Duquesne Law Review

Volume 45 | Number 4 Article 5

2007

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Workers' Compensation Is Not an Employee Benefit Program: *Howard Delivery Services, Inc. v. Zurich American Insurance Co.*

STATUTORY INTERPRETATION — BANKRUPTCY CODE — PRIORITY STATUS — The United States Supreme Court held that unpaid workers' compensation premiums owed to a private creditor are not afforded priority status in a bankruptcy proceeding as "contributions to an employee benefit plan," largely because employers receive at least an equal benefit from workers' compensation as do employees.

Howard Delivery Servs., Inc. v. Zurich Am. Ins. Co., 126 S. Ct. 2105 (2006).

Petitioner, Howard Delivery Service (hereinafter "Howard"), owned and operated a freight trucking business, employing approximately 480 employees in twelve states.[1] Each of those states required Howard to provide workers' compensation coverage to its employees.[2] Howard entered into an agreement with respondent, Zurich American Insurance (hereinafter "Zurich"), wherein Zurich was to provide workers' compensation insurance in ten of those states.[3]

On January 30, 2002, Howard filed a voluntary petition for relief pursuant to Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of West Virginia.[4] Zurich reacted by filing an unsecured creditor's claim, claiming priority status for approximately $400,000 in unpaid workers' compensation premiums.[5] In an amended proof of claim, Zurich asserted that § 507(a)(5) of the Bankruptcy Code[6]

1. Howard Delivery Servs., Inc. v. Zurich Am. Ins. Co., 126 S. Ct. 2105, 2109 (2006).
2. *Howard Delivery*, 126 S. Ct. at 2109.
3. *Id.*
4. Howard Delivery Servs., Inc. v. Zurich Am. Ins. Co. (*In re* Howard Delivery Servs.), 403 F.3d 228, 230 (4th Cir. 2005).
5. *Howard Delivery*, 126 S. Ct. at 2109. Zurich filed a second proof of claim, but did not assert priority status for said second claim. *Howard Delivery*, 403 F.3d at 230 n.3.
6. Bankruptcy Code, 11 U.S.C.A. § 507(a)(5) (Supp. 2006). In the time between the Fourth Circuit's decision and the Supreme Court's decision, the numbering of the 507 priorities in the Bankruptcy Code was altered by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 212(2), 119 Stat. 51, changing the prior-

afforded its claim priority status.[7] Section 507(a)(5) accords priority status to unsecured creditors' claims for unpaid "contributions to an employee benefit plan arising from services rendered."[8] Howard objected to Zurich's basis for asserting priority status, arguing that workers' compensation premiums are not afforded 507(a)(5) priority status as "contributions to an employee benefit plan."[9]

The Bankruptcy Court for the Northern District of West Virginia agreed with Howard's argument.[10] The court noted that § 507(a)(5) was added to the Bankruptcy Code to overrule *United States v. Embassy Restaurant*,[11] which held that a debtor's unpaid contributions to a bargained-for union welfare plan were not within the priority afforded to unpaid "wages."[12] The court held that, because the enactment of § 507(a)(5) overturned a decision wherein the sole issue addressed was whether unpaid *bargained-for* benefits were afforded priority status, Congress intended only to afford priority status to the same.[13] Therefore, the court denied priority status to the unpaid workers' compensation premiums, reasoning that only bargained-for benefits are within the purview of the priority status afforded to "contributions to an employee benefit plan."[14]

Zurich appealed the decision to the United States District Court for the Northern District of West Virginia, arguing that the bankruptcy court's holding ignored the plain meaning of the statute and that the bankruptcy court erred in ruling that priority under § 507(a)(5) is available only for bargained-for benefits.[15] The district court disagreed and affirmed the bankruptcy court.[16] The district court first noted that in contracting with a third-party

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ity list so that (a)(3) became (a)(4), and (a)(4) became (a)(5). *Howard Delivery*, 126 S. Ct. at 2109 n.1. All references to the Bankruptcy Code in this case note, as in the Supreme Court opinion, use the current numbering.

7. *Howard Delivery*, 126 S. Ct. at 2109.

8. 11 U.S.C.A. § 507(a)(5).

9. *In re* Howard Delivery Servs., Inc., No. 02-30289, 2003 Bankr. LEXIS 2142, at *2-3 (Bankr. N.D. W. Va. Jul. 15, 2003).

10. *Howard Delivery*, 2003 Bankr. LEXIS 2142, at *7.

11. 359 U.S. 29 (1959). The bankruptcy court failed to mention that 507(a)(5) was also enacted in order to overrule *Joint Industry Board of Electrical Industry v. United States*, 391 U.S. 224 (1968), which followed *Embassy Restaurant*. *Howard Delivery*, 126 S. Ct. at 2110-11.

