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I. Bankruptcy & Creditors' Rights

I. BANKRUPTCY & CREDITORS' RIGHTS

A. Mack Financial Corp. v. Ireson Best Repair Co. v. United States: *Postpetition Late Charges and Interest Under the Bankruptcy Reform Act of 1978*

The Bankruptcy Act of 1898 ("1898 Act")[1] provided that creditors could recover interest and charges that related to outstanding claims owed to creditors by debtors proceeding under the 1898 Act, to the extent that such interest and charges accrued prior to the debtor's filing of a bankruptcy petition.[2] Under the 1898 Act, however, courts characterized interest and charges which accrued on debts that remained outstanding after a debtor filed a petition for relief (collectively referred to as "Postpetition Charges", individually referred to as "postpetition interest" and "postpetition late charges") as penalties.[3] Because courts considered penalties incompatible with the policies of the 1898 Act, which were to ease the administration of an estate in bankruptcy and to protect the claims of junior and unsecured creditors, courts did not permit creditors to enforce Postpetition Charges.[4]

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1. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1978).

2. See id. § 63(a) (allowing creditor to recover interest and charges that accrued prior to debtor's filing of bankruptcy petition); *see also* Bruning v. United States, 376 U.S. 358, 359 (1964) (allowing creditor to recover prepetition interest on debtor's outstanding debt under § 63 of Bankruptcy Act of 1898 ("1898 Act")); Sexton v. Dreyfus, 219 U.S. 339, 344 (1911) (recognizing that § 63 of 1898 Act entitles creditor to recover on outstanding debt interest that accrues before debtor files bankruptcy petition).

3. See e.g., New York v. Saper, 336 U.S. 328, 330 (1948) (interest that accrues after debtor files petition for relief (postpetition interest) on tax claim constitutes penalty under 1898 Act); *In re* Hawks, 471 F.2d 305, 308 (4th Cir. 1973) (holding that late charge that accrues after debtor files petition for relief (postpetition late charge) constitutes penalty under 1898 Act); United States v. Harrington, 269 F.2d 719, 720 (4th Cir. 1959) (postpetition late charge constitutes penalty under 1898 Act); Bankruptcy Act of 1898, chapter 541, 30 Stat. 544 (1898) (repealed 1978). Under the 1898 Act, courts allowed parties to contract for liquidated damages, but not charges that increased debtors' payments after default for failing to pay an outstanding debt. *See In re* Tastyeast, 126 F.2d 879, 881-82 (3d Cir. 1942) (postpetition interest on outstanding debt for debtor's default on note constitutes penalty under 1898 Act). Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1978). Courts characterized postpetition interest and postpetition late charges (collectively referred to as "Postpetition Charges") as penalties under the 1898 Act because the inequality in bargaining power between debtors and creditors forces debtors to risk increased payments to creditors upon default due to debtors' economic needs. *In re* Tastyeast, 126 F.2d 879, 882 (3d Cir. 1942).

4. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1978); *see* Vanston Bankholders Protective Comm. v. Greene, 329 U.S. 156, 164 (1946) (postpetition late charges are inconsistent with policies of 1898 Act). Bankruptcy courts cited two reasons for denying Postpetition Charges under the 1898 Act. *Id.* at 164, 166. First, allowing Postpetition Charges required courts continually to recompute creditor claims that may have accrued while the debt was outstanding and, therefore, complicated the administration of bankruptcy estates. *Id.* at

Although the 1898 Act limited a creditor's ability to collect Postpetition Charges, the Bankruptcy Reform Act of 1978 (the "Code")[5] expanded creditors' rights to collect claims against debtors in bankruptcy by entitling creditors to collect Postpetition Charges in certain situations.[6]

Under the Code, when a debtor files a petition for relief,[7] creditors may file proofs of claims against the debtor's estate for the amount of outstanding obligations that the debtor owes the creditors.[8] Section 502(b)(2) of the

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164. Bankruptcy courts recognized, however, that denying Postpetition Charges on the outstanding debt eases administration of a bankruptcy estate because the Postpetition Charges on the outstanding debt cease to accrue as of the date of the bankruptcy petition. *Id.* Second, as courts of equity, bankruptcy courts did not want creditors to profit by delay in the administration of an estate to the detriment of subordinate creditors. *Id.* at 166. Creditors with priority could collect a greater proportion of the bankrupt estate because a delay in administration of an estate increases the amount of Postpetition Charges that priority creditors may collect from the estate while reducing the size of the estate from which subordinate creditors may collect subordinate claims. *Id.* Additionally, creditors collecting interest for a debtor at a rate higher than the prevailing market rate profit because of the delay in the administration of the estate. *Id.*

5. 11 U.S.C. §§ 101 - 151326 (1982 & Supp. III 1985) BB *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333; *see Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. 1 (1975) [hereinafter *Commission Report*], *reprinted in* 2 app., L. KING, COLLIER ON BANKRUPTCY 1, 1 (15th ed. 1985). In 1970 Congress appointed a commission to study existing bankruptcy laws and suggest reforms in the 1898 Act. *Id.*; *see* Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (creating commission to study existing bankruptcy law); Bankruptcy Act of 1898, 30 Stat. 544 (repealed 1978). The commission noted that the use of debt to finance consumer purchases and business ventures increased dramatically from 1948 to 1970. *Commission Report*, *supra*, at 33. For example, the number of bankruptcies involving individual consumers increased from 8566 in 1946 to 191,729 in 1967 while the amount of outstanding debt for individual consumers increased from $31 billion to $338 billion over the same period. *Id.* Additionally, the number of business bankruptcies increased from 1630 in 1946 to 18,132 in 1972, while the average liability per business failure increased from $44,690 in 1948 to $175,638 in 1970 ($131,729 in 1948 dollars). *Id.* at 33-35. In its report the commission stated that the primary goal of the bankruptcy system was to rehabilitate the finances of debtors so that debtors again may contribute economically to society *Id.* The commission further stated that a secondary goal of the bankruptcy system was to provide equitable treatment to both debtors and creditors in a credit-based economy. *Id.* The commission's findings evidenced greater sophistication in debtor-creditor relationships. *Id.* Given the commission's findings, Congress determined a need to modernize bankruptcy law to deal with debtor-creditor relationships and to maintain the equitable policies of bankruptcy law. *Id.* Consequently, Congress enacted the Bankruptcy Reform Act of 1978. 11 U.S.C. §§ 101-151326; *see* H.R. REP. No. 595, 95th Cong., 1st Sess 125 (1977) [hereinafter 1977 HOUSE REPORT], *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 5693, 6078-79 (Congress intended to meet goals of bankruptcy system by relieving debtors of creditor hassle and worry of overburdening debt at time when debtors increasingly use debt to finance consumer purchases and business ventures).

6. See 11 U.S.C. § 506(b) (1982 & Supp.III 1985)(defining circumstances under which creditors may collect Postpetition Charges); *infra* text and accompanying note 12 (quoting § 506(b) of Code).

7. *See* 11 U.S.C. §§ 301-303 (1982)(debtor commences bankruptcy proceeding by filing petition for relief).

8. *See* 11 U.S.C. § 501 (1982)(creditors may file proofs of claim or interest claim against

Code allows creditors to include in a proof of claim interest on the outstanding amount of a creditor's claim that had matured prior to the debtor's filing of a bankruptcy petition.[9] The Code further provides that creditors' claims are secured to the extent of the value of a creditor's interest in property of the estate, or to the extent that the value of the creditor's interest in property of the estate exceeds the amount subject to the debtor's right of setoff.[10] The Code's significant addition to creditors' collection rights against bankrupt debtors, however, is that section 506(b) of the Code appears to entitle creditors to collect Postpetition Charges in certain situations.[11] Section 506(b) of the Code provides:

> To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.[12]

Subsequent to the enactment of the Code, however, uncertainty has arisen in debtor-creditor relationships regarding whether section 506(b) of the Code effects a substantive change from the 1898 Act concerning the collection of Postpetition Charges, or whether section 506(b) of the Code merely codifies

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estates of debtors); *see also id.* § 502(a) (discussing allowability of creditor claims). Section 502 of the Code governs the allowance of creditor claims. *Id.* Under § 502(a) of the Code, a proof of claim constitutes prima facia evidence of the validity and amount of the claim. 11 U.S.C. § 502(a) (1982); *see* FED. R. BANKR. P. 3001(f) (creditors' proof of claim constitutes prima facie evidence of claim). Section 502(a), therefore, allows a creditor's claim unless a debtor objects to the claim. 11 U.S.C. 502(a) (1982); *see* FED. R. BANKR. P. 3001(f) (creditors' proof of claim constitutes prima facie evidence of claim). When a debtor objects to a creditor's claim and demands that a bankruptcy court disallow the claim, however, the bankruptcy court must resolve the dispute of whether to allow the claim based on the merits of the creditor's claim. FED. R. BANKR. P. 3007 (proof of claim and objection to proof of claim mandate adversary proceeding).

9. 11 U.S.C. § 502(b)(2) (1982). Section 502(b)(2) of the Code disallows creditor's claims for unmatured interest. *Id.* When a debtor files a bankruptcy petition, § 502 suspends the accrual of interest on a creditor's claim as of the date of the petition. *Id.*; *see* 3 L. KING, *supra* note 5, § 502.02[2], at 502-30 (15th ed. 1985) (filing of bankruptcy petition suspends accrual of interest on creditor claim).

10. 11 U.S.C. § 506(a) (1982). Section 506(a) of the Code provides that a claim by a creditor possessing a lien against property of a debtor's bankrupt estate is a secured claim to the extent of the value of the creditor's interest in property of the estate or to the extent that the value of the creditor's interest in property of the estate exceeds the amount subject to the debtor's right of setoff. *Id. See Id.* § 553 (discussing debtor's right to setoff claim of debtor against claim of creditor). Section 553 of the Code allows a debtor to offset the claims that a debtor and creditor have against one another. *Id.* § 553 (1982). The resulting balance constitutes the debtor's liability to the creditor. *Id.*

11. 11 U.S.C. § 506(b) (1982); *see infra* text and accompanying note 12 (quoting § 506(b) of Code); *infra* notes 84-114 and accompanying text (permitting creditors to recover Postpetition Charges).

12. 11 U.S.C. § 506(b) (1982); *cf. supra* notes 3-4 (discussing Postpetition Charges under 1898 Act).

pre-Code law.[13] In *Best Repair Co. v. United States*[14] and *Mack Financial Corp. v. Ireson*,[15] the United States Court of Appeals for the Fourth Circuit considered whether section 506(b) of the Code allows creditors to collect Postpetition Charges.[16]

In *Mack*, a creditor financed the purchase of a dump truck for the debtor.[17] The installment agreement securing the debtor's obligation to the creditor listed the truck as collateral.[18] The installment agreement contained a clause providing that the creditor would assess a five percent delinquency charge on installments that were delinquent for more than seven days.[19] The debtor defaulted on the truck payments and subsequently filed for reorganization under Chapter 11 of the Code.[20] At the time of default the truck was worth more than the debtor's unpaid balance on the truck.[21] Pursuant

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13. 11 U.S.C. § 506(b) (1982); *see* S. REP. No. 989, 95th Cong., 2d Sess. 68 (1978) [hereinafter 1978 SENATE REPORT] *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5854 (discussing Postpetition Charges under § 506(b)). The senate report on § 506(b) of the Code provides that § 506(b) codifies pre-Code law concerning reasonable fees, costs, or charges. 1978 SENATE REPORT, *supra*, at 68; *see* United Merchants and Mfrs., Inc. v. Equitable Life Assurance Soc'y of the United States, 674 F.2d 134, 138 (2d Cir. 1982)(§ 506(b) codifies pre-Code law); Wolohan Lumber Co. v. Robbins, 21 Bankr. 747, 751 (Bankr. S.D. Ohio 1982)(§ 506(b) codifies pre-Code law). *But see* Unsecured Creditor's Comm. v. Heller, 768 F.2d 580, 582-85 (4th Cir. 1985)(§ 506(b) of Code makes substantive change in pre-Code law); *In re* LHD Realty Corp., 726 F.2d 327, 329 (7th Cir. 1984)(§ 506(b) of Code effects substantive change in pre-Code law by permitting creditors to recover postpetition late charges); *In re* Morrisey, 37 Bankr. 571, 572 (Bankr. E.D. Va. 1984)(§ 506(b) of Code makes substantive change in pre-Code law by allowing creditors to recover postpetition interest).

14. 789 F.2d 1080 (4th Cir. 1985).

15. 789 F.2d 1083 (4th Cir. 1985).

16. *See* Best Repair Co. v. United States, 789 F.2d 1080, 1081 (4th Cir. 1985)(considering whether § 506(b) of Code authorizes creditors to recover postpetition interest); Mack Fin. Corp. v. Ireson, 789 F.2d 1083, 1084 (4th Cir. 1985)(considering whether § 506(b) of Code authorizes creditors to recover postpetition late charges); *supra* text and accompanying note 12 (quoting § 506(b) of Code); *infra* notes 17-40 (discussing *Mack*); *supra* notes 41-62 (discussing *Best*).

17. Ireson v. Mack Fin. Corp., 48 Bankr. 711, 711 (Bankr. W.D. Va. 1985). Mack Financial Corp. financed the purchase of the truck for the debtor, Keson Trucking. *Id.*

18. *Id.* at 711.

19. *Id.* at 711-12.

20. *Id.* at 712; *see* 11 U.S.C. §§ 1101-1174 (1982 & Supp. III 1985). Chapter 11 of the Code provides financially distressed businesses a means to reorganize and continue business operations, as opposed to liquidating and halting business operations. 11 U.S.C. §§ 1101-1174 (1982 & Supp. III 1985); *see* 1977 HOUSE REPORT, *supra* note 5, at 220 (purpose of Chapter 11 is to give distressed businesses opportunity to rehabilitate financial obligations while continuing business operations). 1977 HOUSE REPORT, *supra* note 5, at 220. The house report found that the rehabilitation of businesses in financial distress minimizes unemployment and waste of business assets. *Id.*. Additionally, the report maintained that shareholders are less likely to lose investment monies, and creditors may recoup the full amount of money from loans to debtors, if the Code allows debtors to reorganize and continue business operations. *Id.* The report concluded that, in the long term, rehabilitation under Chapter 11 enhances the economy. *Id.*

21. Mack Fin. Corp. v. Ireson, 53 Bankr. 118, 120 (Bankr. W.D. Va. 1985). When the debtor filed the bankruptcy petition in *Mack*, the debtor listed the value of the truck at $35,000 and a balance due on the truck of $27,016, producing a difference of $7,984. *Id.*

to a court order,[22] the debtor paid the creditor the outstanding balance on the truck, plus postpetition late charges for the delinquency of the truck payments.[23] When tendering payment to the creditor, however, the debtor protested and disclaimed liability for the postpetition late charges.[24] The debtor argued that the charges which accrued after the debtor had filed the bankruptcy petition constituted penalties and, therefore, were unenforceable under the Code.[25] The creditor claimed that section 506(b) of the Code authorized the enforcement of postpetition late charges.[26] Considering the application of section 506(b) of the Code, the bankruptcy court in *Mack* reasoned that section 506(b) substantively did not change the 1898 Act, under which bankruptcy courts characterized postpetition late charges as penalties that were unenforceable in a court of equity.[27] Accordingly, the

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22. Mack Fin. Corp. v. Ireson, 48 Bankr. 711, 712 (Bankr. W.D. Va. 1985). The bankruptcy court in *Mack* originally entered an order extending the security agreement between the debtor and the creditor to provide the creditor the full amount of the outstanding obligation and to provide for postpetition late charges of $688.25. *Id.*; *see* 11 U.S.C. § 1142(a),(b) (1982)(bankruptcy court has authority to confirm reorganization plan and enter all orders necessary to implement plan). The debtor failed to follow the initial court order, and the bankruptcy court entered a second order that modified the payment plan and allowed the court to convert the proceeding to Chapter 7 if the debtor failed to follow the second order. *Mack* 48 Bankr. at 712; *see* 11 U.S.C. § 1112(b)(7),(8)(allowing court to convert Chapter 11 proceeding to Chapter 7).

23. *Mack*, 48 Bankr. at 712. In *Mack* the creditor assessed a total amount of $1187 against the debtor as late charges, which accrued from the time the debtor filed the bankruptcy petition until the debtor paid the creditor under the modified court order. *Id.*. The total amount of postpetition late charges, $1187, represented $688.25 of late charges that accrued from the time the debtor filed for bankruptcy until the court entered the agreed order, and $498.75 of late charges that accrued from the time the court entered the original order until the debtor paid the creditor. *Id.* The debtor paid the creditor a total amount of postpetition late charges of $1187. *Id.*; *see supra* note 22 (discussing initial and modified court orders).

24. *Mack*, 48 Bankr. at 712. In determining whether to allow the creditor's claim for postpetition late charges, the bankruptcy court in *Mack* considered the entire amount of postpetition late charges, $1187, even though the debtor previously had agreed to pay $688.25 in postpetition late charges in the initial court order *Id.* The bankruptcy court in *Mack* considered the full amount of postpetition late charges because the debtor protested the entire amount when paying the creditor. *Id.*; *see supra* note 22 (discussing initial and modified court orders).

25. *Mack*, 48 Bankr. at 712-13. The debtor in *Mack* argued that the express language of § 506(b) of the Code did not change pre-Code law, which characterized late charges as penalties. *Id.* at 713. Accordingly, the debtor argued that the bankruptcy court, as a court of equity, could not enforce the postpetition late charges. *Id.*; *see supra* note 3 and accompanying text (postpetition late charges constitute penalties under 1898 Act); *supra* note 5 (policy of Code is to provide equitable treatment to debtors and creditors).

26. *Mack*, 48 Bankr. at 712; 11 U.S.C. § 506(b) (1982); *see supra* text and accompanying note 12 (quoting § 506(b) of Code).

27. *Mack*, 48 Bankr. at 713. The bankruptcy court in *Mack* found that the legislative history concerning § 506(b) of the Code demonstrated that Congress did not intend that § 506(b) change pre-Code law, which did not allow creditors to recover postpetition late charges. *Id.*; *see supra* note 13 (legislative history of § 506 (b) provides that § 506(b) codifies pre-Code law regarding postpetition late charges); *supra* notes 3-4 and accompanying text (late charges constitute penalties and are not enforceable under 1898 Act).

bankruptcy court held that the creditor in *Mack* could not recover postpetition late charges under section 506(b).[28]

The creditor appealed the bankruptcy court's decision to the United States District Court for the Western District of Virginia.[29] The district court found that section 506(b) of the Code effected a change in substantive law from the 1898 Act.[30] The district court explained that the express language of section 506(b) authorizes the allowance of postpetition late charges when the value of a creditor's security exceeds the value of the debt, and the amount of the postpetition late charges are reasonable.[31] Finding that the value of the creditor's security in *Mack* exceeded the amount of the debt, and that under Virginia law the amount of the postpetition late charges was reasonable,[32] the district court reversed the bankruptcy court's decision and allowed the secured creditor in *Mack* to recover the postpetition late charges.[33]

The debtor appealed the district court's decision to allow the creditor to recover postpetition late charges to the United States Court of Appeals for the Fourth Circuit.[34] On appeal the debtor argued that Congress did not intend section 506(b) of the Code to change the substantive law of the 1898 Act regarding postpetition late charges.[35] The debtor argued that because section 506(b) did not effect a substantive change in the 1898 Act, a creditor could not collect postpetition late charges because such charges constituted penalties.[36] The Fourth Circuit rejected the debtor's contentions and adopted the ruling of the district court in *Mack* that the plain language

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28. *Mack*, 48 Bankr. at 712-14; 11 U.S.C. § 506(b) (1982). The bankruptcy court in *Mack* determined that neither the express language of § 506(b) of the Code nor the legislative history of § 506(b) effected a substantive change in law from the 1898 Act concerning creditors' rights to recover postpetition late charges. *Mack*, 48 Bankr. at 713-14. In holding that creditors cannot recover postpetition late charges, the bankruptcy court in *Mack* explained that under the 1898 Act, a court of equity, such as a bankruptcy court, could not allow late charges because late charges constituted penalties. *Id.* at 712; *see supra* notes 3-4 (bankruptcy courts do not allow charges constituting penalties); *supra* note 13 (discussing legislative history of § 506(b) which states that § 506(b) codifies pre-Code law).

29. Mack Fin. Corp. v. Ireson, 53 Bankr. 118, 119 (W.D. Va. 1985).

30. *Id.*; 11 U.S.C. § 506(b) (1982).

31. *Mack*, 53 Bankr. at 120; *see infra* note 32 (discussing reasonable amount of late charges).

32. *See* VA. CODE ANN. § 6.1-330.26 (1986). The Virginia Code allows a creditor to impose a maximum late charge on a debtor of five percent of the outstanding amount of the debt, if the debtor and the creditor specifically contract for the late charge. *Id.*

33. *Mack*, 53 Bankr. at 120. The district court in *Mack* allowed the creditor to recover postpetition late charges of $1187 because the value of the creditor's security, $35,000, exceeded the value of the debtor's obligation to the creditor, $27,016.00, to the extent of the late charge, and because the five percent late charge was reasonable under Virginia law. *Id.*; *see supra* note 32 (discussing reasonable amount of late charges in Virginia).

34. Mack Fin. Corp. v. Ireson, 789 F.2d 1083, 1083 (4th Cir. 1986).

35. *Id.* at 1084; 11 U.S.C. § 506(b) (1982).

36. *Mack*, 789 F.2d at 1084; 11 U.S.C. § 506(b) (1982); *see supra* notes 3-4 and accompanying text (as courts of equity, bankruptcy courts do not allow creditors to collect charges that constitute penalties).

of section 506(b) entitles creditors to recover postpetition late charges when a creditor is oversecured and the charge is reasonable.[37] The Fourth Circuit added, however, that section 506(b) requires that the debtor and creditor contractually agree to any late charges.[38] In examining the facts of *Mack*, the Fourth Circuit found that the creditor was oversecured, the amount of the late charge was reasonable, and the debtor specifically had agreed to the late charge.[39] Accordingly, the Fourth Circuit in *Mack* held that section 506(b) allowed the creditor to retain the full amount of postpetition late charges that the creditor had collected from the debtor.[40]

The Fourth Circuit expanded its interpretation of section 506(b) of the Code in *Best Repair Co. v. United States*.[41] In *Best*, the Fourth Circuit considered whether section 506(b) of the Code authorizes creditors to collect postpetition interest.[42] The debtor in *Best* filed a petition for reorganization under Chapter 11 of the Code.[43] The government subsequently filed proofs of claims for unpaid taxes that the debtor owed and for penalties and interest on the unpaid taxes, and obtained a lien on the debtor's real property to secure the amount of the outstanding tax claim.[44] The govern-

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37. *Mack*, 789 F.2d at 1083 (4th Cir. 1986); 11 U.S.C. § 506(b) (1982). The Fourth Circuit in *Mack* explained that Congress intended that the express language of § 506(b) of the Code substantively change pre-Code law by allowing creditors to recover postpetition late charges. *Mack*, 789 F.2d at 1084; *see* 1978 SENATE REPORT, *supra* note 13, at 68 (discussing legislative history of § 506(b)). In the Senate Report Congress stated that § 506(b) of the Code codified current law by allowing secured creditors any reasonable charges that the debtor agreed to pay the creditor. *Mack*, 789 F.2d at 1084. The Fourth Circuit in *Mack*, however, declared that the legislative history of § 506(b) did not demonstrate that Congress intended to continue the practice of disallowing postpetition late charges under the 1898 Act. *Id.* at 1084; *see* 11 U.S.C. § 506(b) (1982) (expressly allowing postpetition late charges); *supra* notes 2-4 and accompanying text (discussing charges allowed to creditors under 1898 Act).

38. *Mack*, 789 F.2d at 1084; *see* 11 U.S.C. § 506(b) (1982) (providing for postpetition late charges). Unlike the district court in *Mack*, the Fourth Circuit explained that the express language of § 506(b) of the Code, in addition to requiring that a creditor be oversecured and the late charge be reasonable, requires that the debtor specifically agree to pay the late charge to the creditor. *Mack*, 789 F.2d at 1084.

39. *Mack*, 789 F.2d at 1084. The Fourth Circuit in *Mack* found that the value of the creditor's security was $35,000, while the value of the debtor's obligation to the creditor was only $27,016. *Id.* at 1083. The *Mack* court further found that the five percent late charge in the security agreement between the debtor and the creditor did not exceed the five percent maximum late charge on outstanding debts that Virginia law allowed. *Id.*; *see supra* note 32 (discussing maximum late charge under Virginia law).

40. *Mack*, 789 F.2d at 1084; 11 U.S.C. § 506(b) (1982).

41. 789 F.2d 1080 (4th Cir. 1986).

42. *Id.* at 1081.

43. Best Repair Co. v. United States, 50 Bankr. 386, 386 (E.D. Va. 1985); *see* 11 U.S.C. §§ 1101-1174 (1982)(providing for reorganization of business finances); *supra* note 20 (discussing purpose of Chapter 11 relief).

44. Best Repair Co. v. United States, 50 Bankr. 386, 386; *see* 26 U.S.C. §§ 6321-6322 (1982 & Supp. III 1985)(lien against real and personal property of taxpayer arises in favor of United States when government assesses tax). In *Best* the government claimed that the debtor owed a total amount of $57,838.26, which consisted of $7146.46 in taxes, $19,220.43 in late payment penalties, and $31,489.06 in interest on the taxes and penalties that accrued before

ment claimed that the language of section 506(b) permitted the government to recover interest on the unpaid taxes that accrued after the debtor filed the petition for relief.[45] Arguing that the language of section 506(b) does not authorize creditors to recover postpetition interest, the debtor objected to the government's claim of postpetition interest.[46] The debtor further argued that permitting a creditor to recover postpetition interest on the outstanding balance of a debt violates the equitable policy of the Code that one creditor should not benefit at the expense of another through a delay in administering the estate.[47] In considering the debtor's arguments, the bankruptcy court found that the plain language of section 506(b) of the Code clearly authorizes oversecured creditors to collect postpetition interest on outstanding claims.[48] The bankruptcy court further found that Congress intended section 506(b) to strengthen the rights of oversecured creditors.[49] The bankruptcy court in *Best* held, therefore, that section 506(b) of the Code entitled the government to recover postpetition interest because the value of the governments security exceeded the amount of the government's tax claim, which included the postpetition interest.[50]

The debtor appealed the bankruptcy court's decision to the United States District Court for the Eastern District of Virginia.[51] The district court recognized that allowing postpetition interest under section 506(b) of the Code when no consensual agreement for the postpetition interest exists violates the equitable policies of the Code.[52] The district court then inter-

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the debtor filed the bankruptcy petition. *Best*, 50 Bankr. at 386. In addition to the $57,838.26 in taxes, penalties and prepetition interest in the proof of claim, the government in *Best*, pursuant to § 506(b) of the Code, sought to collect approximately $10,000 in interest that accrued from the time the debtor filed the bankruptcy petition until the debtor ultimately paid the government. Best Repair Co. v. United States, 789 F.2d 1080, 1081 (4th Cir. 1985); *see* 11 U.S.C. §§ 6321-6322 (1982 & Supp III 1985)(government secures tax lien by filing notice of lien, without resort to judicial process); *see also supra* note 8 (creditor may file proofs of claim against estate of debtor).

45. *Best*, 50 Bankr. at 386.

46. *See* Best Repair Co. v. United States, 51 Bankr. 33, 34 (Bankr. E.D. Va. 1985); 11 U.S.C. § 506(b) (1982)(debtor filed motion to determine tax liability to United States in bankruptcy court). The debtor in *Best* argued that the language of § 506(b) required a debtor and creditor to agree specifically to interest on an outstanding debt. *Best*, 51 Bankr. at 34.

47. Best Repair Co. v. United States, 50 Bankr. 386, 386-87 (E.D. Va. 1985); *see supra* note 4 (discussing policy considerations against allowing postpetition interest on nonconsensual debts).

48. Best Repair Co. v. United States, 51 Bankr. 33, 34 (Bankr. F.D. Va. 1985); 11 U.S.C. § 506(b) (1982).

49. *Best*, 51 Bankr. at 34.

50. *Id.*; 11 U.S.C. § 506(b) (1982).

