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Article

2003—A YEAR OF DISCOVERY: CYBERGENICS AND PLAIN MEANING IN BANKRUPTCY CASES

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I. INTRODUCTION

We are all textualists now. No doubt the major methodological development in Supreme Court jurisprudence over the last few decades has been the ascendancy of the plain meaning approach to interpreting statutes. The mantra of plain meaning and its accompanying method of analysis has come to fundamentally affect the manner in which legal questions are posed and answered in the federal courts. The merits of this textualist approach have been exhaustively debated by commentators including a sitting associate justice of the Supreme Court. But trial and appellate court judges do not engage in debates over whether they should adopt a "dynamic" or a "textualist" mode of statutory interpretation. Rather, they interpret laws in accordance with the decisions of the Supreme Court, many of which employ a plain meaning approach to statutory interpretation. Despite its simple, misleading label, a plain meaning approach often can be difficult to apply, and it can be anything but plain.

This difficulty is especially evident when the application involves a textualist approach to the Bankruptcy Code. Enacted in 1978, the Code is intricate, complicated and, in certain portions, hopelessly ambiguous. Later amendments to the Code clarified some matters and simultaneously created new puzzles for lawyers and judges. Consequently, interpreting the Code is often a strenuous exercise that provides a proving ground for theories of statutory construction. It is no surprise, therefore, that several

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pivotal opinions that announced the Supreme Court's textualist turn have concerned provisions of the Bankruptcy Code.¹

In this Article, I examine two judicial responses to the ascendancy of the plain meaning approach in statutory interpretation. First, one palpable effect of the new textualism is the seeming reluctance to declare a provision ambiguous. Statutes that may reasonably admit of varying interpretations are routinely called plain when, perhaps, a few years ago, those same statutes would have been found to be ambiguous. Second, this reluctance to admit textual ambiguity often goes hand in hand with an exercise, under the guise of plain meaning, that explores statutory text in light of various considerations, including the structure and purpose of a provision. By examining the recent en banc decision of the Third Circuit Court of Appeals in Official Committee of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chineiy,² I will discuss how this broad, contextual approach to reading statutes is supported by recent decisions of the Supreme Court, particularly Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.³ Finally, I will conclude with observations on the role of counsel in helping judges conduct a plain meaning analysis.

II. ASCENDANCY OF THE PLAIN MEANING APPROACH

I should clarify what I mean when I say that the plain meaning approach is ascendant in the federal courts. This is not to say that legislative history and other considerations such as public policy find no place in these cases. Decisions of the federal courts, including the Supreme Court, referring to such extratextual aids are legion. This is also not to say that the actual judgments of the Court are predictable; the justices often split as to the correct result notwithstanding a unitary approach to construction. Rather, it is a question of rhetoric—framing how legal issues are presented for disposition. If ever there were lawyers who first began their arguments with legislative history and then proceeded to the text, their approach is unlikely to be effective now.⁴ The prevailing trend is to begin with the text of the statute and to interrogate its meaning in light of related provisions and the broader context of the statutory scheme as a

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¹ See, e.g., Daniel J. Bussel, Textualism's Failures: A Study of Overruled Bankruptcy Decisions, 53 Vand. L. Rev. 887, 900 (2000) ("[T]he Supreme Court has chosen to make the bankruptcy statute a kind of proving ground for textualist interpretation, regularly adopting textualist interpretations to settle the law on contested questions arising under the Bankruptcy Code.").
² 330 F.3d 548 (3d Cir. 2003) (en banc).
³ 530 U.S. 1 (2000).
⁴ See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 530 (1989) (Scalia, J., concurring) (describing "legal culture in which... it was not beyond the pale for a recent brief to say the following: 'Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guideposts in this difficult area, statutory language.'").
whole. Only then do courts proceed to other sources such as legislative history and policy.  

This approach to form does yield substantive consequences. The Supreme Court and the courts of appeals often expend so much effort in order to find a provision's "plain meaning," they overlook signs that a statute is convoluted. For instance, courts have long been suspicious of constructions that would render other provisions of a statute redundant. As the Supreme Court stated, it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."  

 Likewise, a clear and material drafting error might give a court pause before applying a reading that seems plain. But in Lamie v. United States Trustee, the Supreme Court adopted a plain meaning of a statutory provision even though it contained a nontrivial drafting error and the natural reading violated the rule against surplusage.  

The Court in Lamie interpreted Section 330(a) of the Bankruptcy Code, which authorizes a bankruptcy court to award professional fees involved in a bankruptcy proceeding. Before 1994, that provision authorized a court to "award to a trustee, to an examiner, to a professional person, employed under section 327 or 1103 of this title, or to the debtor's attorney." In 1994, Congress amended the provision and deleted the italicized language referring to the "debtor's attorney." By deleting the clause, the legislative drafters left behind a mess. First, the amended provision requires a missing "or." It now authorizes courts to award "to a trustee, an examiner, a professional person employed under section 327 or 1103." Second, and potentially more troubling, the next subparagraph, Section 330(a)(1)(A), which sets out what a court can award, seemingly conflicts with the amended version of Section 330(a)(1). Section 330(a)(1)(A) provides that a court may award "reasonable compensation for actual, nec-


7. Lamie v. United States Trustee, 124 S. Ct. 1023, 1027 (2004) (stating Supreme Court affirms Fourth Circuit's denial of fees because "Petitioner was not so appointed").  

8. See id., 124 S. Ct. at 1034 ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result.'") (citations omitted).  

9. Id. at 1027 ("[S]ection 330(a)(1) of the Bankruptcy Code, 11 U.S.C. § 330(a)(1) [11 USCS § 330(a)(1)], regulates court awards of professional fees, including fees for services rendered by attorneys in connection with bankruptcy proceedings.")  

