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## Strict Construction of the Bankruptcy Code: Is the Inability to Avoid Clean-up Obligations and Substantive Consolidation at Risk?

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As the Supreme Court has shifted towards an increasingly strict interpretation of the Bankruptcy Code<sup>1</sup> from *Midlantic*<sup>2</sup> to *Lamie*,<sup>3</sup> it can be argued that the premises behind certain long-standing court-made doctrines, the validity of which practitioners have come to take for granted, have been materially undermined. This article will examine the continuing, post-*Lamie* validity of certain court-made doctrines, including: (i) restrictions on abandonment of burdensome property of the estate, and (ii) substantive consolidation.

### Evolution of Statutory Interpretation from *Midlantic* to *Lamie*

Courts and commentators have long noted that certain pre-Bankruptcy Code doctrines survived the enactment of the Bankruptcy Code in 1978. Many of these decisions and authorities rely, at least in part, on the Supreme Court's reasoning in *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*,<sup>4</sup> which stands for the proposition that, unless Congress specifically repudiates a Bankruptcy Act policy in the language of the Bankruptcy Code, Congress did not intend to reverse the pre-Code practice.<sup>5</sup>

In *Midlantic*, the Supreme Court examined whether a trustee could use section 554 of the Bankruptcy Code to abandon property containing hazardous materials without taking any steps to safely cleanup or remove the waste. Initially, the bankruptcy court held that, once abandoned, the trustee was under no obligation to clean up or even safely maintain the hazardous waste, because the plain language of section 554(a) imposes no conditions on the abandonment of estate property, regardless of otherwise applicable state and federal environmental laws and regulations.<sup>6</sup> The district court affirmed<sup>7</sup> and the Court of Appeals for the Third Circuit then reversed.<sup>8</sup>

On *certiorari*, the Supreme Court determined that, because pre-Bankruptcy Code cases decided under the repealed Bankruptcy Act of 1898<sup>9</sup> recognized that a trustee's authority to abandon estate property was subject to "well-recognized restrictions... [,] Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws."<sup>10</sup> Thus, the Supreme Court determined that Congress intended to carry forward these



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pre-Bankruptcy Code restrictions on the power of abandonment merely because there is no mention of this Bankruptcy Act rule in **section 554 (a)** or elsewhere in the Bankruptcy Code.<sup>11</sup>

Applying the holding of *Midlantic*, a number of courts have determined that many Bankruptcy Act doctrines remain applicable under the Bankruptcy Code because Congress never explicitly repudiated them.<sup>12</sup> Since the *Midlantic* decision, however, the Supreme Court seems to have altered its view on how courts should interpret provisions of the Bankruptcy Code, moving over time towards increasingly strict reliance upon the plain statutory language of the provisions rather than the prior precedent developed under the repealed Bankruptcy Act.

### Ron Pair Enters

Not long after *Midlantic*, the Court decided *United States v. Ron Pair Enterprises, Inc.*,<sup>13</sup> which examined whether nonconsensual liens (e.g., judgment and property tax liens) were entitled to postpetition interest pursuant to section 506(b) of the Bankruptcy Code.<sup>14</sup> The debtor appealed the district court's reversal of the bankruptcy court's holding that the United States was not entitled to postpetition interest on its nonconsensual tax lien. On appeal, the debtor argued that the government was not entitled to postpetition interest because the pre-Bankruptcy Code case law only permitted such interest for secured creditors holding consensual liens.<sup>15</sup> Relying on *Midlantic* and *Kelly*,<sup>16</sup> the debtor asserted that "pre-Code practice drew a distinction between consensual and nonconsensual liens for the purpose of determining entitlement to postpetition interest, and that Congress' failure to repudiate that distinction require[d the court] to enforce it."<sup>17</sup> The Court of Appeals for the Sixth Circuit, agreeing with the debtor's position, reversed the district court and adopted the bankruptcy court's holding that this Bankruptcy Act rule still applied pursuant to the holding of *Midlantic*.<sup>18</sup>

The Supreme Court, however, rejected the debtor's reliance on pre-Bankruptcy Code precedent and reversed the court of appeals.<sup>19</sup> In coming to its decision, the Court first noted that Congress

substantially altered the bankruptcy laws by enacting the Bankruptcy Code and, thus, Congress did not explain its reasons for every change in policy from the Bankruptcy Act:

In such a substantial overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.<sup>20</sup>

According to *Ron Pair*, silence in the Bankruptcy Code with respect to a matter previously addressed under the Bankruptcy Act does not necessarily indicate Congress' intention to include such prior practice and does not compel courts to look to pre-Bankruptcy Code precedent.<sup>21</sup>

With this principle in hand, the Court found that statutory analysis should always begin with the language of the statute itself and held that where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"<sup>22</sup> Moreover, the Court found that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"<sup>23</sup> Thus, the literal application applies unless it is clearly at odds with the intentions of the drafters, in which case the clear intentions of Congress control.<sup>24</sup> The Supreme Court went on to note that, because the provision of postpetition interest to all lienholders—including nonconsensual lienholders—**under section 506(b) did not conflict** with any other section of the Bankruptcy Code or any important state or federal interest, the plain language of **section 506(b) did not contravene the intentions of Congress** and, thus, should be enforced.<sup>25</sup>