12. *Howard Delivery*, 126 S. Ct. at 2111.

13. *Howard Delivery*, 2003 Bankr. LEXIS 2142, at *8-9.

14. *Id.*

15. Howard Delivery Servs., Inc. v. Zurich Am. Ins. Co. (*In re* Howard Delivery Servs.), No. 3:03CV61, 2003 U.S. Dist. LEXIS 26464, at *11 (N.D. W. Va. Dec. 22, 2003).

16. *Howard Delivery*, 2003 U.S. Dist. LEXIS, at *2.

provider of workers' compensation insurance, the employer shielded itself from the liability of providing workers' compensation benefits.[17] The design and purpose of workers' compensation insurance, therefore, benefits the employer more than its employees.[18]

The court also disagreed that § 507(a)(5) covered more than bargained-for benefits.[19] The aim of § 507(a)(5), the court noted, was to afford priority status to "fringe benefits" gained from "labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted."[20] Because workers' compensation is statutorily mandated, employers may not offer higher wages as a substitute for workers' compensation benefits.[21] The court concluded that workers' compensation benefits are not a "fringe benefit" included within the term "employee benefit plan."[22]

The Fourth Circuit reversed two to one in a per curiam opinion,[23] holding that workers' compensation premiums are afforded priority status pursuant to § 507(a)(5), with the judges in the majority disagreeing on the rationale.[24] Judge King, concurring in the judgment, found that workers' compensation premiums are plainly and unambiguously "contributions to an employee benefit plan."[25] Having found that workers' compensation premiums are "contributions to an employee benefit plan," Judge King refused Howard's invitation to examine the legislative history of the statute, noting that such an analysis would violate the long-standing precedent of examining a statute's legislative history only after the statute is found to be ambiguous.[26]

Judge Shedd concurred in the judgment, but disagreed on whether the phrase "employee benefit plan" is ambiguous.[27] Judge Shedd agreed with Judge King that the individual words

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17. *Id.* at *12-13.
18. *Id.*
19. *Id* at *12.
20. *Id* at *13. (quoting H.R. Rep. No. 95-595, at 187 (1978), *as reprinted in* 1978 U.S.C.A.A.N. 5963, 6313).
21. *Howard Delivery*, 2003 U.S. Dist. LEXIS 26464, at *12.
22. *Id.*
23. A per curiam opinion is defined as "[a]n opinion handed down by an appellate court without identifying the individual judge who wrote the opinion." BLACK'S LAW DICTIONARY 1125 (8th ed. 2004).
24. Howard Delivery Servs., Inc. v. Zurich Am. Ins. Co. (*In re* Howard Delivery Servs.), 403 F.3d 228, 229 (4th Cir. 2004).
25. *Howard Delivery*, 403 F.3d at 237 (King, J., concurring).
26. *Id.* at 238 n.14.
27. *Id.* at 238 (Shedd, J., concurring).

within the phrase are unambiguous, but the phrase as a whole, Judge Shedd noted, is ambiguous.[28] In support of his conclusion, Judge Shedd noted that, while Judge King's definition was a reasonable one, a definition of the phrase could just as reasonably exclude workers' compensation premiums.[29] Finding the phrase to be ambiguous, Judge Shedd examined the statute's legislative history and concluded that it showed Congress' intent for workers' compensation insurance plans to be within the definition of "employee benefit plan."[30] Specifically, Judge Shedd believed that the legislative history revealed Congress' intention for the term "employee benefit plan" in § 507(a)(5) to share the same meaning as "employee benefit plan" under the Employee Retirement Income Security Act (ERISA).[31] Because an "employee benefit plan" under ERISA includes workers' compensation insurance plans, Judge Shedd held the same should be true of the phrase "employee benefit plan" under § 507(a)(5) of the Bankruptcy Code.[32]

Judge Niemeyer dissented.[33] Like the bankruptcy court and the district court, Judge Niemeyer felt that workers' compensation premiums are not within the plain language of § 507(a)(5).[34] He noted that a rule of statutory construction peculiar to the Bankruptcy Code, which requires courts to narrowly construe statutory priorities so that priority status is afforded only "when authorized by Congress in clear and unequivocal terms,"[35] prohibited affording workers' compensation premiums § 507(a)(5) priority status.[36]

The United States Supreme Court granted certiorari to resolve a split among the circuit courts.[37] Writing for the majority, Justice Ginsburg reversed the Fourth Circuit, holding that workers' compensation premiums owed by an employer to its workers' com-

