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The Doctrine of Necessity After *Law v. Siegel*

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Introduction

The Doctrine of Necessity might be at a critical juncture after the recent United States Supreme Court decision in *Law v. Siegel*[1] in which the Supreme Court took a narrow view of the bankruptcy court's equitable power where equity conflicts with explicit statutory authority.

The Doctrine of Necessity is rooted in pre-Code law in railroad reorganization cases.[2] Many bankruptcy courts have used this doctrine as a basis to authorize payments to "critical vendors" outside of a plan of reorganization on account of pre-petition debt where such payments are critical to the debtor's reorganization.[3]

Bankruptcy courts that allow "critical vendor" payments under the Doctrine of Necessity derive their authorization from section 105(a) of the Bankruptcy Code[4] (the "Code"). Section 105(a) of the Code, in relevant part, states that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." The reasoning of these courts is that payments to "critical vendors" might be permissible under section 105(a) of the Code because doing so would preserve the estate, including its going concern value.[5] To some courts, allowing payments under the Doctrine of Necessity is an "extraordinary" remedy.[6] Either way, section 105(a) of the Code is a powerful tool for a bankruptcy court.

How bankruptcy courts rely upon section 105(a) of the Code, however, might be impacted by the recent Supreme Court decision in *Siegel.* Although the case is not related to the Doctrine of Necessity, the opinion could have an impact on the Doctrine of Necessity because it limits a bankruptcy court's

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"equitable powers" under section 105(a) of the Code in the presence of specific statutory authority. In *Siegel*, the Supreme Court held that a bankruptcy court cannot contradict an express provision of the Code while exercising its "equitable powers" under section 105(a) of the Code.[7] The Supreme Court's decision in *Siegel* might be significant because the Doctrine of Necessity, as a judicially-created principle, does not derive from a specific, topical provision of the Code, and the practice of favoring certain unsecured creditors over others outside a plan may not be in harmony with specific, topical provisions of the Code.[8]

This article will discuss the relevant case law on the Doctrine of Necessity, analyze the recent Supreme Court opinion in *Siegel* and its potential impact on the Doctrine of Necessity, highlight some counter-arguments against the use of the Doctrine of Necessity, and will show that the Doctrine of Necessity is suited for the unique nature of a bankruptcy case that often favors creation of workable solutions that work for the largest number of constituents. Nevertheless we will conclude that *Siegel* may become a tool that could narrow the bankruptcy court's equitable powers in the face of more specific statutory authority.

I. Relevant Case Law on the Doctrine of Necessity

CoServ lays out factors that a bankruptcy court could consider in determining whether the Doctrine of Necessity should apply.[9] The issue the court faced in *CoServ* was whether a bankruptcy court could authorize a chapter 11 debtor to pay pre-petition general unsecured claims outside a plan of reorganization. The debtor provided telecommunications services, cable television, website development and hosting in North Texas. The debtor sought to make a payment of $563,183.00 to seven "critical vendors" for the trade debt it owed to them pre-petition.[10] The debtor argued that, on the basis of the "Doctrine of Necessity," the court had equitable powers under section 105(a) of the Code to grant pre-plan payments to selected unsecured creditors to avoid harm to, and keep, the debtor operating. The court allowed the debtor to pay some of its unsecured creditors on its "critical vendors" list and denied payment to others by determining that a debtor is allowed to pay a pre-petition debt outside a plan of reorganization, but it may do so only in "extraordinary" circumstances.[11] The court reasoned that the "Doctrine of Necessity" applied to certain of the proposed payments and should only be used in rare cases.[12]

The court developed a test in determining when pre-plan payments to some general unsecured creditors might be permissible under the Doctrine of Necessity. The court determined that a debtor must show by a preponderance of the evidence that (1) "dealing with the claimant is virtually indispensible to profitable operations or preservation of the estate;" (2) a "meaningful economic gain to the estate or the going concern value of the business will result or that serious economic harm will be avoided through payment of the pre-petition claim;" and (3) "there is no practical or legal alternative to payment of the claim."[13] The court reasoned that absent meeting that test, satisfaction of a pre-petition unsecured debt of some general

unsecured creditor is equivalent to succumbing to "economic blackmail" of certain "disgruntled creditors."[14]

