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Bankruptcy Law: An Exercise in Statutory Interpretation--Staying True to the Broad Aim of the Code or Ignoring Plain Meaning and Purpose?

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CASE COMMENTS

BANKRUPTCY LAW: AN EXERCISE IN STATUTORY INTERPRETATION—STAYING TRUE TO THE BROAD AIM OF THE CODE OR IGNORING PLAIN MEANING AND PURPOSE?

Howard Delivery Service, Inc. v. Zurich American Insurance Co., 126 S. Ct. 2105 (2006)

*Diana L. Hayes**

State law required Petitioner to maintain workers' compensation coverage for his freight trucking business.[1] Petitioner contracted with Respondent to provide this insurance.[2] After Petitioner canceled the policy and filed a Chapter 11 bankruptcy,[3] Respondent, in an amended claim, asserted that the unpaid premiums had priority status as contributions to an employee benefit plan under § 507(a)(5)[4] of the Bankruptcy Code.[5] The bankruptcy court held that the claim was not entitled to priority status because, although the premiums were a benefit for employees, they were statutorily required and not "tied to bargained-for, wage-substitution-type benefits," and thus not intended by Congress to be included in the

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* J.D. anticipated May 2008, University of Florida Levin College of Law. This Comment is for my family, especially my mother, Judith Biniasz, for always being there with words of encouragement when I need them.

1. Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (*Howard IV*), 126 S. Ct. 2105, 2109 (2006).

2. *Id.*

3. Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (*In re* Howard Delivery Serv., Inc.) (*Howard III*), 403 F.3d 228, 230 (4th Cir. 2005), *rev'd*, 126 S. Ct. 2105 (2006).

4. The statute states as a fifth priority:

> [A]llowed unsecured claims for contributions to an employee benefit plan–
> (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
> (B) for each such plan, to the extent of–(i) the number of employees covered by each such plan multiplied by $10,000; less (ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

11 U.S.C.A. § 507(a)(5) (West 2007). This section was renumbered from 507(a)(4) to 507(a)(5) by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 212, 119 Stat. 23 (2005). This change took effect 180 days after April 20, 2005. Cases before the effective date will thus refer to what was then 507(a)(4).

5. *Howard IV*, 126 S. Ct. at 2109.

priority.[6] The district court affirmed, holding that workers' compensation is not a wage substitute and that holding otherwise would excessively broaden the scope of the Bankruptcy Code.[7] On appeal, the Fourth Circuit Court of Appeals reversed and held that claims for unpaid workers' compensation insurance premiums are entitled to priority under § 507(a)(5).[8] The judges, however, disagreed in their reasoning. Judge King determined that the plain meaning of "contributions to an employee benefit plan" included the claim.[9] Judge Shedd reasoned that although the phrase was ambiguous, the legislative history allowed borrowing the definition from the Employee Retirement Income Security Act of 1974 (ERISA),[10] which includes workers' compensation as an employee benefit plan.[11] The U.S. Supreme Court granted certiorari[12] and HELD that, due

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6. *In re* Howard Delivery Serv., Inc. (*Howard I*), BK No. 02-30289, 2003 Bankr. LEXIS 2142, at *9 (Bankr. N.D. W. Va. July 15, 2003), *aff'd*, 2003 U.S. Dist. LEXIS 26464 (N.D. W. Va. Dec. 22, 2003), *rev'd*, 403 F.3d 228 (4th Cir. 2005), *rev'd*, 126 S. Ct. 2105 (2006).

7. Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (*In re* Howard Delivery Serv., Inc.) (*Howard II*), No. 3:03CV61, 2003 U.S. Dist. LEXIS 26464, at *12-14 (N.D. W. Va. Dec. 22, 2003), *rev'd*, 403 F.3d 228 (4th Cir. 2005), *rev'd*, 126 S. Ct. 2105 (2006).

8. *Howard III*, 403 F.3d at 229.

9. *Id.* at 232 (King, J., concurring).

10. *See* 29 U.S.C.A. § 1002 (West 2007). ERISA provides:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . . .
> (2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—(i) provided retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . . .
> (3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

Id.

11. *See Howard III*, 403 F.3d at 239 (Shedd, J., concurring).

12. Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (*Howard IV*), 126 S. Ct. 2105, 2110 (2006). The U.S. Supreme Court granted certiorari to resolve a split among the circuits. *Id. Compare* Travelers Prop. Cas. Corp. v. Birmingham-Nashville Express, Inc. (*In re* Birmingham-

to the equal distribution aim of the Bankruptcy Code and the doubt as to whether workers' compensation claims clearly fit within the category of "contributions to an employee benefit plan . . . arising from services rendered," such claims are not entitled to priority status.[13]

Historically, in interpreting the Bankruptcy Code, the Court has considered the equal distribution purpose of the statute to mandate strict construction of the language to avoid preferring one claimant over another.[14] In *Nathanson v. NLRB*,[15] the Board issued a complaint against a company for unfair labor practices and ordered it to pay back wages to employees who lost pay on account of the company's practices.[16] The company was then forced into involuntary bankruptcy, and the Board filed a claim for the back wages.[17] The issue before the Court was whether that claim was entitled to priority status under § 64(a)(5) of the Bankruptcy Act.[18]

The Court first affirmed the lower court's ruling that the Board was a

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Nashville Express, Inc.), 224 F.3d 511, 512 (6th Cir. 2000) (holding workers' compensation claims were not entitled to priority as contributions to an employee benefit plan), State Ins. Fund v. S. Star Foods, Inc. (*In re* S. Star Foods, Inc.), 144 F.3d 712, 717 (10th Cir. 1998) (same), *and* Employers Ins. of Wausau, Inc. v. Ramette (*In re* HLM Corp.), 62 F.3d 224, 227 (8th Cir. 1995) (same), *with Howard III*, 403 F.3d at 229 (holding workers' compensation claims are entitled to priority as contributions to an employee benefit plan), Employers Ins. of Wausau v. Plaid Pantries, Inc., 10 F.3d 605, 607 (9th Cir. 1993) (same), *and In re* Saco Local Dev. Corp., 711 F.2d 441, 442 (1st Cir. 1983) (same).

13. *Howard IV*, 126 S. Ct. at 2116. One of the reasons the Court held that workers' compensation did not fit within the category is because it benefits employers. *See id.* at 2109. But, pension plans also benefit employers, *see* Richard S. Soble et al., *Pension-Related Claims in Bankruptcy*, 56 AM. BANKR. L.J. 155, 156 (1982) (discussing tax advantages to pension plans that make the plans attractive to employers), yet are explicitly within the priority. *See* H.R. REP. NO. 95-595, at 187 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6148 (stating that the priority for contributions to employee benefit plans "will include health insurance programs, life insurance plans, pension funds, and all other forms of employee compensation that is not in the form of wages").

14. *See* Nathanson v. NLRB, 344 U.S. 25, 28-29 (1952); Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941) (explaining that because of the equality-of-distribution theme of the Bankruptcy Act, an unsecured creditor has the burden of showing clear and convincing evidence that the creditor is entitled to a priority); *see also* John H. Rains IV, Note, *Searching for Fairness in All the Wrong Places: Valuing the Pension Benefit Guaranty Corporation's Unsecured Claim in Bankruptcy*, 58 FLA. L. REV. 1107, 1117 (2006) (describing the payment of creditors in accordance with equal treatment within classes of claims).

15. 344 U.S. 25 (1952).

16. *Id.* at 26.

17. *Id.*

18. *Id.* at 27. Section 64(a)(5) provides: "The debts to have priority . . . shall be . . . (5) debts owing to any person, including the United States, who by the laws of the United States in [sic] entitled to priority . . . ." Bankruptcy Act, Amendments of 1898, ch. 575, § 64, 52 Stat. 840, 874, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

creditor of the company.[19] However, the Court determined that although the Board was an agency of the United States, it did not follow that any debt owed to the Board was a debt owed to the United States.[20] Looking beyond the language to the purpose of the priority, the Court found that the purpose of assuring public revenue was not met since the back pay would go to private individuals.[21] Thus, the Court held that the equality-of-distribution theme of the Bankruptcy Code controlled,[22] and absent a clear purpose to the contrary, the back pay awards should not be treated any differently from other wage claims.[23]

This narrow reading of priorities continued in *United States v. Embassy Restaurant, Inc.*,[24] where the Court held that contributions to a union welfare fund, required by a collective bargaining agreement, were not entitled to priority status as "'wages . . . due to workmen'" under the Bankruptcy Act.[25] At the time of this case, there was no priority for benefit plans.[26] The defendant, a restaurant with union employees, entered into a collective bargaining agreement that set hours, wages, and conditions of employment.[27] The agreement also required that the employer contribute a set amount to the trustees of the welfare fund.[28] When the employer filed for bankruptcy, the trustee filed a claim for unpaid contributions and asserted priority status.[29]

To determine if the claim qualified as priority, the Court first noted the equal distribution policy of the Bankruptcy Act.[30] Since the contributions

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19. *Nathanson*, 344 U.S. at 27.