28. *Id.* at 238-39.
29. *Id.* at 239.
30. *Howard Delivery*, 403 F.3d at 241 (Shedd, J., concurring).
31. *Id.* at 241 (citing Employee Retirement Income Security Act of 1974, 88 Stat. 829 (1974) (current version at 29 U.S.C. § 1001 (2000 & Supp. III)).
32. *Id.*
33. *Id.* (Niemeyer, J., dissenting).
34. *Id.* at 244.
35. *Howard Delivery*, 403 F.3d at 242 (Niemeyer, J., dissenting).
36. *Id.*
37. Howard Delivery Servs., Inc. v. Zurich Am. Ins. Co., 126 S. Ct. 2105, 2110 (2006). Before the Fourth Circuit's decision, four other circuits had considered the issue of whether a debtor's unpaid premiums for workers' compensation insurance were afforded 507(a)(5) priority status as "contributions to an employee benefit plan arising from services." *Howard Delivery*, 126 S. Ct. at 2110. The Sixth, Eighth, and Tenth Circuits all found that workers' compensation premiums are not afforded 507(a)(5) priority status as they are not "contributions to an employee benefit plan," while the Ninth Circuit found that workers' compensation insurers are entitled to priority status. *Id.*

pensation insurance carrier are not afforded § 507(a)(5) priority status in a bankruptcy proceeding.[38]

Justice Ginsburg began by focusing on the bankruptcy court's central premise: that § 507(a)(5) was enacted to overrule *United States v. Embassy Restaurant*[39] and *Joint Industry Board of Electric Industry v. United States*,[40] two cases which held that unpaid contributions to a union welfare plan did not fall within the priority for unpaid wages.[41] While it is clear, Judge Ginsburg noted, that the type of bargained-for benefits at issue in *Embassy Restaurant* and *Joint Industry* are within the § 507(a)(5) priority, Congress' failure to define the terms "*contributions* to an *employee benefit plan* arising from *services rendered*," made it equally unclear whether workers' compensation premiums are within the same priority.[42]

Before interpreting those undefined terms, Justice Ginsburg rejected Zurich's argument that Congress intended to incorporate the ERISA definition of "employee benefit plan" into the Bankruptcy Code.[43] Quoting from *United States v. Reorganized CF&I Fabricators of Utah, Inc.*,[44] Justice Ginsburg noted that "'here and there in the Bankruptcy Code Congress has included specific directions that establish the significance for bankruptcy law of a term used elsewhere in the federal statutes.'"[45] As no such directions are contained within § 507(a)(5), the Court rejected Zurich's invitation to write them into the text.[46]

Justice Ginsburg next turned her attention to whether unpaid workers' compensation premiums are accorded § 507(a)(5) priority status.[47] While the Court concluded that they are not, it did not reason that the statute, by its plain meaning, excluded workers' compensation.[48] Rather, Justice Ginsburg held that unpaid workers' compensation premiums are not afforded § 507(a)(5) priority because of the essential character of workers' compensation in

38. *Id.* at 2109 (Roberts, C.J., and Stevens, Scalia, Thomas, and Breyer, JJ., joined in the majority opinion).
39. 359 U.S. 29 (1959).
40. 391 U.S. 224 (1968).
41. *Howard Delivery*, 126 S. Ct. at 2111.
42. *Id.* at 2111-12.
43. *Id.* at 2113.
44. 518 U.S. 213 (1996).
45. *Howard Delivery*, 126 S. Ct. at 2113 (quoting *CF&I Fabricators*, 518 U.S. at 219-20 (1996)).
46. *Id.*
47. *Id.*
48. *Id.*

contradistinction to the character of employer-sponsored pension plans.[49]

Particularly, Justice Ginsburg noted that, while employer-sponsored pension plans benefit only the employee as wage substitutes, workers' compensation insurance benefits both employees and employers; namely, employees receive compensation for their on-the-job injuries, while employers are shielded from tort liability.[50] Since workers' compensation shields an employer from tort liability, workers' compensation insurance, according to Justice Ginsburg, is more similar to other forms of liability insurance than it is to pension plans designed to ensure an employee's retirement.[51]

The final difference Justice Ginsburg noted is that, even if an employer fails to provide workers' compensation insurance, employees are able to receive the same benefit that said coverage would have provided either through recourse to a state-maintained emergency fund, or in an action in tort against the employer.[52] These alternate avenues are available because workers' compensation, unlike other employee benefit plans, is statutorily mandated in most jurisdictions.[53]

Justice Ginsburg also mentioned that, in interpreting preferential portions of the Bankruptcy Code, courts are required to construe priorities narrowly, so as not to give priority to a claimant not clearly and unequivocally entitled thereto by the statute.[54] The Court, fearing that extending priority status in the absence of a clear indication from Congress to do so would wrongfully diminish the funds available to unsecured creditors with either lower priority or no priority, concluded it must deny priority status to a debtor's unpaid contributions to a workers' compensation insurance plan.[55]