51. Best Repair Co. v. United States, 50 Bankr. 386, 386 (E.D. Va. 1985).

52. *Best*, 50 Bankr. at 386-87. The district court in *Best* reasoned that creditors should not benefit from the delay in the administration of a bankrupt estate which the allowance of postpetition interest could cause. *Id.*; *see* United States v. Harrington, 269 F.2d 719, 723 (4th Cir. 1959)(discussing equitable considerations in denying postpetition interest on nonconsensual claim); *supra* note 4 (allowing postpetition interest permits creditors to recover greater proportion of bankrupt estate).

preted the express language of section 506(b) as authorizing a creditor to collect postpetition interest only when a consensual agreement for postpetition interest exists between the debtor and the government.[53] Accordingly, the district court in *Best* found that because no consensual contract for postpetition interest existed between the debtor and the government, the government could not collect the postpetition interest on the tax claim.[54]

The government appealed the district court's disallowance of postpetition interest to the Fourth Circuit.[55] On appeal the Fourth Circuit considered the language of section 506(b) of the Code and determined that the plain meaning of section 506(b) clearly provides that a creditor may collect postpetition interest on a nonconsensual interest claim when the value of the creditor's security exceeds the amount of the creditor's claim.[56] In construing section 506(b) of the Code, the Fourth Circuit in *Best* realized that commas and the clause "and any reasonable fees, costs, or charges" ("charges clause") separate the clause "interest on such claim" ("interest clause") from the clause "provided for under such agreement" ("agreement clause").[57] The *Best* court, therefore, explained that the agreement clause does not modify the interest clause.[58] Consequently, the *Best* court determined that a creditor need not base the creditor's postpetition interest claim on a consensual agreement between the debtor and creditor.[59] The *Best* court noted that Congress, in drafting section 506(b), easily could have provided that postpetition interest requires a consensual agreement between the debtor and creditor.[60] Additionally, the Fourth Circuit agreed with the district court in *Best* that the legislative history of section 506(b) is inconclusive regarding whether creditors can collect postpetition interest on nonconsensual interest claims.[61] Consequently, the Fourth Circuit found that

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53. *Id.* at 386-87; 11 U.S.C. § 506(b) (1982); *see supra* text accompanying note 12 (quoting § 506(b) of Code). The district court in *Best* found that the legislative history of § 506(b) of the Code did not provide any insight into Congress' intended meaning of § 506(b) concerning postpetition interest. *Best*, 50 Bankr. at 388; *see* 1978 SENATE REPORT, *supra* note 13, at 68 (Senate Report on § 506(b) of Code makes no reference to interest); 1977 HOUSE REPORT, *supra* note 5, at 356-57 (House Report on § 506(b) makes no reference to interest). The district court in *Best* further found that a reasonable construction of the language in § 506(b) of the Code demonstrates that the phrase "provided for under the agreement" ("agreement phrase") modifies the phrase "interest on such claim" ("interest phrase") even though commas set off the interest phrase from the agreement phrase. *Best* 50 Bankr. at 387; 11 U.S.C. § 506(b) (1982). *But see infra* notes 69-77 and accompanying text (agreement phrase does not modify interest phrase).

54. *Best*, 50 Bankr. at 388.

55. Best Repair Co. v. United States, 789 F.2d 1080, 1081 (4th Cir. 1986).

56. *Id.* at 1081-82 (4th Cir. 1986); 11 U.S.C. § 506(b) (1982); *see supra* text accompanying note 12 (quoting pertinent language of § 506(b)).

57. *Best*, 789 F.2d at 1082.

58. *Id.*

59. *Id.*

60. *Id.* at n.2.

61. *See id.* at 1082 (noting that legislative history of § 506(b) of Code makes no reference to interest); *supra* note 53 (discussing legislative history of § 506(b) concerning postpetition interest).

because the value of the government's security in *Best* exceeded the value of the government's claim against the debtor to the extent of the amount of the postpetition interest claim, the government could not recover the full amount of the postpetition interest on the government's claim under section 506(b) of the Code.[62]

The Fourth Circuit correctly allowed the oversecured creditors in *Mack* and *Best* respectively to recover reasonable postpetition late charges under a consensual agreement[63] and postpetition interest on a nonconsensual interest claim.[64] Because of the paucity of case law concerning whether section 506(b) of the Code allows creditors to recover Postpetition Charges, courts necessarily should rely on traditional rules of statutory construction to interpret section 506(b).[65] One rule of statutory construction requires that when the language of a statute is unambiguous, and interpretation of the statutory language by proper construction rules does not produce unreasonable results, the language of the statute controls the meaning of the statute, especially in the absence of a clear legislative intent to the contrary ("Plain Language Rule").[66] When the language of a statute is ambiguous, however, the legislative history of the statute is necessary to interpret the statute.[67] Accordingly, applying the Plain Language Rule to section 506(b) of the Code mandates that the unambiguous language concerning Postpetition Charges governs the interpretation of section 506(b).[68]

Allowing the unambiguous language of section 506(b) to govern the interpretation of section 506(b) nonetheless requires the application of various doctrines of statutory construction.[69] The doctrine of reddendo singula singulis declares that a modifying phrase within a statute refers to the preceding phrase with which the modifying phrase logically connects.[70]

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62. *Best*, 789 F.2d at 1081-82. The parties in *Best* agreed that the value of government's security exceeded value of the government's claim. *Id.* *See supra* note 44 (discussing value of government's security and government's claim).

63. *See supra* notes 34-40 and accompanying text (discussing Fourth Circuit's holding in *Mack* that § 506(b) authorizes creditors to recover postpetition late charges).

64. *See supra* notes 55-62 and accompanying text (discussing Fourth Circuit's holding in *Best* that § 506(b) authorizes creditors to recover postpetition interest).

65. *See infra* notes 66-77 and accompanying text (discussing interpretation of § 506(b) of Code under traditional rules of statutory construction).

66. *See* United States v. Turkette, 452 U.S. 576, 580 (1981)(statutory language initially controls meaning of statute); *see also* 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.04 (4th ed. 1984)(when language of statute is clear and unambiguous, court should give effect to literal meaning of statutory language without examining other indicia of statutory intent).

67. *See* 2A N. SINGER, *supra* note 66, at § 46.01 (when language of statute is ambiguous, courts examine alternative sources to indicate intent, including legislative history of statute).

68. 11 U.S.C. § 506(b) (1982); *see infra* notes 70-77 and accompanying text (language of section 506(b) of Code is unambiguous); *supra* note 66 (unambiguous language of statute controls meaning of statute).

69. *See* 2A N. SINGER, *supra* note 66, at § 46.01 (courts should consult rules of statutory construction when interpreting statute).

70. *See* Mclung v. Kingsland, 14 U.S. (1 How.) 567, 572 (1843)(modifying phrase within

Similarly, the doctrine of prior antecedents requires that a modifying phrase relates to the immediately preceding phrase.[71] In addition, a modifying phrase generally does not refer to all antecedents in a statute unless a comma separates the modifying phrase from the immediately preceding antecedent ("modifying phrase rule").[72] Applying the doctrines of reddendo singula singulis and prior antecedents to interpret the meaning of section 506(b) demonstrates that the modifying phrase "provided for under the agreement" ("agreement phrase") refers to the phrase "any reasonable fees, costs or charges" ("charges phrase") because the charges phrase immediately precedes the agreement phrase and the phrases logically connect.[73] Applying the modifying phrase rule to interpret the meaning of section 506(b) demonstrates that the agreement phrase does not modify the antecedent phrase "interest on such claim" ("interest phrase") because no comma exists between the agreement phrase and the immediately preceding antecedent, the charges phrase.[74] Accordingly, the agreement phrase only refers to the charges phrase.[75] Rules of statutory construction, therefore, demonstrate that section 506(b) of the Code allows creditors to recover: (1) postpetition late charges when an agreement that provides for late charges exists between a debtor and creditor; and (2) postpetition interest even if no agreement for the postpetition interest exists between a debtor and creditor to the extent that the amount of the creditor's security exceeds the value of the debt.[76] Furthermore, construing section 506(b) of the Code to allow Postpetition Charges does not produce unreasonable results because allowing creditors to recover Postpetition Charges complies with Congress' goal of

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statute refers to logically connecting preceding phrase); 2A N. SINGER, *supra* note 66, at § 47.26 (discussing doctrine of reddendo singula singulis).

71. *See* Buscaglia v. Bowie, 139 F.2d 294, 298 (1st Cir. 1943)(modifying phrase modifies immediately preceding phrase under doctrine of prior antecedent); *see also* 2A N. SINGER, *supra* note 66, at § 47.33 (doctrine of prior antecedents provides that modifying phrase modifies immediately preceding phrase).

72. *See* Service Invest. Co. v. Dorst, 232 Wis. 574, 228 N.W. 169, 170 (1939)(no comma separating modifying phrase from immediately preceding phrase indicates modifying phrase modifies only immediately preceding phrase, not all preceding phrases); *see also* 2A N. SINGER, *supra* note 66, at § 47.33 (modifying phrase refers to all antecedent phrases only when comma separates modifying phrase from immediately preceding antecedent phrase).

73. *See* 11 U.S.C. § 506(b) (1982); *supra* text accompanying note 12 (quoting § 506 (b) of Code)(charges phrase is antecedent of agreement phrase and no comma separates charges phrase from agreement phrase); *supra* note 71 and accompanying text (discussing doctrine of prior antecedents); *supra* note 70 and accompanying text (discussing doctrine of reddendo singula singulis).

74. *See* 11 U.S.C. § 506(b) (1982)(no comma separates agreement phrase from charges phrase and comma separates charges phrase from interest phrase); *supra* text accompanying note 12 (quoting § 506(b) of Code); *supra* note 72 and accompanying text (discussing modifying phrase rule).

75. *See supra* notes 73-74 and accompanying text (agreement phrase modifies charges phrase and not interest phrase).

76. 11 U.S.C. § 506(b) (1982); *see supra* notes 69-75 and accompanying text (discussing interpretation of § 506(b) under rules of statutory construction).

protecting a creditor, but does not sacrifice the primary purpose of bankruptcy law, which is to rehabilitate a debtor's finances.[77]

Although the language of section 506(b) of the Code appears unambiguous and arguably produces results consistent with the policies of the Code, a court that ignores the plain language of section 506(b) could find that the legislative history of the House version concerning section 506(b) denies creditors the right to recover postpetition late charges.[78] The House version of section 506(b) expressly included a provision retaining pre-Code law concerning "reasonable fees, costs, and charges".[79] The Senate version of section 506(b), however, made no reference concerning the retention of pre-Code law.[80] In adopting the current version of section 506(b) of the Code, therefore, Congress demonstrated an intent to make a substantive change in pre-Code law, which did not allow creditors to recover postpetition late charges.[81] Consequently, the legislative history of section 506(b) demonstrates a clear legislative intent concerning postpetition late charges.[82] Even if a court is unable to discern a sufficiently clear legislative intent regarding postpetition late charges, the plain meaning of section 506(b)'s language should permit creditors to recover Postpetition Charges.[83]

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77. 11 U.S.C. § 506(b) (1982); *supra* note 5 (primary goal of bankruptcy is to rehabilitate debtor's finances and secondary goal of bankruptcy is to provide creditor total value of outstanding debt).

78. *See* 1977 HOUSE REPORT, *supra* note 5, at 356-57 (discussing § 506(b) of Code regarding Postpetition Charges). The house report concerning § 506(b) of the Code states that § 506(b) codified pre-Code law. *Id.*; *see also supra* notes 3-4 (late charges constituted penalties under 1898 Act and are not enforceable in courts of equity); *see infra* notes 78-83 (discussing legislative history regarding late charges).

79. *See* H.R. REP. No. 8200, 95th Cong., 1st Sess. 393 § 506(b) (1977), *reprinted in* 12 N. RESNICK & E. WYPYSKI, BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, doc. 41, at 387 (1979). The House version of § 506(b) of the Code expressly provided that "there shall be allowed to the holder of such claim *to the extent collectible under applicable law* . . . any reasonable fees, costs, or charges provided under the agreement under which such claim arose." *Id.* (emphasis added).

80. *See* S. REP. No. 2266, 95th Cong., 1st Sess. 394 (1977), *reprinted in* 14 N. RESNICK & I. WYPYSKI, *supra* note 79, doc. 46, at 86. The Senate version of § 506(b) provided that "there shall be allowed to the holder of such claim . . . any reasonable fees, costs, or charges provided under the agreement under which such claim arose." *Id.* The compromise version of 506(b) adopted the Senate language, with minor changes. 11 U.S.C. § 506(b) (1982); *see* Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941, 949-55 (1979) (Senate rejected House language of 506(b) and House agreed to change in House version of 506(b)). Accordingly, the Senate version of § 506(b) controls the meaning of § 506(b) as the full House of Congress enacted Senate version. *See* 2A N. SINGER, *supra* note 66, at § 48.04 (when conflict exists between what committee in House of Congress does at one point in time and what full House of Congress does later, actions of full House of Congress must govern); *see also* Unsecured Creditors' Comm. v. Heller, 768 F.2d 580, 583-85 (4th Cir. 1985)(Congress adopted Senate version of § 506(b)).

81. *See supra* note 80 (Congress rejected provision of § 506(b) of Code retaining pre-Code law).

82. *See supra* notes 79-81 and accompanying text (legislative history of § 506(b) of Code clearly provides that creditors may recover postpetition late charges).

83. *See supra* notes 65-77 and accompanying text (language of § 506(b) of Code is clear and unambiguous).

In addition to the guidance that traditional rules of statutory construction and legislative history provide in interpreting section 506(b) of the Code, several courts have considered the meaning of section 506(b).[84] In *In re LHD Realty Corp.*,[85] the United States Court of Appeals for the Seventh Circuit considered whether a creditor could recover postpetition late charges under section 506(b) of the Code.[86] In *LHD Realty*, a debtor assumed the indebtedness on a promissory note and mortgage securing the note.[87] The note provided that the creditor could recover late charges equal to four percent of the amount of the aggregate monthly installment that the debtor did not pay within ten days of the due date.[88] Eight years after assuming the promissory note and mortgage, the debtor filed for relief under Chapter 11 of the Code.[89] Subsequent to the debtor's petition for relief, the debtor failed to pay installments on the principal amount of the note and late charges for the delinquency of the installments.[90] In considering whether section 506(b) allows creditors to recover postpetition late charges, the district court in *LHD Realty* found that Congress did not intend that section 506(b) effect a substantive change in pre-Code law concerning postpetition late charges and that, therefore, creditors could not recover these charges.[91] On appeal, however, the Seventh Circuit recognized that the express language of section 506(b) authorizes oversecured creditors to collect reasonable postpetition late charges when a consensual agreement exists between the debtor and creditor for the late charges.[92] The *LHD Realty* court reversed the district court's holding because the debtor never appealed the decision

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84. *See infra* notes 85-114 and accompanying text (discussing judicial consideration of whether § 506(b) of Code allows Postpetition Charges).

85. 726 F.2d 327 (7th Cir. 1984).

86. *Id.*

87. *Id.* at 328. The creditor in *LHD Realty* was the assignee of a note valued at $775,000. *Id.* at 329. A mortgage on an office building secured the note. *Id.* The debtor assumed the mortgage, which provided that the mortgagor pay monthly installments on the note for 15 years. *Id.*

88. *In re* LHD Realty Corp., 20 Bankr. 722, 724 (Bankr. S.D. Ind. 1982). In *LHD Realty* the purpose of the late charges in the note was to cover the added expense of handling delinquent installments. *Id.*

89. *In re* LHD Realty Corp., 726 F.2d 327, 329-30 (7th Cir. 1984). After the debtor in *LHD Realty* filed for bankruptcy, the bankruptcy court granted the debtor's request to sell the secured property. *Id.* at 329. The creditor objected to the debtor's request and sought to lift the automatic stay and execute against the secured property in state court. *Id.* at 330. The bankruptcy court denied the creditor relief from the automatic stay and approved the sale of the property because the proposed sale price of the secured property exceeded the value of the outstanding debt that the property secured. *Id.*

90. *Id.*, 726 F.2d at 329. After filing for relief under Chapter 11, the debtor in *LHD Realty* made monthly mortgage payments to the creditor for nine months. *Id.* The payments were late each of the nine months. *Id.* The debtor failed to make any monthly mortgage payments after nine months. *Id.*

91. *In re* LHD Realty Corp., 20 Bankr. 722, 725 (Bankr. S.D. Ind. 1982).

92. *In re* LHD Realty Corp., 726 F.2d 327, 330 (7th Cir. 1984); 11 U.S.C. § 506(b) (1982). The Seventh Circuit in *LHD Realty* realized that the express language in § 506(b) of the Code changed pre-Code law by allowing late charges. *Id.*

of the bankruptcy court in *LHD Realty*, which allowed the creditor to recover postpetition late charges.[93] The *LHD Realty* court noted in dicta, nonetheless, that because the value of the secured creditor's interest in the debtor's property exceeded the amount of the debtor's outstanding obligation, a consensual agreement for late charges existed between the debtor and creditor, and the late charges were reasonable, the creditor could collect postpetition late charges under section 506(b).[94] In determining the reasonableness of the postpetition late charges, the *LHD Realty* court explained that state law determines the reasonableness of the charges when state law provides for late charges.[95]

In addition to the Seventh Circuit's finding regarding postpetition late charges, the United States Court of Appeals for the Sixth Circuit has considered whether section 506(b) of the Code allows postpetition interest when an oversecured creditor's claim for postpetition interest is nonconsensual.[96] In *Cardinal Savings and Loan Association v. Colegrove*,[97] a debtor and creditor executed a mortgage agreement on the debtor's home to secure the creditor's loan to the debtor.[98] The mortgage agreement did not provide for postpetition interest if the debtor defaulted on the note.[99] The debtor defaulted on the note and subsequently filed for bankruptcy under Chapter 13 of the Code.[100] The debtor proposed a payment plan under Chapter 13

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93. *LHD Realty*, 726 F.2d at 333. Although the debtor in *LHD Realty* never appealed the bankruptcy court's holding to allow the creditor to recover postpetition late charges, the district court in *LHD Realty* reversed the holding of the bankruptcy court and did not allow the creditor to recover postpetition late charges. *Id.*

94. *Id.* at 333; 11 U.S.C. § 506(b) (1982). After the *LHD Realty* court considered the debtor's appeal concerning prepayment premiums, it found in dicta that the express provisions of § 506(b) of the Code allow oversecured creditors to recover postpetition late charges when a consensual agreement providing for the late charges exists between a debtor and the creditor. *Id.*

95. *LHD Realty*, 726 F.2d at 333 n.8. In determining the reasonableness of late charges, the *LHD Realty* court noted that Indiana state law provides for late charges to reimburse creditors for the added expense of handling delinquent payments. *Id. See* IND. CODE ANN. § 24-4.5-3-203 (Burns 1974) (allowing late charges at a maximum rate of five percent of outstanding payments); *cf.* Mellon Bank v. Sholos, 11 Bankr. 782, 785-86 (Bankr. W.D. Pa. 1981) (when state law does not provide for reasonableness of late charges, bankruptcy judge determines reasonableness of late charge).

96. *See* Cardinal Sav. and Loan Assoc. v. Colegrove, 771 F.2d 119, 121 (6th Cir. 1985).

97. *Id.* at 121.

98. *Id.* at 120. In *Colegrove* the debtor's home which had a value of $55,000, secured the debtor's outstanding obligation of $2967.60 to the creditor. *Id.* at 121.

99. *Id.* at 120.

100. *Id.; see* 11 U.S.C. §§ 1301-1330 (1982 & Supp. III 1985). Chapter 13 relief attempts to provide for the financial rehabilitation of individual debtors with regular income. 11 U.S.C. §§ 1301-1330 (1982 & Supp. III 1985). Under Chapter 13 of the Code, debtors formulate a payment plan under which they apply a portion of future earnings to outstanding debts until the debtor either satisfies the debts or complies with the terms of the plan. *Id.* § 1307. The purpose of Chapter 13 is to allow a debtor to achieve financial rehabilitation while retaining the debtor's assets, as opposed to having to resort to Chapter 7 liquidation. *See* 1977 HOUSE REPORT, *supra* note 5, at 220 (discussing purpose of Chapter 13 of Code); 11 U.S.C. §§ 701-766 (1982 & Supp. III 1985)(requiring liquidation of debtor's assets to satisfy debts).

that required the debtor to pay all past due mortgage payments.[101] The payment plan, however, omitted interest on the past due mortgage payments from the time the debtor filed the bankruptcy petition until the effective date of the reorganization plan.[102] The creditor objected to the proposed plan and argued that section 506(b) of the Code authorized the creditor to recover postpetition interest.[103] The creditor further argued that, in the alternative, section 1325 of the Code allowed the creditor to recover interest on the outstanding debt.[104] The *Colegrove* court held that unsecured creditors can recover postpetition interest in a Chapter 13 proceeding under section 1325 of the Code.[105] The *Colegrove* court noted in dicta, however, that the language of section 506(b) of the Code provides that a debtor and creditor need not agree to the creditor's recovery of postpetition interest on the outstanding amount of the debt for the creditor to recover such interest.[106] The *Colegrove* court recognized that section 506(b) must at least protect the rights of secured creditors to the extent that section 1325 protects the rights of unsecured creditors.[107] Thus, although the *Colegrove* court held that a creditor can recover postpetition interest under section 1325, the *Colegrove* court recognized that section 506(b), like section 1325, allowed creditors to receive the full value of the creditor's claim, including postpetition interest.[108]

In addition to the Fourth Circuit in *Best* and the Sixth Circuit in *Colegrove*, lower courts have considered whether section 506(b) of the Code

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101. *Cardinal Fed. Sav. and Loan Assoc. v. Colegrove*, 771 F.2d 119, 121 (6th Cir. 1985); *see* 11 U.S.C. § 1307 (1982)(debtor proposes payment plan in Chapter 13 proceeding); 11 U.S.C. § 1322 (providing for contents of Chapter 13 plan).

102. *Colegrove*, 771 F.2d at 120. The creditor in *Colegrove* claimed $2967.60 in interest that accrued on the note from the time the debtor filed for bankruptcy until the effective date of the reorganization plan. *Id.* In holding that the creditor could not collect postpetition interest, the bankruptcy court in *Colegrove* reasoned that the creditor had no contractual or statutory right to the postpetition interest. *Id.* Relying on the bankruptcy court's reasoning that creditors had no contractual or statutory right to postpetition interest, the district court in *Colegrove* affirmed the bankruptcy court's disallowance of postpetition interest. *Id.*

103. *Id.* at 121; 11 U.S.C. § 506(b) (1982).

104. *Colegrove* 771 F.2d at 121; 11 U.S.C. § 1325 (1982). Under § 1325 of the Code, a court cannot approve a debtor's proposed repayment plan if: (1) a creditor objects to the plan and the value of the creditor's claim exceeds the value of the property that the debtor proposes to use to extinguish the debt under the plan; or (2) the debtor has projected disposable income that the debtor does not propose to apply to future payments under the plan. 11 U.S.C. § 1325(b)(1)(A)-(B); *see* 11 U.S.C. § 1325 (b)(2)(defining disposable income).

105. *Colegrove*, 771 F.2d at 122; 11 U.S.C. § 1325 (1982).

106. *Colegrove*, 771 F.2d at 122; 11 U.S.C. § 506(b) (1982).

107. *Id.* at 122; 11 U.S.C. § 506(b) (1982); 11 U.S.C. § 1325 (1982). The *Colegrove* court noted that allowing an unsecured creditor to collect postpetition interest under § 1325 of the Code and denying an oversecured creditor postpetition interest under § 506(b) of the Code would violate the equitable policy of the Code that provides for equitable treatment of creditors. *Colegrove*, 771 F.2d at 122; *see* 11 U.S.C. § 506(b) (1982)(allowing oversecured creditors to recover postpetition interest); 11 U.S.C. § 1325 (1982)(allowing unsecured creditors to recover postpetition interest); *supra* note 5 (policy of Code is equitable treatment of creditors).

108. *Colegrove*, 771 F.2d at 122 n.3; 11 U.S.C. § 1325 (1982); 11 U.S.C. § 506(b) (1982).

authorizes creditors to recover postpetition interest when a debtor and creditor do not agree to the interest.[109] For example, in a case analogous to *Best*, the United States Bankruptcy Court for the Eastern District of New York considered whether the Internal Revenue Service ("IRS") could collect postpetition interest on a tax lien.[110] In *In re Busman*,[111] the debtor owed the IRS $4050.97 in back taxes when the debtor filed for relief under Chapter 13 of the Code.[112] The IRS obtained a tax lien on the debtor's real property, and the value of the property that the lien secured exceeded the value of the IRS' claim.[113] Reasoning that section 506(b) of the Code disallows claims for unmatured interest only, and that the plain language of section 506(b) of the Code allows interest on claims to the extent that the creditor is oversecured, the bankruptcy court held that the creditor could collect the postpetition interest even though the debtor and creditor did not agree to the postpetition interest.[114]

In addition to rules of statutory construction and judicial holdings that allow a creditor to collect Postpetition Charges, policy considerations also demonstrate that section 506(b) of the Code should permit a creditor to recover Postpetition Charges.[115] Allowing a creditor to collect Postpetition Charges gives creditors the full value of an outstanding debt by compensating creditors for the loss of the use of the creditors' money.[116] In addition, allowing creditors to collect Postpetition Charges provides creditors with a means to pay collection costs without infringing on the principal amount of a debt or the interest earned on a debt.[117] Furthermore, allowing creditors

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109. *See* Hoffman v. Internal Revenue Serv., 28 Bankr. 503, 508 (Bankr. Md. 1983)(granting postpetition interest on several tax liens even though debtor and creditor did not agree to interest); *In re* Loveridge Mach. and Tool Co., 9 COLLIER BANKR. CAS. 2d (MB) 1329, 1332 (Bankr. Utah 1983)(allowing postpetition interest on nonconsensual, oversecured claim even though debtor and creditor did not agree to interest); *In re* Busman, 5 Bankr. 332, 337 (Bankr. E.E.N.Y. 1980)(allowing postpetition interest on oversecured tax lien). *But see In re* Stack Steel and Supply Co., 28 Bankr. 151, 154 (Bankr. W.D. Wash. 1983)(denying IRS postpetition interest on secured tax lien because debtor and creditor did not agree to interest).

110. *See In re* Busman, 5 Bankr. 332, 334 (Bankr. E.D. N.Y. 1982).

111. 5 Bankr. 332 (Bankr. E.D. N.Y. 1980).

112. *Id.*; 11 U.S.C. § 1301-1330 (1982); *see supra* note 100 (discussing Chapter 13).

113. *In re* Busman, 5 Bankr. 332, 334 (Bankr. E.D. N.Y. 1980). The value of the property securing the government's tax lien in *Busman*, $5000, was greater than the government's claim of $4050.97. *Id. See* 26 U.S.C. § 6321 (1982)(discussing process by which government obtains tax lien); *see supra* note 44 (discussing government tax lien).

114. *Busman*, 5 Bankr. at 335-37; 11 U.S.C. § 506(b) (1982). The *Busman* court reasoned that the unequivocal language of § 506(b) authorizes an oversecured creditors to recover postpetition interest even though a creditor's claim for interest is nonconsensual. *Id.* at 337.

115. *See infra* notes 116-18 and accompanying text (policy considerations support allowance of postpetition late charges and interest).

116. *See* 3 L. KING, *supra* note 5, § 506.06 at 506-49 (15th ed. 1985) (allowing postpetition interest gives creditor benefit of bargain). Disallowing postpetition interest causes a creditor to lose interest on the amount of the outstanding debt because of the time lag between the debtor's filing of the bankruptcy petition and the debtor's paying the debt. *Id.*

117. *See* Sanders v. Federal Nat'l Mort. Assoc., 373 F.Supp. 738, 741 (E.D. La. 1975)(refusing postpetition late charges causes creditor to use money from outstanding debt to pay for extra costs in handling delinquent accounts).

to recover postpetition charges provides debtors with greater incentive to pay debts.[118]

Although significant policy considerations support the allowance of Postpetition Charges, contrary arguments exist that support the disallowance of Postpetition Charges.[119] Disallowing Postpetition Charges may prevent priority creditors from collecting a greater percentage of the security's value at the expense of subordinate creditors.[120] In addition, disallowing Postpetition Charges precludes creditors from profiting through delay in the administration of a bankruptcy estate and decreases the complexity of administering the estate by eliminating the need to recompute the value of creditors' claims.[121] However, considering the policy considerations in light of the legislative history and judicial interpretations of section 506(b) of the Code demonstrates that section 506(b) authorizes creditors to recover Postpetition Charges.[122]

In addition to the policy considerations of allowing Postpetition Charges in debtor-creditor relationships, the recovery of such charges is consistent with Congress' goals of the Code.[123] The allowance of Postpetition Charges admittedly results in a transfer of money from debtors to secured priority lienholders and, therefore, arguably contradicts Congress' express goal of the Code to rehabilitate a debtor's financial condition.[124] The recovery of

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118. *See id.* The *Sanders* court determined that allowing creditors to recover late charges gives debtors incentive to pay debts on time because delays in payment cause debtors to forfeit more money). *Id.*

119. *See infra* notes 120-22 and accompanying text (discussing policy reasons against allowing creditors to recover postpetition late charges and postpetition interest).

