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**WESTERN NEW ENGLAND
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**REHABILITATING BANKRUPTCY CODE
SECTION 506(c): SHOULD THIRD PARTY
CLAIMANTS HAVE INDEPENDENT
STANDING?**

JUSTIN T. TOTH*

INTRODUCTION

The debtor-in-possession hires a marketing agent to find a buyer for a large piece of machinery that is secured by a lien from the bank that financed the purchase of the machinery. The marketing agent works tirelessly and eventually procures a buyer willing to pay an extremely favorable price for the machinery. Following the sale of the machinery, however, the debtor-in-possession is forced to convert the chapter 11 case to a chapter 7 case. The newly appointed chapter 7 trustee determines that the estate lacks sufficient funds to compensate the marketing agent. The marketing agent requests the trustee to commence an action against the bank to recover the agent's costs and expenses. The trustee, realizing that any recovery for the marketing agent from the bank will not increase the value of the estate, refuses to pursue the action. The marketing agent appears unable to recover the costs and expenses associated

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with facilitating the sale of the bank's collateral, despite the obvious benefit to the bank from the marketing agent's efforts. To prevent the bank from receiving a windfall at the expense of the marketing agent, should a court permit the marketing agent to commence an action against the bank to recover the costs related to the sale of the machinery?

The above described factual scenario (and different variations on these facts) occurs frequently during chapter 7, chapter 11 and chapter 13 cases. In an attempt to address such circumstances, the United States Bankruptcy Code¹ ("Bankruptcy Code" or "Code") provides that "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim."² In other words, section 506(c) expressly permits the trustee, or debtor-in-possession,³ to recover the "reasonable" and "necessary" costs of maintaining collateral which secures the secured creditor's interest, to the extent the secured creditor is benefitted by the expenditures. Thus, if a trustee spends money on appraising, advertising, storing, repairing, and/or selling the debtor's property subject to a secured claim, the trustee may surcharge the secured creditor's interest to the extent the se-

1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1988)), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified as amended in scattered sections of 11 U.S.C.); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended in scattered sections of 11 U.S.C.); Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865 (codified as amended in scattered sections of 11 U.S.C.); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Treasury, Postal Service and General Government Appropriations Act, 1991, Pub. L. No. 101-509, 104 Stat. 1389 (codified as amended in scattered sections of 28 U.S.C.) [hereinafter Bankruptcy Code or Code].

2. 11 U.S.C. § 506(c) (1988).

3. It is undisputed that both the trustee and debtor-in-possession may recover for the estate under § 506(c). *See, e.g.,* Central States, S.E. and S.W. Areas Pension Fund v. Robbins (*In re* Interstate Motor Freight Sys. IMFS, Inc.), 71 B.R. 741, 743 (Bankr. W.D. Mich. 1987) ("Interstate I") (concluding that Bankruptcy Code § 1107(a) confers standing upon debtors-in-possession under § 506(c)). In addition, as this Article's title suggests, other claimants may also share the trustee's § 506(c) standing.

cured creditor is benefitted by those costs.⁴ Though it has been suggested that any such recovery is ostensibly “for the benefit of the estate,”⁵ section 506(c) administrative costs are paid directly to the section 506(c) claimant from the secured claimholder’s interest, rather than returned to the estate for pro-rata distribution among the administrative claimants and creditors. Consequently, section 506(c) is a unique section of the Bankruptcy Code because it essentially permits “administrative” claimants whose services relate directly to a bankruptcy estate’s secured property to step outside the statutory priority scheme to receive payment for services.

Recognizing the potential efficacy of a section 506(c) claim, this Article addresses a particularly troublesome issue: *Who* has standing to assert a claim for reasonable and necessary expenses relating to the disposition of collateral under section 506(c)? Bankruptcy courts and courts of appeal have reached differing, frequently irreconcilable, conclusions. Some decisions, following the “express” language of the statute, have limited standing to trustees and debtors-in-possession.⁶ By contrast, other courts, evoking various equitable considerations, have allowed third parties⁷ to submit claims for expenses under section 506(c).⁸ This Article attempts to resolve this conflict by exploring the underlying bankruptcy policies of section 506(c) in relation to other sections of the Code. At the outset, Part II surveys prior case law under the Bankruptcy Act of 1898⁹ (“Bankruptcy Act”) to ascertain the equitable origins of section 506(c). Part II suggests that, because prior law under the Bankruptcy Act provided only a hobgoblin of rules devoid of any coherent method of application, section 506(c) should not be construed merely as a codification of “prior law” as suggested by its

4. Not surprisingly, courts have struggled to define the meaning of “reasonable, necessary costs” under § 506(c). *See, e.g.*, 3 COLLIER ON BANKRUPTCY ¶ 506.06 (Lawrence P. King ed., 15th ed. 1993) (discussing methods of determining expenses recoverable by the trustee under § 506(c)).

5. *Id.* ¶ 506.06, at 506-56 (citing *In re Dinsmore Tire Center, Inc.*, 81 B.R. 136 (Bankr. S.D. Fla. 1987)). The correctness of this assertion is discussed *infra* at notes 178-86 and accompanying text.

6. *See infra* notes 67-104 and accompanying text which discuss decisions limiting § 506(c) standing to trustees and debtors-in-possession.

7. This Article employs the term “third party” to include any claimant other than the trustee or debtor-in-possession. Third parties may be lessors, repair persons, bailees, or other parties who may contribute to the preservation or disposition of the collateral to the benefit of the secured creditor.

8. *See infra* notes 105-33 and accompanying text which discuss decisions that allow third party claimants standing under § 506(c).

9. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978) [hereinafter Bankruptcy Act].

legislative history. Part III examines the current division between decisions limiting standing to the trustee or debtor-in-possession, and decisions allowing third parties to submit claims. Part IV explores the different bankruptcy policies implicated under section 506(c). In doing so, Part IV addresses the priority of claims, equitable distribution of the estate, direct versus derivative standing, and the equitable powers of bankruptcy courts under the Code in relation to section 506(c). Finally, Part V offers possible solutions to the current impasse in light of the Bankruptcy Code's goals. Part V proposes that courts could create a "demand-futile" decisional law rule that would require third parties to request the trustee to pursue their section 506(c) claim prior to filing a claim independent of the trustee. Alternatively, section 506(c) could be amended to extend standing to third parties in cases where the trustee refused to pursue a colorable claim for expenses related to preservation and/or disposition of the collateral.

I. THE HISTORICAL DEVELOPMENT OF SECTION 506(C)

Bankruptcy Code section 506(c) evolved from both statutory and common law origins.¹⁰ This section of the Article briefly explores the original equitable principles that produced section 506(c), and the provisions in the Bankruptcy Act that implicated secured creditors' interests in the allocation of expenses for preserving or disposing of collateral. Although the standing of administrative claimants was not addressed under the Bankruptcy Act, decisions applying the Bankruptcy Act indicate that administrative claimants were permitted, in some circumstances, to petition for expenses incurred in preserving the collateral. However, an historical examination casts considerable doubt upon the utility of applying pre-1978 Bankruptcy Code law to interpret section 506(c).¹¹

10. See, e.g., *In re S & S Indus., Inc.*, 30 B.R. 395, 397 n.1 (Bankr. E.D. Mich. 1983) (discussing statutory origins of § 506(c) in § 246 of Chapter X of the Bankruptcy Act).

11. When construing § 506(c), courts frequently refer to § 506(c)'s legislative history, which states that it merely "codifies current law." S. REP. NO. 989, 95th Cong., 2d Sess. 68 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5854; H.R. REP. NO. 595, 95th Cong., 1st Sess. 357 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6313. An historical survey demonstrates that "current law" was in such disarray that it could not be codified in a single provision of the Code. See *infra* notes 140-46 which discuss the difficulties with § 506(c)'s legislative history.

A. *Common Law Origins*

The equitable origins of allowing expense reimbursement under section 506(c) are found in early decisions involving surcharges against a fund assessed for preserving and administering the estate. For instance, in *Bronson v. La Crosse and Milwaukee R.R.*,¹² the United States Supreme Court addressed a mortgagee's claim that the United States District Court for the District of Wisconsin lacked the authority to offset the costs of operating a railroad incurred by the court-appointed receiver against the revenues of the railroad that were owed to the mortgagee. After considering the jurisdictional issue regarding the district court's authority,¹³ the Court articulated an equitable principle that a district court, pending the appeal of its decision, was empowered "to adopt all proper and judicious measures to protect and preserve" the collateral.¹⁴ Thus, with respect to the railroad, the Court concluded that the district court could authorize the receiver to operate the railroad through reasonable expenditures of the railroad's revenues to preserve its business value.¹⁵ In doing so, the *Bronson* Court rejected the mortgagee's claim that the receiver could not offset reasonable costs of preserving the railroad against the proceeds to be paid to the mortgagee. Other United States Supreme Court decisions, though not citing *Bronson*, expounded similar broad equitable principles regarding the offset of administrative costs incurred in preserving the value of collateral in the possession of receivers and trustees.¹⁶

Unfortunately, despite attempts to exercise such equitable powers, lower courts were unable to articulate a single, coherent rule for addressing the allocation of expenses in the preservation of collateral during a bankruptcy proceeding. Indeed, as one commentator has noted, "hardly any phase of the bankruptcy law has been plagued with so many inconsistent generalities, irreconcilable rules and principles, disagreements between circuits and even within circuits (apparently without any awareness thereof) and loose, indiscriminate statement of rules and citations of author-

12. 68 U.S. (1 Wall.) 405 (1863).

13. *Id.* at 408-10.

14. *Id.* at 410.

15. *Id.*

16. See, e.g., *Adair v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 303 U.S. 350, 360-62 (1938); *Wright v. Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440, 469 (1937); *Randolph v. Scruggs*, 190 U.S. 533, 538-39 (1903); *Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501, 507 (1891); *Shepherd v. Pepper*, 133 U.S. 626, 652 (1890).

ity.”¹⁷ Nevertheless, courts formulated a number of general considerations to guide judicial inquiries into the propriety of assessing the costs of preserving and disposing of collateral against the proceeds from the collateral when insufficient funds existed to satisfy the outstanding secured claims.¹⁸

In particular, courts emphasized two concerns:¹⁹ (1) the methods of assessing costs against the secured creditor; and (2) the types of costs properly imposed on the collateral. Apparently, the identity of the claimant for administrative costs (receiver, trustee or administrative third party claimant) did not factor into the courts’ determinations.²⁰

1. Theories for Assessing Costs Against a Secured Creditor

Prior to the enactment of the Bankruptcy Code, courts applied a variety of rationales to charge the costs of preservation and sale of collateral against the secured creditor.²¹ In particular, courts examined the benefit of the sale to the secured creditor,²² the costs

17. 4B COLLIER ON BANKRUPTCY ¶ 70.99, at 1224-25 (James Wm. Moore ed., 14th ed. 1978).

18. See generally 6 HAROLD REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES §§ 2606-10 (5th ed. 1952) (discussing different grounds for requiring a lienholder to bear a proportionate amount of the expenses of preserving and liquidating its collateral).

19. See generally Leigh H. Savage, *The Secured Claimholder’s Liability for the Costs and Expenses Incurred in Bankruptcy*, 90 COM. L.J. 430, 430-34 (1985) (surveying decisions under the Bankruptcy Act that addressed the application of collateral proceeds against costs of administration of the collateral); J. Hobson Presley, Note, *The Cost of Realization by a Secured Creditor in Bankruptcy*, 28 VAND. L. REV. 1091, 1098-1120 (1975); C.C. Marval, Annotation, *Imposition upon Lien Creditor of Expenses, Other Than Referee’s and Trustee’s Commissions, Attributable to Bankruptcy Sale Free from Liens*, 48 A.L.R.2d 1343, 1353-68 (1956); Note, *Allocation of Expenses Incurred in a Bankruptcy Sale Free of Liens*, 53 COLUM. L. REV. 845, 847-54 (1953) [hereinafter Note, *Allocation of Expenses*].