Lastly, Justice Ginsburg addressed another case where the Fourth Circuit afforded priority status to a debtor's unpaid workers' compensation premiums.[56] In *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*,[57] the Fourth Circuit

49. *Id.*
50. *Howard Delivery*, 126 S. Ct. at 2113-14.
51. *Id.* at 2114.
52. *Id.*
53. *Id.*
54. *Id* at 2116.
55. *Howard Delivery*, 126 S. Ct. at 2114.
56. *Id.* at 2115.
57. 886 F.2d 714, 718-20 (4th Cir. 1989).

addressed the issue of whether unpaid workers' compensation insurance premiums to a *state fund*, rather than a private insurer, qualified for bankruptcy priority as an "excise tax" under § 507(a)(8)(E) of the Bankruptcy Code.[58] The court held that such an unpaid premium was indeed accorded priority status as an "excise tax."[59] In explaining the distinction between the current holding and the Fourth Circuit's holding in *New Neighborhoods*, Justice Ginsburg noted Congress' general preference for government creditors over private creditors.[60] Given that general preference, Justice Ginsburg observed that it would be inconsistent to advance Zurich's claim to a fifth-level priority, while a government creditor is only entitled to an eighth-level priority.[61]

Justice Kennedy dissented.[62] While Justice Kennedy did individually address the arguments raised by the majority, his main point of disagreement concerned the plain meaning of the statute.[63] Justice Kennedy read § 507(a)(5) to mean that a program which benefits employees in the ordinary sense of the term is conclusively an "employee benefit plan."[64] Justice Kennedy further argued that, while the majority properly cited the principle that preferential provisions of the Bankruptcy Code are to be read narrowly, it misapplied that principle, and read the provision "so narrowly as to conflict with [the statute's] plain meaning."[65]

The dissent alternatively argued that, even if employees must receive a net benefit from the plan in question for it to be accorded § 507(a)(5) priority status as an employee benefit plan, workers' compensation would still qualify.[66] Despite the immunity from tort liabilities that workers' compensation affords employers, prior to the effectuation of workers' compensation, employers often won

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58. *Howard Delivery*, 126 S. Ct. at 2115.
59. *New Neighborhoods*, 886 F.2d at 716.
60. *Howard Delivery*, 126 S. Ct. at 2115.
61. *Id.* Section 507 begins by stating that "[t]he following expenses and claims have priority in the following order." Bankruptcy Code, 11 U.S.C.A. § 507(a) (Supp. 2006). Because the bankrtupt's creditors' claims are grouped according to their priority level, and creditors accorded lower priorities are reimbursed only after the creditors accorded higher priority levels have been totally compensated, a creditor's priority level may control whether that creditor receives any compensation from the bankrupt's estate. Therefore, the higher the priority level a creditor is accorded, the more likely that creditor will be paid from the bankrupt's estate. *In re* Saco Local Dev. Corp., 711 F.2d 441, 446 (1st Cir. 1983).
62. *Howard Delivery*, 126 S. Ct. at 2117 (Kennedy, J., dissenting) (Souter and Alito, JJ., joined in the dissenting opinion).
63. *Id.* at 2118.
64. *Id.*
65. *Id.*
66. *Id.*

employee-filed tort suits for various reasons; namely, plaintiffs had the burden of proving that employers were at fault, and employers were afforded the defenses of assumption of the risk, contributory negligence, and the fellow-servant doctrine.[67] As a result, Justice Kennedy concluded that employees receive a net benefit from workers' compensation because only a small percentage of injured employees ever recovered in tort prior to the effectuation of workers' compensation.[68]

Finally, the dissent addressed the arguments advanced by the majority.[69] First, Justice Kennedy argued that workers' compensation plans are wage substitutes.[70] Second, he reasoned that, by relying upon the mandatory nature of workers' compensation in the case at bar, the application of the Court's holding would depend upon whether the jurisdiction of the debtor's place of business statutorily requires workers' compensation.[71] Third, Justice Kennedy contended that the fact that employees could obtain the same benefit from a state-maintained fall back fund was irrelevant and ignored the purpose of granting priorities.[72] The priorities afforded to employee wages and employee benefit programs are meant to protect employees' financial well-being, and if the insurers of employee benefit programs are not afforded priority status, employees will be harmed either by the insurer's inability to pay their benefits or by the insurer's need to charge higher rates for identical coverage.[73] Lastly, Justice Kennedy noted that when Congress uses a term of art in two separate statutes, the term's meaning in the separate statutes should be shared, unless the statutes have conflicting purposes.[74] Justice Kennedy opined that since the Bankruptcy Code's priorities and ERISA do not have conflicting purposes, the Court erred in finding that the term of art did not have the same meaning in both statutes.[75]

The purpose or aim of the Bankruptcy Code, to which Justice Kennedy referred, is "to bring about an equitable distribution of

