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Part I. Articles

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The Super Duper Priority Administrative Expense: What it is, Where it Comes From, What it Does and How You Get One

I. INTRODUCTION

In Chapter 11 bankruptcy cases, secured creditors very often do not want to allow the debtor in possession to use their collateral. All too frequently, the Bankruptcy Courts rule in favor of the debtor in possession and the secured creditor is left with adequate protection payments. To add insult to injury, as the bankruptcy case progresses, the value of the secured creditor's collateral often diminishes. At some later point in time, to add salt to the wound, the secured creditor is left with collateral that is worth a lot less than when the bankruptcy case commenced. This is, figuratively speaking, the last straw. The purpose of this article

is to suggest how secured creditors can guard against such a scenario and, in fact, be repaid by the debtor in possession for the diminution in value to the secured creditor's collateral.

If done correctly, a secured creditor should be able to have the debtor in possession reimburse it for the diminution in value of the secured creditor's collateral for the time period that the debtor in possession possessed and used that collateral. This is called a "superpriority" administrative expense.

II. STATUTORY INTERPLAY

Being able to obtain a superpriority administrative expense requires an understanding of the interplay among three provisions of the Bankruptcy Code. These provisions are §§ 503(b)(1)(A),[2] 507(b)[3] and 361 of the Bankruptcy Code. The word "superpriority" is not defined in the Bankruptcy Code. It is used to describe a claim which, under applicable bankruptcy law and pursuant to a court order, may be entitled to be paid before some or all administrative expenses are paid, and possibly ahead of secured creditors.[4]

A. § 507(b)

Under this section of the Bankruptcy Code, if adequate protection has been extended to a secured creditor and later proves to be inadequate, that creditor then becomes entitled to a superpriority administrative expense claim if the creditor's administrative expense has been allowed under § 503(b), and such creditor's superpriority is allowed under § 507(b) to the extent that the proffered adequate protection was insufficient.[5] There is very little legislative history on § 507(b).

Section 507(b) was not in either the original House or Senate Bill.[6] It first arose in the compromise bill adopted by the House on September 28, 1978, which was an amendment in the nature of a substitute to the amendments proposed in the Senate Bill and would have permitted administrative expenses as a means to provide adequate protection. Unlike the House Bill, the Senate Bill did not permit the grant of administrative expense priority as a method of providing adequate protection.[7] Section 361(3) as enacted expressly prohibits this method of providing adequate protection.[8]

According to what was said on the floors of both Houses at the time that § 507(b) was first introduced:

> Section 507(b) of the House amendment is new and is derived from the compromise contained in the House amendment with respect to adequate protection under § 361. Subsection (b) provides that to the extent that adequate protection of the interest of a holder of a claim proves to be inadequate, then the creditor's claim is given priority over every other allowable claim entitled to distribution under § 507(a).[9]

At the time § 507(b) was first introduced, it was meant to grant senior administrative expense priority in order to compensate the holder of a claim to the extent that adequate protection of the interest of a holder of a claim proves to be inadequate.[10]

This legislative history indicates that Congress intended § 507(b) as compensation for failed adequate protection. It appears from this legislative history that this section was enacted as part of a compromise between the House and Senate in which administrative expense priority was dropped as an acceptable method for providing adequate protection. Congress had in mind the protection of secured creditors who extend credit to the bankruptcy estate after the filing.[11] Section 507 affords first priority to administrative expenses to encourage the provision of goods and services to the estate, and to compensate those who extended new resources attempting to rehabilitate the estate.[12] Congress granted this priority to offer an inducement for the post-petition extension of credit in order to promote reorganization.[13]

The superpriority section of 507(b) was also intended to recapture the value of security that was unexpectedly lost during the course of a bankruptcy case. In addition, this section is a statutory fail-safe system in recognition of the ultimate reality that protection previously determined to be the "indubitable equivalent" may later prove to be inadequate.[14] Section 507(b) was intended to protect from error or miscalculation in a court's judgment as to the appropriate level of adequate protection. Whereas adequate protection shields the creditor in the first instance from impairment in the value of his interest in the property, the superpriority was intended to recapture the value unexpectedly lost during the course of the case.[15]

This is supported by the remarks of Representative Edwards and Senator DeConcini where they said, with respect to their congressional statements to the Reform Act of 1978 pertaining to § 507(b):

> Subsection (b) provides that to the extent adequate protection of the interest of a holder of a claim proves to be inadequate, then the creditor's claim is given priority over every other claim entitled to distribution under § 507(a).[16]

Section 507(b), however, was not intended to serve as a guaranty that the adequate protection payments would be paid.[17]

As to the timing of § 507(b), where adequate protection becomes inadequate or otherwise fails and the use of the secured creditor's collateral nonetheless continues, § 507(b) comes into play at that time to the extent of the creditor's unprotected interest and giving it priority administrative expense status.[18] Since adequate protection orders are only predictions of the collateral value, they may occasionally fail to fully protect a creditor's interest. This may occur where the imposition of the automatic stay causes the value of the secured creditor's collateral to decline leaving the creditor with little or no compensation for the use of its property.[19] Section 507(b) remedies such inherent risks of an adequate protection order by enabling the injured creditor to file for a superpriority administrative expense for its deficiency ahead of all other administrative claimants.[20] It grants a secured creditor a first priority claim to the extent that the debtor's use of the collateral diminishes its value.[21] Section 507(b) is triggered to the extent of the secured creditor's unprotected interest and according that creditor priority administrative expense status.[22] As can be seen, § 507(b) is an adjunct to the adequate protection alternative set forth in § 361,[23] even though § 361(3), as a general proposition, prohibits the grant of an administrative expense as a means of providing adequate protection.

Section 507 defines the relative priority of expenses and claims against an estate in a bankruptcy case. The presumption in bankruptcy cases is that the debtor's limited resources will be equally distributed among the creditors. Therefore, statutory priorities must be narrowly construed.[24] To give priority to a claimant that was not clearly entitled to it is not only inconsistent with the policy of equality of distribution, it waters down the value of the priority for those creditors Congress intended to prefer.[25]

The prevailing rule under the pre-1978 Bankruptcy Code, that was rooted in equity, was that a debtor's estate is obligated to pay for collateral it controls and uses for the benefit of the estate.[26] Under the 1978 Code, the idea of using administrative expenses to fashion adequate protection for creditors was not abandoned altogether. It was written into § 507 so that to the extent the protection afforded under § 361 proves to be inadequate after the fact, the creditor is still entitled to a first priority administrative expense.[27] Therefore, § 507 has been said to convert a creditor's claim where there has been a diminution in the value of that creditor's secured collateral by reason of a § 362 stay into an allowable administrative expense claim under § 503(b).[28]

B. § 503(b)(1)(A)

Another statutory provision that plays an important part in the granting of a superpriority administrative expense is § 503(b)(1)(A).[29] The primary purpose of this section is to give creditors the motivation to continue to deal with the debtor in possession and supply it with goods and services.[30] Section 503(b)(1)(A) was not meant to saddle debtors with special post-petition obligations lightly or to give preferential treatment to particular creditors by creating a broad category of administrative expenses.[31] For a claim to be granted administrative expense status, the party claiming that entitlement has the burden of proof.[32]

