CANNILY EMPLOYING A STRICT CONSTRUCTION OF THE INCLUSION IN ADMINISTRATIVE EXPENSES

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Introduction

Administrative expenses, the payments from the bankruptcy estate ahead of nearly all other claims against the estate,[1] are subject to two seemingly contradictory interpretive rules. Because, like all priority claims, they deplete the funds available to pay general claims, they are strictly construed.[2] Yet they are neither defined by the Bankruptcy

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[1]11 U.S.C.A. §§ 503(b), 507(a)(2). Prior to 2005, administrative expenses were the first of the priority claims. The Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), Pub. L. 109-8, § 212, 119 Stat. 23 (2005), demoted them to second priority, placing first domestic support obligations, which are relevant only the individual debtors, 11 U.S.C.A. §§ 101(14A), 507(a)(1). Besides domestic support obligations, administrative expenses are subordinate to so-called "superpriority" claims granted to post-petition lenders under 11 U.S.C.A. § 364(c), or holders of interests in estate property when approved adequate protection proposals do not adequately prevent a diminution in in value, 11 U.S.C.A. § 507(b). In addition, administrative expenses incurred in a Chapter 7 case converted from another chapter have priority over administrative expenses incurred such other chapter. 11 U.S.C.A. § 726(b). Administrative expenses share the second priority with certain claims of federal reserve banks, see 12 U.S.C.A. § 343; and with fees and charges assessed against the estate, see 28 U.S.C.A. § 123.

[2]See *Howard Delivery Service, Inc. v. Zurich American Ins. Co.*, 547 U.S. 651, 667, 126 S. Ct. 2105, 165 L. Ed. 2d 110, 46 Bankr. Ct. Dec. (CRR) 177, 55 Collier Bankr. Cas. 2d (MB) 775, 37 Employee Benefits Cas. (BNA) 2743, Bankr. L. Rep. (CCH) P 80624 (2006) (priority claims in general); *In re Federated Dept. Stores, Inc.*, 270 F.3d 994, 1000, 38 Bankr.

Code nor limited to an express enumeration. The statutory list of administrative expenses is prefaced by the word "including,"[3] which must be construed as "not limiting."[4]

The tension between these interpretive rules manifested itself last year in *Connolly North America*, a decision by the Sixth Circuit.[5] The issue concerned the allowability of an administrative expense request for reimbursement of attorneys' fees and expenses of a creditor making a substantial contribution in a Chapter 7 case.[6] Section 503(b)(3)(D) of the Bankruptcy Code expressly authorizes such administrative expense requests in Chapter 9 and 11 cases,[7] but has no explicit provision for such requests in Chapter 7 cases. The court of appeals held in a split decision that such requests could be authorized in Chapter 7 cases, with the majority focusing on the inclusive and non-exhaustive aspect of the enumeration of administrative expenses,[8] and the dissent insisting on the policy of strict construction arising from the non-inclusion of Chapter 7 in the specific provision allowing substantial contribution claims.[9] This article will consider the Sixth Circuit's decision and the competing principles governing the interpretation of administrative expenses. It will also explore some implications of the majority's approach

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Ct. Dec. (CRR) 179, 47 Collier Bankr. Cas. 2d (MB) 397, Bankr. L. Rep. (CCH) P 78528, 2001 FED App. 0391P (6th Cir. 2001) (administrative expenses, specifically); *In re Commercial Financial Services, Inc.*, 246 F.3d 1291, 1293, 37 Bankr. Ct. Dec. (CRR) 227, 26 Employee Benefits Cas. (BNA) 1087, Bankr. L. Rep. (CCH) P 78393 (10th Cir. 2001) (administrative expenses, specifically).

[3]11 U.S.C.A. § 503(b).

[4]11 U.S.C.A. § 102(3); see *In re Healthco Intern., Inc.*, 310 F.3d 9, 12, 40 Bankr. Ct. Dec. (CRR) 97, Bankr. L. Rep. (CCH) P 78730 (1st Cir. 2002).

[5]*In re Connolly North America, LLC*, 802 F.3d 810, 61 Bankr. Ct. Dec. (CRR) 156, 74 Collier Bankr. Cas. 2d (MB) 536, Bankr. L. Rep. (CCH) P 82871 (6th Cir. 2015).

[6]Connolly N. Am., 802 F.3d at 813.

[7]11 U.S.C.A. § 503(b)(3)(D). See also 11 U.S.C.A. § 503(b)(4) (authorizing compensation for attorneys and accountants of creditors and other participants not holding offices created by the Bankruptcy Code identified in § 503(b)(3)(A)–(E)).

[8]Connolly N. Am., 802 F.3d at 815–19.

[9]Connolly N. Am., 802 F.3d at 820–25 (dissenting opinion).

in other situations involving payment of attorneys' fees and other controversial claims, such as those held by so-called "critical vendors."[10]

Connolly North America

The issue in the Sixth Circuit's decision is simply presented: Does the Bankruptcy Code permit the allowance of an administrative expense for making a substantial contribution in a Chapter 7 case?[11] The issue arose because of the decisive and beneficial actions of three creditors in having a Chapter 7 trustee removed and replaced.[12] The original trustee had sued the debtor's accountants for malpractice, seeking a judgment of $4.8 million.[13] He lost that lawsuit when, during the trial, it became apparent that he and his counsel had substantially breached their discovery obligations through gross negligence, and as a result, the court dismissed the case with prejudice.[14] The three creditors then successfully pursued the original trustee's removal.[15] The successor trustee thereafter obtained a settlement from the

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[10]"Critical vendors" are those vendors that (i) sell goods or services without which the debtor will not be able to continue in business, (ii) have pre-petition claims, (iii) without payment of their pre-petition claims, have the right to decline to do business with the debtor after bankruptcy, and (iv) will so decline. See *In re Kmart Corp.*, 359 F.3d 866, 868, 42 Bankr. Ct. Dec. (CRR) 166, 51 Collier Bankr. Cas. 2d (MB) 1076, Bankr. L. Rep. (CCH) P 80054 (7th Cir. 2004); *In re News Pub. Co.*, 488 B.R. 241, 244, 57 Bankr. Ct. Dec. (CRR) 198 (Bankr. N.D. Ga. 2013); *In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15, 17, 44 Bankr. Ct. Dec. (CRR) 66 (Bankr. M.D. Fla. 2005), subsequent determination, 332 B.R. 476, 45 Bankr. Ct. Dec. (CRR) 187 (Bankr. M.D. Fla. 2005). See generally, Daniel Weiner, After Kmart: The Standard for Authorizing "Critical Vendor" Payments, 2013 Norton Ann. Surv. Bankr. L. 267, 267–68 (discussing the need for critical vendor motions); Joseph Gilday, "Critical" Error: Why Essential Vendor Payments Violate the Bankruptcy Code, 11 Am. Bankr. Inst. L. Rev. 411, 415–16 (2003) (discussing critical vendor motions).