10. Id. at 1027-28 (quoting 11 U.S.C. § 330(a) (1994)).  

11. See id. at 1028 ("[T]he 1994 enactment's principal, substantive alteration was its deletion of the five words at the end of what was § 330(a) and is now § 330(a)(1): 'or to the debtor's attorney.'").  

cessary services rendered by such trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person."¹³ Several courts had held that the reference to an "attorney" in the latter subsection arguably contradicted the deletion of that same term in Section 330(a)(1).¹⁴ Other courts strenuously disagreed as to whether the statute should be read to allow or disallow payment of fees to debtor's attorneys.¹⁵ These courts concluded that Section 330(a) was ambiguous and then turned to legislative history to interpret the provision.¹⁶

The Supreme Court disagreed with this approach, finding the language of the provision to be plain despite the foregoing textual anomalies, and held that the Code contained no authorization for payment of debtor's attorneys' fees.¹⁷ Justice Kennedy, who wrote for the majority, observed that many provisions in the United States Code contain grammatical errors.¹⁸ Courts routinely infer trivial missing words such as a conjunction or an article. As for the orphaned reference to "attorneys" in Section 330(a)(1)(A), the Court reasoned that the term could be "read in a straightforward fashion to refer to those attorneys whose fees are authorized by § 330(a)(1): attorneys qualified as § 327 professional persons, that is, in a chapter 7 context, those employed by the trustee and approved by the court."¹⁹ This "straightforward" interpretation presented the Court with a problem: the construction violated the rule against surplusage. If "attorney" just means "professional person," then its insertion after the term "professional person" in Section 330(a)(1)(A) is superfluous. But the Court noted that the rule against surplusage was not an immutable decree.²⁰ "Where there are two ways to read the text—either attorney is surplusage, in which case the text is plain; or attorney is nonsurplusage (i.e., it refers to an ambiguous component in § 330(a)(1)), in which case

¹³. Id. § 330(a)(1)(A) (emphasis added).
¹⁴. See, e.g., In re Top Grade Sausage, Inc., 227 F.3d 123, 130 (3d Cir. 2000) ("To . . . read § 330 to preclude eligibility would create a glaring inconsistency in the Bankruptcy Code."); In re Century Cleaning Servs., Inc., 195 F.3d 1053, 1060 (9th Cir. 1999) ("In contrast to the persuasive evidence that the omission of debtor’s attorneys from the first list in § 330(a)(1) was a mistake, there is absolutely no indication that the retention of attorneys in the second list was an error."); In re Ames Dep’t Stores Inc., 76 F.3d 66, 71 (2d Cir. 1996) ("Although debtors’ attorneys were not specifically included in the coverage of the amended section 330, Collier asserts this omission was inadvertent.") (citations omitted).
¹⁵. See Lamie, 124 S. Ct. at 1027 ("[V]arious courts disagree over the proper interpretation of the portion of the statute relevant to this dispute, concerning attorney’s fees.").
¹⁶. See id. at 1028 ("The Courts of Appeals for the Second, Third, and Ninth Circuits, in contrast, concluded that the text's apparent errors rendered the section ambiguous, requiring consideration of the provision's legislative history.").
¹⁷. See id. at 1030 ("A debtor's attorney not engaged as provided by § 327 is simply not included within the class of persons eligible for compensation.").
¹⁸. See id. (indicating that numerous federal statutes lack conjunctions).
¹⁹. Id. at 1031.
²⁰. See id. (explaining that preference for avoiding surplusage is not absolute).
the text is ambiguous—applying the rule against surplusage is, absent other indications, inappropriate."\textsuperscript{21} Whether or not this reasoning is sound, no layman would call this meaning plain or obvious.

This complex reasoning towards a plain meaning served a straightforward purpose. The Court explained that "[i]n this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history."\textsuperscript{22} Yet the Court did not simply ignore extratextual sources such as legislative history altogether. Justice Kennedy proceeded to examine Section 330's legislative history, the consideration of which the Court sought so strenuously to avoid.\textsuperscript{23} Indeed, in addition to legislative history, the Court satisfied itself that its position comported with policy and common bankruptcy practice, while at the same time acknowledging that this discussion of extratextual sources was "unnecessary" as the Court had already found that the meaning of the provision was plain.\textsuperscript{24}

But the focus in cases and commentary on these "controversial" extratextual sources of meaning, such as legislative history, obscure the many tools employed in arriving at the plain meaning of a provision in the first instance. Thus, while Lamie illustrates the judicial reluctance to find a provision ambiguous, I next turn to two cases, the Supreme Court's Hartford Underwriters and the Third Circuit's Cybergenics, to examine the diversity of methods to finding plain meaning.

III. TEXT AND CONTEXT

Like Lamie, Hartford Underwriters also involved a Bankruptcy Code provision. The issue presented in Hartford Underwriters was whether the phrase "the trustee may" meant that non-trustees may \textit{not}.\textsuperscript{25} Despite its deceptively simple facade, the decision illustrates how expansive a plain meaning approach can be. Beyond just a facile reading of statutory text, the Court considered grammatical canons of construction, and also analyzed the particular Code provision's meaning in light of the Code as a whole.\textsuperscript{26}

