No. 18-0918

In the

Supreme Court of the United States

October Term, 2018

In Re Backstreets Plowing, Inc., *Debtor*

Steven Vin Saint, Chapter 7 Trustee, *Petitioner*

v.

Milton Weinberg,

Respondent

On Writ of Certiorari to the United States Supreme Court

BRIEF OF RESPONDENT

#48

July 31, 2018

Counsel for Respondent

QUESTIONS PRESENTED

(1) Whether 11 U.S.C. § 362(a)(3) is violated when a secured creditor passively retains possession of collateral that it lawfully repossessed from the debtor prior to the petition date?

(2) Whether 11 U.S.C. § 503(b) permits a court to grant an administrative expense for a substantial contribution in a case under chapter 7 of the Bankruptcy Code.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals is not Published in the Federal Reporter but is available from Case No. 17-0805.

STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived pursuant to Competition Rule VIII." All citations shall comply with the form prescribed in the most recent edition of The Bluebook: A Uniform System of Citation

STATEMENT OF FACTS

In Spring 2015, sole shareholder of Backstreets Plowing Inc. ("Debtor"), Christopher "Big Man" Clemons ("Clemons"), realized that in order for his seasonal snow plow business to remain competitive, particularly for a valuable contract with the City of Badlands, he would need to purchase new snowplow trucks. Clemons then approached an acquaintance of his, Milton Weinberg ("Weinberg"), to acquire a $45,000 loan so that the debtor would be able to purchase the trucks. Weinberg agreed to the loan upon being granted a security interest in the trucks.[1] In turn, Clemons personally guaranteed the loan and pursuant to the promissory note, the Debtor agreed make monthly payments to Weinberg when the business began generating revenue in December.

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[1] Neither party disputes that this was a properly perfected security interest giving Weinberg a first priority lean on the trucks.

That August, the Debtor acquired the loan proceeds and purchased the new trucks. Shortly after the purchase, the Debtor and its local competitors submitted bids for the contract with the City of Badlands. The City hesitantly awarded the contract to the Debtor, even though their bid was so superior to the other two bids that several city council members questioned whether the Debtor would be able to perform under the contract given the projected small profit margins. Following a falling out with Weinberg and a very profitable winter for the Debtor, Clemons violated the promissory note by not making payments once the business began generating revenue. In February of 2016, after multiple missed payments as well as unanswered calls, Weinberg drove down to see Clemons and collect the missing payments only for Clemons to have him forcibly removed from the property. In April, Weinberg filed suit against Clemons regarding his personal guarantee and violation of the promissory note. Weinberg obtained default judgment against both the Debtor and Clemons, joint and severally, for $450,000.

After a particularly non-profitable winter for the Debtor, Weinberg began efforts to collect on his default judgment by hiring a repossession company, E Street Auto Recovery, to retrieve the trucks in January 2017. It is not disputed that these trucks were lawfully repossessed and remain in a warehouse owned by Weinberg, even though the title to the trucks remain the name of the Debtor. After cancellation of their contract with the City of Badlands, the Debtor ran out of cash and filed a chapter 11 petition on February 4th. Upon receiving a letter from the Debtors attorney demanding the return of the truck, Weinberg testified before the Bankruptcy Court that his refusal to turn over the trucks was based on his understanding that the Debtor had to bring a turnover action in order for him to adequately protect his interest in the trucks. Agreeing with Weinberg, the court found no violation of the automatic stay through Weinberg's retention of the trucks to which the Debtor appealed.

Recognizing the unlikelihood of a successful restructuring, the Debtor converted the chapter 11 into a chapter 7 wherein a Trustee was appointed to handle the affairs of the debtor. The bankruptcy appeals panel stayed the Debtor's pending appeal in order for the Trustee to get caught up to speed on the Debtor's affairs. Meanwhile, Weinberg began to pursue Clemons on his personal guarantee hiring a collection law firm to assist him. On May 2017, in the course of a creditor's examination, Weinberg recognized that Clemons was paying $100,000 to his daughter, Patti. Upon discovering these fraudulent conveyances, Weinberg provided the Trustee with sufficient documentation and testimony to establish the transfers were avoidable as fraudulent transfers.

