substance and give legal significance to the Committee's description of the settlement funds". *Id*. at 556. Further, the originally-escrowed funds to pay professional fees were likewise not property of the estate even though the Asset Purchase Agreement referred to them as "consideration" for the debtor's assets and part of the purchase price. Because the purchaser was buying, among other assets, all of the debtor's cash and thus the excess over professional fees would be returned to the buyer, these funds could not be termed property of the estate. *Id*. Rather, these were funds to assure a smooth transfer of assets and to resolve objections to the sale rather than as partial consideration for the debtor's assets. *Id*. at 557.

The United States did not appeal the *LifeCare* decision. As discussed below, it is unclear whether *LifeCare* remains good law after *Jevic*.

Beyond *Jevic*

The holding in *Jevic* directly addresses a structured dismissal to which parties objected. The narrow circumstances of *Jevic*, however, should not obscure the more fundamental and commonly-occurring circumstances to which it may—or may not—be applied, as well as several other issues.

(1) Issue: Is *Jevic*'s holding limited to structured dismissals, or do its principles and analysis apply to any potential distribution made during the course of a chapter 11 case which does not comport with the absolute priority rule (or to distributions in a chapter 7 case contrary to the distribution priorities set forth in the Code)? For example, does it apply to a proposed settlement which includes a distribution of proceeds or to first day motions seeking to pay certain prepetition obligations?

Analysis: *Jevic* will likely have broad application. It explicitly contrasts structured dismissals with first-day motions and the like by identifying the former's deficiencies (*e.g.,* doesn't preserve the debtor as a going concern, doesn't promote reorganization). The bankruptcy courts in two subsequent cases (discussed above) clearly apply *Jevic* beyond structured dismissals. In *Pioneer Health Services,* the court explicitly cites the *Jevic* list of deficiencies in evaluating (and denying) a critical vendor motion, noting that *Jevic* "apparently" requires increased scrutiny of such motions. And in *Fryar*, the court cited *Jevic* in refusing to approve a settlement which involved a distribution of proceeds which deviated from the standard Code priority scheme. Although neither is binding precedent, the decisions may augur the approach likely to be taken by many, if not most, courts post-*Jevic*. Whether, and to what extent, courts require a more robust evidentiary showing to support first day motions seeking to pay prepetition claims (ala *Kmart*) remains to be seen.

(2) Issue: If *Jevic* applies beyond structured dismissals (which almost always, by their nature, have most of the deficiencies identified in *Jevic*), can a court approve a deviation from the standard distribution scheme if "Code-related objectives" are achieved even if the affected creditor objects?

Analysis: On the one hand, *Jevic* appears to state a bright-line holding: a deviation from standard Code distribution priorities can only be approved with the consent of the affected creditor. Perhaps this bright line applies to other situations as well. On the other hand, *Jevic* contrasts its circumstances with those of potential first day orders, reciting its laundry list of deficiencies which go well beyond the fact that the affected creditor has not consented. As noted above, post-*Jevic* cases *Pioneer Health* and *Fryar* apply *Jevic*'s more nuanced analysis. Indeed, *Fryar* explicitly analyzed whether Code-related objectives were being achieved only once it noted that creditors had objected. *Fryar*, 2017 Bankr. LEXIS 1123 at *14. However, *Fryar* also noted that the Supreme Court's listing of deficiencies under the facts of *Jevic* was dicta to *Jevic*'s fundamental, narrow holding applicable to structured dismissals. *Id*. at *12-13. The context of *Jevic* made it difficult to argue that the settlement was achieving Code-related objectives—the company had shut its doors pre-bankruptcy and all that was happening through the settlement was a resolution of estate owned fraudulent conveyance actions. But the more typical context of a class-skipping structured dismissal involves a creditors committee giving up its rights to object to a sale or DIP financing in exchange for a fund earmarked to its constituency. In those cases, the elimination of potential sale or DIP litigation often paves the way for a going concern sale without the attendant costs and risks of litigation. Since the Code promotes value maximization one could argue that such a fact pattern is distinguishable and that *Jevic* does not apply. Whether courts will take that view remains to be seen.

(3) Issue: As noted by the Supreme Court, affected parties objected to the structured dismissal in *Jevic*. Presumably if all affected parties consent, a deviation from distribution priorities would be permitted. *Cf. Fryar*, 2017 Bankr. LEXIS at *13 (analysis of whether Code-related objectives have been met undertaken after noting that parties have objected, though states only that the plan "*might* be acceptable if all of the creditors were consenting." (emphasis added)). Does the lack of an objection after notice and opportunity to object constitute consent?

Analysis*:* *Jevic* sheds no light on the issue; the affected parties affirmatively objected. In *Fryar*, the bankruptcy court noted that creditors were not consenting, that three creditors and the UST objected. This *may* imply that had no objections been filed, consent would have been inferred. *Pioneer Health* did not address the issue of consent at all.

Even if consent can be inferred through failure to object, first day motions are of course heard on an emergency basis following limited notice. Perhaps debtors, where possible, should bring critical vendor and similar motions on regular notice sent to all creditors.

(4) Issue: Can a priority skipping payment be authorized over an objection if there is evidence of "significant Code-related objectives" even if the payment will not benefit the affected party? For example, if unsecured creditors would be paid in full on a liquidation, can a critical vendor motion be granted over an objection by such a creditor, who has nothing to gain but whose recovery in full is put at risk by an authorization based on Code objectives of reorganization and preserving the debtor as a going concern?

Analysis: In rejecting the class-skipping payments in *Jevic* the Court reasoned that the structured dismissal pursuant to which they were proposed to be made "does not preserve the debtor as a going concern; it does not make the disfavored creditors better off; it does not promote the possibility of a confirmable plan; it does not help to restore the *status quo ante*; and it does not protect reliance interests." *Jevic*, 137 S. Ct. at 985-86. That language would

imply that if the class-skipping payments further fewer than all —or perhaps even any one— of those Code-related objectives then the payments can be approved even if the payments do not benefit the objecting party. However, the bankruptcy court in *Fryar* appears to go further than the Court in *Jevic*, stating that a settlement which deviates from Code distribution priorities should state how it is serving code related objectives "and should demonstrate that it makes even the disfavored creditors better off." *Fryar*, 2017 Bankr. LEXIS 1123 at *16-17 (and at *13, quoting *In re Kmart Corp*., 359 F. 3d 866, 872 (7th Cir. 2004) discussing justifications for critical vendor motions). *Fryar*, of course, is one bankruptcy court's opinion. Although inconclusive, *Jevic*'s laundry list implies, at a minimum, that not all of the listed elements must be met.

(5) Issue: Are there creative ways to structure a dismissal which do not run afoul of *Jevic*? Does the methodology and do the principles enunciated in *LifeCare* survive *Jevic*, *i.e.,* do the *Jevic* requirements apply to funds which are not property of the estate? Recently, the United States Bankruptcy Court for the District of Delaware approved a credit bid sale to a junior lender under Section 363 which sale included an assumption of $750,000 of prepetition general unsecured claims on a pro rata basis in *United Road Towing Company, et al*., case no 17-10249 (LSS). Although the buyer was also paying known administrative and priority claims, would the assumption of liabilities construct work even if certain priority or administrative claims were not satisfied?

Analysis: The issue of whether *LifeCare* survives *Jevic* was hotly contested in *Constellation Enterprises, LLC, et al*., case no. 16-11213 (CSS) pending in the Delaware bankruptcy court (*see,* primarily, docket nos. 944-948, 955 & 956). Among the arguments put forth that *LifeCare* did not survive *Jevic* were the following: (1) The assets at issue in *Jevic* were also not estate property: $2 million was contributed by secured creditor CIT (clearly not property of the estate) and a lien on $1.7 million was "contributed" by secured creditor Sun. (2)

If the assets being used are so divorced from the estate that *Jevic* does not apply, then the court does not have subject matter jurisdiction over such assets and can neither approve nor disapprove their use.

The Committee replied that no portion of *Jevic* addresses or overrules *LifeCare*. $1.7 million of the funds being used in *Jevic* were estate funds even though they were subject to a lien. And despite that the CIT $2 million was not property of the estate, *Jevic* refused to hold that the use of *any* estate assets which are to be distributed outside the standard distribution scheme is improper. In fact, *Jevic* acknowledged the permissible use of such funds in certain first day and settlement motions. Further, the alleged jurisdictional Catch-22 is merely a red herring, as the settlement resolves numerous disputes in the case regarding, for example, previous objections to DIP financing orders.

In declining to approve the settlement in *Constellation*, Judge Sontchi, for the most part, avoided this issue, finding that though the property in question was currently owned by the purchaser of the estate's assets, the property had once been property of the estate and the parties always contemplated that it would be transferred back. Accordingly, the property in question was considered property of the estate, *LifeCare* was thus inapplicable and the settlement would be disallowed under *Jevic*. Judge Sontchi acknowledged that the Supreme Court in *Jevic* wasn't focused on the issue of property vs. non-property of the estate. Since he concluded that *Constellation* dealt with estate property he was able to sidestep the issue. Accordingly, it is unclear how the Court would have ruled had the property involved been unequivocally non-estate property. Nevertheless Judge Sontchi did reason that "if [*LifeCare]* hasn't been overturned by *Jevic* altogether, and I'm not ruling that it has been, I think it probably has been significantly narrowed…". Transcript of May 16, 2017 hearing in *Constellation*, at 247-48. Elsewhere, however, Judge Sontchi noted that if faced with a true *LifeCare* scenario where

unequivocally only non-estate property was being used, "I think I'd be constrained to follow or enforce [it]". *Id*. at 250.

In a post-*Jevic* world, can the partial assumption of liabilities in *United Road Towing Company* be utilized in a circumstance where higher priority creditors are not being paid in full? If *LifeCare* survives *Jevic*, a sale including *United Road Towing*'s partial assumption of liabilities likely does as well. In the parlance of the *LifeCare* decision, non-estate property is being used to "smooth" the transfer of assets by resolving objections to the sale, rather than to purchase assets.

One can argue that *United Road Towing*'s assumption is even more removed from use of estate assets than the funding of a creditor trust in *LifeCare* with non-property of the estate. No assets whatsoever—estate or non-estate owned—are being transferred. Moreover, it is common practice for a purchaser of assets to selectively assume liabilities. Just as a purchaser is allowed to select which liabilities to assume based on its future business necessities, so too a purchaser should be permitted to select liabilities to assume based on the business necessity of garnering support for the proposed sale transaction.

However, if the purpose of an *United Road Towing*esque partial assumption of liabilities is clearly to bypass the standard Code priority scheme, the issue may still come down to whether *LifeCare* survives or not. A court may either determine that the approach is permitted because estate assets are not being used in violation of Code distribution priorities, or will instead view the structure as form over substance, focusing on the fact that funds paid (as in *LifeCare*) or to be paid (as in *United Road Towing*) are monies the purchaser is willing to pay for the debtor's assets, which monies are being used to pay the debtor's liabilities.

Recent Bankruptcy Decisions in the Supreme Court

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During the 2016-2017 term, the Supreme Court decided *Czyzewski v. Jevic Holding Corp.*, no. 15-649, and *Midland Funding, LLC v. Johnson*, no. 16-348. During the previous term, the Court decided *Husky v. Ritz*, 136 S. Ct. 1581 (2016). This paper discusses these three cases, as well as the remand proceedings in the Fifth Circuit in *Husky* after the Supreme Court decided the matter.

A. Jevic

The Bankruptcy Code authorizes the dismissal of Chapter 11 bankruptcy cases and generally provides that, unless the court for cause orders otherwise, dismissal has the effect of returning the parties to the status quo immediately prior to the commencement of the case. *See* 11 U.S.C. §§ 349, 1112. Rather than return the parties to the status quo, however, some courts have approved "structured dismissals" that effectively distribute the value of the debtor's assets in various ways, approve the release of various parties, and/or settle various claims. These structured dismissals may or may not comply with the Code's priority rules. The question presented in *Jevic* was whether a structured dismissal that did not comply with absolute priority is something a bankruptcy court is authorized to approve and, if so, under what circumstances.

Jevic Transportation was in the trucking business. Prior to filing for bankruptcy, Jevic engaged in a leverage buyout transaction in which Sun Capital Partners acquired the company. Various lenders led by CIT financed the buyout and provided Jevic with an $85 million

revolving line of credit. After Jevic's finances continued to deteriorate, the company decided to file for bankruptcy. It ceased operations, notified its employees of their impending termination, and commenced a Chapter 11 proceeding in Delaware. At the time, Jevic owed its lenders and Sun approximately $53 million secured by liens on the company's assets. It owed an additional $20 million to taxing authorities and general unsecured creditors. An official committee of unsecured creditors was appointed.