\textsuperscript{21.} Id.
\textsuperscript{22.} Id.
\textsuperscript{23.} See id. at 1033–34 (examining legislative history).
\textsuperscript{24.} See id. at 1033 (stating that history and policy support Court's holding based on plain language of Section 330(a)). Justice Stevens in a concurring opinion, which was joined by Justices Souter and Breyer, wrote to clarify his view that when the wrong stroke of a drafter's pen (or push of a key) may result in a significant change in the law, judges "have a duty to examine legislative history." \textit{Id.} at 1035 (Stevens, J., concurring). But not every Justice appreciated this turn to extratextual sources. In a footnote to the Court's opinion, Justice Scalia noted that he joined in all of the Court's opinion but the discussion of policy and legislative history, which is what likely prompted Justices Souter and Breyer to take the unusual step of expressly noting that they joined the Court's opinion in its entirety. See \textit{id.} at 1027.
\textsuperscript{26.} See \textit{id.} at 6–8 (explaining supporting reasons for Court's interpretation).
Section 506(c) of the Code provides that a "trustee may" recover certain costs of preserving property from the estate itself.\textsuperscript{27} The question for decision in \textit{Hartford Underwriters} was whether Section 506(c) permitted non-trustees to seek remuneration from the estate.\textsuperscript{28} The Supreme Court, in a unanimous decision authored by Justice Scalia, held that Hartford Underwriters could not invoke Section 506(c), given that the provision's plain meaning afforded the remedy exclusively to a trustee.\textsuperscript{29}

The Court began with the text of the relevant Code provision, invoking the oft-cited truism that Congress "says in a statute what it means and means in a statute what it says there."\textsuperscript{30} When the law is clear, our job as judges is limited, and resembles that of our colleagues in civil law jurisdictions: we simply refer to the applicable statute, from which our judgment follows inexorably. Or, as the Court stated, "when 'the statute's language is plain, the sole function of the courts'—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.'"\textsuperscript{31} The Court then concluded that the phrase "the trustee may" did indeed mean that \textit{only} the trustee may.\textsuperscript{32} "The question thus becomes whether it is a proper inference that the trustee is the only party empowered to invoke the provision. We have little difficulty answering yes."\textsuperscript{33}

This overstates the plainness of the provision to some degree. After all, on appeal was a decision from an en banc panel of the Court of Appeals for the Eighth Circuit that divided seven judges to five. If the Code provision were actually all that obvious, it is doubtful that several able judges of the Eighth Circuit, who are perfectly capable of understanding plain English, would have found any difficulty construing the provision.\textsuperscript{34} The statute presented a vexing interpretive challenge—one that required judges to look beyond the mere words of the provision and examine its context. If instead all the answers lay in the words "the trustee may," the Supreme Court could have spared several pages of the United States Reports and ended its discussion after two paragraphs. But the plain mean-

\begin{itemize}
\item 27. See \textit{id.} at 5 (quoting Section 506(c) of Bankruptcy Code).
\item 28. See \textit{id.} at 6 (stating issue presented in case).
\item 29. See \textit{id.} at 13–14 (holding that plain meaning of provision only extends to trustees).
\item 31. \textit{Id.} (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (internal quotation marks omitted)); \textit{see also} United States v. Cook, 329 F.3d 335, 338 (3d Cir. 2003) (noting that when confronted with statutory language that was clear and direct, there was simply no interpretation required).
\item 32. \textit{Hartford Underwriters}, 530 U.S. at 6 (stating Court's interpretation of provision in question).
\item 33. \textit{Id.}
\item 34. Moreover, if the provision were all that clear, a rational litigant is unlikely to pursue a quixotic lawsuit, urging an interpretation that would defy ordinary usage. Or, as Judge Easterbrook has put it, "[a]ll judges follow a simple rule: when the statute is clear, apply it. But people rarely come to court with clear cases. Why waste time and money?" Frank H. Easterbrook, \textit{Text, History, and Structure in Statutory Interpretation}, 17 HARV. J.L. \\& PUB. POL'y 61, 61 (1994).
\end{itemize}
ing approach means more than that. Accordingly, the Court paid careful attention to what it called the "contextual features" of the provision.

The Court looked first to canons of statutory construction, in particular, the canon that "[w]here a statute . . . names the parties granted [the] right to invoke its provisions, . . . such parties only may act." Such canons focus a court's attention on the conventions of legislative drafting. The supposition, and it is only a supposition, is that when Congress employs a particular formulation, it always intends the same interpretation. Here, the Court concluded that it was unlikely that Congress would authorize specific action, designate a specific party to take that action, and yet mean that provision to be nonexclusive.

The Court then concluded that it made sense that Congress would only empower trustees to invoke Section 506(c). To arrive at this conclusion, the Court examined the provision in the context of bankruptcy law as a whole. The Court concluded that, "the fact that the sole party named—the trustee—has a unique role in bankruptcy proceedings makes it entirely plausible that Congress would provide a power to him and not to others." The lesson to draw is that courts need to focus on the roles played by various parties in bankruptcy and ask, for example, whether trustees in a Chapter 7 proceeding should have the sole right to recover administrative claims from the estate, or, as the Third Circuit did in Cybergenics, whether creditors' committees are in a position to pursue avoidance actions on behalf of an estate in Chapter 11 proceedings. Such questions take us far beyond the specific language of a Code provision. Indeed, the Court went on to suggest that even if the particular text of Section 506(c) failed to mention "trustee," an examination of the context of bankruptcy proceedings would have nevertheless led to the same conclusion.