The use of the word "including" in § 503(b) is a word of non-limitation under § 102(3),[33] and indicates that a court might well conclude that there are to be allowed as administrative expenses claims not necessarily precisely covered by the provisions of § 503(b) itself but which could fall into any of the phrases described in the subsections of § 503(b). Therefore, what constitutes actual and necessary costs and expenses of preserving the estate is open to judicial construction.[34] For example, in In re Callister, *supra* a Chapter 11 case that was subsequently converted to Chapter 7, the court granted superpriority status pursuant to §§ 503(b) and 507(b) for the loss in value of the collateral due to market forces and some loss through depreciation.[35]

In order for an administrative expense to be allowed, two factors must be met. First, the claimant must prove that the debt arose from a transaction with the debtor in possession, or trustee, as opposed to the preceding entity (or, alternatively, that the claimant gave consideration to the debtor in possession or trustee); and second, that the debt directly and substantially benefited the estate.[36]

1. The Requisite Benefit to the Estate

The words in the statute "actual" and "necessary" are given a high degree of scrutiny because one of the goals of Chapter 11 is to keep administrative costs to a minimum in order to preserve the debtor's scanty resources and encourage rehabilitation. In keeping with this goal, this section was not intended to burden debtors with special post-petition obligations lightly or give preferential treatment to a certain select group of creditors by creating a broad category of administrative expenses.[37] Consequently § 503(b) is given a narrow construction.[38]

This narrow interpretation requires an actual usage of the creditor's property by the debtor or trustee which confers a concrete benefit on the estate before a claim is allowable as an administrative expense. Therefore, the mere potential of a benefit to the estate is not enough for the claim to acquire the status as an administrative expense. The court's administrative expense inquiry focuses on whether the estate has received an actual benefit as opposed to the loss a creditor might experience by virtue of the debtor's possession of its property.[39]

In the case of Ford Motor Credit Company v. Dobbins, *supra,* a company which had financed an automobile dealer's acquisitions of new and used cars filed a superpriority administrative expense claim after an adequate protection order previously entered by the bankruptcy court proved insufficient to protect its interest. The court of appeals held, among other things, that the potential benefit that the chapter 11 debtors may have received when the bankruptcy court denied the creditor's motion for relief from the automatic stay to foreclose on its collateral, in the form of an opportunity to sell the collateral at a favorable price was not an actual benefit such as might entitle the creditor to an administrative expense under § 503(b); it was thus insufficient as a predicate for § 503(b) superpriority status.[40]

The Court held that the mere chance to market collateral is not the type of concrete and actual benefit contemplated by § 503(b)(1)(A). Although this type of a chance does have an advantage to the debtor in possession, it does not encompass the sort of benefit which is provided administrative expense protection because a benefit to the estate results only from use of the property.

This holding should be distinguished from the benefit recognized in In re J.F.K. Acquisitions Group, *supra.* In that case, a mortgagee which had moved unsuccessfully for relief from the automatic stay later moved for a superpriority administrative expense claim based upon the alleged failure of adequate protection ordered by the bankruptcy court in denying its motion to

vacate the stay. The superpriority administrative expense claim was granted because the debtor's use of the collateral, in that case a hotel, and its proceeds went to maintain the property and operate the business, and therefore the use of the collateral was an actual and necessary cost of preserving the estate.[41]

The focus here is on a benefit that is concrete as opposed to merely speculative. When collateral is actually used by a trustee or a debtor in possession in the operation of the debtor's business, it is a necessary cost and expense of preserving the estate under § 503(b) and to be given the priority of an administrative expense. But when the collateral only produces a potential benefit, in that it makes a business more likely to be sold by a purchaser that wants to acquire that sort of an asset, it may be a benefit but it is too speculative to be allowed as an actual, necessary cost and expense of preserving the estate.[42]

In In re ICS Cybernetics, Inc.,[43] the Court held that the mere retention of collateral as available inventory was not enough to constitute an administrative expense because the potential benefit to the estate provided by storage of the collateral did not typically rise to the level of actual use. In reaching this decision, the Court reasoned that while preservation is implicitly for the benefit of creditors, it may also be a means to other ends such as continuation of a business. The threshold requirement that the expense incurred be actual and necessary to the preservation of the estate, however, showed Congress' intent that priority status be awarded sparingly.[44]

Since § 503(b) is given a narrow interpretation, this requires actual usage of the creditor's property by the debtor that confers a concrete benefit on the estate before a claim can be allowed as an administrative expense. Therefore, the mere potential of benefit to the estate is insufficient for the claim to acquire the status as an administrative expense.

The Court's focus with respect to administrative expenses is on whether the estate has received an actual benefit, as opposed to the loss a creditor might experience by virtue of the debtor simply possessing its property.[45]

It has been held to be inequitable to tax unsecured creditors for a decline in the value of collateral when the decline does not result from the use that actually benefits the estate. To prioritize claims where they are not clearly entitled to such treatment is not only inconsistent with the policy of equality of distribution but it also dilutes the value of the priority for the claims of creditors Congress meant to prefer.[46]

2. Transaction With the Debtor in Possession or Trustee

The other requirement of § 503(b)(1)(A) is that the claim arise from a transaction with the debtor in possession or the trustee. In satisfying this, Courts have stated that such requirement is met in situations where there has been a post-petition inducement of a party's performance by the debtor in possession or trustee.[47]

Consideration is given to the estate only where the debtor in possession induces post-petition performance or where performance on a contract not rejected by the debtor in possession is rendered to the estate. Therefore, the key to the allowance of an administrative expense under this analysis is an inducement to a third party by the debtor in possession, followed by consideration from the third party to the debtor in possession. If the commitments of the parties arose pre-petition, no administrative expense is borne by the bankruptcy estate.[48]

Where a sale of property is in question, as opposed to a lease for use of that property, and that sale has occurred pre-petition, the default in payments do not constitute an administrative expense.[49] In Microsoft Corporation v. DAK Industries, Inc. (In re DAK Industries, Inc.),[50] the Court held that a computer software vendor, which had entered into a pre-petition agreement allowing the debtor to install software on computers that the debtor had sold, was not entitled to an administrative expense status for royalty payments based on the debtor's distribution of software post-petition. The Court characterized the parties' agreement as a lump sum sale of software units and concluded that the debt arose pre-petition. Similarly, in In re Marcus,[51] the Court found

that a transaction involving the sale of tools and parts to a debtor was finalized pre-petition and thus concluded that the creditor was not entitled to administrative claim status.