[11]Connolly N. Am., 802 F.3d at 814.

[12]Connolly N. Am., 802 F.3d at 813.

[13]*In re Connolly North America, LLC*, 376 B.R. 161, 164, 49 Bankr. Ct. Dec. (CRR) 17 (Bankr. E.D. Mich. 2007).

[14]Connolly N. Am., 802 F.3d at 813; see Connolly N. Am., 376 B.R. at 164–65.

[15]Connolly N. Am., 802 F.3d at 813; see *In re Connolly North America, LLC*, 2010 WL 4822605, *2 (E.D. Mich. 2010) (affirming bankruptcy court's removal order on grounds of conflict of interest in original trustee's in-

original trustee, his counsel, and their professional liability carrier. That settlement significantly enhanced the distribution to all creditors.[16]

Two of the three creditors applied to recover their attorneys' fees on the ground that they had made a substantial contribution to the Chapter 7 case. The successor trustee supported the creditors' substantial contribution application. Only the United States trustee opposed.[17] Although the bankruptcy court acknowledged that the creditors' efforts had "substantially benefited" the estate and "contributed greatly" to the distribution to creditors generally,[18] it denied their application on the ground that the Bankruptcy Code did not permit such an application in a Chapter 7 case.[19] The district court affirmed on the same ground.[20]

The *Connolly* Majority

The majority began its analysis with two general principles. First, bankruptcy is essentially equitable,[21] and bankruptcy courts' equitable determinations must be

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ability to investigate the estate's claims against himself arising from, among other things, the dismissal of the malpractice action against the debtor's accountants); see *also In re Connolly North America, LLC*, 432 B.R. 244 (E.D. Mich. 2010) (approving former trustee's amendment of notice of appeal of his removal and denying motion to dismiss appeal on the ground of equitable mootness in light of appointment of successor trustee).

[16]Connolly N. Am., 802 F.3d at 813; see *In re Connolly North America, LLC*, 479 B.R. 719, 722, 56 Bankr. Ct. Dec. (CRR) 279, 68 Collier Bankr. Cas. 2d (MB) 1461 (Bankr. E.D. Mich. 2012), aff'd, 498 B.R. 772 (E.D. Mich. 2013), rev'd and remanded, 802 F.3d 810, 61 Bankr. Ct. Dec. (CRR) 156, 74 Collier Bankr. Cas. 2d (MB) 536, Bankr. L. Rep. (CCH) P 82871 (6th Cir. 2015).

[17]Connolly N. Am., 802 F.3d at 814; see Connolly N. Am., 479 B.R. at 721–22.

[18]Connolly N. Am., 479 B.R. at 722.

[19]Connolly N. Am., 479 B.R. at 723–24. The court relied heavily on two cases that reached the same conclusion. *In re Peterson*, 152 B.R. 612, 613–14, 29 Collier Bankr. Cas. 2d (MB) 46 (D.S.D. 1993); *In re Hackney*, 351 B.R. 179, 200–04 (Bankr. N.D. Ala. 2006).

[20]*In re Connolly North America, LLC*, 498 B.R. 772, 775 (E.D. Mich. 2013), rev'd and remanded, 802 F.3d 810, 61 Bankr. Ct. Dec. (CRR) 156, 74 Collier Bankr. Cas. 2d (MB) 536, Bankr. L. Rep. (CCH) P 82871 (6th Cir. 2015).

[21]Connolly N. Am., 802 F.3d at 814. For this principle, the court relied on two Supreme Court cases. The first, *Bank of Marin v. England*,

sustained when they are "exercised within the confines of the Bankruptcy Code."[22] Second, the exercise of equitable powers must be constrained if contradicted by the statutory language, as interpreted by its plain meaning.[23] These principles led the majority to the preliminary conclusion that substantial contributions claims that are supported by

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385 U.S. 99, 87 S. Ct. 274, 17 L. Ed. 2d 197 (1966), contains an iconic quotation from Justice Douglas, "Yet we do not read these statutory words [of the Bankruptcy Act] with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." Bank of Marin v. England, 385 U.S. at 103. The first sentence of this quotation has been discredited by a series of cases employing the "plain meaning" rule in interpreting the Bankruptcy Code, which is the majority's second principle. *See, e.g., Lamie v. U.S. Trustee*, 540 U.S. 526, 536, 124 S. Ct. 1023, 157 L. Ed. 2d 1024, 42 Bankr. Ct. Dec. (CRR) 122, 50 Collier Bankr. Cas. 2d (MB) 1299, Bankr. L. Rep. (CCH) P 80038 (2004); *Union Bank v. Wolas*, 502 U.S. 151, 158, 112 S. Ct. 527, 116 L. Ed. 2d 514, 22 Bankr. Ct. Dec. (CRR) 574, 25 Collier Bankr. Cas. 2d (MB) 1011, Bankr. L. Rep. (CCH) P 74296A (1991); *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 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). The second case relied on is *Curtis v. Loether*, 415 U.S. 189, 94 S. Ct. 1005, 39 L. Ed. 2d 260, 18 Fed. R. Serv. 2d 189 (1974), which concerns the right to a jury trial in a housing discrimination case under a federal civil rights statute. The Court held that the plaintiff had a right to a jury trial, and mentioned equitable proceedings in bankruptcy by way of contrast. Curtis v. Loether, 415 U.S. at 194–95 (citing *Katchen v. Landy*, 382 U.S. 323, 86 S. Ct. 467, 15 L. Ed. 2d 391, 9 Fed. R. Serv. 2d 38A.2, Case 6 (1966)).

[22]Connolly N. Am., 802 F.3d at 814 (quoting *In re Foremost Mfg. Co.*, 137 F.3d 919, 924, Bankr. L. Rep. (CCH) P 77646, 1998 FED App. 0077P (6th Cir. 1998) (quoting, in turn, *In re Omegas Group, Inc.*, 16 F.3d 1443, 1453, 25 Bankr. Ct. Dec. (CRR) 413, 30 Collier Bankr. Cas. 2d (MB) 1019, Bankr. L. Rep. (CCH) P 75722, 1994 FED App. 0051P (6th Cir. 1994)). The origin of this quotation appears to be *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S. Ct. 963, 99 L. Ed. 2d 169, 17 Bankr. Ct. Dec. (CRR) 201, 18 Collier Bankr. Cas. 2d (MB) 262, Bankr. L. Rep. (CCH) P 72186 (1988) ("The short answer to these arguments is that whatever equitable powers remain in the bankruptcy court must and can only be exercised within the confines of the Bankruptcy Code.").