The Court wrote, "had no particular parties been specified—had § 506(c) read simply 'there may be recovered from property securing an allowed secured claim the reasonable, necessary costs and expenses, etc.'—the trustee is the most obvious party who would have been thought empowered to use the provision."
By no means was Hartford Underwriters's holistic approach to the Bankruptcy Code a novel mode of analysis. In an earlier case, when called upon to interpret a different provision of the Code, the Supreme Court instructed the federal courts to "not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."\(^4\) The Court has also elsewhere rejected a singular focus on the text and punctuation of a provision, observing that "[a]long with punctuation, text consists of words living 'a communal existence,' in Judge Learned Hand's phrase, the meaning of each word informing the others and all in their aggregate tak[ing] their purpose from the setting in which they are used."\(^4\)

Thus, textualists do not eschew legislative context; they simply reject the use of certain sources, such as comments in the Congressional Record, as reliable indicators of that context.\(^4\) For instance, Justice Thomas, one of the Supreme Court's most ardent textualists, has observed that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."\(^4\) The structure of a legislative scheme is a critical aid to understanding the purpose of a statute. And further, an interpretation divorced from that purpose, abstracted from that structure, may well frustrate the will of the legislature.\(^4\)

After reviewing the context of Section 506(c), the Court declared that the plain meaning of "the trustee may" was that those that were not trustees, like Hartford Underwriters, may not seek reimbursement under that provision. In Cybergenics, the en banc Court of Appeals for the Third Cir-


Justice Scalia has also noted:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.


\(^4\)As Professor Manning, one of textualism's most forceful advocates, puts it: "To exclude legislative history . . . is not to deny the potential utility of purpose. Few would deny the possibility of gleaning a statute's overall purpose from its structure or from the aims suggested by the text itself." John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2408 n.75 (2003) (citing United States v. Fausto, 484 U.S. 439, 448 (1989) as "inferring purpose from the structure of the Civil Service Reform Act").
circuit construed the precise language that the Supreme Court had found to exclusively enable a trustee to act in *Hartford Underwriters*. At issue was the plain meaning of the phrase "the trustee may," used in a different section of the Bankruptcy Code, Section 544. If *Hartford Underwriters* was just about reading text then, guided by the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning," the Third Circuit would have been compelled to find that the phrase "the trustee may" excluded all other parties. But, like the *Hartford Underwriters* Court, the Third Circuit looked beyond the phrase "the trustee may" to the context of the particular Code provision. The question before the en banc court was whether, as the original three-judge panel had held, the outcome was preordained by the Supreme Court's ruling in *Hartford Underwriters*, or whether the words could, and did, mean something different when introducing a different Code section.

Cybergenics Corporation marketed bodybuilding and weight loss supplements. By August 1996, its dire finances led it to file for bankruptcy protection under Chapter 11. In contrast to the typical procedure attendant to Chapter 7 liquidation, reorganization under Chapter 11 preserves a debtor's control of its assets (the debtor-in-possession) and does not ordinarily require the appointment of a bankruptcy trustee. However, the United States trustee, who is tasked with important administrative functions in a bankruptcy proceeding, appointed a creditors' committee


49. See id. at 555 (same). Section 544 reads:
Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(c) of this title.


51. See *Cybergenics*, 330 F.3d at 555 (stating court's holding). This was indeed the reasoning and the result of the original decision issued by a three-judge panel of the court of appeals that was later vacated by the court sitting en banc. See id. (same).

52. See id. at 559 (distinguishing contexts of *Hartford Underwriters* and case at bar, noting case at bar is one in which "the Code's envisioned scheme breaks down").

53. See id. (questioning whether derivative suits may be maintained under § 544(b) after *Hartford Underwriters*).

54. See id. at 553 (stating facts of case).

55. See id. (same).

Realizing that, while in bankruptcy, its financial situation was beyond repair, the bankruptcy court approved the sale of all of Cybergenics's assets in a court-supervised auction. When Cybergenics sought to have the bankruptcy court close the case, the Committee objected, contending that certain transactions relating to the sale were subject to attack as fraudulent conveyances. The Committee urged that these causes of action had value and should be pursued. Cybergenics, however, was not in favor of pursuing such claims, having concluded that litigation expenses would far outweigh any chance of recovery. Accordingly, the debtor notified the bankruptcy court that it would not pursue any fraudulent transfer claims. Undaunted, the Committee offered to foot the litigation bill itself, so as to have the opportunity to take the matter to court. When Cybergenics refused to budge, the Committee sought the bankruptcy court's permission to bring a derivative action to avoid the allegedly fraudulent transfers. That court urged that the Committee should do so for the benefit of the estate by virtue of Section 544(b) of the Code.

Section 544(b) states that "the trustee may" avoid fraudulent transfers. If a trustee is not appointed, as is usually the case, the debtor possesses the powers of a trustee. The question presented in Cybergenics was whether a creditors' committee could be authorized to sue derivatively on behalf of a debtor that unreasonably declined to pursue a fraudulent conveyance action. The District Court held that the Supreme Court's decision in Hartford Underwriters was dispositive, and that the phrase "the

57. See Cybergenics, 330 F.3d at 553 (stating facts of case).
58. See id. (noting Cybergenics sold its assets via court-supervised auction for $2.65 million).
59. See id. (stating certain buyout-related transactions could give rise to substantial fraudulent transfer actions).
60. The creditors' committee ("Committee") was so adamant about Cybergenics pursuing the fraudulent transfer claims that the Committee offered to bear the costs of the litigation. See id. (noting creditors' committee's willingness to bear costs of litigation).
61. See id. (noting Cybergenics believed probability of recovery to be disproportionately low in relation to high cost of litigating).
62. See id. (noting Cybergenics informed bankruptcy court it would not pursue claims).
63. See id. (noting Committee's offer to bear costs of litigating claims).
64. See id. (explaining Committee's attempt at pursuing derivative action resulted from Cybergenics's decision not to pursue claims, even at Committee's expense).
65. See id. (explaining bankruptcy court allowed Committee to bring derivative suit under § 544(b)).
68. See generally Cybergenics, 330 F.3d at 555 (discussing procedural history of derivative action).
trustee may” permits actions by trustees alone, whether in Section 544(b) or 506(c). Accordingly, only Cybergenics, as the debtor-in-possession with the same rights as a trustee, could pursue avoidance actions under Section 544(b). Having declined to do so—end of story. The District Court ruled that “[t]here is no principled basis under which the Court can apply different meanings to the words ‘the trustee may’ in separate sections of the Code.”