20. In several decisions, administrative claimants, usually attorneys for the receiver or trustee, petitioned courts for allowance of fees from the proceeds of secured collateral independently from the trustee or receiver. See *In re Rice Leghorn Farm*, 113 F. Supp. 903 (W.D. Mo. 1953); *In re Louisville Storage Co.*, 21 F. Supp. 897 (W.D. Ky. 1936), *aff’d sub nom.* *Louisville Title Mortgage Co. v. Louisville Storage Co.*, 93 F.2d 1008 (6th Cir. 1938); *In re Huddleston*, 167 F. 428 (S.D. Ga. 1908). For a discussion of administrative claimants’ standing under the Bankruptcy Act’s equitable rules, see *infra* notes 56-66 and accompanying text.

21. See Presley, *supra* note 19, at 1098-1113.

22. See, e.g., *Reconstruction Fin. Corp. v. Cohen (In re Burch)*, 179 F.2d 773, 776 (10th Cir. 1950) (reasoning that costs should be charged only if secured creditor is benefitted); *In re Rauch*, 226 F. 982, 984 (E.D. Va. 1915), *aff’d sub nom.* *Lott v. Salisbury*, 237 F. 191 (4th Cir. 1916) (allowing fees for referee’s attorney that benefitted mortgagee’s interest); *In re Alaska Fishing & Dev. Co.*, 167 F. 875, 879 (W.D. Wash. 1909) (allowing cost of preserving mortgagee’s collateral); *In re Goldville Mfg. Co.*, 123

incurred in a state foreclosure proceeding,²³ the consent of the secured creditor,²⁴ the value of the estate after satisfying secured claims,²⁵ and the secured creditor's request for specific foreclosure procedures.²⁶ In some cases, a particular approach would dispositively resolve the court's inquiry.²⁷ In other cases, however, courts applied several factors in determining the lienor's liability for

F. 579, 584-85 (D.S.C. 1903) (refusing to charge mortgagees' interest with costs not incurred for their benefit); *see also* Marval, *supra* note 19, at 1355-59 (surveying numerous decisions).

23. *See, e.g.*, *Textile Banking Co. v. Widener*, 265 F.2d 446, 452-54 (4th Cir. 1959) (adopting state foreclosure costs approach to assessing costs against secured creditor); *L. Maxcy, Inc. v. Walker (In re Lake Nursery Co.)*, 119 F.2d 535, 536 (5th Cir. 1941); *Anheuser-Busch Brewing Ass'n v. Harrison (In re Williams' Estate)*, 156 F. 934, 939 (9th Cir. 1907); *Ridgely Nat'l Bank v. Matheny (In re Utt)*, 105 F. 754, 759 (7th Cir. 1901). Despite agreeing on the general theory, courts adopting the state foreclosure method for assessing costs were unable to agree upon *which* state foreclosure costs should be charged to the secured creditor's interest. *See generally*, Note, *Allocation of Expenses*, *supra* note 19, at 857-58 (discussing various methods of computing state foreclosure costs adopted by different courts).

24. *See, e.g.*, *Byrer v. Bushong (In re Snyder)*, 108 F.2d 594, 596 (4th Cir. 1940) (reasoning that the lienor could be charged with all expenses to which it consented); *Miners Sav. Bank v. Joyce*, 97 F.2d 973, 977 (3d Cir. 1938); *Virginia Sec. Corp. v. Patrick Orchards, Inc.*, 20 F.2d 78, 81 (4th Cir. 1927); *In re Beardsley*, 38 F. Supp. 799, 803 (D. Md. 1941); *In re Baughman*, 163 F. 669, 670-71 (D.S.C. 1908). It remained unclear, however, what type of conduct was required to indicate whether the lienholder consented. *Compare In re Torchia*, 188 F. 207, 208 (3d Cir. 1911) (finding failure to object equivalent to affirmative consent) *with In re Tele-Tone Radio Corp.*, 133 F. Supp. 739, 749 (D.N.J. 1955) (reasoning that lienor's failure to request sale constituted refusal of consent). Moreover, courts frequently considered the lienor's consent while evaluating other factors, such as the existence of a surplus in the estate. *See Presley, supra* note 19, at 1109. At best, the meaning of consent to the sale of collateral remained a difficult yardstick to measure the appropriate costs to be assessed against the lienor.

25. *See, e.g.*, *In re Street*, 184 F.2d 710, 711 (3d Cir. 1950) (considering whether a surplus existed in estate prior to assessing costs against lienor); *Rubenstein v. Nourse*, 70 F.2d 482, 484-85 (8th Cir. 1934) (concluding that if a surplus exists, the lienor's interest cannot be charged with costs); *In re Myers*, 24 F.2d 349, 351 (2d Cir. 1928) (considering effect of estate surplus when imposing costs on lienor); *In re J.C. Wilson & Co.*, 252 F. 631, 656 (S.D.N.Y. 1917).

Other decisions, however, have declined to consider whether the debtor's estate contains a surplus when calculating costs to be assessed against the secured party. *See Gugel v. New Orleans Nat'l Bank*, 239 F. 676 (5th Cir. 1917); *Anheuser-Busch Brewing Ass'n v. Harrison (In re Williams' Estate)*, 156 F. 934 (9th Cir. 1907).

26. *See, e.g.*, *In re Louisville Storage Co.*, 21 F. Supp. 897, 899 (W.D. Ky. 1936) (reasoning that specific requests for procedures are for the lienor's benefit), *aff'd sub nom. Louisville Title Mortgage Co. v. Louisville Storage Co.*, 93 F.2d 1008 (6th Cir. 1938). *See generally* Presley, *supra* note 19, at 1113 (discussing the effect of a secured creditor's specific requests in proceeding relating to collateral).

27. *See, e.g.*, *Gugel*, 239 F. at 679 (applying solely the state foreclosure cost theory); *In re Baskind*, 43 F. Supp. 602, 602-03 (S.D.N.Y. 1942) (considering only the lienor's consent to the sale).

costs.²⁸ Unfortunately, though undoubtedly seeking equitable outcomes for both secured and unsecured creditors, courts failed to enunciate any determinative policy beyond the needs of the particular parties.²⁹ This *ad hoc* approach to resolving factually complex claims between trustees, referees, unsecured creditors, and secured lienholders offered little judicial guidance or predictability for the parties involved. Commentators, recognizing “the inadequacy of the present state of the law,”³⁰ argued that courts should adopt a single approach to determine the appropriate method for measuring costs against a secured lienholder.³¹

2. Types of Costs Imposed on Collateral

Rather than considering the *methods* of assessing costs,³² some courts focussed on the *types* of costs to determine whether the secured lienor should be charged.³³ Unfortunately, courts applying this approach also failed to articulate any comprehensive rationale for allowing a particular type of expense while denying other types of expenses.³⁴ Instead, the case law offered only conclusory catego-

28. See, e.g., *Reconstruction Fin. Corp. v. Rhodes*, 214 F.2d 606, 607 (5th Cir. 1954) (considering both state foreclosure theory and the lienor's consent); *In re Stephen R. Jackson & Co.*, 82 F. Supp. 966, 968 (D. Del. 1949) (considering both the estate surplus theory and the lienor's consent).

29. See Presley, *supra* note 19, at 1098.

30. *Id.* at 1124.

31. See Note, *Allocation of Expenses*, *supra* note 20, at 858 (expressing the need for “some clarity and consistency [to] be injected into this phase of law”); cf. Presley, *supra* note 19, at 1125 (recommending an amendment to the Bankruptcy Act to resolve the conflicting decisions).

32. See *supra* notes 21-31 which discuss methods of ascertaining valid costs.

33. See Note, *Allocation of Expenses*, *supra* note 19, at 847-50 (surveying decisions which examined the types of expenses incurred by the estate).

34. Courts recognized the nature of the competing claims in allowing claims against the lienor's interest. For example, in *In re Vulcan Foundry & Mach. Co.*, 180 F. 671 (3d Cir. 1910), the court noted that “where it is sought to charge a lienholder with the cost of preserving and administering the incumbered property, as distinguished from the cost of its sale, it becomes necessary to consider the particular situation with great care.” *Id.* at 673. After recognizing the importance of the lienor's secured interests, the court stated the following:

We do not attempt to lay down a general rule to cover all cases. This would obviously be impracticable, but we think it is safe to say that the holders of liens are ordinarily entitled to judge for themselves what their interests may require, and that these interests cannot be affected without their consent in the effort to benefit persons whose rights are inferior to their own.

Id.

Despite the *Vulcan Foundry* court's willingness to recognize the complexity of the question, this case, and subsequent decisions, avoided the task of articulating an equitable theory explaining on what grounds particular costs should receive preferred treat-

rizations such as “general administrative expenses,”³⁵ “costs of sale,”³⁶ and “costs of preservation.”³⁷

On a case by case basis, courts determined that “general administrative expenses” included expenses of receivership,³⁸ trustee’s fees,³⁹ attorneys’ fees,⁴⁰ “or other expenses incurred solely in the interest of third persons or general creditors and unnecessary to protection or realization of security.”⁴¹ Without exception, if a court classified an expense as a “general administrative cost,” the expense would not be recoverable against the lienor’s interest.⁴² By contrast, the costs of selling the collateral, as well as the costs of preserving its value prior to sale, were generally recoverable.⁴³ Unfortunately, expenses characterized as “general administrative costs” by one court were frequently viewed as essential to the “preservation” of the collateral by another court.⁴⁴ Thus, even the factual distinctions between decisions became blurred. Essentially, prior to the enactment of the Bankruptcy Code, courts assessed

ment. Instead, courts adopted a patchwork of equitable rules, selected as the specific circumstances warranted. One commentator, describing the hobgoblin of decisional law, noted, “[e]ven equitable principles have [some] general continuity, uniformity and consistency.” See 4B COLLIER, *supra* note 17, ¶ 70.99, at 1224. In this context, the principles of allocation of expenses failed to evolve with any certainty or coherence. *Id.*

35. See, e.g., *In re Prindible*, 115 F.2d 21, 24 (3d Cir. 1940) (concluding that general costs of administration are not chargeable against secured lienor’s interest); *Seaboard Nat’l Bank v. Rogers Milk Prod. Co.*, 21 F.2d 414, 417 (2d Cir. 1927); *In re Hagin*, 21 F.2d 434, 438-39 (E.D. La. 1927), *aff’d sub nom.* *Phoenix Bldg. & Homestead Ass’n v. E. A. Carrere’s Sons*, 33 F.2d 563 (5th Cir. 1929), *cert. denied*, 281 U.S. 726 (1930); *In re Howard*, 207 F. 402, 413-14 (N.D.N.Y. 1913).

36. See, e.g., *Miners Sav. Bank v. Joyce*, 97 F.2d 973, 976 (3d Cir. 1938) (finding secured lienor liable for costs of sale of collateral); *In re Danielle Co.*, 117 F. Supp. 178 (D.P.R. 1953); *In re Beardsley*, 38 F. Supp. 799, 803 (D. Md. 1941); *In re New York & Philadelphia Package Co.*, 225 F. 219, 224-25 (D.N.J. 1915).

37. See *In re Chambersburg Silk Mfg. Co.*, 190 F. 411, 412-13 (M.D. Pa. 1911) (allowing costs of watchman to protect collateral); *In re Prince & Walter*, 131 F. 546, 551 (M.D. Pa. 1904) (permitting expenses of operating debtor’s hotel prior to sale).

38. *In re Bourlier Cornice & Roofing Co.*, 133 F. 958, 963-64 (W.D. Ky. 1905).

39. See *In re Rauch*, 226 F. 982, 984 (E.D. Va. 1915), *aff’d sub nom.* *Lott v. Salisbury*, 237 F. 191 (4th Cir. 1916).

40. See *Liddon & Bro. v. Smith*, 135 F. 43, 46-47 (5th Cir. 1905); *In re Howard*, 207 F. 402, 418 (N.D.N.Y. 1913).

41. 6 REMINGTON, *supra* note 18, § 2609, at 138.

42. See Note, *Allocation of Expenses*, *supra* note 19, at 847-48.

43. *Id.* at 848-49; see also *Presley*, *supra* note 19, at 1114-16 (discussing recoverable types of costs).