The *CoServ* court did not allow "critical vendor" payments to some creditors for the following reasons. The court did not deem these creditors to be necessary for the debtor's survival during the bankruptcy case. The court reasoned that "the entire scheme of the Code favors equal treatment of equally allowed claims."[15] By noting several sections of the Code, the court reasoned that Congress intentionally placed some unsecured creditors ahead of others in right of payment in certain instances,[16] and that Congress also knew how to give general unsecured creditors special protections that might allow those creditors to receive payments outside of a plan.[17] According to the court, pre-plan payments to pre-petition general unsecured creditors might be permissible under section 105(a) of the Code when doing so would preserve the estate and its going-concern value.[18]

Unlike the decision in *CoServ*, the United States Court of Appeals for the Seventh Circuit in *Kmart* did not grant the authority to make early payments to "critical vendors" under the Doctrine of Necessity. In *Kmart*, the debtors, Kmart and its affiliates ("Kmart"), sought to pay its "critical vendors" by claiming that absent payment, it might not be able to reorganize successfully because these "critical suppliers" might cease doing business with it if they were not paid in full to satisfy their pre-petition trade debt.[19] Kmart claimed an immediate full payment to these "critical vendors" was necessary to make all other creditors "better off" by allowing the business to survive the bankruptcy process.

The bankruptcy court granted Kmart the authority to pay the "critical vendors" in full under the Doctrine of Necessity. The Seventh Circuit Court of Appeals reversed. It held that Kmart did not present sufficient evidence to prove that disfavored creditors would have been as well off as with reorganization as with liquidation, that payments to "critical vendors" were an absolute necessity for Kmart's successful reorganization, and that the vendors would have ceased supplying to Kmart were they not paid in full on their pre-petition unsecured claims.[20] The court further reasoned that section 105(a) of the Code "does not allow a bankruptcy judge to authorize full payment of any unsecured debt unless all unsecured creditors in the class are paid in full" and that section 105(a) of the Code does not "create discretion to set aside the Code's rules about absolute priority and distribution."[21] The court stated that the "power conferred by section 105(a) is one to implement rather than override."[22] The court noted that the common law principle of the Doctrine of Necessity, which was a norm in the nineteenth century during railroad reorganizations, could not be used to trump the specific statutory scheme of the Code.[23] *Kmart* stood as a key ruling against the general use of section 105(a) and the Doctrine of Necessity alone by bankruptcy courts to allow "critical vendor" payments early in a chapter 11 case as standard practice.

After *Kmart*, in *Corner Home Care,* the bankruptcy court for the Western District of Kentucky articulated an even more stringent test for use of the

Doctrine of Necessity with respect to "critical vendors" than that in *CoServ*. Citing *Kmart*, and reviewing the body of case law on section 105(a) and the Doctrine of Necessity in the context of "critical vendor" payments, the court noted that there was no "per se prohibition on pre-plan payments to unsecured creditors," but that there needed to be a "proper foundation for the granting of a "critical vendor" motion."[24] The court held that in order for a "critical vendor" motion to be approved, a debtor must show that (1) the vendor is necessary for the successful reorganization of the debtor; (2) the transaction is in the sound business judgment of the debtor; and (3) the favorable treatment of the "critical vendor" will not prejudice other unsecured creditors.[25] A debtor can prove that a vendor is necessary by showing that there is no other alternative and that a serious threat to the chapter 11 process would be averted if payments were made to the vendor.[26] The court stated that a debtor would exercise sound business judgment in making a "critical vendor" payment when the vendor agrees to continue supplying goods and services to the debtor.[27] Finally, the debtor must also show that all other unsecured creditors would benefit from paying the "critical vendor."[28]

CoServ, *Kmart* and *Corner Home Care* do not disfavor payments to "critical vendors" under the Doctrine of Necessity altogether. These cases, and modern "critical vendor" practice, however, require more specific evidentiary support for the necessity and utility of "critical vendor" payments under a rigorous test.

II. *Law v. Siegel* and its Potential Impact on the Doctrine of Necessity

Siegel might have a significant impact on the Doctrine of Necessity even though it is not directly related to the doctrine. The Supreme Court's holding and reasoning in the case is based on applying section 105(a) of the Code narrowly.

