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I L L I N O I S B U S I N E S S L A W J O U R N A L

COMITY, CHAPTER 15'S PUBLIC POLICY EXCEPTION, AND THE ABSOLUTE PRIORTY RULE

❖ Note ❖

Christopher Stella[*]

I. INTRODUCTION

Since chapter 15 of the Bankruptcy Code was enacted in 2006, there have been debates about when the public policy exception found in 11 U.S.C. § 1506 should apply to deny recognition of a foreign proceeding, law, or court order.[1] Although some critics have made strong arguments in favor of a broad application of section 1506,[2] the general rule among courts is to sparingly apply section 1506 and presume that recognition is proper.[3] Despite the general rule in favor of recognition, courts have found some situations where section 1506 does apply.[4] For instance, courts have applied section 1506's public policy exception when core bankruptcy principles have been violated, or where statutory rights have been impinged.[5] But courts have not fully addressed whether it would be proper to apply the public policy exception in a case where a foreign debtor's reorganization plan violates bankruptcy's absolute priority rule.[6]

The closest any court has come to resolving that issue was in *In re Vitro*, where the Bankruptcy Court for the Northern District of Texas hinted that a

* J.D. Candidate, Class of 2026, University of Illinois College of Law.

[1] *See* John J. Chung, *In re Qimonda Ag: The Conflict Between Comity and the Public Policy Exception in Chapter 15 of the Bankruptcy Code*, 32 B.U. Int'l L.J. 89 (2014); Frederick Tung, *Is International Bankruptcy Possible?*, 23 Mich. J. Int'l L. 31, 41 (2001).

[2] *See* Chung *supra* note 1.

[3] *In re* Toft, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011).

[4] *See In re* Gold & Honey, Ltd., 410 B.R. 357, 372 (Bankr. E.D.N.Y. 2009); *In re* Qimonda AG, 462 B.R. 165, 165 (Bankr. E.D. Va. 2011).

[5] *See In re Gold & Honey*, 410 B.R. at 372; *In re Qimonda*, 462 B.R. at 165.

[6] *See In re* Rede Energia S.A., 515 B.R. 69, 103 (Bankr. S.D.N.Y. 2014); *In re* Vitro, S.A.B. de C.V., 473 B.R. 117, 119 (Bankr. N.D. Tex. 2012).

violation of the absolute priority rule likely would be manifestly contrary to U.S. public policy.[7] However, the court resolved the case on different grounds and therefore did not actually rule on the issue.[8] A similar situation also occurred in *In re Rede Energia*, where objectors to a foreign plan claimed it breached the absolute priority rule and thus breached U.S. public policy.[9] However, the Bankruptcy Court for the Southern District of New York in *In re Rede Energia* held the plan in question did not violate the absolute priority rule in the first place, and thus did not need to answer whether violating the rule would be considered contrary to public policy under section 1506.[10] Therefore, no court has answered the question as to whether violating the absolute priority rule would be considered manifestly contrary to U.S. public policy under section 1506.

This note will address whether a foreign insolvency plan's violation of the absolute priority rule should be treated as manifestly contrary to U.S. public policy under section 1506 and, therefore, denied recognition. In Part II of this note, I will provide some necessary background information on chapter 15 and its underlying policies, chapter 15's public policy exception in section 1506, and the absolute priority rule.[11] In Part III, I will analyze different arguments in favor of a narrow interpretation of the public policy exception and arguments in favor of a broad interpretation.[12] Then I will analyze the *In re Rede Energia* and *In re Vitro* cases, as well as how courts have spoken about the absolute priority rule.[13] Finally, I will also analyze how courts have viewed section 1506's public policy exception.[14] In Part IV, I will then recommend how courts should rule on a foreign plan that violates the absolute priority rule.[15]

II. BACKGROUND

To understand whether a violation of the absolute priority rule should be considered manifestly contrary to U.S. public policy, a basic understanding of chapter 15, the public policy exception, and the absolute priority rule are necessary. This background information will show that chapter 15 was enacted to enable efficient and fair administration of international bankruptcy cases

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[7] *In re* Vitro, 473 B.R. at 119.

[8] *In re* Vitro S.A.B. de C.V., 701 F.3d 1031, 1043 (5th Cir. 2012); *see generally* In re *Vitro*, 473 B.R. at 119.