The *Ron Pair* Court attempted to harmonize its decision with the Court's earlier decisions in *Midlantic* and *Kelly*.<sup>26</sup> The court distinguished these decisions, noting that both "concerned statutory language which, at least to some degree, was open to interpretation" and that "[e]ach involved a situation where the bankruptcy law, under the

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proposed interpretation, was in clear conflict with state or federal laws of great importance.”<sup>27</sup> Thus, because the language of section 506(b) was clear and because the recognition of postpetition interest for nonconsensual lienholders did not conflict with the Bankruptcy Code or any other state or federal law or regulation, the Court found that *Midlantic* and *Kelly* did not apply. Additionally, the Supreme Court found that the Bankruptcy Act “rule” asserted by the debtor was not recognized by all courts, but rather, was an exception that was highly dependent on the circumstances.<sup>28</sup> Thus, the Court found that even if the mere silence in the Bankruptcy Code could be an indication of Congress’ intent to include repealed Bankruptcy Act precedent, the debtor’s arguments still failed.<sup>29</sup>

Despite the *Ron Pair* Court’s attempts to distinguish *Midlantic* and *Kelly*, it nevertheless appears that this decision significantly narrowed the applicability of those two holdings. Notably, the four Justices dissenting in *Ron Pair* rejected the majority’s argument that the meaning of section 506(b) is plain.<sup>30</sup> Rather, the dissent argued that, although the language of the provision may be plain, the meaning may not be.<sup>31</sup> In addition, the dissent pointed out that the statute in *Midlantic* “did not concern statutory language which was open to interpretation and the Court in *Midlantic* did not attempt to argue otherwise.”<sup>32</sup> Rather, as the dissent notes, “[t]he rule of *Midlantic* is that bankruptcy statutes will not be deemed to have changed pre-Code law unless there is some indication by Congress that it was effecting such a change.”<sup>33</sup> Consequently, the Court’s interpretation of the Bankruptcy Code mandated by *Ron Pair* represents a significant departure from its earlier decisions in that the Supreme Court now required lower courts to first look to the plain language of the Bankruptcy Code and *not* to rely on prior cases decided under the Bankruptcy Act. Despite this departure from *Midlantic*, however, many courts have continued to apply pre-Bankruptcy Code rules and doctrines notwithstanding the plain language of the Bankruptcy Code.<sup>34</sup>

### Lamie

More recently, the Supreme Court endorsed a view regarding interpretation of the Bankruptcy Code, which arguably represents an even greater departure than *Ron Pair* from the holding of *Midlantic*. In *Lamie v. United States*,<sup>35</sup> the Court declined to rely on legislative history or the construction of a predecessor statute to interpret a provision of the Bankruptcy Code, even where the legislative history and an apparent drafting error implied that Congress’ intent likely was different from the literal language of the statute.

In *Lamie*, counsel to the debtor, which had converted its case from a Chapter 11 to a Chapter 7 case, applied for fees for services rendered post-conversion.<sup>36</sup> Despite the plain and literal language of **section 330(a)(1) of the Bankruptcy Code**, which on its face prohibited payments to professionals who had not been appointed pursuant to **section 327**, debtor’s counsel argued that such language was ambiguous because of an apparent scrivener’s error which occurred when the provision was amended in 1994.<sup>37</sup> Thus, debtor’s counsel asserted that the bankruptcy court should look to the predecessor statute,<sup>38</sup> legislative history, and prior bankruptcy practice to determine that a debtor’s attorney is entitled to fees, notwithstanding section 330(a)(1)’s failure to include the word “attorney.”<sup>39</sup> Simply, the debtor’s counsel asked the court to ignore Congress’ apparent mistake in drafting the statute and to apply its perceived intent of Congress.<sup>40</sup> The bankruptcy court, however, disagreed and denied the motion.<sup>41</sup> On appeal, both the district court and the Court of Appeals for the Fourth Circuit rejected the arguments of debtors’ counsel and affirmed the bankruptcy court’s holding “particularly because the application of that plain language supports a reasonable interpretation of the Bankruptcy Code.”<sup>42</sup>

Granting the petition for *certiorari*, the Supreme Court affirmed the lower courts, rejecting the argument that ambiguity was present based on a comparison of the

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current language of section 330 with its predecessor statute.<sup>43</sup> A majority of the Court found that

[t]he starting point in discerning congressional intent is the existing statutory text . . . and not the predecessor statutes. It is well established that “when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”<sup>44</sup>

Applying this standard, although acknowledging that the statute is “awkward, and even ungrammatical,”<sup>45</sup> and that its interpretation of section 330 arguably resulted in surplusage, the Supreme Court ultimately found that the provision was not ambiguous.<sup>46</sup> Thus, the Court enforced the plain meaning of the statute, “since that approach respects the words of Congress” and “[i]n this manner [the Court would] avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history,”<sup>47</sup>

Furthermore, the *Lamie* Court rejected the interpretation of section 330(a){1} proposed by debtor’s counsel, which required the Court “to read an absent word into the statute.”<sup>48</sup> As the Court stated,

His argument would result “not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.” *Iselin v. United States*, 270 US 245, 251 (1926). With a plain, nonabsurd meaning in view, we need not proceed in this way. “There is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted,” *Mobil Oil Corp. v. Higginbotham*, 436 US 618, 625 (1978).<sup>49</sup>

In other words, where the plain language of the statute does not lead to an absurd result, the Supreme Court found that the language should be enforced as written and without addition or expansion to the meaning of the text.

