GRANTED

No. 99-409

IN THE

Supreme Court of the United States

HARTFORD UNDERWRITERS INSURANCE COMPANY,

Petitioner,

v.

UNION PLANTERS BANK, N.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

WENDI ALPER-PRESSMAN
SUSMAN, SCHERMER,
RIMMEL & SHIFRIN LLC
7711 Carondelet Ave.
St. Louis, Missouri 63105
(314) 725-7300

G. ERIC BRUNSTAD, JR.*
PATRICK J. TROSTLE
RENEE M. DAILEY
MARK W. DEVENO
HELDER P. PEREIRA
WILLIAM H. ERICKSON
NICOLE J. ANKER
BINGHAM DANA LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700

* *Counsel of Record*

Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

Does a postpetition administrative creditor in a bankruptcy case have standing under 11 U.S.C. § 506(c) to seek payment of its administrative claim from property of the bankruptcy estate that is encumbered by a secured creditor's lien?

CORPORATE DISCLOSURE STATEMENT

Hartford Fire Insurance Company (the "Parent") owns 100% of the stock of the Petitioner Hartford Underwriters Insurance Company ("Hartford"). The Parent is not publicly held. The Parent is an indirect subsidiary of The Hartford Financial Services Group, Inc., which is a publicly held company. In addition, the Parent is an affiliate of the Hartford Life Insurance Company, which has issued shares to the public.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	vi
Decisions Below	1
Jurisdiction	1
Constitutional Provisions, Statutes and Ordinances Involved	1
Statement of the Case	3
Summary of Argument	6
Argument	9
I. FOR OVER A CENTURY, ADMINISTRATIVE CLAIMANTS HAVE HAD THE RIGHT IN FEDERAL INSOLVENCY PROCEEDINGS TO PURSUE AND RECOVER CLAIMS OF THE KIND SPECIFIED IN SECTION 506(c), AND THIS RIGHT PROPERLY ENDURES UNDER THE BANKRUPTCY CODE.	14

Contents

Page

A. Reference to Established Pre-Code Practice Demonstrates That Hartford's Right to Pursue and Recover the Priority of Its Administrative Claim Is a Longstanding Right That Hartford Is Entitled to Assert in This Case. 20

B. Hartford's Right to Pursue the Priority of Its Claim Under Section 506(c) Is Further Established by Reference to the Legislative Materials. 26

II. THE BANKRUPTCY CODE SHOULD BE CONSTRUED AS A WHOLE, AND REFERENCE TO THE CODE AS A WHOLE DEMONSTRATES THAT HARTFORD IS ENTITLED TO RECOVER ITS CLAIM FROM MAGNA'S COLLATERAL UNDER SECTION 506(c). 28

A. Reference to Section 1109(b) Further Establishes Hartford's Right to Pursue the Priority of Its Claim Under Section 506(b). 32

B. Reference to Sections 502(a) and 503(a) Establishes Hartford's Right to Pursue the Priority of Its Claim Under Section 506(c). 35

Contents

Page

III. THE COURT BELOW RELIED IMPROPERLY ON A CANON OF CONSTRUCTION TO DENY HARTFORD'S RIGHT OF RECOVERY IN THIS CASE, AND HARTFORD IS ENTITLED TO ASSERT ITS CLAIM UNDER SECTION 506(c). 38

IV. HARTFORD HAS STANDING UNDER THE COURT'S CONSTITUTIONAL AND PRUDENTIAL STANDING DOCTRINES TO ASSERT ITS RIGHT OF RECOVERY UNDER SECTION 506(c), AND DOING SO IS NECESSARY TO ENSURE COMPLIANCE WITH THE PURPOSES AND POLICIES OF THE BANKRUPTCY CODE. 40

A. Hartford Has Constitutional Standing. 41

B. Hartford's Standing Is Necessary to Vindicate Its Own Tangible Interest, As Well As the Purposes of the Bankruptcy Code, and the Relevant Prudential Standing Requirements Are Satisfied. 41

Conclusion 48

TABLE OF CITED AUTHORITIES

Page

Cases:

Adair v. Bank of Am. Nat'l Trust & Sav. Ass'n, 303 U.S. 350 (1938) 12, 22

Allen v. Wright, 468 U.S. 737 (1984) 41, 42

Architectural Bldg. Components v. McClarty (In re Foremost Mfg. Co.), 137 F.3d 919 (6th Cir. 1998) 12

Associates Commercial Corp. v. Rash, 520 U.S. 953 (1997) 10

Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970) 40, 41

Bahndorf v. Lemmons, 525 N.W.2d 404 (Iowa 1994) 47

Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. Partnership, 119 S. Ct. 1411 (1999) 20, 35

Bank of Marin v. England, 385 U.S. 99 (1966) ... 46

Barrows v. Jackson, 346 U.S. 249 (1953) 40

Bennett v. Spear, 520 U.S. 154 (1997) 40, 41, 42

Page

Bronson & Soutter v. La Crosse & Milwaukee R.R., 68 U.S. (1 Wall.) 405 (1863) 22

Butner v. United States, 440 U.S. 48 (1979) 46

C. B. Norton Jewelry Co. v. Hinds (In re Jones), 245 F. 341 (8th Cir. 1917) 25

Cannon v. University of Chicago, 441 U.S. 677 (1979) 25

Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106 (1939) 17

Citizens & S. Nat'l Bank v. Mullins (In re Bolton Road Med. Ctr.), 433 F. Supp. 369 (N.D. Ga. 1976) 24

City of New York v. New York, New Haven & Hartford R.R., 344 U.S. 293 (1953) 33

Cohen v. De La Cruz, 523 U.S. 213 (1998) ... 14, 15, 17

Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry. Co., 294 U.S. 648 (1935) 20

Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.), 536 F.2d 950 (1st Cir. 1976) 10

Page

Davis v. Passman, 442 U.S. 228 (1979) 39, 40

Dewsnup v. Timm, 502 U.S. 410 (1992) .. 14, 17, 19, 26

Dreyfuss v. Klein (In re Tyne), 257 F.2d 310 (7th Cir. 1958) 23, 25

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) 42

Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216 (1936) 29

Emil v. Hanley, 318 U.S. 515 (1943) 14

Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.), 799 F.2d 91 (3d Cir. 1986) 46

First W. Sav. & Loan Ass'n v. Anderson, 252 F.2d 544 (9th Cir. 1958) 12, 24

Flast v. Cohen, 392 U.S. 83 (1968) 41

Ford v. United States, 273 U.S. 593 (1927) 8, 39

Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) 7

Freeman Furniture Factories v. Bowlds (In re Ames Corp.), 136 F.2d 136 (6th Cir. 1943) 25

Page

Gardner v. New Jersey, 329 U.S. 565 (1947) 34, 36

General Motors Corp. v. United States, 496 U.S. 530 (1990) 31

Gozlon-Peretz v. United States, 498 U.S. 395 (1991) 31

Gugel v. New Orleans Nat'l Bank, 239 F. 676 (5th Cir. 1917) 25

Gurney v. Atlantic & Great W. Ry. Co., 58 N.Y. 358 (1874) 47

Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 35

Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902) 34

Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.), 150 F.3d 868 (8th Cir. 1998) 5

Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.), 177 F.3d 719 (8th Cir. 1999) 5, 6, 13

Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989) 19

Horton v. McNally Co., 151 N.Y.S. 674 (N.Y. Sup. Ct. 1915) 47

Page

Hyland v. Anchor Fin. Co., 369 A.2d 12 (N.J. 1977) 47

In re Alaska Plywood Corp., 166 F. Supp. 423 (D. Alaska 1958) 24

In re Amatex Corp., 755 F.2d 1034 (3d Cir. 1985) 34

In re Atlas Iron Const. Co., 46 N.Y.S. 467 (N.Y. App. Div. 1897) 47

In re Boyer, 130 F. Supp. 20 (D. Minn. 1955) 25

In re Centralia Ref. Co., 35 F. Supp. 599 (E.D. Ill. 1940) 25

In re Chambersburg Silk Mfg. Co., 190 F. 411 (M.D. Pa. 1911) 25

In re Dawkins, 34 F.2d 581 (E.D. S.C. 1929) 25

In re James Wilson Assocs., 965 F.2d 160 (7th Cir. 1992) 32, 33

In re Lousiville Storage Co., 21 F. Supp. 897 (W.D. Ky. 1936), *aff'd sub nom. Louisville Title Mortgage Co. v. Louisville Storage Co.*, 93 F.2d 1008 (6th Cir. 1938) 24, 25

Page

In re Rice Leghorn Farm, Inc., 113 F. Supp. 903 (W.D. Mo. 1953) 24

In re Trenge, 127 B.R. 552 (E.D. Pa. 1991) 37

Karahalios v. National Fed'n of Fed. Employees, 489 U.S. 527 (1989) 39, 40

Katchen v. Landy, 382 U.S. 323 (1966) 33, 36

Kelly v. Robinson, 479 U.S. 36 (1986) 7, 15, 17, 29

Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603 (1961) 46

Louisville, Evansville & St. Louis R.R. v. Wilson, 138 U.S. 501 (1891) 7, 12, 13, 14, 21, 22, 23, 28, 34, 36

Machinery Rental, Inc. v. Herpel (In re Multiponics, Inc.), 551 F.2d 1049 (5th Cir. 1977) 23, 25

Maxcy v. Walker (In re Lake Nursery Co.), 119 F.2d 535 (5th Cir. 1941) 25

McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.), 136 B.R. 470 (W.D. Mich. 1991) 6, 12, 13, 37, 46

McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991) 26

Page

Meinhard, Greeff & Co. v. Edens, 189 F.2d 792 (4th Cir. 1951) 25

Metropolitan Life Ins. Co. v. Murel Holding Corp. (In re Murel Holding Corp.), 75 F.2d 941 (2d Cir. 1935) 17

Meyer v. Flemming, 327 U.S. 161 (1946) 8, 47, 48

Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (1986) 7, 8, 15, 16, 17, 19, 28, 40

Miners Sav. Bank v. Joyce, 97 F.2d 973 (3d Cir. 1938) 25

National Acceptance Co. v. Magill (In re Chapman Coal Co.), 196 F.2d 779 (7th Cir. 1952) 14, 23, 24

National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974) 39

Neuberger v. Commissioner, 311 U.S. 83 (1940) .. 39

New Orleans Pub. Serv., Inc. v. First Fed. Sav. & Loan Ass'n (In re Delta Towers, Ltd.), 924 F.2d 74 (5th Cir. 1991) 46

New York Dock Co. v. Steamship Poznan, 274 U.S. 117 (1927) 22, 34

Page

Nobelman v. American Sav. Bank, 508 U.S. 324 (1993) 35

North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.), 951 F.2d 229 (9th Cir. 1991) 6, 37, 44, 46

North Star Steel Co. v. Thomas, 515 U.S. 29 (1995) 25

Northern Pac. Ry. Co. v. Boyd, 228 U.S. 482 (1913) 20, 21

Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656 (1993) 40

Patterson v. Shumate, 504 U.S. 753 (1992) 35

Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990) 14, 15, 17

Pepper v. Litton, 308 U.S. 295 (1939) 36

Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.), 57 F.3d 321 (3d Cir. 1995) 46

Rabyor v. Franklin Mortgage Co. (In re Rotary Tire & Rubber Co.), 2 F.2d 364 (6th Cir. 1924) ... 7, 14, 24

Page

Rake v. Wade, 508 U.S. 464 (1993) 38

Ridgely Nat'l Bank v. Matheny (In re Utt), 105 F. 754 (7th Cir. 1901) 25

Russello v. United States, 464 U.S. 16 (1983) 31

South County Sand & Gravel Co. v. Bituminous Pavers Co., 274 A.2d 427 (R.I. 1971) 47

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 38

Textile Banking Co. v. Widener, 265 F.2d 446 (4th Cir. 1959) 19, 25

The Bethulia, 200 F. 879 (D. Mass. 1912) 25

Toibb v. Radloff, 501 U.S. 157 (1991) 31

United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988) ... 10, 11, 17, 28, 29

United States v. Congress of Indus. Orgs., 335 U.S. 106 (1948) 17

United States v. Energy Resources Co., 495 U.S. 545 (1990) 36

United States v. Henderson, 274 F.2d 419 (5th Cir. 1959) 12, 24

Page

United States v. Noland, 517 U.S. 535 (1996) 16, 17

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 19

United States v. Reorganized CF&I Fabricators, Inc., 518 U.S. 213 (1996) 16, 17

United States v. Wells, 519 U.S. 482 (1997) 25

United States, Internal Revenue Serv. v. Boatmen's First Nat'l Bank, 5 F.3d 1157 (8th Cir. 1993) ... 5, 6