[23]Connolly N. Am., 802 F.3d at 815 (citing *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) and *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)).

the facts and the appropriate equitable considerations are generally permissible in Chapter 7 cases.[24]

The court next focused on the specific authorization for substantial contribution claims, which are expressly authorized only in Chapter 9 and 11 cases,[25] and asked whether the express inclusion of Chapter 9 and 11 cases necessarily implies an exclusion of Chapter 7 cases.[26] Reaching the opposite conclusion from that of the lower courts, the majority held there was no such implication, observing that there was no express prohibition on such claims in Chapter 7 cases.[27] The court then turned to the tension between the principle that administrative expenses should be strictly construed, "because they reduce the funds available for creditors and other claimants";[28] and the broad consensus that the statutorily enumerated administrative expenses are not exhaustive,[29] because the statute uses the term "includes,"[30] which is "not limiting."[31] The majority favored inclusion, which permits the allowance of administrative expenses in unanticipated worthy circumstances.[32] Such circumstances would require the demonstration of both a benefit conferred

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[24]Connolly N. Am., 802 F.3d at 815.

[25]11 U.S.C.A. § 503(b)(3)(D), (b)(4).

[26]Connolly N. Am., 802 F.3d at 815–16.

[27]Connolly N. Am., 802 F.3d at 816.

[28]Connolly N. Am., 802 F.3d at 816 (quoting Federated Dep't Stores, 270 F.3d at 1000).

[29]Connolly N. Am., 802 F.3d at 816.

[30]11 U.S.C.A. § 503(b).

[31]11 U.S.C.A. § 102(3).

[32]Connolly N. Am., 802 F.3d at 816. The majority cited two prior Sixth Circuit decisions allowing administrative expenses that were not among those expressly enumerated. In *In re Flo-Lizer, Inc.*, 916 F.2d 363, 365–67, Bankr. L. Rep. (CCH) P 73674, 90-2 U.S. Tax Cas. (CCH) P 50546, 66 A.F.T.R.2d 90-5703 (6th Cir. 1990), the court allowed an administrative expense for post-petition interest on an unpaid post-petition tax claim, despite lack of a the provision for interest, as opposed to penalties, in 11 U.S.C.A. § 503(b)(1)(B) to (C). In *In re George Worthington Co.*, 921 F.2d 626, 633–34, 21 Bankr. Ct. Dec. (CRR) 257, 24 Collier Bankr. Cas. 2d (MB) 308, Bankr. L. Rep. (CCH) P 73743, 109 A.L.R. Fed. 827 (6th Cir. 1990), the court authorized reimbursement of an official creditors' committee's expenses, prior to the enactment of explicit authority to do so in 11

on the estate and that the expenses at issue were actual, necessary and reasonable.[33]

Rejecting the notion that an inclusive interpretation would render the enumerated administrative expenses meaningless, the court reasoned that the enumeration provides examples of common expenses to be allowed, which also serve as guideposts for the consideration of other circumstances.[34] With regard specifically to substantial contribution expenses, the majority observed that the express mention of Chapters 9 and 11 made "good sense" in light of the expected level of creditor participation in such cases, as opposed to all but the most atypical of Chapter 7 cases.[35] In most Chapter 7 cases, the United States trustee's monitoring of the Chapter 7 trustee is sufficient to ensure proper case administration.[36] Nevertheless, the United States trustee "is not a fail-proof safeguard," as illustrated by the facts of the instant case.[37]

Two other canons of statutory construction, *expressio unius est exclusio alterius*[38] and the specific governs the general[39] were also rejected as inapplicable because of the statute's

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U.S.C.A. § 503(b)(3)(F), and despite the limitations in § 503(b)(3)(D) for substantial contributions made by a committee other than an official one.

[33]Connolly N. Am., 802 F.3d at 816.

[34]Connolly N. Am., 802 F.3d at 816–17.

[35]Connolly N. Am., 802 F.3d at 817.

[36]Connolly N. Am., 802 F.3d at 817. The court relied on the functions of the United States trustee to take appropriate actions in bankruptcy cases, 28 U.S.C.A. § 586(a)(3)(G), and to remove substandard trustees from the panel of private trustees maintained by the United States trustee, 28 C.F.R. § 58.6(a)(1),(4). The United States trustee may also seek the removal of a case trustee for cause. 11 U.S.C.A. § 324.

[37]Connolly N. Am., 802 F.3d at 817.

[38]One description of this canon, which means the expression of some things is the exclusion of others, is the "common sense premise that when people say one thing they do not mean something else." 2A Norman Singer & Shambie Singer, Sutherland Statutes and Statutory Construction § 47:23 (7th ed. 2015).

[39]*Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S. Ct. 2031, 119 L. Ed. 2d 157, 1992-1 Trade Cas. (CCH) ¶ 69828 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general.").

use of the term "including."[40] For this reason[41] the majority distinguished the Supreme Court's recent construction of a cramdown provision of the Bankruptcy Code[42] in reliance on the rule that the specific governs the general.[43] Indeed, applying that particular rule to the administrative expenses would violate another cardinal principle of statutory construction, avoiding rendering statutory words superfluous,[44] in this case, the word "including."

The final reason offered by the majority for permitting substantial contribution in appropriate circumstances in Chapter 7 cases was one of policy. Recognizing the policy is the province of Congress not the judiciary, the majority nevertheless stated that to discern the meaning of a specific statutory provision, courts may "properly look to the overall intent and purpose" of the Bankruptcy Code.[45] The failure to permit the reimbursement of the creditors' expenses in this particular Chapter 7 case would both discourage creditor participation in appropriate cases and assail the concept that equitable principles governing bankruptcy relief.[46] Concluding, the court remanded the case to consider the merits of the creditors' substantial contribution request.[47]

The *Connolly* Dissent

The dissent began by stating its areas of agreement with the majority; namely, that bankruptcy is governed by equi-

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[40]Connolly N. Am., 802 F.3d at 817–18.

[41]Connolly N. Am., 802 F.3d at 818.

[42]11 U.S.C.A. § 1129(b)(2)(A).

[43]*RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070–71, 182 L. Ed. 2d 967, 56 Bankr. Ct. Dec. (CRR) 144, 67 Collier Bankr. Cas. 2d (MB) 483, Bankr. L. Rep. (CCH) P 82218 (2012). The Court held that when a plan proposes to sell a secured creditor's collateral, it must preserve the creditor's right to credit bid under 11 U.S.C.A. § 363(k), relying on the specific provision of § 1129(b)(2)(A)(ii), as opposed to the more general provision of § 1129(b)(2)(A)(iii), which allows the creditor to be provided the "indubitable equivalent" of its claim.

[44]Connolly N. Am., 802 F.3d at 818 (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) and *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001)).

[45]Connolly N. Am, 802 F.3d at 818.

[46]Connolly N. Am., 802 F.3d at 818–19.

