Principal Principles of Principled Decisions: Statutory Construction and BAPCPA

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INTRODUCTION

As the title of this material suggests, the Bankruptcy Abuse Prevention and Consumer Protection Act (the Act) has been repeated recognized by the bankruptcy community as, what in common parlance would be called, a mess. It must also be recognized by the bankruptcy community that the Act is the current law of the land and there is no indication it will be subject to legislative correction, or Supreme Court clarification, in the immediately foreseeable future. Further, to the extent history may provide guidance, legislative correction of certain bankruptcy decisions may not yield desirable results.

> **The Bankruptcy Code is complicated and amendments often have unintended consequences, fail in part or sometimes fail completely . . . . Relying on legislation to correct judicial misinterpretations is like relying on surgery to correct ills caused by misprescribed drugs. It is costly, risky and rarely as efficacious as administering the correct medicine in the first place.**

Daniel J. Bussell, "Plain Meaning" Cases Lead to Costly and Flawed Amendments to the Bankruptcy Code, 19-AUG Am. Bankr. Inst. J. 1, 41 (2000).

In the present circumstances, the early bankruptcy court decisions and, to the extent they become available, the first level appellate decisions will construct the initial channels in which the Act's provisions will be viewed. The hope for a fair and functioning bankruptcy system that will be advanced, not eviscerated, by the Act may depend on the appropriate application of principles of statutory interpretation. The toolbox containing established canons of statutory construction holds an array of tools, many appearing capable of completing a given task. The difficult decision is determining which is best suited to yield the correct result.

Reported decisions warn against an "Alice in Wonderland" approach to statutory construction. As the Second Circuit has noted:

> **Critical on this appeal is the meaning of the terms "solid waste" and "hazardous waste," as these terms are defined in the Solid Waste Disposal Act, 42 U.S.C. §§ 6901–6992k (1988), as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), Pub.L. No. 94–580, 90 Stat. 2795 (1976), and the Hazardous and Solid Waste Amendments of 1984, Pub.L. No. 98–616, 98 Stat. 3221 (1984). Defining what Congress intended by these words is not child's play, even though RCRA has an "Alice in Wonderland" air about it. We say that because a careful perusal of RCRA and its regulations reveals that "solid waste" plainly means one thing in one part of RCRA and something entirely different in another part of the same statute.**
>
> **"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."**
>
> **"The question is," said Alice, "whether you can make words mean so many different things."**
>
> **"The question is," said Humpty Dumpty, "which is to be master—that's all."**

Lewis Carroll, Through the Looking—Glass ch. 6 at 106–09 (Schocken Books 1987) (1872).

Congress, of course, is the master and in the discussion that follows, we undertake to discover what meaning Congress intended in its use of the words solid and hazardous waste.

Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc. 989 F.2d 1305, 1308 (2nd Cir. 1993).

> It may, however, be too early to subscribe to the view of one Justice:
>
> **The narrow conclusion I have reached in this case is consistent with the underlying rationale for that principle, which was articulated many years ago by Justice Jackson: "We are not final because we are infallible, but we are infallible only because we are final."** ***Brown v. Allen, 344 U.S. 443, 540, 73 S.Ct. 397, 427, 97 L.Ed. 469 (1953)*** **(opinion concurring in result)**

Thompson v. Oklahoma, 487 U.S. 815, 858, 108 S.Ct. 2687, 2711 (1988).

As some of the initial bankruptcy court decisions establish, the canons of statutory construction do not necessarily compel consistent conclusions.

Sometimes: "And" Means "Or"

11 U.S.C. § 1112(b)(4)(O)—"termination of a confirmed plan by reason of the occurrence of a condition specified in the plan and "In re TCR of Denver. LLC, 338 B.R. 494 (Bankr. D. Colo. 2006)

Sometimes: "And" Means "And"

11 U.S.C. § 362(d)(4)—"delay, hinder and defraud" In re Abdul Muhaimin, B.R., 2006 WL 1153898 (Bankr. D. Md. 2006)

Sometimes: Ignore the Word "Allowed"

11 U.S.C. § 521(a)(6)—"If the word "allowed" is disregarded in the construction of the subsection" *In re Rowe*, 342 B.R. 341, 349 (Bankr. D. Kan. 2006)

Sometimes: Give Effect to the Word "Allowed"

11 U.S.C. § 521(a)(6)—This court respectfully disagrees that the word **"allowed"** should be ignored. *In re Donald*, B.R. , 2006 WL 1666734 (Bankr. E.D N.C. 2006)

Sometimes: Add a Word—"Period"

11 U.S.C. §1325(a)—"In addition, the provision is missing an operable word. The first sentence refers to 'the 910-day **[period]** preceding the date of the filing of the petition .... *Id.* Without the addition of **"period,"** the provision makes little sense and could be read to apply only to debts of the type described that were incurred exactly 910 days—no more, no less—prior to the petition date." (internal quotes omitted and emphasis added) *In re Carver,* 338 B.R. 521, 523 (Bankr. S.D. Ga. 2006)

Sometimes: Apply the Plain Meaning—"With Respect to the Debtor"

11 U.S.C. § 362(c)(3)—*In re Paschal*, 337 B.R. 274 (Bankr. E.D.N.C. 2006); *In re Johnson,* 335 B.R. 805 (Bankr. W.D. Tenn. 2006)

Sometimes Add the Words—"And Property of the Estate"

11 U.S.C. § 362(c)(3)—*In re Jumpp*, B.R. , 2006 WL 1731172 (Bankr. D. Mass. 2006); *In re Jupiter*, B.R. , 2006 WL 1817065 (Bankr. D.S.C. 2006)

Sometimes Apply the Plain Meaning—"Electing"

11 U.S.C. § 522(p)—"Yet Code § 522(p) specifically applies only 'as a result of **electing** under subsection (b)(3)(A) to exempt property

under state or local law.' If the cap of § 522(p) becomes applicable only 'as a result of **electing**,' then it can apply only in non-opt out states, *i.e.*, those states where such an election is available. (emphasis added) *In re McNabb*, 326 B.R. 785, 788 (Bankr. D. Ariz. 2005)

Sometimes Ignore the Plain Meaning—"Electing"

11 U.S.C. § 522(p)—"The intent of Congress is crystal clear, and there is no feasible rationale or policy for enacting what the text of the statute says. Indeed, strictly applying the words of Section 522(p) would actually prevent Congress's goal from being achieved." *In re Kane*, 336 B.R. 477, 489 (Bankr. D. Nev. 2006)

An obvious question is—what are the principles which courts will employ as they interpret and apply the provisions of the Act. An equally obvious answer is—the Supreme Court's body of bankruptcy law reflecting approaches to statutory interpretation.

Although the Supreme Court has repeated resolved statutory interpretation issues involving bankruptcy issues by reference to "plain meaning", a candid assessment of this body of law acknowledges confusion, if not contradiction, in the methodology of these decisions.

As Judge Bruce A. Markell observes in *Alive at 25? A Short Review of the Supreme Court's Jurisprudence*, 1979–2004, 78 Amer. Bankr. L.J. 373, 387 (hereafter *Alive*):

> **Though drafters try to be crystal clear in writing laws, when those laws are applied to specific facts, it is not always clear what the words plainly mean or what the drafters intended or the legislators enacted. In fact, the justices haven't even always agreed on when the text is ambiguous or what method of interpretation should be used when it isn't.**

The Supreme Court's decisions involving bankruptcy issues have often been the battleground for the competing jurisprudential theories denominated purposivism and textualism.

Although the concerns of purposivism and textualism, and the consequences which flow from these positions, still separate Supreme Court Justices and other members of the legal community, recent scholarship suggests that differences continue to diminish and both schools of thought have been enhanced by the incremental inclusions of elements from the other.

> **For a not inconsiderable part of our history, the Supreme Court held that the "letter" (text) of a statute must yield to its "spirit" (purpose) when the two conflicted. Traditionally, the Court's "purposivism" rested on the following intuitions: In our constitutional system, federal courts act as faithful agents of Congress; accordingly, they must ascertain and enforce Congress's commands as accurately as possible. Statutes are active instruments of policy, enacted to serve some background purpose or goal. Ordinarily, a statutory text will adequately reflect its intended purpose. Sometimes, however, the text of a particular provision will seem incongruous with the statutory purpose reflected in various contextual cues—such as the overall tenor of the statute, patterns of policy judgments made in related legislation, the "evil" that inspired Congress to act, or express statements found in the legislative history. Since legislators act under the constraints of limited resources, bounded foresight, and inexact human language, unanticipated problems of fit have long been**

viewed as unavoidable. It is said that just as individuals sometimes inadvertently misstate their intended meaning, so too does Congress. Accordingly, the Court long assumed that when the clear import of a statute's text deviated sharply from its purpose, (1) Congress must have expressed its true intentions imprecisely, and (2) a judicial faithful agent could properly adjust the enacted text to capture what Congress would have intended had it expressly confronted the apparent mismatch between text and purpose.

Near the close of the twentieth century, however, the "new textualism" challenged the prevailing judicial orthodoxy by arguing that the Constitution, properly understood, requires judges to treat the clear import of an enacted text as conclusive, even when the text fits poorly with its apparent background purposes. The textualist critique— which took shape largely in judicial opinions written by Justice Scalia and Judge Easterbrook— initially stressed two related themes: First, textualists emphasized that the statutory text alone has survived the constitutionally prescribed process of bicameralism and presentment. Accordingly, they argued that when a statute is clear in context, purposivist judges disrespect the legislative process by relying upon unenacted legislative intentions or purposes to alter the meaning of a duly enacted text.

Second, building upon the intent skepticism of the legal realists, the new textualists contended that the purposivist judge's aspiration to identify and rely upon the actual intent of any multimember lawmaking body is fanciful. In brief, textualists have contended that the final wording of a statute may reflect an otherwise unrecorded legislative compromise, one that may—or may not—capture a coherent set of purposes. A statute's precise phrasing depends, moreover, on often untraceable procedural considerations, such as the sequence of alternatives presented (agenda manipulation) or the effect of strategic voting (including logrolling). Given the opacity, complexity, and path dependency of this process, textualists believe that it is unrealistic for judges ever to predict with accuracy what Congress would have "intended" if it had expressly confronted a perceived mismatch between the statutory text and its apparent purpose. In place of traditional conceptions of "actual" legislative intent, modern textualists urge judges to focus on what they consider the more realistic—and objective—measure of how "a skilled, objectively-reasonable user of words" would have understood the statutory text in context.

Despite the significant differences thus championed by textualists, recent scholarship has sought to minimize the division between textualism and the (related) approaches that it has sought to displace: intentionalism and purposivism. Proceeding

> along that line, Professor Molot's thoughtful and reflective Article in this Issue argues that the line separating textualists from purposivists has grown fainter over time. Modern textualists, he states, are sensitive to context as well as text. He also suggests that modern purposivists, with whom his allegiance more closely lies, feel the pinch of the statutory text more sharply than purposivists of the past. Based on these trends, he argues that we should conclude that text and purpose are both always relevant and that interpreters should proceed by calibrating how strong the respective textual and purposive cues appear in any particular interpretive case. In effect, Professor Molot proposes an approach more holistic than that of modern textualism—one that recalls Chief Justice Marshall's admonition that "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." (footnotes omitted)

John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70, 71–75 (2006).

> Textualism has outlived its utility as an intellectual movement. Although textualism has only lately earned the respect that it deserves, textualism's recent successes ironically are leading to its own demise. Textualists have been so successful discrediting strong purposivism, and distinguishing their new brand of "modern textualism" from the older, more extreme "plain meaning" school, that they no longer can identify, let alone conquer, any remaining territory between textualism's adherents and nonadherents. Leading textualists may proceed today as if their quest is still worth pursuing, but in so doing they overlook a strong consensus on the interpretive enterprise that dwarfs any differences that remain. Moreover, to the extent that these textualists define textualism so as to create real, and not just apparent, differences with purposivism, they stake out extreme positions that tend to undermine, rather than support, the case for textualism. Textualism is doomed to become either irrelevant or normatively unattractive. It is time for us to put the textualism-purposivism debate behind us, acknowledge areas of agreement as well as disagreement, stop talking past one another, and engage in a more productive dialogue regarding the narrow differences that remain.
>
> To begin to grasp both textualism's past accomplishments and its current irrelevance, simply ask yourself, what is the difference between textualism and purposivism? Conventional wisdom has it that textualists emphasize statutory text and purposivists emphasize statutory purposes. But when one considers how modern textualists go about identifying textual meaning and how purposivists go about identifying statutory purposes, the differences between textualism and purposivism begin to fade. On one hand, textualism has so succeeded in discrediting strong purposivism

> **that it has led even nonadherents to give great weight to statutory text. On the other hand, textualists have been so successful in updating their own philosophy, and in distinguishing modern textualism from the old "plain meaning" school, that textualists themselves will consider a statute's context as well as its text. Given that nonadherents and adherents of textualism alike place great weight on statutory text and look beyond text to context, it is hard to tell what remains of the textualism-purposivism debate. (footnotes omitted)**

Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, 2 (2006).

These issues—purposivism/textualism/holism—are more than mere esoteric discussions of ivory-tower legal theories. They serve as the intellectual underpinnings of multiple court of appeals and Supreme Court decisions. A brief examination would reveal these theories are reflected in both the majority and dissent in the recent Supreme Court decision, *Howard Delivery v. Zurich Am. Ins. Co.*, U.S. , 126 S.Ct. 2105, 2106 (2006), determining that claims for worker's compensation premiums do not qualify for § 507(a)(5) priority, since, "although the question is close", worker's compensation is not an "employee benefit plan."

As Judge Rendell has noted, although there is universal recognition of the significance of a statute's text, this is merely the agreed upon entrance to the statutory interpretation process and, not necessarily, the termination of that process.

> **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.**

Hon. Marjorie O. Rendell, *2003—A Year of Discovery: Cybergenics and Plain Meaning in Bankruptcy Cases*, 49 Vill. L. Rev. 887, 887 (2004).

THE PLAIN MEANING PROCESS

This material suggests, consistent with a significant body of authority, that a bankruptcy judge's interpretation and application of provisions of the Act, in a manner consistent with the Supreme Court's body of bankruptcy law reflecting approaches to statutory interpretation, is not a mechanistic and rigid procedure; but rather, a holistic and nuanced process, which demands analysis beyond the recitation of plain meaning mantras and conclusionary cannons of construction.

As Justice Douglas observed: "[W]e do not read these statutory words with the ease of a computer."

Bank of Marin v. England, 385 U.S. 99, 103, 87 S.Ct. 274, 277 (1966).

Similarly, Justice Frankfurter remarked some time ago, "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States v. Monia,* 317 U.S. 424, 431, 63 S.Ct. 409, 412, (1943) (dissenting opinion).

U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 249, 109 S.Ct. 1026, 1034 (1989).

Ron Pair provides a stark example that it is, perhaps, only our legal system in which a Supreme Court majority could unflinchingly assert (and, thereafter, receive acceptance) that the phrase "interest on such a claim" [§ 506(b)] has a plain meaning, which "cannot be read in any other way", despite the completely opposite conclusion of several lower court judges and four dissenting Justices, all of whom are experienced, intelligent and quite familiar with the English language.

Daniel J. Bussell, *Textualism's Failures: A Study of Overruled Bankruptcy Court Decisions*, 53 Vand. L. Rev. 887, 894–898 (April, 2000).

Justice Scalia in his dissent in *Dewsnup v. Timm*, 502 U.S. 410 (1992), declared:

> **Almost point for point, today's opinion is the methodological antithesis of *Ron Pair*—and I have 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.**
>
> * * * * *
>
> **The principal harm caused by today's decision is not the misinterpretation of § 506(d) of the Bankruptcy Code. The disposition that misinterpretation produces brings the Code closer to prior practice and is, as the Court irrelevantly observes, probably fairer from the standpoint of natural justice. (I say irrelevantly, because a bankruptcy law has little to do with natural justice.) The greater and more enduring damage of today's opinion consists in its destruction of predictability, in the Bankruptcy Code and elsewhere. By disregarding well-established and oft-repeated principles of statutory construction, it renders those principles less secure and the certainty they are designed to achieve less attainable. When a seemingly clear provision can be pronounced "ambiguous" sans textual and structural analysis, and when the assumption of uniform meaning is replaced by "one-subsection-at-a-time" interpretation, innumerable statutory texts become worth litigating. In the bankruptcy field alone, for example, unfortunate future litigants will have to pay the price for our expressed neutrality "as to whether the words 'allowed secured claim' have different meaning in other provisions of the Bankruptcy Code." Ante, at 778, n. 3. Having taken this case to resolve uncertainty regarding one provision, we end by spawning confusion regarding scores of others. I respectfully dissent.**

Dewsnup v. Timm, 502 U.S. 410, 435–36, 112 S.Ct. 773, 787–788 (1992).

> **In the bankruptcy field, the Court is new textualist in that while it sometimes mentions policy considerations, it almost never reasons from a**

> **policy to a result except when a case implicates two statutory schemes (ERISA and the Bankruptcy Code, for example), and the question is which scheme should control. The words in either statute seldom can settle the issue in such cases.**
>
> > **For bankruptcy examples, *see, e.g., United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996); *Patterson v. Shumate*, 504 U.S. 753 (1992).**

Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court's Bankruptcy Jurisprudence*, 45 N.Y.L. Sch. L. Rev. 149, 151 (2000–2001).

As Judge Rendell observed:

> **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 pivotal opinions that announced the Supreme Court's textualist turn have concerned provisions of the Bankruptcy Code.**
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> * * * * *
>
> **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. 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 whole. Only then do courts proceed to other sources such as legislative history and policy. (footnotes omitted)**

Hon. Marjorie O. Rendell, *2003—A Year of Discovery: Cybergenics and Plain Meaning in Bankruptcy Cases*, 49 Vill. L. Rev. 887, 887–89 (2004).

The attempt (necessity) of bankruptcy courts to determine (create) the results intended by Congress in the Act, through the application of principles governing statutory interpretation, is a complicated task, frequently yielding contrary results.

> **Statutory interpretation is among the most important skills a law student, lawyer, or judge possesses, yet, as Karl Llewellyn pointed out, when it comes to the tools of statutory interpretation, "[t]here are two opposing canons on almost every point."**
>
> **Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 401 (1950); or as Richard A. Posner wrote, "For every canon one might bring to bear on a point there is an equal and opposite canon. This is an exaggeration; but what is true is that there is a canon to support every possible result." Richard A Posner, The Federal Courts: Crisis and Reform 276 (1985).**

Lance Phillip Timbreza, *The Elusive Comma: The Proper Role of Punctuation in Statutory Interpretation*, 24 QLR 63, 64–65 (2005).

The initial bankruptcy court decisions demonstrate, convincingly, that the one element legislation should provide—clarity of expression in the choice of language used by Congress so that interested parties can have predictability in their proceedings—is frequently lacking in many significant portions of the Act. Courts have often noted both the significance of predictability and the importance of the judicial branch in supplying predictability through court decisions.

> **A uniform rule under which federal bankruptcy courts apply their forum states' choice of law principles will enhance predictability in an area where predictability is critical.**

Bianco v. Erkins (In re Gaston & Snow), 243 F.3d 599, 606–07 (2nd Cir. 2001), *quoting In re Merritt Dredging*, 839 F.2d 203, 205–06 (4th Cir. 1998).