United States Nat'l Bank v. Independent Ins. Agents of Am., Inc., 508 U.S. 439 (1993) 35

Vienna Park Props. v. United Postal Sav. Ass'n (In re Vienna Park Props.), 976 F.2d 106 (2d Cir. 1992) 46

Virginia Sec. Corp. v. Patrick Orchards, Inc., 20 F.2d 78 (4th Cir. 1927) 23, 25

Warren v. Palmer, 310 U.S. 132 (1940) 23

Warth v. Seldin, 422 U.S. 490 (1975) 40, 41

Yadkin Valley Bank & Trust Co. v. McGee (In re Hutchinson), 5 F.3d 750 (4th Cir. 1993) 35, 36

Page

Statutes:

11 U.S.C. § 101 *et seq.* 9

11 U.S.C. § 101(5) 9, 35

11 U.S.C. § 101(10) 9

11 U.S.C. § 103(a) 33

11 U.S.C. § 105 18

11 U.S.C. § 106(c) 19

11 U.S.C. § 109 ..... 30, 31

11 U.S.C. § 109(a) 30

11 U.S.C. § 109(d) 30

11 U.S.C. § 303(a) 30

11 U.S.C. § 307 30

11 U.S.C. § 330 19

11 U.S.C. § 330(a) 19

11 U.S.C. § 341(c) 30

11 U.S.C. § 348(d) 33

11 U.S.C. § 501(a) 9

Page

11 U.S.C. § 502(a) ... 1, 8, 9, 32, 35, 36, 37, 39, 40, 42, 43

11 U.S.C. § 502(b) 9

11 U.S.C. § 502(b)(9) 38

11 U.S.C. § 503 ..... 5, 10

11 U.S.C. § 503(a) 2, 8, 9, 32, 35, 37, 39, 40, 42, 43

11 U.S.C. § 503(b)(1)(A) 2, 9

11 U.S.C. § 506(a) 10, 12

11 U.S.C. § 506(b) 11, 12, 32

11 U.S.C. § 506(c) ..... *passim*

11 U.S.C. § 507(a)(1) 10

11 U.S.C. § 507(a)(4) 18

11 U.S.C. § 507(a)(7)(E) 16

11 U.S.C. § 510 ..... 17, 45

11 U.S.C. § 523 18

11 U.S.C. § 523(a) 15

11 U.S.C. § 541 ..... 9, 18

	Page
11 U.S.C. § 541(a)	9
11 U.S.C. § 541(a)(1)	18
11 U.S.C. § 544	16, 19, 28
11 U.S.C. § 701	4
11 U.S.C. § 702	4
11 U.S.C. § 702(a)	30
11 U.S.C. § 706(c)	30
11 U.S.C. § 707(b)	29, 30
11 U.S.C. § 726	9
11 U.S.C. § 726(a)	11, 38
11 U.S.C. § 726(a)(1)	10
11 U.S.C. § 1101(a)	3
11 U.S.C. § 1104(a)	4
11 U.S.C. § 1107	3
11 U.S.C. § 1107(a)	44

	Page
11 U.S.C. § 1108	3
11 U.S.C. § 1109(a)	30
11 U.S.C. § 1109(b)	2, 8, 11, 32, 33, 34, 35, 39, 40, 42
11 U.S.C. § 1112	4
11 U.S.C. § 1112(c)	30
11 U.S.C. § 1112(d)	30
11 U.S.C. § 1121(b)	30
11 U.S.C. § 1121(e)	30
11 U.S.C. § 1123(a)(5)(c)	18
11 U.S.C. § 1129	11
11 U.S.C. § 1129(a)(9)(A)	10
11 U.S.C. § 1129(b)(2)(A)(iii)	17
11 U.S.C. § 1129(b)(2)(B)(ii)	20
11 U.S.C. § 1164	30
11 U.S.C. § 1303	30

	Page
11 U.S.C. § 1304(b)	30
11 U.S.C. § 1307(c)(9)	30
11 U.S.C. § 1307(c)(10)	31
28 U.S.C. § 157	1
28 U.S.C. § 158(a)	1
28 U.S.C. § 158(d)	1
28 U.S.C. § 1254	1
28 U.S.C. § 1291	1
28 U.S.C. § 1334	1

Other Authorities:

Douglas G. Baird, *The Elements of Bankruptcy* (rev. ed. 1993)	20
Bankruptcy Act of 1800, ch. 19, 2 stat. 19 (1800) (repealed 1803)	20
Bankruptcy Act of 1841, ch. 9, 5 stat. 440 (1841) (repealed 1843)	20
Bankruptcy Act of 1867, ch. 176, 14 stat. 517 (1867) (repealed 1878)	20

	Page
Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1979)	22
G. Eric Brunstad, Jr. & Mike Sigal, *Competitive Choice Theory and the Unresolved Doctrines of Classification and Unfair Discrimination in Business Reorganizations under the Bankruptcy Code*, 55 Bus. Law. 1 (1999)	20
4 *Collier on Bankruptcy* ¶ 506.05[8] (Lawrence P. King ed., 15th ed. revised 1999)	13
7 *Collier on Bankruptcy* ¶ 1109.04[2][b] (Lawrence P. King ed., 15th ed. revised 1999)	34
124 Cong. Rec. 32,395, 33,994 (1978)	19
124 Cong. Rec. 32,398 (1978)	27
124 Cong. Rec. 32,399, 33,998 (1978)	18
124 Cong. Rec. 32,407, 34,007 (1978)	17
124 Cong. Rec. 33,997 (1978)	27
124 Cong. Rec. H10,766 (daily ed. Oct. 4, 1994)	19
Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947)	29
H.R. 8200, 95th Cong. § 506(c) (1977)	26, 27

Cited Authorities

Page

H.R. Rep. No. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963 ..... 9, 18, 19, 27, 36

6 Harold Remington, *A Treatise on the Bankruptcy Law of the United States* (5th ed. 1952) 10, 12, 23

S. 2266, 95th Cong. § 506(c) (1978) 27

S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 ..... 9, 18, 27

Staff of House Comm. on Judiciary, 95th Cong., 1st Sess., *Table of Derivation of H.R. 8200* (Comm. Print No. 6 1977) 19

Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5 (1995) 20

DECISIONS BELOW

The unreported decision of the Bankruptcy Court determining that Hartford has the right under 11 U.S.C. § 506(c) to recover its administrative claim from property of the debtor's bankruptcy estate is reprinted in the accompanying Appendix at App. 249a-263a. The unreported decision of the District Court affirming the Bankruptcy Court is reprinted in the Appendix at App. 270a-282a. The panel decision of the United States Court of Appeals for the Eighth Circuit affirming the District Court is reported at 150 F.3d 868 (8th Cir. 1998), and is reprinted in the Appendix at App. 286a-296a. The *en banc* decision of the United States Court of Appeals for the Eighth Circuit determining that Hartford lacks standing to pursue its claim under section 506(c) is reported at 177 F.3d 719 (8th Cir. 1999) and is reprinted in the Appendix at App. 297a-316a. The sole issue decided by the *en banc* Court of Appeals is Hartford's standing to enforce the provisions of section 506(c).

JURISDICTION

Jurisdiction in the Bankruptcy Court was invoked pursuant to 28 U.S.C. §§ 157 & 1334. Jurisdiction in the District Court was invoked pursuant to 28 U.S.C. § 158(a). Jurisdiction in the Court of Appeals was invoked pursuant to 28 U.S.C. §§ 158(d) & 1291. The *en banc* decision of the Court of Appeals for the Eighth Circuit was decided on June 7, 1999. Hartford filed a petition for a writ of certiorari in this matter on September 3, 1999, which petition was docketed on September 8, 1999. The Court granted the petition on November 8, 1999. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

11 U.S.C. § 502(a)

§ 502. Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed,

unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

11 U.S.C. § 503(a) & (b)(1)(A)

§ 503. Allowance of administrative expenses.

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including —

> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case: . . . .

11 U.S.C. § 506(c)

§ 506. Determination of secured status.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

11 U.S.C. § 1109(b)

§ 1109. Right to be heard.

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

STATEMENT OF THE CASE

This matter arises out of the chapter 11 bankruptcy proceedings of Hen House Interstate, Inc. (the "Debtor"), commenced on September 5, 1991 in the United States Bankruptcy Court for the Eastern District of Missouri. Both before and after the Debtor commenced its bankruptcy case, the Debtor operated a number of businesses, including service stations, restaurants, gift stores, and an outdoor advertising firm. (App. 38a). Petitioner Hartford Underwriters Insurance Company ("Hartford") supplied workers' compensation insurance to the Debtor during the first year of its bankruptcy case. (App. 216a). The instant controversy involves the question of whether Hartford has the right under section 506(c) of the Bankruptcy Code, 11 U.S.C. § 506(c), to recover its administrative claim for unpaid insurance premiums from property of the Debtor's bankruptcy estate that is encumbered by Respondent's lien.

Before the Debtor filed for bankruptcy relief, Respondent Magna Bank, N.A. ("Magna")[1] was the Debtor's primary lender, holding a lien on all of the Debtor's real and personal property. (App. 190a-191a). After the Debtor commenced its case, the Debtor sought approval from the bankruptcy court to borrow additional funds from Magna, and also to pay certain administrative claims incurred during the course of the reorganization proceedings. (App. 39a-43a).[2] Magna consented

1. The Debtor was originally indebted to Landmark Bank of Illinois, which merged with Magna during the course of the proceedings. Similarly, Magna has since merged with Union Planters Bank, N.A. Consistent with the references in the decisions of the courts below, Hartford refers to the Respondent as Magna throughout this brief.

2. During the course of a chapter 11 bankruptcy case, the debtor typically remains in possession of its property as it attempts to reorganize. *See* 11 U.S.C. § 1101(a) (defining the term "debtor in possession" to mean the debtor), § 1107 (prescribing rights, powers and duties of a debtor in possession in a chapter 11 case), and § 1108 (Cont'd)

to the financing, and also to the use of its collateral to pay certain of the Debtor's necessary administrative expenses. (App. 48a). Subsequently, the Bankruptcy Court entered an order authorizing the financing, and likewise entered an order authorizing and directing the Debtor to pay its necessary operating expenses from Magna's collateral. (App. 145a, 178a). The authorized expenses included the insurance premiums owed to Hartford. (App. 160a-161a, 175a). Notwithstanding this order, the Debtor failed to pay in full the premiums due Hartford. (App. 216a-217a, 268a-269a).

The Debtor's attempt to rehabilitate its businesses was not successful, and on January 20, 1993, the bankruptcy court converted the Debtor's case to a liquidation proceeding under chapter 7, at which time Robert J. Blackwell was appointed to serve as chapter 7 trustee. (App. 251a).[3] Before the conversion, however, the Debtor was able to sell a number of its properties as going concerns, and Magna received the proceeds of these sales. (App. 217a, 163a). It is undisputed that, without Hartford's provision of workers' compensation insurance, the Debtor could not have continued to operate. (App. 216a). It is also undisputed that Hartford did not have notice of the Debtor's bankruptcy proceedings until March of 1993, some two months after the conversion of the Debtor's case. (App. 218a).

Hartford commenced the underlying litigation in the Bankruptcy Court to recover its claim for unpaid postpetition

(Cont'd)
(authorizing the debtor in possession to continue to operate its business in a chapter 11 case). A trustee may be appointed in a chapter 11 case for "cause." *See* 11 U.S.C. § 1104(a). No trustee was appointed during the course of the Debtor's chapter 11 proceeding. As discussed below, however, a chapter 7 trustee was appointed after the Debtor's chapter 11 case was converted to a proceeding under chapter 7.

