Bankruptcy in the Seventh Circuit - Comprehensive Debtor Protection

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During the 1984-85 term the Seventh Circuit further delineated certain provisions of the Bankruptcy Reform Act of 1978 and subsequent 1984 amendments, hereafter referred to as the Bankruptcy Code. Judicial scrutiny of the Bankruptcy Code over the past several years revealed conflicting provisions as well as circumstances not covered by specific Code provisions. This article will survey Seventh Circuit decisions under the Code which involve: 1) possible de-acceleration of a mortgage after a judgment of foreclosure is entered; 2) the valuation of collateral to determine a debtor's eligibility for Chapter 13 relief; 3) dischargeability of a debt arising from the settlement of a claim for willful and malicious conversion; 4) the combining or "stacking" of exemptions under the Illinois personal property exemption statute; 5) survival of a lien after the claim is disallowed; 6) subrogation when the creditor is a close relative of the debtor; and 7) the allowable time for assumption of an executory contract which specifies a time limit for curing a default.

I. De-Acceleration of a Mortgage After a Judgment of Foreclosure is Entered

The Seventh Circuit addressed the question of whether the entry of a judgment of foreclosure prevents the debtor from deaccelerating a mortgage in either a chapter 11 or a chapter 13 reorganization. This issue has recently been discussed in several districts with diverse results. Conflicting opinions concerning the applicability of state law in interpreting the Bankruptcy Code has precluded a uniform, definitive answer to this question.

1. The issue is when in the foreclosure proceedings does the automatic stay of litigation, granted upon filing in bankruptcy, become ineffective to prevent loss of the defaulted property. The diversity of opinions among the districts arises in several areas: 1) whether state law holds to the title theory of mortgages or the lien theory of mortgages; 2) whether the bankruptcy court may look behind the state court judgment in order to apply the policies of federal bankruptcy law to bankruptcy matters, or whether bankruptcy courts must give full faith and credit to the state court judgments; 3) whether title to the property passes at the time of the foreclosure sale or at the time of judicial confirmation of the sale; and 4) whether the redemption period is effective for the debtor to redeem the property after a bankruptcy sale.
A. *In re Clark*

*In re Clark*\(^2\) involved a chapter 13 debtor who wished to reinstate the original terms of his mortgage after a judgment of default was entered against him prior to his filing in bankruptcy. Clark defaulted on a loan secured by a mortgage on his farm. The acceleration clause in the mortgage then made the full amount of the loan due on demand. When Clark failed to respond to the foreclosure action initiated by the Federal Land Bank of St. Paul, a judgment of foreclosure was issued and authorization granted for a foreclosure sale of Clark’s farm. One month after the earliest date on which the foreclosure sale was authorized to be held, but before the sale had actually occurred, the debtor filed a petition under chapter 13 of the Bankruptcy Code.

The debtor’s chapter 13 reorganization plan proposed a de-acceleration of the loan, a curing of the default, and a reinstatement of the original terms of the mortgage. The bank objected to the plan, arguing that once a judgment of foreclosure had been entered against the Clarks, they were no longer entitled to cure defaults, de-accelerate the loan, or restore the former payment schedule.

On appeal, the Seventh Circuit affirmed the reorganization plan proposed by the Clarks. The court first noted that Wisconsin adheres to the lien theory of mortgages.\(^3\) Under Wisconsin law a mortgagee has only a lien on the property until the actual judicial sale, at which time legal and equitable title passes. A judgment of foreclosure in Wisconsin “does little more than determine that the mortgagor is in default,. . . . [t]he judgment does not destroy the lien of the mortgage but rather judicially determines the amount thereof.”\(^4\)

The court then addressed the issue of whether defaults may be cured under chapter 13.\(^5\) According to section 1322(b)(2),\(^6\) if a cure of the default and de-acceleration of the loan was a modification of the bank’s

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2. 738 F.2d 869 (7th Cir. 1984).
5. If the statutory provisions governing chapter 13 did not allow for the cure of a default in a residential mortgage, the Seventh Circuit could not affirm the confirmation of the reorganization plan. *Clark*, 738 F.2d at 870.
6. 11 U.S.C. § 1322(b) provides in pertinent part that the plan may:

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor’s principal residence, or of holders of unsecured claims;
rights, the cure is prohibited since the bank's only security is a mortgage on the debtor's principal residence. However, section 1322(b)(5) expressly allows the curing of a default "notwithstanding paragraph (2) so long as the last payment of the secured claim is due after the final payment of the reorganization plan." This provision allows the curing of defaults in long term mortgages, such as the Clark's, since reorganization plans are approved for periods of only 3-5 years.

The Seventh Circuit focused primarily on the question of whether the curing of a default and de-acceleration is permissible under section 1322(b). An extensive review of the legislative history of section 1322(b) satisfied the court that cure of a default and de-acceleration is an intended purpose of section 1322(b). However, neither the statute nor its legislative history considered circumstances where a judgment of foreclosure is entered before the bankruptcy petition is filed. The Seventh Circuit assumed, without analysis or discussion, that a judgment of foreclosure in Wisconsin effected no change in legal or substantive rights, but merely judicially confirmed the amount of the lien.

Furthermore, the statute does not expressly address the effect of activation of an acceleration clause. Under state law an acceleration clause operates to make the full amount of the loan payable on demand. Hence, judicial de-acceleration modifies the creditor's right to payment in full on demand by extending payment over the years of the original loan.

7. The Clarks obtained the mortgage on the farm in 1974. They used the residence on the farm as their principal residence until the gas service was discontinued in 1981-1982 for non-payment of the bill. In February 1982 the circuit court found the premises abandoned, entered a judgment of foreclosure and authorized a foreclosure sale. However, at the time of the petition in bankruptcy, the Clarks were once again living on the property and the Seventh Circuit found that was sufficient to bring the Bank's claim within the principal residence exception to subsection (b)(2). Clark, 738 F.2d at 870, 871 n.4.

8. 11 U.S.C. § 1322(b) provides in pertinent part that the plan may:
   (5) notwithstanding paragraph (2) of the subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;
9. The Clark's reorganization plan extended for a period of 36 months. Clark, 738 F.2d at 870.
10. Under § 1322(b)(3) defaults may be cured or waived. However, subsection (2) excepts holders of claims secured only by a mortgage on the debtor's principal residence from modification of their rights. Subsection (5) allows the curing of a default if the mortgage extends beyond the termination date of the reorganization plan. 11 U.S.C. § 1322(b).
11. See Clark, 738 F.2d at 872-74.
12. The Seventh Circuit acknowledged that a judgment of foreclosure confirmed the acceleration but went on to add that "such a judgment adds nothing of consequence so far as § 1322(b) is concerned." Clark, 738 F.2d at 874.
13. De-acceleration has been denied on several grounds. The court in In re Antilles Yachting, Inc., 4 Bankr. 470-74 (Bankr. V.I. 1980), held de-acceleration to constitute a "forced investment in a risky enterprise" and refused to permit it. Id. at 474. The court in In re LaPaglia, 8 Bankr. 937 (Bankr. E.D.N.Y. 1981), prohibited de-acceleration under § 1322(b)(5) since, after acceleration, the
Seventh Circuit did mention that a judgment of foreclosure in Wisconsin confirms the acceleration, but failed to address the issue of whether de-acceleration was therefore a modification of this judicially confirmed right to payment in full on demand.\textsuperscript{14} The court explained that the cure of the event triggering the default voided the acceleration clause.\textsuperscript{15}

The Seventh Circuit’s reasoning that the acceleration clause is voided by cure of the default avoids discussion of possible legal effects of a judgment of foreclosure. Since the judicially determined due on demand amount was not upheld in the reinstatement of the mortgage under its original terms, the judgment of foreclosure, confirming the acceleration, is impliedly voided by cure of the default. This approach does not provide for the future status of the state court judgment. Additional litigation may be necessary to determine: 1) the effect of the outstanding and unsatisfied judgment upon completion of the reorganization plan; 2) the possible revival of the judgment if debtors fail to abide by the terms of the plan; and 3) the future validity of the judgment if the debtors default after completion of the plan.

The Seventh Circuit’s decision to avoid the judgment of foreclosure could have been supported by two rationales unmentioned in the opinion. First, the Code defines a secured interest as a “lien created by agreement.”\textsuperscript{16} However, after a judgment of foreclosure is entered, the claim is based on a judicial lien.\textsuperscript{17} Since the mortgage is no longer secured by a security interest, it is subject to modification under the terms of section 1322(b).\textsuperscript{18} The Seventh Circuit merely looked to the language “principal final mortgage payment is no longer due after the final payment date of the reorganization plan. De-acceleration was also prohibited on policy grounds by the court in In re Pearson, 10 Bankr. 189 (Bankr. E.D.N.Y. 1981). This decision noted the difficulty of ascertaining the substantive and procedural rights of the parties if state court judgments were ignored by bankruptcy courts confirming chapter 13 plans. Id. at 195. Furthermore, the court ruled that permitting de-acceleration would adversely affect the home mortgage market and perhaps insidiously undermine the Congressional policy of providing stability in the residential housing market. However, de-acceleration was permitted on policy grounds in In re Taddeo, 9 Bankr. 299 (Bankr. E.D.N.Y. 1981), aff’d sub nom. DiPierro v. Taddeo, 15 Bankr. 273 (Bankr. E.D.N.Y. 1981), aff’d, 685 F.2d 24 (2d Cir. 1982). The Taddeo court cited preemption grounds for rejecting state law as frustrating the federally enacted policy of protecting homeowner debtors.

