DEAD MAN FILING REDUX: IS THE NEW INDIVIDUAL CHAPTER ELEVEN UNCONSTITUTIONAL?

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INTRODUCTION

Since the passage of the 1978 Bankruptcy Code, conventional wisdom has held, as an article of faith grounded in fundamental bankruptcy policy, that a provision allowing initiation of an involuntary chapter 13 case would violate the Thirteenth Amendment's prohibition on involuntary servitude.[1] The passage of amendments to chapter 11 pertaining to individual chapter 11 cases as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")[2] will assuredly test this conventional wisdom, providing, as they do, for an option worse than mere involuntary chapter 13: an involuntary individual chapter 11 case that nonetheless captures (indeed compels the use of) post-petition earnings from individual services to fund a chapter 11 plan but provides no automatic "escape."[3] While it is entirely possible that we arrived at this collision point by congressional inadvertence or sheer ineptitude, this article will first explore the perceived problems with individual chapter 11 that the BAPCPA amendments were *apparently* designed to fix. Second, the article will briefly explore the difference between "old" individual chapter 11 and chapter 13. Third, the article will explore the alleged Thirteenth Amendment basis for those differences, particularly as they related to the exclusion or inclusion within the bankruptcy estate of post-petition earnings from individual services. Fourth, the article will survey the BAPCPA amendments relating to individual chapter 11 and analyze them in the context of the constitutional concerns allegedly undergirding the predecessor provisions. Finally, the article will explore the arguments for holding that the BAPCPA amendments run afoul of the prohibition on involuntary servitude.

I. THE TWO "PROBLEMS" WITH INDIVIDUAL CHAPTER 11 CASES PRE-BAPCPA

A. Post-Petition Earnings and Property of the Individual Chapter 11 Estate

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[1] *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[2] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, § 321, 119 Stat. 23, 94–96 (2005) (to be codified at 11 U.S.C. §§ 1115, 1123(a), 1129(a), 1129(b)(2)(B)(ii), 1141(d), 1127) (amending chapter 11 cases filed by individuals).

[3] *See* Jack F. Williams, *The Federal Tax Consequences of Individual Chapter 11 Cases*, 46 S.C. L. REV. 1203, 1215 (1995) (recognizing "forced impoundment of post-petition earnings" and permitted carving out of future income under section 541(a)(6) of 1978 Bankruptcy Code "could raise serious questions involving the Thirteenth Amendment's prohibition against involuntary servitude.").

Section 541(a)(6) of the Bankruptcy Code provides that property of 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*."[4] Despite the authorization contained in sections 1107 and 1108 of the Code for an individual debtor to continue to operate his or her business, "the great majority of courts to consider this question [hold] . . . that the post-petition wages of an individual in chapter 11 are not property of the estate."[5] While the "earnings exception" of section 541(a)(6) has sometimes been construed more narrowly in sole proprietor chapter 11 cases,[6] at a minimum, income directly attributable to post-petition services of the individual debtor is excluded from the chapter 11 estate.[7] Indeed, the general rule is that the chapter 11 estate includes interests of the debtor in property *as of the commencement of the case*; sections 541(a)(5) and (6) are "exceptions from the general rule that post-petition acquisitions are property of the debtor—exceptions specially provided to include particular property within the bankruptcy estate."[8]

Indeed, bankruptcy courts have been held to have no jurisdiction to restrict the use of an individual chapter 11 debtor's use of post-petition earnings from his or her services.[9] In most jurisdictions, there was no requirement to use such earnings to fund a plan of reorganization in the individual chapter 11 case.[10] Some courts refused to confirm plans relying on future earnings for funding (and feasibility),

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[4] 11 U.S.C. § 541(a)(6) (2000) (emphasis added) (highlighting earnings not included in bankruptcy estate).

[5] Roland v. UNUM Life Ins. Co. of Am., 223 B.R. 499, 502 (Bankr. E.D. Va. 1998) (realizing Fourth Circuit has excluded post-petition wages from property of estate).

[6] *See, e.g.*, Stacy L. Daly, *Post-Petition Earnings and Individual Chapter 11 Debtors: Avoiding a Head Start*, 68 FORDHAM L. REV. 1745, 1765 (2000) (recognizing majority of courts "have held that post-petition income derived from personal services rendered by the individual debtor [is] excluded from the estate, while post-petition income derived from the sole proprietor's business assets [is] included within the debtor's estate.").

[7] *See e.g.*, *In re* Prince, 85 F.3d 314, 323 (7th Cir. 1996) (distinguishing value attributable to goodwill of orthodontics practice from value contributed by debtor's post-petition services); FitzSimmons v. Walsh (*In re* FitzSimmons), 20 B.R. 237, 240 (B.A.P. 9th Cir. 1982), *aff'd*, 725 F.2d 1208, 1211 (9th Cir. 1984) (holding Bankruptcy Code prevented only personally performed post-petition earnings and services of debtor lawyer sole proprietor from being included in bankruptcy estate). As discussed *infra* at notes 83-89, a minority view holds that post-petition earnings of professional service individual chapter 11 debtors (lawyers, doctors, etc.) are all property of the estate under 11 U.S.C. §541(a)(7), and that section 541(a)(6) does not exclude such earnings.

[8] Casey v. Hochman, 963 F.2d 1347, 1351 (10th Cir. 1992) (stating post-petition invention, patent, and royalties of individual debtor were not property of chapter 11 estate or, upon conversion, chapter 7 estate).

[9] *Roland*, 223 B.R. at 503 ("[I]n the context of a chapter 7 proceeding, the bankruptcy court would have no jurisdiction to prevent the use of non estate assets for the retention of counsel unrelated to the bankruptcy proceeding . . . . [I]ndividuals proceeding under chapter 11 are treated [no] differently.").

[10] *See id*. at 504 ("[T]o allow creditors to contest the use of funds exempted by § 541(a)(6) and force those funds to be reserved for a future, as yet unproposed plan, is in essence to read § 541(a)(6) out of the Code and treat post-petition wages functionally as estate property.").

reasoning that such confirmation orders, at the least, would be unenforceable.[11] The Supreme Court's *Ahlers* decision indeed states that a promise to devote future individual services to fund a plan is "in all likelihood, unenforceable."[12] However, how an individual debtor uses post-petition earnings and other non-estate property may be relevant to a determination as to whether a plan is proposed in good faith.[13]

B. Cramdown in the Individual Chapter 11 Case

Ironically, notwithstanding the exclusion of future earnings from the individual chapter 11 debtor's estate, the contribution of such earnings has been held not to satisfy the "new value" exception to the absolute priority rule (the "APR").[14] The APR, of course, requires that, 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."[15] While it may be difficult to conceptualize the individual debtor as the holder of an "interest," the phrase has been construed to refer to holders of ownership interests, and to include the interest of a sole proprietor in a proprietorship.[16] Thus, the individual chapter 11 debtor's retention of any property, including exempt property, likely triggers the APR.[17]

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[11] *E.g.*, *id*. at 504 n.10 (listing and discussing cases where courts refused to confirm chapter 11 reorganization plans because "assignment of future earnings [was] against public policy."); *In re* Bolton, 188 B.R. 913, 917–18 (Bankr. D. Vt. 1995) (denying confirmation of reorganization plan funded by post-petition wages); *see In re* Flor, 166 B.R. 512, 516 (Bankr. D. Conn. 1994) ("[I]t is against public policy to enter a Chapter 11 plan confirmation order which purports to authorize and validate a voluntary assignment of an individual's future wages.").

[12] Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 204 (1988).

[13] *See Roland*, 223 B.R. at 506 (acknowledging bankruptcy court's right to consider manner in which debtor uses post-petition funds); *In re* Weber, 209 B.R. 793, 798 (Bankr. D. Mass. 1997) ("[A]n individual debtor's conduct with respect to nonestate property is highly relevant to a determination of a debtor's good faith under § 1129(a)(3).").

[14] *See Ahlers*, 485 U.S. at 204 ("[N]o decision of this Court, or any Court of Appeals . . . has ever found a promise to contribute future labor, management, or expertise sufficient to qualify for the [new value] exception to the absolute priority rule.").

