

ASHER HAWKINS

## The Least “Constructive” Provisions?: Analyzing the Bankruptcy Code’s Codified Canons

59 N.Y.L. SCH. L. REV. 625 (2014–2015)

ABOUT THE AUTHOR: Asher Hawkins was an Articles Editor of the 2013–2014 *New York Law School Law Review*. He received his J.D. from New York Law School in 2014, and is currently serving as an Appellate Court Attorney with the New York Supreme Court, Appellate Division, Third Judicial Department. His paper, *Navigating § 546’s Safe Harbors in the Wake of Lyondell, Tribune and Barclays*, won the American Bankruptcy Institute’s 2014 Law Student Writing Competition and was published in the June 2014 issue of the *American Bankruptcy Institute Journal*.

## ANALYZING THE BANKRUPTCY CODE'S CODIFIED CANONS

*The seventh of the U.S. Bankruptcy Code's nine "rules of construction" seems straightforward enough: "the singular includes the plural." But bankruptcy judges across the country have, in a surprisingly varied range of contexts, struggled with whether strict obedience to the language of § 102(7) reflects the congressional intent underlying the particular provision being interpreted. Previously, judicial confusion as to proper application of § 102(5) ("or" is not exclusive) had to be resolved by the U.S. Supreme Court. The situation calls for some manner of revision to the Code's statutory-analysis "rules." This note first provides a history of the so-called "canons" of construction before turning to the commonly used number-neutrality canons and explaining how an incomplete reformulation of it was codified within the Code of 1978. Next, this note highlights instances in which strict, as opposed to relaxed, adherence to § 102(5) and § 102(7) has led to conflicting results in disputes stemming from certain Code provisions, including § 522(d)(11)(D) (exemption for "a payment . . . on account of personal bodily injury") and § 548(a)(2)(A) (fraudulent-transfer exception for "a charitable contribution to a qualified . . . entity"). Third, this note explores the practical implications of the conflicting approaches to § 102(7). Finally, this note proposes solutions for resolving the statutory-analysis problems resulting from § 102, an undertaking that would in turn promote increased clarity in a statutory framework that is regarded by some as plagued by imprecise language.*

### I. INTRODUCTION

For Anthony Phillips of Elmont, New York,<sup>1</sup> the 2010s had gotten off to a rocky start. On the morning of August 11, 2010, Phillips was driving his Chevrolet along a roadway in Hempstead, New York, when he was involved in a crash with another vehicle.<sup>2</sup> On June 5, 2011, Phillips was driving on the east side of Manhattan, near the entrance to the Queensboro Bridge, when he was involved in another car accident—this time with a taxi cab.<sup>3</sup> In August 2011, Phillips filed separate personal injury actions against the drivers in those accidents; he alleged in each complaint that he had incurred serious bodily injury as a result of the collision.<sup>4</sup>

On April 12, 2012, Phillips, a retired member of the New York City Police Department, filed for bankruptcy protection in the U.S. Bankruptcy Court for the

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1. See Voluntary Petition at 1, *In re Phillips*, 485 B.R. 53 (Bankr. E.D.N.Y. 2012) (No. 12-72379-ast) [hereinafter Phillips Petition] (listing Anthony Phillips's home address).

2. See Summons and Complaint at 3, *Phillips v. Armand*, No. 20281/11 (N.Y. Sup. Ct. Queens Cnty. Aug. 15, 2011) [hereinafter Armand Complaint].

3. See Summons and Verified Complaint at 3, *Phillips v. Tiki Cab Corp.*, No. 22833/11 (N.Y. Sup. Ct. Queens Cnty. Aug. 30, 2011) [hereinafter Tiki Cab Complaint].

4. See Armand Complaint, *supra* note 2, at 3–4; Tiki Cab Complaint, *supra* note 3, at 4.

Eastern District of New York.<sup>5</sup> He and his wife, April, stated in their voluntary Chapter 7 petition that they had less than three hundred dollars in their various bank accounts, and that they owed more than five hundred thousand dollars on a home in which they had an equitable stake of roughly half that amount.<sup>6</sup>

If the relative proximity of these unfortunate events afforded any silver lining for Phillips, it was that the language of the U.S. Bankruptcy Code (“the Code”) seemed to permit individual debtors to place out of creditors’ reach a sizable chunk of whatever money they expected to recover as a result of pending personal injury actions listed as assets in their bankruptcy petitions. Section 522(d)(11)(D) of the Code states that a bankruptcy debtor may exempt the right to receive “a payment, not to exceed [a fixed amount of money adjusted for inflation, which was \$21,625 in 2012], on account of personal bodily injury.”<sup>7</sup> Of further apparent benefit to Phillips was § 102(7)—one of the Code’s “rules of construction”—which provides that “[i]n this title . . . the singular includes the plural.”<sup>8</sup> Phillips, anticipating that each of his motor vehicle lawsuits would result in recovery of damages in excess of the amount listed in § 522(d)(11)(D), claimed two personal injury action exemptions in his bankruptcy petition for a total of \$43,250.<sup>9</sup>

Phillips and his bankruptcy attorney undoubtedly assumed that they were on solid legal footing in seeking exemptions for twice the amount specifically set forth in § 522(d)(11)(D); bankruptcy courts in Connecticut, Texas, and Pennsylvania had previously permitted individual debtors to claim personal injury action exemptions in this fashion.<sup>10</sup> But when the trustee in Phillips and his wife’s bankruptcy action challenged the extent of Phillips’s § 522(d)(11)(D) exemptions, a Long Island-based bankruptcy judge ruled that Phillips should be limited to a maximum exemption of \$21,625.<sup>11</sup> The judge reasoned that when the rule of construction codified in § 102(7) is applied to the language of § 522(d)(11)(D), it becomes clear that the Code prohibits a debtor in Phillips’s position from claiming more than the amount listed in § 522(d)(11)(D), irrespective of the number of injury-causing events in which he had been involved in the months and years leading up to his bankruptcy petition.<sup>12</sup>

Though perhaps uncomplicated at first glance, § 102(7) has caused no shortage of confusion for debtors, attorneys, and judges involved in bankruptcy litigation in U.S. courts, who remain uncertain as to the extent to which this codified canon

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5. See Phillips Petition, *supra* note 1, sched. I.

6. See *id.* scheds. C–D.

7. 11 U.S.C. § 522(d)(11)(D) (2013). As of the date of publication, the personal injury exemption amount stands at \$22,975. 11 U.S.C.A. § 522(d)(11)(D) (West 2015).

8. 11 U.S.C. § 102(7).

9. See Phillips Petition, *supra* note 1, sched. C.

10. See discussion *infra* Part III.B.3 (discussing courts’ differing approaches to § 522(d)(11)(D)).

11. See *In re Phillips*, 485 B.R. 53, 62 (Bankr. E.D.N.Y. 2012).

12. See *id.* at 57 (“The grammatical structure of § 522(d)(11)(D), therefore, requires the monetary cap ‘not to exceed \$21,625’ to apply with equal force to either one or multiple payment(s) and regardless of how many injuries the debtor suffered.”).

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should—or should not—be applied in particular bankruptcy-related scenarios.<sup>13</sup> As a result, § 102(7) has featured prominently in contexts as varied as disputes over wage garnishments affecting individual debtors<sup>14</sup> and challenges to reorganization plans for major corporations.<sup>15</sup> The unresolved questions regarding the extent to which § 102(7) should be followed have led to conflicting results,<sup>16</sup> meaning that those seeking bankruptcy protection—ranging from individuals with few assets other than a pending motor vehicle suit to corporate conglomerates worth hundreds of millions of dollars on the open market, along with creditors who might be secured to the tune of a couple hundred dollars up to several hundred million dollars—all lack certainty as to how their disputes might be resolved in court.

Section 102(7) is a codified version of just one of Western jurisprudence's numerous canons of statutory analysis. These “rules of thumb” developed over many centuries as lawmakers, jurists, and legal philosophers sought to ensure that overly strict readings of statutes by jurists would not do violence to the intentions of enacting legislatures, and that practical readings—yielding the result that would have been favored by the enacting legislators had they been able to address the situation at issue—would ultimately prevail.<sup>17</sup> In the United States, many statutory frameworks, at the federal and state level, include codified versions of some of the most widely recognized of these rules of thumb.<sup>18</sup> The Code's codified canons are found in § 102, which sets forth a list of rules of construction.<sup>19</sup>

Among the most widely codified of the traditional canons is the principle that when a statute uses the singular form of a particular word, lawyers and judges may presume that the enacting legislature intended for this singular-form usage to also apply to situations involving more than one of the person or thing in question. Similarly, when a statute uses the plural form of a given word, applying that usage to

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13. See generally discussion *infra* Part III.B.

14. See, e.g., *Christians v. Am. Express Travel Related Servs. (In re Djerf)*, 188 B.R. 586 (Bankr. D. Minn. 1995).

15. See, e.g., *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011).

16. Compare, e.g., *In re Djerf*, 188 B.R. 586, with, e.g., *Wilkey v. Credit Bureau Sys., Inc. (In re Clark)*, 171 B.R. 563 (Bankr. W.D. Ky. 1994) (reaching opposite results on the question of whether wage-garnishment amounts should be aggregated for the purpose of determining if a preferential transfer has occurred).

