

# **THE DEATH OF RECLAMATION: HOW CONGRESS AND THE COURTS HAVE EVISCERATED RECLAMATION RIGHTS, AND WHAT CAN BE DONE ABOUT IT**

*By Anthony Michael Sabino*

## **INTRODUCTION**

“Reclaim,” in the domain of the law at least, generally connotes a specific legal action; to wit, to seize, to repossess, to take back something previously given to another, for reason that the other has somehow forfeited the right of ownership.<sup>1</sup> Reclamation is an age-old concept, with roots that far predate the promulgation of the modern Bankruptcy Code in 1978.<sup>2</sup>

However, in 2005, Congress wrote an entirely new chapter for the right of reclamation. Among other things, it can barely be disputed that the legislators made reclamation under the auspices of the Bankruptcy Code explicitly subject to the rights of a prior secured creditor. Just as surely, a partial substitute for the right of reclamation was made with the new, alternative right to a priority of payment as an administrative expense.

Yet aside from these fairly clear-cut amendments, there is great controversy as to their true meaning and final import. Paramount among them: did Congress create a new federal right of reclamation and, in so doing, eradicate the preexisting statutory or common-law rights grounded in nonbankruptcy jurisprudence? What exactly is a prior secured interest that so handily trumps the assertion of a right to reclamation? What exactly is the proper role of the new priority expense claim that, at least in part, modifies the claim of a reclaiming creditor? As one learned commentator frets, is it now true that the right of reclamation “has become the most illusory of remedies”?<sup>3</sup>

Although this heated controversy is now over two years old, it is still very much in its infancy. The relatively sparse case law has much to be criticized and simultaneously much to be commended as we seek answers to these questions.

Thus the purpose of this article is to tackle these pressing issues, first by summarizing the textual changes to the Bankruptcy Code, to delve into the few cases and their

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disparate holdings, to criticize and applaud same in appropriate measure, and, as best as possible, to posit “what do we do now?”

Be aware there are no simple answers here, and any proposal is fraught with controversy, given the highly contentious factions battling each other. Yet that is what makes the subject all the more intriguing, so let us proceed.

## RECLAMATION AND THE 2005 AMENDMENTS

Historically, reclamation is the right of a vendor to recover goods delivered to an insolvent purchaser. Pursuant to the common law, the vendor’s sole avenue to recover the goods was to prove the purchaser misrepresented its financial solvency and thus fraudulently induced the seller to deliver the subject goods.<sup>4</sup>

Reclamation is an *in rem* remedy, applicable solely to the goods in question. If, for example, the goods were no longer in possession of the debtor, were subsumed into a new, different product, or were simply gone, the right to reclaim evaporates. To be sure, reclamation does not include a right to pursue the proceeds if the items were sold.<sup>5</sup>

Pragmatically, “reclamation” has been called a misnomer, since rarely are actual goods ever returned. Quite to the contrary, the goods are long gone, so the true function of section 546(c) is to accord relief by substituting another form of a right of recovery to the reclaiming creditor.<sup>6</sup>

The 2005 Amendments expanded the relief accorded under section 546(c) in two different ways.<sup>7</sup> First, the “lookback” period was expanded from 10 to 45 days.<sup>8</sup> Second, the time in which the reclaiming creditor was required to file its notice of reclamation was lengthened from 10 to 20 days when the notice periods expire after the bankruptcy filing.<sup>9</sup> Also, BAPCPA changed from 10 days to 45 days the time period after receipt of the goods by the debtor in which the vendor had to reclaim the subject items.<sup>10</sup>

Notably, if a reclamation creditor fails to act within the strict time limits of section 546(c), it is still at liberty to assert its 503(b)(9) rights to an administrative priority.<sup>11</sup> At least “[s]uffice it to say...[reclamation] is not longer an exclusive remedy for a prepetition seller.”<sup>12</sup>

This revolutionary change, also marked by BAPCPA, is in the nature of according reclamation creditors a new administrative expense claim equal to the value of any goods received by the debtor within 20 days before the bankruptcy petition is filed, provided that the goods were sold to the debtor in the ordinary course of the debtor’s business.<sup>13</sup>

Yet at least one bankruptcy court has opined that the inauguration of the section 503(b)(9) right to an administrative expense has diminished the importance of the overall section 546(c) reclamation right.<sup>14</sup>

The legislative history of the amended reclamation statute and the new priority expense provision is extraordinarily uninformative.<sup>15</sup> In the first instance, it blandly states that the right of reclamation is now made subject “to the prior rights of security interest holders.”<sup>16</sup> To be sure, no one here claims that further embellishment is needed. However, even if it were, it simply does not exist, beyond those few plain words.<sup>17</sup>

In the second instance, there is the barest amplification of what the BAPCPA amendments to section 546 are intended to do. It simply regurgitates the embedded

notion that a trustee's lien avoidance rights are subject to a seller's rights of reclamation. It then restates the historical maxims, updated with the new chronological limits, to wit, that the right to reclamation exists when the debtor, while insolvent, received the subject goods within the 45 days preceding the bankruptcy filing, and a written reclamation demand must be made within the 45 days following receipt of the goods or within 20 days subsequent to the bankruptcy filing.<sup>18</sup>

The sparse House Report connotes that a failure to reclaim does not impact the survival of the seller's administrative expense rights and reiterates that the amended section 503, the priority expense statute, accords higher standing to a claim for the value of goods received by a debtor in the ordinary course of its business, if so received by the debtor within the 20 days immediately preceding the bankruptcy filing.<sup>19</sup>

In truth, the legislative history parrots the plain words of the amended law. It provides nothing else, pro or con, to work with.

Then again, contemplate if anything need be said at all. For if the words of the statute are so plain, why should the lawmakers' record be verbose? It could very well be that nothing else need be said, and so the legislative history is concomitantly and logically brief.<sup>20</sup>

According to some, Congress missed "a golden opportunity... to provide guidance on those important reclamation issues," to wit, the impact of any debtor equity in the goods to be reclaimed, valuation, and, above all else, who bears the burden of proof in asserting claims pursuant to section 546.<sup>21</sup>

"Congress left no explanation [in]... [t]he slim legislative history" of the amended section 546.<sup>22</sup> The lawmakers failed utterly to explain the eradication of hitherto before key phrases, such as "subject to any statutory or common-law right of a seller of goods."<sup>23</sup> However, in truth, is any such explanation really needed?

In a statement that is pure dicta, the court in *Davis v. Par Wholesale Auto, Inc. (In re Tucker)*<sup>24</sup> ventured that "[p]erhaps the amended § 546(c) creates its own reclamation right, rather than merely validating the right that exists under the U.C.C."<sup>25</sup> Bankruptcy Judge Haines based his burgeoning belief on two aspects of the statute changed by BAPCPA: 1) the expansion of the former U.C.C.-based 10-day demand period to 45 days under the revised Bankruptcy Code proviso, and 2) the striking of all references to nonbankruptcy statutory or common law from the revamped section 546.<sup>26</sup>

Regrettably, the musings of the *Davis* court are for naught because, inter alia, it was decided on August 11, 2005, and BAPCPA only became effective for cases filed after October 17, 2005, over two months later.<sup>27</sup> Moreover, *Davis* ably resolved, albeit under state law, the issue of an unperfected secured claim to motor vehicles subject to reclamation.<sup>28</sup>

*Davis* cannot be cited with authority on the issues before us. Nonetheless, Judge Haines provides much food for thought, as aforementioned. Also noteworthy was his further expansion of the concept that reliance upon the Uniform Commercial Code in reclamation matters was now abolished by the 2005 amendments.

In the interest of making a fair presentation, it must be duly noted that Judge Haines, while hypothesizing that a new, wholly federal right of reclamation was created by BAPCPA, nonetheless cautioned that the amended section 546(c) might not go

that far because it makes no mention of the rights of good faith purchasers and others vis-à-vis a reclaiming creditor.<sup>29</sup> “Perhaps the intent was to incorporate and expand on the U.C.C. reclamation rights, rather than to supplant them entirely in which case some U.C.C. analysis may continue to be relevant in interpreting and applying the new § 546(c),” opined Judge Haines.<sup>30</sup> Once again, sadly dicta, but still a compelling set of thoughts worth further ruminations.

Above we have posited the new law. Below we now turn to the crucial task of interpreting and applying it, all in accordance with the pantheon of unshakeable landmarks that guide such tasks.

### THE PARAMOUNT QUESTION—STATUTORY CONSTRUCTION

The task before us is a quintessential exercise in statutory construction. To accomplish it, we need only call upon and then soberly apply the very foundation stones used for decades in that endeavor.

We must of course begin with “the language of the statute itself.”<sup>31</sup> When the statutory language responds with undeniable clarity, judicial inquiry stops.<sup>32</sup> If the statute is coherent and consistent, we need not (and should not) inquire beyond the law’s plain language.<sup>33</sup>

Of course, where the Code’s language is unambiguous, silence in the legislative history cannot be controlling.<sup>34</sup> Finally, the provisions of the Bankruptcy Code cannot be read in isolation but should be interpreted in light of the entire statutory scheme.<sup>35</sup>

The “plainness,” or conversely the ambiguity, of a statute is determined first by its own words; second, by the context of that language within a provision; and third by an examination of “the broader context of the statute as a whole.”<sup>36</sup>

The language of the amended section 546(c) is most revealing in these circumstances. It is as plain as plain can be. It utterly deletes the reference to state law. It stands solidly on its own footing as a pure Bankruptcy Code provision. There is no ambiguity, no confusion, no doubt. It eradicates one reference to laws outside the federal bankruptcy realm and thus solidifies its own independent position. “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”<sup>37</sup> The new section 546(c) is no different and must be viewed in the same light.

It is well accepted that the nation’s bankruptcy laws are not written on a clean slate.<sup>38</sup> The Supreme Court has often said that the judiciary is bound to “assume that Congress is aware of existing law when it passes legislation.”<sup>39</sup> “The starting point in discerning congressional intent is the existing statutory text, . . . and not the predecessor statutes.”<sup>40</sup>

In short, *Lamie* and *Hughes Aircraft* forbid a court from looking backward to a predecessor statute, even when the newer iteration is supposedly ambiguous. It follows, then, if not more strongly, that a court is totally prohibited from examining an earlier version of a proviso to justify a claim of ambiguity that only judicial tinkering can correct.

Under this rubric, then, how can it be doubted that Congress, by virtue of the deletion of language, completely unmoored the right of reclamation from state law? By

making the new section 546(c) freestanding, did not the lawmakers give it its own position to stand upon?

Courts of today cannot permit the old language, now eradicated, to sway them as to the true meaning of the current law. To do so would defy the commands of *Lamie*, *Hughes Aircraft*, and other high Court precedents.

The courts should look only to text before the bench now. Finding the new reclamation proviso unequivocal, as it most surely is, the court's sole mission is to enforce it according to its unambiguous terms.<sup>41</sup> As has been well said, it is always advantageous to ground a judicial ruling upon the statutory text.<sup>42</sup> "Courts must aspire to give meaning to every word of a legislative enactment."<sup>43</sup>

Indeed, this means the words in the statute today, not yesterday. By extracting words, as the lawmakers so unequivocally did with this statute, Congress is unambiguously telling us what it intends. Judicial attempts to resuscitate terms no longer in existence undermines, if not outright defies, the legislative will.

It is most certainly not the province of courts to correct what they perceive to be legislative errors. If Congress promulgated a law that is somehow different from what it intended, then it is the constitutional role of the lawmakers (and not the judicial branch) to revamp the proviso in order to reshape it to the legislature's original vision.<sup>44</sup>

There is a fundamental difference between filling an actual gap left behind by the legislators and reshaping the law to conform to a judicial preference.<sup>45</sup> Courts must defer to the supremacy of the legislature, even if the resulting outcome might be deemed harsh by some.<sup>46</sup> Indeed, it is far beyond the province of the courts to rescue Congress from its drafting errors and to insert what the judiciary thinks is the preferred result.<sup>47</sup>

To be sure, we have positioned this argument of statutory construction early on in this Article so that our further analysis may be clearly viewed in the context of these unshakeable and unyielding landmarks. That done, we will now see where some lower courts have gone astray from these demanding edicts, while other tribunals have stayed true to the maxims of the Supreme Court.

## **THAT WHICH SURVIVES: THE PRIOR LIEN DEFENSE AND RECLAMATION RIGHTS**

Reclamation claimants have long had to contend with a significant obstacle to their recovery, an impediment known as the "prior lien defense." At the risk of oversimplification, the existence of a prior lien secured by the debtor's assets, in particular inventory and other such acquired goods, bars the reclamation claimant from recovery, as the goods that it had sold are subsumed under the preexisting lien. Bankruptcy courts had long disagreed about the parameters of this defense.

There was a hope among some in the reclamation community that the amendments wrought by BAPCPA would resolve the internecine judicial conflict and fortify their rights to recover. Alas, that was not to be. Recent court decisions have held the prior lien defense still exists, and the 2005 revisions were not in any way helpful to reclaiming claimholders on that score.

The first of these negative decisions we discuss is *In re Dana Corp.*<sup>48</sup> from the Bankruptcy Court of the Southern District of New York. Dana was a far-flung auto parts manufacturer, with global operations and relationships with virtually all of the world's car manufacturers. In order for it to build its products, it depended upon parts from a vast number of suppliers. Thus it comes as no surprise that it was the subject of nearly \$300 million in reclamation claims from over 450 vendors.<sup>49</sup>

As has been customary in large Chapter 11 cases with substantial numbers of reclamation creditors, a reclamation procedures order was entered.<sup>50</sup> After asserting more or less fact-intensive defenses, Dana had winnowed down the reclamation creditors to over 100,<sup>51</sup> out of which the largest reclamation claim was alleged to be over \$9 million.<sup>52</sup> The debtor now moved to have the surviving reclamation claims eradicated as valueless,<sup>53</sup> for the sole reason of the prior lien defense.<sup>54</sup>

Since the linchpin of a prior lien defense is, of course, the existence of a preexisting security interest, Bankruptcy Judge Burton R. Lifland commenced with a lengthy factual analysis of that necessary precursor.<sup>55</sup> Almost a year to the day before it had filed for Chapter 11, Dana had entered into a prepetition revolving credit facility of approximately \$400 million, secured by an interest in all the borrower's equipment, accounts, and, of course, inventory. When the debtor filed for reorganization, the indebtedness of this prebankruptcy facility was over \$380 million, but this was in fact oversecured by the pledged collateral.<sup>56</sup>

Once the Chapter 11 commenced, the bankruptcy court authorized various interim and final postpetition credit facilities. This resource was a typical debtor-in-possession or "DIP" fund incorporating the customary features, to wit, authority to use the prepetition lenders' cash collateral,<sup>57</sup> a grant of adequate protection,<sup>58</sup> and, most important, a far-ranging first priority senior priming security interest in all of Dana's prepetition and postpetition property.<sup>59</sup> To protect the prebankruptcy lenders, they were granted a sweeping replacement lien, subordinated only to the security interest of the DIP facility.<sup>60</sup>

Now before the court on its motion to reduce all remaining reclamation claims to zero, Dana argued first that its prepetition secured debt vastly exceeded even the largest single reclamation claim, and second that any goods subject to reclamation were disposed of in a transaction to repay the prior lienholders. Numerous reclamation creditors opposed and, according to Judge Lifland, struck a common theme that the prepetition lien was wiped out by the DIP facility, thus removing that defense to nonpayment of the reclamation claims.<sup>61</sup>

That factual background now dealt with, the *Dana* court turned to its analysis. Judge Lifland began by restating the long-held view that section 546(c), the Bankruptcy Code's reclamation statute, is "not the source of a right of reclamation, but simply allow[s] a seller to exercise a right of reclamation existing under non-bankruptcy law."<sup>62</sup>

After some unfortunate and unnecessary digressions from the issue at hand, Judge Lifland returned to the nub of the problem. The new reclamation statute, as amended in 2005, was modified to remove an existing reference to the reclaiming seller's statutory or common-law rights. In its place was a specific injunction that any right to reclaim was subject to "the prior rights of a holder of a security interest in such goods."<sup>63</sup>

An utter lack of legislative history left it a mystery as to what Congress intended by this change.<sup>64</sup>

In *Dana*, the reclaiming creditors leapt upon the statutory amendment and claimed the deletion of a reference to state law created “a broad new federal bankruptcy law right.” Unfortunately for them, Judge Lifland disagreed.<sup>65</sup>

First, the very title of section 546 indicates that the statute operates to limit a bankruptcy trustee’s avoidance powers. “It is not,” opined the *Dana* court, “a section dedicated to granting an independent federal right of reclamation nor does it create a coherent comprehensive federal scheme for reclamation.”<sup>66</sup> Judge Lifland drew support for this conclusion by contrasting the lawmakers’ failure to employ more direct language, such as an affirmative prologue that “sellers may reclaim goods when,” which this judge clearly would have found more persuasive.<sup>67</sup>

The *Dana* court relied upon Supreme Court precedent for the guiding principle that, in order to create a federal right, Congress must clearly manifest its intent to do so.<sup>68</sup> “Moreover,” opined Judge Lifland, “if amended section 546(c) was a new federal reclamation right arising under the Bankruptcy Code, it would not be subject to the avoiding powers.”<sup>69</sup>

Judge Lifland then raised an old-but-established rubric; to wit, when Congress amends the nation’s bankruptcy laws, it never writes on a clean slate.<sup>70</sup> Accordingly, courts are markedly reluctant to accept arguments that would work a major change in pre-Bankruptcy Code practice if that new outlook was not ably supported by legislative history manifesting such an intent.<sup>71</sup> In addition, Judge Lifland felt dutybound to be guided by the totality of a given law and not a single sentence or segment thereof.<sup>72</sup>

Furthermore, the prior lien defense is one strictly confined to limiting a reclamation creditor’s rights vis-à-vis the holder of the earlier secured interest. This is to be distinguished from the parallel provisions for reclamation found in the Uniform Commercial Code, which subjects the rights of the reclaiming creditor to that of *subsequent* buyers or good faith purchasers, not prior lienholders.<sup>73</sup>

If the revised section 546(c) created an independent federal law of reclamation that replaced stated law, then “conceivably” a reclamation creditor in a bankruptcy case would be in a better position than subsequent buyers or good faith purchasers in a state law scenario, declared Judge Lifland. The *Dana* court found it impossible that Congress intended to empower reclamation creditors to exercise dominion over goods sold to consumers or other good faith purchasers.<sup>74</sup>

In addition, the *Dana* court raised the following points in rejecting the argument that the revised section 546(c) gave birth to a federal right of reclamation. First, the lack of a reference to state law makes it unclear if a reclaiming creditor could seize goods already paid for. Second, the revised statute lacks a limitation on when the creditor discovers the debtor’s insolvency, a marker that Judge Lifland characterized as serving the historic purpose of protecting a creditor from the debtor’s fraud with regard to the latter’s financial condition.