[9] *See* In re *Rede Energia*, 515 B.R. at 69.

[10] *Id.* at 103.

[11] *See* discussion *infra* Part II.

[12] *See* discussion *infra* Section III.A.

[13] *See* discussion *infra* Sections III.B–C.

[14] *See* discussion *infra* Section III.D.

[15] *See* discussion *infra* Part IV.

through granting recognition to foreign proceedings.[16] Further, it will show that section 1506's public policy exception was meant to be narrow yet overriding.[17] Finally, it will show that the absolute priority rule was created to support the critical bankruptcy policy of fairness to creditors.[18]

A. Creation of Chapter 15 and the Policy Behind It

The globalization of trade and investments toward the end of the 20th Century increased the number of occurrences of cross-border insolvencies.[19] In response, the Model Law on Cross Border Insolvency was created in 1997 by the United Nations Commission on International Trade Law ("UNCITRAL").[20] UNCITRAL wanted to address the challenges which multinational bankruptcies faced due to the lack of coordination between the insolvency regimes from different countries.[21] Because of the lack of coordination, it was difficult to adequately protect a debtor's assets as creditors would simply jump around and attack assets in foreign jurisdictions outside of the country where the debtor filed for bankruptcy.[22] Thus, the Model Law was designed to solve

> [I]nadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets.[23]

Seeing the value in a cross-border insolvency regime, the United States enacted chapter 15 of the Bankruptcy Code in 2005, which is a near copy of the Model Law.[24]

Central to chapter 15 is the idea of comity.[25] Comity is the recognition that U.S. courts give to the laws, orders, and decisions of a foreign country.[26] To illustrate this, imagine a situation where a foreign debtor files bankruptcy in a

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[16] *See* discussion *infra* Section II.A.

[17] *See* discussion *infra* Section II.B.

[18] *See* discussion *infra* Section II.C.

[19] 8 Collier on Bankruptcy P 1501.01 (16th 2025).

[20] *Id.*

[21] *In re* ABC Learning Ctrs. Ltd., 728 F.3d 301, 305 (3rd Cir. 2013).

[22] *Id.*

[23] U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 310 (2005).

[24] In re *ABC Learning*, 728 F.3d at 305.

[25] *In re* Vitro S.A.B. de C.V., 701 F.3d 1031, 1043 (5th Cir. 2012).

[26] Chung, *supra* note 1, at 101.

foreign country. During the hypothetical bankruptcy case, the foreign court orders under a provision of the foreign country's insolvency law a U.S. creditor of the debtor to provide the court with a list of payments the debtor made to the creditor within the past year. If a U.S. court were to recognize the order and enforce it here in the U.S., despite the order being by a foreign court and under a foreign law, then that would be an example of comity.[27] Comity is what allows chapter 15 to further the goal of "cooperation between domestic and foreign courts in cross-border insolvency cases."[28]

B. Section 1506 Public Policy Exception

Despite the principal of comity being central to international insolvency cases, chapter 15 does offer an overriding exception to a U.S. courts recognition of a foreign bankruptcy proceeding or laws for public policy reasons.[29] Section 1506 of the Bankruptcy Code states that "nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."[30] While this exception exists, it is supposed to be narrowly construed, with the term "manifestly" being used to restrict the public policy exception only to fundamental policies of the U.S.[31] Thus, courts have sparingly applied section 1506 to stop recognition.[32]

Courts have read the public policy exception in section 1506 so narrowly out of concern that if section 1506 was read too broadly, it would undermine the cooperative international goals of chapter 15.[33] Therefore, prevailing wisdom among courts is that the public policy exception applies only when there is concern over the procedural fairness of the foreign proceeding or where recognition would impinge severely a U.S. statutory or constitutional right.[34]

Courts have construed section 1506 so narrowly that they have even denied applying it in cases where creditors were denied jury trials, or where

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[27] Comity seen in many instances across chapter 15 cases. *See generally* Armada (Singapore) Pte Ltd. v. Shah (*In re* Ashapura Minechem Ltd.), 480 B.R. 129 (S.D.N.Y. 2012) (recognizing a foreign proceeding); *see also In re* Rede Energia S.A., 515 B.R. 69 (Bankr. S.D.N.Y. 2014 (recognizing a foreign plan).

[28] *In re Vitro*, 701 F.3d at 1043.