20. *Id.*

21. *See id.* at 27-28.

22. As the dissent pointed out, however, an equality-of-distribution theme loses meaning when considering sections of the statute "designed to establish inequality by a series of priorities." *Id.* at 32 (Jackson, J., dissenting); *see also* H.R. REP. NO. 95-595, at 186 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6147 (recognizing the existence of special circumstances or special needs calling for exceptions to the general policy of pro-rata distribution).

23. *See Nathanson*, 344 U.S. at 29.

24. 359 U.S. 29 (1959).

25. *Id.* at 29, 35 (quoting § 64(a)(2) of the Bankruptcy Act); *see also* Joint Indus. Bd. of the Elec. Indus. v. United States, 391 U.S. 224, 228-29 (1968) (holding that claims for unpaid contributions to provide deferred benefits to employees were not entitled to the priority of wages).

26. *See* Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (*Howard IV*), 126 S. Ct. 2105, 2110-11 (2006) (noting that § 507(a)(5) was enacted in response to *Embassy* and *Joint Industry Board* in order to provide a priority for benefits, which were denied in those cases).

27. *Embassy*, 359 U.S. at 30.

28. *Id.* The welfare fund would provide life insurance, sick benefits, and hospital and surgical benefits. *Id.*

29. *Id.* at 30-31.

30. *Id.* at 31 (recognizing at the outset that "'[t]he broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate . . .' and that 'if one claimant is to be preferred over others, the purpose should be clear from the statute'" (omission in original) (quoting Kothe v. R. C. Taylor Trust, 280 U.S. 224, 227 (1930) and Nathanson v. NLRB, 344 U.S.

did not clearly fit within the language of the provision,[31] they could not be entitled to priority unless they satisfied the specific purpose of the provision.[32] The Court found that the purpose of providing employees displaced by bankruptcy prompt access to back wages did not extend to fringe benefits.[33] Thus, the Court read the priority narrowly, and determined that if the wages priority was to include claims for fringe benefits, it would have to be expanded by Congress.[34]

In response to *Embassy*, Congress in 1978 amended the Bankruptcy Code to add a new priority for contributions to employee benefit plans.[35] This priority was intended to encompass those fringe benefits received by employees as substitutes for wages, such as pension plans and health or life insurance plans.[36] The purpose of the priority, like the purpose of the wage priority it is connected with, is in part to ensure that employees will not leave a failing business out of fear of losing compensation.[37] Thus, the new priority was to provide more protection to employees.[38]

Although the *Embassy* Court began its analysis with the equal distribution purpose of the Bankruptcy Act,[39] where the statutory language is clear, principles of statutory construction require the Court to look at the plain meaning of the statute,[40] even if it conflicts with the equal

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25, 29 (1952))).

31. The Court refused to expand the definition of wages to encompass the contributions by reference to other statutes, such as the National Labor Relations Act or the Social Security Act, which had been determined by courts to define various fringe benefits as wages. *See id.* at 33.

32. *See id.*

33. *Id.* at 32-33. Notably, the Court also discussed the separate priority which used to be afforded workers' compensation claims as evidence that Congress did not intend all types of obligations due employees to be included in the wages priority. *See id.* at 32. The Court thus appeared to associate workers' compensation with other forms of fringe benefits. *See id.*

34. *See id.* at 35.

35. *See* S. REP. NO. 95-989, at 69 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5855; 4 COLLIER ON BANKRUPTCY P 507.06 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2006).

36. S. REP. NO. 95-989, at 69 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5855.

37. *See* H.R. REP. NO. 95-595, at 187 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6147-48; *In re* Aer-Aerotron, Inc., 182 B.R. 725, 727 (Bankr. E.D.N.C. 1995) (reasoning that because Congress intended the priority to protect employees, it could not extend to a third party insurer).

38. *See* H.R. REP. NO. 95-595, at 188 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6148.