Third, section 546(c) long demanded that, to be subject to reclamation, goods had to be identifiable and in the debtor’s possession at the time of the demand, and conversely, they could not be commingled or otherwise unidentifiable.<sup>75</sup> *Dana* found it

unlikely that Congress intended to eradicate these defenses by inaugurated a new federal reclamation right.<sup>76</sup>

Next, the *Dana* court posited that, while the Bankruptcy Code clearly delimits reclamation rights to a secured creditor's earlier lien, that body of law "otherwise gives no indication of what those 'prior rights' might be." From that Judge Lifland reasoned that "the only available referent" was state law. Combined with the lack of a fulsome legislative history, *Dana* concluded that the lawmakers intended to continue their reliance upon state law in this view and not create a new substantive federal remedy.<sup>77</sup>

Finally, Bankruptcy Judge Lifland made one last declaration to debunk the theory that in 2005 Congress created a new federal right of reclamation. "[I]t is contrary to the purpose of the Bankruptcy Code to enhance the rights of one set of creditors at the expense of other creditors simply because a bankruptcy petition has been filed."<sup>78</sup> *Dana* cited *Butner v. United States*,<sup>79</sup> for the longstanding axiom that property interests are defined by state, not federal, law, and should not be overturned unless some bona fide federal interest requires a different result.<sup>80</sup>

For all these multitudinous rationalizations, the *Dana* court declared that the 2005 Amendments did not give rise to a new federal right of reclamation. That done, the bench turned to the equally important issue of the viability of the "prior lien defense" to reclamations pursued under the amended Bankruptcy Code.<sup>81</sup>

On that point, the reclaiming creditors vigorously opposed the auto parts supplier's attempts to devalue their claims to zero. These vendor/creditors proclaimed that their rights were subordinated, but not extinguished, by the liens of the prepetition lenders and, furthermore, that the prebankruptcy secured creditors were oversecured and should not reap the windfall of wiping out the reclamation claims.<sup>82</sup>

For his rationale, Judge Lifland first noted that reclamation is an in rem remedy, and thus reclamation creditors have no right to compel a prior lienholder to satisfy its own interest from collateral other than what the reclaiming creditors are pursuing.<sup>83</sup> "Accordingly, if the value of any given reclaiming supplier's goods does not exceed the amount of debt secured by the prior lien, that reclamation claim is valueless."<sup>84</sup> As aforementioned, the liens of the prepetition lenders in *Dana* far exceeded even the largest single reclamation claim.<sup>85</sup>

The reclaiming creditors countered that this judge should recognize that the prepetition creditors here were paid in full via the postpetition DIP facility and not from the sale of the goods sold to the debtor by the reclaiming creditors. In this fashion, they asserted, the prebankruptcy liens were satisfied, and the right to reclaim remained unscathed.<sup>86</sup>

Judge Lifland disagreed. The court found the postbankruptcy financing transaction before it in *Dana* to be substantially similar to the one germane in *In re Dairy Mart Convenience Stores, Inc.*,<sup>87</sup> where the court there found that where the claim of a prepetition lender, secured by a floating lien on inventory, is paid out of a postbankruptcy DIP facility, which is in turn secured by a fresh floating lien on inventory, any goods purportedly subject to reclamation claims were disposed of in satisfying the prepetition debt, thereby zeroing out of the reclamation claims.<sup>88</sup>

This was to be contrasted, said the *Dana* court, with the holding of *In re Phar-Mor, Inc.*,<sup>89</sup> wherein that Ohio bankruptcy court found prepetition liens released, termi-

nated, and extinguished by payment from the DIP facility created by the postpetition lenders. In short, former liens were eradicated by payment, and said payoff was not an assignment, assumption, nor sale of goods subject to reclamation. As the post-bankruptcy lenders had paid off the old debt and received new, superpriority postpetition liens in return, the ultimate impact of that deal relevant to this analysis was that interests of the reclamation creditors could not be diminished in any way by these subsequent fresh liens.<sup>90</sup>

In effect, Judge Lifland was asked to choose a side, and that is precisely what he did. Unfortunately for the reclamation creditors, he sided with the *Dairy Mart* camp.<sup>91</sup>

The *Dana* court found that the goods tentatively subject to reclamation, along with all the other collateral pledged prior to the auto parts maker's bankruptcy, were subject to prepetition liens. The court-authorized DIP facility granted the postpetition lenders a security interest in, and a lien thereupon, all of that same collateral. "Thus the lien chain continued unbroken."<sup>92</sup>

*Dana* adopted the *Dairy Mart* logic that the arrangement of releasing prepetition liens and granting postpetition liens simultaneously was a single, integrated transaction.<sup>93</sup> Judge Lifland justified this by noting that the issuance of the postpetition lien was a necessary precursor to the consummation of the DIP loan.

Of critical import, *Dana* further comments that the prepetition debt was "refinanced and paid off using the proceeds of the DIP [f]acility on the payoff date."<sup>94</sup> In this jurist's view, the goods which might otherwise have been subject to reclamation (or their proceeds) were either liquidated to satisfy the prebankruptcy debt or re-pledged to secure the postpetition borrowings of this debtor.

Thereby effectively disposed of, there were no goods remaining, and it was now valid to ascribe zero value of the nonreclaimable goods pursuant to the "prior lien defense."<sup>95</sup> On that note, *Dana* affirmed the continued existence of the "prior lien defense" and wholeheartedly squashed the claims of the reclamation creditors therein in their entirety.<sup>96</sup>

Regrettably, the opinion in *Dana* is so deeply flawed that it is beyond redemption. We categorize its many shortcomings as follows.

Beginning with a relatively small error, *Dana* clearly announces that it is solely concerned with the "prior lien defense," and the bench will most certainly not address any section 503(b)(9) issues. Notwithstanding that declaration, *Dana* goes on to, thankfully in brief, catalog precisely those points that a section 503(b)(9) dispute might raise.<sup>97</sup> Why bother to elaborate in such dicta in literally the same breath that the court pronounces these matters are not before it? Small it may be, but this is an unfortunate tangent that detracts from the opinion as a whole.

Slight as this error might be, it is compounded when the court unnecessarily raises the influence of the new section 503(b)(9) and its controversial interaction with the amended reclamation proviso.<sup>98</sup> If *Dana* is truly concerned only with the operation of the revamped section 546(c) in this context, why stray into the irrelevancies of the new administrative expense? This flaw likewise diminishes the efficacy of the opinion. However, such minor blemishes pale in comparison to the major, overt flaws that we find in *Dana*.

The *Dana* opinion correctly notes that the textual reference to statutory or common law rights was “remove[d]” from the reclamation statute. Incredibly, it goes on to ponder the lack of a legislative justification for this “deletion.”<sup>99</sup>

*Dana* is right—Congress deleted the reference to state law reclamation rights when it amended section 546(c) in 2005. However, the lawmakers did more than that. Congress removed, deleted, eliminated, expunged, and eradicated the old reference. And that is that. It wiped the slate clean.

No further explanation is necessary. It is the height of judicial obtuseness for *Dana* to seek (if not outright demand) an explanation where none is needed. Congress adds and deletes statutes or parts of statutes every day. At least in a case such as this, elaboration is not needed, and legislative history would be superfluous. It is fatuous for *Dana* to question the new section 546(c) in this manner.

As a further example, see how *Dana* derides the “sparse” legislative history.<sup>100</sup> The court has no right to insist upon a more portentous legislative history when there is no need for it.

Congress eradicated the state law reference, and that is it. To insist on more is to fly in the face of the plain language of the amended law and to disregard its plain text. Unshakeable axioms of statutory construction as aforesaid here demand that the court read and apply the statute before it. *Dana* failed utterly in that regard.

Ironically, while *Dana* stubbornly returns to abide by the simple import of the deletion of the state-law reference from section 546(c), it rushes to embrace the addition of the “prior lien defense” text. *Dana* cannot have it both ways. It cannot honestly doubt the deletion of one thing from the statute and simultaneously applaud the addition of new material, especially when all are of the same piece of the 2005 Amendments.

Error compounds error. Thereafter, *Dana* makes much of the heading of section 546.<sup>101</sup> Indeed, lawmakers write to a purpose, and no one here is suggesting that the title of the statute be ignored.

However, it is just as clear that the appellation “Limitations on avoiding powers” assigned to section 546 over 25 years ago is a broad entitlement dealing with the statute in the main. It does not work to exclude related, but not overtly stated, functions of the provisions that it headlines. To rely upon legislative shorthand in titling a statute as a limiting force on substantive rights is folly.

Shortly thereafter, we encounter one of *Dana*’s truly fatal flaws. The court demeans the statute, as amended in 2005, as neither “dedicated” to granting a federal right of reclamation nor “creat[ing] a coherent comprehensive federal scheme for reclamation.” This is the height of judicial arrogance.

It is the job of the courts to apply the statutes as written. It is certainly not the task of courts to rewrite them by judicial fiat. Equally so, it is not within a court’s purview (especially a court of such circumscribed power as an Article I bankruptcy court) to mock a legislative enactment because said court does not find the statute to match its standards for scope.

*Dana*’s continued folly is to denigrate the amended section 546(c) because it was not drafted to that jurist’s liking, when instead the bench should be applying the law as

plainly written. Substantial evidence of the misguided nature of *Dana* is exemplified when it opines that Congress did not use the appropriate language in revising the reclamation proviso.<sup>102</sup> That is judicial lawmaking at its worst and dooms the opinion.

The aberrations continue. *Dana* goes on to invoke the conventional wisdom that Congress does not write on a clean slate when it amends the Bankruptcy Code.<sup>103</sup> True enough, but here that does not follow. The notion of not scribbling on a blank page pertains to what Congress may or may not have changed from pre-1978 insolvency practice when it promulgated the Bankruptcy Code that year.

Congress had already overwritten pre-Code practice when it drafted the original section 546(c) over 25 years ago. In 2005, the lawmakers simply revised their own handiwork. More to the point, Congress rewrites statutes every day. There is nothing to prevent them from doing so, and the courts' sole function is to apply what is plainly written.

This is another *Dana* flaw. It refused to acknowledge that Congress wrote the reclamation statute one way in 1978 and revamped it, by means of both plain deletion and addition, in 2005. Justifying noncompliance by looking back to pre-Code days makes no sense.

The non sequiturs continue, as *Dana* pleads great concern with how the amended section 546(c) may potentially clash with the Uniform Commercial Code.<sup>104</sup> What of it? Undeniably the U.C.C. is a wonderful codification of the law governing commercial transactions. It holds sway in all 50 states, including the federal courts therein who apply it with such dexterity in diversity cases.

However, the Bankruptcy Code does not cower in the shadow of commercial law. In its own realm, the federal insolvency law reigns supreme.<sup>105</sup> *Dana* posits a great non sequitur with its abject concern that the amended section 546(c) might have friction with the U.C.C. If it does, what of it? Congress rewrote the statute as part of the supreme insolvency law of the land, and so be it. Besides, *Dana*'s fretting is overblown, and if state commercial law yields to the Bankruptcy Code, it is certainly not the first time nor is it a cataclysm.

What we find most fatal to *Dana* here is its turgid prose and tortured reasoning. The opinion makes too long of a stretch, seeking to justify itself in state law, in order to avoid applying the amended section 546(c). Indeed, when *Dana* refers to the "prior lien defense," a basic tenet of its ultimate holding, it unwisely seeks to compound that straightforward textual addition by Congress by intertwining it with nonbankruptcy law.<sup>106</sup> Put another way, *Dana* tried to do too much with too little, an unnecessary exercise that undermines the entire opinion.

Now we come to an argument of *Dana* that leaves us aghast. *Dana* stridently declares that it is not the purpose of the Bankruptcy Code to "enhance" the rights of one set of creditors at the expense of others.<sup>107</sup> Taken in the light that a general goal of the Code is to, inter alia, ensure the equality of distribution among creditors, there is more than a grain of truth to *Dana*'s assertion. Nevertheless, it is just as true that this is not an absolute. The Bankruptcy Code constantly segregates classes of creditors and elevates some above others. Most compelling is the entirety of section 507, the priority claims statute, whose sole purpose and effect is to classify, at legislative dictate, dif-

ferent types of claims and then place these claimholders in a highly structured order, whereby some come before others and *all* come before general unsecured claims.<sup>108</sup>

No one questions the right of Congress to do so, as part of the normal adjustment of the debtor-creditor relationship that is core to the functioning of the Bankruptcy Code and its courts.<sup>109</sup> Not only does Congress unhurriedly go about realigning creditor interests, it frequently modifies that ordination as it sees fit.<sup>110</sup>

To be sure, the hallowed *Butner*<sup>111</sup> decision still stands for the proposition that property interests are normally defined by state law and are not easily disregarded in the bankruptcy process. However, every day we see the Bankruptcy Code overcoming such state-law interests by weight of the federal enactment's inherent supremacy. It is a ghastly statement for Dana to contend that somehow section 546(c) deflates when it is placed in counterpoise to state commercial law, and we cannot abide by such an unsupportable view.

In sum, we find *Dana* largely beyond redemption for the manifold reasons stated above. Accordingly, we question its place in the jurisprudence. That said, let us examine what else is of negative or positive worth among the remaining few judicial decisions on this controversial subject.

### **AMS—Defender of Prior Liens**

Another stalwart defender of the “prior lien defense” can be found in the Delaware bankruptcy case of *Simon & Schuster, Inc. v. Advanced Marketing Services, Inc. (In re Advanced Marketing Services, Inc.)*,<sup>112</sup> which actually preceded the *Dana* ruling by a brief interval. There the debtor, AMS, was a book wholesaler, counting among its customers the best known of the national warehouse club chains as well as traditional retailers and bookstores. The creditor Simon & Schuster is, of course, one of the most renowned names in book publishing. The debtor and Simon & Schuster did significant business, and all of it on a “fully returnable basis”; AMS could always fully return unsold inventory to its book publisher suppliers while, in turn, customers of AMS could fully return unsold books to the debtor.<sup>113</sup>

The debtor enjoyed a senior lending facility, provided by a unit of Wells Fargo. The bank was secured by a floating lien on substantially all of the assets of AMS, including inventory. Just prior to the instant bankruptcy, AMS owed over \$41 million to Wells Fargo pursuant to this facility.<sup>114</sup>

In very late December 2006, AMS filed for Chapter 11. Simon & Schuster reacted swiftly, the same day making a reclamation demand and then, a few days into the new year of 2007, commencing an adversary proceeding by the filing of a complaint seeking, inter alia, the reclamation of goods valued by the publisher of over \$5 million, the immediate payment of certain administrative expense claims, and an accounting of the goods sold by Simon & Schuster to the debtor. As of mid-January, a little over \$800,000 of the goods that Simon & Schuster sought to reclaim were still to be found in the debtor's inventory.<sup>115</sup>

Interestingly, Simon & Schuster sought relief under the stringent standards of a temporary restraining order, labeling all of this an emergency application. The debtor and the senior lender opposed, asserting the “prior lien defense.”<sup>116</sup> AMS and Wells

Fargo jointly alleged that the senior lender's first priority security interest extended to the very goods that Simon & Schuster wished to reclaim.<sup>117</sup>

Integral to these competing claims were the circumstances of the debtor's post-bankruptcy financing. As is typical in Chapter 11, AMS obtained court approval for a DIP credit facility, the composition of the DIP lender apparently including Wells Fargo and others.

As carefully noted by Bankruptcy Judge Christopher Sontchi, "[t]he terms of the Debtors' post-petition financing did not extinguish the Debtors' obligations under the Senior [prepetition] facility or discharge or release any related security interests." Indeed, the court noted the interesting description of this DIP facility as a "creeping roll up" loan, an arrangement whereby it was contemplated that Wells Fargo, as the senior lender, would be satisfied by the application of cash collateral to its preexisting indebtedness.

