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Articles:
- Ignoring Congressional Intent: Kenneth N. Klein
- Eight Years of Judicial Legislation: Frank A. Mavola
- Home Court: Chapter 11: Reconciling Bankruptcy Case: Control with Venue: Flexibility in Proceedings: Richard H. Ginoss
- Future Asbestos Related Litigants as Holders of Statutory Claims (Under Chapter 11) of the Bankruptcy Code and Their Place in the Insider—Insolvent Reorganization: First Installment: Harvey J. Korman
- The Uniform Reorganization Transfer Act: An Introductory Critique: Michael L. Cook
- Richard L. Mandell
- Letting the Lender Have It: Satisfaction of Secured Claims By Abandoning A Portion of the Collateral: Darrell G. Watts

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CONTENTS

ARTICLES

Ignoring Congressional Intent: 
   Eight Years of Judicial Legislation .......... Kenneth N. Klee 1

Home Court, Outpost Court: Reconciling 
   Bankruptcy Case Control With Venue 
   Flexibility In Proceedings ..................... Frank A. Merola 37

Future Asbestos Related Litigants as 
   Holders of Statutory Claims Under 
   Chapter 11 of the Bankruptcy Code and 
   Their Place in the Johns-Manville 
   Reorganization (First Installment) ............ Richard H. Gibson 69

The Uniform Fraudulent Transfer Act: 
   An Introductory Critique ....................... Michael L. Cook 87

Letting The Lender Have It: 
   Satisfaction of Secured Claims 
   By Abandoning A Portion of the 
   Collateral ...................................... Darrell G. Waas 97
Ignoring Congressional Intent: Eight Years of Judicial Legislation*

by

Kenneth N. Klee**
Frank A. Merola

I. INTRODUCTION

The first eight years of jurisprudence under the Bankruptcy Code is riddled with opinions in which the judiciary has gone astray from the drafters' original intent. In some cases legislative intent has been completely overlooked or ignored; in other cases congressional silence has been used to stand for affirmative consent to a proposition; while in still others, constitutional barriers have been constructed by courts with the result that implementation of the Bankruptcy Code has swerved away from original congressional intent. This article illustrates a few of the specific areas where courts have deviated from the drafters' original intent. This introductory section discusses the nature of legislative intent and the judiciary's duty as it relates to legislative intent.

A. JUDICIAL OBLIGATION WITH RESPECT TO LEGISLATIVE INTENT

1. Statutory Interpretation

When a federal court is required to interpret a statute enacted by Congress, such as the Bankruptcy Code, the Supreme Court has clearly and repeatedly underscored the court's obligation. "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."1

The Supreme Court's mandate is clear—to determine congressional intent and give effect to it. Unfortunately, the Court sends contradictory signals on how to determine that intent. One line of cases holds that no statutory

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See also Philbrook v. Glodgett, 421 U.S. 707, 713, 95 S. Ct. 1893, 1898 (1975) ("Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will."); Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215, 82 S. Ct. 1328, 1339 (1962) ("In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where congressional intent is discernible—and here it seems crystal clear—we must give effect to that intent.").
evaluation is complete without reference to congressional intent. 2 A contrary line of cases forbids reference to congressional intent when the language of the statute is clear. "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." 3

The "mixed" signal the Supreme Court sends lower courts is clear though unarticulated—use rules of construction to support, rather than to determine, a result. Adopt a "plain meaning" posture where the language of the statute meets with judicial approval, and use legislative intent to contradict the language of the statute where a literal reading is not kind to the desired result. Leaving the courts with such flexibility allows the judiciary to construct a congressional intent that comports with any judge's view on an issue.

2. Legislative Intent and Constitutional Questions

In an effort to escape the fidelity that federal courts owe in deferring to legislative intent, many courts create constitutional barriers to the intended implementation of the statute. By creating a constitutional question, courts avoid any need to refer to legislative intent.

In the constitutional field the courts have been assigned the role of counter-majoritarian watchdog. In the realm of statutory interpretation, however, there is no need to achieve a balance between effecting the will of the people and enforcing counter-majoritarian norms embodied in the Constitution. . . . In interpreting statutes, judges achieve the democratic ideal through a search for and understanding of legislative intent and goals. 4

As Judge Mikva points out, the role of courts when dealing with constitutional issues is completely different from their role in interpreting stat-

2Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 10, 96 S. Ct. 1958, 1942 (1976) ("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.""); National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 455, 94 S. Ct. 690, 693 (1974) ("But even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent.").

3Cromer, Inc. v. Walling, 324 U.S. 244, 260, 65 S. Ct. 605, 614-15 (1945). See also United States v. Oregon, 366 U.S. 643, 648, 81 S. Ct. 1278, 1281 (1961). Ex Parte Collett, 337 U.S. 55, 61, 69 S. Ct. 944, 947 (1949) ("This canon of construction has received consistent adherence in our decisions"); Helvering v. City Bank Farmers Trust Co., 296 U.S. 85, 89, 56 S. Ct. 70, 72 (1935) ("We are not at liberty to construe language so plain as to need no construction, or to refer to committee reports where there can be no doubt of the meaning of the words used."); Caminetti v. United States, 242 U.S. 470, 485, 37 S. Ct. 192, 194 (1917).

utes. Courts interpreting constitutional questions have a great deal of flexibility. To enjoy this flexibility, it appears to be common practice for courts to create, at best, questionable constitutional issues to avoid the heavy duty of implementing legislative intent. Simply by raising a constitutional barrier, a court can "redraft" the statute to meet with its idea of how the policy should be implemented. A growing number of commentators have criticized this "overuse of the Constitution to reform the statutory landscape."

A full discussion of this topic is beyond the scope of this article. The issue is raised only to explain, in part, the judiciary's apparent eagerness to find constitutional problems with the Bankruptcy Code and to support the conclusion that a good number of these constitutional problems are created by courts in an effort to redirect the policies reflected in the Code, rather than in genuine concern for underlying constitutional rights.

B. THE NATURE OF CONGRESSIONAL INTENT

1. Does It Exist?

A growing number of commentators are beginning to question whether Congress forms any intent at all when it enacts a piece of legislation. That is, when a legislator gives his assent to a bill, it is questionable if he gives his assent to all the legislative history that has been accumulated in the record, rather than merely to the plain language of the bill itself. A more skeptical theory contends that the assent of a legislator to a bill may not even be assent for the bill itself. In his book, The Federal Courts: Crisis and Reform (1983), Richard Posner questions the validity of legislative intent since "an unknown fraction of all bills represent 'deals' struck with or between interest groups." As such, the assents do not necessarily demonstrate an understanding and agreement with the substance and history of the legislation, but rather a concession to political expediency.

Notwithstanding Judge Posner's insights, resort to legislative history is the best method by which a court can peer into the drafters' minds. Since the details of most bills are dealt with in committees, and since committee reports comprise the bulk of legislative history, it is unreasonable to expect or demand familiarity by every member of Congress with every nuance of a piece of legislation. This reality should not undermine courts in relying on the drafters' intent as stated in committee reports. Whether or not a Congressman has read the committee report accompanying a bill, the Congressman is placing a vote in favor of the general policies outlined in the actual language of the bill, the ability of his colleagues to explain the more salient

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5A. Milka, id. at 183. See also G. Calabresi, A COMMON LAW FOR THE AGE OF STATUTES (1982).
6Id. at 269.
points of legislative intent, and the ability of his staff to spot areas where stated legislative intent goes against the individual Congressman's understanding of the purposes of the bill. Merely because each member of Congress is not familiar with each piece of legislative history is no reason to allow a federal court to substitute its own view of the policies behind a law for that of the legislature.

2. Where to Find Legislative Intent

Considering all the documents that pour forth from Congress relating to any one bill, it is important to understand that certain documents are more conclusive of legislative intent than others. In 1984, Justice Rehnquist stated:7

In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the committee reports on the bill, which "represent [...] the considered and collective understanding of those Congressmen involved in the drafting and studying proposed legislation." Zuber v. Allan, 396 U.S. 168, 186 (1969). We have eschewed reliance on the passing comments of one member, Weinberger v. Rossi, 456 U.S. 25, 35 (1982), and casual statements from the floor debates. United States v. O'Brien, 391 U.S. 367, 385 (1968); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). In O'Brien, supra, 391 U.S., at 385, we stated that Committee Reports are "more authoritative" than comments from the floor, and we expressed a similar preference in Zuber, supra, 396 U.S., at 187.

This statement is somewhat problematic to the practitioner searching for legislative history on the Bankruptcy Code. Although committee reports and joint statements of legislative leaders are available for bills that ultimately led to the enactment of the Bankruptcy Code, the joint statements are more authoritative than the committee reports.8 The 1984 and 1986 amendments to the Code took a rather tortuous route through the legislative process generating both committee reports and other legislative records under various titles. The legislative paths of these amendments are more difficult to follow than the paths leading to enactment of the original Bankruptcy Code, and the legislative records are less comprehensive.