44. Compare *In re Mark Shoe Co.*, 289 F. 74, 74-75 (D. Mass. 1923) (concluding that rent costs involved in carrying on the mortgagor’s business were general costs of administration) with *In re Prince & Walter*, 131 F. 546, 551 (M.D. Pa. 1904) (reasoning that the expenses involved in operating the mortgagor’s hotel were vital to preserving the value of the collateral).

claims for expenses against the secured lienor's interest in the collateral on an *ad hoc* basis. Prior decisional law, therefore, offers little coherence or predictability to post-Bankruptcy Code courts considering claims under section 506(c).

B. *Statutory Origins*

In addition to its common law genesis, section 506(c) evolved, in part, from section 246 of the Bankruptcy Act.⁴⁵ Section 246 permitted a judge to allow reasonable compensation for costs incurred in an unsuccessful reorganization under Chapter X.⁴⁶ Despite the statutory language, it remained unclear whether the lienor's interest could be charged with the costs of an abortive reorganization under section 246.⁴⁷

In *Centralia Refining Co.*,⁴⁸ a debtor filed a voluntary petition for reorganization under Chapter X of the Bankruptcy Act. After approving the petition, the court authorized the trustee to employ watchmen and purchase insurance to protect the value of the property.⁴⁹ The court found, however, that the debtor's plan of reorganization was not feasible. The court then ordered a liquidation of the debtor's assets under section 238 of the Bankruptcy Act. Because the value of the claims exceeded the debtor's assets, the trustee sought to charge the administrative costs against the lienor's interest.⁵⁰

The court recognized two opposing rules: (1) a lienholder must bear expenses incurred for its benefit or to which it consents;⁵¹ and (2) a mortgage lien may not be impaired in a 77B reorganization proceeding before a final plan of reorganization has been approved.⁵² Without reconciling these ostensibly opposing concepts, the court concluded that the lienholder had not consented to general expenses such as court costs, trustee fees, auditor fees, and at-

45. See 11 U.S.C. § 646 (1938 & Supp. V 1935-39) (repealed 1978).

46. See *id.*

47. See generally Seymour J. Rubin, *Allocation of Reorganization Expenses*, 51 YALE L.J. 418, 419-24 (1942) (discussing different approaches to expenses under § 246).

48. *In re Centralia Refining Co.*, 35 F. Supp. 599 (E.D. Ill. 1940).

49. *Id.* at 600.

50. *Id.* at 601.

51. *Id.* at 602 (citing *In re Louisville Storage Co.*, 21 F. Supp. 897 (W.D. Ky. 1936), *aff'd sub nom.* *Louisville Title Mortgage Co. v. Louisville Storage Co.*, 93 F.2d 1008 (6th Cir. 1938)).

52. *Id.* (citing *Chicago Title & Trust Co. v. Haight (In re Forty-One Thirty-Six Wilcox Bldg. Corp.)*, 100 F.2d 588, 593 (7th Cir. 1938)).

torney fees.⁵³ Accordingly, such expenses were not recoverable against the lienholder's interest.⁵⁴ However, the specific costs of watchman's fees and insurance, which preserved the value of the collateral, were recoverable.⁵⁵ The court offered no explanation for following common law concepts under section 246 of the Bankruptcy Act.

C. *Identity of the Claimant for Expenses*

Apparently, courts were not concerned with the identity of the claimant for expenses under Bankruptcy Act section 246 or in liquidation proceedings. In most cases, the trustee or receiver petitioned the court for the administrative claimant. But in other cases the administrative claimant petitioned the court directly to recover costs from the lienor's interest.⁵⁶ For example, in *Louisville Storage Co.*,⁵⁷ attorneys for the debtor's receiver sought to recover fees and costs incurred during the debtor's attempted reorganization.⁵⁸ The court observed that "[i]t has always been the rule inherent in general principles of equity that the lienor must bear the expense of bankruptcy administration which is solely for his benefit, or to which he consents, or which he causes."⁵⁹ Thus, because the lienholder had requested the appointment of the receiver, the court concluded "that costs and expenses incurred by reason of the conduct of the lienholder are for his benefit, and he will be required to pay them out of his part of the estate if there are no other assets belonging to the bankrupt out of which they may be discharged."⁶⁰ Evidently, the court was unconcerned that administrative claimants had sought to recover fees without the trustee's participation.

Furthermore, one commentator has suggested that equitable

53. *Id.*

54. *Id.*

55. *Id.*

56. See *In re Rice Leghorn Farm, Inc.*, 113 F. Supp. 903 (W.D. Mo. 1953); *In re Louisville Storage Co.*, 21 F. Supp. 897 (W.D. Ky. 1936), *aff'd sub nom.* *Louisville Title Mortgage Co. v. Louisville Storage Co.*, 93 F.2d 1008 (6th Cir. 1938); *In re Huddleston*, 167 F. 428 (S.D. Ga. 1908).

57. *In re Louisville Storage Co.*, 21 F. Supp. 897 (W.D. Ky. 1936), *aff'd sub nom.* *Louisville Title Mortgage Co. v. Louisville Storage Co.*, 93 F.2d 1008 (6th Cir. 1938).

58. *Id.* at 898.

59. *Id.* at 899. This rule, of course, echoes the principles discussed *supra* notes 12-16 and accompanying text.

60. *Id.* Interestingly, the court applied two methods of calculating recoverable costs for the receiver's attorneys. The court considered the lienholder's consent in the attorney's participation, as well as the surplus remaining in the estate, to determine if the lienholder could be charged with the attorney's expenses. *Id.*

principles from early bankruptcy laws encouraged third party claimants to pursue claims for expenses related to preserving the collateral.⁶¹ The source of this equitable authority is Justice Stone's opinion in *New York Dock Co. v. Steamship Poznan*.⁶² In that decision, Justice Stone noted that "[t]he most elementary notion of justice would seem to require that services or property furnished upon the authority of the court or its officer, acting within his authority, for the common benefit of those interested in a fund . . . should be paid from the fund as an 'expense of justice.'"⁶³ This language has been interpreted as an expansive view of standing for third party claimants under section 506(c).⁶⁴ Specifically, Justice Stone's "sentiment certainly implies that the name of the movant is irrelevant, so long as the service to the 'common fund' was necessary and proper."⁶⁵ Thus, it appears that courts concerned themselves more with the merits of the claim, rather than the identity of the party bringing the claim.

In summary, section 506(c)'s history is fraught with inconsistencies and generalizations. It offers little guidance in evaluating the merits of granting, or denying, third party standing to section 506(c) claimants. More significantly, however, it casts considerable doubt upon the usefulness of section 506(c)'s legislative history, which suggests that section 506(c) merely codified "prior law." If, in fact, section 506(c) merely embodied prior law, courts should not hesitate to extend third party standing based upon decisions that permitted such independent claims by third parties.⁶⁶ However, because third party standing was not directly addressed, an historical approach provides an unpersuasive and unsatisfying resolution to this issue. This Article, therefore, confronts section 506(c) standing from a current perspective under the Bankruptcy Code.

61. See David Gray Carlson, *Secured Creditors and Expenses of Bankruptcy Administration*, 70 N.C. L. REV. 417, 431 (1992).

62. 274 U.S. 117 (1927).

63. *Id.* at 121.

64. See Carlson, *supra* note 61, at 431. It is also worth noting that Justice Stone's opinion in *Steamship Poznan* echoes the same equitable language expressed in *Bronson v. La Crosse & Milwaukee R.R.*, 68 U.S. (1 Wall.) 405 (1863). For a discussion of *Bronson* and other early decisions addressing the equitable origins of § 506(c), see *supra* notes 12-16 and accompanying text.

65. Carlson, *supra* note 61, at 431.

66. See *supra* note 56.

III. THE CURRENT DIVIDE: THE LIMITS OF SECTION 506(c) STANDING

This section of the Article outlines several judicial decisions that reach opposite conclusions regarding the standing of third party claimants under section 506(c). Initially, it addresses decisions that have rejected third party standing on various grounds. Thereafter, it examines decisions that have reached the opposite conclusion and permitted third parties to submit claims for expenses.

A. *Section 506(c) Standing Limited to Trustee or Debtor-in-Possession*

Since the enactment of the Bankruptcy Code, many courts have refused to extend standing under section 506(c) to third party claimants.⁶⁷ Some of these decisions have accepted, without significant explanation, the conclusions reached in prior cases denying standing.⁶⁸ Other courts, recognizing the division of authority, have offered principled reasons for reaching their conclusions.⁶⁹ In particular, the United States Bankruptcy Court for the Western District of Michigan has offered a thorough and insightful analysis of

67. See *Piedmont Farm Credit, ACA v. G & M Milling Co. (In re Caldwell)*, 147 B.R. 119 (M.D.N.C. 1992); *Kessler, Inc. v. United States Trustee (In re Kessler, Inc.)*, 142 B.R. 796 (W.D. Mich. 1992); *In re Oakland Care Ctr., Inc.*, 142 B.R. 791 (E.D. Mich. 1992); *Boyd v. Dock's Corner Assocs. (In re Great N. Forest Prods., Inc.)*, 135 B.R. 46 (Bankr. W.D. Mich. 1991); *White Front Feed & Seed, Div. of Paul Lammers & Sons, Inc. v. State Nat'l Bank (In re Ramaker)*, 117 B.R. 959 (Bankr. N.D. Iowa 1990); *Central States, S.E. and S.W. Pension Fund v. Robbins (In re Interstate Motor Freight Sys., IMFS, Inc.)*, 86 B.R. 500 (Bankr. W.D. Mich. 1988) ("Interstate II"); *Central States, S.E. and S.W. Areas Pension Fund v. Robbins (In re Interstate Motor Freight Sys., IMFS, Inc.)*, 71 B.R. 741 (Bankr. W.D. Mich. 1987) ("Interstate I"); *In re Dakota Lay'd Eggs*, 68 B.R. 975 (Bankr. D.N.D. 1987); *In re J.R. Research, Inc.*, 65 B.R. 747 (Bankr. D. Utah 1986); *In re Groves Farms, Inc.*, 64 B.R. 276 (Bankr. S.D. Ind. 1986); *In re Wyckoff*, 52 B.R. 164 (Bankr. W.D. Mich. 1985); *In re Air Ctr., Inc.*, 48 B.R. 693 (Bankr. W.D. Okla. 1985); *In re Fabian*, 46 B.R. 139 (Bankr. E.D. Pa. 1985); *In re Proto-Specialties, Inc.*, 43 B.R. 81 (Bankr. D. Ariz. 1984); *In re New England Carpet Co.*, 28 B.R. 766 (Bankr. D. Vt. 1983), *aff'd sub nom. Gravel, Shea & Wright, Ltd. v. New England Carpet Co. (In re New England Carpet Co.)*, 38 B.R. 703 (D.C. Vt.), *aff'd sub nom. Gravel, Shea & Wright, Ltd. v. Bank of New England (In re New England Carpet Co.)*, 744 F.2d 16 (2d Cir. 1984); *In re Codesco, Inc.*, 18 B.R. 225 (Bankr. S.D.N.Y. 1982). It is interesting that no circuit courts of appeal have adopted this position as expressed by the lower bankruptcy and district courts.