17. See YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 4 (2008), available at <http://www.fas.org/sgp/crs/misc/97-589.pdf>. Written by legislators and applied by members of the judiciary to non-identical factual scenarios, statutes illustrate the fallibility of harnessing the power of the written word in an attempt to shape the final outcomes of situations that have not yet actually occurred. See Lawrence M. Solan, *Linguistic Issues in Statutory Interpretation*, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW 88, 88 (Peter Tiersma & Lawrence M. Solan eds., 2012) (“[E]vents that result in legal disputes do not always match with clarity the meanings of the words in governing statutes.”).

18. See generally Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010) (surveying the use of codified canons in U.S. state statutory schemes).

19. See 11 U.S.C. § 102 (2013).

situations involving only one person or thing is appropriate.<sup>20</sup> The current version of § 102(7) reflects the former half of this principle.<sup>21</sup>

Other subsections of § 102 codify separate canons of statutory analysis. Section 102(5), for example, provides that “or’ is not exclusive.”<sup>22</sup> Although this codified canon’s analytical mandate would seemingly resolve any potential confusion over how to apply a multi-part statutory provision phrased in the disjunctive, § 102(5) has in recent years played a prominent role in a doctrinal schism among U.S. judges over the proper application of a key part of the Code governing “cramdowns” in Chapter 11 cases;<sup>23</sup> the dispute ultimately had to be resolved by the U.S. Supreme Court in a 2012 decision authored by the Court’s *soi-disant* statutory-analysis guru.<sup>24</sup>

If Congress wishes to promote a new level of clarity within the Code, it would behoove it to begin that process by ensuring that the Code’s general provisions<sup>25</sup> help solve—rather than create—quandaries regarding the proper interpretation and construction<sup>26</sup> of the Code’s non-general provisions. While judge-made common law may be predominant in many areas of U.S. law, bankruptcy law in the United States is regarded as largely bound by the four corners of the existing version of the Code.<sup>27</sup> In addition, commentators increasingly have criticized the level of poor drafting that seems to plague the current version of the Code.<sup>28</sup> Because of the high number of conflicting results secondary to adherence to (or rejection of) § 102(7), seeking a resolution to the

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20. See Scott, *supra* note 18, at 417.

21. See 11 U.S.C. § 102(7).

22. *Id.* § 102(5).

23. See discussion *infra* Part III.A (discussing conflicting decisions regarding the Code provision governing secured-creditor cramdowns).

24. See *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012) (Scalia, J.) (resolving the dispute discussed *infra* Part III.A).

25. Sections 101 through 112 comprise the Code’s “general provisions.” See 11 U.S.C. §§ 101–112. This note refers to those provisions as such, and to the Code’s subsequent sections as its “non-general” provisions.

26. See *infra* Part II.B.2 for a discussion of the difference between statutory interpretation and statutory construction. Many commentators employ the generic phrase “statutory analysis” rather than “interpretation” or “construction.” See generally, e.g., Charles R. Calleros, *Introducing Students to Elementary Legislative Process and Statutory Analysis Through Experiential Learning in a Familiar Context*, 38 GONZ L. REV. 33 (2003). To avoid confusion, this note uses the phrase “statutory analysis” as often as feasible.

27. See generally Thomas E. Lauria & Kevin McGill, *Strict Construction of the Bankruptcy Code: Is the Inability to Avoid Clean-Up Obligations and Substantive Consolidation at Risk?*, 1 BLOOMBERG CORP. L.J. 478 (2006) (discussing, in the context of corporate bankruptcy law, U.S. courts’ tendency to adhere strictly to the provisions of the Code, as opposed to pre-Code precedent); see also *RadLAX Gateway Hotel, LLC*, 132 S. Ct. at 2073 (“[Though] pre-Code practices . . . can be relevant[,] . . . [t]he Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction.” (citing *United States v. Ron Pair Enters., Inc.* 489 U.S. 235, 240–41 (1989))).

28. See, e.g., Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349, 349 (2008) (describing the Code as “a defectively designed and poorly drafted mess”).

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problems associated with this particular provision of the Code's foundational chapter would be a perfect starting point for any such clarity-promoting initiative.

Part II of this note explores the history of the rules of thumb governing statutory analysis in Western jurisprudence, and the ways in which these rules came to be adopted in U.S. statutory frameworks, before examining the extent of the weight afforded to them by latter-day courts and legal scholars in the United States. In addition, Part II also focuses on the creation of the Code's codified canons and why the rule of thumb embodied in § 102(7) is markedly different from its counterparts in other U.S. statutory frameworks. Part III first addresses the recently resolved circuit split regarding § 102(5) and the disjunctive nature of one of the Code provisions governing cramdowns in corporate reorganization cases. Part III then turns to the case law in which § 102(7) has prominently featured, detailing the different contexts in which adherence to—or rejection of—§ 102(7) has led to conflicting results.

Part IV compares the conflicting approaches to § 102(7) by focusing closely on the logic found in the decision that rejected Phillips's attempt to seek multiple exemptions under § 522(d)(11)(D). Part IV also considers the possible side effects of a § 102(7) that more closely tracks the “singular-plural” rule of thumb as codified in other statutory frameworks. Finally, Part V weighs possible solutions to the confusion surrounding § 102(7), ultimately arguing that it and the other non-bankruptcy-specific provisions of § 102, including § 102(5), should be repurposed as statutory-analysis “guidelines” to be used in furtherance of the goal of best applying the non-general provisions of the Code in frequently recurring bankruptcy-related scenarios.

### II. A BRIEF HISTORY OF THE RULES OF CONSTRUCTION

A discussion of the Code's rules of construction cannot proceed without a minimal level of background information regarding the various rules of thumb for analyzing statutory provisions. These general principles of statutory analysis are also commonly referred to as “canons.”<sup>29</sup> As will be shown, using words and phrases with authoritative connotations to describe the canons arguably is misleading—Justice Oliver Wendell Holmes, Jr. famously described the canons as “axiom[s] of experience” that do not amount to “rule[s] of law.”<sup>30</sup> The level of respect that the canons garner among latter-day experts in statutory analysis (whether members of the bench or not) must also be considered before one can turn to the question of why a particular provision of § 102 may prompt different judges to reach different results in cases involving seemingly identical facts.

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29. See, e.g., KIM, *supra* note 17, at 4.

30. *Bos. Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928).

*A. The Need for Guidance in an Increasingly Statutory World*

Legal scholars have propounded and debated the canons for at least several hundred years.<sup>31</sup> While also traditionally seen as useful in interpreting and construing terms in other written documents, such as treaties, the canons have perhaps been most heavily relied on in applying to real-life situations the language of previously written statutes that govern conduct at the national and local levels.<sup>32</sup> Many of the canons developed by legal scholars centuries ago have been codified in U.S. statutory schemes.<sup>33</sup> As will be discussed below, a number of modern legal scholars have adopted theories on statutory analysis that either discount or almost entirely reject the need for the canons.<sup>34</sup> However, the current version of § 102 contains a list of canons that are regularly invoked by judges overseeing bankruptcy-related disputes.<sup>35</sup>

*1. Linguistic Origins of the Canons*

Like many other areas of U.S. law, the tenets of bankruptcy in our country were originally shaped by the reflections of English scholars.<sup>36</sup> The earliest statutes of which written record still exists have been traced back to the reign of King Henry III, who ruled England throughout much of the thirteenth century.<sup>37</sup> Prior to the era in which laws were created by a legislative body (or something close to it), and analyzed by courts of law or analogous bodies, the nature of English autarchy meant that the sovereign alone created the laws, enforced the laws, and explained why a particular law was being applied in a given situation.<sup>38</sup>

After the duties of statutory enactment, on the one hand, and interpretation and construction, on the other, were definitively split between two separate groups of individuals, it became inevitable that statutory frameworks would fail to be, as Justice Benjamin N. Cardozo put it, “so flexible and so minute, as to supply in advance for every conceivable situation the just and fitting rule.”<sup>39</sup> The potential for disconnect

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31. See FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 133–43 (Platt Potter ed., Albany, N.Y., William Gould & Son 1871) (1830) (discussing the approach to the canons of Hugo Grotius and other seventeenth-century jurists).

32. See *id.* at 125 (“In all treaties, conventions, and statutes, inasmuch as language is the instrument or medium of expressing the intent; circumstances, not the time foreseen, give rise to different views, and sometimes to apparent contradictions, arising from the language of the same instrument.”).

33. See generally Scott, *supra* note 18 (surveying the use of codified canons in U.S. state statutory schemes).

34. See discussion *infra* Part II.B.

35. See discussion *infra* Part III.

36. See GUSTAV ADOLF ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES 541–42 nn.155–61 (Jersey City, Frederick D. Linn & Co. 1888) (describing how U.S. judges followed the lead of their English counterparts in utilizing the canons to resolve ambiguities in statutory language).

37. See DWARRIS, *supra* note 31, at 40.

38. See *id.* at 39–41.

39. See BENJAMIN NATHAN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 143 (1921).

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between the intention of the legislature upon enactment, and the final result as determined by the judiciary upon application, arises due to four types of linguistic ambiguity that occur with regularity when a law is written: (1) syntactic ambiguity, where it is not clear which part of the sentence a constituent word modifies or agrees with;<sup>40</sup> (2) semantic ambiguity, where a particular word or phrase is susceptible to more than one plausible understanding;<sup>41</sup> (3) referential ambiguity, where it is unclear to which person or thing a non-specific term refers;<sup>42</sup> and (4) definitional ambiguity, where a word that technically has a broad definition as used in the statute seems to lead to an absurd result as applied to a particular set of facts.<sup>43</sup> When judges are faced with linguistic ambiguities, such as those that fall within these four categories, they often make linguistic presumptions about what the enacting legislature meant when it wrote the law in the manner that it did.<sup>44</sup>

### 2. *The Canons Come Stateside*

By 1850, English statutes had codified a number of widely recognized canons, including that language confined to the masculine gender also should be presumed to apply to the feminine gender, and—notably for this discussion—that the singular includes the plural, and vice versa.<sup>45</sup> Not surprisingly, early U.S. case precedent contains approving references to canons such as those regarding number neutrality, and, as detailed in Part II.A.2.i below, these canons eventually became mainstays of U.S. statutory law. Part II.A.2.ii explains why the English language's lack of precision regarding use of the word “or” has meant that the canon of statutory analysis reflected in § 102(5) has not been widely codified in statutory schemes.

