ULTRA PETROLEUM AND THE ISSUE OF IMPAIRMENT UNDER THE BANKRUPTCY CODE—THE FIFTH CIRCUIT'S ANALYSIS DOESN'T CUT IT

By James H. Millar[*]

Introduction

The term "impairment" has a fairly technical meaning and application when we consider the treatment of claims in a plan under Chapter 11 of the Bankruptcy Code.[1] But to introduce the concept, let's start with a colloquial view. A claim is "impaired" under the Bankruptcy Code if the holder of the claim is not getting everything to which it is entitled.

Whether or not a claim is impaired is actually pretty important. A holder of a claim in an impaired class has the right to vote for or against a Chapter 11 plan, whereas a holder in an unimpaired class is deemed to accept the plan.[2] In addition, an impaired claimholder that votes "no" on a plan has the right to object to the plan based on the best interests of creditors test, which requires that the claimant receive at least as much as it would receive in a Chapter 7 case.[3] An unimpaired claimant cannot bring such an objection.

So, we might ask the question: how do we determine whether or not a claim is impaired? The answer starts, as we will see, with the concept of impairment as provided in Section 1124 of the Bankruptcy Code. We then get to a more specific issue that wraps into the concept of disallowance of claims.

Section 502(b) of the Bankruptcy Code provides that the amount of certain claims are "disallowed"—that is, limited in whole or in part—as against the bankruptcy estate. For

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[1]See 11 U.S.C.A. § 101 et seq. (the "Bankruptcy Code").

[2]See 11 U.S.C.A. § 1126(f).

[3]See 11 U.S.C.A. § 1129(a)(7).

example, under Section 502(b)(6), a landlord's claim for lease rejection damages is disallowed to the extent it exceeds a formula, which tops out at the greater of one year's rent, or 15% of the rent for the remaining term of the lease, not to exceed three years. In addition, many have perhaps heard the popular refrain that postpetition interest on claims is disallowed under Section 502(b)(2).

For a claim to be unimpaired, what must the plan provide for? On the one hand, payment of the entire amount that the claimant would receive outside of bankruptcy under applicable non-bankruptcy law. Or, on the other hand, is it sufficient to pay the amount of the claim as "allowed" by the Bankruptcy Code? As a policy matter, one could reasonably argue for either answer.

Courts, however, should not be in the business of coming up with answers that they think are reasonable or otherwise make good policy. Rather, they should interpret to the best of their ability the provisions of the Bankruptcy Code and prior case law. And if one court gets it wrong, other courts should try to correct those errors.

Recently, the Fifth Circuit handed down a decision on impairment in *In re Ultra Petroleum Corp.*[4] As will become apparent, this article argues that the Fifth Circuit got it wrong. For all the reasons discussed below, the author believes that the Fifth Circuit should have come out the other way.

The Fifth Circuit's opinion lacks solid legal analysis. In the first instance, the court does not really consider the applicable statutory text or the ordinary cannons of statutory construction that one might typically apply. Rather, it just leaps to conclusions as what it thinks the statute means (or perhaps, should mean).

Moreover, in several passages, the court justifies its conclusions because other courts (mostly bankruptcy courts but including one other circuit court) and a leading commentator come out the same way.[5] That might help support an otherwise obvious conclusion at the margins, but the United States Courts of Appeals really should not place great reliance on a

[4] See *In re Ultra Petroleum Corporation*, 943 F.3d 758, 760, Bankr. L. Rep. (CCH) P 83466 (5th Cir. 2019).

[5] See 943 F.3d at 760, 763, 765.

method of statutory construction that essentially equates to groupthink.

At worst, some bankruptcy practitioners might worry that the courts are simply implementing their version of equity in the arena of financial distress no matter what the Bankruptcy Code says. Others might think that courts just default to the rule of "debtor always wins" because that advances some underlying policy. Or perhaps, more worrisome, one might conclude that, at least with respect to the appellate court's short shrift of the issue, that they have more pressing matters that need their time and attention.

Whether or not one agrees with any of these sentiments, everyone should agree that all courts should faithfully apply the ordinary rules of statutory construction to the Bankruptcy Code. That leads to many positive legal results, including certainty in the law, which allows private parties to order their financial relationships. At least with respect to the issue of impairment, this author believes that the Fifth Circuit's opinion in *Ultra Petroleum* missed the mark, and that the next court to address the issue should take a fresh look at the underlying analysis.

What Happened in *Ultra Petroleum*?

Ultra Petroleum Corporation ("Holdings") functioned as a holding company for two subsidiaries involved in oil and gas exploration and production—Ultra Resources, Inc. ("Resources") and UP Energy Corporation ("Energy" and, collectively with Holdings and Resources, the "Company" or the "Debtors").[6] Before bankruptcy, Resources had issued $1.46 billion of unsecured notes and had borrowed another $999 million under a revolving credit facility.[7] Holdings and Energy guaranteed that debt.[8]

While the price of oil was over $100 per barrel in 2014, by early 2016, oil had plummeted to less than $30 per barrel.[9] At those market prices, the Company could not service its debt and, on April 29, 2016, each of the Debtors filed Chapter 11

[6] *In re Ultra Petroleum Corporation*, 943 F.3d 758, 760, Bankr. L. Rep. (CCH) P 83466 (5th Cir. 2019).

[7] 943 F.3d at 760.

[8] 943 F.3d at 760.

[9] 943 F.3d at 760.

petitions.[10] During the bankruptcy case, however, oil prices rebounded and rose to almost $80 per barrel and the Debtors became solvent again.[11]

Given their solvency, the Debtors proposed a Chapter 11 plan that purported to compensate their creditors in full.[12] The plan would pay in cash to the holders of claims under the notes and the revolving credit facility (collectively, the "Class 4 Creditors") (i) all outstanding principal, (ii) prepetition interest, and (iii) postpetition interest, but only at the relatively low federal judgment rate.[13] The Debtors then contended that the Class 4 Creditors were "unimpaired" because they were supposedly paid in full and, accordingly, could not object to the plan as provided in section 1126(f) of the Bankruptcy Code.

The Class 4 Creditors nevertheless objected to their plan treatment by arguing that their claims were in fact impaired because the plan did not require the debtors to pay a contractual "Make-Whole Amount" and additional postpetition interest on their claims calculated at the meaningfully higher default rates set forth in the debt instruments.[14] Under the acceleration clause of the documents governing the notes, the Make-Whole Amount together with all outstanding principal and interest immediately became due upon a bankruptcy filing.[15] While the revolver did not contain a Make-Whole Amount, it likewise provided for acceleration of all principal and accrued interest.[16] In addition, both debt instruments called for interest on the accelerated amounts to accrue from

[10] 943 F.3d at 760–61.

