

THE ELUSIVE MEANING OF IMPAIRMENT

By Rina Welles and Larry D. Simons¹

I. Introduction

"Impairment" is defined as "[t]he fact or state of being damaged, weakened, or diminished."² However, judicial interpretation has expanded the meaning of the word beyond its plain definition. As a result, the concept of impairment has often been misunderstood and misapplied. The amendments contained in the Bankruptcy Reform Act of 1994³ did little to change that.

Impairment is a crucial concept in every plan of reorganization or liquidation under chapter 11 since a plan proponent (and ultimately, the court) must determine whether a creditor is impaired and, therefore, arguably entitled to vote.⁴ Section 1129(a)(1)⁵ of the Bankruptcy Code requires that at least one impaired class vote to accept the plan. On the other hand, classes of unimpaired creditors are presumed to have accepted the plan, and therefore a proponent need not solicit their vote.⁶ Thus, a clear understanding of what is meant by "impairment" is essential.

The primary focus of this discussion is the effect of the 1994 Bankruptcy Reform Act on the interpretation of section 1124(1) as illustrated by case law. Before turning to that question, the authors provide a general background of impairment under the Bankruptcy Act and the Bankruptcy Code. The authors then discuss the deletion of section 1124(3) and attempt to clarify the meaning of

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² BLACK'S LAW DICTIONARY 754 (7th ed. 1999).

³ Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

⁴ This brings up the query whether, once an impaired class votes for the plan, a plan proponent must solicit votes from any other impaired class in a situation where there is more than one such class.

⁵ Unless noted otherwise, all references to sections are made to 11 U.S.C. § 101, et seq.

⁶ See section 1126(f).

section 1124(1). In conclusion, the authors summarize when courts have found a creditor impaired.

II. The Metamorphosis Of "Impairment"

"Impairment" is a term of art which did not exist under the Bankruptcy Act and is not defined in the Bankruptcy Code.⁷

Under the Bankruptcy Act, claimants⁸ and interest holders⁹ were entitled to vote only if they were "materially" and "adversely" affected by the plan.¹⁰ Determining whether a creditor was materially and adversely affected required parties and courts to predict the unknown in an attempt to prove a debtor's value and the plan's potential effect on creditors.¹¹

To remedy the problem, Congress enacted section 11 U.S.C. § 1124 as part of the 1978 amendments. Section 1124 originally provided that a claimant or interest holder is impaired under a plan unless it agrees to less favorable treatment

⁷ The definitional section of the Code does not contain a definition of "impairment." See section 101.

⁸ The term "claim" is defined in section 101(5) as a

- (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
- (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured

⁹ The term "interest holder" is not defined in the Code. See 7 COLLIER ON BANKRUPTCY ¶ 1124.01[1], at 1124-3 n.3 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. Rev. 2002) (ownership interests include the proprietary interest of an individual debtor, general and limited partners in the case of a partnership debtor, and equity security holders in the case of a corporate debtor).

¹⁰ Section 107 of the Bankruptcy Act provided that:

Creditors or stockholders or any class thereof shall be deemed to be "affected" by a plan only if their or its interest shall be materially and adversely affected thereby. In the event of controversy, the court shall after hearing upon notice summarily determined [sic] whether any creditor or stockholder or class is so affected.

¹¹ See COLLIER, *supra* note 9, ¶ 1124.LH., at 1124-17.

than that provided to members of the same class,¹² or unless the plan satisfies section 1124(1), (2), or (3).

