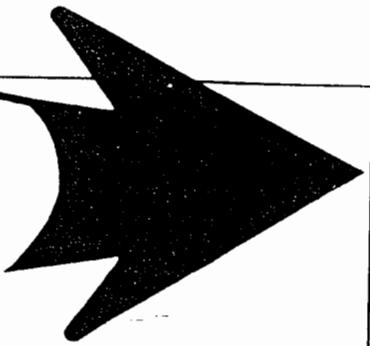


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THE 507 (b) "SUPER PRIORITY"

In every bankruptcy action there is the very real probability that the estate will not have sufficient assets to pay all claims of its creditors, or even all administrative expenses of the bankruptcy. As a result, the Bankruptcy Code outlines certain priorities for payment of claims out of the assets of the estate of the debtor. The first priority, generally, is given to administrative expenses, together with any fees and charges assessed against the estate. These administrative expenses include the costs and expenses of preserving the estate such as wages, salaries, or commissions for services rendered after the commencement of the bankruptcy action, taxes, professional services rendered by an attorney, and various other items. The Code provides that these claims for administrative expenses must be paid before any other property of the estate can be distributed.

Administrative claims allowed by the Code do not share equally. There is a descending ladder of priorities even among such claims. Section 507(b) of the Code, for example, grants a "super priority" to claims of secured creditors that arise due to the failure of the trustee to provide adequate protection for their interests. Claims enjoy-

ing this "super priority" have priority over most other, but not all, claims entitled to administrative priority. Expenses incurred in the preserving of property of the estate under 11 U.S.C. §506(c), for example, occupy a yet higher rung on the priority ladder.

The rationale behind the 507(b) "super priority" is that adequate protection is intended as interim protection to protect creditors who because of the statutory automatic stay cannot repossess their collateral. Adequate protection, as its name implies, is supposed to protect creditors from depreciation or other loss of value to their collateral that may occur while the stay against lien enforcement is in effect. The secured creditor is, of course, wise to make sure that any adequate protection payments allow for payment at the same rate as depreciation of the collateral, so the creditor's interest is not dissipated during the bankruptcy. Unfortunately, the secured creditor cannot always obtain from the trustee a full measure of adequate protection for its collateral. The "super priority" of §507(b) was intended to cover the difference between the adequate protection provided and the actual decrease in value of collateral that the

secured creditor suffers during the pendency of the bankruptcy action.

A creditor is not necessarily entitled, however, to a "super priority" claim for every decline in the value of its collateral. Recent court decisions have held that loss which occurred as a result of an error in adequate protection or due to ordinary foreseeable depreciation is not entitled to a "super priority" claim. If the creditor suffers a loss as a result of some unforeseeable circumstance such as casualty or sudden and swift changes in the market forces, however, then the creditor's loss would qualify for "super priority" status under this developing line of judicial decisions.

For example, suppose a creditor has a claim against the debtor in the amount of \$100,000.00 and collateral valued at the same amount to secure the claim. The court grants \$5,000.00 per month adequate protection payments, but due to an unexpected change in the market forces, the collateral depreciates at a rate of \$7,500.00 per month. If the debtor was not prevented by the stay from enforcing its lien rights, it could have repossessed the collateral and sold it for \$100,000.00 at the time

the debtor filed bankruptcy. The creditor can therefore prove that it was damaged at a rate of \$2,500.00 per month and the 506 (b) administrative priority claim will be \$2,000.00 per month.

In order for a creditor to sustain a "super priority" claim under 506 (b), it must prove that it was provided adequate protection, that the protection provided proved to be inadequate, and that the loss incurred was caused solely by the imposition of the automatic stay. □

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