[11] 943 F.3d at 760–61.

[12] 943 F.3d at 761.

[13] 943 F.3d at 761.

[14] 943 F.3d at 761. Under the notes, the Make-Whole Amount was an additional payment designed to compensate the noteholders for losing the right to maintain their investment because of an early repayment. 943 F.3d at 761. The Make-Whole Amount was determined through a formula, which, generally speaking, calculated the amount by which the discounted value of all scheduled future interest and principal payments would exceed the amount actually paid. The formula calls for a discount rate of 0.5% over comparable U.S. Treasury obligations. 943 F.3d at 761. This is commonly referred to as the "T+50 BIPS" make-whole formula.

[15] 943 F.3d at 761.

[16] 943 F.3d at 761.

the petition date at a default interest rate—an additional 2% over the otherwise applicable rate—until paid in full.[17]

Those amounts were significant—the Make-Whole Amount totaled $201 million and additional postpetition interest was $186 million for a total of $387 million.[18] Rather than impede the progress of an otherwise confirmable plan, the parties stipulated at confirmation that the bankruptcy court could confirm the plan, but leave for later resolution the issue of whether the Debtors needed to pay the additional $387 million.[19] To fund any potential further liability, the Debtors set aside $400 million to compensate the Class 4 Creditors when and if necessary to render the Class 4 Creditors unimpaired.[20]

In the first instance, the bankruptcy court had to determine whether the Class 4 Creditors were impaired as the Bankruptcy Code uses that term even though the Debtors' plan plainly stated that they would not receive the Make Whole Amount and the additional postpetiton interest.[21] Section 1124 of the Bankruptcy Code, which contains two subsections, addresses the concept of impairment. Section 1124(1), the subsection at issue, provides that a class of claims is not impaired if "the [reorganization] plan . . . leaves unaltered the legal, equitable, and contractual rights to which such claim . . . entitles the holder."[22]

Another section of the Bankruptcy Code also proves relevant to the analysis. Section 502(b)(2) provides that the court should disallow a claim "to the extent that [it seeks] unmatured interest."[23] Since determinations under Section 502(b) are made as of the petition date, the reference in subsection (b)(2) to "unmatured interest" means that the court should disallow postpetition interest on claims.

The Debtors argued, in a nutshell, that both the Make-Whole Amount and the amount for the additional contractual

[17] 943 F.3d at 761.

[18] 943 F.3d at 761.

[19] 943 F.3d at 761.

[20] 943 F.3d at 762.

[21] 943 F.3d at 762.

[22] 943 F.3d at 762 (quoting 11 U.S.C.A. § 1124(1)).

[23] 943 F.3d at 762 (quoting 11 U.S.C.A. § 502(b)(2)).

postpetition interest—that is, the amount of postpetition interest that would accrue in excess of the federal judgment rate postpetition—qualified as "unmatured interest," which the bankruptcy court should disallow under Section 502(b)(2).[24] In this regard, the Debtors asserted that Section 502(b)(2) operates in the same way that, for example, state law operates to declare certain "penalty" provisions as unenforceable.[25] That is, the Debtors contended that Section 502(b)(2) of the Bankruptcy Code meant that, notwithstanding the underlying agreement between the parties, the claimant was legally prohibited under the Bankruptcy Code from recovering unmatured interest as part of its claim just like state law prohibits the claimant from recovering unenforceable penalties.[26] Thus, the Debtors alleged, their plan of reorganization paid in full the Class 4 Creditors even though it did not provide for payment of the Make-Whole Amount and contractual postpetition interest.[27]

The bankruptcy court ruled against the Debtors and held that, for a plan to leave a class of claims unimpaired, the holders of those claims must "receive all that they are entitled to under state law."[28] "In other words, if a plan does not provide the creditor with all it would receive under state law, the creditor is impaired even if the Code disallows something state law would otherwise provide outside of bankruptcy."[29] Thus, the bankruptcy court concluded that it did not need to decide whether the Bankruptcy Code disallowed the Make-Whole Amount or postpetition interest at the contractual rate as "unmatured interest."[30] Rather, to leave the claims of the Class 4 Creditors unimpaired, the plan must pay to those creditors the Make-Whole Amount and the additional postpe-

[24] 943 F.3d at 762.

[25] 943 F.3d at 762.

[26] 943 F.3d at 762.

[27] 943 F.3d at 762.

[28] 943 F.3d at 762, (quoting the bankruptcy court's decision, *In re Ultra Petroleum Corp.*, 575 B.R. 361, 372 (Bankr. S.D. Tex. 2017)).

[29] 943 F.3d at 762 (summarizing the bankruptcy court's analysis).

[30] 943 F.3d at 762.

tition interest because those amounts are otherwise permissible outside of bankruptcy under applicable state law.[31]

On appeal, the United States Court of Appeals for the Fifth Circuit reversed and held that applying the limitations of the Bankruptcy Code to an allowed class of claims—so-called "Code impairment"—does not mean that the class of claims is impaired as the Bankruptcy Code uses that term in Section 1124(1).[32] In reaching that conclusion, the Fifth Circuit offered little critical and persuasive analysis. This article seeks to analyze the issue of "impairment" by reviewing the various arguments and authority, including a construction of the statutory text, existing precedent and consideration of the relevant legislative amendment and history. This article will also consider how the Fifth Circuit addressed any of the arguments (if it considered them at all) and whether the next court to analyze the issue should follow suit.

I. Textual Analysis

We begin, of course, with the statutory text.[33] Section 1124 of the Bankruptcy Code provides in relevant part that "a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest . . ."[34]

[31] 943 F.3d at 762.

[32] 943 F.3d at 766.

[33] *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) P 72575, 89-1 U.S. Tax Cas. (CCH) P 9179, 63 A.F.T.R.2d 89-652 (1989); see also *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1, 36 Bankr. Ct. Dec. (CRR) 38, 43 Collier Bankr. Cas. 2d (MB) 861, Bankr. L. Rep. (CCH) P 78183 (2000) ("[W]e begin with the understanding that Congress says in a statute what it means and means in a statute what it says there.") (internal quotation marks omitted). When the Bankruptcy Code's language is plain, "the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." Hartford Underwriters Ins. Co., 530 U.S. at 6 (internal quotation marks and citations omitted).

[34] 11 U.S.C.A. § 1124(1).

A. The Statutory Text Uses "Claim"—Not "Allowed Claim"

Section 1124(1) uses the word "claim." Section 101(5) of the Bankruptcy Code defines a "claim" quite expansively as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . ."[35] As the Supreme Court has noted, "Congress intended by this language to adopt the broadest available definition of 'claim.' "[36]

So, what does it mean for a Chapter 11 plan to "leave[] unaltered the legal, equitable, and contractual rights" with respect to a "claim?" Must it pay in full those portions of the claim that are otherwise not "allowed" under Section 502(b) of the Bankruptcy Code, such as "unmatured interest?" Or, by contrast, is it sufficient to pay the amount of the claim only as "allowed" under the Bankruptcy Code—after application of the limitations to "allowed claims" set forth in Section 502(b)?

