

*Business Track*  
**Individual Chapter 11 Cases:  
The Good, the Bad and the Ugly**

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## Good Faith Requirement in Individual Chapter 11 Cases

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One of the significant provisions governing individual Chapter 11 cases that was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”)<sup>1</sup> is subsection (b) to §1112. Despite the fact the words “good faith” appear nowhere in the sub-section those words have probably generated more litigation than any other aspect of §1112(b). Long before BAPCPA, it was well established that bad faith occurring before or after the filing of a Chapter 11 petition served as a legitimate ground for dismissal.<sup>2</sup> Because “good faith” and “bad faith” are neither mentioned nor defined in §1112(b), court interpretation and application of the rule varies somewhat among the circuits.<sup>3</sup>

### **Lack of Good Faith Constitutes Cause to Dismiss**

The “good faith” requirement is grafted onto §1112(b)(1) which states that:

(b)(1) Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate. .<sup>4</sup>

It is well settled that the “for cause” language of §1112(b) includes the “good faith” requirement.<sup>5</sup> Although the statute neither mentions nor defines “good faith” it does delineate a non-inclusive list of actions justifying dismissal “for cause” as follows:

- (4) For purposes of this subsection, the term "cause" includes--
- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
  - (B) gross mismanagement of the estate;

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<sup>1</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub. L. No. 109-8, 119 Stat. 23.

<sup>2</sup> *In re Winshall Settlor’s Trust*, 758 F.2d. 1136 (6<sup>th</sup> Cir. 1985).

<sup>3</sup> For a short but well annotated discussion of the circuit variations see “*Bad Faith Constitutes Cause for Dismissal of a Bankruptcy Case*”, Kathleen Mullins, American Bankruptcy Institute Law Review Staff, <http://www.abi.org/member-resources/blog/bad-faith-constitutes-cause-for-dismissal-of-a-bankruptcy-case>.

<sup>4</sup> §1112(a)(b)(1)(2).

<sup>5</sup> *In re Lee*, 467 B.R. 906, 917 (6<sup>th</sup> Cir. BAP, 2012).

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- (C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;
- (D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;
- (E) failure to comply with an order of the court;
- (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;
- (G) failure to attend the meeting of creditors convened under section 341 (a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;
- (H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);
- (I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;
- (J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;
- (K) failure to pay any fees or charges required under chapter 123 of title 28;
- (L) revocation of an order of confirmation under section 1144;
- (M) inability to effectuate substantial consummation of a confirmed plan;
- (N) material default by the debtor with respect to a confirmed plan;
- (O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and
- (P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

Courts reviewing whether or not good faith exists often utilize actions enumerated as “cause” as factors giving rise to good faith or bad faith. Several years before BAPCPA the 6<sup>th</sup> Circuit Court of Appeals in *In re Charfoos*, 979 F.2d. 390 (6<sup>th</sup> Cir. 1992) determined that good faith/bad faith can be demonstrated by action or inaction occurring either pre-petition or post-petition

*Charfoos* was a prominent medical malpractice attorney who, along with his wife, invested heavily in a Paris based cosmetics company that experienced financial difficulties. He attempted to sell the business but while the sale was pending, Chaffoos took several large bridge loans from Michigan National Bank. He filed a Chapter 11 case and the bank moved to dismiss for bad faith. The bankruptcy court denied the motion, but the district court found clear error and reversed the decision. The 6<sup>th</sup> Circuit Court of Appeals affirmed the district court’s dismissal for bad faith. The circuit court found three categories of bad faith by Charfoos: “(1) factual misrepresentations and omissions on financial statements and bankruptcy pleadings; (2) violations of state court orders; (3) extravagant lifestyle.”<sup>6</sup> The *Charfoos* decision was recently cited by the 6<sup>th</sup> Circuit

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<sup>6</sup> *Charfoos* at 394.

BAP with approval in *In re Lee*, 467 B.R. 906 (6<sup>th</sup> Cir. BAP 2012) wherein the court noted that “[n]o single test exists for determining whether a bankruptcy petition was filed in good faith . . . instead it ‘is a fact-specific and flexible determination’ that must be made on a case-by-case basis by looking to a totality of the circumstances.” Citing, *In re Alt*, 305 F.3d., 413, at 419 (6<sup>th</sup> Cir. 2002).

### **Application of Good Faith Standard Under §707(b)**

Cases interpreting Bankruptcy Code §707(b)(1) providing for dismissal of certain individual Chapter 7 cases where the granting of relief “would be an abuse of the provisions of this chapter”<sup>7</sup> also incorporate the implied “good faith” requirement and such cases are instructive in understanding how courts will interpret “good faith” in the context of the §1112(b) situation. The bankruptcy court for the Northern District of Ohio held in *In re Tow* that bad faith constitutes a cause for dismissal under §707(a) where debtor’s pre-petition conduct showed “a sustained pattern of fraudulent behavior by debtor” that included “various scams and hustles for years . . .”<sup>8</sup>

However, utilizing bankruptcy to protect and preserve assets while discharging a single large debt is not abusive without the existence of some degree of “unfairness” in debtor’s use of the bankruptcy process.<sup>9</sup> In *McVicker’s* the court considered whether debtors, who had retired and filed a Chapter 7 proceeding primarily to discharge one large commercial loan that both debtors had guaranteed committed “bad faith” in the filing. After the bank obtained a *cognovit* judgement the McVicker’s filed a Chapter 7 petition disclosing an exempt IRA in excess of \$500,000 and an exempt residence having a value of \$200,000. The McVicker’s sought to discharge the \$125,000 bank balance as well as unsecured debt of only \$2300. The bank argued that permitting the McVickers to retain such a large amount of exempt assets while discharging the bank debt was an abuse of the bankruptcy process warranting dismissal for bad faith. The court held that the ability to repay debts in whole or in part did not constitute adequate cause for dismissal and that not utilizing exempt assets to pay the debt was simply taking advantage of legitimate bankruptcy protection. Unlike other cases dealing with bad faith issues where debtors maintained an extravagant lifestyle, the McVicker’s court held that it would be inappropriate to “mechanically impose a ‘belt tightening’ requirement, particularly where debtors have income below the median income level, and are living within their means.”<sup>10</sup> For a much more detailed and robust discussion of the impact of an extravagant lifestyle and high-exempt assets on the “bad faith” analysis see *In re Glunk*, 342 Bankruptcy 717 (Bkrcty Ed. PA. 2006).

### **Post Filing Bad Faith Justified Dismissal**

Post-bankruptcy conduct is often the cause for bad faith dismissals and it is significant to note that §1112(b)(1) is mandatory in that it states that the “bankruptcy court *shall* upon a showing of cause, convert a case to Chapter 7 or dismiss the case ‘unless the court determines that the appointment under §1104(a) of a trustee or examiner is in the best interests of the creditors and the estate.’”<sup>11</sup> In *Grasso* the court found that there was substantial and continuing loss to the estate

<sup>7</sup> §707(b)(1).

<sup>8</sup> *In re Tow*, 2016 WL 74741 (Bkrptcy. N.D. Ohio 2016).

<sup>9</sup> *In re McVicker*, 546 BR 46 (Bkrptcy, N.D. Ohio 2016).

<sup>10</sup> *McVickers* at 54.

<sup>11</sup> *In re Grasso*, 497 BR 448 at 454 (Bkrcty. E.D. PA. 2013).

shown by the debtor's unauthorized expenditure of over \$280,000 of estate assets used to renovate the debtor's personal residence among other extravagant post-petition expenditures.<sup>12</sup> In *Grasso* the court determined that because the debtor's estate was administratively insolvent it was inappropriate to give debtor any further opportunities to reorganize and that the conversion option under §1112(b)(1) was the most appropriate relief.<sup>13</sup>

One of the hallmarks of individual Chapter 11 cases is the requirement that projected net disposal income of the debtor received by the debtor during the five year period beginning on the date of the first payment under the plan must be committed to the payment of claims of the unsecured creditors. After filing an individual Chapter 11, John Joseph Louise Johnson III, a professional hockey player, decided that he did not want to commit all of his net disposable income for five years to the payment of his creditors and sought to convert the case under §1112(a). The court, however, determined that Mr. Johnson had permitted estate assets to be diverted to other family members, had not exhibited candor during the bankruptcy proceeding and had continued to live a lavish lifestyle after filing Chapter 11. Consequently, the court refused to convert the case to Chapter 7 and held that if the case were converted to Chapter 7 it would be subject to "for cause" dismissal under §707(a). The court reasoned that because the case would be subject to dismissal once converted, it would be futile to convert the case. Consequently, the court denied debtor's motion to convert. The court's decision is lengthy and provides a very thorough analysis of the debtor's pre- and post-petition conduct on which the court based its decision.

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<sup>12</sup> *In re Grasso* at 455.

<sup>13</sup> *In re Grasso* at 462.

Payment of Personal Living Expenses Pursuant to Sections 363(c)(1) and 1115(a)

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When a bankruptcy case is commenced, all of the debtor's assets are transferred by operation of law to a bankruptcy estate, which is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case."<sup>1</sup> Prior to the adoption of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), a Chapter 11 debtor's bankruptcy estate was largely defined by such property, i.e., property owned as of the "snapshot" of the petition date. Exceptions exist including (a) interests in property acquired within 180 days of the petition date by bequest, devise, inheritance, as a result of a property settlement, or as a beneficiary of a life insurance policy,<sup>2</sup> (b) proceeds, products, offspring, rents or profits of or from property of the estate,<sup>3</sup> and (c) interests in property that the estate acquires after the commencement of the case.

The bankruptcy estate specifically excluded "earnings from services performed by an individual debtor after the commencement of the case."<sup>4</sup> Thus, a Chapter 11 debtor could use post-petition wages to pay their current living expenses. Only when such wages were inadequate or non-existent did the question arise as to whether an individual chapter 11 debtor could spend part of his capital assets or part of his investment income earned from those assets to meet his continuing personal expenses. With BAPCPA and Section 1115(a) of the Bankruptcy Code, this problem has been exacerbated. With §1115(a), in an individual Chapter 11 case, property of the estate now includes, in addition to the property specified in Section 541 of the Bankruptcy Code:

- (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.<sup>5</sup>

Thus, because of §1115(a), most debtors are now left with no alternative but to use estate property to pay their post-petition living expenses. This gives rise to the question of whether individual Chapter 11 debtors must seek court approval before paying such expenses. The analysis starts with Section 1107 of the Bankruptcy Code, which gives a Chapter 11 debtor-in-possession almost all of the powers of a bankruptcy trustee. Section 1108 of the Bankruptcy Code permits the continued operation of the debtor's business. Section 363(c)(1) of the Bankruptcy Code provides that the trustee, or debtor-in-possession, "[m]ay use property of the estate in the ordinary

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<sup>1</sup> 11 U.S.C. §541(a)(1).

<sup>2</sup> 11 U.S.C. §541(a)(5).

<sup>3</sup> 11 U.S.C. §541(a)(6).

<sup>4</sup> *Id.*

<sup>5</sup> 11 U.S.C. §1115(a).

course of business without notice or a hearing.” Does §363(c)(1) come into play with respect to personal expenses?