120. *See* Wolohan Lumber Company v. Robbins, 21 Bankr. 747, 751 (Bankr. S.D. Ohio 1982)(allowing priority creditors to recover postpetition interest depletes funds which otherwise are available to subordinate creditors).

121. *See* Note, *Post-Petition Interest on Tax Claims in Bankruptcy Proceedings*, 36 TAX LAW 793, 793 (1983)(discussing policy reasons for disallowing Postpetition Charges). Allowing creditors to recover Postpetition Charges complicates administration of an estate because courts must continually recompute creditor claims. *Id.* Additionally, delay in the administration of an estate permits creditors to profit through the recovery of Postpetition Charges. *Id.*; *supra* note 4 (allowing creditors to recover Postpetition Charges complicates administration of estate and permits creditors to profit through delay in administration).

122. *See supra* notes 78-83 and accompanying text (discussing legislative history of § 506(b) of Code); *supra* notes 84-114 and accompanying text (discussing judicial interpretations of § 506(b)); *supra* notes 115-21 and accompanying text (discussing policy considerations of § 506(b)).

123. *See infra* notes 124-26 and accompanying text (discussing consistency of allowing Postpetition Charges with Congress' goals under Code); *supra* note 5 (discussing Congress' goals under Code).

124. *See* 11 U.S.C. § 522 (1982). Through the Code, Congress allows debtors to exclude property from the bankrupt estate. *Id.* Property that a debtor validly excludes from the estate is not available to the debtor's creditors for the satisfaction of outstanding creditor claims. *Id.* The purpose of allowing a debtor to exclude property from the bankrupt estate is to give the debtor the property necessary to gain a fresh start after bankruptcy. *See* 1977 HOUSE REPORT, supra note 5, at 125 (excluding property from reach of creditors facilitates rehabilitation of debtor's finances); *supra* note 5 (primary goal of Code is rehabilitation of debtors'

Postpetition Charges, however, significantly will advance another express goal of Congress, which is to allow creditors the full value of outstanding claims by permitting creditors to realize the benefit of the bargain between a debtor and the creditor.[125] Allowing Postpetition Charges, therefore, may encourage better borrowing practices as debtors must exercise greater restraint in obtaining credit because creditors can obtain a greater percentage of the bankrupt estate. Similarly, the shifting of money from subordinate creditors to secured, priority creditors facilitates better lending practices by encouraging creditors to secure adequate collateral before extending credit to a person who is a poor credit risk. Allowing creditors to recover Postpetition Charges gives creditors who exercise wise credit policies a greater opportunity to recover the full amount of outstanding debt, and penalizes only those creditors who use poor credit practices.[126]

Given the strong policy considerations and potential effect of deterring poor lending practices, the Fourth Circuit's holdings in *Mack* and *Best* that creditors may recover Postpetition Charges provide a well reasoned solution to the modern problems of debtor-creditor relationships.[127] Although complications may arise in administering a bankrupt estate, debtors will not emerge from bankruptcy with assets that equitably belong to creditors.[128] In addition, permitting creditors to recover Postpetition Charges is in accord with Congressional goals of the Code, which are to facilitate debtors' financial rehabilitation and provide equitable treatment to creditors.[129] Accordingly, other jurisdictions should follow the Fourth Circuit's holdings in *Mack* and *Best* to protect creditors and encourage the use of discretion on behalf of debtors regarding credit acquisition.

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financial condition); *see also* Vanston Bankholders Protective Comm. v. Greene, 329 U.S. 156, 166 (1946)(allowing Postpetition Charges transfers money from debtor's estate and junior creditors to senior creditors); Wolohan Lumber Co. v. Robbins, 21 Bankr. 747, 751 (Bankr. S.D. Ohio 1982)(allowing Postpetition Charges transfers money from junior creditors to senior creditors).

125. *See* 3 L. KING, *supra* note 5, § 506.05 at 506-49 (15th ed. 1985) (policy of § 506(b) is to provide benefit of bargain to creditors); *supra* note 5 (policy of Code is to provide equitable treatment to creditors).

126. *See supra* notes 123-26 and accompanying text (allowing Postpetition Charges is consistent with goals of bankruptcy); *supra* note 5 (discussing policy of Code).

127. Mack Fin. Corp. v. Ireson, 789 F.2d 1083, 1084 (4th Cir. 1986); Best Repair Co. v. United States, 789 F.2d 1080, 1082-83 (4th Cir. 1986); *see supra* notes 34-40 and accompanying text (discussing *Mack* court's holding permitting creditors to recover postpetition late charges); *supra* notes 55-62 and accompanying text (discussing *Best* court's holding permitting creditors to recover postpetition interest); *supra* notes 115-22 amd accompanying text (discussing policy considerations of § 506(b) of Code).

128. *See supra* note 116 and accompanying text (allowing Postpetition Charges permits creditors to recover value of investment); *supra* notes 119-122 and accompanying text (discussing complications in administering estate when creditors recover Postpetition Charges).

129. *See supra* notes 123-26 and accompanying text (allowing Postpetition Charges is consistent with policies of Code); *supra* note 5 (discussing policies of Code).

B. Robins v. Piccinin: *The Fourth Circuit's Response to Bankruptcy and Mass Tort*

Congress established Chapter 11 of the Bankruptcy Reform Act[1] (the "Code") to facilitate the reorganization of financially distressed business enterprises.[2] Chapter 11 effectuates congressional intent to facilitate reorganization by allowing a debtor to continue to operate as a business entity after the debtor files a petition in bankruptcy,[3] and by allowing a debtor to defer the payment of debts to creditors pursuant to a court-approved plan.[4] The feasibility of a Chapter 11 reorganization, however, relies heavily

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1. 11 U.S.C. §§ 1101-1174 (1982). Congress initiated bankruptcy reform in 1970 by creating the Commission on the Bankruptcy Laws of the United States (the "Commission") to analyze and recommend changes to the Bankruptcy Act of 1898. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (1970); *see* Bankruptcy Act of 1898, 30 Stat. 544 (repealed 1978). The Commission recognized that the function of the bankruptcy process is to provide debtors relief from debts and to effectuate a meaningful fresh start for debtors and, simultaneously, to protect the position of the bankrupt debtors' creditors in an open credit economy. REPORT OF THE COMM'N ON THE BANKRUPTCY LAW OF THE UNITED STATES, H.R. DOC. No. 137, 93d Cong., 1st Sess., pt. I, at 71 (1973). The Commission ultimately adopted the Bankruptcy Reform Act of 1978 (the "Code"). 11 U.S.C. §§ 101-151326 (1982 & Supp. V 1985), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

2. *See* H.R. Rep. No. 595, 95th Cong., 2d Sess. 6 [hereinafter 1978 HOUSE REPORT], *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 5968. The House Report on the Bankruptcy Reform Act of 1978 noted that individuals, as well as businesses, may petition for relief under Chapter 11 of the Code. *Id.* The House Report explained, however, that the procedures of Chapter 11 impose a sufficient burden to make the availability of Chapter 11 relief feasible generally in the business context only. *Id.; see also* S. REP. No. 989, 95th Cong., 2d Sess. 3 [hereinafter 1978 SENATE REPORT], *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5789, 5795.

3. 11 U.S.C. § 1108 (1982). Under the Code a debtor may, after filing for relief under Chapter 11, continue to operate the debtor's business as a debtor in possession, unless the court otherwise orders. 11 U.S.C. §§ 1107, 1108 (1982). The Code affords a debtor in possession the rights and powers of a Chapter 11 trustee. *Id.; see* 11 U.S.C. §§ 1104-1106 (1982) (discussing appointment and functions of Chapter 11 trustee); 1978 HOUSE REPORT, *supra* note 2, at 220-24 (providing general description of Chapter 11 reorganizations).

4. *See* 11 U.S.C. §§ 1121-1129 (1982) (discussing requirements of court-approved plan). The purpose of a Chapter 11 reorganization is to allow a debtor to attempt to restructure the finances of a business so that the business may continue to operate, to provide its employees with jobs, to pay its creditors and to produce a return for its stockholders. 1978 HOUSE REPORT, *supra* note 2, at 220. The premise of a business reorganization is that assets used for production in the industry for which the assets were designed are more valuable than the same assets sold for scrap if the debtor cannot reorganize. 1978 HOUSE REPORT, *supra* note 2, at 220. To facilitate the purpose of Chapter 11 of the Code, § 1121 of the Code provides that upon the filing of a petition for relief under Chapter 11, a debtor may file a plan of reorganization. 11 U.S.C. § 1121 (1982) (Chapter 11 debtor has exclusive right to file plan of reorganization for 120 days after filing for bankruptcy). The purpose of a plan of reorganization is to determine the amount creditors will be paid, in what form the business will continue and whether the stockholders will continue to retain any interest in the company. 1978 HOUSE REPORT, *supra* note 2, at 221; *see* 11 U.S.C. § 1123 (1982) (contents of plan of reorganization). After formulating a plan, the debtor submits the plan to all affected creditors and stockholders for consent. 1978 HOUSE REPORT, *supra* note 2, at 221; *see* 11 U.S.C. § 1126 (1982) (provisions for acceptance of plan of reorganization). If a certain percentage of affected creditors and

on section 362 of the Code, which, upon a debtor's filing of a petition in bankruptcy, automatically stays most creditor collection activities against the debtor and the debtor's property.[5] The automatic stay imposed by section 362 of the Code facilitates reorganization by preventing creditors from depleting the debtor's assets and thus frustrating the debtor's attempt to reorganize.[6] In addition, the automatic stay provision ensures the equitable treatment of creditors by preventing individual creditors from obtaining judgments against the debtor that would deplete the amount of assets available to satisfy other creditor's claims.[7]

Although section 362 of the Code stays most creditor actions to obtain a judgment against a Title 11 debtor, courts generally do not extend the application of the stay to co-defendants of the debtor.[8] However, when a judgment against a co-defendant of a debtor adversely would affect the debtor, courts may extend the application of the automatic stay to actions against the co-defendant.[9] In addition to the provisions of section 362 of the

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stockholders accept the plan, the court then holds a confirmation hearing. 11 U.S.C. § 1126 (1982) (providing criteria for acceptance of chapter 11 plan); 11 U.S.C. § 1128 (1982) (providing for confirmation hearing on acceptance of chapter 11 plan). Upon confirmation of a plan, the Code provides that the debtor generally is discharged from any debts that arose prior to the date of confirmation. 11 U.S.C. § 1141 (1982) (effect of confirmation).

5. *See* 11 U.S.C. § 362 (1982) (automatic stay provision of Code). The purpose of the automatic stay imposed by § 362 of the Code is to insulate the debtor from the pressure of creditors who attempt to enforce their claims against the debtor, and to enable the debtor to formulate a feasible payment plan. *See id.* (same); 2 L. KING, COLLIER ON BANKRUPTCY § 362.01, at 362-6 (15th ed. 1979) (§ 362 designed to stay actions against debtor); 1978 SENATE REPORT, *supra* note 2, at 54-55 (purpose of automatic stay is to provide debtor relief from creditors). Although the automatic stay provision protects a debtor, the automatic stay also protects unsecured creditors because the stay prevents a race to the courthouse among creditors in order to obtain a judgment against a debtor. 1978 HOUSE REPORT, *supra* note 2, at 174. Accordingly, the automatic stay facilitates a Chapter 11 reorganization that protects the debtor's assets and provides equal treatment among the debtor's creditors. *See id.*

6. *See* 11 U.S.C. § 362 (1982) (automatic stay provision of Code prevents creditors from depleting debtor's assets); *see also supra* note 5 and accompanying text (discussing debtor protection afforded by automatic stay).

7. *See* 11 U.S.C. § 362 (1982) (automatic stay provision of Code promotes equitable treatment of creditors); *see also supra* note 5 and accompanying text (discussing creditor protection afforded by automatic stay). The automatic stay provision of the Bankruptcy Code is not the only Code provision that serves to protect creditors. *See* 11 U.S.C. § 547 (1982) (equitable treatment of creditors underlies Code's preference procedure); 11 U.S.C. § 507 (1982) (equitable treatment of creditors underlies Code's priority procedure).

8. *See* 11 U.S.C. § 362 (1982) (automatic stay provision of Code is a debtor protection); 1978 SENATE REPORT, *supra* note 2, at 54 (automatic stay is fundamental debtor protection); *see also* Williford v. Armstrong World Indus., 715 F.2d 124, 126 (4th Cir. 1983) (refusing to extend automatic stay to co-defendants of a Title 11 debtor); Royal Truck & Trailer, Inc. v. Armadora Maritima Salvadore, 10 Bankr. 488, 490-91 (N.D. Ill. 1981) (automatic stay provision of Code is debtor protection and does not extend to co-defendants of Title 11 debtor).

9. *See, e.g.*, Seybolt v. Bio-Energy of Lincoln, Inc., 38 Bankr. 123, 127-28 (Bankr. D. Mass. 1984) (extending § 362(a)(1) to non-debtor guarantors of Chapter 11 debtor's loan); *In re* Metal Center, Inc., 31 Bankr. 458, 463 (Bankr. D. Conn. 1983) (denying extension of §

Code, which stay most creditor collection activities, section 502(c) of the Code also attempts to facilitate the efficient rehabilitation of a Title II debtor by imposing on the court overseeing the bankruptcy a duty to estimate contingent or unliquidated claims against the debtor.[10] Section 502(c) of the Code applies, for example, when a corporation that has filed for relief under Chapter 11 of the Code is involved in extensive personal injury and wrongful death litigation, and the amount of the tort claims against the corporation is uncertain.[11] Furthermore, a Title 11 debtor may be exposed not only to extensive litigation, but also to widespread litigation involving contingent or unliquidated claims.[12] Accordingly, when a Chapter 11 debtor faces extensive and widespread tort litigation involving co-defendants, the court overseeing the bankruptcy proceeding must determine whether to extend the automatic stay to co-defendants of the debtor and whether centralization of the tort claims in a single forum is necessary to estimate the tort claims to effectuate the congressional policy of fast and efficient reorganization.[13] In *A.H. Robins Co. v. Piccinin*,[14] the United States Court of Appeals for the Fourth Circuit considered whether a court may extend the automatic stay imposed by section

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362(a)(1) to co-defendants of debtor); *In re* Johns-Manville Corp., 26 Bankr. 405, 413 (Bankr. S.D.N.Y. 1983) (recognizing § 362(a)(l) could apply to co-defendants of Chapter 11 debtor), *aff'd*, 40 Bankr. 219 (S.D.N.Y. 1984). In *Seybolt v. Bio-Energy of Lincoln, Inc.*, the bankruptcy court considered whether §362(a)(1) of the Code stayed a creditors' action against guarantors of a chapter 11 debtors' obligation to repay a loan. *Seybolt*, 38 Bankr. at 124. In *Seybolt*, the president of Bio-Energy of Lincoln, Inc. (Bio-Energy), prior to the filing of Bio-Energy's petition in bankruptcy, signed a promissory note for a $100,000 loan made to the company. *Id.* Several individuals guaranteed the loan. *Id.* Subsequently, Bio-Energy filed a petition under Chapter 11 of the Code and Seybolt instituted an action against the guarantors of the loan. *Id.* The *Seybolt* court recognized that when a debtor and non-debtor were so bound by statute or contract that the non-debtor's liability is imputed to the debtor, then § 362(a)(1) of the Code operates to stay actions against the non-debtor. *Id.* at 127-28. Recognizing that the guarantor's liability for the $100,000 loan would be imputed to the debtor, Bio-Energy, the *Seybolt* court extended the stay of § 362(a)(1) to the non-debtor guarantor of the loan. *Id.* at 128; *see also infra* notes 78-83 and accompanying text (discussion of *Manville*).

10. *See* 11 U.S.C. § 502(c) (1982) (bankruptcy court estimates contingent or unliquidated claims for allowance purposes). Section 502(c) of the Code permits the bankruptcy court to estimate the value of any contingent or unliquidated claim when a determination of the actual value of the claim would unduly delay the administration of the bankruptcy case. 11 U.S.C. § 502(c) (1982); *see also* Edwards Co. v. Long Island Trust Co., 75 Misc. 2d 739, 742, 347 N.Y.S.2d 898, 902 (N.Y.Sup. Ct. 1973). In *Edwards Co. v. Long Island Trust Co.*, the court recognized that contingent claims include "all debts that, either as to their existence or as to their amount, depend upon some future event uncertain either as to its occurrence altogether or as to the time of the occurrence. *Id.* at 742, 347 N.Y.S.2d at 902 (citing Collier on Bankruptcy).

11. 11 U.S.C. § 502(c) (1982).

12. *See supra* note 10 and accompanying text (defining contingent or unliquidated claims).

13. 1978 HOUSE REPORT, *supra* note 2, at 5. Congress intended the 1978 Bankruptcy Amendments to provide a quicker, more efficient reorganization procedure, providing greater protection for debtors, creditors and the public interest. *Id.* Placing a value on extensive and widespread tort claims can impede Congress' goal of fast and efficient reorganization and, therefore, centralization of the tort claims may be necessary. *Id.*

14. 788 F.2d 994 (4th Cir. 1986).

362 of the Code to co-defendants of a Chapter 11 debtor and whether a court sitting in bankruptcy validly may fix the venue and centralize pending and possible future tort claims against the debtor.[15]

In *Robins*, the A.H. Robins Company (Robins), faced with approximately 5,000 pending personal injury and wrongful death claims arising from use of the Dalkon Shield,[16] filed a petition for relief under Chapter 11 of the Code.[17] Upon the filing of the Chapter 11 petition, section 362 of the Code automatically stayed the commencement or continuation of all suits against Robins.[18] A number of plaintiffs with pending tort actions naming Robins and at least one other defendant, however, attempted to sever the actions against Robins and proceed solely against the co-defendants.[19] Robins responded by petitioning the court to declare that Robins' products liability policy with Aetna Casualty and Surety Company (Aetna) constituted an asset of Robins' bankrupt estate, in which all Dalkon Shield plaintiffs and claimants had an interest and therefore was protected by the stay imposed by section 362(a)(3) of the Code.[20] In addition, Robins moved for an injunction to stay actions against the co-defendants.[21]

The district court, in a hearing on Robins' request for injunctive relief, found that allowing litigation to continue in the tort actions against Robins'

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15. *Id.* at 998-1016.

16. *See id.* at 996. In 1970, the A.H. Robins Company (Robins) acquired the patent and marketing rights to an intrauterine contraceptive device known as the Dalkon Shield (the "Shield"). *Id.* The Dalkon Shield itself is a plastic device that looks like a crab, "with five 'fins' of varying sizes protruding from either side to make expulsion from the uterus difficult." ENGELMAYER & WAGMAN, LORD'S JUSTICE 18 (1985). A nylon tailstring is attached to the device as a marker to determine if the Shield is in place. *Id.* The Dalkon Shield allegedly caused Pelvic Inflammatory Disease (PID). *Id.* at 11. PID refers to a variety of pelvic infections attacking the uterus, fallopian tubes or ovaries. *Id.* Robins manufactured and marketed the shield from 1971 until 1974, at which time the company discontinued the manufacture and sale of the Shield because of complaints and suits alleging injury from use of the device. *Robins*, 788 F.2d at 996. Robins did not recall the Shield until 1984. *Id.* By mid-1985, Robins and the company's insurer, Aetna Casualty and Surety Company (Aetna), had paid approximately $517 million for 25 trial judgments and 9,300 settlements. *Id.* at 996 n.4.

17. *In re* A.H. Robins Co., No. 85-01307-R (Bankr. E.D. Va. filed August 21, 1985); *supra* note 16 (discussing circumstances leading to Robins' bankruptcy).

18. *Robins*, 788 F.2d at 996; *see* 11 U.S.C. § 362 (1982) (automatic stay applies upon debtor's filing of bankruptcy petition under Code); *supra* note 5 and accompanying text (discussing automatic stay).

19. *Robins*, 788 F.2d at 996. More than half of the 5,000 pending tort claims named Robins as the sole defendant, with the remaining claims naming at least one defendant other than Robins. *Id.*

20. *Id.* at 996-97. The filing of a bankruptcy petition under the Bankruptcy Code creates an estate. 11 U.S.C. § 541(a)(1) (1982). Section 541(a)(1) of the Code defines property of the estate, in part, as "all legal or equitable interests of the debtor in property as of the commencement of the case." *Id.* § 541(a)(1). Section 362(a)(3) of the Code stays actions by creditor of bankruptcy debtors to obtain possession or exercise control over property of the debtor's estate as defined in § 541(a)(1). *Id.* § 362(a)(3). Accordingly, if the A.H. Robins Company's liability policy was property of Robins bankrupt estate, § 362(a)(3) of the Code would operate to stay any proceeding that potentially could deplete the proceeds of the policy. *See id.*

21. *Robins*, 788 F.2d at 997.

co-defendants threatened the property in the Robins' estate, impeded Robins' reorganization effort, contravened public interest, and rendered any plan of reorganization futile.[22] The district judge further found that the burden placed on the Robins' estate by continuation of the tort litigation outweighed the potential harm to the Dalkon Shield claimants that would result from the issuance of an injunction staying the litigation.[23] Therefore, relying on section 362(a)(1) of the Code, the district court enjoined further litigation in the eight tort actions against Robins' co-defendants.[24] In addition, the district court found that the proceeds of Robins' liability policy with Aetna constituted property of the Robins' estate.[25] Recognizing that the Robins' policy with Aetna constituted property of Robins' estate, the district court, pursuant to section 362(a)(3) of the Code, stayed damage actions against Robins or Robins' co-defendants that potentially could be satisfied from proceeds of the Aetna policy.[26] Three defendants, including Anna Piccinin, appealed the district court's decision to grant injunctive relief to the United States Court of Appeals for the Fourth Circuit.[27]

Three weeks after entry of the preliminary injunction staying further litigation against Robins' co-defendants, Robins moved for a determination in the district court of the trial venue of all Dalkon Shield suits.[28] After

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22. *Id.*

23. *Id.* The district court in *A.H. Robins Co. v. Piccinin* applied the preliminary injunction test set forth in *Blackwelder Furniture v. Seilig Manufacturing Company* to determine whether to grant Robins petition for injunctive relief. *Id.* at 1008; *see* Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 195 (4th Cir. 1977) (fourth circuit's preliminary injunction test). The *Blackwelder* court held that the propriety of issuing an injunction is determined by balancing the likelihood of irreparable harm to the plaintiff if an injunction is denied compared to the harm to the defendant if an injunction is issued. *Blackwelder*, 550 F.2d at 195. Following the *Blackwelder* test, the district court in *Robins* found that Robins would suffer irreparable harm from continuation of the actions against its co-defendants, the likelihood of Robins' successful reorganization was indisputable, and the public interest in an effective reorganization of Robins outweighed any hardship to the claimants. *Robins*, 788 F.2d at 1008. Accordingly, the district court granted the injunctive relief, staying all actions against Robins co-defendants. *Id.* The Fourth Circuit later examined the district court's test for determining the circumstances in which injunctive relief is appropriate and agreed with the district court's finding that absent injunctive relief, Robins faced irreparable harm through diminution of its insurance pool. *Id.* The Fourth Circuit also agreed with the district court that Robins had a high likelihood of a successful reorganization. *Id.* Moreover, the Fourth Circuit found, as had the district court, that the balance of hardships favored the issuance of an injunction, and that Robins' effective reorganization served the public interest. *Id.* Accordingly, the Fourth Circuit sustained the district court's decision to enjoin actions against Robins' co-defendants. *Id.*

24. *Robins*, 788 F.2d at 997; *see* 11 U.S.C. § 362(a)(1) (1982) (automatic stay provision).

25. *Robins*, 788 F.2d at 997; *see supra* note 20 (explaining significance of finding that liability policy constitutes property of debtor's estate).

26. *Robins*, 788 F.2d at 997; *see* 11 U.S.C. § 362(a)(3) (1982); *supra* note 20 and accompanying text (discussing application of § 362(a)(3) of the Code to stay actions against property of debtors' bankrupt estate).

27. *Robins*, 788 F.2d at 997.

28. *Id.* In addition to seeking a determination of trial venue, the A.H. Robins Company

hearing the motions, the district judge found that all tort actions arising from use of the Dalkon Shield were proceedings related to the Chapter 11 case and, therefore, concluded that the district court possessed jurisdiction over the proceedings.[29] Accordingly, the district court set the trial venue of the tort actions in the Richmond Division of the United States District Court for the Eastern District of Virginia.[30] The district court further ordered the transfer to the Richmond Division of actions "related to" the Robins Chapter 11 case pending in federal district court during the disposition of the Chapter 11 case.[31] Anna Piccinin appealed the district court's order to the United States Court of Appeals for the Fourth Circuit.[32]

On appeal, the Fourth Circuit first addressed the propriety of the district court's decision to enjoin or stay actions against the co-defendants of Robins.[33] The Fourth Circuit recognized that the automatic stay imposed by section 362(a)(1) of the Code generally stays actions against the debtor only.[34] The Fourth Circuit explained, however, that unusual circumstances may permit a bankruptcy court to stay proceedings against co-defendants of a Title 11 debtor pursuant to section 362(a)(l).[35] The *Robins* court suggested that section 362(a)(l) applies to a co-defendant of a Title 11 debtor when a judgment against a co-defendant effectively would operate as a judgment against the debtor.[36] The *Robins* court noted, for example, that when a co-defendant of a Title 11 debtor is entitled to absolute indemnity

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also moved for identification of Dalkon Shield tort cases "related to" Robins' Chapter 11 case and a transfer of the "related to" cases to the Eastern District of Virginia for trial. *Id.* The importance to Robins of determining which tort cases were "related to" the bankruptcy case is that the district court sitting in bankruptcy possesses jurisdiction over "related to" cases and, therefore, can transfer the venue of "related to" cases to the district court sitting in bankruptcy. *See infra* note 29 and accompanying text (explaining "related to" jurisdiction of district court sitting in bankruptcy).

29. *Robins*, 788 F.2d at 998; *see* 28 U.S.C. § 1334 (1982) (jurisdiction of bankruptcy courts). Section 1334(a) of title 28 of the United States Code, defining the jurisdiction of the district courts over bankruptcy proceedings, provides in part that the United States District Courts possess non-exclusive jurisdiction over civil proceedings "related to" cases under the Code. 28 U.S.C. § 1334 (1982) (jurisdiction of bankruptcy courts); *see* 1 L. KING, COLLIER ON BANKRUPTCY § 3.01, at 3-25 (15th ed. 1974) (defining proceedings related to cases under Title 11). One commentator has suggested that as a guideline, "related to" proceedings include suits between third parties that affect the administration of the Title 11 case. 1 L. KING, *supra*, § 3.01 at 3-25. In the *Robins* case, if the Dalkon Shield claims are "related to" Robins' Chapter 11 case, the district court sitting in bankruptcy would possess jurisdiction to transfer the actions from the district in which the claims were originally filed to the district where the bankruptcy is pending. *See* 28 U.S.C. § 1412 (1982) (permitting district court to change venue).

30. *Robins*, 788 F.2d at 998.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 999; *see supra* note 8 and accompanying text (courts generally extend protection of § 362(a)(1) to debtors only).

35. *Robins*, 788 F.2d at 999; *see supra* note 9 and accompanying text (courts in unusual circumstances may apply § 362(a)(1) of Code to non-debtors).

