

# **Part I**

## **COMMERCIAL BANKRUPTCY**

### **PUNITIVE DAMAGES IN BANKRUPTCY CASES: A MIXED PAST, AN UNCERTAIN FUTURE, BUT A SURE NEED FOR REFORM**

*By Anthony Michael Sabino*

#### **INTRODUCTION**

Punitive damages: a specific variety of monetary damages imposed to punish egregious wrongdoing and prevent its repetition by the same malefactor as well as to deter others from taking similarly wrongful actions. Bankruptcy: a civilized, legal process by which we make an orderly liquidation of the assets of failed individuals and businesses or, in one alternative, restructure, rehabilitate, and return to the economy a troubled enterprise upon completion of the reorganization process.

Are these concepts mutually exclusive, or do they ever intersect? If the latter, do they cross paths harmoniously, or do they violently clash? Are there still other alternatives? Of such questions controversies are born, and therein lies the justification for articles such as this.

In this precise instance, this article is necessitated because the foregoing issues have persisted throughout almost the entire near-40-year history of the modern Bankruptcy Code of 1978.<sup>1</sup> The dispute has fomented for the most fundamental of reasons.

There is one, and only one, statutory proviso within the entirety of the Bankruptcy Code that addresses the role of punitive damages in bankruptcy cases, and that statutory language is not only brief but strictly confined to operate only in Chapter 7 liquidation cases.

In sharp contradistinction, Chapter 11 has no parallel statute and says nothing on the subject. Yet the reorganization chapter is by far the more popular option for complex business bankruptcy cases and therefore where punitives are more likely to ap-

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pear. Even more imperative, Chapter 11 is the home of the great “megabankruptcies,” proceedings of astounding complexity that encompass a diversity of highly combative interests, including holders of claims for punitive damages, sometimes on an epic scale.

The titanic struggles found in these reorganization cases have compelled judges to act, and they have done so. However, without statutory guidelines, they have resorted to making judgments upon purely equitable principles. Is that right?

That is the key question, and, along with other, ancillary matters, we shall seek to find answers. Before we do so, however, our first and vital step is to examine punitive damages themselves and their current role in our legal system.

## I. PUNITIVE DAMAGES: A RECENT HISTORY

The clear objective of this article is to discuss the role of punitive damages in bankruptcy cases. Therefore, we need to, at least briefly, set forth the essential nature of punitive damages, especially as they exist today in American jurisprudence. Indeed, there is a wealth of recent precedent on our chosen subject, and its timeliness makes it even more relevant to our goals.

Punitive damages are an inescapable and permanent part of the American legal landscape, even predating the founding of the Republic.<sup>2</sup> The rich diversity of state law on the subject is far too vast to be set forth here with any degree of utility. The point is better made by acknowledging that punitive damages enjoy a place of honor within a variety of federal codifications, the most illustrious examples being the anti-trust, RICO, and trademark and patent laws.<sup>3</sup>

The nature of punitive damages has often been recognized in recent Supreme Court jurisprudence. In our judicial system, compensatory and punitive damages, nominally awarded at the same time by the same adjudicator, serve different purposes.<sup>4</sup> While the former redresses actual loss, punitive damages serve the broader functions of deterrence and punishment.<sup>5</sup> Punitives further a state’s legitimate interests in punishing wrongful conduct and preventing the repetition of such unlawfulness,<sup>6</sup> but always the twin goals remain unaltered: punitive damages impose retribution and deterrence.<sup>7</sup>

The vital role that the imposition of punitive damages plays in the states’ efforts to uphold law and order is similarly well recognized. In *BMW v. Gore*, the Supreme Court clearly proclaimed the states’ legitimate interests in punishing unlawful conduct and deterring repetition by means of inflicting punitive damages upon wrongdoers.<sup>8</sup> Moreover, most states afford juries appreciable latitude in assessing punitives, again in order to properly vindicate the states’ legitimate interests in punishment and deterrence.<sup>9</sup>

To be sure, the application of state power via the mechanism of a jury verdict is no less a lawful exercise of its sovereignty than the imposition of a state rule of law.<sup>10</sup> Note that it has been posited by Justice Scalia that the testing of the validity of such an award is best tested in the forum from which it originates, not elsewhere.<sup>11</sup> According to the learned Justice, it is ill-advised for a subsequent reviewing court to impose its will on the matter of punitives over that of the state court judges and juries who have already deliberated and decreed such damages be assessed.<sup>12</sup>

The Supreme Court's most recent proclamation on punitive damages is found in *Exxon Shipping Co. v. Baker*.<sup>13</sup> Paying homage to the history of punitives, the Court noted that “[t]he modern Anglo-American doctrine of punitive damages dates back at least to 1763” in England.

Delivering the opinion, Justice Souter further pointed out that punitive damages were not, “however, a wholly novel idea even then,” as “legal codes from ancient times through the Middle Ages” required a multiplication of damages for certain especially heinous acts.<sup>14</sup> As the Europeans crossed the Atlantic to the New World, so did the doctrine.<sup>15</sup> Among other reasons, punitives were historically justified as necessary to redress intangible injuries which did not fall within the scope of normal compensatory damages.<sup>16</sup>

*Exxon* observes that “the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.”<sup>17</sup> More to the point on punitive damages in today's jurisprudence, the high court noted that the regulation of administering punitives varies from state to state.<sup>18</sup>

In most American jurisdictions, “the amount of the punitive award is generally determined by a jury in the first instance, and that determination is then reviewed by trial and appellate courts to ensure that it is reasonable.”<sup>19</sup> State lawmakers “enjoy broad discretion in authorizing and limiting permissible damage awards.”<sup>20</sup>

In this regard, our conclusions are obvious ones. As recently as this last term in *Exxon*, the Supreme Court has made clear as crystal that punitive damages will continue unabated into this century,<sup>21</sup> and while the quantification of their measure has and no doubt will continue to be debated, tested, and adjudicated, their existence will not.

Moreover, the high court's holdings of the last two decades at least tells us a great deal that is relevant to the instant controversy. Notice the great importance that the Justices place on punitives originating with the states as a component of their respective bodies of law. Consider the great respect that the Supreme Court pays to the triers of fact as the ones best equipped to mete out punitives based upon a full and fair hearing.

The points to be made include the facts that punitives are a vital part of our court system, they emanate largely from the states and are therefore not to be taken lightly, and it is the triers of fact in the original proceedings who are in the best position to decide their imposition.

## II. STATUTORY PROVISIONS PERTAINING TO PUNITIVE DAMAGES IN BANKRUPTCY

### The Lone Statute

Normally in these pages we are confronted with two or more statutory provisos, clashing in such a cacophonous manner as to incite the controversy that we then try to untangle. Significantly, we have no such multiplicity here (whether that is a blessing or a curse remains to be seen).

We have one and only one statute at work here: Section 726 of the modern Bankruptcy Code, which determines the distribution of property of the estate but solely in

Chapter 7 cases.<sup>22</sup> More precisely, the statute provides that fourth in line for payment shall be:

Any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order of relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claims.<sup>23</sup>

The text of section 726(a)(4) had remained unchanged since its promulgation in 1978, an increasingly rare thing as the Bankruptcy Code enters its fourth decade of existence.<sup>24</sup>

The legislative history largely paraphrases the statutory text, but it plays a significant role herein for one crucial reason: it utterly lacks ambiguity. The Senate Report accompanying the final bill states simply “that punitive damages... are subordinated to the payment of all other classes of claims.”<sup>25</sup> The report of the House of Representatives differs only in that it insists “that claims for fines, penalties, and damages are divided into the portion that is in compensation for actual pecuniary loss and the portion that is not. Distribution... will be made accordingly.”<sup>26</sup>

What lies beyond such a crystal clear statute and its equally unambiguous legislative history? Nothing—absolutely nothing.<sup>27</sup> We will soon see how the undeniable clarity of the law and the vacuum of conflicting provisions brings us to the present day.

So there is the statutory analysis for this article, sparse as it is, but understandably so, because Congress provided but a modicum of legislation. To be sure, that by itself is not faulty, but it does explain the drive by the courts to address the issue, which leads us to our next phase, the analysis of the conflicting cases.

### III. PUNITIVE DAMAGES IN BANKRUPTCY: ALLOWABLE BUT SUBORDINATE

Every controversy has at least two sides; this situation is no different. Some cases have ruled that punitive damages are impermissible in most, if not all, proceedings, while other holdings have no such compunctions, provided that punitives are relegated to a well-defined role.<sup>28</sup> Thus we have factions that we can handily characterize as pro-punitive and anti-punitive. We shall examine the ostensible proponents of punitive damages in bankruptcy cases first.