This question was answered in *In re Seely*, 492 B.R. 284 (Bankr.C.D.Cal.2013), which reviewed, by analogy, how Chapter 13 cases dealt with issue the pursuant to Section 1306 of the Bankruptcy Code, the Chapter 13 equivalent to §1115(a). *Seely* observed that chapter 13 debtors are not required to obtain court permission before using post-petition wages to pay ordinary post-petition living expenses. *Id.* at 290. The court noted that:

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.<sup>6</sup>

Applying this precedent to individual Chapter 11 cases, §363(c)(1) will authorize a debtor in possession to use property of the estate to pay post-petition living expenses without the need of prior court approval, so long as the amounts to be disbursed qualify as “ordinary course expenses.” *Id.* As in Chapter 13 cases, individual Chapter 11 debtors need to pay their living expenses in order to continue to generate revenue for the estate. However, *Seely* noted that its opinion simply discussed whether a debtor-in-possession was *required* to seek court approval before paying personal expenses from estate property, an entirely separate question from whether it was *advisable* for a chapter 11 debtor to seek such approval. *Id.* at 289 n.5. On this point, court observed that:

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.<sup>7</sup>

In *In re Villalobos*, 2011 WL 4485793, at \*3 (9th Cir.BAP), the debtor filed a motion to approve *nunc pro tunc* payment of expenses pursuant to §§ 363(c)(1) and 1115. The debtor

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<sup>6</sup> *Id.*

<sup>7</sup> *In re Seely*, 492 B.R. at 291 n.5.

asserted that the monthly expenses at issue were ordinary course expenses necessary to preserve estate assets. His budget included monthly expenses totaling \$128,052, broken into two general categories: (1) Mortgages and Other Property Expenses and (2) Personal Expenses. The Mortgages and Other Property Expenses included \$55,419.00 for various properties, including three properties with mortgages in excess of \$10,000 per month. The Personal Expenses consisted of fixed monthly costs totaling \$50,200. The fixed costs included a \$39,000 projected monthly payment to the IRS to pay for 2009 taxes, estimated by the Debtor at \$2.6 million. The remainder of the fixed costs included insurance, pool service, dry cleaning, cleaning services, and \$1,700 for medications.

The debtor also budgeted semi-variable personal expenses which totaled \$22,433. The semi-variable expenses included dental, medical, utilities, homeowners' insurance and food. They also included \$13,643 per month for an office mortgage. Additionally, the debtor included over \$2,585 for ownership expenses on the five luxury automobiles, and tuition expenses for his grandchildren, totaling \$117,500 for the 2010–2011 school year.

The court noted that with §1115, individual Chapter 11 debtors must now pay personal expenses from estate property, “which may create problems considering the resulting diminution in estate assets and the fact that personal expenses do not always neatly fall with the scope of ‘actual, necessary’ expenses under §503(b)(1) or ordinary course business expenses under §363.” *Id.* at \*8. While it did not have to decide the issue, the court observed that commentators have suggested that Section 1129(a)(15)’s disposable income test may be the proper test for approving pre-confirmation budgets and personal expenses of individual chapter 11 debtors under §363. Section 1129(a)(15) incorporates the “disposable income” test utilized in chapter 13.<sup>8</sup> Under §1129(a)(15), a debtor must commit all of his or her projected disposable income to a plan of reorganization for at least five years if an allowed unsecured creditor objects to the plan. The calculation of disposable income takes into account a debtor's reasonable expenses related to certain support and maintenance obligations. Because the Bankruptcy Code recognizes a debtor's need to pay personal expenses after confirmation of a plan, the argument goes that the Debtor must likewise be permitted to pay reasonable personal expenses prior to plan confirmation.

As noted above, this problem of how to pay personal living expenses existed prior to the enactment of BAPCPA, especially with respect to those debtors required to use capital assets or investment income to satisfy their living expenses. These pre-BAPCPA courts have largely resolved the issue in a manner similar to that followed by *Seely* and *Villalobos*. In *In re Rodriquez*, 41 B.R. 774, 775 (Bankr.S.D.Fla.1984), for example, that court stated that it could not “construe §363(c)(1) so narrowly as to prevent the debtor from using his capital assets or income earned by those assets in supporting himself and his dependents during the pendency of [his] chapter 11 proceeding.”<sup>9</sup> The court noted that to follow an alternative course, would deny the debtor recourse to chapter 11.<sup>10</sup> Similarly, in *In re Washburn*, 1987 WL 857551, at \*3 (Bankr.D.N.D.1987) the court concluded that in order for a debtor-in-possession to contribute his labor, experience and expertise to the operation of his business, as he is authorized to do under §1108, he must be allowed to satisfy his personal living expenses. “A debtor-in-possession cannot contribute labor if he is

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<sup>8</sup> See 11 U.S.C. §1325(b)(1)(B)-(2).

<sup>9</sup> *Id.* at 775.

<sup>10</sup> *Id.*

not allowed to buy food and other personal necessities.”<sup>11</sup> The only caveat, of course, was that the expenses must be reasonable.

In *In re Murray*, 216 B.R. 712, 713 (Bankr.W.D.N.Y.1998) the court ruled that the debtor was as free to spend estate funds to hire divorce attorneys, as he was free to spend estate assets on his ordinary business expenses or on normal living expenses. Advance court approval of the retention of such counsel was not required.

In sum, special counsel for matrimonial matters here is not “necessary” for the “estate” in the §327 sense and is denied. But the Court hereby authorizes the [law firm] to act for [the debtor] personally, *nunc pro tunc*, to September 24, 1997, in case the matrimonial court thinks such authorization to be necessary.<sup>12</sup>

Court approval, of course, is necessary where the estate funds represent cash collateral. Thus, in *Matter of May*, 169 B.R. 462, 463-64 (Bankr.S.D.Ga.1994), the debtors used rents derived from an apartment complex and pledged to a lender to pay for their personal expenses. The court found that such use of estate funds violated Section 363(c)(2) of the Bankruptcy Code, which provides:

The trustee may not use, sell or lease cash collateral under [section 363(c)(1)] unless –

- (A) each entity that has an interest in such cash collateral consents; or
- (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.<sup>13</sup>

The debtor was not permitted to use rents for any purpose other than direct costs associated with the underlying real estate (debt service, taxes, utilities, maintenance and the like).

The only way to adequately protect [lender’s] interest in the rents, absent relief from stay, is to require Debtors to segregate all rents in a separate account and strictly limit the use of the rents to the costs and expenses which are directly related to the maintenance of the [ ] property. . . . Use of rents for costs which are only tangentially related to the property or for any personal expenses, will result in a decrease in the value of [lender’s] interest in the rents and would be grounds for relief from the automatic stay under section 362(d) of the Code.<sup>14</sup>

Neither the Bankruptcy Code nor its legislative history provides a framework for analyzing whether particular transactions are in the “ordinary course of a debtor’s business.” As a result, courts have come up with various tests, the most common of which involves a two-step inquiry. This inquiry consists of looking at the transaction from “horizontal and vertical dimensions”<sup>15</sup> The test for the horizontal dimension “is whether, from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry.” *In re Roth American, Inc.*, 975

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<sup>11</sup> *Id.* at \*3.

<sup>12</sup> *Id.* at 713.

<sup>13</sup> 11 U.S.C. §363(c)(1).

<sup>14</sup> *Id.* at 472.

<sup>15</sup> See, *In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 797 (Bankr.D.Del.2007).

F.2d 949, 953 (3rd Cir.1992). The vertical dimension, which is also known as the creditor's expectation test, "analyzes the transaction from the vantage point of a hypothetical creditor and the inquiry is whether the transaction subjects a creditor to economic risk of a nature different from those he accepted when he decided to extend credit." *Id.* *Roth American* explained that "the touchstone of 'ordinariness' is the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of business." *Id.*

In *Martino v. First Nat'l Bank (In re Garofalo's Finer Foods)*, 186 B.R. 414, 428-30 (N.D.Ill.1995), however, the court held that there was no statutory basis for the "horizontal dimension" component of the test. Rather, the court simply adopted a "reasonable expectations" test, under which, again, the court looks to the reasonable expectations of creditors dealing with the debtor as to the types of transactions the debtor might enter. *Garofalo's* stated:

The core of the reasonable expectations test is its analysis of the debtor's pre-petition conduct as a means to inform and develop expectations of its post-petition conduct. The debtor's pre-petition conduct is not, however, the sole reference for defining these expectations. In applying this test, the court must also consider the changing circumstances that are inherent in a debtor's efforts to operate its business under chapter 11. The test seeks to discern "any significant alterations" in a debtor's pre- and post-petition activities. . . .

A creditor's reasonable expectations of a debtor's "ordinary course of business" are based in large part upon the debtor's specific pre-petition business practices and norms and the expectation that the debtor will conform to those practices and norms while operating as a debtor-in-possession. Thus, a fundamental characteristic of an "ordinary" post-petition business transaction is its similarity to a pre-petition business practice. . . . A rigid similarity is not required; rather, the post-petition transaction must have "some consistency" with a pre-petition transaction. . . . The size, nature and type of business, and the size and nature of the transactions in question are all relevant to determining whether the transactions are ordinary.<sup>16</sup>

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<sup>16</sup> *Id.* at 425-26.

**Post-Petition Earnings: Are They Property of the Estate Upon Conversion?**

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Under Section 541(a)(1) of the Bankruptcy Code, the commencement of a bankruptcy case creates an estate that is comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.” Therefore, although §541(a) uses broad language, its scope is generally limited to property interests held by the debtor on the petition date. This pre-petition limitation is underscored by subsection 541(a)(6) which provides that property of the estate includes “[p]roceeds, products, offspring, rents, or profits from property of the estate, *except* such as are earnings from services performed by an individual debtor after the commencement of the case.” Thus, unless another section of the Bankruptcy Code provides otherwise, §541(a)(6) excludes an individual debtor’s post-petition earnings from property of the estate. This exclusion of post-petition earnings is consistent with the policy that upon surrendering property to the estate, the debtor is given a “fresh start.”<sup>1</sup>

In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) added Section 1115(a)(2) to Chapter 11 cases. The language of this statute parallels the language found in Sections 1207 and 1306 of the Bankruptcy Code, providing that 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 to a case under chapter 7, 12, or 13, whichever occurs first.”<sup>2</sup> Thus, like Chapter 12 and 13 cases, with BAPCPA an individual Chapter 11 estate now includes property owned by the debtor at the time that the case was commenced, as well as any income earned by the debtor after the bankruptcy petition is filed.

Section 348 of the Bankruptcy Code governs the effect of conversion from one chapter of the Bankruptcy Code to another. Under §348(a), “[c]onversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but . . . does not effect a change in the date of the filing of the petition.” Subsections 348(f)(1)(A) and (2) of the Bankruptcy Code then describe the fate of post-petition earnings when a case is converted *from Chapter 13*. It provides:

- (1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title – (A) property of the estate in the converted case shall consist of property of the estate, as of the date

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<sup>1</sup> *In re Evans*, 464 B.R. 429, 435 (Bankr.D.Colo.2011), quoting *In re Taronji*, 174 B.R. 964, 970 (Bankr.N.D.Ill.1994).

<sup>2</sup> In Chapter 13, Section 1306(a)(2) of the Bankruptcy Code provides:

- (a) Property of the estate includes, in addition to the property specified in section 541 of this title
- (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.

of filing of the petition, that remains in possession of or is under the control of the debtor on the date of conversion;

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(2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion.

In other words, under §348(f), when a bankruptcy case is converted from Chapter 13 to Chapter 7, the Chapter 7 estate does not include earnings of the debtor after the commencement of the case. Rather, property of the estate under the new Chapter 7 case is comprised simply of property of the estate of the original Chapter 13 case “as of the date of filing the petition” that remains in possession of the debtor “on the date of conversion.” Significantly, §348(f) only deals with Chapter 13 cases. There are no provisions, either in §348 or elsewhere in the Bankruptcy Code, that specifically lays out what happens to post-petition earnings when a debtor first files a petition under Chapters 11 or 12 and later converts the case to Chapter 7. As a result, the question now exists whether such post-petition earnings remain property of the estate after the Chapter 11 case is converted to a case under Chapter 7, or revert back to the debtor, as in Chapter 13 cases. With respect to this issue, the courts are not in concurrence.