Following a complaint against Patti to avoid and recover the transfers under § 548 and § 550 of the bankruptcy code, Weinberg received a $75,000 settlement. Incurring $25,000 in legal fees investigating the transfers, Weinberg filed a motion seeking allowance of a substantial contribution administrative expense pursuant to section 503(b) of the bankruptcy code. The Trustee opposed motion claiming that administrative expenses for substantial contributions were limited to Chapter 9 and Chapter 11 cases under 503(b)(d). Yet again, the court granted judgment to Weinberg allowing the administrative expense in the amount of $25, 000 to which the Trustee appealed.

That September, a competing snow plow company ("Tenth Avenue"), offered to purchase the substantially all of the debtor's assets contingent upon the Trustee immediately obtaining possession of and conveying title to, the snow plow trucks. Seeing this as the best way to maximize value for the benefit of the debtor's creditors, the trustee attempted to negotiation with Weinberg for the tucks. Recognizing that his interest was still not adequately protected, Weinberg refused and, in an attempt to pressure Weinberg into acquiescing, the Trustee

continued to pursue the appeal of the automatic stay. Because of the Trustees inability to obtain possession of and convey title to the trucks, Tenth Avenue withdrew their purchase option. In January 2018, another local competitor offered to purchase the Debtors assets, excluding the snow plow trucks, for $100,000 less than the Tenth Avenue purchase option. The Trustee agreed to the sale with approval of the bankruptcy court and the sale closed in February.

Resentful that Weinberg had not returned the trucks that were not yet paid for nor protected, the Trustee now refuses to dismiss both of his appeals aiming to recover from Weinberg the difference between the offer initially made by Tenth Avenue and the sale proceeds received from Stone Pony.

ARGUMENT

I. PASSIVE RETENTION OF THE TRUCKS DOES NOT VIOLATE THE AUTOMATIC STAY

A. §362 Requires An "Act," Which Is Distinct From A Failure To Act

Section 362(a)(3) of the bankruptcy code does not prohibit a secured creditor from passively retaining estate property that was lawfully repossessed prepetition. The automatic stay simply prohibits creditors from taking further action against the estate by imposing an automatic stay of "any act to obtain possession of the property of the estate or the exercise control over property of the estate." *11 U.S.C. § 362(a)(3)*. Under § 541, the estate consists of property of the debtor "wherever located and whomever held," including "all legal or equitable interests of the debtor in property" as of the date of the petition. *11 U.S.C § 541(a)(1)*. Though the snow plow trucks fall under property of the estate, mere retention of them does not constitute an affirmative act under § 362(a)(3).

Looking to the language of the automatic stay, the 1984 amendment adding the phrase "act…to exercise control" implies an accordance with the aim of preventing affirmative conduct that would disrupt the proceedings of the bankruptcy by "upset[ing] the petition date status quo or otherwise interfere with the trustee's or DIP's "control" of property of the estate." *See* Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II) Who is "Exercising Control" Over What?,* 33 BANKR. L. LETTER 9 Sept. 2013, at 4. Furthermore, in *United States v. Inslaw,* this court recognizes that "The automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control over the property of the estate." 932 F.2d 1467, 1474 (D.C. Cir. 1996).

Moreover, when it comes to examining statutory language, this court had given clear instructions that we ought "presume that a legislature says in a statute what it means and means in a statute what it says there…When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992). The key word for examination in 362(a)(3) both pre- and post-1984 amendment is the word "act." Courts have instructed that when a word is not expressly defined by the statute, that courts should then consult the "ordinary meanings contained in general and legal dictionaries." *See Asgrow Seed Co. v. Winterboer,* 513 U.S. 179, 187 (1995). According to Black's Law Dictionary, the term "act" is defined as the "process of doing something or performing." BLACK'S LAW DICTIONARY 27 (9th ed. 2009). Thus, the failure to act is distinguished from actually acting or "doing something."