68. See *Groves Farms*, 64 B.R. at 277; *Fabian*, 46 B.R. at 141; *Proto-Specialties*, 43 B.R. at 83.

69. See *Caldwell*, 147 B.R. at 120-21; *Great N. Forest Prods.*, 135 B.R. at 62-70; *Ramaker*, 117 B.R. at 965-67.

the concerns presented by this issue.⁷⁰

In *Great Northern Forest Products*, a chapter 7 trustee sought to invalidate a lien on equipment and inventory asserted by the debtor's landlord.⁷¹ Prior to the landlord's assertion of the lien, a bank had properly filed and perfected the only security interest on the debtor's machinery, equipment, and inventory.⁷² The landlord claimed that the debtor's use of the real property⁷³ had caused significant environmental damage for which the landlord could be held liable under state and federal environmental laws.⁷⁴ The landlord argued that, because the debtor's estate lacked sufficient assets to satisfy the lien, the landlord was entitled to charge the bank's secured interest under section 506(c) for unpaid rent and the costs of necessary environmental cleanup.⁷⁵ The trustee contended that the landlord lacked standing to charge the bank's interest.⁷⁶

Initially, the *Great Northern Forest Products* court recognized the division of authority regarding standing under section 506(c).⁷⁷ The court then examined three distinct aspects of the section 506(c) standing issue: (1) the language of section 506(c);⁷⁸ (2) the pro-rata distribution policy of section 726(b);⁷⁹ and (3) the distinction between direct and derivative standing.⁸⁰

With respect to the language of section 506(c), the court applied two rules of statutory construction.⁸¹ Specifically, the court noted:

If the statutory scheme is coherent and consistent, there is no need to inquire beyond the plain language of the statute. If the language is clear, "the sole function of the court is to enforce it according to its terms." This rule is conclusive "except in rare

70. See *Great N. Forest Prods.*, 135 B.R. at 62-70. In fact, the Bankruptcy Court for the Western District of Michigan has considered the issue of § 506(c) standing on several occasions. See *Interstate I*, 71 B.R. at 742-46; *Wyckoff*, 52 B.R. at 167-68. The court has reached the same conclusion denying the third party claimant standing in each decision.

71. *Great N. Forest Prods.*, 135 B.R. at 51.

72. *Id.* at 50-51.

73. The debtor used the property for treating harvested timber prior to processing the wood. *Id.* at 53.

74. *Id.* at 57.

75. *Id.* at 62.

76. *Id.*

77. *Id.* at 62-63.

78. *Id.* at 64-65.

79. *Id.* at 66.

80. *Id.* at 68.

81. *Id.* at 64-65.

cases where the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters[.]” In such a rare situation where the statute appears to contravene intent or conflict with other statutes, courts must adopt “a restrictive rather than a literal or usual meaning of its words[.]”⁸²

The court concluded that the language “[t]he trustee may recover from property securing an allowed secured claim,” plainly and unambiguously limited standing to the trustee.⁸³ The court also observed that the statute’s legislative history demonstrated clear intent to limit standing to the trustee or debtor-in-possession.⁸⁴ The court believed that this indubitable expression of Congressional intent should end any further inquiry into the standing issue.

The court noted, however, that other courts had found the legislative history less convincing.⁸⁵ In response to those decisions, the *Great Northern Forest Products* court continued by considering the overall policy of the Bankruptcy Code as set forth in sections 726(b) and 1123(a)(4).⁸⁶ Both sections express the fundamental policy that “all claimants whose claims are entitled to the same class of distribution shall be reimbursed pro-rata.”⁸⁷ Applying the equitable distribution policy in section 726(b), the court reasoned that allowing third party standing would elevate a “general administrative claimant to a superpriority administrative or a secured claimant.”⁸⁸ Presumably, such a result would unfairly advantage the claimant by

82. *Id.* at 64 (citations omitted).

83. *Id.* at 65. The court noted that “[t]here is no reference in the statute to ‘affected entity’, ‘aggrieved person’, or other parties.” *Id.*

84. *Id.* at 65-66. Despite the *Great Northern Forest Prods.* court’s assured reading of the legislative history, other decisions have reached opposite results construing the same section of the Congressional Record. See *Fulcrum Int’l, Ltd. v. Saybrook Mfg. Co.*, 124 B.R. 141, 144-45 (M.D. Ga. 1991). See also *infra* notes 134-46 and accompanying text which discuss the legislative history of § 506(c).

85. *Great N. Forest Prods.*, 135 B.R. at 66.

86. *Id.* at n.26.

87. *Id.* at 66.

88. *Id.* at 67. The difficulty with this argument is two-fold. First, it assumes a § 506(c) claimant is in fact merely a general administrative claimant, rather than a unique type of claimant recognized by a separate section of the Bankruptcy Code. Indeed, a general administrative claimant need confer no benefit upon the secured creditor to pursue a claim for expenses under § 503. By contrast, the § 506(c) claimant’s expenses are limited by “the extent of any benefit to the [secured creditor].” 11 U.S.C. § 506(c) (1988). Second, it assumes that the equitable result is somehow different when the trustee, or debtor-in-possession, pursues the claim, as opposed to the third party. Certainly, it is irrelevant to the estate or secured creditors if the trustee recovers for the third party, or if the third party is compensated independently. It is immaterial which party pursues the claim. See *infra* notes 160-66 and accompanying text which consider the merits of the argument regarding equitable distribution.

permitting her to step outside her statutory class of distribution, while concomitantly reducing the pro-rata shares remaining for other unsecured creditors. This result would be even more objectionable if the estate lacked funds to satisfy claims beyond the secured creditors.⁸⁹

Lastly, the court attacked the rationale underlying decisions that granted third party standing by comparing the derivative standing conferred upon creditors' committees to the direct standing sought by third party section 506(c) claimants.⁹⁰ The court observed that creditors' committees possessed *derivative* standing to recover claims *for the estate* if the trustee failed to commence litigation.⁹¹ However, creditors' committees could not recover for their own benefit.⁹² The court concluded that this position "recognize[d], either explicitly or implicitly, that only the trustee has standing for the estate."⁹³

By contrast, the third party claimant under section 506(c) sought *independent* standing to pursue a claim for its own benefit. Thus, with respect to section 506(c), the court explained that third party standing would confer quasi-trustee standing on third parties to assert claims for their own benefit, rather than the benefit of the estate.⁹⁴ Such an interpretation would permit any unpaid administrative claimant to pursue a recovery under section 506(c) for costs and expenses.⁹⁵ The court concluded that "[c]ases that allow an entity to be substituted for the trustee as a plaintiff should not be interpreted to create independent direct standing for a creditor to assert a cause of action for its sole individual benefit."⁹⁶ In so holding, the *Great Northern Forest Products* court rejected the landlord's section 506(c) claim to charge the secured creditor's interest for post-petition back rent and environmental clean up costs.⁹⁷

Other decisions have limited section 506(c) standing on different grounds.⁹⁸ In particular, some courts have construed section

89. *Great N. Forest Prods.*, 135 B.R. at 67.

90. *Id.* at 67-69 (citing *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91 (3d Cir. 1986)).

91. *Id.*

92. *Id.* at 68.

93. *Id.*

94. *Id.* at 68-69.

95. *Id.* at 69. The court added that "[s]uch an interpretation of § 506(c) may willy-nilly spawn satellite actions resulting in a litigation free for all." *Id.*

96. *Id.* at 68 (emphasis deleted).

97. *Id.* at 69.

98. It is interesting to note that courts construing § 506(c) frequently pursue dif-

506(c) as a limited exception to the general rule that requires an estate to bear its own costs of administration.⁹⁹ In *Ramaker*, the court reasoned that “[s]ection 506(c) is an exception which recognizes that the estate and the unsecured creditors should not be required to bear the costs or expenses incurred by the estate to care for a secured creditor’s collateral.”¹⁰⁰ The court focussed on an administrative claimant’s position under Bankruptcy Code section 364.¹⁰¹ The court noted that, because section 364 governs unsecured creditors’ post-petition remedies against the debtor, a post-petition claimant’s “remedy lies under [section] 503(b)(1) and the distribution provided under [section] 726.”¹⁰² Alternatively, the unsecured post-petition creditors could seek a security interest under section 364(c) to protect their interests, if they believed the debtor to be a financially risky prospect.¹⁰³ In short, the unsecured post-petition creditor should protect itself under section 364, or resign itself to the priority of an administrative claimant under section 503(b)(1). Stated differently, section 506(c) was not “intended to create an independent cause of action in favor of those entities providing goods or services on credit to an estate.”¹⁰⁴

In summary, courts have denied standing to third parties on a variety of grounds. In particular, courts have relied on the express language of section 506(c), the statute’s legislative history, the equitable distribution policy of section 726(b), and the priority of administrative costs under section 503(b)(1) in holding that only the trustee or debtor-in-possession may pursue a section 506(c) claim.

ferent lines of reasoning in reaching the same conclusion. For example, the *Ramaker* court did not explore the policies of Bankruptcy Code § 726(b), or the role of derivative standing in prior decisions, in reaching its conclusion. Likewise, the *Great Northern Forest Products* court overlooked the *Ramaker* court’s reasoning, which focussed on the different grounds for allowing administrative expenses in relation to § 506(c).

99. See *White Front Feed & Seed, Div. of Paul Lammers & Sons, Inc. v. State Nat’l Bank (In re Ramaker)*, 117 B.R. 959 (Bankr. N.D. Iowa 1990).

100. *Id.* at 966.

101. Bankruptcy Code § 364 authorizes a trustee, or debtor-in-possession, to obtain unsecured credit in the ordinary course of business. Specifically, the Code provides in relevant part:

(a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1304, 1203, or 1204 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.

11 U.S.C. § 364(a) (1988).

102. *Ramaker*, 117 B.R. at 967.

103. *Id.*

104. *Id.* at 966.

Other courts, however, have disagreed on equally principled grounds.

B. *Section 506(c) Standing Extended to Third Party Administrative Claimants*

In stark contrast to the *Great Northern Forest Products* court, other courts have decided that section 506(c) standing does extend to third party administrative claimants.¹⁰⁵ Like the decisions denying third party standing, the decisions permitting a third party to pursue a section 506(c) claim have offered different reasons for extending standing.¹⁰⁶ Some of the rationales adopted by courts granting standing are irreconcilable with decisions confining standing to the trustee. As the decisions discussed below will illustrate, no judicial consensus exists regarding either the relationship between section 506(c) and other Bankruptcy Code sections, or the economic and legal consequences of allowing third party standing.

In *Parque Forestal*, the residents of a chapter 11 debtor's housing development argued that section 506(c) required the secured creditor to pay for a security patrol of the residential premises.¹⁰⁷

105. See *PSI, Inc. v. Anguillard (In re Senior-G & A Operating Co.)*, 957 F.2d 1290 (5th Cir. 1992); *In re Parque Forestal, Inc.*, 949 F.2d 504 (1st Cir. 1991); *New Orleans Pub. Serv., Inc. v. First Fed. Sav. and Loan Ass'n (In re Delta Towers, Ltd.)*, 924 F.2d 74 (5th Cir. 1991); *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91 (3d Cir. 1986); *Shaw v. Travelers (In re Grant Assocs.)*, 154 B.R. 836 (S.D.N.Y. 1993); *United States, Internal Revenue Service v. Boatmens First Nat'l Bank*, 5 F.3d 1157 (8th Cir. 1993); *In re Mechanical Maintenance, Inc.*, 128 B.R. 382 (E.D. Pa. 1991); *Fulcrum Int'l, Ltd. v. Saybrook Mfg. Co.*, 124 B.R. 141 (M.D. Ga. 1991); *In re Blaisure*, 150 B.R. 343 (Bankr. M.D. Pa. 1992); *In re Evanston Beauty Supply, Inc.*, 136 B.R. 171 (Bankr. N.D. Ill. 1992); *In re Scopetta-Senra Partnership III*, 129 B.R. 700 (Bankr. S.D. Fla. 1991); *Cavender v. Ameritrust Co. (In re Opti-Gage, Inc.)*, 124 B.R. 515 (Bankr. S.D. Ohio 1991); *In re So Good S. Potato Chip Co.*, 116 B.R. 144 (Bankr. E.D. Mo. 1990); *Geller v. International Club Enters., Inc. (In re Int'l Club Enters., Inc.)*, 105 B.R. 190 (Bankr. D.R.I. 1989); *In re Chicago Lutheran Hosp. Ass'n*, 89 B.R. 719 (Bankr. N.D. Ill. 1988); *In re Cann & Saul Steel Co.*, 86 B.R. 413 (Bankr. E.D. Pa. 1988); *In re DLS Indus., Inc.*, 71 B.R. 679 (Bankr. D. Minn. 1987); *Guy v. Grogan (In re Staunton Indus., Inc.)*, 74 B.R. 501 (Bankr. E.D. Mich. 1987); *In re Birdsboro Casting Corp.*, 69 B.R. 955 (Bankr. E.D. Pa. 1987); *In re World Wines, Ltd.*, 77 B.R. 653 (Bankr. N.D. Ill. 1987); *In re Energy Coop., Inc.*, 55 B.R. 957 (Bankr. N.D. Ill. 1985); *In re Reda, Inc.*, 54 B.R. 871 (Bankr. N.D. Ill. 1985); *In re T.P. Long Chem. Inc.*, 45 B.R. 278 (Bankr. N.D. Ohio 1985); *In re Loop Hosp. Partnership*, 50 B.R. 565 (Bankr. N.D. Ill. 1985); *National Bank of N. Am. v. Isaac Cohen Clothing Corp. (In re Isaac Cohen Clothing Corp.)*, 39 B.R. 199 (Bankr. S.D.N.Y. 1984).