The original section 1124 offered three scenarios under which a claimant or interest holder would be deemed unimpaired. First, no impairment existed pursuant to section 1124(1) where the plan left unaltered the creditor's legal, equitable, or contractual rights. Second, the creditor was unimpaired where payment had been accelerated, and the proponent of the plan fulfilled section 1124(2) by cure, reinstatement, compensation, and not altering the legal, equitable, or contractual rights of the creditor. Third, a claimant would be deemed unimpaired under section 1124(3) when it received, on the effective date of the plan, cash equal to the allowed amount of its claim. An interest holder would be unimpaired if it received the greater of any fixed liquidation preference¹³ or fixed price under the terms of its security.¹⁴

III. *In re New Valley Corporation*:¹⁵ The Catalyst For Change

The application of section 1124(3) proved to be especially problematic. In 1994, a New Jersey bankruptcy court held that pursuant to the plain language of section 1124, a solvent¹⁶ corporate debtor would not have to pay postpetition interest on allowed unsecured claims.¹⁷ The *New Valley* court reasoned that under section 1124(3), a creditor receiving or retaining value equal to the amount of its allowed claim is unimpaired. Since an allowed claim is described in section 502(b) as a claim which does not include interest not matured on the petition date,¹⁸ the solvent debtor in *New Valley* was able to avoid paying

¹² Section 1123(a)(4).

¹³ A "liquidation preference" is defined as "[a] preferred shareholder's right, once the corporation is liquidated, to receive a specified distribution before common shareholders receive anything." BLACK'S LAW DICTIONARY, *supra* note 2, at 1197.

¹⁴ For a thorough historical discussion of the policy behind impairment see *In re Barrington Oaks Gen. P'ship*, 15 B.R. 952, 956-63 (Bankr. D. Utah 1981).

¹⁵ *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994).

¹⁶ Courts have found that distinguishing between solvent and insolvent debtors in the impairment analysis is not supported by the Code since no such distinction is made in the language of section 1124. See *In re Seasons Apartments, Ltd. P'ship*, 215 B.R. 953, 960 (Bankr. W.D. La. 1997).

¹⁷ 168 B.R. at 77.

¹⁸ Section 502(b)(2).

postpetition interest to a class of unsecured creditors and still have the class deemed unimpaired.

Congress found the outcome of *New Valley* patently unfair and deleted section 1124(3) in the 1994 amendments to the Code. According to legislative history, Congress was acting to prevent solvent debtors from receiving a windfall by being able to pay unsecured creditors an amount exclusive of postpetition interest.¹⁹ As a result of the 1994 amendments, which affect cases filed on or after October 22, 1994, a creditor is deemed unimpaired only if it fulfills the requirements of sections 1123(a)(4), 1124(1) or 1124(2).

IV. Post Amendment Application

A. Interpreting the Deletion of Section 1124(3)

Unfortunately, interpreting the deletion of section 1124(3) proved no less of a problem than figuring out its prior application. Specifically, case law is still unclear on the issue of whether a class of unsecured creditors is impaired when it is paid the amount of its claims in full (as opposed to the "allowed" amount only) on the effective date, including postpetition interest.

1. *In re Atlanta-Steward Partners*²⁰

In re Atlanta-Steward is the first widely cited case addressing impairment under the new amendments. In *Atlanta-Steward*, a Georgia bankruptcy court held as a matter of first impression that post 1994 claims are impaired even if paid "in full."²¹

In *Atlanta-Steward*, a creditor and the United States Trustee objected to the approval of the debtor's disclosure statement. The creditor alleged that the debtor artificially impaired a convenience class by proposing a 95% rather than a 100% payout. The Office of the United States Trustee calculated that the debtor would need only \$154.33 more to pay the class 100% on its claims. However, the debtor argued that the extra payment was unnecessary because, following the

¹⁹ See H.R. REP. NO. 103-835, at 48 (1994), 1994 U.S.C.C.A.N. 3340, 3356, reprinted in WILLIAM L. NORTON, JR., NORTON BANKR. CODE PAMPHLET 2002-2003, at 1127 (2d ed. 2002). See also *In re Rocha*, 179 B.R. 305, 307 n.1 (Bankr. M.D. Fla. 1995).

²⁰ *Equitable Life Ins. Co. of Iowa v. Atlanta-Steward Partners (In re Atlanta-Steward Partners)*, 193 B.R. 79 (Bankr. N.D. Ga. 1996).