In order to violate the automatic, stay a creditor has to "do something" post- petition that exercises control or obtains possession of the property of the estate. This is not the case for Weinberg, his refusal to turn over the trucks until he receives adequate protection for his interest

post-petition was not an act as failure to do something is not by definition the same as doing something. Therefore, in the absence of some "act" by the creditor after the petition was filed, there is no violation of the automatic stay. *See Cowen,* 849 F. 3d at 949; *Inslaw*, 932 F. 2d at 1474. This is consistent with how this court interpreted 362(a)(3) in Citizens *Bank v. Strump.* This Court concluded that a bank's refusal to pay to the Chapter 13 DIP-depositor sums that were on deposit in the debtor's bank account "was neither a taking of possession of [debtor's] property nor an exercising control over it, but merely a refusal to perform its promise." *Citizens Bank of Maryland v. Strumpf,* 516 U.S. 16, 21, 116 S. Ct. 286, 133 L. Ed. 2d 258, 28 Bankr. Ct. Dec. (CRR) 97, 33 *Collier Bankr. Cas.* 2d (MB) 869, Bankr. L. Rep. (CCH) P 76666A (1995).

Similarly, Weinberg not returning the trucks was neither a taking of possession of the debtor's property nor a means of exercising control over it but instead can be seen as refusing to allow the debtor to keep those trucks as they were not paid for and the debtor had not given him opportunity to adequately protect his interest before turning it over. His inaction is not a violation of the automatic stay consistent with this Court's interpretation of § 362(a)(3) and the plain meaning of the word "act."

B. Automatically Requiring Turnover Is Inconsistent With The Design Of The Turnover Provisions

In order to recognize that turnover power is not self-effectuating, one must look at sections 542(a) and 363(e) together. Section 363 gives a trustee authorization to use or sell estate property upon approval of the court. Importantly, § 363(e) protects third parties, like Weinberg, who have an interest in that property providing that: "Notwithstanding any other provision of [section 363], at any time, on request of an entity that has an interest in property…proposed to be used, sold, or leased, the trustee, the court, with or without hearing, shall prohibit or condition such use, sale or

lease as *is necessary to provide adequate protection of such interest.*" *11 U.S.C. § 363(e).* While section 542(a) provides a trustee with the ability to recover property that was "out of possession of the debtor, yet remained 'property of the debtor'" on the date of the petition. *Inslaw,* 932 F.3d at 1471.

When analyzing the history and purpose of this "turnover power," bankruptcy courts have concluded that this power is not automatic but merely provides a mechanism for a trustee to seek entry of an order that would compel turnover of property of the estate that is being held by a third party. *See In re Hall,* 502 B.R. 650, 654-59 (Bankr. D.D.C. 2014) Thus, sections 542(a) and 363(e), in conjunction, "make a secured creditor's obligation to turn over repossessed collateral (for use by the trustee or DIP) contingent upon the trustee of DIP requesting a turnover order from the court, and in the context of that turnover proceeding, the bankruptcy court can then make a determination regarding what the estate must do to adequately protect the value of the secured creditor's lien rights…" *See* Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II) Who is "Exercising Control" Over What?,* 33 BANKR. L. LETTER 9 Sept. 2013, at 9.

Despite Petitioner's reliance on *Whiting Pools*, this Court's holding in that case actually supports Weinberg's position. Crucially, *Whiting Pools* did not announce a rule that turnover was a self-effectuating provision. Rather, the Court merely held that the IRS must deliver property to the debtor once a turnover action was brought pursuant to § 542(a). However, Weinberg does not dispute that Petitioner held the legal title to the trucks or that he would have to surrender the trucks upon a proper adjudication of a turnover action. Instead, there are important, historic limitations on turnover actions that are necessary in order to vindicate the possessory rights of the individual in possession of the property. As *Whiting Pools* observed,