**(A) Pre-Confirmation Conversion of a Chapter 11 Case.**

In *In re Evans*, 464 B.R. 429, 441 (Bankr.D.Colo.2011), the court ruled that upon conversion, the debtor’s post-petition earnings included in the Chapter 11 estate revert back to the debtor and are not property of the new Chapter 7 estate. The court came to this conclusion based on its analysis of legislative history and legislative intent. The court noted that Section 1306(a)(2) pre-dates, but is otherwise largely identical to §1115(a)(2). *Id.* at 439. It observed that courts for years had been divided as to how post-petition earnings were to be treated when a Chapter 13 case was converted to Chapter 7:

Two lines of cases developed as to the appropriate date for determining what would be considered “property of the estate” in a converted case. Some courts held that, upon conversion from Chapter 13 to 7, the date of conversion would control and all property of the Chapter 13 estate, including after-acquired property pursuant to §1306(a), would be included in the Chapter 7 estate. *In re Lybrook*, 951 F.2d 136, 138 (7th Cir.1991) (holding “the Chapter 13 estate passes unaltered into Chapter 7 upon conversion.”). See *Armstrong v. Lindberg (In re Lindberg)*, 735 F.2d 1087, 1090 (8th Cir.1984) (holding the date of conversion, and not date of filing of the original Chapter 13 petition, determines what exemptions may be claimed); *In re Calder*, 973 F.2d 862, 866 (10th Cir.1992). Other courts held that the original petition date would control, meaning that a debtor’s “earnings” acquired after the petition date would be excluded by the Earnings Exception, even though § 1306(a) would have included them up to the conversion date. See *In re Bobroff*, 766 F.2d

797 (3d Cir.1985); *In re Horton*, 130 B.R. 326, 328 (Bankr.D.Colo.1991); *In re Gorski*, 85 B.R. 155 (Bankr.M.D.Fla.1988).<sup>3</sup>

*Evans* noted that in 1994, Congress resolved this split by amending §348 to add subsection (f)(1)(A). *Id.* at 439. As noted, this subsection provides that “when a case under chapter 13 ... is converted to a case under another chapter ... property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.” With this amendment, §348 now expressly excludes a debtor's post-petition earnings from a Chapter 7 estate upon conversion from Chapter 13, despite § 1306's inclusion of such earnings in the estate during the Chapter 13 case. *Evans* went on to explain that:

[The amendment] clearly intended to abrogate the rationale underlying the *Lybrook* line of cases. In doing so, [legislative history] explained that its purpose was to equalize the treatment a debtor would receive under a Chapter 13 case converted to Chapter 7, with the treatment that debtor would have received if he had originally filed under Chapter 7.<sup>4</sup>

*Evans* then quoted from *In re Pisculli*, 426 B.R. 52, 63-64 (E.D.N.Y.2010), which explained the rationale for this legislation:

These latter courts [limiting estate property on conversion to exclude post-petition earnings] have noted that to hold otherwise would create a serious disincentive to chapter 13 filings. For example, a debtor who had \$10,000 equity in a home at the beginning of the case, in a State with a \$10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a \$10,000 second mortgage in the chapter 13 case, creating \$10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor's property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the \$10,000 in equity for the unsecured creditors and the debtor would lose the home.

Admittedly, when Congress enacted §1115(a)(2) in 2005, it did not simultaneously amend §348 to expressly provide for the same treatment of post-petition income in cases converting from Chapter 11 to Chapter 7. While recognizing that some courts have found this failure of Congress as a reflection on Congress's intent that such earnings remain in the estate, *Evans* came to a different conclusion. The court stated that it was also possible to interpret the specific reference to Chapter 13 cases in §348(f) as necessary to resolve the split of authority that had arisen only in cases converted from Chapter 13 to Chapter 7. *Id.* at 440. Otherwise, the court noted that the general language of §348(a) was sufficient to convey the message in all other contexts:

When Congress adopted §348(f), there was no counterpart to §1306 in Chapter 11. At that time, Congress clearly conveyed its purpose to avoid penalizing debtors who first attempt a repayment plan. This same rationale is equally applicable in Chapter 11 reorganization cases converted to a liquidation under Chapter 7. If the

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<sup>3</sup> *Id.* at 439.

<sup>4</sup> *Id.* at 440.

conversion date were the controlling date, then debtors for whom a reorganization case ultimately proved unavailing, would be disadvantaged in their Chapter 7 case because of their voluntary attempt to repay their creditors through reorganization. This cannot be what Congress intended. As many courts recognized before the adoption of §348(f), one of the Bankruptcy Code's goals is to encourage use of debtor repayment plans rather than liquidation. There is no policy reason as to “why the creditors should not be put back in precisely the same position as they would have been had the debtor never sought to repay his debts....” *In re Bobroff*, 766 F.2d 797, 803 (3rd Cir.1985) (citing *In re Hannan*, 24 B.R. 691, 692 (Bankr.E.D.N.Y.1982)). Consequently, there is no reasoned basis to treat Chapter 11 and 12 cases differently than Chapter 13 cases. Absent a binding precedent to the contrary, this Court will not interpret §348 as requiring a different result in a conversion from a Chapter 13 case rather than from a Chapter 11 or 12 case.<sup>5</sup>

*In re Markosian*, 506 B.R. 273 (9th Cir.BAP 2014) came to the same conclusion. The court noted that the statute expressly states that the date of the petition remains unchanged. *Id.* at 276. Where a case is converted from Chapter 11 to Chapter 7, property of the estate is determined by the filing date of the original Chapter 11 petition, and not by the conversion date. As of the petition date, §541(a)(6) excludes from the Chapter 7 estate earnings from services performed by individual debtors after the commencement of the case. As a result, the court stated, “by operation of §348(a), personal service income that came into Debtors’ chapter 11 estate is recharacterized as property of the debtor under §541(a)(6) when the case is converted to chapter 7.” *Id.* The court concluded as follows:

In the end, there is no reason to treat chapter 11 debtors differently than chapter 13 debtors in this context. As the *Evans* court pointed out, at the time Congress enacted §348(f), it “clearly conveyed its purpose to avoid penalized debtors who first attempt a repayment plan . . . [t]here is no policy reason as to ‘why the creditors should not be put back in precisely the same position as they would have been had the debtor never sought to repay his debts. . . .’”<sup>6</sup>

However, an opposite conclusion has been reached by courts such as *Pergament v. Pagano* (*In re Tolkin*), 2011 WL 1302191, at \*10 (Bankr.E.D.N.Y.) and *In re Hoyle*, 2013 WL 3294273 (Bankr.D.Idaho 2013), which have held that upon conversion, post-petition earnings remain property of the bankruptcy estate.<sup>7</sup> These courts rely on Congress’s failure to enact a parallel provision to §348(f)(1)(A) for Chapter 11 or Chapter 12 debtors. In *Tolkin*, the court stated:

The language of [§1115] parallels the language of §1306, and accomplishes the same goal of broadening the scope of property of the debtor’s estate significantly beyond the parameters of §541. However, unlike in a Chapter 13 case, there is no provision similar to §348(f) to modify the result upon conversion of a Chapter 11 case to another chapter. . . . Therefore, what is captured as property of the debtor’s

<sup>5</sup> *Id.* at 441.

<sup>6</sup> *Id.* at 277, quoting *In re Evans*, 464 B.R. 429, 441 (Bankr.D.Colo.2011).

<sup>7</sup> See, *In re Hoyle*, 2013 WL 3294273, at \*9 (Bankr.D.Idaho); *Matter of Freeman*, 527 B.R. 780, 789-97 (Bankr.N.D.Ga.2015) (holding that post-petition earnings by an individual debtor in Chapter 11 remain part of the estate after conversion to Chapter 7).

estate under §1115 remains as property of the estate, even after conversion of the case to another chapter.<sup>8</sup>

A similar conclusion was reached in *In re Meier*, 2016 WL 930656 (N.D.Ill.). Here, the court began its analysis by looking at the language of §348, noting that “[w]hen the plain wording of the statute is clear, that is the end of the matter.” *Id.* at \*3, quoting *U.S. v. Webber*, 536 F.3d 584, 593 (7th Cir.2008). The court’s focus was on §348(f)(1).

Section 348(f) is important for two reasons. First, given that subsection (f) specifically lays out what happens to an estate when a case is converted from one chapter to another, it is difficult to see how the less specific (and arguably less applicable) language of §348(a) - that a conversion “does not effect a change in the date of the filing of the petition” - can be read to address the same issue. Indeed, §348(a) does not mention “estates” at all, and the Seventh Circuit itself noted the opaqueness of §348(a)'s language in a case that led to §348(f)'s enactment. *See In re Lybrook*, 951 F.2d 136, 137 (7th Cir.1991) (noting that a plausible reading of §348(a) is that it “assures the continuity of the case for purposes of filing fees, preferences, statutes of limitations, and so forth”).

Second, when viewed in light of the statutory construction tool *expressio unius est exclusio alterius* (“to express or include one thing implies the exclusion of the other,” Black's Law Dictionary (10th ed.2014)), it is significant that §348(f) mentions only cases converted from Chapter 13 and does not include conversions from Chapter 11 or 12. As further discussed below, Congress certainly had Chapter 12 in mind when enacting §348(f) in 1994 and had the opportunity to include Chapter 12 and Chapter 11 when it revised §348(f) in 2005. But, in both instances, Congress limited the reach of §348(f) to Chapter 13 cases.<sup>9</sup>

In other words, there is nothing in §348(a) to suggest that subsection (f) was meant to be a clarification or illustration of (a), as subsection (f) makes no mention that (a) is the general rule. *Id.* at \*3. The court also noted that §348(f) went further than simply clarifying §348(a). Rather, §348(f)(2) provides that “[i]f the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion.” This bad-faith exception is not found in §348(a) and, according to the court, could not be derived from its language. Legislative history also supported this court’s conclusion, with the court noting that:

When the 1994 amendments were proposed, post-petition funds earned by the debtor in Chapter 12 were part of the estate, just as they were in Chapter 13. *See* 11 U.S.C. §1207(a)(2). And, just as in Chapter 13 cases, courts wrestled with the issue of whether post-petition earnings continued to be part of the estate when a Chapter 12 case is converted to Chapter 7. *See, e.g., In re White*, 25 F.3d 931, 933 (10th Cir.1994) (holding that post-petition earnings remained in the estate after the case was converted from Chapter 12 to Chapter 7). The legislative history demonstrates

<sup>8</sup> *Tolkin*, 2011 WL 1302191, at \*10.

<sup>9</sup> *Meier*, 2016 WL 930656 at \*3.

that Congress was aware of this problem in 1994 when it enacted §348(f). *See* 140 Cong. Rec. 27,697 (“The problem arises because in chapter 13 (and chapter 12)...”). Yet, despite knowing that the “problem” existed for Chapter 12 cases, Congress limited the application of §348(f) to Chapter 13.<sup>10</sup>

The court noted that in 2005, Congress stepped in and simplified Chapter 11 by adding §1115(a)(2), which made post-petition earnings part of the estate in Chapter 11 cases. At the same time, Congress also made substantial changes to §348(f), altering the language of subsection (f)(1)(B) and adding (f)(1)(C). Again, however, Congress did not bring conversions from Chapter 11 or Chapter 12 within the scope of §348(f). *Id.* This fact, in and of itself, provided “ample support that Congress had the knowledge and opportunity to include Chapter 11 and Chapter 12 within the scope of §348(f), but elected not to do so.” *Id.* at \*6.