After the commencement of the bankruptcy case, a group of Jevic's terminated truck drivers filed a class action against Jevic and Sun, alleging violations of federal and state WARN acts, under which Jevic was supposed to provide 60 days' written notice before laying them off. In addition, the creditors' committee brought a fraudulent transfer action against CIT and Sun, alleging that Sun, with CIT's help, took over Jevic with essentially none of its own money in an ill-conceived transaction that placed Jevic in an unreasonably precarious financial position.

Several years later, the bankruptcy court granted in part and denied in part CIT's motion to dismiss the litigation. Thereafter, representatives of the committee, Sun, CIT, Jevic, and the drivers convened to negotiate a settlement. Previously, all of Jevic's assets had been liquidated to pay the lender group led by CIT. By the time of the settlement discussions, all that was left of Jevic was about $1.7 million in cash, which was subject to Sun's lien, and the fraudulent transfer action against CIT and Sun.

Eventually the committee, Jevic, CIT, and Sun reached a settlement agreement with four essential features. First, the parties would release each other, and the fraudulent transfer litigation would be dismissed. Second, CIT would pay $2 million to fund the payment of administrative expenses. Third, Sun would assign its lien on the $1.7 million in cash to pay tax and administrative creditors first, and then to distribute something to general unsecured creditors.

Fourth, the bankruptcy case would be dismissed. In this way, the settlement contemplated a structured dismissal that provided for the distribution of Jevic's remaining assets. It left out, however, the drivers, who had asserted approximately $8.3 million in wage claims entitled to priority under section 507(a)(4) of the Code. Apparently the drivers had been unable to reach a settlement against Sun on their WARN act claims, and Sun was unwilling to agree to any distribution to the drivers so long as their litigation against Sun remained pending.

The drivers and the U.S. Trustee objected to the proposed settlement and structured dismissal. In particular, they claimed that the dismissal violated the Code's priority scheme by authorizing a distribution to general unsecured creditors while the drivers' priority wage claims received nothing. Rejecting these arguments, the bankruptcy court approved the settlement and the structured dismissal. The court reasoned that other courts has granted similar relief in other cases. The court also observed that dire circumstances existed and that, absent the settlement, there was no meaningful prospect of any distribution to anyone other than the secured creditors because completing a Chapter 11 bankruptcy was impractical, as was conversion to a Chapter 7 case. In essence, there was no cash available to fund any further bankruptcy proceedings because all of the available cash was encumbered by Sun's lien.

Although the bankruptcy court observed that Chapter 11 plans cannot violate absolute priority over the objection of creditors, it concluded that there was no similar restriction for settlements. The court found that the drivers' claims against Jevic were essentially worthless because there was no unencumbered cash that could be distributed to them. On appeal, the district court affirmed, as did the Third Circuit, which held that, in rare instances such as the present case, courts could approve structured dismissals. The Third Circuit believed that, in this case, there was no real alternative and observed that, although structured dismissals might not be

used simply to evade the Code's procedural protections and safeguards, there was in this matter no prospect of either a confirmable plan or a viable Chapter 7 case. In addition, the court determined that, although skipping a priority class in favor of distributions to a junior class raises justifiable concerns, it could be done where there are specific and credible grounds that justify the deviation. In this matter, although the drivers were left out in the cold, the bankruptcy court concluded correctly, the court believed, that the settlement best served the interests of the estate and its creditors because further litigation would merely deplete the assets of the estate with little prospect of assisting anyone.

In the Supreme Court, the drivers argued that the absolute priority standard applied equally to settlements as well as plans of reorganization. The drivers reasoned that this was essential to effectuate Congress's policy choice in elevating certain creditors over others. Unlike financial creditors, employees are poor loss spreaders, hence their priority treatment, which should be respected.

In addition, the drivers noted, if they could be skipped over in this case, doing so would serve to open the door to further violations of absolute priority in the future. Settling parties, they noted, should not be permitted to get away with deviations from absolute priority simply because they claim they would not settle unless another creditor group is cut out. The drivers warned that, if approved, exceptional deviations from absolute priority would likely become commonplace. This, they contended, would have dire effects for the negotiation of Chapter 11 plans because it would effectively provide a green light for collusion and undermine the kind of predictability that adherence to absolute priority fosters. This, the drivers warned, would effectively marginalize creditors like the drivers in this case, who generally lack the clout of financial creditors.

In contrast, the several respondents argued that the concept of absolute priority does not superintend the approval of settlements. By the Code's terms, they argued, absolute priority has become codified in the confirmation provisions, but not the rules that govern settlements. Moreover, although a plan must comply with the Code's priority regime set forth in section 507, nothing in the Code mandates the same for settlement agreements.

Respondents also focused on the impossibility of alternative relief. Absent a settlement, there was likely to be nothing to distribute to anyone, other than the secured creditors. Simply put, the settlement was the best vehicle to maximize distributions to creditors. Further, as the bankruptcy court determined, the drivers' claims were essentially worthless because there was essentially no cash available to distribute to them. The distribution to the unsecured creditors simply took funds out of the secured creditors' pockets, so there was no harm to the drivers in any event.

Countering the drivers' policy concerns, respondents argued that siding with the drivers would grant recalcitrant priority creditors too much leverage by encouraging them to demand payment even when doing so would destroy any hope of maximizing value through the settlement process. Although the drivers might have that leverage in the plan process, respondents argued that they do not have it in the settlement context.

Ruling for the drivers, the Supreme Court held that a distribution scheme ordered in the context of a structured dismissal cannot, without the consent of the affected parties, deviate from the ordinary priority rules applicable to distributions under the Bankruptcy Code. The Court noted that the Bankruptcy Code's priority scheme "constitutes a basic underpinning of business bankruptcy law." The Court reasoned that, because of the centrality of this scheme, if Congress had intended to depart from the existing priority rules in the context of the approval of dismissals

under section 349, one would expect some affirmative indication of this intent, observing "Congress … does not … hide elephants in mouseholes."

Based on its review of the Code, the Court found nothing demonstrating such intent. Nor did the Court believe that precedent supported Respondents' position. The Court distinguished situations in which lower courts have approved *interim* distributions that violate absolute priority where these distributions have served Code-related objectives, including various first-day orders. The Court observed that those kinds of distributions are commonly justified as enabling a successful reorganization. In contrast, a structured dismissal involves a final disposition that does not serve the same goal. In particular, it does not preserve the debtor as a going concern, offer the prospect of making disfavored creditors better off, promote the possibility of a confirmable plan, restore the status quo, or protect the reliance interests of creditors who have obtained interests during the course of the bankruptcy case.

Finally, the Supreme Court flatly rejected a "rare case" exception based on "sufficient reasons" in particular cases. The Court was blunt in holding that "it is difficult to give precise content to the concept [of] 'sufficient reasons,'" and expressed the concern that a rare case exception could turn into a more general rule. Specifically, the Court stated that "Congress did not authorize a 'rare case' exception …. [and w]e cannot 'alter the balance struck by the statute'… not even in "rare cases."[1]

B. Midland

[1] Justice Thomas authored a dissent, joined by Justice Alito. The dissent noted that the Court had granted certiorari on a particular question, but the Petitioners had argued (and the Court decided) another question. Given the switch, the dissent would have dismissed the writ of certiorari as improvidently granted.

The Bankruptcy Code authorizes the filing of proofs of claim, and provides for the disallowance of claims to the extent they are unenforceable under applicable non-bankruptcy law, including owing to the expiration of any applicable statute of limitations. *See* 11 U.S.C. §§ 501, 502. The Fair Debt Collection Practices Act prohibits routine debt collectors from, among other things, engaging in false, deceptive, or misleading debt collection practices, including making any false claim about the legal status of any debt. *See* 15 U.S.C. § 1692e. Many courts have concluded that the filing of a state court action to collect a debt the creditor knows is stale because it is beyond the statute of limitations is a violation of the FDCPA. The question presented in *Midland* is whether the filing of a proof of claim seeking to collect on a time-barred debt also violates the FDCPA.

Midland Funding is in the business of purchasing and seeking to collect unpaid debts. Midland purchased a debt that Aleida Johnson at one point owed to Fingerhut Credit Advantage. The date of the last transaction on Johnson's account with Fingerhut was in May of 2003. Johnson filed a Chapter 13 bankruptcy petition in March of 2014. In May of 2014, Midland filed a proof of claim in Johnson's bankruptcy case, seeking to collect $1,879.71 on the debt purchased from Fingerhut. Midland's claim is governed by Alabama law, which imposes a six-year statute of limitations on claims to collect on an overdue debt, and therefore under Alabama law the claim was time-barred.

Johnson commenced an action against Midland in the United States District Court for the District of Alabama, alleging that Midland's time-barred attempt to collect the overdue debt was a violation of the FDCPA. The FDCPA prohibits a "debt collector" from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," including "false[ly] represent[ing] . . . the character, amount, or legal status of any debt." 15

U.S.C. § 1692e. The FDCPA further prohibits a debt collector from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt," including collecting any amount that is not "expressly authorized by the agreement creating the debt or permitted by law." *Id.* § 1692f. A "debt collector" under the statute is "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another." *Id.* § 1692a.

Midland moved to dismiss Johnson's claim. The District Court recognized that it was bound by the Eleventh Circuit's prior decision in *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), determining that filing a proof of claim in bankruptcy to collect a time-barred debt is a violation of the FDCPA. Nevertheless, the court held that the FDCPA prohibition on filing stale proofs of claim is in "irreconcilable conflict" with section 501(a) of the Bankruptcy Code, which provides in permissive terms that "[a] creditor . . . may file a proof of claim." 11 U.S.C. § 501(a). The court held that where, as is the case under Alabama law, a statute of limitations period only extinguishes a creditor's remedy, but not the underlying right to payment, a creditor has the right to file a proof of claim on a time-barred debt under section 501. The court then found that this right is in conflict with the FDCPA because a creditor may comply with the FDCPA only by "surrendering its right under the Code to file a proof of claim on a time-barred debt." Because the Bankruptcy Code was enacted after the FDCPA, the court held that the former impliedly repealed the latter.

On appeal, the Eleventh Circuit reversed. The court first noted that it had faced a "nearly identical" question in *Crawford* and confirmed its decision in that case that filing a stale proof of claim in bankruptcy constitutes a violation of the FDCPA. The Eleventh Circuit also disagreed with the lower court's conclusion that the FDCPA and the Bankruptcy Code conflicted

irreconcilably. The court held that the FDCPA and the Bankruptcy Code "differ in their scopes, goals, and coverage, and can be construed together in a way that allows them to coexist." The Bankruptcy Code allows—but does not require—all creditors to file proofs of claim, while the FDCPA prohibits those creditors that qualify as "debt collectors" from filing stale proofs of claim. Reasoning that the Bankruptcy Code's filing rules "do not shield debt collectors from the obligations that Congress imposed on them," the Eleventh Circuit concluded that a debt collector that chooses to file a time-barred proof of claim "is simply opening himself up to a potential lawsuit for an FDCPA violation."

Federal courts have widely held that filing or threatening to file a lawsuit to collect a time-barred debt is a violation of the FDCPA. *See Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013); *accord Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 399-400 (6th Cir. 2015) (letter offering settlement of time-barred claim was a violation of FDCPA because "consumers might still be confused about the enforceability of a debt"); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011) (recognizing that threatened or actual litigation on a time-barred debt is a violation of the FDCPA, but finding no threat of litigation); *Castro v. Collecto, Inc.*, 634 F.3d 779, 783 (5th Cir. 2011) (recognizing that "threatening to sue on time-barred debt may well constitute a violation of the FDCPA," but finding that claim was not time-barred); *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001) (same as *Huertas*). As one court has explained, "bringing or threatening to bring a lawsuit 'which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate.'" *Herkert*, 655 F. Supp. 2d at 876 (quoting *Ramirez v. Palisades Collection LLC*, No. 07-3840, 2008 WL 2512679, at *5 (N.D. Ill. June 23, 2008)); *see also Beattie*, 754 F. Supp. at 393 ("[T]he [FDCPA]

was designed to prevent debt collectors from threatening suit against persons whom the collector knows or should know are not legally liable for a debt."). These decisions have observed that a lawsuit premised or threatened on the basis of a stale claim is an abuse of the litigation system. In the Supreme Court, Johnson argued that a proof of claim premised on time-barred debt is fundamentally no different.

The act of filing a proof of claim in a bankruptcy case is, Johnson argued, analogous to commencing litigation to collect a debt outside of bankruptcy. To begin with, a debtor commences a court-supervised bankruptcy case by filing a bankruptcy petition. 11 U.S.C. § 301. In turn, the filing of the petition triggers the automatic stay, which generally bars creditors from pursuing debt-collection activity outside the bankruptcy process. 11 U.S.C. § 362.

