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Part I. Articles
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The Standing of Derivative Standing

I. INTRODUCTION

A. The Powers and Duties of a Debtor or a Trustee

The filing of a bankruptcy petition creates an estate[2] that is made up of all of the property listed in 11 U.S.C. § 541, wherever it is located and whomever holds it, including all legal or equitable interests of the debtor in property as of the commencement of the bankruptcy case.[3] The scope of the term "property of the estate" is considered to be very broad.[4] The citation in 11 U.S.C. § 541(a)(1) to "all legal or equitable interests of the debtor in property" has been held to include causes of action belonging to the debtor at the time the case is started.[5]

Until a corporate debtor can be either reorganized or liquidated under a plan of reorganization pursuant to 11 U.S.C. §§ 1121–1129, a trustee, or the debtor, is authorized to manage the property of that debtor's estate.[6] In cases under chapter 11, the debtor usually acts as its own trustee.[7] When a debtor is acting as its own trustee, he is commonly referred to as a "debtor in possession."[8]

The source of the commonality of the powers and duties of debtors and trustees is found in 11 U.S.C. § 1107, which states that "a debtor in possession shall have all the rights … and powers, and shall perform all the functions and duties … of a trustee serving in a case under this chapter."[9] This provision specifically grants the debtor all of the rights and powers of a trustee with only a few limited exceptions. Based upon this language, a chapter 11 debtor is entitled to employ the avoidance powers set forth in chapter 5.[10] Since a debtor, for the most part, performs the same functions as a trustee in a reorganization,[11] the debtor, by necessity, both enjoys the rights and fulfills the duties of a trustee.[12]

> Respondents also ignore that if a debtor remains in possession — that is, if a trustee is not appointed the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession. Wolf v. Weinstein, 372 U.S. 633, 649–652 (1963). Indeed, the willingness of courts to leave debtors in possession "is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee". Id. at 651.[13]

A trustee in bankruptcy, or a debtor in possession, is a fiduciary, and represents both the secured and unsecured creditors of the debtor.[14]

It has been said, that a trustee, or a debtor, colloquially speaking, "owns" the claims of the estate since they are part of the estate which either the trustee or the debtor controls.[15] The trustee, or the debtor, "owns" the claims of the unsecured creditors only by virtue of the fact that they control the prosecution of these claims. They are not the beneficial owners; instead, they are the fiduciary of the creditors.[16]

As one of its duties, a trustee or a debtor is not only allowed to but is required to collect the property of the estate.[17] According to the Supreme Court, "the trustee is accountable for all property received, [11 U.S.C.] §§ 704(2), 1106(a)(1), and has the duty to maximize the value of the estate, see [11 U.S.C.] § 704(1)."[18] Based upon this authority, a trustee or a debtor has the authority to bring a lawsuit for damages on behalf of a debtor corporation against the corporate principals for gross negligence, mismanagement or breach of fiduciary duty where such an action could have been asserted by the debtor corporation, or by its stockholders in a derivative action, before the bankruptcy case began.[19]

Only the debtor or the trustee is entitled to collect the property of the estate and reduce it to money.[20] In this way, a trustee or, if none has been appointed, the debtor, may initiate proceedings to cover preferentially or fraudulently transferred assets.[21] The trustee has the explicit power to sue and be sued.[22]

Chapter 11 and chapter 7 have different goals. The aim of chapter 11 is to give a debtor the legal protection necessary to afford it the chance to reorganize and, in the process, provide creditors with going concern value rather than the possibility of satisfying their claims through liquidation. Accordingly, the maximization of the value of the estate is not necessarily the chief aim of a chapter 11 reorganization as it would be in a chapter 7 liquidation.[23] This does not mean that a debtor, in a chapter 11 case, does not have the obligation to conserve and protect the estate's assets, including accounts receivable.[24]

In some instances, a debtor may not pursue litigation due to a perceived conflict of interest. For example, a corporate debtor may not initiate litigation against its own officers and directors.[25] As a result of the duties bestowed upon a chapter 11 debtor or trustee, the failure to bring an action to avoid a preferential or fraudulent transfer could be considered an abuse of discretion.[26] This is because the creditors' interests in a chapter 11 case are not protected where the debtor fails to satisfy its duty to collect property of the estate. If a valid and potentially profitable cause of action does exist under state law, which the debtor is entitled to assert on behalf of the corporation, all of the creditors are injured when the debtor refuses to pursue it. The value of the estate is not maximized and the ultimate recovery of all of the creditors is lessened.[27]

B. The Available Options to a Dissatisfied Individual Creditor or a Committee

If an individual creditor or a committee is of the opinion that the debtor or the trustee is not acting as it should, the Bankruptcy Code provides a number of alternative options. A motion for the appointment of a trustee or an examiner can be filed pursuant to 11 U.S.C. § 1104. A motion can also be filed to convert the case from chapter 11 to chapter 7, pursuant to 11 U.S.C. § 1112. A third choice is to file a motion to dismiss the bankruptcy case.[28] Pursuing any one of these various options does not automatically guarantee that the debtor will initiate litigation that it has failed to file. In such circumstances, going forward with any one of these alternatives may not result in such litigation being commenced.

That is why individual creditors, and committees, sometimes resort to a fourth option: derivative standing. Derivative standing occurs when courts allow creditors, or committees, the derivative right to bring avoidance actions when the debtor or trustee refuses to do so.[29]

C. A Pre-Bankruptcy Code Primer on Derivative Standing

Since 1898, it has been a recognized part of the bankruptcy landscape that creditors were entitled to recover property for the benefit of the estate and have their attorney's fees paid out of the estate.[30] Under the prior Bankruptcy Act, derivative standing was known as the reimbursable creditor recovery doctrine, and began as judge-made law.[31]

In 1903, this judge-made law was codified into § 64 of the Bankruptcy Act.[32] Creditors that acted for the benefit of the estate were entitled to employ the name of the bankruptcy trustee.[33] Case law imposed a restriction that once a trustee was appointed, a creditor normally needed permission from the trustee or the court before it acted to bring property back into the estate.

> Yet orderly administrative practice calls for a qualification. It is primarily for the trustee to decide whether the estate should embark on an attempt to recover concealed or transferred assets. The right to attorney's fees is, therefore, limited to cases in which the services are rendered either before a trustee has been appointed or in which a trustee has been given an opportunity to intervene and has refused to do so, even though the creditor is allowed to proceed in the trustee's name.[34]

Prior to the decision in In re Eureka Upholstering Co.,[35] it had become settled law that the trustee could give permission to a creditor to initiate such litigation.[36]

D. A Roadmap on Derivative Standing

This article is intended to present a roadmap on the evolution of the concept of derivative standing. It will examine the application of this theory up until the Hartford[37] decision, which, intentionally or not, fundamentally altered the way courts applied this theory. A review of the cases that came down after the Hartford[38] ruling will be reviewed to show the impact of that decision.

In September 2002, the decision in Cybergenics[39] was published. This case, figuratively speaking, seismically appeared on the derivative standing scene and applied the ruling in the Hartford[40] case so strictly as to virtually eradicate derivative standing as it had been previously understood. That decision will be compared and contrasted with the ruling of the Second Circuit in the case of In re Housecraft Industries USA, Inc.,[41] which reached a completely opposite result from the Third Circuit in Cybergenics.[42]

II. DERIVATIVE STANDING UNDER THE BANKRUPTCY CODE

Derivative standing is not explicitly mentioned or authorized in the Bankruptcy Code.[43] By the same token, it is also true that the Bankruptcy Code does not prohibit derivative standing.[44]

Prior to the decision in Hartford[45] decision, courts based their decisions in favor of derivative standing on one or more of four separate grounds. Some courts relied upon 11 U.S.C. § 1103(c)(5).[46] Other courts allowed derivative standing based upon 11 U.S.C. § 1109(b).[47] Still other courts relied on both of these statutory provisions. Finally, a last grouping of courts, instead of basing their decisions on 11 U.S.C. § 1103(c)(5) and/or § 1109(b), justified derivative standing under the principles of equity.

A. Reliance on 11 U.S.C. § 1103(c)(5)

A case exemplifying upholding the concept of derivative standing based upon 11 U.S.C. § 1103(c)(5) is In re First Capital Holdings Corp.[48] In that case, the bankruptcy court held that an exception to the general rule that a demand on the corporate board of directors be made before a derivative action is maintained would be adopted from corporate law to provide for an excuse of such a demand in a bankruptcy case of the corporate debtor upon an adequate showing that the demand was futile, and a creditors' committee accordingly could be excused from making the demand upon the debtor to pursue a cause of action on behalf of the estate where such demand was deemed to be futile. In addition, the court also held that a demand upon the chapter 11 corporate debtor's board of directors would be excused as futile and the creditors' committee would be authorized to prosecute claims against officers, directors, and the controlling shareholder of the debtor, where the committee's complaint alleged specific acts of wrongdoing by members of the board of directors and principal shareholder, conspiracy among some of the directors and other named defendants, and domination of the board of directors by the principal shareholder.

The court began its reasoning by holding that a trustee, and a debtor in possession in a chapter 11 case, had the power to bring an action against a corporate debtor's principal for damages on behalf of the corporation for gross negligence, mismanagement or breach of fiduciary duty where such an action could have been asserted by the debtor corporation, or by its stockholders in a derivative action, before the bankruptcy case had been filed.[49] Nevertheless, in the right circumstances, a committee of unsecured creditors could be authorized to bring such an action instead of a debtor in a chapter 11 case, although the committee could not initiate such a lawsuit where the debtor had done so itself.[50] The court was wrestling with the question of whether a demand on the debtor to bring such an action was always a precondition to a creditors' committee filing that action.[51]

The court held that a creditors' committee has an obligation to act when the debtor fails to do so, on behalf of the estate. In reaching this result, the court explained that a creditors' committee had available to it several alternative courses of action in those circumstances which included: a motion to replace the debtor in possession with a chapter 11 trustee; a motion to convert the case to a case under chapter 7; a motion to dismiss the chapter 11 case; a motion to compel the debtor in possession to act; or, the creditors' committee could request permission from the court to commence an action itself on behalf of the estate. If the committee thought that the debtor had failed to fulfill its duty to prosecute actions, the committee, itself, had a duty to bring this to the attention of the court. In so doing, this advanced the fair and orderly administration of the bankruptcy estate by providing judicial monitoring over the litigation to be pursued.[52]

Although the bankruptcy court pointed out that there was no explicit authority for a creditors' committee to begin an adversary proceeding on behalf of the estate, the bankruptcy court implied such a right under 11 U.S.C. § 1103(c)(5).[53] In arriving at this ruling, the bankruptcy court held that four requirements had to be satisfied before a committee could bring an action on behalf of the estate: (1) the claim had to be colorable; (2) the committee had to make a demand on the debtor to bring the action; (3) the debtor had to have refused unjustifiably to pursue the claim; and (4) the committee must have first obtained leave to sue from the bankruptcy court.[54]

The court was unable to locate any authority to permit excusing a creditors' committee from making a demand on a debtor before bringing a cause of action belonging to the debtor,[55] but ruled that bankruptcy law had adopted from corporate law the requirement that demand be made on a corporation to pursue a cause of action before the owners may pursue it on behalf of the corporation but that the exception to this demand requirement should also be adopted from corporate law that this demand should be excused upon an adequate showing that such demand was futile. In this way, a creditors' committee could be excused from making a demand upon a debtor to pursue a cause on behalf of the estate where such a demand would be of no avail.[56]

On the basis of its holding, the court found that under the circumstances at hand, it had the discretion to excuse a demand upon the debtor's board of directors as futile and to authorize the creditors' committee to proceed to prosecute the claims against the officers, directors and controlling shareholder of the debtor.[57]

B. Reliance on 11 U.S.C. § 1109(b)

Some decisions, that have been in favor of the application of derivative standing, have based their rulings on 11 U.S.C. § 1109(b). In the case of Coral Petroleum, Inc. v. Banque Paribas-London,[58] the unsecured creditors' committee filed a lawsuit in district court seeking a determination that a particular transaction had constituted a preference. The committee claimed standing to sue the creditor due to the debtor's refusal to proceed. This lawsuit was filed in July of 1984. In February of 1985, a stipulation executed by the debtor was filed in the bankruptcy court expressly granting the committee the right to sue this creditor for any reason, including preference claims. In April of 1985, a stipulation by the debtor was filed in the bankruptcy court granting the committee standing to pursue any action that the debtor did not bring by April 1, 1985. In July of 1985, the committee obtained a signature of the debtor's counsel on a document that stated that the April stipulation was intended to allow the committee to prosecute the cause of action that was the subject of this decision.[59]

In October of 1984, the creditor-defendant filed a motion to dismiss the preference claim under Federal Rule of Civil Procedure (the "FRCP") 12(b), which the district court treated as a motion for summary judgment under FRCP 56. After examining the evidentiary record before it, the district judge dismissed the committee's preference claim. In reaching this result, the district court held that the committee did not have standing to sue the creditor, but that it could sue the creditor because the creditor was specifically mentioned in the standing stipulation. The judge also ruled that intervention under 11 U.S.C. § 1109(b) was not warranted because there were no extenuating circumstances that would permit it. On the merits of the preference action, the district court held that as to the creditor, there was no preference because the funds were "earmarked" to pay the debtor's underlying debt and the debtor had no control over their use.[60]

The court of appeals disagreed with the lower court with respect to the standing of the committee to sue the creditor, in the absence of the stipulation. This was based on 11 U.S.C. § 1109(b). In coming to this conclusion, the Fifth Circuit pointed out its previous decision in the case of Fuel Oil Supply and Terminaling Co. v. Gulf Corp.,[61] where the Fifth Circuit held that 11 U.S.C. § 1109(b) does not create an automatic right to intervention; but, instead, places intervention in the Bankruptcy Code at the same level as FRCP 24(a)(2), which permits intervention when a party with an interest in the proceeding would have its rights impaired if it were not allowed to intervene and those rights are not protected by the parties that are in the suit. In that prior case, the Fifth Circuit had held that the intervention rights under 11 U.S.C. § 1109(b) are wide-ranging in keeping with the policies of the Bankruptcy Code and the prior Bankruptcy Act.[62] In that other decision, the Fifth Circuit pointed out that the right to intervene was not absolute because the bankruptcy court can stop duplicative cases where the claimant's interests are already protected under the existing litigation; and had explicitly set forth in that case that bankruptcy cases dealing with the right to initiate proceedings by a creditors' committee are analogous to intervention cases because courts in deciding these cases use the FRCP 24(a)(2) analysis.[63]

