SUPREME COURT OF THE UNITED STATES

No. 97–1418

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER *v.* 203 NORTH LASALLE STREET PARTNERSHIP

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[May 3, 1999]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

I agree with the majority's conclusion that the reorganization plan in this case could not be confirmed. However, I do not see the need for its unnecessary speculations on certain issues and do not share its approach to interpretation of the Bankruptcy Code. I therefore concur only in the judgment.

I

Our precedents make clear that an analysis of any statute, including the Bankruptcy Code, must not begin with external sources, but with the text itself. See, *e.g.*, *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992); *Union Bank* v. *Wolas*, 502 U. S. 151, 154 (1991). The relevant Code provision in this case, 11 U. S. C. §1129(b), does not expressly authorize prepetition equity holders to receive or retain property in a reorganized entity in exchange for an infusion of new capital.[1] Instead,

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[1] In this respect, §1129 differs from other provisions of the Code, which permit owners to retain property before senior creditors are paid. See, *e.g.*, 11 U. S. C. §1225(b)(1)(B) (allowing a debtor to retain nondisposable income); §1325(b)(1)(B) (same).

it is cast in general terms and requires that, to be confirmed over the objections of an impaired class of creditors, a reorganization plan be "fair and equitable." §1129(b)(1). With respect to an impaired class of unsecured creditors, a plan can be fair and equitable only if, at a minimum, it "provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim," §1129(b)(2)(B)(i), or if "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property," §1129(b)(2)(B)(ii).

Neither condition is met here. The Bank did not receive property under the reorganization plan equal to the amount of its unsecured deficiency claim. See *ante*, at 3–4. Therefore, the plan could not satisfy the first condition. With respect to the second condition, the prepetition equity holders received at least two forms of property under the plan: the exclusive opportunity to obtain equity, *ante*, at 18–22, and an equity interest in the reorganized entity. The plan could not be confirmed if the prepetition equity holders received any of this property "on account of" their junior interest.

The meaning of the phrase "on account of" is the central interpretive question presented by this case. This phrase obviously denotes some type of causal relationship between the junior interest and the property received or retained– such an interpretation comports with common understandings of the phrase. See, *e.g.*, The Random House Dictionary of the English Language 13 (2d ed. 1987) ("by reason of," "because of"); Webster's Third New International Dictionary 13 (1976) ("for the sake of," "by reason of," "because of"). It also tracks the use of the phrase elsewhere in the Code. See, *e.g.*, 11 U. S. C. §§365(f)(3), 510(b), 1111(b)(1)(A); see generally §1129. Re-

gardless how direct the causal nexus must be, the prepetition equity holders here undoubtedly received at least one form of property– the exclusive opportunity– "on account of" their prepetition equity interest. *Ante*, at 19. Since §1129(b)(2)(B)(ii) prohibits the prepetition equity holders from receiving "any" property under the plan on account of their junior interest, this plan was not "fair and equitable" and could not be confirmed. That conclusion, as the majority recognizes, *ante*, at 18, is sufficient to resolve this case. Thus, its comments on the Government's position taken in another case, *ante*, at 15–18, and its speculations about the desirability of a "market test," *ante*, at 22–23, are dicta binding neither this Court nor the lower federal courts.

II

The majority also underestimates the need for a clear method for interpreting the Bankruptcy Code. It extensively surveys pre-Code practice and legislative history, *ante*, at 8–13, but fails to explain the relevance of these sources to the interpretive question apart from the conclusory assertion that the Code's language is "inexact" and the history is "helpful." *Ante*, at 8. This sort of approach to interpretation of the Bankruptcy Code repeats a methodological error committed by this Court in *Dewsnup* v. *Timm*, 502 U. S. 410 (1992).

In *Dewsnup*, the Court held, based on pre-Code practice, that §506(d) of the Code prevented a Chapter 7 debtor from stripping down a creditor's lien on real property to the judicially determined value of the collateral. *Id.*, at 419–420. The Court justified its reliance on such practice by finding the provision ambiguous. *Id.*, at 416. Section 506 was ambiguous, in the Court's view, simply because the litigants and *amici* had offered competing interpretations of the statute. *Ibid.* This is a remarkable and un-

tenable methodology for interpreting any statute. If litigants' differing positions demonstrate statutory ambiguity, it is hard to imagine how any provision of the Code– or any other statute– would escape *Dewsnup*'s broad sweep. A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong. *Dewsnup*'s approach to statutory interpretation enables litigants to undermine the Code by creating "ambiguous" statutory language and then cramming into the Code any good idea that can be garnered from pre-Code practice or legislative history.