#### i. *The Number-Neutrality Canons*

There is evidence that some three hundred years prior to the plural-includes-the-singular canon's mid-nineteenth-century codification in English statutory law, an English judge sitting during the reign of King Henry VII extolled the canon's

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40. Solan, *supra* note 17, at 89.

41. *Id.* at 89–91.

42. *Id.* at 91–92.

43. *Id.* at 92–95.

44. See William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 673–74 (1999). Considering one example of such a linguistic presumption as discussed in a nineteenth-century treatise on statutory analysis in Anglo-American law will be particularly useful in understanding the origins of § 102(7). Legislators in England enacted a statute proscribing the unlawful taking of “horses.” See ENDLICH, *supra* note 36, at 531. Did the legislature intend for this new law only to apply in cases in which a horse thief engages in the theft of multiple horses, meaning that a horse thief who has stolen only one horse will not be prosecuted? Even the most passionate of defense counsels would probably have had trouble making that argument with a straight face. The courts tasked with applying the law thus presumed that the legislature, in using the plural form of the thing susceptible to theft, also meant for that usage to capture the singular form. See *id.*

45. ENDLICH, *supra* note 36, at 541.

usefulness in ensuring proper application of statutory law.<sup>46</sup> The plural-includes-the-singular canon featured prominently in an 1863 decision by the Supreme Court of Errors of Connecticut (then the state's highest court) in an appeal stemming from the prosecution of a woman alleged to be the madam of a New Haven brothel.<sup>47</sup> The law pursuant to which the defendant was charged stated that local law enforcement officers were allowed to take action against "any person who shall be guilty of . . . keeping or maintaining houses reputed to be houses of bawdry and ill fame."<sup>48</sup> The court, citing English judges' long-standing adherence to the plural-includes-the-singular canon, rejected the argument that the defendant, accused of managing but a single house of ill repute, had been charged erroneously.<sup>49</sup>

By the late 1800s, U.S. statutory frameworks at the federal and state level were codifying both the plural-includes-the-singular and the singular-includes-the-plural canons.<sup>50</sup> At the state level, codification of these number-neutrality canons currently is widespread.<sup>51</sup> A leading treatise explains that the manner in which English is commonly used in the modern era means that the number-neutrality canons, in particular, lend themselves well to U.S. jurisprudence.<sup>52</sup>

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46. *See* *State v. Main*, 31 Conn. 572, 575 (1863) (citing *Partridge v. Strange*, (1553) 75 Eng. Rep. 123 (K.B.) 138 (Hales, J.) (ruling that a property law that used the plural form in discussing "titles" to "lands" should be applied in cases involving a single title and a single piece of land)).

47. *See id.* at 572–75.

48. *Id.* at 575.

49. *Id.* at 574–75.

50. An 1872 opinion by the Supreme Court of Indiana, in a tax dispute involving a law discussing "aid[ing] a railroad company," stressed that the state currently had a law on the books providing that "words importing the singular number only, may also be applied to the plural of persons and things." *Garrigus v. Bd. of Comm'rs*, 39 Ind. 66, 70 (1872) (emphasis added). In an 1896 holding by the U.S. Supreme Court, in another railroad-related dispute—this one stemming from an 1870 federal law granting land in Oregon "to aid in the construction of a railroad"—the justices relied on the fact that the governing Revised Statutes of the United States contained in its first section a general provision stating that "words importing the singular number may extend and be applied to several persons or things [and] words importing the plural number may include the singular." *United States v. Or. & C.R. Co.*, 164 U.S. 526, 541 (1896) (emphasis added).

51. One commentator's 2010 analysis of state statutory schemes found that all fifty U.S. states have codified both of the number-neutrality canons with language that largely mirrors that found in the general provisions of the modern version of the U.S. Code. *See* Scott, *supra* note 18, at 371, 417. After the U.S. Code replaced the Revised Statutes, the replacing code assumed its predecessor's version of the number-neutrality canons; however, in 1948, a slight but important change was made to the introductory clause preceding the U.S. Code's list of codified canons. Congress included language subordinating the canons to context: "In determining the meaning of any Act of Congress, *unless the context indicates otherwise* [] words importing the singular include and apply to several persons, parties, or things [and] words importing the plural include the singular." Act of June 25, 1948, ch. 645, § 6, 1948 U.S.C.A.N. (62 Stat.) 859 (emphasis added) (current version at 1 U.S.C. § 1 (2013)).

52. NORMAN SINGER & SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 47:34 (7th ed. 2007) [hereinafter *SUTHERLAND*] ("[The number-neutrality canons] reflect the common understanding that the English language does not always carefully differentiate between singular and plural word forms, and especially in the abstract, such as in legislation prescribing a general rule for future application."). However, another leading work on statutory analysis in U.S. law argues that the number-

ii. *Confusion Surrounding Statutory Usage of “Or”*

The prospect of interchangeability between the English language’s conjunctive and disjunctive grammatical conjunctions caused headaches for England’s greatest legal minds as early as the sixteenth century.<sup>53</sup> Consider the example of a 1601 English law authorizing the setting aside of funds “for maintenance of sick *and* maimed soldiers.”<sup>54</sup> Allowing distribution of benefits only to those veterans who were both ill *and* injured on the battlefield would have made a mockery of the charitable intent of the statute, and English judges chose to read the statute as benefiting “sick *or* maimed” veterans.<sup>55</sup> Ultimately, the general consensus that arose among English jurists regarding the interchangeability of conjunctions was that while the context of a statute might call for substituting “and” with “or,” replacing “or” with “and” was frowned upon.<sup>56</sup>

If “or” has been used in a statute, the potential for interchangeability between the English language’s conjunctive and disjunctive conjunctions is minimal when the statute in question sets forth a list of proscribed actions, indulgence in any one of which clearly would be expected to result in some form of liability.<sup>57</sup> Conversely, the probability for confusion regarding what legislators intended when they employed “or” in a particular statutory provision runs high when the provision is phrased in the disjunctive and sets forth a list of conditions that must be met in order for a certain status to be recognized.<sup>58</sup>

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neutrality canons, though widely codified in U.S. statutory frameworks, are not often followed by courts as they go about analyzing substantive provisions of a particular statutory scheme. *See* WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON STATUTORY INTERPRETATION* 340 (2012).

53. *See* DWARRIS, *supra* note 31, at 237, 256, 285–86.
54. *See* INTERNAL REVENUE SERV., EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1980 pt. B (1980) (emphasis added) (citing Statute of Charitable Uses, 1601, 43 Eliz. 1, c. 4 (Eng.)), *available at* <http://www.irs.gov/pub/irs-tege/eotopicb80.pdf>. The “Elizabethan Statute of Charitable Uses” is the principal origin of the United States’ legal concept of charity. *Id.*
55. *See* ENDLICH, *supra* note 36, at 414.
56. *See* DWARRIS, *supra* note 31, at 286. But for a notable case in which the court deemed it necessary to replace “or” with “and,” see *Fowler v. Padget*, (1798) 101 Eng. Rep. 1103 (K.B.) 1106 (Lord Kenyon, C.J.), which addressed a 1603 insolvency statute whose plain language seemed to suggest that a debtor who either intended to avoid his creditors *or* was not present at his residence when a creditor came calling could be subjected to involuntary repossession of his property.
57. *See generally* SUTHERLAND, *supra* note 52, § 21:14 n.8 (listing federal and state decisions where statutes seemingly phrased in the disjunctive have been definitively interpreted as such by courts). This category of statutory phrasing occurs when the forms of proscribed conduct found within the list are practically (or actually) mutually exclusive. *See id.* Consider the following hypothetical example: “Tribeca Law School students, when situated within fifteen feet of the Main Building’s front entrance, shall not smoke cigarettes, chew tobacco, or utilize electronic nicotine-delivery devices.” The human body’s physical shortcomings would almost certainly prevent even the most nicotine-loving law student from engaging simultaneously in more than one of these acts.
58. *See generally id.* § 21:14 nn.15–17 (discussing U.S. judicial perspectives on the exclusive nature of “or” as it appears in various statutes). Consider this hypothetical example: “Each editor on the Executive Board of the *Tribeca Law Review* must, prior to graduation, write a work of legal scholarship under the tutelage of an approved faculty member, complete a course for which the final grade is based on production of a

The English language's inherent imprecision<sup>59</sup> as to the exclusivity or inclusivity of "or," when used in the absence of clarifying language, has prompted the grammatical innovation "and/or," use of which commentators strongly criticize as unhelpful with respect to the problem it purportedly addresses.<sup>60</sup> The Code's drafters chose to preempt any potential confusion regarding the exclusivity or inclusivity of "or" by creating § 102(5), which provides that use of the disjunctive conjunction in the Code should not be presumed to create mutually exclusive conditions.<sup>61</sup>

### 3. *The Canons and the U.S. Bankruptcy Code*

The Code's codified canons as currently written cannot be analyzed properly without first examining the history of their inclusion in U.S. statutory bankruptcy law. The story behind the drafting of § 102(7), discussed in Part II.A.3.ii, is particularly intriguing.