Next, the *Lamie* Court examined the legislative history of section 330 of the Bankruptcy Code, although finding that reliance upon this history was “unnecessary,”<sup>50</sup>

Here, unlike the statutory language, the Court found that the legislative history of section 330 is subject to competing interpretations.<sup>51</sup> Nonetheless, the Supreme Court found that this uncertainty itself supported its reliance on the statutory language, as the statute was not ambiguous.<sup>52</sup>

Finally, notwithstanding any arguments that a plain reading of section 330 of the Bankruptcy Code did not effectuate the legislature’s intent, the Supreme Court stated that it was Congress, and not the federal judiciary, who should rectify any errors in a statute:

If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. “It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.” This allows both of our branches to adhere to our respected, and respective, constitutional roles.<sup>53</sup>

The *Lamie* decision stands for the proposition that bankruptcy courts should enforce Bankruptcy Code provisions first and foremost by relying on the plain meaning of the language enacted by Congress. Even where Congress appears to have made a clerical mistake in drafting the statute, or where evidence exists that Congress may not have intended as harsh a result as the statutory language mandates, *Lamie* holds that courts should nonetheless enforce the plain language; re-drafting statutes should be left to the legislature. Thus, *Lamie* represents a further departure than even *Ron Pair* in that the Supreme Court now requires that bankruptcy courts interpret the Bankruptcy Code using the strict statutory language of the provisions, even where there is evidence that Congress may have intended a different outcome. Unlike *Ron Pair*, in which the Court endorsed applying the strict language of Bankruptcy Code statutes, *unless* contrary to the drafters’ intent, *Lamie* now mandates that bankruptcy courts employ the language as written, regardless of Congress’ intentions, provided that the result is not “absurd.”

In sum, the Supreme Court’s view of how Bankruptcy Code provisions should be interpreted appears to have

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evolved significantly since *Midlantic* was decided in 1986. Whereas, in *Midlantic*, the Court blessed the continuing vitality of pre-Code caselaw as being silently adopted by Congress in the enactment of the Code, in *Lamie*, the Court appears to have reversed course, holding instead that pre-Code principles are to be applied only if explicitly implanted into the Code. Following the Supreme Court's statutory construction principles in *Lamie*, bankruptcy courts no longer should interpret the present provisions of the Bankruptcy Code by relying on either predecessor Bankruptcy Act statutes and practices (*Midlantic*) or Congressional intent where the plain language of the statute appears to contradict such intent (*Ron Pair*). Rather, bankruptcy courts are required to enforce the Bankruptcy Code as written and allow Congress to make its contrary intentions known explicitly by making any necessary revisions.

### Midlantic And Limitations On A Trustee's Right To Abandon Burdensome Property Pursuant To Section 554

Section 554(a) of the Bankruptcy Code permits a trustee, after notice and a hearing, to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."<sup>54</sup> As stated above, a strict reading of the statutory language reveals no limitations on the abandonment power, as long as the burden of the property outweighs its benefit. Nevertheless, the Supreme Court in *Midlantic*, refusing to be limited by the plain language of the statute and relying on precedent under the Bankruptcy Act, carved out a narrow but important exception to the abandonment right—a trustee may not abandon property of the estate "in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."<sup>55</sup> As explained above, however, although *Midlantic* has not been formally overturned, the reasoning of this case is certainly questionable after the Supreme Court's holding in *Lamie*. Indeed, the decision has generated a great deal of criticism as well as inconsistencies in subsequent application.

In the wake of *Midlantic*, courts have struggled to define the limits of a trustee's right to abandon burdensome estate property. A division exists between: (i) those courts that require full compliance with applicable laws and regulations before permitting abandonment, and (ii) those that permit abandonment so long as minimal steps are taken to protect the public from health and safety concerns, even where such laws are violated.

*In re Peerless Plating Co.*<sup>56</sup> represents a prime example of a court requiring full compliance with applicable laws and regulations before permitting abandonment. In that case, the court set forth a list of conditions that a trustee was required to satisfy before the estate would be allowed to abandon burdensome property.<sup>57</sup> Specifically, the court found that abandonment in contravention of otherwise applicable state or federal regulations would only be permissible where:

- (1) the environmental law in question is so onerous as to interfere with the bankruptcy adjudication itself; or
- (2) the environmental law in question is not reasonably designed to protect the public health or safety from identified hazards; or
- (3) the violation caused by abandonment would merely be speculative or indeterminate.<sup>58</sup>

In contrast, the court in *In re Smith-Douglass*<sup>59</sup> stated that the facts and circumstances must evidence a *serious* health risk and an imminent and identifiable harm to health and safety before abandonment would be prohibited. The court further noted that "where the hazards are speculative or may await appropriate action by an environmental agency," there can be no prohibition on the abandonment right.<sup>60</sup> The court primarily based its reasoning on footnote nine of the *Midlantic* decision which states

This exception to the abandonment power vested in the trustee by section 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from

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abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm.<sup>61</sup>