The en banc court of the Third Circuit reversed the District Court and held that, to the contrary, “the trustee may” in Section 544(b) was not exclusive and the bankruptcy court could authorize a creditors’ committee to bring an action in the name of a debtor, if that debtor was in dereliction of its fiduciary duty to protect the estate’s interests. Four judges dissented, concluding that Hartford Underwriters’s view of the language was controlling and that the Bankruptcy Code did not permit such derivative standing.

Although the practice of permitting creditors and creditors’ committees to sue on behalf of the estate was well-established in bankruptcy, the question was whether it was foreclosed by the Code language of Section 544. The leading treatise on bankruptcy law had stated that “[n]early all courts considering the issue have permitted creditors’ committees to bring actions in the name of the debtor in possession if the committee is able to establish” that a debtor is neglecting its fiduciary duty.” And so as the original panel expressed it, “we must decide in this case whether the plain language of § 544 and the holding of Hartford Underwriters invalidates the rather well-established practice of allowing creditors and creditors’ committees to bring avoidance actions derivatively.”

69. See id. (noting District Court’s reliance on Hartford Underwriters in finding Section 506(c) and Section 544(b) rights did not extend to creditors’ committee).
70. Id. at 555 (quoting District Court’s decision).
71. See id. at 566 (noting Third Circuit’s textual conclusion that Congress recognized standing for creditors’ committees to bring derivative actions).
72. See id. at 580–86 (Fuentes, J., dissenting) (reporting Cybergenics’s dissent).
73. See id. at 580 (noting central question presented is whether creditors’ committee has standing under Section 544(b)).
74. Id. at 553 (citing 7 COLLIER ON BANKRUPTCY ¶ 1103.05[6][a] (15th rev. ed. 2002)).
75. Official Comm. of Unsecured Creditors of Cybergenics Corp., ex rel. Cybergenics Corp. v. Chinery, 304 F.3d 316, 322 (3d Cir. 2002), rev’d, 330 F.3d 548 (3d Cir. 2003). The issuance of the 2002 Cybergenics opinion was met with an outcry from bankruptcy practitioners, stemming no doubt from the established nature of bankruptcy courts’ recognition of the practice of derivative standing for creditors’ committees to pursue such avoidance actions. See, e.g., Michael A. Bloom & Joel S. Solomon, Cybergenics II: Ignoring Both Precedent and Pragmatism, 11 J. BANKR. L. & PRAC. 417, 417 (2002) (arguing that original panel decision denominated as Cybergenics II “literally scrapped the prior practice of granting derivative standing to official creditors’ committees in Chapter 11 cases to pursue avoidance actions on behalf of a debtor’s estate”); Robert J. Keach, When the Committee Is Not and When the Committee Is No More, 22-10 AM. BANKR. INST. J. 34, 34 (2003) (referring to “the momentary panic following the first Cybergenics decision in the Third Circuit”).
The majority and the dissenters disagreed as to the effect of *Hartford Underwriters.*\(^{76}\) While the dissenters took *Hartford Underwriters* to be persuasive support for their position, the majority concluded that the ultimate holding in the case simply was not controlling.\(^{77}\) The majority observed that whereas Hartford Underwriters sought to unilaterally reclaim administrative funds for its own coffers, the creditors' committee in *Cybergenics* acted on behalf of the estate and only because Cybergenics, the debtor-in-possession, acted in dereliction of its fiduciary duty.\(^{78}\) Moreover, the majority emphasized that, although *Hartford Underwriters* concerned a "non-trustee's right unilaterally to circumvent the Code's remedial scheme, the issue before us today concerns a bankruptcy court's equitable power to craft a remedy when the Code's envisioned scheme breaks down."\(^{79}\) But, setting aside how the two sides applied *Hartford Underwriters* to the merits of the issue, every judge agreed that *Hartford Underwriters* set forth the interpretive method that courts construing the Bankruptcy Code were obliged to follow.\(^{80}\)

After concluding that *Hartford Underwriters* did not dictate a decision as to the merits of the case, then Chief Judge Becker, writing for the majority, stated that "[w]e agree that *Hartford Underwriters* is most useful for the interpretive methodology it offers."\(^{81}\) The text of Section 544(b) was identical to that of the provision in *Hartford Underwriters,* Section 506(c), both provisions employing the phrase "the trustee may."\(^{82}\) The majority, and indeed the creditors' committee itself, acknowledged that "the trustee may' cannot be read to mean 'the trustee and other parties in interest may.'"\(^{83}\) Nevertheless, the majority concluded that the issue was not whether another party could invoke Section 544(b), but whether the language prevented the bankruptcy court from conferring standing on another party, such as a creditors' committee, based on the court's equitable powers.