[15] 11 U.S.C. § 1129(b)(2)(B)(ii) (2000) (emphasis added). *See* Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 441 (1999) (quoting absolute priority rule of section 1129(b)(2)(B)(ii)).

[16] *See* Unruh v. Rushville State Bank, 987 F.2d 1506, 1508–09 (10th Cir. 1993) (finding equitable ownership interests in farm because of right to future profits, and indicating "sole proprietorships were intended to be included as 'interest holders.'").

[17] *See, e.g.*, *In re* Kovalchick, Nos. 91-24182DAS, 91-24183DAS, 1995 WL 118171, at *4 (Bankr. E.D. Pa. Mar. 15, 1995) ("Retention of any interest whatsoever by a debtor's management triggers the APR."); MJPG, Inc. v. Fross (*In re* Fross), No. KS-98-030, 94-21906, 1999 WL 26886, at *8 (B.A.P. 10th Cir. Jan. 15, 1999) (mentioning absolute priority rule's historical prohibition of debtor's retention of property); *In re* Yasparro, 100 B.R. 91, 95–96 (Bankr. M.D. Fla. 1989) ("[T]he jurisprudence . . . unanimously holds that if the Debtor retains any property, even control or the potential for future earnings, the cramdown provisions of Section 1129(b)(2)(B)(ii) are not met." (quoting *In re* East, 57 B.R. 14, 17 (Bankr. M.D. La. 1985)); *see In re* Armstrong World Indus., Inc., 320 B.R. 523 (Bankr. D. Del 2005) (explaining reorganization plan is not "fair and equitable," and is therefore a violation of section 1129(b)(2)(B)(ii), if debtor retains property).

Unless the individual chapter 11 debtor proposed a 100% plan, the debtor, faced with an objecting, impaired class, had to resort to the new value corollary to the APR, since it was, of course, nearly impossible for the individual debtor to avoid retention of some "property" as defined by these decisions. However, as the *Yasparro* court noted in holding the new value corollary applicable to individual debtors, "it is difficult to perceive how an individual chapter 11 debtor would meet the requirements of the [new value corollary]."[18] The courts have struggled, in fact, to find a contribution by or on behalf of an individual debtor which meets all of the requirements of the corollary.[19] The courts specifically require an "outside" investment of new capital, meaning an investment of property not belonging to the debtor or resulting from such debtor's earning capacity.[20] The devotion of the debtor's future income is insufficient.[21] The contribution of exempt property of the

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Some courts—including most notably one bankruptcy court in the Eastern District of Pennsylvania—have held that the retention of exempt property does not violate the absolute priority rule. *E.g.*, *In re* Henderson, 321 B.R. 550, 561 (Bankr. M.D. Fla. 2005) (ruling "individual debtor does not have to forfeit his exemption rights to which the debtor is otherwise entitled to . . . as a price of obtaining confirmation of his or her plan of reorganization."); *In re* Custer, No. 91-14576S, 1993 WL 7965, at *6 (Bankr. E.D. Pa. Jan. 7, 1993) ("There are practical and equitable reasons for continuing owner participation in a reorganizing debtor."); *In re* Egan, 142 B.R. 730, 733 (Bankr. E.D. Pa. 1992) (explicating debtors have absolute right to retain exempt property because interests in exempt property are not junior to interests of classes of creditors); *In re* Harman, 141 B.R. 878, 885 (Bankr. E.D. Pa. 1992) (applying absolute priority rule only to retention of non-exempt property); *see In re* Shin, 306 B.R. 397, 404 n.17 (Bankr. D.C. 2004) ("The court doubts the correctness of decisions holding that 'property' under § 1129(b)(2)(B)(ii) includes exempt property that creditors cannot reach and that is not property of the estate."); *In re* Kovalchick, Nos. 91-24182DAS, 91-24183DAS, 1995 WL 118171, at *4 (Bankr. E.D. Pa. Mar. 15, 1995) (maintaining reorganization plans violate absolute priority rule if they include both exempt and nonexempt property).

[18] *In re* Yasparro, 100 B.R. 91, 96 (Bankr. M.D. Fla 1989). The "new value corollary" or "new value exception" permits the equity owners of an enterprise to retain their equity (or, in essence, to acquire new equity) without violating the absolute priority rule by making a contribution of "new value." *See* Clifford S. Harris, Note, *A Rule Unvanquished: The New Value Exception to the Absolute Priority Rule*, 89 MICH. L. REV. 2301, 2302 (1991) ("The new value exception to the absolute priority rule permits a shareholder who contributes new capital to retain an ownership interest in the bankrupt enterprise ahead of the creditors to an extent equal to the new investment.").

Under the typical formulation of the doctrine, the new value must be a contribution in money or money's worth, reasonably equivalent in view of all circumstances to the value of the participation interest of the equity holder. *See* Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 203 n.3 (1988) (finding contribution of experience, labor and expertise insufficient to satisfy new value exception).

[19] *See generally* Douglas S. Neville, Note, *The New Value Exception to the Absolute Priority Rule*, 60 MO. L. REV. 465, 481–82 (1995) (defining stringent requirements of new value exception as "precautionary measures against abuse of the exception.").

[20] *See In re* Saleha, No. 93-00638, 1995 WL 128495, at *3 (Bankr. D. Idaho Mar. 10, 1995) ("'[N]ew value' must come from outside of the debtor's business."); David R. Perlmutter, *Navigating a Proposed "New Value" Plan Through the Cross-Currents of the Confirmation Process: An Arduous Journey for the Debtor of a Single-Asset Real Estate Case*, 17 WHITTIER L. REV. 427, 443 (1996) (mandating debtor invest "infusion of fresh capital" rather than old equity).

[21] *E.g.*, *In re* Bolton, 188 B.R. 913, 917 (Bankr. D. Vt. 1995) (concluding debtor's promise to pay future income did not amount to new value); *In re* Saleha, 1995 WL 128495, at *3 (noting new value cannot be provided by debtor's post-petition earnings); *In re* Cipparone, 175 B.R. 643, 645 (Bankr. E.D. Mich. 1994) (remarking debtor's payment of future earnings and income tax returns that would accrue over six years was insufficient to satisfy new value exception); *In re* Harman, 141 B.R. 878, 886 (Bankr. E.D. Pa. 1992) (questioning whether future earnings should be included in computation of debtors' "new value offer").

debtor is also not a contribution of new value.[22] Contributing post-petition proceeds of pre-petition property is similarly not "new".[23] Placing a mortgage on estate assets to secure a deferred payout to unsecured claims is insufficient.[24] A non-debtor spouse's promise to devote future income, while constituting an "outside" investment, was insufficient because it was not a present contribution of money or money's worth.[25] Perhaps only cash gifts or loans from third parties would suffice:

> The individual Chapter 11 debtor's task is more complex in contributing capital which is reasonably equivalent in value to the interest retained by this debtor. It is the major hurdle in seeking cramdown. The individual debtor cannot recast his interest in property the way corporate shareholders can recast their shares. Pragmatically, without a benevolent parent or guardian or 100% payment to the unsecured creditors, the individual debtor is always left in the precarious position of determining how much property to liquidate in order to save the remainder.[26]

Moreover, as *Yasparro* notes, the individual debtor—like all chapter 11 debtors—must establish that the new contribution is reasonably equivalent to the value of the interest retained; the fact that property has little or no equity does not mean that it has no value.[27] Under the Supreme Court's opinion in *Lasalle*,[28] some form of a competitive market "test" must be used to determine the value of the retained interest and the reasonable equivalence of the new value contribution.[29]

Depending on the jurisdiction, the individual chapter 11 debtor and his or her creditors faced a dilemma. A plan relying on future income might be

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[22] *See, e.g., In re* Dowden, 143 B.R. 388, 394 (Bankr. W.D. La. 1989) (deciding debtor's exempt life insurance policy may have been facially defective because it was "not freely tradeable in the economy").

[23] *E.g., In re* Short, 173 B.R. 946, 949 (Bankr. E.D. Okla. 1994) (realizing proceeds derived from use of pre-petiton farmland property did not constitute new value).

[24] *E.g., In re* Rocha, 179 B.R. 305, 309 (Bankr. M.D. Fla. 1995) (placing mortgage on estate property failed to satisfy new value exception because, among other things, mortgage was not new value from outside source).

