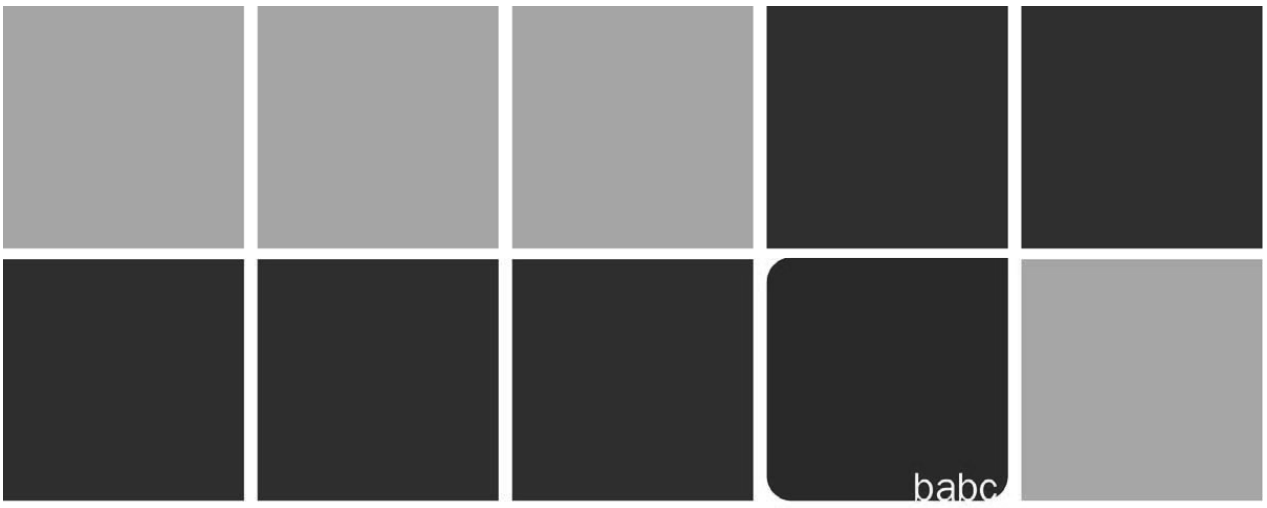
Individual Chapter 11 Problems and Solutions, Including LLC Membership Interests, Absolute Priority Rule and Lifestyle Challenges

Edward J. Peterson, III, Moderator
Stichter, Riedel, Blain & Prosser, PA; Tampa, Fla.

Jennifer A. Henderson
Bradley Arant Boult Cummings LLP; Birmingham, Ala.

Herbert M. Newell, III
Newell & Holden, LLC; Tuscaloosa, Ala.

Ward Stone, Jr.
Stone & Baxter, LLP; Macon, Ga.



CHAPTER 11 PERSONAL EXPENSES AFTER BAPCPA

Bradley Arant Boult Cummings LLP[1]
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203

[1] Contributing writers: William L. Norton, III; Jennifer H. Henderson; and Jay Watkins.

I. Introduction

The passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") resulted in many changes to how individuals must proceed in and confirm their chapter 11 cases.[2] The post-BAPCPA issues confronting individual chapter 11 debtors include whether, and to what extent, an individual chapter 11 debtor can use estate property to pay for post-petition, personal expenses.

II. Discussion

Bankruptcy Code[3] Section 1115,[4] added by BAPCPA, radically changed the definition of what constitutes property of the estate in an individual chapter 11 case. Most significantly, Section 1115 provides that estate property includes an individual chapter 11 debtor's "earnings from services performed . . . after the commencement of the case but before the case is closed."[5]

Prior to the enactment of Section 1115, courts were bitterly divided as to what portion, if any, of an individual debtor's post-petition earnings constituted property of the estate under Bankruptcy Code Section 541. A majority of courts held that, under the "earnings exception" of Section 541(a)(6),[6] post-petition earnings of an individual chapter 11 debtor were excluded from

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[2] Several scholarly articles and presentations have addressed the issues arising from the changes made to individual chapter 11 practice by BAPCPA, including: Robert J. Keach, *Deadman Filing Redux: Is The New Individual Chapter Eleven Unconstitutional?*, 13 AM. BANKR. INST. L. REV. 483 (Winter 2005); G. Ray Warner, *Garnishment Restrictions and the Involuntary Chapter 11: Rethinking Kokoszka in a Means Test World*, 13 AM. BANKR. INST. L. REV. 733 (Winter 2005); and Jack F. Williams & Jacob L. Todres, *Tax Consequences of Post-Petition Income as Property of the Estate in an Individual Debtor Chapter 11 Case and Tax Disclosure in Chapter 11*, 13 AM. BANKR. INST. L. REV. 701 (Winter 2005).

[3] 11 U.S.C. §§ 101-1532.

[4] Section 1115 provides:

> (a) In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541--
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> (1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and
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> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.
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> (b) Except as provided in section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

11 U.S.C. § 1115.

[5] 11 U.S.C. § 1115(a)(2).

[6] Section 541(a)(6) provides that the bankruptcy estate includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, *except such as are earnings from services performed by an individual debtor after the commencement of the case*." 11 U.S.C. § 541(a)(6) (emphasis added).

property of the estate.[7] However, a sizeable minority of courts found that at least a portion of post-petition profits generated by professionals and sole proprietors were not earnings subject to the Section 541(a)(6) exception and, therefore, were estate property.[8] While Section 1115 resolves this split of authority, it leaves unanswered several practical questions related to how an individual chapter 11 debtor's post-petition income will be treated during the bankruptcy case.

A. Payment of Living Expenses

One such issue is whether an individual debtor's living expenses can be paid from estate property as ordinary course of business expenses under Bankruptcy Code Sections 363(c)(1)[9] and 1108,[10] or whether notice and a hearing under Bankruptcy Code Section 363(b)(1)[11] is required for living expenses to be paid. Prior to the enactment of Section 1115, few cases addressed the issue of whether a debtor was required to obtain court approval for the payment of living expenses from estate property. Of those courts that considered the issue, some held that normal living expenses of an individual chapter 11 debtor did not need court approval,[12] while others indicated that some form of court approval would be necessary, at least in cases of significant expenses.[13] Indeed, one early pre-BAPCPA decision, *In re Vincent*,[14] held that no

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[7] *See, e.g., In re Hake*, 2006 WL 2621116, at *7-8 (B.A.P. 6th Cir. Sept. 14, 2006); *Roland v. UNUM Life Ins. Co. of Am (In re Roland).*, 223 B.R. 499, 502 (W.D.N.Y. 1998); *In re Powell*, 187 B.R. 642, 644-45 (Bankr. D. Minn. 1995).

[8] *See, e.g., In re Harp*, 166 B.R. 740, 748-55 (Bankr. N.D. Ala. 1993); *In re Herberman*, 122 B.R. 273, 278-80 (Bankr. W.D. Tex. 1990); *In re Cooley*, 87 B.R. 432, 438-41 (Bankr. S.D. Tex. 1984).

[9] Section 363(c)(1) provides:

> If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1).

[10] Section 1108 provides: "Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business." 11 U.S.C. §1108

[11] Section 363(b)(1) provides, in pertinent part, that: "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1).

[12] *See In re Murra*y, 216 B.R. 712, 713 (Bankr. W.D. N.Y. 1998); *In re Keenan*, 195 B.R. 236, 243 (Bankr. W.D. N.Y. 1996); *In re Bradley*, 185 B.R. 7, 8 (Bankr. W.D. N.Y. 1995) ("[W]hen a Chapter 11 Debtor-in-Possession is a natural person, his personal expenses and his obligations for incidents of his personal life are every bit as much a part of the ordinary course of his business and financial affairs as are expenses incident to the operation of the various shopping malls, nursing homes, and office buildings that he owned.")

[13] *See generally In re Harp*, 166 B.R. at 741-46, 755-56 (discussing that the chapter 11 debtor violated his fiduciary duties by paying for rental of vacation homes, sponsoring a large pre-game Alabama-Auburn brunch and taking a vacation to an exclusive resort in the Netherland Antilles).

[14] 4 B.R. 21 (Bankr. M.D. Tenn. 1979).

authority permitted the payment of an individual chapter 11 debtor's living expenses from estate property.[15]

Post-BAPCPA at least one bankruptcy court has held that Section 363(c)(1) authorizes individual chapter 11 debtors to use estate property to pay "ordinary" living expenses, without obtaining court approval.[16] The court reasoned:

> Notwithstanding section 363(c)(1)'s reference to the ordinary course of a debtor's *business*, because the debtor cannot continue to generate post-petition wages without being able to pay for the personal expenses necessary to permit him to live his life and remain gainfully employed, section 363(c)(1) has generally been understood to authorize chapter 13 debtors to pay post-petition living expenses without notice and an opportunity for hearing or a prior court order, so long as such expenses are "ordinary course" rather than unusual or extraordinary. If a chapter 13 debtor's post-petition living expenses prove unreasonable or excessive, his chapter 13 case will be converted or dismissed, either because his plan was not proposed in good faith or because he is unwilling to devote all of his disposable income to the payment of creditors under his plan, and not because the debtor failed to obtain prior court approval for the payment of his ordinary course living expenses during the pendency of the case.
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> Rather than struggle to invent out of whole cloth a procedure and standard for approving requests by chapter 11 debtors for authority to spend property of the estate for the payment of post-petition living expenses, the court should give section 363(c)(1) the same interpretation in chapter 11 cases as it has always been understood to have in chapter 13 cases. That is, the court should recognize that section 363(c)(1) authorizes a debtor in possession to use property of the estate to pay post-petition living expenses without prior court approval, so long as the amounts to be disbursed qualify as "ordinary course" expenses. An individual chapter 11 debtor needs to pay his living expenses in order to continue generating revenues for the estate. Thus, the payment of ordinary course living expenses

[15] *Id*. at 23; *see also In re Walter*, 83 B.R. 14, 19-20 (B.A.P. 9th Cir. 1988) ("The bankruptcy court properly relied on case law whereby courts had held that personal living expenses for debtors and their families, as well as attorney's fees which benefitted the debtor as an individual, but not the bankruptcy estate, could not be paid out of monies or assets of the estate. The bankruptcy court has authority to deny the debtor use of estate property for living expenses for himself or his family.")

[16] *In re Seely*, 492 B.R. 284, 289-91 (Bankr. C.D. Cal. 2013); *see also In re Goldstein*, 383 B.R. 496, 499 (Bankr. C.D. Cal. 2007) (suggesting that 365(c) permits a debtor-in-possession to use estate property to "buy bread and probably to purchase a ticket to travel to a court hearing" but it did not authorize the debtors to hire divorce counsel); *In re Villalobos*, 2011 WL 4485793, at *8-9 (B.A.P. 9th Cir. Aug. 19, 2011) (suggesting that Section 365(c) may permit an individual chapter 11 debtor to pay living expenses as ordinary course expenses but remanding to the bankruptcy court to articulate the legal rule relied on by the court in approving certain expenses for payment).

> should be treated as being within the debtor's ordinary course of business for the purpose of interpreting section 363(c)(1).[17]

While it remains to be seen whether other courts will agree that "ordinary course" living expenses can been paid without prior court approval, the more difficult question is likely what expenses courts will consider to be "ordinary" living expenses for purposes of Section 363. For instance, will judges take into account the debtor's standard of living in determining what expenses constitute reasonable living expenses?[18] Should Courts adopt a disposable income test similar to § 1325(b) or 1129(a)(15),[19] or will they impose the "minimal" standard of living tests imposed on parties seeking to discharge student loans?[20] While none of these questions have clear answers, some courts will expect lower standards of living from individual debtors during the pendency of their chapter 11 cases.[21]

Also, there is the question of whether individual chapter 11 debtors can pay reasonable living expenses for members of their families. Consider whether a bankruptcy court would permit a corporate chapter 11 debtor to pay the living expenses of a president's son, brother-in-law or other relative, if they provided no value to the debtor's estate. While spouses, former spouses, children of the debtor and other designated parties are entitled to first priority payments for their domestic support obligations,[22] and chapter 13 debtors are expressly authorized to pay for the support of their dependents[23] in their cases, there appears to be no similar expense authorization in chapter 11 of the Bankruptcy Code that would permit an individual chapter 11 debtor to pay

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[17] *In re Seely*, 492 B.R. at 290.

[18] While isolated cases have approved, indirectly, expenditures of an affluent nature, *see In re Bradley*, 185 B.R. at 11 (refusing to impose a budget on an individual chapter 11 debtor) and *In re Rodriquez*, 41 B.R. 774, 775 (Bankr. S.D. Fla. 1984) (approving personal expenses of $7,000 per month), most Courts have refused to consider status or lifestyle in determining what constitutes reasonable living expenses. *See generally In re Cardillo*, 170 B.R. 490, 491 (Bankr. D.N.H. 1994) (chapter 13 case); *In re Jones*, 55 B.R. 462, 466-67 (Bankr. D. Minn. 1985) (chapter 13 case); *In re Gray,* 2009 WL 2475017, at *1-4 (Bankr. N.D. W. Va. Aug. 11, 2009) (court found expenses for care of 15 dogs and duplication of internet and cable providers to be unreasonable and held, as a result, that individual's chapter 11 plan did not meet the disposable income requirement of Section 1129(a)(15)); *see also In re Villalobos*, 2011 WL 4485793, at *8-9 (B.A.P. 9th Cir. Aug. 19, 2011) (bankruptcy court's finding that individual chapter 11 debtor had historically paid certain expenses was insufficient grounds for approving debtor's post-petition payment of luxury vehicles, expensive homes, and college tuition of grandchildren from estate property).

[19] *See generally In re Watson*, 403 F.3d 1, 7-8 (1st Cir. 2005) (chapter 13 debtor's childrens' private school tuition was not a reasonably necessary expense); *In re Gleason*, 267 B.R. 630, 633-35 (Bankr. N.D. Iowa 2001) (chapter 13 debtor's recreation and gift expenses not reasonably necessary); *In re Dick*, 222 B.R. 189, 190-91 (Bankr. D. Mass. 1998) (chapter 13 debtor's payment on non-income producing vacation home not a reasonably necessary expense).

[20] *See generally In re Cox*, 338 F.3d 1238, 1241-1242 (11th Cir. 2003); *In re Hornsby*, 144 F.3d 433, 437 (6th Cir. 1998).

[21] *See generally In re Wood*, 68 B.R. 613, 617 (Bankr. D. Haw. 1986) (large expenditures on pet care demonstrated mismanagement of individual chapter 11 debtor's business affairs); *In re Gray,* 2009 WL 2475017 at *1-4.

[22] *See* 11 U.S.C. §§ 101(14A), 507(a)(1), and 1112(b)(4)(P).

[23] *See* 11 U.S.C. § 1325(b)(2)(A)(i).

for his or her family's support from estate funds.[24] Indeed, in a pre-Section 1115 individual chapter 11 case, *U.S. v. Sutton*, the Fifth Circuit overruled a lower court decision which allowed living expenses of the individual chapter 11 debtor's spouse and minor children to be paid from estate funds.[25] While Courts should be able to distinguish *Sutton* on its unique facts, it does illustrate the problems with new Section 1115.

Ultimately, given BAPCPA's addition of Section 1115, as well as a chapter 11 debtor's fiduciary duty to creditors,[26] an individual chapter 11 debtor should consider requesting bankruptcy court approval of a living expense budget in order to avoid challenges to the spending later in the case.[27] As one bankruptcy court recently noted,

> A chapter 11 debtor in possession or his counsel might well conclude that it would be in the debtor's best interest to seek such approval, whether or not it is required, in order to put parties in interest on notice as to the amounts the debtor intends to spend on living expenses each month, rather than wait until estate assets have been dissipated and another party in interest claims that the debtor's disbursements were unreasonable or excessive (and therefore constitute grounds to warrant the appointment of a chapter 11 trustee or conversion of the case) or did not qualify as ordinary course expenditures.[28]

Notably, some jurisdictions have adopted either a local rule or practice providing for the submission and approval of a living expense budget by individual chapter 11 debtors.[29]

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[24] *See U.S. v. Sutton*, 786 F.2d 1305, 1306-1308 (5th Cir. 1986) (holding that an incarcerated individual chapter 11 debtor was not permitted to have his estate pay living expenses of his wife and minor children).

[25] *Id.*

[26] One of the most difficult concepts that chapter 11 debtors have to grasp when they file for bankruptcy protection is that debtors-in-possession owe fiduciary duties to their creditors to act in the best interests of their bankruptcy estates. *See* C.R. Bowles, Jr., & Nancy B. Rapoport, *Has the DIP's Attorney Become the Ultimate Creditors' Lawyer in Bankruptcy Reorganization Cases?*, 5 AM. BANKR. INST. L. REV. 47, 53-58 (Spring 1997). Courts have universally held that individual chapter 11 debtors owe these duties just like other debtors-in-possession. *See generally In re Hardy*, 319 B.R. 5, 6-8 (Bankr. M.D. Fla. 2004) (full disclosure of assets and of business transactions required); *In re Robino*, 243 B.R. 472, 486-87 (Bankr. N.D. Ala. 1999) (compliance with court orders required); *In re Tornheim*, 181 B.R. 161, 164 (Bankr. S.D.N.Y. 1995) (timely and accurate financial disclosures required); *In re Bowman*, 181 B.R. 836, 843-45 (Bankr. D. Md. 1995) (fiduciary duties include a duty of care to protect assets, a duty of loyalty, and a duty of impartiality); *In re Harp*, 166 B.R. at 746-47, 755-56 (duty to properly account for all property received, to furnish information requested by a party in interest, and to ensure that estate resources are used to benefit unsecured creditors and other parties in interest).

[27] *See In re Harp*, 166 B.R. at 755-56; *see also In re Roland*, 223 B.R. at 506-507; *In re Weber*, 209 B.R. 793, 799-800 (Bankr. D. Mass. 1997) (discussing expenditures of non-estate property in connection with determination of debtors' good faith).

[28] *In re Seely*, 492 B.R. at 289 n.5.

[29] *See* Laury Macau Ley, *The Individual Chapter 11 Case: Still Problematic After All These Years*, 22 NEV. LAW. 17, 18 (March 2014); *see also* Bankr. C.D. Cal. Local Form 2081-1.2.Motion.Budget, *Notice of Motion and Motion in Individual Chapter 11 Case for Order Setting Budget for Interim Use of Estate Property as Defined in 11 U.S.C. § 1115*, available at http://www.cacb.uscourts.gov/forms/local_bankruptcy_rules_forms.