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II. EXAMPLES OF JUDICIAL LEGISLATION

A. THE POLICE POWER EXCEPTIONS TO THE AUTOMATIC STAY

Section 362(b) of title 11 contains two exceptions to the automatic stay with respect to the enforcement of a governmental unit's police or regulatory powers. A "governmental unit" is defined in section 101(26) of title 11 essentially to include any foreign or domestic government. Paragraph (4) of section 362(b) permits a governmental unit to commence or continue an action to enforce its police or regulatory powers notwithstanding the general stay against commencement or continuation of judicial, administrative, or other proceedings against the debtor under section 362(a)(1). Section 362(b)(5) permits a governmental unit to enforce a judgment (other than a money judgment) obtained in an action or proceeding to enforce the governmental unit's police or regulatory powers notwithstanding the stay against lien enforcement provided in section 362(a)(2).

Although the intent of Congress to limit the exception is clear from the legislative history, courts have chosen to construe the police powers exceptions expansively.

1. Statutory Language and Legislative History

The legislative history is quite specific that these exceptions should be read restrictively.

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.9

Section 362(b)(4) indicates that the stay under section 362(a)(1) does not apply to affect the commencement or con-

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continuation of an action or proceeding by a governmental unit to enforce the governmental unit's police or regulatory power. This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.\textsuperscript{10}

2. Case Law

As a matter of practice, virtually every governmental unit has regarded its function as coming within the police or regulatory exceptions to the automatic stay. Many cases decided under sections 362(b)(4) and (b)(5) are completely at odds with the narrow scope that the drafters envisioned for the governmental exceptions. Some courts are absolutely brazen in ignoring legislative intent.

The language of the exception is very comprehensive—the exercise of "regulatory or police powers." Some courts have found a narrower scope to that exception—limiting the exception to the enforcement of health and safety laws, including consumer protection and environmental protection. As a method of statutory construction, this Court does not believe it proper to look to the legislative history when the language of the statute is not ambiguous. And even if recourse is had to the legislative history, that limiting construction is not compelling. Legislative history simply gives examples of types of exercises of the police power—it is illustrative not exhaustive.\textsuperscript{11}

Even though other courts are aware of actual legislative intent, it is clear that the limited exceptions to the automatic stay that were designed to protect public health and safety have expanded to the point where courts find nearly all governmental actions to be within the sections 362(b)(4) and (b)(5) exceptions. Except where the governmental unit is conducting a purely proprietary function,\textsuperscript{12} courts have consistently held that the police or regulatory powers exceptions to the automatic stay apply to permit the governmental unit to proceed against the debtor.

\textsuperscript{10}124 Cong. Rec. 32,395 (1978) (emphasis added).


\textsuperscript{12}See, e.g., Missouri v. United States Bankruptcy Court, 647 F.2d 768 (8th Cir. 1981), cert. denied, 454 U.S. 1162 (1982).
Thus, governmental units may commence or enforce labor proceedings.\(^{13}\) Governmental units may commence or enforce civil rights proceedings.\(^{14}\) Governmental units may even enforce zoning ordinances against the debtor under the police powers exceptions to section 362.\(^{15}\) Cases dealing with the enforcement of zoning ordinances assume that land use regulations are clearly police powers and make no effort to quantify the possible harm to the public from noncompliance with these regulations. The assumption that zoning and land use regulations are police powers appears to be derived from equal protection analysis. In *Village of Bell Terre v. Boraas*,\(^{16}\) Justice Douglas, writing for the majority, concluded that for equal protection purposes, police powers were not limited to those that protect the public from imminent danger. Zoning or land use restrictions were held to be police powers for purposes of equal protection analysis. It is not clear that this definition of police powers should have any relevance in bankruptcy cases. However, by this time, contrary to legislative intent, zoning and land use regulations are well accepted as falling within the police powers exceptions of section 362.

The legislative history to sections 362(b)(4) and (b)(5) makes clear that the drafters envisioned use of the exceptions to protect against threats to the environment. However, courts have been so zealous in allowing environmental agencies to utilize these exceptions to the automatic stay that they have failed to inquire into the possible dangers to the public. The Third Circuit summed up the attitude that most courts take with respect to the sections 362(b)(4) and (b)(5) exceptions by stating that the automatic stay provisions "should, whenever possible, be read in favor of the States."\(^ {17}\) Clearly, this view demonstrates that legislative intent has been abandoned in favor of public outcry on environmental issues. The Fifth Circuit, in *In re Commonwealth Oil Refining Co.*,\(^{18}\) ruled that an EPA action is entitled to exemption from the automatic stay regardless of the danger to the public. Danger to the public was a factor to be considered only in deciding if the trustee should be entitled to abandon the property under section 554 to comply with

\(^{13}\) NLRB v. Cooper Painting, Inc., 804 F.2d 934 (6th Cir. 1986); Ahrens Aircraft, Inc. v. NLRB, 703 F.2d 23 (1st Cir. 1983); In re Mansfield Tire & Rubber Co., 660 F.2d 1138 (6th Cir. 1981); NLRB v. Evans Plumbing Co., 639 F.2d 291 (9th Cir. 1981).


\(^{15}\) See, e.g., *Cournoyer v. Town of Lincoln*, 700 F.2d 971 (1st Cir. 1986); *Braun v. 1600 Pasadena Offices*, Ltd., 64 Bankr. 192 (Bankr. M.D. Fla. 1986).

\(^{16}\) 416 U.S. 1, 94 S. Ct. 1536 (1974).

\(^{17}\) *Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267, 273 (3d Cir. 1984). In *Penn Terra*, the Third Circuit went so far as to state that the police powers exceptions should be "construed broadly," 733 F.2d at 273, and the restriction on a governmental unit to render a monetary judgment "should be construed narrowly." Id.

the Supreme Court's decision in Midlantic. Similarly, in In re Beher Industries Corp., the court permitted the continuation of administrative proceedings on the environmental impact of the debtor's trucking operation on local roads despite the automatic stay. The court did not require the state to demonstrate any threat to health, safety, or welfare to gain the exemption of section 362(b)(4).

Countless numbers of administrative proceedings which clearly pose no danger to the health and safety of the public have been allowed to continue despite the general rule of section 362(a)(1) that administrative actions are enjoined. The exceptions are being construed so broadly as to engulf the rule.

In short, courts have allowed nearly any type of proceeding by a governmental unit to fall within the exceptions contained in sections 362(b)(4) and (b)(5). Consequently, the narrow exceptions that the drafters envisioned to protect public health and safety have been stretched to the point where the "breathing room" provided by the automatic stay is filled with governmental units proceeding against the debtor.

B. LIMITATIONS ON THE TRUSTEE'S RIGHT TO ABANDON

Section 554(c) of title 11 allows the trustee to abandon any property of the estate that is burdensome or of inconsequential value. The Supreme Court's decision in Midlantic National Bank v. New Jersey Department of Environmental Protection limited the trustee's right to abandon property. The Court held that a trustee may not abandon property in contravention of a statute or regulation that is reasonably designed to protect the public health or safety from identified dangers without formulating conditions that will protect the public. Such a limitation is clearly contrary to the legislative intent on the right to abandon.

1. Statutory Language and Legislative Intent

In the Midlantic opinion, the Court refers from silence on the issue that Congress intended to continue the "well-recognized restrictions on a trustee's abandonment power." Because a judicially created restriction existed, the

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158 See, e.g., Donovan v. TMC Industries, Ltd., 20 Bankr. 957 (N.D. Ga. 1982) (action to enjoin sale of goods produced in violation of Fair Labor Standards Act is exempted regulatory action); In re Foster, 43 Bankr. 431 (Bankr. S.D. Tex. 1984) (allowing public nuisance proceedings to continue against a house of prostitution); In re D.H. Overmyer Telecasting Co., 35 Bankr. 400 (Bankr. N.D. Ohio 1983) (action by FCC to strip debtor of its broadcasting license is exempt regulatory action); In re Kennise Diversified Corp., 34 Bankr. 237 (Bankr. S.D.N.Y. 1983) (allowing state receiver to collect rents and use money to remedy violations of housing code); In re Alessi, 12 Bankr. 96 (Bankr. N.D. Ill. 1981) (allowing state racing board to deny debtor's application for a permanent racing license because of the debtor's failure to comply with financial responsibility requirement).
160 106 S. Ct. at 759.
Court reasons that Congress must make an explicit statement of its intent to change the judicial interpretation. Justice Rehnquist makes clear in his stinging dissent that the "well-developed" rule that the Court points to "is particularly unpersuasive." In fact, the "rule" was obscure if it existed at all. In addition to criticizing the majority's reading of the three cases it cites as defining the rule, Judge Rehnquist points out that before enactment of the Bankruptcy Code there was no statutory provision specifically authorizing abandonment in liquidation cases. The mere presence of section 554, he reasons, is a clear statement of congressional intent.

The argument is bolstered by the language of section 554(a) which is clear and unequivocal. "[T]he trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." The statute makes no mention of any other factors to be considered other than the benefit to the estate.