One of the first cases of significant magnitude advocating the allowance of punitive damages in bankruptcy was issued by Chief Bankruptcy Judge Vincent J. Commisa in *Chicago Title Insurance Co. v. Goldberg (In re Goldberg)*.<sup>29</sup> In brief, Goldberg, an attorney, was accused of fraudulent conduct in relation to numerous real estate closings for the diversion of client funds for his own profit.<sup>30</sup> An involuntary Chapter 7 petition filed by his creditors brought him before the bankruptcy judge.<sup>31</sup> The court found conclusive evidence and had “no doubt” that the debtor had committed fraud.<sup>32</sup>

The bankruptcy court was confronted with the specific question of the allowability of punitive damages in this case. Reviewing the underlying law of the forum state, Chief Judge Commisa noted that punitives are appropriate where a fiduciary duty was

violated and the claimant establishes intentional wrongdoing. Those basic requirements were well met here, the court concluded.<sup>33</sup>

In the instant case, “an amount of punitive damages would not injure the unsecured creditors of the debtor,” given that section 726 provides that the unsecureds be fully satisfied on their claims before the punitives, as thereby subordinated by the statute, would fall after them in line.<sup>34</sup> The *Goldberg* court further espoused the view that punitive damages, while arguably not favored and allowed only within narrow limits, are well-founded where egregious conduct must be met with both punishment and deterrence, the amount of which is to be measured by the trier of fact.<sup>35</sup>

Notwithstanding the advocacy of a pro-punitive damages position, the *Goldberg* court, motivated by the debtor’s lack of assets and the prior denial of the bankruptcy discharge (implicitly because of his outlandish fraud), ultimately ruled not to impose punitives here because “no useful purpose would be served.”<sup>36</sup> At the end of the day, this debtor avoided the assessment of punitive because of his already dire circumstances, but Chief Judge Commisa unmistakably made himself an early leader of the pro-punitive damages faction by virtue of his conclusions.

Similar reasoning was found two years later in *In re American Federation of Television and Radio Artists*,<sup>37</sup> a case emanating from New York’s Southern District bankruptcy bench. Prior to the instant Chapter 11, the debtor AFTRA was found guilty of antitrust law violations in a California federal district court and was ordered to pay over \$3 million in compensatory damages. This was increased by well over \$9 million awarded in treble damages, as routine in antitrust cases.<sup>38</sup>

Bankruptcy Judge Edward J. Ryan posited the issue before him as “whether the antitrust treble damages portion of the judgment rendered by the district court is a penalty and therefore an unenforceable claim.” Judge Ryan, as typical for the veteran jurist, did not mince words; the treble damages would be allowed in this Chapter 11.<sup>39</sup>

Paramount to this analysis, we note that the debtor had argued that treble damages are inescapably punitive in nature and therefore an impermissible penalty. AFTRA pleaded that, as foremost a court of equity, this bankruptcy tribunal could not allow such a claim. Finally, the reorganizing debtor beseeched the court not to harm innocent creditors by allowing the punitive damages claimants to participate in the estate’s distribution.<sup>40</sup>

The victors of the antitrust suit contended that the treble damages were not truly punitive, that antitrust damages, “even if punitive,” are not a penalty, and lastly, that no innocent creditors would be harmed if their claim was allowed.<sup>41</sup>

Bankruptcy Judge Ryan then proceeded directly to the core of his decision. First, the court assumed that “statutory antitrust treble damages are punitive in nature,” but are they enforceable in Chapter 11?<sup>42</sup> This proved to be a neat question because, under the former Bankruptcy Act of 1898, punitive damages were more easily set aside on equitable grounds, among others.<sup>43</sup>

However, that was the old regime. Judge Ryan forthrightly declared that the modern Code “significantly cut back” on the criteria for disallowing punitive damages and similar penalties. All the authority for such action was deposited by Congress into section 726, which, notably, holds sway only in Chapter 7 cases.<sup>44</sup> The court cited the specific example from the learned commentary that antitrust treble damage claims

are, for this very reason, parsed into a more favored original damage component, and the rest of the trebled damage amount is paid secondarily.<sup>45</sup>

Turning now to “glean[ ] Congress’ intent as to the enforceability of punitive and multiple damages in Chapter 7 proceedings,” and based upon the above, Bankruptcy Judge Ryan held that statutory treble damages in a lawful judgment have not been prohibited by Congress and therefore are allowable in a Chapter 11 case.<sup>46</sup> Yet, recognizing the other factors at work here, this jurist took care to point out that he was “not unmindful of the force of the policy considerations urged by the debtor,” most especially its plea about supposed harm to innocent creditors.

In the instant case, however, the punitives claimants demonstrated that other creditors would be paid in full, and funds would still be available to pay the punitive claims. In light of this, the allowance of the punitives would not be prejudicial at all to supposed “innocent” creditors.<sup>47</sup> That being so, the debtor’s arguments were rejected, and the punitive damage claims allowed in this reorganization, albeit subordinate to the claims of general creditors.<sup>48</sup>

The chapter of the Bankruptcy Code under which a debtor is proceeding can be highly determinative, as we see in the California bankruptcy case of *In re Comstock Financial Services, Inc.*<sup>49</sup> The case is rooted in allegations that the debtor, a securities broker/dealer, committed negligence and misrepresentation as against its customers, who then sued to recover their losses.<sup>50</sup>

After the bankruptcy court abstained,<sup>51</sup> these matters were tried to a conclusion in the state court, and the creditors/customers obtained default judgments, in part because the Chapter 7 trustee, while duly served, failed to defend.<sup>52</sup> As often is the case in commercial disputes of this kind, the judgments included components of treble damages, awarded pursuant to the Racketeer Influenced and Corrupt Organizations (RICO) Act.<sup>53</sup>

Much later, the trustee was finally prodded into action when the litigants sought to enforce their judgments. Now joining the battle, albeit belatedly, the trustee argued, inter alia, that the RICO treble damages should be disallowed as a matter of equity, or in the alternative, subordinated to other general, unsecured claims pursuant to section 726(a)(4).<sup>54</sup>

In his decision, Bankruptcy Judge Vincent P. Zurzolo inverted the arguments and took the statutory allegation first. The *Comstock* court carefully parsed the language of section 726, duly acknowledging its provisions that fines, penalties, or forfeitures, or multiple, exemplary or punitive damages, must be subordinated to the more general claims of others, to the extent that such damages are not compensation for the actual pecuniary loss suffered by the claimholders.<sup>55</sup>

Indicating that both sides had devoted much effort to the alleged characterization of RICO treble damages as punitive (or not) in nature, Bankruptcy Judge Zurzolo issued two conclusions. First, no court had yet decided the matter. Second, he need not reach that issue here because of his explicit finding “that RICO treble damages are *multiple* damages that arose from pre-petition claims.”<sup>56</sup>

The bankruptcy judge would not agree with the creditors that the RICO laws are designed to compensate victims of fraud for their actual losses via the device of the

treble damages provision. “[I]t runs counter to common sense to find that the tripling of damages is per se intended to compensate for actual loss. Rather, it appears designed to punish wrongdoers and warn others not to engage in similar activities.” For these reasons, Bankruptcy Judge Zurzolo concluded that the creditors’ claims for RICO treble damages were implicitly punitive and therefore had to be subordinated pursuant to section 726 in this Chapter 7 case.<sup>57</sup>

Having found for the trustee on the statutory point, the bankruptcy court parted ways with him on his equity argument. The trustee had alleged, as an alternative ground, that the RICO treble damages should be disallowed pursuant to the court’s general equity power, as embodied in section 105.<sup>58</sup>

Bankruptcy Judge Zurzolo found that this made “no sense.” As already concluded, section 726 mandates subordination of such claims for punitive damages. That being the case, a total disallowance as a matter of equity could not be right. Invoking section 105 and utilizing the tool of equity would not be necessary or appropriate to carry out the provisos of the Bankruptcy Code here, said the court. Indeed, Judge Zurzolo made a great point of distinguishing the case before him, a Chapter 7 proceeding, from the context of a Chapter 11 where section 726 would have no role.<sup>59</sup>

In sum, the *Comstock* court concluded that it was lawful to subordinate the RICO treble damages as punitive claims, pursuant to section 726 of the Code, but not to disallow them entirely. To engage in the latter would be an unwarranted exercise of section 105’s equity power, added Judge Zurzolo.<sup>60</sup>

We can summarize the pro-punitive camp, as follows: section 726 rules the day, at least in liquidation cases. In such instances, punitives are most certainly not forbidden; by statute, they continue on, albeit as subordinated claims. It is that survival which is paramount in resolving the issue in the reorganization context.

Because Chapter 11 says nothing, there is no basis to prohibit them entirely. Punitives exist, they have validity, and therefore they are to be recognized as claims worthy of payment, even if far down the pecking order in a Chapter 11 case.

#### IV. PUNITIVE DAMAGES IN BANKRUPTCY: BARRED FOREVER

Above we reviewed the “ayes”; now let us examine the “nays.” The cases to follow sharply oppose, and in fact have ruled against, the allowance of punitive damages in bankruptcy cases and, to be precise, especially in Chapter 11 proceedings. Yet we take due note of the rationales put forth in justification of these rulings.

The anti-punitive damages camp largely revolves around one or two central holdings. The pivot upon which it most turns is *In re A.H. Robins Co., Inc.*<sup>61</sup> The *Robins* Chapter 11 is noteworthy because it was one of the early “megabankruptcies,” as that term came into common usage in the 1980s; therefore, its history is worth recounting.