[29] *See* 11 U.S.C. § 1506. In re *Vitro*, 701 F.3d. at 1031; In re *ABC Learning*, 728 F.3d at 301.

[30] 11 U.S.C. § 1506.

[31] In re *ABC Learning*, 728 F.3d at 305.

[32] *In re* Toft, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011).

[33] 8 Collier on Bankruptcy P 1506.01 (16th 2025).

[34] In re *ABC Learning*, 728 F.3d at 309; *see also In re* Qimonda AG Bankr. Litig., 433 B.R. 547, 570 (E.D. Va. 2010).

debtors acted in bad faith.[35] For instance, in *In re Ephedra*, the Bankruptcy Court for the Southern District of New York recognized a Canadian court's order in a Canadian insolvency case, even though the order would arguably deprive the group of objectors of their U.S. constitutional right to a jury trial had the case been in the U.S.[36] The court emphasized that section 1506 is narrowly construed such that U.S. courts should accord a foreign judgment comity if "its proceedings are according to the course of a civilized jurisprudence."[37] Because the Canadian proceedings were deemed fair and impartial, despite the lack of a jury, the court held they did not violate public policy under section 1506.[38] Further, in *In re Black Gold*, the Ninth Circuit even refused to use section 1506 to deny recognition when the debtor's principles had been accused of stealing trade secrets and limiting discovery requests.[39] The court held that "a party's misconduct or bad faith, standing alone, is not a proper basis for invoking the public policy exception in section 1506 to deny recognition."[40]

C. The Absolute Priority Rule

The absolute priority rule is found in section 1129(b) of the Bankruptcy Code for corporate reorganizations; it governs the order which creditors get paid in a reorganization plan.[41] The absolute priority rule is a principle of bankruptcy where creditors are compensated in full, ahead of equity holders in the distribution of corporate assets.[42] Basically, "[i]f a business is insolvent, then its owners take nothing[, but if] the business can pay its creditors in full, then its owners take what remains."[43] Only if creditors voluntarily give up their priority rights by a vote, can equity holders retain their equity before creditors are paid in full.[44]

The absolute priority rule was created to combat the inherent danger in any reorganization plan that the plan will be too good of a deal for the debtor's

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[35] *See generally In re* RSM Richter Inc. v. Aguilar (*In re* Ephedra Prods. Liab. Litig.), 348 B.R. 333, 334–35 (S.D.N.Y. 2006); Samba v. Int'l Petro. Prods. & Addictives Co. (*In re* Black Gold S.A.R.L.), 635 B.R. 517 (B.A.P. 9th Cir. 2022).

[36] In re *Ephedra*, 348 B.R. at 334–35.

[37] *Id.* at 336.

[38] *Id.* at 337.

[39] *See generally* In re *Black Gold*, 635 B.R. 517.

[40] *Id.*

[41] 11 U.S.C. § 1129(b).

[42] Alder v. Lehman Bros. Holdings (*In re* Lehman Bros. Holdings), 855 F.3d 459, 470 (2d. Cir. 2017).

[43] Bruce A. Markell, *Owners Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN. L. REV. 69, 70 (1991).

[44] *See* 11 U.S.C. § 1129(b); *see also* Markell, *supra* note 43, at 72.

owners and ignore many of the claims of unsecured creditors.[45] This fear stemmed from the fact that a company's management had a position of dominance which meant that creditors were not able to bargain effectively without a clear standard of fairness.[46] Thus, the absolute priority rule was created because "fairness and equity required that the creditors be paid before the stockholders could retain equity interests for any purpose whatever."[47]

III. ANALYSIS

An analysis shows that despite section 1506's narrow interpretation, a violation of the absolute priority rule by a foreign plan should be considered manifestly contrary to public policy. First, this would further U.S. policy objectives and better protect value for creditors.[48] Second, current case law supports the conclusion that a violation of the absolute priority rule would be manifestly contrary to U.S. public policy under section 1506.[49]

A. Section 1506 Should Be Applied Broadly

Currently, there are two main competing viewpoints on how courts should weigh granting comity against denying recognition for public policy purposes.[50] The first is the universalist approach, which argues that the insolvency law of the debtor's home country should apply worldwide, even if matters between the debtor and their creditors have no connection to the debtor's home country and it would undermine the laws and policies of the other country.[51] This approach argues that it enables the maximization of "value preserved for creditors by facilitating a coordinated disposition of the debtor's assets."[52]

Alternatively, some argue for a broader interpretation of section 1506 to prevent substantive harm to the public policy of a country the debtor is not from.[53] Supporters of this viewpoint argue that chapter 15 was simply meant to promote administrative convenience, not bind countries to the policies of their foreign counter parts.[54] Further, this side argues that considerations of

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[45] Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship, 526 U.S. 434, 444 (1999).

