SELECTED CASE LAW

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

FOR PUBLICATION

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In re:

Case No. 08-74755-AST

Darby General Contracting, Inc.
d/b/a Darby Glass Company,

Chapter 11

Debtor.

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APPEARANCES:

Ronald D. Weiss, Esq.
734 Walt Whitman Road
Suite 203
Melville, New York 11747

Diana G. Adams, Esq.
United States Trustee
Office of the United States Trustee
Alfonse M. D'Amato Federal Courthouse
560 Federal Plaza - Room 560
Central Islip, New York 11722-4437

MEMORANDUM OPINION AND ORDER DENYING DEBTOR'S MOTION TO EXTEND TIME TO CONFIRM A PLAN OF REORGANIZATION AND DENYING EMERGENCY MOTION TO RECONSIDER

Issues Before the Court and Summary of Ruling

Debtor, Darby General Contracting, Inc. ("Debtor") filed a Motion to Extend Time to Confirm a Plan of Reorganization Pursuant to Sections 1129(e) and 1121(e)(3) of the Bankruptcy Code (the "Confirmation Deadline Motion") on July 21, 2009. [dkt item 55] Debtor sought an emergency hearing on the Confirmation Deadline Motion, pursuant to E.D.N.Y. LBR 9077-1. On July 21, 2009, this Court entered an Order that the Confirmation Deadline Motion would be heard on August 4, 2009, at 2:00 p.m. [dkt item 56]

The hearing was held as scheduled, and for the reasons stated on the record, the Confirmation Deadline Motion was denied. That denial was "So Ordered" on the record and appears on the August 4, 2009, written entry on the Court's CM/ECF docket.

On August 5, 2009, Debtor filed an Emergency Motion to Authorize/Direct an Expedited Hearing Prior to August 8, 2009 to Reconsider the Debtor's Previous Order to Show Cause Requesting an Extension of Time to Confirm a Plan of Reorganization Pursuant to Sections 1129(e) and 1121(e)(3) of the Bankruptcy Code (the "Motion to Reconsider"). [dkt item 61] Because the Motion to Reconsider presents no contrary controlling decisions and no data that the Court overlooked in denying the Confirmation Deadline Motion, and simply seeks to reargue what could have been argued on August 4, 2009, the Motion to Reconsider will also be denied.

Jurisdiction

This Court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (L), and 1334(b), and the Standing Order of Reference in effect in the Eastern District of New York.

Findings of Fact and Conclusions of Law

The Court makes the following findings of fact and conclusions of law, in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Procedural History

Debtor filed a petition for relief under Chapter 11 with this Court on September 4, 2008 (the "Petition Date"). Debtor made a timely election to be

treated as a "small business debtor" within the meaning of Section 101(51D) of the Bankruptcy Code. The election was made as a part of Debtor's voluntary petition. [dkt item 1]

Debtor did not initially file its small business balance sheet, its small business cash flow statement, its small business statement of operations, or its small business tax return. Debtor did, however, file its schedules on the Petition Date. [dkt item 1] Debtor filed amended schedules on October 1, 2008 [dkt item 15], and again on November 6, 2009. [dkt item 18] Debtor filed a cash flow statement on September 26, 2008. [dkt item 13]

On October 3, 2008, Debtor filed a Motion denominated as Motion to Assume Nonresidential Lease for Real Property (the "Assumption Motion"). [dkt item 16] The Assumption Motion related to Debtor's lease of its primary business location (the "Lease"). However, Debtor attached the Assumption Motion to a Notice of Motion, which represented that the Assumption Motion was actually an expedited Motion to Extend Time to Assume or Reject Lease to Non-Residential Real Property (the "Notice"). [dkt item 16]

On October 14, 2008, Debtor filed a letter asking the Court to adjourn the hearing on the Assumption Motion, on consent of the United States Trustee, to December 3, 2008. Debtor's request for adjournment was granted.

On December 2, 2008, Debtor asked to again adjourn the hearing on the Assumption Motion. Debtor asked for an adjournment of several months, "as far

out as possible.[1] Based on Debtor's request, the hearing on the Assumption Motion was adjourned until February 4, 2009.

On December 12, 2008, Debtor filed a Motion to Extend Time to Assume Lease for Non-Residential Property (the "Extension Motion). [dkt item 24] The Extension Motion also addressed the Lease, and had an attached stipulation with the landlord that extended the time to seek to assume or reject the lease for one hundred and twenty (120) days from the date of this Court's approval (the "Stipulation"). On January 21, 2009, this Court approved the Stipulation. [dkt item 27]

On February 4, 2009, Debtor appeared at the hearing on the Assumption Motion. At that hearing, Debtor requested a further adjournment because it was still evaluating whether to assume the Lease. In light of the Stipulation, this Court granted a further adjournment, and rescheduled a hearing on the Assumption Motion for April 15, 2009.

On April 15, 2009, Debtor appeared at the hearing on the Assumption Motion. Debtor again requested a further adjournment, and like its prior requests, Debtor stated it was still evaluating whether to assume the Lease. The time for assumption or rejection agreed to in the Stipulation would expire in May 2009. The outside period of 210 days which this Court could allow for Debtor to seek assumption or rejection under § 365(d)(4) without the landlord's consent

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[1] This Court's published procedures in effect prior to and in December 2008 allowed requests for adjournments to be submitted by email to the courtroom deputy, but such requests are required to be submitted no less than two business days prior to the scheduled hearing.

had already run before the April 15 hearing. Therefore, this Court granted a brief adjournment until May 6, 2009. In addition, due to the lack of progress toward confirmation in this case, and due to the Debtor's failure to file operating reports as and when due, on April 15, this Court issued an Order ("April 15 Order") setting a general case status conference for May 6, 2009 ("May 6 Hearing"). [dkt item 35] The April 15 Order provided as follows:

> **ORDERED**, that the Debtor shall file with the Court, and serve upon the Office of the United States Trustee, monthly operating reports during the pendency of this case; that the operating reports shall be in the form prescribed by the Office of the United States Trustee's Operating Guidelines and Reporting Requirements for Debtors-in-Possession and Trustees for cases pending in this District; and that the operating reports shall be served and filed on or before the 20th day of the month following the reporting period; and it is further
>
> **ORDERED, that unexcused failure to comply with the foregoing paragraphs of this Order may constitute cause for conversion of the case to Chapter 7 or dismissal of the case pursuant to 11 U.S.C. § 1112[.]**

[dkt item 35](emphasis in original).

At the May 6 Hearing, this Court reminded Debtor's counsel of the strict time requirements affecting confirmation deadlines in this small business case, and scheduled a further status hearing for July 15, 2009, at 9:30 am. This Court also directed Debtor to file a Plan and Disclosure Statement in time for same to be considered by the Court on July 15, 2009, and also set time aside on July 15 for a confirmation hearing. This Court further instructed Debtor to submit a copy of its disclosure statement upon filing to the office of the United States Trustee ("UST") for consideration, after which this Court would consider conditional

approval in accordance with Bankruptcy Rule 3017.1.

On June 5, 2009, per this Court's instruction, the Debtor filed its proposed Plan of Reorganization ("Plan") [dkt item 43], and an accompanying Disclosure Statement ("Disclosure Statement"). [dkt item 44]

On June 19, 2009, Debtor filed an Amended Disclosure Statement ("Amended Disclosure Statement")[dkt item 53], as well as an Affidavit Re: Extension of Deadline to Obtain Conditional Approval of U.S. Trustee for Disclosure Statement. [dkt item 51] In that Affidavit, Debtor requested to be given until June 22, 2009, to obtain the consent of the UST to conditional approval of its Amended Disclosure Statement because it had "just filed an amended disclosure statement with projections and a liquidation analysis," and that Debtor needed this time because it was delayed by its bookkeeper. Debtor's initial Disclosure Statement was completely lacking in any projections and contained only a minimal liquidation analysis. The lack of projections was astonishing, given that Debtor's Plan called for payments to be made over a five (5) year period following confirmation. Further, Debtor's request to be given until June 22 to obtain UST consent was difficult to fathom, since a June 22 conditional approval of the Amended Disclosure Statement would not provide the required twenty-five (25) days' notice of a July 15 hearing on final approval of the Disclosure Statement and confirmation of the Plan. *See* FED. R. BANKR. P. 2002(b), 3017(d), and 3017.1(c).

On July 8, 2009, Debtor requested an adjournment of the July 15 hearing. The stated reason for this adjournment request was because Debtor still had not

provided the information requested by the UST in order for the UST to state a lack of objection to the Amended Disclosure Statement, and that Debtor had tentatively agreed to a meeting with the UST for July 17, 2009. Debtor requested an adjournment of the status conference until July 28, 2009.

This Court denied this adjournment request and required Debtor to appear on July 15, 2009.

At the July 15 hearing, Debtor's counsel still seemed to be unaware of the deadlines imposed by the Bankruptcy Code for obtaining confirmation of a plan of reorganization in a small business case. This Court reminded counsel of the deadlines, and also recommended that Debtor's counsel read this Court's published opinion on this particular topic, *In re AMAP Sales & Collision, Inc.*, 403 B.R. 244 (Bankr. E.D.N.Y.2009), as well the opinion in *In re Save Our Springs (S.O.S.) Alliance, Inc.*, 393 B.R. 452 (Bankr. W.D. Tex. 2008), which includes Judge Gargotta's extensive analysis of the timing mechanics and other important issues affecting confirmation in a small business case. This Court admonished Debtor's counsel that if he intended to seek an extension of the Debtor's deadline to obtain confirmation, he needed to act with all dispatch, and needed to present evidence from which this Court could find that an extension was warranted.

Notwithstanding the events of July 15, 2009, Debtor waited until July 21, 2009, to file the Confirmation Deadline Motion seeking an extension of the confirmation deadline. The Confirmation Deadline Motion was, therefore, filed on the forty-sixth (46th) day following the June 5, 2009, filing of the Plan. In addition, as cause for the extension, Debtor recited only that it "is earnest in

moving toward confirmation and per the representation of the U.S. Trustee appears likely to have a plan confirmed[.]" [dkt item 55 ¶ 5] The notice of the Confirmation Deadline Motion initially provided by Debtor on July 21 was the mailing of the motion only to the UST, the Debtor, and two creditors (Utica Mutual and Caterpillar Finance) [dkt item 57]. However, Debtor did provide supplemental service on the same day by mail to "[a]ll unsecured creditors." [dkt item 58]

This Court also notes that, even though this case was filed on September 4, 2008, it was not until late July 2009 that Debtor requested this Court set a bar date for the filing of claims. The initial bar date order submitted by Debtor was inadequate. On July 30, 2009, that Debtor filed a motion to set a bar date ("Bar Date Motion"). [dkt item 59] However, the Bar Date Motion incorrectly referred to a non-existent "Rule 23" of the Eastern District of New York Local Rules, and contrary to published procedures,[2] referred to a self-selected deadline of September 3, 2009, for objections to the Bar Date Motion to be filed.

Debtor's Request for Extension of the Confirmation Deadline

In the Confirmation Deadline Motion, Debtor alleged, *inter alia,* as follows:

> 1. On September 4, 2008 (the "Filing Date"), the Debtor, as a "small business debtor" within the meaning of section 101(51D) of the Bankruptcy Code, (the "Code"), filed with this Court a voluntary petition under chapter 11 of the Bankruptcy Code. As a small business debtor, the Debtor is subject to the provisions of the Code that are applicable in a "small business case". See Section 101(51C) of the Code.

[2] This Court considers applications to set a bar date in a Chapter 11 case *ex parte* .

2. The Debtor has continued in the possession of its assets and the operation of its business as a debtor-in-possession. No Creditors' Committee has been appointed in the case.

3. Section 1121(e) of the Code requires that the Debtor file its "plan and disclosure statement not later than 300 days after the date of the filing of the order for relief." On July 1, 2009 would have been the 300th day after the filing of the petition. Prior to the 300th day, on June 5, 2009, **per this Court's instruction,** the Debtor filed its proposed disclosure statement and plan of reorganization (Doc. 43) (the "Plan"), and an accompanying disclosure statement (Doc. 44) (the "Disclosure Statement").

4. Under Section 1129(e) of the Code, the Plan must be confirmed within 45 days after it is filed "unless the time for confirmation is extended in accordance with section 1121(e)(3)." **On August 15, 2009 would be the 345th day after the filing of the petition.**

5. The Code allows an extension of the time for confirmation. Section 1121(e)(3) provides that the 45 days period may be extended only if –

> (a) the debtor, after providing notice to parties in interest (including the United States Trustee), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable time;
>
> (b) a new deadline is imposed at the time the extension is granted; and
>
> (c) the order extending time is signed before the existing deadline has expired.

The 45 day period to obtain confirmation of the Plan presently expires on August 15, 2009 and because the Debtor is earnest in moving toward confirmation and per the representation of the U.S. Trustee appears likely to have a plan confirmed the Debtor requests an extension of time to confirm its plan.

6. By this Motion, and for the reasons set forth below, the Debtor respectfully requests that the Court enter an Order

> extending the Debtor's time to confirm the Plan for ninety (90) days from the present deadline of August 15th, 2009 until approximately November 12, 2009.

[dkt item 55](emphasis supplied by the Court).

Debtor's lead counsel, Ronald D. Weiss, Esq., did not appear at the August 4, 2009, hearing. Instead, Mr. Weiss sent an associate of his firm who, while well meaning, admitted he was unfamiliar with all of the facts of the case, had been handed the file that afternoon, and mostly practiced in chapter 7 and chapter 13 cases. In addition, neither the principal nor any other agent of the Debtor attended this hearing, and no evidence was submitted to support the requested extension. The UST did attend and stated that it did not oppose the extension.

The Court denied the extension on two grounds. First, that it was untimely under Section 1129(e). Second, even if considered timely, Debtor failed to meet its burden of proof under Section 1121(e)(3).

According to Debtor's Plan, the Debtor's primary creditors are the New York State Department of Taxation and Finance ("NYS Tax"), the Internal Revenue Service ("IRS"), Colonial Glass, and Ford Motor Credit.[3] Debtor did not list Caterpillar, Utica Mutual, or the landlord as creditors in its Plan. Without a bar date, it is extremely difficult for the Court to gauge who the creditors are that are likely to be affected by the Plan, and, therefore, whether confirmation is likely.

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[3] Although the "amended" affidavit of service on July 21, 2009 [dkt item 58], states that Debtor served the Confirmation Deadline Motion on "all unsecured creditors," it remains unclear whether it included the creditors listed above, and these creditors are not separately listed on the service list.

Further, Debtor's Plan is internally inconsistent. Debtor's Plan proposes in Article VI to pay all of its secured, administrative, priority, and general unsecured claims over five (5) years. However, Debtor's Plan proposes in Article II to pay the secured, administrative, and priority claims of NYS and IRS in full on the effective date of the Plan. This internal inconsistency had not been reconciled by an amended plan.

Legal Analysis

Debtor is a "small business debtor" within the meaning of Section 101(51D) of the Bankruptcy Code. In the 2005 amendments to the Bankruptcy Code,[4] Congress added certain specific, time-sensitive provisions for small business debtors seeking to confirm a plan or reorganization.[5] In Section 1121(e)(1), the Code addresses the small business debtor's time to file a plan and disclosure statement, by first providing that only the debtor may file a plan for the first 180 days after the date of the order for relief, but that the debtor must file a plan within 300 days. 11 U.S.C. § 1121(e)(1). Under Section 1121(e)(2), the 180-day exclusivity period may be extended for cause, but only to a date which is no more than 300 days after the date of the order for relief.

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[4] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L. No. 109-8, 119 Stat. 23 (2005).

[5] The Bankruptcy Code and Rules also contain specific provisions governing approval of a disclosure statement in a small business case. Under Section 1125(f), the Court may dispense with a separate hearing on a disclosure statement by, *inter alia*, "finding that the plan itself provides adequate information and that a separate disclosure statement is not necessary" (§ 1125(f)(1)), or by conditionally approving a disclosure statement "on application of a plan proponent," subject to final approval in conjunction with the hearing on confirmation of the plan. § 1125(f)(3); FED. R. BANKR. PROC. 3017.1. Adequacy of a small business disclosure statement is addressed in *In re J.D. Mfg., Inc.*, No. 07-36751, 2008 WL 4533690 (Bankr. S.D. Tex. Oct. 2, 2008).

Regardless of the date on which the plan is filed, the Court must confirm an appropriate plan within forty-five (45) days after filing of the Plan, pursuant to Section 1129(e), which provides as follows:

> In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e)(3) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

28 U.S.C. § 1129(e).

Moreover, Section 1121(e)(3) provides as follows:

> (3) the time periods specified in paragraphs (1) and (2), and the time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if-
>
> (A) the debtor, after providing notice to parties (including the United States trustee), demonstrates by a preponderance of evidence that it is more likely than not that the court will confirm a plan within in a reasonable amount of time;
>
> (B) a new deadline is imposed at the time the extension is granted; and
>
> (C) the order extending the time is signed before the existing deadline has expired.

28 U.S.C. § 1121(e)(3).

In *AMAP*, this Court noted that limited case law has developed interpreting Section 1121(e)(3), and, specifically, the evidence required for the Court to find by "a preponderance of evidence that it is more likely than not that the court will confirm a plan within in a reasonable amount of time." *AMAP*, 403 B.R. at 247; *see also In re Save Our Springs (S.O.S.) Alliance, Inc.*, 388 B. R. 202, 229 (Bankr. W.D. Tex. 2008) (denying extension after a five-day confirmation trial).

As stated in *AMAP*, when the debtor fails to appear for the hearing on the

extension request or fails to submit any evidence in support of the motion, the court should deny the request:

> [T]he debtor failed to appear and also failed to file any documents in support of such an extension. As a consequence and as required by 11 U.S.C. § 1121(e)(3), no evidence meeting the preponderance standard having been submitted, the court entered an Order denying extension of confirmation deadline [-].

AMAP, 403 B.R. at 247 (citing *In re Luther*, No. 066-16303DK, 2007 WL 1063008 *2 (Bankr. D. Md. Mar. 22, 2007).

In this Court's view, and as stated in *AMAP*, the plain language of Section 1121(e)(3) requires only that "the Court find by a preponderance of evidence that it is more likely than not that the court will confirm *a* plan within a reasonable amount of time, not necessarily *the* plan which is before the Court at the time of hearing on the extension motion." *AMAP*, 403 B.R. at 247 (emphasis in original). Further, as also stated in AMAP, "the debtor is not required to put on a confirmation trial in order to obtain an extension of time to obtain confirmation." *Id.* at 248.

However, Debtor must provide sufficient evidence for the Court to make the required findings. Congress intended that bankruptcy courts be more active in "judicial oversight of small business bankruptcy cases, which often are the least likely to reorganize successfully." H. COMM. ON THE JUDICIARY, BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, H. Rep. No. 109-

31, pt. 1, at 92 (2005) (the "Report").[6] To obtain an extension, a debtor must submit some evidence from which the Court can find that confirmation within a reasonable amount of time is likely. At the August 4, 2009, hearing, Debtor was unable to state what progress, if any, it had made with either NYS Tax or the IRS.

This Court has fulfilled its function in this case by actively monitoring this case, and by closely reviewing the evidence submitted by Debtor to support the Confirmation Deadline Motion.[7] Debtor failed to submit any evidence from which the Court could determine that the Court will confirm a plan within a reasonable amount of time. Unlike the debtor in *AMAP*, the Debtor in this case simply has not acted with the diligence required in a small business case, nor demonstrated that it has made progress such that confirmation within a reasonable amount of time is likely. On that alternative basis, the Confirmation Deadline Motion was denied.

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[6] As cited in *AMAP*, in the Report, at page 19, Congress further stated as follows: "Most chapter 11 cases are filed by small business debtors. Although the Bankruptcy Code envisions that creditors should play a major role in the oversight of chapter 11 cases, this often does not occur with respect to small business debtors. The main reason is that creditors in these smaller cases do not have claims large enough to warrant the time and money to participate actively in these cases. The resulting lack of creditor oversight creates a greater need for the United States trustee to monitor these cases closely. Nevertheless, the monitoring of these debtors by United States trustees varies throughout the nation. S[enate Bill] 256 addresses the special problems presented by small business cases by instituting a variety of time frames and enforcement mechanisms designed to weed out small business debtors who are not likely to reorganize. It also requires these cases to be more actively monitored by United States trustees and the bankruptcy courts." *AMAP*, 403 B.R. at 248.

[7] The Court also notes that it cannot ascertain if service was properly effected in accordance with Section 1121(e)(3)(A).

The Motion to Reconsider Will Also Be Denied.

While not citing to any statute or rule, Debtor's Motion to Reconsider should be and is treated under Rule 9023 of the Federal Rules of Bankruptcy Procedure, which incorporates Rule 59 of the Federal Rules of Civil Procedure. Generally, motions for reconsideration are not granted unless "the moving party can point to controlling decisions or data that the court overlooked"—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court. *Rafter v. Liddle*, 288 Fed. Appx. 768, 769 (2d Cir. 2008)(citing *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir.1995)). Further, to the extent that facts stated by Debtor in the Motion to Reconsider are not in the original record, neither this Court nor any reviewing court on appeal need consider same. Motions to reconsider under Bankruptcy Rule 9023, as motions to reconsider under Federal Rule of Civil Procedure 59, "are not vehicles for 'taking a second bite at the apple[.]'" *Rafter,* 288 Fed.Appx. at 769 (citing *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir.1998)). Facts that are not in the record of the original hearing cannot be said to be facts that the court "overlooked." *Rafter,* 288 Fed. Appx. at 769. In its Motion to Reconsider, Debtor has pointed to no facts which were overlooked by this Court in denying the Confirmation Deadline Motion.