Had Congress intended to limit the abandonment powers in a manner similar to Midlantic, it would have done so. In fact, in another context, Congress used express language to codify such a provision. Sections 362(b)(4) and (b)(5) of the Bankruptcy Code provide examples of how Congress exempted similar government actions from the automatic stay. Even more persuasive is that in yet another context Congress was aware of the possible need to qualify an abandonment provision and included a qualified abandonment provision in the Bankruptcy Code. Section 1170 of title 11 allows the abandonment of railroad lines only if it is "consistent with the public interest." Not only is this section persuasive that Congress intended no such restriction in section 554, but it also addresses the problem raised by one of the three cases the majority cites to support its "well-recognized restriction" on the trustee's abandonment power.

In addition to the absence of a restriction on the section 554 abandonment power in the statute itself, the legislative history likewise is silent with respect to restricting the power to abandon. The legislative history of section 554(a) is sparse: "This section authorizes the court to authorize the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. Abandonment may be to any party with a possessory interest in the property abandoned."
Since the "well-recognized" restriction on the trustee's abandonment power is at best questionable, and at worst a fantasy, it seems that the Supreme Court should have looked for a definite statement of congressional intent with respect to providing restriction on the powers established in section 554. The language of the section itself, combined with the silence of the legislative history and the negative inference that can be derived from the drafting of other Code provisions leads to the conclusion that Congress never envisioned any restriction to the section 554 powers. The Supreme Court's decision does little more than legislate a priority imposing the cost of cleanup on the creditors of a bankrupt company rather than on the entire populace of a particular state.

2. Case Law

The Supreme Court's decision in Midlantic limited the power of a bankruptcy trustee to abandon property of the estate. Justice Powell, writing for the majority, held that a bankruptcy trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards without formulating conditions that will adequately protect the public's health and safety.

The Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety. Accordingly, without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, we hold that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.28

In Midlantic, the trustee sought to abandon two waste oil processing facilities that were in violation of multiple environmental statutes. The debtor had accepted large quantities of waste oil contaminated with PCBs and stored it, with other waste oil, in deteriorating and leaking containers. Combining the cost of cleanup of these toxic substances with the fact that the mortgages encumbering the facilities' real property exceeded the properties' value, the properties were clearly a net burden to the estate. No party disputed the trustee's allegation, pursuant to section 554(a), that the site was burdensome to the estate. The Court nevertheless reasoned that there was a "well-recognized restriction,"29 on the trustee's abandonment power developed un-

28106 S. Ct. at 762.
29106 S. Ct. at 759.
under pre-Code law. The restriction held that the trustee could not exercise his abandonment power in violation of certain laws. The Court further reasoned that if Congress had intended to change the interpretation of a judicially created concept, it needed to make that intent specific. Since the legislative history is silent as to the applicability of such a restriction, the Court concluded that Congress must have intended to continue the pre-Code limitation under section 554.

This exception to the abandonment power vested in the trustee by § 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm.30

The Midlantic decision may have created more problems than it solved. Courts deciding cases after Midlantic have struggled to determine what is required by the Supreme Court to allow abandonment of contaminated property. The court in In re Oklahoma Refining Co.31 concluded that the only obligation upon the bankruptcy court in deciding to permit abandonment is to “take state environmental laws and regulations into consideration.”32 Oklahoma Refining is a “worst case” scenario where the trustee had no funds other than cash collateral available to remedy the environmental problems. Under a strict reading of Midlantic, since he could neither comply with environmental laws nor abandon the property, the trustee would be forced to create a “bankruptcy case in perpetuity.”33

The bankruptcy court in In re Franklin Signal Corp.34 held that the “trustee only needs to take adequate precautionary measures to ensure that there is no imminent danger to the public as a result of abandonment.”35 Two conditions must be met before abandoning property contaminated with hazardous waste.

First, the trustee must conduct an investigation to determine what hazardous substances, if any, burden the property. Second, the trustee must inform the appropriate state and federal agencies of the situation, including the trustee’s intent to abandon. Any other conditions the bankruptcy court may

30106 S. Ct. at 762-63.
3265 Bankr. at 563.
33Id.
3565 Bankr. at 272.
formulate will depend on the facts of the particular case in light of the factors set forth earlier.\(^25\)

A stricter approach was used by the bankruptcy court in *In re Peerless Plating Co.*\(^37\) The court concluded that *Midlantic* requires the trustee to be forbidden from abandoning the site as long as the property is in violation of applicable federal environmental law. The duty to bring the property within compliance of the law "creates an implicit duty on the Trustee's part to expend the estate's unencumbered assets in cleaning up the site in compliance with [applicable law]."\(^28\) The court speculated on a Supreme Court warning in *Midlantic* that certain state laws would impose conditions that would be so onerous as to interfere with the bankruptcy adjudication itself. In a footnote, the court predicted that a law which prohibited abandonment or the closing of the case after an estate was exhausted or one which permitted environmental authorities to completely usurp administration of the case would be so prohibited.\(^39\)

Although there is a divergence of authority as to what the *Midlantic* decision requires, a fast growing body of law is developing to qualify a power to abandon which the draftsmen saw as unconditional.

C. RETROACTIVE APPLICATION OF SECTION 522(f)

Section 522(f)(2) of the Bankruptcy Code allows individual debtors to avoid nonpossessor, nonpurchase-money security interests encumbering certain property, including household furnishings and appliances. In *United States v. Security Industrial Bank*,\(^40\) the Supreme Court held, in order to avoid a fifth amendment issue, that Congress intended section 522(f)(2) to apply only prospectively. While convenient, this approach was disingenuous.

1. Statutory Language and Legislative History

The statute, the transition provisions,\(^41\) and the legislative history are all silent as to the possibility that section 522(f) would become effective at any date different from the other provisions of the Bankruptcy Code. Section 401(a) of the transition provisions expressly repeals the Bankruptcy Act. Section 403(a), the savings provision, reads:

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\(^{25}\) 65 Bankr. at 273. The factors articulated previously in the opinion included, "(1) the imminence of danger to the public health and safety, (2) the extent of probable harm, (3) the amount and type of hazardous waste, (4) the cost to bring the property into compliance with environmental laws, and (5) the amount and type of funds available for cleanup." 65 Bankr. at 272.


\(^{28}\) 70 Bankr. at 948.

\(^{29}\) 70 Bankr. at 947.


\(^{41}\) Transition provisions were originally enacted in Pub. L. No. 95-598, §§ 401-409, 92 Stat. 2549, 2682-88 (1978).
A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of the parties in connection with any such bankruptcy case, matter, or proceeding, shall continue to be governed by the law applicable to such case, matter, or proceeding as if this Act had not been enacted.

Section 402(a) makes clear that the Bankruptcy Code became effective on October 1, 1979. There is no mention in the transition provisions that any particular section of title 11 should not be subject to that effective date. In explaining the transition provisions Congressman Don Edwards of California said that, "[a]ll cases commenced on or after October 1, 1979, will be governed by title 11 as contained in title I of the House amendment and the other provisions in titles II and III effective on that date."\(^4\)

As a practical matter, Congress must have intended the 1978 Bankruptcy Code to affect creditors' interests which came into being prior to its effective date. For example, section 365 clearly applies to contracts and leases made before October 1, 1979.\(^4\) Retroactive application of all the Code's provisions to a creditor's interest is the only way to give the debtor the full benefit of the "fresh start" Congress intended. It seems doubtful that the quality of the "fresh start" a debtor receives depends on when his creditors established or perfected their security interests.

Despite the lack of an express statutory reference regarding prospective application of section 522(f)(2), the Supreme Court in Security Industrial Bank reached the conclusion that Congress intended section 522(f)(2) to apply only prospectively. Justice Rehnquist made a great deal of the fact that an early version of the transition provisions contained an explicit requirement that all the Code's provisions "shall apply in all cases or proceedings instituted after its effective date, regardless of the date of occurrence of any of the operative facts determining legal rights, duties, or liabilities hereunder."\(^5\) The Court concluded that "Congress' elimination of explicit command is some evidence that it did not intend" the statute to be applied retroactively.\(^6\) The Court did not discuss the propriety of analyzing a provision of a bill introduced in the 94th Congress as indicative of the "intent" of the 95th Congress.

Justice Rehnquist's decision in Security Industrial Bank is at best a strained

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\(^5\) See, e.g., In re Peaches Records & Tapes, Inc., 51 Bankr. 583, 587-90 (Bankr. 9th Cir. 1983).
\(^7\) 459 U.S. at 81.
piece of reasoning. After discussing how fifth amendment law might implicate the retroactive application of section 522(f)(2), the Court concluded that there is "substantial doubt whether the retroactive destruction of the appellees' liens in this case comports with the Fifth Amendment." Rather than resolving that constitutional question, the Court searched for a construction of the statute to avoid the constitutional issue. Accordingly, the Court inferred a congressional intent to apply any provision which would otherwise destroy previously vested property rights only to property interests that came into effect after the enactment date. In "constructing" such a congressional intent, the Court made use of the presumption that a statute is not intended to apply retroactively to vested rights unless the legislature makes clear that intention. By framing the issue that way, Justice Rehnquist allowed legislative silence to serve as express intent that section 522(f)(2) was to apply only to interests in property that were created after the effective date of the Bankruptcy Code.