[46] *Id.*

[47] *Id.*

[48] *See* discussion *infra* Section III.A.

[49] *See* discussion *infra* Sections III.B–D.

[50] *See* Chung, *supra* note 1, at 101.

[51] Tung, *supra* note 1, at 40.

[52] *Id.* at 41.

[53] *See* Chung, *supra* note 1, at 101.

[54] *See id.*

comity were always meant to be subordinate to public policy in a chapter 15 case.[55]

Broader interpretation of section 1506 does seem to be the better solution. To start, section 1506 is blatantly titled the "Public Policy Exception" and stands alone to emphasize the need to protect public policy over other objectives of chapter 15.[56] Therefore, Congress was clearly concerned about how the application of foreign law may impact U.S. parties to a foreign bankruptcy proceeding.[57] Further, the universalist argument that universalism would preserve value for creditors does not necessarily hold true. Under U.S. law, rules such as the absolute priority rule help to preserve value for creditors.[58] However not all countries have similar rules, and therefore debtors can use less sophisticated bankruptcy systems to actually take value away from creditors, therefore making the universalist approach actually worse for creditor value.[59] Thus, a broader interpretation of section 1506 would arguably be better to combat Congress's concerns of how a foreign law would impact domestic interests in a bankruptcy, and to protect creditor value.

B. Rede and Vitro

No court has formally ruled on whether violating the absolute priority rule is manifestly contrary to U.S. public policy, but multiple courts have come close to the issue.[60] First, in *In re Rede Energia S.A.*, an ad hoc group of creditors opposed a motion for the court to recognize a Brazilian reorganization plan because they believed it violated the absolute priority rule and thus was contrary to U.S. public policy under section 1506.[61] Ultimately the court did not have to consider whether a violation of the absolute priority rule would be contrary to U.S. public policy, however.[62] After analyzing the plan, the court held the plan was not in violation of the absolute priority rule in the first place because "significant dilution of outstanding equity under the Brazilian Plan [was] consistent with the purpose of the absolute priority rule in the U.S., which is designed to prevent shareholders from retaining equity in reorganized

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[55] *See id.*

[56] *Id.* at 115.

[57] *Id.* at 117.

[58] Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship, 526 U.S. 434, 444 (1999).

[59] *See In re* Vitro, S.A.B. de C.V., 473 B.R. at 117 (Bankr. N.D. Tex. 2012) (Mexican reorganization laws allowed for a plan which paid equity holders first).

[60] *See generally In re* Vitro, S.A.B. de C.V., 473 B.R. 117 (Bankr. N.D. Tex. 2012); *In re* Rede Energia S.A., 515 B.R. 69 (Bankr. S.D.N.Y. 2014).

[61] In re *Rede Energia*, 515 B.R. at 103.

[62] *Id.*

companies without contributing new value."[63] Therefore, the "foreign representative [] successfully demonstrated that the distribution scheme in the Brazilian Reorganization Plan [was] not manifestly contrary to the public policy of the United States."[64]

The one other court which has flirted with this issue was the Bankruptcy Court for the Northern District of Texas in *In re Vitro*.[65] In *In re Vitro*, an ad hoc group of noteholders opposed a motion for the U.S. court to recognize a Mexican reorganization plan.[66] They argued, in part, that the plan violated the absolute priority rule because the equity holders of the debtor retained their interest while the other creditors did not get paid in full, and therefore it was manifestly contrary to U.S. public policy under section 1506.[67] The court agreed the plan would violate the absolute priority rule but the court did not ultimately hold whether the violation of the absolute priority rule would be contrary to public policy.[68] However, the court noted that the absolute priority rule objection was "strong" and "possibly meritorious."[69] The court emphasized that by violating the absolute priority rule the plan runs afoul of the Bankruptcy Code, "because the result is demonstrably different than would occur in Chapter 11."[70]

