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***301** ISSUES IN LITIGATION

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STANDING TO SURCHARGE THE SECURED CREDITOR: POLICY, PLAIN MEANING, AND PAYMENT UNDER SECTION 506(C) OF THE BANKRUPTCY CODE

Section 506(c) of the Bankruptcy Code [FN1] provides that "the trustee" may recover certain costs and expenses incurred to preserve or dispose of property subject to a creditor's lien from the secured creditor to the extent that the secured creditor received a benefit. [FN2] The unambiguous language of Section 506(c) provides that the trustee is the party to assert such claims against the secured creditor. A number of courts have, however, despite the lack of any statutory authority, granted unpaid administrative expense claimants standing to recover their claims directly from the secured creditor. Other courts have refused to extend standing to unpaid administrative expense claimants and have held that only the trustee may assert such claims.

The conflicting views on the "standing issue" are not surprising in light of the Code's failure to articulate a specific mechanism for satisfying the agreed upon underlying purpose of Section 506(c), which is to prevent secured creditors from receiving a windfall at the expense of the estate. The differing views reflect how different courts have attempted to accomplish the goal of Section 506(c) and the extent to which they are willing to disregard the plain and unambiguous statutory language to ensure the desired result. This article explores the differing views on the "standing issue" and suggests that a derivative action concept on the standing issue and on the distribution question would be more in keeping with the collective debt-collection bankruptcy process.

Cases Granting Standing to Administrative Expense Claimants

A majority of courts, including the Courts of Appeal for the First, Third, Fifth, Eighth, and Ninth Circuits, [FN3] have ***302** held that, notwithstanding the specific language contained in Section 506(c), which provides that the trustee may bring an action to surcharge a secured creditor, such an action may be brought by an unpaid administrative expense claimant. These decisions were based, in part, on the conclusion that the trustee did not have an economic incentive to pursue the action because the recovery would be paid directly to the administrative expense claimant, and, as a result, unless standing was granted to the unpaid claimant, the secured creditor would have received a windfall by avoiding payment of the costs incurred to preserve its collateral. [FN4]

The leading case for granting standing to unpaid administrative expense claimants is the Third Circuit's decision in *In re McKeesport Steel Castings Co.* [FN5] In *McKeesport*, the bankruptcy court entered orders denying Equitable Gas Company, a utility, the right to terminate service but granting it superpriority status for any

unpaid administrative expense claim. Equitable and the debtor entered into various payment schedules and, despite the debtor's failure to maintain any of its agreements, the bankruptcy court refused to allow Equitable to terminate utility service. [FN6] The debtor's business was subsequently sold as a going concern, and the proceeds were paid to the debtor's secured creditor, subject, however, to future claims approved by the bankruptcy court. Equitable filed a motion seeking payment of its unpaid administrative expense claim under Section 506(c) from the proceeds received by the secured creditor. The secured creditor objected to Equitable's motion and contended that such an action could only be brought by a trustee. The bankruptcy court disagreed and entered an order granting the surcharge. The district court reversed, based in part on Equitable's lack of standing to assert a surcharge. However, the Third Circuit reversed the district court and held that Equitable, as an unpaid administrative claimant, had standing to recover under Section 506(c), concluding that:

> The rule that individual creditors cannot act in lieu of the trustee is often breached when sufficient reason exists to permit the breach. [FN7]

The Third Circuit's determination that ***303** sufficient reason existed to grant standing to the utility was based on its conclusion that, because Equitable would receive payment from the recovery, neither the debtor nor the creditors' committee had a reason or an economic incentive to pursue the recovery on Equitable's behalf. [FN8]

The Ninth Circuit subsequently affirmed and expanded the *McKeesport* rationale based on its perceived need to avoid a windfall to the secured creditor. In *In re Palomar Truck Corp.*, [FN9] an entity sought to purchase the debtor's automobile dealership and agreed to operate the business pending bankruptcy court approval of the sale. The dealership, however, was subsequently sold to a higher bidder. The unsuccessful purchaser then moved to have its operating losses allowed as an administrative expense and to obtain payment under Section 506(c) from the sale proceeds that were to be paid to the debtor's secured creditor. Although the secured creditor agreed that if the unsuccessful purchaser had not operated the business the dealership agreements would have terminated and the value of the business would have been significantly less, it contended that the unsuccessful purchaser did not have standing under Section 506(c) to bring a surcharge action. To bolster its contention, the secured creditor argued that standing should be limited to the trustee to enable the trustee to maintain control of the liquidation process. The secured creditor also argued that limiting standing to the trustee would provide for distribution of any recovery to other unpaid administration claims that "preserves Section 726's policy favoring parity of payment to all claimants in a class." [FN10]