In contrast, the court in *In re Peerless* expressed its disagreement with the interpretation of footnote nine,<sup>62</sup> Instead, it relied on the intent of the *Midlantic* Court (i.e., assurance of environmental law compliance) when formulating the conditions for section 554 abandonment.<sup>63</sup>

Although the case law is split, the majority of courts seem to have permitted abandonment where there is no imminent threat to the public's health and safety.<sup>64</sup> This appears to be a result of courts focusing on the content of footnote nine in an effort to minimize the restrictions placed on a trustee's ability to abandon burdensome property of the estate. Following the same reasoning, the more recent cases are characterized by an initial presumption of the abandonment right that is fettered only by an imminent threat to public health or safety, suggesting a further limitation to the scope of *Midlantic*.<sup>65</sup>

In liberally permitting abandonment of burdensome property where there is no imminent threat to the public's health and safety, it could be argued that the majority of courts have merely adopted a plain-meaning, textual interpretation of section 554, simply paying lip service to the Supreme Court's binding decision in *Midlantic*. Given the Supreme Court's holding in *Lamie*, i.e., that the plain language of the statute should control unless it would lead to an absurd result,<sup>66</sup> such lip service may no longer be necessary. Post-*Lamie*, bankruptcy courts should now be compelled to enforce the plain language of section 554 without imposing any judicially-fashioned conditions, thereby eliminating the abandonment exception set forth in *Midlantic* altogether.

## Substantive Consolidation

Under the doctrine of substantive consolidation, a bankruptcy court creates from distinct legal entities with separate creditor bodies: (i) one single estate, and (ii) one creditor body for the benefit of

all creditors.<sup>67</sup> Substantive consolidation generally results in the pooling of assets and liabilities of two or more entities, the elimination of intercompany claims and the combining of creditors of such entities for the purposes of voting on a plan of reorganization.<sup>68</sup>

Courts generally have ordered consolidation of debtor estates under four types of circumstances: (i) when a debtor corporation and its debtor affiliates are alter-egos and the affiliates are mere instrumentalities of the debtor entity;<sup>69</sup> (ii) when creditors relied on the creditworthiness of the consolidated group at the time it extended credit to the debtor;<sup>70</sup> (iii) when the assets and accounting records of the related entities are so intertwined that the cost of restructuring the records would outweigh the recovery benefit to the creditors;<sup>71</sup> and (iv) when the economic prejudice of continued debtor separateness outweighs the economic prejudice of consolidation.<sup>72</sup>

Substantive consolidation can significantly affect the recoveries of creditors: "instead of looking to assets of the [debtor entity] with whom they dealt, they now must share those assets with all creditors of all consolidated entities, raising the specter for some of a significant distribution diminution."<sup>73</sup> Accordingly, courts have recognized the need to use the power to consolidate "sparingly."<sup>74</sup>

## Origins of the Doctrine

The doctrine of substantive consolidation emerged after a long line of cases finding that assets of a non-debtor affiliate could be administered by a trustee in bankruptcy (and thus, be made available to satisfy the claims of creditors of the debtor) under the theory that the debtor entity acted as the "alter-ego" or "instrumentality" of the non-debtor corporation.<sup>75</sup>

Despite the corporate form and state law creation of alter ego and instrumentality actions in developing the doctrine of substantive consolidation, the federal courts have departed from a strict application of state law. Although the bankruptcy and state law remedies may partially overlap, their differences in both governing standards and effect are apparent.<sup>76</sup> Accordingly, substantive consolidation simply cannot be justified as an application of state law.

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### Statutory Basis for Substantive Consolidation

Courts have struggled to point to express statutory authority in the Bankruptcy Code for substantive consolidation. Indeed, while some courts have noted that section 1123(a)(5)<sup>77</sup> provides such authority in connection with a plan of reorganization,<sup>78</sup> many courts have simply recognized that “[s]ubstantive consolidation has no express statutory basis but is a product of judicial gloss.”<sup>79</sup> Judicial gloss notwithstanding, most courts imposing substantive consolidation ultimately base their authority on the general equity powers provided under section 105<sup>80</sup> of the Bankruptcy Code.<sup>81</sup>

Reliance on section 105 alone, however, is problematic. The Supreme Court has held that section 105 powers may only be exercised where there is a statutory basis in the Bankruptcy Code and where the relief is not inconsistent with any provision of the Bankruptcy Code.<sup>82</sup> Thus, section 105 cannot, standing alone, justify substantive consolidation unless it would be effectuating the provisions of the Bankruptcy Code.

Applying the holding of *Midlantic*, bankruptcy courts could reason that because nothing in the Bankruptcy Code explicitly repudiates the pre-Code, Bankruptcy Act doctrine of substantive consolidation, this doctrine remains applicable under the Bankruptcy Code. Following *Lamie*, however, such reasoning is no longer permissible. In interpreting the Bankruptcy Code, courts must now look to the plain language of the statute, and, where it does not lead to an absurd result, enforce it as written and without addition or expansion to the meaning of the text.