#### i. *The General Structure of § 102*

The Bankruptcy Act of 1898 ("1898 Act") marked the United States' fourth attempt to institute a bankruptcy-specific statutory framework, and—having remained in effect until being replaced in 1978 by the current Code—it is regarded as a more comprehensive effort than the previous three bankruptcy statutory schemes, none of which remained on the books for more than eleven years.<sup>62</sup> The 1898 Act contained sibling provisions codifying both the plural-includes-the-singular and singular-includes-the-plural canons, with the language of those provisions being effectively

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work of legal scholarship, or have a work of legal scholarship published in a periodical listed at THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 444 tbl.T.13 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010)." Tribeca Law's administration clearly would not wish to penalize an "E-Board" student who satisfied more than one of the writing-requirement criteria.

59. Some scholars have posited that the Romans avoided this imprecision by using the disjunctive conjunction, *vel*, to signal inclusivity, and a separate disjunctive conjunction, *aut*, when exclusivity was desired. See John P. Finan, *Lawgical: Jurisprudential and Logical Considerations*, 15 AKRON L. REV. 675, 682 (1982) (citing IRVING M. COPI, INTRODUCTION TO LOGIC 251 (4th ed. 1972)). Latter-day logicians reject as a "myth" the notion that Latin's disjunctive conjunctions were utilized so as to differentiate between exclusive and inclusive contexts. See Ray Jennings & Andrew Hartline, *Disjunction*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2013), available at <http://plato.stanford.edu/entries/disjunction>.
60. See SUTHERLAND, *supra* note 52, § 21:14 n.20. Only one U.S. state—Louisiana—has heeded this admonition by enacting a general statutory provision that expressly rejects employment of "and/or." See Scott, *supra* note 18, at 360 (citing LA. REV. STAT. ANN. § 1:9 (2003)).
61. See S. REP. NO. 95-989, at 28 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5814 ("Paragraph (5) specifies that 'or' is not exclusive. Thus, if a party 'may do (a) or (b),' then the party may do either or both. The party is not limited to a mutually exclusive choice between the two alternatives.").
62. See Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941, 941 n.1 (1979).

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identical to that of their counterparts in the Revised Statutes and the pre-1948 version of the U.S. Code's general provisions.<sup>63</sup>

Legislative history documents created during enactment of the current Code contain other statements relevant to this discussion. Several of § 102's rules of construction were created specifically for the Code; for example, § 102(2) provides that the phrase "claim against the debtor" should be presumed to include "claim[s] against property of the debtor."<sup>64</sup> However, other provisions of § 102—§ 102(5) and § 102(7) among them—amount to codifications of non-bankruptcy-specific canons.<sup>65</sup>

There is one final feature of § 102 that bears mentioning. While the introductory line of Title I of the U.S. Code's codified-canons section makes clear that the canons listed therein should be subordinated to "context" (whenever context compels a contrary result to that which would follow from adherence to a given canon), § 102 of the Code contains no such qualifier, merely indicating that "[i]n this title" the specified "[r]ules of construction" are to be followed by courts applying the non-general provisions of the Code.<sup>66</sup>

### *ii. § 102(7)'s Half-Hearted Adoption of the Number-Neutrality Canons*

When the Code was adopted in 1978, a curious thing happened: the plural-includes-the-singular provision dropped out of the bankruptcy scheme's list of codified canons.<sup>67</sup> The Code was ten years in the making, and the process saw bitter disputes regarding a number of issues, including the constitutional status of bankruptcy judges.<sup>68</sup> But there is frustratingly little evidence of the intent behind the Code drafters' unique halving of the number-neutrality canon codification so prevalent in other U.S. statutory schemes, save for a few words included in legislative history records.<sup>69</sup>

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63. See Bankruptcy Act of 1898, ch. 541, § 1(29)–(30), 1898 U.S.C.C.A.N. (30 Stat.) 544 (repealed 1979). The 1898 Act contained no predecessor provision to what is now § 102(5). See generally *id.* ch. 541 (revealing no provision pertaining to the exclusivity or inclusivity of "or").

64. See S. REP. NO. 95-989, at 28.

65. See *id.* At least one provision of § 102 reflects judicial wisdom regarding the utility of a particular canon: § 102(3)—specifying that "includes" and "including" are not limiting—codifies an oft-repeated canon endorsed by the U.S. Supreme Court in a 1933 decision. See *id.* (citing *Am. Sur. Co. v. Marotta*, 287 U.S. 513 (1933)).

66. Compare 1 U.S.C. § 1 (2013), with 11 U.S.C. § 102 (2013).

67. Compare Bankruptcy Act § 1(29)–(30), with 11 U.S.C. § 102(7).

68. See Klee, *supra* note 62, at 947; see also *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion) (finding that the Bankruptcy Act of 1978 violated Article III of the Constitution to the extent that it allowed judges not enjoying the protections of life tenure and stable salaries to exercise federal jurisdiction over private causes of action).

69. See generally S. REP. NO. 95-989, at 28 ("Paragraph (7) specifies that the singular includes the plural. The plural, however, generally does not include the singular. The bill uses only the singular, even when the item in question most often is found in plural quantities, in order to avoid the confusion possible if both rules of construction applied. When an item is specified in the plural, the plural is intended.")

During the course of my research for this note, I interviewed Kenneth N. Klee and Richard Levin, the two principal drafters of the Code. According to Klee, leaving the plural-includes-the-singular canon out of § 102 allowed him and his fellow drafters to “mandate group action” in key non-general provisions of the Code, such as § 1102 (which addresses creditors’ committees),<sup>70</sup> without having to include in these non-general provisions extra language clarifying that group action was what Congress intended in using pluralized language.<sup>71</sup> Levin says that when legislative drafters use the plural at the outset of a sentence—purportedly for the sake of exactness—it often leads to ambiguity in subsequent parts of the sentence when references are made back to the person or thing previously identified using the plural number, but these references do not utilize both the singular and the plural number.<sup>72</sup>

*B. Modern Theories on Divining Legislative Intent*

Judges, lawmakers, and legal scholars in both England and the United States may have unquestioningly adhered to the canons for an untold number of years, but by the mid-twentieth century, the canons were under fire.<sup>73</sup> As will be discussed below, recent decades have seen high-profile judges in the United States effectively divide themselves among competing camps of statutory-analysis legal theory—a division that seems to be determinative of whether a particular judge will or will not look favorably on use of the various canons.<sup>74</sup> Meanwhile, as these battle lines have been drawn and become entrenched, a minority of legal scholars have advocated for an evaluation of the distinction between “interpreting” and “construing” statutes.<sup>75</sup>

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70. See 11 U.S.C. § 1102.

71. Telephone Interview with Kenneth N. Klee, Founding Partner, Klee, Tuchin, Bogdanoff & Stern LLP; Assoc. Counsel, Comm. on Judiciary, U.S. House of Representatives, 1974–1977 (Nov. 8, 2013) [hereinafter Klee Interview]. Using as an example § 1102(b), which speaks of “persons[] willing to serve” on a committee, Klee explained how applying the plural-includes-the-singular canon to a provision of the Code that includes pluralized language could thwart the public policy goals underlying that provision: If terms such as “creditors” and “persons” were singularized, then § 1102(b) would be interpreted as allowing for a committee to be comprised of a single creditor (or a single equity security holder), a result that would be contrary to the “group action” goal underlying the provision. *Id.* (discussing 11 U.S.C. § 1102). “The reference in 1 U.S.C. § 1 [to the plural-includes-the-singular canon] always struck me as sloppy drafting,” Klee said. *Id.* (citing 1 U.S.C. § 1).

72. Telephone Interview with Richard Levin, Partner, Cravath, Swaine & Moore LLP; Assoc. Counsel, Comm. on Judiciary, U.S. House of Representatives, 1974–1977 (Nov. 25, 2013) [hereinafter Levin Interview].

73. In 1950, Professor Karl Llewellyn published his oft-cited commentary that delineated inconsistencies between a number of prevailing canons, and thus begged the question whether the canons were anything more than ideal weapons for the judicial activist’s arsenal. See KIM, *supra* note 17, at 4 (citing 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 (1950)).

74. See discussion *infra* Part II.B.1.

75. See discussion *infra* Part II.B.2.

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### 1. *Intentionalism, Textualism, and Purposivism*

Until the latter half of the twentieth century, “classical intentionalism” was the prevailing legal theory among U.S. federal judges.<sup>76</sup> This legal theory emphasizes “ascertain[ing] as accurately as possible what Congress meant by the words it used” in a particular statute.<sup>77</sup> In recent years, however, a number of influential judges have popularized “textualism,” whose adherents exalt the primacy of the statutory text and tend to eschew extrinsic sources such as legislative histories.<sup>78</sup> Textualists tend to be “attract[ed] to rule-based canons [because of] an implicit belief that such canons accurately reflect congressional habits of mind.”<sup>79</sup> Not surprisingly, critics of textualism often discount the efficacy of invoking the canons when analyzing statutory law.<sup>80</sup>

Somewhere between intentionalism and textualism lies “purposivism,” in which a formulation as to the purpose behind the enactment of a particular statute guides the jurist in analyzing that statute’s language.<sup>81</sup> One commentator has noted the differences between “traditional” purposivists—among them Justice John Paul Stevens, who avoided reliance on extrinsic sources such as dictionaries and shunned semantic canons—and “new” purposivists—including Justices Stephen Breyer and Elena Kagan, who “frequently cite dictionaries” and “resort to the once-discredited semantic canons of construction to ascertain the meaning of statutory texts.”<sup>82</sup>

As this overview of the prevailing schools of legal theory shows, some U.S. judges might be unwilling to rely on a canon styled as a “rule of construction,” while other judges might be willing, or even eager, to do so.