Although the debtor had refused to sue the creditor, the committee still desired to bring that action. The court ruled that if a preference did exist under 11 U.S.C. § 547, the unsecured creditors' interests, which were represented by the committee, would not have been protected and that therefore the intervention should have been allowed; but because no preference existed, the lawsuit was properly dismissed. In reaching this decision about allowing the unsecured creditors' committee standing, the court mentioned that a general right to be heard would be an empty grant unless those who had such a right were allowed to act when those who should act did not.[64]

A second case that has relied upon 11 U.S.C. § 1109 in upholding derivative standing is In re Nicolet, Inc.[65] In that case, a creditors' committee filed a motion wherein it sought leave of court to commence a lawsuit against the debtor's parent and sole shareholder to recover the payment of dividends, management fees and debt payments to that parent totaling in excess of $4.6 million. Before the committee's motion could be finally adjudicated, the debtor commenced an adversary proceeding based upon most of the Bankruptcy Code and state law theories advanced by the committee in its proposed complaint.[66] Because the debtor filed its complaint prior to the committee having its requested relief granted, the court denied the committee's motion. The court did not see how it could simultaneously allow two cases to proceed on almost identical causes of action against the same defendants; one in the name of the debtor, who had a direct cause of action, and the other on behalf of the committee, whose cause of action was derivative from the debtor. In so holding, the court would not assume that the lawsuit initiated by the debtor was a sham and that its lawyers would necessarily fail to undertake the debtor's fiduciary duty to pursue the defendants zealously.[67]

The court pointed out that the committee was entitled to intervene as a party plaintiff in the adversary proceeding filed by the debtor, and the court stated that it thought that the committee would be able to serve as a watchdog by intervening as a plaintiff and could step in more aggressively if the debtor refused to prosecuted vigorously. Unless and until the court was shown that the debtor would not proceed appropriately against its parent and sole shareholder, the committee would be relegated to this sidekick position. Consequently, the committee's motion was denied without prejudice to the committee intervening in the debtor's lawsuit or to attempt to file its own independent action if the debtor's adversary proceeding was delayed or in any way rendered less than totally effective.[68]

What makes this decision so interesting, is that it originates out of the Third Circuit, the circuit that decided Cybergenics,[69] and how different it wound up being from that later decision. Here, the court began its analysis by pointing out what it considered to be the liberal approach that had been used by courts of appeal that had considered questions of derivative standing. It cited to the cases of Coral Petroleum, Inc. v. Banque Paribas-London[70] of the Fifth Circuit and in In re STN Enterprises[71] from the Second Circuit. The court stressed that these cases used a functional approach rather than a technical one. It interpreted the decision in Coral Petroleum, Inc. v. Banque Paribas-London[72] as refusing to permit the committee to bring the proposed lawsuit because it found the underlying cause of action to be without merit but requiring only that the committee show that its cause of action had merit and that the debtor refused to sue in order for the committee to succeed on its derivative standing motion; as opposed to requiring the committee to make any further showing of extenuating circumstances.[73]

In interpreting the case of In re STN Enterprises,[74] the court reasoned that the primary concerns were whether an action asserting such claims is likely to benefit the reorganization estate and whether the committee's fee arrangement with its attorney would in no event impose a burden on the estate.[75]

The court pointed out that the Third Circuit had not yet faced the issue of derivative standing but that a recent case on a related point signaled that this circuit would support the invocation of that doctrine.[76] In the case of In re McKeesport Steel Casings Co.,[77] the court of appeals allowed a creditor, Equitable Gas Co., to maintain an action for its own benefit under 11 U.S.C. § 506(c)[78] even though the Bankruptcy Code specifically states that only the trustee may proceed under that section. The analysis of that decision had been functional as well: the creditor was allowed to proceed because neither the debtor nor a creditors' committee had reason to make a claim against the creditor.[79]

Based upon this other decision in the Third Circuit, this court concluded that the Third Circuit would employ a functional approach in the analogous matter involving derivative standing and hold that a committee could maintain an action on behalf of the debtor as long as the claim had merit and the debtor was, for whatever reason, failing and refusing to maintain that action in a prompt fashion itself.[80]

In following the decision of In re McKeesport Steel Casings Co.,[81] the court was reluctant to prevent a creditor from maintaining a meritorious lawsuit against other creditors merely because of a lack of standing, and cited the case of In re Morrison.[82]

In relying upon these authorities, the court concluded that to refuse to allow a committee to prepare to bring a potentially meritorious lawsuit on behalf of a reluctant debtor would be promoting the concept of standing beyond the consideration of practicalities of the basic bankruptcy ideal of requiring the debtor, as a fiduciary of its creditors, to take an action which would clearly serve their common interests.[83] The court pointed out that the clear majority of bankruptcy court decisions that existed at that time had permitted committees to institute lawsuits for reluctant debtors, although some courts were careful to state that the debtor must be the nominal plaintiff.[84] It was also true, as the court pointed out, that other courts had allowed a committee to maintain an action even in its own name.[85]

After reviewing these authorities, the court ruled that there was no reason why a committee, which was a party in interest, clearly entitled to intervene in its own name, should be prevented from bringing a lawsuit in its own name, if it decided to do so.[86]

As an aside, the court noted that a number of cases in this area spent time discussing why a debtor might not wish to institute a lawsuit, hypothesizing that such a finding of a good reason for not doing so was a necessary requirement to allow a committee to proceed on behalf of the recalcitrant debtor.[87] Despite these rulings, this court did not believe that the reasons why a debtor had failed to proceed were important or that a committee had to prove the existence of any such reason in order to be permitted to proceed with a cause of action in its own name on the debtor's behalf. Instead, the court thought that, upon proving the potential merit of its case and the debtor's failure to proceed, the committee ought to be allowed to proceed on its own without proving anything further.[88]

While it was true that the inherent conflicts in the relationship that a debtor had with its ownership and creditors might be more than enough cause for allowing a committee to sue in its own name, it was also true that it could form the basis for the appointment of a chapter 11 trustee. And, that trustee might initiate the lawsuit that the debtor refused to sue on. But, allowing a committee to file an action on behalf of the debtor was less severe and, according to the court, more preferable than appointing a trustee for the sole purpose of prosecuting a good cause of action which the debtor chose not to file.[89]

Another pillar used by the court to support its reasoning was the stance taken by the Third Circuit regarding the right of a committee to intervene in legal proceedings brought by a debtor. In the case of In re Marin Motor Oil, Inc.,[90] the Third Circuit established a "broad and absolute construction of § 1109(b)," which provided the absolute right of a committee to intervene in any action of the debtor. The court looked at that ruling and held that intervention generally should be analyzed liberally and functionally in order to be consistent with the Third Circuit's approach.[91]

C. Reliance on 11 U.S.C. §§ 1103(c)(5) and 1109(b)

Rather than relying on 11 U.S.C. §§ 1103(c)(5) or 1109(b) individually, some cases premise their approval of the derivative standing theory on both statutory provisions. The Fifth Circuit did this in two decisions involving the case of In re Louisiana World Exposition, Inc. In the first decision,[92] the Fifth Circuit reached the merits of an action instituted by a creditors' committee against the debtor despite the fact that the committee had not sought permission of the bankruptcy court to file its complaint. Citing several cases holding that a creditors' committee had an implied right to institute an action on behalf of the debtor or the trustee, the court then accepted the appellee's concession that the creditors' committee could sue in certain instances.[93] The issue was under what circumstances the creditors' committee could sue. The Fifth Circuit refused to impose a rigid checklist of requirements but agreed that the requirements bankruptcy courts had applied to the determination of standing were relevant considerations.[94] In that case, the creditors' committee had to satisfy some of these relevant considerations to have standing, such as: (1) having a colorable claim; (2) having the debtor refuse unjustifiably to pursue the claim; and (3) having to first receive leave of court to sue.

Another factor that the Fifth Circuit considered was the bankruptcy court's requirement that the creditor(s) have made a demand on the debtor or trustee for action and that the demand was refused. The Fifth Circuit did not strictly apply this consideration in this case. The court, there, said that it reviewed the record and it seemed that the debtor would not have sought the relief the committee was trying to pursue, even if the committee had filed a formal request. The committee had asked the debtor to take another action, and this was refused. The court thought that the same conflict of interest preventing the debtor from bringing the lawsuit against its directors would stop it from filing the action desired by the committee (to prevent insurance proceeds to cover legal costs from being exhausted through payments to the directors of the debtor).

As a result of the debtor's refusal to file that lawsuit, the court believed that there was no reason to think that the debtor would have initiated, or would initiate in the future, the action requested by the committee, and no other party alleged otherwise. The debtor had always been free to seek the relief that the committee wanted but apparently had never done so. The court thought that it didn't take much to come to the realization that conflicts had prevented the debtor from suing its directors and officers and deterred it from seeking to stop the source paying their legal fees. The court also found it important that the debtor had not opposed the committee's complaint on the grounds of standing.[95]

One year later, the Fifth Circuit decided a case arising out of the same facts in Louisiana World Exposition, Inc. v. Federal Insurance Company.[96] There, the creditors' committee wanted to bring a lawsuit because the debtor had an insider conflict that prevented it from filing. The Fifth Circuit reasoned that the committee had standing if: (1) its claim is colorable; (2) the debtor unjustifiably refused to pursue the claim; and (3) the committee received leave from the bankruptcy court to file. The Fifth Circuit stressed its opinion that these factors were relevant considerations although not necessarily a formalistic checklist.[97]

The court addressed the issue of whether the refusal was "unjustified," and examined extensively the duty of the debtor to maximize the value of the estate, reasoning that:

> where the debtor in possession is unable or unwilling to fulfill its obligations — due, for instance to a conflict of interest — the committee may assert the cause of action on behalf and in the name of [the debtor] if authorized to do so by the bankruptcy court. In light of our analysis, we find that the debtor in possession's refusal to pursue [the debtor's] cause of action against its officers and directors for negligent management was indeed unjustified.[98]

In footnote 20, the court gave its reasoning for its conclusion, stating that it was clear from reviewing its decisions in Coral Petroleum, Inc. v. Banque Paribas-London[99] and Fuel Oil Supply & Terminaling Co. v. Gulf Oil Corp.,[100] that in determining whether a debtor's refusal was unjustified, the court had to look at whether the interests of the creditors were left unprotected as a result. Since the interests of creditors were imperiled where valid and profitable state law causes of action are neglected by the debtor, the unjustified refusal calculus would usually amount to little more than a cost benefit equation. The court went on to reverse the district court's decision to grant the motion to dismiss for lack of standing.[101] The court premised its authority under 11 U.S.C. §§ 1103(c)(5) and/or 1109(b).[102]

In analyzing the effect of 11 U.S.C. § 1109(b), the court noted that this provision does not create an automatic right to intervention; instead, it puts intervention under the Bankruptcy Code at the same level at FRCP 24(a)(2), which allows intervention when a party with an interest in the proceeding would have its rights impaired if it were not allowed to intervene and those rights were not protected by the parties in the suit.[103] Bankruptcy cases involving a creditors' committee's right to intervene are analogous to cases concerning its right to initiate adversary proceedings. The Fifth Circuit noted that in prior cases it had held that the creditors' committee's right to initiate adversary proceedings depends on whether the trustee or the debtor had failed to act to protect the creditors' interests.[104]

Where a debtor has a cause of action — and because the estate will benefit as a result of that lawsuit such that the debtor must assert that cause of action, yet is unable to do so due to a conflict of interest — allowing a creditors' committee to pursue that lawsuit on the debtor's behalf will often benefit the estate. Inherent conflicts in the debtor's relationship with its management and creditors may form the basis for the appointment of a trustee. In that scenario, it would be better to have the committee initiate the lawsuit than appoint the trustee. In those instances where the debtor is conducting its affairs without any other objection but for its failure to prosecute a number of claims against insiders, allowing the creditors' committee to pursue these actions could be less expensive than the appointment of a trustee and the payment of his commission. In addition, it would be less disruptive than converting the case from chapter 11 to chapter 7.[105]

Another well-known decision that supports the application of derivative standing based upon 11 U.S.C. §§ 1103(c)(5) and 1109(b) is the Second Circuit opinion of In re STN Enterprises.[106] In that decision, the court held that an unsecured creditors' committee that had applied to the bankruptcy court for permission to file against one of the corporate directors of the debtor had standing to sue. The bankruptcy court and the district court had denied permission to file suit. The district court did so reasoning that a trustee, or a debtor in possession, is statutorily charged with the responsibility to bring suit to conserve assets and that a creditors' committee may do so only where there has been a breach of a statutory duty. The district court believed that there had been no breach of a statutory duty because the corporate director owed no fiduciary to herself as a stockholder and no duty to the creditors of the corporation except under certain circumstances. The district court also did not allow the suit because it felt that to do so would significantly expand the creditors' committee's implied right to sue.

The Second Circuit reversed because the district court had not properly considered whether the corporate director had breached her duties under state law. The court noted that most bankruptcy courts addressing this standing issue had found an implied, but qualified, right for a creditors' committee to sue in the name of the debtor under 11 U.S.C. §§ 1103(c)(5) and 1109(b). The court also pointed out that courts allowing a creditors' committee to sue have done so only when the trustee or debtor unjustifiably fail to bring suit or abused its discretion in not suing to avoid a preferential transfer.

> … If the committee presents a colorable claim or claims for relief that on appropriate proof would support a recovery, the district (or bankruptcy) court's threshold inquiry will still not be at an end. In order to decide whether the debtor unjustifiably failed to bring suit so as to give the creditors' committee standing to bring an action, the court must also examine, on affidavit and other submission, by evidentiary hearing or otherwise, whether an action asserting such claim(s) is likely to benefit the reorganization estate … the court's inquiries will involve in the first instance not only a determination of probabilities of legal success and financial recovery in event of success, but also a determination as to whether it would be preferable to appoint a trustee in lieu of the creditors' committee to bring suit.[107]

The Second Circuit determined that if the committee's claim was colorable and if the corporate director had breached a state law duty, which presumably led to the director's refusal to bring suit, then the committee would have standing. The court remanded to the district court to consider whether the corporate director had breached its duties and thus unjustifiably failed to bring suit to avoid the preferential transfer.

A later decision out of Pennsylvania, In re Walnut Leasing Company, Inc. and Equipment Leasing Corporation of America, Inc.[108] also ruled that a committee had perfected its right to bring suit on behalf of debtors under 11 U.S.C. §§ 1103(c)(5) and 1109(b); but to maintain an action on behalf of the debtors, the committee had to show that: (1) the claim is meritorious; (2) the debtor in possession has refused to sue; and (3) the committee had obtained permission of the court. Alternatively, the debtor could stipulate to representation by the creditors' committee as occurred in that case.[109]

A case emanating from the Ninth Circuit, In re Catwil Corporation,[110] also relied upon 11 U.S.C. §§ 1103(c)(5) and 1109(b) to justify its invocation of derivative standing. There, a creditors' committee sought to avoid allegedly preferential and fraudulent transfers and the defendants, who were insiders of the chapter 11 debtor, moved to dismiss. The bankruptcy court held that the creditors' committee could bring the adversary proceeding on behalf of the chapter 11 estate seeking to avoid the allegedly fraudulent transfers, however, without first obtaining court approval.