In *Siegel*, the Supreme Court held that a bankruptcy court in exercising its "equitable powers" under section 105(a) of the Code cannot contradict an express provision of the Code.[29] In *Siegel*, the chapter 7 debtor, Law, listed as his only significant asset his house that he valued at $363,348, and he asserted that there were two liens on the home that together exceeded the home's value.[30] He claimed $75,000 of the home's value exempt under California's homestead exemption rules.[31] If the debtor's assertion was upheld, the bankruptcy trustee appointed in the case would not have any reason to pursue a sale of the debtor's home because of a lack of equity in the home.

The bankruptcy court, however, determined that one of the liens on the home was fraudulent. This determination came only after extensive litigation between the debtor and the trustee in which the trustee incurred $500,000 in legal fees.[32] The bankruptcy court granted the trustee's request to "surcharge" the entirety of Law's $75,000 homestead exemption,[33] and the Ninth Circuit affirmed the bankruptcy court's decision.[34] The Ninth Circuit noted that a bankruptcy court has the power to "equitably surcharge a debtor's statutory exemptions" and held that the surcharge on Law's homestead was proper because it was "calculated to compensate the estate

for the actual monetary costs imposed by the debtor's misconduct, and was warranted to protect the integrity of the bankruptcy process."[35]

The United States Supreme Court reversed the Court of Appeals for the Ninth Circuit. The issue the Supreme Court addressed was whether a bankruptcy court, using its "equitable powers," may order a debtor's exempt assets to be used to pay administrative expenses incurred as a result of the debtor's misconduct.[36] The Supreme Court held that a bankruptcy court, using its "equitable powers," may sanction a dishonest debtor, but in doing so could not violate an express provision of the Code.[37] The Supreme Court held that the bankruptcy court violated section 522 of the Code when it used its "equitable powers" to order that Law's exempt assets be used to pay the trustee's administrative expenses.[38]

Even though *Siegel* is not directly related to the Doctrine of Necessity, the Supreme Court's reasoning in the case may have a significant impact on the interpretation of section 105(a) of the Code, the provision on which the Doctrine of Necessity relies. In *Siegel*, the Supreme Court reasoned that section 105(a) of the Code "does not allow a bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code."[39] The Court reasoned that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."[40] The Court held that section 522 of the Code allows a debtor to claim a homestead exemption for an amount as determined under that provision, and that the bankruptcy court violated section 522's express terms when it subjected the allowed amount of the homestead exemption to pay attorneys fees, an administrative expense.[41] The Court reasoned that the bankruptcy court's use of its "equitable powers" to surcharge Law's homestead exemption to pay for the trustee's legal fees violated an express provision of the Code.[42] In the Court's view, "equitable powers" under section 105(a) of the Code cannot be used to grant a specific remedy that is expressly prohibited by another provision of the Code.[43] Section 522 of the Code does not permit surcharging a debtor's homestead exemption. When the lower court allowed surcharging the debtor's homestead exemption by using the "equitable powers" of section 105(a) of the Code, in the Supreme Court's view, it countenanced a conflict with section 522 of the Code.

Siegel might infuse new ammunition into the argument that the Doctrine of Necessity, exercised through section 105(a) of the Code, does not give bankruptcy courts discretion to set aside specific provisions of the Code. *Siegel*, along with *Kmart*, can be cited for the proposition that section 105(a) of the Code *alone* cannot be used to grant a specific remedy — making "critical vendor" payments through the Doctrine of Necessity — that would clearly violate other express provisions of the Code.

Some might see validity in *Kmart*'s analysis that narrows a debtors' authority to make "critical vendor" payments. They might also argue that, even though making "critical vendor" payments using the Doctrine of Necessity is not expressly prohibited or prescribed by a specific provision of the Code, making such payments might violate other express provisions of the Code. For example, section 507 of the Code sets the order of priorities for

payments to unsecured creditors.[44] Section 507 of the Code does not give "critical vendors" the first priority among all other unsecured creditors to receive the distribution from a bankruptcy estate. In addition to section 507 of the Code, section 726 of the Code also lists the order of distribution of the bankruptcy estate in a chapter 7 case.[45] Similarly, in a chapter 11 reorganization, the absolute priority rule of section 1129(b)(2)(A)(i)(II) of the Code does not allow distribution to unsecured creditors before secured creditors are paid in full.[46] *Siegel* could stand for the proposition that a bankruptcy court may be violating these express provisions of the Code when granting "critical vendor" payments.