C. § 361

The administration of a bankruptcy case often requires courts to undergo a delicate balancing of the debtor's need to use collateral against the creditor's right to maintain the value of its security. In order to alleviate this tension, the Bankruptcy Code drafted § 361(1) provides the debtor with access to the collateral while giving the creditor adequate protection in the form of periodic cash payments, unless the creditor already has adequate protection by means of an "equity cushion."[52]

Because adequate protection orders are only predictions of a collateral's value, they may occasionally fail to fully protect a creditor's interest. This may occur where the delay caused by the imposition of the automatic stay results in a decline in the value of the secured creditor's collateral, leaving the creditor with little or no compensation for the use of its property.[53] Adequate protection is a means of preserving a creditor's interest in secured collateral subject to post-petition use by the debtor.[54] Adequate protection does not relate to the value of the collateral but rather to the value of the secured creditor's interest in its collateral.[55] The interest of a creditor in collateral includes the right to take possession of the collateral after a default, to dispose of collateral and to apply the proceeds received to reduce the debt and then be reinvested by the creditor.[56]

Adequate protection was intended to be an interim protection "designed not as a purgative of all creditor maladies, but as a palliative of the worst: Final relief comes from either reorganization, dismissal or liquidation." While the bankruptcy case is going forward, adequate protection is nothing more than interim protection for the duration of the automatic stay.[57]

When a bankruptcy petition is filed, a secured creditor is stopped by the automatic stay of § 362(a) from enforcing its state law rights in its collateral, the debtor's property, and from receiving through foreclosure and sale of the collateral the value of its interest in that property as of the date of the bankruptcy petition. It might take many months or years for a case to reach the stage of confirmation. Until then, the debtor may be allowed to use the creditor's collateral in an effort to reorganize. During this usage, along with the passing of time, the property may decline in value from the amount that the debtor would have received through liquidation on the date of the bankruptcy petition but for the imposition of the automatic stay.[58]

The idea of adequate protection in bankruptcy came from the Fifth Amendment protection of property interests.[59] The Bankruptcy Code gives secured creditors a number of rights, including the right to adequate protection, and these rights replace the protection given by possession.[60] The principle of adequate protection reconciles the competing interest of the debtor, who requires time to reorganize free from the harassment of its creditors, with the secured creditor, on the other hand, who is entitled to the constitutional protection of its property interest.[61]

III. PUTTING IT ALL TOGETHER

In order to qualify for a § 507(b) superpriority administrative expense four factors must be present. First, adequate protection must be provided by the debtor to the secured creditor. Second, this adequate protection must fail or be inadequate. Third, the secured creditor's claim qualifies as an administrative expense under § 503(b). Fourth, the secured creditor's claim, post-petition, arises under the stay of actions against property under § 362 or the use, sale or lease of property under § 363 or the granting of a lien under § 364(d).[62]

A. ADEQUATE PROTECTION

There is a split of authority as to whether the adequate protection necessary for a superpriority administrative expense needs to be awarded by a court order or provided voluntarily by the debtor. A minority of cases has held that a court order is not

mandatory.[63] The majority of authorities holds that adequate protection must be generated by a court order in order to qualify for a superpriority administrative expense.[64]

By requiring the Bankruptcy Court to affirmatively grant adequate protection, this excludes an "equity cushion" for a superpriority administrative expense.[65] Section 507(b) uses the active verb "provide." A debtor cannot provide an "equity cushion." An "equity cushion" either exists or it doesn't.[66]

In some cases, where there is an "equity cushion," as long as the Bankruptcy Court requires additional adequate protection, this prong of the superpriority administrative expense test will be met. In In re J.F.K. Acquisitions Group,[67] despite the existence of a minimal equity cushion in the collateral, the Court ordered the debtor to make periodic cash payments to the secured creditor, which satisfied § 507(b). Similarly, in the case of In re Westchester Avenue Marina Realty, Inc.,[68] the Court held that the secured creditor lacked adequate protection despite an "equity cushion" in the collateral because, among other things, the value of the property was declining as real estate values declined. Accordingly, the Court ordered that the debtor provide additional adequate protection, which was a sufficient predicate under § 507(b).[69]

B. THE ADMINISTRATIVE EXPENSE REQUIREMENT

As explained above, in order to have an administrative expense under § 503(b), two requirements must be met: there must be a transaction with the post-petition entity and inducement to provide goods and services by that post-petition entity, as opposed to the pre-petition debtor, and second, there must be benefit to the estate. A superpriority administrative expense may meet the post-petition transaction requirement if the debtor in possession actively bargains for the use of the collateral and the creditor seeks and receives adequate protection for its interest.[70] It is presumed that the use of the collateral was desired by the debtor and contributes to the reorganizational effort. If this were not the case, the debtor would undoubtedly return the collateral and forego providing adequate protection. This beneficial use by the debtor generates the right to adequate protection. Where adequate protection becomes inadequate or otherwise fails and the use nevertheless continues, § 507(b) comes into play by extending superpriority to the creditor's unprotected interest.[71]

C. THE LOSS MUST HAVE BEEN CAUSED BY THE IMPOSITION OF THE AUTOMATIC STAY

In order for a creditor to have a claim for a superpriority administrative expense, it must prove that the loss it suffered was caused solely by the imposition of the automatic stay against property, the use of property under § 363, or a priming lien under § 364(d). Not every decline in value should be reimbursed. Only those declines in value which, but for the automatic stay, could be and probably would be prevented or mitigated.[72]

In In re Mendez,[73] GMAC filed a motion for relief from the automatic stay. The entry of the adequate protection order stopped GMAC's ability to repossess its collateral and exposed the vehicle to the risk of destruction, which eventually occurred. The loss of the vehicle was therefore attributable, at least in part, to the imposition of the automatic stay.

IV. DEFENSES TO A SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIM

There are two specific defenses to a claim for a superpriority administrative expense. First, is the defense of inaction by the claimant which leads to acquiescence in the diminution in the value of its collateral. Second, is the defense that the creditor's collateral was never really used by the debtor and therefore provided only speculative and potential benefit to the estate as opposed to an actual one.[74]

Since a creditor's loss must be triggered solely by the imposition of the automatic stay, a direct corollary of this is that the creditor's right to a superpriority administrative expense can be defeated if the creditor has acquiesced in the harm to the

collateral.[75] In following this rule, courts have denied superpriority administrative expense status to creditors who have not been vigilant in pursuing their rights under an adequate protection order.[76]

In In re Second Timmon Hotel Company, Ltd.,[77] the Court denied superpriority administrative expense status to a creditor for its failure to timely move for relief from the automatic stay in order to foreclose upon the property in question or to file an affidavit of default once the debtor had missed a payment. The Court held that under the circumstances it would be inappropriate to provide the creditor with a superpriority claim for losses occasioned by its own conduct. Consequently, where a creditor is at fault for the damage to its collateral, a court will not reinstate the rights that the creditor itself did not adequately guard.[78]

The case of In re Mendez, *supra* is distinguishable from In re Second Timmon Hotel Company, Ltd., *supra.* In In re Mendez, *supra,* an automobile finance company filed a request for payment of its claim on a superpriority basis. The Court held that the finance company that had allowed the Chapter 13 debtors to continue using an automobile that secured its claim in return for the debtors' promise to continue making their regular monthly payment and to maintain insurance on the vehicle, would be granted superpriority claim status for the balance owing on its contract with the debtors, after the debtors had allowed their insurance to lapse and the automobile was destroyed in a collision. The debtors had alleged that General Motors Acceptance Corporation ("GMAC"), the automobile finance company, did not take any steps to protect its collateral when it learned that the debtors had not maintained comprehensive collision insurance coverage as was required by the adequate protection order. Specifically, the debtors claimed that GMAC's failure to file an affidavit of default resulted in the loss of the collateral.[79]

The Court disagreed with the debtors' contentions. The Court ruled that GMAC's failure to file an affidavit of default did not cause the harm to the automobile. Even if that affidavit of default had been filed, it would not have protected GMAC from the decline in value of its collateral. The automobile had already been wrecked when GMAC discovered that the debtors did not have comprehensive insurance coverage. Therefore, the filing of the affidavit of default would not have improved GMAC's position. Since the automobile was, for all intents and purposes, not worth anything, it would not have been prudent for GMAC to relinquish all rights against the debtors by repossessing the automobile through an affidavit of default.[80]