*In re Gorniak*, 2016 WL 1411494, at \*3 (Bankr.W.D.Wis.), agreed with the conclusion reached in *Meier*. Quoting from one of its earlier decisions, i.e., *In re Ford*, 61 B.R. 913 (Bankr.W.D.Wis.1986), the court noted that while §348(a) provides that “a chapter 7 case which has been converted from a case under another chapter is considered to have been commenced on the date of the original petition,” that fact “does not mean ... that all actions taken in the case prior to conversion become nullities.” *Ford*, 61 B.R. at 916. Specifically, in a Chapter 11 to 7 conversion, the court held that “[t]he operation of section 348(a) of the Code does not result in the retroactive divestment of post-petition property acquired by the estate upon conversion to chapter 7.” *Id.* at 917–918.

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<sup>10</sup> *Id.* at \*5. The House Report concerning the enactment of §348(f) states as follows:

This amendment would clarify the Code to resolve a split in the case law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7. The problem arises because in chapter 13 (and chapter 12) any property acquired after the petition becomes property of the estate, at least until confirmation of a plan. Some courts have held that if the case is converted, all of this after-acquired property becomes part of the estate in the converted chapter 7 case, even though the statutory provisions making it property of the estate does [sic] not apply to chapter 7. Other courts have held that the property of the estate in a converted case is the property the debtor had when the original chapter 13 was filed.

These latter courts have noted that to hold otherwise would create a serious disincentive to chapter 13 filings. For example, a debtor who had \$10,000 equity in a home at the beginning of the case, in a State with a \$10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a \$10,000 second mortgage in the chapter 13 case, creating \$10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor’s property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the \$10,000 in equity for the unsecured creditors and the debtor would lose the home.

This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F.2d 136 (7th Cir.1991) and adopts the reasoning of *In re Bobroff*, 766 F.2d 797 (3rd Cir.1985). However, it also gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case.

140 CONG. REC. H10770 (daily ed. Oct. 4, 1994) (section-by-section description of H.R. 5116); *See also* H.R.REP. NO. 835, 103d CONG. 2d SESS. 57 (1994) (same).

In *Matter of Freeman*, 527 B.R. 780, 790 (Bankr.N.D.Ga.2015), the court found that while reading §§ 541(a), 1115(a)(2) and 348(a) together, it was unclear whether post-petition earnings are included in a post-conversion Chapter 7 estate, as a matter of statutory construction §348(f)(1) provided a clear answer. As in *Meier*, the court noted that the canon of statutory construction of *expressio unius est exclusio alterius* supported the conclusion that upon conversion of a Chapter 11 case, property of the estate includes the debtor's post-petition earnings "because Section 348(f) excludes such property from the estate only in a Chapter 13 case." *Id.* at 793. Further, the court noted that it is hard to interpret §348(f)(1) as simply clarifying §348(a), when §348(f)(2) provides an exception.

Pursuant to Section 348(f)(2), if the debtor converts a case under Chapter 13 in bad faith, property of the estate is determined to be property of the estate at the time of conversion. By its own terms, this provision only applies to conversions from Chapter 13. No matter how one evaluates the statute, Section 348(a) incorporates no such exception for bad faith conversions. Consequently, should the Court conclude that Section 348(a) effects the same result for conversion from Chapter 11 (and Chapter 12) as Section 348(f)(1)(A) effects for conversion from Chapter 13, then the accompanying result permits non-Chapter 13 debtors to convert their cases in bad faith without fear of reprisal. This interpretation renders the Court powerless to prevent such manipulations. It is unlikely that Congress intended to punish only bad faith Chapter 13 debtors, while permitting other debtors to exploit the Code. A better understanding is that Section 348(f)(1)(A) excepts Chapter 13 debtors—who are typically less affluent and less sophisticated than Chapter 11 debtors—from the correctly applied meaning of Section 348(a), but with the caveat that such relief shall not be awarded to those who attempt to take advantage of the bankruptcy system.<sup>11</sup>

Further, the rule of statutory construction that the court should "construe[] [a statute] so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant," did not support an interpretation of §348(f)(1) adopted by *Evans*.<sup>12</sup> The court stated that reading §348(f)(1)(A) as nothing more than a "clarification" of the generally applicable rule in §348(a) renders §348(f)(1)(A) entirely superfluous and meaningless. "If Congress intended to articulate a general rule, it would have been far simpler and more efficient simply to amend Section 348(a), rather than add a subsection facially applicable only to conversions from a single chapter of the Code." *Id.* at 796. Finally, *Freeman* stated that:

Moreover, Section 1115 provides that earnings of a Chapter 11 debtor acquired after commencement, "but *before the case is ... converted to a case under chapter 7 ... [,]*" become property of the estate. If estate property obtained post-petition under Section 1115(a) failed to transfer to the converted estate, there would be no reason to specify that earnings acquired post-commencement but pre-conversion

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<sup>11</sup> *Id.* at 795-96.

<sup>12</sup> *Id.* at 796, quoting *Corley v. U.S.* 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009).

become property of the estate, for conversion would immediately reclassify the property as non-estate property; causing that clause also to become unnecessary.<sup>13</sup>

**(B) Post-Confirmation Conversion of a Chapter 11 Case.**

*Freeman* also dealt with this issue in the context of a Chapter 11 case which converts to a case under Chapter 7 after the Chapter 11 plan is confirmed. Section 1141 of the Bankruptcy Code is now implicated once a plan is confirmed. This section provides that “[e]xcept as otherwise provided for 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.” The court observed that there is a split of authority as to whether the post-confirmation conversion of a Chapter 11 case to Chapter 7 “revests” property of the debtor in the Chapter 7 estate. 527 B.R. at 784. It then followed the line of cases which hold that conversion of a case post-confirmation does not “undo” the plan. Rather, once assets vest in a reorganized debtor, the assets fall outside the bankruptcy court's jurisdiction, as the assets are no longer property of the estate. Post-confirmation conversion of a case is neither a revocation nor a modification, the timing for each of which is strictly limited under the Bankruptcy Code, and therefore the consequences of conversion must necessarily be different from the consequences of revocation or modification. *Id.* at 785.

For support, the court cited to *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 461 (6th Cir.1991) (holding that the Chapter 7 trustee in a converted case could not avoid and recover a post-confirmation transfer of property occurring during the Chapter 11 phase because, under §1141(b), Chapter 11 property vested in the debtor upon confirmation of the plan and §549(a) applies only to the recovery of property of the estate.); *Robb v. Lybrook (In re Lybrook)*, 107 B.R. 611, 613 (Bankr.N.D.Ind.1989) (“[Section 348] should not be read as a nullification act.”), *aff'd*, 135 B.R. 321 (N.D.Ind.1990), *aff'd* 951 F.2d 136 (7th Cir.1991); *In re Winom Tool & Die, Inc.*, 173 B.R. 613, 618-19 (Bankr.E.D.Mich.1994) (holding that property removed from bankruptcy estate upon entry of plan confirmation order remained outside of estate following conversion of bankruptcy case to one under Chapter 7.); and *In re Sundale, Ltd.*, 471 B.R. 300, 304-06 (S.D.Fla.2012) (Although there is a post-conversion estate, once property vests in the debtor, it does not revest in that estate.)

In *In re Meyrowitz*, 2010 WL 5292066, at \*4 (Bankr.N.D.Tex.), the court noted that pursuant to §1115(a), a bankruptcy estate continues to exist after confirmation of a Chapter 11 plan for an individual debtor. It also noted, however, that §1141(b) provides that unless stated otherwise, confirmation of the plan vests all of the property of the estate in the debtor. In order to understand the interplay of these two sections, *Meyrowitz*, followed the “reconciliation approach” referenced by cases dealing with the supposed conflict between sections 1327(b) and 1306(a)(2) which contain largely identical provisions. Quoting *Rodriquez v. Countrywide Home Loans, Inc. (In re Rodriquez)*, 421 B.R. 356, 374 (Bankr.S.D.Tex.2009), the court described the “reconciliation approach” as follows:

Section 1306(a)(2) provides that “earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted” are property of the estate. Section 1327(b) provides that, unless

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<sup>13</sup> *Id.* at 796.

otherwise stated, “the confirmation of the plan vests all of the property of the estate in the debtor.” The two statutes can be reconciled by treating all post-confirmation, *future income* as property of the estate. Thus, at confirmation, all of the property that is *currently* property of the estates could vest in the debtor; and all of the debtor's future income would still be estate property.

Applying this approach to converted Chapter 11 cases, the court stated that all post-confirmation income received by the debtor is property of his bankruptcy estate and that such estate will continue to exist until his bankruptcy case is “close, dismissed, or converted to a case under chapter 7, 12, or 13.” *Id.* at \*5.

Plan Confirmation Issues in Individual Chapter 11 Cases

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The BAPCPA<sup>1</sup> amendments in 2005 attempted to deal with some of the shortcomings of chapter 11 as a remedy for individuals and to bring a chapter 11 case for an individual more in line with that of a case under chapter 13. Those changes impacted plan and confirmation requirements in a multitude of ways, some anticipated, others unanticipated.

- *11 U.S.C. 1123(a)(8)*

BAPCPA added Section 1123(a)(8), which requires that a plan “. . . provide for the payment to creditors under the plan of all or such portion of the individual debtor’s postpetition personal service earnings . . . or other future income of the debtor as is necessary for the execution of the plan.”<sup>2</sup> This section; however, is not an absolute mandate for the inclusion in the plan of reorganization of a debtor’s post-petition earnings, “. . . [r]ather, it directs that such earnings be so applied ‘as is necessary for the execution of the plan.’”<sup>3</sup> As such, if the earnings are not necessary to plan execution, they need not be included. This may be the case where a plan is fully funded from the sale of the debtor’s assets.<sup>4</sup> Additionally, the section does not require ALL earnings to be paid to creditors – only an amount necessary for execution of the plan.

- *11 U.S.C. 1129(a)(3)*

To be confirmable a plan of reorganization must be “. . . proposed in good faith and not by any means forbidden by law.”<sup>5</sup> Technical compliance with the Bankruptcy Code alone is not enough to demonstrate good faith, courts will also whether a plan's terms and the process used to seek its confirmation are fundamentally fair. Even in circumstances where the plan proposes to contribute all of the debtor’s disposable income, courts have found the plan was not proposed in good faith where the debtor’s disposable income is limited by of the debtor’s lavish lifestyle.<sup>6</sup>

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<sup>1</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub. L. No. 109-8, 119 Stat. 23.

<sup>2</sup> 11 U.S.C. § 1123(a)(8).

<sup>3</sup> *In re Brown*, 498 B.R. 486, 507 (Bankr. E.D. Pa. 2013)

<sup>4</sup> *Id.*

<sup>5</sup> 11 U.S.C. 1129(a)(3).