This reasoning is bolstered by an earlier Supreme Court opinion in Holt v. Henley. In Holt, a new statute granted the bankruptcy trustee the position of a lienholder with priority over sellers on conditional sale contracts. Read literally, that provision, like section 522(f)(2), divested property interests which were created before it was enacted. Speaking for a unanimous Court, Justice Holmes stated:

We do not need to consider whether or how far in any event the constitutional power of Congress would have been limited. It is enough that the 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. . . . That is a familiar and natural mode of interpretation. . . . We are of the opinion that it [the creditor's title] was not affected by the enactment of a later date than the conditional sale. The opposite construction would not simply extend a remedy but would impute to the act of Congress an intent to take away rights lawfully retained, and unimpeachable at the moment when they took their start.

This precedent, that absent express congressional intent to the contrary the Court will not interpret the bankruptcy statute to eliminate property rights which existed before the law was enacted, combined with the fact that an earlier version of the transition provisions contained such an explicit intent, which for some unknown reason was modified to its present form, allowed the Court to reach its conclusion.

459 U.S. at 78.
472 U.S. 617, 34 S. Ct. 459 (1914).
482 U.S. at 639-40.
The concurring opinion in *Security Industrial Bank* by Justice Blackmun, with whom Justices Brennan and Marshall joined, cited the *Holt* case as being determinative of the issue. The concurring opinion acknowledged that there is “nothing in the statute with which we are concerned that speaks or hints of only prospective applicability, or that compels it.” Absent the *Holt* decision, the concurring justices "would find it necessary to reach the constitutional issue." In resolving that constitutional issue, the concurrence would have resolved the issue in favor of the debtor. In Justice Blackmun’s opinion, unless the *Holt* decision was overturned, the decision by the Court was unavoidable.

2. Case Law

Although the holding in *Security Industrial Bank* was limited to section 522(f)(2), the broad language of its opinion was not.

No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in absence of an explicit command from Congress. In light of this principle, the legislative history of the 1978 Act suggests that Congress may not have intended that § 522(f) operate to destroy pre-enactment property rights.

The lower courts, seizing upon this language, have applied the same analysis to section 522(f)(1) and have determined that pre-enactment judgment liens may not be avoided. A majority of courts that have considered the issue have held that section 522(f) applies retroactively to liens created during the gap between the enactment date and the effective date.

Congress never envisioned restricting the application of any section of the Code with respect to cases commenced on or after October 1, 1979. Nevertheless, the Supreme Court, in order to avoid a constitutional question, created a legal fiction that Congress desired such a transition provision.

D. "GOOD FAITH" REQUIRED TO CONFIRM A PLAN IN CHAPTER 13

Section 1325 of the Bankruptcy Code establishes the standards for a bankruptcy court to evaluate in deciding whether to confirm a plan under...
chapter 13. Section 1325(a)(3) reads as follows:

(3) the plan has been proposed in good faith and not by any means forbidden by law;

In a sharp break with tradition, several courts made the good faith determination under section 1325(a)(3) a quantitative requirement. That is, despite the absence of language in the statute or the legislative history, courts read "good faith" to require that a chapter 13 plan provide for a certain level of repayment to unsecured creditors.

1. Statutory Language and Legislative History

Numerous Code sections are useful in illustrating that Congress did not intend any quantitative threshold in the good faith determination required to confirm a plan under section 1325(a)(3). Section 1325(a)(4) codifies a best interest of creditors test, permitting the court to confirm a plan only if:

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

It is in this section, and not section 1325(a)(3), that Congress defines the threshold requirement of the minimum amount of payments that must be received by unsecured creditors.

If Congress had desired a minimum level of repayment of unsecured creditors to be a precondition to confirmation of a chapter 13 plan, it was clearly capable of drafting appropriate language. Section 727(a)(9), which limits the frequency with which a debtor may receive a chapter 7 discharge after completing a chapter 13 composition plan, artfully uses such language:

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B) (i) 70 percent of such claims; and (ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

Nowhere in the legislative history of the Bankruptcy Code is the term
"good faith" defined. Most authorities utilize the definition of "good faith" that evolved in construing Chapter XI of the Bankruptcy Act:54 "A comprehensive definition of good faith is not practical. Broadly speaking, the basic inquiry should be whether or not under the circumstances of the case there has been an abuse of the provisions, purpose or spirit of [the chapter] in the proposal or acceptance of the arrangement."55

In searching for the "purpose and spirit" of chapter 13, courts imposing a substantial repayment requirement have misinterpreted legislative history. Most courts citing legislative history to justify their results cite the Senate Report. "It is also necessary to prevent chapter 13 plans from turning into mere offers of composition plans under which payments would equal only the non-exempt assets of the debtor."56 In using this passage to justify a substantial repayment requirement, courts have twisted the true spirit and purpose that the drafters envisioned for chapter 13.

In addition to the fact that both the statute and the legislative history are silent with respect to a threshold requirement for repayment, the legislative history seems clear that Congress envisioned that chapter 13 plans would be limited, in terms of the amount of repayment received, only by the best interest of creditors’ test contained in section 1325(a)(4).

The standards for confirmation of the plan differ from those under current law in two significant respects. First, the bill does not require consents from unsecured creditors. Under present law, the consent requirement often prevents a debtor from making a legitimate offer of less than full payment, for fear that the offer will not obtain the requisite consents. Instead, the debtor, unable to pay his debts in full within a reasonable period, will opt for liquidation. The bill requires only that creditors receive under the plan more than they would if the debtor went into straight bankruptcy. . . . Creditors will not be disadvantaged, because the plan must still pay them more than they would get under a liquidation.57

At least one proponent of the Code shared the same sentiments: "We feel that if the debtor makes an effort to repay his creditors, the creditors should not be able to say that the plan does not propose to pay enough or that it does not do other things that the creditors want."58

Since the main thrust of chapter 13 generally was to liberalize the provi-

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sions of Chapter XIII, which was ineffective as an alternative to liquidation, a substantial repayment requirement is inconsistent with the general spirit of chapter 13. For example it seems unlikely that in the same bill Congress would grant access to chapter 13 relief to welfare recipients, while simultaneously requiring that any plan they propose make substantial repayments to unsecured creditors.

The language of the statute itself demonstrates that Congress contemplated the need for some kind of minimal repayment in a chapter 13 plan, and that it knew how to draft language which would have required a percentage of claims to be satisfied under a chapter 13 plan. There is no indication in the legislative history that the good faith requirement of section 1325(a)(3) was intended to have any quantitative aspect.

2. Case Law

A multitude of cases have held that the good faith requirement of section 1325(a)(3) requires either "substantial" or "meaningful" repayment of unsecured creditors.

Some especially egregious perversions of legislative intent deserve to be mentioned separately. At least two bankruptcy courts reached the conclusion that the "substantial and meaningful" payments required to satisfy the good faith standard of section 1325(a)(3) demanded that the debtor pay at least 70% of allowed unsecured claims. Although the 70% requirement was reversed in Burrell, the district court still required "substantial and meaningful" repayment of allowed unsecured claims. The case was remanded to the bankruptcy court to determine whether the payments offered satisfied the "substantial and meaningful" repayment requirement articulated by the district court. These cases ignore rather than try to reconcile statements of legislative intent: "To this Court it is unconceivable [sic] that it was the intent of Congress for courts to confirm such plans as this. The literal provisions for confirmation of a plan may be fully complied with, but . . . one must assume there was an oversight on the part of Congress."

Perhaps equally distressing are the cases which hold that the best efforts of the debtor to make payments are irrelevant to the determination of good faith if the payments do not reach the "substantial and meaningful" level. "It

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97In re Raburn, 4 Bankr. at 625.
is regrettable but true that in Chapter 13 plans, as in many other human endeavors, even one's best may not be good enough.67

Commendably, the courts of appeals refused to read a substantial repayment requirement into the "good faith" language of section 1325(a)(3).66

In 1978, Congress did all it could to make chapter 13 an attractive alternative to liquidation. In liberalizing its provisions, Congress did not require a minimum payment requirement beyond the "best interest" test codified in section 1325(a)(4). Courts that read a quantitative requirement into the "good faith" determination of section 1325(a)(3) sought to "redraft" chapter 13 to their own liking rather than carry out the intent of Congress.

In 1984, Congress changed its mind and amended section 1325(b) to require payment of the debtor's projected disposable income under most chapter 13 plans. Thereafter courts ceased to use section 1325(a)(3) to defeat minimal repayment plans.67

E. Scope of The Chapter 11 Discharge

Section 1141 of the Bankruptcy Code contains the discharge provisions for a chapter 11 debtor. The language of the statute and the legislative history make very clear a congressional policy to give a broad discharge to chapter 11 debtors. The broad discharge is necessary to give creditors and investors an environment of certainty in which to evaluate the chapter 11 plan.

1. Statutory Language and Legislative History

The plain language of the statute evidences the draftsman's intent that the scope of the chapter 11 discharge be broad.68 The legislative history is equally clear.