### 2. *Distinguishing “Interpretation” from “Construction”*

Though some scholars deride the distinction as irrelevant,<sup>83</sup> a number of legal theorists insist on differentiating between interpretation—“the activity of identifying

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76. See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005).

77. *Id.*

78. See *id.* at 420. U.S. Supreme Court Justice Antonin Scalia and U.S. Court of Appeals for the Seventh Circuit Judge Frank Easterbrook are perhaps the most prominent textualists. See *id.*

79. *Id.* at 423.

80. See *id.* at 436 n.57 (citing Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805–17 (1983)). For further written scholarly debate over textualism, compare Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism#> (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)), with Bryan A. Garner, *Response to Richard A. Posner*, LAWPROSE (Sept. 5, 2012), <http://www.lawprose.org/blog/?p=570> (responding, via blog post, to Judge Posner’s critical review of the book that Garner had co-authored with Justice Scalia).

81. See Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1710 (2006) (outlining the philosophical boundaries of purposivism).

82. John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 174–75.

83. See, e.g., SUTHERLAND, *supra* note 52, § 45:4 (“Th[e] distinction is not helpful. . . . [J]udicial behavior in resolving statutory issues does not appear to differ whether it is characterized as construction or interpretation.”).

the semantic meaning of a particular use of language in context”—and construction—the act of “applying [that identified] meaning to particular factual circumstances.”<sup>84</sup> Legal theorists who insist on this distinction between interpretation and construction similarly divide the canons along these lines, arguing that canons of interpretation amount to rules of thumb that reflect the most common features of “general linguistic regularity” and thus are not necessarily outcome-determinative even when invoked. In contrast, canons of construction tend to be “substantive” in form and, when utilized, obligate jurists to reach the result dictated by the canon.<sup>85</sup> It is important to keep this distinction in mind when analyzing what the Code’s drafters designated as its “rules of construction.”

### III. TAKING MEASURE OF THE CONFLICTING RESULTS UNDER § 102

Judges’ willingness or reluctance to adhere closely to § 102 when faced with questions of statutory analysis concerning the Code’s non-general provisions has led to conflicting results in a surprisingly varied range of bankruptcy-related disputes. A categorized survey of these conflicting results follows below; judicial confusion as to the proper application of § 102(5) will be analyzed first, followed by an overview of the various legal disputes in which § 102(7) has featured prominently.

#### *A. Disjunctive Disjunction: § 102(5)’s Role in the Fight Over Credit Bidding*

Section 1129 of the Code sets forth the provisions to which corporate reorganization plans must conform in order to be confirmed by the overseeing court.<sup>86</sup> Section 1129(b)(1) provides that a plan that has not been accepted by all parties with a claim against the debtor cannot be confirmed unless it is “fair and equitable” to those non-accepting claimholders;<sup>87</sup> § 1129(b)(2) establishes the criteria for this standard, delineating two sets of criteria depending upon whether the non-accepting “class” of claimholders possesses secured or unsecured claims.<sup>88</sup> Section 1129(b)(2)(A) addresses the criteria for the secured-class scenario.<sup>89</sup>

84. See Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011); see also Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 114 (2010).

85. See Solum, *supra* note 84, at 113 (comparing the no-superfluous-language canon of interpretation to the constitutional-question-avoidance canon of construction).

86. See generally 11 U.S.C. § 1129 (2013) (setting forth the Code’s plan-confirmation provisions).

87. *Id.* § 1129(b)(1).

88. *Id.* § 1129(b)(2).

89. Section 1129(b)(2) includes the following language:

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity . . . ; and (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim . . . ;

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Section 1129(b) allows for what is commonly referred to in bankruptcy law as a “cramdown”: so long as the requirements of this subsection are met, the reorganizing debtor may seek to have the plan—in particular, a plan involving the sale of the debtor’s assets—confirmed by the court despite the objections of adversely affected creditors.<sup>90</sup> During the first few decades of the Code’s existence, the (seemingly uncontroversial) interpretation of § 1129(b)(2)(A) was that § 1129(b)(2)(A)(i) covered cramdown sales in which the secured claimholders’ liens remained in place; § 1129(b)(2)(A)(ii) applied to cramdown sales in which the property had been stripped of the claimholders’ liens, but those claimholders were permitted, pursuant to § 363(k), to offer to forgive the debt owed to them as part of a bid at the sale of their collateral; and § 1129(b)(2)(A)(iii) governed cramdown sales in which some other form of remuneration—one that represents “the indubitable equivalent”<sup>91</sup> of the claimholder’s claim—is made available to any non-accepting claimholders.<sup>92</sup>

However in 2009, the U.S. Court of Appeals for the Fifth Circuit—in a decision authored by its chief judge, a former bankruptcy practitioner—called for a different approach grounded in the disjunctive wording of § 1129(b)(2)(A).<sup>93</sup> According to the Fifth Circuit’s opinion in *In re Pacific Lumber Co.*, a debtor is permitted to arrange for a cramdown sale in which assets are sold free of objecting claimholder liens, plan for some form of remuneration to the objecting claimholders but deny them the opportunity to credit bid, and then seek confirmation from the overseeing court pursuant to § 1129(b)(2)(A)(iii)’s “indubitable equivalent” standard.<sup>94</sup>

The following year, the majority of a three-judge panel of the U.S. Court of Appeals for the Third Circuit adopted the Fifth Circuit’s reading of § 1129(b)(2)(A)(iii), stressing the express language of § 102(5) and noting that, according to the legislative history underlying that codified canon, “[a] party is not limited to a mutually exclusive

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(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale . . . ; or (iii) for the realization by such holders of the indubitable equivalent of such claims.

*Id.* (emphasis added).

90. See *In re Phila. Newspapers, LLC*, 599 F.3d 298, 321–22 (3d Cir. 2010) (Ambro, J., dissenting).

91. § 1129(b)(2)(A)(iii); see also *In re Phila. Newspapers*, 599 F.3d at 326 (defining “indubitable equivalent” as “consideration equal to [the creditor’s] claim in value or amount”). The “indubitable equivalent” language in § 1129(b)(2)(A)(iii) derives from a 1935 decision by Judge Learned Hand who, in analyzing the cramdown statute then in existence, argued that there is “no reason to suppose that the statute was intended to deprive” secured creditors of their money or their fair share of the subject property “unless by a substitute of the most indubitable equivalence.” *Metro. Life Ins. Co. v. Murel Holding Corp.* (*In re Murel Holding Corp.*), 75 F.2d 941, 942 (2d Cir. 1935). Congress, in passing § 1129, made clear that it intended for § 1129(b)(2)(A)(iii) to reflect Judge Hand’s “strict approach.” S. Rep. No. 95-989, at 127 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5913.

92. See *In re Phila. Newspapers*, 599 F.3d at 325–26 (Ambro, J., dissenting).

93. *Id.* at 322–23 (citing *In re Pac. Lumber Co.*, 584 F.3d 229 (5th Cir. 2009) (Jones, C.J.)).

94. See *In re Pac. Lumber Co.*, 584 F.3d at 246–47.

choice between the two alternatives.”<sup>95</sup> The *In re Philadelphia Newspapers, LLC* majority noted that in 1996 the U.S. Supreme Court had approved of a reading of a tripartite provision in another statutory framework under which the presence of a broadly worded catchall prong allowed litigants to circumvent the provisions of a more specifically worded prong.<sup>96</sup>

The dissenting judge in *Philadelphia Newspapers* strongly disagreed with the majority’s “more-recent interpretation of § 1129(b)(2)(A),” arguing that the canon codified at § 102(5), while “true as a general proposition[,] is not always the case in practice”—for example, a disjunctively worded provision of the Code setting forth one option that can occur before a particular event, and one option that can occur after that event, does not conform to the express mandate of § 102(5).<sup>97</sup> The dissenting judge went on to argue that the traditional reading of § 1129(b)(2)(A) was supported by a well-known canon absent from the Code: Specifically worded provisions prevail over broadly worded provisions.<sup>98</sup>

In 2011, a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit created a jurisdictional split by unanimously adopting the reading of § 1129(b)(2)(A) advocated by the dissenting judge in *Philadelphia Newspapers* in a consolidated case involving two debtors (with a common lender) who sought to have confirmed under § 1129(b)(2)(A)(iii) cramdown sales in which the assets would be stripped of liens without affording secured creditors the chance to credit bid.<sup>99</sup>

The Seventh Circuit’s ruling was appealed to the U.S. Supreme Court, which affirmed in an eight-to-zero decision.<sup>100</sup> Writing for the Court in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, Justice Antonin Scalia relied in large part on the “well established canon” that specific provisions be favored over general provisions, and rejected the debtors’ argument that the traditional reading of § 1129(b)(2)(A) caused the provision’s “or” conjunction to be changed to “and.”<sup>101</sup> Justice Scalia reasoned that the “structure” of § 1129(b)(2)(A) “suggests” that the traditional reading is the one intended by Congress, and that as long as debtors were not required

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95. *In re Phila. Newspapers*, 599 F.3d at 305 (citing H.R. REP. NO. 95-595, at 315 (1977)).