14. The court simply stated “[d]e-acceleration, therefore, is not a form of modification banned by (b)(2) but rather is a permissible and necessary concomitant of the power to cure defaults. . . . [W]e are not persuaded that the existence of such a judgment [of foreclosure] in the present case alters the result. . . .” \textit{Clark}, 738 F.2d at 872, 874.

15. “Since to cure means to restore matters to the way they were before the default, we think that the power to cure in § 1322(b) necessarily includes the power to de-accelerate the payments on the note.” \textit{Clark}, 738 F.2d at 872.


17. 11 U.S.C. § 101(30) (1985) defines a judicial lien as a “lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.”

18. 11 U.S.C. § 1322(b)(2) exempts from modification only a claim secured solely by a security interest in the debtor’s principal residence. A judicial lien, by definition, is not a security interest.
residence”¹⁹ and decided that the bank’s rights were therefore not subject to modification.²⁰ The court failed to examine the classification of the creditor’s security interest after a judgment of foreclosure is entered. An examination of the security interest held by the bank after entry of the judgment shows the interest to be a judicial lien which is subject to modification under section 1322.²¹

Second, a majority of courts have held that lien avoidance pursuant to section 522(f)²² is permissible in a chapter 13 proceeding.²³ Section 522(f) provides in pertinent part that a debtor “may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled . . . if such lien is—(1) a judicial lien.”²⁴ When section 522(f) is invoked a debtor may avoid a judicial lien on his principal residence imposed through a judgment of foreclosure. The bankruptcy court may then reinstate the original terms of the mortgage, including curing the default, without violating the statute.²⁵ This application avoids the question of the future status of the outstanding state court judgment since the judicial lien is statutorily, not merely judicially, avoided.

B. In re Madison Hotel Associates

The Seventh Circuit once again addressed the issue of whether a default may be cured after foreclosure in Madison Hotel Associates.²⁶ Prudential Insurance Company of America held a mortgage on the Concourse Hotel owned by Madison Hotel Associates (MHA), a limited partnership. MHA defaulted on the loan payments to Prudential, and Prudential commenced a foreclosure action. Prudential obtained an order of foreclosure but before Prudential filed a final judgment of foreclosure...
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sure, MHA filed a petition for reorganization under chapter 11 of the Bankruptcy Code. At the confirmation hearing, all of the creditors except Prudential affirmed MHA's plan of reorganization. The issue addressed by the Seventh Circuit was whether MHA's proposed cure of the loan default and de-acceleration of the loan created an "impairment" of Prudential's claim under 11 U.S.C. section 1124(2). A reorganization plan may be confirmed only if a class of creditors has either accepted the plan or is not impaired under the plan. Prudential refused to accept the plan, therefore it was necessary to determine Prudential's "impairment" under the plan. This issue was crucial because if Prudential's claim was unimpaired then Prudential was "deemed" to have accepted MHA's plan of reorganization.

The Seventh Circuit focused on the legislative history of section 1124(2). "The [district] court ruled that 'because of the continuous and current default in the First Note, First Mortgage, and Security Agreement, [Prudential] may foreclose the First Mortgage by judicial proceeding under the terms of the mortgage and sell the collateral of the Security Agreement.' Moreover, the court ordered that Prudential 'may have until August 24, 1981, in which to submit a form of judgment of foreclosure and sale of the realty described in the First Mortgage and the collateral described in the Security Agreement, to be entered by the court.' On August 24, 1981, before Prudential filed its judgment of foreclosure with the district court, MHA filed a Chapter 11 petition for reorganization in the United States Bankruptcy Court for the Western District of Wisconsin. The effect of MHA's Chapter 11 petition was to stay the foreclosure proceeding, . . . transfer it to the bankruptcy court, . . . and thereby preclude Prudential from obtaining a final judgment of foreclosure." Madison Hotel Assoc., 749 F.2d at 414.

27. "The [district] court ruled that 'because of the continuous and current default in the First Note, First Mortgage, and Security Agreement, [Prudential] may foreclose the First Mortgage by judicial proceeding under the terms of the mortgage and sell the collateral of the Security Agreement.' Moreover, the court ordered that Prudential 'may have until August 24, 1981, in which to submit a form of judgment of foreclosure and sale of the realty described in the First Mortgage and the collateral described in the Security Agreement, to be entered by the court.' On August 24, 1981, before Prudential filed its judgment of foreclosure with the district court, MHA filed a Chapter 11 petition for reorganization in the United States Bankruptcy Court for the Western District of Wisconsin. The effect of MHA's Chapter 11 petition was to stay the foreclosure proceeding, . . . transfer it to the bankruptcy court, . . . and thereby preclude Prudential from obtaining a final judgment of foreclosure." Madison Hotel Assoc., 749 F.2d at 414.

28. 11 U.S.C. § 1124(2) (1985 Supp.) provides:
   Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—
   (2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—
   (A) cures any such default (that occurred before or after commencement of the case under this title) other than a default of a kind specified in section 365(b)(2) of this title;
   (B) reinstates the maturity of such claim or interest as such maturity existed before such default;
   (C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;
   and
   (D) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest;

29. 11 U.S.C. § 1129(a) provides:
   (a) The court shall confirm a plan only if all of the following requirements are met;
   (8) with respect to each class of claims or interests—
      (A) such class has accepted the plan; or
      (B) such class is not impaired under the plan.

30. 11 U.S.C. § 1126(f) (1982) provides that "a class that is not impaired under a plan is deemed to have accepted the plan. . . ." However, the court in In re Marston Enterprises, 13 Bankr. 514, 519-20 (Bankr. E.D.N.Y. 1981), after a thorough investigation and thoughtful analysis, held that "deemed to have accepted the plan" was a presumption rebutted by the creditor's actual rejection of the plan. The Seventh Circuit apparently assumed that "deemed to have accepted" is conclusive.
1124(2) to determine whether allowing MHA to cure the loan default and de-accelerate the loan would impair Prudential's secured claim. The legislative history clearly emphasizes that Congress intended to allow curing and de-acceleration without impairment of claims.

A claim or interest is unimpaired by curing the effect of a default and reinstating the original terms of an obligation when maturity was brought on or accelerated by the default. The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away. The holder of a claim or interest who under the plan is restored to his original position, when others receive less or get nothing at all, is fortunate indeed and has no cause to complain. Curing of the default and the assumption of the debt in accordance with its terms is an important reorganization technique for dealing with a particular class of claims.31

Congress clearly concluded that a person receiving the benefit of the original bargain is unimpaired. Therefore, a reorganization plan may reinstate the original maturity of the claim under section 1124(2), so long as the default is cured and any other legal, equitable and contractual rights of the claim holder are not altered.32 The rationale behind these provisions of chapter 11 is that reorganization is economically more feasible than liquidation.33

Having decided that de-acceleration and curing of the default is not an impairment of Prudential's claim under section 1124,34 the Seventh Circuit next investigated whether an order or judgment of foreclosure would create an impairment if a claim was reinstated under its original terms. The court focused on the fact that a judgment of foreclosure does no more than judicially determine the amount of the lien. Since, under Wisconsin law, legal and equitable title do not pass until judicial confirmation of the foreclosure sale, the court held that Prudential held only a lien on MHA's property which was not impaired by reinstating the original terms of the mortgage.35 The Seventh Circuit distinguished state law

32. Madison Hotel Assoc., 749 F.2d at 420 (quoting 5 L. King, COLLIER ON BANKRUPTCY § 1124.03[2] at 1124-14 (15th ed. 1979)).
33. The Seventh Circuit seems to strongly favor reorganization over liquidation. In In re LDH Realty Corp., 726 F.2d 327 (7th Cir. 1984), the Seventh Circuit held that a creditor who "elects" to accelerate a loan thereby loses the right to a prepayment premium. Id. at 330. Since the Seventh Circuit has now held that acceleration, even after a judgment of foreclosure, is subject to judicial de-acceleration, creditors seem to have no real collection options once the loan is made in the Seventh Circuit.
34. Madison, 749 F.2d at 422. The Seventh Circuit relied on their previous reasoning in Clark, 738 F.2d at 874, to support the holding that Prudential's claim was not impaired.
35. De-acceleration of the mortgage and curing of the default after a judgment of foreclosure was permitted in In re Sapphire Investments, 27 Bankr. 56 (Bankr. D. Ariz. 1983); In re Valente, 34
whereby a judgment of foreclosure merges the mortgage with the title.\(^{36}\) In states applying the merger theory, entry of a judgment of foreclosure could preclude the possibility of curing a default and de-accelerating the loan without impairing the claim.\(^{37}\)

Although Prudential obtained only an order of foreclosure before MHA filed for bankruptcy, the Seventh Circuit, in dicta, applied this decision to cases where a final judgment of foreclosure is entered before the debtor files for bankruptcy.\(^{38}\) This reasoning does not consider that a judicial determination of the amount of the lien after acceleration includes the full amount of the loan, not merely the amount in default. Permitting reinstatement of the original terms of the agreement impliedly voids the state court judgment that the full amount is due on demand. Thus, while the court considered the alteration of Prudential’s rights under the security agreement and found they were not sufficiently altered so as to create an impairment,\(^{39}\) the Seventh Circuit did not address the issue of whether any legal rights conferred by the judgment of foreclosure might be impaired under section 1124(1).\(^{40}\)

While Prudential’s claim was unimpaired under the terms of the agreement with MHA, under section 1124(3)(A) the holder of a claim is entitled to the “allowed amount” of that claim determined at the time of confirmation of the plan.\(^{41}\) The allowed amount has generally been accepted as the amount required to cure any default plus the current


37. While the Seventh Circuit specifically limited the holding to cases arising under Wisconsin law, Madison, 749 F.2d at 423 n.11, the court did discuss case law from Delaware where the judgment of foreclosure merged the mortgage and the judgment, “effectively transferring title to the mortgagee.” Id. at 423.