<sup>6</sup> *See, e.g. In re Auttersson*, 2016 Bankr. LEXIS 844 (Bankr. D. Colo. 2016); *In re Osborne*, 2013 Bankr. LEXIS 2203 (Bankr. E.D.N.C. May 30, 2013) *In re Draiman*, 450 B.R. 777 (Bankr. N.D. Ill. 2011); *In re Weber*, 209 B.R. 793 (Bankr. D. Mass. 1997); *In re Harman*, 141 B.R. 878 (Bankr. E.D. Pa. 1992)

The *Osbourne* decision is an instructive example of the interplay between good faith and a debtor's very high standard of living. The court in *Osborne* examined the totality of the debtors' expense during the bankruptcy proceedings and as projected in the plan and determined the plan was not proposed in good faith. The debtors' expenses included private school of \$1,400 per month for one child, college tuition for their other child, multiple cars, \$1,870 per month on food and restaurants, \$1,460 in clothing, and travel expense (including a Disney vacation). In addition to their principal residence the debtors also maintained a vacation home – combined the monthly mortgage payments and expenses for both homes was \$8,602.02. The court rejected the debtors' argument that the plan was confirmable because it made full disclosure and otherwise met the code's distribution requirements:

In light of the debtors' high cost lifestyle, the court cannot conclude that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code. Instead, the plan fails to meet the § 1129(a)(3) requirement of proposal in good faith.

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A plan that allows the debtors to maintain such a high cost lifestyle, while paying only \$20,000 to unsecured creditors and retaining \$140,000 in the bank, certainly cannot be consistent with the purposes and objectives of the Bankruptcy Code. While the Code confers many benefits to debtors, continued maintenance of an extravagant lifestyle surely was not intended to be one of them.<sup>7</sup>

The *Osbourne* debtors and the debtors in the other cited cases are probably extreme examples of the refusal to curtail a lavish lifestyle prior to and during the bankruptcy proceedings. Counsel representing high net worth and high standard of living debtors, however, should proceed cautiously as there is no bright line rule of how high a standard of living is acceptable and what expenses are too high such that a plan will not be considered to have been proposed in good faith.

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<sup>7</sup> In re *Osborne*, 2013 Bankr. LEXIS 2203, at \*28-29.

- *11 U.S.C. 1129(a)(11)*

A plan can only be confirmed if:

Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.<sup>8</sup>

The potential of a nondischargeable debt in an individual Chapter 11 complicates this feasibility determination. The outcome of a non-dischargeability adversary complaint may impact the amounts to be paid to other unsecured creditor and even the debtor's ability to make the necessary plan payments at all. Absent some showing that it is more likely than not that the debtor will prevail in the non-dischargeability proceedings, the plan as proposed may not be feasible. Alternatively, confirmation may be delayed until the adversary can be resolved.

- *11 U.S.C. 1129(a)(14)*

Counsel representing a debtor with a domestic support obligation (“DSO”) needs to pay special attention to the specific treatment of a DSO in the individual chapter 11 confirmation process. Under 11 U.S.C. 1129(a)(14) a plan can only be confirmed if the debtor is current in all DSO that became payable after the date of filing.<sup>9</sup> Importantly, “[a] chapter 11 plan cannot be confirmed if the payment terms of a DSO have been modified or if the amount of the allowed, non-accepting DSO claim is not paid in full on the effective date.”<sup>10</sup>

- *11 U.S.C. 1129(a)(15)*

Section 1129(a)(15) requires the debtor either (i) pay unsecured creditors in full or (ii) to devote an amount equal to five-years' worth of projected disposable income to the plan, with the five years measured by the date the plan is confirmed or plan payments start, whichever is later. Standing to raise this objection is not class-based. Even if the class of unsecured creditors has accepted the plan, an individual unsecured creditor may invoke the disposable income test.

Much like the debate in Chapter 13, a key question is: what is the definition of “projected disposable income”. Section 1129(a) (15) specifically refers to Section 1325(b)(2). Even if the definition was settled for Chapter 13, this does not necessarily resolve the issue for Chapter 11.

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<sup>8</sup> 11 U.S.C. 1129(a)(11).

<sup>9</sup> *In re McCuller*, 2013 Bankr. LEXIS 5736 (Bankr. W.D. Tenn. Feb. 1, 2013); *see also In re Efron*, 529 B.R. 396 (B.A.P. 1st Cir. 2015) (Chapter 11 dismissed because, in part, debtor's plan was unconfirmable as Debtor was not current in post-petition DSO obligations).

<sup>10</sup> *Id.*, at \*14.

At issue is whether Section 1325(b)(3), and its incorporation of the means test of 707(b)(2), is also applicable to determine the “amounts reasonably necessary” under Section 1325(b)(2).

Courts<sup>11</sup>, commentators<sup>12</sup> and the Advisory Committee on Bankruptcy Rules have determined that 1325(b)(3) does not apply to Chapter 11. The *Roedemeier* court and commentators have reasoned that Section 1129(a)(15) only references Section 1325(b)(2) and does not reference Section 1325(b)(3). Therefore Section 1325(b)(3) and its incorporation of Section 707(b)(2) does not apply. As such, “. . . in calculating an individual Chapter 11 debtor’s projected disposable income, § 1129(a)(15)(B) must be read to allow a judicial determination of the expenses that are reasonably necessary for the support of the debtor and his or her dependents.” *Roedemeier* at 273.<sup>13</sup> There is a lack of case law discussing what expenses are “reasonably necessary” in the Chapter 11 context. Pre-BAPCPA cases addressing the issues of “reasonable necessary” expenses may provide some guidance.

The contrary argument is Section 1325(b)(2) defines disposable income as current monthly income less “**amounts reasonably necessary**” to be expended for the maintenance and support of the debtor and debtor’s dependents. Section 1325(b)(3) specifically states that it is to be used to calculate the “[a]mounts reasonably necessary to be expended under [Section 1325(b)] (2). Thus, Section 707(b)(2)’s expenses are incorporated into Chapter 11 by Section 1325(b)(3). No court has specifically ruled that Section 1325(b)(3) and 707(b)(2) apply in the context of an objection based on Section 1129(a)(15). A few courts, however, have stated that 707(b)(2) applies in a Chapter 11.<sup>14</sup>

Even in cases (e.g. primarily non-consumer debt) where the means test is inapplicable, if Section 707(b)(2) is used to determine the allowable expense it can have massive implications and make it difficult to confirm a plan. All expenses, except secured obligations, in excess of the National and Local Standards will not be considered. A high earning debtor with expenses in excess of the IRS guidelines will have to significantly reduce those expenses to meet the disposable income requirement of 1129(a)(15).<sup>15</sup>

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<sup>11</sup> *In re Gray*, 2009 Bankr. LEXIS 2130 (Bankr. N.D. W. Va. 2009); *In re Roedemeier*, 374 B.R. 264 (Bankr. D. Kan. 2007);

<sup>12</sup> 7 *Collier on Bankruptcy* ¶ 1129.02[15][a]

<sup>13</sup> One other court, *In re Bacardi*, 2010 Bankr. LEXIS 3 (Bankr. N.D. Ill. Jan. 6, 2010), has stated “. . . the means test does not in fact apply in chapter 11. Section 1129(a)(15) mentions section 1325(b)(2) but not section 1325(b)(3).” This statement, however, is unsupported *dicta* in a footnote.

<sup>14</sup> See e.g., *In re Dumas*, 419 B.R. 704, 710-711 (Bankr. E.D. Tex. 2009)(§ 707(b)(2) applies in both Chapter 13 and Chapter 11); *In re Johnson*, 399 B.R. 72, 77 (Bankr. S.D. Cal. 2008). It must be noted that both of these cases are Chapter 7 proceedings, and each courts’ blanket statement is decidedly *dicta*.

<sup>15</sup> Some debtors, however, may actually benefit from the application of 707(b)(2). Under the judicial determined “reasonably necessary” standard, courts frequently held that a debtor’s payment of secured debt on extravagant homes, and vehicles were not reasonably necessary and could not be included in the debtor’s expenses. Under Section 707(b)(2)(A)(iii), all payments on secured debts are deductible for purposes of computing projected disposable income.

One simple example is the impact on debtors paying college and/or private school tuition. Section 707(b)(2) limits the amount to be included as an actual expense to \$1,775 per year per each child under the age of 18. First, this means any tuition payments for college cannot be included. Second, private schools typically charge tuition in excess of \$1,775 per year. For example, Kradwell School in Wauwatosa, Wisconsin charges \$15,360 per year. The \$13,585 difference between the actual tuition and 707(b)(2) allowance would have to be included in the disposable income and be paid to creditors. This may mean debtor can no longer send her children to her preferred school. Even if 707(b)(2) does not apply, it may be difficult to convince the judge that school tuition is “reasonably necessary”, but at least you will have the opportunity to plead your client’s case.<sup>16</sup> Application of 707(b)(2) will cut off all argument.<sup>17</sup>

- 11 U.S.C. 1129(b)(2)(B)(ii) Absolute priority rule.

Given the prevailing trend of Circuit Court opinions is the absolute priority rule of 11 U.S.C. 1129(b)(2)(B)(ii) does apply in an individual Chapter 11 proceedings, how can a debtor satisfy this requirement and confirm a plan absent payment in full to his or her unsecured creditors or surrender/liquidation of all non-exempt property? A possible avenue is the “new value” exception or corollary, which allows a debtor to retain their interest in pre-petition property, notwithstanding the fact that unsecured creditors are not paid in full, if the debtor provides sufficient “new value”. This new value concept was first applied by the U.S. Supreme Court in *Case v. Los Angeles Lumber Prods. Co.*,<sup>18</sup>. In *Los Angeles Lumber* the Supreme Court held that to qualify as new value the contribution must be (1) necessary to the reorganization; (2) in the form of money or money’s worth; and (3) reasonably equivalent to the interest retained.<sup>19</sup> Axiomatic to the new value analysis, the value to be given by the debtor must also be new – i.e. not already property of the bankruptcy estate. Otherwise the debtor is not giving anything new, but only giving the estate assets it already has.

The simplest source of new value is a gift to the debtor from an outside source, e.g. friend or relative, in an amount at least equal to the value of the non-exempt property to be retained. Such a voluntarily contribution from a third party would appear to meet all of the *Los Angeles Lumber* requirements.<sup>20</sup> The funds are necessary for the reorganization – the plan is unconfirmable

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<sup>16</sup> See, e.g. *In re Bonuchi*, 327 B.R. 428 (Bankr. W.D. Mo. 2005) (payment of all of college tuition not reasonably necessary); *In re Gonzales*, 157 B.R. 604 (Bankr. E.D. Mich. 1993) (college tuition is reasonably necessary); *In re Nicola*, 244 B.R. 795 (Bankr. N.D. Ill. 2000) (payment of private school tuition reasonably necessary).

<sup>17</sup> See, *In re Goins*, 372 B.R. 824 (Bankr. D.S.C. 2007)

<sup>18</sup> 308 U.S. 106, 60 S. Ct. 1, 84 L. Ed. 110 (1939)

<sup>19</sup>*Id* at 121-22

<sup>20</sup> If the amount gifted is equal to the value of the debtor’s projected disposable income over a 5-year period, it could be argued that the gifted amount also meets the requirements of 11 U.S.C. 1129(a)(15), such that it is not necessary for the debtor to actually contribute any disposable income to the plan. No court, however, has ruled on this possible interpretation.

otherwise; the gift is money, and equivalent to the interest retained by the debtor. While this solution is simple, not all debtors are lucky to have a relative or friend willing or able to gift the requisite amount.