36. *Robins*, 788 F.2d at 999.

from the debtor for any judgment against the co-defendant, the debtor ultimately will pay any judgments against the co-defendant.[37] Accordingly, the *Robins* court found that extension of the automatic stay to a co-defendant entitled to absolute indemnity is necessary to effectuate the purpose and intent of section 362(a)(1) of the Code to protect the assets of the debtor's estate.[38] Conversely, the Fourth Circuit recognized that when a third-party defendant independently is liable, such as when a debtor and another party are joint tortfeasors, section 362(a)(1) should apply to the debtor only.[39]

In addition to recognizing section 362(a)(1) of the Code as valid authority to stay actions against co-defendants of a debtor, the Fourth Circuit also recognized that section 362(a)(3) of the Code operates to stay any action to obtain possession or exercise control over a Title 11 debtor's property.[40] The Fourth Circuit explained that the property of a Title 11 debtor's estate includes all legal or equitable interests in property that a debtor possesses upon commencement of a bankruptcy proceeding.[41] The *Robins* court then found that Robins' liability policy with Aetna constituted a valuable asset of the Robins bankrupt estate and properly fit within the statutory definition

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37. *Id.*

38. *Id.; see* 11 U.S.C. § 362(a)(1), 362(a)(3) (1982) (providing for stay of actions against debtor and property of debtors estate upon filing of bankruptcy petition); *see also supra* note 5 and accompanying text (purpose of § 362(a) of Code generally is to provide debtor fresh start free from creditor harassment).

39. *Robins*, 788 F.2d at 999. In *A.H. Robins Co. v. Piccinin*, the Fourth Circuit principally relied on two cases to support the position that courts do not extend § 362(a)(1) of the Bankruptcy Code to actions against co-defendants of a debtor when the co-defendant and the debtor are independently liable. *Id.* at 999-1000; *see* Seybolt v. Bio-Energy of Lincoln, 38 Bankr. 123, 128 (Bankr. D. Mass. 1984) (extending § 362(a)(1) to non-debtor guarantors of Chapter 11 debtor's loan); *In re* Metal Center, 31 Bankr. 458, 463 (Bankr. D. Conn. 1983) (denying extension of section 362(a)(1) to co-defendants of debtor); *supra* note 9 (discussion of *Seybolt*). In *In re Metal Center*, the court considered whether to extend the stay imposed by § 362(a)(1) of the Code to a co-defendant of a Chapter 11 debtor. *Metal Center*, 31 Bankr. at 462. In *Metal Center*, Plessey Precision Metals (Plessey) sold goods to the Metal Center on an open account with a third-party guaranteeing payment of all indebtedness that the Metal Center incurred. *Id.* at 459. Subsequently, the Metal Center filed a petition under Chapter 11 of the Code and Plessey instituted suit against the Metal Center and the third-party guarantor. *Id.* The *Metal Center* court recognized that § 362(a)(1) generally applies to debtors, but acknowledged that if a debtor and non-debtor are so bound by statute or contract that the liability of the non-debtor is imputed to the debtor, then § 362(a)(l) should apply to the non-debtor. *Id.* at 462. Finding, however, that Metal Center would not be bound by any judgments against the third-party guarantor, the *Metal Center* court refused to extend the stay of § 362(a)(1) of the Code to the third party guarantor. *Id.* at 403; *see In re* Johns-Manville Corp., 26 Bankr. 405, 413 (S.D.N.Y. 1983) (§ 362(a)(1) of Code applies only to debtor when debtor and non-debtor are joint tortfeasors).

40. *Robins*, 788 F.2d at 1001; *see* 11 U.S.C. § 362(a)(3) (1982) (automatic stay extends to debtor's property); *supra* note 20 and accompanying text (discussing § 362(a)(3) of Code).

41. *Robins*, 788 F.2d at 1001; *see supra* note 20 and accompanying text (property of debtor's estate includes all debtor's legal or equitable interests in property at commencement of bankruptcy case).

of property.[42] Accordingly, the *Robins* court held that because the Aetna policy constituted property of Robins' estate, section 362(a)(3) of the Code applied to stay all actions against Aetna or against any officers or employees of Robins entitled to indemnification under the Aetna policy.[43] In addition to recognizing the statutory power afforded courts in sections 362(a)(1) and 362(a)(3) of the Code to stay actions against co-defendants of a Title 11 debtor, the Fourth Circuit found that section 105 of the Code, in certain circumstances, empowers a bankruptcy court to enjoin actions against co-defendants.[44] Moreover, the Fourth Circuit found that bankruptcy courts possess inherent power as courts of equity to grant a stay applicable to co-defendants of a debtor.[45]

After sustaining the district court's decision to stay actions against Robins' co-defendants, the Fourth Circuit considered the validity of the district court's order fixing the trial venue for all Dalkon Shield cases in and providing for the transfer of the cases to the United States District Court for the Eastern District of Virginia.[46] The Fourth Circuit first recognized that section 157(b)(5) of title 28 of the United States Code grants to a district court the power to fix the trial venue for personal injury and wrongful death tort actions against a Title 11 debtor.[47] Although the

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42. *Robins*, 788 F.2d at 1001; *see In re* Davis, 730 F.2d 176, 184 (5th Cir. 1984) (insurance contracts constitute property of estate under § 541(a)(1) of Code); *supra* note 25 (discussing insurance policy as property of bankrupt estate).

43. *Robins*, 788 F.2d at 1001-02.

44. *Id.* at 1002; *see* 11 U.S.C. § 105 (1982) (district court sitting in bankruptcy possesses power to enjoin actions to carry out purposes of Title 11); The Fourth Circuit, relying on *In re Otero Mills,* recognized that the bankruptcy court should exercise the power afforded by § 105 only when failure to enjoin a suit against co-defendant of a debtor adversely would affect the debtor's estate or hinder the debtor's ability to formulate a Chapter 11 plan. *Robins*, 788 F.2d at 1003; *see also In re* Otero Mills, Inc., 25 Bankr. 1018, 1020 (N.M. 1982); *infra* notes 95-100 and accompanying text (complete discussion of *Otero Mills* decision).

45. *Robins*, 788 F.2d at 1003. In *A.H. Robins Co. v. Piccinin*, the Fourth Circuit recognized that § 1334 of title 28 of the United States Code confers upon the bankruptcy court inherent power to grant a stay under its general equity power and in the efficient management of the court's dockets. *Id;* 28 U.S.C. § 1334 (1982). In order to grant a stay under the court's inherent power, the Fourth Circuit noted that a bankruptcy court must weigh competing interests and justify the stay by clear and convincing circumstances. *Robins*, 788 F.2d at 1003.

46. *Robins*, 788 F.2d at 1009. Before turning to the merits of the district court's order, the Fourth Circuit disposed of Robins' contention that the district court's order fixing the venue in Richmond was not subject to appeal. *Id.* The Fourth Circuit acknowledged that § 1291 of title 28 of the United States Code limits an appellate court's jurisdiction to appeals from final decisions of the district courts. *Id.; see* 28 U.S.C. § 1291 (1982) (final decisions of district courts). The Fourth Circuit explained, however, that any dispute between a debtor and creditor is a distinct and separate proceeding from the overall bankruptcy case. *Robins*, 788 F.2d at 1009. The Fourth Circuit recognized, therefore, that an order settling a dispute between a debtor and a creditor such as a dispute over the venue for trial of the Dalkon Shield claims constitutes a final and appealable order. *Id.; see In re* Saco Local Dev. Corp., 711 F.2d 441 (lst Cir. 1983) (order settling dispute between bankrupt and creditors is appealable).

47. *Robins*, 788 F.2d at 1009-10; *see* 28 U.S.C. § 157(b)(5) (1982) (district court sitting

appellants argued that Congress intended that courts apply section 157(b)(5) to decentralize the trial of tort claims and to permit trials to proceed in the district in which the claim originally was filed, the Fourth Circuit found that section 157(b)(5) contemplates the centralization of tort claims in a single forum to facilitate debtor reorganization.[48] Recognizing that section 157(b)(5) empowers a district court to fix the trial venue for tort actions against a Title 11 debtor, the Fourth Circuit next considered the procedure for exercising the power.[49] The appellants argued that under section 1412 of title 28 of the United States Code, the authority to transfer a suit against a Title 11 debtor rests solely with the court in which the suit is pending.[50] The *Robins* court explained, however, that section 1412 provides a general rule, while section 157(b)(5) specifically addresses the power of a district court to fix venue in a tort claim against a Title 11 debtor.[51] The *Robins*

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in bankruptcy sets trial venue for tort claims against Title 11 debtor). Section 157(b)(5) of title 28 states:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

Id.

48. *Robins*, 788 F.2d at 1010. In *A.H. Robins Co. v. Piccinin*, the appellants relied on the remarks of Senator Dole, in commenting on the Senate Conference Report on the 1984 Bankruptcy Amendments, to support their belief that § 157(b)(5) contemplated decentralization of the trial of tort claims. *Id.; see* 130 CONG. REC. S. 8889 (daily ed. June 29, 1984) (remarks of Senator Dole) [hereinafter 1984 SENATE DEBATE] *reprinted in*, 1984 U.S. CODE CONG. & ADMIN. NEWS 586, 587. Senator Dole, in his remarks on the Conference Report, simply stated that personal injury cases will be handled by the district court "where the bankruptcy case has been filed, or if that court finds it appropriate, where the claim arose." SENATE DEBATE, *supra,* at 8890. The Fourth Circuit found nothing in Senator Dole's comments, however, to suggest that Congress favored decentralization of the trial of tort claims against a debtor. *Robins*, 788 F.2d at 1010. The Fourth Circuit, conversely, noted that Congress feared that decentralizing the trial of tort claims against a Title ll debtor might dissipate the assets of the debtor's estate by creating a multiplicity of forums for the separate adjudication of individual creditors' claims within the bankruptcy case. *Id.; see also* 130 CONG. REC. H7492 (daily ed. June 29, 1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 579. In *Robins*, the Fourth Circuit also rejected the appellant's reliance on *In re White Motor Credit* as support for the proposition that § 157(b)(5) of title 28 contemplates decentralization of the trial of tort claims against a Title 11 debtor. *Robins*, 788 F.2d at 1010; *see In re* White Motor Credit, 761 F.2d 270, 273-74 (6th Cir. 1985). The *White Motor* court found that judicial economy in a large products liability case sometimes may require the bankruptcy court to abstain, allowing the state court to handle the tort case. *White Motor*, 761 F.2d at 274. The Fourth Circuit found that although the *White Motor* court permitted decentralization of the trial of tort claims against a debtor, the *White Motor* opinion did not suggest that decentralization was mandated or preferred. *Robins*, 788 F.2d at 1010.

49. *Robins*, 788 F.2d at 1010-11; *see* 28 U.S.C. § 157(b)(5) (Supp. 1985) (procedures for personal injury bankruptcy cases).

50. *Robins*, 788 F.2d at 1011; *see* 28 U.S.C. § 1412 (Supp. 1985) (district court may transfer Title 11 case to another district in interest of justice and for convenience of parties).

51. *Robins*, 788 F.2d at 1011; *see* 28 U.S.C. § 1412 (Supp. 1985) (change of venue provision); 28 U.S.C. § 157(b)(5) (Supp. 1985) (procedures for personal injury bankruptcy cases); *supra* note 47 and accompanying text (section 157(b)(5) expressly governs jurisdiction of personal injury and wrongful death claims against Title 11 debtor).

court found, therefore, that section 157(b)(5) governed the pending tort claims against Robins and authorized the district court sitting in bankruptcy to transfer the venue of the claims to a single forum.[52]

After concluding that section 157(b)(5) authorizes a district court to centralize personal injury tort claims against a Title 11 debtor, the Fourth Circuit found that certain provisions of the Code necessitated centralization of the tort claims against Robins.[53] The *Robins* court explained that the Dalkon Shield claims represented contingent or unliquidated claims.[54] The *Robins* court recognized that section 502 of the Code generally requires a bankruptcy court to estimate contingent or unliquidated claims against a debtor for allowance purposes when failure to estimate the claims would delay the administration of the bankruptcy proceeding.[55] The Fourth Circuit noted that an exception to the duty imposed by section 502 expressly denies a bankruptcy court authority to estimate contingent or unliquidated tort claims for distribution purposes.[56] The Fourth Circuit acknowledged, however, that the *Robins* case involved an attempted reorganization, and not a liquidation proceeding that would require the distribution of a debtor's assets.[57] The Fourth Circuit found, therefore, that section 502(c) of the Code imposed a duty on the bankruptcy court to estimate the Dalkon Shield claims against Robins.[58] Moreover, the Fourth Circuit found that the bank-

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52. *Robins*, 788 F.2d at 1011; *see* 28 U.S.C. § 157(b)(5) (Supp. 1985) (procedures for personal injury bankruptcy cases).

53. *Robins*, 788 F.2d at 1011-14; *see* 28 U.S.C. § 157(b)(5) (Supp. 1985) (same).

54. *Robins*, 788 F.2d at 1011; *see supra* note 10 and accompanying text (defining contingent claims).

55. *Robins*, 788 F.2d at 1011; *see* 11 U.S.C. § 502(c) (1982). The estimation procedure requires a bankruptcy court to fix the value or dollar amount of those contingent or unliquidated claims against a Title 11 debtor that unduly would delay administration of the bankrupt estate. 11 U.S.C. § 502(c)(1) (1982); *see also* H.R. REP. No. 595, 95th Cong., 1st Sess. 354 (1978) (section 502(c) of Code requires that bankruptcy court convert claims against debtor to dollar amount), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6310.

56. *Robins*, 788 F.2d at 1012; *see* 28 U.S.C. § 157(b)(1) (Supp. 1985) (procedures for personal injury bankruptcy cases). Section 157(b)(1) of title 28 of the United States Code provides, in part, that bankruptcy judges may hear and determine all core proceedings arising under Title 11, or arising in a case under Title 11. 28 U.S.C. § 157(b)(1) (Supp. 1985). Section 157(b)(1) further classifies the estimation of claims against a Title 11 debtor for purposes of confirming a plan as a core proceeding that the bankruptcy judge may hear and determine. *Id.* Section 157(b)(2)(B) provides, however, that the estimation of contingent or unliquidated personal injury tort or wrongful death claims against a Title 11 debtor's estate for purposes of distribution is not a core proceeding. 28 U.S.C. § 157(b)(2)(B) (Supp. 1985). Because estimation for purposes of distribution is a non-core proceeding, bankruptcy judges may not enter a determination by order or judgment that affects the dollar amount to be distributed to tort plaintiffs for their claim. *See* Taggart, *The New Bankruptcy Court System*, 59 AM. BANKR. L.J. 231, 244 (1985) (discussing non-core proceedings).

57. *Robins*, 788 F.2d at 1012; *see* 11 U.S.C. §§ 701-766 (1982) (Chapter 7 of Code governs liquidation proceedings).

58. *Robins*, 788 F.2d at 1012; *see* 11 U.S.C. § 502(c) (1982) (estimation of contingent or unliquidated claims required); Taggart, *supra* note 56, at 251-52. One commentator suggests that Congress structured bankruptcy procedure to allow bankruptcy courts to estimate contin-

ruptcy court in *Robins* could estimate the numerous Dalkon Shield claims efficiently only if the claims were centralized in a single forum.[59]

Upon establishing the bankruptcy court's power to centralize for estimation purposes the tort claims against Robins, the Fourth Circuit considered whether the centralization and estimation proceedings should precede the individual trial.[60] The Fourth Circuit explained that allowing the trial of tort claims to precede the estimation of the claims against a Chapter 11 debtor would divert the debtor's energies from determining the feasibility of reorganization.[61] The *Robins* court further recognized that if the trials of the claims against Robins preceded estimation, the expense of litigation might deplete the assets of Robins' estate and deny the tort claimants reasonable compensation.[62] Conversely, the Fourth Circuit found that if the bankruptcy court fairly estimated the tort claims against Robins, and Robins developed a plan of reorganization based on the estimation, fair compensation of the tort claimants would be possible without the necessity of litigation.[63] In addition, the Fourth Circuit acknowledged that the estimation procedure provides a more efficient process than individual trials on the numerous tort claims because the estimation procedure requires the bankruptcy court to examine only enough claims to make an intelligent estimation, rather than an examination of all claims.[64] Accordingly, the Fourth Circuit approved the district court's decision to centralize the tort claims against Robins prior to the trials of the claims.[65]

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gent or unliquidated tort claims for purposes of confirming a plan, and not for distribution purposes, because Congress feared that without a dollar value placed on the contingent or unliquidated claims, confirmation of a Chapter 11 plan would be delayed. Taggart, *supra* note 56 at 251-52.

59. *Robins*, 788 F.2d at 1013-14. The Fourth Circuit explained that centralization of the claims in a single forum would permit all claimants' interests to be heard and harmonized. *Id.* at 1014.

60. *Id.* at 1012.

61. *Id.*

62. *Id.* In *Robins v. Piccinin*, the Fourth Circuit noted that over 5,000 tort claims remained pending against Robins at the time Robins filed its petition in bankruptcy. *Id.* at 1013. The Fourth Circuit relied on *In re Johns-Manville* in determining that with so many claims filed against Robins, estimation of the claims should precede any trial of the claims. *Id.*; *see also In re* Johns-Manville Corp., 45 Bankr. 823, 825 (S.D.N.Y. 1984). The *Manville* court considered whether § 157(b)(5) mandated the immediate trial of a plaintiff's tort claims against a Chapter 11 debtor prior to the estimation process. *Manville*, 45 Bankr. at 825. In *Manville*, subsequent to Manville's filing under Chapter 11 of the Bankruptcy Code, Roberts, a tort plaintiff, petitioned the court to allow an immediate trial against Manville on Roberts' tort claim. *Id.* The *Manville* court reasoned that ordering the trial of the claims prior to determining whether trial of all the tort claims against Manville would totally deplete the debtor's estate and prior to developing a plan of reorganization was improper. *Id.* at 827. Accordingly, the *Manville* court held that § 157(b)(5) does not mandate immediate trial of tort claims against a Chapter 11 debtor.

63. *Robins*, 788 F.2d at 1013. The Fourth Circuit recognized that estimation was a possible step in permitting Robins to arrive at an acceptable settlement with the tort plaintiffs without resorting to litigation. *Id.*

64. *Id.* at 1013.

65. *Id.*

Recognizing the authority of the district court sitting in bankruptcy to centralize in a single forum tort claims against a Chapter 11 debtor, the Fourth Circuit next examined the procedures for effecting a change of venue that would satisfy the requirements of due process.[66] The Fourth Circuit agreed with the appellants that a right of action in tort constitutes property, which under due process cannot be affected adversely by an involuntary change of venue without notice and an opportunity to object to the venue change.[67] The *Robins* court explained that a tort plaintiff has a right to a jury trial in a district court, and the forum for that trial is also an important right entitled to due process protection.[68] The *Robins* court found, however, that due process is not an inflexible concept, and the requirement of notice and an opportunity for a hearing does not always apply prior to an initial deprivation of property.[69] More specifically the Fourth Circuit explained that when only property rights are involved, due process does not require that prior to an initial deprivation of that property right, notice and an opportunity to be heard be afforded, provided that the opportunity for an adversarial proceeding is provided before the deprivation becomes final.[70] The *Robins* court concluded, therefore, that due process requires only that notice and an opportunity for a hearing be provided to the individual tort plaintiffs before a transfer of venue to the district where the bankruptcy is pending becomes final for trial purposes.[71] Accordingly, the Fourth Circuit

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66. *Id.* at 1014; *see* U.S. CONST. amend. V (due process clause).

67. *Robins*, 788 F.2d at 1014; *see* Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (right of action in tort is subject to due process).

68. *Robins*, 788 F.2d at 1014; *see* 28 U.S.C. § 157(b)(5) (1982) (tort plaintiff has right to jury trial in district court). Despite a bankruptcy court's duty to estimate tort claims in a Chapter 11 reorganization, the Fourth Circuit noted that, pursuant to § 157(b)(5) of title 28 of the United States Code, a tort plaintiff is entitled upon request to a jury trial in a district court. *Robins*, 788 F.2d at 1012; *see also* 28 U.S.C. § 157(b)(5) (Supp. 1985) (procedure for personal injury bankruptcy cases); *supra* note 47 and accompanying text (tort plaintiff entitled upon request to trial).

69. *Robins*, 788 F.2d at 1014; *see* Parratt v. Taylor, 451 U.S. 527, 540 (1981) (procedure giving remedy to plaintiff after deprivation of property sufficient to meet due process requirements); McClelland v. Massinga, 786 F.2d 1205, 1211 (4th Cir. 1986) (due process not mechanical instrument but rather delicate process of adjustment)

70. *Robins*, 788 F.2d at 1014.

71. *Id.* In concluding that individual tort plaintiffs are entitled to notice and an opportunity to object prior to a final transfer of venue, the Fourth Circuit in *Robins v. Piccinin* relied not only on due process analysis, but also on the Bankruptcy Rules. *Id.* The Fourth Circuit explained that Robins' motion to change venue was a "contested matter" that, pursuant to Bankruptcy Rule 9014, required the giving of reasonable notice and an opportunity for a hearing to the tort claimants against whom the relief was sought. *Id.; see* FED. R. BANKR. P. 9014 (rule on contested matters). Bankruptcy Rule 9014 states that in contested matters, a party requesting relief must file a motion, giving the party against whom relief is sought notice of the contested matter and an opportunity for a hearing. FED. R. BANKR. P. 9014; *see* FED. R. BANKR. P. 9014 Advisory Committee Note (discussing contested matters). The Advisory Committee Note to Rule 9014 further explains that when an actual dispute occurs regarding the bankruptcy case, other than an adversary proceeding, the litigation to resolve the dispute before the bankruptcy court constitutes a "contested matter." FED. R. BANKR. P. 9014

held that due process did not require Robins to afford the individual tort plaintiff notice and an opportunity to object and be heard prior to the conditional transfer of venue of the tort claims for estimation purposes.[72]

The United States Court of Appeals for the Fourth Circuit properly extended the automatic stay to co-defendants of Robins under any of the four grounds on which the Fourth Circuit relied.[73] The Fourth Circuit first found that section 362(a)(1) of the Code provided statutory authority to extend the stay to the co-defendants of Robins.[74] The automatic stay that section 362(a)(l) imposes is designed to protect a debtor against most creditor collection activities upon the filing of a bankruptcy petition.[75] Extension of the stay to a co-defendant of a Title ll debtor pursuant to section 362(a)(1) fulfills the express purpose of the stay when the co-defendant is related so closely to the debtor that a judgment against the co-defendant, in effect, would act as a judgment against the debtor.[76] More specifically, when a debtor is obligated to indemnify a co-defendant, as in *Robins*, the debtor ultimately will pay for any trial judgments against the co-defendant.[77]

Advisory Committee Note. The *Robins* court noted that although the debtor gave notice to the Dalkon Shield Claimants Committee (the "Committee"), notice to the Committee did not constitute service on the individual tort plaintiffs as required by Bankruptcy Rule 9014 prior to a final transfer of venue, but possibly satisfied the due process requirements for a conditional transfer of venue to estimate the tort claims. *Robins*, 788 F.2d at 1015. Additionally, the Fourth Circuit recognized that the individual claimants, in addition to being entitled to receive notice, deserved an opportunity to object prior to the final venue change. *Id.* The Fourth Circuit explained that when a tort claimant objects to the final transfer of venue, the district court in which the bankruptcy case is pending must balance the advantages and disadvantages of transferring the claimants' case to the district court in which the bankruptcy case is pending. *Id.* at 1016. The Fourth Circuit noted several factors for the district court to consider in weighing the advantages and disadvantages of transferring the Dalkon Shield claims to Richmond. *Id.* The Fourth Circuit noted that some cases might be prepared and ready for state trial, some might require substantial numbers of local witnesses, and some claimants might be receiving critical medical, physical or psychological care in a local area. *Id.* Additionally, the Fourth Circuit recognized that issues of state law might affect substantially the results in individual cases. *Id.*

72. *Robins*, 788 F.2d at 1016.

73. *See supra* notes 33-45 and accompanying text (discussing Fourth Circuit's extension of automatic stay in Robins).

74. *Robins*, 788 F.2d at 999; *see supra* notes 33-39 and accompanying text (discussing Fourth Circuit's extension of § 362(a)(l) to Robins' co-defendants); *see also* 11 U.S.C. § 362(a)(l) (1982) (automatic stay).

75. U.S.C. § 362(a)(l) (1982); *supra* notes 5-7 and accompanying text (discussing attributes of automatic stay).

76. *See* 11 U.S.C. § 362(a)(l) (1982) (automatic stay); *supra* note 5 and accompanying text (purposes of automatic stay include protection of debtor against creditor collection activities).

77. *See Robins*, 788 F.2d at 1007. In *Robins v. Piccinin*, all co-defendants were entitled to indemnification from Robins. *Id.* Dr. Clark and the two Robins were entitled to indemnification from Robins under Robins' corporate by-laws and the statutes of Virginia, which is the state of Robins' incorporation. *Id.; see* VA. CODE ANN. § 13.1-3 (1984) (corporation in Virginia empowered to provide indemnity for officers or directors). Another co-defendant of Robins, Dr. Davis, was the beneficiary of an express contract of indemnification with Robins.

Accordingly, when a co-defendant is entitled to indemnification from a Title ll debtor, courts properly should extend the automatic stay to suits against the co-defendant to protect the debtor from the wrath of creditor claims through indemnification.[78]

Although section 362(a)(1) of the Code provides valid authority to stay actions against a debtor's co-defendants, the Fourth Circuit correctly held that section 362(a)(3) of the Code also authorized the district court to extend the stay to the co-defendants of Robins.[79] Section 362(a)(3) stays actions by creditors of a bankrupt debtor to obtain possession of or to exercise control over property of the debtor's estate.[80] Section 54l(a)(l) of the Code, with limited exceptions, defines property of a Chapter 11 debtor's estate to include all legal or equitable interests in property that a debtor possesses at

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Robins, 788 F.2d at 1007. Yet another co-defendant of Robins, Aetna, was not entitled to indemnity from Robins, but was Robins' invader against judgments in favor of indemnitees. *Id.* at 1007-08.

78. *See* ll U.S.C. § 362 (1982) (automatic stay provision of Code). In addition to promoting the purpose of the automatic stay, the Fourth Circuit's extension of the automatic stay to non-debtor co-defendants is consistent with other judicial interpretations that section 362(a)(l) can apply to nondebtors. *See In re* Johns-Manville Corp., 26 Bankr. 405 (Bankr. S.D.N.Y. 1983), *aff'd*, 40 Bankr. 219 (Bankr. S.D.N.Y. 1984); Royal Truck & Trailer v. Armadora Maritima Salvadore, 10 Bankr. 488, 491 (N.D. Ill. 1981). In *Royal Truck & Trailer v. Armadora Maritima Salvadore*, the court considered whether to extend the stay imposed by section 362(a)(l) of the Code to co-defendants of a Chapter 11 debtor. *Royal Truck*, 10 Bankr. at 488. In *Royal Truck*, the plaintiff, Royal Truck, leased fifty refrigerator trailers to Armadora Maritima Salvadore (Armasal) with Viterwyk Corporation (Viterwyk) acting as guarantor of Armasals obligation. *Id.* Subsequently, Armasal stopped rental payments on the trailers and ultimately filed a petition under Chapter 11 of the Code. *Id.* Royal Truck instituted an action against Viterwyk as guarantor, and Viterwyk sought protection under the automatic stay of § 362(a)(l) of the Code. *Id.* The *Royal Truck* court characterized § 362(a)(l) as a fundamental debtor protection and refused to extend the stay to Viterwyk. *Id.* The *Royal Truck* court, however, expressly recognized that in certain circumstances section 362(a)(1) could apply to non-debtors. *Id.* at 491. Accordingly, the *Royal Truck* decision left the door open for situations such as the *Robins* case. *Id.* Additionally, after the *Royal Truck* decision, the court in *In re Johns-Manville* considered whether to extend the stay imposed by section 362(a)(l) of the Code to co-defendants of a Chapter 11 debtor. *Manville*, 26 Bankr. at 405. The *Manville* court held that section 362(a)(1) of the Code applies to co-defendants of a Title 11 debtor when the debtor and defendants are "inextricably interwoven." *Id.* at 413. Some ambiguity exists as to whether the *Manville* court intended that the inextricable intertwining be in the nature of common questions of law and fact between the debtor and co-defendant, or whether the term referred to the sharing of liability between the debtor and co-defendant. *Id.* If "inextricable intertwining" did refer to liability, then in the *Robins* case, the fact that Robins and its co-defendants are not joint-tortfeasors with independent liability but rather have indemnification relationships suggests that Robins and its co-defendants are "inextricably intertwined." *See Robins*, 788 F.2d at 1007 (discussing relationship between Robins and co-defendants). Accordingly, under the *Manville* reasoning, section 362(a)(l) of the Code would operate to stay actions against Robins' co-defendants. *Manville*, 26 Bankr. at 405.