The Ninth Circuit rejected these arguments and granted the administrative expense claimant standing to attempt to recover its losses under Section 506(c), stating that:

> Like the trustee in *McKeesport*, the trustee here had no economic incentive to seek recovery under § 506(c), since the recovery would pass to the claimant with no gain to the estate. As in *McKeesport*, if only the trustee were allowed standing, the result would be a windfall for the secured creditor at the expense of the unpaid claimant .... No compelling policies are served by a restrictive reading of § 506(c) in the circumstances of this case. [FN11]

The Ninth Circuit, in response to the additional arguments of the secured creditor, stated that because this case involved a "reorganization" under Chapter 11, neither the trustee's need to control the liquidation process nor Section 726's policy in favor of pro rata distributions were applicable. [FN12]

***304** Several lower courts have held that an unpaid administrative claimant only has standing to surcharge a secured creditor under Section 506(c) if the trustee previously refused to bring the action. For example, in *In re*

DLS Industries, Inc., [FN13] the court stated that "the better rule is to allow the claimant to directly apply for administrative expenses under 11 U.S.C. § 506(c) where the claimant can demonstrate that the debtor in possession or trustee will not proceed with the application itself. The claimant must make a demand of the debtor to bring the action first." Similarly, in *In re Mechanical Maintenance, Inc.*, [FN14] the court stated that unpaid administrative "claimants do have standing where, as here, they have asked the debtor in possession to proceed with a claim but the debtor in possession has not done so." [FN15]

At least one lower court has extended standing to unpaid administrative claimants based on a determination that, although the language of Section 506(c) grants "the trustee" the right to bring the surcharge action, the language of Section 506(c) is nonexclusive. For example, in *In re Staunton Industries, Inc.*, [FN16] the court stated that "[t]he statute specifies that the trustee may recover such costs from the secured party's collateral, but does not definitively state that no other entity may do so."

Other lower courts have granted standing to unpaid administrative claimants because the claimant incurred the administrative expense discharging the trustee's duties. [FN17]

Cases Limiting Standing to a Trustee

A minority of courts have limited standing to the trustee based primarily on the plain and unambiguous language of Section 506(c). Several of these decisions buttress the "plain meaning rule of statutory construction" by holding that an extension of standing to unpaid administrative expense claimants also violates the Bankruptcy Code's policy of pro rata distributions and is not necessary to avoid a windfall to the secured creditor.

The Court of Appeals for the Fourth Circuit, in *In re JKJ Chevrolet, Inc.*, [FN18] recently became the first circuit court ***305** to limit standing under Section 506(c) to the trustee. In *JKJ Chevrolet*, a supplier provided the debtor with a computer system and related goods and services during the debtor's Chapter 11 case. The debtor's business was subsequently sold as a going concern and the case was converted from Chapter 11 to Chapter 7. The proceeds of the sale, which were to be paid to the debtor's secured creditor, were insufficient to satisfy the secured claims and the administrative expense claims. Consequently, the supplier filed a motion seeking an order under Section 506(c) to surcharge the secured creditor in order to obtain payment of its administrative expense claim.

The Fourth Circuit began its analysis of the standing issue by applying the "plain meaning rule of statutory construction" to the language of Section 506(c). The court summarized the rules of statutory constructions established by the Supreme Court as follows:

> If the language is plain and the statutory scheme is coherent and consistent, there is no need to inquire further. The sole function of the courts is to enforce the statute according to its terms. Only in those rare instances in which there is a clearly expressed legislative intent to the contrary, in which a literal application of the statute would thwart its obvious purpose or in which a literal application of the statute would produce an absurd result, should the courts venture beyond the plain meaning of the statute. [FN19]

The Fourth Circuit then concluded that an administrative claimant does not have standing to surcharge a secured creditor because "[t]he language of Section 506(c) is clear and unambiguous. It grants only trustees the authority to seek recovery from the collateral of a secured creditor." [FN20]

The Fourth Circuit went on to state that its decision was "consistent with a fundamental purpose of the