As for controlling decisions, Debtor cites only to *In re JMC Outfitters Co.*, No. 08-314390-C, 2009 WL 2046043 (Bankr. W.D. Tex. May 25, 2009), as authority that this Court may have overlooked. First, *JMC Outfitters* is not

controlling precedent. Second, the court in *JMC Outfitters* did not reach a contrary conclusion on the statutory contours of either Section 1129(e) or Section 1121(e)(3). The construction of the statute and the proper method of counting the time periods for confirmation was not at issue in *JMC Outfitters*. While Judge Clark did comment on the demands imposed on a small business debtor to comply with its statutory requirement to confirm a plan within 45 days after the plan is filed, he did not, as Debtor suggests, hold that the 45-day requirement can be varied and extended to 345 days just because the plan is filed before the expiration of the 300-day deadline to file a small business plan imposed by Section 1121(e)(2). Debtor has misread *JMC Outfitters,* and therefore failed to cite controlling contrary precedent.

Therefore, the Motion to Reconsider will also be denied.

ORDER

Based upon the foregoing, the Court has denied Debtor's Confirmation Deadline Motion, and denies Debtor's Motion to Reconsider.

Dated: August 14, 2009
Central Islip, New York

Alan S. Trust
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re: Case No. 10-75502-ast

Display Group, Inc. Chapter 11

Debtor.

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MEMORANDUM OPINION ON DEBTOR'S FAILURE TO MAKE A SMALL BUSINESS DESIGNATION

Pending before the Court in the above referenced chapter 11 case is a motion filed by the United States Trustee ("UST") requesting, pursuant to Rule 1020(b) of the Federal Rules of Bankruptcy Procedure, that this Court determine that Debtor, Display Group, Inc. ("Debtor"), is a small business debtor as defined under Section 101(51D) of the Bankruptcy Code, and objecting to Debtor's failure to designate this case as a small business case under Section 101(51C) ("Motion"). [dkt item 15] Debtor did not file a response to the Motion.

On October 20, 2010, the Court held a hearing on the Motion ("Hearing"). At the hearing, Debtor stated that it did not object to its designation as a small business debtor and this case as a small business case, but asked that the deadlines applicable in a small business case take effect as of the date of the designation as a small business case, rather than as of the petition date. This Court took under submission the impact of the deadlines applicable in as small business case where a debtor initially fails to designate itself as a small business debtor but is later designated as such by the Court. For the reasons stated herein, this Court concludes that the deadlines applicable in a small business case take effect as of the petition date.

Procedural History

On July 15, 2010, Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code[1] (the "Petition"). [dkt item 1]

On September 14, 2010, the UST filed the Motion. [dkt item 15]

On October 20, 2010, the Court held the Hearing on the Motion. The Court took the matter outlined above under submission.

Factual Background

On the Petition, Debtor checked the box that states "Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D)." [dkt item 1][2] Also on the Petition, Debtor lists total assets of $141,600.00 and total debts of $349,866.03. Included in these debts are unsecured priority claims totaling $194,512.35, which consists of $183,111.00 owed to the Internal Revenue Service ("IRS"), and $11,401.35 owed to the New York State Department of Taxation and Finance. The only assets listed by Debtor is various personal property set out on Schedule B; no real property is listed on Schedule A, and no creditors holding secured claims are listed on Schedule D.

On August 19, 2010, the Court entered an Order authorizing the retention of Macco & Stern, LLP, as counsel for the Debtor ("Counsel"). [dkt item 10]

On August 20, 2010, the UST conducted the meeting of creditors pursuant to Section 341 of the Bankruptcy Code, and thereafter electronically docketed a statement that it was unable to

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[1] Throughout this Memorandum Opinion, all statutory references to the Bankruptcy Code are under Title 11 of the United States Code, §§ 101-1532, unless otherwise indicated.

[2] The voluntary petition, which is Official Bankruptcy Form B1 as promulgated by the Administrative Office of the United States Courts and prescribed by the Judicial Conference of the United States, has a section in which chapter 11 debtors must check that either "Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D)" or "Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D)." *See also* FED. R. BANKR. P. 9009. Here, Debtor checked the "is not" box.

appoint a Committee of Unsecured Creditors pursuant to 11 U.S.C. § 1102(a).

On August 25, 2010, the Court entered an order establishing November 5, 2010, as the last day to file proofs of claims against Debtor. [dkt item 12]

On September 14, 2010, the UST filed the instant Motion. [dkt item 15]

On October 20, 2010, a stipulation regarding the use of cash collateral and adequate protection between Debtor, the Internal Revenue Service, and the UST was so ordered by the Court. [dkt item 19]

On October 20, 2010, the Court held the Hearing on the Motion. Counsel appeared for Debtor and the UST. Because Debtor expressly did not object to the Motion, no evidence was taken.

Legal Analysis

The Mechanics of the Small Business Designation Under Rule 1020 and Objection Thereto

Section 101(51D) of the Bankruptcy Code defines a small business debtor, in pertinent parts, as "a person engaged in commercial or business activities . . . that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition . . . in an amount not more than $2,190,000 . . . for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor [.]" 11 U.S.C. § 101(51D).

Rule 1020(a) governs the procedure for a debtor to designate itself as a small business debtor, and provides that "In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor." FED. R. BANK. P. 1020(a); *see also In re CCT Commc'ns, Inc.*, 420 B.R. 160, 173 (Bankr. S.D.N.Y. 2009); *In re Save Our Springs (S.O.S.)*

Alliance, Inc., 393 B.R. 452 (Bankr. W.D. Tex.2008). Rule 1020(b) authorizes the UST or a party-in-interest to object to Debtor's statement as to whether it is a small business or not no later than thirty (30) days after the conclusion of the Section 341 meeting.[3] FED. R. BANK. P. 1020(b). Because of the nature of the small business case, however, as further discussed *infra*, Rule 1020(c) provides that if a creditors committee has been appointed under Section 1102(a)(1), "the case shall proceed as a small business case only if, and from the time when, the court enters an order determining that the committee has not been sufficiently active and representative to

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[3] (a) Small business debtor designation

In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor. In an involuntary chapter 11 case, the debtor shall file within 14 days after entry of the order for relief a statement as to whether the debtor is a small business debtor. Except as provided in subdivision (c), the status of the case as a small business case shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect.

(b) Objecting to designation

Except as provided in subdivision (c), the United States trustee or a party in interest may file an objection to the debtor's statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later.

(c) Appointment of committee of unsecured creditors

If a committee of unsecured creditors has been appointed under § 1102(a)(1), the case shall proceed as a small business case only if, and from the time when, the court enters an order determining that the committee has not been sufficiently active and representative to provide effective oversight of the debtor and that the debtor satisfies all the other requirements for being a small business. A request for a determination under this subdivision may be filed by the United States trustee or a party in interest only within a reasonable time after the failure of the committee to be sufficiently active and representative. The debtor may file a request for a determination at any time as to whether the committee has been sufficiently active and representative.

(d) Procedure for objection or determination

Any objection or request for a determination under this rule shall be governed by Rule 9014 and served on: the debtor; the debtor's attorney; the United States trustee; the trustee; any committee appointed under § 1102 or its authorized agent, or, if no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d); and any other entity as the court directs.

FED. R. BANK. P. 1020.

provide effective oversight of the debtor and that the debtor satisfies all the other requirements for being a small business." FED. R. BANK. P. 1020(c).

Debtor's Section 341 meeting was held and concluded on August 20, 2010. The UST was unable to appoint a creditors committee in this case.

On September 14, 2010, the UST timely objected to Debtor's designation as not being a small business. *See* FED. R. BANK. P. 1020(b).

Legislative History of the Small Business Designation

Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), debtors which had certain financial attributes could elect to be treated as a small business. *Compare* 11 U.S.C. § 1121(e) (2004) (establishing deadlines "[i]n a case in which the debtor is a small business *and elects* to be considered a small business" (emphasis supplied)) *with* 11 U.S.C. § 1121(c)(2010)(deleting reference to a small business debtor's "election"). Moreover, BAPCPA amended certain definitions within the Bankruptcy Code related to a small business debtor.[4] *See In re Roots Rents, Inc.*, 420 B.R. 28, 34-35 (Bankr. D. Idaho 2009)(citing Hon. Thomas E. Carlson & Jennifer Frasier Hayes, *The Small Business Provisions of the 2005 Bankruptcy Amendments*, 79 AM. BANKR. L.J. 645, 679 (2005) ("The most important change in the definition of 'small business' Debtor is the small business treatment is no longer elective. The cost-and-delay reduction provisions are now mandatory for all Chapter 11 debtors who satisfy the debt and type-of-business limitations of §101(51D).")).

Most significantly, Rule 1020 of the Federal Rules of Bankruptcy Procedure, which

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[4] The BAPCPA amendments replaced Section 101(51C), which defined a small business debtor, "with a definition of a small business case" which is "a case filed under chapter 11 of this title in which the debtor is a small business debtor." 11 U.S.C. § 101(51C)(2010). A small business debtor is now defined by Section 101(51D). 11 U.S.C. § 101(51D)(2010); Hon. Thomas E. Carlson & Jennifer Frasier Hayes, *The Small Business Provisions of the 2005 Bankruptcy Amendments*, 79 AM. BANKR. L.J. 645, 679 (2005).

formerly provided for the election of a debtor to be treated as a small business, was amended by Interim Rule 1020, clarifying that a small business debtor no longer has discretion to proceed or not proceed as a "small business debtor." The Advisory Committee Notes to the 2008 amendments to Rule 1020 of the Federal Rules of Bankruptcy Procedure state that "[U]nder the Code, as amended in 2005, there are no longer any provisions permitting or requiring a small business debtor to elect to be treated as a small business. Therefore, the election provisions in the rule are eliminated." FED. R. BANK. P. 1020 advisory committee's note; *see also In re Roots Rent*, 420 B.R. at 35 n.10. Interim Rule 1020 became permanently effective on December 1, 2008.

Further, Congress intended that bankruptcy courts be more active in "judicial oversight of small business bankruptcy cases, which often are the least likely to reorganize successfully." H. COMM. ON THE JUDICIARY, BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, H. Rep. No. 109-31, pt. 1, at 92 (2005) (the "Report").[5] However, Congress also provided under Section 101(51D) that a case which may otherwise qualify as a small business case but in which a creditors committee has been sufficiently active and representative to provide effective oversight of the debtor need not be designated as a small business case. Presumably, this is because the committee would be providing the oversight that the UST and/or the court

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[5] As cited in *In re AMAP Sales & Collision, Inc.*, in the Report, at page 19, Congress further stated as follows:

> Most chapter 11 cases are filed by small business debtors. Although the Bankruptcy Code envisions that creditors should play a major role in the oversight of chapter 11 cases, this often does not occur with respect to small business debtors. The main reason is that creditors in these smaller cases do not have claims large enough to warrant the time and money to participate actively in these cases. The resulting lack of creditor oversight creates a greater need for the United States trustee to monitor these cases closely. Nevertheless, the monitoring of these debtors by United States trustees varies throughout the nation. S[enate Bill] 256 addresses the special problems presented by small business cases by instituting a variety of time frames and enforcement mechanisms designed to weed out small business debtors who are not likely to reorganize. It also requires these cases to be more actively monitored by United States trustees and the bankruptcy courts.

In re AMAP Sales & Collision, Inc., 403 B.R. 244, 248 (Bankr. E.D.N.Y.2009)

might otherwise provide, thus reducing the need for the type of additional reporting and meeting otherwise required of a small business debtor, which is further discussed *infra*.

Deadlines Triggered By the Small Business Designation

This Court has previously written on the deadlines imposed upon the small business debtor. *See, e.g., In re Darby Gen. Contracting*, 410 B.R. 136 (Bankr. E.D.N.Y. 2009); *AMAP*, 403 B.R. 244. Judge Bernstein of the United States Bankruptcy Court for the Southern District of New York and Judge Gargotta of the United States Bankruptcy Court for the Western District of Texas have also written on this issue. *See CCT Commc'ns, Inc.*, 420 B.R. 160; *S.O.S.*, 393 B.R. 452 (providing extensive analysis of the timing mechanics and other important issues affecting confirmation in a small business case.).

In sum, Section 1121(e)(1) addresses the small business debtor's time to file a plan and disclosure statement by first providing that only the debtor may file a plan for the first 180 days after the date of the order for relief, but that the debtor must file a plan within 300 days. 11 U.S.C. § 1121(e)(1). Under Section 1121(e)(2), the 180-day exclusivity period may be extended for cause and prior to its expiration, but only to a date which is no more than 300 days after the date of the order for relief. 11 U.S.C. § 1121(e)(2). Regardless of the date on which the plan is filed, however, the court must confirm an appropriate plan within 45 days after filing of the Plan, pursuant to Section 1129(e), unless such deadline is extended for cause prior to its expiry.[6] 11 U.S.C. § 1129(e).

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[6] The section provides as follows:

> In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e)(3) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

11 U.S.C. § 1129(e).

Additional Requirements Triggered By the Small Business Designation

In addition to specific confirmation deadlines, a small business debtor is subject to the reporting and meeting requirements established under Section 1116. *See* 11 U.S.C. § 1116. By way of example, a small business debtor must file "its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return[.]" 11 U.S.C. § 1116(1)(A). Moreover, the small business debtor's senior management personnel and counsel must attend all meetings scheduled by the court or the UST, and the debtor must maintain any required insurance, remain current on its tax obligations, and allow the UST or a designee access to its premises, books and records upon reasonable notice. *Id.* § 1116 (2)-(7).

Benefits of Waiver of a Separate Disclosure Statement, Conditional Approval of Disclosure Statement and Combined Hearing on Approval of a Disclosure Statement and Plan Confirmation

One benefit provided a small business debtor is the ability to obtain a waiver of the filing of a separate disclosure statement, or obtain conditional approval of its disclosure statement, even *ex parte*, and to have a combined hearing on final approval of its disclosure statement and confirmation of its Plan. *See* 11 U.S.C. § 1125(f)(3);[7] FED. R. BANK. P. 3017.1.

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[7] Notwithstanding subsection (b), in a small business case--

> (1) the court may determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary;
>
> (2) the court may approve a disclosure statement submitted on standard forms approved by the court or adopted under section 2075 of title 28; and
> (3)(A) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;
>
> (B) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement if the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed not later than 25 days before the date of the hearing on confirmation of the plan; and
>
> (C) the hearing on the disclosure statement may be combined with the hearing on confirmation of a plan.

11 U.S.C. § 1125(f).

When the Applicable Deadlines and Reporting Requirements Begin to Run

As noted, Rule 1020(a), applicable to cases filed as of December 1, 2008, requires that a chapter 11 debtor "shall state in the petition whether the debtor is a small business." FED. R. BANK. P. 1020(a). If a debtor's financial attributes fall within those circumscribed by Section 101(51D)(A), but the debtor fails to properly designate itself in the petition, Rule 1020(a) provides that "a small business case shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect . . .." FED. R. BANK. P. 1020(a). The remaining issue, then, is when a debtor designated by the court as a small business debtor is subject to the associated reporting requirements, meetings, timing provisions, and deadlines specifically applicable to the small business debtor.

When the applicable deadlines, reporting, and remaining requirements begin to run is an issue of statutory and rule construction. This Court must apply the guiding principles of statutory construction to the Bankruptcy Code, starting with the language of the statute. "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). To determine if a statute's language is plain, the Court must look to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341(1997).

Here, Congress in the Bankruptcy Code did not differentiate between deadlines for cases initially filed as small business cases and those determined to be such. The exclusivity period in Section 1121(e)(1) and the outside deadline for debtor to file a plan in Section 1121(e)(1) are expressly stated as running from the order for relief, which is the petition date in a voluntary case. 11 U.S.C. § 1121(e)(1), (2). Similarly, the reporting requirements under Section 1116, when

specifying a deadline by which the debtor must act, also refer to the date of the order for relief. *See* 11 U.S.C. § 1116(1), (3).

Further, while Rule 1020(a) states that the "status of the case as a small business case shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect," neither the Bankruptcy Rules nor the Bankruptcy Code provides for an extension of the established Code deadlines which expressly run from the order for relief. Had Congress intended that the applicable deadlines for a debtor which improperly does not designate itself as a small business debtor run from the later of the order for relief or the date of designation by the court, Congress would have so provided.[8]

Further, the designation is not jurisdictional. The Federal Bankruptcy Rules are clear that a debtor which possesses the financial attributes that fall within those circumscribed by Section 101(51D)(A) for a small business debtor and for which no committee is appointed, but does not designate itself as a small business debtor, and is never designated a small business debtor by the court, may proceed through the case as a non-small business debtor. Rule 1020(b) establishes a specific deadline to object to debtor designation or non-designation at "no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after

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[8] The Court also notes that under the Rules Enabling Act, a Federal Rule of Bankruptcy Procedure, i.e., the election for designation as a small business debtor under Rule 1020(a), should not "modify any substantive right" granted by the "order for relief" which appears in the statute. *See* 28 U.S.C. § 2072; *see also Shady Grove Orthopedic Assocs., PA v. Allstate Ins. Co*, 130 S.Ct. 1431, 1442 (2010). However, this Court need not and does not reach the issue of an improperly non-designated case under Rule 1020(c) in which a creditors committee has been appointed, as to which Rule 1020(c) expressly states that the case "shall proceed as a small business case only if, **and from the time when**, the court enters an order determining that the committee has not been sufficiently active and representative to provide effective oversight of the debtor...." FED. R. BANK. P. 1020 (c)(emphasis supplied). The clause "from the time when" in Rule 1020(c) does not appear in Rule 1020(a), which addresses improperly non-designated cases which shall proceed "in accordance with the debtor's statement under this subdivision, **unless and until** the court enters an order finding that the debtor's statement is incorrect." FED. R. BANK. P. 1020(a) (emphasis supplied).

any amendment to the statement, whichever is later."[9] Absent timely objection, the case proceeds as a non-small business debtor case.

Further, it is clear that a debtor which obtains benefits from designation as a small business debtor may be judicially estopped to later attempt to de-designate itself. *See CCT Commc'ns, Inc.*, 420 B.R. 160; *S.O.S.*, 393 B.R. 452.

Thus, in this case, Debtor's deadlines run from July 15, 2010, the petition date, not the date of this decision or the order hereon.

[9] This Court needs not and does not reach the issue of a case in which an objection to a non-designation is filed after the deadline to file a plan under Section 1121(e)(2) has expired. If the Section 341 meeting has not been concluded within 270 days after the petition date, the Rule 1020(b) deadline to object, which runs 30 days after the conclusion of the meeting of creditors, would not have run before a small business debtor's 300 day deadline to file a plan.

Conclusion

Debtor's designation was incorrect. Debtor is a small business debtor and this case is a small business case. All deadlines which run from the petition date or the order for relief all run from July 15, 2010. An order consistent herewith shall issue.

Dated: November 16, 2010
Central Islip, New York

Alan S. Trust
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

FOR PUBLICATION

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In re:

AMAP SALES & COLLISION, INC.,
d/b/a AMAP COLLISION,

Chapter 11 Case
No. 08-71853 (AST)

Debtor.

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MEMORANDUM OPINION AND ORDER EXTENDING DEBTOR'S TIME TO CONFIRM A PLAN OF REORGANIZATION

APPEARANCES:

Larry I. Glick, Esq.
1500 Miami Center
201 S. Biscayne Boulevard
Miami, FL 33131
Tel: (305) 379-9180

United States Trustee
Diana G. Adams
Stan Yang
Office of the United States Trustee
The Alfonse M. Damato U.S. Courthouse
560 Federal Plaza - Room 560
Central Islip, NY 11722-4437

Issues Before the Court and Summary of Ruling

Debtor, AMAP Sales & Collision, Inc. ("AMAP" or "Debtor"), has filed a Motion (the "Motion") seeking an Order extending its time to obtain confirmation of its plan of reorganization (the "Plan"). The Motion is brought pursuant to Sections 1121(e)(3) and 1129(e) of the Bankruptcy Code. Debtor seeks an extension of time to confirm a plan of reorganization until December 31, 2009, without prejudice to seeking further extensions of time. For the reasons herein,

the Motion is granted.

Jurisdiction

This Court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A)and (L), and 1334(b), and the Standing Order of Reference in effect in the Eastern District of New York.

Findings of Fact and Conclusions of Law

The Court makes the following findings of fact and conclusions of law, in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Procedural History

Debtor filed a petition for relief under Chapter 11 with this Court on April 15, 2008 (the "Petition Date"). Debtor made a timely election to be treated as a "small business debtor" within the meaning of Section 101(51D) of the Bankruptcy Code. The election was made as a part of debtor's voluntary petition. [dkt item 1]

Debtor timely filed its small business Plan and small business Disclosure Statement on February 9, 2009. [dkt items 38, 39]

Debtor filed the Motion on February 20, 2009. [dkt item 41] Notice of the Motion was properly given to all scheduled creditors, all creditors filing proofs of claim, all parties filing a notice of appearance in this case, and the United States Trustee (the "US Trustee").

Debtor filed an Affidavit of Michelle E. Espey in support of the Motion on March 8, 2009 (the "Espey Affidavit"). [dkt item 43]

A hearing was held on the Motion on March 6, 2009. The hearing was

attended by Debtor, through its principal, Nicolas Cosmo ("Cosmo"), and its counsel, as well as by the US Trustee. No objection was filed to the Motion. Also, no opposition was expressed against the Motion at the hearing. Cosmo testified in support of the Motion.