106. See, e.g., *Parque Forestal*, 949 F.2d at 512-13 (focussing on equitable outcome); *Fulcrum Int'l*, 124 B.R. at 144 (examining legislative intent behind § 506(c)); *Scopetta-Senra Partnership III*, 129 B.R. at 702 (discussing application of Bankruptcy Code § 726(b)).

107. *Parque Forestal*, 949 F.2d at 507.

Because both the secured creditor and the chapter 11 debtor had refused to pay for the security services, several of the residents had assumed the responsibility of paying the security company.¹⁰⁸ The secured creditor argued that the residents lacked standing to pursue a claim under section 506(c).¹⁰⁹

Considering the residents' claim, the *Parque Forestal* court noted that despite conflicting authority regarding the standing issue, the residents' claim evoked the precise equitable concerns that persuaded several courts to extend standing to third party claimants.¹¹⁰ Relying on *Equitable Gas Co. v. Equibank, N.A. (In re McKeesport Steel Castings Co.)*,¹¹¹ the court reasoned:

[t]he rule that individual creditors cannot act in lieu of the trustee is often breached when sufficient reason exists to permit the breach. In this case[,] neither the debtor in possession nor a creditors['] committee had reason to make a claim on behalf of . . . [the third party claimant]. . . . Thus, because . . . [the third party claimant] had a colorable claim for expenses and was the only creditor that would zealously pursue that claim, it has standing to bring a § 506(c) action.¹¹²

Specifically, the court observed that the chapter 11 debtor lacked any economic incentive to pursue a claim against the secured creditor: "The debtor in possession had no funds, and its debt to . . . the secured creditor, exceeded the value of the bankrupt estate . . ." ¹¹³ In short, the debtor-in-possession would accede to the benefit of the security services without any expense to itself. Additionally, the court found that the security services offered a significant benefit to the secured creditor by protecting the mortgaged residential property from theft or vandalism.¹¹⁴ In the absence of any motivation for either the debtor-in-possession or the secured creditor to pursue the section 506(c) claim, the court found that the residents, as third party claimants, would be entitled to bring the claim under section

108. *Id.* at 506.

109. *Id.* at 507.

110. *Id.* at 511 (citing *New Orleans Pub. Serv., Inc. v. First Fed. Sav. and Loan Ass'n (In re Delta Towers, Ltd.)*, 924 F.2d 74 (5th Cir. 1991) and citing *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91 (3d Cir. 1986)).

111. 799 F.2d 91 (3d Cir. 1986).

112. *Parque Forestal*, 949 F.2d at 511-12 (quoting *McKeesport Steel Castings*, 799 F.2d at 94).

113. *Id.* at 512.

114. *Id.*

506(c).¹¹⁵ The court confined its analysis, however, to this equitable argument regarding the willingness of the trustee or debtor-in-possession to pursue the section 506(c) claim.

Other decisions have focussed on the policies underlying the Bankruptcy Code in deciding to extend third party standing under section 506(c). For example, in *Scopetta-Senra Partnership III*,¹¹⁶ the court addressed the equitable distribution concerns expressed in Bankruptcy Code section 726(b). In *Scopetta-Senra*, administrative claimants sought to charge rent costs against the secured creditors' interests in the debtor's inventory.¹¹⁷ Initially, the court noted that section 506(c) is an equitable remedy, exercised to prevent secured creditors from receiving a windfall at the expense of the trustee or administrative creditors.¹¹⁸ The court added that the Bankruptcy Code could not have intended a result that would permit secured creditors to acquire such a windfall.¹¹⁹

The court then addressed the policies of Bankruptcy Code section 726(b).¹²⁰ First, the court posited that "the windfall that the secured creditors would receive clearly outweighs the distribution objectives established by Congress in [s]ection 726(b) of the Code."¹²¹ Moreover, because section 506(c) reduces only the amount to be paid to the secured creditor, the Bankruptcy Code's distributional objectives are not violated by extending third party standing.¹²² Lastly, the court reasoned that, regardless of whether the trustee or the third party pursued the section 506(c) claim, the effect on the secured creditor's interest would be the same: it would be diminished by the amount of the claim.¹²³ Thus, because section 726(b) distributional concerns would be implicated equally by a trustee's pursuit of a section 506(c) claim, a third party should not be denied standing. Following the implication of these arguments, the court permitted the administrative claimants to bring the section 506(c) claim for unpaid rent.¹²⁴

Other courts have granted third party standing based on the statutory language and legislative history of section 506(c). In *Ful-*

115. *Id.*

116. *In re Scopetta-Senra Partnership III*, 129 B.R. 700 (Bankr. S.D. Fla. 1991).

117. *Id.* at 700-01.

118. *Id.* at 701.

119. *Id.*

120. *Id.* at 702.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

crum International, Ltd. v. Saybrook Manufacturing Co.,¹²⁵ a broker filed a section 506(c) request for assessment of fees against the proceeds of the secured creditor's interest in the collateral. The secured creditor objected to the request, arguing that the broker lacked independent standing to pursue such a claim.¹²⁶ Agreeing with the secured creditor, the bankruptcy court dismissed the claim on the grounds that the broker lacked standing.¹²⁷

On appeal, the district court examined the statutory language and legislative history of section 506(c).¹²⁸ After reciting the language of section 506(c), the court recognized its obligation to enforce the statute according to its terms "where [. . .] the statute's language [was] plain."¹²⁹ The court added, however, that if the literal application of the statute would produce an outcome at odds with the drafter's intent, the court would be required to follow the drafter's intent.¹³⁰ The court believed section 506(c)'s legislative history demonstrated that "the purpose of section 506(c) is to shift the cost of preserving or disposing of a secured creditor's collateral from the estate to the secured party."¹³¹ The court concluded, therefore, that a third party claimant would have standing if she demonstrated an entitlement to receive reimbursement for which the trustee refused to file a claim.¹³² In allowing third party standing, the *Fulcrum International* court focussed on the cost-shifting objectives of section 506(c), rather than the identity of the claimant pursuing those costs. Apparently, the court believed that the cost-

125. 124 B.R. 141 (M.D. Ga. 1991).

126. *Id.* at 143.

127. *Id.*

128. *Id.* at 144.

129. *Id.* (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (omission in the original)). The ironies of statutory interpretation are particularly evident when this decision is compared with the decision in *Boyd v. Dock's Corner Assocs. (In re Great N. Forest Prods., Inc.)*, 135 B.R. 46, 62-70 (Bankr. W.D. Mich. 1991). Both cases cited identical rules of construction in reaching completely opposite results regarding § 506(c) standing.

130. *Fulcrum Int'l*, 129 B.R. at 144.

131. *Id.* The legislative history of § 506(c) stated in part:

Any time the trustee or debtor in possession expends money to provide for the reasonable and necessary cost and expenses of preserving or disposing of a secured creditor's collateral, the trustee or debtor in possession is entitled to recover such expenses from the secured party or from the property securing an allowed secured claim held by such party.

Id. (citing 124 CONG. REC. 32,398 (1978) (statement of Representative Don Edwards), reprinted in 1978 U.S.C.C.A.N. 6436, 6451).

132. *Id.* at 145. The court's requirement that the trustee refuse to pursue the third party claimant's § 506(c) claim will be discussed extensively *infra* notes 187-202 and accompanying text.

shifting policies outweighed the consequences of permitting a third party to bring the claim. Because the debtor-in-possession refused to pursue any of the broker's section 506(c) claims, the court found that the broker had independent standing to bring the claim.¹³³

The foregoing decisions illustrate the numerous grounds that courts have used in permitting third party claimants to pursue section 506(c) claims. Most of these decisions are irreconcilable with the decisions of courts that limited standing to the trustee or debtor-in-possession. This division of authority offers little precedential guidance for courts considering section 506(c) standing. In an attempt to offer a principled resolution to this conflict, Part IV of this Article further develops the reasoning suggested in these opinions, and posits several additional factors that ought to be considered in addressing section 506(c) standing. In doing so, this Article ultimately concludes that third party claimants *should* have independent standing to pursue section 506(c) claims when the trustee refuses to pursue a colorable claim.

IV. POLICY AND LEGAL CONSIDERATIONS OF SECTION 506(C) STANDING

This section of the Article considers the grounds for extending section 506(c) standing to third party claimants, as well as the consequences of extending standing. In particular, this section appraises the usefulness of statutory construction methods applied by courts considering section 506(c), the equitable powers of section 105, the equitable distribution policies of section 726(b), derivative versus direct standing, and alternative remedies available to third party claimants.

A. *Statutory Construction and Legislative History*

The legislative history of section 506(c) provides dubious authority for allowing, or denying, third party claimants' standing. Nevertheless, courts considering the problem of section 506(c) standing have often initiated their analyses with a discussion of the language and legislative history of section 506(c). Regardless of their final conclusions, courts have employed a two-step method to interpret the meaning of section 506(c).¹³⁴ Following two sequen-

133. *Id.*

134. Compare *In re New England Carpet Co.*, 28 B.R. 766 (Bankr. D. Vt. 1983) (the legislative history of § 506(c) illustrates an intent to limit standing to the trustee), *aff'd sub nom.* *Gravel, Shea & Wright, Ltd. v. New England Carpet Co.* (*In re New*

tial rules of construction articulated by the Supreme Court in *United States v. Ron Pair Enterprises, Inc.*,¹³⁵ courts inquire, initially, whether the language of section 506(c) is "plain."¹³⁶ If the meaning is plainly evident, the court must enforce the statute "according to its terms."¹³⁷ However, if the statute's literal application leads to a result that conflicts with the intention of the drafters, then the court must focus on the drafters' intent to produce a harmonious construction.¹³⁸ Of course, this entire analysis presumes that the drafters' intent can be discerned. Unfortunately, legislative intent is often as enigmatic as the statute itself:¹³⁹ section 506(c) provides a good case in point.

The legislative history of section 506(c) offers little insight into Congressional intent with respect to third party claimants. In fact, the legislative history is confined to paraphrases of the statute itself.¹⁴⁰ The Committee on the Judiciary's Report to the House of Representatives offered only a brief reference to the origin of the statute and a recapitulation of the language of section 506(c). The report stated:

Subsection (c) also codifies current law by permitting the trustee to recover from property whose value is greater than the sum of the claims secured by a lien on that property that [sic] reasonable, necessary costs and expenses of preserving, or disposing of, the property. The recovery is limited to the extent of any benefit

England Carpet Co.), 38 B.R. 703 (D.C. Vt.), *aff'd sub nom.* Gravel, Shea & Wright, Ltd. v. Bank of New England (*In re* New England Carpet Co.), 744 F.2d 16 (2d Cir. 1984) with *Fulcrum Int'l, Ltd. v. Saybrook Mfg. Co.*, 124 B.R. 141, 144-45 (Bankr. M.D. Ga. 1991) (the legislative history of § 506(c) emphasizes the policy of shifting preservation and disposition expenses).

135. 489 U.S. 235 (1989).

136. *Id.* at 241.

137. *Id.*

138. *Id.* at 242.