Bankruptcy Code—equitable distribution to similarly situated creditors." [FN21] Pursuant to its analysis, a Section 506(c) recovery by a trustee becomes property of the estate and is distributed pursuant to the priorities established by the Code on a ***306** pro rata basis to creditors of the same class. To allow an unpaid administrative expense claimant to proceed directly against the secured creditor would circumvent the Code's priority scheme, potentially causing an inequitable division of the estate. [FN22]

The Fourth Circuit disagreed with the conclusion that a trustee often does not have an incentive to pursue a Section 506(c) recovery. The court stated that because the recovery becomes property of the estate, a trustee has sufficient incentive to pursue the action. The court also noted that a trustee owes fiduciary duties to the creditors of the estate and a failure to seek a Section 506(c) recovery may constitute a breach of those duties, resulting in personal liability. [FN23]

The Fourth Circuit also disagreed that the grant of standing to administrative expense claimants was necessary to avoid a windfall to the secured creditor. According to the Fourth Circuit, if a trustee fails to pursue a Section 506(c) recovery, the administrative expense claimant can request that the bankruptcy court (1) compel the trustee to pursue the recovery, (2) remove the trustee, or (3) if a debtor in possession is managing the estate, appoint a trustee. [FN24] The court also left open the possibility that, if these procedures were insufficient, the bankruptcy court could grant derivative standing to the administrative expense claimant to pursue the recovery, on behalf of the trustee, for the benefit of the estate. [FN25]

Consistent with the *JKJ Chevrolet* analysis, many lower courts have held that limiting standing to the trustee is consistent with the legislative intent behind Section 506(c). For example, in *In re Great Northern Forest Products, Inc.*, [FN26] the court stated:

> ***307** The intention of the drafters as expressed in the legislative history of § 506(c) is also clear and unambiguous. The legislative history only refers to the trustee or debtor in possession. There is absolutely no reference to allowing a third party to attempt to surcharge a secured creditors' collateral. Congress' intent is crystalline. Only trustees or debtors in possession may surcharge pursuant to § 506(c). [FN27]

Similarly, in *In re J.R. Caldwell*, [FN28] the court stated that its decision to limit standing to the trustee was "bolstered by the fact that throughout the Bankruptcy Code, Congress has shown its ability to expand or contract standing as it deems appropriate." [FN29]

Several lower courts have also been unsympathetic to the argument that the refusal to extend standing would leave the administrative expense claimant without full payment for the benefit it conferred on the secured creditor. For example, in *In re Kessler, Inc.*, [FN30] the court stated that

> the argument for allowing administrative claimants to obtain reimbursement under § 506(c) improperly presumes that the underlying purpose of § 506(c) is to reimburse administrative claimants for services which benefited a secured creditor. However, § 506(c) is designed not to reimburse the individual administrative claimant, but to reimburse the estate. [FN31]

Similarly, in *In re Interstate Motor Freight System, IMFS, Inc.*, [FN32] the court reasoned that

> many people extend credit to a chapter 11 debtor and go unpaid. That is why the Bankruptcy Code provides a priority for administrative claimants in § 503(b). No Code section distinguishes between administrative claimants who provide credit to the chapter 11 debtor and those who did not, e.g., a tort claimant, nor between those whose credit benefited a secured creditor and those whose credit benefited the estate generally. [FN33]

***308 Conclusion**

The determinative factor in resolution of the standing issue appears to be whether the surcharge recovery is distributed directly to the unpaid administrative expense claimant or is recovered for the benefit of the estate. Courts that have granted standing to unpaid administrative claimants have assumed that a surcharge recovery is distributed directly to a specific claimant. Under this view, a trustee does not have an economic incentive to pursue the recovery and, unless standing is granted to the unpaid claimant, the secured creditor will receive a windfall.

Conversely, courts that have limited standing to the trustee have assumed that a surcharge is recovered for the benefit of the estate. Under this view, a trustee has an economic incentive to pursue the recovery, and granting the unpaid claimant standing to obtain payment directly from the secured creditor would result in an inequitable division of the estate.

The Bankruptcy Code is silent on the distribution question. Recovery of a surcharge for the benefit of the estate, however, instead of distributing it directly to a specific claimant, is consistent with the collective debt-collection process and the desire to encourage all parties to deal with the debtor during its reorganization efforts. Bankruptcy exists, in part, to maximize the value of the debtor's assets, thereby benefiting creditors as a group. [FN34] Recovery of a surcharge for the benefit of the debtor's estate encourages other parties to deal with the debtor, thereby maximizing the value of its assets, by increasing the amount available to satisfy their claims and, consequently, the likelihood that they will be paid.