39. *Embassy*, 359 U.S. at 31.

40. *See* Central Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc., 454 U.S. 354, 359-60 (1982) ("'[I]f [the language of a statute] is plain . . . the sole function of the courts is to enforce it according to its terms.'" (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917))); *Caminetti*, 242 U.S. at 485-86 (explaining that if the meaning of the statute is clear from the language, construed in its ordinary and usual sense, then the court's sole function is to enforce it according to its terms). *But see* United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 543-44 (1940) (allowing the court to look beyond the words of statutes to the purpose of the act when the plain meaning leads to a result at odds with the policy of the legislation).

distribution purpose.[41] In *United States v. Ron Pair Enterprises, Inc.*,[42] after respondent filed a Chapter 11 bankruptcy, the government obtained a nonconsensual security interest in his property through a tax lien.[43] The government then sought recovery of postpetition interest under § 506(b)[44] because the claim was oversecured.[45] The Court looked solely to the statutory language in holding that postpetition interest was plainly available to holders of secured interests, regardless of whether they are consensual or nonconsensual.[46] Even though this holding was "somewhat in tension with the desirability of paying all creditors as uniformly as practicable," the Court determined that the plain language of the statute required this result.[47]

The instant Court's interpretation of § 506(a)(5) priority followed the narrow construction of the Code in order to secure equal distribution among creditors.[48] Although the instant Court did not explicitly look to the language of the priority provision in its opinion, it did conclude that it was far from clear that workers' compensation could be considered "contributions to an employee benefit plan . . . arising from services

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41. *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 245-46 (1989); Small Bus. Admin. v. McClellan, 364 U.S. 446, 452-53 (1960) (allowing the priority for debts due the United States to attach to a debt owed jointly to the Small Business Administration and a private bank, even though it placed the bank in a better position than other private unsecured creditors).

42. 489 U.S. 235 (1989).

43. *Id.* at 237. Obtaining a valid security interest in property gives a creditor heightened protection in bankruptcy. *See* Julia Patterson Forrester, *Still Crazy After All These Years: The Absolute Assignment of Rents in Mortgage Loan Transactions*, 59 FLA. L. REV. 487, 520 (2007).

44. Section 506(b) provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, 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.A. § 506(b) (West 2007).

45. *Ron Pair*, 489 U.S. at 237. Section 506(b) states that an oversecured creditor is entitled to interest. *See* Paul B. Lewis, *Bankruptcy Thermodynamics*, 50 FLA. L. REV. 329, 337 (1998); *supra* note 44.

46. *See Ron Pair*, 489 U.S. at 241. This is in contrast to fees, costs, and charges, which are only available on consensual liens as provided for in their agreement. *Id.* This is hardly a narrow reading, since the dissent asserted that the language of the section is not clear and unambiguous. *See id.* at 249 (O'Connor, J., dissenting).

47. *Id.* at 245-46 (majority opinion).

48. *See* Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (*Howard IV*), 126 S. Ct. 2105, 2109 (2006). As the dissent points out, however, the equal distribution purpose may be better stated in terms of equal treatment of like claims instead of providing priorities to as few creditors as possible. *Id.* at 2117 (Kennedy, J., dissenting).

rendered."[49] Also, the instant Court pointed out that the terms "contributions," "employee benefit plan," and "services rendered" were not defined in the statute.[50] Without attempting to define those terms in light of their ordinary meanings, the instant Court declined to borrow the definition from another statute, concluding that Congress would have included directions if it had intended to use another statute's definition of the terms.[51]

Thus, in the absence of a clear meaning for the priority terms, the instant Court turned to the legislative history of the priority.[52] Congress enacted the priority in response to the *Embassy* decision, which held that contributions to a union welfare plan did not fit into the wages priority.[53] The instant Court found that Congress intended the priority to cover forms of employee compensation that complement or substitute for wages.[54] Also, according to the instant Court, the combined monetary cap on both the priority for wages and the priority for employee benefit plans was further evidence of the strong link between the two types of compensation.[55]

In determining whether workers' compensation is a substitute for wages, the instant Court looked more closely at the characteristics of workers' compensation.[56] The instant Court found that such policies benefit the employer as much as the employee since they give immunity from tort actions.[57] This quality sets workers' compensation apart from other plans that remunerate employees for services rendered.[58] The instant Court also considered the mandatory nature of workers' compensation in reaching its determination that such insurance is not a bargained-for wage substitute.[59] Thus, the instant Court determined that workers' compensation is more appropriately included with other types of liability insurance than with contributions to employee benefit plans.[60]