38. Id.

39. The bankruptcy court found Prudential’s rights under the security agreement to be unimpaired. However, the district court found MHA’s plan did impair Prudential’s rights under the mortgage and security agreement. The Seventh Circuit chose to follow the bankruptcy court since the opinion was not clearly erroneous. Madison, at 424 n. 12.

40. The court rejected “Prudential’s contention that the default is not cured under MHA’s plan because Prudential has an order of foreclosure that will not be reduced to final judgment” as directly contravening the purpose of § 1124(2) to allow a debtor to reverse a contractual or legal obligation. Madison, at 424.

41. 11 U.S.C. § 1124 provides that:

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

... (3) provides that, on the effective date of the plan, the holder of such claim or interest receives, on account of such claim or interest, cash equal to—

(A) with respect to a claim, the allowed amount of such claim;
amount due.\textsuperscript{42} However, after a judgment of foreclosure, the allowed amount is the full value of the loan, not merely the amount in arrears.\textsuperscript{43} When a court reinstates the original terms of the mortgage, the holder of the claim is not receiving the judicially determined “allowed amount” of his claim over the life of the plan as prescribed by section 1124(3)(A).

The decisions in Clark\textsuperscript{44} and Madison Hotel Associates\textsuperscript{45} allowing bankrupt debtors to avoid a judgment of foreclosure are not definitive. The Seventh Circuit was less than thorough in the reasoning and support for these decisions. The implied voiding of a state court judgment without careful explanation leaves room for future litigation on this issue since creditors who will be forced to seek the aid of the state court in enforcing their rights will not be content to idly succumb to another court’s voiding of those rights. It will be interesting to see how future litigation on the issue of whether a judgment of foreclosure precludes de-acceleration of a mortgage achieves the policy of uniformity underlying the Federal Bankruptcy Code.

II. VALUATION OF COLLATERAL TO DETERMINE ELIGIBILITY OF A DEBTOR FOR CHAPTER 13 RELIEF—\textit{IN RE DAY}

The Seventh Circuit in \textit{In re Day}\textsuperscript{46} followed the lead of other jurisdictions\textsuperscript{47} and allowed a valuation of collateral in order to determine a debtor’s eligibility to file a petition in bankruptcy under chapter 13. Day filed a chapter 13 petition listing unsecured debts of $65,000 and secured debts of $161,000, well within the requirements of 11 U.S.C. section 109(e).\textsuperscript{48} This section provides that “only an individual with regular in-

\textsuperscript{42} A claim is impaired under a plan unless the default is cured, the maturity reinstated, and any damages are compensated for. This amount must also be paid on the effective date of the plan to prevent impairment. 11 U.S.C. § 1124(2)(A)(B)(C) and (3).

\textsuperscript{43} The court in In re Pearson, 10 Bankr. 189, 194-95 (Bankr. E.D. N.Y. 1981) questioned the power of the bankruptcy court to deem the allowed amount as being less than the amount of the state court judgment.

\textsuperscript{44} 738 F.2d 869 (7th Cir. 1984).
\textsuperscript{45} 749 F.2d 410 (7th Cir. 1984).
\textsuperscript{46} 747 F.2d 405 (7th Cir. 1984).
\textsuperscript{47} In In re Bobroff, 32 Bankr. 933 (Bankr. E.D. Pa. 1983), the court looked to the value of property securing several loans and determined the outstanding indebtedness secured by the property exceeded the value of the property. The excess debt was characterized as unsecured for the purpose of determining chapter 13 eligibility and the proceeding was converted to a chapter 7 action. Id. at 935-36. In In re Ballard, 4 Bankr. 271 (Bankr. E.D. Va. 1980), the court also looked to the value of the property securing the loan. Since the debt was secured only to the value of the property, the debtors thereby qualified for chapter 13 eligibility. Id. at 273. Similarly, courts have examined claimed noncontingent debts to determine debtor eligibility for a petition under chapter 13. See In re Flaherty, 10 Bankr. 118 (Bankr. N.D. Ill. 1981), In re Wilson, 9 Bankr. 723 (Bankr. E.D.N.Y. 1981), and In re Kelsey, 6 Bankr. 114 (Bankr. S.D. Tex. 1980).

\textsuperscript{48} 11 U.S.C. § 109(e) states: Only an individual with regular income that owes, on the date of the filing of the petition,
come that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 . . . may be a debtor under chapter 13 of this title.”

Medical Funding Services (MFS) purchased Day’s accounts receivable for $73,000 and created a lien on those accounts receivable by signing a security agreement with Day. Although ostensibly a secured loan, included within the debtor’s listing of secured debts, the accounts receivable did not exist. Since the collateral securing the lien was worthless, creditor MFS moved to dismiss the bankruptcy petition. MFS argued that since their lien was secured by valueless collateral, the entire $73,000 debt should be regarded as unsecured. Thus, Day’s total unsecured debts exceeded the $100,000 limit for a chapter 13 petition. The bankruptcy court disagreed with this argument, holding that the mere existence of a valid lien is sufficient to characterize a loan as secured for purposes of section 109(e).

On appeal, the Seventh Circuit chose substance over form and interpreted section 506(a) as applicable to a determination of section noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent liquidated, secured debts of less than $350,000, or an individual with regular income and such individual’s spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 may be a debtor under chapter 13 of this title.

49. 747 F.2d at 406. The court did not explain whether the non-existence of the accounts receivable had given rise to any allegations of fraud.

50. 11 U.S.C. § 1307(c) provides:
Except as provided in subsection (e) of this section, on request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including—
The phrase “for cause” has been interpreted to include a debtor’s ineligibility for chapter 13 relief. See In re Bobroff, 32 Bankr. 933 (Bankr. E.D. Pa. 1983).

51. Day acknowledged $65,000 of unsecured debts. When the court determined that the $73,000 debt secured by worthless collateral was also unsecured, Day’s total unsecured debt amounted to $138,000, precluding Day from eligibility for relief under chapter 13 requirements. In re Day, 747 F.2d at 407.

52. The bankruptcy court in Day held that a valuation of collateral was not necessary to a § 109(e) determination since § 109(e) and § 506(a) were mutually exclusive. Id. at 406 (quoting the bankruptcy court decision).

53. In technical form, Day met the qualifications for relief under chapter 13. However, in reality, worthless collateral does not provide creditor security regardless of the classification of the debt. Therefore, in substance, Day did not fulfill the requirements of chapter 13. Id. at 407.

54. 11 U.S.C. § 506(a) provides:
An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor’s interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the
109(e) eligibility.\textsuperscript{55} The relevant part of section 506(a) applied by the court provides that:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property . . . and is an unsecured claim to the extent that the value of such creditor’s interest . . . is less than the amount of such allowed claim.\textsuperscript{56}

This approach protects the spirit of section 109(e) since prospective debtors cannot create security interests in property with little or no value and thereby “manufacture” chapter 13 eligibility.\textsuperscript{57}

On the other hand, the provision setting out the requirements for a chapter 13 petition is silent regarding a test of valuation of collateral held as a lien on a secured debt. The statute only classifies debts as secured or unsecured on their face. A literal interpretation of section 109(e) would seem to imply that a determination of eligibility should not involve a valuation of collateral. “It was not the intent of Congress that the bankruptcy court make a section 506(a) determination and then apply the result to the question of whether a person qualifies as a chapter 13 debtor pursuant to section 109(e).”\textsuperscript{58} The clear sequential difference in the time for determination of the eligibility for relief under section 109(e), and the later determination at the time of confirmation of the plan of the actual amount of the secured claim under section 506(a), also contributes to a literal reading of the provisions.\textsuperscript{59}

However, the Seventh Circuit’s assumption that Congress did not intend for the $100,000 limitation on unsecured debts in a chapter 13 proceeding to be easily circumvented,\textsuperscript{60} is supported, albeit slightly, in the legislative history of section 109(e).\textsuperscript{61} While the Bankruptcy Code

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\item \textsuperscript{55} 747 F.2d at 407.
\item \textsuperscript{56} 11 U.S.C. § 506(a).
\item \textsuperscript{57} If § 109(e) is interpreted to preclude a valuation of collateral, a debtor, before filing for bankruptcy, could create a security interest in his previously unsecured debts in excess of the $100,000 limitation. If this security interest has no actual value, the debtor’s financial situation would be unchanged but eligibility for relief under chapter 13 would have been created.
\item \textsuperscript{58} Day, 747 F.2d at 406 (quoting the bankruptcy court opinion).
\item \textsuperscript{59} Section 109 appears in the Bankruptcy Code with provisions governing requirements for eligibility, whereas § 506 appears with provisions governing confirmation of reorganization plans.
\item \textsuperscript{60} Day, 747 F.2d at 407.
\item \textsuperscript{61} Section 109(e) represents a compromise between H.R. 8200 as passed by the House and the Senate amendment relating to the dollar amounts of restricting eligibility to be a debtor under chapter 13 of the title 11. The House amendment adheres to the limit of $100,000 placed on unsecured debts in H.R. 8200 as passed by the House. It adopts a midpoint of $350,000 as a limit on secured claims, a compromise between the level of $500,000 in H.R. 8200 as passed by the House and $200,000 as contained in the Senate amendment.
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defines a debt as a liability on a claim, the final version of section 109(e) was described on the floor of Congress as representing "a compromise... The House amendment adheres to the limit of $100,000 placed on unsecured debts... It adopts a midpoint of $350,000 as a limit on secured claims." (emphasis added).