> **We agree with the Seventh Circuit that "a simple rule of valuation is needed" to serve the interests of predictability and uniformity.**

Assocs. Comm'l Corp. v. Rash, 520 U.S. 953, 965, 117 S.Ct. 1879, 1886 (1997).

Despite the position of at least one law professor, who testified before the Senate Judiciary Committee that the legislation was "fine as it is", adding, "There is no word that I would change in this particular piece of legislation." SEN. JUD. COMMITTEE, Hearing on S. 256: Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109th Cong., unofficial transcript (February 10, 2005) (see additional information http://volokh.com/posts/1143601581.html), it is now obvious that many provisions of the Act are far from clear and bankruptcy judges are struggling to discern, in light of the language chosen by Congress, the intention of Congress so that predictability may begin to be established.

As one court noted in construing provisions related to the automatic stay:

> **In an Act in which head-scratching opportunities abound for both attorneys and judges alike, § 362(c)(3)(A) stands out. It uses the amorphous phrase "with respect to" a total of four times in short order and raises questions about the meaning of the words "action taken," and "to the debtor." The language of the statute**

> **is susceptible to conflicting interpretations, and if read literally, would apply to virtually no cases at all. In sum, it's a puzzler.**

In re Paschal, 337 B.R. 274, 277 (Bankr. E.D.N.C. 2006).

Another court noted, in examined the unnumbered, hanging paragraph in 11 U.S.C. § 1325(a):

> **The reader immediately notices two problems. First, the provision "has no alphanumeric designation and merely dangles at the end of § 1325(a). There is no way to cite to this provision other than its proximity to other citable provisions." Dianne C. Kerns, *Cram-a-lot: The Quest Continues*, 24-Nov. Am. Bankr. Inst. J. 10, 10 (2005). In addition, the provision is "missing an operable word. The first sentence refers to 'the 910-day [period] preceding the date of the filing of the petition. . . . *i*" *Id.* Without the addition of "period," the provision makes little sense and could be read to apply only to debts of the type described that were incurred exactly 910 days—no more, no less—prior to the petition date. These two problems are mere shadows of the larger interpretation difficulties this provision presents.**
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> * * * * *
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> **In the face of congressional silence on the question, the Court seeks to craft a rule consistent with the Court's understanding of congressional intent on this issue.**

In re Carver, 338 B.R. 521, 523, 527 (Bankr. S.D. Ga. 2006) (footnote omitted).

Another Court noted in examining 11 U.S.C. § 1102(b)(3)(A):

> **BAPCPA does not define the "information" that section 1102(b)(3)(A) requires an official creditors' committee to make available to its constituency (for example, whether it includes information obtained in confidence) or state how it is to be delivered (for example, whether to all unsecured creditors at once, or upon individual creditors' demand), but its language permits a broad construction. The Committee's motion was based on the fear that section 1102(b)(3)(A) might be interpreted to impose an obligation contrary to other applicable laws and the Committee's fiduciary duties and hamper the Committee's performance under section 1103 of the Bankruptcy Code.**
>
> * * * * *
>
> **Notwithstanding the statute's ambiguity and unhelpful legislative history, there are sources for construing the Committee's obligation to provide "access to information" under Bankruptcy Code section 1102(b)(3)(A). (footnote omitted)**

In re Refco Inc., 336 B.R. 187, 189, 192 (Bankr. S.D.N.Y. 2006).

Another Court noted in examining 11 U.S.C. § 1112(b):

> **This is a case where the language of BAPCPA passed by Congress tends to defy logic and clash with**

> **common sense. This is an example of a specific revision to the Bankruptcy Code, if followed by the Court and applied as Congress seems to intend—i.e., by way of strict construction—would result in an absurd decision and totally unworkable legal precedent. [These drafting problems have the potential of bringing the bankruptcy system to a halt while debtors, creditors, and the courts try to figure out just exactly what Congress intended. This Court would add that it appears that the largely overlooked changes to the bankruptcy provisions related to non-consumer cases, such as the case presently before the Court, may sometimes equal the poor crafting of the consumer provisions. Moreover, serious and consequential constitutional questions may be looming on the horizon because of inartful drafting. (footnote omitted)**
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> * * * * *
>
> **The task of resolving the meaning of a statute begins where all such inquiries must begin: with the language of the statute itself. Unfortunately, here, the Plain Meaning Rule is not appropriate as it would lead to an absurd result. First, if this Court were to require that all the elements of section 1112(b)(4) had to be fulfilled, the Court would doubt very much that a corporate Chapter 11 could ever be dismissed because, for example, this Court can think of no instance where a corporate debtor would have a domestic support obligation. Thus, dismissal could only occur in a Chapter 11 case involving an individual debtor. Moreover, if every element of section 1112(b)(4) was met, the debtor must not only be dismissed, but probably deserves referral to the United States Attorney.**
>
> **Second, if the statute truly requires, as the United States Trustee coined, a "perfect storm" of all the elements constituting cause, it would render 11 U.S.C. § 1112(b) a nullity and the statute cannot be interpreted that way.**
>
> **Third, Congress seem to be quite lax in interchanging "and" and "or" such that "and" can connote disjunctive and "or" can be used in the conjunctive. It appears that the courts have long recognized errors in legislative drafting with respect to the use of conjunctive and disjunctive language and the Courts have construed terms in a manner that makes sense**

In re TCR of Denver, LLC, 338 B.R. 494, 495–96, 499 (Bankr. D. Colo. 2006).

But see *In re Abdul Muhaimin*, __B.R.__, 2006 WL 1153898 (Bankr. D. Md. 2006) (The Court applied a plain meaning reading, compared § 362(d)(4)—hinder, delay and defraud—with § 722(a)(2) and § 548(a)—hinder, delay or defraud—, determined "and" is conjunctive [not disjunctive] in § 362(d)(4) and concluded such a reading reflected a deliberate Congressional determination, which did not produce an absurd result. The Court also distinguished *TCR of Denver*, which determined "and" was disjunctive [not conjunctive], since reading "and" as conjunctive would produce an absurd result.

See also, *In re Donald*, __B.R.__, 2006 WL 1666734 (Bankr. E.D.N.C. 2006) (The Court in determining the "fourth option"/"pay and drive" is not available after BAPCPA, noted that, although under the applicable rules of construction [§102(5)], "or" is not exclusive, when it is used in the construction "either . . . or" , as found in §362(h)(1)(A), it is to be construed as exclusive.

There has been a historical (and largely unsatisfactory) debate about the bankruptcy court's ability to fill in the interstices of bankruptcy law through notions of "equity." ["There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction. Section 2a, 52 Stat. 842, 11 U.S.C. s 11(a); *Pepper v. Litton*, 308 U.S. 295, 304—305, 60 S.Ct. 238, 244—245, 84 L.Ed. 281; *Securities & Exchange Commission v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 455, 60 S.Ct. 1044, 1053, 84 L.Ed. 1293." *Bank of Marin v. England*, 385 U.S. 99, 103, 87 S.Ct. 274, 277 (1966); "The short answer to these arguments is that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code. "*Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 969 (1988); "It is true of course that bankruptcy, despite its equity pedigree, is a procedure for enforcing pre-bankruptcy entitlements under specified terms and conditions rather than a flight of redistributive fancy or a grant of free-wheeling discretion such as the medieval chancellors enjoyed (equity itself is no longer a discretionary system in that sense). *Boston & Maine Corp. v. Chicago Pacific Corp.*, 785 F.2d 562, 566 (7th Cir.1986); *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1197–98 (7th Cir.1989); *Marin v. England*, 385 U.S. 99, 110, 87 S.Ct. 274, 280, 17 L.Ed.2d 197 (1966) (Harlan, J., dissenting)" *In re Lapiana,* 909 F.2d 221, 223 (7th Cir. 1990)].

It is more than possible that, in their good faith efforts to make the system work, bankruptcy courts may be treading impermissibly close to "enacting", rather than merely "interpreting" Congressional legislation. "See *In re Ahlswede*, 516 F.2d 784, 787 (9th Cir. 1975); "[T]he [equity] chancellor never did, and does not now, exercise unrestricted power to contradict statutory or common law when he feels a fairer result may be obtained by application of a different rule"), cert. denied *sub nom*, *Stebbins v. Crocker Citizens Nat. Bank,* 423 U.S. 913, 96 S.Ct. 218 (1975)", cited with approval in *U.S. v. Noland*, 517 U.S. 535, 543, 116 S.Ct. 1524, 1528 (1996).

It is essential to recall that contemporary Supreme Court jurisprudence establishes that the **purpose of statutory interpretation is to determine Congressional intent.** In that context, the **default approach is to apply the plain meaning** of the text enacted in the Congressional legislation. The overriding **exception** to this approach is when such an application would produce **an absurd result or a result demonstrably at odds with the intent of the drafters.** In circumstances where the text of the Congressional legislation, rather than being subject to plain meaning, is **ambiguous, the Supreme Court has employed a variety of principles** to assist in determining Congressional intent. These include, without priority or limitation: the following canons of construction: **surplusage, pre-code [act] practice, neologisms, dictionary definitions, comparison with other sections, unforeseen consequences, *expressio unius est exclusio alterius* and legislative history.**

These principles are frequently used in combination and with other factors to assist in determining Congressional intent.

The balance of this material attempts to look at principles applicable to statutory construction as they appear in connection with initial bankruptcy court decisions construing provisions of the Act.

PLAIN MEANING—AN ANSWER OR AN APPROACH

The doctrine of plain meaning, as prominent a place as it may currently occupy in American jurisprudence, is merely the approved approach, not the absolute answer, to the determination of Congressional intent in connection with statutory interpretation.

The Ninth Circuit, in *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, 448 F.3d 1092, 1093–1100 (9th Cir. 2006), a non-bankruptcy case, highlighted this tension. In denying a request to rehear, en banc, a panel's determination that the text in the Class Action Fairness Act stating "not less than" 7 days after entry of an order will be interpreted to mean "not more than" 7 days after the entry of an order, the majority noted:

> **A quarter century ago, we recognized that the plain meaning rule: does not require a court to operate under an artificially induced sense of amnesia about the purpose of legislation, or to turn a blind eye towards significant evidence of Congressional intent in the legislative history···· [I]t is no talismanic invocation of an exclusively privileged status for apparently unambiguous statutory language. Rather, it is a recognition of the practical principle that evidence is sometimes so good in the first place to which one turns that it is unnecessary to look further. *Heppner v. Alyeska Pipeline Serv. Co.*, 665 F.2d 868, 871(9th Cir.1981). This rule is consistent with the general principle of statutory construction recently restated by the Supreme Court: Th[e] canons [of statutory construction] are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent. *Chickasaw Nation v. United States,* 534 U.S. 84, 94, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001) (noting that "canons are not mandatory rules" but guides "designed to help judges determine the Legislature's intent," and that "other circumstances evidencing congressional intent can overcome their force"). *Scheidler v. Nat'l Org. of Women, Inc.*,—U.S.—, —, 126 S.Ct. 1264, 1273–74, 164 L.Ed.2d 10 (2006).**

The dissent, however, argued:

> **Once it recognized that the statute is unambiguous, the panel should have stopped, for it is a paramount principle of statutory construction that "'[w]here[a statute's] language is plain and admits of no more than one meaning the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.'" *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 878 (9th Cir.2001) (en banc) (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917)); accord *Lamie v. U.S. Tr.*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (noting that "the statute is awkward, and even ungrammatical; but that does not make it ambiguous").**
>
> * * * * *
>
> **However, the courts' role is to give effect to statutes as Congress enacts them; it is not the courts' role to**

assess whether a statute is wise or logical. See *United States v. Locke*, 471 U.S. 84, 93–96, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985). Had I been a member of Congress, or an attorney reviewing the statute prior to recommending that the President sign the CAFA, I might have agreed with the panel's observation that the statute is "illogical." We might also think it was "dumb" and "stupid." Those labels have no legal meaning here. We are a court—charged with interpretation, not legislation—and I know of no "illogicality" doctrine that permits us to change the words in a statute when we think there is a more logical way that Congress could have written it. There are, of course, doctrines by which we may deal with various interpretive dilemmas but, as I discuss in the next section, none of our existing exceptions to the plain meaning rule justifies the panel's decision.

No recognized exception to the plain language rule allows the panel to redraft 28 U.S.C. § 1453(c)(1) to its liking. There are three doctrines, of which I am aware, that might justify a creative interpretation of problematic literal language: the doctrine of constitutional avoidance, the scrivener's error exception, and the absurdity doctrine.

* * * * *

There are real consequences to a court's well-intentioned decision to fix Congress's mistakes. First, if courts are going to correct whatever they perceive to be Congress's mistakes, Congress should lose all confidence that courts will enforce statutes as written. The panel has construed Congress's admittedly clear language to mean the precise opposite of what it says. In so doing, the panel has ignored the deference we must give to the supremacy of the legislature. See *Lamie*, 540 U.S. at 538, 124 S.Ct. 1023; *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 548, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987); *Locke*, 471 U.S. at 95–96, 105 S.Ct. 1785

* * * * *

Furthermore, "rescuing" Congress from what the panel assumes was a mistake forces both the legislative and judicial branches to deviate from their respective constitutional roles. See *Lamie*, 540 U.S. at 542, 124 S.Ct. 1023. When courts turn the meaning of statutes up-side-down, Congress must legislate defensively, not by enacting statutes in the plainest possible language, but by enacting statutes in the language that it predicts the courts will interpret to effectuate its intentions. How can we know Congress's intentions except by looking to its public acts? What if the legislative history is inaccurate? What if some member of Congress made the change deliberately at the last moment? What if, as is the case here, the legislative history did not exist until well after the legislature passed the bill? What other language could Congress have used to effect that no interlocutory appeal could be filed

> under CAFA until seven days after entry of an order? If Congress intended to do something different, let Congress fix it.
>
> Second, the panel's decision strips citizens of the ability to rely on the laws as written. This case is a prime example: The appellants relied on section 1453(c)(1) and filed in this court a timely petition for permission to appeal. Yet, despite the appellants' well-founded reliance on the statute, the panel declared the petition untimely. Such a ruling, in light of an unquestionably clear statute, prevents even the most prudent citizen from ever being confident that his conduct comports with the legislature's laws as the court might choose to enforce them. The panel's decision is a trap for citizens (and their lawyers) who can no longer trust the statute as written to mean what it plainly says, but must look to our decisions in every instance for a contrary construction. The United States Code has traps enough without creating new grounds for malpractice claims.
>
> Third, and perhaps most importantly, the panel's decision undermines our own credibility. If we insist on reading "not less than 7 days" to mean "not more than 7 days," why should anyone reading our opinions trust that he understands them correctly? If words are so malleable, might we routinely read our own precedents as saying the opposite of what they clearly say? May one panel simply rewrite another panel's opinion when it thinks the prior opinion is "illogical?" And where might our creativity lead us with provisions of the Constitution that don't make as much sense as we would like? May we amend even the Constitution at will? If we think that when Congress says "less" it actually means "more," we should not fault anyone who might, as a result, discount other things that we have written.
>
> We command no army; we hold no purse. The only thing we have to enforce our judgments is the power of our words. When those words lose their ordinary meaning—when they become so elastic that they may mean the opposite of what they appear to mean—we cede our right to be taken seriously. (footnote omitted)

Without attempting a compilation of the body of Supreme Court authority concerning statutory interpretation in connection with bankruptcy legislation, it must be recalled that:

> As the United States Supreme Court has instructed courts in examining the provisions of the Bankruptcy Code, "[w]e have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–254, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992) (citation omitted). That statement is consistent with the United States Supreme Court's principles that statutory interpretation is a holistic endeavor which must begin with the language of the statute itself. Resort

> **to an examination of legislative history is appropriate only to resolve statutory ambiguity, and in the final analysis, such examination must not produce a result demonstratively at odds with the purpose of the legislation. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992); *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990); *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986). The Sixth Circuit has likewise noted that statutes "must be read in a 'straightforward' and 'commonsense' manner," and that "[w]hen we can discern an unambiguous and plain meaning from the language of a [statute], our task is at an end." *Rogers v. Laurain (In re Laurain)*, 113 F.3d 595 (6th Cir.1997) (citations omitted); *see also Bartlik v. United States Dep't of Labor*, 62 F.3d 163 (6th Cir.1995).**

Andersson v. Sec. Fed. Sav. & Loan of Cleveland (*In re Andersson*), 209 B.R. 76, 78 (B.A.P. 6th Cir. 1997).

> **The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982). In such cases, the intention of the drafters, rather than the strict language, controls.**

Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 501, 106 S.Ct. 755, 759 (1986).

> **As Justice Scalia observed in a concurring opinion:**
>
> **When the phrase "applicable nonbankruptcy law" is considered in isolation, the phenomenon that three Courts of Appeals could have thought it a synonym for "state law" is mystifying. When the phrase is considered together with the rest of the Bankruptcy Code (in which Congress chose to refer to state law as, logically enough, "state law"), the phenomenon calls into question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it any longer makes sense to talk of "a government of laws, not of men."**
>
> **Speaking of agreed-upon methodology: It is good that the Court's analysis today proceeds on the assumption that use of the phrases "state law" and "applicable nonbankruptcy law" in other provisions of the Bankruptcy Code is highly relevant to whether "applicable nonbankruptcy law" means "state law" in § 541(c)(2), since consistency of usage within the same statute is to be presumed. Ante, at 22462247, and n. 2. This application of a normal and obvious principle of statutory construction would not merit comment, except that we explicitly rejected it, in favor of a**

> one-subsection-at-a-time approach, when interpreting another provision of this very statute earlier this Term. *See Dewsnup v. Timm*, 502 U.S. 410, 416–417, 112 S.Ct. 773, 777–778, 116 L.Ed.2d 903 (1992); id., at 420–423, 112 S.Ct., at 780–783 (SCALIA, J. dissenting). "[W]e express no opinion," our decision said, "as to whether the words [at issue] have different meaning in other provisions of the Bankruptcy Code." *Id.*, at 417, n. 3, 112 S.Ct., at 778, n. 3. I trust that in our search for a neutral and rational interpretive methodology we have now come to rest, so that the symbol of our profession may remain the scales, not the seesaw.

Patterson v. Shumate, 504 U.S. 753, 766–767, 112 S.Ct. 2242, 2250–51 (1992).

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266–267, 99 S.Ct. 2753, 2759–60, 61 L.Ed.2d 521 (1979). The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.

U.S. v. Ron Pair Enters., Inc., 489 U.S. 235, 242, 109 S.Ct. 1026, 1031 (1989).

> It is regrettable that we have a legal culture in which such arguments have to be addressed (and are indeed credited by a Court of Appeals), with respect to a statute utterly devoid of language that could remotely be thought to distinguish between long-term and short-term debt. Since there was here no contention of a "scrivener's error" producing an absurd result, the plain text of the statute should have made this litigation unnecessary and unmaintainable.

Union Bank v. Wolas, 502 U.S. 151, 163, 112 S.Ct. 527, 534 (1991) (Scalia concurring).

> A common rule of construction calls for a single definition of a common term occurring in several places within a statute, *see Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 283, 113 S.Ct. 753, 766, 122 L.Ed.2d 34 (1993); *Dewsnup v. Timm*, 502 U.S., at 422, 112 S.Ct., at 780 (SCALIA, J., dissenting) ("'[N]ormal rule[s] of statutory construction'" require that "identical words [used] in the same section of the same enactment" must be given the same effect) (emphasis in original), and the case for different definitions within a single text is difficult to make, cf. Bray, *supra*, at 292, 113 S.Ct., at 771 (SOUTER, J., concurring in part).