Therefore, *Siegel* might have an impact on the Doctrine of Necessity by how narrowly section 105(a) of the Code may be applied.

III. A Debtor Might Use Other Provisions of the Code to Ensure Continued Supply from "Critical Vendors"

Siegel might also strengthen the arguments that the Doctrine of Necessity may not be needed for a successful reorganization of a debtor. The camp opposing "critical vendor" payments often cite to several provisions of the Code that might also aide a debtor's survival during a reorganization process. Such arguments include that section 363 of the Code can be used to approve out of the ordinary course transactions,[47] or that the administrative priority available under section 364(a) of the Code might be sufficient for a debtor to obtain trade credit for goods and services from "critical vendors" as they will have a guaranteed right to payment during the case.[48] Similarly, section 364(b) of the Code could also be used to assure a debtor's "critical vendors."[49] Finally, sections 364(c) and (d) of the Code allow a debtor to obtain financing which could be used to make payments to the suppliers of the debtor.[50]

There also are arguments that with the enactment of section 503(b)(9) of the Code, Congress intended to allow full payment to only a limited number of vendors on their pre-petition unsecured debt.[51] Section 503(b)(9) allows priority for claims of a supplier who provides goods to the debtor in the ordinary course within twenty days before the commencement of the debtor's bankruptcy case. The argument is that Congress was aware of *Kmart* and *CoServ* before enacting a comprehensive reform of the Code under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, yet it gave priority of payment to only a select group of pre-petition, unsecured creditors.[52]

Therefore, by resort to other statutory provisions including sections 363, 364 and 503(b)(9) of the Code, a debtor still may survive the reorganization process without making "critical vendor" payments.

IV. The Doctrine of Necessity Might be a Workable Solution to a Difficult Issue, and Workable Solutions are Integral to Reorganization

Siegel might be cited for a narrower scope of "equitable powers" under section 105(a) of the Code; however, the courts have not favor a rigid interpretation of the Code. Traditionally, rigid interpretation of the Code has

been highly disfavored by both bankruptcy courts and the Supreme Court.[53] The Supreme Court has often held that pre-Code history should be considered in construing a provision of the Code, and that pre-Code practice should be preserved absent a strong reason to the contrary.[54] In *Dewsnup*, the Supreme Court held that "when Congress amends the bankruptcy laws, it does not write 'on a clean slate.' "[55] *Dewsnup* also rejected interpreting the Code in a way that would effect a major change from pre-Code practice.[56]

The Doctrine of Necessity was born out of a necessity to develop workable solutions to ensure successful railroad reorganizations in the early nineteenth century.[57] The goal was to enable the troubled railroad companies to continue operating so that transportation services were not disrupted while these companies reorganized in bankruptcy.[58] From its roots in railroad reorganizations, the Doctrine of Necessity has become a well-established bankruptcy law doctrine in non-railroad cases.[59] Even with *Siegel*'s narrower interpretation of section 105(a) of the Code, there are strong Supreme Court precedents[60] that support the preservation of the pre-Code practice absent Congressional preemption.

As long as a debtor can provide sufficient evidence supporting a need for "critical vendor" payments, in line with the various specific tests developed of late,[61] such payments should be allowed. *Kmart*, which denied "critical vendor" payments, did so purportedly because of the lack of sufficient evidence that Kmart's suppliers would have ceased business with Kmart if they were not immediately paid.[62]

The recent American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 also recommended preserving the Doctrine of Necessity as part of the bankruptcy process. The Commission recommended that a debtor provide sufficient evidence of a need for "critical vendor" payments and that the evidence should establish that a debtor cannot obtain goods and services from another source.[63] The Commission supported continuing the "critical vendor" payments in order for the debtor to be able to "(i) continue to receive a steady supply of goods and services required for the operation of the debtor's business; (ii) appease creditors who threaten to discontinue supply or services without payment; (iii) obtain products from a single-source supplier; (iv) comply with applicable state or other nonbankruptcy law that requires performance on a contract and is not otherwise preempted by the Bankruptcy Code; and (v) make payments that may be necessary for the survival of a key vendor."[64]

Despite its stringency and its drawbacks or limitations, the Doctrine of Necessity is a workable solution that furthers the bankruptcy goals of favoring reorganization over liquidation and maximizing the estate for the benefit of creditors.