B. Payment of Debtor's Counsel for Personal Services

A clear oversight within BAPCPA was the failure to amend Section 330(a)(4)(B) to authorize the payment of debtor's counsel for personal services in chapter 11 cases. This provision states as follows:

> (B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interest of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.[30]

BAPCPA did not make this section applicable to chapter 11 despite the amendments to chapter 11 that made the treatment of individuals in chapter 11 similar to chapters 12 and 13. Consequently, individuals in chapter 11 cases are unable to hire counsel for personal services, such as criminal, divorce, exemption, discharge, or tax matters, if there is no benefit to the estate.[31]

III. Exemplar Case Annotations

A. Post-BAPCPA Cases

***In re Seely*, 492 B.R. 284 (Bankr. C.D. Cal. 2013).**

In *Seely* individual chapter 11 debtors had used prepetition and post-petition funds to pay for their personal living expenses during their chapter 11 case. The debtors' case was subsequently converted to a chapter 7, and the trustee sought to surcharge a personal injury settlement claimed as exempt by the debtors in order to recover the debtors' expenditures for living expenses during the chapter 11 case. The court found that to surcharge an exemption, the trustee had to show that the debtors' conduct was wrongful and warranted the extraordinary remedy of surcharging exempt assets. The trustee asserted that, because the individual chapter 11 debtors were not operating a business, Bankruptcy Code Section 363(c)(1) did not allow their payment of personal living expenses without express authorization from the court.

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[30] 11 U.S.C. § 330(a)(4)(B).

[31] *See In re Meill*, 2009 WL 2253256 at *1-4 (Bankr. N.D. Iowa July 27, 2009)("Only attorneys employed by Trustee under § 327 with Court approval are entitled to compensation under § 330(a), and then only to the extent that the legal services benefit the bankruptcy estate . . . . The Court may not alter the Bankruptcy Code compensation scheme through the use of § 105(a). Retainers received by Debtor's attorneys, whether in connection with the case or not, constitute property of the estate to the extent the funds have not yet been applied to pay for prepetition services as of the petition date . . . . Trustee is entitled to an accounting of retainers held in Debtor's attorney's trust accounts. She is also entitled to turnover of such funds. If funds remain unadministered at the closing of the case, or if funds revest in Debtor after confirmation of a plan, which are not otherwise obligated under the Plan, the Bankruptcy Code does not restrict Debtor from paying his attorneys with those funds."); *In re Weaver*, 336 B.R. 115, 118-26 (Bankr. W.D. Tex. 2005). *Accord In re Polishuk*, 258 B.R. 238, 250-51 (Bankr. N.D. Okla. 2001) (attorney representing debtor in state court divorce action was entitled to be compensated from estate for time spent in trial of divorce action and in obtaining equitable distribution of marital property, but not for litigating child support and custody issues, given lack of any real "benefit" from such services to estate); *In re Goldstein*, 383 B.R. at 502 (retention of divorce counsel for each chapter 11 co-debtor benefited estate).

The court framed the issue as whether an individual chapter 11 debtor is required to seek court approval before paying for personal living expenses. The court explained that, after BAPCPA, post-petition earnings became property of the estate under Bankruptcy Code Section 1115(a). The court reasoned that because BAPCPA did not provide a standard for courts to determine if individual chapter 11 debtors can use estate funds to pay personal living expenses, Congress must not have intended such debtors to seek court authorization. The court went on to find that, because BAPCPA was intended to make individual chapter 11 cases more like chapter 13 cases, Congress intended post-petition wages to be used for ordinary personal living expenses under both bankruptcy chapters.

Ultimately, the court concluded that Bankruptcy Code Section 363(c)(1) should be given the same interpretation in individual chapter 11 cases as it is given in chapter 13 cases, holding "the payment of ordinary course living expenses should be treated as being within the debtor's ordinary course of business for the purpose of interpreting section 363(c)(1)." The court noted, however, that "[w]hether or not a given expense is an ordinary course expense is a question of fact that may require consideration of both a vertical and a horizontal test of ordinariness." Because the trustee in *Seely* did not argue that any of the debtors' expenditures were non-ordinary course expenditures, the court found no wrongdoing on the debtors' part and denied the motion to surcharge exempt funds from the personal injury settlement.

***In re Villalobos*, 2011 WL 4485793 (B.A.P. 9th Cir. Aug. 19, 2011).**

The individual chapter 11 debtor in *Villalobos* owned 23 parcels of land and five luxury vehicles. He also owned and operated several businesses and claimed certain lawsuits against the California Public Employees Retirement System and the California Attorney General as assets on his schedules (the "California Litigation"). The debtor sought approval of ordinary course expenses (the "Budget") under Bankruptcy Code Sections 363(c)(1) and 1115. The Budget included monthly expenses of $55,419.00 for mortgages on the real property and monthly expenses of $72,633.00 for personal expenses: federal taxes, insurance, pool service, dry cleaning, medications, dental and medical, utilities, food, the five luxury automobiles, and tuition for grandchildren. The IRS objected to the Budget arguing that the debtor's personal expenses were not necessary to preserve the estate. The debtor responded by stating he "could not survive" without paying his personal living expenses.

At a hearing before the bankruptcy court, the debtor testified that he was in the process of selling several properties and three of the luxury cars. He also testified that he had committed to paying for the education of six grandchildren and had previously paid such tuition. In approving the Budget, the bankruptcy court did not make any finding as to the reasonableness of the Budget, but stated that the court was "not going to throw the [grandchildren] out of college" and "such expenses are ordinary expenses of this debtor."

On appeal, the Ninth Circuit Bankruptcy Appellate Panel found "scant authority regarding how individual chapter 11 debtors may pay expenses post-BAPCPA." The debtor asserted that the addition of Section 1115, making post-petition earnings property of the estate, forced him to either be allowed use estate property for personal living expenses or be forced out of chapter 11. The debtor further argued that Bankruptcy Code Section 1129(a)(15) provides the standard for

approving personal expenses, which takes into account a debtor's reasonable expenses in calculating disposable income. Because the Bankruptcy Code allowed for payment of personal expenses post-confirmation, the debtor argued that he should also be allowed to pay personal expenses pre-confirmation.

The IRS relied on *In re Walter*, 83 B.R. 14, 19 (B.A.P. 9th Cir. 1988), in arguing that personal expenses, "which benefit a debtor individually but not the estate, cannot be paid out of monies or assets of the estate." The Ninth Circuit BAP distinguished *In re Walter* because that case used the business justification test to approve non-ordinary course expense under 11 U.S.C. § 363(b), while the debtor in this case sought approval of the Budget as ordinary course expenses under 11 U.S.C. § 363(c).

The IRS further argued that even if the business justification test was not appropriate, ordinary course expenses must still be reasonable. Specifically, the IRS argued that maintenance of luxury vehicles and homes and tuition for grandchildren are not reasonable. The Ninth Circuit BAP did not decide the standard to be applied in determining whether personal living expenses may be paid with estate funds in an individual chapter 11 because the bankruptcy court did not articulate any standard in approving such expenses. The court did specifically hold that "a finding that the Debtor may have historically paid certain expenses is insufficient, without more, to support an appellate review regarding whether the bankruptcy court abused its discretion in approving the [Budget]." Thus, the court reversed and remanded the case "for the bankruptcy court to articulate the legal rule being applied and the explicit findings of fact that support the legal rule."

***In re Miell*, 2009 WL 2253256 (Bankr. N.D. Iowa July 27, 2009).**

In *Miell* an individual chapter 11 debtor sought approval of various attorneys' fees, asking the court to use Bankruptcy Code Section 105(a) to allow compensation under Section 330(a)(4)(B), which applies to chapter 12 and 13 cases only. The debtor sought compensation for his criminal defense attorneys, tax litigation attorneys, and bankruptcy attorney. The U.S. Trustee and certain creditors objected. A chapter 11 trustee had been appointed in the case.

The court found that, in the Eighth Circuit, attorneys' fees will be denied to the extent that the services benefited the debtor as opposed to the estate. *In re Kohl*, 95 F.3d 713, 714 (8th Cir. 1996). The court also relied on the general rule that criminal defense counsel for a debtor may not be compensated from estate funds. The court held that Section 105(a) could not be used bypass the express provisions of the Bankruptcy Code. Lastly, the court found that a debtor has an interest in unearned portions of prepetition retainers and such property belongs to the estate.

The court denied all requests for compensation for the debtor's attorneys. It stated that only counsel employed by the trustee under Section 327, with court approval, was entitled to compensation, and the court would limit such compensation to services that benefited the estate. The court refused to use Bankruptcy Code Section 105(a) to alter the compensation scheme of the Bankruptcy Code. It also ordered an accounting of the retainers for unearned portions as of the petition date, with such unearned portions to be turned over to the trustee. To the extent

funds re-vested in debtor following confirmation of his plan, the debtor could compensate his attorneys with such funds.

***In re Gray*, 2009 WL 2475017 (Bankr. N.D. W. Va. Aug. 11, 2009).**

In *Gray* a creditor objected to an individual chapter 11 debtor's plan on the grounds that she did not commit all of her disposable income to her plan. The debtor's plan provided for monthly plan payments of $4,500.00. The objecting creditor claimed that certain monthly expenses in the debtor's budget were unreasonable and unnecessary. Particularly, the objecting creditor opposed expenses to pay for the debtor's partner of twenty years, the care of fifteen dogs, and television and telecommunication expenses. The debtor's partner, who traditionally contributed to the household income, was temporarily out of work due to surgeries and arthritis during the debtor's bankruptcy case. Thus, the debtor was supporting her partner as well. The debtor also had two television services, two internet providers, and a $250.00 per month cell phone expense.

The court found Bankruptcy Code Section 1129(a)(15) required the plan payments to be "not less than the projected disposable income of the debtor." The court looked to Bankruptcy Code Sections 101(10A) and 1325(b)(2) for the calculation of disposable income. Section 1325(b)(2) specifically allows for a reduction in disposable income for "amounts reasonably necessary . . . for maintenance or support of the debtor or a dependent of the debtor."

The court first addressed whether the debtor's partner was a dependent or whether expenses for her partner's care could be excluded from the debtor's monthly expenses. Finding a wide spectrum of what other courts consider to be a dependent, the court agreed with *In re Gonzales*, 297 B.R. 143, 150-52 (Bankr. D.N.M. 2003), that the purpose of the term dependent is "to recognize and protect a genuine family unit, which may be broader than the traditional nuclear family." Because of the lengthy history of the debtor and her partner and the mutual financial support they provided each other over the years, the court held that the debtor's partner was a dependent. The court also held that the medical bills, household expenses, and fuel expenses for the debtor's partner were both "reasonable and necessary" because they did "not appear to be extravagant and [were] consistent with the long term living arrangement" between the partners.

As to the creditor's other objections to expenses, the court held that $750.00 per month to care for fifteen dogs was unnecessary because the dogs did not "provide a necessary service to the Debtor." The court found that the debtor's "feeling of moral responsibility" to care for the dogs was insufficient to allow such an expense. The court also found two television services and internet providers were unreasonable and unnecessary. Additionally, the debtor's monthly cell phone expense of $250.00 was found to be unreasonable. The court limited the debtor's television and internet services to one and reduced the monthly cell phone expense to $100.00.

The court concluded that the debtor's monthly disposable income should be $4,867.30, as opposed to $4,500.00. Because the debtor did not meet 11 U.S.C. § 1129(a)(15)'s disposable income requirement, the court sustained the creditor's objection to the debtor's plan.

***In re Goldstein*, 383 B.R. 496 (Bankr. C.D. Cal. 2007).**

In *Goldstein* a husband and wife filed a joint petition for relief under chapter 11 and, on the same day, filed motions under Bankruptcy Code Section 327(e) for each to retain special counsel for their divorce proceedings. Each debtor had retained divorce counsel prior to filing for bankruptcy.

The court began by analyzing the effect of Section 1115(a), explaining that, pursuant to Section 1115, individual chapter 11 debtors "are no longer permitted to use their post-petition income to pay [personal expenses such as] divorce counsel unless such an expense is authorized for property of the bankruptcy estate." The court reasoned that Section 363(c) likely allows an individual chapter 11 debtor to pay expenses in the ordinary course of business, such as expenses for food and transportation, from estate property. However, the court noted that payment of divorce counsel is not typical and not in the ordinary course of business.

The court next analyzed whether the joint bankruptcy petition created one estate or two estates. Finding support in the Bankruptcy Code for both views, the court reasoned that where the interests of joint debtors are at odds, "the estates should be treated as separate for each spouse."

In treating the debtors' estates separately, the court found that the employment of special counsel for each debtor was in the best interest of the estates, explaining that the marital dissolution directly impacted the resolution of the bankruptcy.

B. Pre-BAPCPA Cases

***In re Polishuk*, 258 B.R. 238 (Bankr. N.D. Okla. 2001).**

In *Polishuk* an individual chapter 11 debtor filed for bankruptcy protection on the eve of the trial in his divorce case. The debtor's bankruptcy case was subsequently converted to a chapter 13 case and then to a chapter 7. During the pendency of the chapter 11 case, the debtor's reported net income was too low to service his debts. The debtor's chapter 13 plans were facially unconfirmable because, among other things, they provided for increasing monthly payments from unspecified sources. After the case was converted to a chapter 7 case, the debtor's bankruptcy counsel sought compensation for services rendered during the chapter 11 and chapter 13 cases, and the debtor's divorce counsel sought compensation for services provided in the divorce case.

The court initially found that the debtor never had "a sincere desire to reorganize" and that his actions in his bankruptcy case indicated his intent was to simply postpone and later overturn the state court's divorce decree. The chapter 7 trustee and the debtor's ex-wife objected to the compensation of the debtor's attorneys on the basis that the debtor's attorneys provided no benefit to the bankruptcy estate.

The court held that the debtor's bankruptcy counsel did not provide a benefit to the estate because the financial reports in the chapter 11 case, and the debtor's failure to make plan payments in the chapter 13 case, indicated that counsel was aware that a the debtor's plans were

not confirmable. The court did award compensation to divorce counsel to the extent that his efforts resulted in a division of the marital property, impacting the composition of the bankruptcy estate. However, the court denied compensation for services provided by divorce counsel relating to an appeal of the divorce decree and issues on child custody.

***In re Murray*, 216 B.R. 712 (Bankr. W.D.N.Y. 1998).**

In *Murray* an individual chapter 11 debtor sought approval to employ counsel for a family law matter. The issue before the court was whether the debtor was permitted to use property of the estate to pay for this personal expense.

Relying on *In re Keenan*, 195 B.R. 236 (Bankr. W.D.N.Y. 1996), and *In re Bradley*, 185 B.R. 7 (W.D.N.Y. 1995) (both summarized below), the court held that the debtor was "as free to spend estate monies on his matrimonial problems as he is free to spend them on his ordinary business expenses and on normal living expenses." The court stated that it was unnecessary to seek court approval, but the debtor risked creditors moving to convert his case or to appoint a trustee based on such expenditures.

The court refused to approve the debtor's family law counsel under Section 327 because it would give administrative status to such attorneys' fees.

***Roland v. UNUM Life Ins. Co. of Am.*, 223 B.R. 499 (E.D. Va. 1998).**

Individual chapter 11 debtors sought approval from the bankruptcy court to use advances of post-petition earnings to pay for criminal defense counsel in an FBI investigation. The bankruptcy court denied the debtors' application because "the post-petition earnings were the sole source of funding for the joint plan." Additionally, the bankruptcy court found that because there was only an investigation and no indictment, "[a]ny benefit to the estate was purely theoretical."

The debtors appealed the bankruptcy court's decision, and the district court identified the primary issue as whether a bankruptcy court could prevent an individual chapter 11 debtor from using non-estate funds to pay for criminal defense counsel. The district court agreed with the bankruptcy court that the debtors' post-petition wages were not property of the estate under Bankruptcy Code Section 546(a)(6). Thus, the advances that the debtors sought to use were also not property of the estate.

The district court relied on *In re Andrews* in finding that bankruptcy courts have no jurisdiction over non-estate funds. 80 F.3d 906, 909 (4th Cir. 1996). Additionally, the court found that the possibility of criminal proceedings was "simply too attenuated to the bankruptcy proceeding to create jurisdiction over the matter for the bankruptcy court." As to the factor that post-petition earnings were the only source of funding for the debtors' plan, the court found that the Bankruptcy Code did not require an individual chapter 11 debtor to pay creditors with future earnings. *Toibb v. Radloff*, 501 U.S. 157, 166 (1991). The court reasoned that because a bankruptcy court could not compel an individual chapter 11 debtor to use non-estate funds to pay creditors (pre-BAPCPA), it also could not prevent the use of those funds for other purposes.

The district court then addressed whether the debtors' fiduciary duties to creditors provided the bankruptcy court with jurisdiction. The court reasoned that because the post-petition earnings were not property of the estate, they were analogous to an appointed trustee's personal property, for which the trustee does not have to seek approval from the bankruptcy court to use. Essentially, "the scope of the debtor-in-possession's fiduciary obligation is determined by the property constituting the estate. Irrefutably, the debtor-in-possession owes no obligation to the estate for non-estate property." *In re Molina Y Vedia*, 150 B.R. 393, 400 (Bankr. S.D. Tex. 1992).

The district court concluded that the debtors did not need bankruptcy court approval to use their post-petition funds to pay criminal defense counsel. Notwithstanding this holding, the court noted that creditors could still seek to have their debts declared non-dischargeable, a trustee appointed, or the case converted or dismissed. Use of non-estate funds could affect good faith determinations under the Bankruptcy Code. The district court reversed and remanded the case to the bankruptcy court.

***In re Weber*, 209 B.R. 793 (Bankr. D. Mass. 1997).**

The U.S. Trustee (UST) objected to an individual chapter 11 debtor's plan because it was not proposed in good faith pursuant to Bankruptcy Code Section 1129(a)(3). The debtor, a physician, proposed to pay unsecured creditors, who were owed approximately $2.5 million, only $125,000, about five percent of their claims. The debtor's projected monthly expenses totaled more than $11,000, including more than $1,000 for family expenses, entertainment, and recreation. The debtor had no dependents other than his wife. The court detailed the debtor's seven vacations taken during the approximately 18 months of the chapter 11 case, totaling more than $15,000 in expenses. The debtor also proposed to maintain his country club membership and to continue paying the mortgages on his home in a wealthy suburb of Boston and his vacation home in Cape Cod. Notably, all of the unsecured creditors accepted the debtor's plan.