[25] *E.g., In re* Hendrix, 131 B.R. 751, 753 (Bankr. M.D. Fla. 1991) (denying non-debtor spouse's promise to pay eight hundred dollars per month because it was promise to make future payments and not present contribution "with value to the unsecured creditors today.").

[26] *In re* Yasparro, 100 B.R. 91, 98 (Bankr. M.D. Fla. 1989).

[27] *See id.* at 99 (explaining contribution must be reasonably equivalent to value retained and "fact property has little or no equity does not mean it has no value"); *In re* Dowden, 143 B.R. 388, 393 (Bankr. W.D. La. 1989) ("[I]ndividual debtors must . . . demonstrate some basis upon which the Court can postulate a value of the retained interest.").

[28] Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S 434 (1999).

[29] *See id.* at 457–58 (discussing need for "some form of market valuation . . . to test the adequacy of an old equity holder's proposed contribution."). This valuation is often done by termination of the debtor's exclusive period to file a plan, thus permitting competing plans, or by building an "auction" mechanism into the plan. *See* Risa Lynn Wolf-Smith & Tim Gordon, *Another Take on the New Value Exception: Keeping Insiders "In" After North LaSalle*, AM. BANKR. INST. J., Oct. 2001, at 38 (satisfying Supreme Court's concern in LaSalle through competing plans and auction procedures).

unconfirmable. However, since cramdown might be practically unachievable, creditors needed an inducement to consent to plans providing less than fall payment and leaving the debtor with material assets, such as the promise of payments from future income. Many individual chapter 11 plans, therefore, were liquidating plans or otherwise confirmed only on a fully consensual (and sometimes disadvantageous) basis.

II. A COMPARISON OF CHAPTER 13 AND INDIVIDUAL CHAPTER 11—PRE-BAPCPA

A. Chapter 13

Chapter 13, of course, does contain provisions requiring debtors to contribute post-petition earnings to the funding of a plan.[30] Under section 1322, a plan shall "provide for the submission of all or such portion of future earnings or other future income of the debtor . . . as is necessary for the execution of the plan."[31] If a single unsecured creditor objects, the court may not confirm a plan unless the plan provides for full payment or devotes at least three years (and up to five years) worth of the debtor's disposable income to the funding of the plan.[32] Critically, however, a debtor cannot be placed into chapter 13 involuntarily, and a debtor has a near-absolute right to dismiss a chapter 13 case or to convert same to a case under chapter 7.[33] Only the debtor can file a chapter 13 plan.[34] Prior to BAPCPA, the duration of a chapter 13 plan could not exceed five years.[35]

B. Pre-BAPCPA Chapter 11

"Old" (pre-BAPCPA) individual chapter 11 was materially different. An individual chapter 11 could be commenced by involuntary petition.[36] The debtor could not convert a chapter 11 case to a chapter 7 case if the case was commenced

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[30] *See* 11 U.S.C. § 1306(a)(2) (2000) ("Property of the estate includes . . . earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed or converted . . . ."). All references in this section are to the pre-BAPCPA version of chapter 13.

[31] *Id*. § 1322(a)(1) (explaining contents of plan).

[32] *See id*. § 1322(d) (specifying payment periods for plan); *id*. § 1325(b) (providing requirements for court approval of plan upon objection by unsecured creditor).

[33] *See id*. § 303(a) (permitting involuntary case under chapter 7 or 11 exclusively); *id*. § 1307(a) (informing debtor may convert chapter 13 case to chapter 7 case at any time); *id*. § 1307(b) ("On request of the debtor at any time, if the case has not been converted . . . the court shall dismiss [chapter 13 case].").

[34] *Id*. § 1321 ("The debtor shall file a [chapter 13] plan.").

[35] *See id*. § 1322(d) (prohibiting court from approving chapter 13 plan authorizing payments for longer than five years). BAPCPA makes several changes to the chapter 13 plan provisions; those changes are beyond the scope of this article. *See* ALAN N. RESNICK & HENRY J. SOMMER, THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 WITH ANALYSIS 2 (2005) (discussing amendments to confirmation and modification of chapter 13 plans under BAPCPA).

[36] *See* 11 U.S.C. § 303(b) (2000) (defining circumstances where involuntary case against a person may be commenced by filing petition under chapter 11).

as an involuntary case.[37] No absolute right to dismiss the case existed; dismissal had to be ordered by the court for "cause."[38] Following expiration or termination of the debtor's exclusive periods, any party-in-interest, including a creditor, could file a plan.[39] The chapter 11 plan had no maximum term.[40] However, as noted above, and discussed in detail below, under the majority rule, post-petition earnings from individual services were not included within the chapter 11 estate.[41]

III. THIRTEENTH AMENDMENT CONCERNS UNDERLYING CHAPTER 13 AND THE "EARNINGS EXCEPTION"

The features of chapter 13 and chapter 11 discussed above were, from their inception, based upon constitutional concerns. The legislative history to chapter 13, in recognition that post-petition earnings were part of the estate and would fund the plan, emphasized that chapter 13 was wholly voluntary, and debtors could not be "converted into" chapter 13, lest the Code's wage earner provisions run afoul of the Thirteenth Amendment prohibition on involuntary servitude.[42] In reliance on these congressional statements and long-perceived foundations of bankruptcy policy, various courts have suggested a Thirteenth Amendment basis for the various chapter 13 protections, as well as the earnings exception. In cases construing chapter 13, the earnings exception, and more recently, section 707(b) of the Bankruptcy Code, bankruptcy courts have repeatedly emphasized the degree to which constitutional concerns permeate the Code provisions governing individual rehabilitation or reorganization cases.

A. Chapter 13 Cases.

"Congress forcefully expressed its concern with the potential conflict with the Thirteenth Amendment's prohibition against involuntary servitude by mandating

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[37] *Id*. § 1112(a)(2) (listing exceptions where debtor cannot convert chapter 11 case to chapter 7 case).

[38] *See id*. § 1112(b) (conveying situations constituting "for cause").

[39] *See id*. § 1121(c) (specifying parties in interest who may file a chapter 11 plan).

[40] *See id*. §§ 1123, 1129 (setting requirements for contents and confirmation of chapter 11 plan).

[41] *See id*. § 541(a)(6) (excluding post-petition earnings of services performed by individual debtor from property of estate). *See supra* notes 4–13, and *infra* notes 57–92 and accompanying text.

[42] The House and Senate Reports contain the same comments reflecting concerns that an involuntary chapter 13 case would offend the Thirteenth Amendment:

> As under current law, chapter 13 is completely voluntary. This committee firmly rejected the idea of mandatory or involuntary chapter XIII in the 90th Congress. The Thirteenth Amendment prohibits involuntary servitude. Though it has never been tested in the wage earner plan context, it has been suggested that a mandatory chapter 13, by forcing an individual to work for creditors, would violate this prohibition.

H.R. REP. NO. 95-595, at 120 (1977), *reprinted in* 1978 U.S.C.C.A.N. 6080, 6081. *See* S. REP. NO. 95-989, at 32 (1978) (categorizing involuntary chapter 13 cases as "bad policy").

that chapter 13 be strictly voluntary."[43] The prohibitions on creditor conversion of chapter 7 or chapter 11 cases to chapter 13 cases reflect this concern.[44] Granting the debtor the absolute right to dismiss a chapter 13 case, thus relieving the debtor of compulsory devotion of his earnings to fund the plan, has also been found to have a constitutional basis.[45]

Courts have rebuffed creditor attempts to force chapter 13 plan modifications on similar grounds. One court noted that the absence of a mandatory minimum time limit for chapter 13 plans (under the then-existing version of chapter 13) was based upon Thirteenth Amendment concerns.[46] Similarly, the five-year maximum on chapter 13 plans "was a response by Congress to concerns that a plan of too long a duration might amount to involuntary servitude."[47] The debtor could, however, seek a longer plan if it was requested by and benefited the debtor.[48] Another court has suggested that compelling a debtor to pay a certain minimum percentage of debt, including by extending the term of his stay in chapter 13, would offend the Thirteenth Amendment.[49] Requiring the debtor, on a creditor's post-confirmation motion, to amend his chapter 13 plan to pay a higher percentage to creditors from the debtor's earnings was also found to raise constitutional concerns.[50] At least one court has used the chapter 13 jurisprudence to suggest that conversion of an

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[43] *In re* Aberegg, No. 90-30156 HCD, 1990 WL 92427, at *5 (Bankr. N.D. Ind. June 15, 1990) (analyzing statutory and legislative intent behind chapter 13). *See In re* Paolino, No. 85-00759F, 1991 WL 284107, at *12 n.13 (Bankr. E.D. Pa. Jan. 11, 1991) (appreciating congressional concerns underlying chapter 13 requirements); *In re* Noonan, 17 B.R. 793, 800 (Bankr. S.D.N.Y. 1982) (observing forced conversion to chapter 13 would violate Thirteenth Amendment).