[47]Connolly N. Am., 802 F.3d at 819.

table principles, which "can only be exercised within the confines of the Bankruptcy Code";[48] and that administrative expenses must be "strictly construed."[49] The dissent then faulted the majority for failing to abide by the principle of strict construction, and instead propounding an expansive construction.[50] Recognizing that Congress did not expressly exclude substantial contribution claims in Chapter 7 cases, the dissent stressed that Congress intentionally specified such claims only in Chapters 9 and 11, and invoked the plain meaning rationale that Congress "says in a statute what it means and means in a statute what it says there."[51]

A key disagreement concerned the interpretation of the statute's use of the term "including." The dissent emphasized the placement of the term at the end of the prefatory passage, in section 503(b), and also preceding the list of estate preservation expenses in subsection 503(b)(1); but, significantly, not at the beginning of the list of reimbursable expenses incurred by creditors and other participants not holding offices created by the Code in subsection 503(b)(3).[52] Stated differently, the inclusion embraced the general categories of administrative expenses in subsections (1) through (9) of section 503(b), and the estate preservation expenses in subparagraphs (A), (B) and (C) of subsection 503(b)(1);[53] but

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[48]Connolly N. Am., 802 F.3d at 820 (dissenting opinion) (quoting *Law v. Siegel*, 134 S. Ct. 1188, 1994, 188 L. Ed. 2d 146, 59 Bankr. Ct. Dec. (CRR) 43, Bankr. L. Rep. (CCH) P 82592 (2014) (quoting, in turn, Ahlers, 485 U.S. at 206)).

[49]Connolly N. Am., 802 F.3d at 820 (dissenting opinion) (quoting Federated Dep't Stores, 270 F.3d at 1000).

[50]Connolly N. Am., 802 F.3d at 820 (dissenting opinion).

[51]Connolly N. Am., 802 F.3d at 821 (dissenting opinion) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. at 6). The origin of this quotation appears to be *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct. 1146, 117 L. Ed. 2d 391, 22 Bankr. Ct. Dec. (CRR) 1130, 26 Collier Bankr. Cas. 2d (MB) 175, Bankr. L. Rep. (CCH) P 74457A (1992).

[52]Connolly N. Am., 802 F.3d at 821 (dissenting opinion).

[53]11 U.S.C.A. § 503(b)(1) also contains a subparagraph (D), which does not refer to another type of allowable administrative expense, but instead relieves a governmental unit from the requirement to file a request for allowance of taxes, fines, penalties or reductions in credit set forth in subparagraph (B) and (C).

not the specific, itemized, reimbursable expenses in paragraphs (A) through (F) of subsection 503(b)(3).

Several other considerations led the dissent to reject the majority's holding. Permitting creditors in Chapter 7 cases to recover expenses would render section 503(b)(3)(D) superfluous.[54] The legislative history of section 503(b)(3)(D) similarly reflects an intention to limit such expenses to Chapter 9 and 11 cases.[55] Reimbursable expenses listed in other subparagraphs of section 503(b)(3) are not restricted to Chapter 9 and 11 cases, suggesting an intention to restrict substantial contribution claims to such chapters.[56] No other court of appeals case or pre-Code precedent has recognized substantial contributions claims in Chapter 7 or straight bankruptcy cases.[57] Nor does any provision within section 503(b) contain an authorization for any similar type of expense in a Chapter 7 case.[58]

Finally, on issues of equity and policy, the dissent observed countervailing considerations to those that persuaded the majority. The creditors seeking reimbursement from the estate held half of the total unsecured debt in the case. As a result, they would receive half of the net benefit resulting from the settlement with former trustee, his professionals and the professional liability carrier. Consequently, no inducement in the nature of a substantial contribution claim was necessary to ensure such creditors' participation. The other, non-major creditors, on the other hand, would see their recoveries diminished from the award of a substantial

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[54]Connolly N. Am., 802 F.3d at 821 (dissenting opinion).

[55]Connolly N. Am., 802 F.3d at 821–22 (dissenting opinion) (reviewing bills introduced between 1975 and 1978).

[56]Connolly N. Am., 802 F.3d at 822 (dissenting opinion). For example, 11 U.S.C.A. § 503(b)(3)(B) grants a reimbursable administrative expense a "creditor that recovers, after the court's approval, for the benefit of the estate property transferred or concealed by the debtor." Prior Sixth Circuit authority, cited by the dissent, held such provision applied in both Chapter 7 and Chapter 11 cases, and in doing so, distinguished § 503(b)(3)(D). *In re Trailer Source, Inc.*, 555 F.3d 231, 243, 51 Bankr. Ct. Dec. (CRR) 46, Bankr. L. Rep. (CCH) P 81415 (6th Cir. 2009).

[57]Connolly N. Am., 802 F.3d at 823–24 (dissenting opinion).

[58]Connolly N. Am., 802 F.3d at 824 (dissenting opinion).

contribution claim.[59] In this regard, the dissent recalled the Supreme Court's caution that courts, as opposed to Congress, should refrain from attempting to provide parties with incentives to encourage or discourage actions in connection with the operation of the Bankruptcy Code.[60]

The Rationales of Administrative Expenses

The administrative expense provision of the Bankruptcy Code, as initially enacted in 1978, derived from section 64a(1) of the Bankruptcy Act of 1898,[61] which provided a first priority of payment to "the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition."[62] Even under the Bankruptcy Act, what constituted the "actual and necessary costs and expenses of preserving the estate" required interpretation. The adoption of reorganization chapters under the Bankruptcy Act led to the recognition that parties providing goods or services to reorganizing businesses must be given priority of payment over pre-petition debts.[63] Beyond post-petition goods and services, the Supreme Court further awarded administrative expense priority to taxes and interest on taxes incurred dur-

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[59]Connolly N. Am., 802 F.3d at 824–25 (dissenting opinion). Because the two creditors who appealed to the Sixth Circuit were collectively labeled "Coface," it is not clear whether the reference to the holder of 50% of the debt was to one or both of them. See also Connolly N. Am., 479 B.R. at 720, 722 (same lack of clarity in the bankruptcy court's opinion making the same observation as the Sixth Circuit dissent).

[60]Connolly N. Am., 802 F.3d at 825 (dissenting opinion) (citing *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644–45, 112 S. Ct. 1644, 118 L. Ed. 2d 280, 22 Bankr. Ct. Dec. (CRR) 1396, 26 Collier Bankr. Cas. 2d (MB) 487, Bankr. L. Rep. (CCH) P 74513A (1992)).

[61]Bankruptcy Act § 64a(1), former 11 U.S.C.A. § 104(a)(1) (repealed 1978); see S. Rep. No. 95-989, at 66–67 (1978); H.R. Rep. No. 95-595, at 335 (1977).

[62]Bankruptcy Act § 64a(1), former 11 U.S.C.A. § 104(a)(1) (repealed 1978).