*Robins* was a pharmaceutical and consumer products company based in Richmond, Virginia (hence the venue in the same division of Virginia’s Eastern District). In 1970, it acquired all of the rights to the Dalkon Shield intrauterine device. For four years, *Robins* sold over 2 million Dalkon Shields, generating profits of slightly over half a million dollars on approximately \$11 million in sales.<sup>62</sup>

The device was withdrawn from the market in 1974 because of horrific side effects. Toxic tort lawsuits had commenced from the first year that the company had marketed the product, and by the time it filed for bankruptcy protection in 1985, it had already settled nearly 10,000 cases for settlement amounts that more than wiped out its earlier profits. Notwithstanding that, as of the petition date, Robins still faced in excess of 5,000 cases pending nationwide throughout the state and federal courts, with an average of a dozen more being filed each week.<sup>63</sup>

Even more ominous was the tally regarding punitive damage awards. As could be expected, victims of the toxic IUDs sued for both compensatory and punitive damages.<sup>64</sup> As of the bankruptcy filing, Robins had already paid out over \$13 million in punitive damages on an infinitesimal seven judgments, another \$7 million in punitive awards were on appeal, and two settlements awarding a little less than \$3.5 million had been paid out.<sup>65</sup>

Little wonder, then, that District Judge Robert Mehrige, presiding over the bankruptcy by special order, forcefully declared that the debtor's "punitive damage exposure was staggering. Moreover, it was unpredictable."<sup>66</sup> Case in point—the plaintiff in a case called *Carley* won a laughable \$5 in punitive damages while the so-called *Tetuan* judgment yielded an astounding punitive damage verdict of \$7.5 million.<sup>67</sup> To be sure, these polar opposites in outcomes influenced this court.

Decided in the reorganization's third year, and with a view towards an unspecified plan to exit the Chapter 11,<sup>68</sup> District Judge Mehrige was compelled to address the issue of whether or not punitive damages claims by victims of the Dalkon Shield would be allowed.<sup>69</sup> Arrayed before the court were, on the one hand, the committees representing the victim/claimants, both present and future, respectively. Unsurprisingly, they argued that Robins should be subject to punitive damages for its "egregious conduct" in selling such a harmful device.<sup>70</sup>

On the opposing side, the debtor, the creditors, and the debtor's stockholders pleaded for the disallowance of any and all claims for punitive damages. Key to their position was the argument that the court's general equity powers gave it the authority to disallow all claims for punitive damages and, equally so, that power should be exercised because a failure to act would preclude a successful reorganization of the debtor.<sup>71</sup>

As a subordinate argument, Robins and its stockholders further argued that the company had already paid its debt to society, i.e., it had already paid out millions in punitive damages, so they had been punished enough, and the further infliction of punitives would be pointless.<sup>72</sup>

The *Robins* court concluded "that punitive damages [were] inappropriate in the context of" this case,<sup>73</sup> but it was careful to parse its reasoning into where it agreed with, but also where it differed from, the forces opposing punitive damage claims in the Chapter 11.<sup>74</sup>

First, the court debunked a purely statutory argument against punitives, to wit, that section 502 could be utilized to disallow them. Section 502 of the Bankruptcy Code regulates the allowance of claims and generally posits that all claims are presumed allowed unless an objection is made.<sup>75</sup> However, a paragraph of the statute provides for the exclusion of a claim that is, inter alia, unenforceable under "applicable law."<sup>76</sup>

Leading this argument, the committee of creditors contended that the ideological roots of punitive damages, to punish and deter,<sup>77</sup> were well served by the millions of dollars in punitive damages already paid out by *Robins* prebankruptcy. In effect, any more dollars paid toward punitive damage claims would be a fruitless multiplication of punishment for wrongs already righted.<sup>78</sup>

No so, opined District Judge Mehrige. Said argument misses the point that the “applicable law” referenced in section 502, ostensibly state law, encompasses a broad swath of jurisdictions, some of which award punitives to compensate victims or to recover attorney’s fees. “While these differences might, at first blush seem insignificant, they are important in this case due to the state law derivation of each of the bodily injury claims.”<sup>79</sup>

Put another way, punitives do not only punish and deter; in some states, they serve other statutory purposes. Therefore, the section 502 argument fails because the statute “certainly would not justify disallowance in all states.”<sup>80</sup>

Secondly, the creditors’ statutory interpretation fails because it was wholly unsupported. The *Robins* court found no prior case law adopting such a view. No precedent exists, said District Judge Mehrige, for excluding subsequent punitive damage awards against a defendant for the manufacture of one defective product.<sup>81</sup> For these reasons, section 502 did not provide a ground for disallowing any punitive damage awards.<sup>82</sup>

In counterpoise, the victims proffered their own statutory argument in support of allowing punitives, claiming that section 1129 sanctioned such a result.<sup>83</sup> Section 1129 is the proviso that mandates that creditors in a Chapter 11 reorganization must receive at least as much as they would were the debtor liquidated and funds distributed in a Chapter 7.<sup>84</sup>

The *Robins* court made short shrift of this allegation, ruling that section 1129 merely assures a distribution in a reorganization case at least equal to that in a liquidation proceeding and bears no significance to the propriety of punitive damages in bankruptcy cases.<sup>85</sup> Moreover, the *Robins* case was a Chapter 11, and parallel provisions in Chapter 7 prioritizing claims were simply of no force and effect in the reorganization proceedings.<sup>86</sup> In this manner, the *Robins* court reaffirmed its central holding that there was no statutory basis for allowing (or disallowing) punitive damages in a Chapter 11 case.<sup>87</sup>

This brought District Judge Mehrige to the linchpin of the opposition’s argument—equity. Significantly, the court held that section 502’s claims allowance provisions “do not circumscribe the general equity powers of a court exercising bankruptcy jurisdiction.”<sup>88</sup>

Bold words, to be sure. District Judge Mehrige put great stock in the fact that the history of American insolvency law, going back to the predecessor Bankruptcy Act of 1898, gave bankruptcy courts “resort[] to their equitable powers to determine whether a claim will be allowable.”<sup>89</sup>

This practice, so “deeply entrenched in judicial precedent,” provided the foundation of statutory interpretation of the modern Bankruptcy Code and would be the cornerstone of the *Robins* court’s conclusions herein.<sup>90</sup> Indeed, District Judge Mehrige characterized this principle not only as empowering a bankruptcy court to “invoke

equity as not only a source of remedial relief, but also as a source of judicial power,” pursuant to the modern Code as much as under the former Act.<sup>91</sup>

*Robins* declared that equity authorized it to reject punitive damages if the contrary move of allowing them “would frustrate the successful reorganization of the [c]ompany.”<sup>92</sup> Here, such a disallowance was imperative if the debtor was to survive and successfully exit Chapter 11.<sup>93</sup>

“In this case, as in any case, punitive damages cannot be estimated.” The court agreed with the debtor’s characterization that punitives here had a “wild card” quality, relying solely upon the \$5 versus \$7.5 million divergence in such awards as detailed earlier.<sup>94</sup> Such great unknowns made it impossible to estimate liability for punitive damages and, if left unchecked, would destroy any ability of the debtor to reorganize.

Punitive damages are inherently “unequitable,” opined Judge Mehrige, and here the inability to certify a number “would make it virtually impossible” to promulgate a Chapter 11 plan. As so dramatically stated by District Judge Mehrige, “punitive damages would constitute the death knell of any feasible reorganization plan.”<sup>95</sup>

The *Robins* court took its cue from an analogous “megabankruptcy” case, *In re Johns-Manville Corp.*,<sup>96</sup> which invoked equity to preclude punitive damage claims because failure to do so would, in that court’s view, benefit some claimants at the expense of other creditors, a supposed inequity that the New York court would not countenance.<sup>97</sup>

The *Robins* court concluded that this validated its exercise of equitable power, as it found its concerns here matched those of the bankruptcy judge in the *Johns-Manville* Chapter 11. Implicitly not wishing to enhance the recovery of some creditors to the detriment of others, and also not wishing to effectively punish the latter group for the wrongs of the debtor, this court called upon equity as a basis to disallow the punitive damage claims of the Dalkon Shield victims.<sup>98</sup>

The conclusion of *Robins* then takes a strange twist. First, the court commiserates over the debtor’s graceless fall from the heights of the Fortune 500 to the ignominy of Chapter 11 in a Richmond, Virginia federal court. Then, for the first time (and without explication), District Judge Mehrige labels punitives as “windfall damages,” an award that he refuses to sanction because it will destroy the debtor’s ability to reorganize.

By removing “the looming specter” of punitives, “the debtor can proceed with implementing a trust fund that, if managed as envisioned by the court, will compensate the victims.” In stark contrast, declared the *Robins* court, punitives, if permitted to stand, would thwart that compensation scheme and recovery by general creditors.<sup>99</sup> For the second time calling punitives a “windfall,” the *Robins* court declared “it imperative to disallow all punitive damage claims in this bankruptcy.”<sup>100</sup> And so it did.