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67. *Howard Delivery*, 126 S. Ct. at 2118 (Kennedy, J., dissenting).
68. *Id.*
69. *Id.* at 2119.
70. *Id.*
71. *Id.* at 2119-20. Justice Kennedy noted that while only a few states have "wholly permissive" workers' compensation regimes, "many offer exemptions for particular kinds of employers." *Id.*
72. *Howard Delivery*, 126 S. Ct. at 2120 (Kennedy, J., dissenting).
73. *Id.*
74. *Id.*
75. *Id.*

the bankrupt's estate among creditors holding just demands,"[76] and "if one claimant is to be preferred over others, the purpose should be clear from the statute."[77] Since 1841, Congress has clearly afforded priority status to employee wages in bankruptcy proceedings.[78] However, alternative forms of compensation, i.e., fringe benefits, owed to a debtor's employees were not afforded preferential treatment until 1978.[79]

Congress' decision to amend the Bankruptcy Code was prompted by two decisions of the Supreme Court.[80] First, in *United States v. Embassy Restaurant*,[81] the Court held that an employer's unpaid contributions to a collectively bargained-for union welfare plan were not afforded § 507(a)(4) priority status as "'wages . . . due to workmen.'"[82] In reaching its holding, the Court stressed both the nature of the welfare fund[83] and the above-mentioned purpose of the Bankruptcy Code.[84]

The Court began by describing the welfare fund and the rights and obligations it created in both the employer and its unionized employees.[85] The collective bargaining agreement in *Embassy Restaurant* required the employer to contribute "$8 per month per full-time employee" into a trust.[86] The proceeds of the trust were paid as both life insurance and health benefits to its unionized employees.[87] However, the trustees were given complete title to the funds of the trust and full discretion to "establish the conditions of eligibility for benefits."[88] In other words, the union members had no legal right or interest in the trust funds.[89]

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76. Kothe v. R.C. Taylor Trust, 280 U.S. 224, 227 (1930).

77. Nathanson v. NLRB, 344 U.S. 25, 29 (1952).

78. United States v. Embassy Rest., 359 U.S. 29, 31-32 (1959). The Bankrupt Act of August 19, 1841, established a third-level priority for creditor's owed wages from the debtor. *Embassy Rest.*, 359 U.S. at 32 n.4 (citing Bankrupt Act, 5 Stat. 445 (1841)).

79. *Howard Delivery*, 126 S. Ct. at 2111. Interestingly, Congress amended the Bankruptcy Code in 1934 to afford workers' compensation premiums a seventh-level priority. *Embassy Rest.*, 359 U.S. at 32. However, Congress repealed said priority only four years later. *Id.*

80. *Howard Delivery*, 126 S. Ct. at 2110.

81. 359 U.S. 29 (1959).

82. *Embassy Rest.*, 359 U.S. at 33 (quoting Bankruptcy Act, 11 U.S.C. § 104(a)(2) (Supp. V. 1952) (repealed 1978)).

83. *Id.* at 33.

84. *Id.* at 31.

85. *Id.* at 30-31.

86. *Id.* at 30.

87. *Embassy Rest.*, 359 U.S. at 30.

88. *Id.*

89. *Id.*

After it examined the nature of the benefit plan, the Court rejected the trustees' argument that, since unions bargain for both wages and benefits as part of a wage package, bargained-for benefits should be included within the priority afforded to wages.[90] The Court cited the principle that restricts it from extending priorities to creditors unless it is clear from that statute that Congress intended such an extension.[91] The Court reasoned that wages were accorded priority status because of the financial hardship that an employer's bankruptcy inflicted upon its employees.[92] The Court further reasoned that, because the employees of the debtor had no legal right to the trust funds, those funds offered no support to the employees during their time of financial distress.[93] It was, therefore, far from clear that Congress intended contributions to benefit plans, to which employees had no legal right, to share in the priority afforded to the wages due to employees.[94]

Congress also abrogated *Joint Industry Board of Electric Industry v. United States*[95] with the 1978 enactment of § 507(a)(5).[96] In *Joint Industry*, the Court held that "unpaid contributions to an employees' annuity plan established by a collective bargaining agreement" were not afforded priority status as wages.[97] In reaching its holding, the Court reasoned that *Embassy Restaurant* was controlling,[98] despite a significant distinguishing factor noted by the dissent.[99] While the debtor's employees in *Embassy Restaurant* had no legal right to the trust funds, such was not the case in *Joint Industry*.[100] In *Joint Industry*, the employee had a legal right to sums paid into the fund.[101] This right was deferred until the occurrence of a number of contingencies.[102] According to the dissent, wages should not lose their priority status simply because they are not immediately payable to an employee.[103]