The court held that GMAC did not delay when it learned of the debtors' default. Once it was in possession of the automobile, GMAC timely contacted the debtors and the insurance agencies involved. When GMAC discovered that insurance coverage was missing, GMAC promptly filed an objection to confirmation of the debtors' plan as well as an administrative claim against the estate. This evidence showed that GMAC acted immediately to protect its interest and did not acquiesce in the harm to its collateral.[81]

The court compared the case at hand with that of In re Callister, *supra,* where the bankruptcy court held that a creditor was entitled to superpriority status where the debtor had inadvertently failed to insure collateral which was later destroyed in a fire. The creditor, in that case, had not ascertained whether the debtor had purchased insurance and also did not file an affidavit of default. Despite this, the court found that a degree of reliance on stipulations was allowable.[82] The court then distinguished its decision from that in In re Second Timmon Hotel Company, Ltd., *supra* and In re Falwell Excavating Co., Inc., *supra.* In In re Mendez, *supra,* the debtors had provided proof of insurance coverage to GMAC, which GMAC on its own, verified with the insurance company. Therefore, GMAC acted diligently in seeing that insurance was obtained. On the other hand, in the cases of In re Second Timmon Hotel Company, Ltd., *supra* and In re Falwell Excavating Co., *supra,* both cases held that a creditor must be vigilant in seeing that adequate protection payments are met, but this Court, in In re Mendez, held that there was no case law suggesting that a creditor must be equally assiduous in determining whether insurance is maintained on the collateral. While a creditor can easily ascertain payments by the trustee, regular verification of insurance is a more difficult chore. It is the debtor that is in the better position to discover any lapses or discrepancies in insurance coverage since the insurer keeps contact with the insured, rather than with the loss payee.[83]

In re Carpet Center Leasing Company, Inc.,[84] takes a much more liberal position in favor of the secured creditor. Under this decision, as long as the secured creditor takes a pro-active role in negotiating the terms and conditions of the adequate protection order, and agrees to forego possession in exchange for the receipt of adequate protection payments, the defense of inaction and acquiescence is inapplicable.[85]

The trustee had relied upon a number of cases which the court distinguished. The first of these cases was In re Jartran, Inc.[86] In that case, the debtor enjoyed the benefits of advertising services that were performed on the basis of pre-petition contracts. The advertising service provider claimed an entitlement to administrative priority for the cost of providing the ads but the Court held that the debtor had engaged in no post-petition transaction which induced the provision of the ads because the commitment to provide the ads was formed before the debtor had filed its bankruptcy petition.[87]

In contrast to that, in In re Carpet Center Leasing, Inc., *supra,* the debtor had induced the post-petition provision of goods to the estate by negotiating for the retention of the collateral, trucks, that were otherwise subject to repossession, in return for adequate protection payments. Instead of just simply sitting back and enjoying the benefits of a pre-petition commitment, the secured creditor actively bargained with the debtor for the use of the tractors after the filing of the bankruptcy petition.[88]

In In re Advisory Information and Management Systems, Inc.,[89] the court considered a claim for an administrative expense under § 503(b)(1)(A) by a creditor who allowed the debtor in possession to continue using the collateral without seeking adequate protection for one year after the bankruptcy petition was filed. The Court noted that there was nothing in § 503 that even remotely suggested that administrative priority was intended as an optional remedy to adequate protection of a secured creditor's interest in property of the estate and the court held that a secured creditor does not contribute to the administration of an estate by merely sitting back and allowing the debtor in possession to continue using property which the pre-petition debtor had owned.[90] A similar ruling was handed down in the case of In re James B. Downing & Company,[91] where the court held that a creditor who did not seek adequate protection for its lien and who did not advance any post-petition costs or expenses to preserve the estate was not entitled to an administrative expense.

V. SAMPLE CASES

Two preeminent cases on the issue of superpriority administrative expenses are Grundy National Bank v. Rife, *supra* and In re Carpet Center Leasing, Inc., *supra.* In Grundy National Bank v. Rife, *supra,* the bank held a security interest in two cars owned by the debtor. The bankruptcy court denied the bank's motion for relief from the automatic stay four (4) days before the debtor's plan was confirmed over the bank's objection. The plan provided for 100% payment of secured and unsecured claims. The court also entered an order eight (8) days later requiring monthly payments to the bank on a 1985 Chevrolet Cavalier. The bank's interest in a 1976 Chevrolet Chevette was not scheduled nor did the original plan provide for payment on that vehicle. The bank filed another motion for relief from the automatic stay with respect to both automobiles since the debtor had failed to make plan payments and filed a motion for payment of administrative expenses for the defaulted payments under the plan. The automatic stay was continued pending a hearing and in the interim the debtor filed a modified plan which provided for surrender of the 1985 vehicle in full satisfaction of the debt on that car. The modified plan also provided for monthly payments on the 1976 automobile. The bank objected to confirmation of the modified plan based on the failure to make plan payments under both plans and the failure to make adequate protection payments. The Court ultimately denied relief from the stay and the request for administrative expenses. The District Court affirmed.

On appeal, the bank argued, among other things, that it was entitled to an administrative expense for missed payments or for depreciation in the value of the automobiles during the nine (9) months that the debtor had used the cars without making payments. The court of appeals held that the creditor was entitled to be compensated for the use of its collateral when it was precluded from liquidating it. The Court also noted that under the Bankruptcy Act of 1898, a debtor's estate was obligated to pay for collateral it controls and uses for the benefit of the estate. The Court stated that this rule survived the enactment of the Bankruptcy Code of 1978 and was embodied in § 507(b) of the current Bankruptcy Code.[92]

The court of appeals found that by violating the adequate protection order and failing to make payments under the original and modified plans the debtor was unjustly enriched at the bank's expense. A 1985 car which the debtor proposed to return in full satisfaction of the debt on that vehicle had considerably depreciated in value over the time period that the debtor had been using it. The court concluded that the bank was entitled to an administrative expense either for the payments the debtor failed to make under both plans and the adequate protection order or in the amount of the diminution in value, whichever was greater. This result was based on the court's acceptance of the bank's position that the bankruptcy court had violated its due process rights by indefinitely continuing the automatic stay on more than one occasion and entering the order denying both stay relief and the request for an administrative expense claim without providing notice or an opportunity for a hearing with respect to either motion.