The court pointed out that under 11 U.S.C. § 1107, the debtor had the authority to bring an adversary proceeding on behalf of the estate and although the Bankruptcy Code did not contain a parallel section for creditors' committees to initiate adversary proceedings, courts had held that 11 U.S.C. §§ 1103(c)(5) and 1109(b) implied that right.[111] The issue that occupied most of the court's analysis was whether a creditors' committee first had to obtain prior court approval in order to have standing to bring its actions. The majority of courts had held that a creditors' committee was required to secure court approval before instituting adversary proceedings.[112] According to these decisions, this condition promoted the fair and orderly administration of the bankruptcy estate by providing judicial supervision over the litigation.[113] Judicial oversight over adversarial proceedings lessens the probability of the unavoidable confusion that would result if creditors were allowed to file suits whenever they wanted to.[114]

When there is a hearing on a creditors' committee's motion for authority to prosecute a claim, both the debtor and the defendant are informed of the committee's intention to assert the right of the debtor, and there is also given the chance to explain to the court the reasons, if any, for the debtor's refusal to prosecute that claim that the creditors' committee wants to move forward on.[115]

There are some decisions that veer from this majority view, of requiring prior court approval before a creditors' committee can institute an adversary proceeding on behalf of the estate. In the case of In re Chemical Separations Corp.,[116] the court granted the creditors' committee nunc pro tunc authorization to initiate an adversary proceeding due to extenuating circumstances. First, the court found that the defendant, owning 90% of the debtor's stock, was an insider of a debtor. Second, the court found out that because of the inherent conflict of interest, the debtor's attorney had told the creditors' committee that it was not going to pursue an action against its insiders. The debtor's counsel had also informed the creditors' committee that it would be appropriate for the committee to do so instead. Lastly, the court pointed out that the creditors' committee had started the adversary proceeding in the name of the debtor, and not in its own name.[117] Based on these facts, there was not a considerable chance that confusion would result if the creditors' committee initiated that lawsuit.

The court in In re Catwil Corporation[118] was persuaded by this reasoning and applied it to the facts in that case. A number of factors were present that tilted the balance against dismissing the committee's complaint based on the failure to obtain prior court approval. First, the defendants were all insiders of the debtor. One of these defendants was the debtor's president. The inherent conflict of interest between the debtor and the insider-defendants made it unlikely that the debtor would file an avoidance action against the defendants.[119]

Second, it looked as though the debtor was entirely aware of the committee's intent to file the lawsuit on the debtor's behalf. Although it was unknown as to whether the debtor gave the committee authorization to file the lawsuit, the court inferred from the filed pleadings that the committee and the debtor had undertaken wide-ranging negotiations about the validity of such actions.[120]

Third, time was of the essence in filing the lawsuits because the statute of limitations was running out. Although the committee should have requested prior court approval, it looked as though the circumstances did not allow the committee time to do so.[121]

Fourth, there was little, if any, chance that there would be confusion as to which party was going to bring the adversary proceedings. At the time of their initiation, both the defendants and the committee could see that the debtor was not planning to file any lawsuits.[122]

D. Reliance on Equity

A last grouping of courts, instead of relying upon 11 U.S.C. § 1103(c)(5) and/or § 1109(b), has justified derivative standing under the principles of equity.

> Perhaps courts have resorted to § 1109(b) because of the perceived inequity of depriving creditors of the benefit of the trustee's avoiding powers. But it is equity, not the Code, that is the basis for allowing derivative standing to pursue the trustee's powers. Granting derivative standing on equitable principles is not new. In Glenny v. Langdon,

> 98 U.S. (8 Otto) 20, 27, 25 L.Ed. 43, 45 (1878), the Supreme Court found that authority for a creditor to bring suit to recover the property or rights of property of the bankruptcy, under any circumstances, is certainly not given in the Bankruptcy Act ...; but the argument is, that it [derivative standing] is founded upon the enlarged principles of equity ... See also Gochenour, et al. v. Geo. & Francis Ball Foundation, et al., 35 F.Supp. 508, 517, affirmed, 117 F.2d 259 (7th Cir. 1941) (If, after bringing the matter to the attention of the trustee, the trustee fails to act, the creditors have the right to ask the court for leave to prosecute the action for and in the name of the trustee). The Seventh Circuit continues to recognize this equitable principle in code cases. See Matter of Xonics Photo Chemical, Inc., 841 F.2d 198, 203 (7th Cir. 1988) (Derivative standing possible alternative route opened to creditor when debtor is shirking his statutory responsibilities); Matter of Perkins, 92 F.2d 1254, 1258 (7th Cir. 1900) (Citing factors for derivative standing when the trustee unjustifiably refuses a demand to pursue the action); Matter of Vitreous Steel Products Co., 911 F.2d 1223, 1231 (7th Cir. 1990) (Derivative standing available if trustee does not adequately represent interests of creditors) ...[123]

Some courts, however, have refused to permit derivative standing under the precepts of equity. In the case of Surf N Sun Apartments, Inc. v. Dempsey,[124] a creditor moved for authority to pursue fraudulent transfer claims on behalf of the chapter 7 estate. The bankruptcy court granted the motion and an appeal was taken. The district court held that the Bankruptcy Code does not vest bankruptcy courts with authority to grant standing to individual creditors to prosecute fraudulent transfer avoidance claims on behalf of the estate, not even upon a showing of extraordinary circumstances.

Acknowledging that certain courts premised derivative standing upon equity, and citing, as an example of this, the case of In re SRJ Enterprises, Inc.,[125] this court held that equity could not be used to apply derivative standing. In reaching this result, the bankruptcy court held that its equitable powers came from 11 U.S.C. § 105, which provides that "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[126] While 11 U.S.C. § 105 gives to bankruptcy courts the general equitable powers, the application of such equitable powers must be strictly confined to the limits of the Bankruptcy Code. Although a bankruptcy court is a court of equity, it is bound by the rules that Congress has set up for courts.[127]

The court agreed with the United States Supreme Court which, it believed, had made it abundantly clear that a bankruptcy court's usage of equity can only be exercised pursuant to the Bankruptcy Code.[128] Due to the Supreme Court's ruling in that case, the court declined to increase the purview of 11 U.S.C. § 548 using equity based upon extraordinary circumstances.[129] In support of its analysis, the court also pointed out to another Supreme Court decision where the Supreme Court emphasized the long standing principle that "it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."[130]

Congress carefully evaluated and redrafted a good deal of the Bankruptcy Code in 1978. Therefore, the court reasoned that it was only logical to conclude that the text of the Bankruptcy Code was what Congress wanted it to be.[131] The Court pointed out that the House Committee Report concludes its discussion of the trustee's avoiding powers with the notation that the language in the preference section of the earlier Bankruptcy Act was extremely complex and had been the topic of varying interpretations. The bill undid the numerous amendments that had been piled on § 60 during the past forty (40) years, and proposed a unified and coherent section to deal with the problems created by pre-bankruptcy preferential transfers.[132] Relying on another Supreme Court decision, United States v. Ron Pair Enterprises, Inc.,[133] the Court cited with approval the Supreme Court's quote that where "the statutes language is plain, the sole function of the courts is to enforce it according to its terms."[134]

Because Congress was able to expressly provide creditors with a number of rights and powers in other sections of the Bankruptcy Code, thus convinced the court that 11 U.S.C. § 548's silence as to creditors was deliberate and did not result from an omission. Consequently, the plain meaning of that provision seemed clear: that the chapter 7 trustee had standing to pursue fraudulent transfer causes of action to the exclusion of all other affected parties, including creditors, either individually or as a group. The court saw no other option available to it other than to enforce 11 U.S.C. § 548's clear wording.[135]

The court attempted to justify the soundness of its decision by emphasizing that creditors were not neutral and that consequently only trustees should be given avoidance powers. Under 11 U.S.C. § 704, the chapter 7 trustee was given the duty to investigate the financial affairs of the debtor and to collect and reduce to money the property of the estate for the benefit of all creditors. In order to accomplish this, Congress had given the trustee the discretionary power to initiate fraudulent transfer litigation in order to recover property of the debtor's estate. Before filing such lawsuits, the trustee should undertake a cost-benefit analysis in order to calculate whether the proposed litigation made sense and was in the best interest of all of the estate's creditors. Relevant factors that the trustee should take into account include the realistic assessments of the probability of success, the potential net benefit to the estate, and the litigation burden on the estate in terms of time and cost. The court argued that only the trustee had the requisite amount of neutrality needed to make an objective decision on this score. The court held that "common sense teaches" that a creditor upset with its position in a bankruptcy case and with "an ax to grind" was probably not going to be neutral in its decision in the balancing of these factors. Therefore, Congress's providing the standing to the trustee, and the trustee alone, to sue under 11 U.S.C. § 548 was entirely logical.[136]

The court was not entirely unsympathetic to the plight of disappointed creditors. It understood that there would be creditors who wanted the trustee to avoid a particular transfer of the debtor's property and in order to advance its cause, the court recommended that the creditor should voluntarily provide the trustee with all of the necessary facts and evidence that the creditor had and to try and convince the trustee to initiate that action. Despite all of this, the trustee might or might not decide to file suit. If the trustee, in the exercise of his discretion, determined not to take the course of action recommended by the creditor, the creditor could still file a motion with the court to compel the trustee to act or, alternatively, to seek the removal of the trustee for abuse of discretion.[137] Although a bankruptcy court could be sympathetic to what a creditor was going through in such circumstances, the court believed that it could not unilaterally grant standing to creditors to pursue fraudulent transfer causes of action. That authority had to come from Congress and not the courts.[138]

III. THE HARTFORD DECISION

Derivative standing received a judicial jolt from the Hartford[139] decision. There, the Supreme Court decided whether an administrative claimant of a chapter 7 bankruptcy estate has an independent right to bring suit under 11 U.S.C. § 506(c) to recover payment on its claim.[140] Observing that 11 U.S.C. § 506(c) states that only the trustee is entitled to recover, the court considered whether it was a proper inference that the trustee is the only party that is entitled to invoke that statutory provision.[141] The court had "little difficulty" in determining, in the unanimous decision, that the phrase "the trustee may" means that only the trustee can use the recovery power granted in 11 U.S.C. § 506(c).[142] The court declined to decide whether its rationale extended to Bankruptcy Code fraudulent transfer provisions which also contained the same phrase, "the trustee may." Specifically, the court did not confront the validity of the practice under which some courts grant creditors or creditors' committees a derivative right to bring avoidance actions when the trustee refuses to do so.[143]

> ... Here, the statute appears quite plain in specifying who may use § 506(c) — "the trustee." It is true, however, as petitioner notes, that all this actually "says" is that the trustee may seek recovery under the section, not that others may not. The question thus becomes whether it is a proper inference that the trustee is the only party empowered to invoke the provision. We have little difficulty answering yes.
>
> Several contextual features here support the conclusion that exclusivity is intended. First, a situation in which a statute authorized specific action and designates a particular party empowered to take it is surely among the least appropriate in which to presume nonexclusivity. "Where a statute ... names the parties granted [the] right to invoke its provisions ... such parties only may act." 2A N. Singer, *Sutherland on Statutory Construction,* § 47.23,

> p. 217 (5th Edition 1992) (internal quotation marks omitted); See also Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480, 486, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). Second, the fact that the sole party named — the trustee — has a unique role in bankruptcy proceedings makes it entirely plausible that Congress would provide a power to him and not to others.[144]

As clear as the Supreme Court was in explaining what it was deciding, it was equally as clear about what it was not deciding. The Supreme Court specifically said that it was not deciding the validity of the application of the theory of derivative standing.

> We do not address whether a bankruptcy court can allow other interested parties to act in the trustee's stead in pursuing recovery under § 506(c). Amici American Insurance Association and National Union Fire Insurance Co. draw our attention to the practice of some courts of allowing creditors or creditors' committees a derivative right to bring avoidance actions when the trustee refuses to do so, even though the applicable Code provisions, see 11 U.S.C. §§ 544, 545, 547(b), 548(a), 549(a), mention only the trustee. See e.g., In re Gibson Group, Inc., 66 F.3d 1436, 1438 (CA 6 1995). Whatever the validity of that practice, it has no analogous application here, since petitioner did not ask the trustee to pursue payment under § 506(c) and did not seek permission from the bankruptcy court to take such action in the trustee's stead. Petitioner asserted an independent right to use § 506(c), which is what we reject today. Cf In re Xonics Photo Chemical, Inc., 841 F.2d 198, 202–203 (CA7 1988) (holding that creditor had no right to bring avoidance action independently, but noting that it might have been able to seek to bring derivative suit).[145]

IV. DERIVATIVE STANDING AFTER HARTFORD

A. Circuits That Have Continued to Apply Derivative Standing

After Hartford[146] was handed down, the issue of derivative standing still continued to arise but, in most instances, the court took into account, either in following or distinguishing, the rationale in Hartford.[147]

1. First Circuit

In the First Circuit, an example of this is the case of In re Together Development Corp.[148] In that case, the debtor, a purveyor of franchises providing dating services, filed a voluntary chapter 11 petition on November 7, 1997. The principals of the debtor were the individuals who sought out and retained the services of bankruptcy counsel for the corporate debtor. A dilemma emerged when allegations were made of possible fraudulent transfers by the debtor's principals. The debtor's counsel did not pursue these causes of action and counsel for the creditors' committee attempted to do so.[149]

The statute of limitations for avoidance actions was nearing and in order to protect the estate's claims from being wiped out, the debtor and the committee entered into a stipulation under which all interested parties were given the appropriate notice and an opportunity to be heard. The attorney representing the committee told the court that the intent of the parties in entering into this stipulation was to obtain permission for the committee to initiate all causes of action on behalf of the debtor before the statute of limitations had lapsed because the debtor's counsel did not believe it would be appropriate for him to do so. The bankruptcy court approved the stipulation. Unfortunately, the stipulation had a mistake in that it omitted a specific grant of authority for the committee to initiate avoidance actions even though there were recitals referring to such a grant therein. This was corrected by the filing of an amended stipulation. Certain defendants filed objections to this amended stipulation but the amended stipulation was still approved.[150]

The committee filed an adversary proceeding naming the debtor as the plaintiff, but signed by the committee's counsel on the debtor's behalf, "by and through the official committee of unsecured creditors." This complaint was a complaint to avoid and recover preferential transfers as is defined by the Bankruptcy Code. There were also allegations of state law claims for breach of fiduciary duty and violations of corporate law. The defendants objected contending the committee lacked standing. A standing issue was raised in that the defendants failed to object to standing at the time of the original stipulation and only alleged that defense with the amended stipulation. An issue therefore arose as to whether the affirmative defense of standing had been waived by these defendants.[151]

In disposing of the standing issue, the court pointed out that under the law of the First Circuit, objections to a party's standing in a particular case cannot be waived, and the court is required to consider a challenge to a party standing whenever it is raised, and it does not matter whether the challenger failed to make an earlier objection, or whether the court itself raises the issue. Consequently, it was held that the defendants did not waive their challenge to the committee's standing because that kind of an objection is not capable of being waived.[152]

After dealing with the issue of standing, the court next considered the ruling in Hartford.[153] The court stated that it was not convinced that that decision was controlling in this case and that the committee's authority to prosecute such actions was authorized by 11 U.S.C. §§ 1103(c)(5) and 1109(b); and that if that lawsuit was successful, it would result in the payment of claims that would otherwise go unpaid because the statute of limitations would have prevented such recovery.[154] In support of its position, the bankruptcy court cited with approval the decision of In re Catwil Corporation,[155] and after explaining the facts and ruling in that decision, came to the conclusion that the Bankruptcy Code contemplated and provided for the approach adopted in that case and its predecessors.[156]

The court then went to some lengths to distinguish away the decision in Hartford.[157] That decision, according to the court, had vastly different facts than the one at hand. In Hartford,[158] a worker's compensation insurer, as a creditor of the debtor, tried to surcharge a secured creditor for unpaid post-petition insurance premiums that were owed by the debtor after conversion of the debtor's case from chapter 11 to chapter 7. Even as an administrative claim, there was no money to pay the premiums, so the insurer sought payment under 11 U.S.C. § 506(c).