Concluding that the text of the provision did not bar the bankruptcy court from conferring derivative standing, the *Cybergenics* majority believed that the path of the analysis in *Hartford Underwriters* permitted, perhaps dictated, an examination of Section 544(b) in the context of Chapter 11 of

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76. For a discussion of this disagreement, see infra notes 77–79 and accompanying text.
77. Compare *Cybergenics,* 330 F.3d at 557–59, with id. at 584 (Fuentes, J., dissenting) (discussing majority and dissenting views of effect of *Hartford Underwriters*, respectively).
78. See id. at 558 (noting differences between *Hartford Underwriters'*s and *Cybergenics'*s creditors' committees).
79. Id. at 559 (emphasis in original).
80. Compare id. at 559 (noting outcome turns on interpretation of *Hartford Underwriters*), with id. at 580 (Fuentes, J., dissenting) (same).
81. Id. at 558.
82. See id. (noting both cases involved different sections but same language, "the trustee may").
83. Id.
the Bankruptcy Code.84 The majority began its “holistic endeavor,” by first looking to related provisions of the Code.85 Although the Supreme Court often looks to other provisions of a statutory scheme to aid in construction, it did not do so in Hartford Underwriters. And for good reason. The Cybergenics majority explained that “[t]he Hartford Underwriters Court interpreted the Code holistically in determining that ‘the trustee may’ in § 506(c) is exclusive, but in that case, there was no ‘whole law’ to interpret, for § 506(c) is effectively self-contained.”86 Section 506(c) stands alone as a unique remedial provision. By contrast, the majority deemed Section 544(b) to be interrelated to several other provisions in Chapter 11 that should be analyzed.87

For our present purposes, we may avoid the specific details of those other provisions. Yet, while the majority construed these other provisions as setting forth the numerous rights of creditors’ committees and “evinc[ing] Congress’s intent for creditors’ committees to play a vibrant and central role in Chapter 11 adversarial proceedings,”88 Judge Becker nevertheless conceded that none of the Code sections “seem[ed] directly to authorize such standing.”89 As noted above, in Hartford Underwriters, the Supreme Court examined the function of a trustee in Chapter 7 proceedings and concluded that a trustee served a “unique role.”90 The Supreme Court went so far as to suggest that even if Section 506(c) had contained no reference to a trustee, viewing bankruptcy law as a whole, a court could safely presume that the provision was nevertheless intended to refer to trustees.91 Undertaking a similar appraisal in context, the majority in Cybergenics considered the roles of both a creditors’ committee and the bankruptcy court itself in a bankruptcy proceeding.92

In examining the role of a creditors’ committee, the majority first considered Section 544(b)’s reference solely to a trustee.93 The majority emphasized the differences between Chapters 7 and 11.94 Specifically, the

84. See id. (explaining that analysis in Hartford Underwriters is useful guidance for interpretive methodology).
85. See id. at 559 (“‘[s]tatutory construction [ ] is a holistic endeavor’”) (quoting United States Savings Assn. of Tex. v. Timbers of Inwood Forest Assoc. Ltd., 484 U.S. 365, 371 (1988)).
86. Id. at 559–60.
87. See id. at 560 (stating that Section 544(b) is merely part of Chapter 11 framework and must be read in conjunction with other provisions).
88. Id. at 562 (referring specifically to Section 1109(b)).
89. Id. at 567.
91. See id. (stating that had no particular party been specified, then trustee would have been thought of as most obvious party empowered to use provision).
92. See Cybergenics, 330 F.3d at 568 (examining creditors’ committees and bankruptcy court).
93. See id. at 560 (discussing sole reference to trustee).
94. See id. (showing that trustee’s role in Chapter 7 is different than its role in Chapter 11).
majority noted that "while a trustee serves a 'unique role' in Chapter 7, nothing could be further from the truth in Chapter 11, where trustees rarely exist."\textsuperscript{95} After all, Chapter 11 reorganizations are predicated on preserving a debtor's rights to control its assets, and so a trustee is largely unnecessary. "Reading § 544(b) alone would lead to the fatuous conclusion that Congress vested its cause of action exclusively in a party that usually does not exist."\textsuperscript{96} To the contrary, Congress enacted Section 544(b), and Chapter 11 more broadly, to aid in reorganization. Given this purpose, the majority came to the conclusion that a creditors' committee serves an important safeguarding role when a debtor-in-possession fails to protect the interests of the estate.\textsuperscript{97}

The majority further reasoned that bankruptcy courts have a specific role in overseeing bankruptcy proceedings.\textsuperscript{98} It is a role which is, to some degree, independent of debtors, creditors, trustees and estates. As courts of equity, bankruptcy courts are empowered to further the policies of the Code. Of course, equity or no, bankruptcy courts must act within the confines of the statutory law. The law is the law, and equity may not contravene it. But just as Congress enacts statutes that leave gaps to be filled in by federal common law,\textsuperscript{99} so too did Congress enact the Code while preserving the equitable powers of the bankruptcy courts. The flexibility that is a touchstone of equity offers "bankruptcy courts ... broad authority to modify creditor-debtor relationships"\textsuperscript{100} to benefit the estate.

In \textit{Cybergenics}, the company's decision not to pursue a possibly meritorious avoidance action threatened the estate. Although there was no provision expressly authorizing a creditors' committee to represent the estate's interests, the majority concluded that it was well within the equitable role of bankruptcy courts to permit derivative standing.\textsuperscript{101} One may

\textsuperscript{95} \textit{Id.} \\
\textsuperscript{96} \textit{Id.} \\
\textsuperscript{97} \textit{See id.} at 564 (concluding that natural reading of Section 503(b)(3)(B) is to financially award creditors' committees). \\
\textsuperscript{98} \textit{See id.} at 567 (stating that Supreme Court has long recognized that bankruptcy courts are equitable tribunals applying equitable principles in bankruptcy proceedings). \\
\textsuperscript{99} \textit{See, e.g.}, 15 U.S.C. § 1 (2004) (permitting courts to fashion federal common law of anti-competition protection); \textit{see also} Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) (explaining that Rule of Reason—with history in common-law long predating Sherman Act—was implied by Congress into statute's mandate). \\
\textsuperscript{101} \textit{See Cybergenics}, 330 F.3d at 568 (holding that derivative standing for creditors' committees is "straightforward application of bankruptcy courts' equitable powers"). Judge Becker wrote:

The debtor refused to bring an action that the bankruptcy court found would benefit the estate, and thereby violated its fiduciary duty to maximize the estate's value. It is in precisely this situation that bankruptcy courts' equitable powers are most valuable, for the courts are able to craft flexible remedies that, while not expressly authorized by the Code, effect the result the Code was designed to obtain.
take issue with this ultimate conclusion, as the dissenters did, but the interpretive method, to examine a provision's contextual features and to focus on the deeper structure of the Bankruptcy Code, is not only warranted under the plain meaning approach employed in *Hartford Underwriters*, it appears to be required by it. After examining these contextual features, the *Cybergenics* majority concluded that "the most natural reading of the Code is that Congress recognized and approved of derivative standing for creditors' committees." But just as numerous plain meaning decisions of the Supreme Court have nevertheless considered extratextual sources, such as legislative history, if only to confirm a natural reading of statutory text, the *Cybergenics* court went on to examine pre-Code practice and policy.

**IV. Extratextual Sources**

Having come to a textual/contextual conclusion, the majority in *Cybergenics* looked to pre-Code practice and policy considerations for further guidance. Again, *Hartford Underwriters* had touched on these aspects as well. The practice of derivative standing, the *Cybergenics* majority observed, was clearly established as a practice in the law of bankruptcy. Permitting derivative standing was so prevalent that it was reasonable to presume that Congress would have been aware of the practice. And following established Supreme Court guidance, absent a clear statutory expression, we are to assume that Congress did not intend to terminate prevailing practice that existed prior to the enactment of the Code. The majority next concluded that the policy considerations of bankruptcy also weighed in favor of permitting derivative standing. Judge Becker's extensive discussion reconciled conflicting opinions regarding conferring such derivative standing, proffered by amici law professors and found in the bankruptcy scholarship. After considering the potential drawbacks of derivative standing, including the harm unmeritorious suits could cause to an estate, the majority ultimately concluded that "[b]ecause it helps to ensure that creditors' claims are not frustrated

Id. at 568.

102. *Id.* at 566.

103. See *id.* at 569 (examining pre-Code practice for further interpretive guidance).

104. See *id.* (discussing consideration of pre-Code practices in *Hartford Underwriters*).

105. See *id.* at 569–72 (demonstrating compelling tradition of derivative standing).

106. See *id.* at 569 ("Indeed, it is precisely the sort of practice of which Congress would have been aware when drafting the Code.").

107. See *id.* at 572 (finding that derivative standing achieves Congress's policy goals).
by fraudulent transfers, derivative standing seems clearly to give ‘effect to the policy of the legislature.’”

By contrast, the dissenters did not consider the majority’s arguments concerning pre-Code practice and policy to be persuasive, concluding that the holding of Hartford Underwriters regarding the language at issue was controlling, and expressly disapproved such considerations. There is of course merit to the dissenters’ position, and their reading of Hartford Underwriters. For, in Hartford Underwriters, the Supreme Court had stated that pre-Code practice could not be used as an “extratextual supplement” and could not overcome the plain language of a provision. Guided by these strong words, the dissenting opinion stated “[b]ecause the language of § 544 is clear, a review of pre-Code practice is totally unnecessary.” Yet, after finding that Section 506(c)’s language was plain, the Hartford Underwriters Court did proceed to consider pre-Code practice. While the Court found no evidence of contrary bankruptcy practice, it certainly discussed the issue. Hartford had presented several cases that it contended established a widespread practice, which the Court then reviewed and rejected. The Court indeed concluded to the contrary that “[i]t was the norm that recovery of costs from a secured creditor would be sought by the trustee.” Likewise, having found that the plain meaning of the Code supported its conclusion, the majority in Cybergenics reviewed pre-Code practice for additional support; but, unlike Hartford Underwriters, the majority concluded that there existed robust evidence to support the pre-Code practice of conferring derivative standing. That practice, which merely confirmed the plain meaning already identified by the majority, was viewed as adding strong support for its conclusion.

The same can be said of policy considerations. The Supreme Court in Hartford Underwriters recited the undeniable proposition that judges are not policymakers and may not resort to policy considerations to frustrate the clear language of a provision. Accordingly, the Cybergenics dissenters concluded that “[i]n light of the clear import of the language of § 544 and

108. Id. at 579 (quoting Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960)).
109. See id. at 586–87 (Fuentes, J., dissenting) (arguing that Hartford Underwriters controlled decision and considerations of pre-Code practices and public policy are totally unnecessary).
110. See id. (Fuentes, J., dissenting) (stating that pre-Code practices cannot be used when there is no ambiguity in text).
111. Id. at 587 (Fuentes, J., dissenting).
113. See id. at 9–11 (discussing merits of petitioner’s arguments).
114. See id. at 9–10 (considering whether precedent is sufficient to establish widespread practice).
115. Id. at 8.
116. See Cybergenics, 330 F.3d at 553 (holding “that bankruptcy courts’ equitable powers enable them to authorize such suits as a remedy in cases where a debtor-in-possession unreasonably refuses to pursue an avoidance claim”).
because the result that the language commands is not absurd, there is no need to explore the public policy implications of derivative standing."  

Yet having found the Code provision to be plain, the Supreme Court in *Hartford Underwriters* did just that. The Court considered and rejected Hartford's policy arguments, and it concluded to the contrary that Hartford's position "would itself lead to results that seem undesirable as a matter of policy." In like manner, the *Cybergenics* majority first identified a plain meaning and then went on to explore policy considerations that the majority determined cut in favor of its position. In keeping with pre-Code practice, the *Hartford Underwriters* Court concluded that policy could not overcome the plain language of a provision, though the Court did not pretermit a discussion of it. Following suit, the majority in *Cybergenics* referred to pre-Code practice and policy as support for what it had already interpreted to be the clear language of the Code.