²¹ *Id.* at 82.

deletion of section 1124(3), a class of creditors paid 100% of its allowed claims would still be impaired.²²

The court agreed with the debtor's position and held that "under section 1124 as amended, a class of creditors which will receive payment upon the effective date of the plan is impaired within the meaning of the Bankruptcy Code".²³ In its reasoning, the court stated it was relying on the language of the amended section, legislative history and common sense. However, it is not clear what the court was following when it stated that "a creditor who receives payment of its claim in **its entirety** does not retain any legal, equitable, or contractual rights."²⁴

The *Atlanta-Steward* court also opined that the creditor's interpretation that payment in full from an insolvent debtor makes the creditor unimpaired pursuant to section 1124(1) would have made the deleted subsection 1124(3) "superfluous."²⁵ This is questionable in light of the fact that section 1124(3) referred to payment of the allowed amount of the claim, not payment "in full."

The language used by the court in *Atlanta-Steward* is confusing in that, when amending section 1124, Congress specifically referred to payment of the **allowed** amount, not payment **in full** or **in the entirety**. Although the *Atlanta-Steward* court stated it based its reasoning on legislative history, it used the expressions "payment in full" and "payment in its entirety" interchangeably, without explaining how these words relate to payment of the **allowed** amount as discussed in legislative history to the amended section 1124, in the *New Valley* case, and as defined in section 502(b)(2). The difference in meaning between these words is important because an allowed claim is a term of art under section 502, while "payment in full" is not defined in the Bankruptcy Code and can have more than one meaning. For example, it can mean either payment of the whole amount due on the petition date, or payment of that amount plus postpetition interest.

Since legislative history specifically states that in amending section 1124, Congress was referring to payment of the **allowed** claim amount, it is reasonable to conclude that the deletion of section 1124(3) was intended only to prevent the result reached in *New Valley*, not to cause a creditor paid in full with postpetition

²² *Id.* at 80-81.

²³ *Id.* at 82 (emphasis added).

²⁴ *Id.* at 81 (emphasis added).

²⁵ *Id.*

interest to become impaired. However, the reasoning of *Atlanta-Steward* is questionable due to the court's use of imprecise language. As such, the case does not serve as clear precedent in interpreting impairment.²⁶

B. Defining the Meaning of Impairment under Section 1124(1)

Instead of focusing on the deletion of section 1124(3) and creating the kind of speculation prevalent when section 107 of the Bankruptcy Act was in force,²⁷ other courts sought to examine the meaning of section 1124(1), a section Congress left unaltered.²⁸ That section provides that, except as stated in section 1123(a)(4),

[A] class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan - (1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest. . . .²⁹

Case law has shaped the interpretation of section 1124(1), since the meaning of the section is not explained in legislative history and its terminology is not defined in the Code.³⁰ To understand the meaning of section 1124(1), it is first necessary to define the legal, equitable, or contractual rights of a creditor. Such rights may arise under state law,³¹ bankruptcy law,³² or may be created by

²⁶ Inexplicably, several courts have found the reasoning of *Atlanta-Steward* persuasive without further analysis. See *In re Grete Bay Hotel & Casino, Inc.*, 251 B.R. 213, 240 (Bankr. D.N.J. 2000); *In re Crosscreek Apts., Ltd.*, 213 B.R. 521, 536 (Bankr. E.D. Tenn. 1997); *PNC Bank, Nat'l Ass'n v. Park Forest Dev. Corp.* (*In re Park Forest Dev. Corp.*), 197 B.R. 388, 395 (Bankr. N.D. Ga. 1996).

²⁷ See *Perroton v. Gray* (*In re Perroton*), 958 F.2d 889, 895-96 (9th Cir. 1992) (the absence of certain language cannot be construed as indicative of congressional intent in light of clear intent to the contrary).

²⁸ See *In re Seasons Apartments, Ltd. P'ship*, 215 B.R. 953 (Bankr. W.D. La. 1997).