In the first instance, the sections quoted above do not clearly answer those questions. That said, we have other textual points to consider, given that we do not view portions of the text in isolation, but rather view statutory construction of the Bankruptcy Code as a "holistic endeavor."[37] "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . . ."[38]

In particular, we consider the concept of "allowance" of a claim to recover against the bankruptcy estate, on the one hand, versus the broad definition of a "claim," on the other. When the Bankruptcy Code uses the word "claim" standing alone—as it does in Section 1124(1)—does it mean the claim

[35] 11 U.S.C.A. § 101(5)(A).

[36] *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S. Ct. 2150, 2154, 115 L. Ed. 2d 66, 21 Bankr. Ct. Dec. (CRR) 1293, 24 Collier Bankr. Cas. 2d (MB) 1171, Bankr. L. Rep. (CCH) P 73993 (1991).

[37] *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 630, 98 L. Ed. 2d 740, 16 Bankr. Ct. Dec. (CRR) 1369, 17 Collier Bankr. Cas. 2d (MB) 1368, Bankr. L. Rep. (CCH) P 72113 (1988).

[38] 484 U.S. at 371.

as "allowed?" We can look to other parts of the Bankruptcy Code to help us answer this question as a textual matter.

Let us start with this: The Bankruptcy Code uses the term "claim" in some sections and the term "allowed claim" (or "allowed unsecured claim" or "allowed secured claim") in others. By this author's count, "allowed claim" appears 26 times in the text of the Bankruptcy Code. "Allowed secured claim" appears an additional 13 times. And "allowed unsecured claim" is found 23 times.

This is a straightforward application of ordinary statutory construction—using different terms in the statute necessarily means that Congress meant different things. "It is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another . . ."[39] Congress unquestionably knew how to write a term when it meant to refer to a claim as allowed by the Bankruptcy Code—it used the phrase "allowed claim," "allowed unsecured claim" or "allowed secured claim." When it meant to refer to the broad definition of a claim as set forth in Section 101(5), it simply wrote the word "claim." That is a powerful (if not dispositive) point of statutory construction—but there is more.

The introductory language to Section 502(b) is also helpful to the textual analysis. Before getting to the nine subsections that provide limitations on allowed claims—that is, subsections (b)(1) through (b)(9)—Section 502(b) introduces them with the following phrase: "[T]he court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—[the claim runs afoul of any of the subsections (b)(1) to (b)(9)]."[40]

Upon a close reading, we see that this section provides for a two-step process:

— FIRST, the court "***shall determine the amount of such claim***."

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[39] *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S. Ct. 1757, 1761, 128 L. Ed. 2d 556, 25 Bankr. Ct. Dec. (CRR) 1051, 30 Collier Bankr. Cas. 2d (MB) 345, Bankr. L. Rep. (CCH) P 75885 (1994) (quotations omitted).

[40] 11 U.S.C.A. § 502(b).

— SECOND, the court "***shall allow such claim in such amount, except to the extent that***" some or all of the claim is not allowable under subsections (b)(1) to (b)(9).

The critical point is that the court first determines the amount of the claim based on, presumably, that term as defined in Section 101. Then—and only then—does it consider whether some or all of the amount of that claim is not "allowable" as against the bankruptcy estate. Conceptually, the amount of the claim is something more than the allowed amount of that claim. Again, we see a code structure that differentiates between a "claim" and an "allowed claim."

Here, let's digress for a moment. We note that Section 1124(1) states that a claim is "impaired" unless the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." It does not say the claim is impaired unless the plan pays the amount of the ***claim*** nor does it say that the claim is impaired unless the plan pays the amount of the ***allowed claim***. Our dissection of Section 502(b) is helpful in supporting the larger point that "claim" means something different than "allowed claim." That said, we recognize that Section 502(b) talks in terms of determining an "amount of [a] claim" while Section 1124(1) speaks to leaving the rights to the claim unaltered. Simply put, why doesn't Section 1124(1) say that the plan should pay the "amount of such claim" to leave it unimpaired? On first blush, there seem to be some pieces that do not fit.

The answer is a preview of things to come in this paper. Section 1124(1) concerns leaving a claim "unaltered"—we might say that the claim "rides through" bankruptcy. Whatever rights existed to the claimant in respect of its claim before bankruptcy should be maintained by the plan and thus available to the claimant after bankruptcy. That is different, at least in some circumstances, from a "cash out"—which would mean giving the claimant a lump sum of cash in satisfaction of its rights and damages in respect of its claim.

As we'll see in the historical examination, Section 1124 previously included a third subsection—1124(3)—that expressly provided for a "cash out" as a means to unimpair a claim.[41] But Congress ***deleted*** that subsection for reasons that are relevant to the overarching question addressed by this paper. After that statutory amendment, we are left only with the "ride through" concept in Section 1124(1). So, when a plan seeks to unimpair a creditor's claim under Section 1124(1) through a lump sum payment of cash, what it is really doing is letting the claim ride through the bankruptcy and then satisfying that claim in full through a cash payment promptly after exit. If one thinks about unimpairment under Section 1124(1) in terms of "ride through," it makes sense that the plan would pay the claim at the amount due outside of bankruptcy under state law, rather than the potentially smaller amount as "allowed" within the bankruptcy case.

We will mention one further statutory construction argument that arises from the plain language of the Bankruptcy Code and which points to a textual difference between a "claim" and an "allowed claim." As noted above, the definition of claim expressly includes a "right to payment, whether or not such right is matured [or] unmatured."[42] Yet, Section 502(b)(2) seeks to disallow "unmatured interest."[43] If reference to a "claim" includes a claim only as allowed under the Bankruptcy Code, then the statute has some inherent inconsistency given that unmatured amounts are defined as part of the "claim" but unmatured interest, under that construction, would not be part of the "claim." Courts, however, should not construe statutes to contradict themselves[44] and thus this construction would be disfavored.

Turning to the analysis in *Ultra Petroleum*, the Fifth Circuit acknowledged that, as the Class 4 Creditors argued, Section 1124(1) uses the word "claim" but that elsewhere the Bankruptcy Code uses "allowed claim."[45] The court correctly summed up the Class 4 Creditors' arguments: "Then they sug-

[41] See infra, Point II.

[42] 11 U.S.C.A. § 101(5)(A).

[43] 11 U.S.C.A. § 502(b)(2).