3. See 11 U.S.C. § 1112 (governing conversions of chapter 11 cases to proceedings under chapter 7), § 701 (providing for the appointment of an interim chapter 7 trustee), and § 702 (providing for the election of a permanent chapter 7 trustee).

insurance premiums from the remaining undistributed assets of the Debtor's estate. Hartford sought relief pursuant to 11 U.S.C. § 503, which expressly provides for the allowance of administrative claims against an estate in bankruptcy. (App. 207a). Because all of the estate's property (including all available cash) was encumbered by Magna's lien, and because Magna's claim fully exhausts the value of all of the estate's property, Hartford also sought relief pursuant to 11 U.S.C. § 506(c), which expressly provides for the payment of allowed administrative claims from a secured creditor's collateral to the extent that the incurrence of the expense provided a benefit to the secured party. (App. 207a).[4]

The bankruptcy court allowed Hartford's claim under section 503, and likewise ruled that Hartford could recover payment from property encumbered by Magna's lien under section 506(c). (App. 261a). In reaching its decision, the bankruptcy court relied on *United States, Internal Revenue Service v. Boatmen's First National Bank*, 5 F.3d 1157 (8th Cir. 1993), a prior Eighth Circuit decision holding that the United States had the right to pursue an administrative tax claim under section 506(c). (App. 256a-259a). On appeal, the District Court affirmed. (App. 282a).

On further appeal, a three-judge panel of the Eighth Circuit followed *Boatmen's*, and also affirmed Hartford's ability to recover its claim under section 506(c). *See Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 150 F.3d 868, 871-72 (8th Cir. 1998). (App. 290a, 295a). Subsequently, the Court of Appeals granted rehearing *en banc* limited to the issue of Hartford's entitlement to obtain relief under the section (framed as a question of "standing"). *See Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 177 F.3d 719,

4. Hartford did not request the trustee to pursue its claim under section 506(c) because the law in the Eighth Circuit as it existed at that time permitted administrative claimants to pursue such claims on their own behalf. *See United States, Internal Revenue Service v. Boatmen's First Nat'l Bank*, 5 F.3d 1157 (8th Cir. 1993).

721 (8th Cir. 1999) (en banc). (App. 298a). In a split 6-5 decision, the *en banc* court expressly overruled *Boatmen's* and held that Hartford lacks standing to pursue its claim under section 506(c). (App. 300a, 308a). The court concluded that only a trustee (or debtor in possession in a chapter 11 case) has standing to recover payment of an unpaid administrative claim under the section. (App. 303a n.4, 308a). In reaching its conclusion, the court acknowledged that its decision was contrary to the decisions of other courts of appeals. (App. 304a).

SUMMARY OF ARGUMENT

As the courts have recognized, if claimants (such as Hartford) are not permitted to pursue the priority of their own administrative claims under section 506(c), the claims of these parties often will not be pursued at all. *See McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991). The present case well illustrates this concern. Here, the chapter 7 trustee has no funds to litigate with Magna because Magna holds a lien on all of the estate's assets, and Magna has refused to consent to the use of its collateral to pay administrative claims that it initially agreed should be paid from its collateral. Moreover, the trustee has no interest in pursing relief under the section against Magna because the trustee has not paid Hartford's claim (he has no unencumbered funds to do so), and thus would only be litigating with Magna on Hartford's behalf to use Magna's collateral to pay Hartford's claim. Trustees in bankruptcy represent the general creditors of the debtor's estate, and have little incentive to use scarce estate assets to litigate against well-funded secured creditors for the benefit of a single claimant. Magna knows this. That is why Magna has fought to establish the precedent that only trustees may pursue relief under section 506(c) — so that Magna may obtain in cases of this kind the very windfall that section 506(c) was intended to prevent. *See North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991). Whether because of the disproportionate expense involved in pursuing the matter, a lack of funds, the uncertainty

of the outcome, or simply the trustee's general reluctance to pursue relief on behalf of a single claimant, an unpaid administrative creditor should be entitled to pursue the priority of its claim under the section. *Cf. Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 67 (1992) (observing that "the power to enforce the performance of [a statutory remedy] must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist" (citations and internal quotations omitted)).

As this Court has explained, the established rule of statutory construction applicable in the bankruptcy context (and, hence, in the interpretation of section 506(c)) "is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986). In this instance, section 506(c) was intended to codify prior bankruptcy practice, which included allowing individual administrative claimants to pursue and recover claims of the kind at issue here from a secured party's collateral. *See Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501, 506-07 (1891); *Rabyor v. Franklin Mortgage Co. (In re Rotary Tire & Rubber Co.)*, 2 F.2d 364 (6th Cir. 1924) (insurance premium claim). Because Congress intended section 506(c) to codify preexisting practice, and because nothing in the Bankruptcy Code abrogates the specific rule at issue here, the Court should conclude that Hartford has the right in this case to pursue the priority of its claim under the section.

As this Court has also stated, the Bankruptcy Code should be construed as a whole, not as a collection of unrelated provisions. *See Kelly v. Robinson*, 479 U.S. 36, 43 (1986). In this instance, construction of the Code as a whole demonstrates Hartford's right to pursue the priority of its administrative claim under section 506(c). To begin with, Hartford has the right to enforce the provisions of section 506(c) in accordance with

section 1109(b), which confers broad rights on parties in interest to enforce the provisions of the Code that affect their interests. *See* 11 U.S.C. § 1109(b). In addition, Hartford's right is similarly established by reference to sections 502(a) and 503(a). *See* 11 U.S.C. §§ 502(a) & 503(a).

In reaching a contrary decision, the court below erred by ignoring the overall history and text of the Code, and by construing section 506(c) simplistically in accordance with the maxim "*expressio unius est exclusio alterius*" — the expression of one thing (in a statute) is the exclusion of others — to conclude that Hartford has no right to pursue the priority of its claim under the section because Hartford is not a trustee. (App. 303a n.4). As this Court has warned, the *exclusio* rule is far from dispositive in the construction of statutory provisions. *See Ford v. United States*, 273 U.S. 593, 612 (1927). In this instance, the Code's text and structure demonstrate Hartford's right, and the proper method to use in construing the Code is the Court's approach set forth in *Midlantic*.

Finally, Hartford has the right to pursue the priority of its administrative claim under section 506(c) in accordance with the Court's constitutional and prudential standing doctrines. Hartford's interest in this case lies fully within the zone of interests that Congress sought to protect in enacting section 506(c), and recognizing Hartford's right to pursue the priority of its administrative claim is necessary to vindicate the purpose of the section and likewise prevent Magna from receiving a windfall. Hartford's right also follows from the Court's analogous precedent in *Meyer v. Flemming*, 327 U.S. 161 (1946), which recognized the ability of a party other than a trustee to pursue certain remedies ostensibly assigned to trustees in the bankruptcy process. In this instance, the trustee has neither the incentive nor the ability to pursue the payment of Hartford's claim, and Hartford's pursuit of its claim under section 506(c) would occasion no intrusion on the trustee's role as representative of the estate.

ARGUMENT

When a case is commenced under the Bankruptcy Code,[5] section 541 provides for the creation of a bankruptcy estate consisting of all of the debtor's property wherever located and by whomever held, including property subject to a lien. *See* 11 U.S.C. § 541(a). In addition, the Code establishes that the debtor's monetary obligations constitute "claims" against the estate, subject to adjustment and payment as prescribed by the Code's various allowance and distribution provisions. *See* 11 U.S.C. §§ 101(5), 502(b), & 726. Significantly, the Code provides that parties holding prepetition claims (e.g., monetary obligations incurred before the commencement of the case) are "creditors" of the estate, and that creditors have standing not only to file their own claims with the bankruptcy court, but also to ensure that their claims (as well as the claims of others) are treated in accordance with the Code's rules and regulations. *See* 11 U.S.C. §§ 101(10), 501(a), & 502(a).

After the commencement of a bankruptcy case, the estate may incur postpetition expenses of administration, including "the actual, necessary costs and expenses of preserving the estate . . . ." 11 U.S.C. § 503(b)(1)(A). As section 503(a) makes clear, parties (like Hartford) that provide goods or services to the estate during the course of the bankruptcy proceedings have the right to file a request for payment of their administrative claims from the estate. *See* 11 U.S.C. § 503(a). (App. 207a).[6] Moreover, as a rule, administrative expenses are entitled to payment ahead of prepetition unsecured claims, and administrative claimants have the right to enforce this priority.

---

5. 11 U.S.C. § 101 *et seq.* (enacted 1978, effective October 1, 1979).

6. *See* H.R. Rep. No. 95-595, at 355 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6311; S. Rep. No. 95-989, at 66 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5852 (stating that a creditor may file its own administrative claim).

See 11 U.S.C. §§ 507(a)(1), 726(a)(1), & 1129(a)(9)(A).[7] In this instance, it is undisputed that Hartford holds a valid administrative claim within the meaning of section 503 for the workers' compensation insurance premiums that the estate failed to pay.

In addition to prescribing the treatment of administrative claims, the Bankruptcy Code also provides for the determination and treatment of secured claims, such as Magna's claim in this case. As a general rule, secured parties are entitled to receive payment on account of their secured claims equal to the value of their collateral ahead of other types of claims, including administrative expenses. *See United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 378 (1988) (reciting the general rule that "general administrative expenses do not have priority over secured claims").[8] This right, however, is not absolute,[9] and, as is relevant here, section 506(c) states an important exception: to the extent the bankruptcy estate

7. The reason for this priority is straightforward. A bankrupt debtor typically lacks the wherewithal to pay all unsecured claims in full and, unless administrative expenses were entitled to priority treatment, no one would do business with the estate, or undertake to administer the estate on the creditors' behalf. *See Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976).

8. This was also the rule prior to the enactment of the Bankruptcy Code in 1978. *See* 6 Harold Remington, *A Treatise on the Bankruptcy Law of the United States*, § 2606 at 128-29 (5th ed. 1952) (stating that "it is the lienors who are first and primarily entitled to the proceeds from sale of their security"). Under the Bankruptcy Code, section 506(a) provides that the claim of a secured party constitutes a secured claim for bankruptcy purposes to the extent of the value of the secured creditor's interest in the estate's interest in property (e.g., the value of its collateral). *See* 11 U.S.C. § 506(a); *see also Associates Commercial Corp. v. Rash*, 520 U.S. 953, 960 (1997) (explaining the operation of section 506(a)). In this case, Magna's claim exceeds the value of its collateral. As a consequence, there are no unencumbered funds available to pay the claims of other creditors.

9. *See Timbers*, 484 U.S. at 379 ("That secured creditors do not bear one kind of reorganization cost hardly means that they bear none of them.").

incurs an administrative expense that provides a benefit to the secured party in preserving or disposing of the secured party's collateral, the expense may be paid from the collateral ahead of the secured creditor's claim. Specifically, section 506(c) states that "the trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of [the secured] claim." 11 U.S.C. § 506(c).

In context, section 506(c) is merely one of the many provisions of the Bankruptcy Code that specify how property of the estate is to be divided among the various parties to the proceedings (e.g., secured creditors, administrative claimants, unsecured creditors, equity security holders, and others). *See* 11 U.S.C. § 726(a) (specifying priorities of distribution in chapter 7 cases), & § 1129 (specifying the requirements for confirmation of a chapter 11 plan, including the payment of certain claims with certain priorities); *see also* 11 U.S.C. § 1109(b) (defining the phrase "parties in interest"). By its terms, section 506(c) directs plainly that funds that would otherwise be payable to a secured party should be used first to pay qualifying administrative claims. In other words, section 506(c) is a priority provision, prescribing that, under certain defined circumstances, certain administrative claims are to be paid out of a secured party's collateral ahead of the secured party's claim.[10]

10. The nature of section 506(c) as a priority provision is further demonstrated by reference to section 506(b). Section 506(b) provides that "[t]o the extent that an allowed secured claim is secured by property the value of which, *after any recovery under subsection (c) of this section*, 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." 11 U.S.C. § 506(b) (emphasis added); *see generally Timbers*, 484 U.S. at 371-73 (explaining the operation of section 506(b)). As the section plainly provides, in order to calculate whether a secured party's claim exceeds the value of its collateral for purposes of the

(Cont'd)

As summarized by this Court under the prior law, the basic reason for charging administrative expenses of the kind identified in section 506(c) against the secured party's collateral is essentially an equitable one: "[w]e think it may fairly be held that the [secured] party who takes the benefit of . . . a service ought to pay for it; and that equity may properly decree payment therefor." *Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501, 507 (1891) (equity receivership case); *see also Adair v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 303 U.S. 350, 360-61 (1938); *United States v. Henderson*, 274 F.2d 419, 423 (5th Cir. 1959); *First W. Sav. & Loan Ass'n v. Anderson*, 252 F.2d 544, 548 (9th Cir. 1958); 6 Remington, *supra* note 8, § 2606-08 at 128-35 (discussing the equitable nature of the rule and its application under the former Bankruptcy Act of 1898). As courts have similarly explained in cases under the current Bankruptcy Code, the rule is necessary to prevent a secured party from receiving a windfall by enjoying the benefit of services that enhance its collateral without provision for the payment of those services from the collateral, and, further, that permitting an administrative creditor to enforce the provision is often necessary to vindicate this purpose. *See Architectural Bldg. Components v. McClarty (In re Foremost Mfg. Co.)*, 137 F.3d 919, 923 (6th Cir. 1998) (observing that "[t]he plain purpose of § 506(c) — to prevent unjust enrichment of secured creditors — is one that may be important to parties other than to the trustee, and the trustee's interest may not be significant enough to spur him to act. When courts allow these other parties to seek surcharges, they are improving the probability that the statute's true purpose will be vindicated."); *McAlpine v.*

(Cont'd)
section, the court must first deduct from the collateral's value the amount of any right of recovery under section 506(c). The provision thus confirms that claims under section 506(c) are to be paid from a secured party's collateral, and must be taken into account in calculating the secured party's secured claim. *See also supra* note 8 (discussing determination of secured party's claim under section 506(a)).