²⁹ Section 1124(1).

³⁰ See *United States v. Turkette*, 452 U.S. 576, 580 (1981) (where statutory language is clear and unambiguous, that language controls and judicial inquiry is complete absent exceptional circumstances); *Perroton*, 958 F.2d at 893 (when statutory language is unclear, courts use extrinsic aids such as legislative history to construe legislative intent) (citation omitted).

³¹ *E.g.*, payment of prepetition interest.

³² See *In re Smith*, 123 B.R. 863, 866 (Bankr. C.D. Cal. 1991) (rights afforded by the Bankruptcy Code include the right to have the validity and extent of claim determined by the bankruptcy court and the right to receive property or payment equal to the allowed amount of the claim to the extent

contract between the parties.³³ Logic dictates that if those rights are left unaltered, that is, if the creditor receives everything it is entitled to under any theory, be it legal, equitable or contractual, such creditor would not be impaired.

Moreover, in analyzing the rights of creditors under section 1124, it is important to emphasize the distinction between plan impairment and statutory impairment.³⁴ Pursuant to the plain language of section 1124(1), a creditor is impaired if the **plan** alters its rights, not when its rights are altered under the Code due to filing bankruptcy. This distinction is crucial in that section 1124(1) does not address **retention** of rights; instead, it states that the rights should stay **unaltered** by the plan. A clear example of a situation where the rights of a creditor are not altered is where the debtor remains pre and postpetition current and does not modify the terms of the original obligation.³⁵ However, this scenario usually occurs only in connection with secured claimants.

Further, commentators point out the distinction between altering a creditor's rights as opposed to affecting purely economic effects.³⁶ As such, "a plan which proposes to scale down secured and unsecured claims and upon confirmation creates a positive net worth for the debtor without issuing any new equity securities does not alter the legal, equitable and contractual rights of the ownership interest."³⁷ Therefore, although the economic position of such interest holders may be altered in a beneficial way, they will not be entitled to vote because their rights are not impaired.³⁸

there are sufficient assets in the estate).

³³ See *In re Otero Mills, Inc.*, 31 B.R. 185-86 (Bankr. D.N.M. 1983) (payment of lump sum altered creditor's contractual right to monthly installment payments and thus made creditor impaired).

³⁴ See *American Solar King Corp.*, 90 B.R. 808, 819-22 (Bankr. W.D. Tex. 1988) (rejecting "impairment by statute" as contrary to policy behind the Code).

³⁵ COLLIER, *supra* note 9, ¶ 1124.02, at 1124-6; see *Otero Mills*, 31 B.R. at 185 (interpreting section 1124(1) as requiring no pre or postpetition default).

³⁶ COLLIER, ¶ 1124.02[5], at 1124-8.

³⁷ *Id.*

³⁸ *Id.*

1. *Seasons Apartments, Ltd. Partnership*³⁹

Seasons Apartments is one of the more clear and better reasoned opinions interpreting the meaning of section 1124(1). In *Seasons Apartments*, an insolvent chapter 11 debtor proposed to treat an undersecured creditor as unimpaired after payment of the allowed secured and unsecured amount of its claims. The creditor objected, arguing that nonpayment of postpetition interest, fees and costs amounted to impairment. The court noted that deleted section 1124(3) referred to an "allowed claim," while under section 1124(1), it is the claim, not the "allowed claim," which must be left unchanged in order for the creditor to be unimpaired.⁴⁰ Thus, the court reasoned that since Congress chose not to use the same language in both subsections, the meaning of each must be different.⁴¹ The court also noted that section 1124(3) would have been superfluous had Congress intended the same meaning under both subsections.⁴²

The court in *Seasons Apartments* reached the conclusion that the absence of the word "allowed" in front of the word "claim" in section 1124(1) means that the broad definition of "claim" contained in section 101(5) must be applied in analyzing section 1124(1).⁴³ Based on that definition, the creditor would be entitled to payment of matured interest, or its claim would be impaired.⁴⁴ Although the court in *Seasons Apartments* ultimately agreed with the conclusion reached in *Atlanta-Steward*, its reasoning is much more persuasive and more accurately reflects the language of the statute.