The Debtor's primary creditor is the New York State Department of Taxation and Finance ("NYS Tax"). Debtor's Plan proposes, *inter alia*, to pay NYS Tax over five (5) years. Debtor's obligation to NYS Tax is unliquidated and is the subject of an audit being conducted by NYS Tax. Debtor testified that it will, if necessary, supplement its operating revenues with non-debtor sources of cash.

To better assess the Plan's feasibility, the Court directed that Debtor supplement its evidence in support of its Motion with projections setting out the Debtor's anticipated profits and losses, and sources and uses of cash to make the projected payments to creditors, including NYS Tax. Debtor timely filed these projections on March 19, 2009 (the "Projections"). [dkt item 47]

Legal Analysis

Debtor is a "small business debtor" within the meaning of Section 101(51D) of the Bankruptcy Code. In the 2005 amendments to the Bankruptcy Code,[1] Congress added certain specific, time-sensitive provisions for small

[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L. No. 109-8, 119 Stat. 23 (2005).

business debtors seeking to confirm a plan or reorganization.[2] In Section 1121(e)(1), the Code addresses the small business debtor's time to file a plan and disclosure statement, by first providing that only the debtor may file a plan for the first one hundred and eighty (180) days after the date of the order for relief, but that the debtor must file a plan within three hundred (300) days. Under Section 1121(e)(2), the 180-day exclusivity period may be extended for cause, but only to a date which is no more than 300 days after the date of the order for relief.

Regardless of the date on which the plan is filed, the Court must confirm an appropriate plan within forty-five (45) days after filing, pursuant to Section 1129(e), which provides as follows:

> [i]n a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e)(3) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

28 U.S.C. §1129(e).

Moreover, Section 1121(e)(3) provides as follows:

> (3) the time periods specified in paragraphs (1) and (2), and the time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if-
>
> (A) the debtor, after providing notice to parties (including the United

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[2] The Bankruptcy Code and Rules also contain specific provisions governing approval of a disclosure statement in a small business case. Under Section 1125(f), the Court may dispense with a separate hearing on a disclosure statement by, *inter alia*, "finding that the plan itself provides adequate information and that a separate disclosure statement is not necessary" (§ 1125(f)(1)), or by conditionally approving a disclosure statement "on application of a plan proponent," subject to final approval in conjunction with the hearing on confirmation of the plan. § 1125(f)(3); Bankruptcy Rule 3017.1. Adequacy of a small business disclosure statement is addressed in *In re J.D. Mfg., Inc.*, No. 07-36751, 2008 WL 4533690 (Bankr. S.D. Tex. Octo. 2, 2008).

> States trustee), demonstrates by a preponderance of evidence that it is more likely than not that the court will confirm a plan within in a reasonable amount of time;
>
> (B) a new deadline is imposed at the time the extension is granted; and
>
> (C) the order extending the time is signed before the existing deadline has expired.

28 U.S.C. §1121(e)(3).

Limited case law has developed interpreting Section 1121(e)(3), and, specifically, the evidence required for the Court to find by "a preponderance of evidence that it is more likely than not that the court will confirm a plan within in a reasonable amount of time." In certain circumstances, the Court has denied the request, such as in *In re Safeguard-RX, Inc.*, Slipcopy, No. 08-31552-H3-11, 2009 WL 249767 (Bankr. S.D. Tex. Feb. 2, 2009):

> The plan as proposed does not address resolution of the disputes between Debtor and its landlord. The disclosure statement filed in the instant case lacks any indication of any sort of financial planning on the part of Debtor for its existence as a reorganized Debtor post-confirmation, other than a hope that Debtor will be able to resolve its difference with its landlord and/or move to a new location. In a small business case, the Debtor and Debtor's counsel must move expeditiously to ensure that the deadlines under the Bankruptcy Code are met. The court concludes that the instant motion should be denied.

In re Safeguard-RX, Inc., 2009 WL 249767 at *2.

In a case involving a hearing on confirmation combined with an extension request, after a lengthy trial and in an exhaustive analysis, Judge Gargotta of the Austin, Texas, bankruptcy court denied the extension request:

> However, as explained in detail below, after considering all of the evidence presented during the entire five-day hearing, the Court finds that the Debtor failed to provide sufficient evidence that confirmation of the First

> Amended Plan is more likely than not, given the Court's ruling that confirmation of that Plan is denied. Accordingly, to that extent the Motion to Extend Time will be denied.

In re Save Our Springs (S.O.S.) Alliance, Inc., 388 B. R. 202, 229 (Bankr. W.D. Tex. 2008).

Furthermore, where the debtor fails to appear for the hearing on the extension request or fails to submit any evidence in support of the motion, the court should deny the request:

> [T]he debtor failed to appear and also failed to file any documents in support of such an extension. As a consequence and as required by 11 U.S.C. § 1121(e)(3), no evidence meeting the preponderance standard having been submitted, the court entered an Order denying extension of confirmation deadline [-].

In re Luther, No. 066-16303DK, 2007 WL 1063008 *2 (Bankr. D. Md. Mar. 22, 2007).

In this Court's view, the plain language of Section 1121(e)(3) requires the Court find by a preponderance of evidence that it is more likely than not that the court will confirm *a* plan within a reasonable amount of time, not necessarily *the* plan which is before the Court at the time of hearing on the extension motion. Certainly, small business debtors should have the flexibility to modify their plans pursuant to Section 1127, as circumstances of the dynamic chapter 11 process allow or dictate. Further, while this Court agrees that a small business debtor and counsel must move expeditiously, circumstances outside the control of the debtor and counsel can, as is occurring in this case, make adherence to the unextended deadlines extremely difficult or even impossible.

Finally, as with a motion to approve a compromise of controversies, where

the debtor or trustee is not required to put on a "mini trial" demonstrating the strengths and weaknesses of the claims being compromised, the debtor is not required to put on a confirmation trial in order to obtain an extension of time to obtain confirmation. It is well settled that "bankruptcy courts in this circuit may only approve a proposed settlement after an independent determination that it does not 'fall below the lowest point in the range of reasonableness.' " *Resolution Trust Corp. v. Best Prods. Co.* (*In re Best Prods. Co.*), 177 B.R. 791 (S.D.N.Y.1995), *aff'd*, 68 F.3d 26 (2d Cir.1995); *In re Stanwich Fin. Servs. Corp.*, 377 B.R. 432, 436 (Bankr. D. Conn. 2007); *In re Raytech Corp.*, 261 B.R. 350, 360 (Bankr. D. Conn. 2001). In order to make such a determination, the court must evaluate "the fairness of the terms of the compromise" and "form an educated estimate of the complexity, expense, and likely duration of [any unsettled] litigation, the possible difficulties of collecting any judgment which might be obtained, and all other factors relevant to a fair and full assessment of the wisdom of the proposed compromise." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). "In applying that standard the bankruptcy court does not need to conduct a 'mini trial' of the merits of the claims underlying the controversy being settled." *Raytech*, 261 B.R. at 360 (*citing In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983)).

To require the Court to conduct a trial on confirmation in order for a debtor to obtain an extension of time under Section 1121(e)(3) would seem to be at cross purposes with the small business sections, which provide methods to

streamline the efficiency and reduce the costs of the Chapter 11 process for small businesses, while at the same time increasing judicial oversight of the process. Prior to enacting BAPCPA, Congress stated: "With respect to business bankruptcy, S. 256 includes several significant provisions intended to heighten administrative scrutiny and judicial oversight of small business bankruptcy cases, which often are the least likely to reorganize successfully." *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Report of the Committee on the Judiciary, House of Representatives, House Report No. 109-31, Pt. 1, 109th Cong, 1st Session* 92 (2005) (the "Report").

In that Report, Congress further stated as follows:

> Most chapter 11 cases are filed by small business debtors. Although the Bankruptcy Code envisions that creditors should play a major role in the oversight of chapter 11 cases, this often does not occur with respect to small business debtors. The main reason is that creditors in these smaller cases do not have claims large enough to warrant the time and money to participate actively in these cases. The resulting lack of creditor oversight creates a greater need for the United States trustee to monitor these cases closely. Nevertheless, the monitoring of these debtors by United States trustees varies throughout the nation. S. 256 addresses the special problems presented by small business cases by instituting a variety of time frames and enforcement mechanisms designed to weed out small business debtors who are not likely to reorganize. It also requires these cases to be more actively monitored by United States trustees and the bankruptcy courts.

Report, p. 19.

In this case, the US Trustee served the role Congress intended by participating in the hearing on the Motion and expressing its lack of opposition to the extension. The Court has fulfilled its function by closely reviewing the evidence submitted by Debtor.

Thus, although a debtor seeking the Section 1121(e)(3) extension of time must put on evidence from which the Court can determine whether the Court will confirm a plan within in a reasonable amount of time, the Court need not conduct a trial on confirmation.

In this case, Debtor is in the business of auto and truck collision repair and painting, and is one of the few auto body shops on Long Island that is equipped to handle fleet accounts. Cosmo has been the president of the Debtor for approximately thirty (30) years. Debtor has twelve full-time employees and approximately five independent contractors.

During its most recent year of operations, Debtor generated gross revenues in excess of $1,600,000. Within the last six months, Debtor's business has expanded to include the painting of aircraft. Moreover, Debtor has operated profitably since the filing of its chapter 11 petition, and its monthly operating reports reflect post-petition operating income through January 2009 in an amount in excess of $80,000, after payment of statutory fees to the US Trustee.

Although it was operating profitably, Debtor filed for Chapter 11 relief because of a dispute with NYS Tax regarding unpaid sales tax. Prior to filing, Debtor and NYS Tax tentatively agreed to an offer in compromise to settle the sales tax claim (the "Offer in Compromise"). However, this Offer in Compromise was deemed withdrawn by NYS Tax upon its subsequent commencement of a sales tax audit of Debtor for the period from March 2004 through February 2007 (the "Audit").

The Audit has continued post-petition and remains pending. Debtor has

provided NYS Tax with more than 6,000 pages of documents in connection with the Audit.

On February 9, 2009, Debtor timely filed its proposed Plan and an accompanying disclosure statement (the "Disclosure Statement"). The Plan proposes to pay NYS Tax's secured and priority claims in full within five years after the effective date of the Plan (the "Effective Date"), with interest at 2.5 percent.

The Plan proposes to pay general unsecured creditors in full, without interest, within six years after the Effective Date.

Debtor proposes that the funding for the Plan come from three sources: (a) cash on hand as of the Effective Date; (b) cash generated by future operations; and (c) funds contributed by Cosmo or entities or persons related to Cosmo.

Debtor presently has on hand in excess of $30,000, which is available to fund payments required under the Plan.

Potential non-debtor sources funding for the Plan include: (a) a mortgage loan to be secured by the building housing Debtor's operations, which building is owned by a company controlled by Cosmo; (b) a mortgage loan to be secured by Cosmo's personal residence; and (c) a reverse mortgage loan to be secured by the residence of Cosmo's mother.

The Court requested the Projections largely due to the fact that the Disclosure Statement does not identify the amount of NYS Tax's claim to be paid under the Plan. NYS Tax has filed a claim against Debtor in the aggregate

amount of $1,256,373.33 (the "NYS Tax Claim"). Debtor has filed an objection to the NYS Tax Claim (the "Claim Objection"), which remains pending. In the exercise of its business judgment, Debtor does not intend to pursue the Claim Objection until the Audit is concluded. Following the conclusion of the Audit, Debtor intends to resubmit the Offer in Compromise and negotiate the allowed amount of the NYS Tax Claim.

The Projections indicate that, even without obtaining funding from any third party source, Debtor should be able to make the payments required under the Plan if the NYS Tax Claim is reduced to a number comparable to the pre-petition Offer in Compromise. Debtor acknowledges that confirmation of the Plan is dependent upon Debtor's ability to reduce the NYS Tax Claim to an amount that is comparable to the Offer in Compromise.

Certainly, Debtor has complied with the timing mechanics and procedural requirements created by the Bankruptcy Code and Rules. Debtor timely filed its Plan and Disclosure Statement within the 300-day period prescribed by Section 1121(e)(2) of the Bankruptcy Code. Debtor timely filed its Motion seeking an extension of the time to confirm the Plan within the 45 day period set forth in Section 1129(e) of the Bankruptcy Code.

Because of the pendency of the Audit and the resulting uncertainty concerning the allowed amount of the NYS Tax Claim, Debtor is unable to confirm the Plan within the 45 day period set forth in Section 1129(e) of the Bankruptcy Code.

Debtor asserts that it has established that it can reduce the NYS Tax

Claim to an amount comparable to the Offer in Compromise. However, this Court does not make that finding, as it does not have before it the record of the Audit, nor is this matter a hearing on the NYS Tax Claim. Further, this Court need not make that finding, as this Court does not need to find that Debtor can confirm *the filed* Plan, only that it can confirm *a* Plan. Although Debtor has filed a claim objection to the NYS Tax Claim, and/or could file for a determination of tax liability under Section 505, the Debtor has exercised its business judgment and determined to allow the Audit to continue and run its course. If the Audit results in a proposed liability higher than Debtor has proposed to pay, and/or results in an agreed treatment for the NYS Tax Claim that is different than the current Plan, Debtor can seek to amend its Plan. If the Audit yields an unmanageable claim, Debtor can seek to dismiss or convert this case.

However, based upon the evidence presented, consisting of the Cosmo testimony, the Espey Affidavit, and the Projections, Debtor has demonstrated by a preponderance of the evidence that it is more likely than not the Court will confirm a plan of reorganization within a reasonable time.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Court hereby Orders that the time for Debtor to confirm a plan of reorganization is extended to December 31, 2009, without prejudice to seeking further extensions of such time upon proper motion requesting such relief.

Dated: Central Islip, New York
March 25, 2009

/s/ Alan S. Trust
Hon. Alan S. Trust
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

Case No. 812-72378-reg

18 RVC, LLC,

Chapter 11

Debtor.

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MEMORANDUM DECISION

Before the Court are two related motions which raise one legal issue. The motions are: (a) a motion for relief from the stay, by the Debtor's secured lender, New York Community Bank ("NYCB") to permit NYCB to proceed with a foreclosure on the Debtor's real property – the Debtor's sole asset, and (b) a hearing to approve the Debtor's amended disclosure statement related to the Debtor's amended plan of reorganization. The issue which guides the Court's resolution of these two matters is whether under the facts of this case it is legally permissible for a debtor to classify the unsecured deficiency claim of a partially secured lender separately from other unsecured creditors. The Debtor concedes that its ability to propose a viable plan of reorganization under chapter 11 of the Bankruptcy Code hinges on the answer to this question.

The Debtor argues that the existence of a personal guarantee of the secured debt by the Debtor's principal is in itself sufficient basis for this Court to find that the unsecured portion of the secured creditor's claim is not "substantially similar" to the claims of other unsecured creditors, and therefore, should be separately classified. *See Wells Fargo Bank, N.A. v. Loop 76 LLC (In re Loop 76 LLC)*, 465 B.R. 525 (B.A.P. 9th Cir. 2012). NYCB argues that existing law in the Second Circuit requires the Debtor to present the Court with "credible proof of any legitimate reason" for such separate classification and the Debtor has failed to satisfy that standard in this case. *See Boston Post Road Limited Partnership v. FDIC (In re Boston Post*

Road Limited Partnership), 21 F.3d 477 (2d Cir. 1994), *cert denied*, 513 U.S. 1109 (1995).

The Court agrees with NYCB and finds that the existence of a personal guarantee, without more, is not a legitimate reason for separately classifying the unsecured deficiency claim of a secured lender. The Court therefore finds that the Debtor's proposed amended plan of reorganization which is described in the proposed amended disclosure statement, is not confirmable as a matter of law. For that reason, the Court denies the Debtor's motion to approve the amended disclosure statement, and grants NYCB's motion for relief from stay based upon the Debtor's inability to propose a confirmable plan of reorganization.

Background

The Debtor filed a petition under chapter 11 of the Bankruptcy Code on April 17, 2012. The Debtor's sole asset is real property improved by a commercial building located in Rockville Centre, NY. The Debtor is a "single asset real estate debtor" as that term is defined in section 101(51B) of the Code. The Debtor has one tenant – R.S. Naghavi, MD, PLLC, which is the medical practice of Dr. Reza Neghavi. Dr. Neghavi is the managing member of the Debtor's managing member, SMARS Holding, LLC. The real property is encumbered by a first mortgage lien held by NYCB in the total amount of $1,145,839.39. The Debtor admits that it filed this bankruptcy case in order to forestall NYCB's foreclosure proceeding.

On May 3, 2012, NYCB filed a motion for relief from the automatic stay (§362), or alternatively to dismiss the bankruptcy case on the ground that the case was filed in bad faith for the sole purpose of forestalling foreclosure of NYCB's interests (§1112). Relevant to this decision, NYCB argues that the stay should be lifted under section 362(d)(2) of the Code

because there is no equity in the real property and the property is not necessary to an effective reorganization. NYCB argues that the Debtor has no ability to confirm a plan of reorganization in this case because NYCB's unsecured deficiency claim would necessarily control the unsecured class leaving the Debtor unable to satisfy the requirement of section 1129(a)(10) of the Code that an impaired class of creditors vote in favor of the plan of reorganization. The Court deferred ruling on the motion for relief from stay (conditioned upon $10,000 monthly adequate protection payment being made to NYCB) in order to allow the Debtor to propose a confirmable plan of reorganization.

On August 17, 2012, the Debtor filed a proposed disclosure statement and plan, and on October 1, 2012, filed an amended disclosure statement ("Disclosure Statement") and amended plan ("Plan"). The Plan as proposed classifies NYCB's secured, first mortgage claim in Class 1 and proposes to pay the secured claim $820,000 (the alleged value of the Debtor's real property) plus 6% interest based on a 20 year amortization, in 60 equal monthly installments of $5,874, with a balloon payment of $693,782.86 to be paid at the end of 60 months. The total debt owed to NYCB is $1,145,839.39. Pursuant to section 506(a), the Plan proposes to bifurcate NYCB's claim and treat the amount of the debt that exceeds the value of the property, as an unsecured claim. The Plan classifies NYCB's $325,839.39 "deficiency" claim in Class 2 and proposes to pay 5% of that claim (approx. $16,292) in one lump sum payment shortly after confirmation. Class 3 of the Plan contains minimal priority tax claims which will be paid in full, and Class 4 is a class of miscellaneous unsecured creditors to which the Debtor proposes to make a 5% distribution of approximately $27,850.

NYCB objects to the approval of the Disclosure Statement on several grounds, including

that the proposed Plan improperly classifies NYCB's unsecured deficiency claim separately from other unsecured creditors. Relying on *Boston Post Road Limited Partnership v. FDIC (In re Boston Post Road Limited Partnership)*, 21 F.3d 477 (2d Cir. 1994), *cert denied*, 513 U.S. 1109 (1995), NYCB argues that by separately classifying NYCB's unsecured claim, the Debtor has improperly gerrymandered the unsecured classes in an attempt to ensure obtaining an impaired class of creditors who will vote in favor of the Debtor's Amended Plan. NYCB has made it clear that it opposes the Debtor's reorganization and will not vote in favor of the Plan. If NYCB's unsecured deficiency claim were included in the miscellaneous unsecured creditor class – Class 4 – the dollar amount of NYCB's claim in relation to the rest of the class, would ensure that Class 4 would not accept the plan. *See* 11 U.S.C. §1129(a)(10) (requiring that in order to confirm a plan, "at least one class of claims that is impaired under the plan has accepted the plan ..."); 11 U.S.C. §1126(c) (acceptance of a class is accomplished by the vote by "at least two-thirds in amount and more than one-half in number of the allowed claims in such class..."). However, if NYCB's deficiency claim is separately classified, the rejection of the plan by NYCB, and presumed acceptance by Class 4, would permit the Debtor to proceed with a "cramdown" of the plan over NYCB's objection. *See* 11 U.S.C. §1129(b).[1]

The Debtor has filed no legal memoranda to support the separate classification of NYCB's unsecured deficiency claim. However, it became apparent during the course of these

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[1] Even if this Court were to permit separate classification, the Debtor may not be able to satisfy the "cramdown" provisions of section 1129(b) because, in this case, the Debtor's principal is retaining his equity interest in the Debtor. Although Dr. Naghavi is proposing to contribute "new value" in the form of a cash contribution to distribution under the Plan, any such "new value" must be subject to competitive bidding under the rule set forth in *Bank of America v. 203 North LaSalle Street Partnership*, 526 U.S. 434 (1999).

proceedings that the Debtor is basing its legal argument upon a single recent decision of the Ninth Circuit Bankruptcy Appellate Panel in *Wells Fargo Bank, N.A. v. Loop 76 LLC (In re Loop 76 LLC)*, 465 B.R. 525 (B.A.P. 9th Cir. 2012). Debtor's counsel argues that the existence of a personal guarantee by Dr. Naghavi causes NYCB's claim not to be "substantially similar" to the Debtor's other unsecured creditors which do not have recourse against Dr. Naghavi. 11 U.S.C. §1122(a).

A hearing on approval of the Disclosure Statement, and an adjourned hearing on NYCB's motion for relief from stay, was held on October 15, 2012. At that time, the Court issued an oral ruling declining approval of the Disclosure Statement, and granting NYCB's motion for relief from stay. This Memorandum Decision supplements the reasoning of the Court stated on the record on October 15, 2012.