96. *Id.* at 307 (citing *Varity Corp. v. Howe*, 516 U.S. 489, 511–12 (1996) (addressing a provision of the Employee Retirement Income Security Act)).

97. *See id.* at 322–24 (Ambro, J., dissenting). Judge Thomas L. Ambro is widely regarded as the Third Circuit’s foremost bankruptcy expert. *See, e.g.*, Benjamin D. Feder, *Third Circuit Decision in Philadelphia Newspapers Leaves Crucial Issue Unresolved*, 7 AM. BANKR. INST. ASSET SALES COMMITTEE NEWSL. (Am. Bankr. Inst., Alexandria, Va.), June 2010, at 2.

98. *In re Phila. Newspapers*, 599 F.3d at 328–30. This canon—also referred to by its Latinate form, *generalia specialibus non derogant*—has been described by the U.S. Supreme Court as an “ancient interpretive principle.” *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 504 (2012) (per curiam).

99. *See generally* *River Rd. Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011) (reaching an opposite conclusion to that of the majority in *Philadelphia Newspapers*). By way of definition, “[a] credit bid allows a secured lender to bid its debt in lieu of cash.” *In re Phila. Newspapers*, 599 F.3d at 302 n.4.

100. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012) (8-0 decision).

101. *Id.* at 2070–72.

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to comply with both the second and third prong of § 1129(b)(2)(A), the disjunctive nature of the provision remained intact.<sup>102</sup>

### *B. A Surprising Variety of Contexts*

As will be analyzed below, there is confusion over the extent to which § 102(7) has affected both personal Chapter 7 debtors and large corporate debtors pursuing a Chapter 11 reorganization.

#### *1. Wage Garnishments Against Debtors*

Section 547 of the Code addresses transfers from debtors to creditors that may, in certain circumstances, be avoided by the trustee as “preferences” if they occurred within a certain range of temporal proximity to the filing of the debtor’s case.<sup>103</sup> Section 547(c), however, presents a list of situations in which the trustee is not permitted to avoid what would otherwise be considered a preferential transfer.<sup>104</sup> Among these situations is the scenario of an individual debtor with “primarily consumer debts,” and for whom “the aggregate value of all property that constitutes or is affected by such *transfer* is less than \$600.”<sup>105</sup> The question thus has arisen whether a series of sub-\$600 payments that have been siphoned out of a debtor’s bank account within the relevant preference period pursuant to a garnishment initiated by a creditor should be added together for the purpose of determining if an avoidable preference has occurred.<sup>106</sup>

In 1994, bankruptcy courts in Missouri and Kentucky rejected the argument that multiple garnishment-related transfers could be aggregated in evaluating whether the \$600 threshold had been breached;<sup>107</sup> neither decision made reference to § 102(7).<sup>108</sup> But within a year, bankruptcy judges in New Mexico, Minnesota, and Mississippi

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102. *See id.* at 2072. Kenneth Klee approves of this result and believes that § 102(5) did not “answer the question” posed by *RadLAX* because the codification of certain canons within § 102 does not preclude courts from applying “other court-made doctrines” to the Code’s non-general provisions. Klee Interview, *supra* note 71. Richard Levin also agrees with the Court’s decision in *RadLAX*: “We weren’t thinking a lot at the time about multi-debtor plans . . . . Contrary to popular belief, [§ 1129] was created for the small- to medium-sized debtors—it was not created for big businesses, it was just adapted that way.” Levin Interview, *supra* note 72.

103. *See generally* 11 U.S.C. § 547 (2013) (setting forth the Code’s rules regarding preferential transfers).

104. *See id.* § 547(c).

105. *Id.* § 547(c)(8) (emphasis added). Until 1995, the \$600-or-less exception was codified at § 547(c)(7). *See Alarcon v. Commercial Credit Corp.* (*In re Alarcon*), 186 B.R. 135, 136 (Bankr. D.N.M. 1995).

106. *See In re Alarcon*, 186 B.R. at 136.

107. *Howes v. Hannibal Clinic* (*In re Howes*), 165 B.R. 270, 271–72 (Bankr. E.D. Mo. 1994); *Wilkey v. Credit Bureau Sys., Inc.* (*In re Clark*), 171 B.R. 563, 564 (Bankr. W.D. Ky. 1994), *rev’d*, 217 B.R. 89 (W.D. Ky. 1995).

108. *See generally In re Howes* and *In re Clark*, neither of which references the singular-includes-the-plural canon or its codified version in the Code.

held that, in light of § 102(7)'s express language, the singular use of "transfer" in § 547(c) also extends to multiple transfers occurring within the preference period.<sup>109</sup>

## 2. *Tithes and Charitable Contributions as Fraudulent Transfers*

In 1998—after years of judicial confusion as to the propriety of treating individual debtors' charitable contributions as fraudulent transfers in violation of § 548 of the Code—Congress passed the Religious Liberty and Charitable Donation Protection Act, which amended § 548(a)(2) to the effect that "[a] transfer of a charitable contribution" to a religious or charitable group may not be declared fraudulent so long as "the amount of *that contribution*" is less than fifteen percent of the debtor's gross annual income for the year "in which *the transfer of the contribution* is made."<sup>110</sup>

The latent tension between § 102(7) and § 548(a)(2), as amended by Congress in 1998, came to the fore in *Universal Church v. Geltzer*, which was heard by the U.S. Court of Appeals for the Second Circuit in 2006.<sup>111</sup> The debtor in the underlying bankruptcy case had, within the pre-petition fraudulent-transfer period, made a number of contributions to her church—most for less than \$1,500.<sup>112</sup> However, when aggregated, these tithes amounted to well over fifteen percent of the debtor's annual gross income for the relevant calendar years; and when the debtor filed for bankruptcy, these contributions were challenged as fraudulent transfers.<sup>113</sup>

The appellate panel in *Universal Church* reasoned that, while the controlling version of § 548(a)(2) was facially unambiguous, it became ambiguous once the canon codified in § 102(7) was applied to its language: Pluralizing the language of § 548(a)(2) results in a reading of the provision pursuant to which each tithe or contribution must be considered on an individual basis, which would mean that a pre-petition debtor could safely give all of her remaining money to the worthy (but non-creditor) causes of her choosing, so long as she did so in the form of multiple contributions or tithes with each totaling less than fifteen percent of her annual gross income.<sup>114</sup> The court reasoned that allowing debtors to frustrate creditors' claims in this manner is a scenario that Congress could not have intended when it amended § 548(a)(2) in 1998; the panel then turned to the legislative history to resolve the statutory ambiguity against the validity of the tithes at issue.<sup>115</sup>

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109. See *In re Alarcon*, 186 B.R. at 136–37; *Christians v. Am. Express Travel Related Servs. (In re Djerf)*, 188 B.R. 586 (Bankr. D. Minn. 1995); *Electric City Merch. Co. v. Hailes (In re Hailes)*, 77 F.3d 873 (5th Cir. 1996).

110. See Lawrence A. Reicher, Comment, *Drafting Glitches in the Religious Liberty and Charitable Donation Protection Act of 1998: Amend § 548(A)(2) of the Bankruptcy Code*, 24 EMORY BANKR. DEV. J. 159, 160–61, 163 (2008) (emphasis added) (quoting 11 U.S.C.A. § 548(a)(2) (West 2007)).

111. 463 F.3d 218 (2d Cir. 2006).

112. *Id.* at 222.

113. *Id.*

114. *Id.* at 224.

115. *Id.* at 224–25. In so holding, the court acknowledged that a Louisiana bankruptcy court—the only other court to address the issue—had, in a 1999 decision, suggested in dicta that an individual-contribution

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Furthermore, the panel in *Universal Church* rejected the argument that § 548(a)(2) did not need to be re-read with § 102(7) in mind on the ground that, just like the singular-includes-the-plural canon in the codified-canons section of the U.S. Code, § 102(7) should not be applied to the Code's non-general provisions unless the context of such a provision indicates otherwise.<sup>116</sup> The court reasoned that § 102(7), in contrast, "appears within the specific title under consideration" and clearly states that the rules of construction listed therein are to be applied to the various provisions of the Code.<sup>117</sup>

### 3. *Personal Injury Claim Exemptions for Debtors*

Section 522 of the Code sets forth the various exemptions that individual debtors may claim when their assets are converted to property of the bankruptcy estate.<sup>118</sup> One provision of this section, § 522(d)(11)(D), provides that among the property eligible for exemption is the right to receive "a payment, not to exceed [a fixed amount of money adjusted for inflation], on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor."<sup>119</sup>

The potential for tension between § 102(7) and § 522(d)(11)(D) arises in situations in which the debtor, at the time the bankruptcy petition is filed, is in the process of litigating more than one personal injury claim (or has already litigated multiple personal injury claims and received payments as a result of this litigation), and the estimated (or realized) value of these claims totals more than the amount stated in § 522(d)(11)(D).<sup>120</sup>

*In re Marcus*, decided in 1994 by the U.S. Bankruptcy Court for the District of Connecticut, addressed a debtor who was involved in two motor vehicle accidents within the four-month period preceding his Chapter 7 petition.<sup>121</sup> The resulting personal injury actions settled for \$12,500 and \$30,000 respectively; at the time, the maximum exemption amount under § 522(d)(11)(D) was \$7,500.<sup>122</sup> The *In re Marcus* bankruptcy judge—without citing to § 102(7)—found that § 522(d)(11)(D) is

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analysis would be appropriate, notwithstanding the mandate of § 102(7), because the newly amended § 548(a)(2), unlike other provisions within the Code (such as § 547(c)), does not call for aggregating the amounts of challenged transfers. *Id.* at 225 n.3 (citing *Murray v. La. State Univ. Found. (In re Zohdi)*, 234 B.R. 371, 380 n.20 (Bankr. M.D. La. 1999)).