Since section 109(e) refers to secured and unsecured debts as the basis of chapter 13 eligibility, the use of the word "debts" interchangeably with the word "claims" could conceivably imply a legislative intent to make a determination of the value of the security necessary to define the amount of the secured debt. If so, the Seventh Circuit's holding that the value of the collateral is a basis for a determination of chapter 13 eligibility is the correct statutory interpretation.

Furthermore, this approach contributes to more efficient litigation. If valuation of collateral under section 506(a) is applied only at the time of confirmation of the reorganization plan, a creditor could object to confirmation based on the debtor's ineligibility for relief under chapter 13. Since the case would be either dismissed or converted to a chapter 7 proceeding, the final result would be the same as when valuation of collateral is considered at the time of determination of the debtor's eligibility for chapter 13 relief. However, limiting valuation of collateral to the time of confirmation of a plan of reorganization necessitates longer proceedings than necessary to achieve the same result.

The Seventh Circuit's holding that the Bankruptcy Code permits valuation of collateral at the time of determination of a debtor's chapter 13 eligibility contributes to the efficiency of litigation. This construction of the Code provides guidance in a situation not specifically governed by a Code provision, and enunciates proper chapter 13 procedure.

The Bankruptcy Code provides that a debtor is not discharged from any debt "for willful and malicious injury by the debtor to another entity or the property of another entity." Although the clear language of this provision prohibits discharge, in First National Bank of Red Bud v. Kimzey the Seventh Circuit discharged a debt resulting from the settlement of a claim of willful and malicious conversion on the basis of a unique set of facts.

Kimzey filed a voluntary petition in bankruptcy under chapter 7 of the Bankruptcy Code. The First National Bank of Red Bud brought an action to have several of Kimzey's outstanding debts declared non-dischargeable. This action included a debt for the purchase of business supplies necessary for Kimzey to fill a specific order. The alleged conversion occurred when the check for payment of the order was deposited to Kimzey's account rather than endorsed to the Bank to satisfy the debt. Subsequently, the Bank agreed to consolidate this debt along with several others in a new note. Kimzey paid a total of $2,700 on the new consolidated note before filing for bankruptcy. The bankruptcy court found the debt non-dischargeable under section 523(a)(6) of the Bankruptcy Code.

Initially, the Seventh Circuit noted that the bankruptcy court had

68. 11 U.S.C. § 523(a)(6). The overriding policy of the Bankruptcy Code to provide a complete fresh start for consumer debtors necessitates that exceptions to discharge sections should be construed in favor of the debtor. Comment, Creditor Acquiescence as a Defense to an Exception to Discharge in Bankruptcy, 58 IND. L.J. 319, 329-30 (1982).

69. 761 F.2d 421 (7th Cir. 1985).

70. A willful and malicious injury encompasses a willful and malicious conversion. In re Meyer, 7 Bankr. 932, 933 (Bankr. N.D. Ill. 1981). "Willful" means deliberate and intentional, and "malicious" means wrongful and without just cause. In re Scotella, 18 Bankr. 975, 977 (Bankr. N.D. Ill. 1982). If the debtor intended the act performed and that act necessarily resulted in the injury, that is sufficient support for a finding of willful and malicious conduct. In re Franklin, 726 F.2d 606, 610 (10th Cir. 1984). Congressional intent to make this type of debt non-dischargeable is clear. "The intent is to include in the category of non-dischargeable debts a conversion under which the debtor willfully and maliciously intends to borrow property for a short period of time with no intent to inflict injury but on which injury is in fact inflicted." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 364 (1977) reprinted in 1978 U.S. CODE CONG. & AD. NEWS 6320.

71. Kimzey testified that due to financial difficulties his supplier required him to pay in advance for supplies. The bank then agreed to loan him funds, based on customer orders, with which he could purchase the supplies to fill the orders. Kimzey, 761 F.2d at 423.

72. Kimzey testified that the check in payment of an order arrived while he was out of town and his wife accidentally deposited it to the business account. Id.

73. The bankruptcy court found the entire debt to be nondischargeable without accounting for any of the payments which Kimzey had made. Id. at 424.

74. Id. at 423.
not made the necessary finding of malice but only of intentional or willful
conversion. Additionally, the bankruptcy court failed to attribute any
of Kimzey's subsequent payments to this debt. Although these errors
normally required a remand to the bankruptcy court for determination,
the Seventh Circuit assumed a finding of malice for the purpose of review
but nevertheless found the debt dischargeable.

The purpose of section 523(a)(6) is to protect creditors who have
suffered a willful and malicious injury at the hands of a debtor and who
have no remedy if the debt is dischargeable. Debts found non-dis-
chargeable under section 523(a)(6) typically fall into one of two catego-
ries: 1) a creditor claims that the debt arose when the debtor sold
collateral subject to a security agreement; or 2) a creditor claims the debt
arose from a previously entered judgment against the debtor. In the
first category, section 523(a)(6) puts the creditor in the position he would
have been in if the willful and malicious conversion had never oc-
curred. The second category protects injured parties who have "haz-
arded the risks of litigation" and obtained a verdict, after which the
debtor declares bankruptcy. Kimzey does not conform to either of the
typical categories since the debt arose from the settlement of a claim for
willful and malicious conversion. Thus, Kimzey presented a case of first
impression in the Seventh Circuit.

Due to the unique facts of the case, the court specifically limited the
holding in Kimzey to the facts of the case, and noted that not all debts
resulting from the settlement of a claim of willful and malicious con-
version would be dischargeable. When the creditor's conduct is non-cul-
pable a debt arising from the settlement of a willful and malicious injury

75. The Seventh Circuit explained that since "a debt is non-dischargeable under this section
only if the conversion was both willful and malicious ... the bankruptcy court's finding that the
conversion was intentional is not sufficient." Id. at 424.
76. Some amount of these payments is attributable to the principal of the original $5,230 debt
and therefore the debt should be reduced accordingly. Id. at 424-25.
77. The issue framed by the court was whether a debt owed as part of a settlement of a claim for
willful and malicious conversion is non-dischargeable under section 523(a)(6). Id. at 425.
78. Id.
79. Id.
80. This category protects creditors who have a right to possess the property securing their loan
in the event of a default. If the debtor disposes of the property, the creditor is protected through
non-dischargeability of the debt. In re Scotella, 18 Bankr. at 977.
81. Kimzey, 761 F.2d at 425.
82. This category protects creditors who have suffered injury such as medical malpractice and
have succeeded in obtaining a judgment of damages. In re Franklin, 726 F.2d at 610.
83. The Seventh Circuit admitted to finding only one Virginia case in which a creditor tried to
have a settlement agreement found non-dischargeable. Since this case pre-dated the 1978 Bank-
ruptcy Reform Act, it provided little analytical support. Kimzey, 761 F.2d at 425.
84. Id. at 425.
may remain non-dischargeable.  

In the present case, however, Kimzey's conduct in converting the check was apparently less culpable than the Bank's conduct in condoning the conversion. The specific facts of this case led the Seventh Circuit to the conclusion that the debt was dischargeable. Initially, the Bank failed to demand payment of the loan when the conversion was discovered and moreover, it was the Bank itself which suggested that Kimzey sign a new, consolidated note combining this debt with others at an interest rate of 16\%\%\%. In addition, Kimzey testified that the conversion was inadvertent, and furthermore, the amount remaining in the account at the time the Bank discovered the conversion, plus the subsequent payments made by Kimzey, may have been sufficient to fulfill the obligation. The Bank's failure to pursue this collection alternative, and the suggestion that Kimzey sign a new note, indicated the Bank's acquiescence in Kimzey's behavior. Therefore, the Bank constructively elected to assume the responsibility of collecting the debt from the settlement of the willful and malicious conversion.

This decision reflects the growing trend of the courts to place the burden of irresponsible debtor conduct on the creditor who is in the best position to limit the extension of credit. When the creditor fails to do so because of a high profit motive, he assumes the risk of non-collection due to debtor bankruptcy.