V. Conclusion

The Doctrine of Necessity has been fine-tuned since the pre-Code practice of allowing "critical vendor" payments during railroad reorganizations, and in more recent reorganization cases under the Code such as *Kmart* and

CoServ. Although it may seem unfair to favor certain unsecured creditors over others, or to apparently conflict with specific statutory authority, the Doctrine of Necessity has the potential to create conditions that encourage a successful reorganization process and to lead to maximum recoveries by all creditors. Therefore, upon meeting the applicable evidentiary standard, courts and constituents should continue to favor "critical vendor" payments as a means to stabilize, to enable a debtor to continue in operation, and to reorganize in the interests of all stakeholders.

But over time, we may see *Siegel*'s reasoning on the breadth of section 105(a) not only in its application to section 522 disputes, but also with respect to payment of "critical vendors" and other issues. The tension is likely to ratchet up between explicit, statutorily prescribed, approaches, and long-standing but less explicitly prescribed, reorganization tools.

NOTES:

[1]Law v. Siegel, 134 S. Ct. 1188, 188 L. Ed. 2d 146, 59 Bankr. Ct. Dec. (CRR) 43, Bankr. L. Rep. (CCH) P 82592 (2014) (hereafter, "Siegel").

[2]See Miltenberger v. Logansport C. & S.W.R. Co., 106 U.S. 286, 311–12, 1 S. Ct. 140, 27 L. Ed. 117 (1882) (allowing the receiver to pay preexisting debts of suppliers of the railroad company before other creditors to maintain the "good will and integrity of the enterprise"); Wallace v. Loomis, 97 U.S. 146, 152, 24 L. Ed. 895, 1877 WL 18669 (1877) (upholding an order that allowed receivers to obtain first priority loans to 'save and preserve' property of the estate for the benefit of the first-mortgage bondholders); see also In re CoServ, L.L.C., 273 B.R. 487, 492–93, 38 Bankr. Ct. Dec. (CRR) 266, 47 Collier Bankr. Cas. 2d (MB) 851 (Bankr. N.D. Tex. 2002) (hereafter, "*CoServ*") (in *CoServ*, the court discussed that the Doctrine of Necessity has roots in pre-Code railroad reorganizations) (citing Russell A. Eisenberg and Francis F. Gecker, The Doctrine of Necessity and its Parameters, 73 Marq. L. Rev. 1 (1989)).

[3]See In re Enron Corp., 2003 Bankr. LEXIS 2111 *71 n.31 (Bankr. S.D.N.Y. 2003); In re Financial News Network Inc., 134 B.R. 732, 735–36, 26 Collier Bankr. Cas. 2d (MB) 788 (Bankr. S.D. N.Y. 1991); see also Official Comm. of Unsecured Creditors v. Motor Coach Indus. Int'l, Inc. (In re Motor Coach Indus. Int'l, Inc.), 2009 U.S. Dist. LEXIS 13814 (D. Del. Feb. 23, 2009) (stating "the '[D]octrine of [N]ecessity has not previously been brought into serious question by the courts in the Third Circuit . . .' ").

[4]11 U.S.C.A. §§ 101 to 1532 (2006).

[5]CoServ, 273 B.R. at 497; see also In re Jeans.com, Inc., 502 B.R. 250, 257, 58 Bankr. Ct. Dec. (CRR) 212, 70 Collier Bankr. Cas. 2d (MB) 1439 (Bankr. D. P.R. 2013) (applying section 105(a) of the Code together with sections 363 and 1107 of the Code to grant critical vendor motion).

[6]CoServ, 273 B.R. at 491; see also In re Universal Finance, Inc., 493 B.R. 735, 738, 58 Bankr. Ct. Dec. (CRR) 16 (Bankr. M.D. N.C. 2013) (stating that "in courts where the Doctrine of Necessity has been accepted as an exception to the equal treatment rule, its application has been exceedingly narrow").

[7]Siegel, 134 S.Ct. at 1197–98.

[8]Sections 506 and 507 of the Code determine priority of payments among creditors in a chapter 7 liquidation and section 1129 of the Code determines priority of payments in a chapter 11 reorganization.