BFP v. Resolution Trust Corp, 511 U.S. 531, 556–557, 114 S.Ct. 1757, 1771 (1994).

> 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, 112 S.Ct. 773. The Court justified its reliance on such practice by finding the provision ambiguous. *Id.*, at 416, 112 S.Ct. 773. 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 untenable 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.**

Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434, 461, 119 S.Ct. 1411, 1425 (1999).

> **"[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another," *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302 (1994) (internal quotation marks omitted), and that presumption is even stronger when the omission entails the replacement of standard legal terminology with a neologism.**

BFP v. Resolution Trust Corp, 511 U.S. 531, 537, 114 S.Ct. 1757, 1761 (1994).

The starting point in discerning congressional intent is the existing statutory text, *see Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999), and not the predecessor statutes. It is well established that "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." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917))).

Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001) (the preference "is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute'"). 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 the text is ambiguous—applying the rule against surplusage is, absent other indications,

> **inappropriate. We should prefer the plain meaning since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history.**

Lamie v. U.S. Trustee, 540 U.S. 526, 534–36, 124 S.Ct. 1023, 1030 (2004).

Recently, the Supreme Court demonstrated that statutory interpretation involving bankruptcy legislation should rely on previous court interpretations of the phrase, the use of the phrase in other sections of bankruptcy legislation, common understandings of the phrase as reflected in dictionaries and the context of the phrase. In determining whether debtors can exempt IRAs from the bankruptcy estate under 11 U.S.C. § 522(d)(10)(E), Justice Thomas, writing for a unanimous court, stated:

> **We turn first to the requirement that the payment be "on account of illness, disability, death, age, or length of service." *Ibid.* We have interpreted the phrase "on account of" elsewhere within the Bankruptcy Code to mean "because of," thereby requiring a causal connection between the term that the phrase "on account of" modifies and the factor specified in the statute at issue. *Bank of America Nat. Trust and Sav. Assn. v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 450–451, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999). In reaching that conclusion, we noted that "because of" was "certainly the usage meant for the phrase at other places in the [bankruptcy] statute," including the provision at issue here—§ 522(d)(10)(E). *Ibid.* This meaning comports with the common understanding of "on account of." *See*, e.g., Random House Dictionary of the English Language 13 (2d ed.1987) (listing as definitions "by reason of," "because of"); Webster's Third New International Dictionary 13 (1981) (hereinafter Webster's 3d) (same). The context of this provision does not suggest that Congress deviated from the term's ordinary meaning.**

Rousey v. Jacoway, 544 U.S. 320, 125 S.Ct. 1561, 1566 (2005).

LEGISLATIVE HISTORY—A LIGHT OR TOO LITE

Additionally, to the extent that text in the Act is ambiguous, it is not clear what legislative history exists, or, what basis exists to consult what may be offered as legislative history. It is important to recognize that the history of the legislation resulting in the Act is not the same as what may be appropriate legislative history as that term has been employed by Courts. *See* generally Norman J. Singer, *Sutherland Statutes and Statutory Construction*, Sutherland § 48A:11 (updated March 2005) and Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 Wisc. L. Rev. 205 (2000). *See also* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Amer. Bankr. L.J. 3 (2005).

Despite its limited and disputed use, it appears that reference to legislative history has been, and will continue to be, a basis for decisions interpreting "ambiguity" in the text of the Act.

As one bankruptcy court observed:

> **Legislative history is virtually useless as an aid to understanding the language and intent of BAPCPA.**

> **The section-by-section analysis in the Report of the House Committee on the Judiciary merely provides a gloss of the statutory language of BAPCPA § 322. It does not provide an example of the kind of problem or abuse it was intended to correct, nor a citation to a case whose result it sought to alter.**

In re McNabb, 326 B.R. 785, 789 (Bankr. D. Ariz. 2005).

Perhaps not surprisingly, another bankruptcy court observed:

> **Looking to the legislative history of the Reform Act, there is no doubt about what Congress intended. Contrary to the assertion in McNabb that the legislative history "is virtually useless as an aid to understanding the language and intent,"326 B.R. at 789, the Reform Act is replete with references demonstrating that the new homestead limitations in § 522(p) and (q) were intended to apply to all states in which debtors could previously exempt amounts in excess of $125,000. In the aggregate, these legislative references overwhelmingly and convincingly show legislative intent in clear conflict with the result reached in McNabb. (footnote omitted)**

In re Kaplan, 331 B.R. 483, 487–88 (Bankr. S.D. Fla. 2005).

As the Third Circuit has previously noted:

> **Thus, ambiguity does not arise merely because a particular provision can, in isolation, be read in several ways or because a Code provision contains an obvious scrivener's error. *Lamie v. United States Trustee*, 540 U.S. 526, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). Nor does it arise if the ostensible plain meaning renders another provision of the Code superfluous. Id. at 1031. Rather, a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive. In such situations of unclarity, "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived," *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386, 2 L.Ed. 304 (1805) (Marshall, C.J.), including pre-Code practice, policy, and legislative history.**

Price v. Delaware Police Federal Credit Union (In re Price), 370 F.3d 362, 369 (3rd Cir. 2004).

Despite multiple versions of the bankruptcy legislation which eventually resulted in the 2005 Act, beginning, at least, with the September 18, 1997, Responsible Borrower Protection Bankruptcy Act, H.R. 2500, 105th Cong. (1997), the October 20, 1997, National Bankruptcy Review Commission's Report and the October 21, 1997 Consumer Bankruptcy Reform Act of 1997, S.1301, 105th Cong. (1997), no Congress produced an enacted statute until 2005. It may also be acknowledged that certain provisions of the Act remained essentially unchanged throughout this eight year odyssey; however, in connection with the final version of the Act: there is no joint conference committee report, there is no Senate Report, the House Report is often a mere repetition of the text of the Act and there are no joint floor manager statements which might carry the weight of a conference report. *See generally Thornburg v. Gingles*, 478 U.S. 30, 44, 106 S.Ct. 2752, 2763,

n. 7 (1986) ("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill."); *United States v. Awadallah,* 349 F.3d 42, 54 (2nd Cir. 2003) ("[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." (internal quotation marks omitted)). See also *Begier v. Internal Revenue Service*, 496 U.S. 53, 64, 110 S.Ct. 2258, 2266, fn. 5 (1990), in which the majority noted "Congress was unable to hold a conference, so the Senate and House floor managers met to reach compromises on the differences between the two bills." The majority treated these "floor statements . . . as persuasive evidence of Congressional intent." But note Justice Scalia's concurring opinion, "Congress conveys its directions in the Statutes at large, not in excerpts from the Congressional Record, much less in excerpts from the Congressional Record that do not clarify the text of any pending legislative proposal."

> **As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" *See* Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L.Rev. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed.**

Exxon Mobil Corp. v. Allapattah Svcs., Inc., U.S. , 125 S.Ct. 2611, 2626 (2005).

The tension concerning the appropriate reference to legislative history will continue and will require constant monitoring as these issues work their way through the courts.

[NOT SO] AUTOMATIC STAY—§ 362(C)(3) & (4)

The following decisions represent several bankruptcy courts' attempts to determine Congress's intention, despite Congress's choice of language, in connection with 11 U.S.C. § 362(c)(3) and (4) of the Act.

11 U.S.C. § 362(c)(3) and (4)—Extending the Stay

> In an Act in which head-scratching opportunities abound for both attorneys and judges alike, § 362(c)(3)(A) stands out. It uses the amorphous phrase "with respect to" a total of four times in short order and raises questions about the meaning of the words "action taken," and "to the debtor." The language of the statute is susceptible to conflicting interpretations, and if read literally, would apply to virtually no cases at all. In sum, it's a puzzler.
>
> The court's analysis begins with the language of statute. "It is an axiom of statutory interpretation that the plain meaning of an unambiguous statute governs, barring exceptional circumstances." *Wachovia Bank, N.A. v. Schmidt*, 388 F.3d 414, 416 (4th Cir.2004). Section 362(c)(3)(A), however, is far from being unambiguous. The Fourth Circuit recently emphasized in *In re Coleman*, 426 F.3d 719 (4th Cir.2005), that "[i]n analyzing statutory language, [courts] must first 'determine whether the language at issue has a plain and unambiguous meaning.'" Coleman, 426 F.3d at 725 (4th Cir.2005), quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 846, 136 L.Ed.2d 808 (1997). That analysis is "guided '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.'" *Coleman*, 426 F.3d at 725, quoting Shell Oil, 519 U.S. at 341, 117 S.Ct. at 846.
>
> Read literally, § 362(c)(3) applies only under a very narrow set of facts. It says, in relevant part,
>
> if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed. . . .
>
> Parsing this language, the court first notes that a "case" is not filed: A petition is filed, after which a case is opened. Next, the statute directs that the case must be filed by "[a] debtor who is an individual in a case. . . ." For a debtor to be an individual in a case in the present tense, a case must still be pending. Thus, this section literally applies only to a debtor who has a chapter 7, 11, or 13 case open when a new petition is filed by or against that individual. Finally, a single or joint case of the debtor had to be "pending within the preceding 1-year period but was dismissed." Taken all together, the section only applies to individuals who have had three cases pending in one calendar year: one case that has been dismissed, one case that is still pending when the petition at issue is filed, and the new case that is before the court for determination.
>
> * * * * *
>
> When a statute is ambiguous, as is § 362(c)(3)(A), legislative history is helpful and may be considered. However, it is not controlling, especially in circumstances where the

> language of the statute, although ambiguous, contradicts the intention expressed in the legislative history.
>
> If Congress intended for § 362(c)(3)(A) to terminate all provisions of the automatic stay it could have clearly said so, as it did in § 362(c)(4)(A)(i). Section § 362(c)(4)(A)(i) provides if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case[.]
>
> If Congress wanted to terminate the stay of all the protections of the automatic stay in § 362(c)(3)(A), it could easily have used language similar to that in § 362(c)(4)(A)(i) ("the stay under subsection (a) shall not go into effect upon the filing of the later case"). Congress instead chose to describe the termination of stay quite differently.
>
> The Court of Appeals for the Fourth Circuit recently observed that the use of a particular phrase in one statute but not in another "merely highlights the fact that Congress knew how to include such a limitation when it wanted to." *Coleman*, 426 F.3d at 725. The Coleman court also quoted the Supreme Court's clear directive on this topic: "Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208, 113 S.Ct. 2035, 2040, 124 L.Ed.2d 118 (1993) (internal quotation marks and alterations omitted), quoted in Coleman, 426 F.3d at 725–6. Since Congress, in terminating aspects of the automatic stay in § 362(c)(3)(A), chose language that is so vastly different than the straightforward language it used when it terminated all protections of the stay in § 362(c)(4)(A)(i), the court concludes that § 362(c)(3)(A) is not as broad as § 362(c)(4)(A)(i) and that all of the protections of the automatic stay are not eliminated by § 362(c)(3)(A). (footnotes omitted)

In re Paschal, 337 B.R. 274, 277–79 (Bankr. E.D.N.C. 2006).

> This is the first contested motion of its kind considered by this Court under BAPCPA. As a threshold issue, the Court notes that the language in new § 362(c)(3) is very poorly written. It has been noted that the provisions of this new subsection "are, at best, particularly difficult to parse and, at worst, virtually incoherent." *In re Charles*, 332 B.R. 538, 541 (Bankr.S.D.Tex.2005). Judge Thomas Small, former chair of the Advisory Committee on Bankruptcy Rules, has stated that "[i]n an Act in which head-scratching opportunities abound for both attorneys and judges alike, § 362(c)(3)(A) stands out." *In re*

> ***Paschal*, No. 05-06133 5 ATS, 2006 WL 258298, at *2 (Bankr.E.D.N.C. Jan.6, 2006). This Court likewise finds the provisions of § 362(c)(3) to be neither consistent nor coherent.**
>
> * * * * *
>
> **The automatic stay in the 2006 Case arose under § 362(a) as a result of the filing of a "petition" by the Debtor. The Debtor did not file a "case." Accordingly, under a strict construction of the plain language of § 362(c)(3)(A), the limitation on the extent or duration of the automatic stay would not apply in this case. However, strictly construing the plain language of the statute to distinguish between the filing a "petition" operating as a stay under § 362(a) and the filing of a "case" triggering the limitation of such a stay would render § 362(c)(3)(A) completely meaningless. Such a result would be absurd and possibly contrary to what Congress intended.**
>
> * * * * *
>
> **The language of § 362(c)(3)(A) expressly provides that if the subsection applies in a particular case, the stay "shall terminate with respect to the debtor." If the stay terminates with respect to the debtor, does it also terminate with respect to any property that is property of the estate? Interpreting the words "shall terminate with respect to the debtor" to mean terminating the stay as to both the debtor and property of the estate could render the distinction in other subsections of § 362 superfluous. Such an interpretation would not be favored. *Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998).**

In re Baldassaro, 338 B.R. 178, 182–85 (Bankr. D.N.H. 2006).

But see In re Jumpp, B.R. , 2006 WL 1731172 (Bankr. D. Mass. 2006) (stay termination of § 362(c)(3)(A) applies to property of the estate); *In re Jupiter*, B.R. , 2006 WL 1817065, *7, fn. 12 (Bankr. D.S.C. 2006) (same; all bankruptcy judges of the District concurred with the decision).

> **To interpret § 362(c)(3) as allowing the stay to continue as to property of the estate would be contrary to the clear legislative history, do little to discourage bad faith, successive filings, and would create, rather than close, a loophole in the bankruptcy system by allowing these debtors to receive the principal benefit of the automatic stay protection of property of the estate.**

In re Jupiter, B.R. , 2006 WL 1817065, *6 (Bankr. D.S.C. 2006).

ELECTING WITHOUT PARTICIPATING—11 U.S.C. § 522(P)

The following are a series of abbreviated case summaries of several published decisions construing 11 U.S.C. § 522(p). Although these decisions present a multitude of issues, the focus of this material is a consideration of statutory construction, particularly the doctrines of plain meaning and legislative history.

11 U.S.C. § 522(p)—the $125,000 homestead cap

Chapter 7 Debtor moved for abandonment of his residence, asserting the difference between the appraised value and the secured debt was

less than his exemption. The Debtor's equity was $124,500 and Arizona, as an "opt-out" state, allows a $150,000 homestead exemption. Certain creditors argued that § 522(p)(1) of the 2005 Act limited the Debtor to a $125,000 homestead cap because the homestead was acquired less than 1215 days prepetition. The court found that in Arizona the Debtor could not, in the language of § 522(p), "elect" her exemptions because she was forced to use the Arizona exemptions. The court noted the only non "opt-out" states with a greater than a $125,000 homestead cap was Minnesota and Texas and, therefore, § 522(p) would only apply in cases in those two states. The court held an evidentiary hearing to determine valuation in connection with the proposed abandonment.

In re McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005).

Nevada, like Arizona (see *McNabb*) is an "opt-out" state for exemptions. The court respectfully disagreed with McNabb and concluded that all debtors "elect" exemptions pursuant to § 522(b). The court found, to the extent of any ambiguity, the legislative history indicates Congress intended § 522(p) to apply to "opt-out" states. The court quoted from the House Report that § 522(p) was intended to eliminate the "mansion loophole."

In re Virissimo, 332 B.R. 201 (Bankr. D. Nev. 2005).

Due to the conflict between *Virissimo* and *McNabb*, the court *sua sponte* certified the case for direct appeal to the Ninth Circuit Court of Appeals. Although the direct appeal option is available under the Act [See 28 U.S.C. § 158(d)(2)(B)(i)], neither party appealed the decision.

In re Virissimo, 332 B.R. 208 (Bankr. D. Nev. 2005).

The court reviewed the legislative history and found that § 522(p) was intended to apply to "opt-out" states. The court found it appropriate to look at legislative history because the use of the word "electing" was ambiguous. The court stated:

> **Looking at this statutory scheme, there is another plausible meaning to the phrase "as a result of electing" besides limiting the caps to non-opt out states. This Court suggests that Congress was simply (albeit inartfully) intending the phrase to describe those debtors who are utilizing state law exemptions under § 522(b)(3), whether they have a choice or not. Under this interpretation, the key language in the clause is its reference to § 522(b)(3), which refers to state exemptions that are the subject of the new dollar limitation, not the use of the word "electing."**
>
> **Did Congress choose the best language to accomplish the intended purpose? Obviously, the answer is no. But is it language which unambiguously excludes opt-out states from the statute's reach? The answer here is also no. It is not as if Congress plainly said, in the preamble "As to only those debtors living in Minnesota or Texas . . ." or "As to only those debtors who live in states allowing debtors to choose between state and federal exemptions." If that was the language, peculiar as the intent would be, the statute would be unambiguous. As written, however, with more than**

one plausible reading, there is sufficient ambiguity to look at the legislative history to confirm legislative intent.

In re Kaplan, 331 B.R. 483, 487 (Bankr. S.D. Fla. 2005).

Disagreeing with *McNabb*, the court found the phrase "as a result of electing" in § 522(p) could apply to states which have opted out of the federal exemptions. However, the court found the Debtor fell under the "safe harbor" provision of § 522(p)(2)(B) which protected equity transferred from a prior residence, in the same state, which was acquired more than 1215 days from the petition date. The Trustee argued that the Debtor's "previous principal residence" was acquired less than 1215 days prior to the petition. However, the court found the Debtor's interest in the prior residence was carried over from an earlier residence acquired in 1989. Therefore, $150,500 of the Debtor's interest in his current residence was based on equity from a property acquired more than 1215 days from the petition date. Since this is more than the value of the present residence ($150,000), there is no non-exempt portion of the property. The court, in reviewing the House Report for legislative history, concluded that "[t]he gravaman of § 522(p)(1) is to limit the ability of individuals desiring to take advantage of the lenient exemption provisions of 'debtor-friendly' states by relocating to such states."

In re Wayrynen, 332 B.R. 479 (Bankr. S.D. Fla. 2005).

But as Section 522(p) is written and as it was enacted, the "result of electing" language effectively makes it applicable to debtors in only four states (Texas, Massachusetts, Minnesota, and Rhode Island) and the District of Columbia. These are the only jurisdictions that allow debtors to choose between state and federal exemptions and that have homestead exemptions higher than the $125,000 federal cap. However, given the history recounted above, it is inconceivable that Congress intended such a limited result, and it is demonstrably not what members of Congress thought they were implementing when they voted for the bill.

* * * * *

The problem of when, how, and even whether a court can correct a legislature's mistake in drafting a law—that is, when the legislature intends one thing but inadvertently drafts and enacts another—goes back to the earliest cases in this country's legal history,[15] and it has been an ongoing subject of discussion and debate.[16] A key problem is that when a court decides to ignore the clear words and plain meaning of a statute, there is always a danger that what it thinks is a drafting mistake actually represents a substantive decision by the legislature, perhaps the result of an unseen legislative compromise. In that case, rather than helpfully correcting a mistake, the court might be improperly rewriting the law. If the court is mistaken and the words of the statute are indeed what the legislature intended, then when the court substitutes what it thinks the legislature meant for what the statute says, it abandons its proper role as the legislature's agent and, not incidentally, violates the separation of powers that is basic to our constitutional structure.