79. *See Robins*, 788 F.2d at 1001 (finding § 362(a)(3) allowed extension of stay to co-defendants); 11 U.S.C. § 362(a)(l) (1982); 11 U.S.C. § 362(a)(3) (1982); *see also supra* note 20 and accompanying text (discussing § 362(a)(3) of Bankruptcy Code).

80. *See* ll U.S.C. § 362(a)(3) (1982) (providing stay against creditor actions to obtain possession or exercise control over property of debtor's estate); *see also* 2 L. KING, *supra* note 5, at 362-34 (same); 1978 HOUSE REPORT, *supra* note 2, at 341 (same).

the time of the debtor's commencement of a Chapter 11 case.[81] The federal courts agree that insurance policies of a debtor constitute property of the estate under section 541(a)(1) and, therefore, the courts have found that section 362(a)(3) operates to stay any action that could deplete the proceeds of a debtor's insurance policy.[82] For example, in *In re Johns-Manville Corp.*,[83] the bankruptcy court considered whether section 362(a)(3) of the Code stayed actions against a Chapter 11 debtor's insurance carriers.[84] In *Manville*, the court recognized that the expansive scope of the definition of property in section 541 encompasses the insurance proceeds of a Title 11 debtor.[85] The *Manville* court, therefore, held that section 362(a)(3) properly stayed actions against a Chapter 11 debtor's insurance carriers.[86] Applying the principle of *Manville* to the *Robins* case suggests that actions against Robins' co-defendant insurance company, Aetna, and actions depleting Robins' insurance policy properly were stayed.[87] Robins' liability policy with Aetna is certainly a valuable asset of the Robins estate because the proceeds of the policy potentially can compensate the Dalkon Shield claimants.[88] Allowing the continuation or commencement of actions against Aetna or actions against Robins co-defendants entitled to indemnification under the policy, would diminish a source of funds to Robins for the payment of the Dalkon Shield claimants.[89] Accordingly, extension of the stay to Robins co-defendants pursuant to section 362(a)(3) of the Code is proper not only under the *Manville* reasoning, but also in light of the policy behind the automatic stay of protecting the assets of the debtor's estate.[90]

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81. 11 U.S.C. § 541(a)(l) (1982); *see supra* note 20 and accompanying text (§ 541 creates an estate upon filing of petition and defines the estate).

82. *See* ll U.S.C. § 541(a)(l) (1982) (§ 541 creates an estate upon filing of petition); 11 U.S.C. § 362(a)(3) (1982) (stays actions against debtors estate); *see also In re* Pearlwick Corp., 15 Bankr. 143, 148 (Bankr. S.D.N.Y. 1981) (life insurance policy naming Chapter 11 debtor as beneficiary constituted property of debtor's estate), *aff'd*, 26 Bankr. 604 (S.D.N.Y. 1982), *aff'd*, 697 F.2d 295 (2d Cir. 1982); *In re* Moskowitz, 13 Bankr. 357, 358-59 (Bankr. S.D.N.Y. 1981) (debtor's medical insurance policy constituted property of debtor's estate); *In re* Norman Indus., Inc., 1 Bankr. 162, 167 (Bankr. W.D. La. 1979) (debtor's insurance policy constituted property of debtor's estate).

83. 40 Bankr. 219, 229 (S.D.N.Y. 1984).

84. *Id.* at 229. In *In re Johns-Manville Corp.*, GAF Corporation (GAF), a co-defendant of Manville, appealed the bankruptcy court's decision to stay third-party actions against Manville's insurance carriers. *Id.* GAF argued that § 362 of the Bankruptcy Code operates to stay proceedings against a debtor and the debtor's property, but does not cover claims against the debtor's insurers. *Id.* at 230. The *Manville* court recognized that GAF, in essence, argued that a debtor's insurance policy is not property of the debtor's estate under § 541 of the Code and therefore, is not subject to the stay that § 362(a)(3) of the Code imposes. *Id.*

85. *Id.; see* 11 U.S.C. § 541 (1982) (property of debtor's estate).

86. *Manville*, 40 Bankr. at 229; *see* 11 U.S.C. § 362(a)(3) (1982) (automatic stay protecting property of debtor's estate).

87. *See Robins*, 788 F.2d at 1001 (describing actions depleting Robin's insurance policy); *supra* notes 83-86 and accompanying text (discussing *Manville* decision).

88. *See Robins*, 788 F.2d at 1008 (explaining Robin's insurance policy with Aetna).

89. *Id.*

90. 11 U.S.C. § 362(a)(3) (1982); *supra* note 5 and accompanying text (policy of automatic stay is to protect debtor's assets).

In addition to the Fourth Circuit's determination in *Robins* that sections 362(a)(l) and 362(a)(3) of the Code support extension of the stay to co-defendants of a Chapter 11 debtor, the Fourth Circuit correctly recognized that section 105 of the Code, in proper circumstances, authorizes extension of the stay to co-defendants.[91] Section 105 of the Code, in part, empowers a district court sitting in bankruptcy to enjoin a proceeding, such as a tort action against a co-defendant of a debtor, if the bankruptcy court has jurisdiction over the proceeding.[92] A bankruptcy court possesses sufficient jurisdiction to enjoin a proceeding if the proceeding is "related to" the Chapter 11 case.[93] A proceeding is "related to" the bankruptcy case when failure to enjoin pursuant to section 105 of the Code would adversely affect the bankruptcy estate and would detrimentally influence the debtor through the co-defendant.[94] For example, in *In re Otero Mills, Inc.*,[95] the district court considered whether a bankruptcy court, pursuant to section 105 of the Code, properly may enjoin a creditor's suit against the officer of a debtor corporation.[96] In *Otero Mills*, the debtor corporation, Otero Mills, Inc. (Otero), had executed two promissory notes, each of which the corporation's president had guaranteed, in favor of Security Bank & Trust (Security).[97] Subsequently, Otero filed a petition under Chapter 11 of the Code and Security Bank instituted suit against Otero's president as guarantor of the notes on which Otero failed to make installment payments.[98] The bankruptcy court enjoined Security Bank's suit at the request of Otero's president.[99] The *Otero Mills* court explained that because Otero's plan of reorganization required contribution of assets from Otero's president to the

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91. *See Robins*, 788 F.2d at 1002 (fourth circuit applied § 105 to extend stay to Robin's co-defendants); 11 U.S.C. § 362(a)(l) (1982); 362(a)(3) (1982); 11 U.S.C. § 105 (1982).

92. *See* 11 U.S.C. § 105 (1982) (giving bankruptcy court equitable powers); *see also* 28 U.S.C. § 1334 (1982) (defining jurisdiction of district courts over bankruptcy cases). Section 105(a) of the Code empowers a district court sitting in bankruptcy to enjoin proceedings against a debtor or non-debtor necessary to carry out the provisions of Title 11. 11 U.S.C. § 105(a) (1982). The proceeding that the district court sitting in bankruptcy seeks to enjoin, however, must first come within the jurisdiction of the court pursuant to § 1334 of title 28 of the United States Code. *See* 28 U.S.C. § 1334 (1982) (jurisdiction of district court over bankruptcy cases and proceedings). Section 1334, in part, confers jurisdiction to the district courts sitting in bankruptcy over proceedings "related to" a case under the Code. 28 U.S.C. § 1334 (1982). *See supra* note 29 and accompanying text (discussing meaning of "related to"). Accordingly, when a tort claimant files suit against a co-defendant of a Title 11 debtor, as in *Robins*, the court sitting in bankruptcy first must determine that the suit is "related to" the bankruptcy case before the court may enjoin the tort action pursuant to § 105 of the Code. *See* 11 U.S.C. § 105 (1982) (giving bankruptcy courts equitable powers); *see also* Taggart, *supra* note 56, at 239 (discussing of § 1334 of title 28).

93. *See supra* note 29 and accompanying text (discussing meaning of "related to").

94. *See infra* notes 95-100 and accompanying text (discussing *Otero Mills* decision which defined "related to").

95. 25 Bankr. 1018 (Bankr. D.N.M. 1982).

96. *Id.* at 1019.

97. *Id.*

98. *Id.*

99. *Id.*

debtor, the failure to enjoin would adversely affect the bankruptcy estate and, therefore, the bankruptcy court had jurisdiction under Section 105 of the Code to enjoin the Security Bank's suit against the president.[100]

Applying the *Otero* test to *Robins* illustrates that the Fourth Circuit properly found that the bankruptcy court possessed jurisdiction to enjoin the Dalkon Shield claimants' suit against Robins' co-defendants.[101] When a Chapter 11 debtor is obligated to indemnify its co-defendants for tort judgments entered against the debtor's co-defendants, as in *Robins*, the bankruptcy estate is affected adversely because indemnification depletes the assets of the debtor's estate.[102] Depleting the assets of a debtor's estate reduces the amount of assets available to fund a plan of reorganization and, therefore, either delays the payment to creditor's pursuant to the reorganization plan or, if the debtors assets totally are depleted, stops payments altogether.[103] Accordingly, under the *Otero* reasoning, the Fourth Circuit properly recognized section 105 of the Code as providing jurisdiction to enjoin the claims against Robins' co-defendants.[104] In addition, the basic purpose of section 105 of the Code of providing a bankruptcy court with the means to enjoin actions otherwise not subject to the stay, but which interfere with the rehabilitation goals of bankruptcy, supports the Fourth Circuit's reasoning.[105] Allowing actions to proceed against Robins co-defendants would contravene Robins' attempt to rehabilitate its financial despair because of the company's duty to indemnify its co-defendants.[106] Section 105, therefore, should apply to empower the court to enjoin the actions against Robins co-defendants.[107]

After properly determining that the automatic stay extended to Robins' co-defendants, the Fourth Circuit correctly recognized that the district court possessed the power to fix the venue and to provide for the centralization of the Dalkon Shield claims against Robins in the United States District Court for the Eastern District of Virginia.[108] Section 157(b)(5) of title 28 of

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100. *Id.* at 1021.

101. *See Robins*, 788 F.2d at 1003 (fourth circuit's finding that § 105 applied to co-defendants); *see* 11 U.S.C. § 105 (1982) (giving bankruptcy courts equitable powers); *supra* notes 95-100 and accompanying text (discussing *Otero* reasoning).

102. *See supra* note 77 and accompanying text (Robins is obligated to indemnify its co-defendants in Dalkon Shield tort claims).

103. *See supra* note 4 and accompanying text (debtor in Chapter 11 reorganization is required to file reorganization plan).

104. *See Robins*, 788 F.2d at 1003 (fourth circuit employed § 105 to stay actions against Robin's co-defendants); *supra* notes 95-100 and accompanying text (discussing *Otero*).

105. *See* 11 U.S.C. § 105 (1982) (giving bankruptcy courts equitable powers); *see also* 2 L. KING, *supra* note 5, § 105.02 at 105-3 (section 105 of the Code enables court to enjoin actions interfering with rehabilitative goals of bankruptcy).

106. *See supra* note 77 and accompanying text (Robins is obligated to indemnify all co-defendants).

107. *See* 11 U.S.C. § 105 (1982) (giving bankruptcy courts equitable powers).

108. *See Robins*, 788 F.2d at 1009 (fourth circuit found district court had power to fix venue and centralize claims).

the United States Code expressly requires the district court in which a bankruptcy case is pending to order that trials of personal injury and wrongful death claims against a Title 11 debtor be held in either the district court in which the bankruptcy case is pending or in the district court in the district where the tort claim arose.[109] Although section 157(b)(5) permits the district court to fix the venue of a tort claim against a debtor in the district where the claim arose, the Fourth Circuit correctly recognized that Congress favored centralization of the tort actions against a Title 11 debtor.[110] Centralization of tort actions against a Title ll debtor promotes the Code's policy to protect the debtors' assets by allowing the debtor to defend the tort claims in a single forum without incurring the delay and expense of trials spread across the country.[111] Accordingly, the Fourth Circuit correctly upheld the district court's authority to centralize the Dalkon Shield claims.[112]

After concluding that section 157(b)(5) of title 28 of the United States Code governs the transfer of personal injury tort claims against a Title 11 debtor, the Fourth Circuit properly recognized that certain provisions of the Code necessitated centralization prior to the trials of the claims.[113] Section 502(c)(1) of the Code imposes a duty upon the bankruptcy court to estimate contingent or unliquidated claims against a debtor when failure to

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109. *See* 28 U.S.C. § 157(b)(5) (Supp. 1985) (trial of personal injury claims mandated); *see also supra* note 47 and accompanying text (discussing § 157(b)(5)).

110. *See* 28 U.S.C. § 157(b)(5) (Supp. 1985) (trial of personal injury claims mandated); *see also supra* note 48 and accompanying text (remarks of various senators on § 157(b)(5) evidenced no intent to favor decentralization of tort claims against Chapter 11 debtor).

111. *See supra* notes 1-4 and accompanying text (Chapter 11 designed to protect debtor's assets and to facilitate reorganization of debtor's business finances).

112. *See Robins*, 788 F.2d at 1010 (fourth circuit upheld district court's power to centralize tort claims). In addition to determining correctly that section 157(b)(5) of title 28 of the United States Code authorized centralization of the tort claims against Robins, the Fourth Circuit also properly determined that the district court should employ the procedure set forth in section 157(b)(5) in effectuating centralization of the claims. *See Robins*, 788 F.2d at 1010-11; 28 U.S.C. § 157(b)(5) (Supp. 1985) (trial of personal injury claims in district court). When a district court in which a bankruptcy case is pending orders the transfer, pursuant to section 157(b)(5), of a tort action against the Title ll debtor to the district in which the bankruptcy case is pending, the tort action immediately is transferred. *See* 28 U.S.C. § 157(b)(5) (Supp.1985) (same). In contrast, § 1412 of title 28 of the United States Code requires the party requesting a transfer of venue to petition the district court in which the action is pending. 28 U.S.C. § 1412 (Supp 1985). With over 5,000 pending Dalkon Shield suits across the country, however, the time and money spent litigating the propriety of each petition required under § 1412 would detract from Robins' effort of formulating a plan of reorganization. *See supra* note 4 and accompanying text (debtor in Chapter ll reorganization required to file plan of reorganization). By facilitating the debtors' ability to formulate a plan of reorganization, § 157(b)(5) promotes the policy of affording a quick and efficient procedure for rehabilitating the debtor's assets. *See* 28 U.S.C. § 157(b)(5) (Supp. 1985) (trial of personal injury claims in district court). The adoption of section 157(b)(5) to govern the transfer of tort actions against a Title ll debtor thus promotes the bankruptcy policy goals of protecting the debtor's assets and providing a quick and efficient reorganization of the debtor's estate. *See* 28 U.S.C. § 157(b)(5) (Supp. 1985) (same).

113. *See Robins*, 788 F.2d at 1011-12 (fourth circuit determined centralization of claims proper prior to trial of claims).

estimate unduly would delay administration of the bankrupt estate.[114] The bankruptcy court has no power, however, to estimate unliquidated or contingent claims not properly within the bankruptcy court's venue.[115] Failure to centralize completely the Dalkon Shield claims within the venue of the district court having jurisdiction over the bankruptcy proceeding, therefore, would hinder the estimation of the claims that the Code requires.[116] Additionally, each Dalkon Shield plaintiff whose claim is estimated has a right to accept the court's estimation of the claim and thus avoid litigation.[117] If all the Dalkon Shield claims were centralized before the court and fairly estimated, Robins and the claimants could avoid the time and expense of litigation in cases in which claimants accepted the bankruptcy court's estimation.[118] Centralization of the Dalkon Shield claims in a single forum, therefore, would ensure that the bankruptcy court efficiently could undertake its duty to estimate the claims, while potentially reducing the amount of costly and time consuming litigation of the claims.[119]

In addition to the persuasive policy reasons for allowing courts to centralize tort actions for estimation purposes prior to trials of the claims, federal courts have held that estimation should precede trials to facilitate an expedient reorganization.[120] For example, in *In re UNR Industries, Inc.*,[121] the district court considered whether estimation of tort claims against a Chapter 11 debtor properly should precede the trial of the claims.[122] In *UNR*, personal injury and wrongful death asbestos claimants petitioned the court to allow approximately 17,000 asbestos claims against UNR Industries, Incorporated (UNR), a Chapter 11 debtor, to proceed to trial prior to estimation of the claims.[123] The *UNR* court explained that the bankruptcy

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114. 11 U.S.C. § 502(c)(l) (1982); *see also supra* note 55 and accompanying text (discussing bankruptcy court's duty to estimate contingent or unliquidated claims).

115. *See* 11 U.S.C. § 502(c) (1982) (estimation of contingent or unliquidated claims necessary).

116. *See id.* (requiring bankruptcy court to estimate contingent or unliquidated claims).

117. *See id.* (estimation of contingent or unliquidated claims is for purpose of allowance).

118. *See id.*

119. *See Id.*

120. *See In re* Johns-Manville Corp., 45 Bankr. 823, 825 (S.D.N.Y. 1984) (§ 157(b)(5) of title 28 of the United States Code does not mandate immediate trial of tort claims against debtor); *In re* Johns-Manville Corp., 45 Bankr. 827, 829 (S.D.N.Y. 1984) (same).

121. 45 Bankr. 322 (N.D. Ill. 1984).

122. *Id.* at 323. The asbestos claimants in *In re UNR* first argued that because § 157(b)(2)(B) of title 28 specifies that the estimation of contingent or unliquidated claims is not a "core proceeding," the bankruptcy court possessed no power to estimate the claims. *Id.* at 326; *see* 28 U.S.C. § 157(b)(1) (1982) (bankruptcy court has power to set only core procedures). The asbestos claimants, therefore, argued that because estimation is necessary to proceed with the bankruptcy proceeding, the trials mandated by § 157(b)(5) constitute the means for estimation. *In re UNR*, 45 Bankr. at 326. The *UNR* court rejected the asbestos claimants' argument, noting that § 157(b)(2)(B) of title 28 recognized as core proceedings estimations of the asbestos claims for purposes of determining the feasibility of reorganization and, therefore, that the estimations were within the bankruptcy court's authority. *Id.*

123. *In re UNR*, 45 Bankr. at 326. The claimant's argued that because the estimation procedure involves at least a hearing and because 17,000 hearings would be required, the bankruptcy court's estimation is no more efficient than trial. *Id.*

court could estimate fairly the asbestos claims without ordering hearings of each of the 17,000 claims and, therefore, the estimation procedure would be more efficient than trial.[124] Moreover, the *UNR* court recognized that estimation of the numerous tort claims was necessary prior to trial of the claims to determine initially the feasibility of reorganization.[125] Accordingly, the *UNR* court held that the estimation of the tort claims should precede the trials of the claims.[126] The *Robins* case, like *UNR*, involves an enormous amount of tort claims that require estimation prior to the trials of the claims to ensure that Robins' reorganization is feasible.[127] Because of the necessity of estimation to determine the feasibility of reorganization, the Fourth Circuit's decision to estimate the Dalkon Shield claims prior to trial was consistent with *UNR*.[128]

Although the Fourth Circuit's decision to centralize the Dalkon Shield claims promoted the efficient reorganization of Robins, effecting a change of venue for tort claims carries due process implications for the individual tort plaintiffs.[129] Considering the due process implications of a change of venue for a tort claim, the Fourth Circuit properly found that notice of the centralization served only upon the Dalkon Shield Claimants Committee (the "Committee") for purposes of estimating the Dalkon Shield claims did not violate the due process rights of the individual claimants.[130] A right of action in tort constitutes property and, accordingly, is entitled to protection against erroneous or arbitrary deprivation under the Fifth Amendment's due process requirements.[131] Due process thus generally requires that prior to changing the venue for a tort claim, which is an act that adversely can affect or deprive the claim's value, the individual tort plaintiff must receive notice of and an opportunity to object to the venue change.[132] In addition,

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124. *Id.* The *UNR* court found that estimation would not require 17,000 hearings in response to the claimants' argument that because the estimation procedure involves at least a hearing, the bankruptcy court's estimation is no more efficient than trial. *Id.*

125. *Id.* at 326-27. The *UNR* court found that estimation should precede trial to determine the feasibility of reorganization in response to the claimants' argument that because the Code entitles a tort claimant to a trial upon request, trials should commence immediately rather than after estimation so that when the time for distribution of the claim arrives, the claimants immediately can collect their trial judgments. *Id.*

126. *Id.* at 327.

127. *See supra* note 16 and accompanying text (at time Robins filed under Chapter 11, approximately 5,000 tort claims were pending against Robins).

128. *See Robins*, 788 F.2d at 1012-14 (fourth circuit found estimation prior to trial appropriate); *In re* UNR Indust., 45 Bankr. at 322 (*UNR* court estimated prior to trial).

129. *See* U.S. CONST. amend. V (due process clause).

130. *See Robins*, 788 F.2d at 1015 (individual notice to claimants not required prior to venue change for estimation purposes); *see also supra* notes 65-70 and accompanying text (discussing Robins' decision to notify Committee and not individual claimants).

131. *See* U.S. CONST. amend. V (due process clause); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-33 (1982) (right of action in tort constitutes property subject to due process protection). Causes of action generally are considered property interests. *See* 2 L. KING, *supra* note 5, § 101.29 at 101-45 ("property" under the Code covers tort claims).

132. *See* U.S. CONST. amend. V (due process clause).

a tort plaintiff's claim encompasses a right to a jury trial, the forum for which also is subject to due process protection.[133] Due process is not, however, an inflexible concept.[134] Courts generally have not applied any mechanical rule to define the extent of the hearing necessary to comply with due process prior to a deprivation of property.[135] Courts instead have employed a balancing test to determine the hearing procedures required by due process prior to a deprivation of property.[136] Under the balancing test, a conditional deprivation of an individual's property right, absent notice or opportunity for a hearing, may satisfy due process in some circumstances.[137]

The United States Supreme Court in *Mathews v. Eldridge*[138] established the dispositive balancing test for determining the nature and extent of the hearing necessary prior to a deprivation of property to satisfy due process requirements.[139] In *Eldridge*, the Supreme Court considered whether due process required that the recipient of Social Security disability benefit payments be afforded an opportunity for an evidentiary hearing prior to the termination of the benefits.[140] In *Eldridge*, a state agency monitoring the medical condition of a disability benefits recipient determined that, based on medical reports and a questionnaire that the recipient had answered, the recipient's disability no longer existed.[141] The Social Security Administration (SSA) accepted the state agency's decision to terminate the benefits, but the benefits did not officially terminate until two months after

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133. *Id.*; *see also* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (*Mullane* establishes that place of trial enjoys due process protection); *supra* note 47 and accompanying text (recognizing that tort claimant in bankruptcy is entitled to jury trial).

134. *See, e.g.*, Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (due process is not technical conception of inflexible procedures); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (due process requires balancing of interests recognizing that fairness changes from situation to situation); McClelland v. Massinga, 786 F.2d 1205, 1210-16 (4th Cir. 1986) (due process is flexible and plaintiffs are entitled to hearing prior to deprivation of tax refund).

135. *See infra* note 136 and accompanying text (courts do not apply mechanical rule to determine the extent of process which is due but rather undertake balancing test).

136. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1964) (court, after balancing, determined that no hearing required prior to terminating individuals employment); Mathews v. Eldridge, 424 U.S. 319 (1976) (court after balancing determined no hearing was required prior to termination of individual's disability benefits). *But see* Goldberg v. Kelly, 397 U.S. 254 (1970) (court, after balancing, determined that evidentiary hearing was required prior to termination of individual's welfare benefits). *See also infra* notes 138-73 and accompanying text (discussion of *Cleveland Bd. of Educ. v. Loudermill* and *Mathews v. Eldridge* decisions).

137. *See supra* note 136 (notice and opportunity for hearing not always needed required prior to deprivation of property right).

138. 424 U.S. 319 (1976).

139. *Id.* at 332-49; *see* Note, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 STAN. L. REV. 153 (1982) (discussing *Eldridge* balancing test in context of contingent and unliquidated claims in bankruptcy).

140. *Eldridge*, 424 U.S. at 323.

141. *Id.* at 324. Eldridge, the disability benefits recipient, originally was disabled due to chronic anxiety and back strain and subsequently was found to have diabetes. *Id.*

the date of the recipient's recovery from the disability.[142] The recipient claimed that due process requires that an administrative review board afford a disability benefits recipient a hearing prior to termination of the benefits.[143] The Supreme Court in *Eldridge* first recognized that the recipient possessed a property interest in the disability benefits.[144] The Court explained that determining whether the procedures for terminating the disability benefits complied with due process required a balancing test that weighed four critical factors.[145] The Supreme Court in *Eldridge* explained that the factors to consider included the effect of the official action on the private interest at stake, the risk of erroneous deprivation of the private interest through the applied procedures, the value of additional or substitute procedures and the government's interest, including the administrative burden of new procedures on the government.[146] The Court in *Eldridge* recognized that the private interest in disability benefits in general was not great because the benefits were not based on financial need.[147] The Court also noted that holding evidentiary hearings in all disability cases prior to the termination of the benefits would create tremendous administrative expense.[148] Accordingly, the Court held that due process did not require that a disability benefits recipient receive an evidentiary hearing prior to the termination of the benefits because the balancing test weighed in favor of denying a pretermination hearing.[149]

Applying the *Eldridge* reasoning to the *Robins* case supports the Fourth Circuit's finding that notice and an opportunity for hearing are not always required before a change of venue.[150] Several of the factors identified in the *Eldridge* balancing test weigh heavily in favor of the Fourth Circuit's

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142. *Id.* at 338. In *Mathews v. Eldridge*, the administrative procedure leading to a decision to terminate disability benefits began with the state agency's determination that an individual no longer possessed a disability. *Id.* The state agency's determination was reviewed by the Social Security Administration (SSA). *Id.* If the SSA accepted the state agency's determination, the recipient of the benefit was given written notification of the reasons for termination and the right to de novo state agency reconsideration. *Id.* Upon acceptance by the SSA, benefits were terminated, effective two months after the month of recovery from the disability. *Id.* If, after reconsideration by the state agency and SSA review, the decision remains to terminate the benefits, the recipient could request an evidentiary hearing before an administrative law judge. *Id.* at 339.

143. *Id.* at 325.

144. *Id.* at 332.

145. *Id.* at 334-35.

146. *Id.* at 335.

147. *Id.* at 340-41. The Supreme Court in *Mathews v. Eldridge* contrasted *Goldberg v. Kelly*, in which the Court required an evidentiary hearing prior to the termination of welfare benefits, in part, because of the overriding private interest of people living at the margin of subsistence in receiving welfare benefits. *Id.* at 340; *see* Goldberg v. Kelly, 397 U.S. 254 (1970) (examined hearing procedures necessary prior to termination of welfare benefits).

148. *Eldridge*, 424 U.S. at 347-48.

149. *Id.* at 349.

150. *See Robins*, 788 F.2d at 1015 (fourth circuit found notice and opportunity for hearing not always required prior to venue change).

position.[151] The first factor that the *Eldridge* test considers is the effect of the official action on the private interest at stake.[152] Permitting a change of venue of the Dalkon Shield claims, absent individual notice, does not infringe upon the tort claimants' interest in fair compensation for their injuries because any claimant ultimately is entitled to a trial in which a jury assessment of the tort damages will provide the claimant with an enforceable claim, regardless of any prior estimation.[153] Moreover, the Dalkon Shield claimants' interest in a quick, efficient recovery of their claims is served only if the estimation process takes place prior to any objections to the venue change.[154] Therefore, the official action, namely the change of venue, does not impair the Dalkon Shield claimant's private interest at stake.

In addition to the first factor of the *Eldridge* test, the third factor of the test, which considers the value of additional or substitute procedural safeguards, also weighs heavily in favor of centralizing the Dalkon Shield claims for purposes of estimation absent notice to the individual claimants.[155] The appellants in *Robins* claimed that, as an additional procedural safeguard, Robins should have provided the individual claimants with notice prior to changing the venue for estimation purposes.[156] Requiring individual notice, however, would delay the centralization of the Dalkon Shield claims and hinder the estimation procedure that depends on centralization.[157] Hindering the estimation procedure would delay development of a reorganization plan and, consequently, would delay rehabilitation of the debtor and payments to creditors.[158] Accordingly, the value of individual notice to the Dalkon Shield claimants is minimal because requiring individual notice ultimately would reduce the value of the claimants' recovery.[159]

In allowing Robins to serve blanket notice upon the Committee, however, the Fourth Circuit permitted initial centralization of the claims for estimation

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151. *See supra* text accompanying note 146 (four factors to examine in determining nature and extent of hearing necessary to satisfy due process).