Providing that a surcharge is recovered for the benefit of the estate, while granting unpaid administrative claimants standing to bring the action *derivatively*, is also consistent with the unambiguous language and the purpose of Section 506(c). The language of Section 506(c) authorizes a trustee to bring a surcharge action. Derivative standing enables an unpaid claimant to bring the action for the trustee, on behalf of the estate. Conversely, direct standing allows the claimant to bring the action on its own behalf and retain any recovery. Courts that have granted standing to unpaid administrative claimants have failed to distinguish between direct and derivative standing. [FN35]

***309** Derivative standing enables the unpaid administrative claimant to bring a surcharge action and thereby avoid a windfall to the secured creditor, subject to certain judicially developed conditions. [FN36] First, the unpaid claimant should request that the trustee bring the action, to allow the trustee to evaluate it and retain control of the bankruptcy case. This requirement benefits the debtor's other unsecured creditors because the trustee can bring all surcharge actions at once, thereby increasing the amount potentially recovered. It also benefits the secured creditor by avoiding the additional costs associated with multiple actions and potentially allowing it to reach a global settlement regarding all surcharge claims.

If the trustee refuses an administrative claimant's request, or a request would be futile, [FN37] the claimant should obtain bankruptcy court approval prior to commencing the action. This enables the court to determine if a colorable surcharge claim exists and whether the trustee's refusal to bring the action was justified. In reviewing the trustee's refusal, courts should balance the amount of any recovery and the probability of success against the costs associated with the action, including legal fees and any negative impact the action may have on the reorganization or liquidation process.

The current confusion regarding the standing issue is due, in large part, to a failure to directly address whether a surcharge recovery is properly distributed to a specific claimant or the estate and to distinguish

between direct and derivative standing. Whether courts continue to grant standing to unpaid administrative claimants or limit standing to the trustee will depend on the clarity with which these issues are presented and decided.

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[FN1]. 11 USC §§ 101-1331 (1995) (hereinafter Bankruptcy Code, or Code).

[FN2]. Section 506(c) provides:

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

11 USC § 506(c) (1995) (emphasis added).

[FN3]. United States v. Boatmen's First Nat'l Bank of Kan. City, 5 F3d 1157, 1159 (8th Cir. 1993); In re Palomar Truck Corp., 951 F2d 229, 232 (9th Cir. 1991), cert. denied, 113 S. Ct. 71 (1992); In re Delta Towers, Ltd., 924 F2d 74, 77 (5th Cir. 1991); In re Parque Forestal, Inc., 949 F2d 504, 511 (1st Cir. 1991); In re McKeesport Steel Castings Co., 799 F2d 91, 94 (3d Cir. 1986); see also In re Visual Indus., Inc., 57 F3d 321, 325 (3d Cir. 1995) ("Although § 506(c) in terms refers only to recovery by the trustee, we, like many other courts, have held that administrative claimants other than trustee have standing to recover under § 506(c), particularly when no other party has an economic incentive to seek recovery on the claimant's behalf."); In re Senior-G&A Operating Co., 957 F2d 1290, 1297 (5th Cir. 1992) (dicta).

[FN4]. Some decisions are simply based on the prior holdings of other courts and do not contain any independent analysis of the standing issue. See United States v. Boatmen's First Nat'l Bank of Kan. City, 5 F3d 1157, 1159 (8th Cir. 1993); In re Delta Towers, Ltd., 924 F2d 74, 76 (5th Cir. 1991); United Jersey Bank v. Miller, 159 BR 148, 150 n.2 (ED Pa. 1993), rev'd on other grounds, 29 F3d 903 (3d Cir. 1994); In re Blaisure, 150 BR 343, 344 (Bankr. MD Pa. 1992); In re Evanston Beauty Supply, Inc., 136 BR 171, 175 (Bankr. ND Ill. 1992); In re Opti-Gage, Inc., 124 BR 515, 518 (Bankr. SD Ohio 1991); In re International Club Enters., Inc., 105 BR 190, 193 (Bankr. DRI 1989); In re Cann & Saul Steel Co., 86 BR 413, 416 (Bankr. ED Pa. 1988); In re World Wines, Ltd., 77 BR 653, 658 (Bankr. ND Ill. 1987); In re Dulerio, 71 BR 112 (Bankr. ED Pa. 1987); In re Reda, Inc., 54 BR 871, 880-881 (Bankr. ND Ill. 1985); In re Wyckoff, 52 BR 164 (Bankr. WD Mich. 1985); In re Loop Hosp. Partnership, 50 BR 565, 571 (Bankr. ND Ill. 1985); In re Isaac Cohen Clothing Corp., 39 BR 199 (Bankr. SDNY 1984).