The second well known case on superpriority administrative expenses is In re Carpet Center Leasing Co., *supra.* In that case, the debtor operated a fleet of tractor trailers. The creditor seeking an administrative priority held a security interest in almost two dozen of the cab portions of those vehicles. In its chapter 11 case, the debtor reached an agreement with the secured creditor whereby the debtor would retain possession of the collateral in exchange for monthly adequate protection payments. The debtor failed to make payments and the creditor foreclosed, incurring a loss of almost $500,000 which it sought to recover as an administrative expense. The Court allowed the claim because the debtor enjoyed more than the mere post-petition use of the collateral. The Court noted that the trustee actually used the collateral to the benefit of the debtor's estate.[93] The Court found that the negotiation of or continued possession of the collateral in return for adequate protection was a post-petition transaction providing new value to the bankruptcy estate.[94]

VI. RECENT CASE

In In re Wilson-Seafresh, Inc.,[95] a secured creditor moved for allowance of a superpriority administrative expense and for an order requiring the disgorgement by professionals of fees and expenses already paid so that that superpriority administrative expense could be funded. The court held that the creditor was entitled to a superpriority claim upon the failure of adequate protection provided to it under the bankruptcy court's cash collateral order and that the professionals had to disgorge interim fee awards in order to permit the payment of the creditor's superpriority administrative expense. The court reasoned that interim fees can be disgorged under such circumstances, and not only in those instances where there has been a failure to make an adequate disclosure of conflicts which in and of itself would result in a forfeiture of fees.[96] Interim fees can also be disgorged when a case becomes administratively insolvent and requires a redistribution of the fees paid so that those unpaid creditors of the same class can share on a *pro rata* basis.[97]

The court recognized that there was a split of authority as to whether or not a bankruptcy court was entitled to exercise its discretion in deciding a motion for the disgorgement of fees in order to achieve a *pro rata* distribution to unpaid creditors of the same class.[98] The Court noted that interim fee awards had been ordered disgorged in order to satisfy superpriority claims under § 507(b).[99]

The debtor's professional argued that the secured creditor, by taking the position that it did, would require the court to treat the debtor's attorneys and accountants as having pledged the entire value of their professional services to the debtor in order to guarantee that the value of the debtor's inventories and receivables would not decline while the debtor continued its business operations. They further posited that such a disgorgement would equal a confiscation from them.[100] The court responded to this argument by indicating that there were statutory and constitutional grounds for ordering the disgorgement. Statutorily, if the court were not to order the disgorgement, this would result in ignoring the mandatory distributive provisions of the Bankruptcy Code. Bankruptcy courts are not free to rearrange Congressional priorities for the treatment of creditors based on equitable grounds, except for the application of § 510 to the claim of a particular creditor.[101] The risk of disgorgement is shared by all professionals serving a chapter 11 debtor in possession.[102]

Section 507(b) illustrates the concern that Congress had, to the extent that this section is applicable to a given case, that a secured creditor have adequate protection for its claim. Such legislation can head off a constitutional claim of a lack of due process. The concept of adequate protection is derived from the Fifth Amendment protection of property interests as enunciated by the Supreme Court.[103] The court reasoned that the secured creditor's superpriority administrative expense was premised on the protection of a Fifth Amendment property right, whereas the professional's claim for an administrative expense provided for under the Bankruptcy Code is a mere statutory right. Therefore, the constitutional interest must prevail. "It goes without saying, that the law is clear, all interim awards of attorneys' fees in bankruptcy cases are tentative."[104]

The forced disgorgement of fees already paid is admittedly a harsh remedy. However, those who voluntarily undertake the representation of parties in a reorganization and expect their fees to be paid, if at all, from the estate, assume the risk of nonpayment or even disgorgement of interim fees, if the case fails. The priority scheme set forth in the Bankruptcy Code must be applied regardless of the fault of the professional or the equities of the situation. Thus, even the fees and the expenses of the attorney for the unsecured creditors' committee awarded and paid from the estate must be disgorged just as those of the debtor's professionals. The superpriority claim of [the secured creditor] must be paid before the professionals receive anything from the estate. The only way to achieve this is the disgorgement of all payments made to professionals on an interim basis during the administration of this case.[105]

VII. CONCLUSION

The quiver of the secured creditor is not entirely empty in a bankruptcy case when the bankruptcy court allows the debtor in possession to use the secured creditor's collateral in exchange for adequate protection payments. The § 507(b) superpriority administrative expense, when its prerequisites are met, is a potent arrow. As long as its requirements have been satisfied, the secured creditor should be able to fire it at will and regain some or all of the amount that its collateral has diminished during the time that the debtor in possession has possessed and used it during the bankruptcy case, depending on the degree to which the estate is administratively insolvent.

Footnotes

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2 **§ 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 —

(1)

(A) The actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for the services rendered after the commencement of the case; …

3 **§ 507. Priorities**

…

> (b) If the trustee, under sections 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(1) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

4 In re Mendez, 259 B.R. 754, 757 n.1, 45 Collier Bankr. Cas. 2d (MB) 1480 (Bankr. M.D. Fla. 2001). In re Energy Co-op., Inc., 55 B.R. 957, 963 n.20, 13 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) ¶ 70908 (Bankr. N.D. Ill. 1985).

5 In re Carpet Center Leasing Co., Inc., 991 F.2d 682, 686, 24 Bankr. Ct. Dec. (CRR) 435, 28 Collier Bankr. Cas. 2d (MB) 1397, Bankr. L. Rep. (CCH) ¶ 75386 (11th Cir. 1993), *opinion amended on denial of reh'g*, 4 F.3d 940 (11th Cir. 1993). Grundy Nat. Bank v. Rife, 876 F.2d 361, 363, Bankr. L. Rep. (CCH) ¶ 72914 (4th Cir. 1989). In re Mutschler, 45 B.R. 494, 496 (Bankr. D. N.D. 1984). In re McGill, 78 B.R. 777, 779 (Bankr. D. S.C. 1986).

6 See H.R. 8200, 95th Cong., 1st Sess. (1978); S. 2266, 95th Cong., 2d Sess. (1978).

7 Compare H.R. 8200, 95th Cong., 1st Sess. (1978) § 361 with S. 2266, 95th Cong., 2d Sess. (1978) § 361.

8 See § 361(3); In re Ralar Distributors, Inc., 166 B.R. 3, 6, 30 Collier Bankr. Cas. 2d (MB) 1697, Bankr. L. Rep. (CCH) ¶ 75852 (Bankr. D. Mass. 1994), *decision aff'd,* 182 B.R. 81, 27 Bankr. Ct. Dec. (CRR) 374 (D. Mass. 1995), *judgment aff'd,* 69 F.3d 1200, 28 Bankr. Ct. Dec. (CRR) 197, 34 Collier Bankr. Cas. 2d (MB) 1366, Bankr. L. Rep. (CCH) ¶ 76685 (1st Cir. 1995).

9 124 Cong. Rec. H11, 095 (Daily ed. September 28, 1978). 124 Cong. Rec. S17, 411 (Daily ed. October 6, 1978). In re Ralar Distributors, Inc., 166 B.R. at 6.

10 124 Cong. Rec. H11, 095 (Daily ed. September 28, 1978). 124 Cong. Rec. S17, 411 (Daily ed. October 6, 1978). In re Ralar Distributors, Inc., 166 B.R. at 6.

11 In re Ralar Distributors, Inc., 166 B.R. at 8.

12 In re Carpet Center Leasing Co., Inc., 991 F.2d 682, 685, 24 Bankr. Ct. Dec. (CRR) 435, 28 Collier Bankr. Cas. 2d (MB) 1397, Bankr. L. Rep. (CCH) ¶ 75386 (11th Cir. 1993), *opinion amended on denial of reh'g,* 4 F.3d 940 (11th Cir. 1993). In re Pulaski Highway Exp., Inc., 57 B.R. 502, 505, 14 Collier Bankr. Cas. 2d (MB) 417, Bankr. L. Rep. (CCH) ¶ 71156 (Bankr. M.D. Tenn. 1986). In re J.F.K. Acquisitions Group, 166 B.R. 207, 211, 31 Collier Bankr. Cas. 2d (MB) 65 (Bankr. E.D. N.Y. 1994).