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90. *Id.* at 31-32.
91. *Id.* at 33.
92. *Embassy Rest.*, 359 U.S. at 33.
93. *Id.*
94. *Id.*
95. 391 U.S. 224 (1968).
96. Howard Delivery Servs., Inc. v. Zurich Am. Ins. Co., 126 S. Ct. 2105, 2110-11 (2006).
97. *Joint Indus.*, 391 U.S. at 225.
98. *Id.* at 226.
99. *Id.* at 231 (Fortas, J., dissenting).
100. *Id.*
101. *Id.*
102. *Joint Indus.*, 391 U.S. at 231 (Fortas, J., dissenting).
103. *Id.*

Congress reacted to the Court's holdings in *Embassy Restaurant* and *Joint Industry* by amending the Bankruptcy Code in 1978.[104] The 1978 amendment to the Bankruptcy Code afforded priority status to unpaid "contributions to an employee benefit plan arising from services rendered."[105] The First Circuit Court of Appeals was the first federal appellate court to address the breadth of this newly enacted provision in the case of *In re Saco Local Development Corp.*[106] The issue was whether a debtor's unpaid payments toward a noncontributory "employee group life, health, and disability insurance"[107] plan were afforded priority status as contributions to an employee benefit plan.[108] The court held that the unpaid payments were entitled to priority status, reasoning that, although the insurance plan was not the result of collective bargaining, the plan was the result of a "de facto 'bargain' in which employees accepted lower wages than other firms paid in return for a noncontributory plan."[109] The *Saco* court further opined that an insurer should have the right to obtain priority status for premiums "attributable to insurance plan fringe benefits," because allowing an insurer to obtain its premiums through the priority is the best way to protect an employee's benefits due from the insurance plan.[110]

In *Employers Insurance of Wausau v. Plaid Pantries*,[111] the Ninth Circuit held that a debtor's unpaid workers' compensation premiums should be afforded priority status as contributions to an employee benefit plan.[112] The court noted that § 507(a)(5) was added to overrule two cases that refused to afford priority status to "fringe benefits."[113] The court reasoned that, although workers' compensation is statutorily mandated, it is nevertheless a benefit to employees, compensating them in times of distress.[114] The court also reasoned that, since Congress did not amend § 507(a)(4), which gives priority to wages, when it enacted § 507(a)(5), it did not intend to grant priority only to wage substi-

104. Howard Delivery Servs., Inc. v. Zurich Am. Ins. Co., 126 S. Ct. 2105, 2111 (2006).
105. 11 U.S.C.A. § 507(a)(5) (Supp. 2006).
106. 711 F.2d 441 (1st Cir. 1983).
107. *Saco*, 711 F.2d at 442.
108. *Id.* at 448.
109. *Id.*
110. *Id.* at 449.
111. 10 F.3d 605 (9th Cir. 1993).
112. *Plaid Pantries*, 10 F.3d at 607.
113. *Id.*
114. *Id.*

tutes.[115] In adding a priority to the Code, Congress intended to expand priority coverage to wage supplements, not just to wage substitutes.[116]

The next three circuits to address the issue of whether unpaid workers' compensation premiums are afforded priority status in a bankruptcy proceeding disagreed with the Ninth Circuit and held that a debtor's unpaid workers' compensation premiums are not afforded priority status as contributions to an employee benefit plan.[117] The Eighth Circuit in *In re HLM Corp.*[118] was the first of the three circuits to disagree with the Ninth Circuit.[119] In support of its holding, the court referenced the legislative history of the Code section and opined that Congress intended to afford priority status only to those benefits that were the result of employer/employee bargaining.[120] Since Minnesota, the jurisdiction in which the debtor's business was located, statutorily required employers to purchase workers' compensation insurance, the court held that workers' compensation is not an employee benefit plan.[121]

The Eighth Circuit also recognized the benefit that employers receive from workers' compensation, namely the shield from tort liability.[122] The court further noted that, if an employer, in violation of the law, fails to provide workers' compensation insurance to its employees, they have the statutory right to receive the same benefits from a state-maintained fund.[123] Workers' compensation, the court held, is a right and not a "true 'benefit'" — a term used to describe a benefit available to an employee only through an employer-sponsored insurance program.[124]

The next circuit to confront the issue of whether workers' compensation is an employee benefit plan was the Tenth Circuit in *In re Southern Star Foods.*[125] The Tenth Circuit, much like the

115. *Id.*
116. *Id.*
117. *See In re* Birmingham-Nashville Express, Inc., 224 F.3d 511 (6th Cir. 2002); *In re* S. Star Foods, 144 F.3d 712 (10th Cir. 1998).
118. 62 F.3d 224 (8th Cir. 1995).
119. *HLM*, 62 F.3d 224. Although the court did acknowledge the Ninth Circuit's decision in *Plaid Pantries*, it rejected the holding of that case in only one sentence, saying "we disagree [with the Ninth Circuit] and believe that they have excessively broadened the reach of the Code language in question." *Id.* at 227.
120. *Id.* at 225-26.
121. *Id.* at 226.
122. *Id.*
123. *Id.*
124. *HLM*, 62 F.3d at 226.
125. 144 F.3d 712 (10th Cir. 1998).