In lieu of pursuing immediate litigation outside the bankruptcy process, Johnson observed that creditors may, but are not required to, file proofs of claim setting forth the debts they assert they are owed. 11 U.S.C. § 501. The point is to give creditors who are stayed from pursuing legitimate debt-collection activity outside the bankruptcy system an opportunity to assert legitimate claims through the proof of claim procedure. In other words, the point is to provide a means for the creditor to be paid something on its claim, a classic debt-collection activity. In the event a creditor invokes the bankruptcy debt-collection procedure improperly by filing a proof of claim seeking to collect an unenforceable debt, the Code clearly provides that such claims must be disallowed. 11 U.S.C. § 502(b)(1). And the fact that such claims must be disallowed under section 502 dramatically undercuts any notion that it is somehow legitimate for creditors to file such claims in the first instance.

Although the proof of claim process acts generally as a non-bankruptcy litigation substitute, the filing of a proof of claim can easily morph into formal debt-collection litigation, either within

or outside the bankruptcy court. For example, where a creditor has filed a proof of claim, relief from stay may be granted so that the claim may be liquidated in a traditional litigation forum, leaving only the consideration of unique aspects of bankruptcy law to be adjudicated in the bankruptcy court. *See, e.g., Baldino v. Wilson (In re Wilson)*, 116 F.3d 87, 91 (3d Cir. 1997) (allowing relief from stay to "expedite the resolution of [the state tort] claim by eliminating it if [the debtor] prevails on appeal, or by rendering it final and nondischargeable if [the plaintiff] prevails"); *In re Chacon*, 438 B.R. 725, 736 (Bankr. D. N.M. 2010) ("A number of courts have . . . come up with the same solution: permit the liability and damages issues to be determined either in the state court or the U.S. district court, and then have the parties return to the bankruptcy court as needed for an adjudication of the dischargeability issue."); *In re Cummings*, 221 B.R. 814, 819 n.9 (Bankr. N.D. Ala. 1998) ("Numerous courts have determined that, under appropriate circumstances, a bankruptcy court may grant relief from the stay to allow a debt to be liquidated in a pending state court proceeding, and then make a determination of dischargeability based on the state court record."). In such circumstances where relief from stay has been granted and the creditor pursues a time-barred lawsuit against the debtor, the creditor's claim would obviously be subject to any statute of limitations defense, and the pursuit of the litigation itself may well violate the FDCPA. *See, e.g., Phillips*, 736 F.3d at 1079; *Kimber*, 668 F. Supp. at 1487 (finding an FDCPA violation because "time-barred lawsuits are, absent tolling, unjust and unfair as a matter of public policy").

Alternatively, creditors may file proofs of claim and have their claims adjudicated entirely in the bankruptcy court. Once again, such proofs of claim are likewise subject to any available statute of limitations defense and, if time-barred, must be disallowed as unenforceable under section 502 of the Bankruptcy Code. 11 U.S.C. § 502(b)(1). The question is whether, for

purposes of the FDCPA, debt-collection activity involving the filing of a proof of claim should be viewed differently from the very non-bankruptcy debt-collection activity that the proof of claim process substitutes for.

Johnson observed that, just like a debt collector who threatens or commences a traditional lawsuit on a debt he knows is stale, a debt collector who knowingly files a proof of claim for a time-barred debt is plainly seeking to collect a debt that the collector "knows or should know is unavailable or unwinnable by reason of a legal bar." *Herkert*, 655 F. Supp. 2d at 876 (citation and quotation marks omitted). Such conduct is precisely "the kind of abusive practice the FDCPA was intended to eliminate." *Id.*; *see also Beattie*, 754 F. Supp. at 393. Thus, a debt collector's filing of a proof of claim on a debt he knows is time-barred is similarly "unjust and unfair as a matter of public policy" and violates the FDCPA for the same reasons applicable to a traditional debt-collection lawsuit. *Kimber*, 668 F. Supp. at 1487; *see also McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) ("Whether a debt is legally enforceable is a central fact about the character and legal status of that debt. A misrepresentation about that fact thus violates the FDCPA.").

The parallel between a proof of claim and a traditional debt-collection lawsuit is even more apparent in the scenario in which a debtor in bankruptcy objects to a proof of claim and files a counterclaim. A claim combined with an objection and counterclaim gives rise to an "adversary proceeding" under the Bankruptcy Rules, which is just the bankruptcy term for what amounts to a traditional lawsuit commenced by a summons and complaint. *See* FED. R. BANKR. P. 3007(b); FED. R. BANKR. P. 7001 (defining adversary proceedings); *see also, e.g., Mulvania v. United States (In re Mulvania)*, 214 B.R. 1, 7 (B.A.P. 9th Cir. 1997) (objection to claim joined with request to determine validity of lien is an adversary proceeding).

Notably, an adversary proceeding is a separate piece of litigation from the overarching bankruptcy case and in large part mirrors litigation that occurs outside the bankruptcy context. *See, e.g., Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 457 (2004) (Thomas, J., dissenting) ("The similarities between adversary proceedings in bankruptcy and federal civil litigation are striking."); *Estancias La Ponderosa Dev. Corp. v. Harrington (In re Harrington)*, 992 F.2d 3, 6 n.3 (1st Cir. 1993) (noting "[t]he great similarity between an adversary proceeding in bankruptcy and an ordinary civil action"). The Bankruptcy Rules incorporate the Federal Rules of Civil Procedure in adversary proceedings, making discovery and pretrial procedure in an adversary proceeding largely identical to that in traditional civil litigation. *See* FED. R. BANKR. P. 7016 (adopting FED. R. CIV. P. 16 regarding pretrial conferences); FED. R. BANKR. P. 7026-7037 (adopting discovery rules in FED. R. CIV. P. 26 to 37). The filing of a proof of claim, therefore, can easily give rise to a distinct piece of litigation virtually indistinguishable from ordinary civil litigation.

Midland countered that, in spite of the similarities between the filing of a proof of claim on a stale debt and a traditional lawsuit premised on the same stale debt, the filing of a proof of claim cannot be a violation of the FDCPA because "[d]ebt recovery within bankruptcy is fundamentally different from debt collection outside bankruptcy." For example, "debtors in bankruptcy are protected by a panoply of procedures," including the assignment of a trustee (and often counsel) to object to claims, regulations governing the content of proofs of claim and the procedures for administering them, and sanctions for abusive conduct. Johnson responded, however, that similar protections exist for debtors outside of bankruptcy. And just as none of these protections excuse application of the FDCPA in traditional litigation, the protections

Midland identified, Johnson contended, do not excuse the application of the FDCPA to debt-collection activity involving a proof of claim.

For example, under both state and federal law, traditional complaints must meet all applicable pleading standards or risk dismissal. *See, e.g.*, FED. R. CIV. P. 8(a)(2) (a complaint must include a "short and plain statement of the claim showing that the pleader is entitled to relief"); ALA. R. CIV. P. 8(a) (same); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (dismissing a complaint that did not provide "enough facts to state a claim to relief that is plausible on its face"). Moreover, where counsel are involved, they must certify that the relevant pleadings are true and well-founded. For example, an attorney signing a pleading in federal court certifies that a reasonable inquiry has been made regarding the truth of the factual allegations contained therein, the claims are warranted, and the pleading is not motivated by an improper purpose. FED. R. CIV. P. 11; *see also, e.g.*, ALA. R. CIV. P. 11. Under these standards, knowingly filing a time-barred lawsuit has been held to be sanctionable conduct. *See Kimber*, 668 F. Supp. at 1488 (citing cases). But that does not mean that the FDCPA also does not apply.

By the same token, Johnson argued, the mere fact that certain bankruptcy procedures may also shield a debtor from certain kinds of harm arising from illegitimate proofs of claim is not sufficient reason to excuse application of the FDCPA, which has its own focus and remedial scope. The relevant inquiry in determining if a debt-collection action violates the FDCPA is whether a debt collector's conduct is misleading or deceptive, not whether other potential safeguards are in place to further combat abuses. *See, e.g., Freyermuth*, 248 F.3d at 771 ("The case law on this issue focuses on the debt collector's actions, and whether an unsophisticated consumer would be harassed, misled or deceived by them.").

Midland also contended that the FDCPA does not apply to proofs of claim premised on time-barred debts because a creditor has the right under the Bankruptcy Code to file a proof of claim and the debtor may always raise any applicable statute of limitations as a defense. But the same thing can be said, Johnson observed, of traditional debt-collection litigation: the creditor has the right to file a complaint and the debtor may raise any applicable statute of limitations as a defense. *See Goins*, 352 F. Supp. 2d at 272. Notably, courts have consistently rejected this argument as a reason to avoid application of the FDCPA to time-barred lawsuits. *Id.* (although statute of limitations is an affirmative defense that can be waived, it is "a complete defense" and "the threat to bring a suit under such circumstances can at best be described as a 'misleading' representation"); *Kimber*, 668 F. Supp. at 1488 (rejecting assertion that "because a statute of limitations is an affirmative defense which is waived if not raised, a plaintiff may not be penalized for knowingly filing a time-barred suit"). The same reasoning applies to proofs of claim.

The analysis in *Midland*, of course, involves the construction of statutory enactments, and in construing and applying any statute, "[t]he starting point . . . is the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)); *see also United States v. Ron Pair Enters*., 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [the statutory provision at issue] begins where all such inquiries must begin: with the language of the statute itself."). In addition, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations and quotation marks omitted); *see also Rake v. Wade*, 508 U.S. 464, 471 (1993); *Connecticut Nat'l*

Bank v. Germain, 503 U.S. 249, 253-54 (1992). That is because a cardinal presumption is that Congress "says in a statute what it means and means in a statute what it says there." *Germain*, 503 U.S. at 254. Similarly, courts must also generally refrain from engrafting limitations on statutory provisions that do not appear in its text. *See, e.g., Lamie*, 540 U.S. at 538.

On its face, Johnson recited, the FDCPA prohibits debt collectors from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," including "false[ly] represent[ing] . . . the character, amount, or legal status of any debt," 15 U.S.C.

§ 1692e. The FDCPA also prohibits a debt collector from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt," including collecting any amount that is not "expressly authorized by the agreement creating the debt or permitted by law." *Id.* § 1692f. There is no exception in the statute for filing proofs of claim in a bankruptcy proceeding. Rather, the FDCPA provides its own protections by expressly applying only to creditors that qualify as "debt collectors" and allowing a safe harbor for those debt collectors whose violations are "not intentional and resulted from a bona fide error." *Id.* § 1692k(c).

Johnson contended that a debt collector who knowingly attempts to collect a claim by filing a proof of claim premised on a time-barred debt violates the FDCPA no less than a debt collector who knowingly threatens to file or files a traditional lawsuit premised on the same time-barred debt. Both acts fall squarely within the plain terms and remedial scope of the FDCPA, and to read into the statute an exception for proofs of claim filed with a bankruptcy court would improperly apply a limitation to the statute that does not exist. *See Lamie*, 540 U.S. at 538.

Midland contended that the Bankruptcy Code and the FDCPA stand in conflict, with the later giving way to the former. In making its argument, Midland contended that the Bankruptcy Code

provides all of the rules applicable to the filing of proofs of claim, leaving no room for the FDCPA. Johnson countered that the Bankruptcy Code does not supply the full universe of laws and rules that govern the conduct of bankruptcy proceedings. *See, e.g.,* 28 U.S.C. § 959(b) (requiring any trustee, receiver, or debtor in possession to "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated"); *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Prot.*, 474 U.S. 494, 507 (1986) (finding that "[t]he Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety" as required by state law). Although it is true that provisions such as the automatic stay proscribe certain conduct, it is equally true that Congress did not intend for parties in bankruptcy "to have *carte blanche* to ignore nonbankruptcy law." *Id.* at 502.

Moreover, Johnson reiterated that a creditor's right to file a proof of claim is voluntary, not mandatory, observing that section 501 of the Bankruptcy Code provides that "a creditor . . . *may* file a proof of claim." 11 U.S.C. § 501(a) (emphasis added). In comparison, the FDCPA prohibits a "debt collector" from using "any false, deceptive, or misleading representation" or "unfair or unconscionable means" to collect a debt, 15 U.S.C. §§ 1692e, 1692f, unless the debt collector can show by a preponderance of the evidence that its FDCPA violation "was not intentional and resulted from a bona fide error," *id.* § 1692k(c). Nothing in section 501, Johnson argued, creates an exception to the FDCPA for creditors filing proofs of claim in bankruptcy proceedings or suspends the operation of the FDCPA in the bankruptcy context. As the Supreme Court has stated, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent

a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari,* 417 U.S. 535, 551 (1974).