In determining whether an individual chapter 11 debtor's use of future income to pay creditors is a factor in determining good faith, the court found that all decisions addressing good faith considered "a debtor's ability to pay" as a factor. The debtor argued that he did not owe a duty to creditors with regard to future income because it was not property of the estate under Bankruptcy Code Section 541(a)(6). The court found that even if the debtor's post-petition earnings were not property of the estate, he still had to make a good faith effort to pay creditors for his plan to be considered proposed in good faith. Thus, the court considered the debtor's future earnings in determining the good faith issue and concluded that chapter 13's disposable income test provided a "guideline" as to whether the debtor "committed sufficient available resources to a plan."

The court found that the debtor could "more than double the . . . proposed payments to creditors" by, among other things, selling one of his homes and traveling less. In other words, the debtor could not use chapter 11 to continue his "extravagant lifestyle" while only paying creditors five percent of their claims. The court held that the debtor's plan did not meet Section 1129(a)(3)'s good faith requirement. Nonetheless, the court found that the dismissing or converting the case

would not be in the best interest of the creditors. Thus, the court allowed the debtor to amend his plan in accordance with the court's opinion.

***In re Keenan*, 195 B.R. 236 (Bankr. W.D.N.Y. 1996).**

In *Keenan* an unsecured creditor asked the court to limit the individual chapter 11 debtors' use of insurance proceeds. The debtors-in-possession were about to receive $100,000.00 in insurance proceeds for a pre-petition car accident. The parties agreed to certain amounts of the first $25,000.00 being allocated to the debtors' business expenses and personal expenses. The court was asked to decide the allocation for the remainder of the insurance proceeds.

Though the court recognized that other courts across the country recognized a variety of treatments for an individual chapter 11 debtor's post-petition income, the court did not understand why such decisions had to be made at all. The court reasoned that Congress had set parameters in the Bankruptcy Code for debtors and interested parties to negotiate allocation of such funds. The court reasoned that bankruptcy courts are better at answering "'yes' or 'no' questions" within those parameters, such as whether a trustee should be appointed or a case converted, as opposed to "micromanaging the estate."

The court concluded that it was not required to, and would refuse to, answer the creditor's question as to how the insurance proceeds should be allocated. The court stated that the moving creditor or other parties could negotiate an acceptable allocation of the proceeds with the debtors or such parties could act in accordance with the Bankruptcy Code, by seeking the appointment of a trustee, moving to convert or dismiss the case, or moving for stay relief. The court did put a 20-day hold on the use of the insurance proceeds to allow for negotiations or motions from interested parties. Otherwise, the debtors were free to use the insurance proceeds in the ordinary course of their affairs.

***In re Bradley*, 185 B.R. 7 (Bankr. W.D.N.Y. 1995).**

In *Bradley* an individual chapter 11 debtor's wife sought a divorce and asked the bankruptcy court for an administrative expense of $1 million, the estimated support payment to be ordered in the divorce.

The court first relied on its prior order denying certain creditors' motion to have the court limit the debtor's allowance for personal expenses. In that order the court stated that the debtor's "personal expenses and his obligations for incidents of his personal life are every bit as much a part of the ordinary course of his business and financial affairs as are expenses incident to the operation of the various shopping malls, nursing homes, and office buildings that he owned." However, the court explained that its prior ruling, holding that the debtor could use estate property for personal expenses, "did not mean that every person to whom he became obligated had a right to look to property of the estate for payment," particularly payment as an administrative expense.

The court concluded that the debtor's wife should not have any advantages or disadvantages that she would not have had the debtor not filed for bankruptcy. Thus, the court held that her claim

was not entitled to an administrative expense status ahead of her husband's other unsecured creditors.

***In re Warner*, 141 B.R. 762 (Bankr. M.D. Fla. 1992).**

The United States appealed a bankruptcy court's order allowing attorneys' fees for an individual chapter 11 debtor's criminal defense counsel and criminal defense local counsel. The debtor was convicted of crimes involving securities fraud and ordered to pay restitution of $22 million plus costs of prosecution. The bankruptcy court approved the debtor's retention of criminal defense counsel and local counsel to appeal the conviction. The bankruptcy court later approved the requests for compensation, except for approximately $5,000 that the court found to be overhead costs of the criminal defense counsel.

The district court noted that the standard of review for an award of attorneys' fees in bankruptcy was an abuse of discretion standard. The district court then addressed "whether the bankruptcy court abused its discretion in awarding any attorneys' fees for the criminal appeal from the bankruptcy estate." The United States argued that special counsel must benefit the estate, not simply the debtor, and that employing counsel to appeal a criminal conviction did not meet this requirement.

The district court concluded that special counsel could be appointed under Bankruptcy Code Sections 327(a) and (e) if counsel "either assists the debtor in possession in carrying out his duties under [c]hapter 11 or is in the best interest of the estate." *Official Comm. of Disputed Litig. Creditors v. McDonald Inv., Inc.*, 42 B.R. 981 (N.D. Tex. 1984) (citing *In re Tashof*, 33 B.R. 225 (Bankr. D. Md. 1983). The district court held that employing special counsel in this case was in the best interest of the estate because it sought to keep the debtor out of jail, which was necessary for him to manage the estate, and to overturn a multimillion-dollar judgment, which was a liability of the estate. Thus, the bankruptcy court did not abuse its discretion in awarding attorneys' fees for the debtor's criminal defense counsel.

***In re Wood*, 68 B.R. 613 (Bankr. D. Haw. 1986).**

The United States moved to convert or dismiss the case of individual chapter 11 debtors because, among other things, the debtors did not obtain court approval before using post-petition income to pay attorneys' fees, pet expenses, and travel expenses. Additionally, the debtors had repeatedly failed to follow court orders and to properly report the financial information of the estate. The debtors also sought to extend the time to file a plan on multiple occasions, and when they finally filed a plan, they did not file a disclosure statement. Notably, the proposed plan provided for certain payments to creditors to come from unspecified sources at unspecified times in the future, depending on the debtor's pending litigation against certain creditors. The motion to convert or dismiss was filed more than three years following the petition date.

Considering the foregoing, the court concluded that the debtors' delay was "unreasonable and prejudicial to creditors." The court also held that the unapproved expenditures for attorneys, pets, and travel were for the debtors' benefit, not the estate's benefit. The court further stated that the "Debtors live an affluent life while the creditors wait, wait, and wait." Such

expenditures without paying creditors "signify gross mismanagement of debtor's affairs." The court granted the motion to convert the case to a chapter 7.

***In re Rodriguez*, 41 B.R. 774 (Bankr. S.D. Fla. 1984).**

In *Rodriguez* an individual chapter 11 debtor was in the country on a visa that did not permit him to obtain employment. The court approved the debtor's retention of criminal defense counsel to be paid from the estate. The court found that the debtor had averaged $6,728 per month on "direct living expenses" for alimony and child support, management of his businesses, and care for his son. During his chapter 11 case, the debtor had also spent $46,442 on "indirect business expenses," which the court found reasonable and within the ordinary course of the debtor's business.

A creditor sought an accounting and injunctive relief to prevent the debtor from using his capital assets, and investment income from those assets, to pay personal living expenses. The court and the parties agreed that the Bankruptcy Code and case law did not provide instruction on the issue. The court first recognized that Bankruptcy Code Section 1107(a) provided the debtor with the same powers as a trustee and that Section 363(c)(1) allowed the debtor to use property of the estate within the ordinary course of the debtor's business.

Second, the court reasoned that because the debtor could not seek employment under his visa, and a criminal investigation would likely prevent meaningful employment even if the debtor sought it, the court's only options were to allow the debtor to use his capital assets and income from those assets for personal expenses or dismiss the debtor's chapter 11 case. No party had sought dismissal of the case, and the movant had actually agreed that it was best for all interested parties for the chapter 11 case to continue in order to liquidate the debtor's assets.

Limiting its holding to these particular facts, the court held that the debtor could use his capital assets and income from those assets for personal living expenses. The court allowed the debtor $7,000 per month for such living expenses, finding that such figure was in accord with the debtor's current spending on living expenses, which was not unreasonable.

***In re Vincent*, 4 B.R. 21 (Bankr. M.D. Tenn. 1979).**

In *Vincent* an individual chapter 11 debtor moved the court to pay personal living expenses from the estate. Similarly, the debtor's ex-wife moved for payment of alimony and child support from the estate. Evidence presented to the court showed that the debtor's personal living expenses included expenses for a child to be born within the year, $316 per month on rent, $180 per month on health insurance, $30 per month on water, $95 per month on electricity, $400 per month on telephone expenses, and various other monthly bills for gasoline, credit cards, and disability insurance. The debtor suffered a heart attack during the pendency of his chapter 11 case and was not employed. A trustee had been appointed to operate the debtor's business. Prior to the chapter 11 case, a state court appointed a receiver for the debtor's business and provided for a monthly allowance to the debtor, which was subsequently rescinded due to the debtor's failure to follow court orders and cooperate with the receiver.

The court found that the debtor's property as of the petition date was property of the estate under Section 541. The court explained that the debtor's earnings and property acquired after the petition date, assuming such earnings and property did not derive from property of the estate, belonged to the debtor and were not subject to the bankruptcy court's control.

After considering the foregoing, the court held that "no authority vests in this court to provide for the necessary expenses of the debtor" from the estate. The debtor must pay for living expenses from employment obtained post-petition, whether from the trustee or elsewhere. The court then compared the case to a chapter 7 case, explaining that "[c]ertainly in the event of a straight bankruptcy . . . the estate has no obligation to pay necessary living expenses." Though the debtor's heart attack complicated this case, that fact did not provide an exception to the rule.

Likewise, the court held that the debtor's estate had no duty to pay the debtor's ex-wife for future support, as those payments were under the jurisdiction of the state court. Thus, the court denied the debtor's motion and the motion of his ex-wife because there was "no provision in the Code for such payments from the debtor's [c]hapter 11 estate."

The Absolute Priority Rule in Individual Chapter 11 Cases

Ward Stone, Jr.
David L. Bury, Jr.
Stone & Baxter, LLP
Macon, Georgia
www.stoneandbaxter.com

Updated to Include:

Exhibit A – Summary of Cases
Exhibit B – Other Arguments

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Amelia Island, Florida
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I. Overview of the Absolute Priority Rule

The "absolute priority rule" (the "APR") is relevant in Chapter 11 cases where the debtor attempts to "cram down" a Chapter 11 plan over the objection of dissenting unsecured creditors. If the debtor satisfies all of the other confirmation requirements, then a debtor may cram down by satisfying two additional requirements: (1) the plan must not discriminate unfairly against the objecting class of creditors and (2) the plan must be "fair and equitable." 11 U.S.C. § 1129(b)(1). To be fair and equitable, a plan must satisfy the APR as codified in § 1129(b)(2)(B)(ii):

> With respect to a class of unsecured claims—the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, **except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.**

11 U.S.C. § 1129(b)(2)(B)(ii) (bolded language added with 2005 BAPCPA).[1]

Simply put, the APR requires that a dissenting class of unsecured creditors be provided for in full before any junior class can receive or retain any property under a plan. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988). Recent developments focus on the impact of the 2005 amendments on the APR in Chapter 11 cases where the debtor is an

[1] Dating back to the 19th century, the rule arose from the efforts of early courts to interpret the "undefined requirement of the early bankruptcy statute that reorganization plans be 'fair and equitable.'" *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988). The purpose of the rule was to "prevent deals between senior creditors and equity holders that would impose unfair terms on unsecured creditors." *See Friedman v. P + P, LLC*, 466 B.R. 471, 478 (9th Cir. B.A.P. 2012) (internal citations omitted). *See also In re Arnold*, 471 B.R. 578, 590-94 (Bankr. C.D. Cal. 2012) (extensive, treatise-worthy discussion of individual cases, confirmation, cramdown, and the history, purpose, and function of the absolute priority rule in bankruptcy).

individual. Specifically, they focus on the impact of (1) the above bolded language and (2) § 1115, added to the Bankruptcy Code in 2005 and referenced in § 1129(b)(2)(B)(ii). Section 1115 provides that property of the estate in an individual Chapter 11 includes, in addition to the property specified in § 541:

> (1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and
>
> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

11 U.S.C. § 1115(a).

As a result of the language in § 1129(b)(2)(B)(ii) and § 1115, there is a national split on whether the APR still applies in individual Chapter 11 cases. There are two views: the "broad view" and the "narrow view." This paper collects the cases and discusses both views, from the May 2007 *In re Tegeder* case to the May 2014 *Ice House/Cardin* case from the Sixth Circuit.

II. Competing Views on Whether Absolute Priority Rule Applies in Individual Cases

As of the date of this article, the Supreme Court has not weighed-in on whether the APR still applies in individual Chapter 11 cases. Therefore, the decisions on this issue are limited to a handful of Circuit Court decisions (the 4th, 5th, 6th, and 10th Circuits), a Bankruptcy Appellate Panel (BAP) decision (9th Circuit B.A.P.), and a host of lower court decisions. Courts adopting the broad view read § 1115 expansively, concluding that the APR does not apply in individual Chapter 11 cases. Courts adopting the narrow view read § 1115 restrictively, concluding that the APR *does* apply in individual Chapter 11 cases. Although "broad" and "narrow" indicate the result, the approaches vary, even within the two views.

A. Broad View

With respect to the statutory language, the broad view reads the word "includes" [in the newly-added § 1115(a)] and the word "included" [in the phrase, "property of the estate included under section 1115" in the amended § 1129(b)(2)(B)(ii)] together. Reading "included" broadly, the broad view concludes that pre- *and* post-petition income and property are "included" in the estate by virtue of § 1115. Therefore, all such property is excepted from the APR, such that the APR does not apply in individual Chapter 11 cases. The broad view courts bolster their statutory analysis with a variety of different arguments that draw from the legislative history, their interpretation of Congress' intent with respect to BAPCPA, the interpretations of other courts that have reviewed the issue, and policy considerations. If there is an almost universal theme in the narrow view cases, then it is that Congress intended to make Chapter 11 more like Chapter 13 (which has no APR). In any event, the different arguments are summarized in the attached chart, case by case. The following is our attempt to catalog and classify those arguments.

1. The statutory language is ambiguous/unambiguous.

Most of the broad view cases begin the discussion by analyzing the post-BAPCPA statutory language of the absolute priority rule. There are two camps within the broad view cases: the "ambiguous camp" and the "unambiguous camp." Occasionally, there is not an explicit finding either way or the finding is unclear because the case cites approvingly two broad view cases that found differently on the ambiguity issue. However, unlike the narrow view cases, which are all over the place (but evolving to the ambiguous camp), the broad view cases are squarely in the unambiguous camp, including *Tegeder*, *Shat*, *SPCP*, and the Ninth Circuit B.A.P. in *Friedman*. *Rodemeier* and the 2013 case of *O'Neal*, in particular, are in the ambiguous camp.

The cases speak for themselves with respect to why the courts interpreted the statutory language one way or the other. More important, then, is the guidance provided by the courts (on both sides) on the prescribed rules of statutory interpretation. Arguably, *Shat* states them best:

> In this court's view, the starting point is the presumption that Congress intended the accepted and plain meaning of the words it used. As the Supreme Court has said: "The starting point in discerning congressional intent . . . is the existing statutory text . . . and not the predecessor statutes. It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." [quoting *Lamie v. United States Trustee,* 540 U.S. 526, 534 (2004)] . . . In determining the appropriate sense of the words Congress chose, it is appropriate to investigate the context in which English and the Bankruptcy Code employs the same or similar words . . . Put another way, the meaning of statutory language is best revealed by examining not only the general usage in English of the chosen words, but also through a coordinate review of any specialized use of those terms in the code in which they are found . . . In conjunction with this general examination, as indicated above, a court should also examine, in the case of an integrated and cohesive statute such as the Bankruptcy Code, how that code uses or employs the words or phrase in dispute. "[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme . . . Our goal in interpreting a statute is to understand the statute 'as a symmetrical and coherent regulatory scheme' and to 'fit, if possible, all parts into a . . . harmonious whole."

In re Shat, 424 B.R. 854, 864-65 (Bankr. D. Nev. 2010) (internal citations/quotations omitted for ease of reading; relies on and cites Supreme Court authority, primarily).

2. **Reliance on early treatise coverage regarding absolute priority rule.**

In re Tegeder, a broad view, is cited as the first post-BAPCPA case to address the APR issue. Reading the BAPCPA amendments/additions broadly, the *Tegeder* court concluded that the APR no longer applies in individual Chapter 11 cases. However, it did not find any reported cases. Therefore, it looked to treatise coverage for guidance and support of its conclusion. Some of the commentators at that moment supported what would become known as the broad view:

> The absolute priority requirements imposed by Code 1129(b)(2)(B)(ii) were waived by permitting a debtor to retain property included in the estate under 1115. Although 1115 was added by the 2005 Amendments to include post-petition

> property and earnings, it also incorporates property of the estate under 541, and accordingly it is assumed that the debtor shall be entitled to retain property under 541 as well. A more narrow interpretation would cause this amendment to have little effect. Hon. William L. Norton, Jr., 4 *Norton Bankruptcy Law & Practice 2d* § 84A:1 (database updated March 2007, available on Westlaw); *see also* Hon. W. Homer Drake, Jr., *Bankruptcy Practice for the General Practitioner* § 12:27 n. 28 (database updated September 2006, available on Westlaw) (stating that for cases filed after October 17, 2005, § 1129(b)(2)(B)(ii) provides "that, if the debtor is an individual, the debtor may retain property of the estate . . . without violating the absolute priority rule, provided the debtor has satisfied any amounts owed under a 'domestic support obligation'"); Rosemary E. Williams, 3 *Bankruptcy Practice Handbook* § 14:152 n. 1 (2d ed., database updated June 2006, available on Westlaw) (stating that the amendment to 1129(a)(15) "seems to remove individual debtors from compliance with the absolute priority rule . . .").

In re Tegeder, 369 B.R. 477, 480 (Bankr. D. Neb. 2007).[2]

3. Congress intended to make Chapter 11 more like Chapter 13 for individuals.

Ultimately, the broad view boils down to the conclusion that, with BAPCPA, Congress intended to make Chapter 11 more like Chapter 13 for individual debtors. Therefore, because Chapter 13 does not have an absolute priority rule, and Congress intended to make Chapter 11 and Chapter 13 similar for individuals, Congress intended to repeal the APR in individual cases. At least 7 out of the 9 broad view cases make or adopt that argument: *Rodemeier*; *Johnson*; *Shat*; *Friedman*; *Tucker*; *O'Neal*; and *Woodward*. See chart for citations.