67In re Heard, 6 Bankr. 876, 884 (Bankr. W.D. Ky. 1980).
66In re Chaffin, 316 F.2d 1070 (5th Cir. 1963); In re Johnson, 708 F.2d 865 (2d Cir. 1983); In re Estes, 695 F.2d 311 (8th Cir. 1982); Deans v. O'Donnell, 692 F.2d 968 (4th Cir. 1982); Barnes v. Whelan, 689 F.2d 193 (D.C. Cir. 1982); In re Goeb, 675 F.2d 1386 (9th Cir. 1982); In re King, 669 F.2d 426 (7th Cir. 1982).
68Section 1141(e)(3) reads (emphasis added):
(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan:
(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not:
(i) a proof of the claim based on such debt is filed or deemed filed under section 301 of the title;
(ii) such claim is allowed under section 302 of this title; or
(m) the holder of such claim has accepted the plan; and
(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.
Paragraph (1) specifies that the confirmation of a plan dis-
charges the debtor from any debt that arose before the date of the order for relief unless the plan or the order confirming the plan provides otherwise. The discharge is effective against those claims whether or not proof of the claim is filed (or deemed filed), and whether or not the claim is allowed.\(^6\)

Congressman Don Edwards, a floor manager of the legislation, explained the necessity of the broad discharge provisions: “It is necessary for a corporation or partnership undergoing reorganization to be able to present its creditors with a fixed list of liabilities upon which the creditors or third parties can make intelligent decisions.”\(^7\)

Section 1141(c) refers to discharging “debts.” A debt is defined in section 101(11) as “liability on a claim.” “Claim” is defined in section 101(4) to mean a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” The legislative history states that the definition of “claim” is the “broadest possible definition.”\(^8\) Thus, the legislative history and statutory language evidence the intent of the draftsmen of the Code that the discharge of section 1141 give the debtor a “fresh start” free of unknown or contingent liabilities.

2. Case Law

Courts of appeals and several lower courts have simply been unwilling to accept the breadth of the chapter 11 discharge envisioned by Congress. Two judicial limitations have been imposed.

a. Due Process

Obviously, section 1141(d) of the Bankruptcy Code would be limited, regardless of any congressional intent, by constitutional considerations. A due process restriction would limit the scope of the discharge. The kind of notice that must be received to comport with due process requirements is governed by the Supreme Court’s decision in Mullane v. Central Hanover Bank & Trust Co.\(^9\)

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and

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afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.73

The Supreme Court did not determine how Mullane affected bankruptcy litigation until City of New York v. New York, N.H. & H.R. Co.74 City of New York involved a railroad reorganization under Section 77 of the Bankruptcy Act. The debtor did not give notice of the bar date for filing proofs of claim to the City, which had liens on parcels of real estate. The Court held that the City's mere knowledge of the pendency of a bankruptcy case was not adequate notice to a known lienholder to support a discharge of the creditor's claim.

Nor can the bar order against New York be sustained because of the City's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory "reasonable notice" will be given them before their claims are forever barred.75

Read literally, City of New York requires that known lienholders receive actual notice of a bar date or their claims will survive discharge.76

The courts of appeals followed and expanded City of New York by applying it in cases under Chapter X of the Bankruptcy Act. The Third Circuit in In re Harbor Tank Storage Co.77 ruled that a creditor who was in constant contact with a debtor's counsel regarding the reorganization was entitled to

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73Id. (citations omitted).
74344 U.S. 293, 73 S. Ct. 299 (1953).
75City of New York, 344 U.S. at 297 (emphasis added).
76It is important to note that this constitutional standard applies only to known creditors. What due process requires for unknown claimants obviously has to be substantially less than actual notice.
7723 F.2d 111 (3d Cir. 1967).
wait for formal notice before his claim would be barred.\textsuperscript{78}

\[\text{The fact that the creditor knows of the initiation of reorganization proceedings does not of itself place a burden on the creditor to file an appearance or claim in the proceeding before receiving notice to do so: a creditor has every right to assume that he will be sent all the notices to which he is entitled under the Act.}\textsuperscript{79}

A similar conclusion was reached by the First Circuit in \textit{In re Intaco Puerto Rico, Inc.}\textsuperscript{80} The omitted creditor in Intaco had knowledge of the bankruptcy case because he was forced by a bankruptcy court injunction to withdraw a counterclaim he had against the debtor.

Both \textit{Harbor Tank} and \textit{Intaco} assumed that the Supreme Court's ruling in \textit{City of New York} affects unsecured as well as secured creditors without discussing the increased constitutional concerns respecting property interests held by secured creditors.\textsuperscript{81} In addition, both \textit{Harbor Tank} and \textit{Intaco} assume that the proper remedy for such a constitutional infraction basically is to waive the bar date and allow the claims to be presented to the bankruptcy court post-confirmation. Neither case speculates what the proper remedy would be if a distribution of assets under a plan already had occurred.

The Bankruptcy Code of 1978 reaffirmed a strong congressional intent to have a chapter 11 discharge that is as broad as constitutionally permissible. Against this legislative backdrop, and armed with the two appellate cases that interpreted \textit{City of New York}, the Tenth Circuit decided the now infamous \textit{Reliable Electric Co. v. Olson Construction Co. (In re Reliable Electric Co.)}.\textsuperscript{82}

\textit{Reliable Electric Co. ("Reliable")}, the debtor, was an electrical subcontractor on a construction project; \textit{Olson Construction Co. ("Olson")} was the general contractor. Reliable withdrew from the project because it perceived that Olson had breached the subcontract. Soon after it withdrew, Reliable filed a voluntary chapter 11 petition for reorganization. Neither the original nor amended schedules of creditors listed Olson. After filing its petition, Reliable filed suit against Olson in a Colorado state court seeking damages for

\textsuperscript{78}Although the creditor in \textit{Harbor Tank} was "never given notice of the bar order or any other notice of the steps in the reorganization proceeding," 383 F.2d at 112, the court appeared to be concerned primarily with notice regarding the bar date.

\textsuperscript{79}383 F.2d at 113.

\textsuperscript{80}494 F.2d 94 (1974).

\textsuperscript{81}Cf. \textit{United States v. Security Industrial Bank}, 459 U.S. 70, 75, 103 S. Ct. 407, 411 (1983) ("[O]ur cases recognize, as did the common law, that the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral."); \textit{In re Commercial Western Finance Corp.}, 761 F.2d 1329 (9th Cir. 1985) (secured creditors are entitled to adversary proceedings before their liens can be avoided, while unsecured creditors can have their unsecured claims discharged through confirmation of a plan).
breach of the subcontract. Olson removed the action to federal bankruptcy court, where it responded to the complaint through an answer and counter-claim for damages based on Reliable's alleged prepetition breach of the subcontract. Because Olson was not listed as a creditor on the schedules, it did not receive the plan of reorganization, the disclosure statement, notice of time for filing acceptances or rejections of the plan, notice of the confirmation hearing, or notice of the time for filing objections to confirmation. Nevertheless, the bankruptcy court held a confirmation hearing and confirmed Reliable's Third Amended Plan.

After the plan was confirmed, the bankruptcy court held a trial on the subcontract dispute between Reliable and Olson. The bankruptcy court then entered judgment, dismissing Reliable's complaint and granting Olson's recovery against Reliable in the amount of $10,378. Reliable then filed a claim in its chapter 11 case, on behalf of Olson, for the full amount of the judgment. Reliable also filed a motion in the same case to allow Olson's claim. Further, Reliable requested in the subcontract litigation that the court specifically find the $10,378 judgment for Olson to be a prepetition debt subject to compromise and payment as a general unsecured claim.

The bankruptcy court refused Reliable's motion because Olson had not been scheduled as a creditor or notified of the confirmation hearing and, pursuant to the plan of reorganization, Olson's claim would be impaired substantially. The Tenth Circuit dealt specifically with the language in section 1141 that allowed any claim to be discharged, even if the claim holder had not received notice of hearings. "However, we hold that notwithstanding the language of section 1141, the discharge of a claim without reasonable notice of the confirmation hearing is violative of the fifth amendment to the United States Constitution." The remedy that the Tenth Circuit fashioned was startling. "Olson's claim cannot be bound to the Plan and, thus, it is not dischargeable."

Reliable Electric expands beyond reasonable proportions the scope of due process to which a known creditor, as defined in City of New York, is entitled. It does so despite the legislative determination that a chapter 11 discharge needs to be as broad as constitutionally possible.

In Reliable Electric, the Tenth Circuit’s view of due process deviates from the holding of City of New York, in three important respects. First, the Tenth Circuit has a twisted view of what constitutes actual notice. In Reliable Electric, the creditor was not only cognizant of the fact that a reorganization was proceeding, but Olson had already submitted to the jurisdiction of the bankruptcy court to resolve its dispute with the debtor. Not only was Olson

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726 F.2d at 621.
726 F.2d at 623.
7Id.
litigating the subcontract dispute in the bankruptcy court, but the Tenth Circuit's opinion makes clear that Olson made the motion to remove the action to federal bankruptcy court. Obviously, Olson must have received some notice from the bankruptcy court regarding the litigation of its claim.