*Robins* established itself as the pioneer in expunging punitive damage claims from Chapter 11 cases. A decade later, it provided the foundation for the ruling of the eminent Chief Bankruptcy Judge Alexander L. Paskay of Florida in *In re W.G. Wade Shows, Inc.*<sup>101</sup> In a pending Chapter 11 case, the court was confronted with a state court judgment that awarded \$100,000 in compensatory damages and \$500,000 in punitive damages to a claimant allegedly injured by the debtor’s employee.<sup>102</sup>

Chief Judge Paskay duly noted that the claim was first presented in the state courts of Georgia. The debtor failed to appear, and a default judgment was entered, from which the debtor failed to appeal.<sup>103</sup> The claimant placed this final judgment before the bench and requested the Florida bankruptcy court to give it full faith and credit as a matter of constitutional doctrine.<sup>104</sup> The claimant further argued that this final judgment was *res judicata*, which would turn away any attack on the punitive damages portion of the claim.<sup>105</sup> The debtor argued, in its turn, that punitive damages are not allowed in Chapter 11 cases as a matter of law.<sup>106</sup>

Chief Bankruptcy Judge Paskay addressed each of the creditor's points in turn, commencing with the preclusive effect of a valid state court judgment.<sup>107</sup> The bestowing of full faith and credit upon a proper judgment of a state court is a matter first of constitutional mandate,<sup>108</sup> and then of statute, as embodied in the Full Faith and Credit Act.<sup>109</sup>

Pursuant hereto, Chief Judge Paskay affirmed that bankruptcy courts, like all other federal courts, must allocate full faith and credit to state court judgments. Yet the inquiry does not end there.

Indeed, it "leads to the closely connected issue... of *res judicata*" and whether that fundamental doctrine is a "absolute bar to relitigate the issue of the Debtor's liability" in the instant case.<sup>110</sup> Notably, the *Wade* court opined that for the doctrine of *res judicata* to apply, "it is not necessary that the litigation be determined on the merits on the morale [sic] and abstract sense of the word. It is sufficient if the status of the action was such that the parties might have had their suits disposed of if they had properly managed this respective case."<sup>111</sup> No doubt the Florida court was alluding to the debtor's complete failure to contest the state court proceeding in Georgia.

Be that as it may, the *Wade* court noted, as follows: there was no question the parties before it today were the identical parties in the Georgia lawsuit; it was equally beyond peradventure that the debtor had been served and had an opportunity to defend in state court, thereby satisfying any and all concerns for due process; the cause of action was the same in both fora; and the Georgia court was a court of competent jurisdiction duly empowered to hear the original controversy.<sup>112</sup>

Based upon all the foregoing, Chief Bankruptcy Judge Paskay concluded that "there is no question" that the debtor's liability had been "conclusively established" and that the prior judgment must be honored, and without further litigation.<sup>113</sup> Yet, once again, the inquiry did not end there.<sup>114</sup>

While the *Wade* court was well satisfied that the issue of liability was foreclosed, the recognition of the punitive damages component was a separate matter entirely, and Chief Judge Paskay was explicit in reminding that this was a Chapter 11 case, after all.<sup>115</sup> The allowance of punitive damages claims had been litigated before, specifically in *Robins*, noted this court.<sup>116</sup> "[A]lmost without exception," they have been disallowed, with the bankruptcy courts reasoning "that to allow punitive damages against the Debtor's estate would punish the entire body of creditors and not the actual wrongdoer who deserves the punishment."<sup>117</sup> Nothing further needing to be said, nor in fact being said, Chief Judge Paskay disallowed the entire \$500,000 claim for punitive damages.<sup>118</sup>

Another leading decision supporting the anti-punitive damages faction, unsurprisingly also from Chief Judge Paskay, is found in *In re Hillsborough Holdings Corp.*<sup>119</sup> Prior to the debtor's Chapter 11 filing, an injured employee obtained a judgment in Georgia state court for \$1 million in compensatory damages and \$500,000 in punitives.<sup>120</sup>

To be sure, the debtor had been served in that state court action but failed to answer, and a default was entered. A full hearing was held to quantify damages. The intermediate appellate court affirmed the default judgment and denied the debtor's plea for a rehearing. The Georgia Supreme Court declined to review. Once the debtor commenced its reorganization case, the creditor filed a proof of claim in the amount above noted.<sup>121</sup>

After reviewing the facts, Chief Bankruptcy Judge Paskay concluded that the debtor could not deny that it had exhausted all of its state court remedies, some of which it had pursued postpetition. Notwithstanding, the debtor claimed that it had not had a fair opportunity to defend itself, and therefore principles of res judicata should not bar it from now challenging the judgment in bankruptcy court.<sup>122</sup> The *Hillsborough* court now turned to those arguments.

First, the bankruptcy court addressed the role of the Full Faith and Credit Clause of the Constitution.<sup>123</sup> It is unquestioned that the Clause demands that federal courts give unabridged validity to state court judgments properly obtained. Given such, Chief Judge Paskay made short shrift of the issue; this court steadfastly refused to use its equitable powers to disregard the state court judgment herein, and consistent with the axiom of the Full Faith and Credit Clause, it honored that judgment with preclusive effect.<sup>124</sup>

On to res judicata; again, this jurist was more than satisfied that the debtor had fair opportunity to defend itself. Indisputably, it did go so high as the Georgia Supreme Court to obtain relief, and it was rebutted at every turn. Therefore, the court concluded, the doctrine of res judicata prohibited any belated challenge by this debtor before the bankruptcy bench.<sup>125</sup> However, Chief Judge Paskay was not finished.

While the Full Faith and Credit Clause demanded recognition of the state court judgment and principles of res judicata barred relitigation, the *Hillsborough* court found it "appropriate to bifurcate [the creditor's] claim and to consider the claim for actual damages separately from the claim which is based on punitive damages."<sup>126</sup> Invoking *Robins*, the Florida court joined it in declaring that punitive damages may be disallowed, based upon a court's equitable powers, when the allowance of punitives would frustrate a debtor's efforts to reorganize.<sup>127</sup>

Rejecting punitive damages is appropriate "in Chapter 11 cases in some instances to prevent unfairly penalizing innocent creditors," Chief Judge Paskay posited.<sup>128</sup> Put another way, penalizing the successor of a wrongdoer, i.e., a bankruptcy trustee, is counter to the true purpose of the punitive goal of awarding such damages in the first place. The weight of all these considerations requires the disallowance of punitive damages in such circumstances.<sup>129</sup>

Since those same circumstances prevailed here, the court decided to disallow the \$500,000 punitive award. Chief Judge Paskay concluded that "to enforce the punitive damages would serve more to punish unsecured creditors than it would to punish the

debtor,” and so he justified the result of expunging the punitive damages claims from this Chapter 11 case.<sup>130</sup>

The Bankruptcy Court for the Middle District of Florida spoke again, with nearly identical results, in *Jim Walter Homes, Inc. v. Adams (In re Hillsborough Holdings Corp.) (JWH)*,<sup>131</sup> yet another offshoot of the *Hillsborough* Chapter 11. In *JWH*, a group of some 150 disgruntled homeowners sued the debtor for alleged negligence and failure to substantially complete construction of their new homes.<sup>132</sup>

Originally filed in Texas state court, the matter was removed to the federal courts of that jurisdiction and then eventually transferred to the Bankruptcy Court for the Middle District of Florida, where Chief Bankruptcy Judge Paskay was presiding over the debtor’s reorganization case.<sup>133</sup> The debtor countersued in its own adversary proceeding, and then moved for summary judgment on the grounds that, inter alia, the borrowers could not, as a matter of law, sustain their claims for various types of damages.<sup>134</sup> Pertinent to this analysis was the homeowners’ claim for punitive damages of at least \$7 million, plus a variety of fines, penalties, and forfeitures, all based upon Texas consumer credit codes and related statutes.<sup>135</sup>

On that precise issue, Chief Bankruptcy Judge Paskay acknowledged that Chapter 11 by itself “makes no provision” for punitive damages whereas, in sharp contradistinction, in Chapter 7 cases, section 726 requires that punitives be bifurcated from actual pecuniary claims and then subsequently be subordinated.<sup>136</sup>

“Be that as it may,” continued the *JWH* court, it is irrefutable that the subordination proviso of section 726 cannot be applied in reorganization cases. Yet Chief Judge Paskay was not ready to abandon the point, for he then declared that “[n]evertheless, it is clear that even though Chapter 11 of the Bankruptcy Code does not specifically provide for the treatment of claims based on a fine, penalty or punitive damages, the bankruptcy courts traditionally have not favored such claims.”

As before and as will be repeated, this jurist found justification by raising the same nostrum that the recognition of punitive damages punishes innocent parties and not the actual wrongdoer, presumably the debtor.<sup>137</sup> The *JWH* court contended that “it is well established” that the equitable powers of the bankruptcy court give it the power to disallow punitive damage claims under this rationale and also thereby supposedly foster successful reorganizations.<sup>138</sup>

In a step of further rationalization, the *JWH* court repeated the fundamental reasons for punitives in the first place; to punish malefactors and deter future wrongdoing. However, in Chapter 11, such noble goals are thwarted because it is the larger body of general, innocent creditors who are truly punished, not the debtor that they all claim against.