85. “For example, a debt might not be discharged if the debtor induces a creditor to settle a claim and intends to file for bankruptcy shortly thereafter.” 761 F.2d at 425 n.1.
86. 761 F.2d at 425.
87. Kimzey termed the settlement a novation. The Seventh Circuit did not refer to it as a novation but the decision may reflect an agreement with the contract termination. A similar case cited by the Seventh Circuit found an allegedly fraudulently induced debt to be dischargeable in bankruptcy after novation. See In re Akers, 1 Bankr. Ct. Dec. (CRR) 295, 296 (Bankr. W.D. Va. 1974).
88. See supra note 72.
89. Most of the proceeds of the converted payment were still in Kimzey's account when the bank initially discovered the conversion. Kimzey, 761 F.2d at 423.
90. When the bank knowingly elected to extend the debt with a higher rate of interest, the profit motive of the bank in allowing non-payment of the debt accruing from the conversion contributed to a waiver of the bank's right to have the debt discharged in bankruptcy.
92. The court in In re Talbot, 16 Bankr. 50 (Bankr. M.D. La. 1981), held the creditor estopped from preventing discharge of a debt in bankruptcy due to its former conduct. This same rationale applied in In re Gibson, 1 Bankr. Ct. Dec. (CRR) 449 (Bankr. S.D. Ohio 1974), where the creditor allowed the debt to continue in order to collect high interest rates. The creditor was denied a claim of non-dischargeability of the debt in bankruptcy. In the case In re Whitehead, 2 Bankr. Ct. Dec. (CRR) 1647, 1650 (Bankr. D. Utah 1976), involving a willful and malicious conversion of credit, the court found the creditor's action to be an implied ratification of the debtor's conduct.
93. The key factors considered by the court in determining whether acquiescence is a defense to § 523 include: 1) the level of the debtor's culpability; 2) the degree of influence the creditor's conduct has on the debtor's behavior; 3) the relative power of the two parties; and 4) the extent to which the creditor has allowed the debtor's conduct because of high finance charges on the unpaid balance.
The Seventh Circuit's decision to allow discharge of a debt in settlement of a claim of willful and malicious conversion will certainly be cited by future litigants. This decision, contrary to usual strict statutory construction, leaves open the question of whether settlement of a tort claim is non-dischargeable in bankruptcy. Since the decision is based on a case by case analysis of the facts, many debtors with a settlement of a tort claim included in the bankruptcy estate may attempt to have the settlement discharged. Furthermore, creditors will have to be meticulous in arranging settlement of claims to avoid having their conduct result in the debt being discharged in bankruptcy. While this decision is limited to the facts of the case, the novel holding is likely to increase litigation in the future.

IV. "STACKING" EXEMPTIONS UNDER THE ILLINOIS PERSONAL PROPERTY EXEMPTION STATUTE—IN RE BARKER

The Seventh Circuit addressed inconsistencies between the Federal Bankruptcy Code exemptions and Illinois exemption provisions in In re Barker. The Bankruptcy Code allows a debtor to exempt $400 in value plus any unused amount of his homestead exemption in any property. Hence, the general federal exemption permits a debtor to "stack" or aggregate the value of separate exemptions. However, in 1980 the Illinois legislature chose to "opt out" of the federal exemption scheme as permitted by 11 U.S.C. § 522(b)(1). Therefore, Illinois residents filing a petition in bankruptcy under chapter 7 are restricted to the exemptions allowed by Illinois law.

Barker raised the issue of whether the Illinois personal property statute permits the combining or "stacking" of exemptions. The Illi-
nois statute is ambiguous on its face and various interpretations indicate a split between the courts of the Central District and those of the Northern and Southern Districts of Illinois. The Seventh Circuit relied on legislative intent and public policy in holding that the “stacking” of exemptions is allowed under the Illinois personal property statute.

Barker, in his chapter 7 petition for bankruptcy, claimed an exemption of his equity interest in a 1979 Olds Toronado to the maximum statutory amount allowed for any one automobile of $1200. Barker also claimed an additional $1022 equity interest in the same automobile under the exemption of $2000 allowed for any other property. The court for the Central District of Illinois refused to allow this “stacking” of exemptions and denied the additional $1022 exemption for the automobile. The Illinois personal property exemption provides, in pertinent part, that the following items are exempt from judgment, attachment, or distress for rent: 1) the necessary wearing apparel, Bible, school books, and family pictures of the debtor and the debtor’s dependents; 2) the debtor’s equity interest, up to $2000 in value, in any other property; and 3) the debtor’s equity interest, not to exceed $1200 in value, in any one motor vehicle.

The disagreement among the lower courts arose from the interpretation of the phrase “any other property” in section 12-1001(b). The Central District viewed this phrase as applying to any other property not specifically exempted elsewhere in the statute and denied the stacking of exemptions. The Northern and Southern Districts applied a literal interpretation of section (b) independent of any other provision of the statute and allowed the debtor to “stack” his personal property and auto-

debtor’s dependents; and b) the debtor’s equity interest, not to exceed $2,000 in value, in any other property; c) the debtor’s interest, not to exceed $1,200 in value, in any one motor vehicle.”

100. Barker, 768 F.2d at 195.
101. Id. at 194.
102. The district court interpreted the statute to provide for the maximum allowable exemption in any one vehicle. Therefore, the exemption for “any other property” did not include the automobile which had already been exempted to the maximum allowable statutory amount. Id. at 192.
104. 768 F.2d at 195.
105. The Central District in In re Pastorek, 33 Bankr. 406, 407 (Bankr. C.D. Ill. 1983), reasoned that since motor vehicles are specifically exempted in subsection (c) they may not be included in the “any other property” of subsection (b) which refers to any other property not specifically exempted in any other subsection. The court for the Central District distinguished the federal exemption statute as allowing stacking of “any property” while the Illinois statute refers to “any other property” (emphasis added). The court held the inclusion of the word “other” in the Illinois statute evinced a legislative intent to prohibit stacking of exemptions in Illinois. Id. at 408. The bankruptcy court of the Central District found this reasoning persuasive and denied a debtor permission to exempt a second motor vehicle under the “any other property” provision of subsection (b). In re Johns, 39 Bankr. 488, 489 (Bankr. C.D. Ill. 1984).
mobile exemptions. The trustee in this case argued that “any other property” applied to property in the same general category as the property specifically exempted in section 12-1001(a). The Seventh Circuit rejected the trustee’s argument, reasoning that since no dollar amount limit was placed on subsection (a) exemptions, it was anomalous to exempt an additional $2000 in unvalued property. However, since the holdings of both the court for the Central District and the courts for the Northern and Southern Districts were reasonable interpretations of the statute, the Seventh Circuit reviewed the history of the recent revision of the statute.

After the Bankruptcy Reform Act of 1978 increased the federal property exemptions in bankruptcy, the Illinois legislature expanded the personal property statute to increase state exemptions also. While the Bankruptcy Code specifically allows “stacking” of exemptions, the revised Illinois statute does not address “stacking” of exemptions. The Seventh Circuit explained that the omission of language permitting exemption stacking was the result of the legislature’s attempt to work within the language of an existing statute which dated back to 1843. The court then noted the lack of language prohibiting the “stacking” of exemptions in Illinois. Finally, the court mentioned the history of liberal construction of the exemption statute in Illinois. These facts, taken in conjunction with the purpose of statutory exemptions as debtor

106. In the Southern District of Illinois the bankruptcy court interpreted the phrase “any other property” to mean any other property not already specifically exempted and a second motor vehicle was allowed to be exempted under subsection (b). In re Sorenson, 21 Bankr. 94, 95-96 (Bankr. S.D. Ill. 1982). The same court also found that a reasonable reading of ch. 110 § 12-1001 (previously ch. 52 § 13) indicated that specific exemptions should be increased by the unused amount of the general provisions. The court allowed the stacking of exemptions in one motor vehicle. In re Cullen, 21 Bankr. 118 (Bankr. S.D. Ill. 1982). In the Northern District of Illinois the bankruptcy court held Pastorek to be wrongly decided. This court found the exemption of “any other property” to be a “wild card exemption, intended to give the Debtor some additional property in the event anything remains after using his other exemptions.” The court permitted the debtor to stack this exemption with the motor vehicle exemption in one motor vehicle since “[e]xemptions are to be broadly construed in favor of the debtor.” In re Terry, 41 Bankr. 508, 509 (Bankr. N.D. Ill. 1984).
107. The trustee’s narrow interpretation relied on the use of the word “and” between subsection (a) and subsection (b) to limit “any other property” to property in the same general class as that defined in subsection (a). The Seventh Circuit decided that use of the word “and” precluded the use of subsection (a) property in the “any other property” of subsection (b). 768 F.2d at 195.
108. Id.
109. Id.
111. The Supreme Court of Illinois explained that the statute was “amended.” Id.
112. Barker, 768 F.2d at 196.
113. Id.
protection, led the Seventh Circuit to allow Barker to "stack" his personal property exemption and his automobile exemption.

Implicit in this decision is the policy of uniformity among the states inherent in the Bankruptcy Reform Act of 1978. Since the federal provision allows stacking of exemptions, the court's interpretation of the ambiguous Illinois statute as also allowing stacking of exemptions accords with this policy of uniformity.