Discussion

Approval of a disclosure statement pursuant to section 1125 of the Code necessarily precedes the confirmation of any chapter 11 plan. 11 U.S.C. §1125(b). The Code requires that the Court determine whether a disclosure statement contains "adequate information" to allow a "hypothetical investor" to make an "informed judgment" about whether to vote for or against the proposed plan. 11 U.S.C. § 1125(a). In addition to the requirement that the disclosure statement contain adequate information, a bankruptcy court should not approve a disclosure statement if the proposed plan which it describes is incapable of confirmation. *See, e.g., In re GSC, Inc.*, 453 B.R. 132, 157 n.27 (Bankr. S.D.N.Y. 2011), citing *In re Quigley Co.*, 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007) ("An unconfirmable plan is grounds for rejection of the disclosure statement; a

disclosure statement that describes a plan patently unconfirmable on its face should not be approved.").

Section 362(d)(2) provides relief from the automatic stay with respect to actions against property of the estate if "(A) the debtor does not have any equity in such property; and (B) such property is not necessary to an effective reorganization." 11 U.S.C. §362(d)(2). A debtor's inability to confirm a chapter 11 plan may also provide the basis to grant relief from the automatic stay under section 362(d)(2). *See U.S. Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 376 (1988) (". . . lack of any realistic prospect of effective reorganization will require §362(d)(2) relief."); *Pegasus Agency, Inc. v. Grammatikakis (In re Pegasus Agency, Inc.)*, 101 F.3d 882 (2d Cir. 1996) (finding grounds for relief from stay exist where "the reorganization plan's unfounded assumptions and dubious calculations rendered it entirely unreliable, and there is, therefore, no prospect of an effective reorganization under any calculation of the debt."); *In re 266 Washington Assocs.*, 141 B.R. 275, 278 (Bankr. E.D.N.Y.), *aff'd*, 147 B.R. 827 (E.D.N.Y. 1992) (finding debtor's claims classification predicament to be "insoluble" and granting relief from stay for debtor's inability to confirm a plan).

The Debtor concedes that it can only confirm a plan of reorganization in this case if the Court determines that the separate classification of NYCB's unsecured deficiency claim is permitted as a matter of law. Therefore, an adverse ruling by the Court on this issue will result in the Debtor being unable to propose a confirmable plan of reorganization which in turn will result in a granting of the secured creditor's motion to lift stay.

In *Boston Post Road Limited Partnership v. FDIC (In re Boston Post Road Limited Partnership)*, 21 F.3d 477 (2d Cir. 1994), *cert denied*, 513 U.S. 1109 (1995), the Second Circuit

Court of Appeals held that a chapter 11 debtor could not separately classify the unsecured deficiency claim of a secured creditor unless it could present "credible proof of any legitimate reason" for such separate classification. *Boston Post Road*, 21 F.3d at 483. The circuit court found that the different origins of the secured creditor's deficiency claim (versus trade claims) was not sufficient to justify separate classification. *Id.* The circuit court was not concerned that this holding might give the under-secured lender undue influence over the Debtor's ability to reorganize. In fact, its concern was just the opposite– that the "overwhelmingly largest creditor" should not be disenfranchised by the Debtor's ability to separately classify that claim. The court reasoned that,

> approving a plan that aims to disenfranchise the overwhelmingly largest creditor through artificial classification is simply inconsistent with the principles underlying the Bankruptcy Code. A key premise of the Code is that creditors holding greater debt should have a comparably greater voice in reorganization. Thus, although Debtor protests that prohibiting it from separating the unsecured claims of the [secured creditor] from those of its trade creditors will effectively bar single asset debtors from utilizing the Code's cramdown provisions, Debtor fails to persuade that a single-asset debtor should be able to cramdown a plan that is designed to disadvantage its overwhelmingly largest creditor. Chapter 11 is far better served by allowing those creditors with the largest unsecured claims to have a significant degree of input and participation in the reorganization process, since they stand to gain or lose the most from the reorganization of the debtor. This Court thus holds that separate classification of unsecured claims solely to create an impaired assenting class will not be permitted; the debtor must adduce credible proof of a legitimate reason for separate classification of similar claims.

Boston Post Road, 21 F.3d at 483.

The Debtor urges this Court to adopt the holding in *In re Loop*, a recent decision of the Ninth Circuit Bankruptcy Appellate Panel. *See Wells Fargo Bank, N.A. v. Loop 76 LLC (In re Loop LLC)*, 465 B.R. 525 (B.A.P. 9th Cir. 2012). In *Loop*, the BAP held that the existence of a personal guarantee in favor of the debtor's secured creditor was sufficient reason to allow the

debtor to separately classify the unsecured deficiency portion of the secured creditor's claim. The BAP concluded that under existing Ninth Circuit Court of Appeals precedent, the bankruptcy court could "consider the existence of a third-party source for payment, including a guarantor, when determining whether unsecured claims are substantially similar under § 1122(a)." *Loop*, 465 B.R. at 541 (citing *Steelcase Inc. v. Johnston (In re Johnston)*, 21 F.3d 323, 327 (9th Cir. 1994)). The Debtor argues that the *Boston Post* decision does not preclude a holding consistent with *Loop*.

The Debtor bases its position on separate classification solely on the existence of a personal guarantee by the Debtor's principal.[2] The Debtor has presented the Court with no other legitimate reason for separately classifying NYCB's unsecured deficiency claim. The record is barren of any facts that could allow the Court to find that there is any reason for separately classifying this claim other than for the purpose of creating a class of creditors to vote in favor of the Debtor's proposed plan and cram down the secured lender.

The majority of courts that have considered this issue have held that the existence of a personal guarantee, alone, is not a sufficient basis to find that an unsecured deficiency claim is not substantially similar to other unsecured creditors. *See, e.g., In re AOV Indus., Inc.*, 792 F.2d 1140, 1150-51 (D.C. Cir. 1986) ("The existence of a third-party guarantor does not change the nature of a claim vis-a vis the bankrupt estate and, therefore, is irrelevant to a determination of

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[2] The Court will assume for purposes of this Decision that there is a valid personal guarantee by Dr. Naghavi. Although NYCB did not contest the existence of the personal guarantee during the course of these proceedings, the written record is inconsistent on this point. The Debtor's counsel represented to the Court that there is a personal guarantee, and the Debtor's Schedule H lists Dr. Naghavi as a co-obligor on the NYCB debt. However, paragraph 13 of NYCB's motion for relief from stay indicates that Dr. Naghavi declined to execute a personal guarantee [Doc. #24], and the Court has not been presented with documentary proof of such guarantee.

whether claims are 'substantially similar' for classification purposes."); *In re 4th Street East Investors, Inc.*, 2012 WL 1745500 at 4-5 (Bankr. C.D. Cal. May 15, 2012) (declining to follow *Loop* and finding non-debtor guarantor to be an insufficient basis to separately classify unsecured claims); *In re 500 Fifth Ave. Assocs.*, 148 B.R. 1010, 1019 (Bankr. S.D.N.Y. 1993), *aff'd*, 1993 WL 316183 (S.D.N.Y. May 21, 1993) (a right of recourse against the debtor's general partners did not justify separate classification); *In re Thornwood Associates*, 161 B.R. 367, 372 (Bankr. M.D. Pa. 1993) ("The fact that [a creditor] holds a personal guarantee outside of bankruptcy is not relevant to the claim classification inquiry in the Chapter 11 context.").

In *In re 500 Fifth Ave. Assocs.*, 148 B.R. 1010, 1019 (Bankr. S.D.N.Y. 1993), *aff'd*, 1993 WL 316183 (S.D.N.Y. May 21, 1993), the bankruptcy court found that "the rights of various parties outside of chapter 11 – whether in chapter 7 or outside of bankruptcy altogether – are irrelevant." *Id.* Since recourse and nonrecourse creditors "are creditors of equal rank with equal rights within chapter 11, in the absence of a purpose independent of the debtor's desire to gerrymander an impaired assenting class, they should be classified together." *Id.*

The Court is persuaded by this reasoning, and the reasoning of the other decisions mentioned above including *Boston Post Road*, and is not inclined to depart from the majority line of cases deciding this issue. The Court finds that the Debtor's separate classification of NYCB's unsecured deficiency claim, in this case, is an improper gerrymandering of classes intended to obtain the vote of an impaired class of creditors and not for any other legitimate reason. The findings and conclusions of the Court are limited to the facts of this case and are consistent with the prevailing law in this circuit.

Conclusion

For all of the foregoing reasons, and for the reasons stated on the record of the hearing held on October 15, 2012, the Court declines to approve the Debtor's proposed disclosure statement, and grants NYCB's motion for relief from stay. Orders consistent with this Decision will issue forthwith.

Dated: Central Islip, New York
October 22, 2012

/s/ Robert E. Grossman
Robert E. Grossman
United States Bankruptcy Judge

681 F.3d 558
United States Court of Appeals,
Fourth Circuit.

In re Ganess MAHARAJ; Vena Maharaj, Debtors.
Ganess Maharaj; Vena Maharaj,
Plaintiffs–Appellants.
Stubbs & Perdue, P.A.; National Association of Consumer Bankruptcy Attorneys, Amici Supporting Appellants,
Steven Harris Goldblatt, Court–Assigned Amicus Counsel.

No. 11–1747. | Argued: March 22, 2012. | Decided: June 14, 2012.

Synopsis

Background: Creditor objected to plan proposed by individual Chapter 11 debtors, as improperly providing for "strip off" of its junior deed of trust lien and as failing to satisfy absolute priority rule. The United States Bankruptcy Court for the Eastern District of Virginia, Stephen S. Mitchell, J., 449 B.R. 484, denied plan confirmation, and debtors appealed.

[Holding:] The Court of Appeals, Agee, Circuit Judge, held that Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) did not effect implied repeal of absolute priority rule for individual debtors proceeding under Chapter 11.

Affirmed.

West Headnotes (6)

[1] **Bankruptcy**
⇐Conclusions of law; de novo review

Questions of statutory interpretation are reviewed de novo on appeal.

[2] **Statutes**
⇐What constitutes ambiguity; how determined

Statute is ambiguous if it lends itself to more than one reasonable interpretation.

1 Cases that cite this headnote

[3] **Statutes**
⇐Plain language; plain, ordinary, common, or literal meaning

If statute is unambiguous, court's inquiry into Congress' intent is at end, for if language is plain and statutory scheme is coherent and consistent, it need not inquire further.

[4] **Bankruptcy**
⇐Preservation of priority

Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) did not effect implied repeal of absolute priority rule for individual debtors proceeding under Chapter 11; Congress made no clear statement of repeal, Congress could have repealed absolute priority rule in far less convoluted manner, and nothing in BAPCPA's legislative history suggested that Congress intended to repeal absolute priority rule. 11 U.S.C.A. §§ 1115, 1129(b)(2)(B)(ii).

7 Cases that cite this headnote

[5] **Statutes**
⇐Implied Repeal

Repeals by implication are not favored, and therefore legislature's intention to repeal must be clear and manifest.

[6] **Bankruptcy**
Construction and Operation

Courts will not read Bankruptcy Code to erode past bankruptcy practice absent clear indication that Congress intended such departure.

2 Cases that cite this headnote

Attorneys and Law Firms

***559 ARGUED:** Daniel Mark Press, Chung & Press, PC, McLean, Virginia, for National Association of Consumer Bankruptcy Attorneys, Amicus Supporting Appellants. Ann Elizabeth Schmitt, Culbert & Schmitt, PLLC, Leesburg, Virginia, for Appellants. Nilam Ajit Sanghvi, Georgetown University Law Center, Washington, D.C., for Steven Harris Goldblatt, Court–Assigned Amicus Counsel. **ON BRIEF:** Trawick H. Stubbs, Jr., Amy Marvine Currin, Rodney A. Currin, Laurie B. Biggs, William H. Kroll, Heather Kelly Pierce, Ashley Baxter Curry, John W. King, Stubbs & Perdue, P.A., New Bern, North Carolina, for Stubbs & Perdue P.A., Amicus Supporting Appellants. Brett Weiss, Chung & Press, LLC, Greenbelt, Maryland; Tara Twomey, National Association Of Consumer Bankruptcy Attorneys, San Jose, California, for National Association of Consumer Bankruptcy Attorneys, Amicus Supporting Appellants. Steven H. Goldblatt, Director, Doug Keller, Supervising Attorney, Derek Young, Emily Giarelli, Jina Moon, Georgetown University Law Center, Appellate Litigation Program, Washington, D.C., for Steven Harris Goldblatt, Court–Assigned Amicus Counsel.

Before DUNCAN, AGEE, and DIAZ, Circuit Judges.

Opinion

***560** Affirmed by published opinion. Judge AGEE wrote the opinion, in which Judge DUNCAN and Judge DIAZ joined.

OPINION

AGEE, Circuit Judge:

In this direct appeal from the Bankruptcy Court, we address a question of first impression in the circuit courts of appeal: whether, in light of the 2005 amendments to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* ("the Code"), codified by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), Pub.L. No. 109–8, 119 Stat. 23 (2005), the absolute priority rule continues to apply to individual debtors in possession proceeding under Chapter 11.[1] Because we answer that question in the affirmative, we affirm the bankruptcy court's order denying plan confirmation.

I.

Because this appeal requires us to resolve a pure question of law that has divided the nearly two dozen bankruptcy and district courts that have faced it, we begin by setting forth that background in detail. In subpart A, we recite the history of the absolute priority rule. In subpart B, we describe the statutory provisions relevant to determining whether the BAPCPA abrogated the absolute priority rule for individual debtors proceeding under Chapter 11. In subpart C, we discuss the judicial decisions to date addressing that question.

A.

We begin by setting forth the history of the absolute priority rule, which for reasons that will become clear, is significant for our disposition here. The absolute priority rule traces its origins to the latter half of the nineteenth century. The Supreme Court articulated the earliest version of the rule in response to widespread collusion in the context of railroad reorganizations, just after the Civil War. The Court announced that "stockholders are not entitled to any share of the capital stock nor to any dividend of the profits until all the debts of the corporation are paid." *Chi., Rock Island & Pac. R.R. v. Howard*, 74 U.S. 392, 409–10, 7 Wall. 392, 19 L.Ed. 117 (1868). As the Supreme Court later described, "[t]he rule had its genesis in judicial construction of the undefined requirement of the early bankruptcy statute that reorganization plans be 'fair and equitable.' " *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988); *see also* Pub.L.

No. 73–296, 48 Stat. 911, 919 (1934) (amending the Bankruptcy Act to require a finding that a plan is "fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders" for confirmation). In *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 117, 60 S.Ct. 1, 84 L.Ed. 110 (1939), the Court for the first time used the term "absolute priority" to describe the rule.

Although based on the "fair and equitable" requirements found in § 77B of the Bankruptcy Act ("the Act"), the absolute priority rule had itself never been codified under the Act.[2] In fact, Congress expressly ***561** prohibited its further judicial application by passing the 1952 amendments to the Act. *See* Pub.L. 456, 66 Stat. 420, 433 (1952). In modifying the requirements for confirmation of a plan of reorganization under what was then Chapter XI of the Act, Congress amended the Act such that: "[c]onfirmation of an arrangement shall not be refused solely because the interests of a debtor, or if the debtor is a corporation, the interest of its stockholders or members will be preserved under the arrangement." *Id.* Instead, Congress provided for confirmation if the plan "is for the best interest of the creditors and is feasible." *Id.*

The legislative history to the 1952 amendments to the Act reflects that Congress intended an express repeal of the judicially created absolute priority rule in the context of Chapter XI (which was designed for small, privately held businesses).[3] "[T]he fair and equitable rule ... cannot realistically be applied.... Were it so applied, no individual debtor, [and] no corporate debtor where the stock ownership is substantially identical with management could effectuate an arrangement except by payment of the claims of all creditors in full." H.R.Rep. No. 82–2320 (1952) *reprinted in* 1952 U.S.C.C.A.N. 1960, 1982.

In 1978, Congress passed the Bankruptcy Reform Act of 1978, replacing the Act with the Code and creating the structure of modern bankruptcy practice. In enacting the Code, Congress merged many aspects of Chapters X and XI (as well as the infrequently-used Chapter XII) of the Act into the newly created Chapter 11. *See* H.R.Rep. No. 95–595 at 223 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6183 ("This bill adopts a consolidated chapter for all business reorganizations."). In doing so, Congress specifically incorporated the absolute priority rule into § 1129(b)(2)(B)(ii).[4] *Ahlers*, 485 U.S. at 202, 108 S.Ct. 963. The absolute priority rule, as provided in § 1129, remained unchanged until the passage of BAPCPA in 2005.

B.

Under the now-operative provisions of the Code, a bankruptcy case under Chapter 11 commences with the filing of a Chapter 11 petition in the bankruptcy court. 11 U.S.C. § 301. Commencement of the case creates the bankruptcy estate, which includes, pursuant to ***562** 11 U.S.C. § 541(a)(1), "all legal or equitable interests of the debtor in property as of the commencement of the case."

After filing a voluntary petition under Chapter 11, a debtor may file a plan of reorganization with the bankruptcy court. 11 U.S.C. § 1121(a). In addition to numerous other requirements, a reorganization plan must specify classes of claims against the debtor based on specific statutory requirements. 11 U.S.C. § 1123(a)(1). To be operative, a Chapter 11 reorganization plan must be confirmed by the bankruptcy court. A precondition of plan confirmation is that it meet the requirements set forth in 11 U.S.C. § 1129(a).

Of particular import to this case is the requirement, found at § 1129(a)(8)(A), that each impaired class of creditors accept the plan. Pursuant to § 1129(b), however, a plan of reorganization may be confirmed over the dissent of an impaired class of creditors using a procedure commonly known as a "cram down." The plan can avoid the requirements of § 1129(a)(8) in a cram down procedure "if the plan does not discriminate unfairly, and is fair and equitable" to the dissenting creditors. 11 U.S.C. § 1129(b)(1).

The Code inclusively sets forth, at § 1129(b)(2), specific requirements that must be met for a plan to be "fair and equitable." Among those requirements is the absolute priority rule, the construction of which is central to the disposition of this appeal. Prior to 2005, the absolute priority rule (as codified) was simply that, in order to be fair and equitable, a proposed Chapter 11 plan must provide: "the holder of any claim or interest that is junior to the claims of such [dissenting] class will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. § 1129(b)(2)(B)(ii). In other words, if the proposed plan allowed the debtor to retain property, any dissenting creditors must be paid in full in order for the plan to be "crammed down." *See Ahlers*, 485 U.S. at 202, 108 S.Ct. 963.

In 2005, Congress enacted BAPCPA, which we have previously described as an "attempt[ ] to reduce the spiraling costs to society of bankruptcies." *In re Ciotti*, 638 F.3d 276, 279 (4th Cir.2011). Although Congress, in enacting BAPCPA, altered the Code in numerous respects, our focus is the amendment to § 1129(b)(2)(B)(ii), which contains the absolute priority

rule. The Code, after BAPCPA, now states that to be fair and equitable, a proposed plan must provide 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, *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.*

Id. (2005 amendment emphasized).

Section 1115 (which was added to the Code by BAPCPA) in turn provides:

> (a) In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541—
>
> (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 ***563** case under chapter 7, 12, or 13, whichever occurs first.
>
> (b) Except as provided in section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

11 U.S.C. § 1115.

C.

A significant split of authorities has developed nationally among the bankruptcy courts regarding the effect of the BAPCPA amendments on the absolute priority rule when the Chapter 11 debtor is an individual. Some courts have adopted the "broad view" that, by including in § 1129(b)(2)(B)(ii) a cross-reference to § 1115 (which in turn references § 541, the provision that defines the property of a bankruptcy estate), Congress intended to include the entirety of the bankruptcy estate as property that the individual debtor may retain, thus effectively abrogating the absolute priority rule in Chapter 11 for individual debtors. Other courts, adopting the "narrow view," have held that Congress did not intend such a sweeping change to Chapter 11, and that the BAPCPA amendments merely have the effect of allowing individual Chapter 11 debtors to retain property and earnings acquired after the commencement of the case that would otherwise be excluded under § 541(a)(6) & (7).[5]

To date, one district court, one bankruptcy appellate panel, and five bankruptcy courts have taken the "broad view" and ruled, although on different grounds, that Congress intended abrogation of the absolute priority rule. *See In re Friedman,* 466 B.R. 471 (9th Cir.BAP 2012); *SPCP Group, LLC v. Biggins,* 465 B.R. 316 (M.D.Fla.2011); *In re Shat,* 424 B.R. 854 (Bankr.D.Nev.2010); *In re Johnson,* 402 B.R. 851 (Bankr.N.D.Ind.2009); *In re Tegeder,* 369 B.R. 477 (Bankr.D.Neb.2007); *In re Roedemeier,* 374 B.R. 264 (Bankr.D.Kan.2007); *In re Bullard,* 358 B.R. 541 (Bankr.D.Conn.2007).

Some of these "broad view" courts have ruled Congress intended abrogation on the basis of the "plain" language of § 1129(b)(2)(B)(ii). In *Biggins,* for example, the district court reasoned

> [s]ection 1115 says that "property of the estate includes, in addition to the property specified in section 541–(1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case," as well as "(2) earnings from services performed by the debtor after the commencement of the case." The *plain reading* of this statute is that "property of the estate," for purposes of Section 1115, includes property acquired and earnings earned after the debtor files his or her Chapter 11 petition, in addition to property specified in section 541.
>
> ...
>
> Reading these statutes together, "property of the estate" for purposes of Section 1115 includes property and earnings acquired both before and after the commencement of the bankruptcy case.

465 B.R. at 322 (emphasis added); *see Tegeder,* 369 B.R. at 480 ("Since § 1115 broadly defines property of the estate to include property specified in § 541, as well as property acquired post-petition and earnings from services performed post-petition, the [absolute priority] rule no longer ***564** applies to individual debtors who retain property of the estate under § 1115.").