[9]CoServ, 273 B.R. at 491.

[10]CoServ, 273 B.R. at 490.

[11]CoServ, 273 B.R. at 491.

[12]CoServ, 273 B.R. at 491.

[13]CoServ, 273 B.R. at 498–99.

[14]CoServ, 273 B.R. at 494.

[15]CoServ, 273 B.R. at 494. Equality of treatment of similarly situated creditors is a central policy of the Code. Union Bank v. Wolas, 502 U.S. 151, 161, 112 S. Ct. 527, 116 L. Ed. 2d 514, 22 Bankr. Ct. Dec. (CRR) 574, 25 Collier Bankr. Cas. 2d (MB) 1011, Bankr. L. Rep. (CCH) P 74296A (1991); Begier v. I.R.S., 1990-2 C.B. 265, 496 U.S. 53, 58, 110 S. Ct. 2258, 110 L. Ed. 2d 46, 20 Bankr. Ct. Dec. (CRR) 940, 22 Collier Bankr. Cas. 2d (MB) 1080, Bankr. L. Rep. (CCH) P 73403, 90-1 U.S. Tax Cas. (CCH) P 50294, 65 A.F.T.R.2d 90-1095 (1990).

[16]CoServ, 273 B.R. at 494, citing to sections 507(a) and 1171(b) of the Code.

[17]CoServ, 273 B.R. at 494, citing to sections 546(c), 546(d) and 547(c)(3) of the Code.

[18]CoServ, 273 B.R. at 497.

[19]In re Kmart Corp., 359 F.3d 866, 868, 42 Bankr. Ct. Dec. (CRR) 166, 51 Collier Bankr. Cas. 2d (MB) 1076, Bankr. L. Rep. (CCH) P 80054 (7th Cir. 2004).

[20]Kmart, 359 F.3d at 873–74.

[21]Kmart, 359 F.3d at 871.

[22]Kmart, 359 F.3d at 871.

[23]See Kmart, 359 F.3d at 871. The court posited, however, that section 363(b)(1) might be a specific statutory authority upon which to rely.

[24]In re Corner Home Care, Inc., 438 B.R. 122, 126 (Bankr. W.D. Ky. 2010) (hereafter, "*Corner Home Care*") (collecting cases).

[25]Corner Home Care, Inc., 438 B.R. at 127.

[26]Corner Home Care, Inc., 438 B.R. at 127.

[27]Corner Home Care, Inc., 438 B.R. at 128.

[28]Corner Home Care, Inc., 438 B.R. at 129.

[29]Siegel, 134 S.Ct. at 1195.

[30]Siegel, 134 S.Ct. at 1195.

[31]Siegel, 134 S.Ct. at 1195.

[32]In re Law, 401 B.R. 447, 453 (Bankr. C.D. Cal. 2009).

[33]Law, 401 B.R. at 453; In re Law, 435 Fed. Appx. 697, 698, 71 Collier Bankr. Cas. 2d (MB) 1 (9th Cir. 2011).

[34]Law, 435 Fed. Appx. at 698.

[35]Law, 435 Fed. Appx. at 698.

[36]Siegel, 134 S.Ct. at 1192.

[37]Siegel, 134 S.Ct. at 1198.

[38]Siegel, 134 S.Ct. at 1197–98.

[39]Siegel, 134 S.Ct. at 1194.

[40]Siegel, 134 S.Ct. at 1195.

[41]Siegel, 134 S.Ct. at 1195. The trustee's legal fees were considered administrative expenses because under section 503(b)(2) of the Code, an administrative expense includes rea-

sonable compensation for services rendered by a professional person employed by a trustee to represent or assist the trustee in carrying out the trustee's duties.

[42]Siegel, 134 S.Ct. at 1195

[43]See Siegel, 134 S.Ct. at 1195

[44]11 U.S.C.A. § 507.

[45]11 U.S.C.A. § 726.

[46]11 U.S.C.A. § 1129(b)(2)(A)(i)(II); see Robert A. Morris, The Case Against 'Critical Vendor' Motions, 22 Am. Bankr. Inst. 1. 30, 30 (2003) (stating that "critical vendor" payments "circumvent the absolute priority rule, one of the fundamental tenets of bankruptcy law").