[44] *See, e.g.*, Aberegg, 1990 WL 92427, at *4 (showing chapter 11 cases "can be converted to chapter 13 [cases] *only* if the debtor so requests," and chapter 7 cases can be converted to chapter 13 cases only if debtor consents); *see In re* Vitti, 132 B.R. 229, 230 (Bankr. D. Conn. 1991) (insisting courts are prohibited "from converting a case to chapter 13 without the debtor's consent"); *In re* Carrow, 315 B.R. 8, 16 (Bankr. N.D.N.Y. 2004) (stating forced conversion to chapter 13 "would violate both § 706(c) . . . and the United States Constitution.").

[45] *In re* Spencer, 137 B.R. 506, 513 (Bankr. N.D. Okla. 1992) ("[T]he 13th Amendment requires that debtors be allowed to escape *from* Ch. 13 no matter what the circumstances . . . ."); Gaudet v. Kirshenbaum Inv. Co. (*In re* Gaudet), 132 B.R. 670, 674 (Bankr. D. R.I. 1991) (confirming debtor's absolute right to dismiss chapter 13 case).

[46] *In re* Markman, 5 B.R. 196, 199 (Bankr. E.D.N.Y. 1980) ("Had Congress set a mandatory time period during which a debtor had to work for his creditors, it would have run afoul of the spirit, if not the letter, of the 13th Amendment to the U.S. Constitution.").

[47] *In re* Nahat, 315 B.R. 368, 374 (Bankr. N.D. Tex. 2004) (explaining Congress' rationale in limiting duration of chapter 13 plans).

[48] *See, e.g.*, *id*. (determining extension of debtor-couple's collective bankruptcies beyond five years was not *per se* improper because extension of time benefited debtors).

[49] *See id*. (referring to Thirteenth Amendment's influence on prohibition of involuntary chapter 13 cases).

[50] *In re* Fluharty, 23 B.R. 426, 429 (Bankr. N.D. Ohio 1982) (stating unsecured creditor cannot force debtor to modify chapter 13 plan to require increased payment to unsecured creditors). As with other provisions, this particular "congressional concern" may have passed. Section 1329 now specifically authorizes a creditor to seek plan modifications, such as extending the payment period. *See* 11 U.S.C. § 1329(a)(2) (2000) (describing how chapter 13 plan may be modified at request of unsecured creditor).

individual chapter 7 case to chapter 11 should not be permitted since, in that case, it was analogous to an involuntary chapter 13 case.[51]

B. Section 707(b) Cases.

Section 707(b), as originally constructed, permitted the court to dismiss an individual chapter 7 case, upon the motion of a creditor or the United States Trustee, or upon the court's own motion, if granting chapter 7 relief would constitute a "substantial abuse" of chapter 7.[52] The focus of the "substantial abuse" inquiry was often whether the debtor could pay some portion of his debts if he filed a chapter 13.[53] Commentators suggested that dismissing chapter 7 cases due to ability to pay would compel the same debtors to file chapter 13 cases against their will, thus violating the Thirteenth Amendment.[54] Some courts, in applying section 707(b) agreed, and refused to dismiss cases solely because of ability to pay, citing concerns about involuntary chapter 13 cases as well as the Thirteenth Amendment.[55] Other courts flatly disagreed, finding that a section 707(b) was not tantamount to an involuntary chapter 13 case and, in some instances, questioned whether a *voluntarily* commenced bankruptcy case could ever implicate the prohibition against involuntary servitude.[56]

C. The Post-Petition Earnings Cases

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[51] *See In re* Graham, 21 B.R. 235, 238–39 (Bankr. N.D. Iowa 1982) (stressing congressional intent not to force individual debtors into repayment plan against their will). The *Graham* court, however, expressed skepticism that the framers of the Thirteenth Amendment intended it to reach even mandatory repayment plans in bankruptcy cases. *See id*. at 238 n.3 (refusing to recognize similarity between mandatory repayment schemes and slavery Thirteenth Amendment intended to abolish).

[52] *See* 11 U.S.C. § 707(b) (2000) (governing dismissal of chapter 7 case).

[53] *See, e.g.*, J. Kaz Espy, *Chapter 7 Bankruptcy and Section 707(B): Should the Subjective "Substantial Abuse" Standard be Replaced by an Objective "Means-Testing" Formula?*, 56 MERCER L. REV. 1385, 1416 (2005) (recognizing Eight Circuit courts "look[] at the debtor's finances—if the debtor has the ability to fund a Chapter 13 payment plan that debtor will be determined to be substantially abusing Chapter 7.").

[54] *See* Vern Countryman, *Bankruptcy and the Individual Debtor—And A Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 827 (1983) (arguing Thirteenth Amendment challenges should not be precluded solely because debtor's only remedy is chapter 13 case); Karen Gross, *The Debtor As Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 167 (1990) ("Requiring a debtor to work to repay his creditors to obtain a discharge is strikingly close to the condition of peonage, a form of involuntary servitude violative of the thirteenth amendment.").

[55] *See, e.g.*, *In re* McDonald, 213 B.R. 628, 630–31 (Bankr. E.D.N.Y. 1997) (dismissing chapter 7 case because debtors might have had available disposable income for chapter 13 plan, which would compromise chapter 13's voluntary nature); *In re* Farrell, 150 B.R. 116, 119 (Bankr. D. N.J. 1992) (citing Congress' primary concern that debtors not be compelled to work for benefit of creditors in violation of Thirteenth Amendment).

[56] *See* U.S. Trustee v. Duncan (*In re* Duncan), 201 B.R. 889, 901 (Bankr. W.D. Pa. 1996) (pointing to debtor's choice to forego avenue of initiating chapter 13 case); *see In re* Higginbotham, 111 B.R. 955, 967 (Bankr. N.D. Okla. 1990) (stressing statute is not unconstitutional merely because someday it might be unconstitutional "as applied" in future case); *see also In re* Krohn, 87 B.R. 926, 931 (Bankr. N.D. Ohio 1988) (holding no Thirteenth Amendment violation because debtor voluntarily and without compulsion incurred debt which he sought to have discharged).

Concerns about the Thirteenth Amendment have been most pronounced, and most hotly debated, in the decisions construing the earnings exception of section 541(a)(6) as applied to individual chapter 11 cases, particularly cases of sole proprietors and "service professionals"—the doctor, dentist, lawyer cases. The focus on constitutional concerns here is undoubtedly a product of the statement of fundamental bankruptcy policy found in *Local Loan Co. v. Hunt*,[57] as well as the fact that control over a debtor's post-petition earnings most clearly triggers fears of involuntary servitude, *i.e.*, compelled work to repay a creditor.

Early in the history of the Bankruptcy Code, a creditor's motion to convert an individual chapter 7 case into an "involuntary" chapter 11 for the purposes of compelling assumption of the debtor-artist's recording contract was denied on the ground that performance of personal services to repay debt could not be compelled.[58] Conversion to chapter 11 in the circumstances of the case was the equivalent of an involuntary chapter 13 case, although Congress, while aware of the threat in the chapter 13 context, was apparently not focused on the same risk in an individual chapter 11 case.[59]

> The policy against forcing an individual to work against his will is applicable, if the facts present themselves, in chapter 11 as well as in chapter 13. Congress' concerns are so strongly expressed in connection with chapter 13 that this court would be remiss were it to apply them only there.[60]

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[57] Local Loan Co. v. Hunt, 292 U.S. 234 (1934). The Court, in its now-famous passage, stated that:

> When a person assigns future wages, he, in effect, pledges his future earning power. The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much as, if not more than, it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern. From the viewpoint of the wage earner there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either. The amount of the indebtedness, or the proportion of wages assigned, may here be small, but the principle, once established, will equally apply where both are very great. The new opportunity in life and the clear field for future effort, which it is the purpose of the Bankruptcy Act to afford the emancipated debtor, would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his eamings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy.