Eighth Circuit, focused on the fact that workers' compensation is not a bargained-for benefit, but one that is statutorily mandated.[126] Additionally, the Tenth Circuit highlighted the immunity from tort liability that employers receive from workers' compensation, reasoning that because of that immunity, workers' compensation actually benefits employers more than it does employees.[127] Lastly, the Tenth Circuit addressed the Ninth Circuit's holding in *Employers Insurance of Wausau v. Plaid Pantries.*[128] The court criticized that decision, reasoning that the Ninth Circuit, in derogation of the principle that Bankruptcy Code priorities should be read narrowly, read the priority broadly.[129]

Prior to *Howard Delivery*,[130] the Sixth Circuit was the last circuit to hear this issue in the case of *In re Birmingham-Nashville Express, Inc.* [131] While the Sixth Circuit began by citing the theme of equal distribution to creditors and the corollary principle that priorities should therefore be construed narrowly, its interpretation of the § 507(a)(5) priority began at a different point than other circuits that had previously addressed these issues.[132] The court began its analysis by rejecting the First Circuit's holding in the case of *In re Saco Local Development Corp.*,[133] arguing that an employer's unilateral payment for an employee insurance plan is not a "contribution" within the meaning of the priority.[134] The court opined that the priority for "contributions to an employee benefit plan" is accorded only to those plans where employees contribute a portion of their salary to fund the benefit plan.[135] The court further interpreted the word "contribute" to include payments that are statutorily mandated, like workers' compensation premiums in Tennessee, despite the term's common association with voluntary or charitable transfers.[136]

Next, the Sixth Circuit addressed the meaning of the phrase "employee benefit plan."[137] While the court noted that workers' compensation insurance is explicitly included in the statutory

126. *Star Foods*, 144 F.3d at 716.
127. *Id.*
128. *Id.* (citing Employers Ins. of Wausau v. Plaid Pantries, 10 F.3d 605 (9th Cir. 1993)).
129. *Id.*
130. Howard Delivery Servs., Inc. v. Zurich Am. Ins. Co., 126 S. Ct. 2105 (2006).
131. 224 F.3d 511 (6th Cir. 2000).
132. *Birmingham-Nashville*, 224 F.3d at 515.
133. 711 F.2d 441 (1st Cir. 1983).
134. *Birmingham-Nashville*, 224 F.3d at 515.
135. *Id.*
136. *Id.*
137. *Id.* at 516-17.

definition of employee benefit plan under ERISA, the court maintained that ERISA and the Bankruptcy Code "serve different and non-overlapping purposes," and therefore rejected any invitation to incorporate the ERISA definition into the Bankruptcy Code.[138] Rather, the court reasoned that until Congress passed a clearer statement, it must abide by the principle that priorities should be interpreted narrowly and extended only when a claimant is clearly and unequivocally entitled thereto.[139] Finding workers' compensation to be "an award arising out of a work-related injury," and not a wage substitute, the court held that workers' compensation is not an employee benefit plan.[140]

Although it had already reached its holding, the Sixth Circuit continued its opinion, analyzing a situation in which it had previously afforded priority status to workers' compensation premiums.[141] In the case of *In re Suburban Motor Freight, Inc.*,[142] the debtor owed workers' compensation premiums to a government creditor.[143] The Sixth Circuit held that those premiums were afforded what is now 507(a)(8)(E) priority status as claims by a "'governmental unit' for 'an excise tax on . . . a [pre-petition] transaction.'"[144] Thus, the private creditor in the later Sixth Circuit case argued that, because the Sixth Circuit had previously afforded priority status to unpaid workers' compensation premiums owed to a governmental unit, that decision, by analogy, required a similar result when the premiums were owed to a private creditor.[145] The court disagreed with the private creditor and explained that Congress often prefers public creditors over private creditors.[146] The court, quoting its opinion in *Suburban Motor*, stated that "'the workings of Government cannot await bankruptcy distribution alongside unsecured creditors, with the possibility, even the probability of receiving pennies on the dollar of what the taxpayer-debtor owed.'"[147]

Interestingly, the Fourth Circuit confronted the issue of whether unpaid workers' compensation premiums owed to a public