Although the *In re Rede Energia* and *In re Vitro* courts did not explicitly rule on whether a violation of the absolute priority rule would be manifestly contrary to public policy under section 1506, a holding that it would be aligns with those cases. The court in *In re Rede Energia* emphasized how because the Brazilian plan, although different than U.S. plans, still promoted the purposes behind the absolute priority rule, it could not have been manifestly contrary to U.S. public policy.[71] That leaves the door open, however, for a reorganization plan that is not only different from a U.S. plan under the absolute priority rule, but also when it does not promote the policy purposes behind it. That would be similar to the plan in *In re Vitro*, where the court persuasively mentioned in dicta how a plan which violates the absolute priority rule would run afoul of the Bankruptcy Code, and likely be manifestly contrary to U.S. public policy.[72] Therefore, holding that a violation of the absolute priority rule is manifestly contrary to U.S. public policy would arguably be supported by *Vitro* and *Rede*.

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[63] *Id.*
[64] *Id.*
[65] *See* In re *Vitro*, 473 B.R. at 117.
[66] *Id.* at 119.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 132.
[70] *Id.*
[71] *In re* Rede Energia S.A., 515 B.R. 69, 103 (Bankr. S.D.N.Y. 2014).
[72] In re *Vitro*, 473 B.R. at 132.

C. *The Absolute Priority Rule is a Statutory Right and is Fundamental Bankruptcy Policy*

The absolute priority rule has been recognized as one of bankruptcy's most important principles by multiple courts.[73] For instance in *In re Lehman Bros. Holdings*, in a brief discussion about the absolute priority rule, the Second Circuit characterized the rule as a "bedrock principle of bankruptcy."[74] It emphasized how the rule embodied the "axiomatic principle [] that because equity owners stand to gain the most when a business succeeds, they should absorb the cost of the business's collapse."[75]

Then, in the Supreme Court case of *Czyzewski v. Jevic Holding Corp.*, the Court echoed many of those same thoughts toward the absolute priority rule.[76] In *Czyzewski*, the Court had to decide whether a bankruptcy court had the ability to order a distribution which violated basic bankruptcy priority rules in connection with a chapter 11 dismissal.[77] The Court held it does not.[78] In doing so, the Court highlighted how the absolute priority rule "constitutes a basic underpinning of business bankruptcy law… [and] has long been considered fundamental to the Bankruptcy Code's operation."[79] Further, the Court noted that the absolute priority rule, as a fixed priority scheme, "is recognized as the cornerstone of reorganization practice and theory," and "priority is bankruptcy's most important and famous rule."[80] Therefore, due to its crucial importance in protecting creditors' claims, the absolute priority rule is a fundamental statutory right within the Bankruptcy Code.

D. *Violation of the Absolute Priority Rule Would Severely Impinge on a Statutory Right and Be Contrary to Fundamental Bankruptcy Policy*

Despite the courts' hesitancy to use section 1506 to deny recognition of a foreign order or proceeding, courts have denied recognition in cases where a foreign action is contrary to fundamental bankruptcy policy, or has impinged on a statutory right.[81] For example, in *In re Gold & Honey*, an Israeli insolvency

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[73] *See* Alder v. Lehman Bros. Holdings (*In re* Lehman Bros. Holdings), 855 F.3d 459, 470 (2d. Cir. 2017); Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship, 526 U.S. 434, 444 (1999); Czyzewski v. Jevic Holding Corp., 580 U.S. 451 (2017).

[74] In re *Lehman Bros.*, 855 F.3d at 470.

[75] *Id.* at 471 (citing Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 793 (1987)).

[76] *Czyzewski.*, 580 U.S. at 464–65.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 465.