Johnson argued further that, because there is nothing in the language of section 501 that negates application of the FDCPA to debt collectors who file proofs of claim that are "false, deceptive, or misleading" or "unfair or unconscionable," application of the FDCPA should continue in the absence of a clearly stated congressional expression to the contrary. *See Fourco Glass Co. v. Transmirra Prods. Corp.,* 353 U.S. 222, 227 (1957) ("It will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed."); *Green v. Bock Laundry Mach. Co.,* 490 U.S. 504, 521 (1989) (party contending Congress changed settled law has burden of showing intent). There is no such expression in section 501 (or anywhere else in the Bankruptcy Code), therefore both laws are effective.

In support of her position, Johnson invoked the cardinal rule of statutory construction that implicit repeals of one federal statute by another are not favored and will not be found unless the congressional intent to repeal is "clear and manifest." *Red Rock v. Henry*, 106 U.S. 596, 602 (1883); *accord Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007); *Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). The party urging repeal, here Midland, "bears a heavy burden of persuasion" in establishing such intent, *Amell v. United States*, 384 U.S. 158, 165 (1966), which, as noted, are disfavored. *Nat'l Ass'n of Home Builders*, 551 U.S. at 662; *see also Branch v. Smith*, 538 U.S. 254, 273 (2003); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). The Supreme Court has made clear that it "will not infer a statutory

repeal unless the later statute expressly contradict[s] the original act or unless such a construction is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662 (alterations in original) (citations and quotation marks omitted).

The Supreme Court has identified two specific situations in which repeal by implication may occur: "where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch*, 538 U.S. at 273 (quoting *Posadas*, 296 U.S. at 503). Midland did not claim that section 501 of the Bankruptcy Code covers the whole subject of, or is clearly intended to substitute for, the FDCPA. Midland's sole contention was that the statutes "irreconcilably conflict" and that the FDCPA must yield to the later-enacted Bankruptcy Code. *See* Pet. Br. 43-44.

Irreconcilability may be found, however, only where it is "impossible for both provisions under consideration to stand." *Wilmot v. Mudge*, 103 U.S. 217, 221 (1880); *see also Morton*, 417 U.S. at 550 (no implied repeal where the statutes in question "can readily co-exist"). Under this stringent standard, courts may find irreconcilable conflict only where there is "a clear repugnancy between the old law and the new." *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 457 (1945), *reh'g denied*, 324 U.S. 890 (1945); *accord Tennessee Valley Auth.*, 437 U.S. at 190. Where a party advocating for repeal fails to meet the heavy burden of demonstrating that two statutes cannot, under any circumstances, be reconciled, courts must apply both provisions. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." (quoting *Morton*, 471 U.S. at 551)); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) ("It is not enough

to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem.").

Under the Supreme Court's longstanding precedents, Johnson argued, the Court should not infer repeal of the FDCPA as to proofs of claim filed in bankruptcy unless such an inference "is absolutely necessary . . . in order that the words of the [Bankruptcy Code] shall have any meaning at all." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662. Midland, Johnson contended, could not meet the heavy burden of showing such a necessity exists because the Bankruptcy Code simply does not prohibit what the FDCPA directs. Once again, section 501 merely provides that "a creditor . . . *may* file a proof of claim." 11 U.S.C. § 501(a) (emphasis added). In contrast, the FDCPA prohibits a "debt collector" from using "any false, deceptive, or misleading representation" or "unfair or unconscionable means" to collect a debt. 15 U.S.C. §§ 1692e, 1692f. A "debt collector" is defined as "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another." *Id.* § 1692a. Thus, while creditors generally are permitted to file proofs of claim in a debtor's bankruptcy proceeding, the select creditors who also qualify as "debt collectors" violate the FDCPA by knowingly and intentionally choosing to file a proof of claim on a time-barred debt.

Debt collectors can easily comply with both the Bankruptcy Code and the FDCPA, Johnson believed, and it is therefore in no way "impossible for both provisions . . . to stand." *Wilmot*, 103 U.S. at 221. A debt collector is free to choose to file only proofs of claim that do not violate the FDCPA. The two provisions clearly "are capable of coexistence," and it therefore "is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. Ag Supply, Inc.*, 534 U.S. at 143-44.

But even if the FDCPA and the Bankruptcy Code could be said to "irreconcilably conflict" in some sense, repeal by implication is still not appropriate unless the legislature's intent to cause such a result is "clear and manifest." *Posadas*, 296 U.S. at 503; *see also Nat'l Ass'n of Home Builders*, 551 U.S. at 662; *Rodriguez*, 480 U.S. at 524. As the Eleventh Circuit acknowledged, Johnson argued, there was no "clear and manifest" Congressional intent to repeal the FDCPA with the enactment of the Bankruptcy Code.

Reversing the Eleventh Circuit, the Supreme Court held that the filing of an obviously time-barred proof of claim is not a false, deceptive, misleading, unfair, or unconscionable debt collection act within the meaning of the FDCPA. The Court observed that, under Alabama law, a creditor typically retains the right to payment of a debt even after the limitations period has expired. Thus, the creditor typically retains a "right to payment" for bankruptcy purposes, even though the debt may not be enforced. The Court observed that the concept of a "claim" for bankruptcy purposes requires a right to payment, but not explicitly an "enforceable" right to payment. Rather, under section 502(b)(1), a claim that is unenforceable will be disallowed, but that does not mean it was not a proper claim to begin with. The Court determined that this reflects the longstanding practice of treating unenforceability as an affirmative defense.

The Court did not believe that the filing of an obviously time-barred claim was misleading within the meaning of the FDCPA because the audience in a bankruptcy case typically includes a bankruptcy trustee, who will not be misled. Rather, the trustee will understand, even if the debtor does not, that a time-barred claim is subject to disallowance.

The Court likewise did not believe that the filing of an obviously time-barred proof of claim was unfair or unconscionable. In the ordinary civil litigation context, courts have determined that attempts to collect a time-barred claim might lead a consumer debtor to unwittingly repay a

time-barred debt. But in bankruptcy, the Court reasoned, where a trustee is available, these concerns are diminished.

The Court also worried that a rule that replaced the affirmative-defense approach in bankruptcy with a blanket prohibition for stale claims could create problems of its own. For example, under what circumstances would the rule apply? Would it apply only where it was obvious that the claim was time-barred? The Court observed that neither the Bankruptcy Code nor the FDCPA answered such questions. The Court also worried that replacing the affirmative-defense approach would upset the "delicate balance" that Congress struck between a debtor's protections and the rights of creditors. The Court was unwilling to interfere with that balance.

Justices Sotomayor, Ginsburg, and Kagan dissented. The dissent reasoned that the practice of knowingly filing time-barred proofs of claim is both unfair and unconscionable. The dissent noted that statutes of limitations have not deterred creditors from seeking the repayment of unenforceable debts, and that the FDCPA was designed to provide an additional remedy that applies equally in bankruptcy.

C. Husky

Section 523(a)(2)(A) of the Bankruptcy Code excludes from an individual debtor's bankruptcy discharge any debt for money, property, services, or credit to the extent "obtained by . . . actual fraud." The provision is important because it creates an exception to an individual debtor's fresh start for debts that fall within its scope.

In *Husky*, the Supreme Court construed section 523(a)(2)(A) in an unusual setting. In particular, the Court considered the meaning of the phrase "actual fraud," as well as whether the debt in question had been one for goods "obtained by" fraud of some kind. A majority of the

Court concluded that the term "actual fraud" may encompass the conduct of the recipient of a fraudulent transfer who owes a debt for property obtained through the fraudulent transfer scheme if the recipient also had the requisite fraudulent intent, but the Court expressly declined to determine whether the particular debt in the case was for anything "obtained by" fraud. In dissent, Justice Thomas concluded that the debt at issue had not been "obtained by" fraud because there was no evidence that the debtor had induced the creditor to part with the goods giving rise to the debt through the use of any fraudulent means. The Court remanded the matter to the Fifth Circuit to resolve the open question that Justice Thomas essentially answered.

Between 2003 and 2007, the creditor, Husky International Electronics, Inc., sold goods to a business called Chrysalis Manufacturing Corp. An individual, Daniel Ritz, was involved in running Chrysalis. After Chrysalis failed to pay for the goods, Husky discovered that Ritz had caused Chrysalis to make various transfers of funds from Chrysalis to other businesses that Ritz controlled, leaving Chrysalis unable to pay its $163,999.38 debt to Husky. Husky sued Ritz personally, claiming that he should be liable for Chrysalis' debt on a state-law veil-piercing theory.

As part of its theory, Husky contended that the transfers Ritz caused Chrysalis to make were fraudulent conveyances, and specifically that Ritz had acted with actual intent to defraud Husky in causing the transfers to be made. After Ritz filed for bankruptcy, Husky asserted that the debt was non-dischargeable under section 523(a)(2)(A). Husky's theory was that Ritz' fraudulent conveyances made with actual intend to defraud constituted "actual fraud" for purposes of section 523(a)(2)(A). Following prior circuit precedent, the Fifth Circuit ruled that Ritz' conduct did not constitute "actual fraud" for purposes of section 523(a)(2)(A) because he never made any misrepresentation to Husky to induce Husky to deliver the goods to Chrysalis. In

other words, the Fifth Circuit concluded that a misrepresentation of some kind was necessary to establish "actual fraud" for purposes of the statutory provision. A majority of the Supreme Court reversed, concluding that it is possible for a debtor to commit actual fraud without making a misrepresentation. As noted, however, the Court expressly declined to address whether any debt that Ritz may owe was for money, property, services, or credit "obtained by" actual fraud.

Most of the majority's opinion focuses on the meaning of term "actual fraud" and whether a fraudulent conveyance may constitute an example of actual fraud. Although the phrase typically encompasses conduct that includes a misrepresentation of some kind, the Court concluded that actual fraud within the meaning of section 523(a)(2)(A) could be shown in the absence of a misrepresentation in the rare instance in which the recipient of a fraudulent transfer obtained the property transferred with the requisite fraudulent intent and, correspondingly, owed a debt for the property so obtained. Such a debt, the court reasoned, could be a debt for property obtained by actual fraud even though the debtor had made no misrepresentation to anyone. The Court declined, however, to determine whether the facts and circumstances of the Husky case fit that paradigm. In particular, the Court expressly declined to address whether the debt at issue was for money, property, services, or credit obtained by fraud as the section requires, and for good reason. In Husky, the particular debt at issue was the $163,999.38 that Chrysalis owed for the goods that Husky delivered, not any debt that Ritz owed as the recipient of a fraudulent transfer.

Focusing on the particular wording of section 523(a)(2)(A) as a whole, Justice Thomas in his dissent reasoned that the phrase "actual fraud" appearing in section 523(a)(2)(A) applies only to debts for property "obtained by" actual fraud at the inception of a credit transaction, and, he noted, the relevant debt for $166,999.38 was not "obtained by" fraud in this sense. In his view, actual fraud for purposes of section 523(a)(2)(A) does not encompass fraudulent transfer

schemes because no one ever uses a fraudulent transfer scheme to induce a creditor to part with the creditor's money, goods, services, or credit. Rather, fraudulent transfer schemes are used to drain a debtor of property, leaving the debtor's creditors unpaid. Although a fraudulent transfer scheme may vest the transferee of the scheme with property, and the transferee may thereafter owe a debt under fraudulent conveyance principles for the value of the property transferred, that is not the kind of debt that section 523(a)(2)(A) envisions. Instead, section 523(a)(2)(A) envisions a debt owed to a creditor for money, property, services, or credit that the debtor fraudulently induced the creditor to part with. For discharge purposes, fraudulent transfer schemes are addressed in an entirely different provision—section 727(a)(2)(A)—which denies a debtor a discharge in a Chapter 7 case if the debtor made a fraudulent transfer of his or her property within a year before filing for bankruptcy.

Ultimately, the Court's decision in Husky is a narrow one. Given the Court's clear statement that it was not deciding whether the particular debt at issue was for money, property, services, or credit "obtained by" fraud, it seems fair to conclude that all the Court actually decided was that a fraudulent transfer could be an example of actual fraud, not whether Ritz' particular obligation was actually non-dischargeable.

On remand, the Fifth Circuit observed that the Supreme Court had not determined that actual fraud had occurred. It only concluded that a misrepresentation was not absolutely necessarily to show actual fraud. Nor did the Supreme Court determine whether Husky could ultimately prevail in its attempt to prove that Ritz should be denied a discharge of the relevant debt. Whether the debt could be discharged, turned at least in part on whether in fact Ritz owed a debt to Husky. Although the district court had concluded that Ritz did owe a debt to Husky, the Fifth Circuit reversed that determination because it rested on factual determinations the bankruptcy

court, as the trier of fact, had not actually made and the district court, sitting on appeal, was not entitled to make.