In turn, the cash collateral coveted by the senior bank lender would be "derived primarily from the proceeds from the sale of the Debtors' inventory" before any post-petition indebtedness was satisfied. Of course, the inventory to be sold to satisfy Wells Fargo's prepetition debt was comprised, at least in part, by the same goods that Simon & Schuster sought to reclaim.<sup>118</sup>

In addition, the DIP facility was secured by an all-encompassing lien on all pre-bankruptcy, present, and future assets of AMS. This security interest was senior to all liens, aside, of course, from Wells Fargo's own prepetition secured interest. The bank was also granted a superpriority administrative expense claim senior to all other administrative creditors.<sup>119</sup>

Finally, the postbankruptcy loan facility also provided that the senior secured interests of Wells Fargo "continue[d] in full force and effect," securing the repayment of all obligations pursuant to the DIP facility.<sup>120</sup> As to the actual figures, as of the time of the legal action taken by Simon & Schuster in mid-January 2007, AMS owed its lenders \$13 million under the prebankruptcy facility and \$13.5 million for the DIP loan, a total debt of \$26.5 million to essentially the same lenders.<sup>121</sup>

Key to the *AMS* decision is that Simon & Schuster sought relief via a temporary restraining order (TRO). This triggered the axiomatic test for injunctive relief, comprised of the following four elements: 1) the movant must show a substantial likelihood that it will prevail on the merits; 2) the movant will suffer irreparable harm if the injunction is not granted; 3) the irreparable harm to the party subject to the injunction if it is in fact granted; and 4) the public interest in granting such extraordinary relief.<sup>122</sup> Not an easy standard to be met, to be sure.

Thus positing the legal standards, Bankruptcy Judge Sontchi tackled the job before him in workmanlike fashion. First up for consideration was whether or not the book publisher demonstrated a substantial likelihood that it would eventually prevail on the merits of its claim. Unfortunately for Simon & Schuster, the bankruptcy court ruled that it had not.<sup>123</sup>

Given that the claim herein was one for reclamation, the creditor's burden was to establish, by a preponderance of the evidence, each element of section 546(c), the reclamation statute.<sup>124</sup> Bankruptcy Judge Sontchi cut right to the heart of the matter: "The Goods are subject to the Senior Lenders' first priority pre-petition and post-peti-

tion liens and claims.” The 2005 Amendments explicitly stipulated that the rights of a reclaiming seller are secondary to the preexisting rights of a secured creditor with a lien on debtor’s goods or the proceeds thereof.<sup>125</sup>

“Accordingly, under the express language of... the Bankruptcy Code,” the prior and postpetition secured liens of Wells Fargo in the instant case trumped the reclamation claim of Simon & Schuster. “For this reason alone,” Judge Sontchi concluded, “Simon & Schuster has failed to establish it [has] any likelihood of success in establishing it has a valid reclamation right under section 546(c).”<sup>126</sup>

The *AMS* court was circumspect, albeit in a parenthetical, to opine that the result would have been the same even under pre-BAPCPA law. Relying upon earlier cases interpreting both the Bankruptcy Code and the reclamation provisions of the Uniform Commercial Code, the prebankruptcy lien of a secured creditor regularly defeated the claims of a reclamation creditor, so the outcome reached today under the 2005 Amendments would not have been any different under the old law.<sup>127</sup>

Simon & Schuster had attempted to blunt the “prior lien” defense by arguing that the “creeping rollup” of the DIP loan would soon satisfy Wells Fargo’s prebankruptcy claims and thus satisfy its preexisting lien, the only lien that its reclamation claim was subject to.<sup>128</sup> To the book publisher, this meant that it would eventually succeed on the merits of its position.<sup>129</sup>

Bankruptcy Judge Sontchi was wholly unpersuaded, for three reasons. First, the prebankruptcy loan was still in existence. “Although the Senior facility may be satisfied at some future date, S&S has failed to establish when that will occur and, more importantly, whether any of the Goods subject to its reclamation claim will still be in the Debtors’ possession at that time.”<sup>130</sup>

Second, the DIP financing order entered by the bankruptcy court clearly recognized that the bank’s prebankruptcy liens survived and secured the postpetition DIP loan. This “cross-collateralization” ensured the continuity of the senior lender’s prior liens into the postbankruptcy phase to secure the new debt, notwithstanding the satisfaction of an old borrowings. The superiority of liens so preserved flatly defeated the claims of Simon & Schuster for reclamation.<sup>131</sup>

Third and last, Bankruptcy Judge Sontchi castigated Simon & Schuster for its reliance upon the *Phar-Mor* case,<sup>132</sup> declaring that the ruling emanating from the Ohio bankruptcy court was “easily distinguished from the case at hand” for the reason that the secured creditors there were fully paid from collateral other than the reclaimed goods.<sup>133</sup>

*AMS* took pains to quote the *Phar-Mor* opinion for its disclosure that those preexisting lenders freely chose to release their prior liens and were, in fact, paid in full via a subsequent postpetition lending facility. Since the reclaiming creditors were left unmolested by the satisfied prior lienholders, their reclamation claims sailed through that Chapter 11 unaffected.<sup>134</sup>

“That is simply not the case here,” Bankruptcy Judge Sontchi retorted. In the case at bar, Wells Fargo had not been paid in full, and thus the Simon & Schuster reclamation claim was still subject to the bank’s preexisting lien. Moreover, the *AMS* court found that the senior secured lender was being paid, at least in part, by the sale of the very goods that Simon & Schuster wished to reclaim.<sup>135</sup>

Judge Sontchi gave his own perspective on what this reclaiming creditor really wanted. “At the end of the day, S&S is doing little more than using the Court to apply the doctrine of marshalling.”<sup>136</sup> However, that equitable avenue is unavailable to unsecured creditors, held the *AMS* court, and so Simon & Schuster could not demand that Wells Fargo satisfy its claim out of other, unrelated collateral.<sup>137</sup> Most telling of all, the prebankruptcy loan agreement *and* the DIP facility both explicitly provided that the lenders “have no duty to marshal.”<sup>138</sup>

For all these reasons, the *AMS* court ruled that the book publisher had failed to establish a substantial likelihood that it would eventually prevail on the merits of its claim. Thus failing the first prong of the test for injunctive relief, a TRO could not be issued.<sup>139</sup>

The *AMS* court was nothing if not circumspect, and so it delved into the next prong of the requirements for injunctive relief, that of the need for the movant to demonstrate irreparable harm to it should an injunction not be issued. Fundamentally, the court noted, the moving party must demonstrate a potential injury that could not be cured by a legal or equitable remedy granted after a full trial. In contradistinction, injunctions are not granted merely to alleviate fears and apprehension or to allay the anxieties of a complaining party.<sup>140</sup>

Moreover, Bankruptcy Judge Sontchi pointed out, a claim of irreparable harm is undermined by the availability of adequate monetary damages.<sup>141</sup> A potential injury that is purely economic in nature can never be deemed an irreparable harm, given the old adage that money makes you whole.<sup>142</sup>

Simon & Schuster had argued that it needed an injunction to prohibit any buyer of the assets of *AMS* from returning goods and demanding a credit, as well as to protect the book publisher from incurring additional expenses for supplying additional merchandise for other wholesalers who were taking up the slack of the debtor’s former customers. The bankruptcy court found this argument unavailing.<sup>143</sup>

The debtor and this creditor had a contract, this court reminds us, giving *AMS* the right to fully return goods to Simon & Schuster. The book publisher cannot now argue that this exercise of lawful contractual rights, by either the debtor or some future assignee, would ever constitute an irreparable harm.<sup>144</sup>

In addition, any harm to Simon & Schuster can be easily remedied by monetary compensation, something Bankruptcy Judge Sontchi found self-evident by the creditor’s own admission that its goal was to reduce expenses and avoid return credits. This lack of irreparable harm, this lack of an injury that could not be solved by money, and belied by what was clearly a purely economic harm at worst, condemned the irreparable harm prong of the test to failure.<sup>145</sup>

The two paramount segments of the standard of granting injunctive relief thus decided, the *AMS* court easily disposed of the remaining two prongs. The third, the balance of the equities in the case at hand, was neutral, according to Bankruptcy Judge Sontchi.<sup>146</sup>

On the one hand, the debtor would be harmed by the limitation of an injunction. Conversely, Simon & Schuster would be left with a worthless reclamation claim if *AMS* could continue to sell the book publisher’s goods. Nonetheless, because Simon & Schuster bore the burden of proving that measuring the equities favored it and not the debtor, this equipoise meant failure for the creditor.<sup>147</sup>

Simon & Schuster suffered the same fate for the fourth prong, that of the public interest. Bankruptcy Judge Sontchi was unpersuaded by the book publisher's allegation that the preservation of its reclamation rights had a bearing on the public interest. The court tied this in with the results of the first injury, the requirement that the movant establish a substantial likelihood that it would prevail on the legal merits of its claim.<sup>148</sup> Since the creditor had not demonstrated that it had statutory rights to be vindicated, there was no public interest to be served "in this commercial dispute among sophisticated parties."<sup>149</sup>

Bankruptcy Judge Sontchi was succinct in his closing. "This is a simple case," he declared, in the main because the prebankruptcy and postbankruptcy interests of the secured lender were superior to the creditor's reclamation claim. Therefore, Simon & Schuster "failed to establish it has any likelihood (let alone a probability) of success" on the merits, there was no irreparable harm, the equities did not favor the creditor,<sup>150</sup> and the public interest factor was plainly irrelevant here.<sup>151</sup> Simon & Schuster was found woefully lacking point-by-point on the test for injunctive relief, and therefore its motion was flatly denied.<sup>152</sup> Its reclamation claim was left, at least for the moment, unsatisfied.

For our analysis of the foregoing, we find that the *AMS* case presents a mixed bag. We certainly cannot find much fault with the legal reasoning of this Delaware bankruptcy court. As Bankruptcy Judge Sontchi stated, this really is a simple case. In this instance, we must admit that we find greater fault with the strategic and tactical mistakes made by the reclaiming creditor, which effectively foreclosed it from any kind of victory on a contestable legal ground.

Taking the court's holding, it is, fundamentally, an upholding of the plain statutory language of the new section 546(c) promulgation of the "prior lien defense." In all honesty, we cannot argue with the correctness of that decision, at least at that basic level.

Yet we are troubled that this bench did not make a deeper comparison of the solidly grounded "prior lien defense" against the "creeping rollup" lending facility present in this case. Certainly, Wells Fargo possessed a prior lien, and we do not argue that it was entitled to prevail on the now-statutory defense of the same name.

However, S & S made the very cogent point that the entire DIP facility was arranged so that these very same preexisting liens would eventually be extinguished. We submit that if the postpetition financing plan, as approved by this very judge, provided by its own terms that the prepetition secured rights of the bank would evaporate, why did this court not make a more searching inquiry of just when that would happen? After all, it seems plain enough that if a prior lien disappears, and, especially as here, in a wholly voluntary fashion, then the defense vanishes with it.

In sum, we concur that *AMS* was rightly decided, insofar as it recognized the "prior lien defense," but we remain skeptical because the court did not follow through and inquire as to the duration of that defense in the days to come.

That said about the court's holdings, let us respectfully analyze what the reclaiming creditor did or, conversely, did not do, so that we may learn from it. Let us first pick up on the point already made, that the *AMS* court did not pursue the matter of the termination of the prior lien and thus the defense so named.

Remember that the opinion clearly states that S & S failed to prove when this “creeping rollup” mechanism would satisfy the preexisting secured claims. While we may wish the court had gone further, is not true that the creditor was ultimately responsible for making a proper showing of evidence in favor of its argument? If S & S had done more to demonstrate that the “creeping rollup” would have extinguished the prior liens by a certain date or event, either absolute or hypothetical, it is suggested here that the outcome might have been different.

On a relatively minor point, why did this reclaiming creditor seek relief by the much more arduous road of a temporary restraining order? A party moving for injunctive relief has its work cut out. In hindsight, it appears S & S would have been far better served if it had avoided the more stringent standards of the TRO and proceeded via straightforward motion practice or even an adversary proceeding.

Yet the tactic of moving for a TRO raises a more telling set of points. Seeking injunctive relief outwardly connotes a sense of urgency. This creditor sought court intervention on an emergency basis after various financing measures were in place. Where was the creditor’s sense of immediacy before the DIP facility was approved?

Here is where we find the strategy of this reclaiming creditor to be most at fault. S & S did not timely object to the entry of the financing order. That was a mistake. It should have been there from the outset to contest the postpetition financing and, in particular, raise at the earliest point possible its quite-good questions about the efficacy of this “creeping rollup” device. The opportune moment to question the survival of the prior lien was then, at the time that the DIP facility was being considered, not later, after it was already in place.

Moreover, the reclaiming creditor could at that time have pursued a “carve out” for its claim and that of other, similarly situated reclamation creditors. Indeed, if it had gathered its fellows in support, their strength of numbers might have provided some advantage in obtaining recognition for section 546(c) claims as part of the overall postpetition financing. To be sure, the *AMS* court did nothing to protect reclaiming creditors, but could some of the fault for that lie in the fact that the creditors so affected did not ask for relief until it was too late?

In sum, while not entirely comfortable with how the court in *AMS* reached its ultimate outcome, we must admit that the reclaiming creditor did not avail itself of a number of opportunities to achieve a more balanced decision. What’s done is done, but *AMS* remains a powerful object lesson for future strategists laboring to preserve reclamation claims.

### **The Unpublished Troika: Nonprecedential but Still Newsworthy**

It is axiomatic that “[u]npublished decisions do not establish case law and do not serve as precedent.”<sup>153</sup> Therefore, unreported opinions that touch upon the subject at hand are of so little account that they need not even be addressed here.

Nevertheless, and only for the sake of the completeness of this inquiry, we will summarize and critique three such minor opinions. Be forewarned, however, that there shall be more of the latter than the former, as at least two of this trio leave much to be desired.

### ***Global*—A Misdirected Analysis**

First up is *In re Global Home Products, LLC*.<sup>154</sup> There the debtor was a leading designer, marketer, and manufacturer of consumer and specialty products, including the well-known Anchor Hocking line of kitchen and glassware.<sup>155</sup> To manufacture such items, Global was a major consumer of bulk aluminum.<sup>156</sup>

Enter Industria Mexicana del Aluminio, S.A. de C.V. (IMASA), a creditor from whom the debtor purchased nearly 123,000 pounds of aluminum in the 20 days preceding Global's filing for Chapter 11, said purchase made in the ordinary course of the debtor's business.<sup>157</sup> IMASA put before the bankruptcy court a motion for the allowance and the immediate payment of the cost of this raw material, on the grounds that it constituted a 503(b)(9) administrative claim in the undisputed sum of over \$206,000.<sup>158</sup>

In opposition stood Global and its senior lender, Wachovia Bank. Wachovia was the debtor's prebankruptcy and postpetition senior secured creditor, with prepetition liens on substantially all of Global's assets, covering an earlier debt of some \$115 million. Not surprisingly, Wachovia became Global's DIP financier, pursuant to both interim and final orders of the bankruptcy court, which including granting the lender security interests and superpriority administrative expense status.<sup>159</sup>

In the main, the debtor and its bank asserted that IMASA's claim was not budgeted for in its postpetition financing arrangement. Moreover, requiring immediate payment to the vendor would expose Global to "financial risk" by potentially affecting the debtor's "ability to obtain the necessary cash to continue... day-to-day operations" and conceivably open the door to every one of Global's section 503(b)(9) claimants demanding payment now and not at the time that a plan of reorganization became effective.<sup>160</sup>

First acknowledging the relative newness of section 503(b)(9),<sup>161</sup> Bankruptcy Judge Gross correctly pointed out that, notwithstanding the statutory priority accorded by the Bankruptcy Code, "the timing of the payment of that administrative expense claim is left to the discretion of the court."<sup>162</sup> In turn, the court's latitude in determining such timing is guided by the insolvency law's overarching goal of an orderly and equal distribution among creditors and the need to prevent a race to seize the debtor's assets.<sup>163</sup>

Significantly, Bankruptcy Judge Gross opined that "[d]istributions to administrative claimants are generally disallowed prior to confirmation if there is a showing that the bankruptcy estate may not be able to pay all of the administrative expenses in full."<sup>164</sup> This court then cited the (now discredited) doctrine of necessity, purporting that in order to qualify for "exceptional immediate payment," an urgency must be convincingly shown.<sup>165</sup>

The *Global* court reiterated its own three-point test for deciding the time of the payment of an administrative claim<sup>166</sup> and summarily disposed of each factor as follows. One, would immediate payment prejudice the debtor? According to Global's Chief Restructuring Officer (CRO), yes, it would.