The court attempted to distinguish away the facts and ruling in Hartford[159] by pointing out the factual differences between the two cases. The plaintiff in this case was the debtor seeking recovery for all of the creditors of the bankruptcy estate, not a loan creditor attempting to recover for its sole benefit, which was the case in Hartford.[160] In addition, Hartford[161] was based upon an interpretation of 11 U.S.C. § 506(c), which had nothing to do with this case. In further support of its position, the court mentioned that there was no provision in the Bankruptcy Code that barred derivative standing, while on the other hand, courts had held that a creditors' committee could bring an adversary proceeding on the debtor's behalf to avoid fraudulent transfers, sometimes even after the fact, when the defendants were insiders, the debtor was aware of the claims and the committee's intent to pursue them and the claims were subject to a limitations bar at a time when the debtor's counsel declined to file suit.[162]

What was important to the court was that the committee had brought an action in the name of the debtor, and that the debtor, beyond doubt, had standing under 11 U.S.C. § 547. If the defendants wanted to challenge the debtor's counsel's choice of an agent or counsel to pursue that action, they could have done so.[163]

There were other occurrences in this case that demonstrated the chances for severe abuse of the bankruptcy system. Examples of this included the fact that no plan of reorganization had been filed for over three years, and no representative of the estate had been appointed to litigate the causes of action. Due to these occurrences, it appeared that the defendants were claiming that the debtor's principals could not only manipulate a company until it sank into bankruptcy, but then they could oversee the debtor's counsel and prevent him from pursuing allegations of insider fraud and could delay the filing of a plan of reorganization and the appointment of a representative of the estate until after the statute of limitations had expired so that no party would pursue recovery actions for any alleged insider misfeasance. The court concluded that this kind of choreographing by the defendants would not be tolerated by the Bankruptcy Code or the court; and that it was clear that the committee was in a unique position of preserving the bankruptcy estate. The committee had acted within its authority out of concern for its members, the unsecured creditors.[164]

> The creditors' committee is not merely a conduit through whom the debtor speaks to and negotiates with creditors generally. On the contrary, it is purposefully intended to represent the necessarily different interests and concerns of the creditors it represents. It must necessarily be adversarial in a sense, though its relation with the debtor may be supportive and friendly. There is simply no other entity established by the code to guard against those interests. The committee as the sum of its members is not intended to be merely an arbiter but a partisan which will aid, assist and monitor the debtor pursuant to its own self interests.[165]

As a result of what the court believed the role of a committee to be under title 11, it was not surprising to the court that the committee took a position adversarial to the debtor or the debtor's insiders in the course of fulfilling the committee's fiduciary duties to the estate and its constituents. The court found that the committee had not taken acts that were inconsistent with these duties.[166]

2. Second Circuit

Since the ruling in Hartford,[167] the Second Circuit has issued two decisions on derivative standing, at the circuit court level. In the case of Commodore International, Ltd. v. Gould (In re Commodore International, Ltd.) ("Commodore")[168] the court expanded upon its previous rulings of derivative standing. In the earlier case of In re STN Enterprises,[169] the Second Circuit had held that an unsecured creditors' committee could initiate an adversary proceeding in the name of a debtor if the debtor had unjustifiably refused to bring suit.

Commodore[170] involved a lawsuit brought by an unsecured creditors' committee against a number of officers and directors of the debtor under 11 U.S.C. § 1109(b) for fraud, waste, and mismanagement.[171] Unlike the facts in In re STN Enterprises,[172] the debtor in Commodore[173] had not unreasonably declined to bring suit, but did agree to the prosecution by the committee. The Second Circuit held that a creditors' committee could bring suit even where the trustee or the debtor had not unjustifiably refused to do so as long as certain conditions were met: (1) the committee had the consent of the debtor or trustee, and (2) the court found that suit by the committee is (a) in the best interest of the bankruptcy estate and (b) is necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings.[174]

In reaching this decision, the Second Circuit relied upon the ruling and analysis in the decision of In re Spaulding Composites Co.,[175]

> The [debtor in possession] has an obligation to pursue to all actions that are in the best interest of creditors and the estate. An unsecured creditors' committee has a close identity of interest with the [debtor in possession] in this regard. Allowing the [debtor in possession] to coordinate litigation responsibilities with an unsecured creditors' committee can be an effective method for the [debtor in possession] to manage the estate and fulfill its duties ... rather than a flat prohibition, impartial judicial balancing of the benefits of the committee's representation better serves the bankruptcy estate.[176]

Based upon this rationale, the court held that a creditors' committee could sue on behalf of the debtor, with the approval and supervision of the bankruptcy court, not only where the debtor unreasonably failed to bring suit on its claims, but also where the trustee or debtor consented. In the second instance, suit by the committee must be necessary and beneficial to the resolution of the bankruptcy proceeding.[177] The court believed that this approach resulted in a rational and practical division of labor between the creditors' committee and the debtor or trustee while simultaneously giving the bankruptcy court a considerable amount of authority to manage the litigation and to monitor any potential for abuse by the parties.[178] Under the facts before the court, the committee did not have standing to bring suit since it was neither necessary nor beneficial in the light of a prior and identical suit being filed in another jurisdiction and therefore the lawsuit was dismissed.[179] Interestingly, nowhere in this decision was there any mention of the ruling in Hartford.[180]

In late October 2002, the Second Circuit followed its decision in Commodore[181] with Housecraft.[182] In this second decision, the plaintiffs, which included a trustee and an individual creditor, sued a defendant company pursuant to 11 U.S.C. §§ 548 and 549 alleging fraudulent transfers. These plaintiffs sought to recover the proceeds of property that the debtor had fraudulently transferred to the company both before and after the debtor had filed for bankruptcy relief. The court held that the trustee's participation as a party was important because the creditor was not replacing the trustee as a claimant; it was simply assisting him with the litigation. The creditor's action was also held to be necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings.

The trustee had moved for the retroactive ratification of an agreement between himself and the petitioning creditor for the joint prosecution of the adversary proceeding. Under this agreement, the trustee and the creditor were required to prosecute the claims against the defendant company jointly, and the creditor was required to bear the costs of the litigation. This agreement provided that the creditor and trustee would confer on decisions about the claims to be jointly prosecuted, and all such claims could be compromised or settled only with the express consent of the creditor. In return for the creditor's financial assistance, the trustee agreed that any recovery from the litigation would be paid in the following order: (1) litigation costs and attorney's fees to be paid to the creditor; (2) fifteen thousand dollars ($15,000) to be paid to the debtor's estate; and (3) the balance to be split, 80% for the creditor and 20% for the estate. In requesting support for this agreement, the trustee alleged that the debtor's estate, the trustee and the trustee's counsel did not have the financial wherewithal to prosecute the litigation and that without the creditor's commitment to fund this litigation, the claims would be abandoned.[183]

In reaching its ultimate decision, the court noted its prior decisions in Commodore[184] and In re STN Enterprises.[185] The court then compared the factual circumstances in the newer case with those in Commodore.[186] The court believed that the argument for creditor standing was stronger here than in Commodore[187] because the trustee was also named as a plaintiff and the defendant had not challenged the trustee's standing. Even if the defendant had challenged the trustee's standing, any such challenge would have lacked merit because 11 U.S.C. §§ 548 and 549 both expressly provided that "the trustee may avoid" the fraudulent transactions described in each provision and, the Second Circuit noted that it had held that the trustee of a bankruptcy estate has broad powers under the Bankruptcy Code to avoid certain transfers of property made by the debtor either after or shortly before the filing of its bankruptcy petition. Since the trustee had standing, the debtor would still be vulnerable to a lawsuit from him for the full amount of the fraudulent transfer even if the creditor did not have standing.[188]

The involvement of the trustee was held to be of importance because, unlike what had transpired in Commodore,[189] the creditor was not replacing the trustee as a claimant. Instead, the creditor was assisting him with the litigation. The agreement between the creditor and the trustee dictated that the parties would confer on decisions concerning the claims to be jointly prosecuted. Therefore, the trustee had all of the rights of a party plaintiff, including the right to control the course of litigation, along with the creditor, under the supervision of the court. The agreement specifically said that the creditor had the trustee's consent to file suit.[190]

All that the Second Circuit did in this case was apply the ruling in Commodore[191] to the new facts at hand. The court also pointed out that although its prior decisions in Commodore[192] and In re STN Enterprises[193] both involved creditors' committees, the holdings of those cases also applied to individual creditors such as the creditor in that case. The court noted that plenty of courts had granted individual creditors standing to sue in the place of a trustee or debtor. Although some of those courts require individual creditors to meet a more stringent standard than creditors' committees in order to have standing, such a requirement was unnecessary in the Second Circuit because, under Commodore,[194] the Second Circuit only grants standing to creditors, either as individuals or in the form of committees, where doing so is in the best interest of the estate.[195] As with its decision in Commodore,[196] the Second Circuit in Housecraft[197] did not mention Hartford[198] a single time.

3. Fifth Circuit

In the Fifth Circuit, a number of cases involving derivative standing have been decided since the issuance of the opinion in Hartford.[199] In In re Babcock & Wilcox Co.,[200] the debtor filed an adversary proceeding seeking a declaration that, in effect, would affirm several transfers that a committee alleged was fraudulent. The transfers were made to the debtor's parent company and included transfers of all stock that the debtor held in three subsidiaries, who were also defendants. The committee intervened in that proceeding, sought a jury trial, and moved to withdraw the reference of the proceeding and to annul the transfers. The committee's members all had products liability claims against the debtor. The bankruptcy estate included a trust fund from which the members' claims would be paid. The committee sought to recover for the estate $622 million or more in assets that the debtor transferred to its parent company. The court concluded that the committee could act on behalf of the estate. Instead of seeking to annul the transfers, as requested by the committee, the debtor had sought to confirm them and thus was not acting in the best interest of the bankruptcy estate.

In reaching this decision, the court relied on the three factor analysis espoused in Louisiana World Exposition v. Federal Insurance Company[201] and specifically distinguished away the ruling in Hartford.[202] The court held that that Supreme Court decision ruled in favor of the Bankruptcy Code not providing an administrative claimant an independent right to recover costs of preserving collateral of the debtor's estate under 11 U.S.C. § 506(c) and that the Supreme Court had found that that statute authorized only a trustee to recover such costs. On the other hand, the Supreme Court had explicitly stated that it did not address the validity of the practice of allowing other interested parties to act in the trustee's place when the trustee refused to bring an action that the Bankruptcy Code authorized only the trustee to bring. In addition, the Supreme Court said that its decision involved the factual scenario where the petitioner did not ask the trustee to pursue payment and did not seek permission from the bankruptcy court to assert the action in the trustee's place. Consequently, that Supreme Court ruling was held to be inapplicable.[203]

The court applied the factors in Louisiana World Exposition v. Federal Insurance Company[204] to the facts at hand and determined that they had been satisfied. It was also noted that the debtor had the duty to maximize the value of the estate, and not to advance the separate business interests of its parent. In particular, the court mentioned that the test for unjustified refusal is whether the interests of the creditors were left unprotected.[205] Since the debtor's lawsuit was intended to prevent a revocatory claim rather than to assert one, and the cause of action could be worth $622 million or more to the estate, the court found that the debtor's refusal to assert that cause of action was not justified. Therefore, the committee was entitled to assert a revocatory action on behalf of the debtor's estate and the court rejected the debtor's assertion that the committee was not entitled to assert whatever jury trial rights attached to that claim.[206]

Derivative standing was permitted in the case of In re Blount,[207] based upon a theory quite different than those put forward by the cases cited above. In this decision, derivative standing was allowed, on behalf of a creditor, under 11 U.S.C. § 503(b)(3)(B).[208] Before the court, among other things, was the request by a creditor that its lawyers be awarded attorney's fees under 11 U.S.C. § 503(b)(3)(B) because of the efforts of that creditor's counsel in discovering an unscheduled asset of the debtor that the trustee had liquidated, which was a personal injury claim of the debtor that had generated a recovery sufficient to pay all claims and to return a surplus. Because the request for attorney's fees would reduce the surplus to be returned to the debtor, the debtor had objected to the claim.