The *Friedman* panel majority reached a similar conclusion based on its reading of the plain meaning of the words "included" and "in addition to" in § 1115:

> "Included" is not a word of limitation. To limit the scope of estate property in §§ 1129 and 1115 would require the statute to read "included, except for the property set out in Section 541" (in the case of § 1129(b)(2)(B)(ii)), and "in addition to, but not inclusive of the property described in Section 541" (in the case of § 1115).
>
> A *plain reading* of §§ 1129(b)(2)(B)(ii) and 1115 together mandates that the [absolute priority rule] is not applicable in individual chapter 11 debtor cases.

Friedman, 466 B.R. at 482 (emphasis added) (footnote omitted).

Other courts to adopt the "broad view" of the BAPCPA amendments, however, have done so while rejecting a plain-meaning approach. In *Shat,* for example, that bankruptcy court described the phrase "property included in the estate under section 1115" as "ambiguous" but nevertheless concluded that Congress intended to abrogate the absolute priority rule for individual debtors. *See* 424 B.R. at 863–68. The *Shat* court, relying on *Roedemeier,* reasoned that several other BAPCPA amendments to Chapter 11 demonstrate that Congress intended Chapter 11 procedures concerning individual debtors to function more like those found in Chapter 13. *Id.* at 867 (citing *Roedemeier,* 374 B.R. at 276). The *Roedemeier* court described the Chapter 11 amendments as "apply[ing] only to individual debtors and [being] clearly drawn from the Chapter 13 model." 374 B.R. at 275.

Independent of the changes made to the language of § 1129(b), the *Shat* court identified the following additional amendments that, in its view, support the "broad view" regarding absolute priority rule abrogation:

> • changing the mandatory contents of a plan pursuant to § 1123(a)(8) to resemble § 1322(a)(1);
>
> • adding the disposable income test of § 1325(b) to § 1129(a)(15);
>
> • delaying the discharge until the completion of all plan payments as in § 1328(a);
>
> • permitting discharge for cause before all payments are completed pursuant to § 1141(d)(5), similar to the hardship discharge of § 1328(b); and
>
> • the addition of § 1127(e) to permit the modification of a plan even after substantial consummation for purposes similar to § 1329(a).

Shat, 424 B.R. at 862. The *Shat* court concluded that these amendments were "part of an overall design of adapting various chapter 13 provisions to fit in chapter 11." *Id.* at 868. Accordingly, in its view, reading the amendments to § 1129(b)(2)(B)(ii) as eliminating the absolute priority rule for individual debtors would be consistent with the perceived Congressional intent to harmonize the treatment of the individual debtor under Chapter 11 with those under Chapter 13, which has no absolute priority rule.

In further support of their view that Congress intended to make Chapter 11 operate for individual debtors similarly to Chapter 13, the *Shat* and *Friedman* courts noted that Congress drafted the new § 1115 to mirror § 1306(a) of the Code, which adds certain property to a § 541 bankruptcy estate in the Chapter 13 context. *See Friedman,* 466 B.R. at 482; *Shat,* 424 B.R. at 862. Both §§ 1115 and 1306 are similarly prefaced with the language "property of the estate includes, in addition to the property specified in ***565** section 541;" both also list, in like terms, post-petition acquired property and earnings. *See* 11 U.S.C. §§ 1115, 1306.

In addition, the *Shat* court noted its belief that "[t]he broader view ... saves Section 1129(b)(2)(B)(ii) from an almost trivial reading," 424 B.R. at 868; a sentiment echoed by the court in *Roedemeier* when it noted "the narrow reading of the new exception in § 1129(b)(2)(B)(ii) would have little impact on ... probably most ... individual debtors'[ ] ability to reorganize in Chapter 11." 374 B.R. at 275. *See Tegeder,* 369 B.R. at 480, quoting Hon. William L. Norton, Jr., 4 Norton Bankruptcy Law & Practice 2d § 84A:1 ("A more narrow interpretation [of § 1129(b)(2)(B)(ii)] would cause this amendment to have little effect.").

On the other hand, over a dozen separate bankruptcy courts, including the court below, have adopted the "narrow view" and held that BAPCPA did not abrogate the absolute priority rule in its entirety for individual Chapter 11 debtors. *See In re Arnold,* 471 B.R. 578, 2012 WL 1820877 (Bankr.C.D.Cal. May 17, 2012); *In re Tucker,* 2011 WL 5926757 (Bankr.D.Or.2011); *In re Borton,* 2011 WL 5439285 (Bankr.D.Idaho 2011); *In re Lindsey,* 453 B.R. 886 (Bankr.E.D.Tenn.2011); *In re Kamell,* 451 B.R. 505 (Bankr.C.D.Cal.2011); *In re Draiman,* 450 B.R. 777 (Bankr.N.D.Ill.2011); *In re Maharaj,* 449 B.R. 484 (Bankr.E.D.Va.2011); *In re Walsh,* 447 B.R. 45 (Bankr.D.Mass.2011); *In re Stephens,* 445 B.R. 816 (Bankr.S.D.Tex.2011); *In re Karlovich,* 456 B.R. 677 (Bankr.S.D.Cal.2010); *In re Steedley,* 2010 WL 3528599 (Bankr.S.D.Ga.2010); *In re Gelin,* 437 B.R. 435

(Bankr.M.D.Fla.2010); *In re Mullins,* 435 B.R. 352 (Bankr.W.D.Va.2010); *In re Gbadebo,* 431 B.R. 222 (Bankr.N.D.Cal.2010).

In reaching these decisions, courts have stated differing rationales as to why the absolute priority rule remains valid in individual Chapter 11 cases. Beginning with *Gbadebo,* several of the above courts found that the language of § 1129(b)(2)(B)(ii) preserved the absolute priority rule in unambiguous terms. *See, e.g., Tucker,* 2011 WL 5926757 at *2; *Draiman,* 450 B.R. at 821 (relying on the "plain meaning" of § 1129(b)(2)(B)(ii)); *Walsh,* 447 B.R. at 48–49 (quoting *Gbadebo,* 431 B.R. at 229); *Steedley,* 2010 WL 3528599 at *2; *Mullins,* 435 B.R. at 360; *Karlovich,* 456 B.R. at 681; *Borton,* 2011 WL 5439285 at *4.

After discussing the contrary holding of *Shat,* the *Gbadebo* court, in frequently quoted language, stated

> [n]otwithstanding the thorough and thoughtful analysis by the *Shat* court, the Court is unable to agree with its conclusion. If the Court were writing on a clean slate, it would view the language of § 1129(b)(2)(B)(ii) as unambiguous. The Court would read the phrase "included in the estate under section 1115" to be reasonably susceptible to only one meaning: i.e., added to the bankruptcy estate by § 1115.

431 B.R. at 229.

Lindsey, Kamell, and *Gelin,* however, held that the language of § 1129(b)(2)(B)(ii) was ambiguous. *Lindsey* in particular noted that, if the statute were not ambiguous, "there would be no split of authority and the arguments in favor of each position [would not be] so diverse." 453 B.R. at 903. And both *Gelin* and *Kamell* noted the lack of direct (or helpful) legislative history for BAPCPA on the alteration of § 1129(b)(2)(B)(ii). *See Gelin,* 437 B.R. at 441; *Kamell,* 451 B.R. at 509.

A common thread running through many of the "narrow view" cases is that if Congress had intended to abrogate the absolute priority rule for individual Chapter ***566** 11 debtors, it would have done so in a far less convoluted way, particularly in light of the well established place of the absolute priority rule in bankruptcy jurisprudence. *See, e.g., Kamell,* 451 B.R. at 509. These cases note that if Congress had indeed had such an intent, it could have simply added the words "except with respect to individuals" at the beginning of § 1129(b)(2)(B)(ii). *Karlovich,* 456 B.R. at 682.

Other "narrow view" cases take issue with the claim found in "broad view" cases that Congress eliminated the absolute priority rule for individuals to harmonize Chapter 11 with Chapter 13. As the *Karlovich* court observed, "if that were Congress' intent, Congress would simply have amended the statutory debt ceilings for Chapter 13 cases set out in 11 U.S.C. § 109(e), and either eliminate them altogether or set them much higher." 456 B.R. at 682. Indeed, the court in *Lindsey* reasoned that preservation of the absolute priority rule was more consistent with Congressional intent in enacting the BAPCPA. "[T]he narrow interpretation [is] more in line with the primary purpose of BAPCPA to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." 453 B.R. at 904 (quoting H.R. Rep No. 109–31, pt. 1, at 2) (internal quotation marks omitted); *see also Gbadebo,* 431 B.R. at 229 ("No one who reads BAPCPA as a whole can reasonably conclude that it was designed to enhance the individual debtor's 'fresh start.' ").

The bankruptcy court below took a position in line with other "narrow view" cases. After discussing the position taken by the "broad view" courts that Congress may have intended to harmonize Chapter 11's procedures for individual debtors with those of Chapter 13, the bankruptcy court quoted *Mullins* for the proposition that "that purpose would have been more straight-forwardly expressed by simply stating 'except that in a case in which the debtor is an individual, this provision shall not apply,' rather than by awkwardly referring to § 1115." *Maharaj,* 449 B.R. at 493 (citation omitted). The court further echoed the view taken by the Karlovich court that if Congress intended for Chapter 11 to operate the same as Chapter 13 in the case of an individual debtor, "Congress would have simply amended the statutory debt ceilings for Chapter 13 cases set out in 11 U.S.C. § 109(e), and either eliminate them altogether or make them much higher." *Id.*

II.

We now turn to the factual background of this case and the proceedings below. Ganess and Vena Maharaj (hereinafter "Debtors") are the owners and operators of an auto body repair shop in Chantilly, Virginia. Between 2006 and 2008, Debtors were the victims of an apparent fraud that left them saddled with considerable debt. Because their debts exceeded the limits for proceeding in bankruptcy under Chapter 13 of the Code, they filed a voluntary petition for relief under Chapter 11 in the U.S. Bankruptcy Court for the Eastern District of Virginia.[6]

Debtors have continued ***567** to own and operate their auto body shop as debtors in possession throughout these proceedings.

In 2010, Debtors filed a Chapter 11 Plan of Reorganization ("the Plan") with the bankruptcy court. The Debtors' Plan proposed segregating creditors into four classes: Class I represented a $3.5 million claim by Access Bank, secured by Debtors' real property; Class II consisted of a claim held by an automobile lender and secured by an interest in Debtors' vehicle; Class III contained most general unsecured claims; and Class IV consisted of Access Bank's unsecured claims. The Plan provided that Debtors would continue to own and operate their auto body business and use income from the business to pay the general unsecured claims of Class III creditors.

The Plan provided that Debtors would refinance their loan agreements with Access Bank, the sole holder of claims in Class I and IV. The automobile lender whose claim solely comprised Class II was unimpaired by the Plan, as the Plan provided that Debtors' daughter would continue to make payments pursuant to the terms of the automobile financing agreement. The holders of general unsecured claims found in Class III were impaired, with Debtors proposing to pay an estimated 1.7 cents on the dollar over a period of five years to those claims.

Ballots were distributed to the creditors impaired by the Plan. Access Bank, the sole holder of claims in Class I and Class IV, voted to approve the Plan. The Class II creditor did not vote. Discover Bank, the holder of a relatively small Class III unsecured claim, was the only other creditor to return a ballot, and voted to reject the Plan.

Nevertheless, Debtors sought to have the district court engage in a cram down to confirm the Plan over Discover Bank's dissent. While acknowledging that under the absolute priority rule, they would not be able to retain their auto body business, Debtors argued that the bankruptcy court should adopt the "broad view" of the BAPCPA amendments, and hold that the absolute priority rule no longer applied to individual Chapter 11 debtors. Debtors maintained that if they were forced to comply with the absolute priority rule, they would have to liquidate their business to effectuate a cram down. Without their business, however, they would lack a source of income, and be unable to make payments under the Plan.

The bankruptcy court was not persuaded by Debtors' arguments and agreed with those courts that have held that Congress did not intend to abrogate the absolute priority rule in the case of individual Chapter 11 debtors. Rather, the court adopted the "narrow view" that the BAPCPA amendments "merely allowed a debtor to keep post-petition earnings and other property acquired after the commencement of the case." *Maharaj*, 449 B.R. at 492 (citation omitted). Although the court expressed considerable sympathy for Debtors' plight and emphasized that neither the broad nor the narrow analysis is "free from doubt," *id.* at 493, the court entered an order denying confirmation of the Plan.

Debtors noted a timely appeal of the bankruptcy court's order. On its own motion, the bankruptcy court certified its order for direct appeal to this Court pursuant to 28 U.S.C. § 158(d)(2)(A)(i) (allowing a direct appeal when the judgment "involves ***568** a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance"). A panel of this Court then authorized Debtors' direct appeal. *See id.*

III.

[1] [2] [3] This appeal presents a question of statutory interpretation, which we review de novo. *E.E.O.C. v. Great Steaks, Inc.*, 667 F.3d 510, 519 (4th Cir.2012). As we have emphasized,

> "[t]he starting point for any issue of statutory interpretation ... is the language of the statute itself." *United States v. Bly*, 510 F.3d 453, 460 (4th Cir.2007). "In that regard, we must first determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute ... and our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* (omission in original) (quoting *United States v. Hayes*, 482 F.3d 749, 752 (4th Cir.2007), *rev'd on other grounds*, 555 U.S. 415, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009) (internal quotation marks omitted). "We determine the 'plainness or ambiguity of the statutory language ... by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' " *United States v. Thompson–Riviere*, 561 F.3d 345, 354–55 (4th Cir.2009) (omission in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997).

Ignacio v. United States, 674 F.3d 252, 254 (4th

Cir.2012). Furthermore, a statute is ambiguous if it "lends itself to more than one reasonable interpretation[.]" *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 248 (4th Cir.2004). The matter of statutory ambiguity is an important one because "[i]f the statute is unambiguous, our inquiry into Congress' intent is at an end, for if the language is plain and the statutory scheme is coherent and consistent, we need not inquire further." *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 191 (4th Cir.2011) (internal quotation marks and citation omitted).

[4] Accordingly, we begin our analysis by reference to the language of the BAPCPA, which we conclude is ambiguous because it is susceptible to more than one reasonable interpretation. We then look to the specific and broader context within which Congress enacted the BAPCPA, as well as a familiar canon of statutory construction, the presumption against implied repeal, and conclude that Congress did not intend to abrogate the absolute priority rule. Thus, notwithstanding the ambiguity of the plain language of the relevant BAPCPA provisions, when the 2005 BAPCPA amendments are viewed in light of the specific context in which they were enacted and the broader context of the BAPCPA and the field of bankruptcy law, we arrive at the conclusion that Congress did not intend to alter longstanding bankruptcy practice by effecting an implied repeal of the absolute priority rule for individual debtors proceeding under Chapter 11. Finally, we consider, and reject, appellants' public policy contentions as unfounded.

A.

To determine whether the statutes at issue here have a plain meaning, and are not ambiguous, we begin with the plain language of the provisions at issue, and note that we must read §§ 1115 and 1129(b)(2)(B)(ii) both individually and together. ***569** Specifically, we must determine the meaning of the Congressional language "property included in the estate under section 1115" found in § 1129(b)(2)(B)(ii) and "property of the estate includes, in addition to the property specified in section 541" found in § 1115.

There are two competing constructions of the "included in the estate" language. On one view, the phrase "included in" means the equivalent of "added to," since property of the estate has long been defined under § 541. On another view, however, this language "included in" means something closer to "referenced" in § 1115, in which case § 541 was merely "absorbed" and "superseded" into § 1115 for individual Chapter 11 debtors. *See, e.g., Kamell*, 451 B.R. at 509. On the face of the statute, either construction is plausible.

The same is true with respect to the "in addition to the property specified in section 541" language found in § 1115. Court–Assigned Amicus[7] in this case asks us to treat that language as a signpost, used only to note that § 541 property is already included in the bankruptcy estate, because it is set aside from the rest of § 1115 by a comma and a dash, indicating that it is "not essential" to the statute's meaning. Br. of Court–Assigned Amicus Counsel at 21. Stated differently, because § 541 independently includes all § 541 property in the estate, it would be a redundancy to "reinclude" that property through the § 1115 language. On the other hand, several bankruptcy courts have noted that a plausible reading of that language (coupled with the "included in the estate" language) indicates that § 541 operates in § 1115 as a subset of § 1115. *See, e.g., Friedman*, 466 B.R. at 482. By that construction, § 541 property, which is referenced by § 1115, is literally "property included in the estate under § 1115."

In light of the foregoing, we conclude that the language of § 1129(b)(2)(B)(ii) and § 1115 lends itself to more than one reasonable interpretation, and thus does not have a "plain" meaning. Perhaps the only thing that is clear and plain is that the courts that have considered this issue have arrived at plausible, competing arguments as to why their respective approaches are consistent with Congressional purpose in enacting BAPCPA. In short, the meaning of the BAPCPA amendments is anything but "plain." It is ambiguous. *See Friedman*, 466 B.R. at 485 (Jury, J., dissenting) ("[T]he meaning of the words is not plain. There can be more than one cogent interpretation of their meaning and intent[.]").

B.

As we discussed above, in addition to analyzing the plainness or ambiguity the statute's language, we must also look to the specific context in which that language is used, and the broader context of the statute as a whole. In doing so, we find persuasive the argument that the amendment to § 1129(b)(2)(B)(ii) preserved the absolute priority rule as it operated prior to the passage of BAPCPA.

> [P]rior to BAPCPA, property of the estate did not include post-petition acquired property and earnings for

> individuals and non-individuals alike. Hence, post-petition acquired property and earnings could be retained by a Chapter 11 debtor, individual and non-individual alike, without running afoul of the [absolute priority rule]. The addition of § 1115 potentially changed that ***570** by adding to the property of the estate of an individual post-petition acquired property and earnings. Without a corresponding change to § 1129(b)(2)(B)(ii), individual debtors could no longer retain post-petition acquired property and earnings if they wished to "cram down" a plan. By adding the language excepting the § 1115 property from the [absolute priority rule] of § 1129(b)(2)(B)(ii), Congress merely ensured that the [absolute priority rule] would be the same as it had been prior to BAPCPA and be the same for all Chapter 11 debtors. In other words, what Congress took from the individual debtor with its § 1115–hand, it returned for application of the [absolute priority rule] with its § 1129(b)(2)(B)(ii)-hand.

Karlovich, 456 B.R. 677, 681. In this respect we do not agree with the claim, advanced by some of the "broad view" courts, *e.g.*, *Tegeder*, 369 B.R. at 480, that a narrow reading of the amendments renders § 1115 trivial. To the contrary, the "narrow view" of § 1115 "brings post-petition acquired property into the estate, thereby extending the automatic stay in Chapter 11 cases to an individual debtor's postpetition earnings and subject[ing] those earnings to the various tests for confirmation of the Chapter 11 plan." *Gelin*, 437 B.R. at 442 (citation omitted). At the same time, § 1129(b)(2)(B)(ii) permits the debtor to retain that property during the Chapter 11 proceeding and not put it at risk in a cram down analysis.

In our view, the context demonstrates that Congress intended § 1115 to add property to the estate already established by § 541. This position is supported by the Sixth Circuit's holding in *In re Seafort*, 669 F.3d 662 (6th Cir.2012), in which the court interpreted § 1306(a)—the parallel Chapter 13 provision to § 1115.[8] The Sixth Circuit interpreted the statute as follows: "Section 1306(a) expressly incorporates § 541. Read together, § 541 fixes property of the estate as of the date of filing, while § 1306 adds to the 'property of the estate' property interests which arise post-petition." *Seafort*, 669 F.3d at 667.

C.

Strongly supporting our conclusion that the BAPCPA amendments did not abrogate the absolute priority rule is the Supreme Court's view, especially in the bankruptcy context, that implied repeal is strongly disfavored. Indeed, Debtors concede that adoption of their position would represent a significant departure from pre-BAPCPA bankruptcy practice. *See* Debtors' Opening Br. at 18 ("[E]limination of the absolute priority rule represents a significant change from pre-BAPCPA law.").

[5] As a general matter, " 'repeals by implication are not favored,' and therefore, 'the intention of the legislature to repeal must be clear and manifest.' " *The Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 338 (4th Cir.2007) (quoting *TVA v. Hill*, 437 U.S. 153, 189, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978)); *see Hui v. Castaneda*, —— U.S. ——, 130 S.Ct. 1845, 1853, 176 L.Ed.2d 703 (2010) ("As we have emphasized, ***571** repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." (quoting *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175, 129 S.Ct. 1436, 173 L.Ed.2d 333 (2009))).

[6] The canon against implied repeal is particularly strong in the field of bankruptcy law. In interpreting the Code, we are mindful that courts "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Hamilton v. Lanning*, —— U.S. ——, 130 S.Ct. 2464, 2467, 177 L.Ed.2d 23 (2010); *see also Hall v. United States*, —— U.S. ——, 132 S.Ct. 1882, 1890–91, 182 L.Ed.2d 840 (2012) (same) (citing *Cohen v. de la Cruz*, 523 U.S. 213, 221, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998)); *cf. Midlantic Nat. Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986) (citing *Swarts v. Hammer*, 194 U.S. 441, 444, 24 S.Ct. 695, 48 L.Ed. 1060 (1904)) ("If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt."); *Palmer v. Massachusetts*, 308 U.S. 79, 85, 60 S.Ct. 34, 84 L.Ed. 93 (1939) ("If this old and familiar power of the states was withdrawn when Congress gave district courts bankruptcy powers over

railroads, we ought to find language fitting for so drastic a change."); *In re Timbers of Inwood Forest Assocs., Ltd.*, 793 F.2d 1380, 1382 (5th Cir.1986) ("We think it unlikely that Congress would have adopted such a rule—entailing, as it does, major changes in the way in which a reorganization proceeding is conducted—without clear, unequivocal statements to that effect in the bankruptcy statute, or, at least, in its legislative history.").