Although a detailed discussion of the "Chapter 11 to Chapter 13" changes is beyond the scope of this article, it is useful to point to the BAPCPA changes (besides the changes made to the APR itself in § 1129(b)(2)(B)(ii)) that the broad view courts look to, as well as the Chapter 13 provisions that appear to have inspired the BAPCPA changes:

- **§1115:** Similar to §1306, estate property now includes post-petition property/income.
- **§1123(a)(8):** Similar to §1322(a)(1), post-petition earnings/income must be paid to creditors to the extent necessary for the execution of the plan.

[2] As of the date of this article, each of the above-cited treatises has been revised on the APR issue. Rather than choosing one side or the other, they, for the most part, merely collect the cases and recognize the split of authority.

- **§1127(e):** Similar to §1329(a), substantial consummation of the individual debtor's plan is no longer a bar to modification of a confirmed plan.

- **§1141(d)(5):** Similar to §§1328(a)/(b), individuals have their discharges delayed, with certain hardship exceptions, pending completion of plan payments.

- **§1129(a)(15):** Similar to §1325(b), individual Chapter 11 debtors are now subject to the 5 year disposable income test when an unsecured creditor objects to confirmation.

For broad view cases outlining the changes that broad view courts claim made Chapter 11 more like Chapter 13, *see In re Rodemeier*, 374 B.R. 264, 275-76 (Bankr. D. Kan. 2007); *In re Johnson*, 402 B.R. 851, 852-53 (Bankr. N.D. Ind. 2009) (citing changes); *In re Shat*, 424 B.R. 854, 862 (Bankr. D. Nev. 2010);[3] *In re Friedman*, 466 B.R. 471, 482-83 (9th Cir. B.A.P. 2012).

Readers should consult the language of these cases—some of the discussions are quite extensive—but the gist of the broad view is that if one looks at the BAPCPA changes in light of the entire Bankruptcy Code, holistically, then one will realize that Congress was attempting to make Chapter 11 more like Chapter 13, including with respect to the APR. For example, in *In re Shat*, 424 B.R. at 868, the court explained that, pursuant to a Ninth Circuit requirement:

> [T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme . . . Our goal in interpreting a statute is to understand the statute 'as a symmetrical and coherent regulatory scheme' and to 'fit, if possible, all parts into a . . . harmonious whole.'" [internal cites omitted]

Further, the broad view courts submit that the BAPCPA changes are consistent with Congress' intent to curb abuse and make reorganization harder (not easier) for individual debtors. Specifically, they point to the provisions that do just that: the new disposable income requirement; the best interests of creditors test; and the delayed discharge provisions. For example, in *In re Friedman*, 466 B.R. at 481-82, the Ninth Circuit B.A.P. explained that:

[3] *Shat* at *Id*. cites to "5 Keith M. Lundin, Chapter 13 Bankruptcy § 368.1 at pp. 368–1 to 368–5 (3d ed. 2000 & Supp. 2006)" as a source "correlating new chapter 11 provisions with corresponding chapter 13 provisions."

> We find no anomalies, inconsistencies or conflicts created by this interpretation. More importantly, we find significant contextual concordance with the other requirements for plan confirmation, including those previously described, including but not limited to (1) the new requirement for dedication of all of debtor's disposable income for five years, (2) the straight-forward best interest of creditors test, and (3) the delay of issuance of discharge until the plan has been fully consummated. Including the § 541 property within the universe of property contained in § 1115, as we believe a plain-meaning interpretation requires, does no violence to the logical impact of the reorganization process or scheme established in chapter 11. Indeed, especially combined with the new additional requirement of five years of debtor's disposable income, it is illogical to thereafter remove the debtor's means of production of debtor's disposable income by maintaining the absolute priority rule in an individual's case.

4. Absolute priority rule is not sacrosanct; has been amended before.

One of the criticisms raised by the narrow view courts is that the APR has been a mainstay of bankruptcy practice for more than 100 years (see discussion below). The court in *Shat* acknowledged that such counterargument is "powerful." *In re Shat*, 424 B.R. at 867. However, the court counters back: "While 'the absolute priority rule has long been a feature of American bankruptcy law,' *Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 244 (5th Cir. 2009), it is not sacrosanct. Chapter 13 has no absolute priority rule, and as noted above, most of the changes effected by BAPCPA to individual chapter 11 debtors were part of an overall design of adapting various chapter 13 provisions to fit in chapter 11." *Id*. at 867-68. As for the APR not being "sacrosanct":

> Before 1952, individual debtors under chapter XI of the Bankruptcy Act had to propose plans that were "fair and equitable." H.R. Rep No. 82–2320, at 21 (1952). Congress deleted the "fair and equitable" requirement from chapter XI in 1952. Act of July 7, 1952, Pub.L. No. 82–456, § 35, 66 Stat. 420, 433 (1952). As the accompanying House Report stated, "the fair and equitable rule ... cannot be realistically applied in a Chapter XI [action].... Were it so applied, ... no corporate debtor where the stock ownership is substantially identical with management could effectuate an arrangement except by payment of the claims of all creditors in full." H.R.Rep. No. 82–2320; *see also* S. Rep. NO. 82–1395, at 11–12 (1952).

In re Shat, 424 B.R. at 867 n.45. Interestingly, the narrow view courts turn that argument on the broad view courts, arguing that such changes are evidence that when Congress wants to do something significant, it does so clearly, if not explicitly (see "repeal by implication" below).

5. Broad view does not render the BAPCPA changes trivial or purposeless.

Another criticism from the narrow view cases is that the broad view renders the BAPCPA changes trivial or purposeless. The threshold response from the broad view cases is embodied in the "Chapter 11 to Chapter 13" argument discussed above. In other words, the combined purpose of the BAPCPA is to make Chapter 11 more like Chapter 13 for individual debtors. Additionally, *Shat*, *O'Neal*, and *Woodward* counter that criticism head-on. *See In re Shat*, 424 B.R. at 868 ("The broader view also saves Section 1129(b)(2)(B)(ii) from an almost trivial reading; if the narrow view is taken, the section protects only the value of aggregate postpetition earnings payable after the fifth anniversary of plan confirmation."). Indeed, the broad view courts accuse the *narrow* view of rendering the BAPCPA changes trivial:

> The weakness of the narrow view is illustrated if one were to ask the question: "If Congress was not attempting to write out of individual Chapter 11 cases the absolute priority rule, what was the purpose of all of the BAPCPA amendments to Chapter 11, including section 1115, which were obviously borrowed from Chapter 13?" Chapter 13 has no absolute priority rule and would not be of much use if it did. The means test for Chapter 7 debtors created by BAPCPA was designed to move debtors who could pay something to their creditors to reorganization chapters. Here, these Debtors have no recourse to either Chapter 13 or Chapter 12 because of the debt limits imposed by Congress.

In re O'Neal, 490 B.R. 837, 850-51 (Bankr. W.D. Ark. 2013). *See also In re Woodward*, No. 11-40936, 2014 WL 1682847, *4 (Bankr. D. Neb. Apr. 29, 2014) (quoting same).

B. Narrow View

With respect to the statutory language, the narrow view, like the broad view, reads the word "includes" [in the newly-added § 1115(a)] and the word "included" [in the phrase, "property of the estate included under section 1115" in the amended § 1129(b)(2)(B)(ii)]

together. However, it reads "includes" narrowly, concluding that post-petition income and property are the only types of property "included" in the estate *by virtue* of § 1115. Therefore, the APR applies in individual Chapter 11 cases, such that the APR continues to apply to pre-petition assets in individual cases (while post-petition property is excepted from the APR). The narrow view courts bolster their statutory analysis with a variety of different arguments that draw from the legislative history, their interpretation of Congress' intent with respect to BAPCPA, the interpretations of other courts that have reviewed the issue, and policy considerations. If there is an almost universal theme in the narrow view cases, then it is the theme that if Congress had wanted to repeal the APR—a "mainstay" of bankruptcy practice for 100+ years, then it would have done so explicitly and in a far less convoluted fashion. The different arguments are summarized in the attached chart, case by case, chronologically, along with the broad view cases. The following is a summary of the different arguments made by the narrow view courts.

1. The statutory language is ambiguous/unambiguous.

Like the broad view cases, most of the narrow view cases begin the discussion by analyzing the post-BAPCPA statutory language of the absolute priority rule. For the most part, the narrow and broad view cases also appear to agree on the rules of statutory construction, even if they differ in their application. As with the broad view cases, there are two camps within the narrow view cases: the "ambiguous camp" and the "unambiguous camp." And as with the broad view cases, occasionally there is not an explicit finding either way or the finding is unclear because the cases cite approvingly two narrow view cases that found differently on the ambiguity issue. Unlike the broad view cases, which are in the unambiguous camp for the most part, the narrow view cases are all over the place. The trend appears to be in the "ambiguous" direction.

2. Grammatical analysis of BAPCPA changes supports narrow view.

The broad and narrow view cases differ in how they interpret (i) the word "includes" in § 1115(a) and (ii) the word "included" in the phrase, "property of the estate included under section 1115" in the APR exception in § 1129(b)(2)(B)(ii). Four of the narrow view cases engage in some form of grammatical analysis of those words to determine what bankruptcy estate property an individual Chapter 11 debtor may retain. The *Arnold* case leads the pack in that regard. Specifically, the court in *Arnold* conducted a 2,500+ word, 5+ page grammatical analysis of the subject language. *In re Arnold*, 471 B.R. 578, 599-604 (Bankr. C.D. Cal. 2012). Drawing extensively from Laurie Rozakis' *English Grammar for the Utterly Confused* (2003), court starts out defining the elements of a sentence and then moves-into a grammatical discussion that is far beyond the scope of this article (e.g. transitive v. intransitive verbs, adjectival v. adverbial phrases, etc.). Ultimately, the *Arnold* court concludes that its grammatical analysis supports the narrow view such that "§ 1115 does not subsume or supplant § 541," and, thus, only post-petition income and property are exempt from the APR after BAPCPA. *Id*. at 604 (citing *Kamell*, 451 B.R. at 512, *Lindsey*, 453 B.R. at 904; *Karlovich*, 456 B.R. at 681; *Gbadebo*, 431 B.R. at 230, and *Friedman*, 466 B.R. at 492 (Jury, J., dissenting)). *See also In re Lee Min Ho Chen*, 482 B.R. 473, 482-83 (Bankr. D.P.R. 2012) (discussing and adopting *Arnold* and its grammatical analysis); *In re Martin*, 497 B.R. 349, 356-57 (Bankr. M.D. Fla. 2013) (cites to *Arnold* and conducts an abbreviated grammatical analysis); *Ice House Am., LLC v. Cardin*, 751 F.3d 734, 738-39 (6th Cir. 2014) (using its own grammatical analysis as support for the narrow view).

3. Rejection of the "Chapter 11 to Chapter 13" argument.

As described above, the critical assumption in the broad view cases is that with BAPCPA Congress intended to make Chapter 11 resemble Chapter 13 for individual debtors. Therefore,

the argument goes, because the APR is not applicable in a Chapter 13, Congress intended to repeal the APR in individual Chapter 11 cases. The narrow view cases address that assumption and, to varying degrees reject it, as follows. First, some reject the assumption outright, concluding that Congress did not intend to make Chapter 11 more like Chapter 13 for individual debtors.[4] Second, others conclude that had Congress intended to make Chapter 11 more like Chapter 13 for individual debtors, then it could have increased or eliminated the Chapter 13 debt thresholds.[5] Third, others acknowledge that certain of the changes make Chapter 11 more like Chapter 13 for individual debtors, but conclude that such conforming changes do not provide sufficient evidence of Congress' intent to repeal the APR in individual cases.[6] Fourth, regardless of the view, many of the narrow cases emphasize that BAPCPA, as a whole, was designed to impose *greater* burdens on individual debtors (not less burdens),[7] to ensure a greater payout to creditors (not a lesser payout),[8] and to curb bankruptcy abuses (not incentivize them).[9] In short, BAPCPA was not designed to enhance a debtor's fresh start.[10] Fifth, most conclude that regardless of whether Congress intended to make Chapter 11 more like Chapter 13, generally, if

[4] *In re Gelin*, 437 B.R. 435 (Bankr. M.D. Fl. Sep. 29, 2010); *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. May 17, 2012); and *In re Lee Min Ho Chen*, 482 B.R. 473 (Bankr. D. P.R. Nov. 9, 2012).
[5] *In re Karlovich*, 456 B.R. 677 (Bankr. S.D. Cal. Nov. 16, 2010); *In re Kamell*, 451 B.R. 505 (Bankr. C.D. Cal. May 4, 2011); *In re Maharaj*, 681 F.3d 558 (4th Cir. Jun. 14, 2012); *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. May 17, 2012); *In re Lee Min Ho Chen*, 482 B.R. 473 (Bankr. D. P.R. Nov. 9, 2012); *In re Stephens*, 704 F.3d 1279 (10th Cir. Jan. 15, 2013).
[6] *In re Gbadebo*, 431 B.R. 222 (Bankr. N.D. Cal. Apr. 16, 2010); *In re Draiman*, 450 B.R. 777 (Bankr. N.D. Ill. Apr. 19, 2011); *In re Kamell*, 451 B.R. 505 (Bankr. C.D. Cal. May 4, 2011); *In re Maharaj*, 449 B.R. 484 (Bankr. E.D. Va. May 9, 2011); *In re Maharaj*, 681 F.3d 558 (4th Cir. Jun. 14, 2012); *In re Martin*, 497 B.R. 349 (Bankr. M.D. Fla. Sep. 17, 2013); and *In re Maharaj*, 681 F.3d 558 (4th Cir. Jun. 14, 2012).
[7] *In re Gbadebo*, 431 B.R. 222 (Bankr. N.D. Cal. Apr. 16, 2010); *In re Gelin*, 437 B.R. 435 (Bankr. M.D. Fl. Sep. 29, 2010); *In re Kamell*, 451 B.R. 505 (Bankr. C.D. Cal. May 4, 2011); *In re Maharaj*, 681 F.3d 558 (4th Cir. Jun. 14, 2012); *In re Martin*, 497 B.R. 349 (Bankr. M.D. Fla. Sep. 17, 2013); *In re Lee Min Ho Chen*, 482 B.R. 473 (Bankr. D. P.R. Nov. 9, 2012).
[8] *In re Gbadebo*, 431 B.R. 222 (Bankr. N.D. Cal. Apr. 16, 2010); *In re Kamell*, 451 B.R. 505 (Bankr. C.D. Cal. May 4, 2011); *In re Maharaj*, 681 F.3d 558 (4th Cir. Jun. 14, 2012); *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. May 17, 2012); and *In re Lee Min Ho Chen*, 482 B.R. 473 (Bankr. D. P.R. Nov. 9, 2012).
[9] *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. May 17, 2012); *In re Martin*, 497 B.R. 349 (Bankr. M.D. Fla. Sep. 17, 2013); *In re Lee Min Ho Chen*, 482 B.R. 473 (Bankr. D. P.R. Nov. 9, 2012); and *In re Lindsey*, 453 B.R. 886 (Bankr. E.D. Tenn. Aug. 5, 2011).
[10] *In re Gbadebo*, 431 B.R. 222 (Bankr. N.D. Cal. Apr. 16, 2010); *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. May 17, 2012); *In re Lee Min Ho Chen*, 482 B.R. 473 (Bankr. D. P.R. Nov. 9, 2012).

Congress had intended to repeal the APR in individual cases, then it would have done so explicitly, in a far less convoluted manner, and with a clear intent.[11]

4. Congress intended to keep the absolute priority rule the same as it was pre-BAPCPA and the same for individuals and for entities.

The court in *Karlovich* was the first court to submit that the "effect of the new provision in § 1129(b)(2)(B)(ii) is not to abrogate the absolute priority rule, but to make it the same for individual and non-individual Chapter 11 debtors, as it was prior to BAPCPA." *In re Karlovich*, 456 B.R. 677, 681 (Bankr. S.D. Cal. 2010). The court attempts to explain itself, but it is a strange argument. Specifically, the court explains at 681 that:

> That is, prior to BAPCPA, property of the estate did not include post-petition acquired property and earnings for individuals and non-individuals alike. Hence, post-petition acquired property and earnings could be retained by a Chapter 11 debtor, individual and non-individual alike, without running afoul of the absolute priority rule. The addition of § 1115 potentially changed that by adding to the property of the estate of an individual post-petition acquired property and earnings. Without a corresponding change to § 1129(b)(2)(B)(ii), individual debtors could no longer retain post-petition acquired property and earnings if they wished to "cram down" a plan. By adding the language excepting the § 1115 property from the absolute priority rule of § 1129(b)(2)(B)(ii), Congress merely ensured that the absolute priority rule would be the same as it had been prior to BAPCPA and be the same for all Chapter 11 debtors. In other words, what Congress took from the individual debtor with its § 1115–hand, it returned for application of the absolute priority rule with its § 1129(b)(2)(B)(ii)-hand.

The courts in *Kamell*, *Tucker*, and *Cardin* viewed the § 1129 change the same way. For example, the court in *Kamell* explained that "the court finds it at least equally plausible" that:

> Congress merely intended to make individual and non-individual Chapter 11 debtors more alike by including in the estate of an individual under § 1115 post-

[11] *In re Mullins*, 435 B.R. 352 (Bankr. W.D. Va. Jun. 22, 2010); *In re Gelin*, 437 B.R. 435 (Bankr. M.D. Fl. Sep. 29, 2010); *In re Karlovich*, 456 B.R. 677 (Bankr. S.D. Cal. Nov. 16, 2010); *In re Kamell*, 451 B.R. 505 (Bankr. C.D. Cal. May 4, 2011); *In re Maharaj*, 681 F.3d 558 (4th Cir. Jun. 14, 2012); *In re Lindsey*, 453 B.R. 886 (Bankr. E.D. Tenn. Aug. 5, 2011); *In re Tucker*, No. 10-67281, 2011 WL 5926757 (Bankr. D. Or. Nov. 28, 2011); *In re Friedman*, 466 B.R. 471 (9th Cir. B.A.P. 2012) (dissent); *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. May 17, 2012); *In re Maharaj*, 681 F.3d 558 (4th Cir. Jun. 14, 2012); *In re Lee Min Ho Chen*, 482 B.R. 473 (Bankr. D. P.R. Nov. 9, 2012); *In re Stephens*, 704 F.3d 1279 (10th Cir. Jan. 15, 2013); *In re Lively*, 467 B.R. 884, 891-92 (Bankr. S.D. Tex. 2012); *In re Gerard*, 495 B.R. 850 (Bankr. W.D. Wis. Aug. 7, 2013); *In re Martin*, 497 B.R. 349 (Bankr. M.D. Fla. Sep. 17, 2013); and *In re Cardin*, 751 F.3d. 734 (6th Cir. May 13, 2014).