The plain language of the Bankruptcy Code, however, does not authorize bankruptcy courts to impose substantive consolidation. First, substantive consolidation may actually contradict certain plain terms of the Bankruptcy Code, including definitions related to who may be a debtor, who may commence a case under title 11, which entity creditors hold claims against, and what property is included as property of the estate for satisfying claims.<sup>83</sup>

Second, section 302 of the Bankruptcy Code, which authorizes consolidation of joint spouse estates,<sup>84</sup> suggests that Congress knew how to legislate with respect to substantive consolidation,

but intentionally reframed from doing so outside of the spousal estate context. As stated by the Supreme Court, “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>85</sup>

Third, some courts have cited section 1123(a)(5)(C) of the Bankruptcy Code as authority for exercising the remedy of substantive consolidation.<sup>86</sup> This section permits the bankruptcy court to approve, as part of a reorganization plan, “merger or consolidation of the debtor with one or more persons.”<sup>87</sup> A plain reading of this section, however, does not reveal authority for substantive consolidation.<sup>88</sup> Courts have found that Congress did not intend section 1123 to create any rights in a debtor or court which supersede otherwise applicable bankruptcy law.<sup>89</sup> Indeed, such conclusion is reasonable given the plain language of section 1123: “[n]otwithstanding any otherwise applicable nonbankruptcy law.”<sup>90</sup>

Finally, even if section 1123(a)(5)(C) does provide a basis for substantive consolidation, the provision is inherently limited to the reorganization context and the concomitant restrictions on plan confirmation. The plain language of section 1123 requires that such consolidation must be provided for pursuant to a plan of reorganization, thereby subjecting it to such creditor protections as the “best interest test” and the “fair and equitable” requirement under sections 1129(a)(7) and 1129(b) of the Bankruptcy Code.<sup>91</sup>

In conclusion, a plain-meaning interpretation of the Bankruptcy Code, as is required under *Lamie*, reveals that there is simply no statutory authority for substantive consolidation, at least where such consolidation is not provided for pursuant to a plan of reorganization or with respect to joint spouse estates. Such interpretation does not lead to an “absurd” result. Courts have routinely held that substantive consolidation is an extreme remedy that only should be exercised in limited circumstances.<sup>92</sup> Those circumstances, however, should not exceed those provided for pursuant to sections 302 and 1123(a)(5) of the Bankruptcy Code.

### Conclusion

The Supreme Court's view of how provisions of the Bankruptcy Code should be interpreted has evolved significantly since *Midlantic* was decided in 1986. Following *Lamie*, interpretation of the present provisions of the Bankruptcy Code should no longer rely upon either predecessor Bankruptcy Act statutes and practices (*Midlantic*) or Congressional intent where the plain language of the statute appears to contradict such intent (*Ron Pair*). Rather, where the plain language of the Bankruptcy Code does not lead to an absurd result, it should be enforced as written and without addition or expansion to the meaning of the text. As a result, it would appear that the underpinnings of certain court-made doctrines have been materially undermined, if not completely destroyed.

The implications could be manifold and surprising. First, bankruptcy courts may now be obliged to enforce the plain language of section 554 without imposing any judicially-fashioned conditions, thereby eliminating the abandonment exception set forth in *Midlantic*. Second, under a plain-meaning interpretation of the Bankruptcy Code, it can be credibly argued that there is simply no statutory authority for substantive consolidation, at least where such consolidation is not provided for pursuant to a plan of reorganization or with respect to joint spouse estates. While it can be speculated that Congress couldn't have intended such results, *Lamie* seems to suggest that the only way to find out is for the courts to apply the law as written, not as many of us have come to believe it is (or should have been).

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1. 11 U.S.C. §§101-1350 (as amended, the Bankruptcy Code).
2. *Infra*, note 4.
3. *Infra*, note 34.
4. 474 US 494 (1986).
5. *Id.* at 501; see also *Kelly v. Robinson*, 479 US 36 (1986) (following the *Midlantic* rule that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific, the Court held that the pre-Code practice of exempting state criminal restitution obligations from discharge in bankruptcy remained valid after the enactment of the Bankruptcy Code because section 523(a)(7) thereof did not specifically state otherwise).
6. *Id.* at 498-99.
7. *Id.* at 498.
8. *Id.* at 499-500.
9. Hereinafter, the "Bankruptcy Act."
10. *Midlantic*, 474 US at 501.
11. *Id.* (citing *Edmonds v. Compagnie Generale Transatlantique*, 443 US 256, 266-67 (1979) ("[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.")).
12. See, e.g., *In re Cann & Saul Steel Co.*, 76 B.R. 479, 486 (Bankr. E.D. Pa. 1987) (relying on *Midlantic* to conclude that "the Bankruptcy Code must be construed consistently with comparable provisions of the Bankruptcy Act unless Congress expressed a clear indication to effect a change in enacting the Code . . ."); see also Seth D. Gould, *Unsecured Creditors' Entitlement to Postpetition Interest in Solvent Debtor Bankruptcy: The Code's Silent Abrogation of a Pre-Code Doctrine*, 37 WAYNE L. REV. 1849, 1862-66 (1991) (*Midlantic* and *Kelly* suggest "that the pre-Code solvent debtor exception to the prohibition of postpetition interest survives the enactment of the [Bankruptcy] Code because [Congress] does not expressly indicate an intent to abrogate the solvent debtor pre-Code doctrine.").
13. 489 US 235 (1989).