Id. at 245.

[58] *See In re* Noonan, 17 B.R. 793, 794, 797–99 (Bankr. S.D.N.Y. 1982) (denying motion to convert case because agreement involved personal services and no tangible assets).

[59] *Id*. at 799–800 ("[T]here lurks the real possibility [that] the involuntary servitude with which Congress was concerned [with] in chapter 13 never occurred to it when it perceived chapter 11.").

[60] *Id*. at 800.

Congress' concerns in this respect were grounded in the Thirteenth Amendment.[61]

The Supreme Court's decision in *Ahlers*[62] supported the view that a bankruptcy court should not, and could not, force work in order to fund a plan. In refusing to find that the value of future services rendered could constitute "new value" for purposes of the new value exception to the absolute priority rule, the Court held that, "[v]iewed from the time of approval of the plan, respondents' promise of future services is intangible, inalienable, and, in all likelihood, unenforceable."[63]

Against this backdrop, it is hardly surprising that some courts held that the earnings exception in section 541(a)(6)—indeed, a liberal interpretation thereof—was necessary to render individual chapter 11 constitutional in light of the fundamental differences between chapter 11 and chapter 13. In *Cooley*[64], the issue was "the extent, if any, to which profits generated postpetition from the sole proprietorship of an individual Chapter 11 debtor [were] excluded from property of the estate by the earnings exception of [section 541(a)(6)]."[65] The *Cooley* court noted the differences between chapters 11 and 13 as related to post-petition earnings.[66] Congress eliminated the earnings exception in chapter 13 and property of the estate was defined to include post-petition earnings from services.[67] "In contrast, Congress chose not to limit in any manner the earnings exception as it applie[d] to an individual under Chapter 11, whether protection is invoked through a voluntary or involuntary petition, or whether debtor seeks to reorganize or liquidate."[68] This distinction was possible because Congress built into chapter 13 various provisions to insure that inclusion of post-petition earnings within property of the estate would not result in a violation of the Thirteenth Amendment's prohibition of involuntary servitude.[69] First and foremost, with no provision for involuntary petitions in chapter 13 or creditor-forced conversions, chapter 13 is "strictly voluntary:"

> Congress forcefully expressed its concern with the potential conflict with the Thirteenth Amendment's prohibition against involuntary servitude by mandating that Chapter 13 be strictly voluntary. The inclusion of a Chapter 13 debtor's postpetition

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[61] *See id*. at 799–800 (maintaining refusal to convert case was consistent with Congress' views "that the prohibition against involuntary servitude loomed large in bankruptcy.").

[62] Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988).

[63] *Id*. at 204 (reiterating debtor's promise of future services is not valuable to creditors today).

[64] *In re* Cooley, 87 B.R. 432 (Bankr. S.D. Tex. 1988).

[65] *Id*. at 434.

[66] *See id*. at 437 (commenting chapter 13 "stands in sharp contrast" to scope and application of section 541(a)(6) in chapter 7 chapter 11 cases).

[67] *See id*. (weighing underlying policy exceptions behind earnings exception).

[68] *Id*.

[69] *See* FitzSimmons v. Walsh (*In re* FitzSimmons), 20 B.R. 237, 240 (9th Cir. B.A.P. 1982) (declaring policy behind section 541(a)(6) was "to prevent involuntary submission to the bankruptcy state of post-petition earnings from services of an individual[,]" which "[was] consonant with the spirit, if not the letter, of the Thirteenth Amendment to the United States Constitution prohibiting involuntary servitude.").

> earning from services as property of the estate undoubtedly is at the heart of this concern. The insistence that this inclusion be voluntary represents an attempt by Congress to avoid any constitutional conflict. That concern carries over and is addressed by the earnings exception of Section 541(a)(6). The potential otherwise exists that an individual may be subjected to an involuntary bankruptcy under Chapter 7 or Chapter 11 and his earnings included in his estate.[70]
>
> Congress chose not to eliminate the earnings exception with respect to an individual who files a voluntary Chapter 11 petition, in my opinion, to protect against creditors impressing an individual debtor to work for the estate, as well as to protect an individual Chapter 11 debtor's right to a fresh start.[71]

Thus the court held that once the individual debtor proved that he performed services that generated earnings, the burden fell on the creditor to prove that the earnings were in part "proceeds, product, offspring, rents or profits" from other assets of the business previously accrued to the estate under section 541 of the Code;[72] such an "approach seems best to guard against the potential conflict with the prohibition against involuntary servitude . . . ."[73]

The Supreme Court's decision in *Toibb*,[74] in fact, hinted at a constitutional basis for the earnings exception. An *amicus* brief had argued that making individuals not engaged in business eligible for chapter 11 relief would subject wage earners to involuntary chapter 11 cases, a result contrary to Congress' intent, as expressed by the prohibition against involuntary chapter 13 cases.[75] The Court noted that the earnings exception, applicable in chapter 11 but not in chapter 13, assuaged any constitutional concern:

> We find these concerns overstated in light of the Code's provisions for dealing with recalcitrant Chapter 11 debtors. If an involuntary Chapter 11 debtor fails to cooperate, this likely will provide the requisite "cause" for the bankruptcy court to convert the Chapter 11 case to one under Chapter 7. See § 1112(b). In any event, the argument overlooks Congress' primary concern about a debtor's being forced into bankruptcy under Chapter 13: that such a debtor, whose future wages are not exempt from the bankruptcy estate, section 1322(a)(1), would be compelled to toil for the benefit of

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[70] *See* 11 U.S.C. § 303(a) (2000).
[71] *In re* Cooley, 87 B.R. at 437–38.
[72] *See id*. at 441 (attempting faithfulness to plain meaning of section 541(a)(6)).
[73] *Id*. at 441.
[74] Toibb v. Radloff, 501 U.S. 157 (1991).
[75] *See id*. at 165 (citing assertions of *amicus curiae*).

> creditors in violation of the Thirteenth Amendment's involuntary servitude prohibition. See H. R. Rep. No. 95-595, at 120. Because there is no comparable provision in Chapter 11 requiring a debtor to pay future wages to a creditor, Congress' concern about imposing involuntary servitude on a Chapter 13 debtor is not relevant to a Chapter 11 reorganization.[76]

In reliance on *Toibb*, a number of courts adopted the broader version of the earnings exception espoused in *Cooley*.[77] The courts emphasized that various chapter 13 provisions were designed to avoid a conflict with the Thirteenth Amendment in light of the inclusion of post-petition earnings within the chapter 13 estate. Those protections included that no creditor could initiate an involuntary petition against a debtor under chapter 13; debtors have an absolute right to convert or dismiss chapter 13 cases; and that only a debtor can file a chapter 13 plan.[78] Since individual chapter 11 was devoid of such protections—involuntary petitions allowed, no absolute right to dismiss or convert, possibility of creditor plan—the earnings exception was constitutionally necessary: "Nowhere is the threat of impinging upon the protection afforded by the Thirteenth Amendment to the United States Constitution more real than in the case such as this where a creditor is attempting to harness the postpetition wages of individual debtors in a Chapter 11 proceeding."[79]

In light of these alleged constitutional concerns, and the unenforceability of promises to work to pay off debt, a number of courts simply refused to confirm—or to compel in any way—chapter 11 plans in individual cases where feasibility was dependent upon the contribution of post-petition earnings from services of the debtor.[80]

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[76] *Id*. at 165–66; *see also* Rafael Efrat, Toibb v. Radloff *Reconsidered: Reorganization Under Chapter 11 of the Bankruptcy Code By a Consumer Debtor*, 26 BEVERLY HILLS B. ASS'N J. 82, 93–94 nn.153–58 (1992) (observing Thirteenth Amendment concerns were unique to chapter 13 cases only).