The risks of relying on such practice in interpreting the Bankruptcy Code, which seeks to bring an entire area of law under a single, coherent statutory umbrella, are especially weighty. As we previously have recognized, the Code "was intended to modernize the bankruptcy laws, and as a result made significant changes in both the substantive and procedural laws of bankruptcy." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 240 (1989) (citation omitted). The Code's overall scheme often reflects substantial departures from various pre-Code practices. Most relevant to this case, the Code created a system of creditor class approval of reorganization plans, unlike early pre-Code practice where plan confirmation depended on unanimous creditor approval and could be hijacked by a single holdout. See D. Baird, The Elements of Bankruptcy 262 (1993). Hence it makes little sense to graft onto the Code concepts that were developed during a quite different era of bankruptcy practice.

Even assuming the relevance of pre-Code practice in those rare instances when the Code is truly ambiguous, see, *e.g., Midlantic Nat. Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 501 (1986) and assuming that the language here is ambiguous, surely the sparse history behind the new value exception cannot

inform the interpretation of §1129(b)(2)(B)(ii). No holding of this Court ever embraced the new value exception. As noted by the majority, *ante*, at 9, the leading decision suggesting this possibility, *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939), did so in dictum. And, prior to the Code's enactment, no court ever relied on the *Case* dictum to approve a plan. Given its questionable pedigree prior to the Code's enactment, a concept developed in dictum and employed by lower federal courts only *after* the Code's enactment is simply not relevant to interpreting this provision of the Code.[2]

This danger inherent in excessive reliance on pre-Code practice did not escape the notice of the dissenting Justices in *Dewsnup* who expressed "the greatest sympathy for the Courts of Appeals who must predict which manner of statutory construction we shall use for the next Bankruptcy Code case." *Dewsnup, supra,* at 435 (SCALIA, J., joined by SOUTER, J., dissenting). Regrettably, subsequent decisions in the lower courts have borne out the dissenters' fears. The methodological confusion created by *Dewsnup* has enshrouded both the Courts of Appeals and, even more tellingly, Bankruptcy Courts, which must interpret the Code on a daily basis.[3] In the wake of *Dews-*

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[2] Nor do I think that the history of rejected legislative proposals bears on the proper interpretation of the phrase "on account of." As an initial matter, such history is irrelevant for the simple reason that Congress enacted the Code, not the legislative history predating it. See *United States* v. *Estate of Romani*, 523 U. S. 517, 535–537 (1998) (SCALIA, J., concurring in part and concurring in judgment). Even if this history had some relevance, it would not support the view that Congress intended to insert a new value exception into the phrase "on account of." On the contrary, Congress never acted on bills that would have allowed nonmonetary new value contributions. *Ante*, at 10.

[3] See, *e.g.*, *In re Southeast Banking Corp.*, 156 F. 3d 1114, 1123, n. 16 (CA11 1998); *In re Greystone III Joint Venture*, 995 F. 2d 1274 (CA5 1991) (*per curiam*) (vacating prior panel decision regarding new value

nup, the Fifth Circuit withdrew its decision on the new value exception, prompting the author of the original opinion to observe that *Dewsnup* had clouded "[h]ow one should approach issues of a statutory construction arising from the Bankruptcy Code." *In re Greystone III Joint Venture*, 995 F. 2d 1274, 1285 (CA5 1991) (Jones, J., dissenting). Unfortunately, the approach taken today only thickens the fog.

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exception apparently in light of *Dewsnup*); *id.*, at 1285 (Jones, J., dissenting); *In re Kirchner*, 216 B. R. 417, 418 (Bkrtcy. Ct. WD Wis. 1997); *In re Bowen*, 174 B. R. 840, 852–853 (Bkrtcy. Ct. SD Ga. 1994); *In re Dever*, 164 B. R. 132, 138 (Bkrtcy. Ct. CD Cal. 1994); *In re Mr. Gatti's, Inc.*, 162 B. R. 1004, 1010 (Bkrtcy. Ct. WD Tex. 1994); *In re Taffi*, 144 B. R. 105, 112–113 (Bkrtcy. Ct. CD Cal. 1992), rev'd, 72 A. F. T. R. 2d ¶93–5408, p. 93–6607 (CD Cal. 1993), aff'd in part and rev'd in part, 68 F. 3d 306 (CA9 1995), aff'd as modified, 96 F. 3d 1190 (CA9 1996) (en banc), cert. denied, 521 U. S. 1103 (1997); *In re A. V. B. I., Inc.*, 143 B. R. 738, 744–745 (Bkrtcy. Ct. CD Cal. 1992), holding rejected by *In re Bonner Mall Partnership*, 2 F. 3d 899, 912–913 (CA9 1993), cert. granted, 510 U. S. 1039, vacatur denied and appeal dism'd as moot, 513 U. S. 18 (1994).