[FN5]. 799 F2d 91 (3d Cir. 1986).

[FN6]. Id. at 92.

[FN7]. Id. at 93-94.

[FN8]. Id. at 94; see also In re Parque Forestal, Inc., 949 F2d 504, 511 (1st Cir. 1991); In re Croton River Club, Inc., 162 BR 656 (Bankr. SDNY 1993); In re Grant Assocs., 154 BR 836, 841 (SDNY 1993); In re Staunton Indus., Inc., 74 BR 501, 506 (Bankr. ED Mich. 1987); In re DLS Indus., Inc., 71 BR 679, 681 (Bankr. D. Minn.

1987); In re Birdsboro Casting Corp., 69 BR 955, 958 (Bankr. ED Pa. 1987).

[FN9]. 951 F2d 229 (9th Cir. 1991), cert. denied, 113 S. Ct. 71 (1992).

[FN10]. Id. at 232.

[FN11]. Id. at 232.

[FN12]. Id. at 232; see also In re Grant Assocs., 154 BR 836, 841 (SDNY 1993); In re Brown Bros., Inc., 136 BR 470, 474 (WD Mich. 1991); Fulcrum Int'l, Ltd. v. Saybrook Mfg. Co., 124 BR 141, 144 (MD Ga. 1991); In re So Good S. Potato Chip Co., 116 BR 144, 145-146 (Bankr. ED Mo. 1990); In re Chicago Lutheran Hosp. Assocs., 89 BR 719, 726 n.9 (Bankr. ND Ill. 1988); In re World Wines, Ltd., 77 BR 653, 658 n.4 (Bankr. ND Ill. 1987); cf. In re Scopetta-Senra Partnership, III, 129 BR 700, 702 (Bankr. SD Fla. 1991) ("Additionally, the windfall that the secured creditor would receive clearly outweighs the distribution objectives established by Congress in Section 726(b) of the Code.").

[FN13]. 71 BR 679, 681 (Bankr. D. Minn. 1987).

[FN14]. 128 BR 382, 390 (ED Pa. 1991).

[FN15]. See also Fulcrum Int'l, Ltd. v. Saybrook Mfg. Co., 124 BR 141, 144-145 (MD Ga. 1991); In re So Good S. Potato Chip Co., 116 BR 144, 145-146 (Bankr. ED Mo. 1990); In re Staunton Indus., Inc., 74 BR 501, 506 (Bankr. ED Mich. 1987).

[FN16]. 74 BR 501, 504 (Bankr. ED Mich. 1987).

[FN17]. In re Better-Brite Plating, Inc., 105 BR 912, 917-918 (Bankr. ED Wis. 1989) ("When such cleanup action is taken by EPA, or by DNR, ... those entities are standing in the shoes of the trustee in preserving the estate, and where their incurrence of such costs inures to the benefit of a secured creditor, it is appropriate to allow them to seek payment from the assets that are subject to the security interest."), vacated, 136 BR 526 (Bankr. ED Wis. 1990); In re T.P. Long Chem., Inc., 45 BR 278, 287 (Bankr. ND Ohio 1985) (same).

[FN18]. 26 F3d 481 (4th Cir. 1994).

[FN19]. Id. at 483-484 (internal citations and quotations omitted).