116. *See Universal Church*, 463 F.3d at 223 (citing 1 U.S.C. § 1 (2013)) ("[U]nless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things . . ."); *see also* *First Nat'l Bank v. Missouri*, 263 U.S. 640, 657 (1924) (noting that the singular-includes-the-plural canon in § 1 of the U.S. Code "is not one to be applied except where it is necessary to carry out the evident intent of the statute").

117. *Universal Church*, 463 F.3d at 223.

118. *See* 11 U.S.C. § 522 (2013).

119. *Id.* § 522(d)(11)(D).

120. In 2013, that amount was \$15,000. *See id.* As of the date of publication, the personal injury exemption amount is \$22,975. *See* U.S.C.A. § 522(d)(11)(D) (West 2015).

121. 172 B.R. 502, 503 (Bankr. D. Conn. 1994).

122. *Id.*

ambiguous with respect to the possibility of claiming multiple exemptions on more than one claim for bodily injury; he noted that, unlike other provisions within § 522(d), § 522(d)(11)(D) did not call for an aggregation of the amounts at issue.<sup>123</sup> The judge ultimately ruled in favor of the debtor, arguing that it was “entirely rational” for Congress to have intended that debtors who have suffered more than one life-altering injury over the course of multiple unrelated accidents not be limited to a single exemption under § 522(d)(11)(D).<sup>124</sup>

Bankruptcy judges in Texas and Pennsylvania subsequently reached the same result as the *In re Marcus* court—also without citing to § 102(7)—in cases involving analogous fact patterns.<sup>125</sup> However in 1999, a panel of the U.S. Court of Appeals for the First Circuit ruled against a debtor seeking multiple exemptions under § 522(d)(11)(D) for multiple personal injury claims.<sup>126</sup> The *In re Christo* majority reasoned that, while § 522(d)(11)(D) was susceptible to more than one interpretation, it was clear that Congress could not have intended for a debtor who had sustained minor injuries over the course of multiple pre-petition accidents to be eligible for a larger exemption than a debtor who had been catastrophically injured in a single event.<sup>127</sup> One member of the panel dissented, finding that § 522(d)(11)(D) is wholly ambiguous as to the propriety of claiming multiple personal injury exemptions, that the legislative history does not help resolve the ambiguity, and that holding in favor of the debtor was warranted pursuant to a “well-established” canon: exemption-creating statutes should be construed liberally in favor of the debtor.<sup>128</sup>

In 2012, as discussed in Part I, a judge from the U.S. Bankruptcy Court for the Eastern District of New York prevented debtor Anthony Phillips from seeking multiple exemptions on multiple personal injury claims, but for different reasons than the *Christo* majority. The *In re Phillips* court stressed that the Code’s rules of construction must be followed in determining the plain meaning of the Code’s provisions and that, when § 522(d)(11)(D) is read in light of § 102(7), the result is an unambiguous statute restricting eligible debtors to a single exemption of the figure listed in § 522(d)(11)(D), regardless of how many personal injury accidents a debtor may have suffered or the number of “payments” a debtor may have received in conjunction with a personal injury claim.<sup>129</sup>

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123. *Id.* at 504.

124. *Id.* at 505.

125. See *In re Comeaux*, 305 B.R. 802 (Bankr. E.D. Tex. 2003) (containing no reference to § 102(7)); *Opel v. Daly (In re Daly)*, 344 B.R. 304 (Bankr. M.D. Pa. 2005) (same).

126. *Christo v. Yellin (In re Christo)*, 192 F.3d 36, 37 (1st Cir. 1999).

127. *Id.* at 38–39.

128. *Id.* at 40–41 (Gibson, J., dissenting).

129. 485 B.R. 53, 57, 61–62 (Bankr. E.D.N.Y. 2012).

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### 4. *Multi-plan Reorganizations Under Chapter 11*

Section 1129(a)(10) of the Code governs confirmation of a reorganization plan by the overseeing bankruptcy court; it provides that when “a class of claims is impaired under *the plan*, at least one class of claims that is impaired under *the plan* [must] accept[] *the plan*.”<sup>130</sup> Some Chapter 11 proceedings involve a group of corporate affiliates that are technically independent entities, but have common financial interests and interrelated debts.<sup>131</sup> Such cases may, for the sake of convenience, be jointly administered and feature jointly filed plans.<sup>132</sup> When more than one group of entities involved in such proceedings—i.e., multiple groups comprised of debtors and/or creditors—comes up with competing plans, satisfying the “impaired class” requirement of § 1129(a)(10) poses a conceptual conundrum: Should the court interpret the statute as mandating what is known as a “per plan” requirement, which is satisfied by the acceptance of one impaired class for any debtor involved in the proceedings, or does § 1129(a)(10) contemplate a “per debtor” requirement, meaning the plan must be approved by at least one impaired class for each debtor involved?<sup>133</sup>

In 2009, a New York City-based bankruptcy court issued a decision that seemed to endorse the “per plan” view;<sup>134</sup> the decision did not include any reference to § 102(7).<sup>135</sup> But in a 2011 decision, a judge from the U.S. Bankruptcy Court for the District of Delaware adopted a “per debtor” reading of § 1129(a)(10) after citing to § 102(7), reasoning: “[T]he fact that § 1129(a)(10) refers to ‘plan’ in the singular is not a basis, alone, upon which to conclude that, in a multiple debtor case, only one debtor—or any number fewer than all debtors—must satisfy [the impaired-class] standard.”<sup>136</sup>

## IV. WEIGHING THE CONFLICTING APPROACHES TO § 102(7)

Before weighing possible solutions to the statutory-analysis issues highlighted by the cases discussed in Part III, it is necessary to consider whether a non-bankruptcy-specific rule of construction such as § 102(7) could ever be effective in resolving statutory ambiguity. And, with respect to § 102(7) specifically, the logic (or lack thereof) behind the Code’s partial codification of the traditional number-neutrality canon must be analyzed.

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130. 11 U.S.C. § 1129(a)(10) (2013) (emphasis added).

131. See Shane G. Ramsey & Matthew R. Hindman, *Does § 1129(a)(10) Impose a Per Debtor or Per Plan Requirement?*, 10 AM. BANKR. INST. YOUNG & NEW MEMBERS COMMITTEE NEWSL. (Am. Bankr. Inst., Alexandria, Va.), Mar. 2012, at 3.

132. See *In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011).

133. See Ramsey & Hindman, *supra* note 131, at 1.

134. See JPMorgan Chase Bank, N.A. v. Charter Commc’ns Operating, LLC (*In re Charter Commc’ns*), 419 B.R. 221 (Bankr. S.D.N.Y. 2009).

135. See *id.* (containing no reference to § 102(7)).

136. *In re Tribune Co.*, 464 B.R. at 182.

*A. Rethinking the Logic of Phillips*

Adherence to § 102's codified canons does not appear to be optional. In contrast to the codified-canons section of the U.S. Code, § 102 lacks introductory qualifying language that would support a court's reasoning that, given the context of a particular statutory provision, applying a certain codified canon to the provision at issue is unwarranted.<sup>137</sup> This concept of mandatory adherence to § 102's codified canons explains why the bankruptcy court in *Phillips* deemed § 522(d)(11)(D) facially ambiguous when read in light of § 102(7), even though bankruptcy judges in other jurisdictions (and one appellate panel within another circuit) seemed confident that the opposite was true.<sup>138</sup>

But a closer analysis of the *Phillips* court's application of the singular-includes-the-plural canon to the singular-form language of § 522(d)(11)(D) demonstrates that even a judge who, in analyzing a non-general provision of the Code, professes to be strictly adhering to the Code's mandatory rules of construction, may in fact be selectively applying the relevant provision of § 102.

The *Phillips* court's statutory analysis focused on § 522(d)(11)(D)—specifically, the clause's singular-form usage of the words “payment” and “injury,” which the court pluralized to “payments” and “injuries.” However, the court seemed to ignore the possibility that pluralizing singular-form usages within § 522(d)—“[t]he following property may be exempted”—and within § 522(d)(11)—“[t]he debtor's right to receive”—would only deepen the ambiguity observed by other courts considering § 522(d)(11)(D).

Consider how a universal pluralization of *all* of the singular-form usages found within § 522(d)(11)(D)'s constituent clauses would read: “The following *properties* may be exempted . . . *debtors' rights* to receive . . . *payments*, not to exceed \$21,625, on account of personal bodily *injuries*.” This language is susceptible to two interpretations. The first is the reading ultimately adopted by the *Phillips* court: The exemption cannot exceed the value of all of the personal-injury-related payments added up together. But, with the word “right” pluralized to “rights,” a second plausible interpretation emerges: Each debtor enjoys the ability to exempt an unlimited number of rights to receive payments, so long as each individual payment is capped at the inflation-adjusted amount, no matter how large it may have been when received by the debtor prior to the filing of his or her petition. Thus, a non-selective application of § 102(7) does nothing to resolve the ambiguity that initially prompted the trustee's challenge to the debtor's attempts to exempt under § 522(d)(11)(D).<sup>139</sup>

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137. See discussion *supra* Part II.A.3.