In particular, the bankruptcy court never drew the inference from its factual findings that Ritz's various transfers were made with actual intent to hinder, delay, or defraud any creditor. Because the bankruptcy court never drew this inference from the facts, the district court erred in holding that Ritz was liable for the debt to Husky. That is so because whether Ritz was liable for the debt turned on whether the corporate veil could be pierced such that Ritz could be made liable for Chrysalis' debt. And whether the corporate veil could be pierced turned on whether Ritz committed actual fraud. Under Texas law, whether Ritz intended to defraud Husky (and therefore whether he committed actual fraud necessary for the corporate veil to be pierced) is a question of fact for the trier of fact to make, not some other court. Hence, the Fifth Circuit vacated the district court's decision and remanded to the bankruptcy court for further findings.

16288184.1.LITIGATION

STATUTORY INTERPRETATION IN BANKRUPTCY CASES[1]

The Supreme Court of the United States often goes out of its way to avoid deciding constitutional issues. Therefore, before addressing a constitutional issue, the Court will look for a jurisdictional or statutory basis to resolve the case before it.[2] A good example is the Court's decision in *United States v. Security Industrial Bank,*[3] which held that the avoiding powers of the Bankruptcy Code do not apply retroactively rather than addressing whether the retroactive application of the statute would offend the Fifth Amendment of the Constitution.[4]

In order to give the appearance that it decides cases according to a rational rule of law, the Court often articulates rules of statutory construction or legal maxims that inform its decisions. Although these rules and maxims simply might be a veneer for the bald political forces that many suspect underlie case outcomes, they must be briefed and argued as part of the formalism of the Court. Admittedly, there are some Justices who are textualists[5] whose vote might be tied inextricably to these rules and maxims, unless an issue of great policy would be contravened by blindly adhering to them. A brief examination of the rules of statutory construction and legal maxims helps to understand the complexity woven into the Court's rhetorical bases for making legal decisions.

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[1] This paper is a modified version of a portion of Chapter 1 of Kenneth N. Klee & Whitman L. Holt's book, BANKRUPTCY AND THE SUPREME COURT: 1801-2014 (West Academic 2015), which is used here with the prior written consent of the publisher and the authors. The panelists encourage readers interested in more complete analysis of the issues and opinions discussed in this paper to purchase the complete book.

[2] In some instances, however, the plain language of a statute or the importance of the issue presented allows the Court little choice but to address a Constitutional question. *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 478 (2011) (declining to utilize the canon of constitutional avoidance to eliminate need to consider the constitutionality of 28 U.S.C. § 157(b)(2)(C) under Article III); Milavetz, Gallop & Milavetz P.A. v. United States, 559 U.S. 229, 239 (2010) (concluding that the plain text of 11 U.S.C. § 101(12A) did not allow the Court to use the canon of constitutional avoidance to sidestep the need to examine the validity of certain Bankruptcy Code provisions under the First Amendment).

[3] 459 U.S. 70 (1982).

[4] *See id.* at 82 (holding that Bankruptcy Code § 522(f)(2) does not apply retroactively, thereby avoiding a difficult constitutional question).

[5] Justices Alito, Gorsuch, Roberts, and Thomas are textualists whose first approach to resolving a dispute over the Bankruptcy Code is to begin with the plain language of the statute. Based on her opinions in the *Hall* and *Baker Botts* cases, Justice Sotomayor appears to have textualist tendencies, at least in bankruptcy cases. Other Justices, such as Justice Breyer, are purposivists who will look to the purpose the statute addresses as a point of first inquiry. Still other Justices, such as now-retired Justice Stevens, might take a mixed approach, first addressing what is fair as a matter of policy or equity.

STATUTORY CONSTRUCTION

> "The bankruptcy law has now been so thoroughly construed that there is not much doubt about any of its provisions. . . ."[6]

Numerous articles and books discuss statutory construction, and some analyze the Supreme Court's use of statutory construction to decide cases.[7] A few do so specifically with respect to the Court's use of statutory construction in bankruptcy cases.[8] Although this paper does not have the depth or breadth of analysis contained in articles and books dedicated solely to this topic, it might provide the reader with interesting insights about the Supreme Court's use of statutory construction in bankruptcy decisions.

The analysis begins by identifying and then examining the Court's use of maxims of statutory construction in bankruptcy cases. An illustration of their uses with specific examples, noting the use of conflicting maxims, and concluding with a discussion whether the Court uses the maxims as a basis for decision or to rationalize a decision *ex post*, follows.

During the twentieth century, the Court used several maxims of statutory construction in bankruptcy decisions generally reflective of the guiding principle that the Court is to interpret statutes, not make them.[9] Although many of the maxims are generalizable to other areas of the law, the use of such maxims may have particular relevance in the bankruptcy arena given Justice Scalia's observation about how "[t]he Bankruptcy Code standardizes an expansive *(and sometimes unruly)* area of law, and

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[6] *See* H.R. REP. NO. 1182, 63d Cong., 2d Sess. 1 (1914), reprinted in 52 CONG. REC. 435.

[7] *See, e.g.,* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,* in A MATTER OF INTERPRETATION 3 (Amy Gutmann ed., 1997); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critiq*ue, 36 HARV. J. LEGIS. 368–95 (1999). *See generally* H.L.A. Hart, *The Concept of Law* 121–44 (Oxford: Clarendon Press, 1961) (arguing for "open texture" position on judicial interpretation between formalism and rule-skepticism).

[8] *See, e.g.,* Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887 (2000) (discussing legislatively overruled Supreme Court and lower court decisions); Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAPMAN L. REV. 173 (2000) (discussing the interpretive conflict and the Bankruptcy Code while reviewing bankruptcy cases from the Court's 1981 through 1998 terms).

[9] *See* N.Y. County Nat'l Bank v. Massey, 192 U.S. 138, 146 (1904) ("We are to interpret statutes, not to make them."). *See generally* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 24–27 (Aspen Law & Business 1997) (explaining and criticizing the use of canons because "canons are not a coherent, shared body of law from which correct answers can be drawn, and . . . viewed individually, many canons are wrong"); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395–406 (1950) (describing 28 pairs of canons of statutory construction and their opposites and how the current temper of the Court and needs to be addressed affects their use).

it is [the Court's] obligation to interpret the Code clearly and predictably using well established principles of statutory construction."[10]

Among the more important and frequently used maxims of statutory construction are the following:

1. When the language of the statute is unambiguous, courts must interpret the language in accordance with its plain meaning[11] without regard to legislative history,[12] except in the rare case in which the literal application of the "statute will produce a result demonstrably at odds with the intentions of its drafters."[13]

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[10] RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012) (emphasis added).

[11] *See, e.g.,* Patterson v. Shumate, 504 U.S. 753, 760 (1992) (party seeking to defeat plain meaning of the Bankruptcy Code bears an "exceptionally heavy burden" (internal quotation marks omitted)); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then . . . 'judicial inquiry is complete.' " (citation omitted)); Gleason v. Thaw, 236 U.S. 558, 560 (1915) ("[T]he Bankrupt Law is a prosy thing intended for ready application to the everyday affairs of practical business, and when construing its terms we are constrained by their usual acceptation in that field of endeavor."); Citizens Banking Co. v. Ravenna Nat'l Bank, 234 U.S. 360, 368 (1914) ("The advantages and disadvantages have been balanced by Congress, and its will has been expressed in terms which are plain and therefore controlling."); Crawford v. Burke, 195 U.S. 176, 189 (1904) ("The language of this section is so clear as to require no construction."); New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. (1 Otto) 656, 662 (1876) ("Statutes must be interpreted according to the intent and meaning of the legislature; and that intention must, if practicable, be collected from the words of the act itself[.]"); Sloan v. Lewis, 89 U.S. (22 Wall.) 150, 155 (1875) ("If the intention of Congress is manifest from what [appears in the text of the bankruptcy statute itself] we need not go further."); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) ("Where the intent is plain, nothing is left to construction.").

[12] *See, e.g.,* Barnhill v. Johnson, 503 U.S. 393, 401 (1992) ("[W]e note that appeals to statutory history are well taken only to resolve 'statutory ambiguity.' " (citation omitted)); Toibb v. Radloff, 501 U.S. 157, 162 (1991) ("[T]his Court has repeated with some frequency: 'Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.' "); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240–41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there is generally no need for a court to inquire beyond the plain language of the statute. The task of resolving the dispute over the meaning of [the statute] begins where all such inquiries must begin: with the language of the statute itself.") ("*Ron Pair*"); Kuehner v. Irving Trust Co., 299 U.S. 445, 449 (1937) ("The legislative history of this provision . . . cannot affect its interpretation, since the language of the act as adopted is clear.").

[13] *See Ron Pair*, 489 U.S. at 242 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (citation omitted; quoted with approval in Perry v. Commerce Loan Co., 383 U.S. 392, 400 (1966))); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (explaining "that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed"). *Cf.* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202–03 (1819) (adopting a rule of contract construction that overrides plain meaning to avoid "absurdity and injustice").

2. When the language of the statute is clear, the Court must enforce it in accordance with its terms notwithstanding prior practice.[14]

3. Even when the language of the statute is clear, courts must consider the legislative history and issues of policy and previous practice to determine congressional intent.[15]

4. The Court must not erode a past bankruptcy practice absent a clear indication in the legislative history that Congress intended such a departure.[16]

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[14] *See, e.g.,* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 10 (2000) ("[W]hile pre-Code practice 'informs our understanding of the language of the Code,' it cannot overcome that language. It is a tool of construction, not an extratextual supplement." (citation omitted)); BFP v. Resolution Trust Corp., 511 U.S. 531, 546 (1994) ("Where the 'meaning of the Bankruptcy Code's text is itself clear,' . . . its operation is unimpeded by contrary state law or prior practice."); Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990); *Ron Pair*, 489 U.S. at 245–46.

[15] *See, e.g.,* Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 69–72 (2011) (looking to statutory context and purpose to buttress textual interpretation); Kelly v. Robinson, 479 U.S. 36, 43 (1986) ("[T]he text is only the starting point. . . . In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (internal quotation marks and citations omitted)); Bank of Marin v. England, 385 U.S. 99, 103 (1966) ("[We] do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."); Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 279 (1940) ("And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress, lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act." (internal citations omitted)); Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440, 459 (1937) ("The new Act does not in terms provide for 'The right to protect its [the mortgagee's] interest in the property by bidding at such sale whenever held.' But the committee reports and the explanations given in Congress make it plain that the mortgagee was intended to have this right. We accept this view of the statute." (footnote omitted; parenthetical in original)); City of Lincoln v. Ricketts, 297 U.S. 373, 376 (1936) ("In construing the words of an act of Congress, we seek the legislative intent. We give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation." (citations omitted)); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543–44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " (footnotes omitted)); Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 555 (1915) ("And nothing is better settled than that statutes should be sensibly construed, with a view to effectuating the legislative intent." (citations omitted)). *Cf.* Corn Exch. Nat'l Bank & Trust Co. v. Klauder, 318 U.S. 434, 438 (1943) ("[W]e find nothing in Congressional policy which warrants taking this case out of the letter of the Act."); United States v. Emory, 314 U.S. 423, 430 (1941) ("We are aware of no canon of statutory construction compelling us to hold that the word 'first' in a 150 year old statute means 'second' or 'third', unless Congress later has said so or implied it unmistakably.").

[16] *See, e.g.,* Cohen v. de la Cruz, 523 U.S. 213, 221 (1998) ("We . . . will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." (internal quotation marks and citation omitted)); Dewsnup v. Timm, 502 U.S. 410, 419 (1992) ("[T]his Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."); Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 501 (1986) ("The normal rule of construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. . . . The Court has followed this rule with particular care in construing the scope of bankruptcy

5. When Congress uses different language in a successor statute, the Court presumes that Congress has changed its intent.[17]

6. A later statute that does not apply retroactively cannot be invoked to influence construction of an earlier statute.[18]

7. Under the rule of *stare decisis*, once the Supreme Court has decided an issue of statutory construction, the decision is final and binding in future cases, even if the plain meaning of the text is to the contrary.[19]

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codifications." (citation omitted)) (cited with approval in United States v. Noland, 517 U.S. 535, 539 (1996)).