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14. Section 506(b) provides that a secured creditor is entitled to postpetition interest on its claim to the extent that the value of the collateral securing such claim exceeds the principal amount due to such creditor:  
To the extent that an allowed secured claim is secured by property the value of which ... is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or state statute under which such claim arose. 11 U.S.C. §506(b).
15. *Id.* at 243.
16. *Supra*, note 5.
17. *Id.*
18. *Id.* at 237-38.
19. *Id.* at 243.
20. *Id.* at 240.
21. *See id.* at 243-45
22. *Id.* at 241 (quoting *Caminetti v. United State*, 242 US 470, 485 (1917)).
23. *Id.* at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 US 564, 571 (1982)).
24. *Id.*
25. *Id.* at 243.
26. *Id.*
27. *Id.* at 245. As explained above, the proposed interpretation in *Midlantic* would have conflicted with otherwise applicable nonbankruptcy environmental laws designed to protect the public's health and safety. Likewise, the proposed interpretation in *Kelly* would have conflicted with criminal punishment under state law.
28. *See id.* at 246-48.
29. *Id.* at 248.
30. *Id.* at 249 (O'Connor, J., dissenting).
31. *Id.*
32. *Id.* at 252 (internal citations omitted).
33. *Id.*
34. *See, e.g., In re Gaines*, 178 B.R. 101, 103 (Bankr. W.D. Va. 1995), 540 US 526 (2004). Eight out of the nine Supreme Court Justices voted in favor of the statutory interpretation section (*i.e.*, "Part II" of the opinion) employed by the majority in *Lamie*. *Id.* at 528-29. Justices Kennedy, Rehnquist, Thomas, O'Connor, and Ginsburg all accepted the majority opinion in its entirety, while Justice Scalia accepted the majority opinion, except for Part III (*i.e.*, the portion of the decision in which the Court examines the contradictory legislative history, even though it rejects the need to do so). *Id.* Justice Stevens concurred in judgment, but stated that the Court has a duty to examine the legislative history where it has reason to believe that there is a scrivener's error. *Id.* at 542-43. Finally, Justices Souter and Breyer joined the majority opinion in its entirety and concurred with Justice Stevens' concurrence. *Id.*
36. *Id.* at 529.
37. *Id.* at 529-31. Under the Bankruptcy Reform Act of 1994, 108 Stat. 4106 (the "1994 Act"), Congress made comprehensive changes to provisions concerning the payment of professionals' fees, which changes, among other things, were designed to clarify the standards for awarding such professionals' fees under the Bankruptcy Code. *Id.* at 529 (citing 3 COLLIER ON BANKRUPTCY 330.LH[5], pp. 330-75 – 330-76 (15th ed. rev. 2003)).
38. Prior to the 1994 Act, §330 of the Bankruptcy Code provided as follows:
  - (a) After notice to ANY parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 OF THIS TITLE, the court may award to a trustee, TO an examiner, to a professional person employed under Section 327 or 1103 OF THIS TITLE, OR TO THE DEBTOR'S ATTORNEY—
    - (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney . . . and by any paraprofessional persons employed by such trustee, professional person, or attorney . . . ; and
    - (2) reimbursement for actual, necessary expenses."*Id.* at 529-30 (citing 11 U.S.C. §330(a) (pre-1994 Act)) (emphasis added to highlight deletions after the 1994 Act). Following the enactment of the 1994 Act, §330 now provides the following:
  - (a) (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103—
    - (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
    - (B) reimbursement for actual, necessary expenses.*Id.* at 530 (citing 11 U.S.C. §330(a) (post-1994 Act)).
39. *Id.* at 529-32.
40. *Id.* at 531.
41. *Id.*
42. *Id.* at 533.
43. *Id.* at 541.
44. *Id.* at 534 (internal references omitted).
45. *Id.* at 527.
46. *Id.* at 536.
47. *Id.*
48. *Id.* at 538.
49. *Id.*
50. *Id.* at 539. Although concurring with the majority, four justices joined Justice Stevens' opinion that "[w]hen there is such a plausible basis for believing that a significant change in statutory law resulted from a scrivener's error, [the Court has] a duty to examine legislative history." *Id.* at 542-43 (Stevens, J., concurring). Because these four justices were convinced that the legislative history supported the majority's holding, however, they also affirmed the lower courts.
51. *Id.* at 541 ("These competing interpretations of the legislative history make it difficult to say with assurance whether [the debtor's counsel] or [its opponent] lays a better historical claim to the congressional intent.").
52. *Id.* at 542 ("These uncertainties illustrate the difficulty of relying on legislative history here and the advantage of our determination to rest our holding on the statutory text.").
53. *Id.* (quoting *United States v. Granderson*, 511 US 39, 68 (1994) (Kennedy, J., concurring)).
54. 11 U.S.C. §554(a).
55. *Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 US 494, 507 (1986).
56. 70 B.R. 943 (Bankr. W.D. Mich. 1987).
57. *Id.* at 947.
58. *Id.*
59. 856 F.2d 12 (4th Cir. 1988).
60. *Id.* at 16.
61. 474 US at 507.
62. *Peerless Plating Co.*, 70 B.R. at 947 ("Although [the] language [of footnote 9] has been interpreted as permitting abandonment of hazardous waste sites with less than full compliance with the applicable environmental law . . . this court must respectfully disagree.").
63. *Id.* at n.l.
64. *See, e.g., In re Purco*, 76 B.R. 523, 533 (Bankr. W.D. Pa. 1987) (permitting abandonment since "there [was] no showing that the public health and safety [were] not adequately protected."); *In re Franklin Signal Corp.*, 65 B.R. 268, 273 (Bankr. D. Minn. 1986) (allowance of abandonment only requires 'minimal steps' taken to protect the public from imminent danger); *In re Oklahoma Refining Co.*, 63 B.R. 562, 565 (Bankr. W.D. Okla. 1986) (noting the policy implications of reading *Midlantic* narrowly "to require