In City of New York, the City had received no notice at all from the court regarding the bankruptcy case. Even if one is willing to accept the constitutional limitation that actual knowledge of a proceeding is not a substitute for written notice, Reliable Electric raises the due process requirement to actual notice of specific events. For some reason the Tenth Circuit concludes that Olson’s making a motion to remove a cause of action to a bankruptcy court, receiving various notices and complaints regarding that litigation, and adjudicating its claim in front of a bankruptcy judge, was not enough to put Olson on notice of the bar date.

The Ninth Circuit in In re Gregory appears to reach an opposite conclusion with respect to the kind of notice required. When the holder of a large, unsecured claim such as Lawrence receives any notice from the bankruptcy court that its debtor has initiated bankruptcy proceedings, it is under constructive or inquiry notice that its claim may be affected, and it ignores the proceedings to which the notice refers at its peril. “Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry may have led. When a person has sufficient information to lead him to a fact, he shall be deemed to be conversant of it.” The notice included the names of the bankruptcy judge, the trustee, and Gregory’s [the debtor’s] attorney, and presumably any of them could have helped Lawrence obtain a copy of the plan or informed it as to the plan’s proposal concerning its claim. If Lawrence had made any inquiry following receipt of the notice, it would have discovered that it needed to act to protect its interest.

In contrast, the Tenth Circuit envisions that a creditor can remain completely passive to any imperfect notice he receives from a bankruptcy court. The creditor has no duty to inquire of either the court or counsel as to why he did not receive other notices.

This problem is exacerbated by the second major deviation Reliable Electric makes from existing case law. Rather than requiring notice of the bar date to file claims, Reliable Electric focuses on notice of the confirmation hearing.

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726 F.2d at 621.
705 F.2d 1118, 1123 (9th Cir. 1983).
705 F.2d at 1123 (9th Cir. 1983).
Id. (citations omitted).
After supplying a laundry list of notices which Olson did not receive, the Tenth Circuit concludes that only the failure to give notice of the confirmation hearing is of constitutional proportions. \textit{City of New York, Harbor Tank}, and \textit{Intaco} all required notice of the bar date for filing proofs of claim. It is not clear that notice of the confirmation date gives the creditor an opportunity to protect all its rights. At least one case interpreting \textit{Reliable Electric} held that violation of the creditor's due process right would "most certainly be cause for extension of the bar date" under Bankruptcy Rule 3003(c)(3). An argument could also be made that protection of a creditor's rights requires notice of the hearing on the disclosure statement. Bankruptcy Rule 3016(a) makes clear that the disclosure statement hearing is the deadline for a nondebtor to file a plan of reorganization.

More important than the mere curiosity that the Tenth Circuit finds one notice more important than another is the way the court articulates that notice of the confirmation hearing is an absolute requirement. A literal reading of \textit{Reliable Electric} would allow one to conclude that even if the creditor received notice of the bar date, filed a proof of claim, received copies of the plan and disclosure statement, but, through some oversight or accident, did not receive notice of the confirmation hearing, the creditor would not be bound by the plan of reorganization. This view does not comport with any other articulation of the requirements of due process.

Third, and finally, \textit{Reliable Electric} remedies the constitutional violation by holding that the creditor's claim is nondischargeable. Both \textit{Intaco} and \textit{Harbor Tank}, which dealt with unsecured claims, held that the remedy was to extend the bar date and allow the creditor to file a proof of claim. The Tenth Circuit's unusual remedy in \textit{Reliable Electric} of holding the debt nondischargeable appears to be mandated by some type of error in administration. Second, Reliable had already fully distributed the payable assets to Class 4 unsecured creditors (the group Olson would belong to) at the time it moved to force Olson's claim to be subject to the Plan." Inexplicably, all payable assets were distributed to creditors even though the bankruptcy court still had to determine the allowability of Olson's claim. Rather than explain its unique remedy as a function of the anomalous administration of this particular case, the Tenth Circuit relegated discussion of this point to a footnote.

Unfortunately, \textit{Reliable Electric}'s expansive view of what due process requires in a bankruptcy case has been adopted by other courts. In \textit{Broomall Industries, Inc. v. Data Design Logic Systems, Inc.}, the debtor's predecessor

\footnotesize{\begin{itemize}
\item[\textsuperscript{98}]726 F.2d at 621.
\item[\textsuperscript{99}]In re Standard Metals Corp., 48 Bankr. 778 (D. Colo. 1983), aff'd on other grounds, 817 F.2d 623 (10th Cir. 1987).
\item[\textsuperscript{100}]726 F.2d at 623 n.6 (parenthetical in original).
\item[\textsuperscript{101}]786 F.2d 401 (Fed. Cir. 1986).
\end{itemize}}
was allegedly violating a patent held by Broomall. In September, 1986, an attorney from Broomall wrote the debtor’s predecessor, Logic Systems, Inc., that a patent owned by Broomall was being infringed upon by Logic Systems. On February 14, 1977, Broomall threatened suit and sent a copy of the proposed complaint for patent infringement to Logic Systems on March 22, 1977. Logic Systems’ position was that it did not infringe the patent. Interestingly, Broomall did not proceed with its infringement suit against Logic Systems, but rather initiated an infringement suit against another infringer, Nicolet Instrument Corp. On May 7, 1980, three years after Logic Systems had denied infringement of the patent, Logic Systems filed a petition for reorganization under chapter 11. On July 29, 1981, an order was entered confirming a plan of reorganization. The plan made no provision for any possible claim of Broomall, nor was Broomall listed as a creditor on any of the schedules. On February 23, 1983, Broomall’s attorney wrote the post-confirmation entity, Data Design Logic Systems, stating that it intended to enforce its exclusive license on the patent. Broomall’s attorney explained that it did not file suit against Logic Systems until a favorable decision was reached in the Nicolet suit.

The Federal Circuit held that Broomall’s claim was not discharged on two separate grounds. First, in order for Broomall’s claim to be discharged, notice was required to be given to Broomall as a known creditor of Logic Systems, because Logic Systems “knew” of Broomall’s claim in 1977. This definition of what constitutes a known creditor for due process purposes is without support or justification. It requires that a debtor give actual notice to each entity that has threatened suit against the debtor, as long as the statute of limitations on that cause of action has not expired. Clearly, City of New York does not require such a result. Second, the court held that even if Broomall was not a known claimant, the debtor had an obligation to give publication notice to discharge the claims of all unknown claimants.93 The Federal Circuit cites Mullane for this proposition. It is not clear that Mullane requires publication notice to “unknown claimants” when the party providing notice does not know if such claimants exist. Mullane dealt with the situation where the bank knew that beneficiaries to a certain trust existed, but had no idea how to contact those beneficiaries. It is two different things to say that a debtor must make an effort to inform parties it knows exist, but does not know how to identify or reach, and to say that in each bankruptcy case the debtor must publish notice to discharge the claim of any party whose right to payment is unknown by the debtor.94

93 785 F.2d at 404.
94 See In re Standard Metals Corp., 48 Bankr. at 798 (“The requirement for such publication would seem to be more appropriate where there is some evidence of the existence of a claim or claims, with the identify [sic] of the claimants yet to be determined.”).
Recent cases embrace and expand this due process limitation. Several cases have followed the lead of Reliable Electric in holding that known creditors that did not receive actual notice of a bankruptcy case are unaffected by the discharge, regardless of their knowledge of the case.95 Other cases cite Reliable Electric with approval, but remedy the situation by allowing a known creditor to file late if the creditor did not receive adequate notice to timely file either a proof of claim or non-dischargeability complaint.96 Numerous other cases cite and embrace the notice requirements articulated by Reliable Electric.97

Obviously, courts are well within their powers to limit any statute on constitutional grounds. But, where legislative history states that codification of the broadest constitutionally permissible discharge provisions was necessary for chapter 11 to be successful, courts should evaluate carefully this congressional determination before departing drastically from previously articulated due process standards. In taking expansive views of due process in bankruptcy, far beyond that which the Supreme Court envisioned in the City of New York, the courts frustrate legislative intent.

b. Definition of “Claims”

Court-imposed restrictions on the definition of “claim” also affect the scope of the discharge. As demonstrated above, section 1141(d) discharges “any debt,” and “debt” is defined in section 101(11) as “liability on a claim.” By limiting the definition of “claim,” courts have restricted the scope of the chapter 11 discharge.

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*See, e.g., In re Spring Valley Farms, Inc., 68 Bankr. 756 (Bankr. N.D. Ala. 1986) (failure to receive notice of bar date makes claim nondischargeable; unnecessary to reach the notice of confirmation hearing issue); In re General Od Distributors, Inc., 68 Bankr. 603 (Bankr. E.D.N.Y. 1986) (creditor who does not file proof of claim can only be bound by plan if he has received notice of the confirmation hearing); Acevedo v. Van Dam Plastic Machinery Co., 68 Bankr. 495 (Bankr. E.D.N.Y. 1986) (insufficient notice of bankruptcy case to file a claim results in the claim being nondischargeable). Not all the courts listed embraced this precedent happily.