[17] *See* Crawford v. Burke, 195 U.S. 176, 190 (1904) ("Our own view, however, is that a change in phraseology creates a presumption of a change in intent, and that Congress would not have used such different language . . . without thereby intending a change in meaning."). *Cf.* Williams v. Austrian, 331 U.S. 642, 661–62 (1947) ("This negation of long-standing policy should be given effect . . . and should not be hedged by judge-made principles not in accord with those aims. Congress need not document its specific actions in elaborate fashion in order to direct this Court's attention to statutory policy and purpose. The failure to provide appropriate fanfare for . . . the consequent expansion of federal jurisdiction, hardly invites our opinion as to the advisability of the action which Congress has taken."). *But see* Maynard v. Elliott, 283 U.S. 273, 277 (1931) ("Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present case."); Van Huffel v. Harkelrode, 284 U.S. 225, 227 (1931) (finding the right to sell free and clear of encumbrances by implication under the Bankruptcy Act of 1898 even though the Bankruptcy Act of 1867 contained an express provision allowing the power to sell free and clear).

[18] *See* Levy v. Indus. Fin. Corp., 276 U.S. 281, 284 (1928) ("But that statute did not govern this case and cannot be invoked for the construction of the earlier law."). *But cf.* United States v. Emory, 314 U.S. 423, 430 (1941) ("We are aware of no canon of statutory construction compelling us to hold that the word 'first' in a 150 year old statute means 'second' or 'third,' unless Congress later has said so or implied it unmistakably.").

[19] *See* Bank of Am., N.A. v. Caulkett, 575 U.S. ___, 135 S.Ct. 1995, 1999–2000 (2015) (noting how a "straightforward reading of the statute" supported the debtors' position about the operation of Bankruptcy Code section 506, but rejecting that position under the Court's prior holding in *Dewsnup v. Timm*, 502 U.S. 410 (1992), because "[t]he debtors do not ask us to overrule *Dewsnup*"). Technically speaking, the doctrine of *stare decisis* is not a rule of statutory construction but is a court-created doctrine that applies to preclude the Court from reconsidering its previous interpretation of statutory language. *See generally* Boyle v. Zacharie, 31 U.S. (6 Pet.) 348 (1832) (brief opinion by Justice Marshall stating that the principles established in *Ogden v. Saunders* "are to be considered no longer open for controversy, but the settled law of the court" despite Marshall's dissent in *Ogden*). As with rules of statutory construction, however, the Court appears to invoke *stare decisis* only when its application suits the outcome that a majority of the Court wants to reach. For example, in Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 446 (2004), the Court construed the Eleventh Amendment of the United States Constitution to apply to suits against a state by citizens of its own state even though the text of the Eleventh Amendment "refers only to suits against a State by citizens of another State." *But see, e.g.*, Perez v. Campbell, 402 U.S. 637 (1971) (overruling *Kesler* and *Reitz* as misinterpreting the Supremacy Clause of the Constitution). *Accord* Washington v. W. C. Dawson & Co., 264 U.S. 219, 238 (1924) (Frankfurter, J., dissenting) ("Stare decisis is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the Court has disregarded its admonition are many." (footnote omitted)); Cook v. Moffat, 46 U.S. (5 How.) 295, 309 (1847) (concluding "[s]o far, *at least, as the present case is concerned,* the court do not think it necessary or prudent to depart from the safe maxim of stare decisis" (emphasis added)).

8. If possible, every word of a statute must be given meaning.[20]
9. Redundancy is not the same as surplusage.[21]
10. That a statute is awkward and ungrammatical does not make it ambiguous.[22]
11. A court must not interpret a statute to produce an absurd result.[23]
12. If literal interpretation of the statute produces an unfair result, it is up to Congress to amend the statute to remedy the problem.[24]
13. Congress "says in a statute what it means and means in a statute what it says there."[25]

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[20] *See, e.g.,* Rake v. Wade, 508 U.S. 464, 471 (1993) ("To avoid deny[ing] effect to a part of a statute we accord significance and effect . . . to every word." (citations and internal quotation marks omitted)); Hoffman v. Conn. Dep't of Income Maintenance, 492 U.S. 96, 103 (1989) ("It is our duty to give effect, if possible, to every clause and word of a statute. . . ." (citations and internal quotation marks omitted)); D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932) ("[I]f possible, effect shall be given to every clause and part of a statute." (citations omitted)); Peck v. Jenness, 48 U.S. (7 How.) 612, 623 (1849) ("[I]t is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature."); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) ("It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature is to be extracted from the whole."). *But see* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (explaining that the Court's preference for avoiding surplusage "is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute' " (citation omitted)).

[21] *See, e.g.,* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting, and so long as there is no positive repugnancy between two laws . . . a court must give effect to both." (internal citation and quotation marks omitted)). *See also* Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza), 719 F.3d 1253, 1266 (11th Cir. 2013) (applying this principle).

[22] *See* Laime v. United States Trustee, 540 U.S. 526, 534 (2004) ("The statute is awkward, and even ungrammatical; but that does not make it ambiguous. . . .").

[23] *See, e.g.,* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (internal quotation marks omitted)); INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (nonbankruptcy case); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 & 390 (1805) (articulating principle against construing statutes to produce "great inconvenience," but emphasizing limited context in which the principle will apply since many inconveniences "ought to have been contemplated in the legislature when the act was passed" and were "probably overbalanced by the particular advantages [the statute] was calculated to produce").

[24] *See* Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. ___, 135 S.Ct. 2158, 2168–69 (2015); Hall v. United States, 566 U.S. 506, 523 (2012); Cent. Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc., 454 U.S. 354, 360 (1982) (*per curiam*) ("While the Court of Appeals may have reached a practical result, it was a result inconsistent with the unambiguous language used by Congress."). *But see* Tinker v. Colwell, 193 U.S. 473, 490 (1904) ("[W]e think Congress did not intend to permit such an injury [criminal conversation] to be released by a discharge in bankruptcy. An action to redress a wrong of this character should not be taken out of the exception [to discharge] on any narrow and technical construction of the language of such exception.").

[25] *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of

14. Different parts of a statute must be interpreted together (*in pari materia*).[26]

15. A word is presumed to have the same meaning in all parts of the same statute.[27]

16. As a general proposition, the Court will construe a statute to affect only property rights created after the date of enactment.[28]

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legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). *Accord Ron Pair*, 489 U.S. at 241–42; New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. (1 Otto) 656, 663 (1876); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

[26] *See, e.g.,* Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 218 (1936) ("There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."); Lockwood v. Exch. Bank, 190 U.S. 294, 300 (1903) ("The two provisions of the statute must be construed together, and both be given effect."); Pirie v. Chicago Title & Trust Co., 182 U.S. 438, 449 (1901) ("Undoubtedly all the sections of the act must be construed together. . . ."); New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. (1 Otto) 656, 662–63 (1876) (noting how ambiguous language can be given meaning "from other acts in pari materia, in connection with the words, and sometimes from the cause or necessity of the statute" and emphasizing the need to read the text as a whole to produce a harmonious interpretation that avoids internal repugnancy, "unless it appears that the difficulty cannot be overcome without doing violence to the language of the law-maker"). The same rule does not hold for words in other statutes. Although "[h]ere and there in the Bankruptcy Code Congress has included specific directions that establish the significance for bankruptcy law of a term used elsewhere in the federal statutes," in the absence of such specific directions the Court will not look to other statutes to define bankruptcy law terms. *See* Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 547 U.S. 651, 662 (2006) (citing United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 219–20 (1996)).

[27] *See* Bank of Am., N.A. v. Caulkett, 575 U.S. ___, 135 S.Ct. 1995, 2000 (2015) (explaining how the Court is "generally reluctant to give the same words a different meaning when construing statutes" (internal citation and quotation marks omitted)); Hall v. United States, 566 U.S. 506, 519 (2012) ("At bottom, 'identical words and phrases within the same statute should normally be given the same meaning.' " (quoting Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007))); Cohen v. de la Cruz, 523 U.S. 213, 220 (1998) (there is a presumption in the Bankruptcy Code that "equivalent words have equivalent meaning when repeated in the same statute. . . ." (citation omitted)); Patterson v. Shumate, 504 U.S. 753, 758 n.2 (1992) (citing Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Comp. Programs, 461 U.S. 624, 633 (1983), for the principle "that a word is presumed to have the same meaning in all subsections of the same statute"). *But see* Dewsnup v. Timm, 502 U.S. 410, 417 n.3 (1992) ("[W]e express no opinion as to whether the words 'allowed secured claim' have different meaning in other provisions of the Bankruptcy Code.").

[28] *See* United States v. Sec. Indus. Bank, 459 U.S. 70, 79–81 (1982) ("The principle that statutes operate only prospectively . . . is familiar to every law student. . . . This principle has been repeatedly applied to bankruptcy statutes affecting property rights. . . . Holt v. Henley, 232 U.S. 637 (1914). . . . No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress."); Holt v. Henley, 232 U.S. 637, 639 (1914) ("[T]he reasonable and usual interpretation of statutes is to confine their effect, so far as may be, to property rights established after they were passed."); Auffm'ordt v. Rasin, 102 U.S. (12 Otto) 620, 622–23 (1881) ("[W]e see no reason to believe that in making a new rule on that subject Congress intended to make it retrospective, for the purpose of destroying rights of property or rights of action which had become vested before the passage of the law."). The same principle does not apply to contract rights where the bankruptcy statutes usually are construed to apply to pre-existing rights. *See, e.g.,* Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902) (cited with approval in *Sec. Indus. Bank,* 459 U.S. at 80).

17. In a statute, "includes" is illustrative, not limiting or exclusive.[29]

18. When the Bankruptcy Code itself does not define a word or phrase, the Court will look for its "ordinary meaning" in dictionaries and similar sources to provide a plain and natural reading.[30]

19. When a particular matter is specifically dealt with in one part of the Bankruptcy Code, that specific provision will govern over more general provisions of the Bankruptcy Code.[31]

20. Words in the Bankruptcy Code may be given meaning based on their association with other words pursuant to the canon *noscitur a sociis*.[32]

The Court has used conflicting maxims of statutory construction in numerous bankruptcy cases and sometimes within the same case.[33] For example, in *Keppel v. Tiffin Savings Bank*[34] the Court was required to interpret the meaning of "surrender" in section 57g of the Bankruptcy Act of 1898.[35] Under that statute, "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." The Sixth Circuit certified to the Supreme Court three questions, the first of which was "[c]an a creditor of a bankrupt, who has received a merely voidable preference, and who has in good faith retained such preference until deprived thereof by the judgment of a court upon a suit of the trustee, thereafter prove the debt so voidably preferred?"[36] In a 5–4 opinion, the Court held that even creditors who involuntarily "surrender" their preferences may prove claims in bankruptcy.[37] Both the

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[29] *See, e.g.,* Am. Sur. Co. v. Marotta, 287 U.S. 513, 517 (1933); Friedman v. P+P, LLC (*In re* Friedman), 466 B.R. 471, 482 & n.20 (B.A.P. 9th Cir. 2012).

[30] *See, e.g.,* Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. ___, 135 S.Ct. 2158, 2165 (2015); Clark v. Rameker, 573 U.S. ___, 134 S.Ct. 2242, 2246 (2014); Hall v. United States, 566 U.S. 506, 511–12 (2012); Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 69 (2011); Hamilton v. Lanning, 560 U.S. 505, 513–14 (2010).

[31] *See* Law v. Siegel, 571 U.S. ___, 134 S.Ct. 1188, 1194 (2014); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645–46 (2012).

[32] *See* Bullock v. BankChampaign, N.A., 569 U.S. ___, 133 S.Ct. 1754, 1760 (2013).

[33] One commentator has concluded that "the Court does not apply a single interpretive method in its Bankruptcy Code cases." *See* Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAPMAN L. REV. 173, 298 (2000).

[34] 197 U.S. 356 (1905) ("*Keppel*").

[35] 11 U.S.C. § 93g (1976) (repealed 1979). Section 57g of the Bankruptcy Act is the predecessor of Bankruptcy Code § 502(d). *See* STAFF OF SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 95th CONG., TABLE OF DERIVATION OF H.R. 8200, 7 (Comm. Print 1977).

[36] *See Keppel*, 197 U.S. at 359.