The court ruled that under 11 U.S.C. § 503(b)(3)(B), there was required to be court approval prior to the initiation of efforts directed at the recovery of property transferred or concealed by the debtor.[209] Section 503(b)(3)(B) of the Bankruptcy Code requires that the status of the party seeking an administrative expense be a creditor of the debtor; that the creditor be the one that recovers any property transferred or concealed by the debtor; that the recovery of property transferred or concealed by the debtor be for the benefit of the estate; and that there must be court approval. Court approval can be looked at from two perspectives. First, creditors are free to pursue the recovery of property transferred or concealed by a debtor for the benefit of the estate, but to be entitled to an administrative priority status for expenses, must bring the recovery to the court for approval. Under this interpretation, the court believed that this "conjures [an] image of a horde of creditors deputized from the inception of the case, ranging out in the countryside recovering what they can find and bringing it to the court to be checked in (approved) before tossing it into the larder. The problem with this reading stands in contrast to the overall structure of the code."[210]

The second way of looking at the requirement for court approval is that to become a creditor that recovers, under the statute, the creditor must first obtain approval from the court to begin the process by which the property is recovered. In any other way, because of the trustee's standing to recover, a creditor that recovers with no standing to prosecute an action designed to recover property cannot be the party who brings the recovery to the court for approval. Due to the trustee's standing to recover property transferred or concealed by the debtor, independent creditor standing, as a matter of equitable authority, is not available to allow a creditor to begin and prosecute a recovery action.[211]

After explaining the implications of the decision in Hartford,[212] the court pointed out that besides 11 U.S.C. § 506(c), the trustee and the debtor are the only parties authorized to bring avoidance actions under 11 U.S.C. §§ 544, 545, 547, 548 and 549. Under the decision in Hartford,[213] the Bankruptcy Code's wording of the phrase "the trustee may" or "the trustee shall" means "only the trustee may" or "only the trustee shall" have standing to recover property transferred or concealed by the debtor, as established by the Bankruptcy Code, and thus is limited to the trustee.[214]

In contrast to those provisions, 11 U.S.C. § 503(b)(3)(B) specifically provides for reimbursement of recovery of expenses to "a creditor that recovers ... any property transferred or concealed by the debtor." A creditor cannot be a "creditor that recovers" if standing to recover is held only by the trustee. The only way that 11 U.S.C. § 503(b)(3)(B) makes sense is if a court is allowed to authorize standing to parties in addition to the trustee, such as creditors, so that those parties may recover property transferred or concealed by the debtor. If a bankruptcy court cannot do this, then this statutory provision is superfluous. But, for a party other than the trustee to have the appropriate standing under 11 U.S.C. § 503(b)(3)(B), that standing must be authorized before the action or process to recover the property has begun. If this does not occur, the creditor cannot act and a party who is not entitled to act may not recover.[215]

This court interpreted 11 U.S.C. § 503(b)(3)(B) as providing statutory authority for a court to permit a creditor to act instead of a trustee and to also provide an express statutory grant of authority to the court to confer derivative standing upon creditors to pursue actions that would lead to the recovery of property transferred or concealed by the debtor, for the benefit of the estate. This reading was supported by the language in that section that the creditor recover property "for the benefit of the estate," which indicates that the creditor must act on behalf of the estate, or in place of the trustee.[216]

The court acknowledged that there were a number of cases that held, directly, or indirectly, that 11 U.S.C. § 503(b)(3)(B) did not grant authority to courts to confer standing upon creditors to act for the trustee and the estate.[217] The court sought to distinguish its holding from these contrary cases by pointing out that it was not claiming that 11 U.S.C. § 503(b)(3)(B) independently granted standing to a creditor to pursue recovery actions. Rather, that provision only enables courts to grant a creditor standing in the place of the trustee.[218]

Despite going to great lengths to justify the authorization of derivative standing under 11 U.S.C. § 503(b)(3)(B), the court held that counsel for the creditor would not qualify under that provision. Although the creditor's attorney contributed significantly to the discovery of the settlement proceeds and the ultimate accumulation by the trustee of enough money to pay all the creditors plus interest, that action did not rise to the level that would generate the designation of the creditor as a "creditor that recovers" within 11 U.S.C. § 503(b)(3)(B). To be "a creditor that recovers" mandates that the creditor be the moving party, on behalf of the estate, through derivative standing that can be granted under this statutory provision. In the case at hand, the creditor did not act under such a grant of derivative standing from the court. Although the creditor contributed to the trustee's ultimate recovery of the settlement proceeds, the trustee was the party that actually recovered the property. Consequently, the creditor was not entitled to the reimbursement of expenses under 11 U.S.C. § 503(b)(3)(B) and its counsel was not entitled to attorney's fees under 11 U.S.C. § 503(b)(4).[219]

The court was clearly not happy about issuing its opinion. It wanted to provide for the creditor and its counsel, but saw no way out.

> Finally, the court regrets having to issue this opinion, because it wishes there was some way the Bankruptcy Code allowed the requested compensation. Counsel for [the creditor] has greatly assisted the trustee. However, from a structural standpoint, the reasoning offered today provides a clearly visible future road. The trustee in a chapter 7 case is charged with the primary responsibility for recovering property transferred or concealed by the debtor. IF the trustee fails or refuses to act, then § 503(b)(3)(B) provides this court with authority to grant a creditor standing to pursue recovery, of particular property, in the trustee's stead. If the trustee turns a blind eye, the creditor should ask the court to let the creditor seek recovery. If the creditor is not granted such derivative standing, the creditor cannot pursue the action because otherwise standing is specifically limited to the trustee. The first course of action, for a lawyer in the position of [the creditor's] counsel, should always be to contact the trustee with the information one has, to let the trustee do it. Like the trustee did in this case.[220]

In contrast to these two decisions in the Fifth Circuit which seemed to grant derivative standing, the case of In re McLeroy[221] was a decision that was more in line with the ruling in Hartford.[222] In that case, chapter 7 debtors brought an adversary proceeding, seeking a determination that loans used to fund their children's undergraduate college educations were dischargeable on "undue hardship" grounds. Declining to consider whether the debtors' tithing constituted an appropriate expense under the undue hardship test, the bankruptcy court determined that the debtors had satisfied their burden of proving undue hardship and that their student loan obligations should be discharged. The creditor appealed and the district court vacated and remanded holding that the debtors tithes may be considered in some circumstances as an appropriate expense for purposes of determining whether repayment of student loan debts would constitute an undue hardship and that the Religious Liberty and Charitable Donation Protection Act (the "RLCDPA") did not amend the appropriate section of the Bankruptcy Code governing the dischargeability of student loan debts and, thus, that Act did not entitle the debtors to automatically classify their tithing as an appropriate expense under the undue hardship test.

The court found that the RLCDPA had no application to 11 U.S.C. § 523(8)[223] and that the debtors were not entitled under the RLCDPA to automatically refer to their tithing practices as an appropriate expense under the undue hardship test. The plain language of the Bankruptcy Code's relevant section as amended by the RLCDPA only addresses the avoidance powers of the bankruptcy trustee and that that act made no mention of conferring any additional rights to any other party and was devoid of any references to 11 U.S.C. § 523(b)(8).[224]

The court based its decision on the ruling in Hartford.[225] The plain language of 11 U.S.C. § 548, as amended by the RLCDPA, only addressed the instances in which a trustee could seek to set aside an allegedly fraudulent transfer. Therefore, the court, in employing the rationale of Hartford,[226] held that 11 U.S.C. § 548 only referred to the authority of the bankruptcy trustee and not the debtor. Because the case at hand involved actions taken by a trustee, the bankruptcy court had erred in finding that the debtors could use the provisions of the RLCDPA as an automatic way of proving up their tithing expenses for the purposes of satisfying their undue hardship burden.[227]

In a similar ruling, the Fifth Circuit, in the case of Stangel v. United States (In re Stangel),[228] ruled that a debtor does not have standing to avoid a tax lien under 11 U.S.C. § 545 because standing under that provision is limited solely to the trustee.

4. Ninth Circuit.

In this circuit, the decision of In re Godon, Inc.[229] in many respects echoed the decision of In re Blount.[230] In this California case, a chapter 7 trustee and a creditor-bank sought court approval for an agreement whereby the creditor would prosecute actions in the trustee's name to recover, for the benefit of the estate, property allegedly transferred or concealed by the debtor, and the parties resolved any dispute about the secured status of the creditor's claim. The court held that authorized creditors have "statutory standing" to prosecute actions for the recovery of property in the name of the trustee; that the parties proposed agreement fit within the administrative expense statutes creditor recovery model; and that the agreement was fair and equitable. The basis of this decision was 11 U.S.C. § 503(b)(3)(B), under which

> The bankruptcy court acts as gatekeeper for creditors who want to prosecute actions to recover property transferred or concealed by the debtor. Whether the court chooses to open the gate is a matter of judicial discretion.[231]

In reaching its decision, the court underwent a thorough analysis of standing. According to the court, the term "standing" is capable of more than one interpretation. On the one hand, it means "injury in fact" that is the absolute minimum for the case or controversy requirement of Article III of the United States Constitution and also has a prudential element to it with respect to permitting a party to be heard. The same individual might be "injured in fact" for the purposes of the constitutional minimum and yet lack standing for prudential reasons because it is possible to have one form of standing but not the other. The court reasoned that this led to the "linguistic paradox" that a person with standing may lack standing.[232]

The irreducible minimum injury in fact for the purposes of federal jurisdiction under Article III has been called "constitutional standing." It is now considered black letter law that every litigant in federal court must have it.[233]

The second category of standing is known as "prudential standing" and that has a number of different groupings of circumstances in which courts restrict the exercise of federal jurisdiction for reasons related to a number of considerations such as the orderly management of the judicial system.[234] One of these subcategories of prudential standing is "statutory standing," where Congress specifically made the prudential standing determination by designating persons who are entitled to enforce a particular right created by statute. Where the rights or duties can be traced to a statute, Congress has wide-ranging power to define the classes of persons who may be entitled to enforce them. Inherent in this congressional power to create rights and duties is the power to define the classes of person who may enforce them.[235]

Another subcategory of prudential standing is nonstatutory standing, and that is made up of individuals that either have not been named by Congress in a statute or who want to enforce some right not created by the statute. Cases that involve this area of the law have dealt with third party enforcement, where some party that does not have "statutory standing" wants to enforce rights without needing to rely on someone that has "statutory standing." Constitutional standing is a jurisdictional limit on the power of federal courts and cannot be waived. Prudential standing, on the other hand, is not a jurisdictional limit from the Constitution and can be waived in the correct circumstances.[236]

All creditors are injured in fact for the purposes of constitutional standing because they are able to point to an injury that is fairly traceable to the bankruptcy case. If nothing else, they have to confront the automatic stay and the risks that the debts owed to them will be discharged.[237] Some creditors have statutory standing due to Bankruptcy Code provisions that authorize them to perform specific trustee type tasks, as in the case of the court's power to grant permission for a creditor to recover property for the benefit of the estate under 11 U.S.C. § 503(b)(3)(B).[238] The standing of a creditor to recover property for the benefit of the estate with judicial permission represents statutory standing under 11 U.S.C. § 503(b)(3)(B). With respect to a creditor being given permission to recover for the benefit of the estate any property transferred or concealed by the debtor, the original of standing is statutory, and has been that way since at least 1903, when the first version of the creditor recovery provision of the Bankruptcy Act § 64(a) was enacted. That statutory authority was continued into the Bankruptcy Code of 1978 in 11 U.S.C. § 502(b)(3)(B), with the requirement that there by prior judicial authorization.[239]

The court concluded that a creditor that had permission from the court to recover property for the benefit of the estate and to sue in the name of the bankruptcy trustee under 11 U.S.C. § 503(b)(3)(B) had the same statutory standing as the trustee.[240] This decision, besides having the legal underpinning of 11 U.S.C. § 503(b)(3)(B), also had the factual scenario of the cases from the Second Circuit, Commodore[241] and Housecraft,[242] where there was an agreement and consent of the debtor or the trustee. This case had both of those components going for it.

5. Eleventh Circuit

In In re Dur Jac Ltd.,[243] a creditor moved for leave to initiate an avoidance proceeding on behalf of the chapter 11 estate. The court held that a bankruptcy court may permit a single creditor to act in lieu of the chapter 11 debtor, in order to initiate avoidance proceedings, but only sparingly and upon proper showing: that the creditor, as a prerequisite to being allowed to sue for avoidance actions did not first have to make a demand upon the debtor; but that this creditor would not be allowed to pursue the intended claims due to the fact that the debtor was justified in not initiating them himself.

After reviewing the applicable case law from the Fifth Circuit and the Second Circuit, the court held that a bankruptcy court may permit a single creditor in a chapter 11 case to initiate an action to avoid a preferential or fraudulent transfer instead of the debtor in possession, as long as the four factor analysis employed in In re First Capital Holdings Corp.[244] was employed, namely that: (1) a colorable claim has been alleged that would benefit the estate based on a cost benefit analysis performed by the bankruptcy court; (2) the creditor has made a demand on the debtor to file the action; (3) the demand has been refused; and (4) the refusal is unjustified in light of the statutory obligations and fiduciary duties of the debtor in a chapter 11 reorganization.[245]

This decision noted the Supreme Court opinion in Hartford[246] but distinguished it away by pointing out that the court expressly declined to decide whether creditors may bring avoidance actions under 11 U.S.C. §§ 547 or 548. Consequently, this court found that the Supreme Court decision was not analogous.[247]

In the case of In re Holcombe,[248] the issue presented to the court was whether a chapter 13 debtor had standing to use the chapter 5 avoidance powers, as set out in 11 U.S.C. §§ 544 and 547. Both statutes speak in terms of a trustee acting. The question was whether a party other than the trustee was entitled to invoke those provisions.[249]

In order to answer this question, the court examined the powers of a debtor under chapter 13. Section 1303 of the Bankruptcy Code states that a "debtor shall have, exclusive of the trustee, the rights and powers of a trustee under Sections 363(b), 363(d), 363(e), 363(f) and 363(1), of this title." 11 U.S.C. § 1303. Omitted from this list of rights and powers are the avoidance powers of chapter 5 of the Bankruptcy Code.[250] Using the analysis of the Supreme Court in Hartford,[251] the court refused to extend the rights and powers of a trustee under 11 U.S.C. §§ 544 and 547 to chapter 13 debtors since chapter 13 debtors were not specifically allotted those powers in those statutory provisions.

B. Circuits That Have Not Applied Derivative Standing

1. Fourth Circuit

In re Scott[252] involved a debtor that filed for chapter 7. The mortgagee had moved for the retroactive relief from the automatic stay in order to validate its post-petition act of recording its mortgage. The debtor had asserted that even if the lien was valid, it was subject to be voided under 11 U.S.C. § 544. The court disagreed with the debtor's argument and interpreted that provision of the Bankruptcy Code's avoidance powers as applying only to the trustee. In reaching this decision, the court relied upon the Supreme Court's decision in Hartford.[253]

Under 11 U.S.C. § 544, only the trustee was given avoidance powers. While other Bankruptcy Code sections, such as §§ 1107 and 1203 give the debtor the power of the trustee's avoidance powers under 11 U.S.C. § 544, the Bankruptcy Code contains no similar provisions with respect to chapter 13 or 7 debtors. Consequently, this debtor was not permitted to cloak itself with the powers of the trustee under 11 U.S.C. § 544.[254]

2. Third Circuit

Before analyzing Cybergenics[255] and how that decision applied the Supreme Court's ruling in Hartford,[256] it is important to set the stage by first discussing the case of In re McKeesport Steel Castings Co.[257] There, a gas company supplied natural gas to the debtor post-petition under a court order to facilitate the debtor's post-petition operations. This gas company filed suit under 11 U.S.C. § 506(c) to obtain payment for the gas that it had supplied to the debtor. The bankruptcy court had granted this payment. One of the debtor's secured creditors appealed and the district court reversed holding, among other things, that the gas company did not have standing to bring this claim under 11 U.S.C. § 506(c) because it was not the trustee or the debtor. The Third Circuit reversed the district court, and affirmed the bankruptcy court's decision.