Comerica Bank-Detroit (In re Brown Bros., Inc.), 136 B.R. 470, 474 (W.D. Mich. 1991) (observing that "[b]ecause the trustee and debtor have no economic incentive to seek . . . recovery [under section 506(c) on behalf of an unpaid administrative claimant in cases in which the estate has not paid the claim], 'the secured creditor may obtain a windfall at the expense of the unpaid claimant' if the Court were not to recognize the claimant's independent right to sue under 506(c)"). As Judge Heaney explained in his dissent in the court below:

> The reasoning behind the approach which extends standing to creditors and other claimants is that a secured creditor who receives a direct benefit from the rendition of services or provision of goods by an administrative claimant . . . should have the collateral charged for that benefit, regardless of whether the proceeds of the charge are paid to the trustee in reimbursement for the trustee's prior payment to the claimant, or are paid to the claimant directly. Otherwise, if the trustee does not have available funds to pay the claimant, the trustee has no economic incentive to seek a recovery under section 506(c) with respect to amounts that will be paid over to the claimant. As a result, the secured creditor may obtain a windfall at the expense of the unpaid claimant.

Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.), 177 F.3d 719, 726 (8th Cir. 1999) (Heaney, J., dissenting) (quoting 4 *Collier on Bankruptcy* ¶ 506.05[8] at 506-142-43 (Lawrence P. King ed., 15th ed. revised 1999)). (App. 310a-311a).

In *Wilson*, this Court recognized an attorney's right in a federal insolvency proceeding to recover directly from a secured party's collateral the cost of legal services that the attorney performed for the bankrupt debtor where the services provided a benefit to the secured party, stating:

> [W]hen he [the receiver] has not acted [to pay a claim], and the question is presented to the court as to the liability of the property for any claim, the court is not foreclosed by the order of appointment [of the receiver governing the receiver's duties], but may consider and determine equitably the extent of liability of the property to such claim, and what its rights or priority may be. Hence, as the receiver did not pay this claim, the parties in interest may rightfully challenge its priority, even if it were within the very letter of the order of appointment of the receiver.

Wilson, 138 U.S. at 506; *see also National Acceptance Co. v. Magill (In re Chapman Coal Co.)*, 196 F.2d 779, 784-85 (7th Cir. 1952) (permitting an administrative claimant to recover directly); *Rabyor v. Franklin Mortgage Co. (In re Rotary Tire & Rubber Co.)*, 2 F.2d 364 (6th Cir. 1924) (same). The narrow issue in this case is whether, in proceedings under the Bankruptcy Code, the Court's rule articulated in *Wilson* still endures.

I. FOR OVER A CENTURY, ADMINISTRATIVE CLAIMANTS HAVE HAD THE RIGHT IN FEDERAL INSOLVENCY PROCEEDINGS TO PURSUE AND RECOVER CLAIMS OF THE KIND SPECIFIED IN SECTION 506(c), AND THIS RIGHT PROPERLY ENDURES UNDER THE BANKRUPTCY CODE.

As this Court has observed, "[w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate.' " *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (quoting *Emil v. Hanley*, 318 U.S. 515, 521 (1943)). Moreover, as this Court has often repeated, "[w]e . . . 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.' " *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (quoting *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990)); *see also Davenport*, 495 U.S. at 565 (O'Connor, J., dissenting) ("This Court carefully has set forth a method for statutory analysis of the Bankruptcy Code. . . . To determine the drafters' intent, the Court presumes that Congress intended to keep continuity between pre-Code judicial practice and the enactment of the Bankruptcy Code in 1978." (citations omitted)). Applying this approach in a series of cases, the Court has indicated time and again that, in construing the provisions of the Code, it will not presume that Congress intended to overturn an established bankruptcy practice *sub silentio*, but will instead require any intent to change the law to be "unmistakably clear." *Cohen*, 523 U.S. at 222.

For example, in *Kelly v. Robinson*, 479 U.S. 36 (1986), the Court addressed the claim that, in enacting section 523(a) of the Code, Congress intended to discharge criminal restitution obligations because these obligations are not specifically excepted from the Code's broad discharge provisions. Recognizing that " 'the starting point in every case involving construction of a statute is the language itself,' " the Court nevertheless explained that "the text is only the starting point," and proceeded to review the matter in light of established practice. *Id.* at 43-44 (citations omitted). After discussing the preexisting rule that criminal obligations were not dischargeable under the former Bankruptcy Act, the Court declined to construe section 523(a) in a manner that would "silently abrogate[ ] . . . [an] exception created by courts construing the old Act." *Id.* at 47. In reaching this conclusion, the Court stated: " 'The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.' " *Id.* (quoting *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986)). Moreover, as the Court further observed, "[t]he Court has followed this rule with particular care in construing the scope of bankruptcy codifications." *Id.* (citations omitted).

Similarly, in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986),

the Court addressed the claim that the plain meaning of section 544 of the Code permits a trustee to abandon contaminated property of the estate regardless of state regulations requiring the handling of the property in ways designed to protect public health and safety. In spite of the absence of any textual restriction on the trustee's power under the section, the Court observed:

> when Congress enacted § 544, there were well-recognized restrictions on a trustee's abandonment power. In codifying the judicially developed rule of abandonment, Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws. The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.

Id. at 501.

More recently, in *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213 (1996), the Court considered whether section 507(a)(7)(E) of the Code, which prescribes a priority for certain taxes, properly embraces its own definition of an excise tax, or must follow the designations of other federal statutes. Recognizing that "a priority provision for taxes [under the bankruptcy law] was nothing new," the Court commenced its analysis with consideration of its own prior precedents under the former Act. *Id.* at 220-21. Adhering to its precedents, the Court concluded that the appropriate interpretation of section 507(a)(7)(E) was to define the phrase "excise tax" as a matter of substantive bankruptcy law. *Id.* at 220. Citing *Midlantic*, the Court stated: "Congress could, of course, have intended a different interpretive method for reading terms used in the Bankruptcy Code it created in 1978. But if it had so intended we would expect some statutory indication. . . ." *Id.* at 221; *see also United States v. Noland*, 517 U.S. 535, 539 (1996)

(following *Midlantic*, and concluding in construing section 510 of the Code that "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific"); *cf. United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 112-13 (1948) ("There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments.").

The Court's interpretive approach in construing the Bankruptcy Code is compelling. The Code is a codification of equitable principles developed largely by the federal courts in the administration of insolvency proceedings over the past two centuries, and in drafting the Code, Congress has relied repeatedly on preexisting judicial doctrine both to fill out and to inform the Code's essential meaning.[11] Consistent with Congress's reliance on judicial doctrine in crafting the provisions of the Code, the Court's interpretive methodology presumes the continuance of preexisting bankruptcy practices, and, hence, merely conforms to the legislature's approach. Of course, Congress is free to alter or abrogate preexisting legal procedures, even those of longstanding importance and duration (except as the Constitution commands otherwise). Nevertheless, as the Court's analysis in *Kelly*, *Midlantic*, *Cohen*, *Dewsnup*, *Davenport*, *Noland*, and *CF&I* demonstrates, the abrogation of

11. For example, section 1129(b)(2)(A)(iii) makes use of the term of art "indubitable equivalence." 11 U.S.C. § 1129(b)(2)(A)(iii). As explained in the legislative history, this term derives from *Metropolitan Life Ins. Co. v. Murel Holding Corp. (In re Murel Holding Corp.)*, 75 F.2d 941 (2d Cir. 1935) (L. Hand, J.). 124 Cong. Rec. 32,407, 34,007 (1978); *see also United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 378 (1988) (discussing derivation of "indubitable equivalence" term of art); *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 115 (1939) (interpreting the words "fair and equitable" as used in section 77B of the former Bankruptcy Act as having acquired a "fixed meaning" through judicial interpretations in the field of equity receivership reorganizations).

preexisting bankruptcy doctrine requires proof of clear and unmistakable disavowal, not simply oblique inferences of implicit repeal.

Moreover, the validity of the Court's method of analysis is further supported by reference to the legislative materials accompanying the Code. For example, in drafting section 507(a)(4) governing the distributional priority of certain employee benefit claims, Congress intended to modify prior practice, and so stated in the relevant house report: "Paragraph (4) overrules *United States v. Embassy Restaurant*, 359 U.S. 29 (1958), which held that fringe benefits were not entitled to wage priority status." H.R. Rep. No. 95-595, at 357-58 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313. Dozens of similar statements appear in the legislative record.[12] As stated in

12. For example, in enacting section 105 governing, among other things, the injunctive powers of the bankruptcy court, Congress intended to change the prior law, and expressly stated its intent: "This section is also an authorization . . . for a court of the United States to stay the action of a state court. As such, *Toucey v. New York Life Insurance Company*, 314 U.S. 118 (1941) is overruled." H.R. Rep. No. 95-595, at 317 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6274. Similarly, in drafting section 523 governing exceptions to the Code's discharge provisions, the legislative materials state: "The provision is intended to overrule *Birkett v. Columbia Bank*, 195 U.S. 345 (1904)." 124 Cong. Rec. 32,399, 33,998 (1978). Likewise, in drafting section 541 defining property of the bankruptcy estate, the materials explain: "Paragraph 1 [541(a)(1)] has the effect of overruling *Lockwood v. Exchange Bank*, 190 U.S. 294 (1903) . . . [and] *Lines v. Frederick*, 400 U.S. 18 (1970)." H.R. Rep. No. 95-595, at 368 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6324. Moreover, in drafting section 1123(a)(5)(c) governing the contents of a plan of reorganization, the legislative materials state: "Subparagraph (C), as it applies in railroad cases, has the effect of overruling *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298 (1954)." H.R. Rep. No. 95-595, at 407 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6363; S. Rep. No. 95-989, at 119 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5905. In amending the Code, Congress has continued the practice of stating its intent to overrule prior practice. (Cont'd)

Dewsnup, "this Court has been reluctant to accept arguments that would interpret the Code . . . to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." 502 U.S. at 419. As the foregoing illustrates, the Court's reluctance is well-founded: when Congress intends to abrogate prior bankruptcy practices, it does not employ methods of stealth, but rather expresses its designs directly in the legislative record.

Turning to the matter at hand, it is significant that, like the provisions of section 544 addressed in *Midlantic*, section 506(c) is also a codification of a judicially developed rule.[13] In order to understand the relevant procedure, however, it is helpful first to place the matter in appropriate historical context.

(Cont'd)
For example, in revising section 106(c), Congress indicated: "This section would effectively overrule two Supreme Court cases [*Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96 (1989) and *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992)]." 140 Cong. Rec. H10,766 (daily ed. Oct. 4, 1994). In addition, Congress has also not been bashful in stating its intent to overturn lower court decisions. For example, in drafting section 330 governing compensation, the legislative materials state: "The effect . . . is to overrule *In re Beverly Crest Convalescent Hospital, Inc.*, 548 F.2d 817 (9th Cir. 1976, as amended 1977)." H.R. Rep. No. 95-595, at 330 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6286. Similarly, in drafting section 330(a), the materials state: "*Massachusetts Mutual Life Insurance Company v. Brock*, 405 F.2d 429, 432 (5th Cir. 1968) is overruled." 124 Cong. Rec. 32,395, 33,994 (1978). Numerous additional examples appear throughout the legislative materials.