Specifically, the debtor's recorded section 503(b)(9) claims "far exceed[ed] the company's availability to borrow," the debtor lacked the cash to pay administrative claims, Global needed all of its current \$1.7 million DIP facility to fund current opera-

tions, and lastly at least nine other 503(b)(9) creditors were seeking over \$2 million in administrative expenses, with more of such claimants expected to follow.<sup>167</sup>

In short, said Global's CRO, if the debtor had to pay administrative claims now and in full, its Chapter 11 would collapse.<sup>168</sup> As this was uncontroverted, Judge Gross accepted it in toto as evidence that the debtor would indeed be prejudiced if he authorized an immediate payment to IMASA.<sup>169</sup>

While that finding could have disposed of the issue, the court forthrightly pressed on to the second prong of the test, measuring the harm to the claimant. IMASA contended that the injury to it was "self-evident," in that it was "singled out of a class of [administrative] claimants" for nonpayment. IMASA noted that, pursuant to court authority, certain "critical vendors" could be paid for prebankruptcy claims. Yet the creditor offered nothing else to substantiate its plea of harm.<sup>170</sup>

In sharp contrast, Global argued that the creditor had no desperate need for immediate payment, pointing to information on IMASA's own website that it generated annual sales of over \$400 million on a yearly production in excess of 70 million pounds of aluminum.<sup>171</sup> Using the vendor's own trumpeting of the scope of its business against it, along with that same creditor's failure to make a more substantive proffer of evidence, the debtor prevailed on this point as well.<sup>172</sup>

Summarizing, Judge Gross declared that he was totally persuaded by the unrefuted testimony of the debtor's CRO that "the tenuous financial position" of Global fully translated into extreme prejudice to the debtor should it be compelled to pay this 503(b)(9) claim immediately, whereas the creditor in question would not endure any hardship at all if it had to wait until plan confirmation for the payment of its administrative expense. Accordingly, IMASA's section 503(b)(9) claim was left unpaid, albeit recognized, hopefully for payment another day.<sup>173</sup>

*Global* has been harshly criticized by the leading commentators,<sup>174</sup> and rightly so, as this author now joins in that outcry of justifiable criticism.

First, and most important, *Global* is fatally flawed because its legal theories are untenable. It relies upon not one, but two, wholly discredited doctrines. *Global* grounds its legal rationale first upon the "necessity of payment" doctrine. One, the "necessity of payment" doctrine has been exposed for the fallacy that it is.<sup>175</sup>

Two, the doctrine of necessity relates to the early postpetition payment of wholly prepetition debt. While a section 503(b)(9) claim is rooted in a prebankruptcy transaction, to be sure, Congress has now explicitly characterized such a claim as an administrative expense, thereby inarguably transmogrifying its classification. To allude to the doctrine of necessity, a now-defunct maxim appurtenant to prepetition debt, to justify the denial of a statutorily categorized administrative expense is truly an attempt to pound a square peg into a round hole.

Next, *Global* compounds its faulty legal rationale by calling upon the equally defunct "critical vendor" postulate. Critical vendor motions are thankfully a thing of the past, for various and sundry good reasons.<sup>176</sup> In short, *Global*, by its own choice of rejected doctrines, sustains two killing blows, neither of which it could survive individually and which combined are doubly fatal.

Turning to the factual underpinnings of *Global*, one can temper our harsh critique, but only for a moment. The creditor IMASA has no one to blame but itself for its twin failure of: a) allowing the debtor's testimony to go by unopposed; and b) not presenting more substantive evidence of its own hardship, and, better yet, the dire straits in which this debtor was sailing. A lesson for future section 503(b)(9) claimants there, to be more aggressive in debunking the debtor's opposition and fortifying their own evidence of their right to and need for payment.

However, while IMASA is correctly criticized for both not going the distance on its own case in chief and its lackluster reply to the debtor's opposition, the greater fault regarding the evidence presented lies once again with the bankruptcy court.

The *Global* court simply drew the wrong conclusions from the body of facts put before it. This debtor candidly admitted that, even for a reorganizing debtor, it was in serious trouble. It had horrendous cash flow problems, consuming all of its DIP facility just to keep its doors open.

Conspicuous by its absence was any indication that *Global* was breaking even, let alone making money, in its postpetition life. The debtor further proclaimed that the 503(b)(9) claims then pending (to say nothing of future administrative expenses!) well exceeded its entire postbankruptcy borrowing power.

All indications were that *Global*'s Chapter 11 was in serious jeopardy, and it was doubtful that it could ever pay all administrative expenses in full, a key prerequisite to emerging from the reorganization proceeding. If anything, this debtor demonstrated a serious likelihood of administrative insolvency, which in turn would merit a conversion of its Chapter 11 case to a liquidation proceeding or an outright dismissal.<sup>177</sup>

In truth, *Global* should have been condemned by its own words. Yet, inexplicably, Bankruptcy Judge Gross failed to discern this sorry state of affairs and did not take the next, logical step of questioning the essential viability of this Chapter 11. Might a more probing inquiry have changed the narrow denial here of IMASA's motion for immediate payment? Possibly not. However, the greater point, the opportunity that was surely squandered, is that the debtor's confessed inability to pay this 503(b)(9) claim should have triggered a sweeping review of the debtor's capability to pay its priority administrative debts, let alone its entire creditor body.

### ***Bookbinders' Restaurant—A More Palpable Dish***

Next in our troika of unpublished, and hence nonprecedential, decisions is the case of *In re Bookbinders' Restaurant, Inc.*,<sup>178</sup> concerning the reorganization of a landmark restaurant in Philadelphia. Apparently the atmosphere of the City of Brotherly Love was conducive to harmonious relations, even in bankruptcy court, as the debtor and five creditors had reached an accord recognizing the validity and amount of each creditor's 503(b)(9) claims. However, not all was bliss, as one claimant, known as Blue Crab Plus Sfd, demanded that its administrative claim be paid immediately.<sup>179</sup>

In a comparatively narrow holding, Bankruptcy Judge Frank ordered that the claim of the dark-hued crustacean be held in abeyance and rejected the assertion that, as a matter of law, 503(b)(9) claims had to be paid upon demand.<sup>180</sup> To be sure, the court

agreed to hold evidentiary hearings to determine if the facts at hand compelled payment now or later.<sup>181</sup>

The *Bookbinders* court correctly noted that, prior to the 2005 Amendments, “it was black letter law that the question whether the bankruptcy estate should be ordered to pay an allowed administrative expenses is within the bankruptcy court’s discretion.”<sup>182</sup> Against this backdrop, Congress bestowed the new section 503(b)(9) administrative expense status upon what were heretofore prepetition reclamation creditors. Bankruptcy Judge Frank therefore posited the question before him as whether or not the lawmakers intended for the new section 503(b)(9) claim “to alter existing practice that the timing of the payment of an allowed administrative expense is left to the discretion of the bankruptcy court.”<sup>183</sup>

This court concluded that it did not, ruling that the pre-BAPCPA deference to the bankruptcy judge’s discretion in such matters was left undisturbed by the promulgation of section 503(b)(9).<sup>184</sup> Judge Frank rejected the creditor’s notion that this new category of administrative expense in turn entitled it to immediate payment of that specific claim, “in derogation of... the court’s discretion.” Section 503(b)(9) “does nothing more than define a type of liability” and “neither states nor even implies... an unqualified right to immediate payment,” nor any more favorable treatment than any other administrative expense.<sup>185</sup>

As a further argument, the *Bookbinders* court drew a comparison between 503(b)(9) claims and postpetition obligations payable pursuant to section 365.<sup>186</sup> The latter statute requires the timely payment of all rents accruing postpetition under an existing lease of commercial real estate until that lease is assumed or rejected by the debtor.<sup>187</sup> Said proviso contains a textual element of discretion, whereby the bankruptcy judge may make a small extension of the debtor’s time to perform.<sup>188</sup>

There is a purpose to drawing this contrast, stated Judge Frank. Certainly, the court was deliberate in refusing to take sides over the differing views as to precisely how much elasticity a bankruptcy court can exercise over extending a debtor’s time to make obligatory section 365(d)(3) payments. Yet that was the point, the bankruptcy judge contended, noting the relative dissension that nevertheless existed over a statute with fairly clear requirements and supported by an “explicit” legislative history.<sup>189</sup>

In contradistinction, the argument is “much weaker” for asserting that 503(b)(9) usurps the bankruptcy court’s established discretion concerning the timing of the payment of administrative expenses.<sup>190</sup>

Had Congress intended “some type of enhanced right” for section 503(b)(9) claims, “I am convinced that it would have made its intent express in the statute.”<sup>191</sup> Yet the lawmakers had not done so, so the *Bookbinders* court finally concluded that this was another reason to hold that its discretion was left intact of the 2005 promulgation of the new administrative expense proviso.<sup>192</sup>

All things considered, Bankruptcy Judge Frank’s rationales in *Bookbinders* hold water better than the irreparably flawed viewpoints in *Global*. To its credit, *Bookbinders* was seemingly correct in propagating the historical view that a bankruptcy court’s discretion still holds sway over when administrative payments, including sec-

tion 503(b)(9) claims, may be paid. Notwithstanding, the Pennsylvania court's ruling is not beyond valid criticism.

Firstly, *Bookbinders* fails to recognize that section 503(b)(9) creates an entirely novel classification of an administrative expense. Can it follow that this new right is still paid in accord with old rules? Yes, but it is equally sound to say that this new claim is to be looked at afresh as to when it should be paid.

Secondly, *Bookbinders* never takes the measure of the debtor's solvency in its post-petition phase. To be sure, it is for less offensive in that regard than *Global*, which so wrongly ignored the debtor's abject lack of cash. The debtor in the instant case appeared to have the wherewithal to pay at the time that the creditor requested,<sup>193</sup> but the fact that the court did not take that solvency into account diminishes its reasoning. Had the situation been opposite, it would have been highly relevant, this author posits.

Thirdly, *Bookbinders* engaged in a brief recapitulation of section 503 administrative expenses and subdivides them into some factual, but nonetheless arbitrary, categories. Certainly, Judge Frank makes some sensible and accurate distinctions, but are such differentiations truly germane here?

Is it not true that some administrative expenses, the most glaring examples being attorney's fees, trustee's commissions, and similar professional compensation, are paid on a current basis in almost all Chapter 11 cases? Are the fees of lawyers (including this author) more worthy of early payment than section 503(b)(9) claims? Put another way, are some administrative expenses "more equal" than others? This author doubts that.

Fourth, and here is where the strongest refutation of the reasoning of *Bookbinders* is made, the analogy drawn between the timing of the payment of 503(b)(9) claims and postpetition lease payments, the latter as required by section 365(d)(3), is simply unsustainable. Undeniably, the Congress afforded extraordinary treatment to the claims of commercial landlords for postbankruptcy rent. It has long been recognized that such preferential status is the result of the unique circumstances of the real estate market and the concomitantly vigorous demands of commercial property owners for exceptional protection in bankruptcy cases.<sup>194</sup>

Yet it does not follow that the bold exposition of the specialized rights of section 365 claimants derogates the rights of creditors under section 503(b)(9). While this author routinely advocates a holistic approach to the interpretation of the Bankruptcy Code, that does not necessarily mean that the overt recitation of one class of creditor's prerogatives means that another class holds something quite inferior. Indeed, Congress created a whole new claim when it enacted section 503(b)(9); to subtract rights from the beneficiaries of that new position in the priority expense scheme can only lead to folly.

### *Incredible Auto*

Completing the troika of unpublished decisions on this topic, we have the Montana case of *Auto Auction Associates of Montana, Inc. v. Incredible Auto Sales LLC (In re Incredible Auto Sales LLC)*.<sup>195</sup> The penultimate holding of Bankruptcy Judge Kirscher was that Auto Auction, the reclaiming creditor, had a superior right, via the reclamation process, to the proceeds of a Chevy Blazer vehicle sold by the debtor, Incredible Auto. Concurrently, Auto Auction's assertion of reclamation rights to six other motor

vehicles (or the sale proceeds thereof) collapsed before the irresistible secured creditor rights of Hyundai Motor Finance Co. pursuant to the “prior lien defense” of the amended section 546(c).<sup>196</sup>

Why this diversified outcome? Hyundai’s security interest in the Blazer truck was never perfected; thus the absence of a bona fide preexisting security interest made a clear path for Auto Action to realize upon its claim for reclamation. However, by fulfilling the requirements of Montana’s enactment of the Uniform Commercial Code (including, among other things, the successful delivery of title documentation to the debtor by Auto Auction, the tendering of checks by the debtor, and its taking of physical possession of the six vehicles prebankruptcy), *Incredible Auto* became the undisputed owner of the automobiles, and Hyundai’s blanket security interest firmly attached to that collateral. The lender’s unshakeable grip on those assets gave rise to the prebankruptcy lien, which defeated the auctioneer’s claim under the amended section 546(c).<sup>197</sup>

As for Bankruptcy Code issues, Bankruptcy Judge Kirscher’s legal analysis was tightly focused on section 546(c)’s new codification of the “prior lien defense,” largely because he found that all other requirements of the reclamation statute had been met.<sup>198</sup> After first noting that “floor plan” financiers were historically recognized as holding perfected security interests capable of defeating reclamation creditors, the *Incredible Auto* court turned immediately to the result stated above, as arrived at by analyzing the perfection requirements of state law.<sup>199</sup> As the remainder of the decision deals almost exclusively with matters of state law not germane to our purposes, nothing else need be said, with one exception.

In a brief detour into the realm of dicta, Judge Kirscher expounds, among other things, the changes to section 546(c) wrought by BAPCPA, the burgeoning division over whether or not the 2005 Amendments created a new federal right of reclamation, and the lack of guidance in the amendment’s legislative history. Yet it must be gainsaid that the bulk of *Incredible Auto* is devoted to issues of state law, not the federal Bankruptcy Code, and thus does not veer off into speculative territory on that account.

For these reasons, this Montana case is the least troublesome of the unreported trio. It quickly notes the one and only bankruptcy question essential to the making of its decision. That issue is, of course, the amended language of section 546(c) that espouses the “prior lien” defense.

With that said, all *Incredible Auto* had to do was ascertain if prior perfected security interests existed in the goods to be reclaimed. Here, as we have already observed, they did indeed for a half a dozen vehicles, putting them out of the reach of the reclaiming creditor. Only one vehicle could be successfully reclaimed by the reclaiming creditor, Auto Action, because Hyundai never perfected its earlier security interest under the procedures required by state law. Therefore, *Incredible Auto* rightly focuses on its home state’s commercial code, and that we do not argue with.

## IS ANYONE LISTENING?

We cannot deny that, for reasons well stated, we have criticized much of the foregoing decisions. Could our critique been muted had these opinions been adopted by other courts? Possibly, but that is the point—they have not.

These decisions have yet to attract a following. As of the time of this writing, *AMS* has only been cited by its compatriot *Dana*. *Dana* has itself never been cited.

It is a given that bankruptcy court decisions in one district do not bind bankruptcy judges in other districts; indeed, it can be gainsaid that a bankruptcy court decision does not even bind its brethren in the very same district.<sup>200</sup> Therefore, these decisions from the lower rungs of the bankruptcy court hierarchy bind no one. More to the point, they do not appear to present views looked upon favorably by other jurists. This would seem to explain the dearth of citations thereto, and it could be the precursor to future challenges to their authority.

### SECURED STATUS AS AN OBSTACLE TO SECTION 503(b)(9) PRIORITY

One of the new key issues confronting the bankruptcy court system is the intersection of the new section 503(b)(9) with the rest of the Bankruptcy Code. Case in point—the availability of section 503(b)(9) to secured creditors (whether they be oversecured, undersecured, or just “plain,” i.e., fully secured).

The latest teaching on that precise topic is found in *Brown & Cole Stores, LLC v. Associated Grocers, Inc. (In re Brown & Cole Stores, LLC)*.<sup>201</sup> While highly instructive, the decision of the Ninth Circuit’s Bankruptcy Appellate Panel is certainly not conclusive for its thoughtful dissent keeps alive significant questions about what the law truly should be. Yet this case’s saving grace is that it ably exposit the opposing points of view and thus provides a choice for the foundation of what the law shall eventually become.

The debtor in this case was in the most prosaic of businesses; it was a chain of grocery stores in Washington State. Associated Grocers (Associated) was not only a key creditor, its relationship with Brown intertwined on a number of levels. Associated was a buyer’s cooperative, and Brown owned about one-quarter of the stock, making the debtor Associated’s largest shareholder. Meanwhile, Associated sold an average of nearly \$3 million of goods to Brown each week, leading to its standing as a major creditor.<sup>202</sup> With respect to the stock, Associated claimed a senior secured interest in shares held by Brown.<sup>203</sup>

Of paramount importance here was Associated’s claim for over \$6.3 million of goods sold within the 20 days prior to Brown filing for bankruptcy and thereby falling within the purview of section 503(b)(9).<sup>204</sup> Additional legal issues were in play, one of them arising from a “Master Supply Agreement” between the two combatants.

This accord contained a “most favored nations” clause calling for Associated to sell to Brown on terms no less favorable than those offered to any other Associated shareholder or customer. The debtor contended the cooperative had breached this agreement by selling goods to Brown at prices higher than those it charged other customers.<sup>205</sup> Another bone of contention came from the debtor’s plea that Associated caused unspecified damages well into seven figures by reason of the latter’s wrongful termination of a rebate program.<sup>206</sup>

Brown filed a petition for reorganization in November 2006. Associated moved to have allowed and paid immediately its section 503(b)(9) claim of over \$6.3 million. Brown opposed and ticked off various grounds.