In discussing whether Congress, in enacting the Chandler Act of 1938, intended to extend the jurisdiction of bankruptcy courts over certain mortgage lien enforcement actions, the Supreme Court worried that "[i]f [the statute] is read to extend the power of the bankruptcy court to the present situation, the four month period [governing the delivery of certain property to the bankruptcy court] will have acquired a new significance in bankruptcy law." *In re John M. Russell, Inc.*, 318 U.S. 515, 521, 63 S.Ct. 687, 87 L.Ed. 954 (1943). The Court continued: "[w]e cannot help but think that if Congress had set out to make such a major change, some clear and unambiguous indication of that purpose would appear." *Id.*

Below, we discuss the ambiguous language of the statute and sparse legislative history and conclude that Congress made no clear statement of repeal. We go on to consider, and reject, Debtors' and their amici's contention that Congress repealed the absolute priority rule with the intent of harmonizing Chapter 11 and Chapter 13 for individual debtors.

1.

Looking to the text of both §§ 1129(b)(2)(B)(ii) and 1115, we find no clear indication that Congress intended to abrogate the longstanding absolute priority rule for individual Chapter 11 debtors. As we discussed above, the language at issue is ambiguous, and we are unable to draw from it a clear Congressional intent to abrogate the rule. To the contrary, we are in agreement with those courts that have concluded that, if Congress intended to abrogate such a well-established rule of bankruptcy jurisprudence, it could have done so in a far less convoluted manner. ***572** As the *Kamell* court persuasively observed:

> [T]he [absolute priority rule] or something very like it has been acknowledged as far back as at least the 1890's. It has long been held that major changes to existing practice will not be inferred unless clearly mandated. Further, as observed by the U.S. Supreme Court when it upheld application of the [absolute priority rule] in *Norwest Bank Worthington v. Ahlers*, despite the newly enacted Chapter 12, "where, as here, Congress adopts a new law ... it normally can be presumed to have had knowledge of the interpretation given to the old law." From such awkward and convoluted language the court cannot infer that Congress truly intended such a wide and important change in individual Chapter 11 practice as discarding the [absolute priority rule].

451 B.R. at 509–10 (internal citations, alterations, and quotation marks omitted).[9]

Similarly, there is simply no clear indication from the language of either §§ 1129(b)(2)(B)(ii) or 1115 that Congress intended such a dramatic departure from pre-BAPCPA bankruptcy practice. Absent such a clear statement, we must refrain from adopting the "broad view" and cannot conclude that the absolute priority rule has been abrogated for individual debtors in a Chapter 11 proceeding.

Furthermore, there is nothing in the BAPCPA's legislative history that suggests that Congress intended to repeal the absolute priority rule. To say the least, that would be an odd occurrence for such a significant change. As many courts in a variety of contexts have noted, BAPCPA's legislative history is sparse. *See, e.g., In re Jass*, 340 B.R. 411, 416 (Bankr.D.Utah 2006) (internal citation and quotation marks omitted) (noting that "the Congressional record is largely silent because the only records available are little more than a gloss of the statutory language of BAPCPA"); *In re Davis*, 348 B.R. 449, 457 (Bankr.E.D.Mich.2006) (describing BAPCPA's legislative history as "scant"). A glean of the Congressional record reveals that there is simply no indication whatsoever that Congress intended to repeal the absolute priority rule for individual debtors.

The lack of any clear statement, either in the text of § 1129(b)(2)(B)(ii) or the legislative history of BAPCPA, is fatal to the "broad view" for at least two reasons. First, as Court–Assigned Amicus Counsel notes, Congress does discuss in the BAPCPA legislative history instances where BAPCPA changes longstanding bankruptcy practice. *See* H.R. Rep. 109–31(I) at *97. But in the section of the legislative history appearing beneath the label "Consumer Creditor Bankruptcy Protections" there is simply no mention whatsoever of abrogation of the absolute priority rule. This Congressional silence is telling.

Second, the "narrow view" is supported by the history of the absolute priority rule, as described at the outset of our opinion. When Congress amended the Act in 1952 to

eliminate the "fair and equitable" requirement, it clearly explained its actions in the accompanying legislative history. Not only did Congress amend the Act to state that plan confirmation shall not be refused because "the interest of a debtor ... will be preserved under the arrangement," *573 but Congress explained itself in the Congressional Record: "[T]he fair and equitable rule ... cannot realistically be applied[.]" *See* H.R. Rep. 82–2320. History shows that Congress knows how to abrogate the absolute priority rule, and it has not done so here.

2.

Nor are we persuaded by the contention, advanced by Debtors and their amici, that all the foregoing is overridden because abrogation of the absolute priority rule for individual Chapter 11 debtors is congruent with the Congressional goal of harmonizing Chapter 11 proceedings for individuals with those in Chapter 13. They note that prior to 2005, individual debtors had the option of proceeding under Chapter 7, in which case the debtor could retain certain exempt property and obtain a discharge of debt. BAPCPA, however, amended Chapter 7 to include a means test as a barrier for the use of Chapter 7 by some debtors. 11 U.S.C. § 707(b). Thus, debtors earning over a certain median income must either proceed under Chapter 11 or Chapter 13. Debtors who are unable to utilize Chapter 7, and whose debts exceed the limits found at § 109(e), must proceed under Chapter 11. According to the argument advanced by Debtors and their amici, the Congressional goal of forcing certain debtors who would otherwise proceed under Chapter 7 to repay their creditors from their disposable income would be thwarted if Chapter 11 was not a viable alternative for those ineligible for Chapter 13. Br. of Amicus NACBA at 14.

Putting aside for now the difficulty of assuming that Congress intended such a sea change without a clear statement either in the Code or the legislative history, we are still not persuaded that Congress intended to do so. First, we again encounter the problem that Congress could have effected the changes that Debtors argue it sought in a far less awkward and convoluted manner by simply raising the Chapter 13 debt limits and making additional individuals eligible to proceed under that chapter. *See Karlovich*, 456 B.R. at 682; *see also Mullins*, 435 B.R. at 360–61 ("[I]f it had been the intent of Congress to eliminate entirely the operation of the [absolute priority rule] from individual chapter 11 cases, it would have been much clearer, easier and more direct for it to have said simply in § 1129(b)(2)(B)(ii) 'except that in a case in which the debtor is an individual, this provision shall not apply' in lieu of the language which it did use....").

More importantly, however, we are not in accord with those courts adopting the "broad view" on the supposition that Congress was necessarily attempting to make Chapter 11 for individuals function in all respects more like Chapter 13. As the *Gbadebo* court observed:

> Each one of these new provisions appears designed to impose greater burdens on individual chapter 11 debtors' rights so as to ensure a greater payout to creditors. This was a frequently expressed overall purpose of BAPCPA: i.e., to ensure that debtors who can pay back a portion of their debts do so. No one who reads BAPCPA as a whole can reasonably conclude that it was designed to enhance the individual debtor's "fresh start."
>
> The *Shat* Court asserts that the [absolute priority rule] makes it virtually impossible for an individual Chapter 11 debtor to confirm a plan that does not provide for payment in full to the holders of unsecured claims. To the contrary, such a plan may be confirmed if the holders of such claims vote in favor of the plan. They are likely to do so if a reasonable dividend is proposed, and *574 they conclude that they will receive no dividend in a Chapter 7 case.

431 B.R. at 229–30. It may well be that Congress intended in some respects to harmonize the provisions of Chapter 11 as they relate to individual debtors with those of Chapter 13. However, neither the language of the statute nor the legislative history of BAPCPA compels such a conclusion, and much less so that Congress intended such a dramatic change in bankruptcy law as abrogation of the absolute priority rule.

D.

Because we conclude, based on our analysis of the specific and broader context of the BAPCPA, that Congress did not intend to repeal the absolute priority rule for individual debtors in Chapter 11 cases, we are not obligated to consider Debtors and amici's public policy arguments. *Cf. Hall*, 132 S.Ct. at 1893 ("[T]here may be compelling policy reasons for treating postpetition income tax liabilities as dischargeable. But if Congress intended that result, it did not so provide in the statute."). Even were public policy considerations pertinent to our decision, however, we do not agree that public policy necessarily supports Debtors' interpretation of the Code.

Moreover, in view of the strong arguments recited above supporting the "narrow view," relying on a vague public policy rationale would be the weakest of reeds upon which to reach a contrary conclusion.

Debtors' primary contention on appeal with respect to policy is that continued application of the absolute priority rule for individual Chapter 11 debtors makes it more difficult to confirm a plan of reorganization, contrary to the goals of Chapter 11. The rule, the argument goes, is antithetical to the aims of Chapter 11 because if a debtor who is a sole proprietor is forced to sell a business that is a sole source of income, the debtor will have insufficient means to fund payments under the plan.

First, as noted above, we do not agree that Congress, in enacting BAPCPA, necessarily intended to provide greater benefits to debtors as compared to protections for creditors. The second full paragraph of the House Report on BAPCPA describes the BAPCPA amendments in favor of the interests of creditors:

> the proposed reforms respond to many of the factors contributing to the increase in consumer bankruptcy filings, such as lack of personal financial accountability, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system. The heart of the bill's consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ("needs-based bankruptcy relief" or "means testing"), which is intended to ensure that debtors repay creditors the maximum they can afford. S. 256 also establishes new eligibility standards for consumer bankruptcy relief and includes provisions intended to deter serial and abusive bankruptcy filings. It substantially augments the responsibilities of those charged with administering consumer bankruptcy cases as well as those who counsel debtors with respect to obtaining such relief. In addition, the bill caps the amount of homestead equity a debtor may shield from creditors, under certain circumstances.

H.R.Rep. No. 109–31(I), *89. The next paragraph, discussing the additional consumer protections found in BAPCPA, is silent with respect to the absolute priority rule. It is for this reason that we agree with the *Gbadebo* court's assessment that "[n]o one who reads BAPCPA as a whole can reasonably conclude that it was designed to enhance the individual debtor's 'fresh start.' " 431 B.R. at 229.

*575 We also reject Debtors' argument that retention of the absolute priority rule for individual debtors makes confirmation impossible. The absolute priority rule unquestionably applied to individuals from 1978 to 2005, and during that time classes of unsecured creditors were always able to take advantage of the rule to veto confirmation of a plan where a debtor sought to retain property. *See Ahlers,* 485 U.S. at 202, 108 S.Ct. 963 ("There is little doubt that a reorganization plan in which respondents retain an equity interest in [their] farm is contrary to the [absolute priority rule]."). "Faced with statutory silence, we presume that Congress is aware of the legal context in which it is legislating." *Palisades Collections LLC v. Shorts,* 552 F.3d 327, 334 n. 4 (4th Cir.2008) (internal alterations omitted); *see Hall,* 132 S.Ct. at 1893 ("When Congress amends the bankruptcy laws, it does not write on a clean slate.") (quoting *Dewsnup v. Timm,* 502 U.S. 410, 419, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992)) (internal quotation marks omitted). Debtors would have us hold that Congress decided to address this "harsh" outcome in the most oblique way possible, and yet omit any mention of this remedy from the legislative history. That, we are not prepared to do.

Moreover, we remain unconvinced that the doom and gloom scenario presented by Debtors is an accurate picture of the state of bankruptcy law. Debtors assume that, if the absolute priority rule is left intact, consensual confirmation is virtually impossible. To the contrary, plan acceptance is still very much a possibility, even within the confines of the absolute priority rule. Debtors "may negotiate a consensual plan, pay higher dividends, pay dissenting classes in full, or comply with the [absolute priority rule] by contributing prepetition property." *Friedman,* 466 B.R. at 491 (Jury, J., dissenting) (citing *Kamell,* 451 B.R. at 512; *Gbadebo,* 431 B.R. at 229–30).

IV.

As the bankruptcy court below observed, no analysis of this issue is "free from doubt." However, for the reasons set forth above, we believe that Congress did not intend to abrogate the absolute priority rule for individual Chapter

11 debtors. The dramatic nature of such a departure from longstanding pre-BAPCPA law, the ambiguous language of the statutes, and the total lack of any indication in the legislative history of such an intent, lead us to conclude that Congress intended to and did preserve the absolute priority rule. Congress knows how to eliminate or partially abrogate the absolute priority rule; it has done so before, but did not do so again in BAPCPA.

Accordingly, we conclude that the absolute priority rule as it applies to individual debtors in Chapter 11 has not been abrogated by BAPCPA, and we affirm the bankruptcy court's order denying plan confirmation.

AFFIRMED

Parallel Citations

67 Collier Bankr.Cas.2d 1429, 56 Bankr.Ct.Dec. 166, Bankr. L. Rep. P 82,289

Footnotes

1 A debtor proceeding under Chapter 11 is termed a debtor in possession under 11 U.S.C. § 1101, but for simplicity we use the generic term "debtor" for purposes of this opinion.

2 Although Congress enacted federal bankruptcy laws in 1800, 1841, and 1867, the Bankruptcy Act of 1898, 30 Stat. 544, "marked the beginning of the era of permanent federal bankruptcy legislation." Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr.Inst. L.Rev. 5, 23 (1995). As the Supreme Court later stated, the purpose of the Act was to afford the emancipated debtor "[t]he new opportunity in life and the clear field for future effort." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934).

Congress passed several amendments to the Act after 1898, but it undertook a complete overhaul of the bankruptcy system with the passage of the Bankruptcy Reform Act of 1978; Pub.L. No. 95–598, 92 Stat. 2549, 2682 (1978). *See, e.g.*, Tabb, *History of the Bankruptcy Laws, supra* at 26–33. The Bankruptcy Reform Act replaced the (Bankruptcy) Act with the Code, culminating "almost a decade of study and debate about bankruptcy reform [.]" *Id.* at 32.

3 The absolute priority rule remained a fixture of Chapter X of the Act, which was designed for public companies. *See* Ralph A. Peeples, *Staying In: Chapter 11, Close Corporations and the Absolute Priority Rule*, 63 Am. Bankr.L.J. 65, 66 (1989).

4 The legislative history of the 1978 Act indicates that Congress perceived a need for the new Chapter 11 to have "the flexibility of Chapter XI ... and ... the essence of the public protection features [i.e. the absolute priority rule] of current Chapter X." H.R. Rep. No. 95–595 at 224 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963 at 6183. "The areas of greatest importance [in Chapter 11] are the financial standard for confirmation [later described as the absolute priority rule]; the court hearing on the plan and the report on the plan to creditors and stockholders; the right to propose a plan; and the appointment of a trustee." *Id.*

5 We adopt the terminology frequently used by commentators and courts writing on the post-BAPCPA status of the absolute priority rule. That is, the "broad view" represents a finding that the absolute priority rule has been abrogated by BAPCPA, while the "narrow view" holds no abrogation has occurred.

6 "Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $360,475 and noncontingent, liquidated, secured debts of less than $1,081,400, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $360,475 and noncontingent, liquidated, secured debts of less than $1,081,400 may be a debtor under chapter 13 of this title." 11 U.S.C. § 109(e) (footnotes omitted).

7 We thank court-assigned amicus counsel, the Appellate Litigation Program at Georgetown University Law Center, for its able representation of the bankruptcy court's position in this matter.

8 11 U.S.C. § 1306(a) provides:

> Property of the estate includes, in addition to the property specified in section 541 of this title—
> (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and
> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

9 In addition, as at least one bankruptcy court has noted, the "broad view" of the BAPCPA amendments may render certain parts of the Code superfluous. "The language 'in addition to the property specified in section 541' ... would render surplusage the words 'all property of the kind specified in section 541' in Section 1115(a)(1), if Section 1115 is interpreted to include all property of the

estate." *Stephens*, 445 B.R. at 820–21.

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466 B.R. 471
United States Bankruptcy Appellate Panel
of the Ninth Circuit.

In re Gregory A. FRIEDMAN and Judith Mercer–Friedman, Debtors.
Gregory A. Friedman; Judith Mercer–Friedman, Appellants,
v.
P+P, LLC, Appellee.

BAP Nos. AZ–11–1105–JuKiCl, AZ–11–1149–JuKiCl. | Bankruptcy No. 07–02135. | Argued and Submitted Jan. 18, 2012. | Decided March 19, 2012.

Synopsis
Background: Order was entered by the United States Bankruptcy Court for the District of Arizona, Philip H. Brandt, J., refusing to confirm plan proposed by individual Chapter 11 debtors on ground that plan, under which debtors would retain their equity interests in businesses, did not provide for a 100% distribution on unsecured claims. Debtors appealed.

[Holding:] The Bankruptcy Appellate Panel, Clarkson, J., held that, by its plain terms, "absolute priority" rule was inapplicable in Chapter 11 case filed by individual debtors.

Reversed and remanded.

Jury, J., dissented and filed opinion.

West Headnotes (11)

[1] **Bankruptcy**
⇐Effect; proceedings in converted case
Bankruptcy
⇐Finality

When bankruptcy court converted individual Chapter 11 case to case under Chapter 7, based on debtors' failure to file amended plan as directed by court, its prior order denying confirmation of earlier plan became a "final" order, from which appeal would lie. 28 U.S.C.A. § 158(a)(1).

[2] **Bankruptcy**
⇐Conclusions of law; de novo review

Whether the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) amendments had made "absolute priority" rule inapplicable in Chapter 11 case filed by individual debtors was question of statutory interpretation, that the Bankruptcy Appellate Panel (BAP) would review de novo. 11 U.S.C.A. §§ 1115, 1129(b)(2)(B)(ii).

8 Cases that cite this headnote

[3] **Bankruptcy**
⇐Preservation of priority

"Absolute priority" rule should be viewed through the lens of common sense and interpreted in such a way as to facilitate goals of the statute. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

[4] **Statutes**
⇐What constitutes ambiguity; how determined

Ambiguities do not necessarily arise simply because statutory terms may have alternate meanings.

[5] **Statutes**
⇐Context

Statutory words, all of them, should be read in

context with the sentence, the paragraph, and the entire text of statute.

[6] **Bankruptcy**
Construction and Operation

Interpretation of the Bankruptcy Code begins with statutory language itself, and if that language is plain and unambiguous, then court must enforce the Code according to its terms.

1 Cases that cite this headnote

[7] **Statutes**
Plain Language; Plain, Ordinary, or Common Meaning

As long as statutory scheme is coherent and consistent, there generally is no need for court to inquire beyond plain language of statute.

[8] **Bankruptcy**
Fairness and Equity; "Cram Down."
Bankruptcy
Confirmation; Objections

Burden of demonstrating that proposed Chapter 11 plan is "fair and equitable," as required for "cramdown," falls on plan proponent. 11 U.S.C.A. § 1129(b).

1 Cases that cite this headnote

[9] **Bankruptcy**
Unsecured creditors and equity holders, protection of

Simply put, Chapter 11 plan that does not pay unsecured creditors in full is nonetheless "fair and equitable," and can be "crammed down" over unsecured creditor's objection, as long as individual Chapter 11 debtor does not retain any property other than property included in expanded definition of "property of the estate" applicable in individual Chapter 11 cases. 11 U.S.C.A. §§ 1115, 1129(b)(2)(B)(ii).

3 Cases that cite this headnote

[10] **Bankruptcy**
Property of Estate in General
Bankruptcy
After-acquired property; proceeds; wages and earnings

By its plain terms, property included in expanded definition of "property of the estate" applicable in individual Chapter 11 case consists of all the property specified in general definition of "property of the estate," together with two types of property that debtor acquires postpetition, newly acquired property and income. 11 U.S.C.A. §§ 541(a), 1115.

2 Cases that cite this headnote

[11] **Bankruptcy**
Preservation of priority
Bankruptcy
Unsecured creditors and equity holders, protection of

By its plain terms, "absolute priority" rule was inapplicable in Chapter 11 case filed by individual debtors, such that debtors' retention of their equity interests in businesses that they started up prepetition did not prevent them from "cramming down" plan that would result in less than a 100% distribution on unsecured claims. 11 U.S.C.A. §§ 1115, 1129(b)(2)(B)(ii).

3 Cases that cite this headnote

***472** Appeal from the United States Bankruptcy Court for the District of Arizona, Honorable Philip H. Brandt, Bankruptcy Judge, Presiding, Honorable James M.

Marlar, Chief Bankruptcy Judge, Presiding.*

Attorneys and Law Firms

Scott D. Gibson, Esq., of Gibson, Nakamura & Green, PLLC, argued for appellants Gregory A. Friedman and Judith Mercer–Friedman. Daniel Mark Press, Esq., argued for National Association of Consumer Bankruptcy Attorneys, as amicus curiae, by special leave of the Panel, supporting the appellants' position.

Before: JURY, KIRSCHER, and CLARKSON,** Bankruptcy Judges.

Opinion

***473 OPINION**

CLARKSON, Bankruptcy Judge.

Chapter 11 debtors, Gregory Friedman ("Gregory") and Judith Mercer–Friedman ("Judith") (collectively, the "Friedmans" or "Debtors"), appeal the bankruptcy court's orders denying confirmation of their second amended plan (BAP No. 11–1105) and converting their case to chapter 7 (BAP No. 11–1149).

These consolidated appeals raise the issue whether the absolute priority rule embodied in § 1129(b)(2)(B)(ii)[1] applies to individual chapter 11 debtors. We granted leave to the National Association of Consumer Bankruptcy Attorneys ("NACBA") to file an amicus brief in support of Debtors' position that the rule does not apply to them. Both the Appellants and the NACBA participated in the oral arguments before us. No party has participated as an appellee in this appeal. For the reasons stated, we hold that the absolute priority rule does not apply in individual debtor chapter 11 cases and REVERSE the bankruptcy court's order denying confirmation of their second amended plan (BAP No. 11–1105). We also REVERSE the bankruptcy court's order converting the Debtors' chapter 11 case to chapter 7 (BAP No. 11–1149). We REMAND these matters to the bankruptcy court for further action consistent with this opinion.