[77] *See, e.g.*, FitzSimmons v. Walsh (*In re* FitzSimmons), 20 B.R. 237, 240 (B.A.P. 9th Cir. 1982), *aff'd*, 725 F.2d 1208, 1211 (9th Cir. 1984) (excepting from estate those earnings generated by individual debtor's personal services, and accruing to estate those earnings generated by individual debtor's law practice); Roland v. UNUM Life Ins. Co. of Am., 223 B.R. 499, 502 (Bankr. E.D. Va. 1998) (finding "postpetition wages of an individual in chapter 11 are not property of the estate."); *In re* Powell, 187 B.R. 642, 645 (Bankr. D. Minn. 1995) (agreeing with the broader version of the earnings exception and summarizing "postpetition earnings such as wages from outside employment fall within the scope of the earnings exception and are therefore personal property of the individual debtor and excluded from the bankruptcy estate."); *In re* Molina Y Vedia, 150 B.R. 393, 402 (Bankr. S.D. Tex. 1992) (excluding post-petition earnings from physician's sole proprietorship from property of estate).

[78] *See Powell*, 187 B.R. at 645–46 (emphasizing chapter 13 is completely voluntary); *Molina Y Vedia*, 150 B.R. at 399 (quoting legislative history to confirm voluntariness of chapter 13 proceedings).

[79] *Powell*, 187 B.R. at 646.

[80] *See, e.g.*, *In re* Gibbs, 230 B.R. 471, 473–74 (Bankr. D. Conn. 1999) (frustrating purpose of chapter 11 bankruptcy if debtor "were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy."); *In re* Lundeen, 207 B.R. 604, 610 (Bankr. S.D. Ind. 1997) (excluding goodwill of debtor's podiatry practice from bankruptcy estate pursuant to earnings exception); *In re* Bolton, 188 B.R. 913, 914

The Ninth Circuit took a narrower view of section 541(a)(6) in the context of the professional services case. The earnings exception was recognized, but would be limited to earnings generated by the services personally performed by an individual debtor.[81] The court found this interpretation consistent with the plain meaning of the section.[82] Application of the Ninth Circuit approach has been held not to offend the Thirteenth Amendment in a voluntary individual chapter 11 case.[83]

However, in *Herberman*,[84] the court held that all of the earnings of a professional services debtor were property of the estate under section 541(a)(7); none of the earnings were excluded under the earnings exception of section 541(a)(6), which was limited to earnings which were a subset of "proceeds, product, offspring, rents or profits."[85] In addition to its interpretation of the language of section 541(a)(6), the court also found that exclusion of earnings in such a case was inconsistent with the individuals position as debtor-in-possession and, therefore, as fiduciary to the estate.[86] This position required the court to confront the Thirteenth Amendment issue head on. Referring to the involuntary servitude concerns as a "shibboleth," the court held that including earnings within the chapter 11 estate would not violate the Thirteenth Amendment, at least in a voluntary case, because the debtor was not being compelled to work for his creditors, even though, as the court acknowledged, the debtor did not have an absolute right to dismiss his case.[87] The debtor had filed the case voluntarily, presumably with the knowledge of all potential ramifications, including that the court would include post-petition earnings in the estate due to the interplay of sections 1107 and 1108 (making the debtor the estate fiduciary).[88] In addition, the debtor had options. First, he could convert the case to a case under chapter 7, or he could have filed under chapter 7 in the first place: "There is nothing particularly remarkable about the fact that the choice of

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(Bankr. D. Vt. 1995) (denying confirmation of chapter 11 reorganization plan because promise of future payments from uncertain source violated new value exception to absolute priority rule); *In re* Flor, 166 B.R. 512, 516 (Bankr. D. Conn. 1994) (rejecting chapter 11 confirmation plan because it was against public policy "to authorize and validate a voluntary assignment of an individual's future wages.").

[81] *See In re* FitzSimmons, 725 F. 2d 1208, 1211 (9th Cir. 1984) ("We hold that the earnings exception applies only to services performed *personally* by an individual debtor . . . .").

[82] *See id*. ("Our interpretation accords with the plain meaning of the language of § 541(a)(6).").

[83] *See In re* Angobaldo, 160 B.R. 140, 150 (Bankr. N.D. Cal. 1993) (discussing Ninth Circuit's earnings exception and finding debtor's Thirteenth Amendment argument unpersuasive).

[84] *In re* Herberman, 122 B.R. 273 (Bankr. W.D. Tex. 1990).

[85] *See id*. at 278–80 (analyzing professional services under section 541(a)(6) and section 541(a)(7)).

[86] *See id*. at 282–83 (taking into account debtor's dual role of "debtor as trustee" and "debtor as employee")

[87] *See id*. at 283 (pointing out that although debtor could not dismiss his chapter 11 case as of right, "that [did] not render the proceeding itself peonage or involuntary servitude . . . .").

[88] *See id*. at 283–84 (presuming debtor was aware of ramifications before voluntarily submitting himself to chapter 11 bankruptcy). That the court was departing from the seemingly settled analysis of *Cooley* and *FitzSimmons* was, of no moment; apparently, this too was to be anticipated. *See* Williams, *supra* note 3, at 1217–18 (noting courts have gone in three different directions since *FitzSimmons*, and indicating *Herberman* followed one of those paths).

chapters involves a trade-off of benefits and burdens."[89] The debtor could move for the appointment of a trustee, removing himself as fiduciary, and then simply refuse to work for the trustee (or his creditors) and the court would, under the Thirteenth Amendment, be forced to "accede." As the court summarized:

> The involuntary servitude argument, in short, is little more than a shibboleth. The debtor always has the keys to the shackles. Economic necessity may discourage him from freeing himself, but it is hardly the equivalent [of] a law or force compelling performance or continuance of service in violation of the Constitution.[90]

Herberman has been soundly criticized for "narrow[ing] the earnings exception clause to the point of extinction."[91] In addition, *Herberman* was found to ignore Congress' concerns about the Thirteenth Amendment—whether real or not—not to mention the Supreme Court's pronouncement in *Toibb*.[92] Moreover, if the constitutional concern depends upon whether the case is commenced involuntarily or not, *Herberman* creates a different rule for inclusion of earnings within the estate dependent upon how the case was initiated. The fiduciary concern was also found misplaced; the debtor is a fiduciary only as to property of the estate. Accordingly, the scope of the fiduciary duty is determined by definition of the property of the estate, not the other way around.[93]

An analysis of the cases indicates that the Thirteenth Amendment issue has seldom been directly confronted; rather, the courts have construed the Code in light of Congress' expressed concern about involuntary chapter 13 cases, as well as the Supreme Court's apparent confirmation of those concerns, at least on the subject of inclusion of post-petition earnings within the chapter 13 estate, in *Ahlers* and *Toibb*. To the extent that the involuntary servitude concern has validity, chapter 13 (which

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[89] *Herberman*, 122 B.R. at 284. Of course, with BAPCPA's introduction of means-testing as a requirement for chapter 7 eligibility, the "option" will now be foreclosed to most individual chapter 11 debtors, somewhat undercutting the *Herberman* court's treatment of the Thirteenth Amendment issue. *See* Roger Cox, *Consumer Debts and Bankruptcy*, 68 TEX. B.J. 777, 777 (2005) (explaining application of "means-test" to challenge of individual's eligibility for chapter 7 under BAPCPA).

[90] *Herberman*, 122 B.R. at 285; *see In re* Harp, 166 B.R. 740, 753–54 (Bankr. N.D. Ala. 1993) (adopting *Herberman* rationale and agreeing Thirteenth Amendment was not an issue because debtor voluntarily commenced chapter 11 case).

[91] *In re* Molina Y Vedia, 150 B.R. 393, 397–98 (Bankr. S.D. Tex. 1992) (criticizing *Herberman* for effectively excluding section 541(a)(6) from consideration when determining property of estate of chapter 11 debtor).

[92] *See id.* at 399 ("Congress' articulated concerns about the Thirteenth Amendment[] strongly militates against the *Herberman* reasoning. The Court finds strong support for this interpretation in *Toibb* . . . .").