The instant Court's focus on the characteristics of workers' compensation may not help to decide future cases because characteristics can be variable.[61] For example, a few states do not require workers'

49. *Id.* at 2116 (majority opinion).
50. *Id.* at 2112.
51. *See id.* at 2112-13.
52. *Id.* at 2111.
53. *Id.* at 2110-11.
54. *Id.* at 2111.
55. *Id.*
56. *See id.* at 2109.
57. *Id.*
58. *Id.*
59. *See id.* at 2114.
60. *See id.*
61. *See id.* at 2119 (Kennedy, J., dissenting) (pointing out that if states begin mandating other

compensation[62] and several more have considered making other benefits mandatory.[63] Furthermore, the changing nature of tax benefits may make it more or less appealing for employers to provide certain benefits, such as pension plans and health insurance.[64] Congress specifically included pension plans and health insurance plans when granting the new priority for employee benefit plans.[65] Therefore, relying on the mandatory nature of plans or the presence of benefits to the employer could arguably exclude those plans under certain circumstances that Congress clearly meant to include.[66]

Also, the instant Court's reliance on the Bankruptcy Code's broad equal distribution purpose,[67] instead of the plain language or purpose of the specific provision, may unnecessarily narrow the scope of the priorities.[68] Although it is arguable whether the language of the priority is clear,[69] the instant Court could have remained more true to *Ron Pair* by attempting to construe the words in light of their ordinary meaning.[70] While the instant Court noted that the words in the priority are undefined,[71] statutory interpretation should start with the ordinary and usual meaning of the words.[72] This would have given the Court two choices: (1) determining the

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benefits, they might fall outside the priority under the majority's reasoning).

62. *Id.* at 2120.

63. *See* MD. CODE ANN., LAB. & EMPL. §§ 8.5-102, 8.5-104 (LexisNexis 2006) (requiring that employers with 10,000 or more employees pay at least eight percent of their total wages on health insurance); *see also* Jennifer Drage Bowser, *The People's Choice: From Stem Cell Research to Electoral College Reform, Citizens Have Their Say*, ST. LEGISLATURES, Dec. 2004, at 16, 17 ("California voters had the chance to affirm a new law requiring employers to provide health insurance for their employees, but it failed.").

64. *See Howard IV*, 126 S. Ct. at 2119 (Kennedy, J., dissenting) (explaining that by providing health benefits, employers may receive numerous benefits such as "tax breaks, good will, a healthy work force, and the leverage to pay lower wages"). *See generally* Soble, Eggertsen, & Bernstein, *supra* note 13 (discussing tax advantages to pension plans that make them attractive to employers).

65. S. REP. NO. 95-989, at 69 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5855.

66. *See Howard IV*, 126 S. Ct. at 2118-19 (Kennedy, J., dissenting).

67. *See id.* at 2116 (majority opinion).

68. *See id.* at 2117 (Kennedy, J., dissenting) (stating that "priority provisions should not be read so narrowly as to conflict with their plain meaning").

69. *Compare* Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (*In re* Howard Delivery Serv., Inc.) (*Howard III*), 403 F.3d 228, 237 (4th Cir. 2005) (King, J., concurring) (finding the language of the priority clearly and unambiguously including workers' compensation), *rev'd*, 126 S. Ct. 2105 (2006), *and id.* at 244 (Niemeyer, J., dissenting) (finding that the plain language of the priority does not include unpaid workers' compensation premiums), *with id.* at 239 (Shedd, J., concurring) (finding the priority ambiguous).

70. *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240-41 (1989).

71. *Howard IV*, 126 S. Ct. at 2112.