[63]See *In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir. 1976). This principle is currently codified at 11 U.S.C.A. § 364(a), which automatically treats credit incurred in the ordinary course of an operating business as an allowable administrative expenses under 11 U.S.C.A. § 503(b)(1).

ing the period of a chapter XI,[64] and post-petition torts by a receiver in a chapter XI arrangement.[65]

These principles carried through under the Bankruptcy Code as initially enacted. Administrative expenses are typically viewed as arising from a post-petition transaction with a trustee or debtor in possession and resulting in a benefit to the trustee or debtor in possession in the operation of the business.[66] In addition, businesses operated under bankruptcy court auspices must comply with all federal, state and local tax obligations.[67] Nevertheless, certain non-beneficial post-petition claims, such as post-petition torts, continue to have administrative priority.[68] Since the enactment of the Code, another major category of non-beneficial administrative expense has emerged, environmental clean-up costs associated with property that trustee or debtor in possession is unable to abandon, because it poses an actual

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[64]*Nicholas v. U.S.*, 1966-2 C.B. 511, 384 U.S. 678, 687–88, 86 S. Ct. 1674, 16 L. Ed. 2d 853, 66-1 U.S. Tax Cas. (CCH) P 9465, 17 A.F.T.R.2d 1194 (1966). Taxes and penalties on taxes are currently expressly included in administrative expenses. 11 U.S.C.A. § 503(b)(1)(B) to (C). For some reason, interest on taxes was not expressly included. Nevertheless, the holding regarding interest on taxes in *Nicholas* has been carried through under the Code. See *In re Weinstein*, 272 F.3d 39, 42, 38 Bankr. Ct. Dec. (CRR) 197, 47 Collier Bankr. Cas. 2d (MB) 334, Bankr. L. Rep. (CCH) P 78545, 2002-1 U.S. Tax Cas. (CCH) P 50111, 88 A.F.T.R.2d 2001-7079 (1st Cir. 2001) (collecting cases); Flo-Lizer, 961 F.2d at 365–67; *In re Mark Anthony Const., Inc.*, 886 F.2d 1101, 1106, 19 Bankr. Ct. Dec. (CRR) 1391, Bankr. L. Rep. (CCH) P 73073, 89-2 U.S. Tax Cas. (CCH) P 9550, 64 A.F.T.R.2d 89-5412 (9th Cir. 1989).

[65]*Reading Co. v. Brown*, 391 U.S. 471, 485, 88 S. Ct. 1759, 20 L. Ed. 2d 751 (1968). The Court based its decision on "fairness to all persons having claims against an insolvent" and "the possibility of insurance." 391 U.S. at 477, 483.

[66]*In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 172, 56 Bankr. Ct. Dec. (CRR) 222, 67 Collier Bankr. Cas. 2d (MB) 1770, Bankr. L. Rep. (CCH) P 82311 (3d Cir. 2012), as corrected, (Oct. 25, 2012); *In re Hemingway Transport, Inc.*, 954 F.2d 1, 5, 26 Collier Bankr. Cas. 2d (MB) 372, Bankr. L. Rep. (CCH) P 74431, 22 Envtl. L. Rep. 20719 (1st Cir. 1992); *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 101, 14 Collier Bankr. Cas. 2d (MB) 1075, 7 Employee Benefits Cas. (BNA) 1426, Bankr. L. Rep. (CCH) P 71096 (2d Cir. 1986).

[67]28 U.S.C.A. § 960.

[68]Philadelphia Newspapers, 690 F.3d at 173.

threat to health and safety.[69] If the property may not be abandoned, it must be cleaned up, and if someone other than the trustee or debtor in possession expends funds for the remediation, that someone has an administrative expense claim.[70]

What emerges from this brief review of the interpretation of the administrative expense provisions of both the Bankruptcy Act and the Bankruptcy Code is that such expenses are not strictly limited to the costs of conducting the bankruptcy case or of preserving the estate. Rather, such expenses have included claims that do not benefit the estate, such as post-petition torts or environmental remediation expenses, as a matter of fairness or as a matter of policy driven by other Congressional enactments.[71] This suggests that non-enumerated expenses supported by any of the rationales of benefit to the estate, fairness to the parties, or the protection of other Congressional policies should be eligible for inclusion in the set of allowable administrative expenses.

Changes Made by BAPCPA and Their Consequences

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")[72] amended section 503(b) in several respects, but two changes deserve special attention. First, it added section 503(b)(9), which created an administrative expense priority for certain pre-petition claims, those for the delivery of goods in the ordinary course of business

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[69]*Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 505–06, 106 S. Ct. 755, 88 L. Ed. 2d 859, 13 Bankr. Ct. Dec. (CRR) 1262, 13 Bankr. Ct. Dec. (CRR) 1269, 13 Collier Bankr. Cas. 2d (MB) 1355, 23 Env't. Rep. Cas. (BNA) 1913, Bankr. L. Rep. (CCH) P 70923, 16 Envtl. L. Rep. 20278 (1986).

[70]See *In re Chateaugay Corp.*, 944 F.2d 997, 1010, 22 Bankr. Ct. Dec. (CRR) 74, 25 Collier Bankr. Cas. 2d (MB) 620, 34 Env't. Rep. Cas. (BNA) 1233, 21 Envtl. L. Rep. 21466 (2d Cir. 1991); *In re Dant & Russell, Inc.*, 853 F.2d 700, 709, 18 Bankr. Ct. Dec. (CRR) 301, 20 Collier Bankr. Cas. 2d (MB) 369, 28 Env't. Rep. Cas. (BNA) 1049, Bankr. L. Rep. (CCH) P 72406, 18 Envtl. L. Rep. 21312 (9th Cir. 1988).

[71]See *In re 800Ideas.com, Inc.*, 527 B.R. 701, 707–08, 60 Bankr. Ct. Dec. (CRR) 237 (Bankr. S.D. Cal. 2015) (holding that a penalty for an unreasonable failure to file a S corporation tax return is an unenumerated administrative expense, even though no tax was due, based on fairness to the IRS and the promotion of tax policy).

[72]Pub. L. 109-8, § 212, 119 Stat. 23 (2005).

within 20 days of the petition.[73] Second, it added section 503(c),[74] which prohibited three kinds of administrative expenses: most payments to induce insiders to remain employed,[75] certain severance payments to insiders,[76] and "other transfers or obligations that are made outside the ordinary course of business and not justified by the facts and circumstances of the case."[77]

It must be borne in mind that with the enactment of section 503(b)(9), Congress has broken through a wall. No longer can it be categorically stated that pre-petition claims are ineligible for administrative expense status. Perhaps breaches of this wall should be strictly limited: No other pre-petition claims should be considered for such treatment. Nevertheless, at the same time, Congress enacted a statute that specifically denies administrative expense status in three instances. Certainly, if Congress wished to permit only one breach of the wall, it could have expressly provided that no other pre-petition claim may be considered for administrative expense status.

In light of the rationales for administrative expenses and the changes made by BAPCPA discussed above, the question may be posed how the term "including" in section 503(b) should be construed, especially with regard to the provisions of section 503(b) that were not amended. Courts have

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[73]11 U.S.C.A. § 503(b)(9), added by BAPCPA § 1227(b).

[74]11 U.S.C.A. § 503(c), added by BAPCPA § 331.