[47]11 U.S.C.A. § 364(a); see Joseph Gilday, "Critical" Error: Why Essential Vendor Payments Violate the Bankruptcy Code, 11 Am. Bankr. Inst. L. Rev. 411, 419–20 (2003).

[48]11 U.S.C.A. § 363; see also Kmart, 359 F.3d at 872; but see Travis N. Turner, *Kmart* and Beyond: A "Critical" Look at Critical Vendor Orders and the Doctrine of Necessity, 63 Wash. & Lee L. Rev. 431, 450–455 (2006) (describing that several courts have looked to section 363(b) of the Code in conjunction with section 105(a) of the Code to authorize "critical vendor" payments).

[49]In re Payless Cashways, Inc., 268 B.R. 543, 545–46, 47 Collier Bankr. Cas. 2d (MB) 568 (Bankr. W.D. Mo. 2001) (utilizing section 364(b) of the Code to induce "critical vendors" of the debtor to continue doing business with it during its bankruptcy process).

[50]11 U.S.C.A. §§ 364(c) and (d).

[51]Alan N. Resnick, The Future of the Doctrine of Necessity and Critical-Vendor Payments in Chapter 11 Cases, 47 B.C. L. Rev. 183, 209–10 (2005).

[52]Under section 503(b)(9) of the Code, only those unsecured creditors who provide goods to the debtor 20 days prior to the debtor's bankruptcy are protected. Unsecured creditors who provide services to the debtor are excluded from the protection; but see Nicholas S. Zeppos, Legislative History and the Interpretation of Statutes: Toward A Fact-Finding Model of Statutory Interpretation, 76 Va. L. Rev. 1295, 1320 (1990) (giving importance to the Congressional omission in a statute requires engaging in ". . . some highly speculative assumptions about Congress as an entity").

[53]See, e.g., In re Jewish Memorial Hospital, 13 B.R. 417, 419, 24 C.B.C. 551 (Bankr. S.D. N.Y. 1981), citing Pepper v. Litton, 308 U.S. 295, 308, 60 S. Ct. 238, 246, 84 L. Ed. 281 (1939) (stating "[i]n the exercise of its equitable jurisdiction the bankruptcy court has the power to shift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankruptcy estate").

[54]Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 563, 110 S. Ct. 2126, 109 L. Ed. 2d 588, 20 Bankr. Ct. Dec. (CRR) 833, 22 Collier Bankr. Cas. 2d (MB) 1067, Bankr. L. Rep. (CCH) P 73382 (1990), superseded by statute as stated in U.S. v. Colasuonno, 697 F.3d 164, 178, 68 Collier Bankr. Cas. 2d (MB) 779, 2012-2 U.S. Tax Cas. (CCH) P 50623, 110 A.F.T.R.2d 2012-6313 (2d Cir. 2012).

[55]Dewsnup v. Timm, 502 U.S. 410, 419, 112 S. Ct. 773, 116 L. Ed. 2d 903, 22 Bankr. Ct. Dec. (CRR) 750, 25 Collier Bankr. Cas. 2d (MB) 1297, Bankr. L. Rep. (CCH) P 74361A (1992).

[56]Dewsnup v. Timm, 502 U.S. at 419.

[57]See Gilday, supra note 47, at 426–31 (discussing an extensive history of the Doctrine of Necessity in railroad reorganizations); see Resnick, supra note 51, at 186–87 (also discussing history of the Doctrine of Necessity in late 1800s).

[58]See Gilday, supra note 47, at 426–31.

[59]See Eisenberg and Gecker, supra note 2, at 4 (discussing that the Doctrine of Necessity in non-railroad cases is well-established in bankruptcy common law).

[60]Dewsnup, 502 U.S. at 419; Pa. Dep't. of Pub. Welfare, 495 U.S. at 563.

[61]See e.g., Corner Home Care, 438 B.R. at 127; CoServ, 273 B.R. at 498–99.

[62]Kmart, 359 F.3d at 873–74.

[63]Am. Bankr. Inst. L. Rev. Commission To Study the Reform of Chapter 11, 1, 90 (2012–2014).

[64]Am. Bankr. Inst. L. Rev. Commission To Study the Reform of Chapter 11 at 89.