Fn. 15 *See, e.g., Huidekoper's Lessee v. Douglass,* 7 U.S. (3 Cranch) 1, 2 L.Ed. 347 (1805), in which the Supreme Court concluded that the word "residing" in a Pennsylvania statute resulted in an "absurdity," and concluded, "It is clear that they [the legislature] do not mean what they say, and the question is, what did they mean to say?" *Id.* at 58. The court changed "residing" to "shall reside" to straighten things out. *Id.*

Fn. 16 The literature on this subject is enormous, to say the least. See WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999). Particularly helpful in analyzing the current case were Jonathan R. Seigel, What Statutory Drafting Errors Teach Us About Statutory Interpretation, 69 GEO. WASH. L.REV. 309 (2001) and Michael S. Fried, A Theory of Scrivener's Error, 52 RUTGERS L.REV. 589 (2000).

As a result, there is a strong and longstanding view that the words of a statute are supreme and, if they are clear, they should be taken as fully embodying what the legislature intended. If the text is not ambiguous, that is the end of the inquiry. As no less than Oliver Wendell Holmes, Jr. *486 wrote more than 100 years ago, "[W]e do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, Jr., The Theory of Legal Interpretation, 12 HARV. L.REV. 417, 419 (1899).

* * * * *

In his opinions, Justice Scalia has occasionally set out the high standard that, in his view, a court must meet before it may substitute legislative intent for legislative enactment. In brief, he requires that two conditions be met before such variance is permissible. First, the plain meaning of the statute under consideration must lack any rational purpose—not just what Congress may have intended, but any plausible congressional purpose. In *Holloway v. United States*, for example, Justice Scalia disagreed with the majority's willingness to reform an otherwise unambiguous statute because he found a "plausible congressional purpose in enacting this language—not what I necessarily think was the real one." *Holloway v. United States*, 526 U.S. 1, 19 n. 2, 119 S.Ct. 966, 143 L.Ed.2d 1 (Scalia, J., dissenting) (1999). Further, he acknowledged, "I search for a plausible purpose because a text without one may represent a 'scrivener's error' that we may properly correct." *Id.* So, according to Justice Scalia, if there is

> **no plausible congressional purpose in the text as written, the statute is a candidate for reformation.**
>
> **But there must be more. A second element for Justice Scalia is that the intended meaning to be used must be obvious. "The sine qua non of any 'scrivener's error' doctrine, it seems to me, is that the meaning genuinely intended but inadequately expressed must be absolutely clear," he wrote. "[O]therwise we might be rewriting the statute rather than correcting a technical mistake." *488 *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82, 115 S.Ct. 464, 130 L.Ed.2d 372 (Scalia, J., dissenting) (1994).**
>
> *** * * * ***
>
> **In the view of this court, the text of Section 522(p) meets both of Justice Scalia's requirements for correction. There is no plausible purpose in linking the 1,215-day ownership requirement to a debtor's choosing between state and federal exemptions, and there is not a shred of evidence in the extensive legislative history going back to 1997 that the mansion loophole was in any way connected to a debtor's choice of exemptions. Further, it is obvious that Congress intended to close the mansion loophole in opt-in states as well as opt-out states. But the drafters of the legislation inartfully, unthinkingly, and, as it turned out, incorrectly expressed that intention by using the word "electing." They should have said, "If there is a state homestead exemption,. . . ." Unfortunately, they expressed that idea as, "[A]s a result of electing . . . to exempt property under State or local law." All the evidence indicates that they believed—erroneously—that the two expressions were equivalent, which they are not.**
>
> **This court is, of course, reluctant to say that although Congress enacted X it actually meant Y, and it does not do so lightly. But in this case, the scrivener's error is obvious from the extensive record and from common sense: The intent of Congress is crystal clear, and there is no feasible rationale or policy for enacting what the text of the statute says. Indeed, strictly applying the words of Section 522(p) would actually prevent Congress's goal from being achieved. So it is proper to give the statute the meaning that Congress undeniably intended. (some footnotes omitted)**

In re Kane, 336 B.R. 477, 484–89 (Bankr. D. Nev. 2006).

In a decision, which appears to contradict the intention of the legislatures of Florida and Colorado, but which appears to comport with Congressional intention, a bankruptcy court noted:

> **The undesignated sentence at the bottom of 11 U.S.C. § 522(b)(3) provides that "[i]f the effect of he domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d)." This sentence**

> follows subparagraph (C), but it is not indented as the subparagraphs are. This indicates that it modifies the entirety of paragraph (3). Further, this is the only logical way to interpret the sentence, as subparagraph (C) deals with the exemption of retirement funds, and it does not make sense for the undesignated sentence to only apply to retirement funds. Since paragraph (3) relates to exemptions under state law, it makes the most sense for the undesignated sentence to apply to paragraph (3) as a whole. Thus, it means exactly what it says: if the 730-day domiciliary requirement under subparagraph (A) renders a debtor ineligible for any state exemptions, the debtor may claim federal exemptions. Since the Debtor may not claim Colorado exemptions because she is not a Colorado resident, and since the 730-day domiciliary requirement in the Bankruptcy Code renders her ineligible to claim exemptions under any state's laws, the Debtor may claim federal exemptions.

In re Underwood, 342 B.R. 358, 359 (Bank. N.D. Fla. 2006).

THAT DARN CAR—AN UNNUMBERED HANGING PARAGRAPH AT THE END OF §1325(A) AND PRIOR TO § 1325(B) [THE 910 CAR CLAIM]

> Although the statutory language itself is not particularly ambiguous, there is no question that, because of its construction, Revised § 1325(a) is, at best, confusing. *See* Henry E. Hildebrand, III, Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Chapter 13 Trustees, 79 AM. BANKR. L.J. 373, 386 n. 65 (Spring 2005) ("Though it appears that the intent of the hanging paragraph is to preclude the claim splitting or 'cramdown' that is embodied in 506(a), the means by which such restriction was drafted is confusing, at best."). A review of the legislative history for guidance does not provide any particular insight that is helpful to the court; however, it also does not provide any evidence that the court's determination does not comport with Congressional intent when including the Anti-Cramdown Paragraph in Revised § 1325(a).
>
> * * * * *
>
> Beyond these statements of Congressional intent, which basically mirror the statutory language, there is no further clarification. The court has no choice but to interpret the Anti-Cramdown Paragraph as written, i.e., that it applies to both Revised § 1325(a)(5)(B) and (C). *See United States v. Ron Pair Enters.*, 489 U.S. 235, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989) (holding that if the language of a statute is plain and unambiguous, "the sole function of the courts is to enforce it according to its terms."). To apply the Anti-Cramdown Paragraph only to Revised § 1325(a)(5)(B), but not to Revised § 1325(a)(5)(C), would allow a secured creditor, upon surrender of its collateral, to bifurcate its claim

> **into different secured and unsecured components, contrary to its unambiguous mandate that Revised § 506 "shall not apply to a claim described in [Revised § 1325(a)(5)]." 11 U.S.C. § 1325(a) (2005).**

In re Ezell, 338 B.R. 330, 340–41 (Bankr. E.D. Tenn. 2006) (surrender is in full satisfaction of the amount of the creditor's entire claim).

> **At issue in this case is the definition of "personal use" in the unnumbered hanging paragraph to 11 U.S.C. § 1325(a), which was added as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")**
>
> * * * * *
>
> **In interpreting the hanging paragraph, the Court begins with the principle that it must enforce the plain language of the statute unless doing so leads to an absurd result. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030, 157 L.Ed.2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6, 120 S.Ct. 1942, 1947, 147 L.Ed.2d 1 (2000)). Furthermore, "'[i]t is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another.'" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S.Ct. 1757, 1761, 128 L.Ed.2d 556 (1994) (quoting *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302 (1994)).**
>
> * * * * *
>
> **"Personal" is defined as "[o]f or relating to a particular person; private." American Heritage Dictionary of the English Language (4th ed.2000). In this case, the vehicle must have been acquired for the use of a particular person—Debtor—for the hanging paragraph to apply. Nissan has conceded that the Gran Prix was purchased to replace Debtor's wife's previous car, that she has at all times been the primary driver of the Gran Prix, [FN1] and that Debtor has primary use of a different vehicle. Because the Gran Prix was not acquired for Debtor's personal use, the hanging paragraph does not apply to Nissan's claim.**
>
> **Nissan also contends, with the strangled use of double-negatives, that nothing in the sales contract indicates that Debtor did not acquire the car for his personal use. This argument is somewhat perplexing because—as noted above—the contract stated that the Gran Prix was purchased for "personal, family or household" use. The use of the words "family" and "household" necessarily open the scope of potential drivers and expressly contradict Nissan's argument. (footnote omitted)**

In re Jackson, 338 B.R. 923, 926 (Bankr. M.D. Ga. 2006) (The car must be for the personal use of the debtor, as opposed to the debtor's spouse, or it is not a 910 car claim.)

> **The Car Creditors argue that the 910 Day Car Language alters the present value requirement of**

Section 1325(a)(5)(B)(ii). We disagree. The only thing the 910 Day Car Language does is render Section 506 of the Bankruptcy Code not applicable to the Car Creditors' claims. The 910 Day Car Language merely prohibits the bifurcation and cram down of the Car Creditors' claims and thus quantifies the Car Creditors' secured claims at the balance due on the filing date. The 910 Day Car Language has no impact on the requirement to pay present value set forth in Section 1325(a)(5)(B)(ii) other than to clarify the dollar amount of the claim which must receive present value. Till still controls what interest rate is required to ensure present value under Section 1325(a)(5)(B)(ii). *In re Johnson*, 337 B.R.269, 2006 WL 270231 (Bankr.M.D.N.C.2006); *In re Robinson*, 338 B.R. 70, 2006 WL 349801 (Bankr.W.D.Mo.2006); *In re Wright*, —B.R.—, 2006 WL 547824 (Bankr.M.D.Ala.2006). Accordingly, the proper interest rate to be paid to the Car Creditors in the Chapter 13 plans is the interest rate applicable for secured claims in Chapter 13 plans established pursuant to Local Bankruptcy Rule 3015-3.

In re Fleming, 339 B.R. 716, 722 (Bankr. E.D. Mo. 2006) (A 910 car claim's interest rate is subject to cram down).

SOME CONSIDERATIONS

The following are some considerations which may be of assistance as all participants in the bankruptcy system work their way through the obvious, and not yet obvious, changes generated by BAPCPA.

- In commencing a statutory construction analysis, it might be desirable to have a "magic tool" or an "easy button" which guarantees the correct result in every situation. Obviously, there are no such devices; rather, significant portions of the Act require the most attenuated effort to discern Congressional intent, in light of the congressionally chosen text.
- In commencing a statutory construction analysis, the purpose of statutory construction remains the determination of congressional intent; however, the confusion engendered by the text of BAPCPA has exacerbated the inherent difficulty in matching Congressional wishes with Congressionally chosen words.
- In commencing a statutory construction analysis, there may frequently be a sense of frustration that we as lawyers and judges are attempting to salvage, what as legislators we would have rejected. This rejection of many of the provisions of BAPCPA would not have been as a matter of political party affiliations or political philosophies; but, rather, as a matter of professionalism in crafting the appropriate language for the purpose intended. The focus must remain on assisting in the operation of a functioning bankruptcy system.
- In commencing a statutory construction analysis, it is important to always start with the reasoning and work forward to the result and avoid any process which begins with the result and works backward to the reasoning.
- In commencing a statutory construction analysis, it is necessary to recall that previous Supreme Court decisions in the area of bankruptcy law provide directions, rather than destinations, for this process. Plain meaning is the default entrance, not the mandatory exit.

- In commencing a statutory construction analysis, it should be noted that early bankruptcy court and first level appellate court decisions demonstrate that this careful process can yield persuasive results which can provide predictability in specific areas.
- A modest suggestion is to "First, do no harm." It may be appropriate to ask whether the analysis will yield a result which is helpful or harmful to Title 11 as a whole. A consideration may be whether the result can be contained within one of the specific chapters (7, 11, 12, 13, 15) or will spill throughout all of Title 11 (chapters 1, 3, 5). Stated another way—within the language of BAPCPA, can the result be "contained" on a principled basis with the least overall harm to Title 11.
- A final goal is the continuation of a functioning bankruptcy system with as much principled predictability as possible. As the Seventh circuit has noted:

> **While we do not doubt that "foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines," Ralph Waldo Emerson, Self Reliance, Essays: First Series (1841), we hope that our emphasis on consistency does not qualify as foolishness. On the contrary, consistency in the law forms the backbone of effective jurisprudence. See, e.g., *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 937 (7th Cir.1984) (Posner, J., concurring)**

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In re Abdul Muhaumin,—B.R.—, 2006 WL 1153898 (Bankr. D. Md. 2006)

In re Donald, B.R. , 2006 WL 1666734 (Bankr. E.D N.C. 2006)

In re Jupiter, B.R. , 2006 WL 1817065 (Bankr. D.S.C. 2006)

In re Merritt Dredging, 839 F.2d 203 (4th Cir. 1998)

In re Paschal, 337 B.R. 274 (Bankr. E.D.N.C. 2006)

Sixth Circuit:

Andersson v. Sec. Fed. Sav. & Loan of Cleveland (In re Andersson), 209 B.R. 76(B.A.P. 6th Cir. 1997)

Bankers Life and Cas. Co. v. United States, 142 F.3d 973 (7th Cir. 1998)

In re Ezell, 338 B.R. 330 (Bankr. E.D. Tenn. 2006)

Seventh Circuit:

Bankers Life and Cas. Co. v. United States, 142 F.3d 973, 982 (7th Cir. 1998)

In re Lapiana, 909 F.2d 221 (7th Cir. 1990) Eighth Circuit:

In re Fleming, 339 B.R. 716 (Bankr. E.D. Mo. 2006)

Ninth Circuit:

Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc., 448 F.3d 1092 (9th Cir. 2006)

In re Ahlswede, 909 F.2d 221 (9th Cir. 1990)

In re Kane, 336 B.R. 477 (Bankr. D. Nev. 2006)

In re McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005)

In re Virissimo, 332 B.R. 201 (Bankr. D. Nev. 2005)

In re Virissimo, 332 B.R. 208 (Bankr. D. Nev. 2005)

Tenth Circuit:

In re Galanis, 334 B.R. 685 (Bankr. D. Utah 2005)

In re Rowe, 342 B.R. 341, 349 (Bankr. D. Kan. 2006)

In re TCR of Denver, LLC, 338 B.R .494 (Bankr. D. Colo. 2006)

Eleventh Circuit:

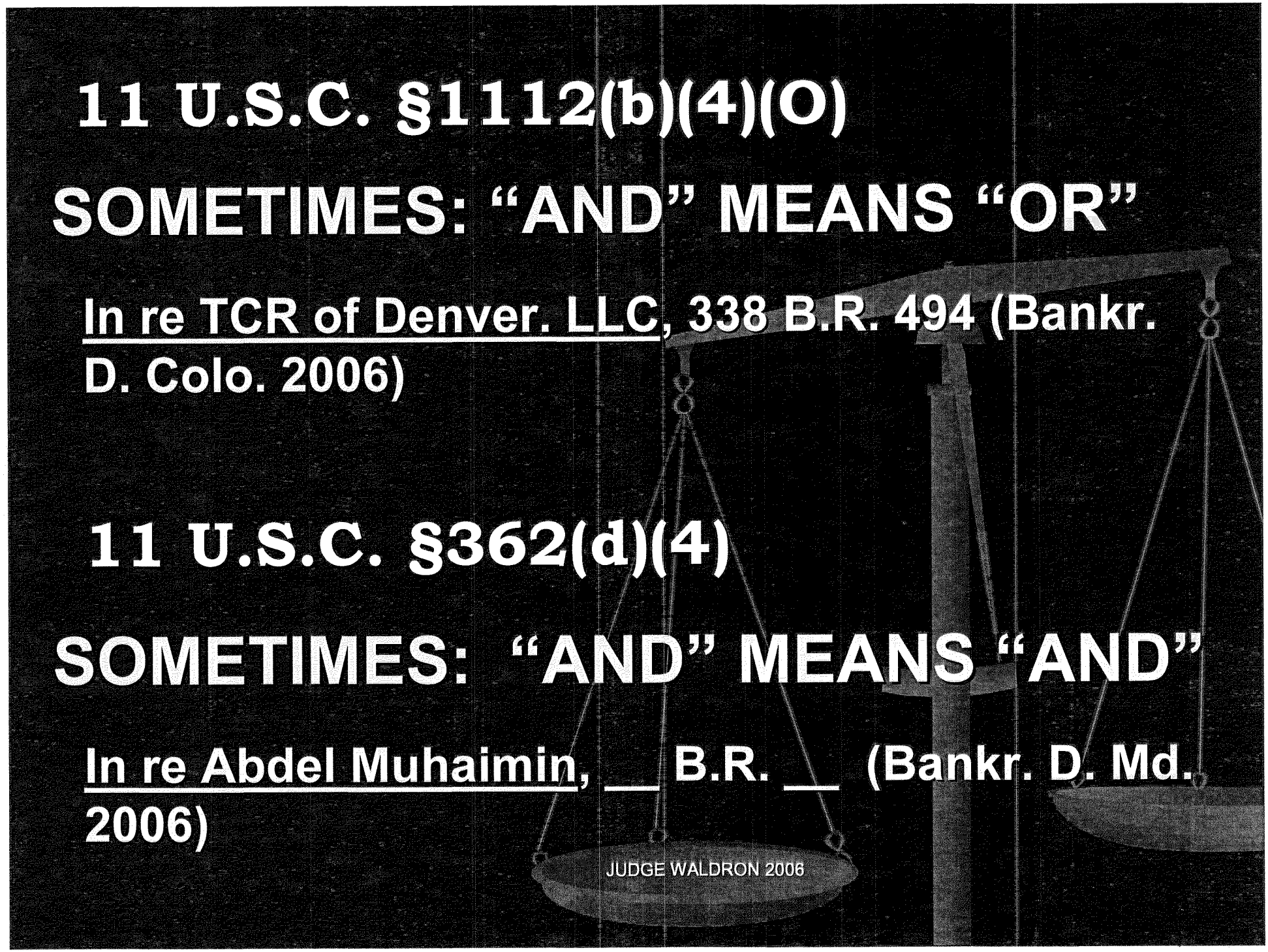
In re Carver, 338 B.R. 521 (Bankr. S.D. Ga. 2006)