First and foremost, it alleged that the secured status of Associated's claims disqualified it from treatment as an administrative priority claim pursuant to section 503(b)(9). Second, it would be inequitable to other creditors, proclaimed the debtor, to grant administrative priority to a claim that was already secured. Next, Brown asserted a right of setoff for the aforementioned alleged contractual breach.<sup>207</sup>

The bankruptcy judge granted Associated's motions and ordered the 503(b)(9) claim recognized. This appeal followed.<sup>208</sup>

Writing for the Bankruptcy Appellate Panel of the Ninth Circuit,<sup>209</sup> Bankruptcy Judge Denis Montali declared that *Brown* presented a question of first impression to the western tribunal.<sup>210</sup> As the issue was not a minor one, the veteran bankruptcy jurist opined, "[w]e expect that the issue is of great importance to many sellers of goods to troubled companies."<sup>211</sup> Prophetic words, indeed.<sup>212</sup>

The Ninth Circuit BAP took this issue of first impression and further delineated it into two distinct branches for adjudication. One, is a secured claims entitled to section 503(b)(9) treatment? Two, can setoff be utilized in circumstances such as those presented here?<sup>213</sup>

Clearly, the first query was a matter of statutory interpretation and thus entitled to de novo review,<sup>214</sup> while the second would be reviewed under an abuse of discretion standard.<sup>215</sup>

Writing for the tribunal, Bankruptcy Judge Montali left no doubt, declaring in the header itself that this BAP found that a secured claim may be allowed section 503(b)(9) priority.<sup>216</sup> The *Brown* court reminds that statutory construction begins with the statute itself,<sup>217</sup> and when the law's language is plain, the sole function of a court is to enforce that proviso according to its own terms.<sup>218</sup>

Amazingly, the debtor urged the panel to disregard these well-settled maxims. Brown's rationale focused on the split of authority, pre-BAPCPA, for secured tax claims.

Bankruptcy Judge Montali noted that one faction held fast to the notion that section 503's priority status was never meant to apply to secured claims because, by their very nature, priority administrative claims arise after the commencement of a bankruptcy case.<sup>219</sup> Yet the second cadre countered that secured tax claims could be entitled to administrative priority standing.<sup>220</sup> This split persisted for many years<sup>221</sup> until BAPCPA came into being.

BAPCPA amended the relevant provisions of section 503 by adding these four crucial words of qualification: "whether secured or unsecured," with regard to tax claims.<sup>222</sup> Thus the post-BAPCPA Bankruptcy Code makes the determination of the secured or unsecured status of a tax claim wholly irrelevant; either kind of demand for taxes payable is accorded administrative priority, and in this manner Congress ended the internecine debate.<sup>223</sup>

It then follows, argued the debtor here, that the absence of such conclusive wording from section 503(b)(9) per force limits its scope to unsecured claims. Brown asked the BAP to infer that the lack of such words of inclusion in the priority expense proviso, while clearly made into law in 2005 for the adjoining tax claims clause, could only mean that Congress intended to limit section 503(b)(9) to unsecured claims.<sup>224</sup>

The majority of the bankruptcy tribunal would not hear of it. “We reject that invitation,” declared Judge Montali. Section 503(b)(9) is not ambiguous, and therefore it must be interpreted according to its own plain language, decreed the court.<sup>225</sup>

Aside from holding that the statute holds no ambiguity, the *Brown* court found adjacent support by, ironically, taking the converse of the debtor’s argument. Whereas the grocery chain asserted that the lack of the additional wording of “secured or unsecured” worked to exclude secured claims, Judge Montali took the contrary view. Writing for the Ninth Circuit BAP, he wrote that, by declining to insert the qualifying term “unsecured” into the statute, the lawmakers had decided not to so delimit section 503(b)(9).<sup>226</sup>

Garnering further support from the statutory text, the BAP set forth in a parenthetical that section 503(b)(9) has only three precise, “plain language” limitations. To qualify for priority status, such a claim must be for goods not services, said goods received within the 20 days prior to the commencement of the bankruptcy case, and the goods must have been sold in the ordinary course of the debtor’s business. The lack of further textual mandates spoke loudly to the *Brown* panel, leading it to decree that section 503(b)(9) did not suffer from the limitation that this debtor sought to impose.<sup>227</sup> To be sure, the BAP found its conclusion to be obvious in that “all claims arising from twenty-day sales are entitled to administrative priority.”<sup>228</sup>

What of the debtor’s cry that bestowing priority upon an already secured creditor would work an inequity to other creditors? “We can do nothing about” that, decreed the court, since “it is up to Congress to decide which creditors have leverage and which do not.”<sup>229</sup>

Aside from its forthright refusal to engage in legislating from the bench, the BAP made another rational point. If Associated’s section 503(b)(9) claim is in fact fully secured, then payment of it by Brown would consequently free up the value of that collateral for the benefit of other creditors.<sup>230</sup> Yet if the creditor’s claim was ultimately proven to be undersecured or even wholly unsecured, “then to deny administrative priority would be to ignore the statute, something we cannot do.”<sup>231</sup>

Anticipating the upcoming dissent, the *Brown* majority continued to fortify its battlements on the bankruptcy policy issues present herein. In response to the dissent’s point that secured claims in a Chapter 11 can be subject to a “cramdown,” Bankruptcy Judge Montali noted that Congress undoubtedly gave “tremendous leverage” to section 503(b)(9) creditors by permitting them to seek quicker payment as administrative creditors “and in doing so, perhaps dramatically affecting the outcome” of reorganization cases such as this.<sup>232</sup> “It is not our place to reallocate that leverage,” said the court, once again steadfastly refusing to do Congress’s job.<sup>233</sup>

Finally, the majority opined that if it were to yield to the dissent’s point of view, a 503(b)(9) creditor could simply waive its secured status, pursue its claim as an administrative priority, “and have equally powerful influence over the outcome of the case.”<sup>234</sup> Confronted with such realities, the majority held its ground and moved on to the setoff issue.

Regarding the setoff, which the debtor sought but the bankruptcy judge below denied, the Ninth Circuit BAP reversed, first holding that the requisite mutuality of the competing claims was present.<sup>235</sup>

Section 503(b)(9) claims are unique among all administrative priority claims, said the tribunal, because they accord postpetition priority to what are, in truth, prepetition claims.<sup>236</sup> Unlike all other priority claims, which are constructed of postpetition debts, the lawmakers singled out 503(b)(9) claims and “simply moved these claims up higher on the priority ladder.”<sup>237</sup> This makes for a crucial distinction when counterposing the right of setoff against such claims, noted the court.<sup>238</sup>

Examining section 553,<sup>239</sup> the *Brown* court emphasized that the setoff statute requires a mutuality of debt between debtor and creditor as a precondition to setoff. By virtue of this, most administrative priority claims are not subject to setoff because they fall on the opposite side of the petition date line of demarcation. Section 503(b)(9) claims are the exception because, by definition, they arise prebankruptcy.<sup>240</sup> Given this exception to the norm, it was error, decreed the tribunal, for the bankruptcy judge below to rule, as a matter of law, that setoff was impermissible here.<sup>241</sup>

To be sure, said the bankruptcy tribunal, equitable considerations may be considered in allowing or denying a setoff.<sup>242</sup> However, in the case at bar, the record below was bereft of any validation for the bankruptcy court’s denial of a right to setoff.<sup>243</sup>

Judge Montali wrote that a prospective Chapter 11 debtor is not dutybound to disclose its ruminations to creditors. Moreover, Associated had not argued nor established that Brown engaged in any inequitable conduct. Apparently the entire issue was raised sua sponte by the court below, and the higher bankruptcy tribunal deemed that inappropriate, absent compelling circumstances to refuse setoff.<sup>244</sup>

Writing for the BAP, Judge Montali made a number of telling and realistic points. The decisionmaking process for a vendor extending credit to a buyer “is a complex one, factoring in the potential profit to be made from a continuing relationship” as well as judging the buyer’s creditworthiness.<sup>245</sup>

Notably, found the tribunal, the filing of bankruptcy does not by itself create insolvency; rather, “it merely confirms its existence and, hopefully, is a first step towards solving the problem.” To now create a judge-made rule that demands potential debtors to notify suppliers that a bankruptcy filing is under consideration would make Chapter 11 “much more difficult and in many cases impossible.”<sup>246</sup>

Indeed, the BAP held that, even if it adopted Associated’s argument that Brown had some kind of duty to warn, the record below was once more lacking evidence that the creditor had been in some way harmed by lack of notice of the debtor’s upcoming Chapter 11.<sup>247</sup>

Finally, noted Judge Montali, Associated wore three separate hats as a creditor. It possessed reclamation rights, a security interest, and its section 503(b)(9) priority.<sup>248</sup> Given such enviable status, and taken into consideration with everything else, the Ninth Circuit BAP found no reason to prohibit this debtor’s right to a setoff on equitable grounds.<sup>249</sup>

The BAP did not agree outright that Brown could set off. As an additional ruling, the bankruptcy tribunal held that the debtor had likewise not proved its setoff right. That too was subject to a remand for Brown to establish evidence of its right to setoff, pursuant to the clarifying standards that the BAP had just provided.<sup>250</sup>

In conclusion, the Ninth Circuit BAP declared that secured claims could be section 503(b)(9) claims as easily as unsecured ones, and a determination of setoff here could

not yet be made, particularly on some yet-to-be proven equitable ground. A remand was thus ordered to address the latter question.<sup>251</sup>

Illuminating as the BAP majority opinion was, it was not the only voice to be heard in the instant case. Bankruptcy Judge Jaroslovsky contributed a rather erudite and inquiring dissent that demands attention.

While in accord on the remand of the setoff issue, the learned jurist disagreed with the majority's resolution of the section 503(b)(9) point, boldly labeling it an "overly-sterile conclusion." Judge Jaroslovsky firmly disagreed with the notion "that a fully secured creditor can also have rights under § 503(b)(9)" not only as a matter of statute but for "compelling policy reasons."<sup>252</sup>

The dissent declared that a simple "plain meaning" statutory analysis was too facile an approach to such a critical question. In sharp contradiction to the majority, Judge Jaroslovsky declared any judicial interpretation to be "considerably complicated" by the BAPCPA amendment inserting the "whether secured or unsecured" priority tax claim corollary within section 503(b)(9).<sup>253</sup>

The dissent notes that said modification and the addition of section 503(b)(9) were simultaneous in 2005. Yet the latter change can be distinguished because Congress did not use the same language that it did when clarifying the tax claims subparagraph. Judge Jaroslovsky relied upon the maxim that Congress is aware of the ramifications "when it includes particular language in one section of a statute but omits it from another."<sup>254</sup>

The dissent contended that if the legislature intended for secured status to have no impact on the allowability of all administrative expenses, "it would have certainly have added 'whether secured or unsecured' in the first sentence of §503(b) and not in just one of nine enumerated subsections."<sup>255</sup> Having thus posited his statutory construction theorem, Judge Jaroslovsky turned to a broader argument.

The dissent was equally (if not more) concerned with "fundamental policy considerations... at stake in this case." Permitting a secured claim to also be prioritized in a Chapter 7 case "may not have a big impact," opined Judge Jaroslovsky, but "it can make a huge difference in a Chapter 11 case." The strictures of the reorganization chapter would require Associated's claim to be paid in full upon plan confirmation if it was accorded priority, whereas without priority status it could be crammed down (albeit still paid in full).<sup>256</sup>

The dissent's paramount concern was that if section 503(b)(9) did not distinguish between secured and unsecured claims, then "we may be in effect giving a secured creditor veto power over a plan of reorganization when... sound bankruptcy policy dictate[s] that a secured creditor can be forced to accept a plan which is fair and equitable to it, honors its secured status and pays its secured claims in full over time."<sup>257</sup> Judge Jaroslovsky declared there were not merely hypothetical concerns, at least in the instant case, because Associated's various claims in Brown's Chapter 11 were then pending before the bankruptcy court.<sup>258</sup>

Citing longstanding Supreme Court precedent, the *Brown* dissent reminds that "[p]rovisions of the Bankruptcy Code cannot be read in isolation but should be interpreted in light of the remainder of the statutory scheme."<sup>259</sup>

Judge Jaroslovsky acknowledged the difficulty of interpolating “an isolated change to one section of the [Bankruptcy] Code” when Congress provides no guidance as to how that alteration is to be fully integrated into the whole. The *Brown* dissent would have answered this challenge by weaving section 503(b)(9) “into the tapestry of American bankruptcy law.”<sup>260</sup>

This new stitching would take the form of preserving the Congressional intent of section 503(b)(9) to give distinct rights to recent suppliers of goods to debtors but at the same time steadfastly refusing to unravel other Chapter 11 touchstones enacted to facilitate reorganization, in this case preserving the ability to cramdown a secured claim by denying it the additional stature of an administrative priority that would have to be paid immediately upon confirmation.<sup>261</sup> The dissent concluded with a declaration consistent with its weaving thematic, stating “I prefer this result to the crazy quilt patched together by my brethren.”<sup>262</sup>

## ANALYSIS

Stepping back to review the outcomes in *Brown*, we find this to be a truly intriguing case, for it not only provides an initial landmark ruling but it sets forth in exquisite counterpoise the very contrary argument that might yet be adopted elsewhere as law.

Let us take the well-reasoned majority first. The essence of its position is that the newly enacted section 503(b)(9) does not, by its own words, prohibit priority treatment for a claim that also happens to enjoy secured status. In this regard, the majority’s position is simplicity itself; if the statutory text does not expressly discriminate against secured section 503(b)(a) claims, it would be folly for a court to unilaterally read such distinguishing language into the proviso. As truly a “plain meaning” language argument as one could imagine, this facet of the *Brown* holding is rather formidable.

However, there is more. The second great stone in the foundation is the argument that Congress, in enacting BAPCPA, knew what it was doing when it went out of its way in a nearby subparagraph to explicitly state that both secured and unsecured tax claims were to be accorded priority treatment. Congress clearly demanded that no differentiation be made between tax claims backed by a security interest and those that enjoyed no such benefit.

Yet in saying nothing of the sort for section 503(b)(9) claims, is it not true that the lawmakers simply never intended that anyone at anytime ever make such distinctions with regard for that new proviso? *Brown* appears to be of view that, since Congress said nothing, and when it provided a few statutory lines before that it knew exactly what to say when it chose to do so, then there was no need for the lawmakers to speak. There is undeniable validity to the view that Congress said nothing else in making the new section 503(b)(9) part of BAPCPA because there was nothing to be said. Why distinguish when exclusion is not an issue?

Indeed, the notion of exclusion plays a further role herein. Although not stated by the Ninth Circuit BAP, is its position not in some way an exercise of the *expressio unius* doctrine? For the record, the well-accepted maxim of *expressio unius* declares that the expression of one thing in a statutory text means the exclusion of something else in a further or related segment of that same body of law.<sup>263</sup>

*Brown* can be reasonably viewed as holding that the “secured and unsecured” merger in the preceding tax claim clause of section 503 per force means that it never entered the minds of the lawmakers to either create or knock down such barricades a bit later on within the same Bankruptcy Code section. Also, be reminded that Congress clearly had good reason to once and for all eradicate the distinction between secured and unsecured tax claims since the courts were undisputedly divided, and a legislative solution was mandated.

Put as simply as possible, *Brown* decrees that if Congress intended to bar secured claims from section 503(b)(9) status, it could have said so, and it would have said so. However, it did not, and, once again, by saying one thing to the exclusion of another, it seems to this author that *Brown* draws validity from the equally potent *expressio unius doctrine*.

For a third and powerful reason why the *Brown* majority was right, note well how Bankruptcy Judge Montali resolutely declared that this tribunal would not engage in the act of judicial legislation, steadfastly refusing to rewrite (or newly write) the law. Well taken is the court’s vigor in declaring that it is the job of the Article I branch to write the law, a task constitutionally prohibited to the Article III branch and its subunit, the bankruptcy court. In sum, *Brown* is unquestionably right when it declares that it must take the law that the nation’s elected representatives wrote and not disassemble their work by judicial fiat.

Vital in this regard is the *Brown* court’s firm refusal to entertain the debtor’s policy arguments, enticing as they may have been. Once again, Congress writes the Bankruptcy Code to fit the lawmakers’ vision of what insolvency law policy should be (and that is certainly true for the 2005 Amendments in which section 503(b)(9) finds its start!). Once the legislators embody that policy into statutory language, it is not for the judicial branch to usurp that policy and replace it with the jurists’ own vision. As noted by Judge Montali, if a secured creditor found itself with greatly augmented leverage because section 503(b)(9) now gave it a concomitant administrative expense priority, so be it. Only Congress can undo what it has made law, *Brown* so rightly holds.

To be sure, the majority’s point is also well taken, that exercise of section 503(b)(9) rights might actually help the overall situation, as it would free up collateral previously pledged to a single creditor. Clearly, this shows cognizance of the credo that “secured creditors look to be paid first from their collateral.” In effect, *Brown* tells us that enforcing section 503(b)(9) by its own terms could result in a satisfaction of a secured claim by means other than the collateral segregated for but one lienholder. The resulting release of some or all of that secured creditor’s collateral could actually benefit a debtor’s reorganization efforts. So, in refusing to undo established bankruptcy policy, *Brown* in fact serves it and serves it admirably.

For all these good and varied reasons, *Brown* now stands as an excellent and well-reasoned landmark for the proposition that section 503(b)(9) claims must be honored, whether they are secured or unsecured; but is it truly the final word on this point?

Regrettably, we must say “no,” for as much as this writer applauds the majority in *Brown*, intellectual honesty and good sense demands that we acknowledge the counterpoint raised in the *Brown* dissent.

For it is equally so that the dissent in *Brown* makes a certain degree of sense and may yet prevail, if not in its own venue then in another jurisdiction. First, Judge Jaroslovsky pointedly criticizes the majority for what is, in his view, an oversimplification in applying the “plain meaning” rule to section 503(b)(9). Put another way, even the “plain meaning” rule can be too plain, and it appears that is just the accusation that the dissent is hurling here.

The *Brown* dissent is of the mind that what is truly plain is that Congress went a fair distance to make explicit the inclusion of secured tax claims in the priority expense subparagraph some little distance from the section 503(b)(9). This overt inclusion in the former, as contrasted to the lack of a similar scope in the latter, makes it “plain” that the new administrative expense does not include secured variants of its claims.