[44] When construing a statute, the court's "task is to fit, if possible, all parts into an harmonious whole." *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 100, 132 S. Ct. 1350, 182 L. Ed. 2d 341, 2012 A.M.C. 609, 72 A.L.R. Fed. 2d 559 (2012) (quoting *F.T.C. v. Mandel Brothers, Inc.*, 359 U.S. 385, 389, 79 S. Ct. 818, 822, 3 L. Ed. 2d 893 (1959)).

[45] In re Ultra Petroleum Corp., 943 F.3d at 764.

gest the absence of 'allowed' in § 1124(1) means 'claim' there refers to the claim before the Code's disallowance provisions come in and trim its edges."[46] One would expect that, if a court were to not accept that forceful statutory construction, it would offer a robust textual counterargument.

Instead, we got a brief blurb that did not address the statute's use of "claim" versus "allowed claim" at all. The court's entire analysis on this point stated:

> But the broader statutory context cuts the other way. Section 1124 is not just (or even primarily) about the allowance of claims. It is about rights—the "legal, equitable, and contractual rights to which [the] claim . . . entitles the holder." That means we judge impairment after considering everything that defines the scope of the right or entitlement—such as a contract's language or state law. Even the bankruptcy court recognized this to some extent because it asked whether New York law permitted the Noteholders to recover the Make-Whole Amount. The Bankruptcy Code itself is a statute which, like other statutes, helps to define the legal rights of persons.[47]

Let's break down that reasoning. First, the court states that Section 1124 is not about allowance of claims. That statement is eminently true, but entirely beside the point. Unquestionably, Section 1124 speaks to whether or not a claim is "impaired"—not whether or not it is "allowed." But keep in mind the important point: By using the word "claim"—a defined term—and not using the phrase "allowed claim" or otherwise incorporating the concept of "allowance" from Section 502, Section 1124(1) seeks to build the concept of impairment off the broad definition of claim and not the more limited notion of an allowed claim.

Next in its analysis, the court tells us what the section "***means***." The section should "mean," of course, what it says in its text—and the text uses the word "claim," not "allowed claim." To the extent the Fifth Circuit is suggesting that the fundamental purpose of the section is somehow divorced from its text, that's bogus. A textual construction "takes purpose

[46] 943 F.3d at 764.

[47] 943 F.3d at 764. (internal citations and quotations omitted).

into account, but in its concrete manifestations as deduced from close reading of the text."[48]

More specifically, the court never addresses the use of the word "claim" as opposed to "allowed claim." Rather, it simply says that it will "judge impairment after considering everything that defines the scope of the ***right or entitlement***—such as a contract's language or state law."[49] That sounds like a germane statement, but it does not really address the underlying question. It essentially just replaces the word "claim" with the phrase "right or entitlement," but does not give us further analysis about how those words resolve the issue. That is, should the "right or entitlement" be as "allowed" by the Bankruptcy Code? If so, how do we get that from the statutory text? The court never addresses those issues in its supposed effort to interpret the plain language.

Finally, we sense a concern by the Fifth Circuit that interpreting Section 1124(1) to encompass the broadly defined word "claim" somehow unmoors Section 1124(1) from a focus on the underlying "rights" of the claimant. But that concern is unfounded. The definition of "claim" begins by stating its fundamental limitation: It is a "right to payment."[50] It is certainly reasonable to circumscribe Section 1124(1) by reference to the claimant's "right to payment" as contemplated within the definition of "claim," even if those rights could be greater than the rights provided to an "allowed claim." Indeed, that seems to be an appropriate and sensible circumscription given that the section in fact uses that defined term.

B. <u>"Plan Impairment" Versus "Statutory Impairment"</u>

The Fifth Circuit's decision rests in part on the false choice between "plan impairment" and "statutory impairment." Here is how that argument goes: Section 1124(1) states that "a class of claims or interests" is not impaired if "***the plan*** . . . leaves unaltered the [claimant's] legal, equitable, and contractual

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[48] A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 20 (2012).

[49] In re Ultra Petroleum Corp., 943 F.3d at 764 (emphasis added).

[50] 11 U.S.C.A. § 101(5)(A).

rights."[51] Relying on the 1988 *Solar King* decision[52] from a Waco, Texas, bankruptcy court, the Fifth Circuit and other courts posit that, for a claim to be impaired, "the plan"—as opposed to the statute—must be the vehicle for altering the claimant's rights under its claim.[53] As these courts hold, if the statute, and in particular the disallowance provisions in Section 502, reduce a claimant's rights on its claim, that is not "impairment" within the meaning of Section 1124(1) because the impairment is not caused by the plan.[54] The Fifth Circuit actually quoted *Solar King* for this proposition: "Impairment results from what the plan does, not what the [bankruptcy] statute does."[55]

This argument has superficial appeal because it at least focuses on a few words in the statutory text. But it is nevertheless demonstrably wrong because it does not take on board that ***the plan*** is a necessary vehicle for the discharge of claims upon the debtor's exit bankruptcy. As we will see, the discharge of claims is critical to the impairment analysis.

To unpack this point, we need to take onboard a couple key provisions of the typical Chapter 11 plan. A Chapter 11 plan provides a treatment for each class of claims or interests.[56] So, for example, in a typical plan, secured creditors might receive a new secured note, unsecured creditors might get some stock, and existing equity could get warrants. For the question of "unimpairment," we are concerned with the situation where, rather than getting something different, a class is told that the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest . . ."[57]

But remember that the plan typically effects another key outcome: It usually provides for a discharge of all claims upon

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[51] In re Ultra Petroleum Corp., 943 F.3d at 763 (quoting 11 U.S.C.A. § 1124(1)) (emphasis added).

[52] *In re American Solar King Corp.*, 90 B.R. 808, 819–22, 18 Bankr. Ct. Dec. (CRR) 270, 20 Collier Bankr. Cas. 2d (MB) 547 (Bankr. W.D. Tex. 1988).

[53] See 90 B.R. at 819–22 (and citations set forth therein).

[54] See 90 B.R. at 819–22.

[55] 90 B.R. at 819–22 (quoting Solar King, 90 B.R. at 819).

[56] See 11 U.S.C.A. § 1123(a)(1).

[57] 11 U.S.C.A. § 1124(1).

confirmation. Why is that important? ***Because, if there were no discharge, the claimant could sue the reorganized debtor after the debtor emerges from Chapter 11 to recover the entire amount of claimant's claim.*** So, for example, if a creditor did not receive postpetition interest because section 502(b)(2) disallowed postpetition interest, then without a discharge the creditor could sue the reorganized debtor in state court for that amount after it emerges from bankruptcy.