[75]11 U.S.C.A. § 503(c)(1); see *In re Dana Corp.*, 351 B.R. 96, 103, 47 Bankr. Ct. Dec. (CRR) 6, 39 Employee Benefits Cas. (BNA) 2462, Bankr. L. Rep. (CCH) P 80734 (Bankr. S.D. N.Y. 2006) (denying approval of first version of compensation plan as violative of § 503(c)(1)); *In re Dana Corp.*, 358 B.R. 567, 584, 47 Bankr. Ct. Dec. (CRR) 126, Bankr. L. Rep. (CCH) P 80803 (Bankr. S.D. N.Y. 2006) (conditionally approving second version of compensation plan).

[76]11 U.S.C.A. § 503(c)(2); see *In re AMR Corporation*, 497 B.R. 690, 697–98, 58 Bankr. Ct. Dec. (CRR) 126, 70 Collier Bankr. Cas. 2d (MB) 317 (Bankr. S.D. N.Y. 2013) (disapproving severance payment to debtors' outgoing chief executive officer).

[77]11 U.S.C.A. § 503(c)(3); see *In re Pilgrim's Pride Corp.*, 401 B.R. 229, 236–37, Bankr. L. Rep. (CCH) P 81432 (Bankr. N.D. Tex. 2009) (holding that § 503(c)(3) requires the court to engage in a more searching analysis of an applicable transaction than the business judgment test applicable under § 363(b)(1)). But see Dana Corp., 351 B.R. at 102 (holding business judgment test applicable).

employed *ejusdem generis*[78] to interpret what non-enumerated "cause" may be used to dismiss a Chapter 7 under section 707(a), which lists three causes, preceded by "including."[79] Indeed, this canon of statutory interpretation seems particularly well suited to apply to an enumeration preceded by "including," since it would yield the same interpretive results as if the statute had instead been written to insert a residual phrase, such as "and other similar things" at the end.[80] Significantly, if the interpretation of the statute is aided by *ejusdem generis* or other the statutory construction tools, such as *expressio unius est exclusion alterius*,[81] or *noscitur a sociis*,[82] and the statute is amended by changing the list, then it stands to reason that the interpre-

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[78]The Latin phrase, which means of the same kind, is employed as a tool of statutory construction when general words follow specific ones in an enumeration to limit the meaning of the general words to matters similar to the specific ones to avoid rendering the specific ones superfluous. 2A Norman Singer & Shambie Singer, Sutherland Statutes and Statuory Construction § 47:17 (7th ed. 2015).

[79]See *McDow v. Smith*, 295 B.R. 69, 74, 92 A.F.T.R.2d 2003-5037 (E.D. Va. 2003); *In re Lobera*, 454 B.R. 824, 841–42 (Bankr. D. N.M. 2011). See generally, Alec P. Ostrow, "Insider 'Includes'? Include Me Out," 7 Am. Bankr. Inst. L. Rev. 601, 615–18 (1999) (contending that *ejusdem generis and noscitur sociis* represent appropriate statutory construction tools to determine what the definition of "insider" includes).

[80]See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15, 121 S. Ct. 1302, 149 L. Ed. 2d 234, 85 Fair Empl. Prac. Cas. (BNA) 266, 17 I.E.R. Cas. (BNA) 545, 79 Empl. Prac. Dec. (CCH) P 40401, 143 Lab. Cas. (CCH) P 10939 (2001) (applying *ejusdem generis* to a residual phrase in § 1 if the Federal Arbitration Act, 9 U.S.C.A. § 1).

[81]See n.38, supra, for a definition of the Latin phrase. This doctrine is to be employed "only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Rai v. WB Imico Lexington Fee, LLC*, 802 F.3d 353, 362 (2d Cir. 2015) (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S. Ct. 748, 154 L. Ed. 2d 653, 29 Employee Benefits Cas. (BNA) 2089 (2003)).

[82]This doctrine, essentially that a word in a statute is "known by the company it keeps" is used to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to Acts of Congress.' " *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575, 115 S. Ct. 1061, 131 L. Ed. 2d 1, Fed. Sec. L. Rep. (CCH) P 98,531 (1995) (quoting *Jarecki v. G. D. Searle & Co.*, 1961-2 C.B. 254, 367 U.S. 303, 307, 81 S. Ct. 1579, 6 L. Ed. 2d 859, 61-2 U.S. Tax Cas. (CCH) P 9503, 7 A.F.T.R.2d 1585 (1961)). See also 2A Norman Singer &

tation must change as well.[83] Stated differently, what is encompassed by "including" changes as the list that follows "including" changes.

Applying *Connolly North America* to a BAPCPA-Changed List of Administrative Expenses

The natural starting point for applications of the *Connolly North America* result is to the reimbursement of creditors and other participants not holding offices created by the Code and compensation for their professionals. As of this writing one court outside the Sixth Circuit, citing *Connolly North America*, has already considered the merits of a substantial contribution claim in a Chapter 7 case.[84] The more interesting questions are whether the *Connolly North America* precedent can be used to revisit other situations in which courts have refused compensation requests under other statutory provisions, and seek to have them allowed as administrative expenses under section 503(b).

Notably, in *Lamie v. United States Trustee*[85] the Supreme Court held that a 1994 amendment to section 330 of the Bankruptcy Code barred an award of compensation to counsel for the Chapter 7 debtor.[86] Prior to the 1994 amendment, section 330 expressly authorized such awards. In 1994, the entire section was comprehensively revised, and provision for the award to counsel for such debtor was left out.[87] The Court, rejecting the suggestions by other courts of inad-

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Shambie Singer, Sutherland Statutes and Statuory Construction § 47:16 (7th ed. 2015) (discussing *noscitur a sociis*).

[83]Cf. *Studio Frames Ltd. v. Standard Fire Ins. Co.*, 397 F. Supp. 2d 674, 683 (M.D. N.C. 2005), aff'd, 483 F.3d 239 (4th Cir. 2007).(" Another canon of statutory construction states that when the wording of an amended statute differs in substance from the wording of the statute prior to amendment, Congress intended the amended statute to have a different meaning. ")

[84]*In re Ideal Mortgage Bankers, Ltd.*, 539 B.R. 409, 434–35 (Bankr. E.D. N.Y. 2015). The court denied the substantial contribution claim.

[85]*Lamie v. U.S. Trustee*, 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024, 42 Bankr. Ct. Dec. (CRR) 122, 50 Collier Bankr. Cas. 2d (MB) 1299, Bankr. L. Rep. (CCH) P 80038 (2004).

[86]Lamie, 540 U.S. at 538.