> petition property and earning, but at the same time avoiding through § 1129(b)(2)(B)(ii) the untenable situation that an individual cannot keep *any* of his post-petition earnings for the entire period of his plan nor any pre-petition property if he must resort to cram down.

In re Kamell, 451 B.R. 505, 511 (Bankr. C.D. Cal. 2011). *See also In re Tucker*, No. 10-67281, 2011 WL 5926757, *2 (Bankr. D. Or. Nov. 28, 2011) (adopting *Karlovich* and holding that the BAPCPA "puts individual chapter 11 debtors in the same position as other chapter 11 debtors with respect" to the APR). Most recently, the Sixth Circuit held that the "amendment maintains the pre-2005 scope of the absolute priority rule, thus limiting the rule's scope to pre-petition property, even as the definition of 'property of the estate' extends to include post-petition property in § 1115." *In re Cardin*, 751 F.3d. 734, 739 (6th Cir. May 13, 2014).

5. If Congress wanted to repeal the absolute priority rule in individual cases, then it would have done so explicitly and in a less convoluted fashion.

If there is a common, nearly universal, theme in the narrow view cases, then it is that if Congress had intended to repeal the APR in individual cases, then it would have done so explicitly and certainly not in the convoluted manner suggested by the broad view cases.[12] The theme takes different forms but, more than any other argument against the broad view cases, it best explains the reluctance of the narrow view courts to conclude that the APR does not apply in individual cases. The first form that it takes is exactly as just described: If Congress had intended it, then it would have done so explicitly and clearly. Specifically, rather than adding § 1115, Congress could have simply amended §1129(b)(2)(B)(ii) to provide explicitly that the

[12] *In re Mullins*, 435 B.R. 352 (Bankr. W.D. Va. Jun. 22, 2010); *In re Gelin*, 437 B.R. 435 (Bankr. M.D. Fl. Sep. 29, 2010); *In re Karlovich*, 456 B.R. 677 (Bankr. S.D. Cal. Nov. 16, 2010); *In re Kamell*, 451 B.R. 505 (Bankr. C.D. Cal. May 4, 2011); *In re Maharaj*, 681 F.3d 558 (4th Cir. Jun. 14, 2012); *In re Lindsey*, 453 B.R. 886 (Bankr. E.D. Tenn. Aug. 5, 2011); *In re Friedman*, 466 B.R. 471 (9th Cir. B.A.P. 2012) (dissent); *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. May 17, 2012); *In re Maharaj*, 681 F.3d 558 (4th Cir. Jun. 14, 2012); *In re Lee Min Ho Chen*, 482 B.R. 473 (Bankr. D. P.R. Nov. 9, 2012); *In re Stephens*, 704 F.3d 1279 (10th Cir. Jan. 15, 2013); *In re Lively*, 467 B.R. 884, 891-92 (Bankr. S.D. Tex. 2012); *In re Gerard*, 495 B.R. 850 (Bankr. W.D. Wis. Aug. 7, 2013); *In re Martin*, 497 B.R. 349 (Bankr. M.D. Fla. Sep. 17, 2013); and *In re Cardin*, 751 F.3d. 734 (6th Cir. May 13, 2014).

APR does not apply in individual cases, period. The second form that it takes is the same as the first form, but, in the process, the court emphasizes that for the broad view to be believable, one has to conclude that Congress intended to implement such a sweeping change in a convoluted fashion. Indeed, many of the narrow view cases emphasize that the APR has been a mainstay of bankruptcy practice for at least 100 years and, thus, conclude that Congress could not possibly have intended to repeal the APR so cryptically. The third, and perhaps most fully developed, form that it takes is the argument that the Supreme Court prohibits the repeal of prior bankruptcy practice by implication. That third form is discussed in the following section.

6. Broad view violates the prohibition against "repeal by implication."

Arguably, the most compelling version of the "if Congress wanted to repeal the APR, then it would have done so explicitly" argument is the version that cites the Supreme Court's prohibition against "repeal by implication." In a way, each of the narrow cases concluding that Congress would have repealed it explicitly if it had wanted to is a "repeal by implication case." However, the Fourth Circuit's *Maharaj* case is the first case to explicitly cite to the doctrine on the APR issue, holding that "implied repeal is strongly disfavored," particularly in bankruptcy. *In re Maharaj*, 681 F.3d at 570-71. Specifically, it explained that in "interpreting the Code, we are mindful that courts 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" *Id*. at 571 (quoting *Hamilton v. Lanning,* 560 U.S. 505, 506 (2010) and a number of other Supreme Court cases).[13] Ultimately, the Court concluded that "Congress made no clear statement of repeal" of the APR. *Id*. The other Circuit Courts that have addressed the issue (10th, 5th, and 6th Circuits) have also relied on

[13] *See also In re Timbers of Inwood Forest Assocs., Ltd.,* 793 F.2d 1380, 1382 (5th Cir. 1986) (quoted in *Maharaj* and holding that "We think it unlikely that Congress would have adopted such a rule—entailing, as it does, major changes in the way in which a reorganization proceeding is conducted—without clear, unequivocal statements to that effect in the bankruptcy statute, or, at least, in its legislative history.").

the "repeal by implication" doctrine in adopting the narrow view. The same is true for two bankruptcy court decisions that followed *Maharaj*.[14]

7. Broad view injures creditors; narrow view strikes a proper balance.

The broad and narrow view cases disagree about the impact that their respective views will have on debtors and creditors. Specifically, some of the narrow view cases submit that the broad view upsets the balance between debtor and creditor rights in bankruptcy. In explaining why the narrow view better-protects that balance, the court in *Arnold* held that:

> The broad view removes the creditor protection of the absolute priority rule in Chapter 11 cases as to individual debtors because there are no debt limits in Chapter 11. Thus, the broad view would allow highly leveraged individuals who are not eligible for Chapter 13 to qualify for Chapter 11 reorganization by allowing them to retain their prepetition property without having to satisfy the absolute priority rule, no matter how much debt they had incurred. In this court's view, this interpretation does violence to the delicate balance between creditors and debtors in Chapter 11 and is not supported by the structure and language of the Bankruptcy Code or the legislative history of the 2005 Code amendments . . .

In re Arnold, 471 B.R. 578, 611-12 (Bankr. C.D. Cal. 2012) (citing *Kamell*, 451 B.R. at 511). *See also In re Kamell*, 451 B.R. 505, 511 (Bankr. C.D. Cal. 2011) (the "court sees instead a Congressional effort to balance benefits and hardships in cram down for Chapter 11 individuals"); *In re Friedman*, 466 B.R. 471, 485 (9th Cir. B.A.P. 2012) (dissent) ("majority's approach loses sight of this balance, allowing the reorganized individual debtor to retain all his or her assets while disenfranchising the vote of unsecured creditors who seek more value").

8. Narrow view does not make the BAPCPA changes trivial.

One criticism made in *Shat* and *Rodemeier* is that the narrow view renders the BAPCPA changes trivial. The courts in *Gelin* and *Lively* take issue with that criticism. Specifically, the court in *Gelin* submits that (1) "§ 1115 brings post-petition acquired property into the estate,

[14] *E.g.*, *In re Gerard*, 495 B.R. 850 (Bankr. W.D. Wis. Aug. 7, 2013) and *In re Martin*, 497 B.R. 349 (Bankr. M.D. Fla. Sep. 17, 2013).

thereby extending 'the automatic stay in Chapter 11 cases to an individual debtor's postpetition earnings and subjects those earnings to the various tests for confirmation of a Chapter 11 plan'" and (2) the additional language in § 1129(b)(2)(B)(ii) is not made meaningless, "as debtors are able to keep post-petition earnings despite the absolute priority rule." *In re Gelin*, 437 B.R. 435, 442 (Bankr. M.D. Fla. 2010). *See also In re Lively*, 467 B.R. 884, 891-92 (Bankr. S.D. Tex. 2012) (explaining that the exception is not "trivial" because "even if the requirements of § 1129(a)(15) are triggered . . . debtors still have the ability to retain property earned during the first five years of the plan by either economizing or increasing their actual earned income").[15]

9. Narrow view does not make confirmation impossible in individual cases.

Some of the narrow view cases take issue with the argument made in the broad view cases that, as a practical matter, the narrow view makes confirmation impossible for an individual Chapter 11. Specifically, in *Gbadebo*, Judge Tchaikovsky responded to *Shat*:

> The *Shat* court asserts that the "absolute priority" rule makes it virtually impossible for an individual chapter 11 debtor to confirm a plan that does not provide for payment in full to the holders of unsecured claims. To the contrary, such a plan may be confirmed if the holders of such claims vote in favor of the plan. They are likely to do so if a reasonable dividend is proposed, and they conclude that they will receive no dividend in a chapter 7 case.

In re Gbadebo, 431 B.R. 222, 229-30 (Bankr. N.D. Cal. 2010). The courts in *Kamell* and *Arnold*, and the Fourth Circuit in *Maharaj*, responded similarly, emphasizing that, notwithstanding the BAPCPA changes, individuals can still negotiate consensual plans by paying creditors fair dividends or more than the creditors might receive in a Chapter 7 liquidation.[16]

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[15] It raises an interesting, although not completely satisfactory, hypothetical about a married couple downsizing their auto loan obligations post-confirmation and pocketing the savings (as opposed to having the 5 year disposable income requirement snatch-up those savings for creditors' benefit, as would occur under § 1325(b)(2)). *Id.* at 892. Interestingly, *Friedman* (a broad view case) cites the *Lively* example. *See In re Friedman*, 466 B.R. at 490.

[16] *See In re Kamell*, 451 B.R. 505, 512 (Bankr. C.D. Cal. 2011); *In re Arnold*, 471 B.R. 578, 611 (Bankr. C.D. Cal. 2012); *In re Maharaj*, 681 F.3d 558, 573-74 (4th Cir. 2012).

10. Case comparison, case adoption approach.

Some of the narrow view cases merely adopt another narrow view case, often without much explanation or independent analysis. *Gbadebo*, *Karlovich*, and *Arnold*—cases which pioneered the narrow view—are probably the most explicitly-adopted cases, particularly when the narrow view was in its infancy. Similarly, many of the narrow view cases curate the cases on both sides as a starting point, even if they ultimately provide independent analysis. Therefore, many of the narrow view cases involve a case comparison or adoption approach. However, the cases that standout as having employed a "compare the line of cases and choose the most persuasive" approach are *In re Stephens*, 445 B.R. 816 (Bankr. S.D. Tex. 2011); *In re Borton*, No. 09-00196, 2011 WL 5439285 (Bankr. D. Idaho Nov. 9, 2011); *In re Tucker*, No. 10-67281, 2011 WL 5926757 (Bankr. D. Or. Nov. 28, 2011); *In re Batista-Sanechez*, 505 B.R. 222 (Bankr. N.D. Ill. 2014); and *In re Texas Star Refreshments, LLC*, 494 B.R. 684 (Bankr. N.D. Tex. 2013).

IV. Conclusion

All of the Circuit Courts (4th, 5th, 6th, and 10th) that have addressed the issue of whether the absolute priority rule still applies in individual Chapter 11 cases post-BAPCPA (one as recently as May 2014) have adopted the "narrow view," and concluded that the absolute priority rule continues to apply to all property of the debtor except for post-petition income and assets. Additionally, most bankruptcy courts that have addressed the issue, especially recently, have reached the same conclusion. Although the original broad view cases are not getting any younger, the broad view continues to have an ally in the 2012 Ninth Circuit B.A.P. *Friedman* case (subject to its extensive and lengthy dissent). Additionally, the 2013 *O'Neal* and the 2014 *Woodward* Bankruptcy Court decisions are two of the more rigorous and extensive broad view

cases in the broad view "canon" of cases. However, until the momentum shifts, the Supreme Court weighs-in otherwise, or Congress intervenes, if ever, individual Chapter 11 debtors who cannot pay their creditors in full will likely only enjoy Chapter 11 via negotiation and consent.

[Note: The Case Summary Chart Will Be Available Online. It will also be available upon request by emailing David Bury at dbury@stoneandbaxter.com]

EXHIBIT A[1]

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
In re Tegeder, 369 B.R. 477 (Bankr. D. Neb. May 23, 2007)	Broad	Finding no reported decisions, Court relies on several treatises, including Judge Drake's Bankruptcy Practice for the General Practitioner § 12:27 n. 28, as of Sep. 2006, and concludes that BAPCPA repealed APR for individuals because §1115 references §541.	Unambiguous	Not Discussed	Not Discussed	Not Discussed
In re Roedemeier, 374 B.R. 264 (Bankr. D. Kan. Aug. 16, 2007)	Broad	Recognizes possibility of two interpretations; seeks, therefore, to determine Congress' intent; mostly relies on "Ch. 11→Ch. 13" argument (i.e. Congress was trying to make Ch. 11 similar to Ch. 13 for individuals and, thus, intended to repeal APR); cites *Tegeder* approvingly.	Ambiguous	Not Discussed	Broad view helps explain the reason for a number of the BAPCPA changes, including APR exception: Allow Ch. 11 to function much like Ch. 13; notes that many of the changes apply to individuals only and are drawn from the Ch. 13 model; lists the changes: §§1115; 1123(a)(8); 1129(b)(2)(B)(ii); 1129(a)(15); 1141(d)(5); and 1127(e).	Narrow reading makes it difficult to see the purpose of the other, related amendments under BAPCPA.
In re Johnson, 402 B.R. 851 (Bankr. N.D. Ind. Mar. 4, 2009)	Broad	In deciding another BAPCPA intent issue, the Court summarizes various BAPCPA changes that made, according to one commentator, Ch. 11 more like "big Chapter 13" cases for individuals; *in dicta*, without analysis or support,	No Finding	Not Discussed	In *dicta* on the APR issue, Court lists "Ch. 11→Ch. 13" changes: • Property of estate now includes post-petition property (§1115 v. §1306) • Post-petition earnings and income must be used to fund plan to extent necessary	Not Discussed

[1] This is Exhibit A to "The Absolute Priority Rule in Individual Chapter 11 Cases," prepared by Ward Stone, Jr. and David L. Bury, Jr. of Stone & Baxter, LLP for the ABI's 19th Annual Southeast Bankruptcy Workshop (2014).

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
		Court concludes that BAPCPA repealed APR for individuals as long as debtor satisfies disposable income test of §1325(b)(2); also points out that certain differences between Ch. 11 and Ch. 13 remain.			(§1123(a)(8) v. §1322(a)(1) • Substantial consummation no longer a bar to modification of confirmed plan (§1127(e) v. §1329(a)) • Individual must wait until plan payments are complete before receiving a discharge (§1141(d)(5) v. §1328(a))	
In re Shat, 424 B.R. 854 (Bankr. D. Nev. Feb. 22, 2010)	Broad	Focuses on meaning of "property included in the estate under" §1115 in §1129(b)(2)(B)(ii); relies on the "relatively straightforward" language of statute and the "Ch. 11→Ch. 13"-type changes to conclude that the narrow view is the better view; other than perhaps *Friedman*, *Shat* is the broad view case most discussed by the narrow view courts.	Ambiguous	Discussed extensively; concludes there is no discussion of policy/ purpose behind BAPCPA changes to APR.	Concludes that purpose was to adopt for individual Ch. 11 debtors as much of Ch. 13 as possible to prevent debtors from an easy escape from means testing; outlines the changes: • Redefining property of the estate via §1115 (similar to what is provided in §1306) • Changing mandatory requirements of plan via §1123(a)(8) (to resemble §1322(a)(1)) • Addition of §1325(b)'s disposable income test via §1129(a)(15) • Delay of discharge until completion of plan payments (similar to §1328(a)) • Introduction of the hardship discharge via §1141(d)(5) (similar to §1328(b)) • Addition of §1127(e) to permit modification after substantial consummation (similar to §1329(a)) Emphasizes that the statutory language must be viewed in the context of the Code as a whole.	Acknowledges that broad view reads APR out of individual Ch. 11 cases in a "convoluted manner—arguably indicative that Congress did not fully appreciate the effect of the language it chose." However, it also points out that APR, even if it has a long history, is not "sacrosanct"—Ch. 13 doesn't have an APR and most of the BAPCPA changes were designed to adapt various Ch. 13 provisions to fit Ch. 11. Concludes that broad view saves APR from an "almost trivial reading" because under narrow view "only the value of aggregate postpetition earnings payable after the fifth anniversary of plan confirmation" is protected.

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
					Concludes that, given the "relatively straightforward reading of the statute supporting the broader reading and the general rehabilitative aim" of Ch. 11, the "in addition to the property specified in section 541" language in §1115 absorbs and then supersedes §541 for individual Ch. 11 cases. Concludes that its reading is consistent with "Ch. 11→Ch. 13" changes listed above and that such changes are meaningless under the narrow view. In support, the Court summarizes prior broad view cases (*Bullard*, *Tegeder*, and *Roedemeier*).	
In re Gbadebo, 431 B.R. 222 (Bankr. N.D. Cal. Apr. 16, 2010)	Narrow	Cites broad view cases: *Tegeder*, *Roedemeier*, and *Shat*; discusses *Shat* extensively, but disagrees; §541 reference in §1115 is meant to avoid §1115 superseding §541, such that APR exception only applies to property *added* by §1115; rejects "Ch. 11→Ch. 13" argument; claims that its conclusion is based on the language and the Code as a whole.	Unambiguous	Purpose of BAPCPA: ensure debtors who can pay a portion of their debts do so.	"Ch. 11→Ch. 13" changes do not show that Congress meant to repeal APR for individuals, especially given that many of them impose greater burdens on debtors, not less burdens. As a whole, BAPCPA was not meant to enhance the "fresh start."	Disagrees with the argument that the amendment makes confirmation impossible for individual debtors in Ch. 11. They can confirm via consent, especially if they offer a reasonable dividend that exceeds the Ch. 7 payout.