V. CONCLUSION

These cases also hold a significant lesson for practitioners who appear before the Third Circuit. As is evident from the *Cybergenics* opinion, the plain meaning approach does not obviate the need to thoroughly brief a court on various sources from which congressional intent can be gleaned. To be sure, judges will continue to be suspicious of legislative history, but the other aspects considered in *Hartford Underwriters* and in *Cybergenics* should be fair game as reliable indicators of legislative purpose. The plain meaning approach does not reject considerations beyond the text of a provision. Indeed, such an approach requires that courts and, by extension, attorneys, pay close attention to what Justice Scalia in *Hartford Underwriters* called a provision's "contextual features." There, the Court looked not only to grammatical canons and the role that Congress envisioned for a trustee in a bankruptcy proceeding, it also examined pre-Code practice and policy considerations to confirm its reading. In other cases, context may include related provisions of the Code, the common practice of the bankruptcy courts, and, given the equitable nature of bankruptcy, the role of a bankruptcy court itself.

117. *Id.* at 587 (Fuentes, J., dissenting).
118. *Hartford Underwriters*, 530 U.S. at 12.
119. *See Cybergenics*, 330 F.3d at 559-67 (concluding that "missing link" in statutory language is closed by court's equitable power).
120. *See Hartford Underwriters*, 530 U.S. at 12 (discussing statutory language).
121. *See Cybergenics*, 330 F.3d at 569-72 (noting that "complete doctrinal uniformity in caselaw is hardly to be expected where powers of equity are concerned").
The need for such a versatile plain meaning approach is particularly acute in the bankruptcy arena. The law of bankruptcy poses tough challenges for judges. The Code was the culmination of nearly ten years of congressional debates, involving the testimony of literally hundreds of participants. Not only did the Code build on the decades of bankruptcy jurisprudence, but also, in some areas, Congress codified new concepts to replace prior practice. The resultant legislation was, to say the least, intricate and complex, balancing the diametrically opposed interests of debtors and creditors.

Bankruptcy is a highly specialized practice with practitioners who are well versed in navigating the Code and the policies behind its many provisions. Many bankruptcy lawyers do not appreciate the fact that oftentimes judges simply are not conversant in bankruptcy parlance and may be unfamiliar with its practice. I call this the "Fifth Floor Syndrome," in which lawyers begin arguing and urging a particular interpretation, assuming that judges have a suitable doctrinal foundation when, in fact, they often do not. In other words, one must start at the ground floor and work one's way up. The costs of the Fifth Floor Syndrome are especially high for bankruptcy and similar areas of the law involving a complex and interwoven legislative scheme. Code provisions, like those of ERISA, are rarely isolated; they interact in numerous ways not always obvious to even the most learned judges. I find that the practitioner's shock over appellate court opinions in the bankruptcy area—which happens regularly—can often be traced to a lack of appreciation of the nuances apparent to practitioners, but not to judges.

Superficial or limited briefing by the parties, in which insufficient attention is paid to a statute's context or relevant policy, will predictably lead to results that may be "right" at the level of semantics, grammar or syntax, but ultimately wrong when viewed in light of the Code or bankruptcy practice as a whole. As Cybergenics makes clear, viewing the words of Congress

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124. Cf. Robert K. Rasmussen, A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases, 71 WASH. U. L.Q. 535, 538 (1993). Professor Rasmussen argues that while the bankruptcy, district and appellate courts are well-placed to practice a more dynamic form of statutory interpretation, considering policy implications if necessary, the Supreme Court "then selects the result that best comports with the statutory text . . . without engaging in the policy debate." Id. He concludes that "[t]extualism is thus the best pragmatic strategy for the Court to employ when interpreting the Bankruptcy Code." Id.


126. I can recall the uproar in the legal community when the Third Circuit decided In re Frenville, 744 F.2d 332 (3d Cir. 1985). While the panel's opinion was scholarly and well-reasoned, it was nevertheless perceived by practitioners as lacking an appreciation of the decision's practical implications.
in light of their contextual features, with an aim to preserving the ultimate coherence of the Code, can make a difference.\footnote{127}

To maintain this overall coherence, courts must be informed. Attorneys need all the relevant information regarding the contextual features of a provision. In the words of Chief Justice Marshall, "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived."\footnote{128} This proposition is no less true now than it was nearly two hundred years ago, and exceedingly pertinent as it pertains to the minds of judges when deciding a case in the bankruptcy area. Though we may be all textualists now, that approach demands great attention to the context of an intricate statutory scheme such as the Bankruptcy Code, and due respect to the will of the legislature.

\footnote{127. To be certain, Congress may fix our mistakes, as is evident from the numerous amendments to the Code since 1978. Nevertheless, scholars have argued both that Congressional intervention is often delayed and oftentimes undesirable, creating more problems than solutions. See Douglas Baird & Robert Rasmussen, Boyd's Legacy and Blackstone's Ghost, 1999 Sup. Ct. Rev. 393, 433 ("Congress cannot monitor systematically judicial interpretation of the Bankruptcy Code . . . . Given two interpretative methodologies that are equally easy to apply, we are better off with one that best maintains the coherence of the Code as a whole during the interregnum."); Bussel, supra note 1, at 900 n.46 ("[T]he many amendments to the Code since 1978 can often be fairly described as patchwork, ill thought-through, or special interest legislation insensitive to the overall structure of the Code and bankruptcy policy.").}