[87]Lamie, 540 U.S. at 529–30. Presumably, the same analysis applies to a debtor in a Chapter 11 case when a Chapter 11 trustee is serving.

vertence,[88] read the revised statute in accordance with its plain meaning.[89] Since an award under section 330 is foreclosed, one may inquire whether an award under section 503(b) is now available. Specifically, if creditors making a substantial contribution in a Chapter 7 case may be granted an administrative award for their counsel, there seems to be little reason why compensation for a Chapter 7 debtor's counsel cannot be "included" as well, especially if such counsel meets the *Connolly North America* criteria of conferring a benefit on the estate and being actual, necessary and reasonable.[90]

It must be observed that the *Lamie* Court did not address section 503(b),[91] and section 503(c) does not prohibit such an award.[92] Moreover, a section 503(b) award for debtor's counsel would not circumvent section 330, since debtor's counsel is not a retained professional for the services at issue.[93] The amount of a section 503(b) award for debtor's counsel would not necessarily equal that of a section 330

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[88]See *In re Top Grade Sausage, Inc.*, 227 F.3d 123, 130, 36 Bankr. Ct. Dec. (CRR) 194 (3d Cir. 2000); *In re Century Cleaning Services, Inc.*, 195 F.3d 1053, 1061, 35 Bankr. Ct. Dec. (CRR) 63, 43 Collier Bankr. Cas. 2d (MB) 59, Bankr. L. Rep. (CCH) P 78054 (9th Cir. 1999); *In re Ames Dept. Stores, Inc.*, 76 F.3d 66, 71–72, 19 Employee Benefits Cas. (BNA) 2675, Bankr. L. Rep. (CCH) P 76953 (2d Cir. 1996) (citing to 2 Collier on Bankruptcy, ¶¶ 330.01, 330.04).

[89]Lamie, 540 U.S. at 536.

[90]Connolly N. Am., 802 F.3d at 816.

[91]See Lamie, 540 U.S. at 529, 538–39.

[92]11 U.S.C.A. § 503(c)(3) prohibits transfers that are "outside the ordinary course of business and not justified by the facts and circumstances of the case." A transfer that on account of services that benefit the estate, and are actual, necessary and reasonable would be justified by the facts and circumstances of the case.

[93]11 U.S.C.A. § 330(a)(1) governs award of professional compensation to "a professional person employed under section 327 or 1103." 11 U.S.C.A. § 327(a) authorizes the trustee to employ professional persons with the court's approval. 11 U.S.C.A. § 1103(a) authorizes an official committee to employ professional persons with the court's approval. A debtor in possession has the rights, powers and duties of a trustee, 11 U.S.C.A. § 1107(a), so professional persons employed by a debtor in possession are therefore employed under section 327. Unless the debtor is a debtor in possession, a debtor's attorney is not retained under section 327 or 1103, and therefore, such attorney's compensation would not be governed by section 330. This analysis would not aid an attempt to use 11 U.S.C.A. § 503(b) to obtain an

award, since section 330 provides other bases besides actual benefit to the estate on which to premise an award.[94] Nevertheless, some portion of debtor's counsel's services ought to be considered eligible for a section 503(b) award in a court adopting the reasoning of *Connolly North America*.

In another set of compensation cases, certain creditors that play major roles in confirmed Chapter 11 cases have sought and obtained plan provisions authorizing the compensation of their counsel without having to satisfy the criteria governing substantial contribution claims.[95] The justification for such compensation was found in Code provisions authorizing plans to include "any appropriate provision not inconsistent with the applicable provisions of" the Bankruptcy Code,[96] and requiring payments made in connection with the plan or the case to "approved by, or subject to the approval of, the court as reasonable."[97] This line of bankruptcy court cases was dealt a setback by a district court that reversed a bankruptcy court decision[98] and held the plan provisions inconsistent with the statute's express requirement to demon-

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award for a retained professional for defending an objection to a fee application, thus circumventing the holding of *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169, 192 L. Ed. 2d 208, 61 Bankr. Ct. Dec. (CRR) 41, 73 C.B.C. 1017, Bankr. L. Rep. (CCH) P 82811 (2015).

[94]11 U.S.C.A. § 330(a)(3)(C) allows compensation for services that "were necessary to the administration of, or beneficial at the time at which the service was rendered to toward the completion of, a case" under the Bankruptcy Code.

[95]See AMR Corp., 497 B.R. at 693, 695–96 (members of the official creditors' committee); *In re Lehman Brothers Holdings Inc.*, 487 B.R. 181, 187, 190–91, 57 Bankr. Ct. Dec. (CRR) 159 (Bankr. S.D. N.Y. 2013), vacated and remanded, 508 B.R. 283, 59 Bankr. Ct. Dec. (CRR) 80 (S.D. N.Y. 2014), motion to certify appeal denied, 2014 WL 3408574 (S.D. N.Y. 2014) (indenture trustees and members of the official creditors' committee); *In re Adelphia Communications Corp.*, 441 B.R. 6, 8, 19–22, 53 Bankr. Ct. Dec. (CRR) 267 (Bankr. S.D. N.Y. 2010) (ad hoc committees and individual creditors).

[96]11 U.S.C.A. § 1123(b)(6).

[97]11 U.S.C.A. § 1129(a)(4).

[98]*In re Lehman Bros. Holdings Inc.*, 508 B.R. 283, 291–94, 59 Bankr. Ct. Dec. (CRR) 80 (S.D. N.Y. 2014), motion to certify appeal denied, 2014 WL 3408574 (S.D. N.Y. 2014), rev'g *In re Lehman Brothers Holdings Inc.*, 487 B.R. 181, 57 Bankr. Ct. Dec. (CRR) 159 (Bankr. S.D. N.Y. 2013), vacated and remanded, 508 B.R. 283, 59 Bankr. Ct. Dec. (CRR) 80 (S.D. N.Y. 2014), motion to certify appeal denied, 2014 WL 3408574 (S.D. N.Y.

strate a substantial contribution.[99] Nevertheless, if section 503(b) is construed more broadly, under the *Connolly North America* holding, satisfying the requirement of a substantial contribution would not be the sole method of establishing an allowable administrative expense. The actual, necessary and reasonable services that provide a benefit to the estate,[100] as evidenced by a provision in a confirmed Chapter 11 plan, could be awarded without offending section 503(b).

Separate and apart from issues of compensation, the *Connolly North America* interpretation of section 503(b), as applied to the post-BAPCPA inclusion of one category of pre-petition debt, can also supply a statutory grounding for certain "first-day" payments,[101] such as those to employee creditors,[102] foreign creditors,[103] or to "critical vendors"[104] that

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2014). The district court subsequently denied a motion to certify its decision for an interlocutory appeal under 28 U.S.C.A. § 1292(b). *In re Lehman Bros. Holdings Inc.*, 2014 WL 3408574 (S.D. N.Y. 2014). See generally, Jeffrey Chubak, Nixing Permissive Plan Payments Effectively Repeals § 1129(a)(4), 39 Am. Bankr. Inst. L.J., July 2014, at 18–19, 72–73 (criticizing the district court's decision).

[99]11 U.S.C.A. § 503(b)(3)(D), (b)(4).

[100]Connolly N. Am., 802 F.3d at 816.