2. *In re PPI Enterprises (U.S.), Inc.*⁴⁵

Another case that made a clear departure from the reasoning of the *Atlanta-Steward* line of cases came from a Delaware bankruptcy court. In *PPI*, the creditor in question was the holder of a terminated lease claim. Under the plan, the debtor proposed to cap the creditor's claim pursuant to section 502(b)(6)

³⁹ *In re Seasons Apartments, Ltd. P'ship*, 215 B.R. 953 (Bankr. W.D. La. 1997).

⁴⁰ *Id.* at 959.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See note 8 for the definition of "claim."

⁴⁴ *Seasons Apartments*, 215 B.R. at 960, citing *Liberty Nat'l Enter. v. Ambanc La Mesa Ltd. P'ship* (*In re Ambanc La Mesa Ltd. P'ship*), 115 F.3d 650 (9th Cir. 1996).

⁴⁵ *In re PPI Enterprises (U.S.), Inc.*, 228 B.R. 339 (Bankr. Del. 1998), *aff'd*, 324 F.3d 197 (3d Cir. 2003).

and pay the creditor in full in cash, including pre and postpetition interest, on the effective date of the plan. The creditor argued that the petition was filed in bad faith because the debtor's primary purpose in filing bankruptcy was to cap the creditor's claim, making its claim impaired.⁴⁶

Chief Judge Walsh found that the bankruptcy was not filed in bad faith since the Code specifically allows debtors to cap lease claims pursuant to section 502(b)(6). The court also found that the creditor was unimpaired because it was getting everything it would otherwise be entitled to under the lease. As such, its legal, equitable and contractual rights were left unaltered under section 1124(1).⁴⁷

The *PPI* court also examined the effect of the 1994 Amendments on section 1124(3). The court concluded that a reading of the legislative history indicates that Congress merely intended to eliminate the anomalous result created by the *New Valley* decision, but "did not intend to eliminate impairment for purely money claims."⁴⁸ Thus, to be deemed unimpaired, a claimant must receive postpetition interest.⁴⁹

Additionally, the court opined that payment of pre and postpetition interest put the creditor in the same position it would have been in had the bankruptcy never been filed. The court further reasoned that a creditor should not be paid more in bankruptcy than it is entitled to be paid under contract and applicable state law. The court went so far as to state that allowing a creditor to vote on a plan under which the creditor gets everything it is entitled to outside of bankruptcy would be "anomalous."⁵⁰

The outcome of *PPI* is more convincing than the *Atlanta-Steward* line of cases because the opinion follows the exact language used by Congress. Thus, the reasoning of the case is necessarily more consistent with legislative intent.

Although the court in *PPI* reached the conclusion that the creditor could not be impaired since it was getting everything it would otherwise be entitled to under the Bankruptcy Code (the question of what), it did not address the issue whether the fact that under the plan the creditor might have been paid at a

⁴⁶ *Id.* at 341-42.

⁴⁷ *Id.* at 342.

⁴⁸ *Id.* at 352.

⁴⁹ *Id.*

⁵⁰ *Id.*

different time than provided for in the contract altered its contractual rights (the question of when). This is important since unimpaired creditors are required to be paid on the effective date, although payment at that particular time may not correspond to the agreement between the parties.⁵¹ It appears that this issue has not so far been addressed by case law.

C. The Effect of Section 1129 on the Impairment Analysis

The language used in section 1129(a)(9) contributes to even more confusion in this area. Section 1129(a)(9)(A) relates to payment of section 507(a)(1) and (a)(8) claims, including administrative claims. The section provides in part that, except to the extent that the holder of a claim agrees otherwise, the court shall confirm a plan only if such claimants are paid the cash value of their allowed claims on the effective date of the plan.