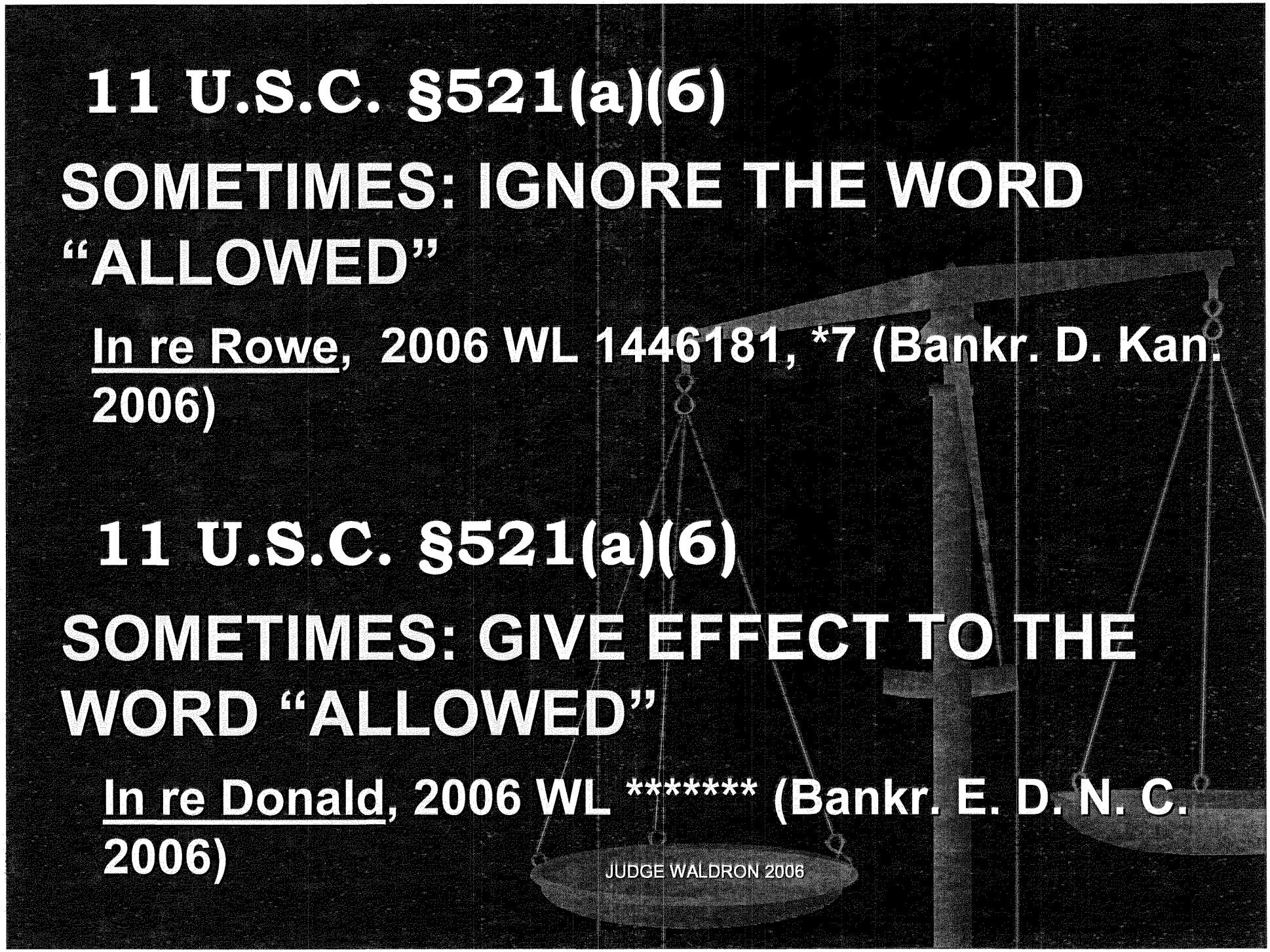
In re Kaplan, 331 B.R. 483 (Bankr. S.D. Fla. 2005)

In re Jackson, 338 B.R. 923 (Bankr. M.D. Ga. 2006)

In re Underwood, 342 B.R. 358 (Bank. N.D. Fla. 2006).

In re Wayrynen, 332 B.R. 479 (Bankr. S.D. Fla. 2005)


11 U.S.C. §1112(b)(4)(O)
SOMETIMES: "AND" MEANS "OR"
In re TCR of Denver. LLC, 338 B.R. 494 (Bankr. D. Colo. 2006)
11 U.S.C. §362(d)(4)
SOMETIMES: "AND" MEANS "AND"
In re Abdel Muhaimin, __ B.R. __ (Bankr. D. Md. 2006)
JUDGE WALDRON 2006



11 U.S.C. §521(a)(6)

SOMETIMES: IGNORE THE WORD "ALLOWED"

In re Rowe, 2006 WL 1446181, *7 (Bankr. D. Kan. 2006)

11 U.S.C. §521(a)(6)

SOMETIMES: GIVE EFFECT TO THE WORD "ALLOWED"

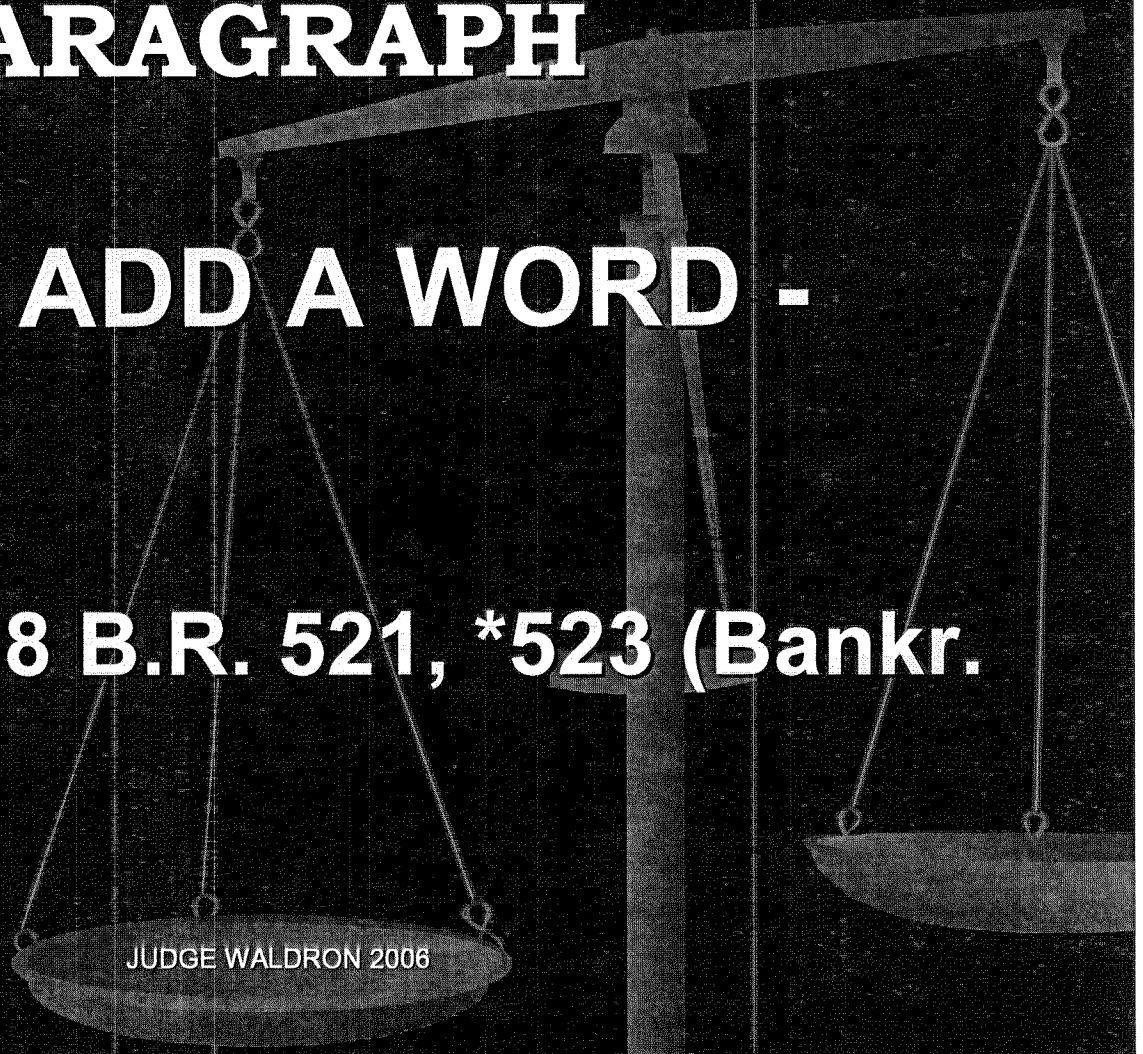
In re Donald, 2006 WL ******* (Bankr. E. D. N. C. 2006)

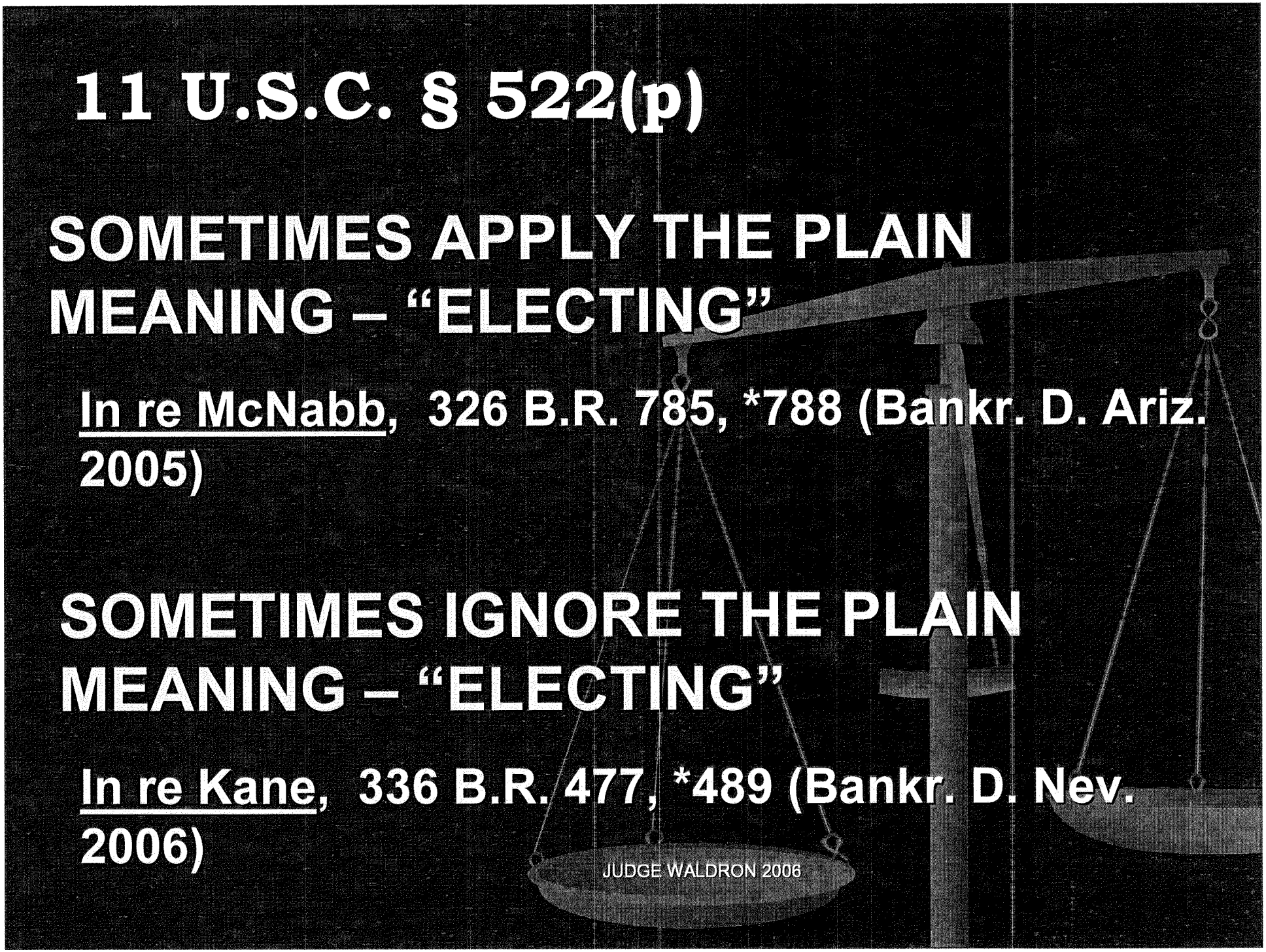
JUDGE WALDRON 2006

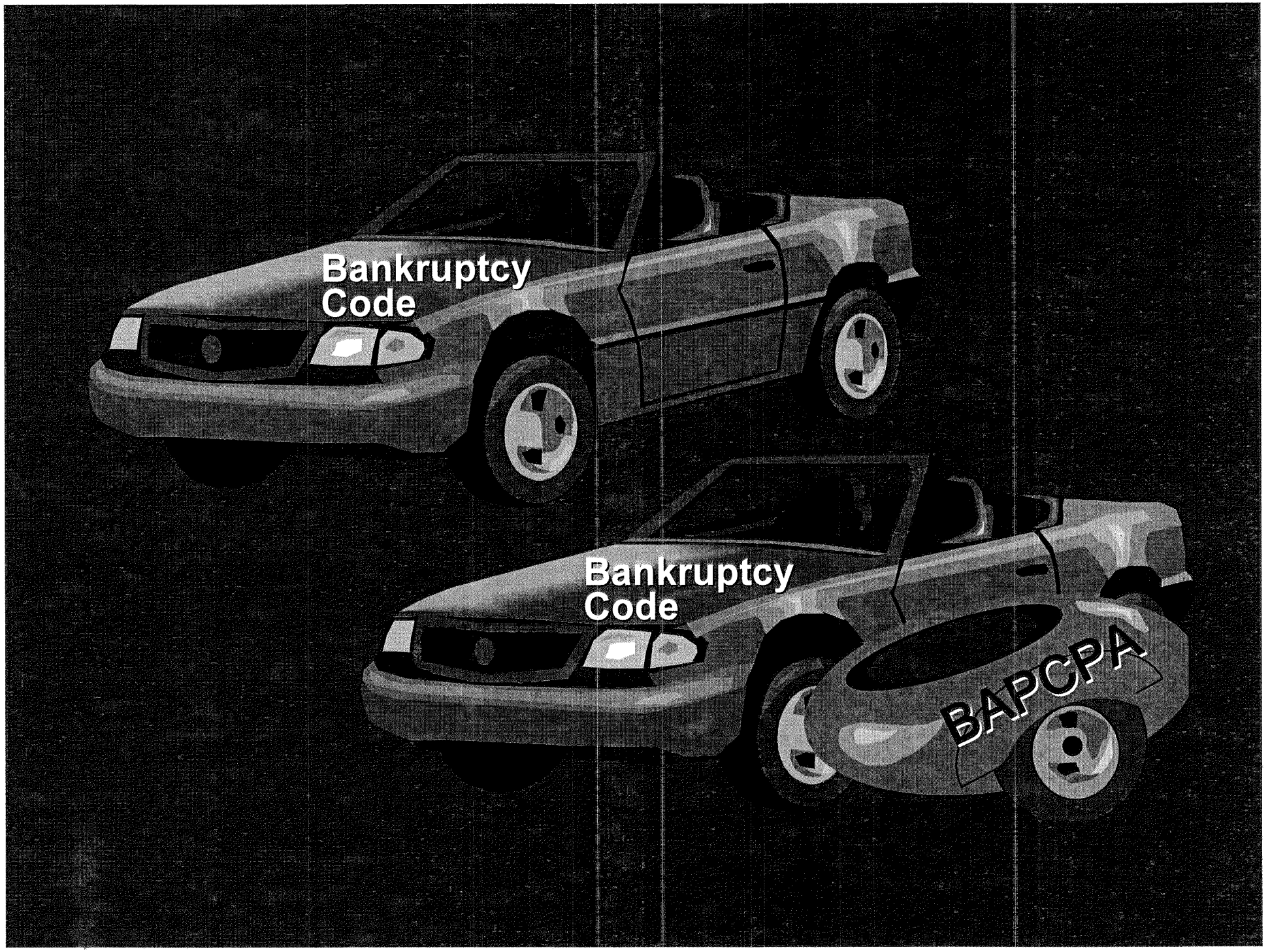
11 U.S.C. §1325(a) – THE HANGING PARAGRAPH

SOMETIMES: ADD A WORD - "PERIOD"

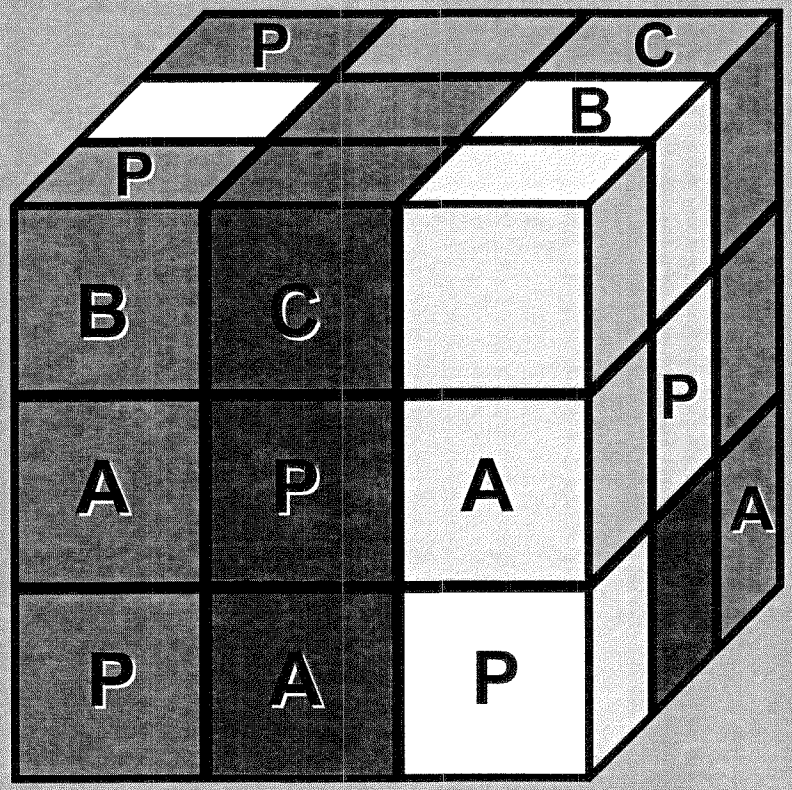
In re Carver, 338 B.R. 521, *523 (Bankr. S. D. Ga. 2006)




11 U.S.C. § 522(p)
SOMETIMES APPLY THE PLAIN MEANING – "ELECTING"
In re McNabb, 326 B.R. 785, *788 (Bankr. D. Ariz. 2005)
SOMETIMES IGNORE THE PLAIN MEANING – "ELECTING"
In re Kane, 336 B.R. 477, *489 (Bankr. D. Nev. 2006)
JUDGE WALDRON 2006