[81] *See generally In re* Gold & Honey, Ltd., 410 B.R. 357 (Bankr. E.D.N.Y. 2009); *In re* Qimonda AG, 462 B.R. 165 (Bankr. E.D. Va. 2011).

proceeding seeking recognition was found to be manifestly contrary to public policy under section 1506 because the Israeli receiver violated a U.S. court's automatic stay orders. The court said recognizing the Israeli proceeding after the stay violation would ultimately hinder U.S. bankruptcy courts' abilities to promote two fundamental policies of the bankruptcy code: (1) preventing creditors from taking advantage over each other and (2) providing for the efficient distribution of assets in accordance with their priority.[82] Thus, the court decided not to recognize the Israeli proceeding under section 1506 because doing so would be manifestly contrary to U.S. public policy as it violated fundamental bankruptcy policies.[83]

Then, in *In re Qimonda*, the court denied recognition of a German bankruptcy court's order which it allowed a U.S. patent license to be cancelled.[84] The court emphasized that, by recognizing the German courts order, it would discourage investment in research and development, and in construction and manufacturing facilities.[85] Thus, it would "severely impinge an important statutory protection accorded licensees of U.S. patents and thereby undermine a fundamental U.S. public policy promoting technological innovation."[86] Therefore, impinging upon a statutory right in this case, which promoted a crucial U.S. public policy, was enough for the court to deny recognition using section 1506.[87]

Looking at the persuasive precedents set in *In re Qimonda* and *In re Gold & Honey*, a violation of the absolute priority rule would be manifestly contrary to U.S. public policy. As mentioned, in *In re Qimonda*, the court refused to recognize a German courts order to cancel a U.S. patent license.[88] The court said that recognition would violate a statutory right that afforded licensees of U.S. patents protections and violate the important policy goal of greater technological innovation.[89] Similar to how cancelling patent licenses violated a statutory right in *In re Qimonda*, violating bankruptcy's absolute priority rule in turn violates statutory rights given to creditors to protect their claims in bankruptcy. As emphasized by the *Czyzewski* court, the absolute priority rule "constitutes a basic underpinning of business bankruptcy law… [and] has long been considered fundamental to the Bankruptcy Code's operation."[90] Further, the absolute priority rule requires that "creditors are entitled to be paid ahead

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[82] *See* In re *Gold & Honey*, 410 B.R. at 372.
[83] *See id.*
[84] *See* In re *Qimonda AG*, 462 B.R. at 165.
[85] *Id.* at 185.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 464–65 (2017).

of [equity holders] in the distribution of corporate assets."[91] This was to promote the policy goals of fairness and equity in the distribution process.[92] Therefore, violating the absolute priority rule would clearly be a violation of an important statutory right given to creditors by the Bankruptcy Code to promote the important policy of fairness and equity in the distribution process. So, in line with the *In re Qimonda* court, a violation of the absolute priority rule would be manifestly contrary to U.S. public policy under section 1506.

Then, in *In re Gold & Honey*, the court denied recognition of an Israeli insolvency proceeding because recognition would severely hinder the courts ability to promote the two crucial bankruptcy policies of preventing creditors from taking advantage over other creditors and the distribution of assets in accordance with priority.[93] By violating the absolute priority rule, these same principles of bankruptcy would also be violated. Again, the absolute priority rule is meant to ensure that creditors receive compensation before any equity holders within the debtor's business.[94] Thus, a violation of the rule would allow for equity holders to take advantage over creditors and would not allow for the distribution of assets according to priority. Therefore, using the *In re Gold & Honey* case, violating the absolute priority rule should call for a denial of recognition under section 1506.[95]

IV. RECOMMENDATION

A violation of the absolute priority rule by a foreign reorganization plan should be considered manifestly contrary to U.S. public policy for three reasons: (1) a reading of section 1506 to encompass a violation of the absolute priority rule would better protect U.S. domestic interests, (2) this interpretation would better support the policies behind chapter 15, and (3) this interpretation of section 1506 is already supported by current case law.

Section 1506 was included in chapter 15 for a reason.[96] Congress saw the inherent problems with applying foreign law in the U.S. that was against domestic interests and, therefore, needed an exception that would allow courts to promote U.S. policy.[97] Here, the absolute priority rule promotes multiple fundamental U.S. bankruptcy policies.[98] Thus, by holding a violation of the

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[91] Alder v. Lehman Bros. Holdings (*In re* Lehman Bros. Holdings), 855 F.3d 459, 470 (2d. Cir. 2017).

[92] Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship, 526 U.S. 434, 444 (1999).

[93] *In re* Gold & Honey, Ltd., 410 B.R. 357, 372 (Bankr. E.D.N.Y. 2009).

[94] *See* In re *Lehman Bros*, 855 F.3d at 470.

[95] In re *Gold & Honey*, 410 B.R. at 372.

[96] Chung, *supra* note 1, at 117.