This, by itself, is “inequitable as it would drain the assets of the estate to the detriment of other creditors.”<sup>139</sup> The above considerations, as well as “fundamental fairness, applied to the circumstances of these reorganizations mandate” that punitive damages be disallowed.<sup>140</sup>

We can draw certain conclusions from the foregoing. *Robins* is the cornerstone of the anti-punitives line of cases, built upon over subsequent years by Chief Bankruptcy Judge Paskay in the *Hillsborough* and affiliated Chapter 11s. Lacking explicit statu-

tory guidance from within the reorganization chapter, these jurists blazed a trail with equity as their only tool. We now test the propriety of that reasoning.

#### IV. ANALYSIS AND COMMENTARY

Having posited the relevant statute and cases hereinabove, as customary it is time to analyze same and provide some pithy (we hope!) commentary, but be forewarned that the observations found below are not as cogent as we would like them to be.

This is primarily because of the variety of differing judicial viewpoints that we have found and the equally diverse policy considerations that have driven them. That being so, we can only make our best effort to critique them and propose solutions, where necessary, to provide for more principled decisionmaking in the future.

##### **The Statutory Edict**

If one thing has become clear from our endeavors here, it is that there is one—and only one—statutory proviso that can truly be said to be on point with regard to this controversy. That statute is, of course, section 726. It is inarguably clear as crystal on a number of points.

First, it unequivocally addresses punitive damages, calling them by name. Its relevance to this discussion is therefore beyond question. However, if one were to seek ambiguity when it does not exist, the reference to “multiple” damages (and to a far lesser extent “penalties”) might be rationally deemed to bring punitive damages under its umbrella.

However, we need not be so adventuresome, for the language is plain. That is not the end of it, for we have decades worth of admonishments from the Supreme Court that the Bankruptcy Code (indeed, all statutory law, to be certain) is to be interpreted according to its plain meaning.<sup>141</sup>

Second, section 726 calls for the subordination of punitive damages claims, not their disallowance. Once again, the absolute mandate of plain language applies. Congress clearly used the specific word “subordination.”

Not to be presumptuous, but Congress’s will must be done. As the Supreme Court has likewise often declared, the legislature presumably knows what it is doing when it writes a law. Since Congress used the word “subordinate,” then subordination it is, to the exclusion of other alternatives.

Speaking of exclusion, let us not forget the doctrine of similar name, *expressio unius*.<sup>142</sup> This closely connected credo, again long espoused by the high court, mandates that the statement of one thing excludes a dissimilar or contrary outcome. Here, the point is deadly accurate; the lawmakers, by legislating subordination, per force excluded the wholesale (or even partial) disallowance of claims for punitive damages. Adherence to the *expressio unius* doctrine, among others, demands that disallowance of punitive damage claims simply not be countenanced. Certainly, this fidelity to the axiom is well exemplified by the decisions of Judges Commisa and Ryan as leaders of the pro-punitive damages camp,<sup>143</sup> and they win the point hands down.

We cannot emphasize enough that the Supreme Court demands nothing less than strict adherence to the canons of statutory construction in interpreting the modern Bankruptcy Code. This brings us to our third and last point within this subargument, and one that coalesces much, if not all, of the above.

The plain language of the Code tells us, without ambiguity, without room for contrary views, that section 726 applies in Chapter 7 cases only. Again harking to the *expressio unius* doctrine, if Congress wanted something else, they would have said so. Therefore, it cannot be denied that section 726, while it roundly demands subordination but not disallowance of punitive damages claims, can only be applied within the confines of liquidation cases.

Conversely, it cannot be extended beyond these borders to Chapter 11 cases; and while that might solve some issues, it is not a panacea for all controversy, as we shall soon see.

In sum, the unassailable weight of multiple canons of statutory construction demand but one result; punitive damages are to be subordinate, but never disallowed, in Chapter 7 cases, for reason of the statutory commands of section 726. Yet that statute cannot be applied to Chapter 11 cases. Where that leaves punitive damage claims in reorganization cases is our next topic.

### **Barring Punitive Damages in Chapter 11 Cases: A Misguided Prohibition That Must Be Abolished**

We do not dispute the indisputable; we have just said that section 726, calling for the subordination of punitive damage claims (but not their disallowance) does not apply to Chapter 11 cases. We now state the obvious: the learned cases explicated above have said this already, and we concur that there is zero statutory provision for punitive damage claims in reorganization cases. So does that mean we agree with the cadre of cases that have erased such claims from recognition in Chapter 11 proceedings? Absolutely not, for the rationalizations that have led to such incorrect judgments are fatally flawed, as we will now amply demonstrate.

### **Equity Is No Excuse**

From the beginning of the Republic, courts of bankruptcy have historically enjoyed wide equitable powers (this is equally true of their legal antecedents).<sup>144</sup> Indeed, this was codified in the modern Code to large degree via section 105. Thus the inherent power of equity, further bolstered by the explicit provisions of section 105, make for a powerful equity tool to be wielded by the bankruptcy courts.

But is this equitable power without limitation? Certainly not. First, common sense tells us that any power left unchecked will eventually do more harm than good. This sensible norm is further cemented by actual case law. The Supreme Court has long said that the equitable powers of the bankruptcy courts, while prodigious, must nevertheless still be exercised within the confines of the insolvency law.<sup>145</sup>

Most precisely, courts such as the prestigious Seventh Circuit have derided the equity power and its statutory twin, section 105, when employed incautiously, mock-

ing such unprincipled exercises as “just a fancy name for a power to depart from the Code.”<sup>146</sup> When jurists as eminent as Circuit Judge Frank Easterbrook of that same tribunal criticize unbridled use of equity to override the statutory confines of the Bankruptcy Code, one must do more than pause; one must listen. This reining in of section 105 and the equity power have led to the demise (or at least the strict confinement) of such equity-based frolics as the Doctrine of Necessity and critical vendor motions.<sup>147</sup>

The anti-punitive damages camp has been consistent, if nothing else. Time and again, the lack of clear statutory guidance has compelled its proponents to invoke equity to erase claims for punitive damages. Time and again, they have rationalized this exercise of power as permissible under the rubric of section 105; but the foregoing restraints upon the equity power and/or section 105 apply with at least equal vigor here. The courts cannot, out of whole cloth, abolish a certain type of claim. Invoking equity to nullify a specific subcategory of claimant is an unchecked and unprincipled abuse of the equitable power. Employing the vagaries of section 105 is to take that statute, which wise tribunals tell us should be invoked sparingly and cautiously, and use it to unceremoniously write quasi-statutes out of thin air.

We must remember that the high court has declared that “[t]here is a basic difference between filling a gap left by Congress and rewriting rules that Congress has affirmatively and specifically enacted.”<sup>148</sup> The anti-punitive courts have unwisely violated that very precaution from the Justices.

In sum, the safeguards on equity and the restraints clamped down upon section 105 tell us that it is grave error to justify the elimination of punitive damage claims in Chapter 11 cases upon either or both of those bases, and if we are right to overturn such expulsion, then we are correct to permit punitive damages in reorganization cases.

### **Are Some Creditors More “Innocent” Than Others?**

Before entirely departing our criticism of equity as a ground for excluding punitive damages from Chapter 11 cases, we must assess a linchpin of that argument, as made by the anti-punitive damages camp. The courts comprising that cadre have consistently joined in espousing the view that claims for punitive damages, if permitted, would only injure innocent creditors.

That is a firm and noble objective. No one, most assuredly this author, wants innocent creditors to suffer (after all, by merely being creditors in a bankruptcy, they have already suffered enough!).

However, permit us to ask the following: across the vast spectrum of bankruptcy, are other nonpunitive creditors more innocent than anyone else? Conversely, are holders of punitive damage claims somehow less innocent than every other conceivable creditor? We cannot fathom truthful answers to the above being anything other than “no.”

We appreciate that Chief Bankruptcy Judge Paskay, who we admire and respect as a prodigious contributor to the nation’s bankruptcy jurisprudence, has frequently and consistently taken the position that the innocence of the nonpunitive claimants is somehow superior. We have an equal measure of regard for District Judge Mehrige, who in *Robins* was a pioneer, and a just one, in wisely adjudicating one of the first “megabankruptcies” of the modern era, a reorganization further complicated by the

toxic tort/mass casualty implications of that proceeding. Let it be understood that we respect their achievements in the cases cited above and the many others that they have presided over across the years.

Nevertheless, we respectfully disagree. There is no basis, in statute, in equity, or in common sense, to distinguish punitive claimholders as somehow not as “innocent” as everyone else. Within the plain pages of the Bankruptcy Code, Congress often differentiates between groups of creditors (indeed, most of Chapter 11 itself is devoted to the classification of creditors). We accept this as commonplace.

However, nowhere (except to a mild degree in section 726) does the legislature subdivide levels of “innocent” creditors anywhere in the Code, let alone specifically in Chapter 11. Again calling upon all the pillars of statutory construction discussed above, there is no statutory rationale for debasing punitive damage claimholders to a lesser status than other general creditors.

Next, we find that there is no basis in equity to compartmentalize creditors in the fashion that *Robins*, *Hillsborough*, and others have done. Those cases call general creditors innocent but demean punitive creditors. Why? There is not one iota of theory, let alone fact, that justifies such disparate treatment.