The holding in Barker is a broad federal interpretation of a state statute. The decision follows the trend of construing ambiguous exemption provisions in favor of the debtor. Absent any future action by the Illinois legislature to specifically prohibit the stacking of exemptions, Illinois debtors in bankruptcy have broad leeway in the use of the general exemption for "any other property." Since stacking of exemptions is allowed under the Illinois personal property exemption statute, future litigants will undoubtedly argue for an extension of this holding. The Seventh Circuit may soon be enlisted to decide whether Illinois debtors may stack their personal property and homestead exemptions consistent with the Bankruptcy Code.

V. LIEN SURVIVAL AFTER DISALLOWANCE OF THE CLAIM—In re Tarnow

A claim secured by a lien on property generally survives a bankruptcy proceeding even if the creditor does not file a claim. However,

114. As early as 1871 the Illinois Supreme Court cited "the humane principle... that a creditor should not wholly deprive the husband and father of the means of supporting his family...." Good v. Fogg, 61 Ill. 449, 451 (1871). This policy was reaffirmed in 1960, with the debtor being viewed as the beneficiary of the personal property exemptions statutes. In re Schriar, 284 F.2d 471, 474 (7th Cir. 1960).

115. Barker, 768 F.2d at 196.


117. The opt-out provision has been criticized as "unconsidered" legislative action, Haines, Section 522's Opt-Out Clause: Debtor's Bankruptcy Exemptions in a Sorry State, 1983 ARIZ. ST. L.J. 1, 5-6, which defeats the policy of uniformity in bankruptcy law. Vukonich, Debtors' Exemption Rights Under The Bankruptcy Reform Act, 58 N.C.L. REV. 769 (1980). The Seventh Circuit's interpretation attempts to restore some uniformity between federal and state exemptions consistent with federal policy.

118. This rule was established in Long v. Bullard where the Court held that "debts secured by mortgage or pledge can only be proved for the balance remaining due after deducting the value of the security, unless all claim upon the security is released. Here the creditor neither proved his debt in bankruptcy nor released his lien. Consequently, his security was preserved notwithstanding the bankruptcy of his debtor." Long v. Bullard, 117 U.S. 617, 620-21 (1886).
in *In re Tarnow*\(^{119}\) a claim was filed and disallowed. Thus, the judicially created rule of lien survival\(^{120}\) appeared to conflict with the statutory provisions extinguishing the lien when the claim is disallowed. The Seventh Circuit equitably allowed the lien to survive the bankruptcy proceeding in *Tarnow* despite the fact that the claim had been disallowed. The court based its reasoning on the longstanding validity of the rule,\(^{121}\) and the legislative history of the statute.\(^ {122}\)

Tarnow received a loan from the Commodity Credit Corporation (CCC), a federal agency, secured by a lien on his crops and equipment. Before the loan was repaid, Tarnow filed for bankruptcy under chapter 11 of the Bankruptcy Code. The bankruptcy court fixed a deadline for the filing of claims against the estate and CCC had actual knowledge of this deadline. However, CCC failed to file a claim until two months after the deadline had passed and the bankruptcy court disallowed this claim as untimely.\(^{123}\) Furthermore, the bankruptcy court extinguished the lien securing the claim since the claim had been disallowed.\(^{124}\)

On appeal, Tarnow argued that since CCC's claim was disallowed, the lien securing the claim was thereby extinguished. The Bankruptcy Code provides support for this argument in section 506(d)\(^{125}\) which states "to the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless—(1) a party in interest has not requested that the court determine and allow or disallow such claim under section 502 [regulating the allowance of claims against the bankrupt estate]."\(^ {126}\)

Collier explains this provision as a reconciliation of the interest of the debtor in obtaining a fresh start and the interest of the creditor to be protected from deprivation of his property without due process. Since

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119. 749 F.2d 464 (7th Cir. 1984).
120. See supra note 118 and accompanying text.
122. *Id.* at 466-67.
123. *Id.* at 464.
124. The decision of the bankruptcy court was upheld on appeal to the district court.
126. 11 U.S.C. § 506(d). Under § 502 a claim may be objected to because it was not filed in a timely fashion. In *re Wise*, 41 Bankr. 51, 52 (Bankr. W.D. La. 1984). The district court in *Tarnow* relied on the fact that a party in interest had requested the court to disallow the claim and the claim had been so disallowed. Furthermore, since there is no provision in the Code for claims objected to in terms of validity, legality, or timeliness, the court assumed such objections were covered by the general provisions of § 502. Finally, timely filing of a proof of claim is the touchstone of the allowability of a claim. Since the major purpose of the Bankruptcy Code is to "provide for fair and orderly distribution of the assets among creditors, and give the debtor a fresh start," allowing untimely claims undermines the purposes of the Bankruptcy Code. The court therefore held the lien to be extinguished when the claim was properly disallowed. In *re Tarnow*, 35 Bankr. 1014 (Bankr. N.D. Ind. 1983).
the creditor is given his day in court, the lien will survive to the extent the claim is allowed and the lien will be extinguished to the extent the claim is disallowed "for any reason other than it is a claim for reimbursement or contribution within the purview of section 502(e)." A literal interpretation of the statute would therefore appear to extinguish CCC's lien.

The Seventh Circuit found this result to be anomalous since CCC was not required to file a claim and a failure to file would not have completely extinguished the valid lien. The court noted the long standing rule that allows a creditor whose loan is secured by a lien on the assets of a bankrupt debtor to ignore the bankruptcy proceeding and look only to the lien for the satisfaction of the debt. If the collateral is insufficient to satisfy the amount owed, the creditor may file a claim against the bankruptcy estate for the excess balance of the loan. For the purpose of this claim only, the creditor is considered unsecured. Following this rationale, the Seventh Circuit held that only the amount Tarnow owed in excess of the value of CCC's lien was disallowed due to the untimely filing of the claim. The validity of the lien and CCC's status as a secured creditor were not affected by the disallowed claim and survived the bankruptcy proceeding.

The court found support for this position in the legislative history of section 506(d). The Senate version provided "that to the extent a secured claim is not allowed, its lien is void unless the holder has neither actual notice nor knowledge of the case." The final version of this provision contains more lenient terms for the extinguishment of liens. The Seventh Circuit interpreted this to be indicative of a legislative intent to be less strict and applied this presumed intent to the present case.

Additionally, the Seventh Circuit found the statutory language to be ambiguous and applied the "hindsight" gleaned from the legislative intent behind the 1984 amendment codifying the long standing rule of lien

128. Tarnow, 749 F.2d at 465.
129. Norton's treatise on bankruptcy law also provides support for this holding. "[A] party in interest may seek the allowance or disallowance of the claim and the court will then determine the validity of the lien." 1 NORTON, BANKRUPTCY LAW AND PRACTICE, § 28.27, at 28-18 (1983).
130. Tarnow, 749 F.2d at 466.
132. Id. at 467, citing 124 CONG. REC. 33997 (1978).
133. The Senate version "could have been read to mean that the lien would be extinguished whatever the basis for disallowing the claim. But Congress enacted the House version, ... which is less hospitable to such a reading." Id. at 467.
survival.\textsuperscript{134} The court excused the retroactive application of the 1984 amendment by explaining that the amendment was merely “clarifying” and therefore not strictly prospective.\textsuperscript{135}

Although the court made no reference to an earlier bankruptcy case in which these same statutes were strictly construed to the detriment of the creditor,\textsuperscript{136} the Seventh Circuit reached a fair decision in \textit{Tarnow}.\textsuperscript{137} Separating CCC’s claim into a secured and unsecured portion, with only the unsecured excess being disallowed, permitted the court to avoid an unduly harsh result while maintaining the integrity of both the statute and the long standing judicial rule.

The Seventh Circuit’s decision to allow survival of a lien when the claim is untimely is an equitable decision on facts not strictly governed by any Bankruptcy Code provision. This holding does not comport with the policy of finality in bankruptcy since the holder of a claim secured by a lien on the debtor’s property does not have to participate in the bankruptcy proceedings but may come forward at a later date to enforce his lien. However, future debtors will probably not succeed in avoiding liens on this argument since the debtors should be aware of liens placed on their property and therefore cannot claim surprise when a lienholder comes forward to satisfy the lien after conclusion of the bankruptcy proceeding.

VI. \textsc{Subrogation When the Debtor and Creditor Are Close Relatives—In re Bugos}\

“Among the oldest of these [equitable doctrines] is the rule of subrogation whereby one who has been compelled to pay a debt that ought to have been paid by another is entitled to exercise all remedies which the

\textsuperscript{134} In 1984 a new \S\ 506(d)(2) was enacted to replace \S\ 506(d)(1), “and the new section preserves the lien if the claim ‘is not an allowed secured claim due only to the failure of any entity to file proof of such a claim . . . .’” \textit{Id.} at 467.

\textsuperscript{135} The court explained that although amendments may be formally only prospective, a legislator may refer to the amendment as “clarifying” in which case it may be applied retroactively to a pre-existing provision. However, the Seventh Circuit held the previous statutory language was ambiguous and therefore the purpose of the 1984 amendment was truly to clarify, not modify, the existing statute. \textit{Tarnow}, 749 F.2d at 467.