It could be argued that another potential source of “new value” is the debtor’s post-petition and post-confirmation wages. Although 11 U.S.C. § 1115 broadens the categories of assets that comprise the bankruptcy estate set forth in 11 U.S.C. § 541; post-petition assets are only considered property of the estate until the case is closed.<sup>21</sup> In those districts that automatically close Chapter 11 cases shortly after confirmation or allow the case to be closed upon the filing of a procedural motion, the earnings and property obtained by a debtor after the Chapter 11 case is closed are not property of the bankruptcy estate. As such, much like contribution of exempt property or a gift, those post-closing earnings would not be property of the bankruptcy estate and, therefore, it could be argued are “new” assets for new value purposes. Support for this argument may also be found in 11 U.S.C. 1129(b)(2)(B)(ii) itself. 11 U.S.C. 1129(b)(2)(B)(ii) allows the debtor to retain his or her post-petition property even if unsecured creditors are not paid in full. The only limitation on a debtor’s right to retain his or her post-petition earnings is the obligation to pay domestic support obligations in 11 U.S.C. § 1129(a)(14). As the debtor is allowed to retain their post-petition earnings, notwithstanding the absolute priority rule, it could be argued that voluntary contribution of those assets are new assets for the purpose of the new value exception. Assuming the wages are reasonably equivalent to the value of the property retained, it could be argue that contribution of the post-petition wages constitute “new value”.<sup>22</sup>

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<sup>21</sup> 11 U.S.C. 1115(a)(2).

<sup>22</sup> See, *In re Hadley*, 2014 Bankr. LEXIS 2491 (Bankr. D. Utah June 6, 2014) (“absolute priority rule” is satisfied where the Plan contemplates that the Debtor will contribute substantial post-petition earnings); *but see, In re Andrews*, 2015 Bankr. LEXIS 2547 (Bankr. M.D. Tenn. 2015) (the debtors’ post-petition income cannot be considered a new value contribution under the new value exception because they are already required to contribute those funds to the plan pursuant to 11 U.S.C. 1129(a)(15)(B)).

## The Absolute Priority Rule in Individual Chapter 11 Cases

Susan V. Kelley

U.S. Bankruptcy Judge, Eastern District of Wisconsin

Cases current as of April 27, 2016

The Bankruptcy Code requires “fair and equitable” treatment of the class of creditors or equity security holders subject to cramdown.<sup>1</sup> For unsecured creditors and equity holders, this phrase is bankruptcy law shorthand for the application of the absolute priority rule.

Under the absolute priority rule, a junior class may not receive anything from the plan unless and until all senior classes have been paid in full.<sup>2</sup> It is fundamental that the absolute priority rule only applies in Chapter 11 cases and only in the context of a cramdown. When the plan has been accepted by all impaired classes of creditors and equity security holders, the operative financial standard for confirmation is the best interests test, i.e., distributions at least equal in value to Chapter 7 liquidation value.<sup>3</sup> In such a case, absolute priority is irrelevant.<sup>4</sup>

On the other hand, a dissenting creditor does not necessarily need to object to the plan in order to have the protection of the absolute priority rule. The Eleventh Circuit held that because of the unique nature of the absolute priority rule and the statutory obligations of the bankruptcy court in a cramdown proceeding, a dissenting creditor was not required to formally object to confirmation to implicate the absolute priority rule.<sup>5</sup>

If the senior classes agree to it, a plan does not have to satisfy the absolute priority rule. Although

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<sup>1</sup> 11 U.S.C. § 1129(b)(1). See *In re Nutritional Sourcing Corp.*, 398 B.R. 816 (Bankr. D. Del. 2008) (court refused to confirm plan that severely impacted non-goods trade creditors, as it was not fair and equitable under § 1129(b) or Rule 9019); *In re Windwood Heights, Inc.*, 385 B.R. 832 (Bankr. N.D. W. Va. 2008) (discussing negative amortization with respect to fair and equitable treatment of a class of dissenting creditors); *In re Ferch*, 333 B.R. 781 (Bankr. W.D. Tex. 2005).

<sup>2</sup> *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship.*, 526 U.S. 434 (1999) (discussing new value exception to the rule); *In re Castleton Plaza, LP*, 707 F.3d 821 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 146 (2013) (equity investor could not evade competitive process by arranging for new value to be contributed by insider); *Dish Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79 (2d Cir. 2010) (senior creditor class may not distribute collateral proceeds to equity holders when a junior creditor class does not accept the plan); *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508 (5th Cir. 2004) (right of shareholders to acquire securities in reorganized debtor implicated absolute priority rule). See also *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (applying absolute priority rule, family farmer could not retain equity interest in farm); *Consol. Rock Prods. Co. v. Du Bois*, 312 U.S. 510 (1941). But see *In re Lindsey*, 453 B.R. 886 (Bankr. E.D. Tenn. 2011) (collecting cases on application of absolute priority rule to individual debtor post-BAPCPA). Note that the appeal to the Sixth Circuit was dismissed because the Court of Appeals found that an order denying confirmation of a plan is not a final appealable order. *Lindsey v. Pinnacle Nat'l Bank (In re Lindsey)*, 726 F.3d 857 (6th Cir. 2013).

<sup>3</sup> 11 U.S.C. § 1126(a)(7).

<sup>4</sup> *In re Lafayette Hotel P'ship*, 227 B.R. 445 (S.D.N.Y. 1998) (rule not applicable when all classes of unsecured creditors vote in favor of plan); *In re Arden Props., Inc.*, 248 B.R. 164 (Bankr. D. Ariz. 2000) (if all impaired classes have accepted the plan, the plan does not need to meet the additional requirements of § 1129(b), and the absolute priority rule is not implicated).

<sup>5</sup> *Alabama Dep't of Econ. & Cmty. Affairs v. Ball Healthcare-Dallas, LLC (In re Lett)*, 632 F.3d 1216 (11th Cir. 2011).

it would be rare, the junior class could be paid in full, and senior classes may agree to accept less than full payment of their claims, and the absolute priority rule would not apply.<sup>6</sup> More commonly, either the unsecured creditor class must be paid in full on the effective date of the plan *or* the absolute priority rule applies,<sup>7</sup> such that “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.”<sup>8</sup>

In 2005, BAPCPA amended § 1129(b)(2)(B)(ii) and added a new § 1115 defining property in an individual Chapter 11 case. The added language in 11 U.S.C. § 1129(b)(2)(B)(ii) is highlighted below:

(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.**

The added language permits individual debtors to retain “property included in an estate under § 1115” even if a dissenting class of unsecured creditors could otherwise contend such retention violates the absolute priority rule. The scope of the exception turns on the phrase “included in the estate under § 1115.” Section 1115, also added in 2005, specifies that property of the estate for individual chapter 11 debtors is different than property of the estate for all other chapter 11 debtors. It specifically states:

(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 -

...

(2) earnings from services performed by the debtor after the commencement of the case . . .

Thus, § 1115 creates more “property of the estate” in individual chapter 11 cases under BAPCPA. It achieves this by first specifying all property covered by § 541, and then by adding to that base one category of property previously excluded by § 541(a)(6): an individual’s post-petition income from services. As a result, the new phrase “included in the estate under § 1115” covers, at a minimum, such post-petition income from services. Whether it includes more depends on the meaning of “included” and the

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<sup>6</sup> See generally Kenneth Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 133 (1979). See also *In re Journal Register Co.*, 407 B.R. 520 (Bankr. S.D.N.Y. 2009) (plan which proposed that senior lender group would pay trade creditors who did not object to confirmation could be confirmed).

<sup>7</sup> *In re Tegeder*, 369 B.R. 477 (Bankr. D. Neb. 2007) (for a Chapter 11 plan to be “fair and equitable,” unsecured claims must be paid in full, or the Bankruptcy Code’s absolute priority rule must be followed); but see *Kentuckiana Med. Ctr., LLC v. KMC Real Estate Investors, LLC (In re KMC Real Estate Investors, LLC)*, 518 B.R. 505 (S.D. Ind. 2014) (plan providing for equity interest distribution did not violate absolute priority rule where distribution was payment for substantial administrative claims).

<sup>8</sup> 11 U.S.C. § 1129(b)(2)(B)(ii).

construction of § 1115.

If “included” in § 1129(b)(2)(B)(ii) means only property which is added by § 1115 then it has a very narrow meaning: it refers only to post-petition income from personal services—and not to property originally defined by § 541. However, if “included” means that § 1115 supplants entirely § 541, and assumes that the property of the estate in an individual’s chapter 11 case can only be found in § 1115, then it has a very broad meaning, essentially exempting individuals from the absolute priority rule.

A minority of courts have adopted a “broad view” holding that the BAPCPA amendments eliminate the absolute priority rule as applied to an individual’s entire estate.<sup>9</sup> But all of the Circuit Courts to have considered the issue (including the Ninth Circuit which recently reversed the B.A.P.) and a host of bankruptcy courts have reached the opposite conclusion, holding that the only property exempted from application of the absolute priority rule is the property that § 1115 adds to an individual estate – not the pre-petition property already defined by § 541.<sup>10</sup> The Seventh Circuit has not ruled. Several courts have allowed the debtor to retain exempt property without running afoul of the rule.<sup>11</sup>

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<sup>9</sup> *In re O’Neal*, 490 B.R. 837 (Bankr. W.D. Ark. 2013) (taking the broad view, Congress intended abrogation of the absolute priority rule); *SPCP Group, LLC v. Biggins*, 465 B.R. 316 (M.D. Fla. 2011) (same); *In re Shat*, 424 B.R. 854 (Bankr. D. Nev. 2010) (no absolute priority rule in case of individual debtor); *In re Johnson*, 402 B.R. 851 (Bankr. N.D. Ind. 2009) (individual debtor’s plan does not need to satisfy the absolute priority rule, as long as it satisfies the projected disposable income test); *In re Roedemeier*, 374 B.R. 264 (Bankr. D. Kan. 2007) (11 U.S.C. § 1129(b)(2)(B)(ii) extends the exemption from the absolute priority rule to individual Chapter 11 debtors); *In re Bullard*, 358 B.R. 541 (Bankr. D. Conn. 2007) (debtor was permitted to retain his exempt property under the cramdown provision of 11 U.S.C. § 1129(b)(2)(B)(ii) because the retention was not on account of debtor’s junior interest in property).

<sup>10</sup> *Zachary v. Cal. Bank & Trust*, 2016 U.S. App. LEXIS 1368 (9th Cir. January 28, 2016) (overruling *Friedman v. P+P, LLC (In re Friedman)*, 466 B.R. 471 (B.A.P. 9th Cir. 2012) and holding that the BAPCPA amendments do not impliedly repeal the long-standing absolute priority rule); *Ice House Am., LLC v. Cardin*, 751 F.3d 734 (6th Cir. 2014) (absolute priority rule continues to apply to pre-petition property of individual debtors); *In re Lively*, 717 F.3d 406 (5th Cir. 2013) (Congress did not abrogate absolute priority rule as it would not have done so without a clear indication); *In re Stephens*, 704 F.3d 1279 (10th Cir. 2013) (reaching identical result); *Maharaj v. Stubbs & Perdue, P.A. (In re Maharaj)*, 681 F.3d 558 (4th Cir. 2012) (after a thorough analysis, Congress did not intend to abrogate the absolute priority rule for individual debtors); *In re Akinpelu*, 530 B.R. 822 (Bankr. N.D. Ga. 2015) (absolute priority rule applies to property in the estate under § 541); *In re Martin*, 497 B.R. 349 (Bankr. D. Fla. 2013) (absolute priority rule continues to apply to individual Chapter 11 debtors); *In re Lee Min Ho Chen*, 482 B.R. 473 (Bankr. D.P.R. 2012) (adopting narrow reading citing BAPCPA’s purpose to have debtors pay more to creditors); *In re Lindsey*, 453 B.R. 886 (Bankr. E.D. Tenn. 2011) (debtor could not retain pre-petition property over objection of unsecured creditors); *In re Kamell*, 451 B.R. 505 (Bankr. C.D. Cal. 2011) (adopting narrow view that absolute priority rule was modified, not completely abrogated); *In re Draiman*, 450 B.R. 777 (Bankr. N.D. Ill. 2011) (adopting narrow view whereby § 1115 simply adds certain property to an individual debtor’s estate, and does not eliminate the absolute priority rule); *In re Walsh*, 447 B.R. 45 (Bankr. D. Mass. 2011) (absolute priority rule applies if there is a dissenting class); *In re Mullins*, 435 B.R. 352 (Bankr. W.D. Va. 2010) (absolute priority rule applies); *In re Gbadebo*, 431 B.R. 222 (Bankr. N.D. Cal. 2010) (absolute priority rule applies to the extent that individual debtor may not retain property of the bankruptcy estate).