Did an award of punitive damages somehow expunge innocence from these claimholders? We think not, and see nothing in the cases to make us think differently. Equity is simply all about justice and fairness. What is equitable about characterizing certain creditors as less innocent, and then banishing their claims, merely because a component of their demands reflects an award of punitive damages?

Such a perspective turns the very word equity on its head. To segregate claims for punitive damages because they are supposedly less innocent is not to do equity; rather, it is to do egregious violence to the nature of the doctrine itself.

Finally, there is common sense. Let us be realistic; creditors are creditors, innocence presumed unless proven otherwise, and entitlements being equal unless statute explicitly mandates different treatment, and then cogently expressed by force of congressional enactment.

Where is the common sense in proclaiming that punitive creditors are not as innocent as other general creditors? How is this principled decision making? Sadly, it is not; it is purely arbitrary and thus cannot survive.

In sum, we respect the good intentions of the anti-punitives school of thought; but it is mistaken, and dangerously so. Law, equity, and justice, in all their forms, do not provide a justifiable, fair nor principled basis to declare that punitive damage claims are not as innocent as others. Indeed, to work this wholesale expulsion is a grave injustice. It cannot stand any longer.

### **Can We Borrow from Section 726 for Chapter 11 Cases?**

“Retreat” is not a word normally associated with this writer and by no means has this article backpedaled one bit from its earlier postulation that section 726, for a host of reasons, applies only to Chapter 7 liquidations. We do not vary from that statement

nor shy away from the advocacy of those cases that issued said proposition as a matter of law.

However, “retreat” is one thing; “borrowing” is another. So we present the following thought: can we “borrow” section 726, merely as guidance, for Chapter 11 cases? We say yes, and the underlying thesis follows.

We agree that section 726 exists, it is plain, and it is explicitly limited to liquidation cases. We further agree that Chapter 11 is bereft of statutory guidance on this issue, and as the anti-punitive cases clearly exemplify, the ouster of such claims from Chapter 11 proceedings has been accomplished under the banner of equity, not statutory authority.

We contend that this statutory vacuum in the reorganization context can be ameliorated (not necessarily solved) by the judicious “borrowing” of the fundamentals of section 726. First and foremost, is “borrowing” a valid concept or a pipe dream? If nothing else, we wish to be intellectually honest, and we can say with utter truthfulness that the notion is not only known, but accepted.

First, consider the most elemental “borrowing” of all; the importation of state rules of law in federal diversity cases. The *Erie* Doctrine<sup>149</sup> provides a rich and varied history and positive proof of workability in such endeavors. There is no need to amplify *Erie* and what every first-year law student knows.

Second is a simple example from the federal securities laws. From the time of its promulgation, Section 10, and its counterpart Rule 10b-5, the great and powerful anti-fraud provision of the 1934 Securities Exchange Act,<sup>150</sup> lacked an explicit statute of limitation. For decades, the federal courts “borrowed” state statutes of limitations that were applicable to fraud controversies.

When the inevitable balkanization became too much of an obstacle to the full and fair adjudication of the nationwide scheme of federal securities laws, the Supreme Court in the landmark case of *Lampf, Pleva, Lipkind, Prupis and Petigrow v. Gilbertson*<sup>151</sup> “borrowed” the one-year/three-year limitations period found elsewhere in the 1934 Act, as well as in the parallel Securities Act of 1933, the 1934 Act’s twin (albeit born a year earlier).<sup>152</sup> The judicially approved one-year/three-year rule brought uniformity and justice to the land, until Congress ultimately replaced it with a two-year/five-year limitation statute by explicit remedial lawmaking.<sup>153</sup> Note well that Congress took its cue in filling the gap by promulgating a law to replace interstitial judicial rulemaking.

The point should be evident by now. In Chapter 7, the preexisting section 726 subordinates, but does not ban, punitive claims. The foregoing makes a compelling argument to “borrow” its fundamentals and impose a likeminded judicial analog in Chapter 11 cases.

Returning to the last point made above, if Congress is displeased, they now have motive and opportunity to modify or even demolish the borrowed platform as envisioned above, and pass into law a device more to its liking. Moreover, this would be an appropriate deference to the supremacy of the popularly elected legislature.<sup>154</sup> We are also constrained to remember the fatal flaws already discussed in the anti-punitives camp. Those who would outright prohibit punitives in Chapter 11 ignore the fact that they are permitted, albeit subordinated, in liquidation cases.

Next, equity, especially the ill-conceived and unprincipled arguments made in this regard, is a poor substitute and a dangerous excursion into waters where equity should not sail. Borrowing, if done with care, has existing precedent, builds on what already exists, and thus can accomplish substantial and principled justice.

Finally, borrowing invites Congress to engage in interstitial lawmaking; and without a doubt, that is the final outcome—a clear, statutory promulgation from Congress—that is far and away the best and most desirable solution to this controversy.

## V. CONCLUSION

In this article, we have presented the two diametrically opposed factions comprising this controversy. The pro-punitive damages camp does not necessarily embrace such claims but recognizes its duty, pursuant to unequivocal statute, that punitives merely be subordinated, but not excluded, insofar as Chapter 7 cases go. The opposing school of thought believes in an out-and-out prohibition of punitive damage claims in reorganization cases. To them, punitives can never be allowed in Chapter 11s.

A knotty problem but not one incapable of principled resolution. The anti-punitives regime relies upon the equity power accorded to the bankruptcy court as the sole authorization for such expungement. That is an unwarranted and unwise incursion of the equity power into unlawful territory.

Next, it turns a blind eye to the analogous statute that does not expel but only subordinates punitives in liquidation cases. Catapulting to equity while ignoring a most helpful (if not necessarily dispositive) provision is folly.

Finally, both sides are guilty of the following omissions. Neither side respects the place of punitive damages in jurisprudence that stretches back, literally, to ancient times and most certainly to the unassailable roots of Anglo-American legal tradition. Neither faction pays heed to punitives as arising only after full and fair adjudications in nonbankruptcy courts (primarily state), with duly empowered judges, juries, and usually with more than ample due process. Finally, neither side takes full cognizance of the Supreme Court's oft-repeated declarations that the imposition of punitive damages is a legitimate exercise of the states' power and serves legitimate state interests.

The nation's bankruptcy courts, duly empowered as they may be and serving a crucial role in our system of civil justice, are still quite subordinate to these greater concerns and per force must stay restricted to their lesser role. The wholesale expulsion of punitive damages is an act of violence against that proper order, and so it must be stopped.

We believe that this is consistent with what Congress intended when it first promulgated the modern Code, based upon what it legislated in section 726 and has left undisturbed for 30 years. If it is not, or if Congress is persuaded that the courts had it right all along, then the lawmakers can execute their proper constitutional role by engaging in interstitial lawmaking. In any event, far, far better for Congress to legislate than the judicial branch (or a subunit of that branch, to be sure).

In closing, the bankruptcy courts may continue the established (and rightful) practice of subordinating punitives in Chapter 7 cases and henceforth should commence

doing likewise in reorganization proceedings; but the time has come (indeed, it is long past) for bankruptcy courts to stop the wrongful denial of punitive damage claims in Chapter 11 cases. Holders of punitive damage claims are no less innocent than any other creditor, and so they should be recognized and treated fairly.

**NOTES**

1. 11 U.S.C.A. §§ 101, et seq.
2. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580-81, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (cataloging over 60 English statutes found during the period between 1275 and 1753 providing for double, treble, or quadruple damages).
3. *BMW*, 517 U.S. at 581 n.33.
4. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 121 S. Ct. 1678, 149 L. Ed. 2d 674, 58 U.S.P.Q.2d 1641 (2001).
5. *Cooper Industries*, 532 U.S. at 432.
6. *BMW*, 517 U.S. at 568.
7. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 111 S. Ct. 1032, 113 L. Ed. 2d 1, 18 Media L. Rep. (BNA) 1753 (1991); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 155 L. Ed. 2d 585, Prod. Liab. Rep. (CCH) P 16805, 60 Fed. R. Evid. Serv. 1349, 1 A.L.R. Fed. 2d 739 (2003) (“punitive damages... are aimed at deterrence and retribution”).
8. *BMW*, 517 U.S. at 568, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789, 1 Media L. Rep. (BNA) 1633 (1974).
9. *BMW*, 517 U.S. at 568, citing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 456, 113 S. Ct. 2711, 125 L. Ed. 2d 366, 61 Empl. Prac. Dec. (CCH) P 42321 (1993).
10. *BMW*, 517 U.S. at 572 n. 17, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S. Ct. 710, 11 L. Ed. 2d 686, 1 Media L. Rep. (BNA) 1527, 95 A.L.R.2d 1412 (1964).
11. *BMW*, 517 U.S. at 598 (Scalia, J., dissenting), and at 600 (“punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserves”). For a lucid discussion of this and other issues of constitutional import, see Scalia, “A Matter of Interpretation,” (Princeton Press 1997) (discussing, inter alia, *BMW* and *Pacific Mut. Life*).
12. *BMW*, 517 U.S. at 598-600 (Scalia, J., dissenting). See also *BMW*, 517 U.S. at 607 (Ginsburg, J., dissenting) (“The Court...unnecessarily and unwisely ventures into territory traditionally within the States’ domain,...[an] unnecessary intrusion into an area dominantly of state concern”).
13. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 171 L. Ed. 2d 570, 66 Env’t. Rep. Cas. (BNA) 1545, 2008 A.M.C. 1521 (2008).
14. *Exxon Shipping*, 128 S. Ct. at 2620-21, citing, inter alia, the Code of Hammurabi.
15. *Exxon Shipping*, 128 S. Ct. at 2620-21.
16. *Exxon Shipping*, 128 S. Ct. at 2621. See also *Cooper Industries*, 532 U.S. at 437-38 n.11.
17. *Exxon Shipping*, 128 S. Ct. at 2621.
18. *Exxon Shipping*, 128 S. Ct. at 2621.
19. *Exxon Shipping*, 128 S. Ct. at 2621 (internal quotations omitted), citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15, 111 S. Ct. 1032, 113 L. Ed. 2d 1, 18 Media L. Rep. (BNA) 1753 (1991); See also *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 421-26, 114 S. Ct. 2331, 129 L. Ed. 2d 336, Prod. Liab. Rep. (CCH) P 13895 (1994).
20. *Cooper Industries*, 532 U.S. at 432; See also *BMW*, 517 U.S. at 568.
21. *Exxon Shipping*, 128 S. Ct. at 2620-21.
22. 11 U.S.C.A. § 726.