[97] *Id.*

[98] *See* In re *Lehman Bros*, 855 F.3d at 470.

rule to be manifestly contrary to U.S. public policy, courts would be protecting U.S. domestic interests. For instance, the absolute priority rule mainly protects a creditor's rights to be paid for their claim against the bankruptcy estate.[99] This is extremely important, especially in the chapter 15 context, because the creditors will likely be U.S. based, compared to a foreign debtor.[100] This begs the question: which better promotes U.S. domestic interests, a hypothetical holding supporting U.S. creditors who are attempting to get their money back, or one supporting a foreign debtor, who is seeking recognition of a foreign reorganization plan which violates a fundamental principle of U.S. bankruptcy law (the absolute priority rule)? The answer should be the former, as the court would be protecting the interests of the U.S. creditors. So, by considering a violation of the absolute priority rule to be manifestly contrary to U.S. public policy, courts would be protecting U.S. domestic interests by protecting U.S. domestic creditors.

Although the drafters of section 1506 were concerned that a broad reading would undermine the goals of chapter 15,[101] in this instance, broader application of section 1506 would likely better promote the goals and policies behind chapter 15. As discussed, one of the main policy reasons behind chapter 15 was to combat "inadequate and inharmonious legal approaches, which… are not conducive to a fair and efficient administration of cross-border insolvencies."[102] However, by enforcing a foreign plan which does not follow the absolute priority rule, a court would be enforcing an inadequate plan that is not conducive to a fair and efficient administration of cross-border insolvencies. Again, the absolute priority rule is considered to be a "cornerstone" of successful reorganization regimes,[103] as it promotes fair distribution among creditors. Therefore, adequate reorganization regimes should have a rule which promotes similar "fair" policy objectives to the absolute priority rule. So, by denying recognition to foreign plans which violate the absolute priority rule, U.S. courts would be supporting the chapter 15 policy objectives of promoting adequate and fair legal approaches to bankruptcy.

Finally, the current case law on the subject seems to support the recommendation that a violation of the absolute priority rule should be

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[99] Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship, 526 U.S. 434, 444 (1999).

[100] *See generally In re* Vitro, S.A.B. de C.V., 473 B.R. 117 (Bankr. N.D. Tex. 2012); *In re* Rede Energia S.A., 515 B.R. 69, 103 (Bankr. S.D.N.Y. 2014).

[101] 8 Collier on Bankruptcy P 1506.01 (16th 2025).

[102] U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 310, U.N. Sales No. E.05.V10 (2005).

[103] Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 465 (2017).

considered manifestly contrary to U.S. public policy.[104] As mentioned, the absolute priority rule provides creditors with certain fundamental statutory rights.[105] Under the *In re Qimonda* test, by violating the rule, a foreign plan would severely impinge on a statutory right and therefore be manifestly contrary to U.S. public policy.[106] Further, under the *In re Gold & Honey* test, a violation of the absolute priority rule would be contrary to fundamental bankruptcy policies and therefore manifestly contrary to U.S. public policy.[107] And finally, the court discussions in *In re Vitro* and *In re Rede Energia*, also seem to support the notion that a violation of the absolute priority rule would be manifestly contrary to U.S. public policy.[108] With the support of the case law, a violation of the absolute priority rule should be considered manifestly contrary to U.S. public policy.

V. CONCLUSION

Overall, the absolute priority rule is a fundamental part of the bankruptcy code. It protects the rights of creditors so that equity holders do not take advantage of the bankruptcy process by paying themselves before the creditors in a corporate reorganization. Thus, it should be recognized as manifestly contrary to U.S. public policy under chapter 15 if a foreign debtor's plan violates the rule, and the foreign plan should not be recognized.

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[104] *See generally In re Vitro*, 473 B.R. 117; *In re Rede Energia*, 515 B.R. 69; *In re* Gold & Honey, Ltd., 410 B.R. 357 (Bankr. E.D.N.Y. 2009); *In re* Qimonda AG, 462 B.R. 165 (Bankr. E.D. Va. 2011).

[105] *See* discussion *supra* Section III.C.

[106] In re *Qimonda*, 462 B.R. at 185.

[107] In re *Gold & Honey*, 410 B.R. at 372.

[108] *See generally* In re *Vitro*, 473 B.R. 117; In re *Rede Energia*, 515 B.R. 69.