Section 1141(d)(1) provides the general rule for a Chapter 11 discharge. It states:

> (d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—
>
> (A) discharges the debtor from any debt that arose before the date of such confirmation . . . whether or not—
>
> (i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
>
> (ii) such claim is allowed under section 502 of this title; or
>
> (iii) the holder of such claim has accepted the plan[.][58]

We note several salient textual points. The introductory language makes clear that, in situations where a discharge is legally permissible, the plan can nevertheless not provide for a discharge.[59] In other words, the language of ***the plan*** controls whether or not a class of claims will be discharged. And again, if a given claimant's claim is discharged, the claimant cannot pursue that claim after bankruptcy. Thus, the plan is clearly doing the work to impair the claim.

In addition, the statute makes clear that it is "confirmation of ***a plan***" that implements the discharge.[60] Discharge is clearly tied to the Chapter 11 plan, not simply the process of going through Chapter 11 generally. That's different from Chapter 7, by way of illustration, which provides for a discharge by court order.[61]

Also, under romanette (ii), the discharge operates on a

[58] 11 U.S.C.A. § 1141(d)(1).

[59] There are circumstances where a discharge is simply not legally permissible, such as in a liquidating Chapter 11 plan for a business. See 11 U.S.C.A. § 1141(d)(3).

[60] 11 U.S.C.A. § 1141(d)(1).

[61] See 11 U.S.C.A. § 727.

claim "whether or not" the "claim is allowed under section 502 of this title."[62] If the allowance provision in Section 502 were the absolute limitation on a claim that operated independently to limit the claim to the allowed amount, then the discharge provision would not have to discharge a claim "whether or not" allowed. Rather, the discharge provision would only need to apply to "allowed claims." The reference to the disallowed portion of the claim in the discharge provision makes clear that the claimant would otherwise have rights with respect to that portion of its claim.

While perhaps not hitting all the textual points noted above, Judge Isgur's ruling in the bankruptcy court set forth much of the analysis regarding the interplay of the discharge with the impairment issue.[63] The Fifth Circuit, frankly, seemed unwilling or unable to understand these arguments so it did not meaningfully address them. Rather, after recognizing that the Class 4 Creditors and the bankruptcy court had made these arguments, the sum total of its analysis was as follows:

> In one sense, plan confirmation limits creditors' claims for money by discharging underlying debts. But in another sense, the Code limits the creditors' claims for money and imposes substantive and procedural requirements for plan confirmation. The Class 4 Creditors' argument thus begs the critical question: What is doing the work here? We agree with *PPI*, every reported decision identified by either party, and Collier's treatise. Where a plan refuses to pay funds disallowed by the Code, the Code—not the plan—is doing the impairing.[64]

With all due respect, those few sentences do not offer much by way of analysis—textual or otherwise. The court does nothing to answer its own question of "[w]hat is really doing the work here?" Rather, the court just dogmatically announces its holding because one other circuit court came to that result and a bunch of lower courts evidently followed.

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[62] 11 U.S.C.A. § 1141(d)(1)(ii).

[63] *In re Ultra Petroleum Corp.*, 575 B.R. 361, 372–73, 64 Bankr. Ct. Dec. (CRR) 189 (Bankr. S.D. Tex. 2017), rev'd in part, vacated in part, 913 F.3d 533, 66 Bankr. Ct. Dec. (CRR) 187 (5th Cir. 2019), opinion withdrawn and superseded on reh'g, 943 F.3d 758, Bankr. L. Rep. (CCH) P 83466 (5th Cir. 2019) and rev'd in part, vacated in part, 943 F.3d 758, Bankr. L. Rep. (CCH) P 83466 (5th Cir. 2019).

[64] In re Ultra Petroleum Corp., 943 F.3d at 765.

II. Historical Statutory Analysis

A. The Pre-Amendment Version of Section 1124

Before a statutory amendment in 1994, Section 1124 contained three methods by which a plan could "unimpair" a class of claims. We have discussed the first subsection at length above. The second is not at issue, as it concerns the de-acceleration and reinstatement of debt. The third, however, is quite relevant to the subject of this paper as it addresses a "cash-out" of an allowed claim.

Under that subsection, a plan could leave a class of claims unimpaired if the plan "(3) provides that, on the effective date of the plan, the holder of such claim or interest receives, on account of such claim or interest, cash equal to—(A) with respect to a claim, ***the allowed amount of such claim***[.]"[65]

This subsection addressed the exact situation at issue in *Ultra Petroleum*. It allows a plan to unimpair a class of claims by providing for payment in cash of the allowed amount of the claim. It is unmistakably clear that the section referred to a claim as limited by the allowance provisions in Section 502(b).

B. The *New Valley* Decision

In a 1994 Chapter 11 case before the United States Bankruptcy Court for the District of New Jersey, the debtor enjoyed

[65] Former Bankruptcy Code § 1124(3)(A) (emphasis added). The entire text of now-deleted Section 1124(3) as it existed before 1994, provided as follows:

§ 1124. Impairment of claims or interests

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

. . .

(3) provides that, on the effective date of the plan, the holder of such claim or interest receives, on account of such claim or interest, cash equal to—

(A) with respect to a claim, the allowed amount of such claim; or

(B) with respect to an interest, if applicable, the greater of—

(i) any fixed liquidation preference to which the terms of any security representing such interest entitle the holder of such interest; or

(ii) any fixed price at which the debtor, under the terms of such security, may redeem such security from such holder.

a fair bit of prosperity after it filed its bankruptcy petition.[66] On a going concern basis, its value exceeded its liabilities.[67] Given that it was solvent, the debtor proposed a plan that provided "100% cash distributions on the effective date of the Plan on the ***allowed claims*** of all of its creditors other than those whose claims are reinstated under the Plan."[68]

Of critical importance, the debtor's plan did not provide for any payment of postpetition interest to the creditors being cashed out because postpetition interest was disallowed under Section 502(b)(2).[69] Relying on the express language of Section 1124(3), the debtor (properly) claimed that, since the creditors were receiving a cash-out in the amount of their ***allowed claim***—which did not include postpetition interest—their class was unimpaired.[70] Even though the debtor was solvent, under the plan the debtor would not pay postpetition interest but would instead allow that value to flow to equity.[71]

The creditors strenuously objected based on, among other things, the so-called "best interest of creditors" test of Section 1129(a)(7)(A)(ii).[72] Under that test, "to confirm a Chapter 11 plan each member of an impaired class of claims or interests must either have accepted the plan or retain or receive property that has a value not less than they would receive if the debtor were liquidated under Chapter 7."[73] In a Chapter 7 liquidation, Section 726(a)(5) provides that a claimant must receive postpetition interest on its claim before any value is returned to the debtor.[74] "Thus, post-petition interest must be paid to dissenting members of impaired classes under a

[66] *In re New Valley Corp.*, 168 B.R. 73, 75, 25 Bankr. Ct. Dec. (CRR) 947 (Bankr. D. N.J. 1994).