13. Confirming this point, the table of derivations appearing in the legislative history to the Bankruptcy Code does not cross-reference section 506(c) to any prior section of the former Bankruptcy Act. Instead, it references a single case: *Textile Banking Co. v. Widener*, 265 F.2d 446 (4th Cir. 1959). *See* Staff of House Comm. on Judiciary, 95th Cong., 1st Sess., *Table of Derivation of H.R. 8200*, 8 (Comm. Print No. 6 1977). *Widener*, however, provides no discussion on the issue of whether a trustee alone is the proper party to pursue a surcharge claim.

A. Reference to Established Pre-Code Practice Demonstrates That Hartford's Right to Pursue and Recover the Priority of Its Administrative Claim Is a Longstanding Right That Hartford Is Entitled to Assert in This Case.

Congress has enacted five different bankruptcy acts, the first three of which were of relatively short duration.[14] Between the repeal of the Act of 1867, and the passage of the monumental Act of 1898 (and, indeed, for some time thereafter), the federal courts engaged in a thriving insolvency business in the form of the equity receivership. Encouraged largely by the need for some means to rehabilitate insolvent railroads, the equity receivership was a creature wholly of judicial creation.[15]

During this time, the Court heard a number of appeals arising from receivership proceedings, and intervened to establish a variety of equitable bankruptcy rules that still form the backbone of current insolvency law. *See Northern Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 508 (1913) (discussing the judicially created absolute priority rule); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. Partnership*, 119 S. Ct. 1411, 1417 (1999) (explaining section 1129(b)(2)(B)(ii) of the Code

14. *See* Bankruptcy Act of 1800, ch. 19, 2 stat. 19 (1800) (repealed 1803); Bankruptcy Act of 1841, ch. 9, 5 stat. 440 (1841) (repealed 1843); Bankruptcy Act of 1867, ch. 176, 14 stat. 517 (1867) (repealed 1878); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 13-14 (1995).

15. For a general discussion of equity receivership practice, particularly concerning railroad reorganizations, *see* Douglas G. Baird, *The Elements of Bankruptcy* 64-66 (rev. ed. 1993); G. Eric Brunstad, Jr. & Mike Sigal, *Competitive Choice Theory and the Unresolved Doctrines of Classification and Unfair Discrimination in Business Reorganizations under the Bankruptcy Code*, 55 Bus. Law. 1, 42 (1999); *see also Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 670-72 (1935) (summarizing the history of federal bankruptcy enactments and discussing the equity receivership).

as a codification of the absolute priority rule articulated in *Boyd*). Significantly, among the cases heard during this period was the above-cited *Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501 (1891).

In *Wilson*, the U.S. Circuit Court for the Southern District of Illinois appointed a receiver to take possession of the defunct Louisville, Evansville & St. Louis Railway Company. Following customary practice, the railroad was sold as a going concern through a judicial foreclosure procedure to a newly organized firm.

An attorney who had supplied services to the railroad by assisting in the recovery and rental of equipment, filed a claim seeking, among other things, payment of his fees. Because the receiver had not paid the claim, and had no unencumbered funds to do so, the attorney argued that he was entitled to payment out of the secured parties' collateral. Responding to this argument, the Court framed and addressed the following question:

> What were the services for which the appellee made his claim[,] and were they so beneficial to the security holders that a court of equity might justly give them priority? And the question, it will be borne in mind, is not, whether out of the earnings of the road such claims are payable, but whether, where there are no surplus [unencumbered] earnings, they may be paid out of the *corpus* of the property in preference to secured liens.

Id. at 506 (emphasis added). In resolving the question, the Court concluded that the attorney's services had, indeed, conferred a benefit on the secured creditors, and also concluded, as a matter of equity, that the fees ought to be paid out of the secured creditors' collateral. *See id.* at 507. Responding further to the argument that provision for the payment of attorney's fees had not been made in the order

appointing the receiver, the Court also concluded that this fact would neither bar the attorney's recovery, nor prevent review of the priority of his claim. *See id.* Given the value of the services to the secured parties (fixed by the relevant testimony at $300), the Court concluded, "[w]e think, therefore, there was no impropriety in allowing intervenor three hundred dollars for these services." *Id.* at 507.

Following *Wilson*, and the subsequent passage of the Bankruptcy Act of 1898,[16] courts continued the practice of permitting certain administrative expenses to be paid out of property encumbered by the lien of a secured party in a bankruptcy case.[17] Although the Act contained no express

16. Bankruptcy Act of 1898, ch. 541, 30 stat. 544 (1898) (repealed 1979).

17. The practice of allowing an equitable charge against a fund traces its origins in federal proceedings to *Bronson & Soutter v. La Crosse & Milwaukee R.R.*, 68 U.S. (1 Wall.) 405 (1863). There, the Court recognized that, pending the outcome of an appeal, a lower court had the power to protect and preserve the property (a railroad) within its control from waste or loss. In so ruling, the Court affirmed the appointment of a receiver authorized to use operating revenues to run the railroad. The Court ruled that only the net revenues — those remaining after the payment of the costs incurred by the receiver – must be reserved for general distribution. *See id.* at 410; *see also New York Dock Co. v. Steamship Poznan*, 274 U.S. 117, 121 (1927). After the enactment of the Bankruptcy Act, the Court continued to allow charges of this kind on equitable grounds. For example, in *Adair v. Bank of America National Trust & Savings Ass'n*, 303 U.S. 350 (1938), the Court allowed a commissioner, appointed under the Bankruptcy Act, to charge the proceeds of certain farm crops with the costs of harvesting them. The Court allowed this charge despite the existence of a chattel mortgage on the crops, stating:

> [The chattel mortgagee] certainly cannot complain of the devotion of the proceeds of the 1934 crop to the cost of harvesting that crop. The care and harvesting of that crop represented the only way to preserve its worth, and the

(Cont'd)

provision authorizing this practice, federal courts held routinely that certain expenses should be given priority over the claims of secured creditors to the extent of a benefit to the secured party. *See Machinery Rental, Inc. v. Herpel (In re Multiponics, Inc.)*, 551 F.2d 1049, 1051 (5th Cir. 1977); *Dreyfuss v. Klein (In re Tyne)*, 257 F.2d 310, 312 (7th Cir. 1958); *Virginia Sec. Corp. v. Patrick Orchards, Inc.*, 20 F.2d 78, 81 (4th Cir. 1927). Significantly, as in *Wilson*, the rationale for allowing the priority remained steadfastly equitable. *See Machinery Rental, Inc.*, 551 F.2d at 1051 ("[T]he lienholder can be charged with general costs of administration, where he has in some manner caused or benefited from such expenditure, or expressly or impliedly consented thereto."); *Dreyfuss*, 257 F.2d at 312 ("[W]here expenses are incurred that primarily benefit the lienholder such expenses should be allocated to him in the proportion to the benefit he derives therefrom."); 6 Remington, *supra* note 8, § 2606-08 at 128-35.

Moreover, nothing in these decisions indicates that the equitable right to recover a claim from property encumbered by a lien was established solely to protect the trustee or the estate. On the contrary, the cases establish the opposite rule that any claimant who provided services during an attempted reorganization that resulted in a benefit to a security holder could recover its claim directly from the secured property.

For example, in *National Acceptance Co. v. Magill (In re Chapman Coal Co.)*, 196 F.2d 779 (7th Cir. 1952), the Court of Appeals for the Seventh Circuit affirmed an order granting a union's petition for priority status of certain wage and benefit

(Cont'd)

> cost of protecting a fund in court is everywhere recognized as a dominant charge on that fund.

Id. at 360-61 (citation omitted); *see also Warren v. Palmer*, 310 U.S. 132, 139 (1940); 6 Remington, *supra* note 8, § 2608 at 132-35 (describing equitable surcharge practice under the former Bankruptcy Act).

claims over the lien of a secured party. In affirming the petition, the court observed that the "continued employment of the [union] workers [was] necessary for the preservation of the mine properties of the debtor, and that such operation would be 'to the best interests of the parties,' including [the secured creditor] which held a lien on all of the properties of the debtor." *Id.* at 784. Recognizing that "it was possible to continue the operation of the mine only by continuing to employ the [union] workers," the court affirmed an order granting the union priority over the secured creditor. *Id.* at 784, 785; *see also Rabyor v. Franklin Mortgage Co. (In re Rotary Tire & Rubber Co.)*, 2 F.2d 364 (6th Cir. 1924) (allowing unpaid premiums owed to brokers who had provided insurance during the bankruptcy proceedings to be charged against collateral ahead of existing mortgage).

In addition, a number of pre-Code decisions allowed both the trustee *and* some other claimant to proceed jointly against encumbered property of the debtor's bankruptcy estate. *See United States v. Henderson*, 274 F.2d 419, 421-22 (5th Cir. 1959) (involving both the trustee and his attorney as parties to an appeal regarding the payment of their fees from mortgaged property); *First W. Sav. & Loan Ass'n v. Anderson*, 252 F.2d 544, 546-47 (9th Cir. 1958) (allowing both the trustee and her attorney to bring petitions that charged the mortgaged property with the costs of their services); *Citizens & S. Nat'l Bank v. Mullins (In re Bolton Road Med. Ctr.)*, 433 F. Supp. 369, 370-71 (N.D. Ga. 1976) (involving an action where both the trustee and his attorney were parties to a proceeding for the recovery of fees from secured property); *In re Alaska Plywood Corp.*, 166 F. Supp. 423, 425 (D. Alaska 1958) (allowing both the trustee and a stockholders' committee to request priority over mortgaged property); *In re Rice Leghorn Farm, Inc.*, 113 F. Supp. 903, 906 (W.D. Mo. 1953) (allowing the trustee, his attorney, counsel for the petitioning creditors, and counsel for the debtor to bring applications for priority over secured creditors); *In re Louisville Storage Co.*, 21 F. Supp. 897, 898 (W.D. Ky. 1936) (allowing the trustee, as well as an attorney

for the receiver, and an employee of the bankrupt, to bring petitions seeking priority over secured creditors), *aff'd sub nom. Louisville Title Mortgage Co. v. Louisville Storage Co.*, 93 F.2d 1008 (6th Cir. 1938). Of course, in addition to these cases, numerous others involved only a trustee's attempt to recover certain expenses against a secured party's collateral. Significantly, however, none of these decisions discuss (let alone adopt) the view that a trustee is better suited to pursue a surcharge claim than an administrative claimant, and none of the cases deny an administrative claimant the right to recover its claim on the ground that the claimant was not a proper party to do so.[18]

In enacting section 506(c) as part of the Bankruptcy Code, Congress is presumed to have been aware of the precedents outlined above. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."); *see also United States v. Wells*, 519 U.S. 482, 495 (1997); *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995). In addition, Congress was presumptively aware of this Court's method of

18. Instead, the focus of each case is on the equitable grounds for allowing the charge against the collateral. *See Machinery Rental, Inc. v. Herpel (In re Multiponics, Inc.)*, 551 F.2d 1049, 1051 (5th Cir. 1977); *Textile Banking Co. v. Widener*, 265 F.2d 446, 453-54 (4th Cir. 1959); *Dreyfuss v. Klein (In re Tyne)*, 257 F.2d 310, 312 (7th Cir. 1958); *Meinhard, Greeff & Co. v. Edens*, 189 F.2d 792, 796 (4th Cir. 1951); *Freeman Furniture Factories v. Bowlds (In re Ames Corp.)*, 136 F.2d 136, 140-41 (6th Cir. 1943); *Maxcy v. Walker (In re Lake Nursery Co.)*, 119 F.2d 535, 536 (5th Cir. 1941); *Miners Sav. Bank v. Joyce*, 97 F.2d 973, 977 (3d Cir. 1938); *Virginia Sec. Corp. v. Patrick Orchards, Inc.*, 20 F.2d 78, 81 (4th Cir. 1927); *C. B. Norton Jewelry Co. v. Hinds (In re Jones)*, 245 F. 341, 343 (8th Cir. 1917); *Gugel v. New Orleans Nat'l Bank*, 239 F. 676, 679 (5th Cir. 1917); *Ridgely Nat'l Bank v. Matheny (In re Utt)*, 105 F. 754, 757 (7th Cir. 1901); *In re Boyer*, 130 F. Supp. 20, 23 (D. Minn. 1955); *In re Centralia Ref. Co.*, 35 F. Supp. 599, 602 (E.D. Ill. 1940); *In re Dawkins*, 34 F.2d 581, 581-82 (E.D. S.C. 1929); *The Bethulia*, 200 F. 879, 881 (D. Mass. 1912); *In re Chambersburg Silk Mfg. Co.*, 190 F. 411, 412 (M.D. Pa. 1911).

interpreting the bankruptcy laws, including the Court's presumption of the ongoing validity of pre-Code practice. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (stating that "[i]t is presumable that Congress legislates with knowledge of our basic rules of statutory construction," particularly those that are well-settled). Hence, if Congress had intended to abrogate the rule recognizing the right of administrative claimants to pursue their claims against property encumbered by a lien, then one would expect Congress to have made that intention explicit in the legislative materials accompanying the Code, as it did on other occasions. *See Dewsnup*, 502 U.S. at 419. In this instance, however, the only evidence is that Congress intended to continue the prior law.