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
In re Mullins, 435 B.R. 352 (Bankr. W.D. Va. Jun. 22, 2010)	Narrow	Acknowledges competing cases, but concludes that *Gbadebo* is most consistent w/ statutory language and broad view cases have "strained to find ambiguity" to support "Ch.11→Ch. 13" argument. in the statute in order to arrive at a conclusion which is more in keeping with the broader intent of certain BAPCPA provisions intended to make" Ch. 11 cases more like Ch. 13 cases.	Unambiguous	Not Discussed	If Congress has intended on repealing APR, then it would have done so explicitly. Concluded that the "chief problem" addressed by Congress was that "pre-BAPCPA cases for individual debtors whose principal business endeavor was the earned income which their personal efforts generated were problematic for chapter 11 debtors because their post-petition earnings were not deemed to be property of the bankruptcy estate. The new statutory language quite clearly changed that prior rule."	Acknowledges that the decision might make Ch. 11 less attractive or desirable for similarly-situated debtors, but suggests that a policy of providing creditor protection when a debtor proposes to retain significant property, with little guarantees for creditors, is not unreasonable. Although debtor's proposal was not an unreasonable one, the Court suggests that it is more appropriate for the debtor to negotiate consent.
In re Steedley, 2010 WL 3528599 (Bankr. S.D. Ga. Aug. 27, 2010)	Narrow	Relies on, and more or less adopts, *Gbadebo.*	Unambiguous	Not Discussed	Agrees with *Gbadebo*, concluding that nothing in the plain language of statute suggests that §1115 subsumes §541; rather, §541 applies in all Ch. 11 cases; therefore, because §1115 *adds* property to the estate, it is *that* property that an individual debtor may retain under APR.	Not discussed.
In re Gelin, 437 B.R. 435 (Bankr. M.D. Fl. Sep. 29, 2010)	Narrow	Focuses on meaning of "property included in the estate under § 1115"; acknowledges both views but disagrees with broad view cases, including *Shat*; relies on *Gbadebo* instead; concludes that narrow approach is more persuasive and broad approach is convoluted, complicated, and forced.	Ambiguous	Not helpful; silent on whether APR repealed; and ambiguous in its own right.	Adopts *Gbadebo*: (1) far more likely that §1115 *adds* to §541 (it doesn't subsume it) and (2) BAPCPA not intended to make Ch. 11 like Ch. 13 (i.e. easier). Concluded that the approaches in *Shat*, *Roedemeier*, and *Tegeder* to eliminating APR could not be more convoluted. If Congress had intended on repealing the APR, then it would	Narrow view doesn't make §1115 meaningless: §1115 brings post-petition property into estate and, thus, subjects it to automatic stay and Ch. 11 confirmation tests. Narrow view doesn't make language added to APR meaningless: individuals can now retain post-petition assets despite APR.

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
					have done so explicitly.	If debtors want to retain pre-petition property, they must obtain consent or pay in full.
In re Karlovich, 456 B.R. 677 (Bankr. S.D. Cal. Nov. 16, 2010)	Narrow	Disagrees w/ broad cases; relies on *Gbadebo*; concludes that language is unambiguous, showing Congress' intent to keep APR the same as it was pre-BAPCPA.	Unambiguous	Not Discussed	Purpose of the §1129 change was to make APR the same for individuals and non-individuals, as it was pre-BAPCPA; it merely balances out the §1115 change. If Congress has intended on repealing the APR, then it would have done so explicitly. Rejects "Ch. 11→Ch. 13" argument: If Congress had wanted to make them similar, it would have increased or eliminated the Ch. 13 debt thresholds. .	Not Discussed
In re Stephens, 445 B.R. 816 (Bankr. S.D. Tex. Feb. 22, 2011)	Narrow	Acknowledges the split; collects the cases on both sides; and chooses and agrees w/ the narrow side (i.e. *Gbadebo*, *Mullins*, *Gelin*, and *Karlovich*).	No Finding	No Discussion	Under broad view, the "in addition to the property specified in section 541" language from §1115(a) would "render surplusage" the "all property of the kind specified in section 541" language from in §1115(a)(1). Similarly, the broad view also renders §541 surplusage.	Not Discussed
In re Walsh, 447 B.R. 45 (Bankr. D. Mass. Mar. 9, 2011)	Narrow	References *Shat* but disagrees with it; focus of issue is the "property included in the estate under section 1115" language; adopts *Gbadebo* (and cites approvingly other similar narrow view cases).	Unambiguous	Not Discussed	Relying on *Gbadebo*, Court does not discuss intent of BAPCPA. Rather, it focuses exclusively on statutory language, concluding that §1115 merely adds to §541, such that only the property added by §1115 is exempt from APR.	Not Discussed

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
In re Draiman, 450 B.R. 777 (Bankr. N.D. Ill. Apr. 19, 2011)	Narrow	Collects the cases; agrees w/ narrow cases starting w/ *Gbadebo* (including *Mullins*, *Gelin*, *Steedley*, and *Karlovich*); §1115 adds to §541; it doesn't subsume/supersede it.	Unambiguous	Concludes there is no relevant legis. history showing intent to repeal APR.	Some BAPCPA changes were intended to make Ch. 11 more like Ch. 13, but that "purpose is not evident with respect to" APR.	Not Discussed
In re Kamell, 451 B.R. 505 (Bankr. C.D. Cal. May 4, 2011)	Narrow	Acknowledges both views and cites the cases; uses a "holistic," context-based statutory approach; finds language and legis. history, unhelpful; viewing APR as a mainstay of Ch. 11, it finds no clear intent by Congress to repeal it (essentially, a "no repeal by implication"-style case).	Ambiguous	Legislative history is scarce, equivocal, and unhelpful.	Addresses "Ch. 11→Ch. 13" argument and lists examples of the conforming changes; however, concludes it "is a bridge too far" to conclude that intent was to make Ch. 11 like Ch. 13: (1) if Congress wanted to make Ch. 11 and Ch. 13 similar, then it could have increased Ch. 13 debt thresholds in Ch. 13 and (2) purpose of BAPCPA was "to tighten, not loosen" the ability of debtors to avoid paying creditors. If Congress has intended on repealing APR, then it would have done so explicitly, especially given that APR is a mainstay going back to 1930s (or earlier). Equally plausible that Congress wanted to make the APR similar for individuals and entities by (i) including post-petition income in the estate but (ii) avoiding, via the language added to APR, the "untenable situation that an individual cannot keep *any* of his post-petition earnings for the entire period of his plan nor any pre-petition property if he must resort to cram down." Concludes that Congress was	Doesn't agree that the narrow view makes Ch. 11 unworkable for individuals because individuals can still negotiate acceptance, pay dissenters in full, or contribute new value.

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
					attempting to balance the benefits and hardships in cram down for individual Ch. 11 debtors.	
In re Maharaj, 449 B.R. 484 (Bankr. E.D. Va. May 9, 2011)	Narrow	Acknowledges both views; cites the cases; adopts *Mullins* and the like as being more consistent w/ "structure of the changes made by BAPCPA"	No explicit finding (but adopts *Mullins*, which found the language unambiguous)	Not Discussed	Addresses "Ch. 11→Ch.13" argument: If Congress intended to make them similar, it would have done so explicitly. Also agrees w/ *Karlovich*: Congress could have simply increased or eliminated Ch. 13 debt thresholds.	Recognizes analysis not "free from doubt"; sympathizes w/ debtor, who proposed a payout greater than available in a Ch. 7, but was not surprised that creditors objected.
In re Lindsey, 453 B.R. 886 (Bankr. E.D. Tenn. Aug. 5, 2011)	Narrow	One of the more extensive decisions; detailed overview of statutory construction rules: (1) start w/ plain language; (2) only consider intent if ambiguous or if it is facially clear, but would lead to absurd/inconsistent results; acknowledges both views; cites broad/narrow view cases, w/ extensive discussions of *Shat* and *Kamell*, in particular; chooses narrow view after weighing the cases; extensive analysis of the interplay between the §1115 and §1129(b) language, concluding that §1115 merely supplements, and does not supplant §541; therefore, it's more logical to conclude that only post-petition income/property are excepted from APR; bolsters its analysis with four factors (see across).	Ambiguous	Legislative history is sparse, at best, and "provides no real assistance."	Proper decision hinges on what Congress meant by "included in the estate under §1115." Concludes, by analyzing the language (similar to prior narrow cases), that §1115 only supplements §541, such that Congress only intended for post-petition earnings and property be excepted from APR. Points to 4 supporting factors: • Narrow view in line with purpose of BAPCPA: restore personal responsibility and integrity to the system and ensure that the system is fair for both sides (quotes 2005 WL 832198 for legis. hist.) • Having creditors bear losses from inability to collect from debtors hurts the economy. • Without BAPCPA, there are loopholes and incentives that allow, and even encourage, bad faith, abusive filings. • Some debtors can repay a	See discussion of the 4 factors, wherein Court discusses extensively the policy considerations behind BAPCPA.

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
					significant portion of their debts but, pre-BAPCPA, there was no clear mandate that they do so; there is now. In light of such factors, it's not reasonable to assume that Congress intended to repeal APR, on the one hand, and to decrease liquidations and increase repayment, on the other hand. Agrees with common narrow view argument that Congress would have repealed APR explicitly if it intended to repeal it.	
SPCP Group, LLC v. Biggins, 465 B.R. 316 (M.D. Fla. Sep. 21, 2011)	Broad	Acknowledges the 2 views by comparing *Shat* and *Gelin*; departs from both, concluding that language is unambiguous, such that it's not necessary to guess what Congress meant; concludes that the broad approach is correct because it's clear under §1115 that property of the estate includes pre- and post-petition property; therefore, APR does not apply in individual cases.	Unambiguous	Not Discussed	Not Discussed (as the Court concluded that its inquiry must stop upon determining that the meaning of the statute is clear) **But Note**: Court changed its mind in *In re Martin* (see below) in light of recent Circuit decisions adopting narrow approach.	Not Discussed
In re Borton, 2011 WL 5439285 (Bankr. D. Idaho Nov. 9, 2011)	Narrow	Acknowledges both views; cites competing cases; sides w/ narrow view using a case comparison approach.	Unambiguous	Not Discussed	Not discussed	Not discussed

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
In re Tucker, 2011 WL 5926757 (Bankr. D. Or. Nov. 28, 2011)	Narrow	Acknowledges both views; cites competing cases; adopts *Karlovich* with little explanation.	Unambiguous	Not discussed	As per *Karlovich*, §1115 puts individuals in the "same position as other chapter 11 debtors" with respect to the APR.	Not discussed
Friedman v. P + P, LLC (In re Friedman), 466 B.R. 471 (9th Cir. B.A.P. Mar. 19, 2012)	Broad	Begins w/ history of APR, emphasizing it was not codified until '78, it's not labeled as such in the Code, it's never been absolute; and courts have always viewed it w/ common sense to facilitate goal of Code; even if words have alternative meanings, that doesn't mean ambiguities arise; recites rules of construction and turns to statutory language; concludes that property "included" in estate under §1115 includes §541 property as well as post-petition property added by §1115; finds support for "plain meaning" view in other plan confirmation requirements (disposable income requirement; best interests of creditors test; and delay of discharge pending plan payments); addresses dissent; addresses other matters in support (legislative history, congressional intent, and other views) (see column across); but see dissent by Judge Jury. *Also note: It is often*	Unambiguous	Not very helpful; pretty limited; the Code itself is a better guide; L.H., discussions of congressional intent, and other speculations aren't very helpful and amount to "titanic effort to frame [] outcomes on what may be a very weak universe of original sources," when Code itself is best guide.	Relies primarily on a "plain-meaning" interpretation of the statutory language in §1115 and §1120(b)(2)(B)(ii), concluding that §1115 includes §541 property as well as the property added for individual debtors in §1115. Tests its plain-meaning interpretation against rest of Ch. 11, concluding that (i) there are no anomalies, inconsistencies, or conflicts created by its view and (ii) the rest of Ch. 11 accords with its view (e.g. new disposable income requirement, best interests of creditors test, and delay of discharge pending completion of plan payments). Illogical to impose disposable income requirement and then "remove the debtor's means of production of debtor's disposable income by maintaining" the APR. With respect to the dissent's argument that broad view makes §541 superfluous, Court argues that §1115 mirrors §1306 but no one ever argued that §1306 renders §541 superfluous. To do otherwise would "create an indefensible discontinuity between § 1115 and § 1306."	See BAPCPA column.

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
		pointed out that Friedman was only briefed/argued by debtor and a supporting amicus brief, without the narrow view being advocated.			Ultimately, "included" isn't a word of limitation, as dispute over "included"/"includes" arises from "misinterpretation of the words." Cites *Gelin*, *Tegeder*, and *Shat.* Reiterates "Ch. 11→Ch. 13"-type changes make confirmation more difficult for individuals; in fact, just as in Ch. 13, disposable income requirement ensures debtor will dedicate all of his disposable income for designated period (at least 5 years). Disagrees w/ procedural "anomaly" cited by *Gbadebo*, disagreeing w/ idea that repealing APR means debtors will solicit votes they can then ignore. Specifically, if the class votes "yes," then §1129(a)(8) is satisfied. If the class votes "no," then vote is not ignored: debtor must either pay in full (§1129(a)(15)(A)) or satisfy the disposable income requirement (over 5 yrs or life of plan under §1129(a)(15)(B)) and be fair and equitable under §1129(b)(1). In short, the Court concludes that Congress intended that the disposable income requirement trump the APR in individual Ch. 11 cases.	
Friedman v. P + P, LLC (In re Friedman), 466 B.R. 471 (9th Cir. B.A.P. Mar.		In her extensive dissent, Judge Jury criticized the majority for its "simplistic	Ambiguous		Argues that majority lost sight of 2 important policies: (1) striking balance b/w debtor's interest in	Argues debtor can still retain *something* under narrow view, and cites to the auto loan

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
19, 2012) **Judge Jury's Dissent**		outcome," "strained reading" of the statute, and "result-driven approach." Concludes that majority bases its "simplistic outcome" on "conviction" that Congress intended to make Ch. 11 like Ch. 13. Concluded that the majority's analysis of BAPCPA violated the rules of statutory construction, including the rule that disfavors interpretations that render language superfluous, produce absurd or bizarre results, or are inconsistent with the intent of the statute. After reciting construction rules and an extensive analysis of the language, concludes language isn't plain at all; §1115 merely adds to the estate (such that §1115 does not subsume §541 and APR exception is limited to post-petition income/property); this avoids rendering others parts of Code superfluous; citing *Kamell*, argues broad view makes §1129(b)(2)(B)(i) absurd. At bottom, something as significant as APR should only be repealed if there is a clear expression of			reorganizing and creditor's interest in maximizing estate and (2) enhancing return to creditors, as intended by BAPCPA. Disagrees w/ majority that Congress intended disposable income requirement in §1129(a)(15) to trump APR, pointing out that §1129(a)(15) only applies when unsecured creditor objects to confirmation. Argues that majority relies exclusively on literal meaning of statute while ignoring its purpose, rejecting the "Ch. 11→Ch.13" argument: some of the changes might make them similar, but they aren't sufficient to conclude that Congress intended to repeal APR, particularly given Congress wanted debtors to pay more, not less, after BAPCPA. Concludes that broad view throws Ch. 11 out of balance and permits debtor to retain property while disenfranchising the votes of unsecured creditors. Individual Ch. 11 debtors are not just Ch. 13 debtors w/ larger debts: they get to continue to possess their property and have powers of a trustee. In exchange, Ch. 11 gives creditors protection from debtor retaining everything. APR has been embedded in bankruptcy for many years; therefore, courts should be	payment example from *Lively* (see discussion above). Disagrees that narrow view makes confirmation impossible: they can proceed via consent, pay creditors in full or comply w/ APR—all of the options debtors had before BAPCPA. Just because result is harsh does not mean court can read words into the statute.

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
		Congressional intent.			cautious in finding an exception that Congress is not clear on.	
In re Lively, 467 B.R. 884 (Bankr. S.D. Tex. Mar. 21, 2012)	Narrow	Issues memorandum certifying its denial of confirmation (see *In re Lively*, 2011 WL 6936363 (Bankr. S.D. Tex. 2011), attached to certification; collects cases; emphasizes (but disagrees with) *Shat*.	Unambiguous	Not discussed	Narrow approach doesn't produce absurd results and fits in the overarching statutory scheme.	Narrow view doesn't make §1129 exception trivial (uses an example of downsizing an expense, post-confirmation, with no increase in disposable income, such that debtor, not creditors, retain the benefit of the downsizing).
In re Arnold, 471 B.R. 578 (Bankr. C.D. Cal. May 17, 2012)	Narrow	Arguably the most thorough and extensive of the narrow view cases; concludes that *Friedman*, as a BAP decision, is not binding; provides detailed overview of history/purpose of APR, w/ emphasis on connection b/w APR, consent, and cramdown in bankruptcy; starts w/ statutory approach (w/ an overview of construction rules, similar to those summarized above); agrees w/ *Lindsey* that it's "axiomatic" that the language is ambiguous; *extensive*, pages-long grammatical analysis, which concludes that §1115 adds to §541 (and doesn't subsume it) and that broad view renders §541 superfluous (in violation of rules of construction); chooses the narrow view, pointing to legislative history and policy in further	Ambiguous	Acknowledges that some view it as sparse, equivocal, and altogether unhelpful; concludes that it merely restates the statute. Also concludes that L.H. supports narrow view and the idea of debtors paying more, not less via 4 factors cited in L.H.: (1) consumer filings increasing and becoming too available; (2) increased losses to Americans who do pay their debts; (3) loopholes & improper incentives in Code; and (4) fact that some debtors can and should pay a	Clear that Congress intended debtors to pay more, not less; Congress didn't intend to enhance debtor's ability to get a fresh start. Not clear from legislative history that Congress intended to relax confirmation standards for individual Ch. 11 debtors or to repeal APR. In fact, explains the court, §1115 was added as a part of the "Discouraging Abuse" part of BAPCPA. Concludes "Ch. 11→Ch. 13" argument not supported by structure of statute; e.g. Congress could have raised Ch. 13 debt limits. If Congress has intended on repealing APR, then it would have done so explicitly, either with the statutory language or in the legislative history. Quotes Supreme Court prohibition against eroding past practice.	Explains that BAPCPA permits individual Ch. 11 debtor to keep something, at least (something it couldn't do pre-BAPCPA, says the court). The amendment to §1129 and addition of §1115 strikes a proper debtor/creditor balance, whereas broad view destroys and does "violence" to that "delicate" balance. Without APR, debtor has no incentive to negotiate. Cites *Friedman* dissent. Narrow view does not make Ch. 11 impossible for individuals: they can, like before, still negotiate consent or pay dissenters in full.