[93] *See id.* at 400 ("Property of the estate is not determined by the debtor-in-possession's fiduciary obligations to the estate; rather, the scope of the debtor-in-possession's fiduciary obligation is determined by the property constituting the estate."); *In re* Powell, 187 B.R. 642, 647 (Bankr. D. Minn. 1995) (citing and using rationale from *Molina Y Vedia*).

includes post-petition earnings within the estate and requires their use to fund a plan) is saved from conflict with the Thirteenth Amendment, under the available jurisprudence, because (1) a chapter 13 case cannot be commenced via an involuntary petition; (2) a debtor cannot be placed into a chapter 13 case by a creditor or court-initiated conversion of a case under chapter 7 or 11 into chapter 13; (3) a creditor cannot file a chapter 13 plan; (4) a chapter 13 plan has a limited maximum duration; and (5) a chapter 13 debtor has an absolute right to dismiss or convert his case. Pre-BAPCPA, individual chapter 11, by contrast, had none of these protections and was—according to the case law—saved from constitutional conflict by the earnings exception. Under this analysis, removing the earnings exception from individual chapter 11 without building in the protections enjoyed by chapter 13 debtors would create a conflict—indeed a collision—with "Congress' concerns" about the Thirteenth Amendment and its prohibition of involuntary servitude.

IV. THE BAPCPA AMENDMENTS RELATING TO INDIVIDUAL CHAPTER 11

Under BAPCPA, the rules for individual chapter 11 cases change radically, paralleling the chapter 13 provisions, but without the attendant protections. BAPCPA adds a new section 1115, providing that in a chapter 11 case "concerning an individual," property of the estate would include, in addition to property brought into the estate by section 541, earnings from *services performed by the debtor* after the commencement of the case.[94] Section 1123(a) is amended to provide that a plan must, in a case concerning an individual debtor, "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."[95] Section 1129(a) is amended to make it a requirement for confirmation, in the event of an *objection by a single unsecured creditor* (not a failure to accept by a *class* of creditors), that unsecured claims must be paid in full or the individual debtor must devote all "projected disposable income," defined as in chapter 13, for the longer of five years or the term of the plan.[96] Section 1129(b) is amended to allow the debtor to retain his property only if the debtor complies with the disposable income requirement.[97]

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[94] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 321, 119 Stat. 23, 94–95 (2005) (to be codified at 11 U.S.C. § 1115(a)(1) and (a)(2)) (paralleling 11 U.S.C. § 1306 nearly word for word).

[95] *Id*. (to be codified at 11 U.S.C. § 1123(a)(8)) (emphasis added).

[96] *See id*. (to be codified at 11 U.S.C. § 1129(a)(1)) (amending chapter 11 to consider projected disposable income in valuation of property).

[97] *See id*. (to be codified at 11 U.S.C. § 1129(b)(2)(B)(ii)). This is what is apparently meant by the amendment to section 1129(b)(2)(B)(ii). The statute says the debtor can retain the "property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section." *Id*. Section 1115 includes in the estate post-petition property and earnings, in addition to the property brought into the estate by section 541. *See id*. (to be codified at 11 U.S.C. § 1115(a)). If the reference in section 1129(b)(2)(B)(ii) is only to post-petition property and earnings, the amendment makes little sense and the problems with the

Discharge will not occur upon confirmation, but upon completion of plan payments, or failing that, a showing that creditors received as much as they would get in chapter 7 and that plan modification is not practicable.[98] Under the amendment to section 1127, in a case concerning an individual, the plan could be modified, regardless of whether or not substantial consummation has occurred, upon request of the debtor, the trustee, the United States Trustee, or *the holder of an allowed unsecured claim*, and such modification could, *inter alia*, increase the amount of payments to a particular class and extend the time period for plan payments, with no maximum term.[99]

The amendment also does not address the fact that one can be placed into a chapter 11 involuntarily.[100] Moreover, the individual chapter 11 debtor's right to convert is still limited, and nonexistent in an involuntary case, and such a debtor still has no absolute right to dismiss.[101] Thus, binding an individual debtor to a chapter 11 plan which requires contribution of earnings from personal services, and which can be increased and lengthened upon creditor motion, raises serious policy, if not Thirteenth Amendment, concerns.[102]

Thus, BAPCPA's individual chapter 11 provisions present, among others, the following possible scenarios. First, the debtor is placed into chapter 11 via an involuntary petition. Pursuant to a creditor-filed plan, confirmed by the court, the debtor is required to devote all of his net disposable income to the funding of the plan until all creditors are paid in full. In order to fund the plan, the debtor is required to remain in his current job or one providing equivalent earnings. The debtor has no right to convert and no absolute right to dismiss. Second, the same scenario occurs, although the debtor's original petition was voluntary. Third, the

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absolute priority rule would remain. Moreover, under that interpretation, the parallel to chapter 13 would be lost.

In addition, the reference to section 1129(a)(14) appears to be a typographical error. Subsection (a)(14) governs the requirement of paying domestic support obligations. *See id*. § 213 (to be codified at 11 U.S.C. § 1129(a)(14)). Presumably, the reference should be to subsection (a)(15) which sets out the requirement of paying 100% or five years or more of projected disposable income. *See id*. § 321 (to be codified at 11 U.S.C. § 1129(a)(15)). The poor drafting in section 1129(b)(2)(B)(ii) is likely to create litigation opportunities and interesting judicial comment.

[98] *See id*. (to be codified at 11 U.S.C. § 1141(d)(5)) (discussing when court is able to grant discharge for individual debtors).

[99] *See id*. (to be codified at 11 U.S.C. § 1127(e)) (describing when and how individual debtor can modify plan).

[100] *See* 11 U.S.C. § 101(41) (2000) (indicating "person" includes "individual"); 11 U.S.C. § 303(a) (2000) ("An involuntary case may be commenced only under chapter 7 or 11 of this title . . . .").

[101] *See* 11 U.S.C. § 1112 (2000) (governing conversion and dismissal of chapter 11 debtor).

[102] The amendments also vitiate the primary feature of chapter 11: the ability to bind dissenting members of an otherwise accepting class. *See* 11 U.S.C. § 1141(a) (2000) (explaining provisions of confirmed plan bind any creditor "whether or not such creditor . . . has accepted the plan."). The amendments allow a single holder of an unsecured claim to trigger the disposable income requirement, notwithstanding the vote of such creditor's class. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 321 (to be codified at 11 U.S.C. § 1129(a)(15)(B)) (applying where holder of unsecured claim objects to confirmation of individual debtor's plan). What is the point of solicitation and voting in chapter 11 if a single creditor can force a different plan notwithstanding the outcome of the vote? The single creditor modification rule conflicts with the "creditor democracy" aspect fundamental to chapter 11.

debtor files voluntarily and files and confirms a plan for a five-year payment; post-confirmation, upon the motion of a single creditor, the plan is extended for an additional five-year term (or beyond).

V. BAPCPA'S INDIVIDUAL CHAPTER 11 AND INVOLUNTARY SERVITUDE

Do the BAPCPA amendments offend the Thirteenth Amendments' prohibition against involuntary servitude? If the comments in *Toibb* mean anything, under the existing case law, and certainly as applied to create the first (involuntary petition) scenario described above, the amendments would appear to be unconstitutional. A case may be commenced, involuntarily, in which the debtor's future income is captured to pay his creditors, and the debtor has no "out," except by leave of the court. As the *Herberman* court notes, however, the Thirteenth Amendment analysis turns upon the degree to which the debtor is compelled to work for his creditors. Under BAPCPA, does the debtor have the keys to the shackles? Can the individual debtor in a BAPCPA chapter 11 case simply refuse to work, and is that enough to save the amendment from violating the prohibition against involuntary servitude? A brief examination of the applicable Thirteenth Amendment cases is required.