[101]Fed. R. Bankr. P. 6003(b) restricts the relief that may be granted in "first-day" and other motions heard prior to 21 days after the filing of the petition for authority "to pay all or part of a claim that arose before the filing of the petition" to that which will "avoid immediate and irreparable harm."

[102]See *In re Gulf Air, Inc.*, 112 B.R. 152, 153, 20 Bankr. Ct. Dec. (CRR) 435, Bankr. L. Rep. (CCH) P 73310 (Bankr. W.D. La. 1989); see also *In re The Colad Group, Inc.*, 324 B.R. 208, 214, 44 Bankr. Ct. Dec. (CRR) 194, 54 Collier Bankr. Cas. 2d (MB) 350 (Bankr. W.D. N.Y. 2005) (approving as a "first-day" order payments of pre-petition employee claims to the maximum priority amounts in § 507(a) for employ wage and contribution claims).

[103]See *In re Cenargo Intern., PLC*, 294 B.R. 571, 580 (Bankr. S.D. N.Y. 2003) (referring to prior authorization granted to pay foreign creditors under the "doctrine of necessity"); see also *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 5–6 (Bankr. S.D. N.Y. 2003) (referring to authorization granted to pay foreign creditors to prevent the seizure of assets without discussing the basis for the authorization).

[104]See *In re Just For Feet, Inc.*, 242 B.R. 821, 824, 43 Collier Bankr. Cas. 2d (MB) 476 (D. Del. 1999); *In re CoServ, L.L.C.*, 273 B.R. 487, 496, 38 Bankr. Ct. Dec. (CRR) 266, 47 Collier Bankr. Cas. 2d (MB) 851 (Bankr.

have been justified under the "doctrine of necessity."[105] The salient court of appeals case, the Seventh Circuit's decision in *Kmart*,[106] rejected the "doctrine of necessity" as a basis to authorize such payment, because it is an equitable doctrine outside the confines of the Bankruptcy Code.[107] Significantly for present purposes, *Kmart* also rejected the use of section 503(b), because the pre-BAPCPA understanding of the statute left room only for post-petition expenses as administrative expenses.[108] Instead, *Kmart* suggested, but did not hold, that statutory grounding for the payment of pre-petition critical vendors could be found in section 363(b)(1),[109] but any such use would require the demonstration that all creditors would be benefited by such payments, including the non-favored creditors.[110]

BAPCPA's addition of one category of pre-petition debt to

N.D. Tex. 2002) (both discussing the "necessity of payment" doctrine); see also *In re EcoSmart, Inc.*, 2015 WL 9274245, at *4–9 (Bankr. C.D. Cal. Dec. 18, 2015) (treating a motion to pre-petition claims for commissions for corporations not qualifying for the employee priority in 11 U.S.C.A. § 507(a)(4) as a motion to pay "critical vendors" and denying it).

[105]See *Miltenberger v. Logansport C. & S.W.R. Co.*, 106 U.S. 286, 311, 1 S. Ct. 140, 27 L. Ed. 117 (1882) (establishing what later became the "necessity of payment" doctrine in railroad reorganizations). See generally, Alan N. Resnick, The Future of the Doctrine of Necessity and Critical-Vendor Payments in Chapter 11 Cases, 47 B.C. L. Rev. 183, 184–92 (2005) (discussing the doctrine of necessity and its application to Bankruptcy Code cases).

[106]*In re Kmart Corp.*, 359 F.3d 866, 42 Bankr. Ct. Dec. (CRR) 166, 51 Collier Bankr. Cas. 2d (MB) 1076, Bankr. L. Rep. (CCH) P 80054 (7th Cir. 2004).

[107]Kmart, 359 F.3d at 871. For similar reasons, the court also rejected the use of 11 U.S.C.A. § 105(a) as authority to pay pre-petition debt.

[108]Kmart, 359 F.3d at 872 ("Pre-filing debts are not administrative expenses; they are the antithesis of administrative expenses. Filing a petition for bankruptcy effectively creates two firms: the debts of the pre-filing entity may be written down so that the post-filing entity may reorganize and continue in business if it has a positive cash flow. Treating pre-filing debts as 'administrative' claims against the post-filing entity would impair the ability of bankruptcy law to prevent old debts from sinking a viable firm.") (citation omitted).

[109]11 U.S.C.A. § 363(b)(1) authorizes the court to approve a use of property of the estate out of the ordinary course of business.

[110]Kmart, 359 F.3d at 872–74.

the list of administrative expenses,[111] and its failure to prohibit other categories of justifiable pre-petition debt from qualifying as administrative expenses,[112] has removed the *Kmart* court's objection to section 503(b)'s serving as a source of authority for critical vendor payments.[113] Indeed, if the inclusion in section 503(b) is interpreted broadly as in *Connolly North America*, the changes made by BAPCPA may furnish a justification for finding that the "doctrine of necessity" now fits within the confines of the Bankruptcy Code. Certainly, by avoiding a catastrophic loss, these putative administrative expenses provide a benefit to the estate. The necessity and the benefit are the same. If these payments are also actual and reasonable, they have all the qualifications for an unenumerated administrative expense under *Connolly North America*.[114] Their status as pre-petition debts should no longer keep them from qualifying.[115]

Conclusion

The tension between the strict construction and the inclusive nature of administrative expenses, as exemplified by the contrasting opinions in *Connolly North America*, is palpable. Both the majority and the dissent offer ample justification for their contrasting views. The history of the interpretation of administrative expenses, however, demonstrates the need to allow certain kinds of expenses that were not statutorily enumerated, based on benefit to the estate, fairness to the parties, or the promotion of other Congressional policies. Significantly, because BAPCPA added to the list of allowable administrative expenses, the list of what else

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[111] 11 U.S.C.A. § 503(b)(9).

[112] 11 U.S.C.A. § 503(c)(1) to (3).

[113] But see Alan N. Resnick, The Future of the Doctrine of Necessity and Critical-Vendor Payments in Chapter 11 Cases, 47 B.C. L. Rev. 183, 209 (2005) (suggesting that by allowing one type of pre-petition claim to achieve administrative expense status, there is a negative inference to be drawn against allowing other to achieve similar status).

[114] Connolly N. Am., 802 F.3d at 816.

[115] Cf. Mark A. McDermott, Critical Vendor and Related Orders: Kmart and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 14 Am. Bankr. Inst. L. Rev. 409, 410 (2006) (suggesting that the Kmart court's concern about paying certain pre-petition debts prior to plan confirmation may warrant reexamination in light of BAPCPA's introduction of a pre-petition administrative expense).

may be included must also have been augmented. This list now includes pre-petition debt. The approach of the *Connolly North America* majority, which permits claims for substantial contribution in Chapter 7 cases, may be employed not only to allow compensation claims for beneficial services that are unauthorized by other Code provisions, but also to provide a statutory grounding as administrative expenses for "critical vendor" and other pre-plan payments of pre-petition debt. Indeed, the "doctrine of necessity" may at last be able to exist within the confines of the Bankruptcy Code.