139. Indeed, as many commentators have suggested, legislative intent may be a questionable basis upon which to ground any interpretation of specific statutory language. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 428-34 (1989). Professor Sunstein notes that when construing the meaning of a particular statute, "courts should approach legislative history cautiously." *Id.* at 431. For purposes of this discussion, though, it is sufficient to question the validity of those decisions that assumed Congressional intent based upon the lack of specific language in the legislative history surrounding Bankruptcy Code § 506(c).

140. See S. REP. NO. 989, *supra* note 11, at 68, *reprinted in* 1978 U.S.C.C.A.N. at 5854; H.R. REP. NO. 595, *supra* note 11, at 357, *reprinted in* 1978 U.S.C.C.A.N. at 6313; 124 CONG. REC. 32,398 (1978) (statement of Representative Don Edwards), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6451; 124 CONG. REC. 33,997 (1978) (statement of Senator Dennis DeConcini), *reprinted in* 1978 U.S.C.C.A.N. 6505, 6520.

to the holder of such claim.¹⁴¹

As Part II of this Article illustrates, it would have been extremely problematic merely to codify the "current law" into section 506(c).¹⁴² Indeed, if section 506(c) embodied such a legislative intent, Congress would have failed to clarify the morass of conflicting caselaw that existed under the Bankruptcy Act of 1898. More significantly, however, this language makes no reference to the propriety of expense claims from parties other than the trustee or debtor-in-possession. But because the legislative history is little more than a paraphrase of the statute, we cannot conclude that the absence of specific references to third party claimants precludes a finding that third parties *could* possess standing.

The statements proffered by members of Congress during discussion of the House Report add little to the House Report itself. Senator Dennis DeConcini and Representative Don Edwards each limited their respective references to section 506(c) to identical statements. Both Congressmen stated:

Section 506(c) of the House amendment was contained in H.R. 8200 as passed by the House and adopted, verbatim, in the Senate amendment. Any time the trustee or *debtor in possession* expends money to provide for the reasonable and necessary cost and expenses of preserving or disposing of a secured creditor's collateral, the trustee or *debtor in possession* is entitled to recover such expenses from the secured party or from the property securing an allowed secured claim held by such party.¹⁴³

Apart from restating the language of section 506(c), this legislative history adds little except the term "debtor in possession." This is not particularly helpful in ascertaining the scope of section 506(c) standing.¹⁴⁴ At best, the additional language affirms Bankruptcy Code section 1107(a),¹⁴⁵ which vests virtually the same rights and powers of a trustee in the debtor-in-possession. In fact, a debtor-

141. See H.R. REP. NO. 595, *supra* note 11, at 357, *reprinted in* 1978 U.S.C.C.A.N. at 6313.

142. See *supra* notes 13-67 and accompanying text which discuss the confusion under prior case law.

143. 124 CONG. REC. 32,398 (1978) (emphasis added) (statement of Representative Don Edwards), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6451; 124 CONG. REC. 33,997 (1978) (emphasis added) (statement of Senator Dennis DeConcini), *reprinted in* 1978 U.S.C.C.A.N. 6505, 6520.

144. Many courts, however, have seized upon the inclusion of this term to support the conclusion that Congress intended to limit the use of § 506(c) to trustees and debtors-in-possession. See *supra* note 84.

145. 11 U.S.C. § 1107(a) (1988).

in-possession would have possessed section 506(c) standing, regardless of the legislative history, based solely upon section 1107(a). Thus, this legislative recognition of a separate Code section's effect on section 506(c) is not particularly probative of any deliberate intent to preclude third party claimants from filing claims under section 506(c). Nevertheless, numerous courts have relied on this amorphous legislative history to deny standing to third party claimants.¹⁴⁶

B. *Bankruptcy Code Section 105 Equitable Powers*

Bankruptcy Code section 105¹⁴⁷ empowers bankruptcy courts to exercise broad equitable powers to facilitate the goals and purposes of the Bankruptcy Code.¹⁴⁸ Courts have followed two different schools of thought when exercising these equitable powers.¹⁴⁹ The first approach constrains the reach of section 105 to very specific and narrow applications. The second approach, by contrast, perceives section 105 as a tool that permits bankruptcy courts to "fill the gaps left by the [Bankruptcy Code's] statutory language."¹⁵⁰ It is clear, however, that section 105 cannot be used in

146. See *Central States, S.E. and S.W. Areas Pension Fund v. Robbins* (*In re Interstate Motor Freight Sys., IMFS, Inc.*), 71 B.R. 741, 742-43 (Bankr. W.D. Mich. 1987) ("Interstate I"); *In re Dakota Lay'd Eggs*, 68 B.R. 975, 977 (Bankr. D.N.D. 1987); *In re Air Ctr., Inc.*, 48 B.R. 693, 694 (Bankr. W.D. Okla. 1985); *In re New England Carpet Co.*, 28 B.R. 766, 771-72 (Bankr. D. Vt. 1983), *aff'd sub nom.* Gravel, Shea & Wright, Ltd. v. New England Carpet Co. (*In re New England Carpet Co.*), 38 B.R. 703 (D.C. Vt.), *aff'd sub nom.* Gravel, Shea & Wright, Ltd. v. Bank of New England (*In re New England Carpet Co.*), 744 F.2d 16 (2d Cir. 1984).

147. The statutory language that codifies the bankruptcy court's equitable powers provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a) (1988).

148. See *In re Middleton Arms, Ltd. Partnership*, 934 F.2d 723 (6th Cir. 1991). Bankruptcy Code § 105 derives from § 2a(15) of the Bankruptcy Act of 1898. See 11 U.S.C. § 11(a)(15) (1976) (repealed 1978). The earlier law was viewed as an express grant of equitable power to issue orders *necessary* to the administration of the debtor's estate. See 2 COLLIER ON BANKRUPTCY ¶ 105.01[2] (Lawrence P. King ed., 15th ed. 1992). At least one commentator has suggested that § 105 confers a broader set of powers upon the bankruptcy court than its predecessor. *Id.*

149. See 2 COLLIER, *supra* note 148, ¶ 105.01[3]. See generally Manuel D. Leal, *Power of the Bankruptcy Court: Section 105*, 29 S. TEX. L. REV. 487 (1988) (discussing different methods of applying § 105).

150. 2 COLLIER, *supra* note 148, ¶ 105.01[3].

contravention of the Code's express statutory language, regardless of the apparent "equities" before a court.¹⁵¹ One commentator has even suggested that the statutory language "suggests that an exercise of section 105 power be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective."¹⁵² However, in a less polemic recognition of section 105 power, the Supreme Court stated that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."¹⁵³

With respect to section 506(c), section 105 offers a foundation within the Bankruptcy Code upon which to extend standing to third party claimants. Obviously, the language of section 105 confers no such express authority. Moreover, to comport with the Supreme Court's admonition, section 105 should be limited to remedying ambiguities, or contradictory results, that occur within the Code itself.¹⁵⁴ Such a construction lends considerable support to extending standing to third party claimants under section 506(c).

Yet, despite this equitable power, section 105 has been rejected as a ground upon which to extend standing to third parties under section 506(c).¹⁵⁵ In *Central States, S.E. and S.W. Pension Fund v. Robbins (In re Interstate Motor Freight Sys., IMFS, Inc.)*, the administrative claimants argued that section 105 permitted the court to grant them independent standing to pursue their section 506(c) claim.¹⁵⁶ The court refused to exercise its equitable powers on the grounds that independent standing would violate express provisions

151. See *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

152. *Id.* In a sense, however, this observation begs the question. It would be difficult, if not impossible, to interpret any of the Bankruptcy Code without some reference to the objectives of the bankruptcy process. Certainly, in clear cases, a court should not use § 105 powers to obviate the Bankruptcy Code's express language, or invent a "bankruptcy common law." In practice, however, a court is unlikely to need § 105 powers when the applicable law is readily ascertainable. Rather, a court will require such power when the question before it eludes the Code's express provisions, or when it appears to conflict with the Code's policies as expressed in other Code sections.

153. See *Norwest Bank Worthington*, 485 U.S. at 206.

154. Such a construction of § 105 avoids the pitfall of creating an omnipotent equitable power that could be used in derogation of the express provisions of the Code. Section 105 should not be construed to reduce the Bankruptcy Code to a set of rules so flexible that they may be followed or ignored whenever a judge decides the circumstances warrant a certain result. Some degree of consistency and predictability is required within the Bankruptcy Code.

155. See *Central States, S.E. and S.W. Pension Fund v. Robbins (In re Interstate Motor Freight Sys., IMFS, Inc.)*, 86 B.R. 500 (Bankr. W.D. Mich. 1988) ("Interstate II").

156. *Id.* at 501.

of the Code.¹⁵⁷ Specifically, the court found that “a grant of standing to these [claimants] would favor them over any other administrative claimant or unsecured creditors.”¹⁵⁸ In short, the court concluded that express provisions of the Bankruptcy Code prevented it from exercising its equitable powers under section 105.

As the forthcoming discussion will illustrate, however, the Bankruptcy Code does not, either impliedly or expressly, prohibit independent third party standing under section 506(c).¹⁵⁹ In fact, numerous bankruptcy policies support extending section 506(c) standing to third parties. Section 105, therefore, should be viewed as a mechanism that enables courts to avoid inequitable applications of section 506(c). Upon recognizing that the Bankruptcy Code contains no proscription against third party standing, section 105 may be construed in light of other equitable considerations requiring third party standing in some circumstances. This limited application avoids the danger of allowing section 105 to become an equitable “catch-all” to be employed by any party dissatisfied with the results of a particular decision.

C. Bankruptcy Code Section 726(b) and Equitable Distribution

Some courts have concluded that third party standing must be limited to the trustee on the grounds that the Bankruptcy Code’s equitable distribution policy requires such a conclusion.¹⁶⁰ In particular, courts have suggested that section 726(b),¹⁶¹ which requires

157. *Id.* at 503.

158. *Id.* The court followed the reasoning in its prior opinion in *Central States, S.E. and S.W. Pension Fund v. Robbins*. (*In re Interstate Motor Freight Sys., IMFS, Inc.*), 71 B.R. 741 (Bankr. W.D. Mich. 1987) (“*Interstate I*”). In *Interstate I*, the court reasoned that the equitable distribution rule expressed in Bankruptcy Code § 726(b) precluded third party standing under § 506(c). As the forthcoming discussion demonstrates, though, the court’s reasoning in *Interstate I* failed to discern several important characteristics of a § 506(c) claim that preclude the application of § 726(b). See *infra* notes 160-66 and accompanying text.

159. See *infra* notes 160-87 and accompanying text which discuss the relationship of § 506(c) with other Code provisions.

160. See *Boyd v. Dock’s Corner Assocs.* (*In re Great N. Forest Prods., Inc.*), 135 B.R. 46, 66-67 (Bankr. W.D. Mich. 1991); *Interstate I*, 71 B.R. at 744-45.

161. Section 726(b) of the Bankruptcy Code provides the following:

Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6) or (7) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1112[,] 1208, or 1307 of this title, . . . [administrative expenses] incurred under this chapter after such conversion has priority over . . . [administrative expenses] incurred under any other chap-

equitable distribution among similarly situated classes of claimants, precludes third party administrative claimants from filing section 506(c) claims.¹⁶² Essentially, this view contends that third parties could use section 506(c) to step outside section 726(b)'s statutory distribution scheme and gain a priority position under section 503(b).

Such an interpretation of sections 726(b) and 506(c) reveals several misconceptions regarding the nature of a section 506(c) claim. First, and perhaps most importantly, it is essential to recognize that section 506(c) establishes a unique type of administrative claim within the Bankruptcy Code. When drafting the Bankruptcy Code, Congress created a particular category of claims which it described as "administrative expenses" in section 503. Separately, in section 506, Congress addressed the rights and liabilities of the holder of an allowed secured claim. Within that section, Congress recognized the obligation of a secured claimholder to compensate an administrative claimant for services directly related to the collateral and benefitting the secured creditor. This obligation is fundamentally distinct from the obligation of an estate to satisfy its own administrative costs as required by section 503.