13 In re Ralar Distributors, Inc., 166 B.R. at 8.

14 In re James B. Downing & Co., 94 B.R. 515, 520, 20 Collier Bankr. Cas. 2d (MB) 1583 (Bankr. N.D. Ill. 1988). In re Callister, 15 B.R. 521, 528, 8 Bankr. Ct. Dec. (CRR) 446, 5 Collier Bankr. Cas. 2d (MB) 1058 (Bankr. D. Utah 1981), *subsequently aff'd,* 13 Bankr. Ct. Dec. (CRR) 21, 1984 WL 249787 (10th Cir. 1984). In re Marine Optical, Inc., 10 B.R. 893, 894, 7 Bankr. Ct. Dec. (CRR) 742, 4 Collier Bankr. Cas. 2d (MB) 837, Bankr. L. Rep. (CCH) ¶ 67991 (B.A.P. 1st Cir. 1981).

15 In re Second Timmon Hotel Co., Ltd., 91 B.R. 985, 988 (Bankr. M.D. Fla. 1988). In re Callister, 15 B.R. at 528. In re Marine Optical, *supra* at 894.

16 124 Cong. Rec. H11095 (Daily ed. September 28, 1978). S17411 (Daily ed. October 6, 1978). In re James B. Downing & Company, *supra* at 520.

17 In re Second Timmon Hotel Company, Ltd., *supra* at 988.

18 In re J.F.K. Acquisitions Group, *supra* at 212. In re Mutschler, *supra* at 496.

19 In re Mendez, *supra* at 757. In re Carpet Center Leasing Company, 991 F.2d at 685.

20 In re Mendez, *supra* at 757.

21 In re Mendez, *supra* at 757. In re Blackwood Associates, L.P., 153 F.3d 61, 68, 33 Bankr. Ct. Dec. (CRR) 90, Bankr. L. Rep. (CCH) ¶ 77789 (2d Cir. 1998).

22 In re Mutschler, *supra* at 496.

23 In re Mutschler, *supra* at 496.

24 In re James B. Downing & Company, *supra* at 519 citing Joint Industry Bd. of Elec. Industry v. U. S., 391 U.S. 224, 228, 88 S. Ct. 1491, 1493, 20 L. Ed. 2d 546, 68 L.R.R.M. (BNA) 2193, 57 Lab. Cas. (CCH) ¶ 12679 (1968). Ford Motor Credit Co. v. Dobbins, 35 F.3d 860, 865, 26 Bankr. Ct. Dec. (CRR) 19, Bankr. L. Rep. (CCH) ¶ 76096 (4th Cir. 1994). In re D.M. Kaye & Sons Transport, Inc., 259 B.R. 114, 119 (Bankr. D. S.C. 2001).

25 In re James B. Downing & Company, *supra* at 519–520. In re Mammoth Mart, Inc., 536 F.2d 950, 953 (1st Cir. 1976).

26 Grundy National Bank v. Rife, *supra* at 363. Kneeland v. American Loan & Trust Co., 136 U.S. 89, 10 S. Ct. 950, 34 L. Ed. 379 (1890).

27 Grundy National Bank v. Rife, *supra* at 363. In re Callister, 15 B.R. at 528.

28 Grundy National Bank v. Rife, *supra* at 363–364.

29 See footnote no. 2, *supra* for the text of § 503(b)(1)(A).

30 In re D.M. Kaye & Sons Transport, Inc., *supra* at 119. In re Southern Soya Corp., 251 B.R. 302 (Bankr. D. S.C. 2000). In re Merry-Go-Round Enterprises, Inc., 180 F.3d 149, 158, 34 Bankr. Ct. Dec. (CRR) 623, 42 Collier Bankr. Cas. 2d (MB) 218, Bankr. L. Rep. (CCH) ¶ 77938 (4th Cir. 1999).

31 In re D.M. Kaye & Sons Transport, Inc., *supra* at 119. In re Mid Region Petroleum, Inc., 1 F.3d 1130, 24 Bankr. Ct. Dec. (CRR) 920, Bankr. L. Rep. (CCH) ¶ 75522 (10th Cir. 1993).

32 In re D.M. Kaye & Sons Transport, Inc., *supra* at 119. General American Transportation Corp. v. Martin (In re Mid-Region Petroleum, Inc.), *supra* at 149. Merry-Go-Round Enterprises v. Simon DeBartolo Group (In re Merry-Go-Round Enterprises). *supra* at 149.

33 **§ 102. Rules of Construction**

…

(3) "Includes" and "including" are not limiting; …

34 Grundy National Bank v. Rife, *supra* at 364. In re Callister, 15 B.R. at 526 n. 20a.

35 In re Callister, *supra*. Grundy National Bank v. Rife, *supra* at 364.

36 In re United Trucking Service, Inc., 851 F.2d 159, 161, 18 Bankr. Ct. Dec. (CRR) 64, 19 Collier Bankr. Cas. 2d (MB) 542, Bankr. L. Rep. (CCH) ¶ 72367 (6th Cir. 1988). In re Five Star Partners, L.P., 193 B.R. 603, 613, 28 Bankr. Ct. Dec. (CRR) 913 (Bankr. N.D. Ga. 1996). In re D.M. Kaye & Sons Transport, Inc., *supra* at 119. In re ICS Cybernetics, Inc., 111 B.R. 32, 37, 20 Bankr. Ct. Dec. (CRR) 305, Bankr. L. Rep. (CCH) ¶ 73303 (Bankr. N.D. N.Y. 1989).

37 Ford Motor Credit Company v. Dobbins, *supra* at 866. General American Transportation Corp. v. Martin (In re Mid-Region Petroleum Company, Inc.), *supra* at 1134.

38 Ford Motor Credit Company v. Dobbins, *supra* at 866. In re Dant & Russell, Inc., 853 F.2d 700, 706, 18 Bankr. Ct. Dec. (CRR) 301, 20 Collier Bankr. Cas. 2d (MB) 369, 28 Env 1049, Bankr. L. Rep. (CCH) ¶ 72406, 18 Envtl. L. Rep. 21312 (9th Cir. 1988).

39 Ford Motor Credit Company v. Dobbins, *supra* at 866. In re ICS Cybernetics, Inc., *supra,* at 36. In re Allen Care Centers, Inc., 163 B.R. 180, 188, 25 Bankr. Ct. Dec. (CRR) 249, Bankr. L. Rep. (CCH) ¶ 75709 (Bankr. D. Or. 1994), *order aff'd,* 175 B.R. 397, Bankr. L. Rep. (CCH) ¶ 1006 (D. Or. 1994), *aff'd,* 96 F.3d 1328, 29 Bankr. Ct. Dec. (CRR) 1031, Bankr. L. Rep. (CCH) ¶ 77122 (9th Cir. 1996) (The benefit to the estate must be actual, not potential).