I. FACTS[2]

The Friedmans are technology entrepreneurs who founded and operated several internet-related businesses. Several of those businesses suffered financial difficulties and had filed for protection under chapter 11 of the United States Bankruptcy Code. Eventually, however, those businesses were unable to reorganize and their bankruptcy cases were dismissed, leaving the Friedmans with significant tax liabilities and unpaid secured and unsecured business debts.

A. *The Prior Corporations' Bankruptcy Events*

The Friedmans founded Netbeam, Inc. ("Netbeam"), a company that provided high speed wireless internet services to customers in Summit County, Colorado. On July 10, 2001, Netbeam filed a voluntary petition for chapter 11 relief in the Colorado bankruptcy court (Bankruptcy Case No. 01–19986). Two days prior to Netbeam's filing, the Friedmans formed Peak Speed Communications, Inc. ("Peak"). Ten days after Netbeam's filing, the Friedmans, as officers of Peak, entered into an Operating and Merger Agreement between Netbeam and Peak. Although this agreement was not disclosed to the bankruptcy court, the Friedmans implemented its terms. At some point, the undisclosed ***474** agreement surfaced and an examiner was appointed.

Netbeam eventually confirmed a plan which effectively merged Netbeam and Peak. In accordance with the confirmed plan, Peak, the successor, closed a loan from First United Bank (the "Bank") in the approximate amount of $600,000. P+P, LLC ("P+P") pledged $200,000 to guarantee the loan. The loan was secured by all of Peak's assets and a second deed of trust on the Friedman's real property located in Breckenridge, Colorado ("the Breckenridge Property"), which they used as a rental property and a part-time residence.

During Netbeam's bankruptcy, significant amounts of employment taxes went unpaid. Eventually, Netbeam ceased making its quarterly payments to the U.S. Trustee and was unable to make other payments required under the plan. On August 22, 2006, the bankruptcy court dismissed Netbeam's case.

A few years earlier, on May 3, 2004, Peak filed a chapter 11 petition in the Colorado bankruptcy court (Bankruptcy Case No. 04–19246). During the course of Peak's bankruptcy, P+P purchased the Bank's loan to Peak. In the process, P+P stepped into the Bank's shoes with respect to the Bank's security interest in virtually all of Peak's assets and the second deed of trust on the Breckenridge Property. P+P then acquired and later sold Peak's assets.

In 2007, P+P commenced an action in the Colorado state court against the Friedmans, seeking a declaration that it had a valid lien on the Breckenridge Property and the right to foreclose. The state court entered a default judgment in favor of P+P which began foreclosure

proceedings on the Breckenridge Property.

B. *The Friedmans' Bankruptcy Events*

On October 27, 2007, the Friedmans filed their chapter 11 petition in the Arizona bankruptcy court, thus staying the foreclosure.[3] Their Schedule A valued the Breckenridge Property at $750,000 and Schedule D showed the property was overencumbered with three liens. Washington Mutual Home Loans ("Washington Mutual") had a first lien in the amount of $578,000. P+P had a second lien in the amount of $556,000. Finally, a painting company held a third lien in the amount of $2,500.

Debtors' Amended Schedule B showed personal property consisting of household goods and vehicles. It also showed that Debtors (1) were the sole members in AZCI NET, LLC ("AZCI"), a wireless internet service provider located in Arizona City, Arizona; (2) owned 100% of the stock of Blue River Networks, Inc. ("Blue River"), a technology and management consulting and support company located in Arizona City, Arizona; (3) were partners in a family trust named JGF Family LLP, the purposes of which were resort rental management services and family trust; and (4) held stock or had an interest in Peak, a wireless broadband engineering company located in Breckenridge, Colorado. Debtors assigned a zero value to their interests in all these entities.

Schedule E showed priority unsecured debt consisting of substantial amounts owed to the Colorado Department of Revenue and the Internal Revenue Service for employment taxes by Netbeam or Peak, and for personal income taxes. Schedule F showed debt owed on equipment leases and vehicles for Netbeam. Those amounts, along with credit card and other ***475** miscellaneous unsecured debt, totaled $359,000.

Finally, Debtors' Amended Schedule I showed combined average monthly income as $15,094. Of that amount, $9,000 was attributed to income from their businesses and $3,000 was attributed to income from rentals on the Breckenridge Property. Amended Schedule I also reflected that both debtors were collecting social security income and Gregory was receiving a pension from IBM of $594 a month. Amended Schedule J showed average monthly expenses of $13,698, which included $6,730.18 towards the debt on the Breckenridge Property. Debtors' monthly net income was reflected at $1,395.84.

P+P immediately moved for relief from stay on the Breckenridge Property. Washington Mutual later filed a similar motion.

C. *Debtors' Initial Plan*

Debtors' initial plan provided for, among other things, payments to satisfy their mortgage and other debt related to the Breckenridge Property, with the exception of the claims of P+P. Debtors stated their belief that they had paid P+P in full.[4] Under the heading "Implementation of the Plan", the plan provided:

> Upon confirmation, all of the assets of the Debtors' estate shall be vested in the Debtors and the Debtors shall continue to work in their consulting and business management company. Debtors shall pay all expenses of their personal life, including taxes and insurance costs, on a current basis. The Debtors' disposable income shall be deposited into the Plan Fund and distributed as provided herein.

D. *Debtors' First Amended Plan*

After a status conference on this plan, Debtors filed a first amended plan which provided for P+P's claim in the event the state court default judgment against them was upheld. The plan also provided that to the extent P+P's claim was unsecured, its claim would be paid pro rata with the other general unsecured claims. Debtors proposed to pay $634 per month to unsecured creditors.[5]

Before any hearing took place on Debtors' first amended plan, the bankruptcy court granted P+P's motion for relief from stay on the Breckenridge Property by order entered on September 12, 2008. The bankruptcy court later granted Washington Mutual's relief from stay motion on the Breckenridge Property by order entered on April 9, 2009. Eventually, Washington Mutual foreclosed on the Breckenridge Property. Due to the collapse of the real estate market, P+P's secured claim against the Breckenridge property became entirely unsecured.

E. *Debtors' Second Amended Plan*

In early February 2010, Debtors filed their second amended plan. For confirmation purposes, this plan only needed to address the priority and secured claims of the taxing authorities and Debtors' general unsecured claims, including the claims of P+P.[6] Debtors' proposed statement of implementation ***476** of the plan remained the same; i.e., upon confirmation, their assets, including their equity interests in their businesses, would revest in Debtors and they would continue to work and contribute all their disposable income to the plan. The proposed payment of $634 a month to unsecured creditors was not

altered.

According to Debtors' second amended disclosure statement, their combined monthly income went from $15,094 to $6,297. The $6,297 figure consisted of $2,000 income from Debtors' businesses with the remaining amounts attributed to Gregory's IBM pension and Debtors' combined social security income.

P+P, Debtors' largest unsecured creditor, voted against the second amended plan and filed an objection[7] on the grounds that it (1) violated the absolute priority rule because Debtors' plan left their ownership interests in "valuable" property untouched while paying unsecured creditors only $634 a month; (2) violated the best interests of creditors' test under § 1129(a)(7) because Debtors had not properly disclosed the value of their business interests in AZCI and Blue River; and (3) was filed in bad faith. In connection with its objection, P+P offered the opinion of an expert that AZCI had a value of $605,000 to $662,500 as of the date of the petition.[8]

F. *The Debtor's Modification to their Second Amended Plan*

On June 3, 2010, Debtors filed a modification to their second amended plan. The modification increased the payments to unsecured creditors on a monthly basis following the effective date, based on anticipated growth in Debtors' business ventures.

The bankruptcy court conducted a hearing on Debtors' second amended plan and only addressed the applicability of the absolute priority rule found in § 1129(b)(2)(B)(ii). The bankruptcy court, recognizing the split of authority throughout the nation, concluded that the absolute priority rule applied to individual chapter 11 plans. On February 17, 2011, the bankruptcy court entered the order denying confirmation of Debtors' second amended plan. In the order, Debtors were instructed to filed a third amended plan and disclosure statement by March 1, 2011.

[1] Debtors did not further amend their plan. Instead, they filed an appeal of the order denying confirmation of their second amended plan. On March 7, 2011, the bankruptcy court conducted a show cause hearing as to why Debtors' case should not be dismissed or converted. The court issued a Memorandum Decision and converted the case to chapter 7, finding that (1) Debtors failed to comply with an *477 order of the court, (2) there was an absence of a reasonable likelihood of rehabilitation, and (3) Debtors failed to file a disclosure statement, or file or confirm a plan within the time fixed by order of the court, § 1112(b)(4)(J). The bankruptcy court entered the order converting Debtors' case on March 11, 2011.[9]

Debtors moved for a stay pending appeal. On March 29, 2011, the bankruptcy court granted the motion in a Memorandum Decision, staying the proceedings pending the adjudication of this appeal. The bankruptcy court again recognized the split of authority on the issue of whether the absolute priority rule applied to individual chapter 11 debtors and, therefore, found Debtors had a chance of success on appeal. In addition, the bankruptcy court found that Debtors would suffer irreparable injury if no stay was granted because their businesses could be sold in chapter 7, leaving them without the ability to earn a living. The bankruptcy court also found that the harm to the IRS and P+P was merely delay. Finally, the bankruptcy court stated that as a policy question, the public interest would be advanced by obtaining a ruling from this Panel on the applicability of the absolute priority rule in an individual chapter 11 case. The bankruptcy court entered the order staying the conversion of Debtors' case on March 29, 2011. Despite the stay, Debtors received their chapter 7 discharge on September 22, 2011.[10]

II. JURISDICTION

The bankruptcy court had jurisdiction over this proceeding under 28 U.S.C. §§ 1334 and 157(b)(2)(L). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUE

Does the absolute priority rule in § 1129(b)(2)(B)(ii) apply to chapter 11 debtors who are individuals?[11]

IV. STANDARD OF REVIEW

[2] This appeal raises a statutory interpretation question which we review de novo. *AMB Prop., L.P. v. Official Creditors (In re AB Liquidating Corp.)*, 416 F.3d 961, 963 (9th Cir.2005). A de novo review allows us to examine the interpretation *478 and application of the relevant statutes independent of the bankruptcy court's determination.

V. DISCUSSION

A. *The Absolute Priority Rule*

The absolute priority rule, and issues within its realm, are significant mainstay topics for most bankruptcy practitioners and jurists of the last quarter of the 20th and early 21st centuries. Once only held closely in the hearts and minds of commercial and business reorganization counsel, since the passage of the 2005 BAPCPA[12] the absolute priority rule, as amended, has now crossed over to the general consumer bankruptcy practice world.[13]

The absolute priority rule initially was a judicially created concept, arising from a series of early twentieth-century railroad cases including *N. Pac. Ry. Co. v. Boyd,* 228 U.S. 482, 508, 33 S.Ct. 554, 57 L.Ed. 931 (1913). The U.S. Supreme Court adopted the absolute priority rule to prevent deals between senior creditors and equity holders that would impose unfair terms on unsecured creditors.

An interesting feature of the absolute priority rule, even before enactment of the BAPCPA amendment to § 1129(b)(2)(B)(ii)[14], is that the rule has never been absolute. For instance, the U.S. Supreme Court in *Kansas City Terminal Ry. Co. v. Cent. Union Trust Co.,* 271 U.S. 445, 455, 46 S.Ct. 549, 70 L.Ed. 1028 (1926), albeit in dicta, recognized that a new, substantial, and necessary contribution could allow an old equity holder to retain an interest in the reorganized debtor. This contribution was commonly called the "new value corollary." Later, in *Case v. Los Angeles Lumber Products Co.,* 308 U.S. 106, 60 S.Ct. 1, 84 L.Ed. 110 (1939), the U.S. Supreme Court considered an offer by shareholders to continue their participation in the company's business after confirmation of the plan of reorganization, which finally confirmed and clarified the new value corollary.[15]

The absolute priority rule (as it pertained to unsecured creditors) was eventually codified in 1978, within § 1129(b)(2)(B)(ii). Interestingly, and despite years of case law by that time, no reference was made to "absolute priority" or "new value" in that codification. The words "absolute priority" or "new value" do not appear anywhere in § 1129.

Other nuances with respect to the absolute priority rule developed following its codification, with courts finding other "exceptions" besides the new value corollary, ***479** that do not appear in the text of the statute. For instance, in 2001, the 9th Circuit Court of Appeals in *Security Farms v. Gen. Teamsters, Warehousemen and Helpers Union, Local 890 (In re Gen. Teamsters, Warehousemen & Helpers Union, Local 890),* 265 F.3d 869, 874 (9th Cir.2001), found that the absolute priority rule did not apply to organizations where their members did not hold "equity interests" in the entity (even though the term "equity interest" does not appear in § 1129(b)(2)(B)(ii)).

In that case, the Ninth Circuit, relying on the Seventh Circuit's case of *In re Wabash Valley Power Ass'n,* 72 F.3d 1305, 1315 (7th Cir.1995), agreed that the term "interest" in § 1129(b)(2)(B)(ii) meant equity interest in a for-profit corporation. These cases undertook a historical review of the absolute priority rule, delving into the fact that the "absolute priority rule" had (at least) one specific mission—to undermine corporate shareholders' advantages over unsecured creditors.

Prior to the enactment of BAPCPA, an individual debtor's plan needed to meet the requirements of the absolute priority rule.[16] "Interest" as it appears in § 1129(b)(2)(B)(ii) has various meanings, and the individual debtor's ownership rights in estate property, as that property is defined from time to time by the Bankruptcy Code and judicial interpretations, are perfectly harmonized within the absolute priority rule, both prior to and after BAPCPA's enactment.

[3] [4] [5] Two points are to be drawn here. First, courts have always reviewed § 1129(b)(2)(B)(ii) through the lens of common sense and have approached legislative interpretation in a way to facilitate the goals of the statute. Second, simply because words may have alternative meanings, ambiguities do not necessarily arise. The words, all of them, should be read in context with the sentence, the paragraph, and the entire text of the statute (in this case, the Bankruptcy Code). As in the case of "interest" in § 1129(b)(2)(B)(ii), words have various meanings depending on their underlying required usages, but no real reasonable ambiguity is created simply because of those various usages.

B. *The Methodology of Statutory Interpretation*

How do we endeavor to understand the parts of §§ 1129(b)(2)(B)(ii) and 1115 as they relate to the applicability of the absolute priority rule to individual chapter 11 debtor plans? We are first guided by primary principles.

[6] "The interpretation of the Bankruptcy Code first begins with the language itself. *See In re Griffith,* 206 F.3d 1389, 1393 (11th Cir.2000); *United States v. Ron Pair Enters.,* 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). If the language is plain and unambiguous, then the Court must enforce the Bankruptcy Code according to its terms. *Id.*" *In re Gosman,* 282 B.R. 45, 48 (Bankr.S.D.Fla.2002).

The U.S. Supreme Court in *Lamie v. U.S. Trustee,* addressed this point directly:

> The starting point in discerning congressional intent is the existing statutory text, *see Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999), and not the predecessor statutes. It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters* ***480** *Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989), in turn quoting *Caminetti v. United States,* 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917)).

Lamie v. U.S. Trustee, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004).

[7] In interpreting the Bankruptcy Code, the U.S. Supreme Court has held "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." *BFP v. Resolution Trust Corp.,* 511 U.S. 531, 566, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994).

Thus, we look to the statutory language at issue.

C. *The Plain Meaning of the Absolute Priority Provisions*

The requirements for confirmation of a plan of reorganization are generally set out in § 1129, which provides two separate and distinct paths for successful confirmation. The first path is mapped out in the sixteen paragraphs of § 1129(a). If a plan proponent can demonstrate to the satisfaction of the court that each and every requirement contained in paragraphs (1) through (16) of § 1129(a) has been met, a plan can be confirmed. Of particular note is the requirement of obtaining the consent of each class of creditor as required by paragraph (8) of § 1129(a).

[8] A second path to confirmation is established pursuant to § 1129(b), where absent consent of each class of creditor (as required by § 1129(a)(8)), a plan may still be confirmed by the bankruptcy court if (1) the fifteen remaining paragraphs of § 1129(a) are met, and (2) the plan is, among other things, "fair and equitable." This nonconsensual method of confirmation is referred to as "cramdown."[17] The burden of demonstrating that the plan is "fair and equitable" in order to obtain confirmation falls on the plan proponent.

The Bankruptcy Code provides guidance as to whether a plan is "fair and equitable" as to unsecured creditors. Section 1129(b)(2)(B)(ii), known as the "absolute priority rule", provides that a plan is "fair and equitable" if:

> (B) With respect to a class of unsecured claims—
>
> (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.*

11 U.S.C. § 1129(b)(2)(B)(ii) (emphasis added).[18]

[9] Simply put, a plan not paying an unsecured creditor in full is nevertheless "fair and equitable" (and can be crammed down over the unsecured creditor's objections), *so long as an individual debtor does not retain property except property included in the bankruptcy estate under § 1115.*

***481** Therefore, one must now consider the companion section to § 1129(b)(2)(B)(ii), § 1115, to determine what property was included in the bankruptcy estate when the debtor is an individual.

[10] We believe that § 1115[19] plainly identifies an individual chapter 11 debtor's estate as

> (1) Property specified in § 541 (i.e., "property of the estate includes, *in addition to the property specified in section 541* ") (emphasis added);
>
> (2) All property of the kind specified in § 541 that the (individual) debtor acquires after the commencement (but before the closure, dismissal or conversion) of the case; and
>
> (3) 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.

Application of "plain-meaning analysis" has been set out in the recent 9th Circuit BAP decision *Barns v. Belice (In re Belice),* 461 B.R. 564 (9th Cir. BAP 2011). In that

opinion, the BAP was critical of the bankruptcy court's application of the plain-meaning analysis.

> Without considering the relationship of the phrase in question to the contextual statutory scheme or the logical impact of their broad interpretation on that scheme, they improperly emphasize one meaning of the words to the exclusion of all other considerations. *See Corley v. United States,* [556 U.S. 303] 129 S.Ct. 1558, 1567 n. 5, 173 L.Ed.2d 443 (2009).

Belice at 577.

With this guidance in mind, we consider here, and later in our opinion, our plain-meaning interpretation of the language contained in § 1129(b)(2)(B)(ii) and § 1115 within the contextual statutory scheme and logic of plan confirmation requirements of Chapter 11.

First, we observe that there are no conflicting provisions within Chapter 11 relative to our view that the absolute priority rule does not apply in individual chapter 11 cases. We find no anomalies, inconsistencies or conflicts created by this interpretation. More importantly, we find significant contextual concordance with the other requirements for plan confirmation, including those previously described, including but not limited to (1) the new requirement for dedication of all of debtor's disposable income for five years, (2) the straight-forward best interest of creditors test, and (3) the delay of issuance of discharge until the plan has been fully consummated. Including the § 541 property within the universe of property contained in § 1115, as we believe a plain-meaning interpretation requires, does no violence to the logical impact of the reorganization process or scheme established in chapter 11. Indeed, especially combined with the new additional ***482** requirement of five years of debtor's disposable income, it is illogical to thereafter remove the debtor's means of production of debtor's disposable income by maintaining the absolute priority rule in an individual's case.

The dissent argues that the rule of statutory construction guides that, where possible, one must avoid rendering any parts superfluous. (Citing *TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001)). The dissent further argues that "the broad construction the Panel advocates causes parts of the Code to become superfluous. For example, § 103(a) makes § 541, which states that an estate is created upon the filing of a petition, applicable in chapter 11 cases. Section 103(a) was not amended by BAPCPA. But the broad view makes § 103(a) inapplicable in individual chapter 11's." However, the argument proves too much and is incongruent with the reality of the Bankruptcy Code. Section 1115 mirrors § 1306 which was part of the 1978 Code concurrent with enactment of § 103(a). Nobody, ever, has argued that § 1306 made § 103(a) surplusage, and there is no reason for this Panel to do so with respect to § 1115. To do otherwise would create an indefensible discontinuity between § 1115 and § 1306.

Section 1115's identification of estate property consists of the property contained in § 541 *and* the two post-petition acquired assets—newly acquired property and income. The so-called disputes over what "included" means in § 1129(b)(2)(B)(ii) and "in addition to" in § 1115 arise from misinterpretation of the words. "Included" is not a word of limitation.[20] To limit the scope of estate property in §§ 1129 and 1115 would require the statute to read "included, except for the property set out in Section 541" (in the case of § 1129(b)(2)(B)(ii)), and "in addition to, but not inclusive of the property described in Section 541" (in the case of § 1115).

[11] A plain reading of §§ 1129(b)(2)(B)(ii) and 1115 together mandates that the absolute priority rule is not applicable in individual chapter 11 debtor cases. *Accord SPCP Group, LLC v. Biggins,* 465 B.R. 316, 320–22 (M.D.Fla.2011) (declined to follow *In re Gelin,* 437 B.R. 435 (Bankr.M.D.Fla.2010), which followed the narrow view based on an ambiguity analysis); *In re Tegeder,* 369 B.R. 477 (Bankr.D.Neb.2007) (following a plain meaning analysis); *In re Shat,* 424 B.R. 854 (Bankr.D.Nev.2010) (following the broad view based upon an ambiguity analysis).