B. Hartford's Right to Pursue the Priority of Its Claim Under Section 506(c) Is Further Established by Reference to the Legislative Materials.

That Congress intended section 506(c) to codify preexisting practice is evident from the legislative history. H.R. 8200, the bill that Congress ultimately enacted as the Bankruptcy Code, contained a proposed section 506(c) identical to the current provision. H.R. 8200, 95th Cong. § 506(c) (1977). On September 8, 1977, the House Judiciary Committee reported H.R. 8200 favorably to the full House, which debated the bill on October 27 and 28, 1977, and again on February 1, 1978. The committee report accompanying the bill describes the measure as follows:

> Subsection (c) also codifies current law by permitting the trustee to recover from property whose value is greater [sic] than the sum of the claims secured by a lien on that property that [sic] reasonable, necessary costs and expenses of preserving, or disposing of, the property. The recovery is limited to the extent of any benefit to the holder of such claim.

H.R. Rep. No. 95-595, at 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313.[19] Although the passage is obviously short on explication, and embraces a partly erroneous description of the section's actual operation (which was subsequently clarified),[20] it is nonetheless evident that Congress harbored no intent to change prior doctrine relating to surcharge rights. On the contrary, the statement in the report that section 506(c) was intended to codify the current law only signals Congress's intent to maintain the status quo.

---

19. The Senate version of the Bankruptcy Code, S. 2266, as reported by the Senate Judiciary Committee and considered on the floor on September 7, 1978, contained a proposed section 506(c) identical to the provision in H.R. 8200. S. 2266, 95th Cong. § 506(c) (1978). Likewise, the Senate Report accompanying the bill restated the discussion in the House Report. *See* S. Rep. No. 95-989, at 68 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5854.

20. The passage indicates that recovery under the section is predicated on the value of the collateral being "greater" than the sum of the relevant claims against the collateral. Use of the word "greater," however, is in error. If recovery under the section were predicated on the value of the collateral exceeding the sum of the liens, the requirement that the administrative claim must have benefited the secured party in order to be chargeable against the collateral would make no sense — if the claim were to be paid out of unencumbered funds, the interest of the secured party, and any benefit to it, would be immaterial. The description in the House Report regarding the operation of section 506(c) was clarified subsequently by Representative Edwards, one of the sponsors of the legislation:

> Section 506(c) of the House amendment was contained in H.R. 8200 as passed by the House and adopted, verbatim, in the Senate amendment. Any time the trustee or debtor in possession expends money to provide for the reasonable and necessary cost and expenses of preserving or disposing of a secured creditor's collateral, the trustee or debtor in possession is entitled to recover such expenses from the secured party or from the property securing an allowed secured claim held by such party.

124 Cong. Rec. 32,398 (1978); *see also* 124 Cong. Rec. 33,997 (1978).

Although the specific issue of an administrative claimant's ability to pursue relief under the section is not mentioned, this silence is not surprising given the brevity of the passage, the fact that many of the surcharge cases under the Bankruptcy Act involved claims brought by trustees, and the fact that, under the prior law, the ability of nontrustees to assert the same relief was entirely uncontroversial. Moreover, under the rules of construction outlined above, Congress is expected to explain its intent regarding specific pre-Code practice *only* if Congress intends to abrogate the practice, and the mere discussion of the relevant general pre-Code practice without mention of the particular procedure at issue in this case is not grounds for inferring an intent to abrogate the unmentioned procedure.

In *Midlantic*, the Court observed that "[i]n codifying the judicially developed rule of abandonment [codified in section 544], Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws." 474 U.S. at 501. Similarly, in this case, in codifying the judicially developed rule of equitable surcharge in section 506(c), Congress also presumably included the established corollary that individual claimants could recover their claims directly. Following *Midlantic*, as well as the other relevant precedents cited above, the Court should conclude that its rule in *Wilson* still endures.

II. THE BANKRUPTCY CODE SHOULD BE CONSTRUED AS A WHOLE, AND REFERENCE TO THE CODE AS A WHOLE DEMONSTRATES THAT HARTFORD IS ENTITLED TO RECOVER ITS CLAIM FROM MAGNA'S COLLATERAL UNDER SECTION 506(c).

As this Court has directed, the Code, like other comprehensive remedial schemes, should be construed as a whole, not as a collection of unrelated provisions. *See United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (construing sections 361, 362, and 506 of the Bankruptcy Code, and observing that "[s]tatutory construction . . . is a holistic endeavor"); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (stating that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy" (citations and internal quotations marks omitted)); *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936) ("To fix the meaning of these provisions [of the Bankruptcy Act] there is need to keep in view the background of their history. There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."). In this instance, wholly apart from consideration of the Bankruptcy Code's legislative history and the relevant pre-Code practice, Hartford's ability to pursue the priority of its administrative claim under section 506(c) follows directly from consideration of the text of the Code as a whole, and also from its overall purpose, structure, and design.

As indicated above, section 506(c) states that a "trustee" may recover certain administrative expenses from a secured party's collateral, and, obviously, Hartford is not a trustee. This observation, however, is not dispositive. Consistent with the structure of the Code, what matters is that section 506(c) does not say that "only" a trustee may enforce its provisions. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947) ("One must also listen attentively to what it [the statute] does not say.").

In drafting the Bankruptcy Code, in instances in which Congress has intended to limit the ability of a party in interest to enforce a particular section, Congress has done so expressly, either by stating that "only" certain parties may pursue relief under the particular section, or by specifically *precluding* enumerated parties from enforcing the provision. For example, section 707(b) governs who may request dismissal of a chapter 7 case for "substantial abuse." Significantly, section 707(b) does

not simply authorize certain parties to pursue relief under this provision as a means to identify those parties with rights under the section and those without. On the contrary, section 707(b) expressly provides that relief under the section may be sought by "the court, on its own motion or on a motion by the United States trustee, *but not at the request or suggestion of any party in interest.*" 11 U.S.C. § 707(b) (emphasis added).

Similarly, in defining who may be a debtor under the various chapters of the Bankruptcy Code, the various subsections of section 109 are quite specific in delimiting the persons with and without rights under the provisions. For example, section 109(a) provides that "*only* a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." 11 U.S.C. § 109(a) (emphasis added). Likewise, section 109(d) provides that "*[o]nly* a person that may be a debtor under chapter 7 of this title, *except* a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title." 11 U.S.C. § 109(d) (emphasis added); *see also* 11 U.S.C. § 303(a) (stating that the section applies "only" against certain persons, and not others), § 307 (providing that the United States trustee may raise, appear and be heard on any issue "but may not file a plan"), § 341(c) (directing that the court "may not preside at, and may not attend" a meeting of creditors), § 702(a) (specifying that "only" certain creditors may vote for a trustee), § 706(c) (expressly limiting relief under the section to the debtor), § 1109(a) (expressly limiting the standing of the Securities and Exchange Commission to take an appeal), § 1112(c) (expressly limiting relief under the section to the debtor), § 1112(d) (same), § 1121(b) (providing that "only" the debtor may file a plan within a prescribed period of time), § 1121(e) (same), § 1164 (providing that certain governmental agencies may raise issues and appear and be heard, but may not take an appeal), § 1303 (specifying certain rights of the debtor "exclusive" of the trustee), § 1304(b) (same), § 1307(c)(9) (prescribing that "only"

the United States trustee may request certain relief), and § 1307(c)(10) (same).

Congress's deliberate decision to foreclose the ability of specially enumerated parties to invoke specific provisions of the Code demonstrates Congress's general intent not to foreclose parties in interest from invoking provisions that carry no special restrictions. *See Toibb v. Radloff*, 501 U.S. 157, 161 (1991) (explaining in the context of construing section 109 of the Bankruptcy Code that "[t]he Code contains no ongoing business requirement for reorganization under Chapter 11, and we are loath to infer the exclusion of certain classes of debtors from the protections of Chapter 11, because Congress took care in § 109 to specify who qualifies — and who does not qualify — as a debtor under the various chapters of the Code. . . . Congress knew how to restrict recourse to the avenues of bankruptcy relief; it did not place Chapter 11 reorganization beyond the reach of a nonbusiness individual debtor."). As this Court has explained, where Congress uses words of limitation to restrict the availability of relief under one section of a statutory scheme, but not another, the latter section should not be construed as carrying an implied limitation that does not, in fact, exist, particularly where, as here, the implied restriction would undermine the effectiveness of the particular provision. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404-05 (1991) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (refusing to restrict one section of the RICO statute based on a restriction in another section, particularly where doing so would blunt the effectiveness of the provision)); *General Motors Corp. v. United States*, 496 U.S. 530, 541 (1990) ("The fact that Congress explicitly enacted an enforcement bar similar to the one proposed by petitioner in one section of the statute, but failed to do so in the section at issue in this case reinforces our refusal to import such a bar here.").

In this instance, Hartford has the right to pursue the priority of its administrative claim under section 506(c) because the historic right of an administrative claimant to pursue the kind

of relief provided by the section is not specifically precluded, and is therefore presumed to endure. In addition, Hartford's right in this case is established by reference to section 1109(b), and likewise to sections 502(a) and 503(a).

A. Reference to Section 1109(b) Further Establishes Hartford's Right to Pursue the Priority of Its Claim Under Section 506(b).

Section 1109(b) provides generally that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, *may raise and may appear and be heard on any issue* in a case under this chapter." 11 U.S.C. § 1109(b) (emphasis added). As Judge Posner has explained, section 1109(b) simply means what it says:

> [that] anyone who has a legally protected interest that could be affected by a bankruptcy proceeding is entitled to assert that interest with respect to any issue to which it pertains, thus making explicit what is implicit in an *in rem* proceeding — that everyone with a claim to the *res* has a right to be heard before the *res* is disposed of since that disposition will extinguish all such claims.

In re James Wilson Assocs., 965 F.2d 160, 169 (7th Cir. 1992).

In this case, Hartford has an obvious interest in having its administrative claim paid from property of the Debtor's bankruptcy estate. More to the point, pursuant to sections 503(a) and 1109(b), Hartford is entitled to assert both its administrative claim, and also *any issue regarding the priority of its claim*, before the assets of the estate are finally distributed to Magna. Because nothing in section 506(c) precludes Hartford from asserting its position under section 1109(b), Hartford may pursue its interest.

The court below dismissed the relevance of section 1109(b) on the theory that the section applies only in a chapter 11 case,

and that the Debtor's case had been converted to a chapter 7 proceeding before Hartford filed its claim for relief. (App. 301a-302a n.3). It is true, of course, that the Debtor's case was converted from a chapter 11 proceeding to one under chapter 7 before Hartford filed its claim. It does not follow, however, that section 1109(b) is therefore inapposite.

To begin with, Hartford's claim accrued in its entirety during the course of the Debtor's chapter 11 proceeding. Thus, had Hartford asserted its claim before the conversion, Hartford would clearly have been entitled to rely on section 1109(b). Hartford's right ought not to be forfeited simply because of the conversion where nothing in the Bankruptcy Code directs such a result. *Cf.* 11 U.S.C. § 348(d). This conclusion is all the more compelling in this instance because Hartford did not have notice of the Debtor's bankruptcy case until two months *after* the case was converted to a chapter 7 proceeding. (App. 218a). But even if such were not the case, Hartford's right to enforce the priority of its claim should in no event turn on whether the case was a proceeding under chapter 11 or 7, given that section 506(c) applies equally in both types of proceedings and, presumably, should operate to the same effect in each instance. *See* 11 U.S.C. § 103(a).