In its own way, the *Brown* dissent alludes to the *expressio unius* doctrine, insofar that it claims that the expression of one, to wit the sweeping language for secured and unsecured tax claims, is to the exclusion of the same broad range for section 503(b)(9) claims. One may not agree with the *Brown* dissent’s application of *expressio unius* in this manner (this writer does not), but it does portray some merit.

Judge Jaroslovsky contends that the clarifying language for tax priorities actually muddies the application of section 503(b)(9). Whether this perspective will flourish elsewhere remains to be seen, but it nonetheless exists, and so we acknowledge it.

It would be pure folly to underestimate Bankruptcy Judge Jaroslovsky’s wisdom, even as we disagree with him. He was a key proponent of the proposition that the opinions of a particular circuit’s Bankruptcy Appellate Panel binds all of the bankruptcy jurists residing within its jurisdiction.<sup>264</sup> That Judge Jaroslovsky contributes his viewpoint in *Brown* as a member of the Ninth Circuit’s BAP is worthy of respect.

However, it is equally valid to criticize the dissent, especially for its claim that Congress could have inserted the “secured and unsecured” language in the preface of section 503, thus making it all encompassing. Respectfully, that is judicial legislation at its worst. It is not the job of the courts to rewrite the law or make the albeit lesser mistake of suggesting how it should have been written. The dissent must fall here to the majority’s far more judicious edict that it must take the law as Congress wrote it and not rewrite it out of caprice.

A related and equally valid criticism is the dissent’s overemphasis on bankruptcy policy. Those concerns are best left to the lawmakers. While Judge Jaroslovsky makes some good points about the potential change to the balance of power in reorganization cases worked by the new section 503(b)(9), again it is not the bench’s province to interpret statutes in order to fulfill the court’s vision of what that policy should be.

We can appreciate the *Brown* dissent’s stated desire to better weave section 503(b)(9) claims into the overall tapestry of the Bankruptcy Code. However, as well-founded as that goal is, it cannot be called upon to trump what Congress had written.

In sum, the dissent in *Brown* makes some cogent and debatable points. Yet it must yield to the superior reasoning, to say nothing of precedential value, of the ultimate holding of *Brown*. For now, section 503(b)(9) priority status is to be accorded equally to claims, be they unsecured or undergirded by some form of collateral.

## IN THE FUTURE....

At the outset of this article, it was promised that there would be some discussion of potential solutions to the problems for reclaiming creditors, as wrought by the 2005 Amendments and the smattering of judicial decisions that followed in its wake. It is now time to deliver on that promise.

Unfortunately for many, these possible courses of action represent difficult paths, to say the least, and the prospects for beneficial change are not at all bright. Nonetheless, to do nothing is the greater folly, so we address some potential outcomes.

### Legislative Action

While fraught with opinion, it is not far from the conventional wisdom to contend that BAPCPA was passed with a great deal of trial and tribulation. Moreover, it is likewise an accepted fact that the 2005 Amendments achieved the reality of statutory power only because powerful interests in the credit card industry exerted maximum effort to ensure its passage into law. Therefore, it is more than fair to say that the legislative branch is unlikely to subject itself to such strenuous efforts again anytime soon and similarly that the powerful tides that impelled BAPCPA to passage as the law have disappeared. Lacking such motivations, legislative change would be nearly impossible.

Just for the sake of discussion, if reclaiming creditors could have their way, no doubt they would first target the elimination of the new language of section 546(c) that makes their interests subservient to that of prior lienholders. That, of course, would be the proverbial “million in one” shot, because: a) having just made that exception into law, Congress would not so soon eliminate it; and b) the community of reclaiming creditors would be overwhelmed by the alliance of banks, financial institutions, and asset-based lenders who are far better organized and financed (after all, they are banks!) and would never allow this explicit protection of their secured interests to be diminished even one iota by new legislation.

With respect to section 509(b)(9), one area that might be susceptible to legislative fine-tuning would be an amendment clearly stating that such claims enjoy priority status whether or not they are secured. In essence, this would be the passing into law of the holding of *Brown*. Yet, as argued above, we expect the reasoning of the *Brown* majority to hold sway, while the contrarian view of its dissent shall not gain influence. Thus although having Congress revamp the law would be a nice thing to have, it is not a gilt-edged necessity as it appears that the judicial decisions are headed down the right path.

In sum, the major legislative revision that reclaiming creditors need most, that of undoing the paramouncy of the prior lien defense by statutory excision, is far too remote a possibility to be seriously considered while the more modest change to section 509(b)(9) to assure priority for secured and unsecured reclamation changes is in all likelihood not needed, provided of course that the case law continues to evolve along present lines.

If legislative change beneficial to reclaiming creditors is not a viable possibility, then what is to be done for such claimants? The answer would seem to lie with what they can do for themselves in the trenches of everyday bankruptcy practice.

### **Practical Solutions to Practical Problems**

Many share this writer's steadfast belief that the courts of bankruptcy are by far the most practical in our system of jurisprudence. After all, it all comes down to money, and who gets it, and what can be more practical than that? As such, then what better place and time to suggest real options that will hopefully lead to real results.

Let us first take the inevitability of the "prior lien defense." It cannot be denied that this protection for secured lenders is now a very solid brick in the infrastructure of the Bankruptcy Code. As aforesaid, it is nearly impervious to legislative revision, at least for years to come. What to do with such an immovable object?

Well, as the saying goes, if you cannot go through it, then go around it. We suggest an alternative not in the least devious, but what should prove to be highly effective in overcoming the "prior lien defense," in essence by circumventing it, albeit by highly legal means.

As we have seen, the centerpiece in the cases on point has been not merely the presence of secured creditors with preexisting liens but the propagation of their interests via the device of debtor-in-possession financing, the so called "DIP" facilities. This is the consistent thread that we have witnessed running through *Dana*, *Bookbinders*, and their ilk.

Decades of real world experience has taught us that the big money lenders that financed the entity during its decline almost invariably step forward to finance its reorganization phase, if for no other reason that to ensure the survival of their paramount claim to the debtor's assets.<sup>265</sup> The prebankruptcy lenders assure the continuity of their secured interests during the life of the Chapter 11 by quickly injecting new cash to finance the postpetition operations of the debtor, in return for "superpriority" liens, the "rollover" (or "rollup" if you prefer) of prepetition liens into postbankruptcy secured status, excluding the payment of reclamation claims from the cash collateral budget, and such other devices aimed at crushing the claims of reclaiming sellers and anyone else who stands in the way of secured lender hegemony.

This is the prior lienholders' greatest strength, and yet it is also their greatest weakness. If unchallenged, they win. Yet it is here that they are at their most vulnerable, for if the reclaiming creditors can band together and oppose this cozy little setup of the unbroken chain of secured interests, this merging of prebankruptcy and postbankruptcy lienholder status, reclaiming creditors can then breach the walls of the secured creditors' fortress and obtain recognition and payment of their claims. Practitioners, including this author, have urged reclamation creditors to "band together" to enforce section 503(b)(9) claims and expedite their payment.<sup>266</sup>

This is of course not easily accomplished. It means that reclaiming creditors must be proactive on a scale never seen before. It means that reclaiming creditors must move with lightning speed to be there on the first hour of the first day of the Chapter 11 when secured creditors move to jealously consolidate their interests with a suffu-

sion of cash via the DIP facility. It also means that reclaiming creditors must unite and bring together their disparate interests and monetary stakes to find strength in numbers to fight a well-heeled and experienced adversary, to wit, the banking community.

We have seen the consequences of inaction. As portrayed above, another common thread which *Dana* and its unfortunate brethren exposit is the decisiveness with which prebankruptcy lenders act to maximize their advantage under the law. Witness how quickly the prior lienholder rolls up its prebankruptcy secured interests in exchange for DIP financing. Almost identically, a new lender or the infamous “consortium” of banks appear with fresh money to finance the Chapter 11 and merge all prebankruptcy liens into their new superpriority, postpetition secured interests.

Where were the reclaiming creditors when this happened? Where was their opposition? Just as the lending community is there from Day One, the reclaiming creditors must be there as well to speak in opposition to the unification of all prebankruptcy and postbankruptcy secured interests and in defense of their reclamation rights.

Reclaiming creditors must also seek some recognition of their interests and an allocation to same from the inception of any Chapter 11 case. In the cases that we have discussed, we have seen the price to be paid when reclaiming creditors are not there to fight for status when postpetition operating budgets are drawn up, when the use of cash collateral is authorized, and when “carveouts” for professional and administrative fees are made.

We have witnessed the painful results when reclaiming creditors are absent from the process of making provision for interests counter to that of the secured lenders. Therefore, reclaiming creditors need to be there and be loud enough to be heard when budgets are drawn and allocations are made in order to assure that their interests are not snuffed out. Again, if “carveouts” for legal fees are an accepted fact of Chapter 11 practice (and they indisputably are), reclaiming creditors are worthy of at least equal, if not better, treatment in order to protect both their section 546(c) and section 509(b)(9) rights.<sup>267</sup>

However, the simple point to be made is that no one will hand recognition of these rights to reclaiming creditors; they have to fight for them. They must do so by more closely monitoring troubled customers that might slip into the morass of a reorganization case.

If anything, section 503(b)(9) now implores trade vendors to keep debtors on a strict 30-day payment terms, as this will tend to assure that approximately two-thirds (i.e., the last 20 days of shipments out of 30) shall be accorded administrative expense status.<sup>268</sup> They must maintain better and more relevant lines of communication within the reclaiming creditor community.

Then, when lightning strikes, reclaiming creditors must move swiftly, boldly, and decisively.<sup>269</sup> To be sure, reclaiming parties often represent a diversified cross-section of creditors with widely divergent monetary claims, products sold, and business interests, but such divergence cannot be allowed as an obstacle to uniting, even for the temporary purpose of a particular Chapter 11, to fight for their collective commercial interests against the powerful adversary of a secured lender. If reclaiming creditors cannot band together to fight as one, they will be mercilessly crushed by lienholders.

The cases expositied above bear true witness to that unfortunate, but avoidable, result. The rest is up reclaiming creditors.

## CONCLUSION

The 2005 Amendments wrought by BAPCPA to the Bankruptcy Code simultaneously brought clarity and confusion to the interests of reclaiming creditors. Their rights have been clearly subjugated to that of secured creditors holding the “prior lien defense.”

Yet they have benefited by the ascendancy to priority administrative expense status by the promulgation of section 509(b)(9), protecting, at least in part, their claim to monies for goods delivered to the debtor on the eve of bankruptcy. They have suffered because certain courts stubbornly refuse to acknowledge that Congress, by explicit legislative action, has accorded a new federal right of reclamation to such creditors.

In the future, opportunities for assistance from the lawmakers appear to be severely limited. Judicial decisions are divided. In some respects, they are evolving along a logical path, assuring the recognition of certain rights of reclaiming creditors. Other legal theories, contrary to the protections afforded reclaiming creditors by the new law, are out there, but thankfully they seem to be going unheeded.

The true ending has yet to be written, and it can only be written by the reclaiming creditors themselves by demonstrating that they can move with alacrity, band together for their common interests, and defend and prosecute<sup>270</sup> their essential rights as reclaiming creditors, notwithstanding overwhelming opposition from secured lenders that have successfully denigrated their status in the past. If that is to change, the reclaiming creditors are the only ones who can change it.

Is this the death of reclamation? No, it is not, if reclaiming creditors are willing to fight for themselves and defend what rights they have under the Bankruptcy Code. We wish them well in that battle.

## NOTES

1. By way of contrast, the plain dictionary meaning of “reclaim” includes making land usable for growing crops on. American Heritage Dictionary at 576 (1983).

2. To say nothing of the rights of a reclaiming creditor as encapsulated in section 2-702 of the Uniform Commercial Code, whose historical antecedents go back too many years to count.

3. Thorne, *The Courts Begin to Speak: Deciphering § 546(c)*, ABI Journal (April 2007) at 38.

4. See *In re Pester Refining Co.*, 964 F.2d 842, 844, 23 Bankr. Ct. Dec. (CRR) 12, 26 Collier Bankr. Cas. 2d (MB) 1663, Bankr. L. Rep. (CCH) P 74639, 17 U.C.C. Rep. Serv. 2d 1138 (8th Cir. 1992).

5. See Thorne, ABI Journal (April 2007) at 38. See also *Matter of Samuels & Co., Inc.*, 526 F.2d 1238, 1240, 18 U.C.C. Rep. Serv. 545 (5th Cir. 1976).

6. See *In re Dana Corp.*, 367 B.R. 409, 414, 48 Bankr. Ct. Dec. (CRR) 36, 57 Collier Bankr. Cas. 2d (MB) 1559, Bankr. L. Rep. (CCH) P 80942 (Bankr. S.D. N.Y. 2007).

7. Dana, 367 B.R. at 414.

8. 11 U.S.C.A. § 546(c)(1).

9. 11 U.S.C.A. § 546(c)(1)(B).

10. 11 U.S.C.A. § 546(c)(1)(A).

11. 11 U.S.C.A. § 546(c)(2). See Dana, 367 B.R. at 415.
12. Dana, 367 B.R. at 411-12.
13. 11 U.S.C.A. § 503(b)(9). See also Dana, 367 B.R. at 411 n.2 and 415.
14. Dana, 367 B.R. at 409 n.5.
15. Compare Sommer, Trying to Make Sense Out of Nonsense: Representing Consumers under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 79 Am. Bankr. L.J. 191, 193 (2005) (“the bill’s poor drafting will require judges to exercise their judgment simply in trying to determine what it means”); Lundin, Ten Principles of BAPCPA: Not What was Advertised, 24 Am. Bankr. Inst. J. 1, 70 (2005) (“[w]hether by design or default, bankruptcy practitioners and judges will spend decades unraveling cross-references that lead nowhere and interpreting new terms of art that fail to communicate”) (citations omitted).
16. H.R. Rep. No. 109-31, 109th Cong., 1<sup>st</sup> Sess. (2005), Sec. 406, p. 1, 87 (April 8, 2005), reprinted at 4 U.S.C.C.A.N. 88, 153.
17. Further statements therein concerning a prohibition on avoiding a warehouse lien, paralleling a similar UCC provision, are not germane in the least to this discussion. H.R. Rep. No. 109-31, 109th Cong., 1<sup>st</sup> Sess. (2005), Sec. 406, p. 1, 87 (April 8, 2005), reprinted at 4 U.S.C.C.A.N. 88, 153.
18. H.R. Rep. No. 109-31, at 146, reprinted at 4 U.S.C.C.A.N. at 204-05.
19. H.R. Rep. No. 109-31, at 146, reprinted at 4 U.S.C.C.A.N. at 204-05.
20. For the sake of completeness, the amendments to the statutory language add nothing to the mix. Pub. L. No. 109-8, 109th Cong., 1<sup>st</sup> Sess. (2005), § 1, § 1227, reprinted at 1 U.S.C.C.A.N., 119 Stat. 23, 199-200. Accord *In re Sorrell*, 359 B.R. 167, 176 (Bankr. S.D. Ohio 2007) (BAPCPA’s legislative history is of “dubious assistance in divining legislative intent”). See also *In re Quevedo*, 345 B.R. 238, 246, 56 Collier Bankr. Cas. 2d (MB) 511, Bankr. L. Rep. (CCH) P 80660 (Bankr. S.D. Cal. 2006).
21. Gretchko, *The Bankruptcy Reform Act One Year Later: A Disappointment for Trade Creditors*, ABI Journal (February 2007) at 18.
22. Thorne, ABI Journal (April 2007) at 38.
23. Thorne, ABI Journal (April 2007) at 38, quoting former 11 U.S.C.A. § 546(c).
24. *In re Tucker*, 329 B.R. 291, 59 U.C.C. Rep. Serv. 2d 1131 (Bankr. D. Ariz. 2005).
25. Tucker, 329 B.R. at 298 n. 8.
26. Tucker, 329 B.R. at 298 n. 8.
27. Tucker, 329 B.R. at 298 n. 8.
28. Tucker, 329 B.R. at 294, et seq.
29. Tucker, 329 B.R. at 298 n. 8.
30. Tucker, 329 B.R. at 298 n. 8.
31. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) P 72575, 89-1 U.S. Tax Cas. (CCH) P 9179, 63 A.F.T.R.2d 89-652 (1989); *Toibb v. Radloff*, 501 U.S. 157, 162, 111 S. Ct. 2197, 115 L. Ed. 2d 145, 21 Bankr. Ct. Dec. (CRR) 1296, 24 Collier Bankr. Cas. 2d (MB) 1179, Bankr. L. Rep. (CCH) P 73994 (1991).
32. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S. Ct. 755, 142 L. Ed. 2d 881, 22 Employee Benefits Cas. (BNA) 2265 (1999), followed by *In re Hall*, 376 B.R. 741, 747, 58 Collier Bankr. Cas. 2d (MB) 1096, Bankr. L. Rep. (CCH) P 81032, 100 A.F.T.R.2d 2007-6229 (Bankr. D. Ariz. 2007) (when statute’s language is plain, sole function of the court is to enforce it according to its terms).
33. *Ron Pair*, 489 U.S. at 240-41.
34. *Dewsnup v. Timm*, 502 U.S. 410, 779, 112 S. Ct. 773, 116 L. Ed. 2d 903, 22 Bankr. Ct. Dec. (CRR) 750, 25 Collier Bankr. Cas. 2d (MB) 1297, Bankr. L. Rep. (CCH) P 74361A (1992).