[FN20]. Id. at 484; see also In re Dyac Corp., 164 BR 574, 579 (Bankr. ND Ohio 1994); In re J.R. Caldwell, 147 BR 119, 120 (MDNC 1992); In re Kessler, Inc., 142 BR 796, 799-800 (WD Mich. 1992); In re Oakland Care Ctr., Inc., 142 BR 791, (ED Mich. 1992); In re Great N. Forest Prods., Inc., 135 BR 46, 65 (Bankr. WD Mich. 1991); In re Interstate Motor Freight Sys. IMFS, Inc., 71 BR 741, 743 (Bankr. WD Mich. 1987); In re Ramaker, 117 BR 959, 966 (Bankr. ND Iowa 1990); In re Dakota Lay'd Eggs, 68 BR 975, 978 (Bankr. DND 1987); In re Groves Farms, Inc., 64 BR 276, 277 (Bankr. SD Ind. 1986); In re Air Ctr., Inc., 48 BR 693, 694 (Bankr. WD Okla. 1985); In re J.R. Research, Inc., 65 BR 747, 749 (Bankr. D. Utah 1986); In re Fabian, 46 BR 139, 141 (Bankr. ED Pa. 1985); In re Thomas, 43 BR 201, 208 (Bankr. MD Ga. 1984); In re Proto-Specialties, Inc., 43 BR 81, 83 (Bankr. D. Ariz. 1984); In re Manchester Hides, Inc., 32 BR 629, 633 (Bankr. ND Iowa 1983); In re S&S Indus., Inc., 30 BR 395, 397 (Bankr. ED Mich. 1983); In re Codesco Inc., 18 BR 225, 230 (Bankr. SDNY 1982).

Several courts have also noted that because Section 506(c) is an exception to the general rule that adminis-

trative expenses are paid by the estate, it should be interpreted restrictively. See In re Kessler, Inc., 142 BR 796, 800 (WD Mich. 1992); In re J.R. Research, Inc., 65 BR 747, 749 (Bankr. D. Utah 1986); In re New England Carpet Co., 28 BR 766, 771 (Bankr. D. Vt.), aff'd on other grounds, 38 BR 703, 704 (D. Vt. 1983), aff'd, 744 F2d 16 (2d Cir. 1984).

[FN21]. Id. at 484.

[FN22]. See also In re Kessler, Inc., 142 BR 796, 800 (WD Mich. 1992); In re Oakland Care Ctr., Inc., 142 BR 791, 794 (ED Mich. 1992); In re Great N. Forest Prods., Inc., 135 BR 46, 67 (Bankr. WD Mich. 1991); In re Interstate Motor Freight Sys., IMFS, Inc., 86 BR 500, 504, 506 (Bankr. WD Mich. 1988); In re Interstate Motor Freight Sys. IMFS, Inc., 71 BR 741, 744 (Bankr. WD Mich. 1987); In re J.R. Research, Inc., 65 BR 747, 750-751 (Bankr. D. Utah 1986).

[FN23]. See also In re Interstate Motor Freight Sys., IMFS, Inc., 86 BR 500, 503 (Bankr. WD Mich. 1988); In re J.R. Research, Inc., 65 BR 747, 750 (Bankr. D. Utah 1986).

[FN24]. Id. at 485; see also In re Great N. Forest Prods., Inc., 135 BR 46, 69 n.28 (Bankr. WD Mich. 1991); In re Dakota Lay'd Eggs, 68 BR 975, 978 (Bankr. DND 1987); cf. In re K&L Lakeland, Inc., 185 BR 20, 23 (Bankr. ED Va. 1995) ("Based on the holding in JKJ Chevrolet ... we conclude that [the administrative claimant] can no longer proceed directly against [the secured creditor]. We therefore substitute the Chapter 7 trustee for [the administrative claimant], and accordingly drop [the administrative claimant] as a § 506(c) claimant.").

Courts have also suggested that "under appropriate circumstances, a creditor may conceivably be entitled to sue a secured creditor outside of the bankruptcy court pursuant to a state law cause of action." In re Great N. Forest Prods., Inc., 135 BR at 69 n.28; see also In re J.R. Caldwell, 147 BR 119, 121 (MDNC 1992) ("Also, even if there is unfair enrichment to [the secured creditor], presumably [the claimant] could directly address this issue in a claim for unjust enrichment under state law."). But see Knox v. Phoenix Leasing Inc., 29 Cal. App. 4th 1357, 1360-1361, 35 Cal. Rptr. 2d 141, 144 (Cal. App. Ct. 1994) ("[A] decided majority of jurisdictions have disallowed the equitable remedy of restitution (whether termed unjust enrichment, quantum meruit, contract implied in law, etc.) .... California and more recently Colorado, while conceding considerable soundness to the majority position, have permitted restitution from a secured creditor.").

[FN25]. Id. at 485 n.7.

[FN26]. 135 BR 46 (WD Mich. 1991).

[FN27]. Id. at 66. The legislative history to Section 506(c) provides:

> Any time *the trustee or debtor in possession* expends money to provide for the reasonable and necessary costs and expenses of preserving or disposing of a secured creditor's collateral, *the trustee or debtor in possession* is entitled to recover such expenses from the secured party or from the property securing an allowed secured claim held by such party.