Clearly, the section 506(c) claim shares some of the characteristics of an administrative claim under section 503. Both claims involve post-petition costs and expenses that are incurred by third parties in service to the reorganization or liquidation proceedings. However, unlike section 503, the section 506(c) claimant's costs and expenses must relate to the secured creditor's collateral *and must benefit the secured creditor*.¹⁶³ In fact, the section 506(c) claimant

ter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

11 U.S.C. § 726(b) (1988) (footnote omitted). The same equitable goal is incorporated in 11 U.S.C. § 1123(a)(4) (1988).

162. See *supra* notes 85-89 and accompanying text which explain the *Great Northern Forest Products* court's reasoning in denying third party standing based upon § 726(b).

163. Alternatively, some courts have allowed the secured creditor to be charged with § 506(c) costs if the secured creditor consented to those expenditures. See *United States v. Arnett Ford, Inc. (In re Arnett Ford, Inc.)*, 64 B.R. 946 (Bankr. D. Neb. 1986); *Crownover v. Manufacturers Hanover Commercial Corp. (In re Central Foundry Co.)*, 45 B.R. 395 (Bankr. N.D. Ala. 1984). With respect to the "benefit" language in § 506(c), the judicially created doctrine of consent appears premised on the assumption that a secured creditor would be unlikely to consent to expenditures that provided no benefit to the secured creditor. Nevertheless, for the purposes of this discussion, even the requirement to prove "consent" would distinguish a § 506(c) claim from a typical § 503(b) administrative claimant.

cannot recover any expenses if the secured creditor is not benefited by the expenditures. By contrast, the section 503(b) claimant is not required to establish that any benefit accrued to the secured creditor. Additionally, a section 503(b) claim need not be related to the preservation or disposition of the secured creditor's collateral. In short, the section 506(c) claim is a fundamentally different animal than the section 503(b) administrative claim: a section 506(c) claim is not "merely" an administrative claim.

It follows, therefore, that unlike section 503 administrative claims, the Bankruptcy Code does not prioritize section 506(c) claims in the hierarchy of distribution under section 507.¹⁶⁴ Section 506(c) does not create a distinct "class" of claimants who share in the distribution of the estate's unencumbered assets. Instead, the Code requires the section 506(c) claimant to look to the secured claimholder for compensation. Therefore, it is erroneous to impose the equitable distribution requirements of section 726(b) on a section 506(c) claimant who does not participate in the section 507 distribution process. Those courts that have applied section 726(b) to section 506(c) claims fail to apprehend this fundamental distinction.

Second, the application of section 726(b) to section 506(c) standing draws a false distinction between the role of the trustee and the third party in pursuing that claim. Specifically, it assumes that the equitable outcome is somehow different when the trustee, or debtor-in-possession, pursues the claim, as opposed to the third party. It is clear, however, that the secured creditor's interest would be identically diminished regardless of whether the trustee or the third party filed the section 506(c) claim: the secured creditor will be required to compensate either party. Moreover, it is irrelevant to the estate whether the trustee recovers for the third party or the third party is directly compensated. A section 506(c) recovery is paid directly to the third party, rather than the general estate. Of course, the estate is certainly benefitted because it is not required to satisfy the obligation out of its own unencumbered assets. This benefit, however, will accrue regardless of whether the trustee or the third party brings the section 506(c) claim. Thus, the distinction between the third party and trustee simply does not affect the equitable distribution of the estate under section 726(b).

Lastly, it has been suggested that the windfall a secured claimholder would receive if the trustee refused to pursue the section 506(c) claim outweighs any distributional objection under sec-

164. 11 U.S.C. § 507 (1988 & Supp. IV 1992).

tion 726(b).¹⁶⁵ Undoubtedly, the secured claimholder is benefitted when a third party incurs expenses maintaining the secured creditor's collateral. In a sense, the third party is actually expending resources to protect the secured claimholder's interest. If a trustee, or debtor-in-possession, refused to pursue a reasonable claim for expenses, the secured creditor would receive a windfall at the expense of the third party who agreed to perform the services with the expectation of future payment. This inequitable result is avoided by permitting the third party to protect itself by filing a section 506(c) claim.¹⁶⁶

D. *Direct or Derivative Standing*

Some recent decisions have drawn an analogy between the standing accorded creditors' committees to represent the trustee and standing for third party claimants under section 506(c).¹⁶⁷ This analogy has been challenged by other decisions which have rejected section 506(c) standing for third parties. Most notably, the *Great Northern Forest Products*¹⁶⁸ court maintained that it would be erroneous to extend *direct* standing to section 506(c) claimants based upon prior decisions that allowed creditors' committees *derivative* standing to pursue claims *for the estate*.¹⁶⁹ In particular, the court reasoned that the courts that had granted creditors' committees standing did so on the grounds that the creditors' committee would pursue the claim for the benefit of the estate.¹⁷⁰ Thus, the creditors' committee acted derivatively for the trustee. As the *Great Northern Forest Products* court noted, "[t]his analysis . . . recognizes, either explicitly or implicitly, that only the trustee has standing for the estate."¹⁷¹ By contrast, the third party section 506(c) claimant

165. See *supra* notes 116-19 and accompanying text which discuss the *Scopetta-Senra Partnership III* court's resolution of the § 726(b) issues.

166. The limits of the third party's standing are suggested *infra* notes 187-201 and accompanying text.

167. See *In re* Parque Forestal, Inc., 949 F.2d 504 (1st Cir. 1991); *New Orleans Pub. Serv., Inc. v. First Fed. Sav. and Loan Ass'n (In re Delta Towers, Ltd.)*, 924 F.2d 74 (5th Cir. 1991); *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91 (3d Cir. 1986); *In re Scopetta-Senra Partnership III*, 129 B.R. 700 (Bankr. S.D. Fla. 1991).

168. *Boyd v. Dock's Corner Assocs. (In re Great N. Forest Prods., Inc.)*, 135 B.R. 46 (Bankr. W.D. Mich. 1991).

169. *Id.* at 68-69.

170. *Id.* at 67-68 (citing *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1362-63 (5th Cir. 1986)).

171. *Id.* at 68.

pursued the claim directly for its own benefit.¹⁷²

Although the above observation is accurate, for several reasons it is questionable whether it provides any basis upon which to preclude third party standing under section 506(c). Most significantly, those decisions that have permitted a creditors' committee to pursue a claim for the trustee addressed claims which, if recovered, would have entered the estate for equitable distribution. Conversely, a section 506(c) claim does not enter the estate for distributional purposes. For example, in *Philadelphia Light Supply*,¹⁷³ a creditors' committee sought to pursue a claim to recover a preferential transfer from an insider of the debtor-in-possession.¹⁷⁴ Under normal circumstances, the trustee, or debtor-in-possession, would recover a preferential transfer for the benefit of the estate to be distributed equitably under section 507. In this case, however, the debtor-in-possession, despite its fiduciary obligations to the estate, lacked incentive to pursue a claim against the inside party.¹⁷⁵ The court, citing a litany of authority, held that it could "authorize the creditors' committee to institute suit under a colorable claim on behalf of the debtor-in-possession or the trustee if these entities fail to do so."¹⁷⁶ The court, therefore, granted the creditors' committee standing to bring the preferential transfer claim for the estate.¹⁷⁷

In contrast to a recovery of a preferential transfer for the estate, the section 506(c) claim is recovered for the benefit of the claimant; the estate does not share in the recovery from the secured creditor. Nevertheless, one commentator has suggested that "[a] section 506(c) recovery is for the benefit of the estate."¹⁷⁸ This assertion, however, is unsupported by case law. In fact, it is an incorrect interpretation of the decision from which it originated. The *Dinsmore Tire Center* case involved a trustee's claim for compensation.¹⁷⁹ The trustee argued that, beyond the compensation authorized by the Bankruptcy Code, he was entitled to an additional

172. *Id.* at 69.

173. *In re Philadelphia Light Supply Co.*, 39 B.R. 51 (Bankr. E.D. Pa. 1984).

174. *Id.* at 51.

175. *Id.* The court observed the following: "The debtor in possession has not commenced suit against [the insider] and we doubt that it would commence and zealously prosecute such an action since [the insider] is the president and sole shareholder of the debtor in possession." *Id.* at 52-53.

176. *Id.* at 52 & n.2 (footnote omitted).

177. *Id.* at 53.

178. 3 COLLIER, *supra* note 4, ¶ 506.06, at 506-56 (citing *In re Dinsmore Tire Ctr., Inc.*, 81 B.R. 136 (Bankr. S.D. Fla. 1987)).

179. *See Dinsmore Tire Ctr.*, 81 B.R. at 137.

amount from the secured creditor for negotiating the sale and disbursing the proceeds of the creditor's collateral.¹⁸⁰ The court reasoned, however, that the trustee's compensation was governed exclusively by section 362(a) of the Code.¹⁸¹ The Code provided no authorization for the trustee to retain any payment beyond that allowed under section 362(a).¹⁸² Thus, any additional recovery by the trustee for his services constituted "a recovery by the trustee for the estate."¹⁸³ The *Dinsmore Tire Center* court made no reference to section 506(c) in connection with a recovery for the estate.

Thus, unlike the preferential transfer described in *Philadelphia Light Supply*, the section 506(c) claim is *not* recovered for the benefit of the estate. Regardless of whether the trustee or a third party pursues the claim, the section 506(c) claim is a recovery for the individual claimant. It is, therefore, meaningless to limit section 506(c) standing on the principle that "only the trustee has standing for the estate."¹⁸⁴ In application, the trustee is required to pursue the claim for the section 506(c) claimant.¹⁸⁵ Assertions to the contrary notwithstanding,¹⁸⁶ third party standing does not permit the third party to usurp the trustee's role as the estate's fiduciary by preferentially recovering property of the estate. Rather, third party standing allows the claimant to perform a *distinct* trustee function related, not to the estate, but rather to the section 506(c) claim against the secured claimholder. Consequently, the much belabored distinction between direct and derivative standing is superfluous in the context of third party standing under section 506(c).

In summary, neither the express provisions of the Bankruptcy Code nor the Code's underlying policies preclude third party standing for section 506(c) claims. It is, therefore, appropriate for courts to exercise section 105 equitable powers to prevent the secured claimholder from receiving a windfall at the expense of a party rendering post-petition services. Courts should, however, carefully for-

180. *Id.*

181. *Id.*

182. *Id.* at 138.

183. *Id.*

184. *Boyd v. Dock's Corner Assocs. (In re Great N. Forest Prods., Inc.)*, 135 B.R. 46, 68 (Bankr. N.D. Mich. 1991).

185. *See* 11 U.S.C. § 506(c) (1988). Arguably, if § 506(c) did not exist, the trustee could not pursue any claim for an administrative claimant without running afoul of his or her fiduciary obligation to recover property for the estate under § 704(1). In other words, § 506(c) establishes a limited role for the trustee in assessing statutorily defined post-petition costs against a secured claimholder. This role exists independently of the trustee's fiduciary obligations to the estate.

186. *See supra* notes 87-89 and accompanying text.

ulate a rule governing independent standing for third party claimants under section 506(c). The remainder of this Article is devoted to suggesting a workable rule.

V. TWO POSSIBLE SOLUTIONS

Any proposal to resolve the conflict regarding section 506(c) claimants' standing must account for a myriad of difficulties. On the one hand, as the discussion above indicates, the bright-line rule denying standing to third party claimants produces inequitable and unfair results for parties who render useful services to the secured creditor's collateral (and, by implication, the debtor). On the other hand, it is equally undesirable to permit *any* party that involves itself with the post-petition debtor to submit a section 506(c) claim, thereby complicating the administration or reorganization of the debtor's estate. The following proposals attempt to reconcile the competing interests in extending standing to third parties under section 506(c).

A. *The Demand-Futile Rule*

Perhaps the most objectionable aspect of extending third party standing concerns the circumvention of the trustee, or debtor-in-possession, by the third party claimant who renders services to the estate and subsequently commences an action to recover the expense of providing those services. This procedure bypasses the trustee and complicates the process of managing the debtor's estate. Granting third party claimants standing should not result in this type of unnecessary satellite litigation that ultimately consumes the estate's resources.¹⁸⁷ Therefore, any rule permitting third party standing should involve the trustee, or debtor-in-possession, to the greatest extent possible.