In the pre amendment 1986 case of *In re Distringas Corp.*,⁵² the court made an interesting observation about the distinction between sections 1124 and 1129(a)(9). Although the court also used imprecise language when referring to satisfaction of claims under section 1129 ("payment in full" instead of "payment of allowed amount"),⁵³ the court went on to discuss the difference between "claims" and "classes of claims" as those words are used in the Code. Comparing section 1129(a)(9)(A) with section 1129(a)(9)(B), the court stated that "[w]hile classes may be affected by the plan, priority claims must be paid in full and, therefore, cannot be impaired by the plan."⁵⁴ The court further opined that Congressional intent was clear in allowing claims which may be altered to vote on the plan while claims which have to be "paid in full, in cash, on the effective date of the plan, have no interest at stake and, therefore, need not be a voting class."⁵⁵

⁵¹ Courts have held, however, that payment after the effective date of the plan does constitute impairment. See *Oxford Life Ins. Co. v. Tucson Self-Storage, Inc.* (*In re Tucson Self-Storage, Inc.*), 166 B.R. 892 (B.A.P. 9th Cir. 1994) (unsecured creditors having to wait 60 days after effective date to be paid in full are impaired).

⁵² *In re Distringas Corp.*, 66 B.R. 382 (Bankr. D. Mass. 1986).

⁵³ Although *Distringas* is a 1986 case, the court noted that impairment has generally come to mean "any material alteration of the holder's legal, equitable, or contractual rights. . . ." 66 B.R. at 384. This illustrates the danger of courts using imprecise language in interpreting statutes; although the material alteration test had been abandoned in 1978 when section 1124 was enacted, apparently some courts in 1986 were still relying on the old language when analyzing impairment.

⁵⁴ 66 B.R. at 386.

⁵⁵ *Id.*

Following this reasoning to its logical conclusion, if payment of the allowed amount causes certain claimants to be unimpaired pursuant to the language of section 1129(a)(9), why wouldn't payment of the allowed amount to other classes of claimants make their claims unimpaired? After all, as the *Distrigas* court pointed out, when analyzing statutory language "[a] basic rule of statutory construction is that each provision should, if possible, be given effect so as to carry out the congressional intent while making the entire Act a consistent whole."⁵⁶ As such, one could ask why what is good for the goose is not good for the gander in light of the fact that under the 1994 Amendments, claimants other than those listed in section 1129(a)(9) are now impaired if paid the allowed amount of their claim in cash on the effective date of the plan, with or without interest.

D. Any Modification is Impairment

Courts have adopted an expansive definition of section 1124(1), ruling that any alteration, including a beneficial one, constitutes impairment.⁵⁷ This approach rectifies the struggle created under the Act which forced courts to determine if a claimant or interest holder was "materially and adversely affected."

Courts have generally found impairment when a creditor's rights created under state law are altered in any way. For example, in *L&J Anaheim Associates*, the Ninth Circuit affirmed the bankruptcy court's holding that even a positive change in a creditor's foreclosure rights with respect to security on real property would make the creditor impaired.⁵⁸ In another case, the court found that waiver of any potential valid defenses or causes of action would result in impairment.⁵⁹

Further, courts interpreting a holder's rights in reference to contractually created obligations have consistently ruled that any modification in the nature of those rights constitutes impairment. For example, in the case of *In re Barrington Oaks Gen. Partnership*, the court stated that if a secured creditor's right to pursue the obligor on a nonrecourse note created by contract is taken away, that creditor would be impaired.⁶⁰ On the other hand, a creditor was found to be unimpaired

⁵⁶ *Id.*, citing *Kokoszka v. Belford*, 417 U.S. 642 (1974).

⁵⁷ *L&J Anaheim Assocs. v. Kawasaki Leasing Int'l, Inc. (In re L&J Anaheim Assocs.)*, 995 F.2d 940, 943 (9th Cir. 1993) (holding that creditor's rights were impaired even though plan resulted in enhancement of position).