"[T]urnover is not required in three situations: when the property is of inconsequential value or benefit to the estate, 11 U.S.C.S. § 542(a), when the holder of the property has transferred it in good faith without knowledge of the petition, 11 U.S.C.S. § 542(c), or when the transfer of the property is automatic to pay a life insurance premium, 11 U.S.C.S. § 542(d)." 462 U.S 198, 206 n.12 (1983). However, such intrinsic limitations upon the turnover action only strengthen the case that it cannot be self-effectuating. Rather, the only way to guarantee that the possessor's interests are adequately protected is to require a turnover adjudication so that both parties have ample opportunity to seek legitimate protection of their respective interests. Without this simple procedural requirement, creditors' constitutionally protected property interests in collateral will not be adequately protected. Among these protections are requiring the debtor to show that the property really belongs to the estate, allowing the creditor to seek limitations on debtor's use of the property, and ensuring that the property must be relinquished according to law. "The Bankruptcy Code provides secured creditors various rights, including the right to adequate protection, and these rights replace the protection afforded by possession." *Id* at 207.

II. WEINBERG'S SUBSTANTIAL CONTRIBUTIONS ARE REIMBURSABLE UNDER § 503(b)

A. The Plain Statutory Language Authorizes Administrative Expenses For Substantial Contributions In Chapter 7 Bankruptcies

Despite the sweeping equitable prerogatives of the Bankruptcy Court system, their powers must be exercised solely "within the confines of the Bankruptcy Code." *Architectural Bldg. Components v. McClarty (In re Foremost Mfg. Co.)*, 137 F.3d 919, 924 (6th Cir. 1998) (quoting *In re Omegas Group*, 16 F.3d 1443, 1453(6th Cir. 1994)). This Court has explained that, when interpreting the Bankruptcy Code, "[t]he task of resolving the dispute over the meaning…begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron*

Pair Enters., Inc., 489 U.S. 235, 241 (1989). Thus, once the answer to a legal question is plainly deduced from the language of the statute, bankruptcy courts "need not look further because Congress 'says in a statute what it means and means in a statute what it says.'" *Mediofactoring v. McDermott (In re Connolly N.Am., LLC)*, 802 F.3d 810, 815 (6th Cir. 2015) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

The plain meaning of 11 U.S.C. § 503(b) establishes that creditors may be reimbursed for substantial contributions in Chapter 7 cases. The relevant statutory language is as follows:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, *including*—
>
> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—
>
> (D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title.

11 U.S.C. § 503(b)(3)(D) (emphasis added).

The word "including" plays a crucial role in the provision because it signals Congress' intent to provide a non-exhaustive list of examples rather than a comprehensive catalogue of permitted administrative expenses. "[B]y using the term 'including' in the opening lines of the subsection, Congress built a mechanism into § 503(b) for bankruptcy courts to reimburse expenses not specifically mentioned in § 503(b)'s subsections." *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 816 (6th Cir. 2015). Indeed, the use of "including" indicates Congress' expectation that bankruptcy courts would encounter a variety of administrative expenses deserving reimbursement, which the bankruptcy courts could then "evaluate on a case-by- case basis depending on the specific facts of the case, the benefit conferred upon the bankruptcy estate and its creditors, and whether the expenses at issue were actual, necessary, and reasonable." *Id* at 16.

Furthermore, the Bankruptcy Code itself supports an expansive reading of § 503(b). In § 102(3), the statute specifically explains that the terms "'includes' and 'including' are not limiting." *See United States v. Flo- Lizer, Inc. (In re Flo-Lizer, Inc.)*, 916 F.2d 363, 365 (6th Cir. 1990). Thus, the categories of administrative expenses listed in section 503(b) should be read as illustrative, not exhaustive. *See In re Pappas*, 277 B.R. 171, 176 (Bankr. E.D.N.Y. 2002). To adopt Petitioner's reading of the statute as a comprehensive list would impose upon Congress the impossible burden of anticipating and codifying every conceivable instance where reimbursement would be warranted and force the equitable activity of bankruptcy courts to turn a blind eye to meritorious but unenumerated circumstances deserving reimbursement.