Courts could adopt an equitable rule, without altering the existing language of section 506(c), by creating a "demand-futile" procedure for commencing a section 506(c) action.¹⁸⁸ To some extent, such a procedure has already been recognized by several recent de-

187. See, e.g., *Great N. Forest Prods.*, 135 B.R. at 69 (suggesting that, if third party standing were allowed, "every unpaid administrative claimant could sue a secured creditor under § 506(c) to seek to recover asserted costs or expenses"). See *supra* note 95 which expresses similar concerns.

188. As the prior discussion indicates, bankruptcy courts possess the authority to create such a rule through 11 U.S.C. § 105(a) (1988). See *supra* notes 147-59 and accompanying text.

cisions.¹⁸⁹ Specifically, before a third party files a claim under section 506(c), the third party must formally submit the claim to the trustee and request that the trustee pursue the claim for the third party. If the trustee refuses to do so, the third party may commence an action in its own name to recover reasonable and necessary section 506(c) expenses. If the third party fails to comply with this procedure before submitting a section 506(c) claim, the court would be required to dismiss the claim as procedurally unripe.

Such a demand-futile rule avoids the undesirable consequence of permitting any third party to file an action in its own name against the secured creditor. In many cases, the trustee may consider the third party's claim to be reasonable and willingly pursue the claim for the third party. The demand-futile rule would reduce the number of potential litigants involved in the bankruptcy proceedings and consolidate the administration of the estate under the trustee when it is feasible to do so. In the same respect, however, this rule prevents a trustee who is hostile to the third party's interests from unfairly blocking the claim. As one court noted, third parties should be granted standing because "[a]ny other approach would give the trustee unrestricted discretion as to whether a party who arguably benefitted a secured creditor is entitled to pursue a claim against the secured creditor."¹⁹⁰ Further, the court explained that

[i]f the trustee is friendly to the claimant, and is willing to pursue the 11 U.S.C. § 506(c) claim on behalf of the claimant, the claimant will be able to collect assuming the 11 U.S.C. § 506(c) claim is meritorious. If the trustee alone has standing, and the trustee is hostile to the claimant, the claimant's claims will be denied without notice and an opportunity for a hearing. Such a result would raise serious due process questions.¹⁹¹

A trustee's, or debtor-in-possession's, unwillingness to pursue a claim is particularly likely to arise in cases where the trustee lacks a financial incentive to pursue the claim for the third party.¹⁹² For

189. See *In re So Good S. Potato Chip Co.*, 116 B.R. 144, 146 (Bankr. E.D. Mo. 1990); *Guy v. Grogan (In re Staunton Indus., Inc.)*, 74 B.R. 501, 506 (Bankr. E.D. Mich. 1987); *In re DLS Indus., Inc.*, 71 B.R. 679, 681 (Bankr. D. Minn. 1987). Unfortunately, these decisions have not received significant attention from other courts considering this issue.

190. *In re Chicago Lutheran Hosp. Ass'n*, 89 B.R. 719, 726 n.9 (Bankr. N.D. Ill. 1988).

191. *Id.*

192. See *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings*

example, in *McKeesport Steel Castings Co.*, Equitable Gas Company (“Equitable”) supplied natural gas required to operate the debtor’s business prior to the filing of the debtor’s chapter 11 petition.¹⁹³ Equibank, N.A. (“Equibank”), the debtor-in-possession’s largest secured creditor, possessed a secured interest in the debtor’s inventory and accounts receivable.¹⁹⁴ Though Equitable sought to terminate service for the post-petition debtor-in-possession, the bankruptcy court denied it permission to do so and required Equitable to continue supplying natural gas.¹⁹⁵ The debtor-in-possession failed to pay for any of the post-petition natural gas service.¹⁹⁶ Eventually, the debtor-in-possession was purchased as a going concern for \$500,000.00.¹⁹⁷ Equitable sought to recover \$57,261.16 for post-petition natural gas service.¹⁹⁸

In allowing Equitable to bring a claim under section 506(c), the United States Court of Appeals for the Third Circuit noted that Equitable had provided gas service as required by the bankruptcy court’s order.¹⁹⁹ Further, “neither the debtor in possession nor a creditors committee had reason to make a claim on behalf of Equitable, when the debtor would thereby be required to pay for utilities it had received without charge following the date that its petition was filed.”²⁰⁰ In other words, by supplying the debtor-in-possession with natural gas, Equitable had preserved the going concern value of the debtor’s business. Because the value was preserved, the debtor’s business sold at a higher price. Equibank, as a secured creditor, directly benefitted from the preservation of the debtor’s going concern business value, yet it was not required to pay for the benefit.²⁰¹ Of particular importance to the court, the

Co.), 799 F.2d 91, 94 (3d Cir. 1986); *National Bank v. Isaac Cohen Clothing Corp.* (*In re Isaac Cohen Clothing Corp.*), 39 B.R. 199, 200 (Bankr. S.D.N.Y. 1984).

193. *McKeesport Steel Castings*, 799 F.2d at 92.

194. *Id.* at n.1.

195. *Id.* at 92.

196. *Id.*

197. *Id.* at 92-93.

198. *Id.* at 93.

199. *Id.* at 94.

200. *Id.*

201. In fact, the debtor-in-possession never paid Equitable for any post-petition natural gas service. *Id.* at 92-93. Thus, considering the debtor-in-possession’s financial woes, Equitable’s services may have ensured that the debtor *had* a going concern value rather than merely a liquidation value. The court left little doubt that it believed that Equibank benefitted from Equitable’s continued natural gas service. *Id.* at 94. The court noted: “If gas service had been terminated, Equibank’s . . . recovery would have been significantly less since these assets either would not have existed or would have been worth little, if anything.” *Id.*

debtor-in-possession lacked incentive to pursue a section 506(c) claim against Equibank because it had already received the natural gas, and future gas service was not contingent upon payment to Equitable.

It is clear that if the *McKeesport Steel Castings* court had denied Equitable standing to pursue a section 506(c) claim, Equibank would have received an enormous windfall at Equitable's expense. The court extended third party standing to prevent an unfair windfall to the secured creditor. Moreover, as a matter of bankruptcy policy, the court's decision rests on firm ground. If only the debtor-in-possession possessed section 506(c) standing, other professionals, trade creditors, and service industries would be likely to withdraw from doing business with debtors-in-possession and trustees because payment for their post-petition services would be subject to the whim of the debtor-in-possession or trustee. In congruence with the *McKeesport Steel Castings* decision, the demand-futile rule suggested by this Article avoids such undesirable consequences by allowing the third party to protect its interests through specific procedural steps. Simultaneously, it provides a workable rule that ensures consolidated management of the reorganization or liquidation process while preventing secured creditors from profiting at the expense of parties rendering services to the post-petition debtor.²⁰²

B. *Amendment to Section 506(c)*

Undoubtedly, the judiciary invests considerable time and effort formulating case law rules to address gaps left by Congress in its efforts to create statutory law. The issues surrounding third party standing under section 506(c) exemplify this type of difficulty. Nevertheless, an amendment to section 506(c) would provide the simplest and clearest resolution to the conflicting interpretations of third party standing. Such an amendment could easily codify the

202. Several commentators have also concluded that standing should be extended to third party claimants under section 506(c). See 3 COLLIER, *supra* note 4, ¶ 506.06. Specifically, one authority noted that

[t]he better view is that a secured creditor who received a direct benefit from the rendition of services or provision of goods by an administrative claimant of the estate should have the collateral charged for such benefit, regardless of whether the proceeds of such charge are paid to the debtor, debtor in possession or trustee as reimbursement for its prior payment to the claimant or are paid to the claimant directly.

Id. at n.7a. Another commentator observed that "cases that permit only the trustee to seek 506(c) expenses from secured creditors . . . seem ill-advised." See Carlson, *supra* note 61, at 430-31.

procedure suggested in the demand-futile rule outlined above. Currently, section 506(c) provides that “[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving or disposing of, such property to the extent of any benefit of the holder of such claim.”²⁰³ The current language could be amended by adding the following sentence: *Any other party may recover to the extent the trustee could recover under this section if the party formally requests that the trustee pursue a colorable claim under this section and the trustee refuses to bring such a claim for that party.*

This proposed amendment deserves some explanation. First, the amendment limits any recovery by a third party “to the extent the trustee could recover.” This language prevents future confusion regarding the amount recoverable by the third party. Namely, the court should treat issues of “reasonable, necessary costs” and “benefit” to the secured claimholder in the same fashion for trustees and third parties alike. Second, the amendment requires that the third party “formally” request that the trustee pursue the claim. At minimum, this rule would require the third party to file a written request with the trustee to bring a section 506(c) claim for the benefit of the third party. Alternatively, in a more formal procedure, the amendment might require the third party to file a Motion to Request Trustee to Pursue a Section 506(c) Claim with the bankruptcy court.²⁰⁴ Regardless, the amendment contemplates a definitive procedure whereby the trustee is given adequate opportunity to pursue the third party’s claim if he or she desires to do so.

Finally, the proposed amendment utilizes the term “colorable claim” to provide a trustee some basis upon which to reject the third party’s claim. The language seeks to prohibit third parties from wasting judicial resources by bringing frivolous claims. The trustee would have the opportunity to reject the claim and, if necessary, file a motion before the bankruptcy court seeking to deny the third party standing on the grounds that the claim is meritless. On the other hand, as the language suggests, the term “colorable claim” should be construed broadly to include those claims involving the disposition or preservation of the collateral that arguably conferred a benefit upon the secured creditor. A narrow construction would

203. 11 U.S.C. § 506(c) (1988).

204. This would require an additional amendment to the Federal Rule of Bankruptcy Procedure regarding the filing of the motion.

defeat the purpose of allowing a third party to pursue meritorious claims.

Ultimately, the statutory solution follows a path similar to the demand-futile case law rule. Both proposals attempt to provide some basis to permit third parties to pursue section 506(c) claims while simultaneously limiting the circumstances under which a third party would be entitled to do so. Most importantly, however, either solution would remedy the current conflict among the circuits and provide a principled basis upon which to prevent secured creditors from receiving a windfall at the expense of parties rendering services to the post-petition debtor.

CONCLUSION

The current version of Bankruptcy Code section 506(c) is derived from the equitable principle that persons protecting or managing a trust or *res* are entitled to recover their expenses from the trust fund.²⁰⁵ The Bankruptcy Act of 1898 attempted to codify this idea, but it failed to provide a coherent method of determining the types of costs and expenses chargeable to the secured creditor's interest. Moreover, though it was never specifically addressed, courts appeared to allow standing to third party claimants under the Bankruptcy Act.²⁰⁶ After nearly a century of confusing and frequently conflicting decisional law, the Bankruptcy Code of 1978 added section 506(c). At first blush, section 506(c) appeared to limit standing to pursue such a claim to trustees and debtors-in-possession.

Such a limited reading, however, produced inequitable results, prompting a majority of courts to expand section 506(c) standing to include third parties.²⁰⁷ Other decisions, however, interpreted the statutory language in a "literal" manner and limited section 506(c) standing to the trustee or debtor-in-possession.²⁰⁸ This Article confronts the arguments of those decisions that denied third parties standing and concludes that no provision or policy of the Bankruptcy Code precludes granting standing to third parties.²⁰⁹ In an attempt to provide a workable alternative, this Article suggests that bankruptcy courts, applying their equitable powers, could create a demand-futile rule requiring third parties to request that the trustee

205. See *supra* notes 12-16 and accompanying text.

206. See *supra* notes 56-66 and accompanying text.

207. See *supra* note 105.

208. See *supra* note 67.

209. See *supra* notes 134-86 and accompanying text.

pursue their section 506(c) claim prior to bringing such an action independently. Alternatively, the Article proposes that Bankruptcy Code section 506(c) could be amended to provide the statutory basis for a procedure whereby third party claimants would possess independent standing if the trustee refused to pursue a colorable claim for section 506(c) expenses. Both solutions prevent secured claimholders from unfairly benefitting from the efforts of parties rendering services to the post-petition debtor.