⁵⁸ *Id.*

⁵⁹ *In re Applied Safety, Inc.*, 200 B.R. 576, 588 (Bankr. E.D. Pa. 1996).

⁶⁰ *In re Barrington Oaks Gen. P'ship*, 15 B.R. 952, 956-63 (Bankr. D. Utah 1981).

when property securing a loan was transferred to a third party but the third party was not required to assume the obligation and the creditor's right to collect from the debtor was not extinguished.⁶¹ Moreover, a change of the maturity date as well as a requirement that creditor execute releases in connection with a note amounts to impairment.⁶²

Finally, as to rights created by the Bankruptcy Code, the court in *In re Smith* found impairment where a creditor did not retain the right to have its claim estimated and share in the liquidation process.⁶³ Impairment was also found where a plan deprived an equity holder of his right to vote for management.⁶⁴ Moreover, a creditor was found to be impaired when the plan delayed payment to the creditor beyond its effective date.⁶⁵

Arguably, courts would also find impairment when the creditor's interest rate under the plan is different from that provided for in the contract or under state law. However, in light of the Ninth Circuit holding in *In re Cardelucci*⁶⁶ that the postpetition "legal rate" to which an unsecured judgment creditor is entitled from a solvent debtor is the federal judgment rate rather than the state statutory rate, the interesting query which may create further confusion in the Ninth Circuit is whether all similarly situated creditors will now automatically be impaired under section 1124(1), since pursuant to *Cardelucci*, they will only be entitled to receive the federal judgment rate (resulting in a possible modification of their rights under state law).

V. Conclusion

After the 1994 Amendments took effect, case law has provided little guidance in the interpretation of impairment. Courts are split in their reasoning, causing uncertainty in predicting issues affecting plan confirmation. Although

⁶¹ *Bustop Shelters of Louisville, Inc. v. Classic Homes, Inc.*, 914 F.2d 810, 814-15 (6th Cir. 1990). The opinion does not state whether the lien on the property was left intact.

⁶² *In re Ronit Inc. v. Block Shim Dev. Co.-Irving (In re Block Shim Dev. Co.-Irving)*, 118 B.R. 450, 455 (N.D. Tex. 1990), *aff'd*, 939 F.2d 289 (5th Cir. 1991).

⁶³ *In re Smith*, 123 B.R. 863, 867 (Bankr. C.D. Cal. 1991).

⁶⁴ *In re Acequia, Inc.*, 787 F.2d 1352, 1363 (9th Cir. 1986).

⁶⁵ *Oxford Life Ins. Co. v. Tucson Self-Storage, Inc. (In re Tucson Self-Storage, Inc.)*, 166 B.R. 892, 895 n.5 (B.A.P. 9th Cir. 1994) (unsecured creditors having to wait 60 days after effective date to be paid in full are impaired).

⁶⁶ 285 F.3d 1231, 1234 (9th Cir. 2002).

under the Code claimants and interest holders in cases filed after October 22, 1994, are deemed unimpaired only where the plan satisfies 11 U.S.C. section 1123(a)(4), section 1124(1) or section 1124(2), unresolved issues remain as to the meaning of section 1124(1).

For one, courts have not clearly opined whether an unsecured claim is unimpaired under section 1124(1) where it is paid in full, including postpetition interest, on the effective date of the plan. Another issue left unanswered is the effect the time of payment, as opposed to the amount, has on the impairment analysis, i.e., whether payment on the effective date alters a creditor's rights in cases where a different date was originally agreed upon between the parties. The answer to this question appears especially relevant in light of holdings that any alteration of a creditor's rights, no matter how insignificant and including a beneficial change, would make a creditor impaired.

Congressional action is needed to clarify section 1124(1) and establish more uniformity among the various sections relating to plan disclosure, voting and confirmation. In light of possible future amendments, now is a good time to effect the changes.