[37] *See id.* at 374.

majority[38] and dissent[39] focused on the plain meaning of the statute and the policy it was intended to accomplish. The majority looked to the dictionary definition of "surrender" and determined that it applied to both voluntary and involuntary actions.[40] The majority buttressed its statutory construction by noting that the fundamental purpose of the provision was to secure an equality of distribution among creditors, and that denying a creditor who disgorges a preference the opportunity to prove a claim would create an inequality.[41] The dissent countered that a creditor who resists the trustee and disgorges a preference after judgment has nothing left to surrender; to hold otherwise would defeat the statute's policy of a prompt, equal, and inexpensive distribution of the estate.[42] The majority believed that to deprive the preferred creditor of a claim after disgorgement of the preference would be punitive and would "disregard the elementary rule that a penalty is not to be readily implied . . . unless the words of the statute plainly impose it."[43] Thus, each side passionately used maxims of statutory construction to support different interpretations and meanings of the same word.[44]

More recently, in *United States v. Ron Pair Enterprises, Inc.*,[45] the Court decided whether Bankruptcy Code § 506(b)[46] entitles a creditor to receive postpetition interest on an allowed, nonconsensual, oversecured claim. To resolve this issue, both the majority and dissent invoked different maxims of statutory construction. The war of the maxims resulted in a 5–4 decision in favor of granting postpetition interest to the oversecured-nonconsensual lien creditor. The majority invoked the maxim that a statute must be construed in accordance with its plain meaning.[47] In this case, the placement of the second of four commas in section 506(b) meant that interest was available to any oversecured creditor and did not have to be provided in an agreement. "The language and punctuation Congress used cannot be read in any other way."[48] The dissent noted that

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[38] *See id.* at 361 ("Let us first consider the meaning of this provision, guided by the cardinal rule which requires that it should, if possible, be given a meaning in accord with the general purpose which the statute was intended to accomplish.").

[39] *See id.* at 380 (Day, J., with whom Harlan, Brewer, and Brown, JJ., joined, dissenting) ("Therefore the sole question here is: What is meant by the term 'surrender' as used in the act of 1898?").

[40] *See id.* at 362 ("The word 'surrender,' however, does not exclude compelled action, but, to the contrary, generally implies such action.").

[41] *See id.* at 361.

[42] *See id.* at 378, 384.

[43] *See id.* at 362.

[44] For a more recent example of a 5–4 decision that follows a similar pattern of disagreement over statutory interpretation, *see* United States v. Sotelo, 436 U.S. 268 (1978).

[45] 489 U.S. 235 (1989).

[46] 11 U.S.C. § 506(b) (2012).

[47] *See Ron Pair*, 489 U.S. at 241 ("[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917))).

[48] *See id.* at 242.

based on the position of a comma in the statute, the majority had adopted a statutory construction that reversed a clear past practice and Supreme Court ruling without any clear evidence that Congress intended a different result when it adopted Bankruptcy Code § 506(b).[49] The dissent contended that the majority's approach violated the maxims that "[p]unctuation is not decisive of the construction of a statute" and "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."[50]

Indeed, several Supreme Court cases have held that as a matter of statutory construction, courts should "not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."[51] Sometimes the Court will go to an extreme to find such a past practice. For example, in *Midlantic National Bank v. New Jersey Department of Environmental Protection*,[52] despite "unequivocal language"[53] in the statute authorizing a trustee to abandon "any property of the estate that is burdensome," the Court held that Bankruptcy Code § 554(a)[54] does not authorize a trustee to abandon hazardous property in contravention of a state statute or regulation reasonably designed to protect the public health or safety. Relying on only three pre-Code cases (including one that did not deal with state laws and another in which the relevant language was arguably dictum), the Court concluded that under pre-Code bankruptcy law there were restrictions on a trustee's power to abandon property.[55] On the other hand, the Court has limited the maxim of reliance on prior practice by noting that "where the meaning of the Bankruptcy Code's text is itself clear . . . its operation is unimpeded by contrary . . . prior practice."[56]

The Court also has adhered to the maxim that in the absence of express language, courts will not construe statutes to affect property rights established before they were passed. For example, in *Auffm'ordt v. Rasin,*[57] the Court declined to give retroactive effect to a 1874 amendment to the Bankruptcy Act of 1867 that reduced the avoidance

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[49] *See id.* at 252–53 (O' Connor, J., with whom Brennan, Marshall, and Stevens, JJ., joined, dissenting).

[50] *See id.* at 250, 252 (citations omitted).

[51] Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990). *Accord, e.g.*, Cohen v. de la Cruz, 523 U.S. 213 (1998); United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 221 (1996); *Ron Pair* 489 U.S. at 244–45; United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 380 (1988); Kelly v. Robinson, 479 U.S. 36, 53 (1986).

[52] 474 U.S. 494 (1986).

[53] *See Ron Pair*, 489 U.S. at 251 (O'Connor, J., dissenting).

[54] 11 U.S.C. § 554(a) (1988).

[55] In *Midlantic*, Justice Rehnquist's dissent, in which Justice O'Connor joined, made plain that a close reading of the three cases relied on by the majority "reveals that none supports the rule" of *Midlantic*. *See Midlantic*, 474 U.S. at 510 (Rehnquist, J., dissenting).

[56] *See* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 10 (2000) (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 546 (1994)).

[57] 102 U.S. (12 Otto) 620 (1881).

reachback period since there was no evidence that Congress intended for the amendment to have retroactive effect or otherwise "destroy a vested right of property or an existing right of action."[58] Likewise, in *Holt v. Henley*,[59] Justice Holmes wrote for a unanimous Court in refusing to apply the trustee's newly-enacted lien rights[60] to defeat the pre-existing rights of a vendor who installed a sprinkler system for the debtor. "[T]he reasonable and usual interpretation of such statutes is to confine their effect, so far as may be, to property rights established after they were passed."[61] The Court relied on this precedent 68 years later in *Security Industrial Bank*[62] when it refused to retroactively apply the Bankruptcy Code's newly-created section 522(f)[63] power to avoid liens in household goods and furnishings:[64] "No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress."

The rule of *stare decisis* plays a large role in Supreme Court decisions. Even if a statute has a plain meaning, if the Court previously has ruled against the plain meaning, a later court generally will not overturn the result.[65] The Court's recent Eleventh Amendment jurisprudence illustrates this point nicely. For example, the Eleventh Amendment, by its terms, plainly applies only to suits against a state by a citizen of another state.[66] But long ago, in *Hans v. Louisiana*[67] the Court construed the amendment to cover suits against a state by its own citizens.[68] This expansive construction served the policy that it would be unseemly for a state to be sued by its own citizens even more than foreign

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[58] *See id.* at 622–23.

[59] 232 U.S. 637 (1914) ("*Holt*").

[60] The Act of June 25, 1910, ch. 412, § 8, 36 Stat. 838, 840 amended section 47a(2) of the Bankruptcy Act of 1898 to give the trustee the rights of a lien creditor.

[61] *See Holt*, 232 U.S. at 639.

[62] *See* United States v. Sec. Indus. Bank, 459 U.S. 70, 80 (1982).

[63] *See* 11 U.S.C. § 522(f)(2) (Supp. 1980).

[64] *Sec. Indus. Bank*, 459 U.S. at 81.

[65] A vivid example of this rule can be observed in *Bank of America, N.A. v. Caulkett*, 575 U.S. ___, 135 S.Ct. 1995 (2015). In *Caulkett*, the Court noted how the debtors' position was consistent with a "straightforward reading of the statute." *See id.* at 1999. Nevertheless, the Court rejected the debtors' position based on its prior holding in *Dewsnup v. Timm*, 502 U.S. 410 (1992), which the debtors did *not* ask the Court to overrule. *See id.* at 1999–2001. Indeed, the precedential force of *Dewsnup* held despite the Court's observation in a footnote that the *Dewsnup* decision has been criticized since its inception. *See id.* at 2000 n.†. Of course, *stare decisis* does not preclude the Supreme Court from overturning previous holdings, but this is seldom done on the basis of textualism as opposed to policy concerns. *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241–43 (1989).

[66] *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

[67] 134 U.S. 1 (1890).

[68] *See id.* at 20 ("[T]he obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court. . . .").

citizens.[69] It also violated the maxim of statutory construction that every word must be given meaning or significance.[70] In *Hans* the Supreme Court effectively read "another" out of the Eleventh Amendment. Despite this plain departure from textualist principles, after *Hans*, Justices who adhere to textualism have followed *stare decisis* and refused to use textualism to overrule *Hans*.[71] Yet on other occasions, the Court has changed its position despite *stare decisis*. For example, in *Perez v. Campbell*,[72] the Court overruled its earlier decisions in *Kesler v. Department of Public Safety*[73] and *Reitz v. Mealey*[74] as misinterpreting the Supremacy Clause of the Constitution. In his April 9, 1971 letter to Justice Blackmun regarding *Perez*, Justice Harlan urges Justice Blackmun to turn his draft opinion into a dissent upholding *Kesler* with greater emphasis on *stare decisis*.[75]

Some commentators hold the view that the Supreme Court's bankruptcy jurisprudence adopts "a 'plain meaning' posture where the language of the statute meets with judicial approval, and use[s] legislative intent to contradict the language of the statute where a literal reading is not kind to the desired result."[76] This pragmatic, perhaps somewhat cynical, view of the Court is borne out by the research of the decisions by most, but not all, Justices.[77] Over the years, a significant

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[69] *See* Alden v. Maine, 527 U.S. 706, 749 (1999) ("In some ways, of course, a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum.").

[70] *See, e.g.,* Rake v. Wade, 508 U.S. 464, 471 (1993) ("To avoid deny[ing] effect to a part of a statute we accord significance and effect . . . to every word." (citations and internal footnotes omitted)); Hoffman v. Conn. Dep't of Income Maintenance, 492 U.S. 96, 103 (1989) ("It is our duty to give effect, if possible, to every clause and word of a statute. . . ." (citations and internal footnotes omitted)); D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932) ("[I]f possible, effect shall be given to every clause and part of a statute." (citations omitted)). *But see* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) ([T]he Court's preference for avoiding surplusage "is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute.' " (citation omitted)).

[71] "Regardless of what one may think of Hans, it has been assumed to be the law for nearly a century. During that time, Congress has enacted many statutes—including the Jones Act and the provisions of the Federal Employers' Liability Act (FELA) which it incorporates—on the assumption that States were immune from suits by individuals." Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 496 (1987) (Scalia, J., concurring).

[72] 402 U.S. 637 (1971).

[73] 369 U.S. 153 (1962).

[74] 314 U.S. 33 (1941).

[75] *See* April 9, 1971 letter from Justice Harlan to Justice Blackmun (contained in Blackmun papers) ("From my standpoint *Kesler* was correctly decided, and, further, I think that *stare decisis* should stand in the way of overruling.").

[76] *See* Kenneth N. Klee & Frank A. Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1, 2 (1988). *See also* Justice Powell's notes on a clerk's memorandum dated September 19, 1986 regarding congressional intent and Kelly v. Robinson, 479 U.S. 36 (1986) ("Congress could not have intended that restitution orders, analogous to criminal fines, are dischargeable.").

[77] The tendency of courts to sometimes depart from "plain meaning" has caused one Supreme Court Justice to "question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it any

number of Justices appear to care deeply about the legislative history[78] and view their role as interpreting statutes to achieve congressional intent even when the statutory language is inconsistent with the desired outcome. For example, Bankruptcy Act § 75(s)(3)[79] permitted the debtor to redeem an encumbered farm by paying its appraised value. But the remedy was subject to two provisos, the second of which authorized the secured creditor to demand a public sale of the property.[80] In *Wright v. Union Central Life Insurance Co.,*[81] the Court was asked to decide whether a debtor could redeem farmland at a value fixed by the court before the secured creditor could cause the farm to be sold in a public sale.[82] In deliberating about the Court's decision in *Wright*, Justice Roberts wrote Justice Douglas a letter specifically referencing congressional debates to influence the Court's interpretation of the statute. Justice Roberts writes to Justice Douglas as follows:[83]

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longer makes sense to talk of 'a government of laws, not of men.' " *See* Patterson v. Shumate, 504 U.S. 753, 766 (1992) (Scalia, J., concurring).

[78] In the context of the Bankruptcy Code, the Court has recognized that "[b]ecause of the absence of a conference and the key roles played by Representative [Don] 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." Begier v. I.R.S., 496 U.S. 53, 64 n.5 (1990). *See also* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 350 (1985) (quoting statements made by members of Congress). *But see* Fid. Fin. Servs. v. Fink, 522 U.S. 211, 220 (1998) ("Whatever weight some Members of this Court might accord to floor statements about proposals actually under consideration, remarks that purport to clarify 'related' areas of the law can have little persuasive force, and in this case none at all."); Hoffman v. Connecticut, 492 U.S. 96, 103–04 (1989) (in refusing to rely on floor statements, the Court noted that " 'legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment' " (citation omitted)). The Court also has relied on House and Senate Reports in construing bankruptcy statutes. *See, e.g.,* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 351 (1985) ("Both the House and the Senate Reports state that § 542(e) 'is a new provision. . . .' "). *But see Begier*, 496 U.S. at 69 (Scalia, J., concurring) ("I think it both demeaning and unproductive for us to ponder whether to adopt literal or not-so-literal readings of Committee Reports, as though they were controlling statutory text."). When congressional reports are silent, the Court has even looked at hearing testimony to determine legislative history. *See* United States v. Whiting Pools, Inc., 462 U.S. 198, 207 (1983) ("Although the legislative reports are silent on the precise issue before us, the House and Senate hearings . . . provide guidance."). In some instances, even when the congressional reports address the issue, the Court will refer to hearing testimony. *See, e.g.,* Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 205 n.5 (1988). *But see* Kelly v. Robinson, 479 U.S. 36, 51 n.13 (1986) ("We acknowledge that a few comments in the hearings . . . may suggest that the language bears the interpretation adopted [below]. . . . But none of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements.").