138. See discussion *supra* Part III.B.3.

139. Does § 102 allow for the sort of selective application of its various codified canons that was apparently utilized by the court in *Phillips*? The answer to that question is unclear; § 102 merely reads “[i]n this title” and then sets forth the Code's various codified canons. 11 U.S.C. § 522(d)(11)(D). The lack of clarity as to the scope of § 102's canons means that judges are, on the one hand, obligated to apply the Code's codified canons, but, on the other, given no guidance on how to apply them properly.

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### *B. Imagining the Impact of a “Complete” § 102(7)*

As discussed in Part II.A.3.ii, the Code's drafters had their reasons for leaving the plural-includes-the-singular canon out of § 102. Even if the soundness of these reasons were challenged, the outcome of that debate would not change the fact that the Code's non-general provisions, and all of the singularized and pluralized language therein, were drafted pursuant to the understanding that the singular-includes-the-plural canon would be the sole number-neutrality canon applicable to the non-general provisions. Subjecting the Code's non-general provisions to the plural-includes-the-singular canon would only lead to more confusion than § 102(7), as currently worded, has already engendered.<sup>140</sup>

## V. POSSIBLE SOLUTIONS TO INCONSISTENT APPLICATIONS OF THE CODE'S CODIFIED CANONS

There are three categories of possible solutions to the problem presented by § 102(7): (1) amending the provision to include additional, clarifying language; (2) removing the singular-includes-the-plural canon from the Code entirely; and (3) reclassifying the singular-includes-the-plural codified canon as an “interpretive guideline” rather than a “rule of construction,” and shifting it to a new section of the Code, possibly along with other codified canons within § 102 for which such relocation would make sense.

### *A. Additional Language*

Given its prominent role in jurisdictional splits on the proper interpretation of a number of the Code's provisions, § 102(7)'s brevity is somewhat remarkable, and it would be hard to dispute that this statutory provision could stand some additional verbiage to help clarify how it should be applied.

Congress could amend § 102(7) in one of two ways. It could, through analysis at the committee level, review the instances in which adherence to § 102(7) (or lack thereof) has led to conflicting results and then add to § 102(7) a list of the Code's non-general provisions (possibly of a non-exclusive nature) to which § 102(7) should or should not apply.

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140. One leading treatise on U.S. bankruptcy law has analyzed the absence of the plural-includes-the-singular from § 102 by focusing on the plural-form language found in § 303(h)(1) of the Code. *See* 2 COLLIER ON BANKRUPTCY ¶ 102.08 (Matthew Bender & Co. 16th ed. 2010) [hereinafter COLLIER]. This provision states that when an involuntary case's petition is not changed in a timely fashion, the court may order relief against the debtor only if “the debtor is generally not paying such debtor's *debts* as such *debts* become due.” 11 U.S.C. § 303(h)(1) (emphasis added). Traditionally, the treatise editors note, bankruptcy courts required the existence of at least two such debts, but a more recent, seemingly pragmatic approach has been to enter an order pursuant to § 303(h)(1) in cases in which a single, large debt is not being paid. *See* COLLIER, *supra*, ¶ 102.08 n.4 (comparing *Paroline v. Doling*, 116 B.R. 583 (Bankr. S.D. Ohio 1990), with *In re Euro-Am. Lodging Corp.*, 357 B.R. 700 (Bankr. S.D.N.Y. 2007)). Kenneth Klee criticizes the recent approach as “turn[ing] bankruptcy into a collection device”: state courts, he argues, are the appropriate fora for debt-related disputes between two parties. Klee Interview, *supra* note 71.

Alternatively, Congress could opt for clarifying language not specific to any particular provision within the Code. Outside of the Code, disputes over statutory analysis related to singular- and plural-form usages tend to center around what type of grammatical article modifies the word at issue.<sup>141</sup> Thus, Congress could, for example, amend § 102(7) to state that a singular-form noun modified by an indefinite article (“a” or “an”) shall have the singular-includes-the-plural canon applied to it.<sup>142</sup>

The downside to both of these approaches is that Congress would inevitably have to engage in provision-specific analysis of how such amendments to § 102(7) would affect outcomes in future legal disputes. For hot-button issues such as the viability of tithing by pre-petition debtors, extensive debate would be unavoidable and members of Congress may simply decide to let the courts sort out any ambiguity in the provisions discussed in Part III.

### *B. Removal*

Removing § 102(7) in its entirety would of course solve any analytical quandaries stemming from its presence. To the extent that courts struggle to resolve apparent ambiguities in the non-general provisions of the Code, they would not be prevented from relying on other statutory-analysis methods, such as consulting relevant legislative history or the codified-canons provision of Title I of the U.S. Code. Nor would the absence of the singular-includes-the-plural canon from the Code prevent judges from relying on it in support of a particular interpretation of a disputed Code provision.<sup>143</sup>

The problem with removing § 102(7) is that such a maneuver would not aid courts in resolving the statutory-analysis quandaries discussed in Part III.B. Once again, Congress would either have to specify, on a provision-by-provision basis, why it was amending § 102, or risk leaving the courts to struggle with the bankruptcy-related debates in which § 102(7) has played such a prominent role.

### *C. Reclassification*

As discussed in Part II.B.2, semantic canons are properly categorized as canons of “interpretation” and not of “construction”—canons of interpretation are best described as “rules of thumb” that help guide courts in their statutory analysis, rather

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141. See SUTHERLAND, *supra* note 52, § 47:34.

142. According to Kenneth Klee, “when we meant to say ‘one,’ we said ‘one,’” but a singular-form term within the Code to which the indefinite article is attached “is subject to the singular-includes-the-plural rule.” Klee Interview, *supra* note 71. Confusion stemming from § 1129(a)(10)’s singular-form definite-article reference to “the plan,” discussed in Part III.B.4, would be best resolved by an express (and exclusive) choice on the part of Congress in favor of either the “per plan” or the “per debtor” approach. However, generalized language in § 102(7) to the effect that the singular-includes-the-plural canon applies whenever a singular-form noun is preceded by an indefinite article would prevent quandaries such as the one posed by § 548(a)(2)’s reference to “a transfer of a charitable contribution,” discussed in Part III.B.2.

143. As discussed in Part IV.B, with respect to the plural-includes-the-singular canon, and in Part III.A, with respect to the *generalia specialibus* canon, a canon’s absence from the Code’s list of rules of construction does not prevent courts from utilizing it in their statutory analysis.

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than mandate a predetermined result, which is the focus of substantive rules of construction.

For this reason, removing the codification of the semantic singular-includes-the-plural canon from the Code's list of rules of construction, and reclassifying it under the heading of, for example, "guidelines of interpretation," would be appropriate. In addition, including introductory qualifying language in this new section to make clear that application of this codified canon should be subordinated to context—along the lines of the language that exists at the outset of the U.S. Code's codified-canons section—would help courts not particularly familiar with the academic study of statutory analysis better appreciate how strongly they should adhere to this codified canon of interpretation.

The arguments underlying the Supreme Court's ruling in *RadLAX* seem to support such a repurposing—not only for § 102(7), but also for § 102(5) and the Code's other non-bankruptcy-specific codified canons. If these historic principles of statutory analysis need not always be strictly applied when context (and other, non-codified canons) suggest otherwise, then they are properly regarded as guidelines that may be helpful in interpreting a particular provision of the Code—and not as rules that steer judges toward a result-oriented construction. In contrast, the bankruptcy-specific canons of § 102 are properly regarded as outcome-determinative directives that deserve the title of "rules of construction."

It might be said that such a repurposing would simply pave the way for judges to selectively apply non-bankruptcy-specific codified canons so as to cloak with a legal-rhetoric imprimatur what effectively amounts to legislating from the bench. However, the debate over the proper reading of § 1129(b)(2)(A)—and the justices' conclusive position in that debate—shows that the courts already are picking and choosing when to strictly follow the Code's non-bankruptcy-specific codified canons. Repurposing these canons as "guidelines of interpretation" would mean that the Code merely reflects the prevailing judicial wisdom.

## VI. CONCLUSION

U.S. bankruptcy judges' inability to arrive at a uniform approach to the application of the Code's singular-includes-the-plural codified canon underscores the lack of guidance these jurists face in analyzing the seeming ambiguities in an all-powerful statutory scheme. That § 102(7) is not the only non-bankruptcy-specific codified canon to have been at the center of a jurisdictional split over how to resolve a particular statutory ambiguity within the Code<sup>144</sup> suggests that its codified-canon sub-framework needs to be overhauled. Reclassifying the Code's non-bankruptcy-specific codified canons as interpretive guidelines, and including qualifying language

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144. Compare *In re Pac. Lumber Co.*, 584 F.3d 229, 245–47 (5th Cir. 2009), and *In re Phila. Newspapers, LLC*, 599 F.3d 298, 305 (3d Cir. 2010) (relying on § 102(5)'s "or" is not exclusive" canon to reach a strict construction of the cramdown provisions of § 1129(b)(2)), with *In re Phila. Newspapers*, 599 F.3d at 324 (Ambro, J., dissenting), and *River Rd. Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642, 649 n.5 (7th Cir. 2011) (arguing that the canon codified in § 102(5) should not be rigidly applied when analyzing Code provisions).

explaining that these analytical aids should be subordinated to context—statutory changes that could be effectuated through relatively simple amendments not likely to trigger an undue amount of legislative controversy—would ensure that the Code’s codified-canon sub-framework reflects the realities of modern statutory analysis. Reformulating this foundational aspect of the Code would amount to a first step towards fine-tuning the Code to ensure that it prevents confusion—instead of fostering it.