More important, as Judge Posner has suggested, section 1109(b) is significant not simply for what is says, but also for the fundamental principle that it illuminates: in the absence of an express statutory provision foreclosing relief, fundamental principles of equity dictate that, in any *in rem* insolvency proceeding involving the distribution of property, a party has the right to assert its claim (including any available priority under the relevant distribution scheme), before that claim is extinguished through the distribution of the *res* to others. *See In re James Wilson Assocs.*, 965 F.2d at 169. *See also Katchen v. Landy*, 382 U.S. 323, 329-30 (1966); *City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293, 297 (1953) (stating that "even creditors who have knowledge of a reorganization have a right to assume that the statutory

'reasonable notice' will be given them before their claims are forever barred" and that "[t]he statutory command for notice embodies a basic principle of justice — that a reasonable opportunity to be heard must precede denial of a party's claimed rights"); *Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 192 (1902) (observing that "[p]roceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*," and concluding that, so long as notice is given "to those who may be interested in opposing discharge," a decree discharging a debt is valid).[21] The concept of creditor participation follows from the right of creditors to obtain payment of their claims, not only from the debtor personally, but also from the debtor's available assets. *See Hanover Nat'l Bank*, 186 U.S. at 191 (discussing this right). In addition, the concept follows from the Court's analysis in *Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501 (1891), which established the equitable right of an administrative claimant in an insolvency proceeding to recover its claim from a secured creditor's collateral to the extent of a benefit to the secured party. *Id.* at 506-07; *see also New York Dock Co. v. Steamship Poznan*, 274 U.S. 117, 121 (1927). Thus, even in the absence of section 1109(b), Hartford should still be entitled to

21. As explained in the *Collier* treatise:

> [The purpose of section 1109(b)] is to grant any party with a financial stake in the case the right, at the party's election, to participate with respect to the judicial determination of any issue bearing on the ultimate disposition of his or her interest. This purpose traces its origins to basic considerations of due process: that no person directly affected by a judicial proceeding should suffer the consequences of the proceeding without a meaningful opportunity to appear and be heard.

7 *Collier on Bankruptcy* ¶ 1109.04[2][b] at 1109-29 (Lawrence P. King ed., 15th ed. revised 1999); *see also In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985) ("Section 1109(b) continues the pattern of permitting interested parties in bankruptcy cases the absolute right to be heard and to insure their fair representation.").

proceed on its claim and enforce its priority.[22] Yet, even if this were not so, Hartford is nevertheless entitled to enforce the priority of its claim under sections 502(a) and 503(a).

B. Reference to Sections 502(a) and 503(a) Also Establishes Hartford's Right to Pursue the Priority of Its Claim Under Section 506(c).

Section 502(a) provides in relevant part that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a *party in interest* . . . objects." 11 U.S.C. § 502(a) (emphasis added). As defined in section 101(5), the term "claim" includes any right to payment, whether "secured, or unsecured," and thus includes Magna's secured claim. 11 U.S.C. § 101(5); *see also Nobelman v. American Sav. Bank*, 508 U.S. 324, 331 (1993). Moreover, although the phrase "parties in interest" is not defined in section 502(a), it is defined expansively in section 1109(b), and there is no reason to presume in this instance that the same phrase appearing in different sections of the Code should have a different meaning. *See Patterson v. Shumate*, 504 U.S. 753, 758 (1992) (presuming consistency in meaning of same phrase used in different sections of the Bankruptcy Code); *see also United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 460 (1993); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).[23]

22. Few issues in bankruptcy are more important than a claimant's right of participation. As this Court has explained recently, in enacting the reorganization provisions of the Bankruptcy Code, "Congress adopted the view that creditors . . . are very often better judges of . . . their own economic self-interest than courts, trustees, or [governmental agencies]." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. Partnership*, 119 S. Ct. 1411, 1423 n.28 (1999). Indeed, implicit in the bankruptcy process as a whole, and explicit in the text of section 1109(b), is the unmistakable principle that creditors should have the right to champion their own interests on their own behalf.

23. The phrase "party in interest" is intended to include any party with a pecuniary interest in the particular controversy at issue. *See Yadkin*

(Cont'd)

To the extent that a secured party (such as Magna) may seek to recover the payment of its secured claim from property of the estate without provision for the payment of administrative expenses in accordance with the requirements of section 506(c), this failure should constitute proper grounds for objection to the payment of the claim. *See Gardner*, 329 U.S. at 573 ("When objections [to claims] are made, [the bankruptcy court] is duty bound to pass on them. . . . Without that sifting process, unmeritorious or excessive claims might dilute the participation of the legitimate claimants."); *Pepper v. Litton*, 308 U.S. 295, 308 (1939) ("[T]he bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in the administration of the bankrupt estate."); *Wilson*, 138 U.S. at 506; *see also United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990); *Katchen*, 382 U.S. at 329-30.[24] Given the right of any party in interest under section 502(a) to assert an objection to a claim, it would be anomalous to conclude that, although Hartford (or any other party in interest) has standing to enforce indirectly the requirements of section 506(c) by objecting to the payment of Magna's secured claim, nevertheless Hartford lacks the

(Cont'd)
Valley Bank & Trust Co. v. McGee (In re Hutchinson), 5 F.3d 750, 756 (4th Cir. 1993) (stating that the term "party in interest . . . is generally understood to include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings").

24. Although cases such as *Pepper v. Litton* cited above were decided under the former law, Congress intended that they be followed in the administration of cases under the Code. *See* H.R. Rep. No. 95-595, at 359 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6315 ("The Bankruptcy Court will remain a court of equity . . . *Local Loan v. Hunt*, 292 U.S. 234, 240 (1934) [with power to disallow] a claim in appropriate circumstances. *See Pepper v. Litton, supra.*").

ability to assert its own interest in enforcing the section directly on the same ground.[25]

Moreover, it would be an exceptionally odd construction of the Code to conclude that, although Hartford has standing to pursue the general payment of its administrative claim from the estate under section 503(a), Hartford cannot pursue the claim's specific *priority* under section 506(c), but must rely on the trustee to do so, regardless of whether the trustee has any ability or incentive to carry this burden. In this instance, the trustee has neither the resources nor the incentive to pursue Hartford's claim because the trustee has not paid Hartford's claim from funds of the estate (and thus has no incentive to recover the expense for the estate), and lacks unencumbered funds to litigate with Magna. Hence, any forced reliance on the trustee would simply result in denial of the remedy prescribed by the statute, resulting in a windfall to the bank in derogation of Congress's intent in enacting section 506(c). *See North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991); *McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991).

25. The reason for permitting any party in interest in a bankruptcy case to object to the claims of other creditors is straightforward. As indicated previously, bankruptcy proceedings involve the division of assets under circumstances in which, typically, there are insufficient resources to pay everyone in full. Accordingly, parties may object to the claims of others in order to vindicate their own interests by ensuring that others do not take more than their prescribed share. In this case, Magna seeks to recover more than its fair share as defined by section 506(c). Because Hartford stands to benefit from keeping Magna honest, Hartford is properly a party in interest for purposes of section 502(a), and is entitled to object to Magna's claim. *Cf. In re Trenge*, 127 B.R. 552, 554-55 (E.D. Pa. 1991) (upholding junior secured creditor's standing to object to agreement between senior secured creditor and debtor in possession regarding surcharge of expenses that would dilute recovery for junior secured creditor).

In general, the Code requires individual claimants to pursue their own claims and rights in a timely fashion, including the assertion of any relevant priority. *See* 11 U.S.C. § 502(b)(9) (disallowing certain late-filed claims), § 726(a) (discussing the treatment of certain tardily filed claims); *see also Taylor v. Freeland & Kronz*, 503 U.S. 638, 644 (1992). Absent some statutory explanation evident from the text demonstrating that Hartford's pursuit of the payment of its administrative claim should be divorced from pursuit of the claim's priority, Hartford's right to assert both aspects of its claim under the Code should be recognized.

III. THE COURT BELOW RELIED IMPROPERLY ON A CANON OF CONSTRUCTION TO DENY HARTFORD'S RIGHT OF RECOVERY IN THIS CASE, AND HARTFORD IS ENTITLED TO ASSERT ITS CLAIM UNDER SECTION 506(c).

In construing section 506(c), the court below eschewed reliance on the overall text and structure of the Code, and instead invoked the maxim "*expressio unius est exclusio alterius*" — the expression of one thing (in a statute) is the exclusion of others — in reaching its conclusion that Hartford is not entitled to pursue the priority of its claim under the section. (App. 303a n.4). The court also reasoned that the language of section 506(c) is " 'clear and unambiguous,' " and therefore should be enforced " 'according to its terms.' " (App. 303a (quoting *Rake v. Wade*, 508 U.S. 464, 471 (1993)). The court's own analysis, however, reveals that the text of the section is far from plain on the question of who may enforce it, for if the meaning of the section were truly plain, the court would not have had occasion to invoke a canon of construction (i.e., the *exclusio* rule) to decipher its meaning. In truth, section 506(c) does not state (as the court implied) that "only" a trustee may enforce its terms, and no such limitation follows from any "plain" reading of the text. On the contrary, the plain, collective meanings of sections

1109(b), 503(a), and 502(a) demonstrate that section 506(c) cannot be exclusively its own arbiter on the question of who may enforce its requirements.

As this Court has warned, the *exclusio* rule is far from dispositive in the construction of statutory provisions. *See Ford v. United States*, 273 U.S. 593, 612 (1927) (observing that, while "[i]t is often a valuable servant, [the *exclusio* maxim is] a dangerous master to follow in the construction of statutes [and] ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice"); *see also National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (concluding that the maxim "must yield to clear and contrary evidence of legislative intent."); *Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940) ("The maxim *expressio unius est exclusio alterius* is an aid to construction, not a rule of law. It can never override clear and contrary evidences of Congressional intent."). In this instance, the Code's text and structure, together with consideration of the logical relation between its several parts (including sections 1109(b), 503(a), and 502(a)), demonstrate that Congress did not intend the mere authorization of a trustee to pursue relief under section 506(c) to preclude others from doing so where their interests are implicated.

In an effort to uphold the Court of Appeals' analysis, Magna has argued that the question of Hartford's ability to recover its claim under section 506(c) should be determined in accordance with this Court's analysis in such cases as *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527 (1989), and *Davis v. Passman*, 442 U.S. 228 (1979), which prescribe various methods for determining the entitlement of certain parties to pursue implied causes of action under federal law. (*See* Brief in Opposition to Petition for Writ of Certiorari, at 8-9). These cases, however, are of no assistance to Magna.

To begin with, none of these cases involve interpretation of the bankruptcy laws, and as this Court has explained repeatedly, the correct standard to apply in construing the provisions of the Code is the approach taken in *Midlantic*. Moreover, even following the analysis undertaken in cases such as *Davis* and *Karahalios*, the Court should still conclude that Hartford is entitled to pursue the priority of its claim under section 506(c). In this instance, Hartford's right to enforce the priority of its administrative claim under section 506(c) follows not only from longstanding historical practice but also from the text of the Code itself (including consideration of sections 1109(b), 503(a), and 502(a)), the Code's overall structure, its legislative history, the purpose of the relevant sections, and the fact that denying Hartford its due would generate a windfall of the very type that Congress sought to prevent. Given Congress's intent in enacting section 506(c) to continue pre-Code practice, and the obvious need to recognize Hartford's right in this case to vindicate the statute's purpose, the Court should conclude that Hartford has the right to enforce the priority of its claim under the section.

IV. HARTFORD HAS STANDING UNDER THE COURT'S CONSTITUTIONAL AND PRUDENTIAL STANDING DOCTRINES TO ASSERT ITS RIGHT OF RECOVERY UNDER SECTION 506(c), AND DOING SO IS NECESSARY TO ENSURE COMPLIANCE WITH THE PURPOSES AND POLICIES OF THE BANKRUPTCY CODE.

As this Court has held, the issue of a party's standing to pursue relief under a federal statutory scheme requires analysis of "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citing *Barrows v. Jackson*, 346 U.S. 249 (1953)); *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). In order to satisfy the Constitution, the claimant must meet the case and controversy requirements of Article III.

See Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 663-664 (1993); *see also Bennett*, 520 U.S. at 162; *Flast v. Cohen*, 392 U.S. 83, 101 (1968). In addition, the claimant must satisfy any relevant prudential standing limitation, such as whether the interest that the party in question seeks to vindicate arguably lies within the "zone of interests" sought to be protected or regulated by the relevant statutory scheme. *See Bennett*, 520 U.S. at 162; *Data Processing*, 397 U.S. at 153. In this case, Hartford satisfies each of the relevant requirements.