152. *Eldridge*, 424 U.S. at 335; *see* Note, *supra* note 139, at 163 (discussing private interests affected by claim estimation). When determining the private interest affected by the official action, courts generally consider the severity of the property deprivation, the duration of the deprivation, the reversibility of the deprivation, and the access of claimants to private alternatives. Note, *supra* note 139 at 163.

153. *See* 28 U.S.C. § 157(b)(5) (Supp. 1985) (trial of personal injury claims in district court); *see also supra* note 47 and accompanying text (section 157(b)(5) of Code permits trial of tort claims).

154. *See supra* notes 113-28 and accompanying text (recognizing that estimation should precede trial to promote efficiency).

155. *See Eldridge*, 424 U.S. at 335 (describing third factor of *Eldridge* test).

156. *Robins*, 788 F.2d at 1015.

157. *See supra* notes 113-28 and accompanying text (efficient estimation depends on centralization of tort claims).

158. *See supra* note 4 and accompanying text (Chapter 11 debtor is required to file plan of reorganization).

159. *See* Note, *supra* note 139, at 167. The threat of delay and resulting administrative costs associated with numerous contingent and unliquidated claims against a debtor explains the strong interest in using abbreviated hearings in settling the claims. *Id.*

purposes prior to holding any hearings on individual objections.[160] Notice served only upon the Committee obviates a situation in which the district judge must rule on potentially thousands of objections to the transfer of venue before undertaking any meaningful estimation of the claims.[161] Moreover, when the bankruptcy court estimates all the Dalkon Shield claims, the bankruptcy court then can require Robins to notify the individual claimants of both the estimation figure and the fact that each claimant can request a hearing in objection to the venue change for purposes of trial.[162] Delaying the individual plaintiffs' opportunity to object to the transfer of venue until after the estimation of the claims may permit many plaintiffs to forego litigation and accept the court estimation of their claim.[163] The possibility of delay inherent in affording individual notice to the Dalkon Shield claimants, therefore, suggests that the Fourth Circuit's procedure allowing the conditional transfer of claims prior to affording each individual claimant notice and an opportunity to be heard greatly outweighs the value of the proposed alternative.[164]

In addition to the balancing factors indicated in *Eldridge*, the United States Supreme Court's decision in *Cleveland Board of Education v.*

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160. *See Robins*, 788 F.2d at 1015 (fourth circuit allowed centralization of tort claims prior to hearing objections).

161. *See infra* note 185 and accompanying text (district judge eventually hears objections to transfer); *see also supra* note 71 (discussing factors that district judge must weigh in balancing advantages and disadvantages of changing venue). Although the Fourth Circuit in *A.H. Robins Co. v. Piccinin* held that the notice given to the Committee for estimation purposes met the requirements of due process, the question arises as to whether the Committee is empowered to object to the venue change for estimation purposes on behalf of the individual claimants as a class. *See* 11 U.S.C. § 1103 (1982) (discussing power of Committee). If the claimants receive no notice of the venue change for estimation purposes, they cannot object individually, however, possibly the Committee could. *Id.* If the Committee can raise due process objections for the individual claimants, the Fourth Circuit did not consider how the objections would be handled. *See Robins*, 788 F.2d at 1015 (Fourth Circuit failed to address Committee objections to due process). If a hearing were held on the Committee's objection, only one hearing, as opposed to potentially thousands, would be required because the Committee would represent Dalkon Shield claimants as a class. *See Robins*, 788 F.2d at 1016 (fixing day for hearings on individual claimants' objection to venue change for trial purposes).

162. *Robins*, 788 F.2d at 1015-16. In *A.H. Robins Co. v. Piccinin*, the Fourth Circuit held that Robins was to give notice after filing a motion for a venue change with the district court sitting in bankruptcy, in the form of a letter, to each claimant and the claimant's attorney. *Id.* at 1016. The Fourth Circuit required the notice to state that the conditionally transferred venue and the transfer would become final if the claimant did not object to the venue change. *Id.* The notice would also fix a time limit for the filing of objections by claimants and a day for a hearing on the objections. *Id.* The estimation procedure, however, should precede the giving of the notice, because the bankruptcy court's estimation of the claims may influence whether a claimant objects to changing the trial venue. *See supra* note 134 and accompanying text (claimant is entitled to accept bankruptcy court's estimation).

163. *See supra* note 34 and accompanying text (creditors of a Title 11 debtor may accept bankruptcy court's estimation of contingent or unliquidated claims).

164. *See Robins*, 788 F.2d at 1015-16 (fourth circuit allowed transfer of claims prior to notice).

Loudermill[165] illustrates that an individual need not receive notice and an opportunity for a hearing prior to deprivation of a property right when an informal procedure is available to the individual prior to deprivation.[166] In *Cleveland Board*, the Supreme Court considered whether an Ohio statute affording civil servants an opportunity for administrative review after a discharge from employment, but not before discharge, satisfied due process requirements.[167] In *Cleveland Board*, the Board of Education of Ohio fired a civil servant for dishonesty in filling out his employment application.[168] The Supreme Court recognized that the Ohio statute governing termination of civil servants provided for an extensive post-termination administrative hearing reviewing the discharge.[169] The discharged employee claimed, however, that due process required an opportunity for a hearing prior to the termination of employment.[170] The Court in *Cleveland Board* balanced the competing interests at stake and determined that individuals possess a significant private interest in retaining employment, that some opportunity to respond prior to termination of employment would eliminate mistaken discharges, and that the government's interest in keeping individuals usefully employed was great.[171] Accordingly, the Supreme Court in *Cleveland Board* held, after balancing the competing interests at stake, that due process required some form of a pre-termination hearing.[172] The Supreme Court in *Cleveland Board* noted, however, that because the discharged employee was entitled to an extensive hearing post-termination, the pre-termination hearing need not definitely resolve the propriety of discharge, but need only provide an opportunity for the employee to respond as an initial check against mistakes.[173]

The Supreme Court's reasoning in *Cleveland Board* provides persuasive authority for the Fourth Circuit's position that notice to the Committee prior to centralizing the venue of the Dalkon Shield claims for estimation only did not violate the individual claimants' due process rights.[174] By

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165. 470 U.S. 532 (1984).

166. *See id.* at 542.

167. *Id.*

168. *Id.* at 535. In *Cleveland Board of Education v. Loudermill*, James Loudermill, a civil servant, stated on his job application that he had never been convicted of a felony. *Id.* The Board of Education, as part of a routine examination of Loudermill's employment records, determined 11 months later that Loudermill had been convicted of grand larceny. *Id.*

169. *Id.; see* OHIO REV. CODE ANN. § 124.34 (Baldwin 1984) (employment of classified civil servants are terminated only for cause and may obtain administrative review of discharge).

170. *Cleveland Bd.*, 470 U.S. at 536.

171. *Id.* at 542-45.

172. *Id.*

173. *Id.* at 545-46. The Supreme Court in *Cleveland Board of Education v. Loudermill* suggests that an opportunity to respond, on the facts of *Cleveland Board*, only involves giving the discharged employee an opportunity to present his side of the story to prevent initial mistakes prior to depriving the employee of a property right. *Id.*

174. *See Cleveland Board*, 470 U.S. at 545 (pre-deprivation hearing required only in certain circumstances); *Robins*, 788 F.2d at 1015 (notice to Committee prior to centralizing proper).

analogy, the notice to the Committee and the Committee's representation of the individual claimants at the estimation hearing provided the claimants with an informal procedure that acted as an initial check against any mistakes, as contemplated in *Cleveland Board*.[175] The subsequent trial of the Dalkon Shield claims after the estimation procedure represents the extensive administrative hearing that due process requires prior to a final deprivation of property.[176] Accordingly, Robins' notice to the Committee prior to centralization of the claims appears to satisfy due process under the *Cleveland Board* reasoning, provided Robins affords the individual claimants with notice and an opportunity for a hearing before the transfer of venue becomes final for trial purposes.[177]

The *Cleveland* Board reasoning further suggests that the Fourth Circuit's determination that notice to the Claimants Committee alone suffices for purposes of estimating the Dalkon Shield claims contemplates that notice upon the Committee is mandatory, rather than optional.[178] Although the Dalkon Shield Claimants Committee is not empowered to represent individual claimants, the Committee is empowered to represent the whole class of plaintiffs at the estimation hearing.[179] Therefore, the notice to the Committee and the Committee's representation of the class of claimants at the estimation proceeding provides the initial check against any inappropriate transfers, as contemplated by the Supreme Court in *Cleveland Board*.[180] The practical effect of not notifying the Committee prior to the estimation hearing would be to deny the Dalkon Shield claimants any opportunity to

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175. *See Cleveland Board*, 470 U.S. at 545 (pre-deprivation hearing is check against mistakes).

176. *See id.* at 547-48 (*Cleveland Board* court recognizes extensive post-termination hearing).

177. *See Robins*, 788 F.2d at 1015-16 (Robins required to give notice prior to centralization).

178. *See id.* at 1015 (notice to Committee alone sufficient for estimation); *Cleveland Board*, 470 U.S. at 542-45 (*Cleveland Bd.* reasoning).

179. *See* 11 U.S.C. § 1103(c)(3) (1982) (creditors committee may participate in formulation of Chapter 11 reorganization plan); *see also* 11 U.S.C. § 1103(c)(5) (1982) (creditors committee may perform services in interest of those represented). Section 1103 of the Code expressly permits a Chapter 11 creditors committee to participate in the formulation of a debtor's plan of reorganization, and to perform other services in the interest of the creditors that the committee represents. 11 U.S.C. § 1103(c)(3) (1982); *see* 11 U.S.C. § 1103(c)(5) (1982) (same). Because the estimation hearing focuses on the examination of a class of claims both to determine the feasibility of reorganization and to arrive at a figure for inclusion in the plan of reorganization, and because committee representation of all individual claimants at the estimation proceeding constitutes a service to the claimants, the committee perhaps can represent all claimants at the hearing. *See* 11 U.S.C. § 1103(c)(3) (1982) (creditors committee may participate in formulation of Chapter 11 reorganization plan); 11 U.S.C. § 1103(c)(5) (1982) (creditors committee may perform services in interest of those represented); *see also* Note, *The Chapter 11 Creditor's Committee: Statutory Watchdog?*, 2 BANKR. DEV. J. 247, 252-62 (1985) (discussing § 1103(c)(3) and (c)(5) of Code).

180. *See Cleveland Bd.*, 470 U.S. at 545.

express their position on the claims.[181] The Fourth Circuit expressly recognized, however, that the purpose of the estimation hearing is to hear the interests of all claimants.[182] Notice upon the Committee is required prior to centralizing the claims in the bankruptcy court to ensure that the centralization complies with due process.[183]

Although notice served only upon the Dalkon Shield Claimants Committee satisfies due process with regard to the centralization of the claims for estimation purposes, the Fourth Circuit found that due process requires that each individual claimant receive notice and an opportunity to respond before the transfer of venue may become final.[184] When an individual tort plaintiff objects to the venue change, the Fourth Circuit's decision in *Robins* requires the district judge to engage in a balancing test to determine the necessity of transfer.[185] The Fourth Circuit suggested guidelines for the district judge to follow when considering objections to the venue change, but did not outline explicitly the relative importance of factors to consider when balancing.[186] Other courts considering the transfer of venue issue, however, have provided guidelines in determining the factors that courts should consider in determining the necessity of a venue change.[187] For example, in *In re Cole Associates,*[188] the bankruptcy court found that the single most important factor in determining whether a venue change is appropriate is whether a transfer of venue promotes the efficient and economic administration of the debtor's estate.[189] Applying the Fourth Circuit's suggested guidelines and *Cole*'s reasoning to the Robins bankruptcy proceeding, the forum of the bankruptcy proceeding is the most appropriate forum for venue of the tort claims because Robins will not be forced to

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181. *See Robins*, 788 F.2d at 1015 (notice to individual claimants not required prior to venue change for estimation and, therefore, individual claimants have no opportunity to voice opinion at estimation hearing).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1016; *see supra* note 71 and accompanying text (discussing factors in *Robins* balancing test).

186. *See Robins*, 788 F.2d at 1016 (fourth circuit's guidelines for balancing); *see supra* note 71 and accompanying text (discussing factors in balancing test).

187. *See In re* Nixon Machinery Co., 27 Bankr. 871, 873 (Bankr. E.D. Tenn. 1983) (paramount consideration in transferring venue is speedy and economic administration of bankruptcy proceeding); *In re* Whippany Paper Board Co., 15 Bankr. 312, 317 (Bankr. D.N.J. 1981) (important factor to determine the propriety of venue change is whether transfer of venue promotes efficient and economic administration of estate).

188. 7 Bankr. 154 (Bankr. Utah 1980).

189. *Id.* at 157. In *In re Cole Assocs.*, the bankruptcy court considered whether to uphold several creditors' motions to transfer venue from the bankruptcy court to the creditors' respective forums. *Id.* at 156. In *Cole*, a Chapter 11 debtor (Cole) instituted an adversary proceeding to recover property, which was allegedly property of the debtor's estate, that three creditors held. *Id.* at 155. The creditors subsequently petitioned the court to transfer the venue of the action to the creditors' forums. *Id.*

expend time and money defending claims in forums throughout the country.[190]

In light of the multiplicity of claims involving the Dalkon Shield, the Fourth Circuit's holding in *Robins* represents the most liberal reading of the Bankruptcy Code's automatic stay provision and other provisions governing the transfer of venue for actions against a debtor.[191] The Fourth Circuit's liberal reading of the automatic stay provision, however, is consistent with congressional intent concerning Chapter 11 of the Code to facilitate the financial rehabilitation of business debtors.[192] The Fourth Circuit's opinion in *Robins* represents significant precedent on which the federal courts can rely in recognizing the broad statutory and inherent powers of a bankruptcy court in complex Chapter 11 cases to stay any proceeding that potentially can deplete the assets of the debtor's estate or adversely affect the debtor's ability to reorganize.[193] Similarly, the Fourth Circuit's decision to centralize the venue of tort claims against a Chapter 11 debtor for purposes of estimating the claims, without requiring individual notice to claimants, evinces a broad power afforded to bankruptcy courts to facilitate and protect the debtor's reorganization efforts.[194] Enabling the bankruptcy court to centralize claims against a Chapter 11 debtor and to estimate the claims without notifying individual claimants permits the debtor's reorganization to proceed immediately.[195] Moreover, the estimation procedure potentially reduces the amount of the debtor's assets required to litigate the claims because creditors may accept the estimated figure and forego trial.[196] Furthermore, individual claimants who request trials because of dissatisfaction with the bankruptcy court's estimation of the value of their claims most likely will have the burden of attempting to convince the district judge that trial venue in the bankruptcy court will not promote the efficient administration of the bankrupt's estate.[197] The Fourth Circuit's

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190. *See Robins*, 788 F.2d at 1016 (suggesting guidelines to determine propriety of venue change for Dalkon Shield claims); *In re Cole*, 7 Bankr. at 157 (suggesting guidelines for determining propriety of venue change in a bankruptcy case).

191. *See* 11 U.S.C. § 362 (1982) (automatic stay provision of Code); *see also* 28 U.S.C. § 157(b)(5) (1982) (governing transfer of venue for actions against a debtor); *supra* note 5 and accompanying text (discussing purposes of automatic stay); *supra* note 47 and accompanying text (discussing § 157(b)(5)).

192. *See supra* notes 1-3 and accompanying text (purposes of Chapter 11 reorganization); 11 U.S.C. § 362 (1982) (automatic stay provision).

193. *See supra* notes 33-45 and accompanying text (summary of *Robins* decision regarding automatic stay).

194. *See supra* notes 46-72 and accompanying text (summary of *Robins* decision regarding centralization of Dalkon Shield claims).

195. *See supra* notes 108-90 and accompanying text (discussion of centralization of Dalkon Shield claims and notice requirements regarding centralization).

196. *See supra* note 117 and accompanying text (Dalkon Shield claimants can accept bankruptcy court's estimation of Dalkon Shield claims).

197. *See supra* notes 186-90 and accompanying text (most important factor in determining whether to transfer venue of claims against debtor is whether transfer promotes economic and efficient administration of debtor's estate).

decision in *Robins v. Piccinin* thus provides flexible guidelines to bankruptcy courts and evinces the broad range of powers available to the courts effectively to protect and facilitate debtors attempting to reorganize under the Bankruptcy Code.[198]

DAVID WALSH

C. Sumy v. Schlossberg: *Exempting Entireties Property Under Section 522(b)(2)(B) of the Bankruptcy Reform Act of 1978*

In 1978 Congress enacted the Bankruptcy Reform Act (the "Code")[1] to provide debtors an opportunity to rehabilitate debtors' distressed finances and to provide equitable treatment among the creditors of bankrupt debtors.[2] To facilitate these goals, section 541 of the Code establishes an estate upon

198. *See Robins*, 788 F.2d at 994-1016.

1. 11 U.S.C. §§ 101-151326 (1982 & Supp. III 1985) *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. In 1970 Congress appointed a commission (the "Commission") to study existing bankruptcy laws and suggest reforms in the Bankruptcy Act of 1898 (1898 Act). *See Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. 1 (1973) [hereinafter *Commission Report*] (discussing findings of *Commission Report*) *reprinted in* 2 app. L. KING, COLLIER ON BANKRUPTCY 1 (15th ed. 1985); Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978). In its report,the Commission stated that the two primary goals of bankruptcy law are to rehabilitate the finances of a debtor in bankruptcy so that the debtor again may contribute economically to society, and to provide stability to debtor-creditor relationships in a credit-based economy. *Id.* The commission's findings evidenced greater sophistication in debtor-creditor relationships. *Id.* Given the commission's findings, Congress determined a need to modernize bankruptcy law to deal with debtor-creditor relationships and to maintain the equitable policies of bankruptcy law. *Id.* Consequently, Congress enacted the Bankruptcy Reform Act of 1978 (the "Code") to modernize federal bankruptcy law. *See* 11 U.S.C. § 101-151326 (1982 & Supp. III 1985) (Code); S. REP. No. 989, 95th Cong., 2d Sess. 1-2 (1978) [hereinafter 1978 SENATE REPORT](discussing findings of Commission), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5787-88.

2. *See Commission Report, supra* note 1, at 1 (purpose of bankruptcy law is to facilitate rehabilitation of debtor's distressed finances and to provide equal treatment among creditors of bankrupt debtors); *see also* H.R. REP. No. 595, 95th Cong., 1st Sess. 125 (1977) [hereinafter 1977 HOUSE REPORT](discussing goals of Code), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5693, 6078-79. Congress designed the Code to relieve debtors of creditor hassle and the worry of overburdening debt when debtors overextend their financial resources. 1977 HOUSE REPORT, *supra*, at 125. Congress structured the Code, therefore, to discharge a bankrupt debtor from creditor obligations and allowing the debtor to retain a portion of the debtor's property upon discharge from bankruptcy. *Id.* at 6078.

a debtor's filing for relief under the Code.[3] The estate that section 541 creates includes all of a debtor's legal and equitable interests in both real and personal property as of the commencement of a bankruptcy proceeding.[4] Upon the creation of an estate, section 363 of the Code authorizes a trustee in bankruptcy[5] to administer the property of the estate for the benefit of a debtor's creditors.[6] More specifically, section 363(f) of the Code authorizes a trustee to sell property of an estate free and clear of all interests in the property, other than a co-owner's interest in such property.[7] Section 363(h) of the Code, however, excepts from the general provisions of section 363(f) property that a debtor owns as a tenant by the entirety (entireties property)[8]

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3. 11 U.S.C. § 541 (1982 & Supp. III 1985). Section 541 of the Code defines property of the estate as all legal and equitable interests that the debtor has in property as of the commencement of the bankruptcy proceeding. *Id.*; *see* 1978 SENATE REPORT, *supra* note 1, at 82 (discussing property in estate). Property of the estate may be real or personal, and includes property that a debtor subsequently may exempt from the estate under section 522(b) of the Code. *See* 1978 SENATE REPORT, *supra* note 1 at 82 (discussing property in estate); 11 U.S.C. § 522(b) (1982 & Supp. III 1985) (allowing debtor to exempt property from estate).

4. 11 U.S.C. § 541(a) (1982 & Supp. III 1985); *see supra* note 3 (discussing property that debtor includes in estate which section 541(a) of Code creates).

5. *See* 11 U.S.C. §§ 701-704 (1982 & Supp. III 1985)(providing for appointment and duties of trustee). Upon a debtor's filing of a bankruptcy petition, Chapter 7 of the Code requires that a trustee preside over the estate. *See id.* §§ 701-702 (providing for appointment and election of trustee to govern estate). The duties of a trustee include liquidating the estate and efficiently winding up the estate in a manner that best represents the interests of the debtor and creditor. *Id.* § 704; *see* 1977 HOUSE REPORT, *supra* note 2, at 379 (principal duties of trustee are liquidating and winding up estate in efficient manner); *see also* 11 U.S.C. §§ 1104-1106 (1982 & Supp. III 1985)(providing for appointment and duties of trustee under Chapter 11); 11 U.S.C. §§ 1302 (1982 & Supp. III 1985)(providing for appointment and duties of trustee under Chapter 13).

6. 11 U.S.C. § 363(b)(1) (1982 & Supp. III 1985). Section 363(b)(1) of the Code authorizes a trustee, after the trustee provides interested parties an opportunity for notice and hearing, to use, sell, or lease estate property for the benefit of creditors of the debtor. *Id.; see supra* note 3 (discussing property in estate).

7. 11 U.S.C. § 363(f) (1982 & Supp. III 1985); *see* 1977 HOUSE REPORT, *supra* note 2, at 345 (authorizing trustee to sell estate property free and clear of all interests). Section 363(f) of the Code authorizes the trustee to sell the debtor's property free and clear of any interest in such property of an entity other than the estate if: (1) applicable nonbankruptcy law permits the sale; (2) the entity consents to the sale; (3) the entity's interest is a lien and the sale price of the property exceeds the amount that the lien secures; (4) the interest is in bona fide dispute; or (5) if a court can compel the entity to accept a money satisfaction of the entity's interest in the property in a legal or equitable proceeding. 11 U.S.C. § 363(f) (1982 & Supp. III 1985).

8. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY 210-16 (1984) [hereinafter CUNNINGHAM & STOEBUCK]. Tenancy by the entirety is a form of concurrent ownership of real or personal property between a husband and wife. *Id.* at 210. In a tenancy by the entirety, when one spouse dies, full title in the entireties property vests in the surviving spouse. *Id.* at 214. Under the law of most jurisdictions, neither the husband nor wife individually can convey, encumber, or subject to the satisfaction of creditors' claims the other spouse's right to the possessory estate or right of survivorship in entireties property. *Id.* at 214. A tenancy by the entirety vests in a husband and wife when the husband and wife acquire an interest in property at the same time and by the same instrument. *Id.* Additionally, the interests of the husband and wife must be identical regarding the fractional share and type of estate, and regarding rights of possession. *Id.* at 212.

or a joint tenant.[9] Section 363(h) of the Code specifically authorizes a trustee to sell the interest in entireties or joint tenancy property owned by the co-owner of a debtor only when the benefit to the estate of selling the property outweighs any detriment to the co-owner of the property.[10]

Notwithstanding the trustee's power to sell property of an estate under section 363(h) of the Code, section 522(b) of the Code allows debtors, in certain circumstances, to exempt from the estate a debtor's interest in entireties and joint tenancy property that the debtor otherwise would include in the estate under section 541(a) of the Code.[11] Section 522(b) entitles a debtor proceeding under the Code to exempt from the estate either property for which state and federal nonbankruptcy law authorizes an exemption or property for which the Code authorizes an exemption.[12] When a debtor

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9. *See* CUNNINGHAM & STOEBUCK, *supra* note 8, at 202-07 (1982). Joint tenancy is a form of concurrent ownership of real or personal property between two or more persons who may or may not be husband and wife. *Id.* at 203. In a joint tenancy, which carries the right of survivorship, when one co-owner of the property dies, full title in the property vests in the surviving owners. *Id.* at 202. Under the law of most jurisdictions, a co-owner who transfers his interest will destroy the joint tenancy in favor of a tenancy in common to the extent of the transferring co-owner's interest in the property. *Id.* at 205. Additionally, under the law of most states, the transfer of the property specifically must provide for the right of survivorship. *Id.* at 206-07.

10. 11 U.S.C. § 363(h) (1982 & Supp. III 1985)(permitting sale of co-owner's interest in property in which debtor has undivided interest as tenant by entirety or joint tenant); *see In re* Trickett, 14 Bankr. 85, 90 (Bankr. W.D. Mich 1981) (§ 363(h) of Code authorizes trustee to sell entireties property in bankruptcy estate for benefit of joint creditors of individual debtor and debtor's nonfiling spouse).

11. *See* 11 U.S.C. § 522(b) (1982 & Supp. III 1985) (providing for exemptions under Code); *Commission Report, supra* note 1, at 125-27 (exemptions provide means for rehabilitation of debtor's distressed finances); 11 U.S.C. § 541 (1982 & Supp. III 1985)(discussing property of estate). In its report to Congress, the Commission explained that a provision enabling debtors to exempt certain interests in property from an estate would best achieve Congress' primary goal of bankruptcy, which is the rehabilitation of a debtor's distressed finances. *Commission Report, supra* note 1, at 125. To facilitate rehabilitation of a debtor's finances, Congress created § 522(b) of the Code which allows debtors to exempt certain interests in property from an estate and, therefore, from the claims of creditors. 11 U.S.C. § 522(b) (1982); *see also In re* Trickett, 14 Bankr. 85, 89 (Bankr. W.D. Mich. 1981)(exemptions provide means of reaching Congressional goal of rehabilitating debtor by allowing debtor to keep certain property); *but cf.* 1978 SENATE REPORT, *supra* note 1, at 5792 (Congress did not design exemptions to give debtors instant affluence);

12. *See* 11 U.S.C. § 522(b) (1982 & Supp. III 1985). Section 522(b) of the Code allows debtors to choose between federal exemptions under the Code and exemptions under applicable state law or federal nonbankruptcy law. *Id.* Debtors cannot, however, simultaneously choose both federal exemptions and state and federal nonbankruptcy exemptions. 3 L. KING, *supra* note 1, § 522.02 at 522.12; *see also* Canaday v. Wilson, 653 F.2d 210, 212 (5th Cir. 1981)(when debtors file joint bankruptcy petition, section 522(b) of Code does not allow one debtor to choose federal exemptions and other debtor to choose state and federal nonbankruptcy law exemptions). Under § 522(b), however, individual states may limit debtors to exemptions that state and federal nonbankruptcy law provides. *See* 11 U.S.C. § 522 (b)(1) (1982 & Supp. III 1985)(permitting states to limit debtors to state and federal nonbankruptcy law exemptions); *Canaday*, 653 F.2d at 12. This opt out provision represents a compromise between the House of Representatives, which wanted exclusive federal exemptions, and the Senate, which desired

elects to exempt property under state and federal nonbankruptcy law, section 522(b)(2)(B) of the Code allows the debtor to exempt from the estate the debtor's interest in entireties or joint tenancy property, to the extent that the debtor's interest is immune from process under applicable nonbankruptcy law.[13] Because property that a debtor exempts under section 522(b) of the Code does not remain in the estate, a trustee may not administer the property under section 363(h) of the Code.[14] Uncertainty exists among courts, however, concerning the extent that section 522(b)(2)(B) of the Code permits a debtor to exempt the debtor's interest in entireties and joint tenancy property from the estate and, therefore, from administration by the trustee in bankruptcy under section 363(h) of the Code.[15] In *Sumy v. Schlossberg*[16] the United States Court of Appeals for the Fourth Circuit considered whether section 522(b)(2)(B) of the Code authorizes an individual debtor to exclude entireties property from an estate when the debtor owes debts to unsecured creditors jointly with the debtor's nonfiling spouse.[17]

In *Sumy* the debtor, filed a voluntary petition for relief under Chapter 7 of the Code[18] in the Bankruptcy Court for the District of Maryland.[19] The debtor filed a schedule of debts that included unsecured debts which the debtor had incurred jointly with the debtor's nonfiling spouse prior to filing a bankruptcy petition.[20] The debtor also filed a schedule of property that included the debtor's home, to which the debtor and his spouse held

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to involve states in determining exemptions. *See* 124 CONG. REC. S. 17,412 (daily ed. Oct. 6, 1978)(opt out provision of § 522(b)(1) of Code represents compromise between House and Senate); *see also* Rhodes v. Stewart, 705 F.2d 1059, 1063 (6th Cir. 1983)(even if state opts out, no minimum number on state exemptions exists).