Of course, the examples provided in the subsections of § 503(b) are not devoid of meaning. Such a reading would disturb the "'cardinal principle of statutory construction,'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001)): that a statute should be construed so that "'no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Id.* But then, the canon against superfluity cuts both ways: "including" must also be given a meaning and role in § 503(b), and the only reading consistent with both the statute as a whole and the plain meaning of the text is that "including" introduces an open-ended list of examples.

It is, however, possible to read § 503(d)(3)(B)'s specific enumeration of chapters 9 and 11 as illustrative without nullifying their meaning. As the Sixth Circuit observed, "They provide a contextual framework, describing obligations of the bankruptcy estate, such as wages and taxes, and situations where the trustee, creditors, creditor committees, and others administer, preserve, or augment the estate." *In re Connolly N. Am., LLC*, 802 F.3d at 816–17. By explicitly setting out the more common administrative expenses, Congress provided guidance about what bankruptcy

courts should expect. Indeed, chapters 9 and 11 offer the paradigmatic examples of administrative expenses, regularly witnessed in large cases, which were the most likely to help bankruptcy courts comprehend and apply the principles behind administrative expenses. Illustrations of the obscure or arcane could hardly be calculated to instruct practitioners in the administration of bankruptcy. But while the comparative scarcity of valid administrative expense claims in chapters 7 or 13 renders those chapters execrable exemplars, it does not compel their exclusion from the Code. Although the appointment of a trustee in chapter 7 cases makes it unlikely that creditors will incur administrative expenses, no trustee is infallible, and cases, like the one at bar, exist.

In order to make the logical leap that listing chapters 9 and 11 mandates the exclusion of all others, Petitioner relies on the precept *expression unius est exclusion alterius* ("the expression of one thing excludes others" and the Supreme Court's endorsement of the "well-established cannon…of statutory construction that the specific governs the general" in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*. 566 U.S. 693, 645 (2012). Petitioner's reliance on these principles is inapposite for several reasons. First, *RadLAX* doesn't apply to this case because the subsection is prefaced with the word "including." Not only did *RadLAX* deal with a different provision in the Code that did not include any variation of the word "including," applying that case in this context would contravene Congress' directive in § 102(3) that the term "[is] not limiting." Because "including" provides an "unambiguous general directive," the Ninth Circuit concluded that "the administrative expense statute's use of 'including' renders the *expressio unius* rule inapplicable to section 503." *In re Mark Anthony Constr., Inc.*, 886 F.2d 1101, 1106 (9th Cir. 1989).

Second, Congress' failure to specifically designate a type of expense as permissible under § 503(b) does not mean that it's excluded. For example, the Sixth Circuit held that "the failure of Congress to expressly list interest as an administrative expense [in a subsection of § 503(b)] does not mean that it cannot be an administrative expense." *United States v. Flo- Lizer, Inc. (In re Flo-Lizer, Inc.)*, 916 F.2d 363, 365 (6th Cir. 1990). Or in another case, "Although we fail to find express authority for the reimbursement of an official committee's administrative expenses in the Code, we believe it is implied in the overall scheme for reorganization and in the legislative history of the Code and its amendments." *In re George Worthington Co.*, 921 F.2d 626, 634 (6th Cir. 1990). Additionally, other sections of the statute use "including" to indicate a non-exhaustive list of examples. For instance, 11 U.S.C. § 363 states that "the trustee may enter into transactions, including the sale or lease of property of the estate…." As with § 503(b), here the bankruptcy code uses "including" to introduce a non-exhaustive list of transactions and specifically mentions only the most common kinds, without excluding others, such as using property as collateral.