## THE DEATH OF RECLAMATION

35. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 370-372, 108 S. Ct. 626, 98 L. Ed. 2d 740, 16 Bankr. Ct. Dec. (CRR) 1369, 17 Collier Bankr. Cas. 2d (MB) 1368, Bankr. L. Rep. (CCH) P 72113 (1988). As stated by the erudite Bankruptcy Judge Howard Schwartzberg many years ago:

The concept calling for strict construction of statutes has roots in the Old Testament: "You shall not add to the word which I command you, nor take from it." (Deut. 4:2). Therefore, absent a basis for concluding that the legislative intent called for a result other than that dictated by the statute's plain language, the courts should not deviate from its express language."

In re Kolinsky, 100 B.R. 695, 704, 19 Bankr. Ct. Dec. (CRR) 686 (Bankr. S.D. N.Y. 1989).

36. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808, 72 Fair Empl. Prac. Cas. (BNA) 1856, 69 Empl. Prac. Dec. (CCH) P 44493 (1997) (citations omitted).

37. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391, 22 Bankr. Ct. Dec. (CRR) 1130, 26 Collier Bankr. Cas. 2d (MB) 175, Bankr. L. Rep. (CCH) P 74457A (1992).

38. See *In re John M. Russell, Inc.*, 318 U.S. 515, 521, 63 S. Ct. 687, 87 L. Ed. 954 (1943).

39. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275, 1991 A.M.C. 1 (1990).

40. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024, 42 Bankr. Ct. Dec. (CRR) 122, 50 Collier Bankr. Cas. 2d (MB) 1299, Bankr. L. Rep. (CCH) P 80038 (2004), citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S. Ct. 755, 142 L. Ed. 2d 881, 22 Employee Benefits Cas. (BNA) 2265 (1999).

41. *Lamie*, 540 U.S. at 534, quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1, 36 Bankr. Ct. Dec. (CRR) 38, 43 Collier Bankr. Cas. 2d (MB) 861, Bankr. L. Rep. (CCH) P 78183 (2000).

42. *Lamie*, 540 U.S. at 542.

43. *U.S. v. Watkins*, 278 F.3d 961, 966 (9th Cir. 2002).

44. *Lamie*, 540 U.S. at 542.

45. See *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 56 L. Ed. 2d 581, 1978 A.M.C. 1059 (1978).

46. *Lamie*, 540 U.S. at 538. See also *U.S. v. Locke*, 471 U.S. 84, 95, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985) (citations omitted).

47. *U.S. v. Granderson*, 511 U.S. 39, 68, 114 S. Ct. 1259, 127 L. Ed. 2d 611 (1994).

48. *In re Dana Corp.*, 367 B.R. 409, 48 Bankr. Ct. Dec. (CRR) 36, 57 Collier Bankr. Cas. 2d (MB) 1559, Bankr. L. Rep. (CCH) P 80942 (Bankr. S.D. N.Y. 2007).

49. *Dana*, 367 B.R. at 410-11.

50. *Dana*, 367 B.R. at 410.

51. *Dana*, 367 B.R. at 411.

52. *Dana*, 367 B.R. at 413.

53. *Dana*, 367 B.R. at 410.

54. *Dana*, 367 B.R. at 411.

55. In dicta, the *Dana* court specifically outlined other issues that consideration of section 503(b)(9) would entail, but declared it would not consider that statute at all today. *Dana*, 367 B.R. at 411.

56. *Dana*, 367 B.R. at 412.

57. See 11 U.S.C.A. § 363(a) ("cash collateral" defined).

58. See 11 U.S.C.A. § 363(e) ("adequate protection" defined).

59. *Dana*, 367 B.R. at 412.

60. Dana, 367 B.R. at 412-13.
61. Dana, 367 B.R. at 413.
62. Dana, 367 B.R. at 414. See *In re Victory Markets Inc*, 212 B.R. 738, 741 (Bankr. N.D. N.Y. 1997) (section 546(c) historically viewed as a recognition of state law rights to reclaim goods).
63. Dana, 367 B.R. at 416, quoting 11 U.S.C.A. § 546(c).
64. Dana, 367 B.R. at 416. Parenthetically, Judge Lifland offered “several possible explanations” culled from a handful of past cases, in the main exhibiting pre-existing judicial disarray as to how Congress wished to treat existing lienholders under the old statute. Dana, 367 B.R. at 416 n.7.
65. Dana, 367 B.R. at 416.
66. Dana, 367 B.R. at 416.
67. Dana, 367 B.R. at 416 (citation omitted).
68. Dana, 367 B.R. at 416-17, citing *Gonzaga University v. Doe*, 536 U.S. 273, 280, 122 S. Ct. 2268, 153 L. Ed. 2d 309, 165 Ed. Law Rep. 458 (2002).
69. Dana, 367 B.R. at 417. In a footnote, *Dana* makes a bare mention of the “sparse legislative history” of the 2005 amendment to section 546(c). Dana, 367 B.R. at 417 n.8.
70. Dana, 367 B.R. at 417, citing *Dewsnup*, 502 U.S. at 419.
71. Dana, 367 B.R. at 417. See *Dewsnup*, 502 U.S. 410; see also *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 563, 110 S. Ct. 2126, 109 L. Ed. 2d 588, 20 Bankr. Ct. Dec. (CRR) 833, 22 Collier Bankr. Cas. 2d (MB) 1067, Bankr. L. Rep. (CCH) P 73382 (1990) (refusing to “erode past bankruptcy practice absent a clear indication that Congress intended such a departure”).
72. Dana, 367 B.R. at 417. See *In re Northwest Airlines Corp.*, 483 F.3d 160, 48 Bankr. Ct. Dec. (CRR) 12, 57 Collier Bankr. Cas. 2d (MB) 1442, 181 L.R.R.M. (BNA) 2752, Bankr. L. Rep. (CCH) P 80896, 154 Lab. Cas. (CCH) P 10826 (2d Cir. 2007).
73. Dana, 367 B.R. at 417 (footnote omitted).
74. Dana, 367 B.R. at 417.
75. Dana, 367 B.R. at 418. See *In re Charter Co.*, 54 B.R. 91, 92-93, 13 Bankr. Ct. Dec. (CRR) 772, Bankr. L. Rep. (CCH) P 70801, 42 U.C.C. Rep. Serv. 198 (Bankr. M.D. Fla. 1985); *Matter of Flagstaff Foodservice Corp.*, 14 B.R. 462, 8 Bankr. Ct. Dec. (CRR) 120, 9 Collier Bankr. Cas. 2d (MB) 9, Bankr. L. Rep. (CCH) P 68438, 32 U.C.C. Rep. Serv. 1479 (Bankr. S.D. N.Y. 1981).
76. Dana, 367 B.R. at 418.
77. Dana, 367 B.R. at 418.
78. Dana, 367 B.R. at 418.
79. 440 U.S. 48, 54-55 (1979).
80. Dana, 367 B.R. at 418. See *Butner*, 440 U.S. at 55 (“Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding”).
81. Dana, 367 B.R. at 418.
82. Dana, 367 B.R. at 418-19.
83. Dana, 367 B.R. at 419.
84. Dana, 367 B.R. at 419.
85. Dana, 367 B.R. at 419.
86. Dana, 367 B.R. at 419.
87. *In re Dairy Mart Convenience Stores, Inc.*, 302 B.R. 128 (Bankr. S.D. N.Y. 2003).
88. Dana, 367 B.R. at 419. See *Dairy Mart*, 302 B.R. at 135-36.

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89. In re Phar-Mor, Inc., 301 B.R. 482, 42 Bankr. Ct. Dec. (CRR) 54, 51 Collier Bankr. Cas. 2d (MB) 462, 52 U.C.C. Rep. Serv. 2d 154 (Bankr. N.D. Ohio 2003).
90. Dana, 367 B.R. at 420. See Phar-Mor, 301 B.R. at 489.
91. Dana, 367 B.R. at 420-21.
92. Dana, 367 B.R. at 420-21.
93. Dana, 367 B.R. at 421. See Dairy Mart, 302 B.R. at 131.
94. Dana, 367 B.R. at 421.
95. Dana, 367 B.R. at 421. In a terse aside, the *Dana* court brushed away the reclaiming creditors' remaining allegations that the DIP financing lacked good faith and fair dealing, finding those assertions meritless. Furthermore, the court defended its own reclamation procedures order, noting that said decree forewarned the reclamation creditors that their reclamation rights were not by any means guaranteed. Quite the opposite, as the reclamation claims in *Dana* were indeed at risk to various defenses, primary among them the assertion of prior liens. Dana, 367 B.R. at 421.
96. Dana, 367 B.R. at 421.
97. Dana, 367 B.R. at 411.
98. Dana, 367 B.R. at 415 and n. 5.
99. Dana, 367 B.R. at 416.
100. Dana, 367 B.R. at 417.
101. Dana, 367 B.R. at 416.
102. Dana, 367 B.R. at 416.
103. Dana, 367 B.R. at 417.
104. Dana, 367 B.R. at 417-18.
105. U.S. Constitution, Article I, Section 8.
106. Dana, 367 B.R. at 418.
107. Dana, 367 B.R. at 418.
108. 11 U.S.C.A. § 507.
109. See 28 U.S.C.A. § 157(b)(2)(O).
110. See 11 U.S.C.A. § 507(a)(1)(A) (elevation of domestic support obligations from seventh place to first position as part of BAPCPA). See Sabino, Violence of Action: The Bankruptcy Code, Domestic Relations Law, and the New War with State Probate Law, 19 Quinnipiac Probate L.J. 264, 267 (2006).
111. Butner, 440 U.S. at 54-55.
112. In re Advanced Marketing Services, Inc., 360 B.R. 421, 47 Bankr. Ct. Dec. (CRR) 192, 57 Collier Bankr. Cas. 2d (MB) 607 (Bankr. D. Del. 2007), subsequent determination, 360 B.R. 429 (Bankr. D. Del. 2007) (AMS).
113. AMS, 360 B.R. at 424.
114. AMS, 360 B.R. at 424.
115. AMS, 360 B.R. at 424.
116. AMS, 360 B.R. at 423.
117. AMS, 360 B.R. at 424.
118. AMS, 360 B.R. at 425.
119. AMS, 360 B.R. at 425.
120. AMS, 360 B.R. at 425.
121. AMS, 360 B.R. at 425.

122. AMS, 360 B.R. at 426. See, inter alia, *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 290 F.3d 578, 586, 62 U.S.P.Q.2d 1757, 2002-1 Trade Cas. (CCH) ¶ 73672 (3d Cir. 2002).

123. AMS, 360 B.R. at 426.

124. AMS, 360 B.R. at 426. See *In re Primary Health Systems, Inc.*, 258 B.R. 111, 114, 37 Bankr. Ct. Dec. (CRR) 72, 45 Collier Bankr. Cas. 2d (MB) 1363, 44 U.C.C. Rep. Serv. 2d 160 (Bankr. D. Del. 2001).

125. AMS, 360 B.R. at 426.

126. AMS, 360 B.R. at 426.

127. AMS, 360 B.R. at 426 n.6. See *In re Pittsburgh-Canfield Corp.*, 309 B.R. 277, 283-88, 42 Bankr. Ct. Dec. (CRR) 277, 51 Collier Bankr. Cas. 2d (MB) 1873, Bankr. L. Rep. (CCH) P 80088, 2004 FED App. 0004P (B.A.P. 6th Cir. 2004) (senior lenders' floating lien on goods negated reclamation claims, pursuant to Bankruptcy Code section 546 and UCC section 2-702); See *Allegiance Healthcare*, 258 B.R. at 114 (security interest in after-acquired property defeats reclamation claims); *In re Arlco, Inc.*, 239 B.R. 261, 270-71, 34 Bankr. Ct. Dec. (CRR) 1305, 42 Collier Bankr. Cas. 2d (MB) 1539, 39 U.C.C. Rep. Serv. 2d 738 (Bankr. S.D. N.Y. 1999) (UCC good-faith-purchaser status accorded secured creditor, overcoming reclamation claims).

128. AMS, 360 B.R. at 426-27.

129. AMS, 360 B.R. at 426-27.

130. AMS, 360 B.R. at 427.

131. AMS, 360 B.R. at 427. In an aside, the court noted that the lenders' adequate protection liens also attached to prepetition collateral, including the goods that S&S sought to reclaim. AMS, 360 B.R. at 457 n.7.

132. AMS, 360 B.R. at 427, citing *In re Phar-Mor*, 301 B.R. 482.

133. AMS, 360 B.R. at 427.

134. AMS, 360 B.R. at 427, citing *Phar-Mor*, 301 B.R. at 497. It should be noted that AMS quoted *Phar-Mor's* further declaration that when a right of reclamation is subject to a prior lien, the value of the reclaiming creditor's demand depends upon the actual disposition of the goods to be reclaimed. AMS, 360 B.R. at 427, citing *Phar-Mor*, 301 B.R. at 497.

135. AMS, 360 B.R. at 427.

136. AMS, 360 B.R. at 427 (footnote omitted).

137. AMS, 360 B.R. at 427, citing *Pittsburgh-Canfield*, 309 B.R. at 291.

138. AMS, 360 B.R. at 427. The erudite Bankruptcy Judge DeVito succinctly summarized the "firmly established" doctrine of marshalling in *Matter of Jack Dillon Const. Co., Inc.*, 54 B.R. 136, 137 (Bankr. D. N.J. 1984):

The Supreme Court has noted that "[t]he equitable doctrine of marshalling rests upon the principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, who may resort to only one of the funds." *Sowell v. Federal Reserve Bank*, 268 U.S. 449, 456-57, 45 S. Ct. 528, 530-31, 69 L.Ed 1041 (1925). When determining the relevance of the doctrine to a particular case, the Supreme Court observed that:

marshalling is not bottomed on the law of contracts or liens. It is founded instead on equity, being designed to promote fair dealing and justice. Its purpose is to prevent the arbitrary action of a senior lienor from destroying the rights of all who have an interest in the property involved and is applied only when it can be equitably fashioned as to all of the parties.

*Meyer v. United States*, 375 U.S. 233, 237, 84 S. Ct. 318, 321, 11 L.Ed.2d 293 (1963). In *Meyer* the Supreme Court also found that, absent federal law to the contrary, state law

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must be considered when determining the extent of the doctrine's application. Meyer, supra, 375 U.S. at 239, 84 S. Ct. at 322.

Dee Wood, 54 B.R. at 137. Accord *In re Spectra Prism Industries, Inc.*, 28 B.R. 397, 399, 10 Bankr. Ct. Dec. (CRR) 269, 8 Collier Bankr. Cas. 2d (MB) 325, Bankr. L. Rep. (CCH) P 69106 (B.A.P. 9th Cir. 1983). See also Sabino, *Practical Guide to Bankruptcy* at ¶ 8.3[1] (analyzing *Dee Wood*).

139. AMS, 360 B.R. at 427-28.

140. AMS, 360 B.R. at 428. See *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 92, 24 U.S.P.Q.2d 1537 (3d Cir. 1992).

141. AMS, 360 B.R. at 428, citing *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988).

142. AMS, 360 B.R. at 428.

143. AMS, 360 B.R. at 428.

144. AMS, 360 B.R. at 428.

145. AMS, 360 B.R. at 428.

146. AMS, 360 B.R. at 428.

147. AMS, 360 B.R. at 428.

148. AMS, 360 B.R. at 428.

149. AMS, 360 B.R. at 428-429.

150. AMS, 360 B.R. at 429.

151. AMS, 360 B.R. at 429 n.9.

152. AMS, 360 B.R. at 429.

153. Sabino, *Practical Guide to Bankruptcy* at ¶ 6.8[3], citing *In re Mortgage & Realty Trust*, 123 B.R. 626, 630, 21 Bankr. Ct. Dec. (CRR) 470, Bankr. L. Rep. (CCH) P 73821 (Bankr. C.D. Cal. 1991). Unreported bankruptcy court decisions have very little weight as precedent. When a bankruptcy judge wants a decision to serve as precedent, the judge publishes the decision. Unpublished decisions do not establish case law and do not serve as precedent. Sabino, *Practical Guide to Bankruptcy* at ¶ 6.8[3], citing *Mortgage & Realty Trust*, 123 B.R. at 630.

154. *In re Global Home Products, LLC*, 57 Collier Bankr. Cas. 2d (MB) 475, Bankr. L. Rep. (CCH) P 80894, 2006 WL 3791955 (Bankr. D. Del. 2006)

155. Global, 2006 WL 3791955 at \*1.

156. Global, 2006 WL 3791955 at \*1.

157. Global, 2006 WL 3791955 at \*2.

158. Global, 2006 WL 3791955 at \* 2.

159. Global, 2006 WL 3791955 at \*1.

160. Global, 2006 WL 3791955 at \*3.

161. Global, 2006 WL 3791955 at \*3.

162. Global, 2006 WL 3791955 at \*3, citing, inter alia, *In re Garden Ridge Corp.*, 323 B.R. 136 (Bankr. D. Del. 2005). Chapter 11 only requires that administrative expenses be paid in full on or before the effective date of a plan of reorganization. 11 U.S.C.A. § 1129(a)(9). Aside from that general boundary, the timing of the payment of administrative expenses is largely discretionary with the bankruptcy court. Global, 2006 WL 3791955 at \*3.