The Third Circuit held that the rule that individual creditors could not act in the place of the trustee is often excepted from when enough reason exists to permit it. In that case, neither the debtor nor a creditors' committee had reason to make a claim on behalf of the gas company, when the debtor would be required to pay for utilities it had received without charge following the date that its petition was filed. Since the gas company had a colorable claim for expenses and was the only creditor that would avidly pursue that claim, it had standing to bring its action under 11 U.S.C. § 506(c).[258]

The Third Circuit allowed the creditor to go forward under certain conditions. First, there had to be a colorable claim; and second, no other statutory party had to have a reason to zealously pursue that claim. The Third Circuit permitted an individual creditor to bring a claim that was statutorily assigned to the trustee or debtor if a sufficient reason existed to do so. Missing from this analysis was a discussion of whether the gas company should have obtained permission of the bankruptcy court prior to filing its claim under 11 U.S.C. § 506(c) or whether it should have made a demand upon the debtor to act.

This decision had a ruling that appears to be completely opposite to that in Hartford.[259] When this Supreme Court decision was handed down, although it did not mention this prior Third Circuit opinion, that opinion, for all intents and purposes, was over and done with.

In Cybergenics,[260] the debtor, rather than reorganize, decided to sell its assets through a court supervised auction. At this sale, a third party successfully bid $2.65 million for all of Cybergenics' assets, and the bankruptcy court approved the sale in October of 1996. The debtor moved to dismiss the bankruptcy case but the unsecured creditors' committee objected, contending that certain transactions relating to the leveraged buyout could give rise to fraudulent transfer actions.[261]

The debtor told the bankruptcy court that it would not pursue any fraudulent transfer claims. But, based on its own investigation and on this refusal by the debtor, the committee sought leave from the bankruptcy court to bring a fraudulent transfer action itself on behalf of the debtor, under the theory of derivative standing. After a hearing, the bankruptcy court authorized the committee to bring the claims.[262]

The committee filed its complaint wherein it sought to avoid allegedly fraudulent transfers made by and liabilities incurred by the debtor in connection with the leveraged buyout and post-buyout transactions and to have the value of the avoided transactions returned to the bankruptcy estate. The complaint had three counts including one under 11 U.S.C. § 544(b) against each of three groups of defendants.[263]

The defendants filed motions to dismiss under FRCP 12(b)(1), and contended, among other things, that the fraudulent transfer claims asserted by the committee had been sold in the prior asset sale. The district court granted the defendants' motions and dismissed the committee's complaint for lack of subject matter jurisdiction. The court held that the fraudulent transfer claims were assets of the debtor, and that because the bankruptcy asset sale sold off all of the debtor's assets, the claims were no longer property of the bankruptcy estate and the committee was not able to raise them on the estate's behalf.[264]

The Third Circuit reversed, holding that under state law, fraudulent transfer claims belong to the creditors and that the claims are not assets of the debtor. Therefore, the claims could not have been sold as part of the debtor's assets in the bankruptcy auction.[265]

After remand, the defendants filed motions to dismiss yet again. They argued several grounds for dismissal which they had asserted in their prior motion and which the Third Circuit declined to reach. For the first time, however, they brought to the attention of the court the decision in Hartford[266] and argued that the committee lacked standing to bring the fraudulent transfer action because only a trustee or a debtor could do so.[267]

The district court granted the renewed motions to dismiss, and held that the committee could not bring suit under 11 U.S.C. § 544. It found that the Bankruptcy Code did not authorize a creditors' committee to bring a fraudulent transfer avoidance action derivatively and that the interpretation of the Supreme Court in Hartford[268] in the reading of the phrase the "trustee may" applied to the use of the same language in 11 U.S.C. § 544. In addition, the district court also gave a number of other alternative grounds for dismissal. The committee appealed, and the Third Circuit affirmed.[269]

After thoroughly analyzing the Supreme Court's rationale in Hartford,[270] the Third Circuit noted that a number of courts had allowed creditors' committees to bring derivative fraudulent transfer lawsuits in chapter 11 cases under 11 U.S.C. §§ 1103(c)(5) and 1109(b) despite the absence of any explicit statutory authority permitting derivative standing. The court held that these provisions, although broad in scope, do not authorize a creditors' committee to act derivatively to prosecute an avoidance action.[271]

The court held that 11 U.S.C. § 1109(b) does not grant authority to a creditors' committee to initiate an action when the trustee or a debtor refuses to bring one. Instead, that provision only permits a committee to intervene as a party plaintiff when a proceeding has already been brought by the statutorily authorized party. Despite this distinction between initiation and intervention, the Third Circuit pointed out that a number of courts had granted authority to creditors to bring avoidance actions under this provision claiming that a right to be heard would be an empty grant unless those who had such right were allowed to act when those who should act did not.[272] Nevertheless, when 11 U.S.C. § 544(b) was interpreted under the dictates of Hartford,[273] it had to be read as an exclusive right of action to the trustee; but a broad "right to be heard" provision cannot expand the intent that was shown by the unambiguous wording that Congress used in 11 U.S.C. § 544(b).[274]

The Third Circuit then went on to disagree with the usage of other courts in relying upon 11 U.S.C. § 1103(c)(5) as a basis for derivative standing. The court described this provision as a "catch all" which allows a creditors' committee to perform such other services as are in the interests of those represented. But, if this provision were given the far reaching scope that the committee had wanted, it would overcome all of the other conflicting Bankruptcy Code provisions and any limitations contained in them.[275] The Third Circuit did not want the tail to wag the dog.

> Neither § 1103(b)(5) nor § 1109(b), taken separately or together, provide sufficient statutory authority for the practice followed by the committee and approved by the bankruptcy court in this case. Because these chapter 11 provisions granting significant authority to creditors' committees do not go so far as to allow such committees to initiate avoidance actions, no matter whether the trustee fails to act and/or the committee secures court approval, we can not distinguish Hartford Underwriters on the basis that Hartford Underwriters was a chapter 7 case while here we consider a case under chapter 11. The committee urges us to go beyond a "cursory reading" of § 544(b) and examine other provisions of the Code. We have done so, and can find no provision which grants the committee the authority denied to it in § 544(b).[276]

The Third Circuit then went on to discuss those cases that were handed down after Hartford[277] but had allowed derivative standing under their own particular circumstances. For example, the Third Circuit mentioned Hartford[278] and noted that that decision had emphasized the fact that derivative standing under 11 U.S.C. §§ 547 and 548 had nothing to do with the Supreme Court's decision dealing with 11 U.S.C. § 506(c).[279]

Another case that the Third Circuit mentioned and attempted to distinguish away was In re Together Development Corp.[280] In In re Together Development Corp.,[281] the court had noted that there was no provision in the Bankruptcy Code that prohibited derivative standing. The Third Circuit found it more important that no provision of the Bankruptcy Code actually allowed derivative standing and that the Hartford[282] decision ruled that this omission of a positive authorization was critical.[283]

Even though the Supreme Court decision in Hartford[284] dealt with 11 U.S.C. § 506(c), the Third Circuit, nevertheless, used the Supreme Court's reasoning in interpreting the language of 11 U.S.C. § 544(b).[285]

> [W]e should not idly ignore considered statements the Supreme Court makes in dicta. The Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket. "Appellate courts that dismiss these expressions [in dicta] and strike off on their own increase the disparity among tribunals (for other judges are likely to follow the Supreme Court's marching orders) and frustrate the even-handed administration of justice by giving litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there.[286]

Therefore, even though Hartford[287] dealt with a different statutory provision than the Third Circuit was considering, the Third Circuit still felt that the Supreme Court's logic should be applied in any event.

Lastly, the Third Circuit held that prior practice and policy reasons were not enough to justify the usage of derivative standing. The Third Circuit pointed out that a number of other decisions, such as In re The Gibson Group, Inc.,[288] had relied upon this to validate the employment of derivative standing. Although a debtor might not initiate litigation, due to conflicts of interest or, for other reasons, this was not enough to justify derivative standing. The Third Circuit believed that it was up to Congress, not the judiciary, to establish derivative standing in creditors or committees. Derivative standing might make sense, but it was a policy decision that should be left to Congress, and not the courts.[289]

Cybergenics[290] was handed down on September 20, 2002. Less than one month later, on November 18, 2002, this opinion and judgment was vacated and was scheduled for a rehearing en banc. A majority of the active judges who had not been recused had voted for a rehearing en banc. Of the judges that decided the opinion on September 20, 2002, Judges Scirica, Alito, and Fuentes, only Judge Fuentes, who wrote the opinion, and Judge Alito voted to allow the opinion to stand pending en banc review. At the time of the writing of this article, the en banc review had not occurred.

V. CONCLUSION

Recently, derivative standing has taken a few hits. Hartford,[291] although an indirect one, still had an impact on the evolution of this theory. A number of the cases that were decided after this decision have felt the need to wrestle with the rationale employed by the Supreme Court and it can be seen that derivative standing, in certain instances, has not been as widely applied.

Cybergenics[292] was a direct hit, but that ruling has been vacated and there is nothing left to do but wait for the Third Circuit's en banc rehearing. In those instances where a creditor, or a committee, would like to pursue an avoidance action by assisting the debtor or the trustee, derivative standing, as a result of these more recent decisions, would appear to still apply. In addition, some post-Hartford[293] cases have attempted to avoid the reach of that decision by premising derivative standing under 11 U.S.C. § 503(b)(3)(B). The language of that provision does speak to the actions of a creditor whereas the other statutory provisions under 11 U.S.C. § 544, 547 and 548 do not.

Other circuits, like the Second Circuit, have simply ignored Hartford.[294] Apparently, their decisions do not think that the ruling is applicable and so it is never even mentioned.

Although this theory may be a bit battered and bruised, as a result of Hartford[295] and Cybergenics,[296] all-in-all, derivative standing is still standing.

Footnotes

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2 11 U.S.C. § 541(a).

3 11 U.S.C. § 541(a).

4 Louisiana World Exposition v. Federal Ins. Co., 858 F.2d 233, 18 Bankr. Ct. Dec. (CRR) 498 (5th Cir. 1988); United States v. Whiting Pools, 462 U.S. 198, 205–206, 103 S.Ct. 2309, 2313–2314, 76 L.Ed.2d 515 (1983); In re Louisiana World Exposition, Inc., 832 F.2d 1391, 1399 (5th Cir. 1987).

5 Louisiana World Exposition v. Federal Insurance Company, 858 F.2d 233, 246; In re S.I. Acquisition, Inc., 817 F.2d 1142, 1149 (5th Cir. 1987); In re MortgageAmerica Co., 714 F.2d 1266, 1274 (5th Cir. 1983); In re Ozark Restaurant Equipment Co., 816 F.2d 1222, 1225 (8th Cir. 1987) cert. denied, 484 U.S. 848, 108 S.Ct. 147, 98 L.Ed.2d 102 (1987).

6 11 U.S.C. § 1108.

7 In re Dur Jac Ltd., 254 B.R. 279, 44 Collier Bankr. Cas. 2d (MB) 1774 (Bankr. M.D. Ala. 2000); 11 U.S.C. § 1108.

8 In re Dur Jac Ltd., 254 B.R. 279, 284.

9 11 U.S.C. § 1107.

10 In re Holcombe, 284 B.R. 141, 142 (Bankr.N.D.Ala. 2001).

11 Louisiana World Exposition, 858 F.2d 233, 245–246; United States v. Whiting Pools, 462 U.S. 198, 200 n. 3; In re Hughes, 704 F.2d 820, 822 (5th Cir. 1983).

12 Louisiana World Exposition, 858 F.2d 233, 246; In re Hughes, 704 F.2d 820, 822; Georgia Pacific Corp. v. Sigma Service Corp., 712 F.2d 962, 966 (5th Cir. 1983). See also Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery, 304 F.3d 316, 40 Bankr. Ct. Dec. (CRR) 53, Bankr. L. Rep. (CCH) ¶ 78729 (3d Cir. 2002), reh'g en banc granted, opinion vacated, 310 F.3d 785 (3d Cir. 2002) and on reh'g en banc, 330 F.3d 548, 41 Bankr. Ct. Dec. (CRR) 98, Bankr. L. Rep. (CCH) ¶ 78861 (3d Cir. 2003) ("Cybergenics") ("Under 11 U.S.C. § 1107(a), when no trustee is appointed, a debtor in possession … possesses all of the powers and duties of a trustee.").

13 Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 352, 105 S.Ct. 1986, 1992, 85 L.Ed.2d 372 (1985). See also In re The Gibson Group, Inc., 66 F.3d 1436, 1441 (6th Cir. 1995) ("A debtor in possession has all the powers of a trustee.").

14 Louisiana World Exposition, 858 F.2d 233, 250; Ford Motor Credit Co. v. Weaver, 680 F.2d 451, 462 n.8 (6th Cir. 1982); Matter of Vitreous Steel Products Company, 911 F.2d 1223, 1230 (7th Cir. 1990) ("The trustee in bankruptcy acts as representative of all the unsecured creditors."), citing Koch Refining v. Farmers Union Central Exchange, Inc., 831 F.2d 1339, 1342–1343 (7th Cir. 1987), cert. denied, 485 U.S. 906, 108 S.Ct. 1077, 99 L.Ed.2d 237 (1988).

15 Fogel v. Zell, 221 F.3d 955, 965 (7th Cir. 2000); Pepper v. Litton, 308 U.S. 295, 307, 60 S.Ct. 238, 84 L.Ed. 281(1939); Koch Refining v. Farmers Union Central Exchange, Inc., 831 F.2d 1339, 1343–1344 (7th Cir. 1987), cert. denied, 485 U.S. 906, 108 S.Ct. 1077, 99 L.Ed.2d 237 (1988); In re Ionosphere Clubs, Inc., 17 F.3d 600, 604 (2nd Cir. 1994).

16 Fogel, 221 F.3d 955, 966; Commodity Futures, 471 U.S. 343, 354–355; In re Salzer, 52 F.3d 708, 712 (7th Cir. 1995); In re Martin, 91 F.3d 389, 394 (3rd Cir. 1996).