\textsuperscript{136} A judicial interpretation of 11 U.S.C. \S\ 506(d) in a fact situation very similar to the present case reached the opposite result. The creditor whose claim was secured by a lien knew the debtor had filed a petition in bankruptcy but failed to file a claim against the estate within the specified time. An objection to the claim, based on the untimely filing, resulted in the claim being disallowed. Since the creditor had an opportunity for his “day in court” and failed to avail himself of it, the court ruled the lien securing the claim to be extinguished. \textit{In re Wise}, 41 Bankr. 5152 (Bankr. W.D. La. 1984).

\textsuperscript{137} The rule that a lien survives a bankruptcy proceeding even if the creditor is being treated as unsecured prevailed in \textit{In re Rebuelta}, 27 Bankr. 137 (Bankr. N.D. Ga. 1983), and \textit{In re Hines}, 20 Bankr. 44 (Bankr. S.D. Ohio 1982).
creditor possessed against the other." The right to subrogation is readily recognized when a surety makes payment prior to the filing of bankruptcy, and the right to subrogation is equally readily denied when a mere volunteer makes pre-petition payment. Beyond these two extremes the interpretation of "compelled to pay" becomes difficult. The Seventh Circuit addressed the issue of the right to subrogation as applied to a father and son who had gone into farming as co-tenants in In re Bugos.

James Bugos and his son David purchased a seventy acre farm as co-vendees and agreed orally to share all expenses. When David began having financial difficulties, James Bugos, of necessity, had to bear the full expense of the farm. Two years later David filed for bankruptcy and included his one-half interest in the farm in the bankruptcy estate. The district court determined that James Bugos was not entitled to subrogation for the pre-petition payments made on his son's behalf for the previous two years. Bugos claimed a right of subrogation under section 509(a) which provides:

Except as provided in subsection (b) and (c) of this section, an entity that is liable with the debtor on or that has secured, a claim of a creditor, and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment.

The lower court presumed that property purchased in the name of a family member is a gift and found James Bugos' pre-petition payments on behalf of his son to be a gift. This presumption can be rebutted by clear and convincing evidence that a gift was not intended. However, the district court found the evidence insufficient to rebut the presumption. The district court noted that the agreement to share expenses was oral; there was no written agreement that the son would repay Bugos the

139. A surety, as well as a guarantor, a co-signer, a joint venturer, a joint tortfeasor and an endorser may have a legal obligation to pay the creditor. If payment is made, these entities have a right to subrogation in a bankruptcy proceeding. D. Cowans, Bankruptcy Law and Practice, § 12.29 (1983 Interim Ed.).
140. In re Co-Build Companies, 21 Bankr. 635, 637 (Bankr. E.D. Pa. 1982). One who satisfies the debt of another voluntarily does not fulfill the requirement that he be "compelled to pay" the debts of another and therefore has no right to subrogation.
141. 760 F.2d at 731.
142. Id. at 732.
144. This presumption was based on Moore v. Moore, 9 Ill. 2d 556, 138 N.E.2d 562 (1956). In Moore, a mother purchased property to be held in joint tenancy with some of her children. After the mother died, a child not named a joint tenant brought suit to enjoin title vesting in his siblings. The court held that the property interests created in favor of the other children were presumed to be gifts. The Seventh Circuit distinguished Moore since the case did not involve the issue of subrogation. Bugos, 760 F.2d at 735.
purchase price; there was no demand by Bugos for repayment of any of the sums; and Bugos received no repayment of the purchase money from his son.\(^\text{145}\) This evidence, in total, not only failed to rebut the presumption of a gift but actually supported the contention that James Bugos' payments on behalf of David were intended to be a gift.

On appeal, the Seventh Circuit looked to further facts of the case to find Bugos entitled to subrogation for the pre-petition payments made on behalf of his son. First, the Seventh Circuit rejected the presumption of a gift as inapposite in this case where avoidance of forfeiture compelled the co-debtor to pay more than his share.\(^\text{146}\) Instead, the court favored the presumption that "where one tenant in common relieves the property of a burden, pays a lien or pays taxes he is entitled to contribution from the other tenants in common."\(^\text{147}\) Based on Bugos' presumed entitlement to contribution, the court held that Bugos was entitled to subrogation in this bankruptcy proceeding.\(^\text{148}\)

Additionally, under the clear language of the statute, the court found Bugos was "liable with the debtor on . . . a claim of a creditor,"\(^\text{149}\) since Bugos and his son were co-tenants. A co-tenant holds an undivided one-half interest, and since, under the terms of the purchase agreement, a forfeiture would give the vendors the right to take possession of the entire premises, Bugos was jointly and severally liable for the deficiency.\(^\text{150}\) For this reason also, the court held that Bugos was entitled to subrogation.

Furthermore, the purchase contract included a covenant to avoid having liens placed on the property. If the son's deficiency had resulted in a lien being placed on the property, Bugos would have been liable for the breach of contract.\(^\text{151}\) Therefore, the court again found Bugos entitled to subrogation.

In sum, the Seventh Circuit found the acknowledged donative mo-

\(^{145}\) There was no written agreement of contract, other than the purchase agreement listing Bugos and his son as co-vendees, to substantiate the business purposes of this arrangement. Bugos took no action to enforce his alleged right to repayment. The testimony of Bugos' wife did little to support Bugos' position. Mrs. Bugos testifies that the son paid "when he could" and that Bugos made payments on his son's behalf with the understanding that "once he got back on his feet he would pay us back." \textit{Bugos}, 760 F.2d at 735.

\(^{146}\) \textit{Id.} at 735.

\(^{147}\) \textit{Id.} (quoting Kratzer v. Kratzer, 130 I11. App. 2d 762, 768, 262 N.E.2d 419 (4th Dist. 1971)).

\(^{148}\) Bugos' right to contribution from his co-tenant could be upheld as simply an allowed claim against the bankruptcy estate.

\(^{149}\) \textit{Bugos}, 760 F.2d at 734, (quoting 11 U.S.C. § 509(a).)

\(^{150}\) Bugos was compelled to pay the debts of his son to protect his own one-half interest in the farm. Neither the statute nor the Supreme Court made reference to whether protecting one's own interests qualifies one for the right to subrogation.

\(^{151}\) \textit{Bugos}, 760 F.2d at 735.
tive of Bugos overshadowed by his continuing liability for the debts.\textsuperscript{152} The court was aware that the arrangement between Bugos and his son did not appear to be an arms length transaction but a casual family agreement, since the entire repayment agreement was both oral and lenient. However, by focusing on James Bugos' continuing liability the court applied the language of section 509(a) and granted subrogation using the broad discretion allowed courts of equity.

The doctrine of subrogation is an equitable remedy based on the facts and circumstances of each case. Subrogation will not be applied where (1) it would be inequitable to do so; (2) it would work injustice to others having equal equities; or (3) it would operate to defeat another's legal rights.\textsuperscript{153} The record before the Seventh Circuit did not disclose the rights of the creditors satisfied by Bugos, nor did it allude to any creditors whose claims had not been satisfied.\textsuperscript{154} The court apparently assumed that unfulfilled creditor's rights or unsatisfied claims would have been brought to the attention of the court. Therefore, permitting subrogation in this case did not violate any equities or legal rights nor create an injustice. Furthermore, granting subrogation in this case provided some equitable relief to a small farmer in keeping with the policy of the Bankruptcy Code.\textsuperscript{155}

The decision to grant the right of subrogation to Bugos evinces the trend of the Seventh Circuit to broadly construe provisions of the Bankruptcy Code in favor of the debtor, by allowing the debtor's father, in this case, subrogation for the debts paid on the son's behalf. Bugos was not so much compelled to pay the debts of another as he was compelled to pay his own liabilities to protect his own pecuniary interests. Nevertheless, the Seventh Circuit granted subrogation since Bugos technically fit the statutory definition. In this case the Seventh Circuit chose form over substance in upholding the policies of the Bankruptcy Code. In future litigation, parties in interest to a business bankruptcy under chapter 11 should find subrogation easier to obtain under the Seventh Circuit's broad interpretation.

\textsuperscript{152} Id.

\textsuperscript{153} In re Co-Build Companies, Inc., 21 Bankr. 635 (Bankr. E.D. Pa. 1982).

\textsuperscript{154} 760 F.2d at 734 n.5.

\textsuperscript{155} Congress gave farmers special defensive protections under the Bankruptcy Code. In re Jasik, 727 F.2d 1379, 1381 (5th Cir. 1984). For example, 11 U.S.C. § 303(a) (1985) provides that farmers cannot be placed in involuntary bankruptcy and 11 U.S.C. § 1112(c) provides that a chapter 13 proceeding cannot be converted to a chapter 7 proceeding if the debtor filing the petition in bankruptcy is a farmer.
VII. **TIME LIMITS FOR THE ASSUMPTION OF EXECUTORY CONTRACTS—** *Moody v. Amoco Oil Co.*

In *Moody v. Amoco Oil Co.* 156 the Seventh Circuit considered the issue of time restrictions for the assumption of an executory contract 157 in a chapter 11 proceeding. The contract in this case specifically delineated the time limits for curing a default after service of a termination notice. 158 Additionally, the Bankruptcy Code contains two applicable provisions governing time limits for contract assumption: section 108(b) provides sixty days from the date of the filing of the petition to file, cure, or perform; section 365(d)(1) provides for the assumption of an executory agreement at any time before confirmation of the reorganization plan. The Seventh Circuit resolved this conflict in favor of the provision specifically governing executory agreements, section 365(d)(1), and allowed assumption of the contract at any time prior to confirmation of the plan. 161

Moody and his solely owned business, Jermoo's, conducted wholesale petroleum operations as an Amoco jobber. Amoco notified Moody

156. 734 F.2d 1200 (7th Cir. 1984), cert. denied, 105 S. Ct. 386 (1985).