The question presented to the Court is a difficult one, and the conclusion by the Court might have been different had this been a question of first impression. In light of the plaintiffs' actual knowledge of the defendants' bankruptcy case and the concept of giving a “fresh start” to a bankruptcy debtor, it may appear contrary to the remedial spirit of the statute to permit the plaintiffs after the conclusion of the bankruptcy case to continue to assert their alleged claims against the defendants.


*See, e.g., Talman Home Mortgage Corp. v. El Lago Apartment Venture, 70 Bankr. 346 (N.D. Ill. 1987) (lack of formal notice of plan modification bars discharge of claim); In re Pagan, 39 Bankr. 394 (D.P.R. 1986) (failure to give notice is not determinative if the creditor is guilty of laches).
By far, the most frequently cited and criticized case is the Third Circuit's
Avelino v. M. Frenville Co. (In re M. Frenville Co.) 98 When creditors
of Frenville filed an involuntary bankruptcy petition, its lenders filed suit
in state court against Frenville's accountants on the ground that the financial
statements prepared were false and misleading. The accountants, in turn,
sought relief from the automatic stay to assert a claim for statutory indemni-
ty against Frenville as a third party defendant in the state court action. In
deciding whether the automatic stay applied, the Third Circuit had to de-
cide whether the statutory cause of action for indemnification was a "claim"
under section 101(4). The court held that the accountants' right to payment
against Frenville did not arise until the lenders had filed suit against the ac-
countants directly. Although the alleged error in the financial statements was
made prepetition, the statutory right to payment for indemnification for that
error was a postpetition claim and, therefore, not subject to the automatic stay.

At first glance, A&B [the accountants] might be thought to have an unliquidated,
contingent, unmatured and disputed claim pre-petition. While all of these adjectives may describe
A&B's cause of action against the Frenvilles, the threshold requirement of a claim must first be met—there must be a
"right to payment." 99

By separating the action which gives rise to a claim from the claim itself,
the Frenville court embarked on a line of reasoning that carried it far away
from the original legislative intent that the definition of claim be "the broad-
est possible." This decision has been soundly and consistently criticized.100

In deciding Frenville, the Third Circuit redefined the term "claim" in a
manner inconsistent with congressional intent. The definition of "claim" in
section 101(4) makes clear that "the right to payment" can be unliquidated,
contingent, unmatured, or disputed. The Third Circuit twists this statutory
language in concluding that although the claim is undisputed, unliquidated etc., the right to payment must exist at the time of the filing of the petition.
Such a reading is clearly inconsistent with Congress' deletion of the element
of provability that was required under certain chapters of the Bankruptcy
Act.101 It is clear that the right to reimbursement or contribution existed,
although it was still contingent and unmatured, at the time the act giving rise to the underlying wrong occurred.

99744 F.2d at 336.
100See In re Baldwin-United Corp. Litigation, 765 F.2d 343, 348 n.4 (3d Cir. 1985); In re Black, 76
Bankr. 645 (Bankr. D. Utah 1985); In re A.H. Robins Co., 63 Bankr. 986 (Bankr. E.D. Va. 1986); In re
Edge, 60 Bankr. 690 (Bankr. M.D. Tenn. 1986); In re Johns-Manville Corp., 57 Bankr. 680 (Bankr. S.D.N.Y.
1986); In re Yanke, 49 Bankr. 35 (Bankr. S.D. Fla. 1983); In re Baldwin-United Corp., 48 Bankr. 901 (Bankr.
S.D. Ohio 1985); R. McBay and A. Jarvis, In re Frenville: A Critique by the National Bankruptcy Confer-
ence's Committee on Claims and Distributions, 42 BUS. LAW. 697 (1987).
Perhaps some courts have been concerned that a creditor must know that it has a claim in order for the claim to be discharged as a matter of due process. Instead of confronting this issue, courts have blindly applied Fremontville despite the well-deserved criticism that has been heaped upon it. The Third Circuit applied Fremontville to hold nondischargeable claims for asbestos-related injuries under the Federal Employers Liability Act. In Schweitzer, the court ruled that an employee's claim for damages did not arise until the injury became apparent. Therefore, although the exposure to the asbestos occurred prepetition, postpetition manifestations of the disease were not dischargeable in a plan. In In re Tonyc, the bankruptcy court denied the debtor's application to reopen its case to add creditors to its schedules so that their claims would be discharged. The claims that the debtor sought to discharge arose from wrongful death caused by the debtor's prepetition negligent installation of a gas furnace. The court held that the matter fell squarely within the ruling of Fremontville, and since the right to payment did not arise until the death which occurred postpetition, the suits were not "claims" that could be discharged in bankruptcy.

Courts should be more cautious in imposing restrictions on the chapter 11 discharge. Congress evinced a clear intention that prepetition claims could not affect a postconfirmation debtor in order to give investors and creditors confidence in dealing with a reorganized company. As that confidence is diminished, so is the desire of third parties to provide funds to rehabilitate the debtor.

F. "American Mariner" Interest

Two courts of appeals have concluded that a creditor whose claim is partially secured is entitled to adequate protection compensation for delay in foreclosure caused by the automatic stay. In other words, the creditor is entitled to the lost opportunity cost or time value of money, based on the value of the collateral, during the period of delay attributable to the stay. Such a conclusion is unequivocally contrary to congressional intent.

1. Statutory Language and Legislative History

Section 362(d) of the Bankruptcy Code authorizes "a party in interest" to request relief from the automatic stay "for cause, including lack of adequate protection of an interest in property." Section 361 illustrates several

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104 In re American Mariner Indus., Inc., 734 F.2d 426 (9th Cir. 1984).
105 Id., see also Grundy National Bank v. Tandem Mining Corp., 734 F.2d 1436 (4th Cir. 1984); but see United Sav. Ass'n v. Timbers of Inwood Forest Assoces., 703 F.2d 1380 (5th Cir. 1986), cert. granted, 107 S. Ct. 2450 (1987), and In re Briggs Transportation Co., 780 F.2d 1339 (8th Cir. 1986).
means of providing adequate protection. The legislative history acknowledges that the means of providing adequate protection listed in the statute "are neither exclusive nor exhaustive." Although the legislative history of section 361 alone does not resolve the argument conclusively, reference to other provisions of the Bankruptcy Code makes clear that Congress did not intend the result reached in American Marine.

Regardless of the label placed on them, the payments received by a partially secured creditor from the debtor for use of collateral that is not depreciating constitute the economic equivalent of postpetition interest. Terms such as "opportunity cost" or "time value of money" do not change the economic substance of these payments.

As a general rule, creditors are not allowed a claim for interest accruing on their debts during the bankruptcy case. For over two hundred years, bankruptcy law has provided a general rule that interest on debts does not accrue after a petition is filed. The rule originally had its basis not in the language of any statute, but as a principle of equity.

Extraction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved.

Although the rule was developed when bankruptcy law provided only for liquidation, the rule was quickly accepted in reorganization cases under Chapter XI of the Bankruptcy Act of 1898.

Under the common law, exceptions had evolved to the general rule. First, an oversecured creditor was entitled to claim postpetition interest, but only to the extent that the principal of the debt plus accrued interest did not exceed the value of the collateral securing the debt and the interest. Second, creditors in general might be entitled to postpetition interest if the debtor's estate ultimately proved to be solvent.

In light of this historical precedent, by the time the Bankruptcy Code was drafted, the fact that undersecured creditors were not entitled to postpe-

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3. Sexton v. Dreyfus, 219 U.S. 339, 344, 31 S. Ct. 256, 257 (1911) ("For more than a century and a half the theory of the English bankruptcy system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission.")
tution interest was a well-established rule of law. As a matter of statutory interpretation, if Congress intends for legislation to change the interpretation of a judicially created concept, it must make this intent specific.115 The Supreme Court has followed this rule with particular care in construing the scope of bankruptcy codification.116 If Congress desired to compensate undersecured creditors for the time delay of bankruptcy proceedings, “the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.”117

Interestingly, Congress knew enough to codify specifically most of the provisions of the traditional rule. Section 502(b)(2) holds that any claim for unmatured interest will be disallowed. Moreover, section 506(b) continues the pre-Code treatment allowing accrual of postpetition interest on the claim of an oversecured creditor. The legislative history to this provision makes clear that Congress intended to codify current law on the issue of interest on an oversecured claim.118 Furthermore, section 726(a)(5) grants creditors postpetition interest in the case of a solvent chapter 7 debtor. It is beyond comprehension how Congress could have so carefully codified “current law” on the postpetition interest issue while at the same time intending the revolutionary treatment of the undersecured creditor reached in American Manmar without any express mention of such a change.

Congressional intent can also be inferred from the structure of section 361. Section 361 presents an illustration of adequate protection by offering three examples. The first two examples codified in sections 361(1) and (2) expressly state that adequate protection is in compensation for “a decrease in the value of such entity’s interest in such property.” Section 361(3) which appears to be a “catch-all” provision, allowing other methods of adequate protection, contains no language regarding the decrease in the value of such entity’s interest in the property. It is under section 361(3), the indubitable equivalent standard, that courts such as the Ninth Circuit in American Manmar find authority to require payment to an undersecured creditor even though the value of the collateral is not being affected by the debtor’s use.