17 Louisiana World Exposition, 858 F.2d 233, 247, citing 11 U.S.C. § 704(1).

18 Commodity Futures, 471 U.S. 343, 352, 105 S.Ct. 1986, 1992.

19 Louisiana World Exposition, 858 F.2d 233, 246; Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416, 428–429, 92 S.Ct. 1678, 1686, 32 L.Ed.2d 195 (1972); Pepper v. Litton, 308 U.S. 295, 307, 60 S.Ct. 238, 245 (In interpreting § 70(a)(6) of the prior Bankruptcy Act, a predecessor of §§ 541(a)(1) and 704(1) of the current Bankruptcy Code, the Supreme Court ruled that while usually that fiduciary duty is enforceable directly by the corporation, or through a shareholder's derivative action, it is, due to a bankruptcy filing of the corporation, enforceable by the trustee).

20 In re Dur Jac Ltd., 254 B.R. 279, 284, citing 11 U.S.C. §§ 1107 and 1108.

21 In re STN Enterprises, 779 F.2d 901, 904 (2nd Cir. 1985), citing 11 U.S.C. §§ 704, 1106 and 1107.

22 In re STN Enterprises, 779 F.2d 901, 904, citing 11 U.S.C. § 323(b).

23 In re The Gibson Group, Inc., 66 F.3d 1436, 1442, citing 11 U.S.C. §§ 701–766 and 1101–1174.

24 In re The Gibson Group, Inc., 66 F.3d 1436, 1442; In re March, 995 F.2d 32 (4th Cir. 1993) (ruling that a chapter 11 debtor acts as the trustee for all of his creditors); Bennett v. Williams, 892 F.2d 822, 823 (9th Cir. 1989) (holding that the trustee must preserve assets of the estate).

25 Louisiana World Exposition, 858 F.2d 233, 246–247.

26 In re The Gibson Group, Inc., 66 F.3d 1436, 1442.

27 Louisiana World Exposition, 858 F.2d 233, 249.

28 In re Dur Jac Ltd., 254 B.R. 279, 284–285; Nebraska State Bank v. Jones, 846 F.2d 477 (8th Cir. 1988); Matter of Xonics Photochemical, Inc., 841 F.2d 198, 202–203 (7th Cir. 1988).

29 Cybergenics, 304 F.3d 316, 319; Louisiana World Exposition, 858 F.2d 233, 247; Hartford Underwriters Insurance Company v. Union Planters Bank, 530 U.S. 1, 13 n. 5, (2000) ("Hartford").

30 In re Godon, Inc., 275 B.R. 555, 561 (Bankr.E.D.Cal. 2002).

31 In re Godon, Inc., 275 B.R. 555, 561; Chatfield v. O'Dwyer, 101 F. 797, 799–800 (8th Cir. 1900). See also 3A James Wm. Moore, et al., Collier on Bankruptcy, ¶ 64.104 n.6 (14th ed. rev. 1975) ("Collier 14th Ed.").

32 "(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankruptcy estates, and the order of payment, shall be: (1) …; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, is recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery;" Bankruptcy Act § 64(a)(1), 11 U.S.C. § 104(a)(1) (redesignated from § 64(b)(2) in 1938) (repealed 1978). In re Godon, Inc., 275 B.R. 555, 562.

33 In re Kenny, 269 F. 54, 57 (W.D.Pa. 1920) (the creditors of the debtor were the prosecutors of the lawsuit and used the trustee's name merely as a legal necessity). Cf. A.C. James Co. v. Reconstruction Finance Corp. (In re Western Pacific Railroad Co.), 122 F.2d 807, 808 (9th Cir. 1941); Australia v. MacDonald (In re Patterson-MacDonald Shipbuilding Co.), 288 F. 546, 548 (9th Cir. 1922); Ohio Valley Bank v. Mack, 163 F. 155, 156 (6th Cir. 1906); Collier 14th Ed., ¶ 62.29[2.4]; In re Godon, Inc., 275 B.R. 555, 562.

34 Collier 14th Ed., ¶ 62.29[2.4] at p. 1578 (footnotes omitted); In re Godon, Inc., 275 B.R. 555, 562. In re Eureka Upholstering Co., 48 F.2d 95, 96 (2nd Cir. 1931) ("… The receiver is responsible for the collection of the assets, and he alone can authorize any charges against them. If any creditor, petitioning or other, learns facts which lead him to suppose that property has been concealed, he may, and indeed he should, advise the receiver, and if the receiver prove slack, he may apply to the referee [bankruptcy judge] to stir him to action. The referee or the [district] judge may then authorize the creditor to proceed, and he will be entitled to his reward under § 64(b)(2) [64a(1)], but not otherwise.") (citations omitted).

35 In re Eureka Upholstering Co., 48 F.2d at 95.

36 In re Stearns Salt & Lumber Co., 225 F. 1 (C.C.A. 6th Cir. 1915); In re Godon, Inc., 275 B.R. 555, 562.

37 Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 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) ¶ 78183 (2000).

38 Hartford, 530 U.S. 1.

39 Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery, 304 F.3d 316, 40 Bankr. Ct. Dec. (CRR) 53, Bankr. L. Rep. (CCH) ¶ 78729 (3d Cir. 2002), reh'g en banc granted, opinion vacated, 310 F.3d 785 (3d Cir. 2002) and on reh'g en banc, 330 F.3d 548, 41 Bankr. Ct. Dec. (CRR) 98, Bankr. L. Rep. (CCH) ¶ 78861 (3d Cir. 2003).

40 Hartford, 530 U.S. 1.

41 In re Housecraft Industries USA, Inc., 310 F.3d 64, 40 Bankr. Ct. Dec. (CRR) 98, Bankr. L. Rep. (CCH) ¶ 78740 (2d Cir. 2002) ("Housecraft").

42 Cybergenics, 304 F.3d 316.

43 Housecraft, 310 F.3d 64; Cybergenics, 304 F.3d 316, 325; Louisiana World Exposition, 858 F.2d 233, 247; In re STN Enterprises, Inc., 779 F.2d 901, 904; In re First Capital Holdings Corp., 146 B.R. 7, 11 (Bankr.C.D.Cal. 1992); In re Suffola, Inc., 2 F.3d 977, 979 n.1 (9th Cir. 1993); In re Pilavis, 233 B.R. 1, 3 (Bankr.D.Mass. 1999).

44 In re Together Development Corp., 262 B.R. 586, 591 (Bankr.D.Mass. 2001).

45 Hartford, 530 U.S. 1.

46 Sectionn 1103. Powers and duties of committees

(c) A committee appointed under Section 1102 of this title may —

(5) perform such other services as are in the best interest of those represented.

47 Section 1109. Right to be heard: (b) A party in interest, including the debtor, the trustee, a creditors" committee, an equity security holders' committee, a creditor, an equity security holder or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

48 In re First Capital Holdings Corp., 146 B.R. 7, 23 Bankr. Ct. Dec. (CRR) 783, 27 Collier Bankr. Cas. 2d (MB) 1043, Bankr. L. Rep. (CCH) ¶ 74964 (Bankr. C.D. Cal. 1992).

49 First Capital, 146 B.R. 7, 10, citing Louisiana World Exposition, 858 F.2d 233, 246.

50 First Capital, 146 B.R. 7, 10, citing Official Committee of Unsecured Creditors v. First Union National Bank (In re Florida Group, Inc.), 123 B.R. 923, 924 (Bankr.M.D.Fla. 1991) and Official Creditors' committee v. Alloy Automotive Co. (In re Wesco Products Co.), 22 B.R. 107, 109 (Bankr.N.D.Ill. 1982).

51 First Capital, 146 B.R. 7, 10.

52 First Capital, 146 B.R. 7, 11.

53 First Capital, 146 B.R. 7, 11, citing In re STN Enterprises, 779 F.2d 901, n. 3 and William L. Norton, Jr., Bankruptcy Law & Practice § 52.1150 (1991).

54 First Capital, 146 B.R. 7, 11, citing Louisiana World Exposition, 858 F.2d 233, 247 and United Jersey Bank v. Morgan Guaranty Trust Co. (In re Prime Motor Inns, Inc.), 135 B.R. 917, 919 (Bankr.S.D.Fla. 1992) (dictum).

55 First Capital, 146 B.R. 7, 11.

56 First Capital, 146 B.R. 7, 13.

57 First Capital, 146 B.R. 7, 13.

58 Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351, Bankr. L. Rep. (CCH) ¶ 71434 (5th Cir. 1986).

59 Banque Paribas-London, 797 F.2d 1351, 1354.

60 Banque Paribas-London, 797 F.2d 1351, 1354

61 Fuel Oil Supply and Terminaling v. Gulf Oil Corp., 762 F.2d 1283, 12 Collier Bankr. Cas. 2d (MB) 1381, Bankr. L. Rep. (CCH) ¶ 70592 (5th Cir. 1985).

62 Banque Paribas-London, 797 F.2d 1351, 1363, citing Fuel Oil Supply, 762 F.2d 1283, 1286 ("Congress intended § 1109(b) to carry forward to the Bankruptcy Code the broad rights to appear and be heard under the former Bankruptcy Code.").

63 Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351, 1363, citing Fuel Oil Supply and Terminaling Co. v. Gulf Oil Corp., 762 F.2d 1283, 1287

64 Banque Paribas-London, 797 F.2d 1351, 1363, citing 5 Collier on Bankruptcy, ¶ 1109.02(3) (15th Ed. 1986).

65 In re Nicolet, Inc., 80 B.R. 733 (Bankr. E.D. Pa. 1987).

66 Nicolet, 80 B.R. 733, 735–736.

67 Nicolet, 80 B.R. 733, 740.

68 Nicolet, 80 B.R. 733, 740.

69 Cybergenics, 304 F.3d 316.

70 Banque Paribas-London, 797 F.2d 1351.

71 In re STN Enterprises, Inc., 779 F.2d 901.

72 Banque Paribas-London, 797 F.2d 1351.

73 Nicolet, 80 B.R. 733, 737–738.

74 In re STN Enterprises, Inc., 779 F.2d 901.

75 Nicolet, 80 B.R. 733, 738.

76 Nicolet, 80 B.R. 733, 738.

77 In re McKeesport Steel Castings Co., 799 F.2d 91, 15 Collier Bankr. Cas. 2d (MB) 563, Bankr. L. Rep. (CCH) ¶ 71437 (3d Cir. 1986).

78 11 U.S.C. § 506. Determination of secured status: (c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

79 McKeesport, 799 F.2d 91, 94.

80 Nicolet, 80 B.R. 733, 738.

81 McKeesport, 799 F.2d 91.

82 In re Morrison, 69 B.R. 586 (Bankr. E.D. Pa. 1987), where the court stated that it was most reluctant to decide issues before it on the ground that a party that was enthusiastically supporting a legal position should not be allowed to do so on the basis of a lack of standing. Nicolet, 80 B.R. 733, 738, citing Morrison, 69 B.R. 586, 588–590, In re United Church of the Ministers of God, 74 B.R. 271, 276 (Bankr.E.D.Pa. 1987) and In re Young, 70 B.R. 968, 970–971 (Bankr.E.D.Pa. 1987).

83 Nicolet, 80 B.R. 733, 738, citing Wolf v. Weinstein, 372 U.S. 633, 642–645, 10 L.Ed.2d 33, 83 S.Ct. 969 (1963).

84 Nicolet, 80 B.R. 733, 738; In re Curry & Sorensen, Inc., 57 B.R. 824, 828–829 (9th Cir. BAP 1986); In re Jermoo's, Inc., 38 B.R. 197, 200 (Bankr.W.D.Wis. 1984); In re Toledo Equipment Co., 35 B.R. 315, 317 (Bankr.N.D.Ohio 1983); In re Liberal Market, Inc., 14 B.R. 685, 688 (Bankr.S.D.Ohio 1981).

85 Nicolet, 80 B.R. 733, 738–739, citing In re Monument Record Corp., 71 B.R. 853, 863 (Bankr.M.D.Tenn. 1987); In re Four Seasons Sporting Goods, Inc., 46 B.R. 528, 531 (Bankr.N.D.Cal. 1985); In re Philadelphia Light Supply Co., 39 B.R. 51, 52 (Bankr.E.D. Pa. 1984); In re Chemical Separations Corp., 32 B.R. 816, 819 (Bankr.E.D.Tenn. 1983); In re Gander Mountain, Inc., 29 B.R. 260, 263 (Bankr. E.D. Wis. 1983); In re Joyanna Holitogs, 21 B.R. 323, 326 (Bankr.S.D.N.Y. 1982); and In re Monsour Medical Center, 5 B.R. 715, 719 (Bankr.W.D.Pa. 1980).

86 Nicolet, 80 B.R. 733, 739.

87 Nicolet, 80 B.R. 733, 739; In re Parrot Packing Co., 42 B.R. 323, 330 (M.D.Ind. 1983) (the debtor had refused to reject a collective bargaining agreement to avoid unfair labor practice charges). In re Philadelphia Light Supply Co., 39 B.R. 51, 52 (the debtor had failed to pursue its own president and sole shareholder); In re Toledo Equipment Co., 35 B.R. 315, 319 (the debtor wanted to maintain a good relationship with its creditor); In re Chemical Separations Corp., 32 B.R. 816, 819 (the debtor did not want to sue its own principal stockholder).

88 Nicolet, 80 B.R. 733, 739.

89 Nicolet, 80 B.R. 733, 739.

90 In re Marin Motor Oil Co. Inc., 689 F.2d 445, 457 (3rd Cir. 1982).

91 Nicolet, 80 B.R. 733, 738; Marin Motor Oil, 689 F.2d 445, 457; In re Hanover Industrial Machine Co., 61 B.R. 551 (Bankr.E.D.Pa. 1986); In re United Minerals & Grains Corp., 76 B.R. 991, 996–1000 (Bankr.E.D.Pa. 1987).

92 Louisiana World, 832 F.2d 1391.

93 Louisiana World Exposition, 832 F.2d 1391, 1397.

94 Louisiana World Exposition, 832 F.2d 1391, 1397.

95 Louisiana World Exposition, 832 F.2d 1391, 1398.

96 Louisiana World Exposition v. Federal Ins. Co., 858 F.2d 233, 18 Bankr. Ct. Dec. (CRR) 498 (5th Cir. 1988).

97 Louisiana World Exposition, Inc. v. Federal Insurance Company, 858 F.2d 233, 247.

98 Louisiana World Exposition, Inc. v. Federal Insurance Company, 858 F.2d 233, 252–253.

99 Banque Paribas-London, 797 F.2d 1351.

100 Fuel Oil Supply, 762 F.2d 1283.

101 Louisiana World Exposition, Inc. v. Federal Insurance Company, 858 F.2d 233, 253.

102 Louisiana World Exposition, Inc. v. Federal Insurance Company, 858 F.2d 233, 247.

103 Louisiana World Exposition, Inc. v. Federal Insurance Company, 858 F.2d 233, 249, citing Banque Paribas-London, 797 F.2d 1351 and Fuel Oil Supply, 762 F.2d 1283, 1285–1287.