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
		support of narrow view.		significant part of their debts.		
In re Maharaj, 681 F.3d 558 (4th Cir. Jun. 14, 2012)	Narrow	Acknowledges split; collects cases and discusses them extensively; starts w/ text, concluding that "includes" and "included" are susceptible to more than 1 reasonable interpretation; holds that Congress didn't intend to repeal APR, based on broader context of BAPCPA, a "familiar canon of statutory construction," and presumption against implied repeal.	Ambiguous	Sparse, such that there's no clear statement by Congress of intent to repeal APR; does show that creditors were focus of BAPCPA.	Based on *Karlovich*, concludes that amendment preserved APR as it operated pre-BAPCPA. Disagrees w/ *Tegeder* that narrow view renders §1115 trivial because, it argues, narrow view brings post-petition property into estate via §1115 and, thus, extends scope of automatic stay. Additionally, amendment permits debtor to retain that property during the Ch. 11 w/out it being at risk in a cram down analysis. Points to Supreme Court's view that, especially in bankruptcy, implied repeal is strongly disfavored. There must be a clear indication of intent before court can read the "Bankruptcy Code to erode past bankruptcy practice." Relying on *Kamell*: if Congress had intended on repealing a long-standing principle like the APR, then it would have done so in a far less convoluted manner and it would have done so explicitly, either in the text or in the legislative history as it has done on prior occasions (e.g. in 1952). Rejects the "Ch. 11→Ch. 13" argument, concluding that Congress could have made Ch. 11	It points out that based on its conclusion that Congress did not intend to repeal the APR, it is not required to consider policy arguments. However, it considers and rejects them anyway: (1) the legislative history rejects the notion that Congress intended to provide greater benefits to debtors as compared to protections for creditors and (2) BAPCPA did not make confirmation impossible, as the APR has always applied to individuals, and debtors can still negotiate consent, pay higher dividends, or comply with the APR by contributing pre-petition property.

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
					more like Ch. 13 in a far less convoluted manner and, relying on *Gbadebo*: changes that made Ch. 11 more like Ch. 13 do not justify the conclusion that Congress intended to make them similar with respect to the APR.	
In re Tucker, 479 B.R. 873 (Bankr. D. Or. Oct. 11, 2012)	Broad	Initially, Court concluded that APR applied; however, *Friedman* came down; concluding that *Friedman* is binding, it follows it w/out further discussion.	No Finding	Not Discussed	Not Discussed	Not Discussed
In re Lee Min Ho Chen, 482 B.R. 473 (Bankr. D. P.R. Nov. 9, 2012)	Narrow	More or less follows and adopts *Arnold* (including its grammatical analysis).	Ambiguous	Legislative history is sparse but suggests that Congress wanted debtors to pay more, not less. Therefore, it supports the narrow view.	Agrees with *Arnold* (see above).	Agrees with *Arnold*: policy considerations weigh heavily in favor of narrow view; broad view undercuts creditor protections and would allow highly-leveraged debtors who do not qualify for Ch. 13 to retain their pre-petition property creditors' expense.
In re Stephens, 704 F.3d 1279 (10th Cir. Jan. 15, 2013)	Narrow	Statutory text is ambiguous, as shown by decisions reading the text different ways; agrees w/ *Maharaj* that either view is plausible; recognizes merits of each view's take on Congress' intent and the inherent tension between the "avoid abuse" argument and the "enhance fresh start" argument; Congressional intent is ambiguous; heeds "presumption against	Ambiguous	Sparse; contains no explanation of what changes result from the addition of §1115	Recognizes broad view points as to BAPCPA intent: (1) the "Ch. 11→ Ch. 13" provisions and (2) even without APR, creditors are still protected by the disposable income requirement and the best interests of creditors test. Recognizes narrow view points as to BAPCPA intent: (1) each of the new provisions, even those modeled after Ch. 13, impose greater burdens on debtors to ensure a greater payout; (2) if	Not Discussed

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		implied repeal," esp. in bankruptcy where courts are not to read Code to erode past practice w/out clear intent and particularly when Congress has expressly repealed APR before.			Congress had intended to repeal the APR, then it would have done so in a far less convoluted way (e.g. via changing the Ch. 13 debt limits); and (3) legis. history lists several debtor protections but doesn't mention repeal of APR. Therefore, under narrow view, amendments preserve status quo. Because the text and Congress' intent are ambiguous, Court heeded "presumption against implied repeal." There simply is not a clear indication that Congress intended to repeal such a "pillar of creditor protection," especially it has explicitly repealed the APR in the past.	
In re Texas Star Refreshments, LLC, 494 B.R. 684 (Bankr. N.D. Tex. Mar. 22, 2013)	Narrow	Only briefly addresses APR in a multi-part confirmation decision; acknowledges the split; concludes that, after reviewing the cases, the narrow view cases are the "better reasoned" cases; cites *Maharaj* and *Lively* (but notes that *Lively* was, at that time, on appeal to the 5th Circuit) (see discussion below).	No Finding	Not Discussed	Not Discussed	Not Discussed
In re O'Neal, 490 B.R. 837 (Bankr. W.D. Ark. Apr. 12, 2013)	Broad	Reviews the 2 Circuit decisions at that time: *Stephens* and *Maharaj*; it then reviews *Friedman*; focuses on "Ch. 11→Ch. 13"-type changes, concluding that they make no sense unless Congress	Ambiguous	Not Relied On	Make Ch. 11 work more like Ch. 13 for individuals, as shown by the various "Ch. 11→Ch. 13" changes outlined in *Friedman* (including disposable income test and delay of discharge) and the similarity b/w §§1115 and 1306.	"No analysis of this issue is free from doubt." Narrow view renders ineffective any practical application of §1115, especially given the addition of the disposable income

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
		was attempting to make Ch. 11 work like Ch. 13; therefore, APR does not apply in individual cases.			"If Congress was not attempting to write out of individual Chapter 11 cases the absolute priority rule, what was the purpose of all of the BAPCPA amendments to Chapter 11, including section 1115, which were obviously borrowed from Chapter 13?" Illogical to require individuals to satisfy 5 year disposable income test and then remove their means of providing that income.	requirement.
In re Lively, 717 F.3d 406 (5th Cir. May 29, 2013)	Narrow	Acknowledges most courts have found the statutory language ambiguous and have, therefore, gone on to examine "unenlightening legislative history and extrinsic interpretative factors to arrive at" broad or narrow view; agrees w/ lower court that narrow approach is "unambiguous and correct"; even if language is ambiguous, narrow view must prevail; otherwise, there would be repeal by implication.	Unambiguous	Unenlightening	The changes were intended to coordinate Ch. 11 somewhat with Ch. 13: it wanted individual Ch. 11 debtors, like Ch. 13 debtors, to have a disposable income requirement, but, at the same time, did not want individual Ch. 11 debtors saddled, under APR (which does not exist in Ch. 13), w/ committing all of their post-petition property to satisfy claims. Grammatical parsing unnecessary as "§ 1115 expressly states that property is being 'added' to that comprised by § 541." Even if §1115 is ambiguous, broad view would result in a startling and indirect way for Congress to have "effected partial implicit repeal of the very provision that the section amended." Repeals by implication are disfavored, especially in bankruptcy, unless intent is clear and manifest.	Not Discussed

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
					As APR has been a "cornerstone" in Ch. 11 for over a century," Congress must have been aware of the rule; and, without something more clear, would not have intended to reverse it.	
In re Sample, No. 10-38373, 2013 WL 3759795 (Bankr. D. Ariz. July 15, 2013)	Broad	Concludes that BAP decisions are binding; although the court tended to agree w/ *Friedman* dissent (see above), court adopted *Friedman* majority because it believed that it's binding.	No Finding	Not Discussed	Not Discussed	Not Discussed
In re Gerard, 495 B.R. 850 (Bankr. W.D. Wis. Aug. 7, 2013)	Narrow	Acknowledges narrow view is majority; rejects debtor's reliance on §1115(b), concluding that §1115(b) merely codifies that DIP keeps his stuff while he's a DIP; concurs with *Gelin*.	Unambiguous	No legislative history suggests that amendments were intended to repeal APR.	Adopting *Gelin*, Court concludes that if Congress has intended on repealing APR, then it would have done so explicitly. Cites *Stephens* for the proposition that there is a presumption against repeal by implication. More likely interpretation is that §1115 merely adds to the estate, such that only post-petition property is exempted from APR.	Not discussed
In re Martin, 497 B.R. 349 (Bankr. M.D. Fla. Sep. 17, 2013)	Narrow	Departs from *SPCP v. Biggins* (broad view case) in light of the Circuit cases; sides w/ narrow view because (1) plain language supports it (does a limited grammatical analysis); (2) repeal by implication is disfavored; (3) narrow view consistent w/ BAPCPA purpose; and (4) BAPCPA changes simply harmonize	Unambiguous	Not discussed directly, but it does make conclusions about the purpose of BAPCPA (see next column)	Relies on "no repeal by implication" doctrine, concluding that APR has been a part of bankruptcy practice for 100+ yrs and that there can be no erosion of past practice w/out clear intent. If Congress has intended on repealing the APR, then it would have done so explicitly. Narrow view consistent w/	Not Discussed

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
		treatment of individual Ch. 11/13 debtors.			BAPCPA because BAPCPA was intended to impose greater burdens on debtors to curb abuse and to increase payments. Wonders why Congress would add the means test and disposable income requirement but then repeal APR. Also concludes it would be remarkable for a debtor to keep his stuff by paying pennies on the dollar. Agrees w/ 5th Cir. in *Lively* that purpose of BAPCPA is harmonize treatment of individual Ch. 11/13 debtors: It adds post-petition property to §541 but then modifies so that debtor does not have to give-up his post-petition income as a price for cramdown.	
In re Brown, 498 B.R. 486 (Bankr. E.D. Pa. Sep. 26, 2013) [Part 1]	Narrow	Acknowledges 2 views and summarizes the arguments made by both; recognizes that narrow view is now the majority; ultimately weighs the 2 views and concludes that the narrow view more accurately reflects Congress' intent.; purpose was to preserve APR (as explained in *Karlovich*)	No explicit finding	No history suggesting that Congress intended to change long-standing APR in individual cases.	Cites to Sup. Ct. prohibition against eroding past bankruptcy practice absent a clear indication from Congress. If Congress wanted to repeal APR then it would have done so in a far less convoluted way, especially given that APR is so well-established in bankruptcy (e.g. it could have changed the debt limits for Ch. 13 since Ch. 13 does not have the APR).	Even if decision appears to make confirmation more difficult for individuals, that difficult has existed since 1988 when Sup. Ct. applied the APR in *Ahlers*. In 2005, Congress decided to leave APR unchanged. Court's job is limited to enforcing that decision.
In re Batista-Sanechez, 505 B.R. 222 (Bankr. N.D. Ill. Jan. 31, 2014)	Narrow	In reviewing compliance w/ §1129, the Court, citing *Lively*, *Stephens*, and *Maharaj*, rejects debtor's	Not Discussed	Not Discussed	Not Discussed	Not Discussed

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
		Shat-inspired argument that APR does not apply in individual cases.				
In re Brown, 505 B.R. 638 (E.D. Pa. Feb. 24, 2014)	Narrow	Acknowledges the split; starts w/ statute; cites to construction rules; if, and only if, it's ambiguous can the court consult extrinsic sources; concludes that it's not ambiguous; reviews the legislative history; turns to the Code, as a whole; concludes that narrow view is the better view, else § 1115 would render other Code provisions (e.g. 541) superfluous; broad view would render § 1129 meaningless because debtor could side-step full payment option in §1129 (an abuse that Congress could not have intended); errs on side of respecting the prohibition against repeal by implication.	Unambiguous	L.H. is silent on whether Congress intended to repeal the APR, as the L.H. merely reiterated the text.	There is nothing in the text or legislative history suggesting a clear intent to repeal APR. Therefore, agreeing w/ broad view requires the conclusion that Congress meant to repeal APR implicitly, a conclusion that the Sup. Ct prohibits, esp. in bankr. Concluding that Congress intended to preserve APR is also consistent w/ BAPCPA goal of curbing bankruptcy abuses: w/out APR, creditors would be at mercy of debtors, for pennies on the dollar payouts (cites *Friedman*).	
In re Woodward, 2014 WL 1682847 (Bankr. D. Neb. Apr. 29, 2014)	Broad	The *Tegeder* judge acknowledges that the weight of authority has shifted towards the narrow view since the *Tegeder* decision; concluded that the logic of the narrow view is not overwhelming enough to "reverse course"; also concludes that the *Tegeder* decision has worked well in that jurisdiction; adopts *O'Neal* and, thus, concludes that the broad	No Finding	Not Discussed	Agrees that the following question from *O'Neal* reveals the weakness of the narrow approach: "If Congress was not attempting to write out of individual Chapter 11 cases the absolute priority rule, what was the purpose of all of the BAPCPA amendments to Chapter 11, including section 1115, which were obviously borrowed from Chapter 13?" Although the Court recognizes that valid arguments can be made	

Case	View	Approach/Rationale	Statutory Language	Legis. History	Intent of BAPCPA	Consequences
		view is still the better view.			on both sides, it concludes that the broad view is the "better fit with the apparent overall goals of the 2005 amendments."	
In re Cardin, 2014 WL 1887583 (6th Cir. May 13, 2014)	Narrow	Performs a limited grammatical analysis and concludes that §1115 merely adds to the "pile"; a pretty concise opinion, but it addresses issue on both sides.	No explicit finding, but it appears to find the language unambiguous (even if it requires close scrutiny)	Not Discussed	Relies on the no repeal by implication doctrine, explaining that there can be no erosion of past practice without clear intent. If Congress has intended on repealing the APR, then it would have done so explicitly. All BAPCPA does is maintain pre-BAPCPA scope of APR.	Recognizes that the disposable income requirement combined with the continuing APR is a sort of "double whammy" for debtors, but explains that it's job is to determine Congress' intent, not what is fair.

EXHIBIT B[1]

OTHER ARGUMENTS AGAINST THE SURVIVAL OF THE ABSOLUTE PRIORITY RULE IN INDIVIDUAL CASES

I. Whole Act Rule of Statutory Construction

Whether the Absolute Priority Rule ("APR") survived in individual Chapter 11 cases after BAPCPA is undoubtedly one of the most divisive bankruptcy debates since the enactment of the Bankruptcy Code in 1978. The four Circuit Courts (4th, 5th, 6th, and 10th Circuits) that have examined the APR debate (see main discussion) each relied on the "No Repeal by Implication" Rule to find no clear intent to repeal the APR in individual Chapter 11 cases within the four corners of § 1115 and § 1129(b)(2)(B)(ii). However, they failed to consider the remaining provisions of the Bankruptcy Code and BAPCPA in attempting to resolve the "ambiguity," and their failure is material. The Whole Act Rule of statutory interpretation, either overlooked by the "narrow view" courts or not followed, requires a broader reading of the law and pushes courts to look at a section of a statute not "in insolation from the context of the whole Act." *Richards v. U.S.*, 369 U.S. 1, 11 (1962) ("[I]n fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law, and to its object and policy.") (internal citation omitted). The No Repeal by Implication Rule should be resorted to only if the meaning of the statute cannot be resolved using other rules of statutory construction, including the Whole Act Rule, the purpose of the exercise being, after all, to ascertain the intent of Congress.

To determine the meaning of a word or clause in a statute, the court will look to the Act or Code in which the statute is found, or to similar public acts, to determine the meaning of the

[1] This is Exhibit B to "The Absolute Priority Rule in Individual Chapter 11 Cases," prepared by Ward Stone, Jr. and David L. Bury, Jr. of Stone & Baxter, LLP for the ABI's 19th Annual Southeast Bankruptcy Workshop (2014).

ambiguous word or phrase. *See Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 573 (1989) ("'[I]t is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute.'") (quoting *Stafford v. Briggs*, 444 U.S. 527, 535 (1980)) (internal quotations omitted). Further, statutory construction is a "holistic endeavor." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). The words of a statute "must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. V. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The goal in interpreting a statute is to understand the statute "as a symmetrical and coherent regulatory scheme" and to "fit if possible, all parts into a harmonious whole." *Id.*[2]

Regarding the instant issue of interpretation, Judge Markell (the judge in the broad view *Shat* case, a case discussed in the main article and summarized on **Exhibit A**) did not cite the Whole Act Rule by name in interpreting § 1129(b)(2)(B)(ii). Rather, he relied on the similar presumption of consistent usage. "Put another way, the meaning of statutory language is best revealed by examining not only the general usage in the English of the chosen words, but also through a coordinate review of any specialized use of those terms in the code in which they are found." *In re Shat*, 424 B.R. 854, 865 (Bankr. D. Nev. 2010) (discussing *Rousey v. Jacoway*, 544 U.S. 320, 326-27 (2005)). The presumption is that "identical words used in different parts of the same act are intended to have the same meaning." *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). In fairness to the narrow and broad view cases, many of the decisions recite, consistently, the rules of statutory construction, some rather extensively. *See*

[2] In *Dada v. Mukasey*, 554 U.S. 1 (2008), the Supreme Court went into great detail concerning the application of the Whole Act Rule, which must be employed where a narrower reading would render a right a nullity. *Id.* at 16.

attached **Exhibit A** (Summary of Cases). However, some of the decisions are not faithful to those rules, particularly with respect to viewing BAPCPA in light of entire Bankruptcy Code.

II. Approach of Circuit Courts Adopting the Narrow View Approach

Circuit Courts adopting the narrow view each rely on the No Repeal by Implication Rule to find that the APR survived BAPCPA in individual cases with respect to pre-petition property. However, before resorting to such Rule, the Circuit Courts, in particular, primarily construe only the newly-added § 1115 and amended § 1129(b)(2)(B)(ii). Generally, they do not meaningfully consider the pre-BAPCPA Bankruptcy Code provisions or other BAPCPA provisions. Rather, they focus on the meaning of "includes" in § 1115(a) and "included" in § 1129(b)(2)(B)(ii).