[79] The Frazier-Lemke Act, ch. 869, 48 Stat. 1289 (1934) (formerly codified at 11 U.S.C. § 203(s)) (repealed 1949) (adding subsection (s) to Bankruptcy Act § 75).

[80] *See id.* ("[U]pon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction.").

[81] 311 U.S. 273 (1940).

[82] *See id.* at 275–76 ("The narrow issue presented . . . is whether under § 75(s)(3) the debtor must be accorded an opportunity . . . to redeem the property at the reappraised value or at a value fixed by the court before the court may order a public sale.").

[83] *See* December 2, 1940 letter from Justice Roberts to Justice Douglas regarding Wright v. Union Cent. Life Ins. Co., 311 U.S. 273 (1940).

> This was the congressional view: "Under existing language of the bill, whether or not there may be foreclosure in a case where the award is less than the debt secured is left to the discretion of the judge. Now, that is not a clear explanation, but it will suffice for the present purpose. I would make it clearer if it were important. However, the amendment proposed removes the judge's discretion, if the original debt has not been fully paid, and gives the creditor the right, as a matter of right, to have a foreclosure of the property in the event his debt has not been in full." (79 Cong. Rec. 14333)

This concern is evidenced in the unanimous reported opinion stating that "the [Bankruptcy] Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress, lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."[84]

Similar themes pervade other Supreme Court bankruptcy decisions. For example, "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[85] Justice Douglas made this point quite clearly in *Bank of Marin v. England*[86] when he wrote, "[y]et we do not read these statutory words with the ease of a computer."[87]

Certain Justices are devoted textualists even when their politics would appear to favor a different outcome. For example, in *Dewsnup v. Timm*,[88] Justice Scalia, an avowed textualist, wrote a scathing dissent to a majority opinion that forbade lien-stripping of liens securing claims of undersecured creditors.[89] The substance of the dissent was that Congress could not have intended to use "secured claim" one way in Bankruptcy Code § 506(a) and another way in § 506(d). In *Bank of Marin*, Justice Harlan chided the Court for disregarding "both the proper principles of statutory construction and the most permanent interests of bankruptcy administration" in fashioning a pragmatic result "in its haste to alleviate an indisputable inequity to the bank."[90]

Yet, if the policy at stake is overwhelmingly important, even the most ardent textualist might compromise his principles of statutory

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[84] Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 279 (1940) (citations omitted). *Accord* Wright v. Logan, 315 U.S. 139 (1942).

[85] Kelly v. Robinson, 479 U.S. 36, 43 (1986) (quoting United States v. Heirs of Boisdoré, 49 U.S. (8 How.) 113, 122 (1850)).

[86] 385 U.S. 99 (1966) ("*Bank of Marin*").

[87] *Id.* at 103.

[88] 502 U.S. 410 (1992).

[89] *See id.* at 420–36 (1992) (Scalia, J., dissenting).

[90] *See Bank of Marin*, 385 U.S. at 103 (Harlan, J., dissenting).

interpretation.[91] For example, in *BFP v. Resolution Trust Corp.*,[92] Justice Scalia wrote for the Court interpreting "reasonably equivalent value" in Bankruptcy Code § 548.[93] In order to protect 400 years of real estate mortgage foreclosure practices from fraudulent transfer attack, Justice Scalia wrote that the value received at a regularly conducted real property foreclosure sale is per se reasonably equivalent to the value of the property sold.[94] Outside the real property foreclosure context, however, "the 'reasonably equivalent value' criterion will continue to have independent meaning (ordinarily a meaning similar to fair market value)."[95]

The dissent made two textualist arguments, both of which had been used by Justice Scalia in other cases, to refute the soundness of the majority opinion. First, the dissent noted that engrafting a "foreclosure-sale exception" onto Bankruptcy Code § 548 was "in derogation of the straightforward language used by Congress,"[96] noting that neither congressional intent nor the plain meaning of the statute support the conclusion that the distressed prices normally fetched at foreclosure sales qualify for "reasonably equivalent value" in section 548. In fact, "rejecting such a reading of the statute is as easy as statutory interpretation is likely to get."[97] Second, the dissent noted that the Court's construction of the statute to permit avoidance of only collusive or procedurally deficient foreclosure sales rendered several congressional amendments to the Bankruptcy Code superfluous.[98] This interpretation transgresses a well-known rule of statutory construction that every part of a statute must be given some meaning.[99] Moreover, the Court eviscerates another canon of statutory construction by interpreting the same words in section 548 to have one meaning for real property foreclosures and another meaning for all other transfers.[100] As Justice Scalia wrote in his dissent in *Dewsnup v. Timm*, " 'Normal rule[s] of statutory construction' " require that "identical words [used] *in the same section of the same enactment*" must be given the same effect.[101]

Instead of simply resting the *BFP* decision on policy grounds, however, Justice Scalia went to great efforts to answer the dissent's

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[91] *See, e.g.,* Young v. United States, 535 U.S. 43 (2002) (Scalia, J., writing for a unanimous Court).

[92] 511 U.S. 531 (1994) ("*BFP*").

[93] 11 U.S.C. § 548 (2012).

[94] *See BFP*, 511 U.S. at 542–43.

[95] *See id.* at 545.

[96] *See id.* at 549 (Souter, J., with whom Blackmun, Stevens, and Ginsburg, JJ., joined, dissenting).

[97] *See id.* at 550–51.

[98] *See id.* at 555.

[99] *See supra* n.20 and accompanying text.

[100] *See BFP*, 511 U.S. at 556–57.

[101] *See Dewsnup v. Timm*, 502 U.S. at 422 (Scalia, J., dissenting) (emphasis in original).

textualist attack on his opinion.[102] He countered that the meaning of the statute is not plain because it creates an ambiguity by failing to define what a foreclosed property is worth.[103] He wrote that the Court's opinion does not render congressional amendments superfluous because "[p]rior to 1984, it was at least open to question whether § 548 could be used to invalidate even a *collusive* foreclosure sale. . . . It is no superfluity for Congress to clarify what had at best been unclear, which is what it did here by making the provision apply to involuntary as well as voluntary transfers and by including foreclosures within the definition of 'transfer.' "[104] Finally, Justice Scalia noted that his opinion did not give two inconsistent meanings to "reasonably equivalent value."[105] The inquiry whether the debtor received reasonably equivalent value is "the same for all transfers"; but the fact that "a piece of property is legally subject to a forced sale . . . necessarily affects its worth [and] completely redefin[es] the market in which the property is offered for sale. . . ."[106]

The exchange among the Justices in *BFP* is not an isolated example of sharp differences over statutory construction. For example, in *FCC v. NextWave Personal Communications, Inc.*,[107] Justice Scalia, writing for the Court, takes sharp issue with Justice Breyer's dissent,[108] at one point writing that "[i]n addition to distorting the text of the provision, the dissent's interpretation renders the provision superfluous."[109] Justice Breyer's dissent attacks the majority opinion in kind, largely based on issues of statutory construction,[110] at one point writing that the majority's reasoning "rests too heavily upon linguistic deduction and too little upon human purpose."[111]

In fact, Justice Breyer's observation is characteristic of some of the Court's bankruptcy decisions. On occasion, the Court will adhere to plain meaning and overturn a pragmatic result that departs from the language of the statute. For example, the Court's *per curiam* opinion in *Central Trust Co. v. Official Creditors' Committee*[112] interpreted section 403(a) of the Bankruptcy Reform Act of 1978 to prohibit dismissal of a chapter XI case filed under the Bankruptcy Act and refiling it as a chapter 11 case

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[102] *See BFP*, 511 U.S. at 546 ("The dissent's insistence here that no doubt exists—that our reading of the statute is 'in derogation of the *straight-forward language* used by Congress,' . . . does not withstand scrutiny." (emphasis in original)).

[103] *See id.* at 547 ("But what *is* the 'value'? The dissent has no response. . . ." (emphasis in original)).

[104] *See id.* at 543 n.7 (emphasis in original).

[105] *See id.* at 548.

[106] *Id.*

[107] 537 U.S. 293 (2003).

[108] *See id.* at 305–07.

[109] *See id.* at 307.

[110] *See id.* at 313–21.

[111] *Id.* at 321.

[112] 454 U.S. 354 (1982).

under the Bankruptcy Code.[113] Even if the dismissal was in the best interests of the estate and would conserve judicial resources, the bankruptcy court was not free to disregard a clear congressional directive.[114] "While the Court of Appeals may have reached a practical result, it was a result inconsistent with the unambiguous language used by Congress."[115]

In other instances, however, the Court will doggedly adhere to a plain meaning rule of statutory interpretation even when the result is harsh. For example, in *Laime v. United States Trustee*,[116] in a straightforward manner, the Court dealt with Congress' 1994 deletion of an award of compensation from the bankruptcy estate "to the debtor's attorney" under section 330 of the Bankruptcy Code.[117] Although the 1994 deletion left the statute "awkward, and even ungrammatical," the Court found it unambiguous.[118] The Court relied on its previous statement in *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.* and previous opinions that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[119] The plain meaning of the statute did not lead to absurd results because the statute does not prevent debtors from engaging counsel before filing for chapter 7, even though those same attorneys could not be compensated out of the estate after the filing.[120] The Court recognized that deference to the supremacy of the Legislature caused its "unwillingness to soften the import of Congress' chosen words even if . . . the words lead to a harsh outcome. . . ."[121] Likewise, in *Hall v. United States*,[122] the Court concluded that although "there may be compelling policy reasons for treating postpetition income tax liabilities as dischargeable," Congress failed to "so provide in the statute," and it was up to Congress to amend the text

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[113] *See id.* at 359–60.

[114] *See id.* at 359.

[115] *Id.* at 360.

[116] 540 U.S. 526 (2004).

[117] *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, 108 Stat. 4106, 4130–31 (§ 224(b) of the Act amending 11 U.S.C. § 330(a) (1994)).

[118] *See Laime*, 540 U.S. at 534.

[119] *See* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (internal quotation marks omitted).

[120] *See Laime*, 540 U.S. at 535–36.

[121] *See id.* at 538; Corn Exch. Nat'l Bank & Trust Co. v. Klauder, 318 U.S. 434, 437–38 (1943) ("Such a construction is capable of harsh results . . . but we find nothing in Congressional policy which warrants taking this case out of the letter of the Act."). *But see* Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 223 (1936) ("Such a reading of the act will help at the same time in the avoidance of other consequences too harsh or incongruous to have been intended by the Congress.").

[122] 566 U.S. 506 (2012).

because the Court simply would not rewrite the statute to accomplish its purpose.[123]

Sometimes the Court will adopt a sensible rule of construction that Congress later codifies. For example, in *American Surety Co. v. Marotta*,[124] the Court interpreted the meaning of the word "includes" in the definition of "creditor" in section 1(9) of the Bankruptcy Act of 1898.[125] The Court rejected the interpretation of the lower court which had interpreted "the word 'include' to be one of limitation, the equivalent of 'include only,' and to exclude every person not having a demand presently provable."[126] Rather, the Court noted that "[i]n definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration."[127] In the context of the Bankruptcy Act, the Court contrasted "shall include" with "shall mean" and concluded that in the context of section 1(9), "it is plain that 'shall include' . . . cannot reasonably be read to be the equivalent of 'shall mean' or 'shall include only.' "[128] Congress later adopted this reasonable rule of construction for the entire 1978 Bankruptcy Code.[129]

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[123] *See id.* at 523.

[124] 287 U.S. 513 (1933).

[125] *See id.* at 516 ("(9) 'creditor' shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy.").

[126] *See id.* at 516–17.

[127] *See id.* at 517.

[128] *Id.*

[129] *See* 11 U.S.C. § 102(3) (1978) ("In this title, 'includes' and 'including' are not limiting."). *See also* H.R. REP. NO. 595, 95th Cong., 1st Sess. 315 (1977) ("Paragraph (3) is a codification of American Surety Co. v. Marotta, 287 U.S. 513 (1933)."). The Table of Derivation of the Bankruptcy Code also indicates this rule of construction was taken from American Surety Co. v. Marotta. *See* TABLE OF DERIVATION OF H.R. 8200, SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 95th Cong., 1st Sess. 2 (Comm. Print No. 6 1977).