Bankruptcy
Code
Bankruptcy
Code
BAPCPA

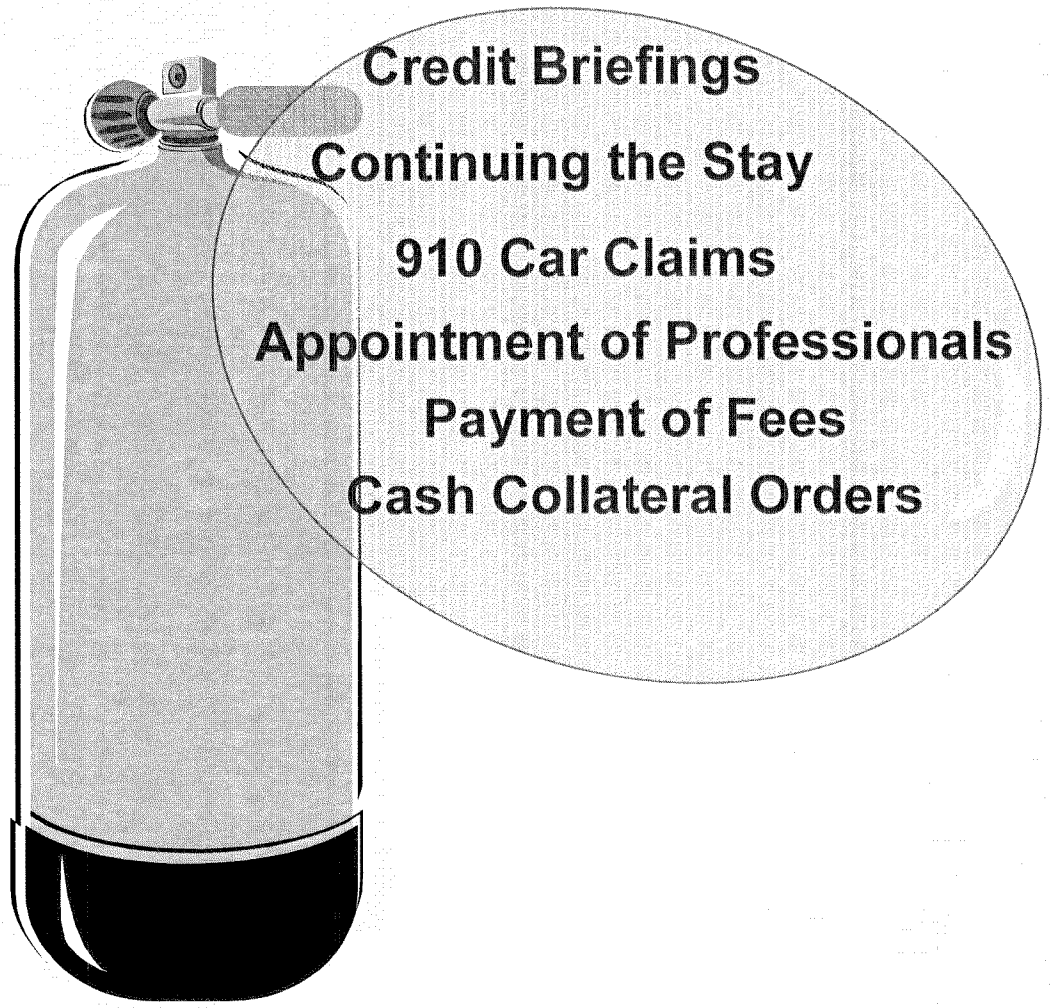
RPM
MPH



Analogy suggested by Judge Small

In re Donald

AVAILABLE JUDICIAL TIME



STATUTORY INTERPRETATION

(PREVIOUS APPROACH)

GOLDEN RULE

Exclusively Purposive

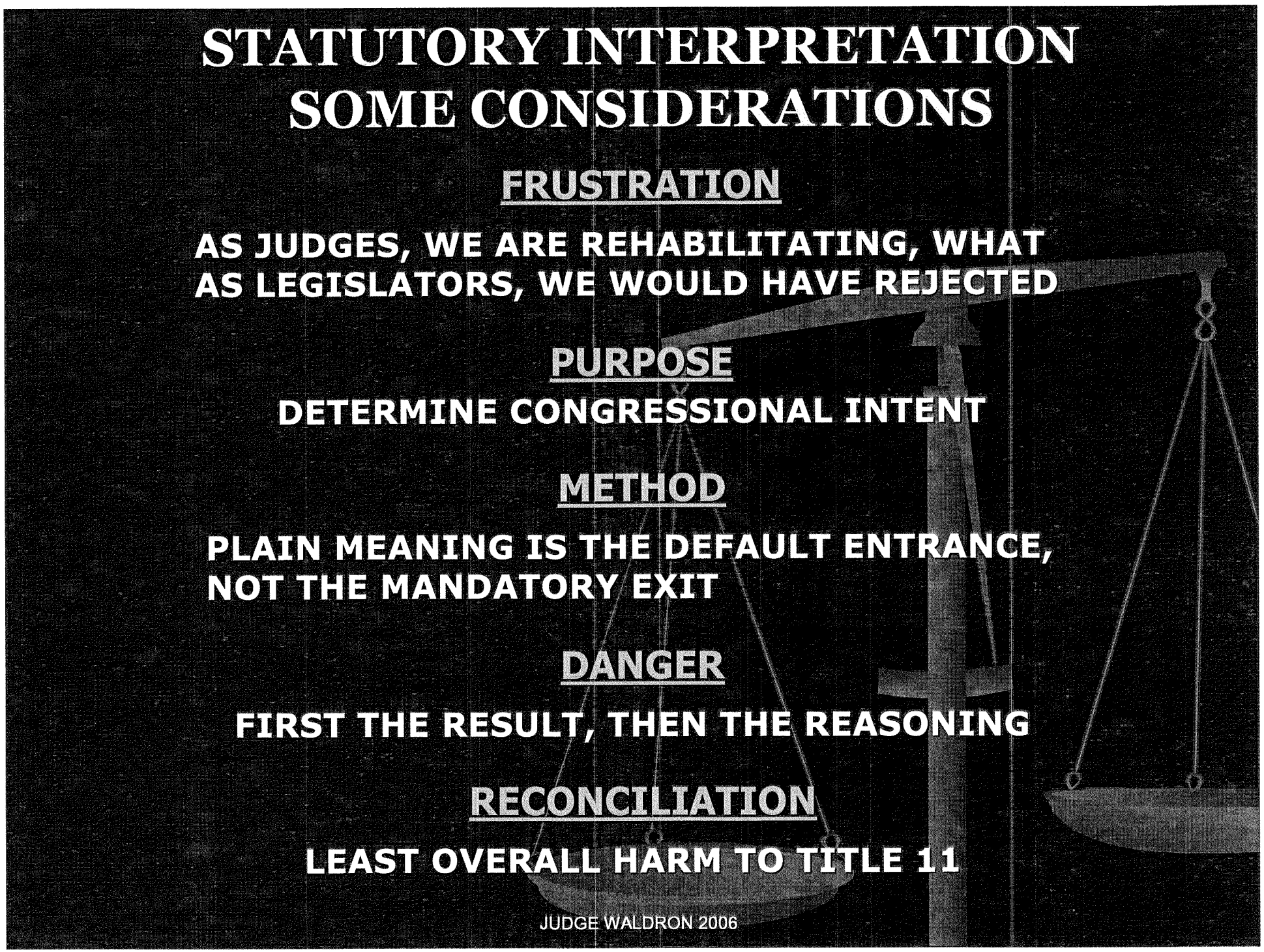
MISCHIEF RULE

Exclusively Purposive

LITERAL RULE

Exclusively Textualist

STATUTORY INTERPRETATION
SOME CONSIDERATIONS



FRUSTRATION

AS JUDGES, WE ARE REHABILITATING, WHAT AS LEGISLATORS, WE WOULD HAVE REJECTED

PURPOSE

DETERMINE CONGRESSIONAL INTENT

METHOD

PLAIN MEANING IS THE DEFAULT ENTRANCE, NOT THE MANDATORY EXIT

DANGER

FIRST THE RESULT, THEN THE REASONING

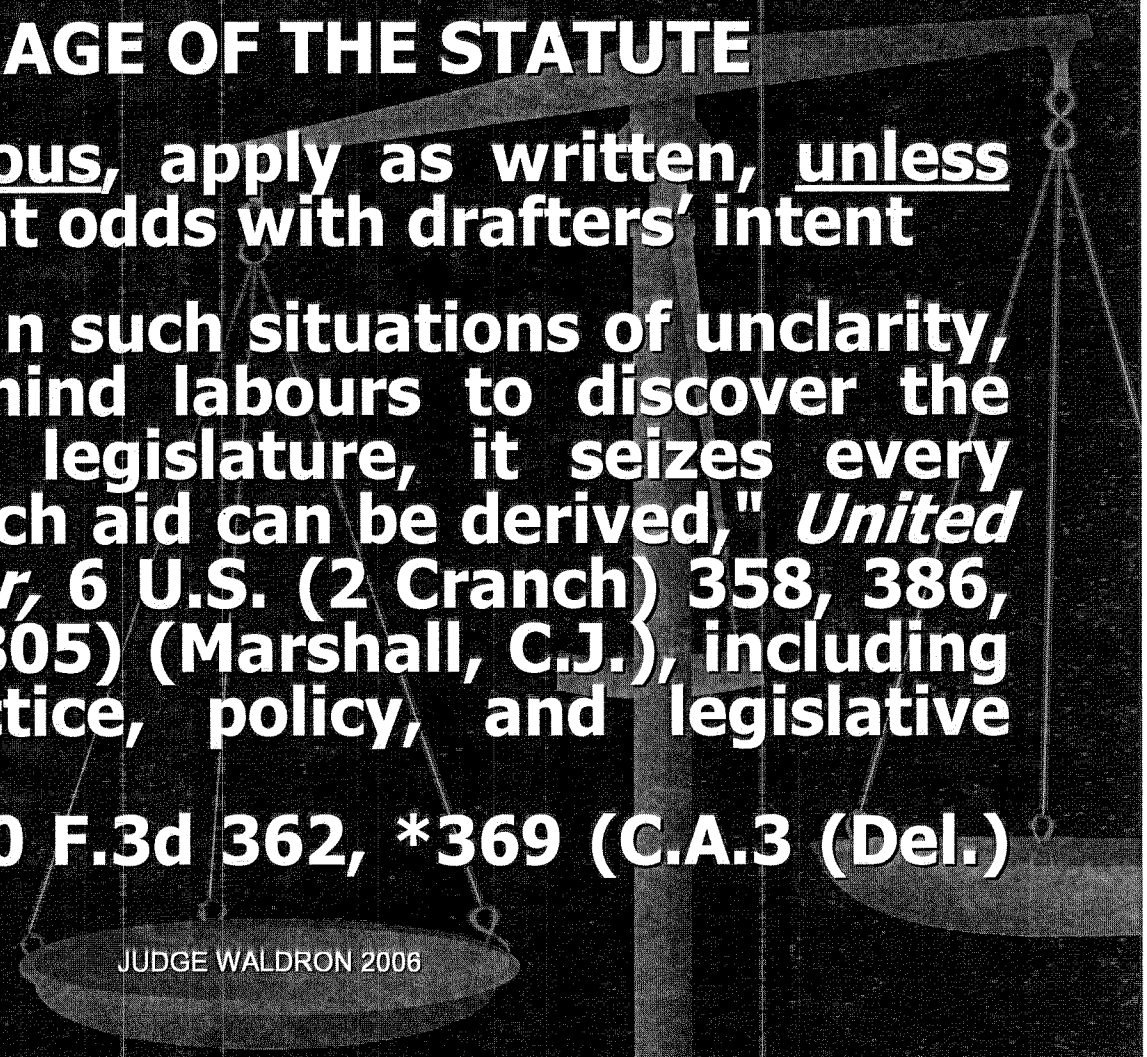
RECONCILIATION

LEAST OVERALL HARM TO TITLE 11

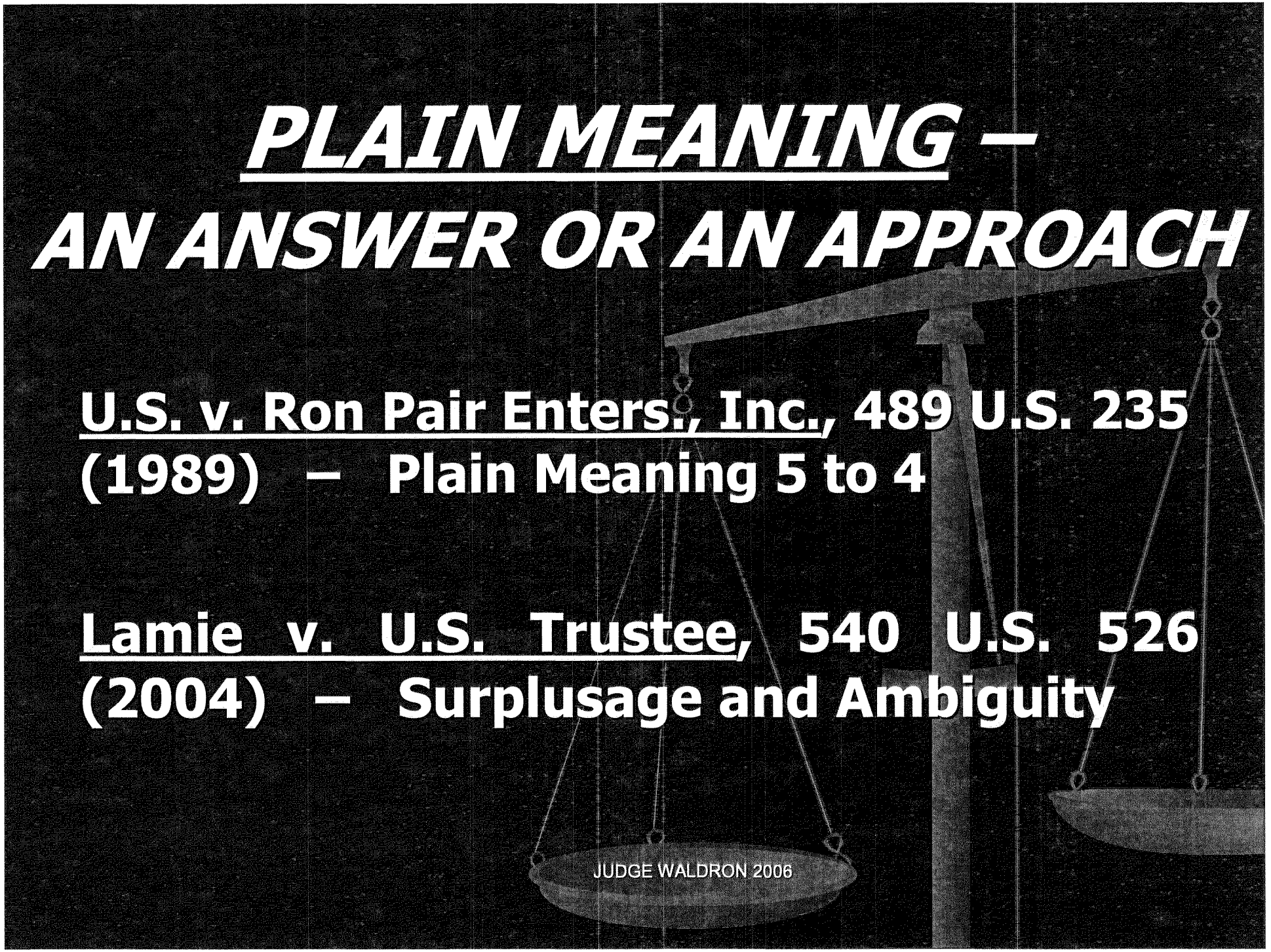
JUDGE WALDRON 2006

STATUTORY INTERPRETATION

- **TO DISCERN CONGRESSIONAL INTENT START WITH THE LANGUAGE OF THE STATUTE**
  - **If not ambiguous, apply as written, unless demonstrably at odds with drafters' intent**
  - **If ambiguous, in such situations of unclarity, "[where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived," *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386, 2 L.Ed. 304 (1805) (Marshall, C.J.), including pre-Code practice, policy, and legislative history.**
    In re Price, 370 F.3d 362, *369 (C.A.3 (Del.) 2004)



JUDGE WALDRON 2006


PLAIN MEANING –
AN ANSWER OR AN APPROACH
U.S. v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) – Plain Meaning 5 to 4
Lamie v. U.S. Trustee, 540 U.S. 526 (2004) – Surplusage and Ambiguity
JUDGE WALDRON 2006

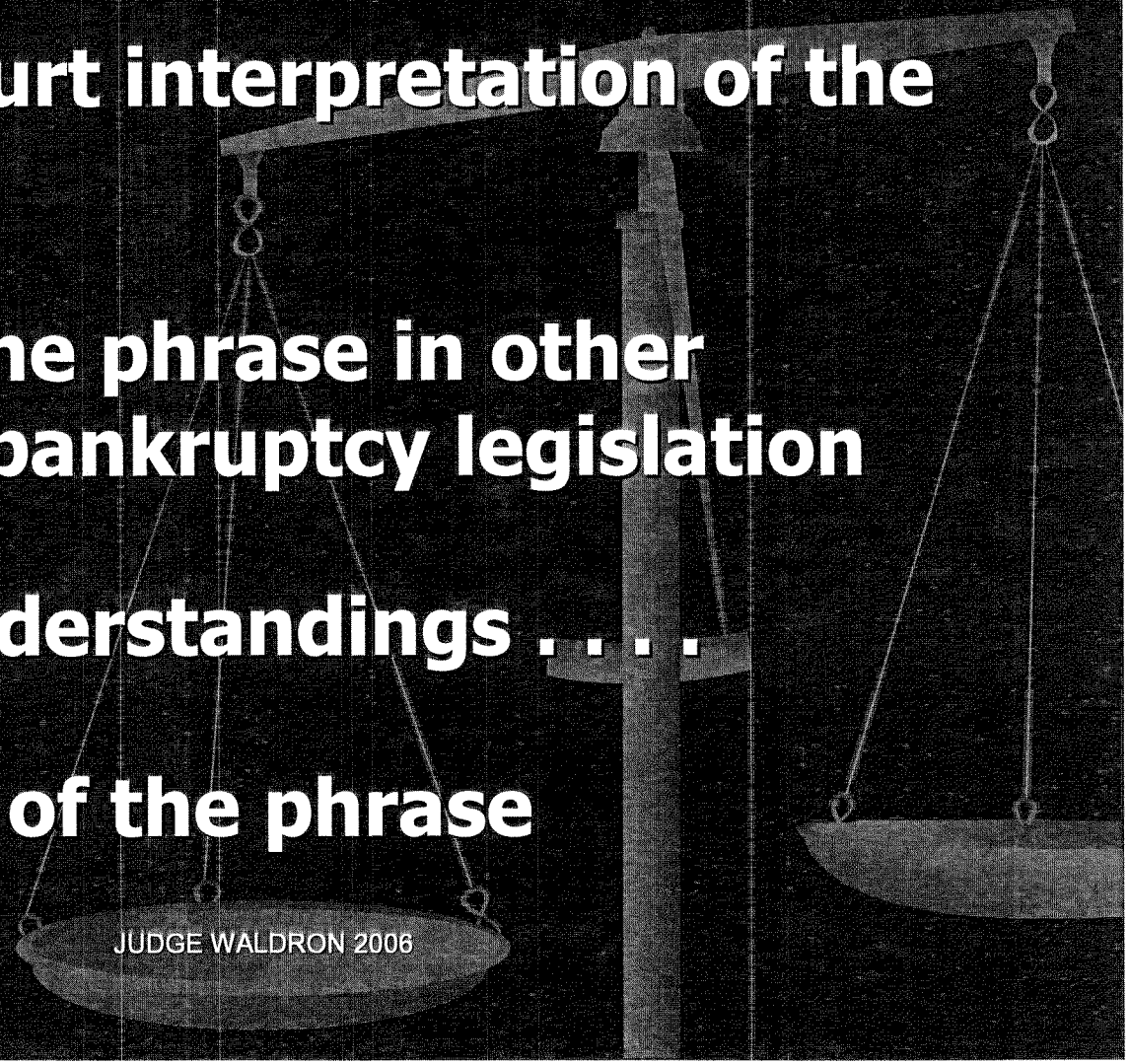
Rousey v. Jacoway, 125 S.Ct. 1561 (2005) – 9 to Ø