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- strict compliance with State environmental law under the facts of this case could create a bankruptcy case in perpetuity and fetter the estate to a situation without resolve.”); *but see In re Anthony Ferrante & Sons, Inc.*, 119 B.R. 45 (D. N.J. 1990) (criticizing these courts’ reliance on *Midlantic’s* footnote nine).
65. *See, e.g., In re Malden Mills Indus., Inc.*, 303 B.R. 688, 701 (BAP. 1st Cir. 2004) (clarifying that the only condition to the abandonment right under section 544(a) is the protection of the public’s health and safety); *In re Guterl Special Steel Corp.*, 316 B.R. 843, 860 (Bankr. W.D. Pa. 2004) (“A state law or regulation designed to protect public health and safety which, if enforced, would obstruct or prevent expeditious distribution of estate assets is ‘trumped’ by §544(a)”); *In re St. Lawrence Corp.*, 248 B.R. 734, 738-39 (D.N.J. 2000) (holding that the trustee could abandon burdensome property despite violation of environmental laws, provided that the public’s health and safety was adequately protected); *see also Denis v. Delta Air Lines, Inc.*, 546 S.E.2d 805, 807 (Ga. Ct. App. 2001) (same); *In re Unidigital, Inc.*, 262 B.R. 283, 286-87 (Bankr. D. Del. 2001) (same); *but see Guterl Special Steel Corp. v. Econ. Dev. Admin. (In re Guterl Special Steel Corp.)*, 198 B.R. 128, 134 (Bankr. W.D. Pa. 1996) (holding that a trustee may not abandon burdensome property where such abandonment would violate state statutes or regulations).
66. *See* Part II.B, *supra*.
67. *See Stone v. Echo (In re Tip Top Tailors, Inc.)*, 127 F.2d 284, 289 (4th Cir. 1942).
68. *See F.D.I.C. v. Colonial Realty Co.*, 966 F.2d 57, 61 (2d Cir. 1992); *Union Savings Bank v. Augie/Restivo Baking Co., Ltd. (In re Augie/Restivo Baking Co., Ltd.)*, 860 F.2d 515, 518 (2d Cir. 1988).
69. *See Tip Top*, 127 F.2d at 288; *Soviero v. Franklin Nat’l Bank of Long Island*, 328 F.2d 446, 447 (2d Cir. 1964).
70. *See Augie/Restivo*, 860 F.2d at 519.
71. *See Chem. Bank N.Y. Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966); *see also In re Flora Mir Candy Corp.*, 432 F.2d 1060, 1063 (2d Cir. 1970).
72. *See Eastgroup Props. v. S. Motel Ass’n, Ltd.*, 935 F.2d 245, 249 (11th Cir. 1991).
73. *In re Owens, Coming*, 419 F.3d 195, 206 (3d Cir. 2005).
74. *See Augie/Restivo*, 860 F.2d at 518.
75. *See In re Reider*, 31 F.3d 1102 (11th Cir. 1994); *In re Standard Brands Paint Co.*, 154 B.R. 563 (Bankr. C.D. Cal. 1993); *Tip Top*, 127 F.2d at 284; *Fish v. East*, 114 F.2d 177 (10th Cir. 1940).
76. *See In re Wm. Glucking Co, Ltd.*, 457 F.Supp. 379, 384 (S.D.N.Y. 1978) (“The standard for consolidation [is] that ‘the interrelationships of the group are hopelessly obscured and the time and expense necessary even to attempt to unscramble them [is] so substantial as to threaten the realization of any net assets for all the creditors’ [which, in turn,] ‘does not require any piercing of the corporate veil.’” (citing *Chem. Bank*, 369 F.2d at 847)); *In re Cooper*, 147 B.R. 678, 684 (Bankr. D. N.J. 1992) (“[S]ubstantive consolidation is more extensive relief than piercing the corporate veil, because substantive consolidation is a complete merger of legal entities, while piercing the corporate veil is essentially a limited merger for the benefit of only one creditor or group of creditors.”); *see also Krok Bros. Dev. Co. v. Krok Bros. Mgmt. Co. (In re Krok Bros. Dev. Co.)*, 117 B.R. 499, 501 (Bankr.W.D. Mo. 1989) (distinguishing a substantive consolidation action, where property of another company actually becomes the debtor’s property, from that of an alter-ego action, where an entity “has acted in a manner to render itself liable for another’s debts”).
77. Section 1123 (a) provides:
- (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—
- (1) designate, subject to §1122 of this title, classes of claims, other than claims of a kind specified in §507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests;
- (2) specify any class of claims or interests that is not impaired under the plan;
- (3) specify the treatment of any class of claims or interests that is impaired under the plan;
- (4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;
- (5) provide adequate means for the plan’s implementation, such as—
- (A) retention by the debtor of all or any part of the property of the estate;
- (B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;
- (C) merger or consolidation of the debtor with one or more persons; 11 U.S.C. §1123(a).
78. *See, e.g., In re Stone & Webster, Inc.*, 286 B.R. 532, 540-41 (Bankr. D. Del. 2002) (noting that substantive consolidation is contemplated by §1123(a)(5) of the Bankruptcy Code). Additionally, §302 of the Bankruptcy Code authorizes consolidation of joint spouse estates. *See* 11 U.S.C. §302.
79. *Augie/Restivo*, 860 F.2d at 518; *see also In re Bonham*, 229 F.3d 750, 764 (9th Cir. 2000); 2 COLLIER ON BANKRUPTCY ¶ 105.09[1] [b] (Lawrence P. King et al., 15th ed. 2006).
80. Section 105 of the Bankruptcy Code provides in pertinent part that a Bankruptcy Court “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. §105(a).
81. *See Bonham*, 229 F.3d at 764 (“At present, consistent with its historical roots, the power of substantive consolidation derives from the bankruptcy court’s general equity powers as expressed in §105 of the Bankruptcy Code.”); *see also In re Reider*, 31 F.3d 1102, 1105 (11th Cir. 1994); *Augie/Restivo* at 518 n.1.
82. *See Norwest Bank v. Ahlers*, 485 US 197, 206 (1988) (stating that section 105 powers “must and can only be exercised within the confines of the Bankruptcy Code”).
83. *See* SABIN WILLET, *The Doctrine of Robin Hood: A Note on “Substantive Consolidation,”* 4 DEPAUL BUS. & COM. L.J. 87, 90-91 (2005) (internal citations omitted):
- One might plausibly argue that substantive consolidation does indeed contradict plain terms in the Code. Code definitions incorporate state law to tell us who may be a debtor. For example, a “corporation” may be a debtor, but a corporation is purely a creature of state law, and maybe a debtor only when lawfully existing as a function of that law. The Code, in turn, makes clear that a case under title 11 may be commenced by or in respect of a single such entity. The “creditors” in a Chapter 11 case are the holders of claims against that entity (*i.e.*, dual singular creature of state or federal law).
- In Chapter 7 cases, the claims of creditors are to be satisfied, if at all, from “property of the estate,” and “property of the estate” is itself defined by reference to that singular debtor. The estate consists of: “interests of the debtor [i.e. that singular entity again, not some other entity] in property;” property the trustee recovers under enumerated statutes; and certain property acquired by the debtor after the case commences. Congress was excruciatingly specific about those occasions when property of the estate was to include property of someone other than the debtor. Subsection (a) (2) of Section 541 sweeps in certain property interests of the debtor’s spouse. Subsections (a) (6) and (7) make certain kinds of property generated by the estate itself “property of the estate:” that is, certain proceeds, profits and the like, and all property later acquired by the estate itself. Thus, allowing estate property to be distributed to persons other than holders of claims against and interests in the debtor contradicts an elaborate and precise Code architecture.