<sup>11</sup> *In re Brown*, 498 B.R. 486 (Bankr. E.D. Pa. 2013), *aff’d*, 505 B.R. 638 (E.D. Pa. 2014) (Congress did not eliminate absolute priority rule; debtor could not retain pre-petition, non-exempt property in face of creditor rejection of plan); *In re Martin*, 497 B.R. 349 (Bankr. M.D. Fla. 2013) (calling cases allowing

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debtor to retain exempt property “better reasoned”); *In re Gerard*, 495 B.R. 850 (Bankr. E.D. Wis. 2013) (absolute priority rule applies, but debtors could retain exempt property without violating the rule).

Discharge of Indebtedness in Individual Chapter 11 Cases

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Prior to the BAPCPA<sup>1</sup> amendments in 2005 there were no unique discharge provisions applicable to individual Chapter 11 cases. Thus, the discharge provisions of §1141(d)(1) provided that confirmation of a plan of reorganization discharged the debtor from pre-petition obligations at the time the Order Confirming Plan was entered.

The BAPCPA amendments added a new sub-section to §1141 specifically dealing with individual Chapter 11 cases. The new sub-section (5) provides that an individual Chapter 11 debtor does not receive a discharge of indebtedness until completion of all payments required under the plan<sup>2</sup>; however, the court may grant an earlier discharge, after notice and a hearing for “cause,” or after confirmation if the value of plan distributions exceeds the amount that would have been payable had debtor’s estate been liquidated under Chapter 7, modification of the plan under §1127 is not practicable and the debtor is not subject to certain rare proceedings under §522. Sub-section (5) of §1141(d) reads as follows:

- (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;
  - (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;
    - (ii) modification of the plan under section 1127 is not practicable; and
    - (iii) subparagraph (C) permits the court to grant a discharge; and

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<sup>1</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub. L. No. 109-8, 119 Stat. 23.

<sup>2</sup> §1141(d)(5).

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- (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; and
  - (ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522( q)(1 )(A) or liable for a debt of the kind described in section 522(q)(1)(B); and if he requirements of subparagraph (A) or (B) are met.

As noted in previous portions of these topic materials, the 2005 BAPCPA amendments dealing with individual Chapter 11 proceedings import many provisions that are similar to Chapter 13 procedure into individual Chapter 11 cases.<sup>3</sup> The timing of debtor's discharge of pre-petition obligations is one such feature. A Chapter 13 debtor also receives his/her discharge only upon completion of plan payments.

Sub-section 5 permits a court for "cause" to provide that debtor's discharge occurs upon confirmation. §1141(d)(5)(A). However, after confirmation of the plan the court may grant a discharge to the debtor before all plan payments have been made only if after notice and hearing the court determines that, (1) as of the effective date of the plan, the value of property actually distributed under the plan to the holder of each allowed unsecured claim is not less than the amount the holder would have been paid if the debtor's estate was liquidated under Chapter 7; (2) that it was not practicable to modify the plan under §1127; and (3) there is no reasonable cause to believe that certain exemption rules under §522(q)(1) are applicable to the debtor. §1141(d)(5)(B). Whether and under what circumstances to grant an individual Chapter 11 debtor a discharge of indebtedness prior to completion of all payments required by the plan of reorganization has generated significant commentary and differing opinions.<sup>4</sup>

Part (A) of sub-section 5 states that confirmation does not discharge any debt provided for in the plan unless the court orders otherwise after notice and a hearing. Thus, part A provides a mechanism for an individual Chapter 11 debtor to obtain a discharge at confirmation if the court finds after notice and a hearing that cause exists.

Part B of sub-section 5 provides that *at any time after confirmation* the court after notice and a hearing may grant a discharge to a debtor who has not completed payments if the value of the property actually distributed exceeds the amount that each holder of an allowed unsecured claim would have received in a Chapter 7. Note that part B does not contain a requirement that the debtor show "cause" justifying the entry of an early discharge.

Congress must have intended that the two parts, (A) and (B) operate independently and for a different purpose. If that were not the case the drafters could surely have written one sentence defining more simply their intention. Unfortunately, the drafters did not define what "cause"

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<sup>3</sup> *In re Johnson*, 402 B.R. 851 (Bkrtcy. N.D. Ind. 2009).

<sup>4</sup> For a more detailed discussion, *see*, Emory Bankruptcy Development's Journal, Vol. 31, Issue 2, Whether to Grant an Individual Chapter 11 Debtor an "Early" Discharge, A. Ahart and M. Wallace.

means in this sub-section, nor are there many cases discussing the issue.<sup>5</sup> The court in *In re Sheridan* considered an individual Chapter 11 filed by Paul A. Sheridan, an attorney who had the misfortune of starting a real estate development business in Arizona in 2005. After closing the real estate development business in Arizona, he and his veterinarian wife moved back to North Carolina where they eventually filed a joint individual Chapter 11 case. They filed a timely disclosure statement and plan disclosing substantially more debt than assets. They proposed to pay their only impaired class, the holders of unsecured claims, a total of \$20,000 over a period of five years in monthly installments bearing 6% interest. Their plan requested pursuant to §1141(d)(5)(A) that their discharge of indebtedness be effective upon confirmation of their plan.

**Required Notice to Creditors**

The court first considered the statutory requirement of notice in this case. The debtors provided notice of their request to deviate from the normal requirements of §1141 by including a statement in the notice of the confirmation hearing as well as a bold and conspicuous statement on the first page of their disclosure statement reading as follows:

**THE DEBTORS HEREBY GIVE NOTICE THAT THEY INTEND TO SEEK THE ABOVE-REFERENCED RELIEF [discharge upon confirmation of Plan on Effective Date] AT THE HEARING ON CONFIRMATION OF THIS PLAN.**<sup>6</sup>

The court's notice to creditors scheduling the confirmation hearing also contained a paragraph stating that the debtors sought an early discharge pursuant to statute. The court found that the conspicuous notice on the first page of the disclosure statement combined with the paragraph in the notice of the hearing constituted adequate notice under §1141(d)(5)(A). Furthermore, the court found that the debtor's demonstrated "cause" for the early entry of a discharge by showing the "likelihood" that the debtors will make all payments required, that the debtor's plan has only one impaired class and that the debtors provided collateral for the \$20,000 amount to be paid to the holders of unsecured claims by granting them a second mortgage on their residence.

An entirely different result was reached by bankruptcy Judge Kendig of the United States Bankruptcy Court for the Northern District of Ohio, in a "not for publication" opinion in 2012.<sup>7</sup> Judge Kendig noted that §1141(d)(5)(A) like several provisions added by BAPCPA were intended to model procedures in an individual Chapter 11 case after the procedures utilized for individuals in a Chapter 13 proceeding.<sup>8</sup> This court and a couple of others that considered adequacy of notice determined that a notice of intention to seek an early discharge must be made by motion accompanied by separate notice. In other words the *Detweiler* court rejected the conclusion of *Sheridan* that a conspicuous statement in the disclosure statement satisfied the notice requirement. In so holding, the court cited a decision from the bankruptcy court for the District of Colorado, *In re Brown* 2008 WL 4817505, stating that:

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<sup>5</sup> *In re 291 Sheridan*, 291.

<sup>6</sup> *In re Sheridan*, 291.

<sup>7</sup> *In Re Detweiler*, 2012 WL 5935343 (Bkrptcy. N.D. Ohio 2012).

<sup>8</sup> *Id.*

[I]f the debtor wishes to alter the usual statutory rule that would delay entry of a discharge until all payments under the plan have been completed, the debtor should file a motion seeking to alter the usual statutory rule, with notice to creditors of the opportunity to oppose the motion. Because the issue would be academic if no plan is confirmed, the debtor's notice should indicate that the motion will be heard at the confirmation hearing. To minimize postage expense, the separate notice of the motion may be served with a proposed plan and disclosure statement.

*Brown*, 2008 WL 4817505.

*Sheridan* and the *Brown/Detweiler* cases represent two separate views on adequacy of notice for a motion to deviate from the normal rule that a discharge in individual Chapter 11 cases is entered only after all payments have been made. In any given district the correct approach likely is established by local rule or practice custom. If not, a cautious lawyer probably will use both methods of notice.

### Administrative Closing to Avoid UST Fees

Courts have struggled with an issue relating to the timing of the entry of discharge in individual Chapter 11 cases and here too have reached opposite opinions. Typically, a Chapter 11 bankruptcy case is closed when the case is "fully administered" and Bankruptcy Rule 3022 provides that "[a]fter an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party of interest, shall enter a final decree closing the case." But now that individual Chapter 11 cases might provide for payments to unsecured creditors over a period of five years and mortgage payments to secured creditors for 20, 25 or even 30, years must the court keep these cases open on their dockets and must the individual Chapter 11 debtors continue to make U.S. Trustee payments based upon the amount of their total expenditures?

One of the early decisions crafting the concept of "administratively closing" a case arose in the United States Bankruptcy Court for the Northern District of Indiana in *In The Matter of David Allen Johnson*, 402 BR 851(Bkrcty. N.D. Ind. 2009). In that case, Judge Grant made a detailed analysis of the Code and Rule provisions dealing with the timing of closing as well as discussed the burdens placed upon debtors in continuing to make U.S. Trustee fee payments during a potentially decades long period of time before all Chapter 11 plan payments would be completed. In so doing, he considered the 2008 decision *In re Ball* 2008 WL 2223865 (Bkrcty. N.D. WV 2008) that denied a debtor's request to close a case before plan payments were completed. Judge Grant distinguished *In re Ball* because the plan in that case was based upon a fixed amount payable to unsecured creditors and backed by a promissory note, whereas Johnson committed to make payments based upon a percentage of his income and thus, the amount of future payments on account of U.S. Trustee fees would directly reduce the amount payable to the holders of unsecured claims.

In apparently dueling 2011 decisions, the bankruptcy courts for the Northern District of Alabama and the District of Massachusetts reached different conclusions on the issue. Judge Robinson of the Northern District of Alabama<sup>9</sup> expressed his sympathies with the debtor regarding

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<sup>9</sup> *In re Kerley*, 2001 WL 5330667 (N.D. Alabama 2011).

the U.S. Trustee expenses payable in an individual Chapter 11, but ruled that it was up to Congress and not the court to fashion rules regarding what fees must be paid. Judge Hoffman of the District of Massachusetts on the other hand, reached the opposite conclusion in *In re Mendez* where he permitted the debtor to administratively close his individual Chapter 11 case in order to avoid continuing U.S. Trustee fees. Significantly, Judge Hoffman noted that if the individual Chapter 11 case was simply closed before full payment that the automatic stay under §362 would terminate.<sup>10</sup> Judge Hoffman stated however that administratively closing a case prior to full payment does not eliminate the automatic stay and he invoked §105(a) to fashion an order relieving debtor of his ongoing obligation to pay U.S. Trustee fees, continue the automatic stay and continue the tolling of unexpired non-bankruptcy statutes of limitations.<sup>11</sup>

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<sup>10</sup> §362(c)(2)(A).