163. Global, 2006 WL 3791955 at \*3, citing *In re HQ Global Holdings, Inc.*, 282 B.R. 169 (Bankr. D. Del. 2002).

164. Global, 2006 WL 3791955 at \*3, citing HQ Global, 282 B.R. 169.

165. Global, 2006 WL 3791955 at \*3, citing, inter alia, *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 179 (Bankr. S.D.N.Y. 1989).

166. Global, 2006 WL 3791955 at \*4, citing *Garden Ridge*, 323 B.R. at 143.

167. Global, 2006 WL 3791955 at \*4. A footnote elaborates that anywhere from 10 to 20 other creditors, aside from the aforementioned section 503(b)(9) claimants, were seeking the immediate payment of administrative claims. Global, 2006 WL 3791955 at \*4, n.6.

168. Global, 2006 WL 3791955 at \*4. The debtor's witness also confirmed that section 503(b)(9) payments were not included in the DIP budget entered into with Wachiova. Global, 2006 WL 3791955 at \*4.

169. Global, 2006 WL 3791955 at \*5.

170. Global, 2006 WL 3791955 at \*5.

171. Global, 2006 WL 3791955 at \*5.

172. Global, 2006 WL 3791955 at \*5. To be sure, the third prong of the test, the potential detriment to other creditors if this administrative claim was immediately paid, Global, 2006 WL 3791955 at \*4, was not really addressed by the Global court, aside from an obtuse and unverified remark at the opinion's conclusion concerning supposed prejudice to Global's other creditors. Global, 2006 WL 3791955 at \*5.

173. Global, 2006 WL 3791955 at \*5.

174. See Conaway, Important Delaware Decision on '20-Day Administrative Claim' Remedy for Creditors, 5 ABI Unsecured Trade Creditors Comm. Newsl. (March 2007), available at <http://abiworld.net/newsletter/utc/vol5num1/ImportantDelaware.html>. See also Burnett & Garrity, Two New Judges, Two New Opinions: Too Bad for 503(b)(9) Suppliers, available at <http://abiworld.net/newsletter/utc/vol5num1/TwoNewOpinions.html>.

175. See Sabino, The Death of Critical Vendor Motions and the Potential Demise of the Doctrine of Necessity of Payment: Farewell to Two Misbegotten Doctrines, 6 Transactions: Tenn. J. Bus. L. 47, 81 (2004), citing *In re Kmart Corp.*, 359 F.3d 866, 871, 42 Bankr. Ct. Dec. (CRR) 166, 51 Collier Bankr. Cas. 2d (MB) 1076, Bankr. L. Rep. (CCH) P 80054 (7th Cir. 2004) (deriding the doctrine of necessity as "just a fancy name for a power to depart from the [Bankruptcy] Code").

176. Sabino, 6 Transactions: Tenn. J. Bus. L. at 85, citing *KMart*, 359 F.3d at 874.

177. See Conaway, 5 ABI Unsecured Trade Creditors Comm. Newsl. (March 2007), available at <http://abiworld.net/newsletter/utc/vol5num1/ImportantDelaware.html>. (raising same criticisms).

178. *In re Bookbinders' Restaurant, Inc.*, 47 Bankr. Ct. Dec. (CRR) 187, Bankr. L. Rep. (CCH) P 97757, 2006 WL 3858020 (Bankr. E.D. Pa. 2006).

179. *Bookbinders'*, 2006 WL 3858020 at \*1.

180. *Bookbinders'*, 2006 WL 3858020 at \*7.

181. *Bookbinders'*, 2006 WL 3858020 at \*7.

182. *Bookbinders'*, 2006 WL 3858020 at \*4 (citations omitted).

183. *Bookbinders'*, 2006 WL 3858020 at \*4.

184. *Bookbinders'*, 2006 WL 3858020 at \*4.

185. *Bookbinders'*, 2006 WL 3858020 at \*5.

186. *Bookbinders'*, 2006 WL 3858020 at \*6.

187. See 11 U.S.C.A. § 365(d)(3).

188. *Bookbinders'*, 2006 WL 3858020 at \*6, citing 11 U.S.C.A. § 365(d)(3).

189. *Bookbinders'*, 2006 WL 3858020 at \*6.

190. *Bookbinders'*, 2006 WL 3858020 at \*6.

191. *Bookbinders'*, 2006 WL 3858020 at \*6.

192. *Bookbinders'*, 2006 WL 3858020 at \*7.

193. *Bookbinders'*, 2006 WL 3858020 at \*1.

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194. See i.e., Sabino & Susca, *The Demise of the ‘Shopping Center Amendments’ to the Bankruptcy Code and a Proposal for Revitalizing Bankruptcy Code Section 365(d)(4)*, 68 U. Det. L. Rev. 375, 379 (1991).

195. *In re Incredible Auto Sales LLC*, 48 Bankr. Ct. Dec. (CRR) 42, 62 U.C.C. Rep. Serv. 2d 357 (Bankr. D. Mont. 2007).

196. *Incredible Auto*, 48 Bankr. Ct. Dec. (CRR) 42, 62 U.C.C. Rep. Serv. 2d 357.

197. *Incredible Auto*, 48 Bankr. Ct. Dec. (CRR) 42, 62 U.C.C. Rep. Serv. 2d 357.

198. *Incredible Auto*, 48 Bankr. Ct. Dec. (CRR) 42, 62 U.C.C. Rep. Serv. 2d 357.

199. *Incredible Auto*, 48 Bankr. Ct. Dec. (CRR) 42, 62 U.C.C. Rep. Serv. 2d 357.

200. See *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1124, 8 Employee Benefits Cas. (BNA) 1343, 43 Fair Empl. Prac. Cas. (BNA) 47, 43 Fair Empl. Prac. Cas. (BNA) 1056, 42 Empl. Prac. Dec. (CCH) P 36866, 43 Empl. Prac. Dec. (CCH) P 37251 (7th Cir. 1987), cited by Sabino, *Practical Guide to Bankruptcy* at ¶ 6.8[3] (“Keep in mind that district court decisions in bankruptcy cases do not bind other district judges in the same district (let alone other districts). Similarly, district court bankruptcy decisions are of limited precedential value and arguably do not bind bankruptcy courts in the same district”), citing *In re Shattuck Cable Corp.*, 138 B.R. 557, 565, 567, Bankr. L. Rep. (CCH) P 74600, 17 U.C.C. Rep. Serv. 2d 1149 (Bankr. N.D. Ill. 1992) (disapproved of by, *Matter of Reliable Drug Stores, Inc.*, 70 F.3d 948, 34 Collier Bankr. Cas. 2d (MB) 1496, Bankr. L. Rep. (CCH) P 76740 (7th Cir. 1995)).

201. *In re Brown & Cole Stores, LLC*, 375 B.R. 873, 48 Bankr. Ct. Dec. (CRR) 257 (B.A.P. 9th Cir. 2007).

202. *Brown*, 375 B.R. at 875. Among other things, Associated claimed that Brown owned it over \$900,000 for products covered by the Perishable Agricultural Commodities Act (PACA), over \$4 million for good sold prebankruptcy and now comprising a general unsecured, nonpriority claim, prepetition rent of \$125,000, and over \$4.5 million in lease rejection damages. *Brown*, 375 B.R. at 875.

203. *Brown*, 375 B.R. at 875.

204. *Brown*, 375 B.R. at 875.

205. *Brown*, 375 B.R. at 876.

206. *Brown*, 375 B.R. at 876.

207. *Brown*, 375 B.R. at 876. A fourth ground, that any payment should be deferred until plan confirmation, had been withdrawn. *Brown*, 375 B.R. at 876.

208. *Brown*, 375 B.R. at 876.

209. As part of the 1984 Bankruptcy Amendments and Federal Judgeship Act (BAFJA), Congress authorized each of the circuit courts of appeals to create a specialized tribunal, composed of the bankruptcy judges of that circuit, to convene and hear appeals of decisions of bankruptcy judges residing in that circuit’s districts. These Bankruptcy Appellate Panels, called BAPs, were designed as an alternative to the nominal appellate path from the Article I bankruptcy courts to the Article III district judges. The intended benefits included relieving congestion in the district courts and establishing a body with specific knowledge of the Bankruptcy Code, thereby yielding swifter and better results than the generalist Article III court might provide.

Under the Judicial Code, the judicial council of an individual circuit can establish a bankruptcy appellate panel (BAP) to hear initial appeals in place of the district court. The panels must be composed of bankruptcy judges serving within that circuit. 28 U.S.C.A. § 158(b). The Ninth Circuit was the first to institute a BAP. See Sabino, *Practical Guide to Bankruptcy* at ¶ 6.8[1].

210. *Brown*, 375 B.R. at 875.

211. *Brown*, 375 B.R. at 875.

212. Parenthetically, from the outset, the panel took due note of the legislative history, which implied that section 503(b)(9) was in fact aimed to alleviate the burden of those who had supplied goods to a debtor just prior to a bankruptcy filing. *Brown*, 375 B.R. at 872 n.2, quoting

Cho, *The Intersections of Critical Vendor Orders and Bankruptcy Code § 503(b)(9)*, 29 Cal. Bank. J. 7, 11 (2007), citing BAPCPA, Pub. L. No. 109-8 at § 1227.

213. Brown, 375 B.R. at 877.

214. Brown, 375 B.R. at 877. See *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1006, 45 Bankr. Ct. Dec. (CRR) 58, Fed. Sec. L. Rep. (CCH) P 93,341 (9th Cir. 2005).

215. Brown, 375 B.R. at 877. See *In re Luz Intern., Ltd.*, 219 B.R. 837, 840, 39 Collier Bankr. Cas. 2d (MB) 1332 (B.A.P. 9th Cir. 1998).

216. Brown, 375 B.R. at 877.

217. Brown, 375 B.R. at 877. See *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024, 42 Bankr. Ct. Dec. (CRR) 122, 50 Collier Bankr. Cas. 2d (MB) 1299, Bankr. L. Rep. (CCH) P 80038 (2004).

218. Brown, 375 B.R. at 877. See *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1, 36 Bankr. Ct. Dec. (CRR) 38, 43 Collier Bankr. Cas. 2d (MB) 861, Bankr. L. Rep. (CCH) P 78183 (2000).

219. Brown, 375 B.R. at 877. See *In re Florida Engineered Const. Products, Corp.*, 157 B.R. 698, 700, 24 Bankr. Ct. Dec. (CRR) 1023, 29 Collier Bankr. Cas. 2d (MB) 920, Bankr. L. Rep. (CCH) P 75436 (Bankr. M.D. Fla. 1993).

220. Brown, 375 B.R. at 877-78. See *In re R.H. Macy & Co., Inc.*, 176 B.R. 315, 316-17 (S.D. N.Y. 1994).

221. Brown, 375 B.R. at 878. See *In re Soltan*, 234 B.R. 260, 269, 83 A.F.T.R.2d 99-2803 (Bankr. E.D. N.Y. 1999).

222. Brown, 375 B.R. at 878. See 11 U.S.C.A. § 503(b)(1)(B)(i).

223. Brown, 375 B.R. at 878.

224. Brown, 375 B.R. at 878.

225. Brown, 375 B.R. at 878.

226. IBrown, 375 B.R. at 878.

227. Brown, 375 B.R. at 878 n. 7.

228. Brown, 375 B.R. at 878.

229. Brown, 375 B.R. at 878.

230. Brown, 375 B.R. at 878.

231. Brown, 375 B.R. at 878.

232. Brown, 375 B.R. at 878 n.8.

233. Brown, 375 B.R. at 878 n.8.

234. Brown, 375 B.R. at 878 n.8.

235. Brown, 375 B.R. at 878.

236. Brown, 375 B.R. at 878-79.

237. Brown, 375 B.R. at 879.

238. Brown, 375 B.R. at 879.

239. See 11 U.S.C.A. § 553.

240. Brown, 375 B.R. at 879.

241. Brown, 375 B.R. at 879. In a footnote, the BAP commented that Associated failed to expeditiously raise the legal authority for the bankruptcy court's conclusion and instructed the creditor that, on the remand, it should raise supposed issues of law (here, the Uniform Commercial Code) and any purported failure of the debtor to fulfill contractual requirements for asserting a setoff. Brown, 375 B.R. at 879 n.9.

242. Brown, 375 B.R. at 879. See also *In re Bennett Funding Group, Inc.*, 212 B.R. 206, 212 (B.A.P. 2d Cir. 1997), decision aff'd, 146 F.3d 136, 32 Bankr. Ct. Dec. (CRR) 1055, 40 Collier Bankr. Cas. 2d (MB) 369, Bankr. L. Rep. (CCH) P 77740 (2d Cir. 1998).

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243. Brown, 375 B.R. at 879.
244. Brown, 375 B.R. at 879. See also *In re Medina*, 205 B.R. 216 223, 79 A.F.T.R.2d 97-363 (B.A.P. 9th Cir. 1996) (“the setoff right is an established part of our bankruptcy laws and should be enforced unless compelling circumstances require otherwise”).
245. Brown, 375 B.R. at 879-80.
246. Brown, 375 B.R. at 880.
247. Brown, 375 B.R. at 880.
248. Brown, 375 B.R. at 880. See 11 U.S.C.A. § 546(c) (reclamation).
249. Brown, 375 B.R. at 880.
250. Brown, 375 B.R. at 880. Key among the debtor’s deficiencies in that regard were Brown’s naked allegations that Associated had breached the “most favored nations” pricing arrangement and had illegally terminated the rebate program. The debtor had merely argued, but not provided, the necessary proof that the creditor owed it a debt, an absolute prerequisite to the mutuality of debt needed for setoff. Significantly, noted Judge Montali, no contested matter or adversary proceeding had been initiated to determine these matters. In truth, there was nothing to setoff, and there would be nothing to setoff, unless and until there was an adjudication, after which all defenses, setoffs, and counterclaims could be considered as a whole. Brown, 375 B.R. at 880-81.
251. Brown, 375 B.R. at 881.
252. Brown, 375 B.R. at 881.
253. Brown, 375 B.R. at 881.
254. Brown, 375 B.R. at 881. See *Keene Corp. v. U.S.*, 508 U.S. 200, 208, 113 S. Ct. 2035, 124 L. Ed. 2d 118, 38 Cont. Cas. Fed. (CCH) P 76523 (1993).
255. Brown, 375 B.R. at 881.
256. Brown, 375 B.R. at 881. See 11 U.S.C.A. § 1129(a)(9)(A) (priority claims to be paid in full upon plan confirmation) and 11 U.S.C.A. § 1129(b)(2)(A) (providing for the cramdown of secured claims).
257. Brown, 375 B.R. at 881-82 (footnote omitted).
258. Brown, 375 B.R. at 882 n.11.
259. Brown, 375 B.R. at 882, citing *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 370-72, 108 S. Ct. 626, 98 L. Ed. 2d 740, 16 Bankr. Ct. Dec. (CRR) 1369, 17 Collier Bankr. Cas. 2d (MB) 1368, Bankr. L. Rep. (CCH) P 72113 (1988).
260. Brown, 375 B.R. at 882.
261. Brown, 375 B.R. at 882. In a footnote, Judge Jaroslovsky suggested first applying any collateral to Associated’s claims other than the 503(b)(9) amount, thereby denying priority status of any portion of the 503(b)(9) claim that was indubitably secured. The dissent further speculated that Associated might still wind up with some kind of priority for its 503(b)(9) claim. Brown, 375 B.R. at 882 n.12.
262. Brown, 375 B.R. at 882.
263. The full phrase reads: *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). *Black’s Law Dictionary* at 581 (6th ed. 1991).
264. See *In re Muskin, Inc.*, 151 B.R. 252, 255 (Bankr. N.D. Cal. 1993) (Jaroslovsky, J.) (“The bankruptcy judge who refuses to feel bound by Appellate Panel decisions... harms the system”) cited by Sabino, *Practical Guide to Bankruptcy* at ¶ 6.8[3].
265. Briefly, we acknowledge that this is irrelevant in Chapter 7 cases where the DIP facility does not exist. There, the “prior lien defense” simply trumps reclamation claims. However, liquidation cases so pale in significance to the claims asserted by reclaiming creditors in major Chapter 11 cases that the losses in the former are deemed acceptable.

266. Accord Gretchko, *The Bankruptcy Reform Act One Year Later: A Disappointment for Trade Creditors*, *ABI J.* (Feb 2007) at 18, 19, and 45.

267. Accord Conaway, *Important Delaware Decision on '20-Day Administrative Claim' Remedy for Creditors*, 5 *ABI Unsecured Trade Creditors Committee Newsletter* (March 2007), available at <http://abiworld.net/newsletter/utc/vol5num1/ImportantDelaware.html>., (noting similarity to caveats for professional fees).

268. See Conaway, *Important Delaware Decision on '20-Day Administrative Claim' Remedy for Creditors*, 5 *ABI Unsecured Trade Creditors Committee Newsletter* (March 2007), available at <http://abiworld.net/newsletter/utc/vol5num1/ImportantDelaware.html>.

269. “[C]laims delayed may be claims denied,” Burnett & Garrity, *ABI Unsecured Trade Creditors Comm. Newsl.*, available at <http://abiworld.net/newsletter/utc/vol5num1/TwoNewOpinions.html>.

270. Burnett & Garrity, *ABI Unsecured Trade Creditors Comm. Newsl.*, available at <http://abiworld.net/newsletter/utc/vol5num1/TwoNewOpinions.html>.