[67] 168 B.R. at 75.

[68] 168 B.R. at 75 (emphasis added).

[69] 168 B.R. at 75.

[70] 168 B.R. at 75–76.

[71] See 168 B.R. at 76.

[72] 168 B.R. at 79.

[73] 168 B.R. at 79 (citing Section 1129(a)(7)(A)(ii)).

[74] 168 B.R. at 79 (citing Section 726(a)(5)).

Chapter 11 plan if they would receive post-petition interest pursuant to section 726(a)(5) in a Chapter 7 liquidation."[75]

The bankruptcy court recognized that postpetition interest "is not a component of an allowed claim" because that amount is disallowed by Section 502(b)(2).[76] Thus, the court held that the objecting creditors were not impaired because they had received the allowed amount of their claims in cash as provided by the express statutory language of Section 1124(3).[77] Finally, the objecting creditors could not complain about a violation of the "best interest of creditors" test of Section 1129(a)(7)(A)(ii) because that test only applies to ***impaired*** classes.[78] Accordingly, the court ruled that "a solvent debtor is not required to pay postpetition interest on claims of unsecured creditors who are unimpaired under the plan . . ."[79]

C. The 1994 Amendment to Section 1124

Congress repealed Section 1124(3) in its entirety in its 1994 amendments to the Bankruptcy Code.[80] Before we get to the legislative history, we will make a point about ***statutory history***. As the Supreme Court has made clear, "[w]hen Congress amends legislation, courts must 'presume it intends [the change] to have real and substantial effect.' "[81] Even textualists such as the late Justice Scalia agree that, while they "oppose the use of legislative history," statutory history such as amendments "form part of the context of the statute, and (unlike legislative history) can properly be presumed to have been before all the members of the legislature when they voted."[82]

In this situation, Section 1124(3) provided that a class of

[75] 168 B.R. at 79.

[76] 168 B.R. at 79.

[77] 168 B.R. at 79.

[78] 168 B.R. at 79.

[79] 168 B.R. at 81.

[80] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, Title II, § 213(d), 108 Stat. 4106, 4125–6 (1994).

[81] *Ross v. Blake*, 136 S. Ct. 1850, 1858, 195 L. Ed. 2d 117 (2016) (quoting *Stone v. I.N.S.*, 514 U.S. 386, 397, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995)).

[82] A. Scalia & B. Garner, supra note 48, at 256.

claims would be unimpaired if the plan "provides that, on the effective date of the plan, the holder of such claim . . . receives . . . cash equal to . . . the allowed amount of such claim[.]"[83] Congress deleted that subsection. The logical conclusion is that a cash-out of a class of claims at the allowed amount of such claims does not render them unimpaired. That statutory history simply cannot be ignored.

Some jurists, of course, oppose to varying degrees the use of legislative history when interpreting a statute. Nevertheless, it can be helpful at least to confirm that one is on the right track. Here, the legislative history not only confirms our approach, but also is quite compelling. It states as follows:

> **Section 214. Impairment of Claims and Interests.**
>
> The principal change in this section is set forth in subsection (d) and relates to the award of postpetition interest. In a recent Bankruptcy Court decision in *In re New Valley Corp.*, 168 B.R. 73, 25 Bankr. Ct. Dec. (CRR) 947 (Bankr. D. N.J. 1994), unsecured creditors were denied the right to receive postpetition interest on their allowed claims even though the debtor was liquidation and reorganization solvent. The *New Valley* decision applied section 1124(3) of the Bankruptcy Code literally by asserting, in a decision granting a declaratory judgment, that a class that is paid the allowed amount of its claims in cash on the effective date of a plan is unimpaired under section 1124(3), therefore is not entitled to vote, and is not entitled to receive postpetition interest. The Court left open whether the good faith plan proposal requirement of section 1129(a)(3) would require the payment of or provision for postpetition interest. In order to preclude this unfair result in the future, the Committee finds it appropriate to delete section 1124(3) from the Bankruptcy Code.
>
> ***As a result of this change, if a plan proposed to pay a class of claims in cash in the full allowed amount of the claims, the class would be impaired, entitling creditors to vote for or against the plan of reorganization.*** If creditors vote for the plan of reorganization, it can be confirmed over the vote of dissenting class of creditors only if it complies with the "fair and equitable"

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[83] Former Bankruptcy Code § 1124(3)(A) (emphasis added). For the entire text of Section 1124 as it existed before 1994, see infra Part III.

> test under section 1129(b)(2) of the Bankruptcy Code and it can be confirmed over the vote of dissenting individual creditors only if it complies with the "best interests of creditors" test under section 1129(a)(7) of the Bankruptcy Code[84] (emphasis added).

The bolded, italicized language makes clear that Congress amended Section 1124 to prevent a plan from unimpairing a class of claims by cashing them out at the allowed amount. That result also follows from the statutory history. Courts and commentators agreed.[85] Congress, one would have believed, must have thought that it had put this issue to bed.

D. The *PPI Enterprises* Decision

In re PPI Enterprises (U.S.), Inc. concerned a dispute between a landlord and a Chapter 11 debtor over the treatment

[84] H. R. Rep. No. 103-835, § 214 at 47–48 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3356–57 (emphasis added).

[85] See *In re Seasons Apartments, Ltd. Partnership*, 215 B.R. 953, 959 (Bankr. W.D. La. 1997) ("Under § 1124(1), the 'claim,' not the 'allowed claim,' must be left unaltered for such claim to be unimpaired."); *In re Atlanta-Stewart Partners*, 193 B.R. 79, 81, 28 Bankr. Ct. Dec. (CRR) 774, 35 Collier Bankr. Cas. 2d (MB) 518 (Bankr. N.D. Ga. 1996) ("[T]he common sense reading of this subsection would not include payment in full. Obviously, a creditor who receives payment of its claim in its entirety does not retain any legal, equitable, or contractual rights. In addition, the suggested reading of § 1124(1) would have rendered the former § 1124(3) superfluous."); *In re Crosscreek Apartments, Ltd.*, 213 B.R. 521, 536, 38 Collier Bankr. Cas. 2d (MB) 1329 (Bankr. E.D. Tenn. 1997) ("In light of the deletion of subsection (3) to § 1124 by the Bankruptcy Reform Act of 1994, the court concludes that it is no longer a valid argument to assert that the plan proponent can render a claim unimpaired by paying the claim in full at confirmation."); *In re Park Forest Development Corp.*, 197 B.R. 388, 395, 36 Collier Bankr. Cas. 2d (MB) 192 (Bankr. N.D. Ga. 1996) ("The reasoning of the Atlanta-Stewart Partners opinion is persuasive . . ."); Neil Batson, Real Estate Problems in the Bankruptcy Court — Selected Issues in Single Asset Real Estate Cases, 753 PLI/COMM 401, 408 (April 1997) ("a debtor's plan may provide for the payment in full of a class of unsecured claims and satisfy the requirements of subsection 1129(a)(10) of the Code because the elimination of subsection 1124(3) means that these claims are 'impaired.' "); David Gray Carlson, Artificial Impairment and the Single Asset Chapter 11 Case, 23 Cap. U. L. Rev. 339, 375 (1994) ("After the 1994 amendments, the ability to disimpair creditors by paying them in full may no longer exist [and] the technology of artificial impairment may have been permanently ruined.").