40 Ford Motor Credit Company v. Dobbins, *supra* at 866–867. General American Transportation Corp. v. Martin (In re Mid Region Petroleum, Inc.), *supra* at 1133. (Creditor not entitled to § 503(b) administrative expense based on the mere chance to maintain possession post-petition of leased rail cars or opportunity to sell the debtor's business with leases intact. The rail cars were never used post-petition).

41 In re J.F.K. Acquisitions Group, *supra* at 212.

42 Ford Motor Credit Company v. Dobbins, *supra* at 867. In re Subscription Television of Greater Atlanta, 789 F.2d 1530, 1532, Bankr. L. Rep. (CCH) ¶ 71159 (11th Cir. 1986) (A creditor was obligated to keep a broadcast signal available for a sixty (60) day period, causing the creditor to be deprived of the signals used. The Court held that the creditor was not entitled to administrative claim status for the period of time during which the signal was available for, but not actually used by, the Trustee.)

43 *Supra* at 37–38.

44 In re ICS Cybernetics, Inc., *supra* at 36, citing In re Grant Broadcasting of Philadelphia, Inc., 71 B.R. 891, 897, 16 Collier Bankr. Cas. 2d (MB) 1116, Bankr. L. Rep. (CCH) ¶ 71731 (Bankr. E.D. Pa. 1987).

45 In re ICS Cybernetics, Inc., *supra* at 36.

46 Ford Motor Credit Company v. Dobbins, *supra* at 868. Matter of Chicago, M., St. P. & Pac. R. Co., 658 F.2d 1149, 1163 (7th Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1632, 71 L.Ed. 2d 867 (1982).

47 In re D.M. Kaye & Sons Transport, Inc., *supra* at 120. In re Lunan Family Restaurants, 194 B.R. 429 (Bankr. N.D. Ill. 1996).

48 In re D.M. Kaye & Sons Transport, Inc., *supra* at 120. In re Cardinal Industries, Inc., 142 B.R. 801, 803–804 (Bankr. S.D. Ohio 1992).

49 In re D.M. Kaye & Sons Transport, Inc., *supra* at 120.

50 In re DAK Industries, Inc., 66 F.3d 1091, 27 Bankr. Ct. Dec. (CRR) 1185, 34 Collier Bankr. Cas. 2d (MB) 531, Bankr. L. Rep. (CCH) ¶ 76648 (9th Cir. 1995).

51 In re A. Marcus Co., 64 B.R. 207 (N.D. Ill. 1986).

52 In re Mendez, *supra* at 757.

53 In re Mendez, *supra* at 757.

54 In re Mutschler, *supra* at 496.

55 In re McGill, *supra* at 781 citing Grundy Nat. Bank v. Tandem Min. Corp., 754 F.2d 1436, 12 Collier Bankr. Cas. 2d (MB) 264, Bankr. L. Rep. (CCH) ¶ 70258 (4th Cir. 1985); In re Martin, 761 F.2d 472, 12 Collier Bankr. Cas. 2d (MB) 974, Bankr. L. Rep. (CCH) ¶ 70543 (8th Cir. 1985).

56 In re McGill, *supra* at 781. Grundy National Bank v. Tandem Mining Corporation (In re Tandem Mining Company), *supra*.

57 In re Callister, 15 B.R. at 528. In re Alyucan Interstate Corp., 12 B.R. 803, 7 Bankr. Ct. Dec. (CRR) 1123, 1124, 4 Collier Bankr. Cas. 2d (MB) 1066 (Bankr. D. Utah 1981); In re McGill, *supra* at 781.

58 In re Johnson, 145 B.R. 108, 113, 27 Collier Bankr. Cas. 2d (MB) 1406 (Bankr. S.D. Ga. 1992), order rev'd on other grounds and remanded, 165 B.R. 524, 25 Bankr. Ct. Dec. (CRR) 677, 134 A.L.R. Fed. 723 (S.D. Ga. 1994).

59 In re Johnson, 145 B.R. at 113. Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 61 S. Ct. 196, 85 L. Ed. 184 (1940). LNC Investments, Inc. v. First Fidelity Bank, 247 B.R. 38, 49 (S.D. N.Y. 2000), adhered to on denial of reconsideration, 44 Collier Bankr. Cas. 2d (MB) 62, 2000 WL 461612 (S.D. N.Y. 2000).

60 In re Johnson, 145 B.R. at 113. U.S. v. Whiting Pools, Inc., 462 U.S. 198, 207, 103 S. Ct. 2309, 2315, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) ¶ 69207, 83-1 U.S. Tax Cas. (CCH) ¶ 9394, 52 A.F.T.R.2d 83-5121 (1983), applying § 363(e).

61 In re Johnson, 145 B.R. at 113. In re Planned Systems, Inc., 78 B.R. 852, 861, 16 Bankr. Ct. Dec. (CRR) 543 (Bankr. S.D. Ohio 1987).

62 In re Carpet Center Leasing Company, Inc., *supra*. In re Mendez, *supra* at 757. Ford Motor Credit Company v. Dobbins, *supra* at 865. In re Five Star Partners, L.P., *supra* at 608–609. In re J.F.K. Acquisitions Group, *supra* at 212. In re Quality Beverage Co., Inc., 181 B.R. 887, 896–897, 33 Collier Bankr. Cas. 2d (MB) 1049 (Bankr. S.D. Tex. 1995). In re Cason, 190 B.R. 917, 123, 34 Collier Bankr. Cas. 2d (MB) 1476 (Bankr. N.D. Ala. 1995).

63 In re Center Wholesale, Inc., 759 F.2d 1440, 1451 n. 23, 13 Bankr. Ct. Dec. (CRR) 163, 12 Collier Bankr. Cas. 2d (MB) 1107 (9th Cir. 1985). In re Prime, Inc., 35 B.R. 697 (Bankr. W.D. Mo. 1984). In re Downing, *supra* at 520.

64 In re Downing, *supra* at 520–521 (A superpriority claim pursuant to § 507(b) is predicated upon the express granting of adequate protection to the creditor). In re J.F.K. Acquisitions Group, *supra* at 211 (In order for a claim to have superpriority status under § 507(b) … the Court must expressly award adequate protection to the creditor …).

65 In re Five Star Partners, L.P., *supra* at 610 (An equity cushion is a condition, the positive difference between value and debt, and is either present or absent and cannot in any practical sense be applied by the trustee.).

66 In re Five Star Partners, L.P., *supra* at 610.

67 *Supra* at 209.

68 In re Westchester Ave. Marina Realty, Inc., 124 B.R. 161, 166, 21 Bankr. Ct. Dec. (CRR) 628 (Bankr. S.D. N.Y. 1991).

69 *Supra* at 166.

70 In re Carpet Center Leasing Company, Inc., 991 F.2d at 686–687. In re D.M. Kaye & Sons Transport, Inc., *supra* at 121. In re Raymond Cossette Trucking, Inc., 231 B.R. 80, 84, 34 Bankr. Ct. Dec. (CRR) 5, 41 Collier Bankr. Cas. 2d (MB) 1079 (Bankr. D. N.D. 1999).

71 In re Carpet Center Leasing Company, Inc., 991 F.2d at 686. In re McGill, *supra* at 780. In re Mutschler, *supra* at 496.

72 In re Second Timmon Hotel Company, Ltd., *supra* at 988. In re Callister, 15 B.R. at 530–531. In re Alyucan Interstate Corp., 12 B.R. at 808. In re Mendez, *supra* at 758.