157. An executory contract is “a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.” *Countryman, Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973). “[A]n executory contract represents a contingent opportunity...[t]he reference to assuming the contract derives from the technical construct that filing a bankruptcy petition creates a legal entity (the estate) that is separate and distinct from the debtor prior to bankruptcy. Assumption of the contract implies that the bankrupt is entitled to receive the other party’s performance, and that the bankrupt will perform its aspect of the contract. Conversely, rejection of the contract is analogous to repudiation and breach of the agreement. The other party need not perform, but has a claim against the estate.” *Nimmer, Executory Contracts in Bankruptcy: Protecting the Fundamental Terms of the Bargain*, 54 U. COLO. L. REV. 507, 513 (1983).

158. Amoco issued a notice of termination of the jobbership by a certified letter dated February 1, 1983. The termination was to be effective on May 6, 1983 if Moody had not cured the default within fifteen days from the postmark date on the letter. Moody did not cure the default within fifteen days, and had not cured the default at the time the Seventh Circuit decided the case.

159. 11 U.S.C. § 108(b) provides:

Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; and

(2) 60 days after the order for relief.


In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

161. 734 F.2d at 1216.
that it was electing to terminate the jobbership contract due to more than $230,000 in arrearages which had been outstanding for over a year. The termination notice provided fifteen days for Moody to cure the default and reinstate the jobbership contract. Moody then filed a petition in bankruptcy under chapter 11 of the Bankruptcy Code.

Moody argued that since the petition for bankruptcy was filed within the fifteen day period provided for curing the default and reinstating the contract, the jobbership contract was executory at the time of the filing of the petition. Under section 365(d)(1) debtors may assume an executory agreement at any time prior to confirmation of a reorganization plan. Thus Moody claimed the jobbership contract was still assumable since no reorganization plan had yet been confirmed.

Amoco, relying on section 108(b), argued that debtors had only sixty days from the filing of the petition in bankruptcy to assume the jobbership contract. Section 108(b) specifically addresses the situation where an agreement fixes a certain time period for cure of a default. The debtor is allowed the longer of the period fixed by the agreement or sixty days to cure the default. Since Moody failed to cure the default and assume the contract within sixty days of filing bankruptcy, Amoco argued the jobbership contract could no longer be assumed.

The issue before the Seventh Circuit concerned which provision took priority since both statutes were applicable and conflicting. The court chose to apply the more lenient provisions of section 365(d)(1) in this case.\textsuperscript{162} This provision granted Moody a more liberal time limit for reorganizing his business affairs, in keeping with the policy of the Bankruptcy Code to protect debtors.\textsuperscript{163} Although section 108(b) appears to be a more specific provision on the facts of this case, the Seventh Circuit explained the reason for rejecting this provision in favor of the more liberal section 365(d)(1) was a policy decision. The underlying policy of section 108(b) is to grant a debtor an extension of time for the accomplishment of acts necessary to preserve his rights.\textsuperscript{164} Amoco's application of section 108(b) in this case worked to restrict the debtor's rights, in opposition to the underlying policy of this provision,\textsuperscript{165} since the other applicable but conflicting provision granted the debtor a longer time to preserve his rights.

\textsuperscript{162} Id. at 1215.
\textsuperscript{163} Id. at 1216.
\textsuperscript{164} Id.

\textsuperscript{165} While § 108(b) would extend the fifteen day period specified by Amoco for reinstating the jobbership contract, the application of § 365 is more generous in extending the time available to the debtor to assume the contract. Therefore, as between § 365(d)(1) and § 108(b), the latter provision actually reduces the time available to the debtor.
Additionally, the general purpose of chapter 11 is to prevent liquidation and permit a successful rehabilitation of the debtor.\footnote{Moody, 734 F.2d at 1216 (citing N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513 (1984)).} This purpose can only be accomplished if debtors are allowed a certain amount of flexibility in reorganizing their affairs. In the present case, applying section 108(b) rather than section 365(d)(1) restricts debtor flexibility by limiting the time available for the debtor to reorganize his affairs.\footnote{Moody, 734 F.2d at 1215.} This application of the statutes serves to frustrate rather than promote the purpose of chapter 11.

Furthermore, section 108(b) is a general provision of the Bankruptcy Code while section 365(d)(1) is a specific provision relating to the time allowed for the curing of defaults in an executory agreement.\footnote{Moody, 734 F.2d at 1215 (citing In re McLouth Steel Corp., 20 Bankr. 688, 690 (Bankr. E.D. Mich. 1982)).} Since the more specific provision of the Bankruptcy Code will apply over the more general provision,\footnote{Id. at 1215 (citing In re McLouth Steel Corp., 20 Bankr. 688, 690 (Bankr. E.D. Mich. 1982)).} section 365 governs in this case. Finally, when one provision of the Bankruptcy Code governs, another provision should not be interpreted so as to cause irreconcilable conflict.\footnote{Bank of Commonwealth v. Bevan, 13 Bankr. 989 (Bankr. E.D. Mich. 1981).} The Seventh Circuit construed section 365(d)(1) to extend the time limits of section 108(b) in the case of executory contracts despite the specific provision of section 108 governing the extension of time for curing defaults after a notice of termination. Therefore, Moody could assume the jobbership contract at any time before confirmation of the reorganization plan.

Although supported by a statutory provision, this decision at first glance appears to work an inequitable hardship on Amoco. The $230,000 in arrearages had been outstanding for almost a year and a half at the time Moody filed for bankruptcy. It was an additional year before the Seventh Circuit decided the case. Moody had neither cured the arrearages nor assumed the contract in that time. However, the court noted that if a situation such as this arises which is overly burdensome to the creditor, relief is possible.\footnote{11 U.S.C. § 365(d)(2) provides:}

In a case under chapter 9, 11, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the
Bankruptcy court may set a deadline prior to the confirmation of the plan for assumption or rejection of the contract. Any default must be cured at the time of assumption and the court will take this into consideration. Therefore, debtor protection under section 365 is not achieved to the inequitable detriment of the creditor. Rather than on insisting on the unassumability of the contract, Amoco could have shown an economic burden and then could have requested the court to set a time for Moody to assume or reject the contract. Had Amoco so requested, reliance on section 108 to limit the court ordered time for assumption or rejection of the contract to sixty days might have been successful.

While this contract was subject to a termination notice, it also included terms for cure of the default and reinstatement of the agreement. Therefore it was an executory contract. The Seventh Circuit's resolution of the tension between section 108 and section 365 in favor of section 365 in executory contract cases, seems to decrease the necessity for and the potency of section 108, since the majority of contracts which fall within the parameters of section 108 will also fit the requirements of section 365. However, this decision is consistent with the Seventh Circuit's inclination to construe statutory provisions in favor of the debtor where there is ambiguity or conflict between provisions. It will be interesting to see under what circumstances the Seventh Circuit applies section 108 in the future.

**Conclusion**

The Seventh Circuit relies strongly on legislative history and intent to construe the various provisions of the Bankruptcy Code. While this approach is consistent with comprehensive debtor protection, it does not necessarily contribute to consistency or predictability in the area of bankruptcy law. Although the Seventh Circuit's bankruptcy decisions are generally fair and equitable, the reasoning behind the decisions is often

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173. The court in McLouth Steel determined that a debtor should have a reasonable time to decide whether to assume an executory contract but, mindful of the inequity of allowing unlimited time, proceeded to set a deadline for the debtor to assume the contract. McLouth Steel, 20 Bankr. at 692. The application of these same principles allowed a debtor only two additional weeks in which to assume or reject an executory lease in In re Easthampton Sand & Gravel Co., 25 Bankr. 193 (Bankr. E.D.N.Y. 1982). The court rejected a claim that the bankruptcy court should not have set a final date for assumption or rejection of a contract using the same equitable reasoning. Since the creditor was adequately protected from economic loss during the reasonable time period necessary for the debtor to decide whether to assume or reject the contract, the Seventh Circuit held that the bankruptcy court had not abused its discretion in failing to set a deadline. In re Whitcomb and Keller Mortgage Co., Inc., 715 F.2d 375 (7th Cir. 1983).
less than fully supported. The powers of equity granted to bankruptcy
courts are suitable to further the goal of debtor protection in the con-
struction of ambiguous or conflicting provisions, but statutory interpreta-
tion which weighs too heavily towards underlying intent and the facts of
each case will result in uncertainty in bankruptcy law. The primary pur-
purpose of the Bankruptcy Reform Act of 1978, to create uniformity in this
area of law, is not enhanced by individualized application of Bankruptcy
Code provisions. The goals of debtor protection and uniformity must
each be afforded consideration to achieve a balanced system of bank-
ruptcy law.