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84. Pursuant to §302:
  - (a) A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse. The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter.
  - (b) After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated. 11 U.S.C. §302.
85. *Gozlon-Peretz v. United States*, 498 US 395, 404 (1991) (citation omitted); *see also United States v. Preston*, 209 F.3d 783, 784 (5th Cir. 2000); *Geron v. Valeray Realty Co. (In re Hudson Transfer Group, Inc.)*, 245 B.R. 456, 460 (Bankr. S.D.N.Y. 2000) (because sections 365(d)(1), 365(d)(4), and 1121 (d) of the Bankruptcy Code explicitly contained 60-day extension provisions, §108(b) did not, as the provision was silent with regard to such an extension); *but see In re Dow Corning Corp.*, 244 B.R. 678, 691-92 (Bankr. E.D. Mich. 1999) (arguing that the word "includes" weakens this "disparate-inclusion" analysis of the Bankruptcy Code).
86. *See, e.g., In re Stone & Webster*, 286 B.R. 532, 540-41 (Bankr. D. Del. 2002).
87. 11 U.S.C. §1123 (a) (5) (C).
88. *See Willet, supra* note 83, at 91; DOUGLAS BAIRD, *Substantive Consolidation Today*, available at [http://www.iiiglobal.org/country/usa/Substantive\\_Consolidation\\_5.pdf](http://www.iiiglobal.org/country/usa/Substantive_Consolidation_5.pdf) at 10.
89. *See Id.* at 92 (providing examples of cases where courts found Congress did not intend §1123 (a) to supersede other bankruptcy laws or requirements applicable to the debtor).
90. 11 U.S.C. §1123(a) (emphasis added).
91. *See* 11 U.S.C. §1129 (a) (7) (which requires the court to deny confirmation of a plan that does not pay each non-accepting creditor at least as much as such creditor would receive in a hypothetical chapter 7 liquidation); 11 U.S.C. §1129(b) (permitting plan confirmation only where the "plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan").
92. *See Owens Corning*, 419 F.3d at 206; *Augie/Restivo*, 860 F.2d at 518.