124 Cong. Rec. 32,398 (1978) (emphasis added) (statement of Representative Don Edwards), reprinted in 1978 USCCAN 6436, 6451; 124 Cong. Rec. 33,997 (1978) (emphasis added) (statement of Senator Dennis DeConcini), 5787 (statement of Rep. Edwards) (emphasis added), reprinted in 1978 USCCAN 6505, 6520.

[FN28]. 147 BR 119, 120 (MDNC 1992).

[FN29]. See also In re Kessler, Inc., 142 BR 796, 799-800 (WD Mich. 1992) ("The intention of the drafters is

consistent with the plain language of the statute."); In re Interstate Motor Freight Sys. IMFS, Inc., 71 BR 741, 742-743 (Bankr. WD Mich. 1987); In re J.R. Research, Inc., 65 BR 747, 750 (Bankr. D. Utah 1986); In re Air Ctr., Inc., 48 BR 693, 694 (Bankr. WD Okla. 1985); In re S&S Indus., Inc., 30 BR 395, 398 (Bankr. ED Mich. 1983).

[FN30]. 142 BR 796 (WD Mich. 1992).

[FN31]. Id. at 800; see also In re J.R. Research, Inc., 65 BR 747, 750 (Bankr. D. Utah 1986); In re Codesco Inc., 18 BR 225, 230 (Bankr. SDNY 1982).

[FN32]. 86 BR 500 (Bankr. WD Mich. 1988).

[FN33]. Id. at 504 (citation omitted); see also In re J.R. Caldwell, 147 BR 119, 121 (MDNC 1992); In re Oakland Care Ctr., Inc., 142 BR 791, 794 (ED Mich. 1992); In re Ramaker, 117 BR 959, 967 (Bankr. ND Iowa 1990) ("The Code created generally adequate incentive for these creditors to provide such credit to the estate under § 364. The expenses are allowable as administrative expenses under § 503(b)(1). Moreover, these creditors could have sought a security interest under § 364(c).").

Courts have also limited standing to avoid inefficient satellite litigation and to enable the trustee to retain control of the bankruptcy case. In re JKJ Chevrolet, Inc., 26 F3d 481, 484 n.6 (4th Cir. 1994) ("An interpretation of § 506(c) as granting standing to individual claimants is likely to result in a flood of satellite litigation by those seeking to avoid a pro rata division of the estate."); In re Great N. Forest Prods., Inc., 135 BR 46, 69 (Bankr. WD Mich. 1991) ("Such an interpretation of § 506(c) [by extending standing] may willy-nilly spawn satellite actions resulting in a litigation free for all."); In re Dakota Lay'd Eggs, 68 BR 975, 978 (Bankr. DND 1987) ("The trustee's legitimate effort in this regard [to administer and close the estate] could be thwarted and control lost if courts were to routinely allow general creditors to intervene in case administration by seeking costs and expenses under section 506(c).").

[FN34]. E.g., Thomas H. Jackson, The Logic and Limits of Bankruptcy Law 24 (1986).

[FN35]. See In re J.R. Caldwell, 147 BR 119, 121 (MDNC 1992) ("The circuit court cases fail to recognize the distinction between derivative and independent standing and, most importantly, do not analyze the language of the statute."); In re Great N. Forest Prods., Inc., 135 BR 46, 68 (Bankr. WD Mich. 1991) ("McKeesport fails to recognize the important distinction between independent standing and derivative standing to assert a trustee's cause of action.").

[FN36]. See generally Louisiana World Exposition v. Federal Ins. Co., 858 F2d 233, 247 (5th Cir. 1988); In re STN Enters., 779 F2d 901, 905 (2d Cir. 1985).

[FN37]. See, e.g., In re First Capital Holdings Corp., 146 BR 7, 12 (Bankr. CD Cal. 1992) ("Such a demand prior to filing a derivative action, and refusal by the board, is excused, however, if the facts pleaded demonstrate that such a demand would have been futile.").

A demand on the trustee could be futile if the debtor is in possession and insiders have guaranteed the secured creditor's debt. See In re DLS Indus., Inc., 71 BR 679, 681 (Bankr. D. Minn. 1987) ("In many cases, personal guarantees of secured debt by corporate shareholders may slow a debtor in possession from paying other fees out of a secured creditor's collateral.").

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