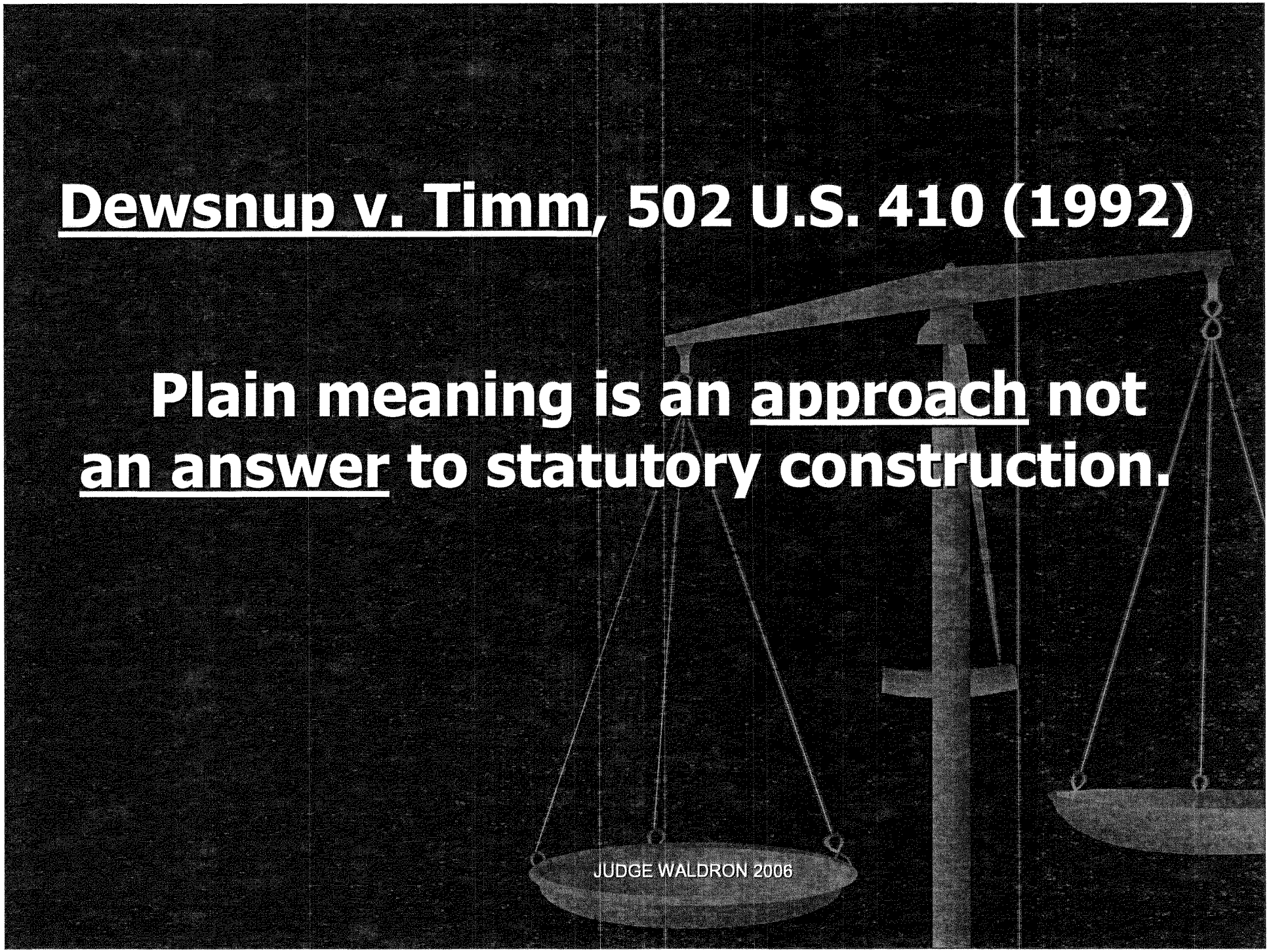
1) previous court interpretation of the phrase

2) the use of the phrase in other sections of bankruptcy legislation

3) common understandings . . . .

4) the context of the phrase



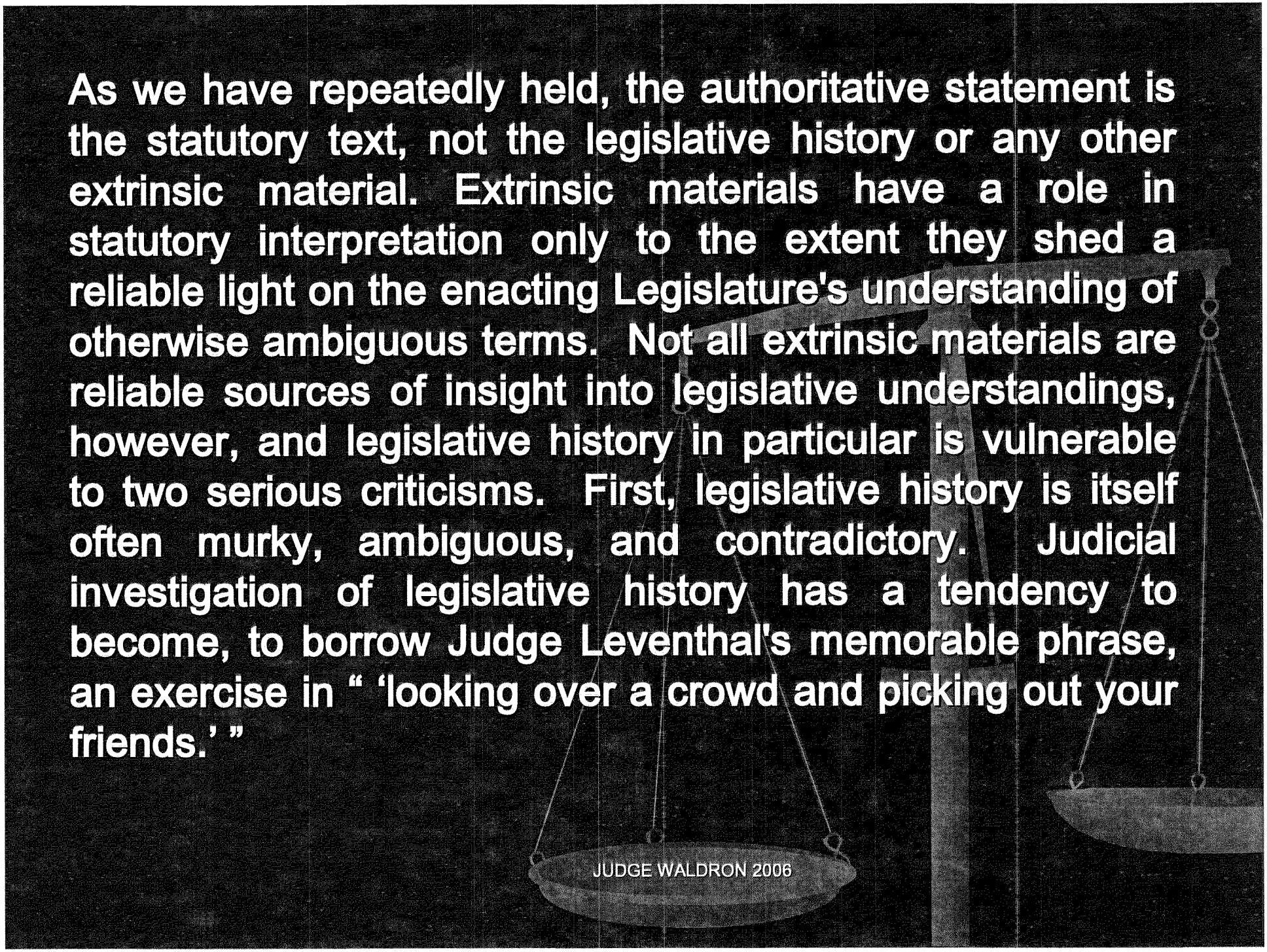

Dewsnup v. Timm, 502 U.S. 410 (1992)
Plain meaning is an approach not an answer to statutory construction.
JUDGE WALDRON 2006

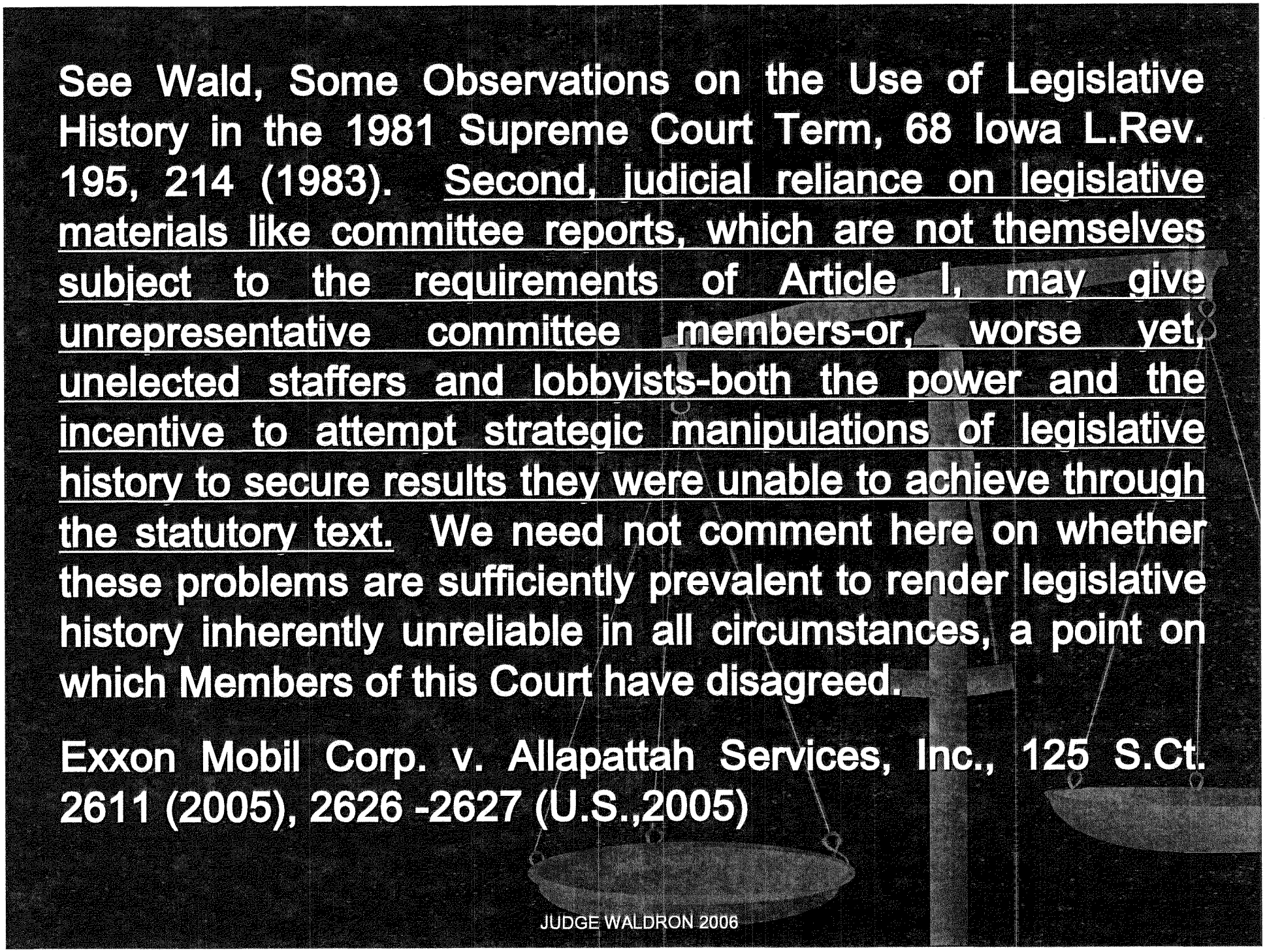
LEGISLATIVE HISTORY

Legislation's History == Legislative History

- No joint conference committee report
- No Senate Report
- No joint floor manager statements which might carry the weight of a conference report
- House Report is often a mere recitation of the text of the Act

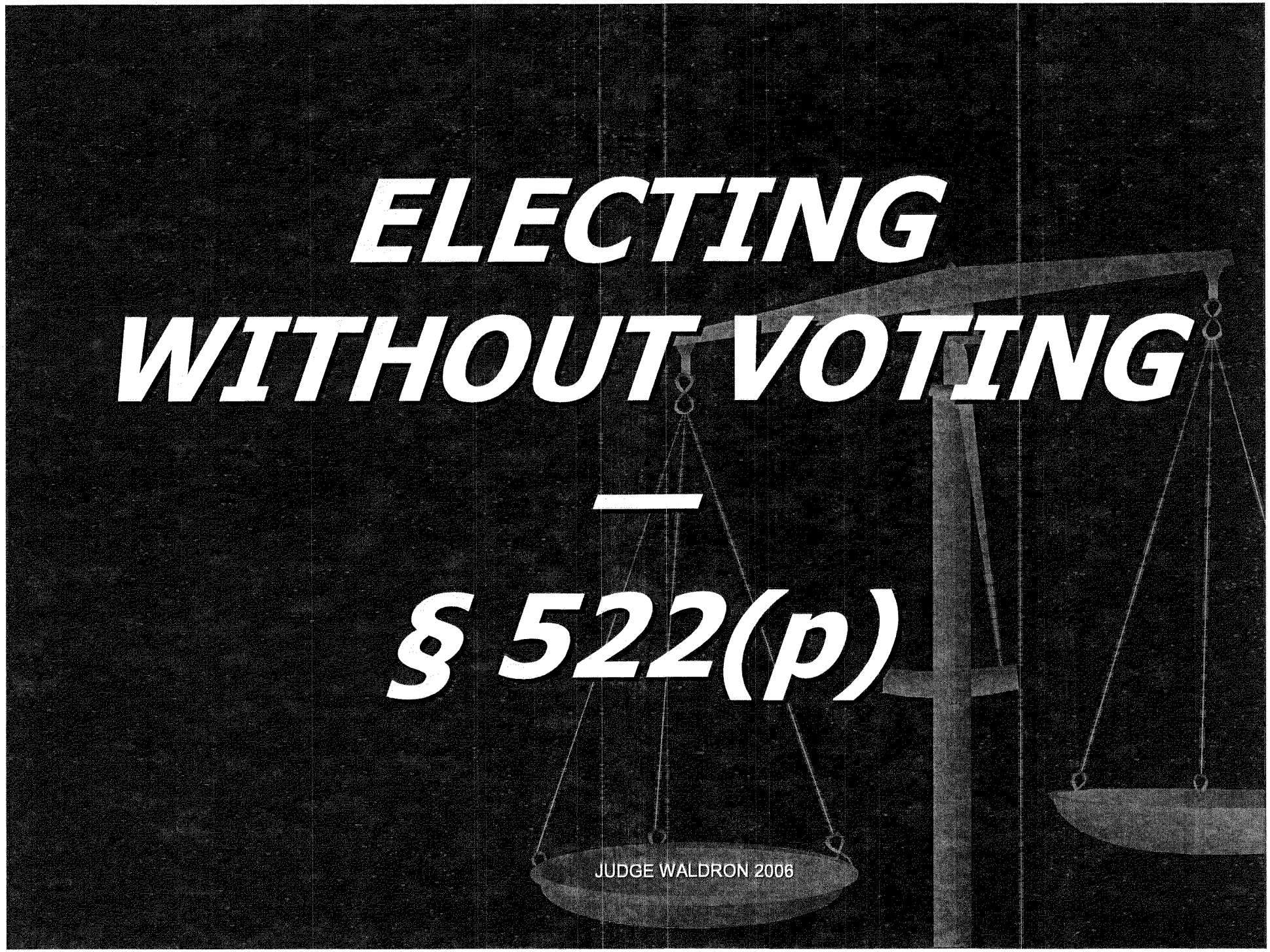
JUDGE WALDRON 2006


As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in " 'looking over a crowd and picking out your friends.' "
JUDGE WALDRON 2006



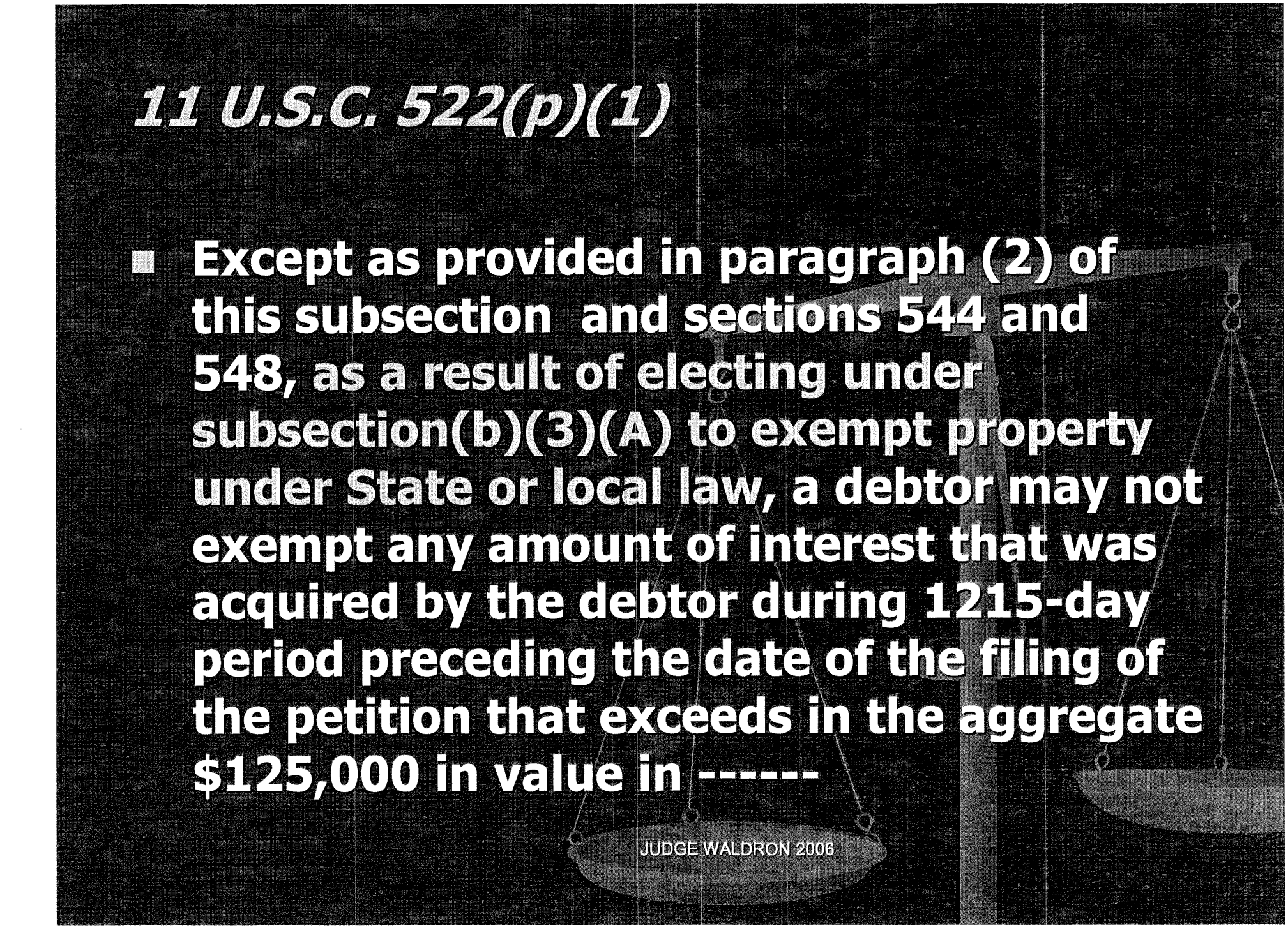
See Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L.Rev. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members-or, worse yet, unelected staffers and lobbyists-both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed.