Ignoring the Whole Act Rule, the narrow view cases do not consider the impact of the "Best Interests of Creditors Test" which applies in all restructuring chapters of the Code. The Best Interest of Creditors Test requires that, in order to be confirmed, any restructuring plan must pay to creditors at least as much as they would receive in a Chapter 7 liquidation of the debtor's assets. 11 U.S.C. §§ 1129(a)(7)(A)(2), 1325(a)(4), and 1225(a)(4). Essentially, the consequence of the narrow view cases is that, with the APR intact, an individual debtor under Chapter 11 must (1) pay a minimum to creditors equal to the value of the non-exempt property that creditors would receive in a Chapter 7 ***and then*** (2) give that non-exempt property to creditors! That is in stark contrast to Chapters 12 and 13 where individual debtors must, at a minimum, pay to unsecured creditors an amount equivalent to what the creditors would receive in a Chapter 7 in return for which they are allowed to retain both their exempt and non-exempt property. Therefore, the narrow view doubles the burden on individual debtors in Chapter 11 over the corresponding burden imposed on individual debtors in Chapters 12 and 13. In fact, two months ago in *Cardin*, the Sixth Circuit more or less acknowledged this "double whammy":

> Thus, as the bankruptcy court observed . . . an individual debtor in Chapter 11 is hit by a **double whammy**: he must dedicate at least five years' disposable income to the payment of unsecured creditors, and—unlike a debtor in Chapter 13—is also subject to the absolute-priority rule (and thus cannot retain any pre-petition property) if he does not pay those creditors in full.

In re Cardin, 751 F.3d 734, 739-40 (6th Cir. 2014) (emphasis added). Although the Sixth Circuit acknowledges such "hardship" and does not "take lightly" the concerns that led the lower court in that case to adopt the broad view, its response is limited: "In any event, our task is to interpret the laws that Congress enacted, not to determine whether they are fair." *Id*. at 740.

Following the Whole Act Rule, it becomes clear that the abolition of the APR in individual Chapter 11 cases would resolve one of the remaining ambiguities which had plagued Chapter 11 since 1978—that is, the problem with fitting individual debtors into the category of "holders of interests." Under the APR, even where proposed payments to unsecured creditors would satisfy the Best Interests of Creditors Test, holders of "interests" classified below unsecured creditors may not "receive or retain" any property under a Chapter 11 plan unless unsecured claims are paid in full or unsecured creditors have accepted the plan. Effectively, this requirement allows creditors to force Chapter 11 debtors to liquidate. It is intended to give unsecured creditors, or at least results in their having, significant leverage in negotiating their treatment under a plan. Elimination of equity interest in a corporate debtor is a straightforward process. It is more difficult for individuals. How do they *not* "keep or retain any property?"[3]

Even prior to BAPCPA, courts fashioned the "New Value" exception to the APR for corporations. Under the New Value exception, the APR could be satisfied if (1) the plan satisfies the Best Interests of Creditors Test and (2) new equity sufficient to fund plan payments and to meet the reasonably anticipated operating capital needs of the reorganized business is invested in

[3] Courts generally construe the provision as allowing individual debtors to retain *exempt* property. *See In re Gerard*, 495 B.R. 850, 855 (Bankr. E.D. Wis. 2013); *In re Bullard*, 358 B.R. 541, 544 (Bankr. D. Conn. 2007).

exchange for new equity interests, and the old equity interests are extinguished. *See In re Haskell Dawes, Inc.*, 199 B.R. 867, 871-72 (Bankr. E.D. Penn. 1996). Most courts ruled, however, that individuals could not satisfy the New Value Exception by voluntarily committing future income excluded from the estate under § 541(a). *See In re Henderson*, 341 B.R. 783, 791 (M.D. Fla. 2006) (holding that, unlike non-debtor wife's $525,000 contribution, debtor's non-exempt assets did not qualify as "new value" under the exception). Accordingly, to receive a discharge, individual debtors are forced to convert to Chapter 7 (or Chapter 12 or 13, if they qualify). In a Chapter 7 of an individual, creditors receive, at most, what the Best Interests of Creditors Test would pay under Chapter 11, and the debtor retains only his exempt property.

Post-BAPCPA, the minimum dividend to unsecured creditors rejecting plans in individual cases is *increased* over the dividend that they would receive in a Chapter 7. That is because BAPCPA requires an individual Chapter 11 debtor to commit the debtor's post-petition disposable income (calculated in the same manner provided for Chapter 13 debtors) for a minimum of 5 years or the life of the plan, whichever is longer. Arguably, where an individual plan proposes payments to home mortgages or other long-term obligations for periods longer than five years, distributing the reorganized debtor's disposable income to unsecured creditors must continue until all payments under the plan are completed.[4] Arguably to incentivize debtors to make these increased payments, Congress eliminated the APR in individual Chapter 11 Cases. With the APR intact in individual Chapter 11 Cases, debtors have no incentive to make protracted payments to creditors, where they must not only pay the value of their property to creditors, but also liquidate the property! The narrow view effectively removes the incentive for

[4] If creditors insist on payments over the length of a long-term pay-out, then debtors will likely propose "balloon" payments at the earlier of the 5 year mark or the date that payments satisfy the Best Interests of Creditors Test.

individual debtors to pay creditors more, as enacted under BAPCPA. That could force individual debtors back to the old Chapter 7 alternative, where creditors receive less.

Arguably, a faithful application of the Whole Act Rule would have more clearly revealed that the more likely object and policy of Congress behind eliminating the APR from individual cases was to increase payments to unsecured creditors, while the "sentence diagramming" approach of the narrow view (and even some of the broad view) courts failed to identify the policy behind the rule. As noted in the main article, many of the narrow view cases emphasize that BAPCPA, as a whole, was designed to impose greater burdens on individual debtors (not less burdens), to ensure a greater payout to creditors (not a lesser payout), and to curb bankruptcy abuses (not incentivize them) (see main discussion). However, the narrow view courts stop there, overlooking the Best Interests of Creditors Test. They assume that if individual debtors are allowed to retain non-exempt property, then such property (and presumably its value) would be placed beyond the reach of creditors. That is not the case.

Even on the level of "microscopic sentence analysis," the narrow view courts miss the mark. One might conclude that there is an ambiguity between amended § 1129(b)(2)(B)(ii) and new § 1115 concerning whether all property which becomes property of the estate under § 541(a) is subsumed into § 1115. However, interpreting the added BAPCPA language together with the remainder of § 1115 and other Chapter 11 provisions resolves the ambiguity in favor of eliminating the APR in individual cases. As noted in the main article, § 1115 provides that property of the estate in an individual Chapter 11 includes, in addition to § 541 property:

> (1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and

> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

11 U.S.C. § 1115(a). Section 1115(b), a provision which courts on either side rarely reference, much less discuss, provides that "[e]xcept as provided in section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate."

Ignoring the Whole Act Rule, the narrow view courts spill much ink over whether § 1129(b)(2)(B)(ii) allows individual debtors to retain only the property "added" to the estate under § 1115, or whether § 1115 subsumes all property otherwise included in the estate under § 541(a). There is no disagreement, however, that the property clearly added under subsections (1) and (2) of § 1115 may be retained. The broad view courts hold that § 1115 subsumes all estate property included under either §§ 541 or 1115, while the narrow view courts hold that the section includes only the "additional" property added under subsections (a) and (b). Even without journeying outside of § 1115, it is clear that the broad view courts are correct.

First, and again, subsection (a) includes in property of the individual debtor's estate "all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first." 11 U.S.C. § 1115(a). Under § 1141(b), *confirmation* of a Chapter 11 plan "*vests all of the property of the estate in the debtor*." 11 U.S.C. § 1115(a) (emphasis added). *Confirmation* occurs "*before the case is closed, dismissed, or converted to chapter 7, 12, or 13, whichever occurs first*" (such language being the language from § 1115). Therefore, unambiguously, § 1141(b) channels the property of the estate to the debtor upon confirmation and, therefore, into § 1115. If Congress had not intended such result, then § 1141(b) would have

been amended in BAPCPA. Section 1141(b) is identical to § 1327(b). Neither section has ever been interpreted as being ambiguous.

The result is also apparent from a plain reading of § 1115(b). It provides that: "Except as provided in section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate." Narrow view courts spend virtually no time analyzing § 1115(b), arguably for good reason—§ 1115(b) cannot be interpreted consistently with their holdings. Subsection (b) is entirely consistent with § 1141(b). It unambiguously provides that the debtor shall *remain in possession* of *all* property of the estate except as provided in a plan or order confirming a plan. A plan or an order confirming a plan can only occur *after* creation of the individual's bankruptcy estate under §§ 541 and 1115. The creation of the bankruptcy estate occurs on the petition date. Indeed, one can only *remain in possession* of property already in one's possession! Additionally, as some of the broad view courts have pointed out, § 1115 is virtually identical to § 1306. Section 1306(a) and (b) provide that property of the estate, includes, "in addition to the property specified in section 541 of this title":

> (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first;
>
> and
>
> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.
>
> (b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

Similar to § 1141(a), § 1327(b) provides that confirmation of a Chapter 13 plan vests all property of the estate in the debtor. This identical language in Chapter 13 has never been found

to be vague or ambiguous as it relates to what property is included in an individual's bankruptcy estate under Chapter 13. There is no reason to interpret § 1115 any differently.

Employing the Whole Act Rule resolves any "ambiguity" under § 1129(b)(2)(B)(ii), which permits an individual debtor to only retain "property included in the estate under Section 1115," because it ultimately matters not whether the property consists of post-petition earnings and property acquired by the debtor post-petition or is acquired by the debtor as a matter of law at confirmation under § 1141(b). That is because, either way, all of it is considered to be property of the estate under § 1115(b). An individual debtor cannot both "remain in possession of all property of the estate" as mandated under § 1115(b) (unless provided otherwise by a plan or order confirming a plan), on the one hand, and simultaneously "not receive or retain . . . any property" of the estate upon failing the APR under § 1129 (b)(2)(C)(ii), on the other hand, unless the Chapter 11 plan in an individual case may lawfully provide for the retention of all property of the estate by the reorganized debtor notwithstanding the APR. The APR in individual cases could not have survived the meshing gears of §§ 1115, 1129(b), and 1141(b). Arguably, only a full, faithful application of the Whole Act Rule leads to this conclusion.

III. Discharge and Hardship Discharge under BAPCPA

In pertinent part, § 1141(d)(5)(A), as amended by BAPCPA, provides that in a "case in which the debtor is an individual," unless the court, after notice and a hearing "orders otherwise for cause," the confirmation of the "plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan." 11 U.S.C. § 1141(d)(5)(A). However, the narrow view courts would impose a policy that individual debtors complete all payments due under a plan without any property except post-petition earnings and whatever property was acquired between the petition date and the effective date of a plan. Such

view leaves the reorganized debtor with only exempt property (majority view) coupled with the obligation to still pay the value of the non-exempt property forfeited at confirmation. Several courts adopting the narrow view admit this result is "harsh." Bluntly, it is also nonsensical and, arguably, renders the BAPCPA amendments to § 1141(d)(5) meaningless.

Likewise, § 1141(d)(5)(B), the hardship discharge provision, provides that "at any time after the confirmation of the plan" (and notice and a hearing), the court may grant a discharge, even plan payments are not complete, *if* (1) "*the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date*; (2) "modification of the plan under section 1127 is not practicable"; and (3) §1141(d)(5)(C) "permits the court to grant a discharge." 11 U.S.C. § 1141(d)(5)(B) (emphasis added). There is no mention in § 1141 that property that vested in the debtor upon confirmation under § 1141(b) be forfeited to creditors so long as the value of the non-exempt property has been paid to creditors. There is perhaps no clearer statement of Congressional intent as it relates to the retention of non-exempt property by individual Chapter 11 debtors. The narrow view cases do not address this provision.

IV. "Ambiguity" Resolved

From the foregoing discussion, it is clear that the object and policy of Congress in passing BAPCPA with respect to individual Chapter 11 debtors (who presumptively are ineligible for relief under Chapters 12 or 13) is that such individuals be required to pay to their creditors at least the present value of their non-exempt property out of their future disposable income for a period of at least five years, or the life of the plan, whichever is longer. This payment stream is designed to assure payments to unsecured creditors of not less than what they

would receive in a Chapter 7, while leaving the reorganized debtor with the property needed for an effective fresh start. As in the case of Chapter 13 debtors, an individual Chapter 11 debtor's discharge is *delayed* until *all* payments under the plan have been completed. Just as provided under BAPCPA for Chapter 13 debtors ranking higher on the Means Test, individual Chapter 11 debtors must begin at the 60 month payment level, but must then continue to pay their disposable income to creditors for the length of the plan. The same public policy that has always excluded the APR from Chapter 13 applies equally in individual Chapter 11 cases. The absolute priority rule has no place in individual Chapter 11 cases within the object and policy of BAPCPA.

APPENDIX TO EXHIBIT B

The following parallel provisions of Chapters 11 and 13, read as a whole, support the broad view that the absolute priority rule does not apply in individual Chapter 11 cases:

Provision	Individual Chapter 11 Debtor	Individual Chapter 13 Debtor
Eligibility	**11 U.S.C. § 109(d)** provides that an Individual may be a Debtor under Chapter 11 regardless of the amount of debt owed.	**11 U.S.C. § 109(e)** provides that only an individual [and such individual's spouse] with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $383,175 and noncontingent, liquidated secured debts of less than $1,149,525 may be a debtor under Chapter 13.
Basic Property Included in <u>All</u> Estates	**11 U.S.C. § 541(a)** provides that upon the filing of a voluntary petition under Title 11, all of the debtor's legal and equitable interests in property **<u>as of the commencement of the case</u>**	**11 U.S.C. § 541(a)** provides that upon the filing of a voluntary petition under Title 11, all of the debtor's legal and equitable interests in property **<u>as of the commencement of the case</u>**

Provision	Individual Chapter 11 Debtor	Individual Chapter 13 Debtor
	becomes property of the bankruptcy estate, except for earnings from services performed by an individual debtor after the commencement of the case (see § 541(a)(6)).	becomes property of the bankruptcy estate, except for earnings from services performed by an individual debtor after the commencement of the case (see § 541(a)(6)).
Additional Property Included in Estates of Individuals	**New § 1115 provides:** (a) Property of the Estate in an individual Chapter 11 includes, in addition to the property specified in § 541 - (1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first. (b) Except as provided in Section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.	**11 U.S.C. §1 306 provides:** (a) Property of the estate includes, in addition to the property specified in section 541 of this title – (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7,11, or 12 of this title , whichever occurs first. (b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.
Mandatory and Permissive Provisions for Individual	**§ 1123**	**§ 1322**

Provision	Individual Chapter 11 Debtor	Individual Chapter 13 Debtor
Plans:	(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—	(a) The plan—
	(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.	(1) shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan; . . .
	(5) provide adequate means for the plan's implementation, such as—	
	(A) retention by the debtor of all or any part of the property of the estate; . . .	
	(b) Subject to subsection (a) of this section, a plan may—	(b) Subject to subsections (a) and (c) of this section, the plan may - . . .
	(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests; . . .	
	(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the	(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class

Provision	Individual Chapter 11 Debtor	Individual Chapter 13 Debtor
	rights of holders of any class of claims; and (6) include any other appropriate provision not inconsistent with the applicable provisions of this title. (c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease. [NO MEANS TEST]	of claims; . . . (4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim; (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due; . . . (8) provide for the payment of all or part of a claim against the debtor <u>from property of the estate or property of the debtor</u>; (9) <u>provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor</u> or in any other entity; . . . (11) include any other appropriate provision not inconsistent with this title. . . . (d) [MEANS TEST]

Provision	Individual Chapter 11 Debtor	Individual Chapter 13 Debtor
		[Depending upon income:] the plan may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years.
Confirmation Requirements	**§ 1129**	**§ 1325**
	(a) The court shall confirm a plan only if all of the following requirements are met: . . . (3) The plan has been proposed in good faith and not by any means forbidden by law. . . .	(a) Except as provided in subsection (b), the court shall confirm a plan if— . . . (3) the plan has been proposed in good faith and not by any means forbidden by law;
Best Interests of Creditors Test	(7) With respect to each impaired class of claims or interests— (A) each holder of a claim or interest of such class— (i) has accepted the plan; or (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or . . .	(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date; . . .

Provision	Individual Chapter 11 Debtor	Individual Chapter 13 Debtor
Unsecured Claim Cramdown	(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan— (A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or (B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325 (b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer. <u>[1325 (b)(2)) Cross-Reference]</u> (2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in	(b) (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan— (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan. (2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the

Provision	Individual Chapter 11 Debtor	Individual Chapter 13 Debtor
	accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended— (A) (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and (ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548 (d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548 (d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business. (b) (1) Notwithstanding section 510 (a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with	extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended— (A) (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and (ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548 (d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548 (d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

Provision	Individual Chapter 11 Debtor	Individual Chapter 13 Debtor
	respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan. (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: . . . (B) With respect to a class of unsecured claims— (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, **the debtor may retain property included in the estate under section 1115**, subject to the requirements of subsection (a)(14) of this section.	

Provision	Individual Chapter 11 Debtor	Individual Chapter 13 Debtor
Effect of Confirmation	**§ 1141(a)** a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan. (b) Except as otherwise provided in the plan or the order confirming the plan, **the confirmation of a plan vests all of the property of the estate in the debtor.** (c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.	**§ 1327** (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan. (b) Except as otherwise provided in the plan or the order confirming the plan, **the confirmation of a plan vests all of the property of the estate in the debtor.** (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

Provision	Individual Chapter 11 Debtor	Individual Chapter 13 Debtor
Modification of Confirmed Plan	**§ 1127(e):** If the debtor is an individual, the plan may be modified at any time after confirmation of the plan but before the completion of payments under the plan, whether or not the plan has been substantially consummated, upon request of the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim, to— (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; (2) extend or reduce the time period for such payments; or (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim made other than under the plan.	**§ 1329(a):** At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to— (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; (2) extend or reduce the time for such payments; (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and

Provision	Individual Chapter 11 Debtor	Individual Chapter 13 Debtor
		demonstrates that— (A) such expenses are reasonable and necessary; . . .
Discharge	**§ 1141(d)(5):** In a case in which the debtor is an individual— (A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;	**§ 1328(a):** Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, . . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, . . .
Hardship Discharge	**§1141(d)(5)(B)**: at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if— (i) **the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date**;	**§1328(b):** Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if— (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable; (2) **the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such**

Provision	Individual Chapter 11 Debtor	Individual Chapter 13 Debtor
	(ii) modification of the plan under section 1127 is not practicable; and (iii) subparagraph (C) permits the court to grant a discharge; and (C) the court may grant a discharge if, after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that— (i) section 522 (q)(1) may be applicable to the debtor [i.e. the debtor is attempting to retain more than $146,450 in exempt property]; . . .	**date; and** (3) modification of the plan under section 1329 of this title is not practicable.

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