72. *See* Caminetti v. United States, 242 U.S. 470, 485-86 (1917).

language did not include workers' compensation,[73] or (2) determining the language was ambiguous enough to look to the purpose of the priority.[74]

In *Embassy*, where the clear language of the priority did not include the fringe benefits at issue in the case, the Court looked to the specific purpose of the priority to see if it was met.[75] Similarly, in *Nathanson*, the Court looked to both the plain meaning and the specific purpose of the priority to determine that it did not include the claim at issue.[76] Thus, though the equal distribution purpose was an overriding theme in those cases, the actual language and purpose of the priorities controlled.[77]

In contrast, the instant Court focuses more on the broad equal distribution aim of the Bankruptcy Code to determine that the claim is not within the priority.[78] Although the instant Court notes that the reason for adding the priority was to provide for fringe benefits,[79] the instant Court does not examine whether allowing the claim at issue would satisfy the purpose of the priority. Because it is arguable whether the plain meaning includes workers' compensation claims,[80] determining that the specific purpose of the priority was not met could have provided the instant Court with an alternative ground for reaching the same decision while staying truer to precedent.

The purpose of the priority was to provide additional protection to employees of a bankrupt business and to keep them from quitting for fear of losing compensation.[81] Thus, the instant Court could have determined that paying a third-party insurance provider would not provide benefits to employees.[82] Alternatively, the instant Court could have determined that paying the workers' compensation insurer would not have furthered the purpose because the policy was already cancelled.[83] Thus, employees

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73. *See Howard III*, 403 F.3d at 244 (Niemeyer, J., dissenting).

74. *See* United States v. Embassy Rest., Inc., 359 U.S. 29, 33 (1959) (reasoning that because contributions did not fall within the clear language, they must satisfy the purpose for which Congress enacted the priority).

75. *See id.*

76. *See* Nathanson v. NLRB, 344 U.S. 25, 27-28 (1952).

77. *See Embassy*, 359 U.S. at 33; *Nathanson*, 344 U.S. at 27-28.

78. Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (*Howard IV*), 126 S. Ct. 2105, 2109, 2116 (2006).

79. *See id.* at 2111.

80. *See supra* note 69.

81. *In re* Aer-Aerotron, Inc., 182 B.R. 725, 727 (Bankr. E.D.N.C. 1995); H.R. REP. NO. 95-595, at 187 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6147-48.

82. *See Aero-Aerotron*, 182 B.R. at 727 (discussing why the priority should not extend to third parties beyond employees).

83. *See* Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (*In re* Howard Delivery Serv., Inc.) (*Howard III*), 403 F.3d 228, 230 (4th Cir. 2005) (King, J., concurring), *rev'd*, 126 S. Ct. 2105 (2006).

would not be any less likely to quit.[84] Instead, the instant Court focused more on the advantages that employers obtain from workers' compensation—a weaker argument because employees and employers can be protected simultaneously.[85]

The instant Court's narrow focus on the equal distribution aim of the Bankruptcy Code moves away from precedent and toward a new rule of statutory interpretation for the Bankruptcy Code. Instead of looking to the plain language of a provision,[86] and then to the purpose of the provision to determine the meaning,[87] the instant Court appeared to construe the priority to exclude as many creditors as possible.[88] Also, by focusing on the variable characteristics of workers' compensation, the instant Court left open the possibility that plans included in the priority today could be excluded in the future.[89] Thus, future creditors may have trouble obtaining priority status, even if Congress intended to include them.[90] It took Congress almost twenty years to overrule the *Embassy* decision,[91] so it is empty consolation to suggest that Congress will amend the statute if it intended to include certain plans.[92] By that time, both the creditor and the business may be long gone.

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84. As noted above, a purpose of the Act was to keep employees from quitting for fear of nonpayment. *See supra* note 81.

85. *See* Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (*Howard IV*), 126 S. Ct. 2105, 2109, 2118-19 (2006) (Kennedy, J., dissenting).

86. *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240-41 (1989).

87. *See* Unites States v. Embassy, 359 U.S. 29, 33; Nathanson v. NLRB, 344 U.S. 25, 27-28 (determining if including claims would further the purposes of priorities).

88. *See Howard IV*, 126 S. Ct. at 2117 (Kennedy, J., dissenting).

89. *See id.* at 2119 (expressing disbelief that certain benefits would fall outside the priority if States mandated them in the future).

90. For example, if States mandated that employers provide health insurance, those benefits may not have priority status. *See id.* at 2117-18 (discussing how health benefit plans undeniably fall within the priority).

91. In response to *Embassy*, a 1959 case, Congress amended the Bankruptcy Code in 1978 to add a new priority for contributions to employee benefit plans. *See* S. REP. NO. 95-989, at 69 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5855; 4 COLLIER, *supra* note 35, at P 507.06.

92. *See Howard IV*, 126 S. Ct. at 2116.