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23. 11 U.S.C.A. § 726(a)(4).
24. See Pub. L. No. 95-598, § 101, § 726, 92 Stat. 2549, 2608 (1978).
25. Senate Rep. No. 95-989, 95th Cong., 2nd Sess. 96 (1978), reprinted at 1978 U.S. Code Cong. & Admin. News 5787, 5882.
26. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 383 (1977), reprinted at 1978 U.S. Code Cong. & Admin. News 5963, 6339.
27. Section 502, dealing with the allowance of claims, says nothing about punitive damages. 11 U.S.C.A. § 502. In re Hillsborough Holdings Corp., 247 B.R. 510, 511, 35 Bankr. Ct. Dec. (CRR) 273 (Bankr. M.D. Fla. 2000).
28. It has been held that a bankruptcy court can subordinate, limit, or disallow claims for punitive damages. In re Keene Corp., 162 B.R. 935, 947, 30 Collier Bankr. Cas. 2d (MB) 947, Bankr. L. Rep. (CCH) P 75670 (Bankr. S.D. N.Y. 1994), citing Matter of Johns-Manville Corp., 68 B.R. 618, 627, 15 Bankr. Ct. Dec. (CRR) 480, 16 Collier Bankr. Cas. 2d (MB) 98, Bankr. L. Rep. (CCH) P 71531 (Bankr. S.D. N.Y. 1986), aff'd, 78 B.R. 407 (S.D. N.Y. 1987), order aff'd, 843 F.2d 636, 17 Bankr. Ct. Dec. (CRR) 695, Bankr. L. Rep. (CCH) P 72264 (2d Cir. 1988). This is due in part to the contention that even the res judicata effect of a final judgment does not bar reconsideration when the judgment is asserted as a claim in the bankruptcy court against a debtor. Keene, 162 B.R. at 947. See Pepper v. Litton, 308 U.S. 295, 305-06, 60 S. Ct. 238, 84 L. Ed. 281 (1939)).
29. Matter of Goldberg, 12 B.R. 180, 4 Collier Bankr. Cas. 2d (MB) 393 (Bankr. D. N.J. 1981) (As both the year and the volume number of the Bankruptcy Reporter indicate, the Code was still very much in its infancy at the time that this decision was issued).
30. Goldberg, 12 B.R. at 182.
31. Goldberg, 12 B.R. at 181.
32. Goldberg, 12 B.R. at 183-84.
33. Goldberg, 12 B.R. at 185.
34. Goldberg, 12 B.R. at 185.
35. Goldberg, 12 B.R. at 185 (citations omitted).
36. Goldberg, 12 B.R. at 185.
37. Matter of American Federation of Television and Radio Artists, 32 B.R. 672, 10 Bankr. Ct. Dec. (CRR) 1424, 9 Collier Bankr. Cas. 2d (MB) 299 (Bankr. S.D. N.Y. 1983) (AFTRA).
38. AFTRA, 32 B.R. at 673. See 15 U.S.C.A. § 15(a) (treble damages provision of the federal antitrust laws.).
39. AFTRA, 32 B.R. at 673.
40. AFTRA, 32 B.R. at 673.
41. AFTRA, 32 B.R. at 673. Parenthetically, the *AFTRA* court noted that the punitive claimants also argued that res judicata prohibited the relitigation of their claim, but the court rejected that point on the ground that the enforceability of a claim in the insolvency forum is an issue strictly for the bankruptcy court. AFTRA, 32 B.R. at 673 n.3.
42. AFTRA, 32 B.R. at 673.
43. AFTRA, 32 B.R. at 674.
44. AFTRA, 32 B.R. at 674.
45. AFTRA, 32 B.R. at 674 (citation omitted).
46. AFTRA, 32 B.R. at 674.
47. AFTRA, 32 B.R. at 674.
48. AFTRA, 32 B.R. at 674.
49. In re Comstock Financial Services, Inc., 111 B.R. 849, Bankr. L. Rep. (CCH) P 73289, R.I.C.O. Bus. Disp. Guide (CCH) P 7436 (Bankr. C.D. Cal. 1990).
50. Comstock Financial, 111 B.R. at 852.

51. For an explanation of the abstention doctrine, see Sabino, Practical Guide to Bankruptcy at 6.6[2] and 6.6[3].
52. Comstock Financial, 111 B.R. at 852-53.
53. Comstock Financial, 111 B.R. at 853. See 18 U.S.C.A. §§ 1961, 1964(c).
54. Comstock Financial, 111 B.R. at 853, 860.
55. Comstock Financial, 111 B.R. at 860, citing 11 U.S.C.A. § 726(a)(4).
56. Comstock Financial, 111 B.R. at 860 (emphasis in the original).
57. Comstock Financial, 111 B.R. at 860.
58. Comstock Financial, 111 B.R. 853 and 860. See 11 U.S.C.A. § 105(a) (bankruptcy court's general equity power).
59. Comstock Financial, 111 B.R. 860.
60. Comstock Financial, 111 B.R. 860.
61. In re A.H. Robins Co., Inc., 89 B.R. 555, Bankr. L. Rep. (CCH) P 72620 (E.D. Va. 1988). "Megabankruptcies" have been defined by the Administrative Office of the U.S. Courts as cases with over 1,000 creditors and \$100 million or more in assets. See Bartell, "A Guide to the Judicial Management of Bankruptcy Mega-Cases," at 4 (Federal Judicial Center 2d ed. 2007).
62. Recall, gentle reader, these are 1974 dollars, when gasoline averaged 50 cents per gallon.
63. A.H. Robins, 89 B.R. at 557.
64. A.H. Robins, 89 B.R. at 557.
65. A.H. Robins, 89 B.R. at 558.
66. A.H. Robins, 89 B.R. at 558.
67. A.H. Robins, 89 B.R. at 558.
68. By this time, Robins was operating pursuant to its sixth amended and restated Chapter 11 plan. A.H. Robins, 89 B.R. at 559 and 559 n.2.
69. A.H. Robins, 89 B.R. at 557.
70. A.H. Robins, 89 B.R. at 558.
71. A.H. Robins, 89 B.R. at 558.
72. A.H. Robins, 89 B.R. at 558-59.
73. A.H. Robins, 89 B.R. at 557.
74. A.H. Robins, 89 B.R. at 559.
75. A.H. Robins, 89 B.R. at 559. See 11 U.S.C.A. § 502(a).
76. A.H. Robins, 89 B.R. at 559, citing 11 U.S.C.A. § 502(b)(1).
77. See *infra*.
78. A.H. Robins, 89 B.R. at 559.
79. A.H. Robins, 89 B.R. at 559-60.
80. A.H. Robins, 89 B.R. at 560.
81. A.H. Robins, 89 B.R. at 560. To be sure, District Judge Mehri commented that, at the time of his writing, only academic law articles existed debating the Eighth Amendment implications of successive punitive damage awards as possibly constituting cruel and unusual punishment, something of course prohibited by the Bill of Rights. A.H. Robins, 89 B.R. at 560.
82. A.H. Robins, 89 B.R. at 560.
83. A.H. Robins, 89 B.R. at 560.
84. A.H. Robins, 89 B.R. at 560, citing 11 U.S.C.A. § 1129(a)(7)(A).
85. A.H. Robins, 89 B.R. at 560.
86. A.H. Robins, 89 B.R. at 560, citing 11 U.S.C.A. § 726(a)(4) (assigning a low priority to punitive damage claims in liquidation cases).
87. A.H. Robins, 89 B.R. at 560.