of the landlord's claim.[86] In that case, the debtor had sufficient cash to pay its creditors in full and to make a distribution to equity.[87] The debtor's plan provided that the debtor would pay the landlord's claim in cash in full, ***but only at the allowed amount of the claim*** after application of the statutory cap set forth in Section 502(b)(6).[88] Section 502(b)(6) is one of the disallowance provisions of the Bankruptcy Code and, specifically, allows a landlord's claim at no more than a statutory maximum even though under state law outside of bankruptcy the landlord would have the right to a larger claim.[89]

The debtor argued that it did not need to get approval of its plan by an affirmative vote of its creditors because those creditors were unimpaired under Section 1124(1).[90] The landlord contended that its claim was impaired because it would be paid only the amount of its claim, as allowed under Section 502(b)(6) of the Bankruptcy Code, as opposed to the full amount of its claim under applicable state law. Further, as an impaired creditor, the landlord argued that it had a right to

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[86] *In re PPI Enterprises (U.S.), Inc.*, 324 F.3d 197, 41 Bankr. Ct. Dec. (CRR) 16, 49 Collier Bankr. Cas. 2d (MB) 1749, Bankr. L. Rep. (CCH) P 78824 (3d Cir. 2003). At a previous law firm, the author was one of the lawyers representing the landlord on its appeal to the Third Circuit.

[87] 324 F.3d at 202 n.6.

[88] 324 F.3d at 202.

[89] 11 U.S.C.A. § 502(b)(6) provides as follows:

> Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—
>
> (6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—
>
> (A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—
>
> (i) the date of the filing of the petition; and
>
> (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus
>
> (B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates[.]

[90] 324 F.3d at 202.

vote against the plan and, if its vote were counted, the plan would not be confirmable.[91]

Applying Section 1124(1), the bankruptcy court found that the landlord's claim was unimpaired because the limitation on the allowance of the claim was provided by Section 502(b)(6), not by the Plan.[92] As to the arguments concerning the statutory amendment, the bankruptcy court determined that, notwithstanding the wholesale repeal of Section 1124(3) that had previously permitted a cash-out at the amount of the allowed claim, the amendment really only concerned postpetition interest.[93] "[M]y reading of the legislative history indicates that Congress merely intended to eliminate the anomalous result created by the *New Valley* decision. Thus, I conclude that Congress did not intend to eliminate unimpairment for purely money claims. It intended that to be unimpaired, the claim must receive postpetition interest."[94]

Here, we note that counsel to the landlord (including the author) argued to the Third Circuit that the bankruptcy court's analysis would lead to a revival of the *New Valley* problem:

> [U]nder the Bankruptcy Court's interpretation of section 1124(1), *New Valley*'s deprivation of creditors' right to postpetition interest would still be good law. Postpetition interest claims are not "allowed" under section 502(b)(2) just as lease breach claims are not "allowed" above section 502(b)(6)'s cap . . . Since Congress specifically sought to remedy the *New Valley* problem, an interpretation of section 1124(1) that could lead to its revival is obviously wrong.[95]

The Third Circuit ruled against the landlord and held that the landlord's claim as capped by Section 502(b)(6) was not

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[91] 324 F.3d at 202 (also citing 11 U.S.C.A. §§ 1129(a) and 1126(c) in n.7).

[92] 324 F.3d at 203.

[93] 324 F.3d at 206.

[94] 324 F.3d at 206 (quoting the bankruptcy court's decision, *In re PPI Enterprises (U.S.), Inc.*, 228 B.R. 339, 352, 33 Bankr. Ct. Dec. (CRR) 856 (Bankr. D. Del. 1998), subsequently aff'd, 324 F.3d 197, 41 Bankr. Ct. Dec. (CRR) 16, 49 Collier Bankr. Cas. 2d (MB) 1749, Bankr. L. Rep. (CCH) P 78824 (3d Cir. 2003) (citations omitted)).

[95] *Principal Brief of Appellant Sheldon H. Solow, d/b/a Solow Building Company at 39–40, Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.)*, Case No. 01-4140, 2001 WL 34556452 (3d Cir. Mar. 5, 2002).

impaired by the plan. It followed the reasoning of the *Solar King* court on statutory impairment versus plan impairment.[96] "[A] creditor's claim outside of bankruptcy is not the relevant barometer for impairment; we must examine whether the plan itself is a source of limitation on a creditor's legal, equitable, or contractual rights."[97]

As to the statutory amendment and legislative history, the Third Circuit agreed with the bankruptcy court's analysis that there was no "sweeping intent by Congress to give impaired status to creditors more freely outside the postpetition interest context."[98] Rather, it concluded that the amendment concerned principally the payment of postpetition interest.[99]

The Third Circuit did not explain in its analysis how one was to conclude from the court's statutory construction that the plan would have to provide for payment of postpetition interest to render a claim unimpaired. As noted, postpetition interest claims are not "allowed" under Section 502(b)(2) just as lease breach claims are not "allowed" above the cap in Section 502(b)(6).[100] Following simple logic, one would have to anticipate that a debtor would make this exact argument in an effort to avoid paying postpetition interest that otherwise would be disallowed under Section 502(b)(2)—the exact *New Valley* situation that the amendment sought to fix.

D. *Ultra Petroleum*'s Analysis of the Statutory Amendment and *PPI*

In *Ultra Petroleum*, the Fifth Circuit addressed the statutory amendment and legislative history by announcing (without any textual support, as the Third Circuit had in *PPI Enterprises*) that the amendment to Section 1124 was meant only to address the *New Valley* situation where a solvent

[96] In re PPI Enters. (U.S.), Inc., 324 F.3d at 204 (citing and quoting *In re American Solar King Corp.*, 90 B.R. 808, 819–20, 18 Bankr. Ct. Dec. (CRR) 270, 20 Collier Bankr. Cas. 2d (MB) 547 (Bankr. W.D. Tex. 1988)).

[97] 324 F.3d at 204.

[98] 324 F.3d at 207.

[99] 324 F.3d at 207.