138. *Id.* at 517.
139. *Birmingham-Nashville*, 224 F.3d at 517.
140. *Id.*
141. *Id.* at 517-18.
142. 998 F.2d 338 (6th Cir. 1993).
143. *Birmingham-Nashville*, 224 F.3d at 517.
144. *Id.* (quoting the Bankruptcy Code, 11 U.S.C.A. § 507(a)(8)(E) (Supp. 2006)).
145. *Id.*
146. *Id.* at 518.
147. *Id.* (quoting *Suburban Motor*, 998 F.2d at 342).

creditor were afforded priority status prior to deciding whether the same debts owed to a private creditor were afforded priority status.[148] In *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*,[149] the Fourth Circuit held that unpaid workers' compensation premiums are afforded 507(a)(8)(E) priority status as "excise taxes."[150] The court, in dicta, addressed private creditors and considered whether unpaid workers' compensation premiums owed to a private creditor would be afforded priority status.[151] The court opined that they would not, explaining that "such a difference is really only a 'distinction between the sovereign power of the state and the rights of private citizenry.'"[152]

The Fourth and Sixth Circuit cases granting excise tax priority status to unpaid workers' compensation premiums owed to a public creditor are truly interesting because the term "excise tax" is also undefined by the Bankruptcy Code.[153] Therefore, when determining whether unpaid workers' compensation premiums owed to either public or private creditors are afforded priority status, courts must first determine the meaning of two separate, undefined priority provisions.[154] Understanding that the underlying objective of the Bankruptcy Code is equal distribution, and preferential provisions are therefore to be tightly construed, one could reasonably anticipate that "excise taxes" would be construed narrowly enough to exclude workers' compensation from its purview. However, as recited above, both the Fourth[155] and Sixth Circuits[156] have held that workers' compensation premium payments owed to public creditors are within the meaning of "excise taxes."

Justice Ginsburg explained that this apparent inequality in treatment is consistent with Congress' general preference for public creditors over private creditors.[157] However, that preference

148. New Neighborhoods, Inc. v. W. Va. Workers' Comp. Fund, 886 F.2d 714 (4th Cir. 1989).

149. *New Neighborhoods*, 886 F.2d 714.

150. *Id.* at 719 (quoting the Bankruptcy Code, 11 U.S.C.A. § 507(a)(8)(E) (Supp. 2006)). Of particular interest was the court's reasoning that workers' compensation premiums owed to a government creditor are afforded priority as "excise taxes" because of the employer's statutorily mandated obligation to provide workers' compensation. *Id.*

151. *Id.* at 719-20.

152. *Id.* at 720 (quoting State Indus. Accident Comm'n v. Aebi, 162 P.2d 513, 517 (Or. 1945)).

153. Bankruptcy Code, 11 U.S.C.A. § 507(a)(8)(E).

154. *See In re* Suburban Motor Freight, Inc., 998 F.2d 338, 339-40 (6th Cir. 1993); *New Neighborhoods*, 886 F.2d at 717.

155. *New Neighborhoods*, 886 F.2d at 719-20.

156. *Suburban Motor*, 998 F.2d at 342.

157. Howard Delivery Servs., Inc. v. Zurich Am. Ins. Co., 126 S. Ct. 2105, 2115 (2006).

should apply only when public and private creditors are similarly situated. Here public and private creditors are not similarly situated, despite the fact that they both provide the same service. Private creditors are, at least arguably, owed "contributions to an employee benefit plan," while public creditors are owed unpaid "excise taxes." Whether private creditors are afforded priority status is, therefore, collateral to the fact that public creditors are afforded priority status under a different priority.

The Court's decision in *Howard Delivery*, therefore, must find its support, if it can find any support at all, in its interpretation of the phrase "employee benefit plan." However, it is hard to understand Justice Ginsburg's holding as anything other than reading language into the statute rather than simply interpreting a statutory provision. In holding that an "employee benefit plan" may not simultaneously benefit the employer, Justice Ginsburg maintained that the term implicitly excluded programs that benefit both employees and employers alike.[158] Furthermore, given that § 507(a)(5) was enacted to secure an employee's wage alternatives, the benefit that an employer may also receive from a specific pension program is wholly irrelevant. Section 507(a)(5) priority is meant to secure an employee's financial stability when that employee depends upon wage alternatives in addition to wages, which are afforded § 507(a)(4) priority.[159]

To hold that a pension program that benefits both employers and employees does not qualify as an "employee benefit plan" simply because of the reciprocal benefits it affords ignores the purpose of § 507(a)(5). Rather than read the provision narrowly, as the Fourth and Sixth Circuits did when addressing whether unpaid workers' compensation premiums owed to a public creditor were afforded priority status as "excise taxes," the Court read language into the provision, resulting in an interpretation that violates both the intention and spirit of the provision.

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158. *Howard Delivery*, 126 S. Ct. at 2113-14.
159. Bankruptcy Code, 11 U.S.C.A. § 507(a)(4) (Supp. 2006).