13. 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985).

14. *See* 11 U.S.C. § 522(b) (1982 & Supp. III 1985)(permitting debtor to exempt property in estate).

15. *See* Liberty State Bank & Trust v. Grosslight, 757 F.2d 773, 777 (6th Cir. 1985)(disallowing exemption of entireties property under § 522(b)(2)(B) and allowing trustee to administer property under § 363(h)); Chippenham Hosp., Inc. v. Bondurant 716 F.2d 1057, 1059 (4th Cir. 1983) § §(disallowing exemption of entireties property under § 522(b)(2)(B) but not considering whether trustee may administer property under § 363(h)); *In re* Ford, 3 Bankr. 559, 575 (Bankr. Md. 1980).

16. 777 F.2d 921 (4th Cir. 1985).

17. *Id.* at 922.

18. 11 U.S.C. §§ 701-766 (1982 & Supp. III 1985)(Chapter 7 of Code). Under a Chapter 7 proceeding a debtor must forfeit to the trustee all property of the debtor's estate that the debtor may not exempt under § 522 of the Code. *Id.* § 704; *see id.* § 521(4) (debtor must surrender all property of estate to trustee). The trustee then distributes the assets of the estate for the benefit of the debtors creditors. *Id.* § 704. The purpose of Chapter 7 is to liquidate the debtor's bankruptcy estate to relieve the debtor of outstanding creditor obligations. 1977 HOUSE REPORT, *supra* note 2, at 379; *see* Burlinham v. Grouse, 228 U.S. 459, 473 (1913)(purpose of Chapter 7 is to liquidate debtor's assets and distribute proceeds to creditors to relieve debtors of debts).

19. Sumy v. Schlossberg, 46 Bankr. 217, 218 (D. Md. 1985).

20. *Id.* The debtor in *Sumy* scheduled a total of $19,575.50 in unsecured claims. *Id.* Of the total amount of claims, $1474.78 constituted claims that the debtor owed jointly with the debtor's nonfiling spouse. *Id.*

title jointly as tenants by the entirety.[21] The debtor claimed the equity in the home as exempt from the estate under section 522(b)(2)(B) of the Code.[22] The debtor argued that Maryland common law did not permit joint creditors of an individual debtor to execute against the debtor's individual, undivided interest in entireties property.[23] Accordingly, the debtor argued that section 522(b)(2)(B) of the Code permitted the debtor to exempt the equity interest in the home owned as tenants by the entirety from the estate.[24] The trustee objected to the debtor's claimed exemption and sought to administer the entireties property under section 363(h) for the benefit of the joint creditors of the debtor and the debtor's nonfiling spouse.[25] In considering the trustee's objection, the bankruptcy court explained that section 522(b)(2)(B) of the Code entitles a debtor to exempt the debtor's interest in entireties property from the estate only to the extent that the interest is not subject to levy and execution under applicable nonbankruptcy law.[26] The bankruptcy court then determined that under Maryland common law, joint creditors may enforce a judgment against joint debtors by executing against property that joint debtors hold as tenants by the entirety.[27] The court then found that because the debtor and his spouse held title to the home as tenants by the entirety, Maryland common law would permit joint creditors to execute against the entireties property to satisfy the joint creditors' claims against the debtor and his nonfiling spouse.[28] Accordingly, the bankruptcy court held that section 522(b)(2)(B) of the Code did not authorize the debtor to exempt the entireties property from the bankruptcy estate.[29]

The debtor appealed the bankruptcy court's holding to the United States District Court for the District of Maryland.[30] In considering whether the individual debtor could exempt entireties property from the estate, the district court recognized that section 522(b)(2)(B) of the Code allows debtors to exempt the debtor's interest in entireties property from the estate to the extent that the interest is not subject to levy and execution under state

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21. *Id.* In *Sumy* the debtor and the debtor's spouse owned as tenants by the entirety a home worth $72,500. *Id.* The equity in the debtors' home amounted to approximately $20,000. *Id.* at n.1; *see supra* note 8 (discussing common law principles of tenancy by the entirety).

22. Sumy v. Schlossberg, 46 Bankr. 217, 218 (D. Md. 1985); 11 U.S.C. 522(b)(2)(B) (1982 & Supp. III 1985).

23. *Sumy*, 46 Bankr. at 218; *see supra* note 8 (discussing common law principles of tenancy by entirety).

24. *Sumy*, 46 Bankr. at 218; *see supra* note 14 and accompanying text (§ 522(b)(2)(B) of Code allows debtor to exclude interests in entireties property from estate to extent that interests not subject to creditor process under state law); *supra* note 8 (under common law, individual undivided interest in entireties property is not subject to creditor claims).

25. *Sumy*, 46 Bankr. at 218; 11 U.S.C. § 363(h) (1982); *see* FED. R. BANKR. P. 4003(b) (trustee must object to debtor's claimed exemptions within 30 days from time that debtor files schedule of exempt property).

26. *Sumy*, 46 Bankr. at 218; 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985).

27. *Sumy*, 46 Bankr. at 218.

28. *Id.*

29. *Id.*; *see supra* note 14 and accompanying text (discussing § 522(b)(2)(B) of Code).

30. *Sumy*, 46 Bankr. at 217.

law.[31] The district court then examined Maryland common law and determined that joint creditors cannot execute against a debtor's individual, undivided interest in entireties property.[32] The district court in *Sumy* explained that under section 541 of the Code, only a debtor's individual, undivided interest in entireties property becomes part of the estate in bankruptcy.[33] The district court in *Sumy* found that because only the individual debtor's undivided interest in entireties property, (rather than the actual entireties property), became part of the bankrupt estate, joint creditors could not execute against the interest under Maryland common law.[34] The district court held, therefore, that section 522(b)(2)(B) of the Code allowed the debtor to exempt the debtor's equity interest in the debtor's home from the estate.[35]

The trustee appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit.[36] In considering whether section 522(b)(2)(B) of the Code allows an individual debtor to exempt the debtor's interest in entireties property from the estate when the debtor owes debts jointly with the debtor's nonfiling spouse, the Fourth Circuit first recognized that upon the filing of a petition for relief under the Code, all of a debtor's legal and equitable interests in entireties property as of the time of filing

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31. *Id.* at 218-19; 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985).

32. *Sumy*, 46 Bankr. at 219; *see supra* note 8 (discussing common law principles of tenancy by the entirety).

33. *Sumy*, 46 Bankr. at 219; *see supra* note 3 (discussing property of estate).

34. *Sumy*, 46 Bankr. at 219-21; *see supra* note 8 (discussing common law principles of tenancy by entirety). In finding that unsecured joint creditors cannot proceed against an individual joint debtor's interest in entireties property under Maryland common law, the district court in *Sumy* relied on the Fourth Circuit's reasoning in *In re* Ford. *Sumy*, 46 Bankr. at 217; *see In re* Ford, 3 Bankr. 559 (Bankr. Md. 1980). In *Ford* the Fourth Circuit considered whether an individual debtor may exempt entireties property from an estate when the debtor has incurred joint debts with the debtor's spouse. *Ford*, 3 Bankr. at 562. The *Ford* court first found that only the debtor's interest in entireties property, and not the entireties property itself, becomes part of the debtor's bankruptcy estate under § 541(a) of the Code. *Id.* at 575; *see* 11 U.S.C. § 541(a) (1982 & Supp. III 1985)(providing for property of estate); *see supra* note 3 (discussing property in estate). The *Ford* court then reasoned that because under Maryland common law neither individual nor joint creditors can execute against a debtor's individual, undivided interest in entireties property, § 522(b)(2)(B) of the Code allows debtors to exempt their interest in entireties property from the bankrupt estate. *Ford*, 3 Bankr. at 576. The *Ford* court noted, however, that joint creditors could, nonetheless, proceed in state court to unify the joint debtors' individual, undivided interests in entireties property, obtain and enforce a joint judgment against the debtors, and satisfy the judgment out of the debtors' entireties property. *Id.*

35. *Sumy*, 46 Bankr. at 221; 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985). The district court in *Sumy* found that section 522(b)(2)(B) of the Code permitted the debtor to exclude his interest in entireties property from the estate because the joint creditor could not execute on the individual debtor's undivided interest in entireties property that became part of the estate under § 541(a) of the Code. *Sumy*, 46 Bankr. at 221; *see supra* note 34 and accompanying text (district court in *Ford* explained that only individual debtors' undivided interest in entireties property, and not entireties property itself, becomes part of estate).

36. Sumy v. Schlossberg, 777 F.2d 921, 922 (4th Cir. 1985).

became part of the estate.[37] The *Sumy* court then noted that section 522(b)(2)(B) authorizes debtors to exempt entireties property interests from the estate only to the extent that the interests are exempt from process under applicable nonbankruptcy law.[38] The *Sumy* court next examined Maryland common law to determine whether joint creditors may execute upon an individual debtor's interest in entireties property when the debtor has incurred debts jointly with the debtor's nonfiling spouse.[39] The Fourth Circuit explained that under Maryland common law a joint creditor with a claim against only one spouse cannot levy and execute on the entireties property held between the spouses.[40] The *Sumy* court further explained, however, that Maryland common law permitted a creditor with a claim against both spouses to proceed in state court to obtain a joint judgment against both spouses and execute upon the entireties property to satisfy the joint creditor's judgment.[41] The Fourth Circuit determined, therefore, that when a joint debtor files an individual petition for relief under the Code, a joint creditor of both the individual debtor and the debtor's nonfiling spouse may petition the bankruptcy court for relief from the automatic stay,[42] obtain a judgment against the joint debtors, and satisfy the judgment out of the joint debtors' entireties property.[43] The Fourth Circuit held, accordingly, that because the joint creditor in *Sumy* possessed a joint claim against the debtor and the debtor's nonfiling spouse that was enforceable in state court, section 522(b)(2)(B) of the Code did not authorize the debtor

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37. *Id.* at 923; *see supra* note 3 (discussing property in estate).

38. Sumy v. Schlossberg, 777 F.2d at 926; 11 U.S.C. §§ 522(b)(2)(B), 363(h) (1982 & Supp. III 1985); *see supra* notes 10-11 and accompanying text (trustee may not administer property that is not in debtor's bankrupt estate).

39. *Sumy*, 777 F.2d at 926; *see supra* note 8 (discussing common law principles of tenancy by entirety).

40. *Sumy*, 777 F.2d at 926.

41. *Id.* at 926-27. The *Sumy* court explained that in a bankruptcy proceeding, an unsecured joint creditor can petition the bankruptcy court to lift the automatic stay and proceed in state court to obtain a joint judgment against the individual debtor and the debtor's nonfiling spouse. *Id.* at 927. The *Sumy* court then explained that under Maryland law a creditor who possesses a joint judgment against a debtor and the debtor's nonfiling spouse may execute against the entireties property of the debtor and the debtor's nonfiling spouse to satisfy the judgment. *Id.* Additionally, the *Sumy* court noted that because no joint creditors existed in *Ford*, any holdings in *Ford* concerning joint creditors constituted dicta. *Id.*; *see Ford*, 3 Bankr. at 926 (joint creditors did not exist in *Ford*); *supra* note 33 (discussing *Ford*).

42. *See* 11 U.S.C. § 363(d) (1982 & Supp. III 1985)(bankruptcy court grants relief from automatic stay for benefit of party in interest for valid cause). A debtor's filing for relief under the Code automatically imposes a stay against practically all attempts by creditors to collect the debtor's outstanding financial obligations. *Id.* § 362(a). The automatic stay continues until property is no longer part of the estate or until the bankruptcy court grants relief from the stay under § 363(d) of the Code. *Id.* § 363(d); *see* Phillips v. Krakower, 46 F.2d 764, 767 (4th Cir. 1931)(bankruptcy court grants joint creditors relief from automatic stay to prevent inequity caused by not allowing joint creditors to collect outstanding debts of joint debtors).

43. *Sumy*, 777 F.2d at 928; *supra* note 8 (discussing common law principles of tenancy by entirety).

to exempt the debtor's interest in the entireties property from the estate.[44] The *Sumy* court further held that because the entireties property remained in the estate, the trustee could administer the entireties property under section 363(h) of the Code.[45]

In support of its holding, the Fourth Circuit maintained that excluding the debtor's interest in entireties property from the estate in *Sumy* would result in an inequitable treatment of the joint creditor.[46] The Fourth Circuit noted that section 522(f)(1) of the Code allows a debtor to avoid judicial liens against estate property to the extent that the lien impairs an exemption that section 522(b)(2)(B) otherwise authorizes.[47] The Fourth Circuit further noted that section 522(c) of the Code provides that once property is exempt from the estate, the property is not available to satisfy creditor's claims that arose before the debtor filed a bankruptcy petition.[48] The Fourth Circuit explained that section 522(f)(1) and section 522(b) allow a debtor permanently to avoid judicial liens on entireties property and exempt interests in entireties property from the bankruptcy estate, and thus effectively prevent joint creditors from executing against the entireties property either

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44. *Sumy*, 777 F.2d at 928.

45. *Id.* at 932; 11 U.S.C. § 363(h) (1982 & Supp. III 1985). In addition to the *Sumy* court's holding that § 363(h) of the Code permits a trustee to sell entireties property, the *Sumy* court found that a creditor nonetheless may petition the bankruptcy court to lift the automatic stay and proceed in state court against a debtor's entireties property. *Sumy*, 777 F.2d at 932; *see supra* note 10 and accompanying text (§ 363(h) allows trustee to sell entireties property that debtor may not exempt from estate pursuant to § 522(b)(2)(B) of Code).

46. *Sumy*, 777 F.2d at 929-32; *see infra* notes 47-53 and accompanying text (discussing equitable policies that Fourth Circuit considered in determining that 522(b)(2)(B) of Code did not allow debtor to exempt entireties property from estate).

47. *Sumy*, 777 F.2d at 930; 11 U.S.C. §§ 522(b)(2)(B), 522(f)(1) 1982 & Supp. III 1985). The *Sumy* court noted that § 522(f)(1) of the Code allows debtors, either before discharge from bankruptcy or by post discharge complaint, to avoid a judicial lien that attaches to the debtor's property before the debtor files a bankruptcy petition. *Sumy*, 777 F.2d at 930; *see* 11 U.S.C. § 101(30) (1982 & Supp. III 1985) (judicial lien is lien that creditor obtains by judgment, levy, sequestration or other legal or equitable proceeding). The Fourth Circuit explained that a debtor may avoid a judicial lien that arises after discharge by filing a post-discharge complaint that claims that the judicial lien impairs an exemption that § 522(b) of the Code authorizes. *Id.* at 930 n.22. The *Sumy* court further explained that allowing debtors to avoid judicial liens that arise both before and after the debtor obtains a discharge from bankruptcy prevents inequitable treatment between creditors possessing prepetition and post-petition judicial liens solely because of the timing of the lien. *Id.*

48. *Sumy*, 777 F.2d at 930-31; 11 U.S.C. § 522(c) (1982 & Supp. III 1985). The *Sumy* court recognized that § 522(c) of the Code compliments §§ 522(b) and (f) by generally insulating property that is exempt under § 522(b) and (f) from claims of creditors that arose before the commencement of a bankruptcy proceeding. *Sumy*, 777 F.2d at 930; 11 U.S.C. § 522(c) (1982 & Supp. III 1985). The Fourth Circuit in *Sumy* then explained that because § 522(c) of the Code protects a debtor's exempt property from prepetition claims of creditors, even those joint creditors who lift the automatic stay to proceed against a debtor's property in state court cannot proceed to satisfy outstanding claims against the property that the debtor has exempted under §522(b) of the Code. *Sumy*, 777 F.2d at 930-31; 11 U.S.C. § 522(b)-(c) (1982 & Supp. III 1985).

during or after the bankruptcy proceeding.[49] Additionally, the *Sumy* court determined that preventing a debtor from exempting an interest in entireties property from the estate places all similarly situated joint creditors under the jurisdiction of a single bankruptcy proceeding.[50] The Fourth Circuit recognized that a single judicial proceeding eliminates the need for a creditor to lift the automatic stay and proceed in state court to obtain a lien on the debtor's entireties property.[51] The *Sumy* court further recognized that a single judicial proceeding enables debtors to quickly rehabilitate distressed finances and enhances judicial efficiency.[52] The *Sumy* court found, therefore,

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49. *Sumy*, 777 F.2d at 931; 11 U.S.C. §§ 522(b),(f)(l) (1982 & Supp. III 1985). The *Sumy* court recognized that §§ 522(f) and (c) of the Code were ineffective unless a debtor could exempt property under § 522(b) of the Code. *Id.* The *Sumy* court explained, therefore, that not allowing the debtor in *Sumy* to exempt entireties property from the estate would allow the trustee to administer the entireties property under § 363(h) of the Code. *Id.* The Fourth Circuit in *Sumy* added that its holding thus prevented debtors from excluding entireties property from an estate that equitably should be available to satisfy the claims of joint creditors. *Id.* at 929. The *Sumy* court characterized the exclusion from an estate of entireties property that equitably should be available to satisfy joint creditors' claims as legal fraud. *Id.*; *see* Phillips v. Krakower, 46 F.2d 764, 765 (4th Cir. 1931)(defining legal fraud). In *Phillips v. Krakower*, the Fourth Circuit defined legal fraud as the effective withdrawing of a debtor's property from the reach of creditors who are entitled to the property. *Id.* The Fourth Circuit in *Phillips* recognized that bankruptcy courts must prevent debtors from committing legal fraud. *Id.* at 765. In *Phillips* the Fourth Circuit permitted an unsecured creditor to petition the bankruptcy court to lift the automatic stay and proceed in state court to obtain and enforce a joint judgment against an individual debtor and the debtor's nonfiling spouse. *Id.* at 766. The *Phillips* court explained that not allowing a joint creditor to proceed in state court permits an individual debtor to perpetuate fraud by shielding assets from creditors that are properly applicable to the satisfaction of creditors' claims. *Id.* The *Phillips* court characterized legal fraud as "shocking to the conscience." *Id.*

50. *Sumy*, 777 F.2d at 932. The *Sumy* court explained that when a debtor may exempt an interest in entireties property from the debtor's bankrupt estate under § 522(b)(2)(B) of the Code, each joint creditor must petition the bankruptcy court to lift the automatic stay so that the joint creditor may levy and execute against the debtor's property in state court. *Id.* The *Sumy* court recognized, however, that when § 522(b)(2)(B) of the Code does not authorize a debtor to exempt an interest in entireties property from the debtor's estate, a trustee can administer entireties property under § 363(h) of the Code. *Id.* The Fourth Circuit explained that, consequently, each creditor does not have to proceed in state court to satisfy the debtor's outstanding obligation to the joint creditor. *Id.*; 11 U.S.C. §§ 363(h), 522(b)(2)(B) (1982 & Supp. III 1985).

51. *Sumy*, 777 F.2d at 932; *see supra* note 50 (discussing creditors' rights against debtors' entireties property in bankruptcy proceeding).

52. *Sumy*, 777 F.2d at 932. The *Sumy* court explained that when § 522(b)(2)(B) of the Code authorizes debtors to exempt an interest in entireties property from an estate, joint creditors must petition the bankruptcy court to lift the automatic stay to proceed in state court to obtain and enforce a judgment against joint debtors. *Id.* The Fourth Circuit found that requiring joint creditors to proceed in state court against joint debtors delays a debtor's discharge from bankruptcy due to the multiple judicial proceedings. *Id.* The *Sumy* court further found that the delay in discharging a debtor from bankruptcy prevents the debtor from promptly rehabilitating distressed finances and economically contributing to society. *Id.* The *Sumy* court determined that a single judicial proceeding in bankruptcy benefits both the debtor and creditor by eliminating the costs and delays that multiple judicial proceedings cause. *Id.*; *see supra* note 1 (primary goal of bankruptcy is to rehabilitate debtors distressed finances so that debtor again can contribute to society).

that policy considerations dictate that a debtor cannot exempt interests in entireties property from the estate under section 522(b)(2)(B) of the Code when joint creditors otherwise could execute against the entireties property in state court.[53]

The Fourth Circuit correctly held that an individual debtor cannot exempt the debtor's interest in entireties property from an estate in bankruptcy to the extent that the individual debtor owes a joint debt with the co-owner of entireties property.[54] Both judicial precedent and policy considerations concerning the exemption of entireties property from an estate support the Fourth Circuit's holding.[55] For example, in *Ragsdale v. Genesco, Inc.*[56] the Fourth Circuit considered whether section 522(b)(2)(B) of the Code authorized joint debtors to exclude entireties property from an estate when a creditor possesses a prebankruptcy joint judgment against the debtors.[57] In *Ragsdale* the debtors suffered a prebankruptcy joint judgment that resulted in a lien against the property that the debtors owned as tenants by the entirety.[58] After filing a joint petition for relief under the Code, the debtors attempted to exempt their equity interest in their entireties property from the estate under section 522(b)(2)(B) of the Code.[59] The *Ragsdale* court

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53. *Sumy*, 777 F.2d at 929-32; 11 U.S.C. § 522(B)(2)(b) (1982 & Supp. III 1985); *see supra* notes 46-52 and accompanying text (discussing policy considerations in *Sumy*).

54. *See infra* notes 55-104 and accompanying text (discussing *Sumy*).

55. *See* Liberty State Bank & Trust v. Grosslight, 757 F.2d 773, 777 (6th Cir. 1985)(§ 363(h) of Code authorizes trustee to administer entireties property not exempt under § 522(b)(2)(B) of Code); Chippenham Hosp., Inc. v. Bondurant, 716 F.2d 1057, 1058 (4th Cir. 1983)(§ 522(b)(2)(B) of Code does not authorize jointly indebted debtor filing individually for bankruptcy to exempt entireties property from estate); Ragsdale v. Genesco, 674 F.2d 277, 278 (4th Cir. 1982)(§ 522(b)(2)(B) of Code does not authorize debtors suffering a joint judgment to exempt entireties property from estate); *infra* notes 56-82 (discussing judicial interpretations of § 522(b)(2)(B)); *infra* notes 83-104 (discussing policy considerations concerning § 522(b)(2)(B)).

56. 674 F.2d 277 (4th Cir. 1982).

57. *Id.* at 278; 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985). Although the Fourth Circuit decided *Ragsdale v. Genesco* under Virginia common law and decided *Sumy* under Maryland common law, both Virginia and Maryland common law are identical in all relevant aspects concerning entireties property. *See In re* Ford, 3 Bankr. 559, 565 (4th Cir. 1980)(discussing Maryland law concerning tenancy by entirety); Vasilion v. Vasilion, 192 Va. 735, 737, 66 S.E.2d 599, 602-04 (1951)(discussing Virginia law concerning tenancy by entirety); *supra* note 8 (discussing common law principles of tenancy by the entirety).

58. Ragsdale v. Genesco, 674 F.2d 277, 278 (4th Cir. 1982). In *Ragsdale* the debtors suffered a prebankruptcy judgment of $8,532.26, plus interest and attorney fees, on an outstanding debt that the debtors owed the joint creditor. *Id.* The creditor recorded the judgment and obtained a judicial lien on the debtors' entireties property, which had a value of $74,500 and was subject to a first deed of trust in the amount of $51,482. Ragsdale v. Genesco, 9 Bankr. 991, 992 (Bankr. E.D. Va. 1981).

59. Ragsdale v. Genesco, 9 Bankr. 991, 991 (Bankr. E.D. Va. 1981); 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985); *see supra* note 14 and accompanying text (discussing debtor's authority to exempt interest in entireties property under § 522(b)(2)(B) of Code). The debtors in *Ragsdale* claimed that § 522(f)(l) of the Code authorized the debtors to avoid the judicial lien that the creditor possessed onthe entireties property. *Ragsdale*, 9 Bankr. at 991; *see* 11 U.S.C. § 522(f)(l) (1982 & Supp. III 1985)(debtor may avoid judicial lien on entireties

recognized, however, that the language of section 522(b)(2)(B) authorizes debtors to exempt interests in entireties property from the estate only to the extent that the interests are not subject to creditor process under state law.[60] The *Ragsdale* court then examined the applicable state law and found that creditors holding a joint and several judgment against two persons may execute in state court against the property that those same persons own as joint tenants or tenants by the entirety.[61] The *Ragsdale* court found, therefore, that because the joint creditor in *Ragsdale* held a joint judgment against the joint debtors that would permit the creditor to execute against the debtors' entireties property in state court, the debtors could not exempt their interest in the entireties property from the estate under section 522(b)(2)(B) of the Code.[62]

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property to extent that judicial lien impairs an exemption of a debtors' interest in entireties property under § 522(b)(2)(B) of Code). Like the Fourth Circuit in *Ragsdale*, the bankruptcy court in *Ragsdale* recognized that before § 522(f)(1) of the Code authorized a debtor to avoid a judicial lien, § 522(b) of the Code must entitle the debtor to exempt the debtor's interest in property from the bankrupt estate. *Ragsdale*, 9 Bankr. at 932; *see* Ragsdale v. Genesco, 674 F.2d 277, 278 (4th Cir. 1982)(recognizing that § 522(b)(2)(B) must authorize debtor to exempt interest in entireties property from estate before § 522(f)(1) authorizes debtor to avoid judicial lien). In considering whether § 522(b)(2)(B) of the Code allowed the debtors in *Ragsdale* to exempt the equity interest in entireties property, the bankruptcy court examined Virginia law and determined that Virginia law allows joint creditors to reach property that joint debtors own as tenants by the entirety. *Id.*; *see* 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985)(debtor may exempt interest in entireties property to extent that applicable nonbankruptcy law protects interest from joint creditor execution). The bankruptcy court in *Ragsdale* held, therefore, that § 522(b)(2)(B) of the Code did not authorize the debtors to exempt their equity interest in entireties property from the debtors' bankruptcy estate. *Id.* Thus, the bankruptcy court in *Ragsdale* found that § 522(f)(1) of the Code did not authorize the debtors to avoid the judicial lien on the debtors' entireties property. *Id.*

60. *Ragsdale*, 674 F.2d at 278-79; 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985).

61. *Ragsdale*, 674 F.2d at 279; *see* Vasilion v. Vasilion, 192 Va. 735, 737, 66 S.E.2d 599, 603 (1951)(fundamental principle of debtor-creditor relations is that joint creditors may obtain satisfaction of outstanding debts out of joint judgment debtors' entireties property).