Finally, although Congress did not specifically include chapter 7 in the statute, it did not specifically exclude it either. "There is no distinction between the chapters, and the court's interpretation of § 503(b)(3)(D) is consistent with the policies of the bankruptcy code to encourage creditor participation in all bankruptcy cases, including chapter 7 cases." *In re Health Trio, Inc.*, 584 B.R. 342, 353 (Bankr. D. Colo. 2018). This Court should hesitate, therefore, before finding "a limitation where Congress did not expressly create one." *United States v. Miranda*, 986 F.2d 1283, 1284 (9th Cir. 1993

As one court pointed out, adopting Petitioner's interpretation of the statute "appears illogical." *In re Maqsoudi*, 566 B.R. 40, 44 (Bankr. C.D. Cal. 2017). Reading the statute as one

coherent sentence proves that it is "grammatically improper" to conclude that the word "include" applies to one subsection of the text yet has zero impact on another. *Id.* That is, holding that the subsections of § 503(b) are non-exhaustive, but that the *subsections of 503(b)(3)* are exhaustive, "would make the application of the statute to situations outside its plain language untenable" and create confusion about what level of the statute an applicant's request should be analyzed under. *Id.*

Although Petitioner correctly points out that claims for expenses under § 503(b) ought to be strictly construed because they "reduce the funds available for creditors and other claimants," *City of White Plains v. A & S Galleria Real Estate, Inc. (In re Federated Dep't Stores, Inc.)*, 270 F.3d 994, 1000 (6th Cir. 2001) (citation omitted), this argument gains little traction against the "broad consensus that the categories listed in the statute are not exhaustive." *In re Connolly N. Am., LLC*, 802 F.3d at 816. *See, e.g., Connolly*, 802 F.3d at 816-17; *In re Al Copeland Enters*., 991 F.2d 233, 239 (5th Cir. 1993); *In re Mark Anthony Constr., Inc*., 886 F.2d 1101, 1106 (9th Cir. 1989); *In re T.A. Brinkoetter & Sons, Inc*., 467 B.R. 668, 670 (Bankr. C.D. Ill. 2012); *Pergament v. Maghazeh Family Trust (In re Maghazeh*), 315 B.R. 650, 654 (Bankr. E.D.N.Y. 2004). Contrary to Petitioner's concerns that the flexible approach will open the door to a flood of creditor claims for reimbursement, thereby reducing the funds available for other claimants, Respondent merely seeks affirmation of the rule that already applies to all claims of administrative expenses. As the Fourth Circuit has stated, "an administrative expense has two defining characteristics: (1) the expense and right to payment arise after the filing of bankruptcy, and (2) the consideration supporting the right to payment provides some benefit to the estate." *CIT Commc'n Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.)*, 406 F.3d 229, 237 (4th Cir. 2005). In every example of the numerous bankruptcy cases granting an

administrative expense for a substantial contribution in a case under Chapter 7, this analysis was completed. *See, e.g., In re Sharkey*, 2017 U.S. Dist. LEXIS 188689 at *14 ("[A] bankruptcy court [may] award an administrative expense in a Chapter 7 case where, 'as here, reimbursement of administrative expenses properly follows from the totality of the pertinent facts, interpretation of the statutory language, and relevant equitable considerations.'").

Critically, there is no present dispute that Weinberg made a substantial contribution to the estate: The Trustee explicitly acknowledged his contribution. In other words, Petitioner does not contest the fact that Weinberg deserves to be reimbursed, only whether he is entitled to it. Perhaps the most disturbing aspect about Petitioner's whole position is that merely by deciding to switch from one chapter of bankruptcy to another, Weinberg's reasonable and compensable claim was transformed into a handful of ashes.

B. The Principles of Equity and Sound Policy Establish that Chapter 7 Administrative Expenses Are Included in § 503(b)

While many of the cases following *Connolly* have adopted its equitable approach to chapter 7 administrative expenses, see, e.g. *In re Pappas*, 277 B.R. 171 (Bankr. E.D.N.Y. 2002); *In re Zedda*, 169 B.R. 605 (E.D. La. 1994); *In re Rumpza*, 54 B.R. 107 (Bankr. D.S.D. 1985), some still fail to conform to the equitable principles that govern bankruptcy cases. Bankruptcy courts are "specialized courts of equity." *Curtis v. Loether*, 415 U.S. 189, 195 (1974). Thus, while their equitable powers are not unlimited, "their decisions are unimpeachable so long as these powers are exercised within the confines of the Bankruptcy Code." *In re Connolly N. Am., LLC*, 802 F.3d at 817.