<sup>11</sup> *Mendez*, at 66.

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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In re

Chapter 11

Case No. \_\_\_\_\_

\_\_\_\_\_,  
Debtor.

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**MOTION TO ADMINISTRATIVELY CLOSE CHAPTER 11 CASE**

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\_\_\_\_\_ (the "Debtor"), by his/her attorney, moves the Court for entry of an order administratively closing the Debtor's chapter 11 case, and respectfully represents:

1. On \_\_\_\_\_, the Court entered an Order confirming the Debtor's Chapter 11 plan.
2. The Debtor seeks an order administratively closing the case for the pendency of the Chapter 11 plan, provided that the order will not operate to close the case for the purposes of 28 U.S.C. § 1930 Appendix (11), 11 U.S.C. § 362(c)(2)(A), or Fed. R. Bankr. P. 4006.
3. The Debtor filed monthly operating reports through the confirmation hearing date and will continue to file quarterly reports with the U.S. Trustee. All quarterly fees due to the U.S. Trustee have been paid.
4. The Debtor has made all plan payments due up to the date of this motion.
5. The plan has been substantially consummated as defined by 11 U.S.C. § 1101(2), and the bankruptcy estate has been fully administered, except for the completion of all plan payments.
6. All litigation in the Chapter 11 case has concluded.
7. The Debtor requests that jurisdiction remain with the Bankruptcy Court pursuant to the plan, and at plan completion, the Debtor will move to reopen the case to obtain a discharge and final decree.

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WHEREFORE, after notice and a hearing, if requested by a party in interest, the Debtor respectfully requests that the Court enter an order administratively closing this Chapter 11 case, subject to reopening for granting of a discharge, and granting such other and further relief as the Court deems appropriate.

Date:

\_\_\_\_\_  
Signature Block for Debtor's Attorney

**NOTES**

Unless the Court orders or the confirmed plan provides otherwise, serve this Motion on the "shortened service list" for the case. If there is no shortened service list, serve the Debtor, Creditors' Committee (or top 20 unsecured creditors if there is no committee), the U.S. Trustee, and all creditors who have requested notice in the case. File a certificate of service.

If the notice period runs without objection, upload a proposed Order administratively closing the case. (Local Form available.)

When plan payments have been completed (or if the Debtor qualifies for a discharge before completion of plan payments under 11 U.S.C. § 1141(d)(5)(B)), file a motion to reopen the case for entry of discharge and final decree. (Local Form available.) **Note there is a filing fee for the motion to reopen; as of April 1, 2016, the fee was \$1,167.**

**2016 CENTRAL STATES BANKRUPTCY WORKSHOP**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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In re

Chapter 11

\_\_\_\_\_

Case No. \_\_\_\_\_

Debtor.

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**NOTICE OF DEBTOR'S MOTION TO ADMINISTRATIVELY CLOSE CASE**

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PLEASE TAKE NOTICE that the Debtor, \_\_\_\_\_, by his/her attorneys, has filed a Motion to administratively close this Chapter 11 case, a copy of which is enclosed.

**Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)**

If you do not want the Court to grant the Debtor's Motion, or if you want the Court to consider your views on the Motion, then no later than **14 days from the date of service of this notice**, you or your attorney must:

File with the Court a written objection at:

Clerk, United States Bankruptcy Court  
517 East Wisconsin Avenue, Room 126  
Milwaukee, WI 53202-4581

If you mail your objection to the Court for filing, you must mail it early enough so the Court will receive it on or before the date stated above.

You must also send a copy to:

Office of the U.S. Trustee  
517 E. Wisconsin Ave., Rm 430  
Milwaukee, WI 53202

Debtor's Attorney  
Attorney's Address

If you file an objection, the Court will set a hearing. You will be notified of the hearing and you or your attorney must appear at it. If you or your attorney do not take these steps, the Court may enter an order approving the Motion without further notice or hearing.

Date \_\_\_\_\_

\_\_\_\_\_  
Signature Block for Debtor's Attorney

**NOTES**

Unless the Court orders or the confirmed plan provides otherwise, serve this Notice on the “shortened service list” for the case. If there is no shortened service list, serve the Debtor, Creditors’ Committee (or top 20 unsecured creditors if there is no committee), the U.S. Trustee, and all creditors who have requested notice in the case. File a certificate of service.

If the notice period runs without objection, file a certificate of no objection and upload a proposed Order. (Local Form available.)

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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In re

Chapter 11

Case No. \_\_\_\_\_

\_\_\_\_\_,  
Debtor.

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**ORDER GRANTING DEBTOR'S MOTION  
TO ADMINISTRATIVELY CLOSE CHAPTER 11 CASE**

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Upon consideration of the Debtor's motion to administratively close this Chapter 11 case (the "Motion"), the Court finds that due notice was given and no objections were filed. The Debtor's confirmed plan has been substantially consummated as defined by 11 U.S.C. § 1101(2), and the chapter 11 estate has been fully administered, except for the completion of the payments required under the plan.

IT IS THEREFORE ORDERED:

1. The Motion is granted and this case is administratively closed.
2. The Court will retain jurisdiction to hear all matters as specified by the confirmed plan.
3. This order will not constitute an order closing this case for the purposes of 28 U.S.C. § 1930 Appendix (11), 11 U.S.C. § 362(c)(2)(A), or Fed. R. Bankr. P. 4006.
4. The Debtor may move to reopen this case for purpose of receiving a discharge when all plan payments have been completed or the Debtor otherwise qualifies for a discharge under 11 U.S.C. § 1141(d)(5).

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Note: Use this form when plan payments have been completed (or if the Debtor qualifies for a discharge before completion of plan payments under 11 U.S.C. § 1141(d)(5)(B)). **There is a filing fee for the motion to reopen; as of April 1, 2016, the fee was \$1,167.**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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In re

Chapter 11

Case No. \_\_\_\_\_

\_\_\_\_\_,  
Debtor.

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**MOTION TO REOPEN CASE FOR ENTRY OF DISCHARGE AND FINAL DECREE  
AND CHAPTER 11 FINAL REPORT**

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\_\_\_\_\_ (the "Debtor"), by his/her attorney, requests that the Court reopen this case to grant the Debtor a discharge, enter a final decree and close this case. In support, the Debtor states:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) as a matter concerning the administration of the estate. The basis for relief is 11 U.S.C. §§ 350 and 1141(d)(5) and Fed. R. Bankr. P. 3022.
2. On \_\_\_\_\_, the Court entered an order confirming the Debtor's chapter 11 plan.
3. On \_\_\_\_\_, the Court entered an order administratively closing the Debtor's case, subject to being reopened for entry of a discharge upon completion of the plan.
4. The Plan has been substantially consummated as defined by 11 U.S.C. § 1101(2), the bankruptcy estate has been fully administered, and the Debtor has completed all payments under the plan. [Or, if the Debtor qualifies for a discharge before all plan

**2016 CENTRAL STATES BANKRUPTCY WORKSHOP**

payments are completed, state the elements of § 1141(d)(5)(B). Note that this “hardship discharge” would require separate notice and opportunity for hearing.]

5. Attached to this Motion as Exhibit A is the Debtor’s Final Report.
6. The Debtor has filed a certificate showing that the Debtor completed a course in financial management.
7. The Debtor satisfies the provisions of 11 U.S.C. § 1141(d)(5)(C)(i) in that the provisions of 11 U.S.C. § 522(q)(1) are inapplicable to the Debtor.
8. The Debtor satisfies the provisions of 11 U.S.C. § 1141(d)(5)(C)(ii) in that there are no pending proceedings in which the Debtor may be found guilty of a felony of the kind described in § 522(q)(1)(A) or liable for a debt of the kind described in § 522(q)(1)(B).

WHEREFORE, the Debtor respectfully requests that the Court enter an order reopening this case, determining that the Debtor is eligible for a discharge, granting the Debtor a discharge of all dischargeable debts, issuing a final decree and closing this case.

Dated \_\_\_\_\_

\_\_\_\_\_  
Signature Block for Debtor’s Attorney

**Note:** Unless the Court orders or the confirmed plan provides otherwise, serve this Motion along with the Notice on the “shortened service list” for the case. If there is no shortened service list, serve the Debtor, Creditors’ Committee (or top 20 unsecured creditors if there is no committee), the U.S. Trustee, and all creditors who have requested notice in the case. File a certificate of service. After the notice period runs without objection, file a certificate of no objection, and upload the proposed order reopening the case, granting the discharge and entering the final decree. A local form order is available.

**AMERICAN BANKRUPTCY INSTITUTE**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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In re \_\_\_\_\_, Chapter 11  
Debtor. Case No. \_\_\_\_\_

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**CHAPTER 11 FINAL REPORT**

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1. \_\_\_\_\_ Percent dividend paid to general class of unsecured creditors.
2. \_\_\_\_\_ Debtor has completed all payments under the plan or the Court has granted a discharge after motion and notice as specified in 11 U.S.C. § 1141(d)(5).

Date: \_\_\_\_\_  
Signature Block for Debtor's Attorney

**EXHIBIT A**

**2016 CENTRAL STATES BANKRUPTCY WORKSHOP**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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In re

Chapter 11

Case No. \_\_\_\_\_

\_\_\_\_\_,  
Debtor.

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**NOTICE OF DEBTOR'S FINAL REPORT AND MOTION TO REOPEN CASE FOR  
GRANTING A DISCHARGE AND ENTRY OF FINAL DECREE**

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PLEASE TAKE NOTICE that the Debtor, \_\_\_\_\_, by his/her attorneys, has filed a Final Report and Motion to Reopen this Case for Entry of a Discharge and Final Decree, copies of which are enclosed.

**Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)**

If you do not want the Court to grant the Debtor's Motion, or if you want the Court to consider your views on the Motion, then no later than **14 days from the date of service of this notice**, you or your attorney must:

File with the Court a written objection at:

Clerk, United States Bankruptcy Court  
517 East Wisconsin Avenue, Room 126  
Milwaukee, WI 53202-4581

If you mail your objection to the Court for filing, you must mail it early enough so the Court will receive it on or before the date stated above.

You must also send a copy to:

Office of the U.S. Trustee  
517 E. Wisconsin Ave., Rm 430  
Milwaukee, WI 53202

Debtor's Attorney  
Attorney's Address

If you file an objection, the Court will set a hearing. You will be notified of the hearing, and you or your attorney must appear at it. If you or your attorney do not take these steps, the Court may enter an order approving the Motion without further notice or hearing.

Date \_\_\_\_\_

\_\_\_\_\_  
Signature Block for Debtor's Attorney

**AMERICAN BANKRUPTCY INSTITUTE**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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In re

Chapter 11

Case No. \_\_\_\_\_

\_\_\_\_\_,  
Debtor.

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**ORDER REOPENING CASE, GRANTING DISCHARGE OF CHAPTER 11 DEBTOR,  
ENTERING FINAL DECREE AND CLOSING CASE**

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Upon consideration of the Debtor's motion to reopen this chapter 11 case to grant the Debtor's discharge and enter a final decree, due notice having been given and no objections having been filed, the Court finds that the Debtor has completed all payments under the confirmed plan and has otherwise complied with the requirements to receive a discharge.

IT IS THEREFORE ORDERED: the Debtor's bankruptcy case is reopened.

IT IS FURTHER ORDERED: the Debtor is granted a discharge of all dischargeable debts, and the Chapter 11 Order of Discharge will be sent to all creditors.

IT IS FURTHER ORDERED: the final report is approved, and this case may be closed.

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