A. Hartford Has Constitutional Standing.

In this instance, it is undisputed that the relevant indebtedness to Hartford remains unpaid, and that Hartford seeks recovery of its own claim. It is equally undisputed that Hartford seeks payment from funds that would otherwise be payable to Magna, and that there are no other funds available to pay Hartford's claim. Finally, a ruling favorable to Hartford will result in payment to Hartford, thus redressing its injury. As Magna concedes, the constitutional requirements are not at issue, and Hartford has standing under Article III to pursue its claim. (*See* Brief in Opposition to Petition for Writ of Certiorari, at 10).

B. Hartford's Standing Is Necessary to Vindicate Its Own Tangible Interest, As Well As the Purposes of the Bankruptcy Code, and the Relevant Prudential Standing Requirements Are Satisfied.

Like the requirements of Article III, the Court's prudential standing doctrine is "founded in concern about the proper — and properly limited — role of the courts in a democratic society." *Warth*, 422 U.S. at 498. As stated by the Court in *Allen v. Wright*, 468 U.S. 737 (1984), the doctrine

> embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication

> of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Id. at 751; *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978). Moreover, as this Court held unanimously in *Bennett*, "Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated." 520 U.S. at 163.

The Bankruptcy Code bestows broad rights of standing on parties in interest (including Hartford in this case) to pursue and enforce the various sections of the Code that bear on their interests. Moreover, in this instance, Hartford's claim lies comfortably within the zone of interests that Congress sought to protect in enacting sections 506(c), 503(a), 502(a), and 1109(b), and Hartford is a proper party to pursue its claim. As this Court has stated, "the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of [one scheme] may not do so for other purposes." *Bennett*, 520 U.S. at 163. Thus, the "first question" is whether any relevant provision of the Bankruptcy Code "negates the zone-of-interests test . . . or, perhaps more accurately, expands the zone of interests . . . ." *Id.* at 164. Significantly, although no provision of the Bankruptcy Code expressly negates the Court's prudential standing doctrine, the relevant sections at issue here do affect the doctrine's application in favor of bestowing broad rights of participation on parties seeking to enforce the provisions of the Code. Hence, the zone of interests test should be applied as expansively as the provisions that Hartford seeks to vindicate.

As indicated previously, section 1109(b) expressly permits any party in interest in a chapter 11 case to "raise, appear and be heard on any issue" in the case. 11 U.S.C. § 1109(b). Similarly, section 503(a) expressly permits administrative claimants such as Hartford to pursue the recovery of their own

administrative claims. *See* 11 U.S.C. § 503(a). In turn, section 502(a) permits any party in interest in a case to object to any other party's claim in order to vindicate the provisions of the Code. *See* 11 U.S.C. § 502(a). Finally, section 506(c) provides expressly for the payment of administrative claims of the kind held by Hartford ahead of the claims of secured parties like Magna. *See* 11 U.S.C. § 506(c). Given the context, it is thus difficult to understand how Hartford's claim could not fall within the zone of interests of these provisions.

Of course, in some cases involving the enforcement of section 506(c), it only makes sense for the trustee to pursue payment of the particular expense at issue. For example, if the trustee has already paid an administrative claim from unencumbered funds of the bankruptcy estate, the claimant obviously has no incentive to enforce the requirements of the section because the claimant has already been paid. In such a case, the trustee is the appropriate party to enforce the section because the trustee would have every incentive to do so in order to replenish the estate on behalf of the estate's general creditors.[26] On the other hand, where, as here, the claim remains unpaid, and the trustee has neither the resources nor the inclination to pursue the matter on the claimant's behalf, the claimant is the only party with any incentive to enforce the statute, and thus should be permitted to do so in order to avoid the lapse of a perfectly valid right of recovery. Where, as in this case, the trustee has neither the ability nor the incentive to fulfill the policies and purposes of section 506(c), an administrative claimant like Hartford should be permitted to do so in its capacity as the real party in interest. Moreover, because the trustee has no interest in enforcing the priority of Hartford's claim, Hartford's pursuit of its own interest would occasion no intrusion on the trustee's function.

Similarly, it makes no difference whether a trustee has been selected to serve in the case (as in every chapter 7

26. Creditors would also have an incentive to ensure the enforcement of section 506(c) in such a case, and, hence, would have standing to pursue the matter if the trustee failed to do so.

proceeding, and some chapter 11 proceedings), or whether a debtor in possession is supervising the estate (as in most chapter 11 proceedings).[27] As the court below indicated, a debtor in possession may enforce the requirements of section 506(c). (App. 303a n.4). This follows not only from the legislative history,[28] but also from section 1107(a). *See* 11 U.S.C. § 1107(a) (providing that a debtor in possession enjoys "all the rights . . . and powers . . . of a trustee serving in a case under this chapter"); *North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 231 (9th Cir. 1991). As discussed previously, where (as here) the trustee (or debtor in possession) has not paid an administrative claim, and lacks the ability or inclination to litigate with the secured party on the claimant's behalf, the claimant is entitled to assert the priority of its claim under section 506(c).

Taking a different approach, the court below concluded that Hartford should not be entitled to enforce the provisions of section 506(c) because doing so would undermine the Code's policy of equality of distribution. (App. 305a-306a). The court reasoned that, when a trustee recovers a claim under the section, the recovery should then be available for general distribution to creditors on a *pro rata* basis in accordance with their priorities. (App. 305a-306a). Thus, the court believed, Hartford should not be able to enforce the provision on its own account because doing so would generate a result "incompatible with the fundamental equal distribution goals of the Bankruptcy Code." (App. 306a). In addition, the court warned that permitting Hartford to pursue its claim would "invite 'a flood of satellite

27. *See supra* notes 2 & 3 (discussing the concept and role of a debtor in possession in a chapter 11 case, and also the role of a trustee in the chapter 11 or 7 context).

28. *See supra* note 20 (reciting the relevant passage from the legislative history stating that a debtor in possession may enforce the provisions of section 506(c)).

litigation by those seeking to avoid a pro rata division of the estate.' " (App. 306a). The court's analysis, however, is in error.

If a trustee pays an administrative claim from funds of the bankruptcy estate, and then recovers the payment from a secured creditor's collateral, it makes sense to conclude that the recovery is then available for general distribution because the trustee's recovery simply replenishes funds in the estate. On the other hand, where (as here) the trustee does not pay the administrative claimant from funds of the estate, it makes no sense to conclude that any recovery obtained on account of the unpaid administrative claim is then subject to general distribution. Apart from generating inconsistent results based solely on whether the trustee initially pays the claim or not, there is no basis in the Code for concluding that a claim's priority in this context should be distributed to anyone other than the holder of the claim. *Cf.* 11 U.S.C. § 510. More important, the court's rule in this case could cause recoveries under section 506(c) to revert back to secured parties, thereby ensuring that the statute would not be enforced.

In this case, Magna lent funds to the Debtor after the Debtor filed for bankruptcy relief, and was granted in exchange broad collection rights against the estate, including lien rights on all of the Debtor's property to secure the Debtor's pre- and postpetition indebtedness to Magna. (App. 196a). Following the court's analysis that recoveries under section 506(c) are to be made available for general distribution in accordance with the creditors' respective priorities, this may simply mean that Magna would be entitled to collect any recovery on Hartford's claim under section 506(c), a result at odds with the purpose of the section. Section 506(c) bestows a priority in favor of the payment of certain kinds of claims from a secured party's collateral, and there is no reason why this priority should be eviscerated by requiring the disbursement of the benefits of the priority to others, including the very party whose collateral is supposed to bear the expenses in question.

Moreover, there is no merit to the conjecture that permitting parties such as Hartford to enforce the provisions of section 506(c) would generate a flood of satellite litigation. The rule permitting claimants such as Hartford to pursue surcharge claims has been in place for over a century, and the courts have experienced no such difficulty in administering it. Moreover, the right is no more cumbersome than any similar right to pursue a priority granted by the Code. Because claimants such as Hartford seek merely to enforce the provisions of section 506(c) under circumstances in which a trustee is unwilling or unable to do so, Hartford is entitled to enforce its right to prevent the windfall that the section seeks to avoid.

As the courts have acknowledged, "There is a longstanding bankruptcy policy of preventing a party from receiving a windfall merely by reason of the happenstance of bankruptcy." *Vienna Park Props. v. United Postal Sav. Ass'n (In re Vienna Park Props.)*, 976 F.2d 106, 113 (2d Cir. 1992) (internal quotation marks omitted) (quoting *Butner v. United States*, 440 U.S. 48, 55 (1979); *Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961)).[29] It is significant that, had Hartford's claim been incurred in a state court receivership proceeding,

29. Courts have recognized this principle in construing section 506(c). *See Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995); *New Orleans Pub. Serv., Inc. v. First Fed. Sav. & Loan Ass'n (In re Delta Towers, Ltd.)*, 924 F.2d 74, 77 (5th Cir. 1991); *North County Jeep & Renault, Inc. v. General Elec. Capital Corp. (In re Palomar Truck Corp.)*, 951 F.2d 229, 232 (9th Cir. 1991); *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91, 94 (3d Cir. 1986); *McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991); *see also Bank of Marin v. England*, 385 U.S. 99, 103 (1966) (observing in construing section 70d(5) of the Bankruptcy Act "we do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction.").

the claim would have been paid out of the Magna's collateral.[30] Magna, of course, argues that it should be entitled to enjoy the benefit of the windfall that it seeks, but that is not the policy of the law.

In *Meyer v. Flemming*, 327 U.S. 161 (1946), this Court addressed and rejected an analogous argument under the prior Bankruptcy Act that, after the commencement of a bankruptcy proceeding and the appointment of a bankruptcy trustee, the debtor no longer had standing to prosecute a cause of action that he had previously commenced prior to filing for bankruptcy relief. In analyzing the matter, the Court recognized the general rule that, once a bankruptcy action has commenced, the right to prosecute a prepetition cause of action against third parties rightfully vests in the bankruptcy estate to be pursued by the trustee. *See id.* at 165. The Court also held, however, that "[i]f, because of the disproportionate expense, or uncertainty as to

30. *See Bahndorf v. Lemmons*, 525 N.W.2d 404, 408 (Iowa 1994) ("Expenses of a receivership . . . are to be paid first."); *Hyland v. Anchor Fin. Co.*, 369 A.2d 12, 15 (N.J. 1977) ("Our courts have consistently held that receivership costs have priority over the claims of a secured creditor."); *South County Sand & Gravel Co. v. Bituminous Pavers Co.*, 274 A.2d 427, 430 (R.I. 1971) (noting judicial rule permitting receivership expenses to be taxed against encumbered property to the extent that secured creditor or the collateral securing such debt has been benefited or otherwise advantaged by the receivership proceedings); *In re Atlas Iron Const. Co.*, 46 N.Y.S. 467, 468 (N.Y. App. Div. 1897) ("The fees and expenses of administration are disbursements necessary to realize the sum of money from the assets of the corporation to distribute among its creditors . . . such disbursements are necessary before the property can be reduced to money, and the debts of the corporation collected."); *Horton v. McNally Co.*, 151 N.Y.S. 674, 677 (N.Y. Sup. Ct. 1915) (noting that "expenditures necessary for the preservation of the property" are administrative claims and are paid prior to secured receiver's certificates). Additionally, individual claimants have been recognized in the state receivership context as entitled to assert directly a claim for the payment of an administrative expense. *See Gurney v. Atlantic & Great W. Ry. Co.*, 58 N.Y. 358, 366-68 (1874).

the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation." *Id.* at 166. Because the court below failed to adhere to this principle as articulated in the bankruptcy context in *Meyer*, the Court should reverse the decision and conclude that Hartford has the right to pursue the priority of its claim under section 506(c).

CONCLUSION

For the foregoing reasons, Hartford respectfully requests that the Court determine that Hartford has the right to enforce the priority of its administrative claim under section 506(c) in this case, reverse the *en banc* decision of the Court of Appeals, and remand for further proceedings consistent with the Court's holding.

Respectfully submitted,

WENDI ALPER-PRESSMAN
SUSMAN, SCHERMER,
RIMMEL & SHIFRIN LLC
7711 Carondelet Ave.
St. Louis, Missouri 63105
(314) 725-7300

G. ERIC BRUNSTAD, JR.*
PATRICK J. TROSTLE
RENEE M. DAILEY
MARK W. DEVENO
HELDER P. PEREIRA
WILLIAM H. ERICKSON
NICOLE J. ANKER
BINGHAM DANA LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700

Attorneys for Petitioner

* *Counsel of Record*