Logically it seems strained that the same term could be illustrated by three examples, with two examples having a significant restriction on them, without assuming that the third example, although silent with respect to the restriction, does not contain an identical limitation. In other words, if all the

116Midlantic, 474 U.S. at 494.
118S. Res. No. 980, 95th Cong., 2d Sess. 63, 65 (1978). Section 506(b) “codifies current law” by giving “a creditor with an oversecured claim” interest “to the extent that the value of the collateral exceeds the amount of the underlying claim.”
paragraphs of section 361 are illustrating the same concept, and paragraphs (1) and (2) only define that concept in terms of the reduction of the value of the creditor's interest in the property, the flexible,"catch-all" provision must also contain such an implied limitation. Courts adopting the American Mariner position are forced to acknowledge that their result is inconsistent with sections 361(1) and (2). That all three paragraphs could be defining the same concept, yet actually providing for the protection of different interests, is untenable.

Cases following the American Mariner line of reasoning make a great deal out of the language in section 361(3) which grants the "indubitable equivalent of such entity's interest in such property." In contrasting that language to section 1129(b)(2)(A)(iii) which provides for "the indubitable equivalent of such claims," some courts conclude that section 361(3) was designed to protect a broader interest than "claims" as mentioned in section 1129(b)(2)(A)(iii).

Such a reading is clearly not the one envisioned by Congress. The legislative history states that "[a]dequate protection of an interest of an entity in property is intended to protect a creditor's allowed secured claim." In "Interest in property" is a broader term than "claim," but not broader in the sense of what it protects, but rather who it protects. "Claim" in section 1129(b)(2)(A)(iii) relates only to secured creditors. By definition, only "creditors" have "claims." "Interest in property" was designed to allow lessors or consignors to share in the protection offered by section 361. The legislative history corroborates this view by making clear that consignors were intended to be within the scope of protection. This open definition of the types of interests that are protectable facilitates the adequate protection provided in section 363(c) to any "entity that has an interest in property used, sold, or leased" by the debtor. In this regard, many courts have allowed lessors to recover adequate protection.

Section 1129, along with section 1325, casts additional doubt on the American Mariner view of legislative intent. In both section 1129 and section 1325, Congress clearly provided for creditors' claims to be protected on a present value basis when rights are modified permanently by a plan of reorganization. It is obvious that Congress considered the possibility of "opportunity costs" or "time value of money" in drafting these provisions. The fact

117 American Mariner, 754 F.2d at 432.
that Congress provided such protection only when rights were modified permanently, while remaining silent on any pre-confirmation provision, is excellent evidence of its intent. If Congress had intended the American Mariner treatment, section 361 would have contained the present value language found throughout the confirmation provisions of chapters 11 and 13. Instead, not only is the statute itself silent, but the legislative history contains no mention of a concept that, in another context, Congress had both contemplated and developed language to express.

If the American Mariner result were contemplated by Congress, the Code is woefully inadequate to provide for its implementation. While all courts applying the American Mariner holding agree on the basic concept—that adequate protection payments are a function of the hypothetical foreclosure proceeds and their hypothetical reinvestment, they fail to agree on the specifics. Since the statute did not envision such a reading, it is of little help to discuss these details. If Congress had intended the American Mariner result, it would have been wise enough to codify specifics such as:

1. Whether to compensate for lost opportunity costs from the date of the petition, the date of the motion for relief from the stay, or the date of a ruling on the motion;
2. Whether to take into account the practicalities of delay in the state foreclosure process and delay in selling the property in order to realize something more favorable than a forced-sale price, during which a creditor would not be able to invest proceeds from its collateral;
3. Whether to apply to the hypothetically re-invested proceeds of sale the contract rate of interest, or the current market rate, and in that case, the long-term or short-term market rate; and
4. Whether to apply "lost opportunity cost" payments that are actually made to the principal amount of the debt.

Courts applying the American Mariner reasoning have differing opinions on most of these issues.

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123 See supra note 25.
124 Recent repudiation of American Mariner in the enactment of § 1203 does not support contrary intent. It is fundamental that the intent of Congress in 1986 cannot be used to infer the intent of Congress in 1978. United States v. Price, 361 U.S. 304, 315, 80 S. Ct. 526, 532 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); but see Bell v. New Jersey, 461 U.S. 773, 784, 103 S. Ct. 2147, 2194 (1993) ("Of course the view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value.")
125 United Sav. Ass'n v. Timbers of Inwood Forest Assoc., Inc. v. Timbers of Inwood Forest Associates, Ltd., 793 F.2d 1280, 1403 (5th Cir. 1986), reh'g denied, 808 F.2d 363 (5th Cir. en banc), cert. granted, 107 S. Ct. 2430 (1987).
126 See generally Timbers, 703 F.2d at 1403-04.
Finally, although the legislative history does not expressly state that the treatment of undersecured creditors provided in American Mariner was not allowed under section 361, there is absolutely no evidence in the legislative record that supports the American Mariner outcome. This result is not surprising because the issue was never raised. "[T]he subject of periodic postpetition interest payments for undersecured creditors was not raised in the testimony or prepared statement of a single witness." In addition, statements made by legislative leaders did not raise the possibility that adequate protection could be granted in a situation where the value of the collateral was not depreciating. "If a creditor is concerned that property is being misused or depreciating, the creditor can demand adequate protection or relief from the automatic stay."  

The Ninth Circuit, in American Mariner, makes a great deal of the House Report which states:

Secured creditors should not be deprived of the benefit of their bargain. There may be situations in bankruptcy where giving a secured creditor an absolute right to his bargain may be impossible or seriously detrimental to the bankruptcy laws. Thus, this section recognizes the availability of alternate means of protecting a secured creditor's interest. Though the creditor might not receive his bargain in kind, the purpose of the section is to assure that the secured creditor receives in value essentially what he bargained for.

It is difficult to see how this rather cryptic statement could be cited for the proposition that partially secured creditors are entitled to opportunity cost payments based on the value of their collateral. This is particularly true in light of the fact that the House Report described a bill that did not include the "indubitable equivalent" standard. To call this single statement inconclusive is an understatement. Taken in the totality of the rest of the provisions in the Code, this call not to deprive the secured creditor of the benefit of his bargain is little more than a call for equity in designing adequate protection measures. The best explanation of the American Mariner position was given by Judge Randall of the Court of Appeals for the Fifth Circuit in her thoughtful Timbers opinion:

It seems that the debate has become not what the Bankruptcy Code requires, but what it should require. If we were Members of Congress, or if bankruptcy law were not controlled
by a statute, we might find the economic debate of primary significance. However, as judges, we must be governed by congressional intent as set forth in the Bankruptcy Code.\textsuperscript{130}

While the economic and policy arguments in support of the American Mariner position are somewhat attractive to creditors, that does not by fiat make them congressional intent. Congress simply did not intend that unsecured creditors be compensated for the delay occasioned by the automatic stay any more than unsecured creditors would be compensated. Such a position is a drastic divergence from previously established bankruptcy law. As such, under canons of statutory interpretation, Congress' intent must be specific and clear. Not only is the statute and the legislative history unsupportive of the position in American Mariner, but Congress managed to find the kind of language that would be required to codify such a result in other sections of the Bankruptcy Code. In addition, if Congress had intended the treatment for an unsecured creditor as provided in American Mariner, it omitted several crucial statutory provisions. Clearly, courts following the American Mariner decision do so despite the fact that the draftsmen of the Code never envisioned such a result.

2. Case Law

In addition to the Ninth Circuit's American Mariner decision,\textsuperscript{131} the Fourth Circuit has also adopted such a rule.\textsuperscript{132} The Eighth Circuit holds that an unsecured creditor is not entitled to such payments as a matter of law, but may be so entitled depending on the circumstances of each case.\textsuperscript{133} Since the American Mariner rule is the established law in two circuits, dozens of reported cases have followed such a rule.\textsuperscript{134}

\textsuperscript{130}Timbers, 793 F.2d at 1364.
\textsuperscript{131}734 F.2d 426 (9th Cir. 1984).
\textsuperscript{132}Grundy National Bank v. Tandem Mining Corp., 754 F.2d 1436 (4th Cir. 1985).
\textsuperscript{133}In re Biggs Transportation Co., 780 F.2d 1359 (8th Cir. 1985).
The Fifth Circuit opinions in *In re Timbers of Inwood Forest Associates, Ltd.*\textsuperscript{135} stay true to the legislative intent and refuse an *American Maritime* approach. Certiorari has been granted in *Timbers*\textsuperscript{136} and will be heard by the Supreme Court this term. Time will tell whether the Court will adhere to congressional intent or succumb to the temptation to promulgate judicial legislation.

\textsuperscript{135} 793 F.2d 1380 (5th Cir. 1986), reinstated & aff'd, 808 F.2d 363 (5th Cir. en banc), cert. granted, 107 S. Ct. 2459 (1987).
\textsuperscript{136} 107 S. Ct. 2459 (1987).