[100] See infra, note 95.

debtor did not pay postpetition interest.[101] But then, of course, it had to confront the appellees' attempt to distinguish *PPI Enterprises*: Appellees argued that the landlord in *PPI Enterprises* was not seeking to recover postpetition interest, but rather sought an amount of damages for breach of lease above the statutory cap of Section 502(b)(6).[102] In *Ultra Petroleum*, by contrast, the debtors were arguing that their plan did not need to pay amounts disallowed as ***postpetition interest*** under Section 502(b)(2). Given that *Ultra Petroleum* was a case about postpetition interest, even if one accepted *PPI Enterprises'* narrow holding as correct, shouldn't the creditor win if that rule were faithfully applied?

The Fifth Circuit's analysis on this point is patently inconsistent. Literally one paragraph after stating that the statutory amendment was meant to address only postpetition interest, the court states as follows:

> Next, the Class 4 Creditors attempt to distinguish *PPI*. True, that case involved disallowance under § 502(b)(6), not § 502(b)(2). But that's a distinction without a difference. Section 502 states that "the court . . . *shall allow* [a] claim in [the requested] amount, *except to the extent that*" any one of nine conditions apply. If any of the enumerated conditions applies, the court shall not allow the relevant portion of the claim. *PPI* reasoned that where one of those conditions applies, the Code—not the plan—impairs the creditors' claims. That reasoning applies with equal force to § 502(b)(2).[103]

We agree that a court must treat the disallowance provisions of Sections 502(b)(2) and 502(b)(6) in the same manner when it comes to impairment—indeed, that is the point. When we do that, under the logical application of *PPI Enterprises* and *Ultra Petroleum*, we would have to conclude that a plan does not need to pay any postpetition interest to leave a class of claim unimpaired because postpetition interest is disallowed under Section 502(b)(2). So, the flawed analysis of these two circuit courts has resurrected the *New Valley* problem in its entirety, notwithstanding a statutory amendment and Congress's legislative commentary instructing the courts to the contrary.

[101] In re Ultra Petroleum Corp., 943 F.3d at 764 (citing In re PPI Enters. (U.S.), Inc.), 324 F.3d at 207).

[102] 943 F.3d at 764.

[103] 943 F.3d at 764–65 (internal citations omitted; emphasis in original).

In addition, courts cannot rely on the "best interest of creditors" test of Section 1129(a)(7)(A)(ii), which incorporates Section 726(a)(5), to solve the problem. Let's recap that point: Under the "best interest of creditors" test, with respect to each impaired class, each holder of a claim must either vote "yes" or, if they vote "no," such holder must receive at least as much as it would receive if the debtor were liquidated under Chapter 7.[104] In a liquidation under Chapter 7, the priorities of Section 726 would apply.[105] Under Sections 726(a)(5) and (a)(6), claimants must receive postpetition interest on their claims before value flows back to the debtor.[106] Accordingly, in a solvent Chapter 7 liquidation, a claimant would in fact receive postpetition interest, at least as the "legal rate."[107] Thus, under the best interest of creditors test for a solvent debtor, an impaired class of claimants would likewise have a meritorious objection to any plan that did not pay to them postpetition interest.

But here's the rub: the best interest of creditors test applies only to "each ***impaired class*** of claims or interests."[108] That point is crystal clear in the statute. Moreover, Congress did not make a drafting mistake by failing to address the limitation in Section 1129(a)(7)'s application to only impaired classes when it amended Section 1124. The legislative history from the 1994 amendment to Section 1124 makes clear that only impaired creditors can avail themselves of the best interest of creditors test: "With respect to section 1124(1) and (2), [the statutory amendment to Section 1124] would not change

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[104] 11 U.S.C.A. § 1129(a)(7), which provides:

(a) The court shall confirm a plan only if all of the following requirements are met:

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date[.]

[105] See 11 U.S.C.A. § 726.

[106] See 11 U.S.C.A. § 726(a)(5) and (6).

[107] See 11 U.S.C.A. § 726.

[108] 11 U.S.C.A. § 1129(a)(7) (emphasis added).

the beneficial 1984 amendment to section 1129(a)(7) of the Bankruptcy Code, which excluded from application of the best interests of creditors test classes that are unimpaired under section 1124."[109] Thus, as the *New Valley* court found years ago, unimpaired classes of creditors have no rights under the best interest test and it cannot be a vehicle for obtaining postpetition interest.[110] Indeed, that is why Congress amended the impairment provisions of Section 1124.

We also should say a word about *Solar King*[111]—the 1988 decision from a Texas bankruptcy court that seems to have persuaded both the Third and Fifth Circuits to adopt the concept of "statutory impairment" versus "plan impairment."[112] *Solar King*, as a pre-1994 amendment case, did not have the benefit of the statutory history and the legislative history to guide its decision. In addition, if one actually reads *Solar King*, one would see that it states the exact *New Valley* conclusion that Congress sought to fix in 1994: "Because allowed unsecured claims do not include postpetition interest, the holders of such claims will be forced to forego interest at the judgment rate, yet will not be permitted to vote on the plan because they are deemed unimpaired [under section 1124(3)]."[113] This case should have no role in interpreting Section 1124 of the Bankruptcy Code as it reads today.[114]

Conclusion

Congress amended Section 1124 in 1994 to make clear that

[109] H. R. Rep. No. 103-835, § 214 at 48 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3357.

[110] See infra, note 78.

[111] *In re American Solar King Corp.*, 90 B.R. 808, 18 Bankr. Ct. Dec. (CRR) 270, 20 Collier Bankr. Cas. 2d (MB) 547 (Bankr. W.D. Tex. 1988).

[112] See infra, notes 53 and 97.

[113] In re Am. Solar King Corp., 90 B.R. at 820 n.18.

[114] This point was made to the Third Circuit. See *Principal Brief of Appellant Sheldon H. Solow, d/b/a Solow Building Company at 41–42, Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.)*, Case No. 01-4140, 2001 WL 34556452 (3d Cir. March 25, 2002). It chose to ignore it simply because the legislative history did not specifically refer to Solar King. See In re PPI Enters. (U.S.), Inc.), 324 F.3d at 207 ("The congressional committee specifically referenced the New Valley decision without referencing the text of § 1124(1) or the many cases addressing its provisions, including *Solar King*.").

a class of claims would be impaired if the plan proposed to cash out those claims in the full, but only at the allowed amount as provided by the Bankruptcy Code. Congress did this to overrule the result of the *New Valley* case. Unfortunately, through a series of analytical missteps, the Fifth Circuit has entirely unwound this statutory amendment and reintroduced the original problem that Congress sought to fix. Rather than just following along, the next circuit court to address this issue should take a fresh look at the arguments and, if it finds them persuasive, not be afraid to create a circuit split so that the issue may be brought to a head, either in the Supreme Court or again in Congress.