As is apparent, the Thirteenth Amendment prohibits more than slavery. In the debt peonage cases, the Supreme Court made it clear that "involuntary servitude" encompasses compelling debtors to work for creditors to repay debt, even if the contract to do so was voluntary at the outset, if the consequence of the refusal to work—breach of contract—was a legal sanction other than damages, such as a criminal fine or imprisonment.[103] Under these decisions, peonage—a form of involuntary servitude—"is a status or condition of compulsory service . . . based upon a real or alleged indebtedness."[104]

The critical issue is whether the service is compelled. If our debtor can simply quit, and suffer no sanction other than a suit for damages or the economic dislocation brought upon by the absence of debt relief, then the Thirteenth Amendment is not implicated.[105] Professors Gross and Klee have suggested that the threat of a criminal conviction and a criminal fine or imprisonment must be

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[103] *See* Pollock v. Williams, 322 U.S. 4, 24 (1944) (stressing state may not "directly or indirectly command involuntary servitude, even if it was voluntarily contracted for."); Taylor v. Ga., 315 U.S. 25, 29 (1942) (clarifying peonage is form of involuntary servitude within meaning of Thirteenth Amendment); Bailey v. Ala., 219 U.S. 219, 240, 241, 243–244 (1911) (observing that Thirteenth Amendment prohibits all kinds of "slavery," including performing labor in payment of debt); Clyatt v. U.S., 197 U.S. 207, 215, 217 (1905) (concluding Thirteenth Amendment can either directly or indirectly eradicate all forms of slavery and involuntary servitude); *see also* Gross, *supra* note 53, at 167, 177 (arguing Thirteenth Amendment prohibits involuntary servitude for payment of debt, even if framers did not have bankruptcy in mind when drafting the amendment).

[104] Pierce v. United States, 146 F.2d 84, 86 (5th Cir. 1944) (defining peonage).

[105] *See e.g.*, Flood v. Kuhn, 309 F. Supp. 793, 808 (S.D.N.Y. 1970) (failing to recognize Thirteenth Amendment violation because debtor was not compelled to play baseball by reserve clause, even though refusal to honor such clause would prevent debtor from playing professionally in United States).

present.[106] The stated source of this requirement is the Supreme Court's decision in *United States v. Kozminski*.[107]

This appears to read more into *Kozminski* than is there. In *Kozminski*, the issue was whether an employer could be convicted of violating the Thirteenth Amendment, and the related anti-peonage statues, if the criminal jury found that only psychological coercion was employed to keep the alleged victim working.[108] The Court held that a finding of psychological coercion would, under the applicable statutes, be insufficient to convict.[109] Reviewing the peonage cases, the Court held that "our precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion."[110] In the debt peonage uses, "the victim had no available choice but to work or be subject to legal sanction."[111] But the *Kozminski* Court did not say "criminal" sanction or imprisonment was required. Indeed, prior to *Kozminski*, lower courts had found that forms of legal sanction other than criminal fines or imprisonment provided the compulsion necessary to trigger a violation of the Thirteenth Amendment.[112]

However, even if threat of imprisonment is required, that threat may be present for the individual chapter 11 debtor under BAPCPA. The requirement to devote future income to fund the plan will be embodied in the confirmation order, or in an order extending the term of the plan. If the debtor wishes to quit his job, and not for work his creditors, he cannot, like the chapter 13 debtor, dismiss his case at any time. The debtor's intentional termination of employment, and resulting intentional failure to fund the plan, will be not just a breach of contract, but a contempt of the court's orders. Temporary confinement, as well as imposition of coercive fines, for civil contempt is within the bankruptcy court's arsenal of options to address willful

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[106] *See* Gross, *supra* note 53, at 185–95 (discussing coercion and criminal law exposure as they relate to Thirteenth Amendment). Professor Gross, however, finds that state statutes, such as bad check laws, may provide this threat. *See id.* at 190–91 (deducing state laws cause debtors to fear consequences of being charged and convicted of crime); Kenneth N. Klee, *Restructuring Individual Debts*, 71 AM. BANKR. L.J. 431, 448 n.28 (1997) ("[P]otential for imprisonment exists under state law for nonpayment of certain types of debts, and . . . this possibility creates the threat of imprisonment for insolvent debtors who do not work to obtain a discharge.").

[107] U.S. v. Kozminski, 487 U.S. 931 (1988).

[108] *See id.* at 934–36 (explaining relevant facts behind psychological coercion and potential Thirteenth Amendment violation).

[109] *See id.* at 953 (deciding only threat of physical or legal coercion would be sufficient to convict).

[110] *Id.* at 944.

[111] *Id.* at 943.

[112] *See* Brooks v. Central Bank of Birmingham, No. 81-G-1303-S, 1982 WL 365, at *8, *10 (N.D. Ala. June 14, 1982), *rev'd on other grounds*, 717 F. 2d 1340, 1343 (11th Cir. 1983) (threatening disbarment constituted sufficient compulsion); *In re* Nine Applications for Appointment of Counsel in Title VII Proceedings, 475 F. Supp. 87, 88 (N.D. Ala. 1979) ("[T]he attorney who is coerced into representing a Title VII complainant is placed into involuntary servitude, in violation of the thirteenth amendment to the United States Constitution."). In *Brooks*, the court also held that the availability of a possible release from compelled work by appeal to the court did not remove the required factor of compulsion. *Brooks*, 1982 WL 365, at *15 (rejecting argument that possibility of release was enough). Thus, the fact that a bankruptcy court might simply dismiss or convert an individual chapter 11 case does not remove the element of coercion.

violation of its orders.[113] The *threat* of "legal sanction" (coercive incarceration or fines) exists if the debtor leaves his job without cause. Moreover, that the entire proceeding is involuntary from the outset adds an element of legal coercion. Since earnings are within the estate, the debtor is an involuntary fiduciary as to those earnings; he cannot just abandon them without consequence. BAPCPA's amendments relating to individual chapter 11 cases, by paralleling chapter 13 but not prohibiting involuntary cases or forced conversions, and by not providing the option of escape through dismissal or conversion, therefore, raise genuine Thirteenth Amendment concerns.

CONCLUSION

As discussed above, in passing the 1978 Bankruptcy Code, Congress clearly expressed its concern that an involuntary chapter 13 would violate the Thirteenth Amendment's prohibition of involuntary servitude. As another commentator has noted, when it came to the BAPCPA amendments regarding individuals, "[t]he involuntary servitude concern[] echoed by the Congress in 1977 appears to be no longer a concern."[114] But whether this Congress was concerned or not, the issue has not gone away. The rush by the drafters of BAPCPA to have individual chapter 11 parallel chapter 13 in order to achieve creditor access to post-petition earnings from services, combined with the (at best) inadvertent or (at worst) cynical failure to replicate the chapter 13 protections against involuntary servitude, will surely result in a constitutional challenge to the "new" individual chapter 11. At that time, we will find out whether the concerns were real, whether the *Toibb* statements had any meaning, and whether this constitutional protection extends to individual debtors in chapter 11 cases.

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[113] *See, e.g.*, Oliner v. Kontrabecki, 305 B.R. 510, 523 (Bankr. N.D. Cal. 2004) (finding bankruptcy court could enter coercive civil contempt order); Musselewhite v. O'Quinn (*In re* Musslewhite), 270 B.R. 72, 79 (Bankr. S.D. Tex. 2000) (reaffirming civil contempt order versus debtors was properly entered); *In re* Krypton Broad. of Ft. Pierce, Inc., 181 B.R. 657, 665–66 (Bankr. S.D. Fla. 1995) (imposing fines and incarceration if debtor failed to comply with bankruptcy court's coercive civil contempt order); *see In re* Lawrence, 238 B.R. 498, 501–02 (Bankr. S.D. Fla. 1999), *aff'd* 251 B.R. 630, 654 (Bankr. S.D. Fla. 2000), *aff'd* 279 F. 3d 1294, 1297 (11th Cir. 2002) (ordering imprisonment of debtors for violation of disclosure and turnover orders relating to acquisition of assets from offshore asset protection trusts, and announcing inability to comply with such orders was no defense because impossibility was self-induced); F.T.C. v. Affordable Media, LLC, 179 F. 3d 1228, 1243–44 (9th Cir. 1999) (producing same result as *Lawrence*, based upon district court injunction relating to assets in asset protection trust).

[114] John E. Matejkovic & Keith Rucinski, *Bankruptcy "Reform": The 21st Century's Debtors' Prison*, 12 AM. BANKR. INST. L. REV. 473, 494 (2004).