73 *Supra* at 758.

74 In re Carpet Center Leasing Company, Inc., 991 F.2d at 687–689. In re Mendez, *supra* at 758. For a discussion on benefit to the estate, see § IIB(i), *supra.*

75 In re Mendez, *supra* at 758. In re Falwell Excavating Co., Inc., 47 B.R. 217, 12 Collier Bankr. Cas. 2d (MB) 453, Bankr. L. Rep. (CCH) ¶ 70308 (Bankr. W.D. Va. 1985).

76 In re Mendez, *supra* at 758. In re Falwell Excavating Co., *supra* at 219.

77 In re Second Timmon Hotel Company, Ltd., 91 B.R. at 988.

78 In re Second Timmon Hotel Company, Ltd., *supra* at 988. (In this case, the creditor's failure to recover the full value of its collateral was not the result of a miscalculation in the adequate protection order by the court, but resulted from its own business decision not to pursue the remedies available to it. "More specifically, [the creditor] failed to timely move for relief from the stay in order to foreclose upon the property or to file its affidavit of nonpayment once the debtor missed the payment due August 23, 1987. Furthermore, [the creditor] went so far as to waive the missed adequate protection payments in the stipulation of settlement which was noticed to all creditors. Under the circumstances, it would be inappropriate to provide [the creditor] with a superpriority claim for losses occasioned by its own conduct …") See also In re Mendez, *supra* at 758.

79 In re Mendez, *supra* at 758.

80 In re Mendez, *supra* at 758.

81 In re Mendez, *supra* at 759.

82 In re Mendez, *supra* at 759. In re Callister, 15 B.R. at 531.

83 In re Mendez, *supra* at 759. In re Callister, 15 B.R. at 531. (If this risk were allocated between the debtor and [the creditor] outside bankruptcy, naturally, it would be borne by the debtor, who, as between the two innocent parties, was in a better position to prevent the inadvertence).

84 *Supra* at 687.

85 In re Carpet Center Leasing Company, Inc., 991 F.2d at 687. (Unlike the creditors in Advisory Information and Management Systems and James B. Downing, the secured creditor's predecessor in interest employed the statutory procedures provided for protection of its collateral in the possession of the debtor. The secured creditor did not sit back and allow the debtor to continue to use the collateral, in this instance tractors, but asserted its right to repossession and agreed to forego repossession only after and because the debtor consented to paying adequate protection. Therefore, the secured creditor's administrative expense claim would not be barred under the inaction theory.)

86 Matter of Jartran, Inc., 732 F.2d 584, 11 Bankr. Ct. Dec. (CRR) 1181, 10 Collier Bankr. Cas. 2d (MB) 1069, Bankr. L. Rep. (CCH) ¶ 69831 (7th Cir. 1984).

87 In re Jartran, Inc., *supra* at 588–589.

88 In re Carpet Center Leasing Company, Inc., 991 F.2d at 687.

89 In re Advisory Information and Management Systems, Inc., 50 B.R. 627, 13 Bankr. Ct. Dec. (CRR) 257, 13 Collier Bankr. Cas. 2d (MB) 55 (Bankr. M.D. Tenn. 1985).

90 In re Advisory Information and Management Systems, Inc., *supra* at 630.

91 In re James B. Downing & Company, 94 B.R. at 521.

92 Grundy National Bank v. Rife, 876 F.2d at 363.

93 In re Carpet Center Leasing Company, Inc., 991 F.2d at 688.

94 In re Carpet Center Leasing Company, Inc., 991 F.2d at 688.

95 In re Wilson-Seafresh, Inc., 263 B.R. 624 (Bankr. N.D. Fla. 2001).

96 In re Wilson-Seafresh, Inc., *supra* at 630. In re Woodward, 229 B.R. 468 (Bankr. N.D. Okla. 1999). (Failure of the debtor's attorney to properly disclose compensation was, in and of itself, grounds for the disgorgement without regard to reasonableness of fees or whether attorneys may have earned the fee by performing valuable services). In re Keller Financial Services of Florida, Inc., 248 B.R. 859 (Bankr. M.D. Fla. 2000). Matter of Taxman Clothing Co., 49 F.3d 310, 26 Bankr. Ct. Dec. (CRR) 1034, 32 Collier Bankr. Cas. 2d (MB) 1642, Bankr. L. Rep. (CCH) ¶ 76391 (7th Cir. 1995), reh'g en banc denied, (Mar. 30, 1995) (Interim fees can also be disgorged on the merits when final approval is sought).

97 In re Unitcast, Inc., 219 B.R. 741, 32 Bankr. Ct. Dec. (CRR) 439, 39 Collier Bankr. Cas. 2d (MB) 1022, Bankr. L. Rep. (CCH) ¶ 77654, 98-1 U.S. Tax Cas. (CCH) ¶ 50294, 81 A.F.T.R.2d 98-1240 (B.A.P. 6th Cir. 1998). In re Chute, 235 B.R. 700 (Bankr. D. Mass. 1999). In re Anolik, 207 B.R. 34 (Bankr. D. Mass. 1997). In re Wilson-Seafresh, Inc., *supra* at 630.

98 In re Wilson-Seafresh, Inc., *supra* at 630–631. In re Unitcast, Inc., *supra* at 752–754. ("We agree with the Bankruptcy Court that § 726(b) does not compel disgorgement from professionals in every administrative insolvency".) In re Kingston Turf Farms, Inc., 176 B.R. 308, 310, 26 Bankr. Ct. Dec. (CRR) 626 (Bankr. D. R.I. 1995) (Disgorgement is required as a matter of law just to adhere to the mandatory payment scheme of the Bankruptcy Code).

99 In re Wilson-Seafresh, Inc., *supra* at 631 citing In re Kids Creek Partners, L.P., 236 B.R. 871, 34 Bankr. Ct. Dec. (CRR) 692, 42 Collier Bankr. Cas. 2d (MB) 1068 (Bankr. N.D. Ill. 1999); In re Printcrafters, Inc., 208 B.R. 968, 37 Collier Bankr. Cas. 2d (MB) 1641 (Bankr. D. Colo. 1997); Matz v. Hoseman, 197 B.R. 635 (N.D. Ill. 1996); U.S. Trustee v. Johnston, 189 B.R. 676 (N.D. Miss. 1995); In re Wise Transp., Inc., 148 B.R. 52, 23 Bankr. Ct. Dec. (CRR) 1210, 28 Collier Bankr. Cas. 2d (MB) 154 (Bankr. N.D. Okla. 1992).

100 In re Wilson-Seafresh, Inc., *supra* at 631.

101 In re Wilson-Seafresh, Inc., *supra* at 631 citing In re Printcrafters, Inc., *supra* at 973.

102 In re Wilson-Seafresh, Inc., *supra* at 631 citing In re Printcrafters, Inc., *supra* at 972.

103 In re Wilson-Seafresh, Inc., *supra* at 631 citing LNC Investments, Inc. v. First Fidelity Bank, *supra* at 44. Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 61 S. Ct. 196, 85, 85 L. Ed. 184 (1940).

104 In re Wilson-Seafresh, Inc., *supra* at 631 citing In re Taxman Clothing Co., *supra* at 312.

105 In re Wilson-Seafresh, Inc., *supra* at 632.

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