104 Louisiana World Exposition, Inc. v. Federal Insurance Company, 858 F.2d 233, 249; Banque Paribas-London, 797 F.2d 1351, 1363; Fuel Oil Supply, 762 F.2d 1283, 1287.

105 Louisiana World Exposition, Inc. v. Federal Insurance Company, 858 F.2d 233, 251; Philadelphia Light Supply, 39 B.R. 51, 52. Nicolet, 80 B.R. 733, 739 ("Allowing a committee to maintain an action on behalf of a [debtor in possession] is [a] less drastic and hence we believe initially preferable course to that of requiring appointment of a trustee simply to prosecute a meritorious cause of action where the [debtor in possession] chooses not pursue").

106 STN Enterprises, Inc., 779 F.2d 901.

107 STN Enterprises, 779 F.2d 901, 905.

108 In re Walnut Leasing Company, Inc. and Equipment Leasing Corporation of America, Inc., 1999 WL 729267, *2, n.4.

109 Walnut Leasing, 1999 WL 729267.

110 In re Catwil Corp., 175 B.R. 362, 32 Collier Bankr. Cas. 2d (MB) 644 (Bankr. E.D. Cal. 1994).

111 Catwil, 175 B.R. 362, 364.

112 Louisiana World Exposition, Inc. v. Federal Insurance Company, 858 F.2d 233, 247; In re Curry & Sorensen, Inc. 57 B.R. at 828 n3 (citing In re Amarex, Inc., 36 B.R. 59, 62 (Bankr.W.D.Okla. 1984)); In re First Capital Holdings, 146 B.R. 1, 11; In re Toledo Equipment Co., 35 B.R. 316, 319–320; In re Joyanna Holitogs, 21 B.R. at 325–326; Catwil, 175 B.R. 362, 364.

113 In re Curry & Sorensen, Inc., 57 B.R. at 828 (citing Meyer v. Fleming, 327 U.S. 161, 169 (1946)); Gochenour v. George & Francis Ball Foundation, 35 F.Supp. 508, 518 (S.D. Ind. 1940), affirmed, 117 F.2d 259 (7th Cir. 1941), cert. denied, 313 U.S. 566, 61 S.Ct. 942, 85 L.Ed. 1525 (1941); Catwil, 175 B.R. 362, 364.

114 In re Curry & Sorensen, Inc., 57 B.R. at 828; Catwil, 175 B.R. 362, 364.

115 Catwil, 175 B.R. 362, 364–365.

116 In re Chemical Separations Corp., 32 B.R. 816, 819, 11 Bankr. Ct. Dec. 1029, 9 Collier Bankr. Cas. 2d (MB) 542, Bankr. L. Rep. (CCH) ¶ 69386, (Bankr. E.D. Tenn. 1983).

117 Chemicals Separations, 32 B.R. 816, 819.

118 Catwil, 175 B.R. 362, 365.

119 Catwil, 175 B.R. 362, 365.

120 Catwil, 175 B.R. 362, 365.

121 Catwil, 175 B.R. 362, 365.

122 Catwil, 175 B.R. 362, 365.

123 In re SRJ Enterprises, Inc., 151 B.R. 189, 194 (Bankr.N.D.Ill. 1993).

124 Surf N Sun Apartments, Inc. v. Dempsey, 253 B.R. 490 (M.D. Fla. 1999).

125 SRJ Enterprises, 151 B.R. 189, 194.

126 Surf N Sun, 253 B.R. 490, 493, citing 11 U.S.C § 105(a).

127 Surf N Sun, 253 B.R. 490, 493, citing Matter of Texas Consumer Finance Corp., 480 F.2d 1261, 1265 (5th Cir. 1973) and Matter of Levens, 563 F.2d 1223, 1224 (5th Cir. 1977).

128 Surf N Sun, 253 B.R. 490, 493, citing Norwest Bank of Worthington v. Ahlers, 485 U.S. 197, 206, 108 S.Ct. 963, 969, 99 L.Ed.2d 169 (1988).

129 Surf N Sun, 253 B.R. 490, 493.

130 BFP v. Resolution Trust Corp., 511 U.S. 531, 537, 114 S.Ct. 1757, 1761, 128 L.Ed.2d 556 (1994) (Citation omitted); Surf N Sun, 253 B.R. 49, 493.

131 Surf N Sun, 253 B.R. 490; Union Bank v. Wolas, 502 U.S. 151, 160, 112 S.Ct. 527, 532, 116 L.Ed.2d 514 (1991).

132 H.R.Rep. No. 95-595, p. 179 (1977), U.S. Code. Cong. & Admin. News 1978, p. 6139.

133 U.S. v. Ron Pair Enterprises, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989), quoting Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917).

134 Surf N Sun, 253 B.R. 490, 493–494; Ron Pair, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030; Caminetti, 242 U.S. 470, 485, 37 S.Ct. 192, 194.

135 Surf N Sun, 253 B.R. 490, 494, citing In re Adams Furniture Industries, 191 B.R. 249, 253 (Bankr.S.D.Ga. 1996).

136 Surf N Sun, 253 B.R. 490, 494.

137 Surf N Sun, 253 B.R. 490, 494, citing 11 U.S.C § 324.

138 Surf N Sun, 253 B.R. 490, 494–495.

139 Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 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) ¶ 78183 (2000).

140 Hartford, 530 U.S. 1, 3.

141 Hartford, 530 U.S. 1, 6.

142 Hartford, 530 U.S. 1, 6.

143 Hartford, 530 U.S. 1, 13 n.5.

144 Hartford, 530 U.S. 1, 6–7.

145 Hartford, 530 U.S. 1, 13 n. 5.

146 Hartford, 530 U.S. 1.

147 Hartford, 530 U.S. 1.

148 In re Together Development Corp., 262 B.R. 586, 37 Bankr. Ct. Dec. (CRR) 273 (Bankr. D. Mass. 2001).

149 Together Development, 262 B.R. 586, 587.

150 Together Development, 262 B.R. 586, 587–588.

151 Together Development, 262 B.R. at 588.

152 Together Development, 262 B.R. 586, 588–589; United States v. AVX Corp., 962 F.2d 108, 116 n.7 (1st Cir. 1992); Sentinel Trust Co. v. Newcare Health Corp. (In re Newcare Health Corp.), 244 B.R. 167, 170 (1st Cir.BAP 2000).

153 Hartford, 530 U.S. 1.

154 Together Development, 262 B.R. 586, 589.

155 Catwil, 175 B.R. 360, 362.

156 Together Development, 262 B.R. 586, 590.

157 Hartford, 530 U.S. 1.

158 Hartford, 530 U.S. 1.

159 Hartford, 530 U.S. 1.

160 Together Development, 262 B.R. 586, 590–591.

161 Hartford, 530 U.S. 1.

162 Together Development, 262 B.R. 586, 591, citing Catwil, 175 B.R. 360, 365.

163 Together Development, 262 B.R. 586, 591–592.

164 Together Development, 262 B.R. 586, 592.

165 Official Unsecured Creditors' committee v. Steam (In re SPN Manufacturing Corp.), 984 F.2d 1305, 1316 (1st Cir. 1993), citing In re Daig Corp., 17 B.R. 41, 43 (Bankr.D. Minn. 1981); Together Development, 262 B.R. 586, 592–593.

166 Together Development, 262 B.R. 586, 593.

167 Hartford, 530 U.S. 1

168 In re Intern. Ltd.Commodore, 262 F.3d 96, 38 Bankr. Ct. Dec. (CRR) 72, 46 Collier Bankr. Cas. 2d (MB) 1120 (2d Cir. 2001).

169 STN Enterprises, 779 F.2d 901, 904.

170 Commodore, 262 F.3d 96.

171 Commodore, 262 F.3d 96, 98.

172 STN Enterprises, 779 F.2d 901, 904.

173 Commodore, 262 F.3d 96.

174 Commodore, 262 F.3d 96, 100.

175 In re Spaulding Composites Co., 207 B.R. 899, 904 (9th Cir.BAP 1997).

176 Spaulding Composites, 207 B.R. 899, 904; Commodore, 262 F.3d 96, 99.

177 Commodore, 262 F.3d 96, 100.

178 Commodore, 262 F.3d 96, 100.

179 Commodore, 262 F.3d 96, 100.

180 Hartford, 530 U.S. 1.

181 Commodore, 262 F.3d 96.

182 In re Housecraft Industries USA, Inc., 310 F.3d 64, 40 Bankr. Ct. Dec. (CRR) 98, Bankr. L. Rep. (CCH) ¶ 78740 (2d Cir. 2002).

183 Housecraft, 310 F.3d 64.

184 Commodore, 262 F.3d 96.

185 STN Enterprises, 779 F.2d 901.

186 Commodore, 262 F.3d 96.

187 Commodore, 262 F.3d 96.

188 Housecraft, 310 F.3d 64.

189 Commodore, 262 F.3d 96.

190 Housecraft, 310 F.3d 64.

191 Commodore, 262 F.3d 96.

192 Commodore, 262 F.3d 96.

193 STN Enterprises, 779 F.2d 901.

194 Commodore, 262 F.3d 96.

195 Housecraft, 310 F.3d 64, citing Avalanche Maritime Ltd. v. Parekh (In re Parmetex, Inc.), 199 F.3d 1029, 1031 (9th Cir. 1999); In re the Gibson Group, Inc., 66 F.3d at 1446; William B. Tanner Co. v. United States (In re Automated Business Systems, Inc.), 642 F.2d 200, 201 (6th Cir. 1981); In re Pilavis, 233 B.R. at 3–4; U.S.A.-FmHA v. Indi-Bel, Inc. (In re Williams), 167 B.R. 77, 82 (Bankr.N.D.Miss. 1994).

196 Commodore, 262 F.3d 96.

197 Housecraft, 310 F.3d 64.

198 Hartford, 530 U.S. 1.

199 Hartford, 530 U.S. 1.

200 In re Babcock & Wilcox Co., 2001 WL 725318 (E.D.La., June 26, 2001).

201 Louisiana World Exposition, 858 F.2d 233, 247; In re Babcock & Wilcox Co., 2001 WL 725318, *3.

202 Hartford, 530 U.S. 1; In re Babcock & Wilcox Co., 2001 WL 725318, *3, n. 1.

203 In re Babcock & Wilcox Co., 2001 WL 725318, *3, n. 1.

204 Louisiana World Exposition, 858 F.2d 233, 247.

205 In re Babcock & Wilcox Co., 2001 WL 725318, *4, citing Louisiana World Exposition v. Federal Insurance Company, 858 F.2d 233, 252 n. 20.

206 In re Babcock & Wilcox Co., 2001 WL 725318, *4.

207 In re Blount, 276 B.R. 753 (Bankr.M.D.La. 2002).

208 11 U.S.C. § 503. Allowance of administrative expenses:

(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 —

(b) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

209 In re Blount, 276 B.R. 753, 759. See also In re Romano, 52 B.R. 590, 593 (Bankr.N.D. Fla. 1985); Kentucky Threaded Products, Inc., 49 B.R. 118, 119 (Bankr.W.D.Ky. 1985); In re Spencer, 35 B.R. 280, 281 (Bankr.N.D.Ga. 1983); Lazar v. Casale (In re Casale), 27 B.R. 69, 70 (Bankr.E.D.N.Y. 1983); In re Schachter, 228 B.R. 359, 364 (Bankr.E.D.Pa. 1999); In re Lagasse, 228 B.R. 223, 225 (Bankr.E.D.Ark. 1998); In re Conty, 205 B.R. 329, 331–332 (Bankr.M.D.Fla. 1996); In re Monahan, 73 B.R. 543, 544 (Bankr.S.D.Fla. 1987); In re Jelinek, 153 B.R. 279, 286 (Bankr.D.N.D. 1993); In re Fall, 93 B.R. 1003, 1012 (Bankr.D.Or. 1988).

210 In re Blount, 276 B.R. 753, 759.

211 In re Blount, 276 B.R. 753, 759.

212 Hartford, 530 U.S. 1.

213 Hartford, 530 U.S. 1.

214 In re Blount, 276 B.R. 753, 760.

215 In re Blount, 276 B.R. 753, 760–761.

216 In re Blount, 276 B.R. 753, 761.

217 In re Blount, 276 B.R. 753, 761–762, citing Surf N Sun, 253 B.R. 490, 492 (federal courts have consistently held that § 503 (b)(3)(B) does not confer standing to creditors to sue on behalf of the bankruptcy estate ...); McCarthy v. Navistar Financial Corp. (In re Vogel Van & Storage, Inc.), 210 B.R. 27, 32 n. 4 (N.D.N.Y. 1997) (§ 503(b)(3)(B) does not itself confer standing; rather, it merely authorizes the recovery of certain expenses); Larson v. Munoz (In re Munoz), 111 B.R. 928, 931 n.2 (D.Colo. 1990); SRJ Enterprises, 151 B.R. 190, 193 n.1 (but § 503(b)(3)(B) does not confer standing; it only authorizes recovery of expenses to a creditor who successfully recovered property, which is to say, a creditor who had standing in the first place).

218 In re Blount, 276 B.R. 753, 762.

219 In re Blount, 276 B.R. 753, 763.

220 In re Blount, 276 B.R. 753, 764.

221 In re McLeroy, 250 B.R. 872 (N.D.Tex. 2000).

222 Hartford, 530 U.S. 1.

223 11 U.S.C. § 523 Exceptions to Discharge.

(a) A discharge under Sections 727, 1141, 1228(a) and (b) or 1328(b) of this title does not discharge an individual debtor from any debt —

(8) or an educational benefit, overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend, unless accepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependants;

224 In re McLeroy, 250 B.R. 872, 880.

225 Hartford, 530 U.S. 1.

226 Hartford, 530 U.S. 1.

227 In re McLeroy, 250 B.R. 872, 881.

228 In re Stangel, 219 F.3d 498 (5th Cir. 2000), cert. denied, 532 U.S. 910, 121 S.Ct. 1240, 149 L.Ed.2d 147 (2001).

229 In re Godon, 275 B.R. 555 (Bankr.E.D.Cal. 2002).

230 In re Blount, 276 B.R. 753.

231 In re Godon, Inc., 275 B.R. 555, 569.

232 In re Godon, Inc., 275 B.R. 555, 563.

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