62. *Ragsdale*, 674, F.2d at 279; 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985). The Fourth Circuit in *Ragsdale* failed to recognize, however, that because the debtors could not exempt entireties property from the estate, the trustee could administer the entireties property under section 363(h) of the Code. *Ragsdale*, 674 F.2d at 279. The *Ragsdale* court, therefore, permitted the joint creditor to lift the automatic stay and proceed against the debtors' entireties property in state court. *Id.*; *accord* Napotnik v. Equibank Parkvale Sav. Assoc., 679 F.2d 316 (3d Cir. 1982). In *Napotnik*, as in *Ragsdale*, the creditor obtained a joint judgment against joint debtors. *Id.* at 318. The creditor in *Napotnik* recorded the judgment and obtained a lien against the debtors' entireties property. *Id.* The debtors filed a joint bankruptcy petition and claimed that § 522(b)(2)(B) of the Code allowed the debtors to exempt their interest in entireties property from the estate and, therefore, that § 522(f)(1) of the Code allowed the debtors to avoid the judicial lien on the entireties property. *Id.* at 318. In considering whether § 522(b)(2)(B) of the Code authorized the debtors to exempt their interest in entireties property from the estate, the United States Court of Appeals for the Third Circuit determined that § 522(b)(2)(B) of the Code required the *Napotnik* court to examine state law to determine whether the debtor's interest in entireties property was subject to levy and execution by joint creditors. *Id.* at 319; *see* 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985)(debtors may exempt interest in entireties property from estate only to extent that interest is not subject to process

In *Chippenham Hospital, Inc. v. Bondurant*[63] the Fourth Circuit extended the scope of the *Ragsdale* court's holding concerning the ability of joint creditors to execute against entireties property in state court.[64] In *Bondurant* the Fourth Circuit considered whether an unsecured joint creditor could execute against the entireties property of an individual Title 11 debtor and the debtor's nonfiling spouse to satisfy the creditor's joint claim against the debtors.[65] The debtor in *Bondurant* filed an individual petition for relief under Chapter 7 of the Code.[66] The debtor scheduled outstanding debts that the debtor owed to the unsecured joint creditor.[67] The unsecured joint creditor petitioned the bankruptcy court to lift the automatic stay and allow the creditor to proceed in state court to obtain and enforce a judgment against the joint debtors.[68] The debtor argued, however, that section 522(b)(2)(B) of the Code authorizes debtors to exempt from the estate debtors' equity interest in entireties property and, therefore, exempt the equity in the property from claims of joint creditors under sections 522(c) and 522(f)(1) of the Code.[69] In considering the arguments of the debtor and creditor in *Bondurant*, the Fourth Circuit recognized that the language of section 522(b)(2)(B) allows debtors to exempt interests in entireties property from an estate only to the extent that creditors may not execute on the interests in entireties property under state law.[70] The *Bondurant* court then

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under applicable nonbankruptcy law). The *Napotnik* court then found that the applicable state law permitted creditors to satisfy joint judgments from the entireties property of joint debtors. Napotnik v. Equibank Parkvale Sav. Assoc., 679 F.2d 316, 320 (3d Cir. 1982). The *Napotnik* court held, therefore, that § 522(b)(2)(B) of the Code did not authorize the debtors to exempt their interest in entireties property from the estate and that, consequently, the debtor could not avoid the judicial lien under § 522(f)(l) of the Code. *Id.* at 321-22. *See generally*, Comment, *Section 522(b)(2)(B)—Debtor May Not Exempt Pennsylvania Entireties Property Subject to an Existing Judgment Against Both Debtor and Spouse on a Joint Debt*, 28 VILL. L. REV. 655, 655-76 (1983)(discussing *Napotnik* holding).

63. 716 F.2d 1057 (4th Cir. 1983).

64. Chippenham Hospital, Inc. v. Bondurant, 716 F.2d 1057, 1058 (4th Cir. 1983).

65. *Id.*

66. *Id.* at 1057; *see supra* note 18 (discussing relief under Chapter 7 of Code).

67. *Bondurant*, 716 F.2d at 1057. The debtor in *Bondurant* listed an outstanding debt of $1,346.60 that the debtor owed to the creditor for hospital care provided by the creditor. *Id.* The creditor claimed that the debtor and the debtor's spouse were jointly and severally liable for the outstanding debt. *Id.*

68. *Id.* The bankruptcy court in *Bondurant* granted the joint creditor's request to lift the automatic stay, which would permit the creditor to proceed in state court and potentially obtain a judgment against the joint debtors and to enforce the judgment against the entireties property of the joint debtors. *Id.* at 1057-58. The district court in *Bondurant* affirmed the bankruptcy court's holding to lift the automatic stay and allow the joint creditor to proceed in state court to satisfy the outstanding debt. *Id.* at 1058; *see supra* note 42 (discussing automatic stay).

69. *Bondurant*, 716 F.2d at 1058; 11 U.S.C. §§ 522(b)(2)(B), 522(c), 522(f)(l) (1982 & Supp. III 1985).

70. *Bondurant*, 716 F.2d at 1058-59; *see* 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985)(debtors may exempt interest in entireties property from estate only to extent that interest is exempt from creditor process under state law).

examined the applicable state law and found that a joint creditor with an unsecured claim against a debtor and the debtor's spouse may execute against the debtor's entireties property in state court.[71] The Fourth Circuit held that because applicable state law rendered the entireties property subject to the claims of joint creditors in state court, section 522(b)(2)(B) of the Code did not entitle the individual debtor to exempt from the estate the debtor's interest in entireties property.[72] The *Bondurant* court recognized that allowing debtors to exempt interests in entireties property from the estate permits debtors to retract permanently the entireties property from the reach of creditors.[73] Because the the Fourth Circuit in *Bondurant* permitted the creditor to lift the automatic stay to proceed in state court instead of permitting the trustee to administer the entireties property under section 363(h), however, the *Bondurant* court failed to address the potentially inequitable treatment of similarly situated joint creditors that requiring the creditors to race to the courthouse to obtain a priority lien may cause.[74]

Unlike the Fourth Circuit in *Bondurant*, the United States Court of Appeals for the Sixth Circuit in *Liberty State Bank & Trust v. Grosslight*[75] addressed the inequitable treatment of similarly situated joint creditors that requiring creditors to proceed in state court against a Title 11 debtor's entireties property may cause.[76] Upon the debtor's filing for relief under the Code in *Grosslight*, an unsecured creditor of the debtor attempted to levy and execute in state court on the entireties property of the debtor and the debtor's nonfiling spouse to satisfy an outstanding joint obligation that the debtor and his spouse owed to the creditor.[77] The debtor claimed that

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71. *Bondurant*, 716 F.2d at 1058. The *Bondurant* court found that Virginia common law permitted an unsecured creditor to proceed against entireties property of an individual debtor and the debtor's nonfiling spouse to prevent legal fraud. *Id.*; *see supra* note 49 (discussing legal fraud).

72. *Bondurant*, 716 F.2d at 1059; *see* Vasilon v. Vasilon 192 Va. 735, 737, 66 S.E.2d 559, 603 (1951)(Virginia common law permits creditors to proceed in state court to obtain judgment against debtor and nonfiling spouse and enforce judgment against entireties property of debtor and debtor's nonfiling spouse).

73. *Id.* The *Bondurant* court explained that § 522(f)(1) of the Code permits a debtor to avoid a lien on property to the extent that the lien impairs an exemption that the debtor claims under § 522(b) of the Code. *Id.*; 11 U.S.C. §§ 522(b), (f)(l) (1982 & Supp. III 1985). The *Bondurant* court further explained that under § 522(c) of the Code, property that a debtor exempts under §§ 522(b) and (f) is not liable for the claims of creditors that arose before commencement of the bankruptcy proceeding. *Bondurant*, 716 F.2d at 1059.

74. *Bondurant*, 716 F.2d at 1059; ll U.S.C. § 363(h) (1982 & Supp. III 1985).

75. 757 F.2d 773 (6th Cir. 1985).

76. Liberty State Bank and Trust v. Grosslight, 757 F.2d 773, 777 (6th Cir. 1985).

77. *Id.* Subsequent to filing for relief under the Code, the individual debtor in *Grosslight* filed a schedule of exempted property that listed the debtor's entireties property as exempt from the estate. *Id.* at 777. The creditor failed, however, to file an objection to the debtor's claimed exemption of entireties property. *Id.* After the debtor filed for bankruptcy, the creditor in *Grosslight* instituted an adversary proceeding requesting that the bankruptcy court either lift the automatic stay to permit the creditor to proceed in state court, or allow the trustee to sell the debtor's entireties property under § 363(h) of the Code for the benefit of the creditor.

section 522(b)(2)(B) of the Code allowed the debtor to exempt his interest in entireties property from the estate, and thus protect that interest pursuant to sections 522(f)(1) and 522(c) from claims arising prior to the filing of the bankruptcy petition.[78] The *Grosslight* court found that the language of section 522(b)(2)(B) prevented the debtor from exempting the debtor's interest in entireties property from the estate because the applicable state law permitted the joint creditor to obtain a joint judgment against the debtor and the debtor's nonfiling spouse and enforce that judgment against the joint debtors' entireties property.[79] The *Grosslight* court further found that because section 522(b)(2)(B) of the Code denied the exemption of the debtor's interest in entireties property from the estate, the trustee could administer the property under section 363(h) of the Code.[80] Similar to the Fourth Circuit in *Sumy*, the Sixth Circuit in *Grosslight* extended a joint creditor's right to proceed against entireties property by permitting a trustee to administer the entireties property under section 363(h) of the Code, instead of requiring the creditor to proceed in state court to satisfy a debtor's obligation.[81] The *Grosslight* holding enhances judicial efficiency and fairness by requiring only one judicial proceeding to administer joint debtors' entireties property for the benefit of joint creditors instead of requiring proceedings in both state court and bankruptcy court once a debtor files a bankruptcy petition.[82]

Id. In considering the creditor's request, the bankruptcy court in *Grosslight* found that by failing to file an objection to the debtor's claimed exemption of entireties property, the creditor did not follow proper bankruptcy procedure. *Id.; see* FED. R. BANKR. P. 4003(b) (creditor may file objection to debtor's claimed exemptions). The bankruptcy court in *Grosslight*, therefore, denied the creditor's request for relief and discharged the debtor from bankruptcy. *Grosslight*, 757 F.2d at 777. On appeal the district court in *Grosslight* affirmed the bankruptcy court's holding. *Id.* The creditor appealed the district court's holding to the United States Court of Appeals for the Sixth Circuit. *Id.* at 774. The Sixth Circuit found that the previous adversary proceeding that the creditor initiated constituted an objection by the creditor to the debtor's claimed exemption and considered whether § 522(b)(2)(B) authorized the debtor to exempt entireties property from the estate. *Id.*; 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985).

78. *Grosslight*, 757 F.2d at 774; *see* 11 U.S.C. §§ 522(c), (f)(l) (1982 & Supp. III 1985)(permitting debtor to avoid judicial lien).

79. *Id.* at 776; *see* 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985)(debtor may exempt interest in entireties property from debtor's bankrupt estate only to extent that interest is not subject to process under applicable nonbankruptcy law).

80. *Grosslight*, 757 F.2d at 777; 11 U.S.C. §§ 363(h), § 522(b)(2)(B) (1982 & Supp. III 1985); *see In re* Trickett, 14 Bankr. 85, 90 (Bankr. W.D. Mich. 1981)(§ 363(h) of Code authorizes trustee to sell entireties property in bankrupt estate for benefit of joint creditors of individual debtor and debtor's nonfiling spouse); *accord In re* Koehler, 6 Bankr. 203, 209 (Bankr. M.D. Fla. 1980)(§ 363(h) authorizes trustee to administer entireties property in bankrupt estate).

81. *Id.; see* Sumy v. Schlossberg, 777 F.2d 921, 932 (4th Cir. 1985)(allowing creditor to satisfy outstanding joint claim against debtor and debtor's nonfiling spouse through trustee's sale of debtors' entireties property under § 363(h) of Code or through proceedings in state court); 11 U.S.C. § 363(h) (1982 & Supp. III 1985)(permitting trustee to sell debtors' entireties property).

82. *Grosslight*, 757 F.2d at 777. The *Grosslight* court explained that because requiring

In addition to judicial interpretations of section 522(b)(2)(B) of the Code, policy considerations support the Fourth Circuit's holding in *Sumy*.[83] As a court of equity, a bankruptcy court should enforce the policies of the Code, which are to provide debtors an opportunity to rehabilitate distressed finances and to provide equitable treatment among the creditors of bankrupt debtors.[84] To facilitate the enforcement of the equitable policies of the Code, Congress granted bankruptcy courts jurisdiction over the entire bankruptcy proceeding.[85] A bankruptcy court's jurisdiction includes the jurisdiction to determine whether debtors may exempt property from the estate and, therefore, from administration by the trustee.[86]

In considering whether 522(b)(2)(B) of the Code allows debtors to exempt interests in entireties property from an estate, a bankruptcy court must ensure that debtors effectively do not withdraw entireties property from the reach of joint creditors because equitable considerations entitle joint creditors the right to satisfy joint claims out of the entireties property held by the joint debtors.[87] For example, when a debtor effectively withdraws entireties property from creditor process by exempting the property from the estate under section 522(b)(2)(B) of the Code, that property generally is not subject to any debt that arose prior to the time the debtor filed the bankruptcy petition.[88] Moreover, when a debtor obtains a discharge from

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joint creditors to proceed in state court against a debtor and the debtor's nonfiling spouse causes multiple judicial proceedings, permitting the trustee to administer the individual debtor's entireties property for the joint creditors' benefit within the context of a single bankruptcy proceeding enhances judicial efficiency. *Id.; see supra* note 10 and accompanying text (discussing trustee's power to sell entireties property under § 363(h) of Code).

83. Sumy v. Schlossberg, 777 F.2d 921, 929-32 (4th Cir. 1985); *see supra* notes 36-53 and accompanying text (discussing Fourth Circuit's holding in *Sumy*); *supra* notes 56-82 (discussing judicial interpretations of § 522(b)(2)(B) of Code); *infra* notes 84-104 and accompanying text (discussing policy considerations concerning § 522(b)(2)(B) of Code).

84. *See* 11 U.S.C. §§ 726(b), 1123(a), 1322(a) (1982 & Supp. III 1985)(providing for pro rata distribution of debtor's assets); Phillips v. Krakower, 46 F.2d 764, 765-66 (4th Cir. 1931)(bankruptcy court is court of equity that should enforce equitable policies of Code); *In re* Trickett, 14 Bankr. 85, 89 (Bankr. W.D. Mich. 1981)(bankruptcy court is court of equity); *supra* note 1 (discussing Congressional goals of Code).

85. *See* 28 U.S.C. § 1471(b)(c) (1984)(bankruptcy court has original jurisdiction over civil proceedings arising or related to cases under Code); *id.* § 1471(e) (bankruptcy court has exclusive jurisdiction over all debtor's property as of commencement of proceeding under Code); *see also* 1978 SENATE REPORT, *supra* note 1, at 82-83 (discussing jurisdiction of bankruptcy court).

86. *See* 1978 SENATE REPORT, *supra* note 1, at 82-83 (stating that bankruptcy court may determine whether § 522(b) of Code authorizes debtor to exempt property from estate, or whether debtor's property remains in estate); *supra* note 10 and accompanying text (trustee may administer property in estate).

87. *See* Liberty State Bank & Trust v. Grosslight, 757 F.2d 773, 776 (6th Cir. 1985)(bankruptcy court must prevent injustices to creditors); Phillips v. Krakower, 46 F.2d 764, 765-66 (4th Cir. 1931)(duty of bankruptcy court is to prevent legal fraud); *supra* note 49 (discussing legal fraud); *supra* note 1 (goal of Code is to provide equitable treatment to bankrupt debtor's creditors).

88. 11 U.S.C. § 522(b)(2)(B),(c) (1982 & Supp. III 1985). Section 522(c) of the Code provides that property exempted under § 522(b) generally is not liable to satisfy prebankruptcy creditors' claims either during or after a bankruptcy proceeding. *Id.* § 522(c).

bankruptcy, the debtor generally no longer personally is liable to creditors for debts that the debtor incurred before commencement of the bankruptcy proceeding.[89] Finding that section 522(b)(2)(B) of the Code entitles a debtor to exempt entireties property from an estate, therefore, forces unsecured joint creditors to act quickly to lift the automatic stay and proceed state court to preserve the creditors' rights against a debtor's entireties property before the bankruptcy court discharges the debtor from bankruptcy.[90] When unsecured joint creditors lift the automatic stay and proceed against entireties property in state court, the first joint creditor to lift the automatic stay and gain a judgment against the joint debtors receives a priority lien on the entireties property under the laws of most states.[91] Forcing unsecured joint creditors to proceed in state court to protect the joint creditors' rights against a debtor's entireties property, therefore, creates a so-called "creditors race" to the courthouse and violates the bankruptcy maxim that a bankruptcy court treat all creditors of the same class equally.[92] In addition to creating a creditor's race to the courthouse, requiring joint creditors to proceed in state court duplicates court and attorney expenses for joint

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89. 11 U.S.C. 522(b)(2)(B) (1982); *see* 11 U.S.C. § 524 (1982 & Supp. III 1985)(discussing effect of discharge from bankruptcy). When a bankruptcy court discharges a debtor from bankruptcy under §§ 727, 944, 1141 or 1328 of the Code, all judgments against the debtor are void to the extent that the judgment determines the personal liability of the debtor. *Id.* § 524(a)(1). Additionally, when a bankruptcy court discharges a debtor under the Code, the debtor is immune from all creditors attempting to attach personal liability to the debtor for the discharged debt. *Id.* § 524(a)(2); *see also* 11 U.S.C. §§ 727, 944, 1141, 1328 (1982 & Supp. III 1985)(providing for discharge of debtor from bankruptcy under chapters 7, 9, 11 and 13 of Code, respectively).

90. *See* 11 U.S.C. § 524 (1982 & Supp. III 1985)(all judgments against debtor are void upon discharge to extent that judgment determines personal liability of debtor); Munoz v. Dembs, 757 F.2d 777, 778 (6th Cir. 1985)(creditor cannot satisfy state court judgment against debtor's property after debtor's discharge from bankruptcy); *In re* Palazzolo, 20 Bankr. 692, 693 (Bankr. E.D. Mich. 1982)(creditors cannot execute against debtor's property to satisfy prebankruptcy debts after court discharges the debtor from bankruptcy).

91. 11 U.S.C. §§ 726(b), 1123(a), 1322(a) (1982 & Supp. III 1985)(specifying that payments to creditors within same class be pro rata); *see In re* Trickett, 14 Bankr. 85, 90 (Bankr. W.D. Mich. 1981)(forcing joint creditors to proceed in state court effectively creates race to courthouse because first creditor to lift automatic stay and obtain judgment against debtors receives priority lien); *In re* Anderson, 12 Bankr. 483, 490-91 (Bankr W.D. Mo. 1981)(bankruptcy courts should treat all similarly situated creditors equally).

92. *See In re* Trickett, 14 Bankr. 85, 90 (Bankr, W.D. Mich. 1981)(first creditor to lift automatic stay receives priority lien); *see also* Plumb, *The Recommendations of the Commission on Bankruptcy Laws—Exempt and Immune Property*, 61 VA. L. REV. 1, 123-26 (1975)(discussing inequities in joint creditor bankruptcy procedure). Mr. Plumb explained that under the 1898 Act, on which the commission based the goals of the Code, bankruptcy courts had to allow joint creditors to proceed in state court to execute against a joint debtors' entireties property. *Id.* at 126. Mr. Plumb asserted that requiring joint creditors to proceed in state court, as opposed to bankruptcy court, causes a race to the courthouse. *Id.* Unsecured Joint creditors must race to the courthouse to obtain and record a judgment against joint debtors to receive a priority lien over other joint creditors. *Id.* Inequities result, therefore, because the creditor that "wins the race" receives distribution out of the debtors' estates before subordinate joint creditors. *Id.*

creditors and may discourage joint creditors with insignificant claims from proceeding in state court to satisfy the outstanding claims of joint debtors.[93] Disallowing the exemption of entireties property from the estate to the extent that the property is subject to process under applicable nonbankruptcy law, however, requires that all joint creditors proceed in bankruptcy court to reach the entireties property of an individual debtor and the debtor's nonfiling spouse.[94] Because federal bankruptcy courts treat unsecured joint creditors equally, no unsecured joint creditor gains priority over another regarding joint debtors' entireties property.[95] Furthermore, disallowing the exemption of entireties property under section 522(b)(2)(B) of the Code benefits a bankrupt debtor because a single judicial proceeding results in less litigation, which quickens the judicial process and thereby allows the debtor to rehabilitate his distressed finances at an earlier point in time.[96]

By exempting entireties property from the bankruptcy estate, debtors not only effectively may withhold entireties property from unsecured creditors, but also effectively may withdraw entireties property from the reach of secured joint creditors.[97] Section 522(f)(1) of the Code allows debtors to avoid certain types of liens, including prepetition judicial liens on property that otherwise would be exempt under section 522(b) of the Code, to the extent that the lien impairs the exemption.[98] Moreover, section 522(c) of the Code provides that entireties property that is exempt under section 522(b) is not subject to debts that arose before the debtor filed a bankruptcy

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93. *See* Liberty State Bank & Trust v. Grosslight, 757 F.2d 773, 777 (6th Cir. 1985)(multiple judicial proceedings cause inefficient use of creditor resources).

94. *See* Liberty State Bank & Trust v. Grosslight, 757 F.2d 773, 777 (6th Cir. 1985)(disallowing exemption permits trustee to administer property under § 363(h) of Code and thus unsecured and secured joint creditors must proceed in bankruptcy court); *In re* Anderson, 12 Bankr. 483, 491 (Bankr. W.D. Mo. 1981)(disallowing exemption of entireties property under § 522(b)(2)(B) necessitates that joint creditors proceed in bankruptcy to satisfy claims).

95. *See* 11 U.S.C. §§ 726(b), 1123(a), 1322(a) (1982 & Supp. III 1985)(providing for equitable distribution of debtor assets); *In re* Anderson, 12 Bankr. 483, 490-91 (Bankr. W.D. Mo. 1981)(Code provides for equitable distribution of estate property). The *Anderson* court recognized that a pro rate distribution of estate property under the Code was more equitable than requiring each creditor to race to the courthouse to obtain a priority lien against a debtor's entireties property. *Anderson*, 12 Bankr. 483, at 490-91; *see also supra* note 91 (discussing pro rata distribution of property of estate to creditors within same class).

96. *See* Liberty State Bank & Trust v. Grosslight, 757 F.2d 773, 777 (6th Cir. 1985)(denying exemption of entireties property results in less litigation and, therefore, increases judicial efficiency); Napotnik v. Equibank & Parkvale Sav. Assoc., 679 F.2d 316, 319 (3d Cir. 1982)(disallowing entireties property exemption § 522(b)(2)(B) of Code results in single judicial proceeding).

97. *See infra* notes 102-108 (discussing how debtors may commit legal fraud against secured joint creditors); *supra* note 87 and accompanying text (discussing legal fraud).

98. *See* 11 U.S.C. § 522(f)(l) (1982 & Supp. III 1985)(debtor may avoid judicial lien on property to extent that lien impairs debtor's claimed exemption under § 522(b) of Code); *id.* § 522(b)(2)(B)(permitting debtor to exempt interest in entireties property from estate to extent that property is exempt from process under applicable nonbankruptcy law); *supra* note 47 (discussing § 522(f)(1) of Code).

petition.[99] Therefore, to the extent that a court permits a debtor to exempt the debtor's interest in encumbered entireties property from the estate, a debtor in effect may shield forever the exempt entireties property from those joint creditors who had previously secured a lien on such property.[100] The Fourth Circuit's position in *Sumy*, however, prevents the apparent inequitable treatment of secured joint creditors by refusing to allow Title 11 debtor's to exempt interests in entireties property to the extent that joint creditors could execute against the property under nonbankruptcy law.[101] Because of the limited exemption that the *Sumy* court allowed under section 522(b)(2)(B) of the Code, a debtor may not avoid a lien on entireties property under section 522(f)(l) to the extent that the debtor's interest in entireties property is subject to execution under applicable state law.[102] Rather, to the extent that a joint creditor has a claim against both a debtor and the debtor's nonfiling spouse that the creditor may enforce by execution on entireties property in state court, the property remains in the estate and the trustee may administer the property for the benefit of the joint creditor.[103] Consequently, prohibiting a debtor from exempting entireties property under section 522(b)(2)(B) of the Code prevents joint debtors from effectively withdrawing entireties property from the reach of joint creditors, and is consistent with the equitable policies of bankruptcy which suggest that joint creditors should obtain satisfaction of joint debts against a Title ll debtor and the debtor's nonfiling spouse from entireties property.[104]

In *Sumy v. Schlossberg*, the Fourth Circuit held that section 522(b)(2)(B) of the Code did not permit an individual joint debtor to exempt entireties property from an estate, and thus from administration under section 363(f).[105]

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99. *See* 11 U.S.C. § 522(c) (1982 & Supp. III 1985)(property of debtor that is exempt under § 522(b) or lien on property that debtor may avoid under § 522(f) of Code generally is not liable for creditors claims which arose before commencement of bankruptcy proceeding); *id.* § 522(b)(2)(B) (allowing debtor to exempt interest in entireties property from estate to extent that interest is not subject to execution under applicable nonbankruptcy law).

100. *See supra* notes 47-49 and accompanying text (§ 522(c) & (f)(1) of Code permit debtor effectively to withdraw entireties property from reach of joint creditors when debtor exempts interest in entireties property from estate under 522(b)(2)(B) of Code).

101. U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985); *see supra* notes 35-52 and accompanying text (discussing *Sumy* holding); *supra* notes 97-100 and accompanying text (debtor effectively may forever shield entireties property from reach of creditors through § 522(c) & (f)(l) of Code).

102. *See* Sumy v. Schlossberg, 777 F.2d 921, 928 (4th Cir. 1985)(recognizing that under § 522(b)(2)(B) of Code debtor may exempt from estate only that interest in entireties property which is not subject to creditor process under state law); 11 U.S.C. § 522(f)(l) (1982 & Supp. III 1985)(debtor may avoid judicial lien on property to extent that lien impairs debtor's claimed exemption under § 522(b) of Code).

103. *See* 11 U.S.C. § 522(b)(2)(B) (1982 & Supp. III 1985)(debtor may exempt from estate only that interest in entireties property which is not subject to creditor process under state law); *id.* § 363(h) (trustee may administer entireties property for benefit of creditors); *supra* note 44 and accompanies text (under *Sumy* holding, entireties property remains in estate).

104. *See supra* notes 97-103 and accompanying text (*Sumy* holding prevents joint debtors from withdrawing entireties property from reach of joint creditors).

105. *See supra* notes 18-53 and accompanying text (discussing *Sumy* holding).

Judicial holdings and policy considerations demonstrate that the *Sumy* court's refusal to exempt entireties property from the bankruptcy debtor's estate under section 522(b)(2)(B) conforms to the equitable policies of the Code.[106] When courts refuse to follow *Sumy*'s holding and permit an individual joint debtor to exempt entireties property from the debtor's estate in bankruptcy, joint creditors nonetheless can proceed in state court to obtain a judgment against the individual joint debtor and the debtor's nonfiling spouse.[107] The joint judgment creditor then can satisfy the judgment out of the entireties property of the joint debtors.[108] Permitting individual debtors to exempt property from the estate, therefore, potentially causes multiple judicial proceedings between debtors and creditors, which decreases judicial efficiency and increases the expenses of debtors, creditors, and courts.[109] The position that the *Sumy* court adopted, however, retains in a bankruptcy estate the property that is subject to the claims of joint creditors, thereby providing equal treatment to similarly situated creditors.[110] Therefore, the *Sumy* court's holding enhances judicial efficiency by providing for a single judicial proceeding, and thus facilitates a quick and efficient financial rehabilitation of debtors.[111] Accordingly, the *Sumy* court's holding provides the fairness and efficiency that Congress intended in enacting the Code.[112] Courts at bar in states that allow joint creditors to levy and execute against an individual joint debtor's interest in entireties property, therefore, should adopt the *Sumy* position and refuse to allow individual joint debtors to exempt entireties property from an estate under section 522(b)(2)(B) of the Code.

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106. 11 U.S.C. § 522(b)(2)(B) (1982); *see supra* notes 56-82 and accompanying text (discussing judicial interpretations of § 522(b)(2)(B) of Code); *supra* notes 83-104 and accompanying text (discussing policy considerations of disallowing exemption of entireties property under § 522(b)(2)(B); *supra* note 1 (discussing equitable policies of Code).

107. *See In re* Ford, 3 Bankr. 559, 573-75 (4th Cir. 1980)(when individual joint debtor can exempt property from estate under § 522(b)(2)(B) of Code, joint creditor, nonetheless, may execute against joint debtors' entireties property in state court); *supra* note 34 (discussing *Ford*).

108. *See supra* notes 61-62 and accompanying text (joint creditor possessing judgment against joint debtors can satisfy judgment against joint debtors' entireties property under state law).

109. *See supra* note 93 and accompanying text (allowing debtor to exempt interest in entireties property under § 522(b)(2)(B) of Code forces multiple judicial proceedings, which decreases judicial efficiency).

110. *See supra* notes 94-95 and accompanying text (not allowing debtors to exempt interest in entireties property under § 522(b)(2)(B) of Code provides equal treatment to similarly situated joint creditors).

111. *See supra* note 1 (primary goal of Code is to rehabilitate debtor's distressed finances).

112. *See supra* notes 93-96 and accompanying text (not allowing debtors to exempt interest in entireties property under § 522(b)(2)(B) of Code promotes judicial efficiency).