Exxon Mobil Corp. v. Allapattah Services, Inc., 125 S.Ct. 2611 (2005), 2626 -2627 (U.S.,2005)

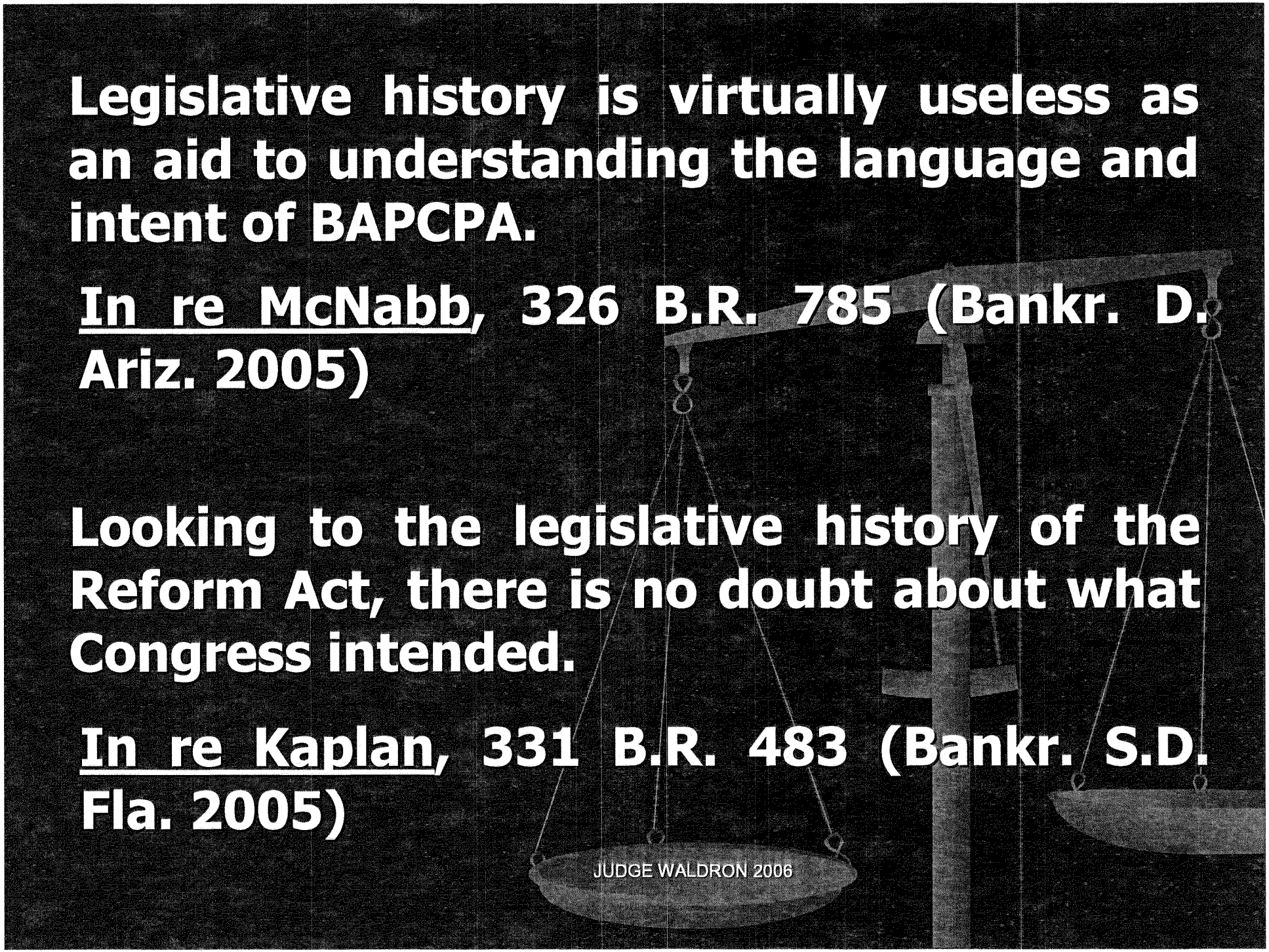

ELECTING
WITHOUT VOTING
—
§ 522(p)
JUDGE WALDRON 2006

11 U.S.C. 522(p)(1)

- **Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection(b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate $125,000 in value in ------**



JUDGE WALDRON 2006


Legislative history is virtually useless as an aid to understanding the language and intent of BAPCPA.
In re McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005)
Looking to the legislative history of the Reform Act, there is no doubt about what Congress intended.
In re Kaplan, 331 B.R. 483 (Bankr. S.D. Fla. 2005)
JUDGE WALDRON 2006

In re KANE, 336 B.R. 477(Nev)

- This court is, of course, reluctant to say that although Congress enacted X it actually meant Y, and it does not do so lightly. But in this case, the scrivener's error is obvious from the extensive record and from common sense: The intent of Congress is crystal clear, and there is no feasible rationale or policy for enacting what the text of the statute says. Indeed, strictly applying the words of Section 522(p) would actually prevent Congress's goal from being achieved.

JUDGE WALDRON 2006

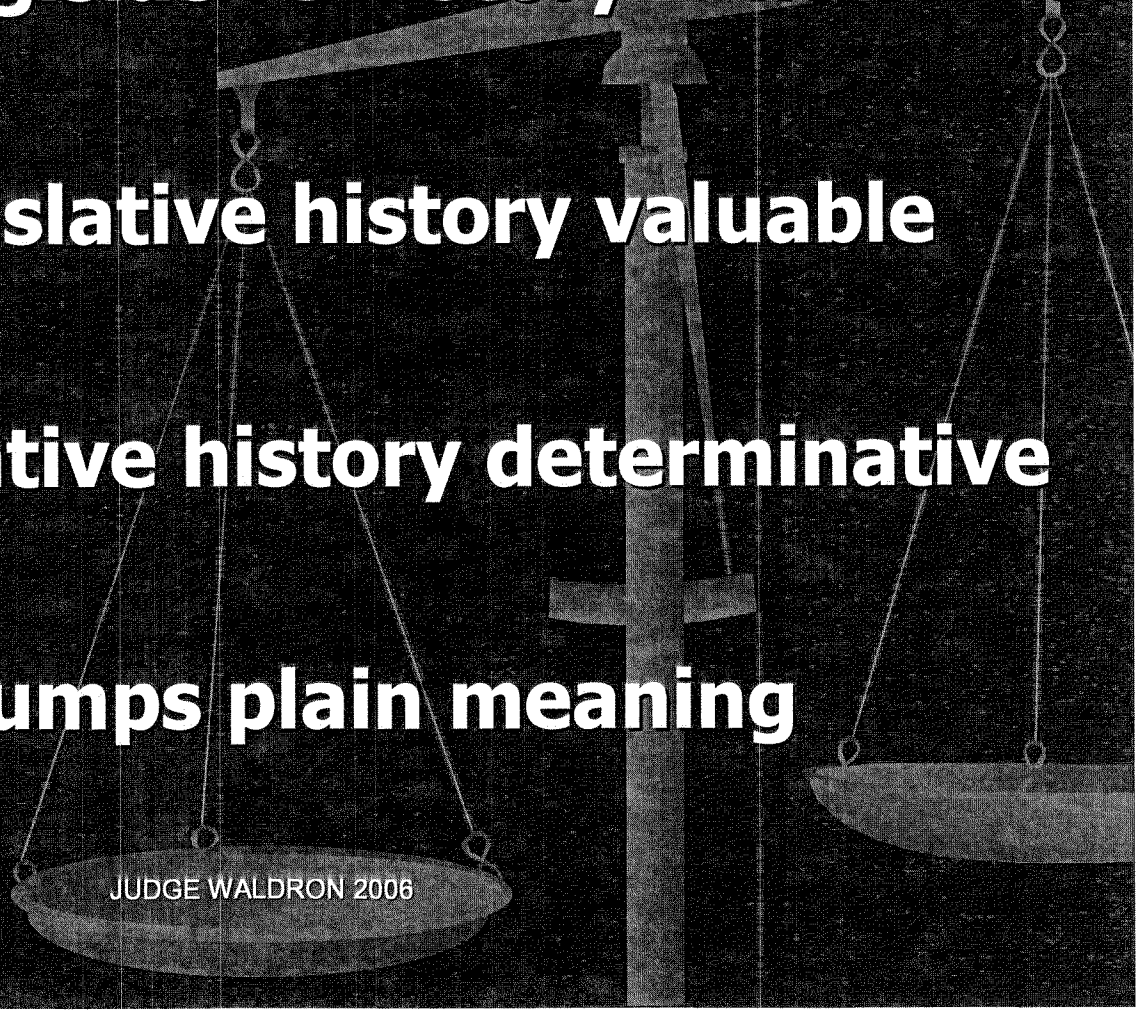
§ 522(p) - $125,000 homestead

McNabb – No legislative history + no value

Virissimo – Legislative history valuable

Kaplan – Legislative history determinative

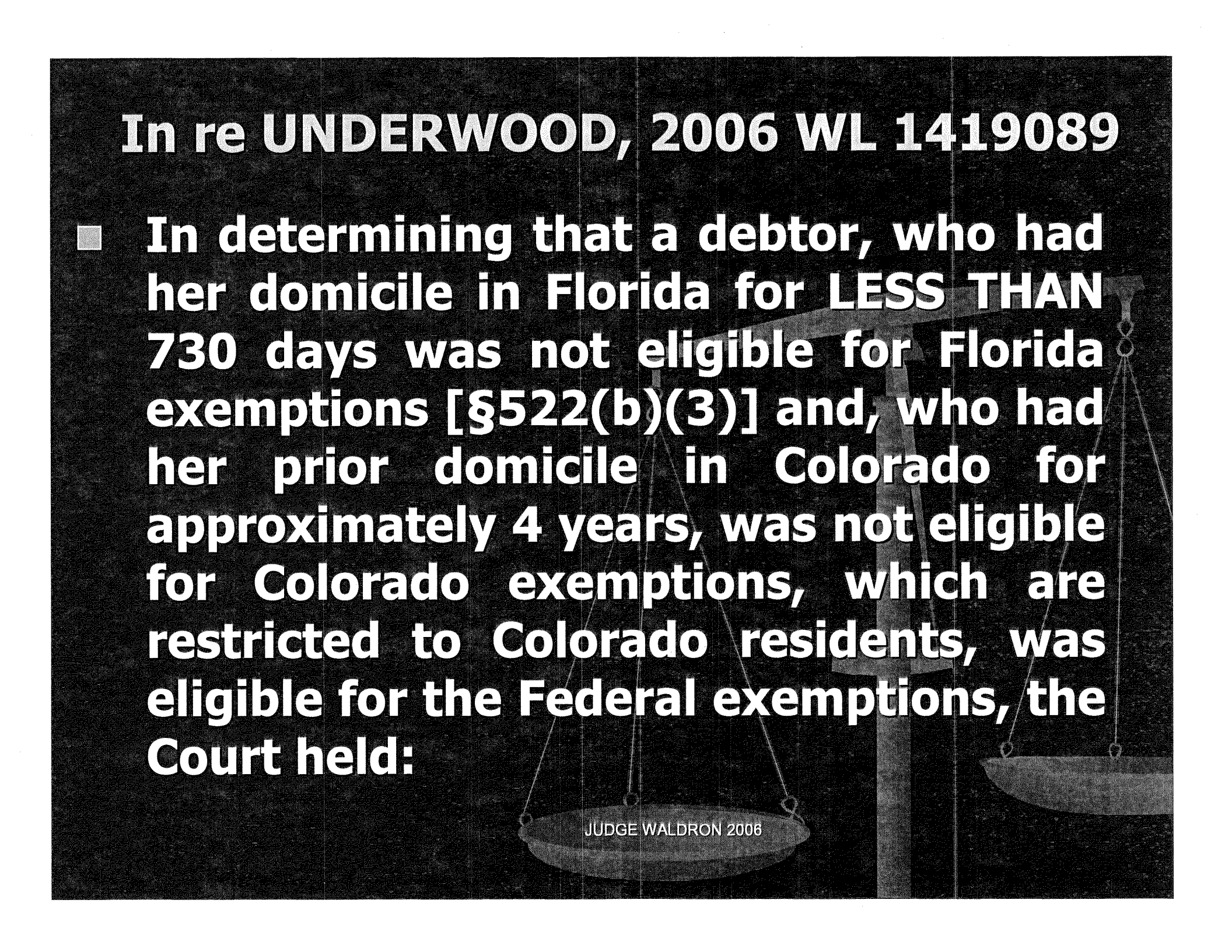
Kane – Intent trumps plain meaning

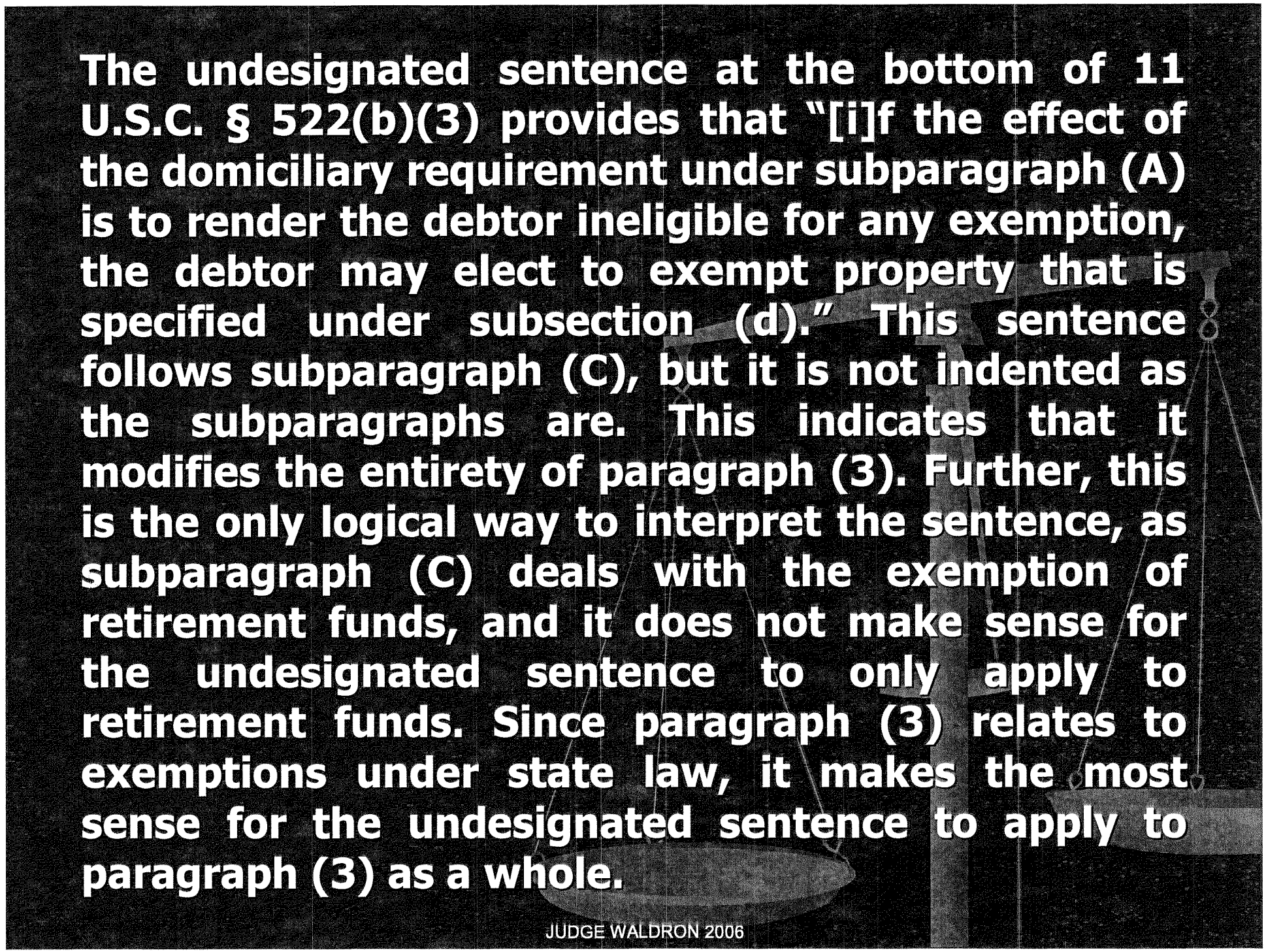


JUDGE WALDRON 2006

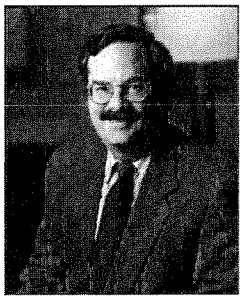
In re UNDERWOOD, 2006 WL 1419089

- In determining that a debtor, who had her domicile in Florida for LESS THAN 730 days was not eligible for Florida exemptions [§522(b)(3)] and, who had her prior domicile in Colorado for approximately 4 years, was not eligible for Colorado exemptions, which are restricted to Colorado residents, was eligible for the Federal exemptions, the Court held:




The undesignated sentence at the bottom of 11 U.S.C. § 522(b)(3) provides that "[i]f the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d)." This sentence follows subparagraph (C), but it is not indented as the subparagraphs are. This indicates that it modifies the entirety of paragraph (3). Further, this is the only logical way to interpret the sentence, as subparagraph (C) deals with the exemption of retirement funds, and it does not make sense for the undesignated sentence to only apply to retirement funds. Since paragraph (3) relates to exemptions under state law, it makes the most sense for the undesignated sentence to apply to paragraph (3) as a whole.
JUDGE WALDRON 2006

PANELISTS



Honorable Bruce A. Markell
U. S. Bankruptcy Court
Las Vegas, Nevada

Bruce A. Markell was sworn in as a bankruptcy judge on July 9, 2004. He came to the bench from the academy; since 1999, he had been the Doris S. and Theodore B. Lee Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas, where he taught Contracts, Commercial Law, Securitization and Bankruptcy. He maintains his connections with the Boyd School of Law as their Senior Fellow in Bankruptcy and Commercial Law. Judge Markell is a 1977 graduate of Pitzer College, and a 1980 graduate of the King Hall School of Law, University of California at Davis, where he was first in his class and editor-in-chief of the law review.

Honorable Thomas F. Waldron
U. S. Bankruptcy Court
Dayton, Ohio

He is a 1967 graduate of the University of Cincinnati Law School, was originally appointed on July 8, 1985 and has been reappointed as a United States Bankruptcy Judge for the Southern District of Ohio at Dayton. He is currently Chief Judge of the Southern District of Ohio Bankruptcy Court. He also served as Chief Judge of the Bankruptcy Appellate Panel of the Sixth Circuit. He is a fellow of the American College of Bankruptcy, a member of the adjunct faculty at the University of Dayton Law School and a contributing editor to the Norton Bankruptcy Law Practice Treatise. He is a frequent speaker at national, regional, and local bankruptcy education programs.