Applying the powers of equity gives bankruptcy courts the requisite flexibility to address the myriad of circumstances and issues that are present in every single bankruptcy case. Too strictly reading § 503(b) would prevent these crucial aims of the bankruptcy courts from being attained.

Chapter 7 cases appoint a trustee to safeguard the interests of the creditors. Their primary role is to serve as the bankruptcy watch-dogs, "monitoring the progress of cases under [the Bankruptcy Code] and taking such actions as the United States trustee deems to be appropriate to prevent undue delay in such progress." 28 U.S.C. § 586(a)(3)(G). Yet, as the facts in *Connolly* and in the instant case demonstrate, "the U.S. trustee is not a fail-proof safeguard, and in certain circumstances, a Chapter 7 creditor may be compelled to utilize its own resources to protect the estate as a whole." *In re Connolly N. Am., LLC*, 802 F.3d at 817.

Circumstances abound when it benefits the estate for creditors to monitor its assets to protect their own interests. Sometimes creditors are privy to information that eludes trustees. Sometimes the trustees themselves may be derelict in their responsibilities and must be removed. Sometimes creditors have previous causes of action that make their intervention on behalf of the estate cheaper and/or more convenient than that of the trustee. In all such cases, creditors are amply able to help the bankruptcy process along. But only, Petitioner would have you hold, when dealing with a chapter 9 or 11 bankruptcy.

Petitioner offers no sound policy or equitable justification for his position. Indeed, the overall purpose and design of the Code militates strongly in favor of Weinberg's position. "Failing to award administrative expenses to the rare Chapter 7 creditors who are forced by circumstances to 'tak[e] action that benefits the [bankruptcy] estate when no other party is willing or able to do so,' would deter them from participating in bankruptcy cases and proceedings, which is plainly inconsistent with the purposes of the Act." *In re Connolly N. Am., LLC*, 802 F.3d at 818.

Denying creditors reimbursement of administrative expenses in such circumstances would disincentivize participation in the bankruptcy process and impugn the fundamental notion of bankruptcy as equitable relief. *Id*. This state of affairs would risk limiting creditor involvement in the process, limiting interested parties' supervision of the trustee, and ultimately limiting the size of the estate itself. In the absence of a clear statutory mandate compelling such a result, permitting reimbursement in chapter 7 cases is much more consistent with the equitable principles of bankruptcy.

Petitioner argues that the balance of equities cuts both ways, that allowing creditors in chapter 7 cases access to high priority reimbursement for administrative expenses will harm other creditors in the proceedings. However, petitioner ignores the realities of the circumstances. In the first place, any expenses incurred for recovering assets for the estate would be drawn from the estate regardless of whether the trustee or a creditor sought recovery. "[H]ad the U.S. trustee fulfilled its duty as the 'bankruptcy watch-dog' here, there is no question that the estate would have paid the expenses associated with removing the former trustee and prosecuting the malpractice action." *Id* at 817. Thus, there is no damage to other creditors for reimbursing expenses that would have to paid anyway. Second, petition forgets that, as with all claims for administrative expense, creditors seeking reimbursement must prove that their actions substantially contributed to the estate; pursuing frivolous or duplicative actions hardly establishes an equitable case to get a first bite at the apple. Moreover, but for the efforts of such creditors, irreparable damage may be done to the bankruptcy estate that would affect all creditors. Permitting reimbursement in chapter 7 cases would not suddenly render all chapter 7 creditors eligible for § 503(b); it only gives courts the discretion to do so in the spirit of equity. Finally, allowing creditors to receive reimbursement in chapter 7 cases is no different from

allowing them to recover in chapter 9 and 11 cases, recovery that all acknowledge is legitimate. Because the same equitable and policy considerations apply equally across all bankruptcy chapters, and there is no compelling statutory reason to exclude chapter 7 cases, courts should be permitted to grant administrative expenses for substantial contributions under chapter 7 of the Bankruptcy Code.

CONCLUSION

The judgement of the court of appeals should be affirmed.

Respectfully submitted.

Team 48

JANUARY 2019