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88. A.H. Robins, 89 B.R. at 561.
89. A.H. Robins, 89 B.R. at 561.
90. A.H. Robins, 89 B.R. at 561.
91. A.H. Robins, 89 B.R. at 561-62.
92. A.H. Robins, 89 B.R. at 562.
93. A.H. Robins, 89 B.R. at 562.
94. A.H. Robins, 89 B.R. at 562.
95. A.H. Robins, 89 B.R. at 562.
96. Matter of Johns-Manville Corp., 68 B.R. 618, 15 Bankr. Ct. Dec. (CRR) 480, 16 Collier Bankr. Cas. 2d (MB) 98, Bankr. L. Rep. (CCH) P 71531 (Bankr. S.D. N.Y. 1986), aff'd, 78 B.R. 407 (S.D. N.Y. 1987), order aff'd, 843 F.2d 636, 17 Bankr. Ct. Dec. (CRR) 695, Bankr. L. Rep. (CCH) P 72264 (2d Cir. 1988).
97. A.H. Robins, 89 B.R. at 563, citing Johns-Manville, 68 B.R. at 627.
98. A.H. Robins, 89 B.R. at 563. Furthermore, the *Robins* court, just like its predecessor in *Johns-Manville*, refused the alternate step of subordinating the punitive damage claims, alleging "it would not serve any purpose in the instant case." A.H. Robins, 89 B.R. at 563. At most, it would postpone "an unfair treatment of [other] claimants," given that any residual funds in the Chapter 11 were to be proportionally distributed after all compensatory damages were paid. A.H. Robins, 89 B.R. at 563. Aside from that, the *Robins* court strikingly gave no other explanation of why a subordination of punitive damage claims would be without purpose.
99. A.H. Robins, 89 B.R. at 563.
100. A.H. Robins, 89 B.R. at 563-64.
101. In re W.G. Wade Shows, Inc., 218 B.R. 625 (Bankr. M.D. Fla. 1998).
102. Wade, 218 B.R. at 626.
103. Wade, 218 B.R. at 626.
104. Wade, 218 B.R. at 626.
105. Wade, 218 B.R. at 626.
106. Wade, 218 B.R. at 626.
107. Wade, 218 B.R. at 626-27.
108. See U.S. Const. Art. IV, (1).
109. Wade, 218 B.R. at 627, citing 28 U.S.C.A. § 1738: section 1738 of Title 28, the Judicial Code, mandates that every court of the U.S. shall give full faith and credit to all judgments of any state court. See In re Keene Corp., 162 B.R. 935, 946, 30 Collier Bankr. Cas. 2d (MB) 947, Bankr. L. Rep. (CCH) P 75670 (Bankr. S.D. N.Y. 1994). Absent extraordinary circumstances, such as fraud, the bankruptcy courts may not be utilized to relitigate issues already resolved in a court of competent jurisdiction. Keene, 162 B.R. at 946. See also Kelleraan v. Andrijevic, 825 F.2d 692, 695, 17 Collier Bankr. Cas. 2d (MB) 565, Bankr. L. Rep. (CCH) P 71930 (2d Cir. 1987). Put another way, principles of res judicata and collateral estoppel forbid a bankruptcy court from overturning a predating court judgment. Keene, 162 B.R. at 946, citing Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S. Ct. 2424, 69 L. Ed. 2d 103, 1981-1 Trade Cas. (CCH) ¶ 64124 (1981).
110. Wade, 218 B.R. at 627.
111. Wade, 218 B.R. at 627 (citations omitted).
112. Wade, 218 B.R. at 627.
113. Wade, 218 B.R. at 628.
114. Wade, 218 B.R. at 628.
115. Wade, 218 B.R. at 628. The *Wade* court also reminded that it has exclusive jurisdiction over the allowance or disallowance of claims in bankruptcy issues before it. Wade, 218 B.R.

at 628, citing 11 U.S.C.A. § 503 (claims allowance process) and 28 U.S.C.A. § 157(b)(2)(B) (Judicial Code provisions empowering Article I bankruptcy courts to decide claims).

116. Wade, 218 B.R. at 628, citing Robins, 89 B.R. 555.

117. Wade, 218 B.R. at 628 (citations omitted).

118. Wade, 218 B.R. at 628.

119. In re Hillsborough Holdings Corp., 218 B.R. 617 (Bankr. M.D. Fla. 1991). Strange but true—*Wade* and *Hillsborough* were decided seven years apart but are only separated by four pages in the same volume of the Bankruptcy Reporter. We have no explanation for this time-bending anomaly.

120. Hillsborough, 218 B.R. at 619. Notably, it appears that the employee's initial physical injury was routed to the workers' compensation process, as usual. A subsequent injury, coupled with the debtor's mishandling of the workers' compensation claim, resulted in the half-million dollars in punitive damages being awarded. Hillsborough, 218 B.R. at 618-19.

121. Hillsborough, 218 B.R. at 619.

122. Hillsborough, 218 B.R. at 619.

123. Hillsborough, 218 B.R. at 619, citing U.S. Const. Art. IV.

124. Hillsborough, 218 B.R. at 619.

125. Hillsborough, 218 B.R. at 620.

126. Hillsborough, 218 B.R. at 620.

127. Hillsborough, 218 B.R. at 620, citing Robins, 89 B.R. 555.

128. Hillsborough, 218 B.R. at 620.

129. Hillsborough, 218 B.R. at 620.

130. Hillsborough, 218 B.R. at 620.

131. In re Hillsborough Holdings Corp., 146 B.R. 1015 (Bankr. M.D. Fla. 1992).

132. Hillsborough Holdings, 146 B.R. at 1017.

133. Hillsborough Holdings, 146 B.R. at 1017-18.

134. Hillsborough Holdings, 146 B.R. at 1018.

135. Hillsborough Holdings, 146 B.R. at 1018-19 and 1022.

136. Hillsborough Holdings, 146 B.R. at 1019.

137. Hillsborough Holdings, 146 B.R. at 1022.

138. Hillsborough Holdings, 146 B.R. at 1022, citing Robins, 89 B.R. 555.

139. Hillsborough Holdings, 146 B.R. at 1022.

140. Hillsborough Holdings, 146 B.R. at 1022.

141. The cases are legion, and include, among the many, the following: 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); Dewsnap v. Timm, 502 U.S. 410, 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); 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); 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). See A.M. Sabino, *The Death of Reclamation: How Congress and the Courts Have Eviscerated Reclamation Rights, and What Can Be Done About It*, 2008 Norton Annual Survey of Bankruptcy Law 31, 34-35 (2008 ed) (analyzing cases).

142. The full name is *expressio unius est exclusio alterius*, to wit, the expression of one thing is the exclusion of another. Black's Law Dictionary at 581 (6th ed. 1991).

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143. See discussion, *infra*.

144. *Katchen v. Landy*, 382 U.S. 323, 327, 86 S. Ct. 467, 15 L. Ed. 2d 391, 9 Fed. R. Serv. 2d 38A.2, Case 6 (1966) (citations omitted). For an engaging analysis of the bankruptcy courts' equity powers, and the overall history of the American bankruptcy system, we commend Professor David Skeel's *Debt's Dominion: A History of Bankruptcy Law in America*" (Princeton University Press 2001).

145. See Sabino, *Practical Guide to Bankruptcy* at 6.1[1]. See also *Matter of Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 791 F.2d 524, 528 (7th Cir. 1986).

146. *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).

147. Sabino, *The Death of Critical Vendor Motions and the Potential Demise of the Doctrine of Necessity: Farewell to Two Misbegotten Doctrines*, 6 *Transactions: The Tenn. J. Bus. L.* 47, 74 et seq. (2004), analyzing *Kmart*, etc.

148. *Lamie*, 540 U.S. at 538. See also *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).

149. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938).

150. 15 U.S.C.A. § 78j(b); and 17 C.F.R. § 240.10b-5, respectively.

151. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321, *Fed. Sec. L. Rep.* (CCH) P 96034 (1991).

152. *Lampf*, 501 U.S. at 360. See Sabino, *A Statutory Beacon or a Relighted Lampf? The Constitutional Crisis of the New Limitary Period for Federal Securities Law Actions*, 28 *Tulsa L. J.* 23, 25-26 (1992), cited by *Pacific Mut. Life Ins. Co. v. First Republic Bank Corp.*, 997 F.2d 39, *Fed. Sec. L. Rep.* (CCH) P 97664 (5th Cir. 1993), judgment aff'd, 511 U.S. 658, 114 S. Ct. 1827, 128 L. Ed. 2d 654, *Fed. Sec. L. Rep.* (CCH) P 98220 (1994) and cert. granted, judgment vacated, 514 U.S. 1079, 115 S. Ct. 1789, 131 L. Ed. 2d 718 (1995) and cert. granted, judgment vacated, 514 U.S. 1079, 115 S. Ct. 1789, 131 L. Ed. 2d 718 (1995) and opinion vacated, 53 F.3d 1409 (5th Cir. 1995). See also Sabino, *The New Uniform Statute of Limitations for Federal Securities Fraud Actions: Its Evolution, Its Impact, and a Call for Reform*, 19 *Pepperdine L. Rev.* 485, 506-10 (1992) (analyzing *Lampf*).

153. 28 U.S.C.A. § 1658(b), enacted as part of the Sarbanes-Oxley Act of 2002.

154. *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). See also *Lamie*, 540 U.S. at 542 ("This allows both of our branches to adhere to our respected, and respective, constitutional roles").