D. *Analysis of Legislative History, Congressional Intent, or other Speculations*

Much time has been spent by jurists and scholars on the legislative history, congressional intent, and other speculations surrounding the applicability of the absolute priority rule in individual debtor chapter 11 cases. We have reviewed a myriad of lower court decisions and articles replete with seemingly endless analyses of possible congressional intentions and various outcomes depending on the "narrow" or "broad" view adopted by the author.

While certainly not exhaustive in scope, these decisions and articles have undertaken a titanic effort to frame their outcomes on what may be a very weak universe of ***483**

original resources. However the Bankruptcy Code, as the main resource, does provide significant assistance. For instance, Congress in adopting BAPCPA's individual debtor chapter 11 provisions borrowed provisions from chapter 13. Section 1123(a)(8) was added to the Bankruptcy Code, providing that, to be confirmable, an individual debtor's plan must provide for the payment to creditors of all or such portion of earnings from personal services or other future income of the debtor—resembling § 1322(a)(1). Section 1129(a)(15) was added, giving dissenting unsecured creditors who are not being fully paid under the plan absolute veto power over the plan unless the debtor contributes an amount equal to all of his projected disposable income over the longer of five years or the plan payment period—resembling § 1325(b). Section 1141(d)(5)(A) was added, delaying the discharge until completion of all plan payments—resembling § 1328(a). Section 1141(d)(5)(B) was added, permitting a discharge for cause before all payments are completed—resembling the hardship discharge of § 1328(b). And, Section 1127(e) was added, permitting modification of a plan even after substantial consummation—resembling § 1329(a).

Finally, a plain reading of §§ 1129 and 1115 demonstrates that, just as in chapter 13, to confirm a plan does not require the application of an absolute priority rule. As in Chapter 13, the disposable income requirement insures that the individual debtor is required to dedicate all of his or her disposable income over a designated time period (three or five years in Chapter 13, at least five years in chapter 11) to plan payments directed to unsecured creditors.

When decisions have gone further than exercising a plain reading of the statute, they have entered into speculative analyses that are fatally flawed.

As an example, the bankruptcy court in *In re Gbadebo,* in determining that the absolute priority rule continued to exist in individual debtor chapter 11 cases, found a so-called "anomaly" that made "no sense." The bankruptcy court said:

> Finally, if §§ 1129(b)(2)(B)(ii) and 1115 are read to eliminate the "absolute priority" rule for individual chapter 11 debtors, the Court is faced with a procedural anomaly. If the plan proposes to pay them anything, the debtor is required to send them a ballot. Yet, their vote can be ignored. This makes no sense. The Court reads §§ 1129(b)(2)(B)(ii) and 1115 to eliminate the "absolute priority" rule only as to an individual chapter 11 debtor's post-petition property. It bases this conclusion on both the language of the statute, both in isolation and viewed in the context of the Bankruptcy Code as a whole. It finds this reading most consistent with the intent of Congress as expressed in the legislative history.

In re Gbadebo, 431 B.R. 222, 230 (Bankr.N.D.Cal.2010).

The above passage challenges the abrogation of the absolute priority rule in individual cases (with respect to pre-BAPCPA § 541 estate property) based on an apparent procedural anomaly that the debtor must solicit votes but can ignore them. No anomaly exists; those votes are not ignored. The analysis is incomplete. If the class votes yes, § 1129(a)(8) is satisfied. If the class votes no, its vote is not ignored. If the plan provides distributions of property equal to the allowed amount of the unsecured claim, both §§ 1129(a)(15)(A) and 1129(b)(2)(B)(i) are met, and the court may confirm the plan if it is fair and equitable under § 1129(b)(1). If the plan provides for less than satisfaction in full on a present value basis and the impaired class votes no, then it may be ***484** confirmed as long as § 1129(a)(15)(B) and (b)(1) are satisfied. In essence, Congress affirmatively amended the law so that § 1129(a)(15)(B) would trump § 1129(b)(2)(B)(ii) in individual debtor cases. Thus, § 1129(b)(2)(B)(ii)'s proscription on the retention of ownership interests by an individual debtor is not an aspect of the absolute priority rule in individual debtor chapter 11 cases. In this instance, recourse to legislative history and spirited analytics is unnecessary in light of the plain meaning of this particular statute.

The Dissent disagrees with the Panel's point, stating that for one reason or another, creditors may vote against a plan without filing an objection. However, clearly, the drafters of § 1129(a)(15) tried to create symmetry between chapters 11 and 13 for individual debtors. Of course in chapter 13, unsecured creditors do not get to vote on the plan. They can only object to confirmation under § 1325(b)(1). The BAPCPA amendment to § 1129(a)(15) mirrors this treatment in chapter 11 where creditors holding claims in impaired classes have the right to vote on the plan as well as to object to confirmation. The drafter's failure to anticipate this nuance does not provide a reason to destroy the symmetry between chapters 11 and 13. The possibility that all unsecured creditors voting against the plan would simultaneously

fail to object to confirmation is a theoretical figment squarely opposed to reality. We will not interpret a statute to destroy a sensible interpretation based on such a conjecture.

VI. CONCLUSION

We hold that the absolute priority rule does not apply in individual debtor chapter 11 cases for the reasons stated above. Therefore, we REVERSE the orders denying confirmation of Debtors' second amended plan and converting their case to chapter 7, and REMAND the matter to the bankruptcy court for further action consistent with this opinion.

JURY, Bankruptcy Judge, dissenting:

Addressing an issue that has confronted and confounded innumerable bankruptcy courts around the country and resulted in a significant number of published opinions from those courts which split demonstratively in their results, the Panel rules that the words of the post-BAPCPA statutes about the absolute priority rule in individual chapter 11's are "plain" and subject to only one simple reading. The Panel premises this simplistic outcome on its conviction that Congress intended to align individual chapter 11's almost entirely with chapter 13's because of some alterations in the Bankruptcy Code by BAPCPA which made the two previously divergent proceedings more similar.

I disagree—not only with the holding, but also with the underlying assumptions which drive the decision. The majority's analysis would have us conclude that the definition of property of the estate found in § 541 and made applicable to all chapters by § 103(a) has no meaning in individual chapter 11's. They would further have us conclude that one of the significant differences between chapter 11's and 13's—that classes of creditors are entitled to vote for or against confirmation in chapter 11's whereas no class vote exists in chapter 13's—has little or no importance in an individual chapter 11. Finally, their narrow reading of the meaning of the terms "included" and "in addition to" by focusing solely on §§ 1129(b)(2)(B)(ii) and 1115 causes them to overlook one of the key tenets of statutory construction: that we are to read the statute as a cohesive whole, giving all sections their due place and not creating an island of words that ***485** floats independently of the integrated continent. Taken in this context the meaning of the words is not plain. There can be more than one cogent interpretation of their meaning and intent and I believe they do not write the absolute priority rule out of individual chapter 11's.

In addition to my disagreement with the statutory construction elements of the majority decision, I believe my colleagues have lost sight of two important policies—one of which has been an underpinning of chapter 11 determinations since the enactment of the Code in 1978 and the other of which was the primary purpose of the BAPCPA amendments in 2005. The long standing purpose behind chapter 11, as stated by the Supreme Court, is to strike a balance between a debtor's interest in reorganizing and restructuring its debts and the creditors' interest in maximizing the value of the bankruptcy estate. *See Toibb v. Radloff,* 501 U.S. 157, 163, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991). The majority's approach loses sight of this balance, allowing the reorganized individual debtor to retain all his or her assets while disenfranchising the vote of unsecured creditors who seek more value.

More recently, the policy behind the enactment of BAPCPA was to enhance the return to creditors. As observed by many courts, "BAPCPA has been read to tighten, not loosen, the ability of debtors to avoid paying what can reasonably be paid on account of debt." *In re Kamell,* 451 B.R. 505, 508 (Bankr.C.D.Cal.2011) (*citing In re Gbadebo,* 431 B.R. at 229); *In re Lindsey,* 453 B.R. 886, 904 (Bankr.E.D.Tenn.2011) (observing that the primary purpose of BAPCPA is " 'to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.' ").

The Panel's ruling eviscerates these recognized motives behind the original Code and its revisions when applied in the individual chapter 11 proceeding. Based on both of these considerations, I respectfully dissent.

I.

Section 1129 sets forth the requirements for the confirmation of a chapter 11 plan. The focus of this case is on § 1129(b)(2)(B)(ii) which contains the "fair and equitable" requirement. That section, which is referred to generally as the "absolute priority rule," was amended in 2005 with the enactment of BAPCPA, and provides that a plan is fair and equitable if:

(B) With respect to a class of unsecured claims—

(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....* (Emphasis added).

It is the statute's use of the word "included" and its cross reference to § 1115 which has caused interpretive problems. Namely, what property is "included" in the estate by § 1115 that an individual chapter 11 debtor may retain? Section 1115(a) provides the following definition of property of the estate for individual chapter 11 debtors:

In a case in which the debtor is an individual, *property of the estate includes, in addition to the property specified in section 541*—

(1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but ***486** 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. (Emphasis added).

Here, the key phrase for interpretation is contained in the preamble of the statute: "property of the estate includes, in addition to the property specified in section 541."

A.

Before proceeding with the application of any interpretive rule, a brief review of the current state of the bankruptcy court caselaw in the Ninth Circuit is warranted. Two basic interpretations of §§ 1129(b)(2)(B)(ii) and 1115 have emerged.

Under what is called the broad view, the bankruptcy court in *In re Shat,* 424 B.R. 854 (Bankr.D.Nev.2010) construed the phrase "in addition to the property specified in section 541" contained in § 1115 to mean that "[s]ection 1115 absorbs and then supersedes [s]ection 541 for individual chapter 11 cases." *Id.* 865. In turn, the court reasoned that if § 1129(b)(2)(B)(ii) excepts from the operation of the absolute priority rule that property "included" in § 1115, then the "exception extends to *all* property of the estate." *Id.*[21] Thus, in essence, *In re Shat* holds that the absolute priority rule does not apply in individual chapter 11 cases. *Id.* at 867. In reaching its decision, the *Shat* court relied upon the numerous revisions in BAPCPA which make individual chapter 11's more like chapter 13[22] and also the few cases which had addressed the issue. *Id.* at 865–66. Nonetheless, the court acknowledged that its broad reading of § 1115 was "not without problems." *Id.* at 867.

Other bankruptcy courts, in equally well-reasoned decisions, have narrowly interpreted § 1115 to supplement § 541 by adding only the debtor's postpetition earnings and other property acquired after the commencement of the case. *See In re Tucker,* 2011 WL 5926757 (Bankr.D.Or.2011); *In re Borton,* 2011 WL 5439285 (Bankr.D.Idaho 2011); *In re Kamell,* 451 B.R. 505; *In re Karlovich,* 456 B.R. 677 (Bankr.S.D.Cal.2010); *In re Gbadebo,* 431 B.R. 222. Under the narrow view, the absolute priority rule still applies to individual chapter 11 debtors with respect to their prepetition property, but postpetition property is not subject to its strictures. Notably, the Panel mentions only one of these well-reasoned decisions.

Not surprisingly, Debtors and NACBA advocate adoption of the broad view and echo an analysis similar to that in *In re Shat.* My colleagues accepted those arguments, but I am not persuaded. Instead, I ***487** think numerous statutory interpretive tools favor the narrow construction camp. Even if in the end of my endeavor no clear answer emerges after application of these tools, then I ask a further question not addressed by the Panel: What purpose consistent with generally recognized policies would a broad reading of the relevant statutes serve? Nowhere does the Panel address the answer to that question.

B.

I start my analysis with a review of the basic statutory rules by which I am bound. If the statutory language is clear, I must apply it by its terms unless to do so would lead to absurd results. *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241–42, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). I do not recite this tenet of statutory interpretation idly. Examining the language of a statute in the context in which it is used is always the starting point.

In addition, I am instructed to construe a statute, if possible, so that "no clause, sentence or word" is rendered "superfluous, void, or insignificant." *TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001); *see also, Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)

("[C]ourts should disfavor interpretations of statutes that render language superfluous."). Another basic tenet of statutory construction is that courts should interpret a law to avoid absurd or bizarre results. *Demarest v. Manspeaker,* 498 U.S. 184, 191, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991) (applying statute's terms where the result was not "so bizarre that Congress could not have intended it"); *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Finally, I engage in statutory interpretation by taking a holistic approach that strives to implement the policies behind the enactment of BAPCPA and harmonize the provisions of the Code. *See Drummond v. Wiegand (In re Wiegand),* 386 B.R. 238, 241 (9th Cir. BAP 2008). Of course, underlying all these interpretive tools is the tenet that "aids to interpretation can be used only to resolve ambiguity and never to create it." 2A Norman J. Singer and J.D. Shambie Singer, *Statutes and Statutory Construction* § 46:4 (7th ed. 2007). Keeping this in mind, I now apply the rules.

C.

There is no serious debate about whether § 1129(b)(2)(B)(ii) allows an individual chapter 11 debtor to retain some property without running afoul of the absolute priority rule. The definition of that property is "included" in § 1115. The Panel contends that the word "included" is not a word of limitation under the Code and that, to treat it as such, the statute would read a different way than drafted; i.e., "included, except for property set out in Section 541." I cannot adopt this strained reading of the word "included."

The Panel loses sight that words have different meanings in different contexts. It is a well-established canon of statutory construction that when the word "includes" or "including" is followed by a list of examples, those examples are considered illustrative rather than exhaustive. *See Vermejo Park Corp. v. Kaiser Coal Corp. (In re Kaiser Steel Corp.),* 998 F.2d 783, 788 (10th Cir.1993) (holding that the word "including" after "party in interest" in § 1109(b) indicates that the list of examples is not exhaustive of possible parties in interest); *In re Adams,* 275 B.R. 274, 281 (Bankr.N.D.Ill.2002) (stating that § 503(b) ***488** is a nonexclusive list of six categories of administrative claims). Thus, the "not a term of limitation" context. Here, however, the statutory use of the word "included" is not used as the preface for representative or illustrative examples. Rather, the property "included" in the estate requires further inquiry by its cross reference to § 1115 (not § 541). As a result, I believe the word "included" in § 1129(b)(2)(B)(ii) means that property "added to" the estate under § 1115.

My conclusion is consistent with my view of what § 1115 accomplishes. The introductory phrase of § 1115 states that "property of the estate includes, in addition to the property specified in § 541...." My interpretation of the word "includes" here is derived from the fact that property of the estate is already defined in § 541. Section 1115(a) brings into the estate a debtor's postpetition property expressly excluded by § 541. *See* § 541(a)(6) (carving out post-petition earnings from services performed by an individual debtor after the commencement of the case) and § 541(a)(7) (making property of the estate any interest in property that the estate (not the debtor) acquires after the case). Therefore, Congress intended to add, or "include," the postpetition property to the individual chapter 11 debtor's estate in § 1115, in order to expand the estate.

This reading is compatible with the phrase "in addition to the property specified in section 541," which is not ambiguous. The ordinary meaning of "in addition to" is "a part added" or "besides". Merriam–Webster's Dictionary, http://merriam-webster.com; *see also* Oxford English Dictionary, http://oxford dictionaries.com ("the action or process of adding something to something else"). Accordingly, for these reasons, I believe that §§ 1129(b)(2)(B)(ii) and 1115 are most naturally understood to add to the property already defined in § 541 the property which the debtor acquires postpetition. *See In re Kamell,* 451 B.R. at 512 ("[T]he careful reference in § 1129(b)(2)(B)(ii) to only § 1115 *and not to § 541* preserves the distinction between existing assets and those acquired post-petition because of the way § 1115 is worded (which clearly makes post-petition earnings and acquisitions *an addition* to § 541 property).").

In statutory construction endeavors, I am also guided by the rule that, where possible, I must avoid rendering any parts superfluous. *TRW Inc. v. Andrews,* 534 U.S. at 31, 122 S.Ct. 441. The broad construction the Panel advocates causes parts of the Code to become superfluous. For example, § 103(a) makes § 541, which states that an estate is created upon the filing of a petition, applicable in chapter 11 cases. Section 103(a) was not amended by BAPCPA. But the broad view makes § 103(a) inapplicable in individual chapter 11's. *See In re Stephens,* 445 B.R. 816, 820–21 (Bankr.S.D.Tex.2011); *In re Gelin,* 437 B.R. 435, 442 (Bankr.M.D.Fla.2010) (stating that since neither § 103(a) nor § 541 was

amended by BAPCPA, "there is no reason for § 1115 to 'absorb' and 'supersede' § 541 to define property of the estate for individual chapter 11 cases.").

In short, by interpreting § 1115 to add only postpetition property to the individual chapter 11 debtor's estate, I avoid a construction which creates superfluous language and preserve the distinctions between prepetition property which becomes property of the estate under § 541 and postpetition property which becomes property of the estate under § 1115. These distinctions, which are mainstays of bankruptcy ***489** law, make it unlikely that Congress meant for § 1115 to "absorb" and "supersede" § 541. *See In re Borton,* 2011 WL 5439285, at *4 (finding that § 1115 "supplements § 541, but it does not supplant or subsume § 541").[23]

There are other textual difficulties with the broad view. For example, an adoption of the broad view likely eliminates § 1129(b)(2)(B)(i),[24] if not renders it an absurdity.

> The 'broad view' necessarily eliminates subsection (B)(i) as well, even though none of its language was amended in BAPCPA, because otherwise the statute would express a nonsensical and harsh alternative in (B)(i) to a much more lenient if not entirely inapplicable subsection (B)(ii) which, in the 'broad view,' allows the individual debtor to keep all of his pre-petition property and all post-petition property not already dealt with at § 1129(a)(15). This is another reason the court doubts the 'broad view,' because it makes subsections (B)(i) and (B)(ii), expressed as alternatives, into an absurdity. Since the BAPCPA language referencing individuals is only included in alternative (B)(ii), (B)(i) remains there as a nullity respecting individuals in the 'broad view.'
>
> *In re Kamell,* 451 B.R. at 508 n. 3.

In their result-driven approach, my colleagues do not address any of these problems.

D.

I also disagree with the Panel's statement that "Congress affirmatively amended the law so that § 1129(a)(15)(B)[25] would trump § 1129(b)(2)(B)(ii) in individual debtor cases." Notably, the Panel reached this conclusion without explaining how. The Panel overlooks that § 1129(a)(15) is only triggered when the holder of an allowed unsecured claim *objects* to confirmation of the plan. An objection is clearly different than a vote under the Code. For this reason, I part company with the Panel's critique of the "so-called" procedural anomaly created by the broad view as stated in *In re Gbadebo,* 431 B.R. at 230 (stating that "[i]f the plan proposes to pay [a creditor] anything, the debtor is required to send them a ballot. Yet, [under the broad view], their vote can be ignored. This makes no sense."). It is quite possible that for one reason or another creditors may vote ***490** against a plan without filing an objection. In that event, the way I read the Code, § 1129(a)(15) would not come into play.

Moreover, under the narrow reading that I propose, an individual chapter 11 debtor would still retain property during the first five years of his or her plan. One recent decision contained the following illustration:

> • A married couple files a joint Chapter 11 petition.
>
> • At confirmation the debtors are making two separate $700 monthly car payments to secured creditors. The plan is confirmed with the two car payments.
>
> • One year into the plan, the debtors trade these cars for less expensive cars requiring payments of only $400 per month each.
>
> BAPCPA's § 1129(b)(2)(B)(ii)'s exception allows the debtors to retain the savings on the cars. Under § 1325(b)(2) as incorporated by § 1129(a)(15), the $1,400.00 in car payments would have served to reduce the debtors' projected disposable income. Nevertheless, the trade-in of the cars would allow the debtors' actual disposable income to be supplemented by a $600.00 per month saving without any corresponding increase in projected disposable income—which is determined as of the petition date. Over the remaining four years of the plan, the total amount retained by the debtors would be $28,800. (The total savings per month is $600 ($300 for both cars). There are 48 months left in the first five years of the plan. Forty-eight times $600 equals $28,800.).
>
> The debtors' actual income might increase during the plan as well—perhaps if one of the debtors received a raise or decided to work fifty hours per week instead of forty. Because debtors' projected disposable income, and monthly payments to secured creditors, were calculated based on circumstances at the beginning of the plan, the resulting difference is an amount the debtors may retain because of the exclusion contained in § 1129(b)(2)(B)(ii).
>
> *In re Lively,* 2011 WL 6936363, at *4–5 (Bankr.S.D.Tex.2011). The *Lively* court recognized that a creditor could attempt to modify the plan under § 1127(e), but noted that a court would not necessarily approve the

modification for two reasons. "Regarding the trade-in, a modification would have the perverse result of punishing debtors for economizing. As to the example of a debtor deciding to work more hours, a debtor might return to the regular normal number of hours if the only result of the greater effort is an increased payout to creditors." *Id.* at n. 10.

For these reasons, Congress could not have intended § 1129(a)(15) to replace the absolute priority rule with respect to an individual chapter 11 debtor's prepetition property.

II.

I also believe that the Panel has relied exclusively on what it perceives to be the literal meaning of the statutes while ignoring their purpose. I am not convinced that BAPCPA's amendments, which make some aspects of individual chapter 11 cases similar to chapter 13, translate into an abrogation of the absolute priority rule with respect to individual chapter 11 debtors. In the larger picture, this approach is demonstrably at odds with the policies behind the enactment of BAPCPA. As previously mentioned, the purpose behind BAPCPA was to have debtors pay more, not less. *In re Kamell,* 451 B.R. at 508 (citing *In re Gbadebo,* 431 B.R. at 229); *In re Lindsey,* 453 B.R. at 905. Furthermore, the broad view taken by the Panel destroys the careful balance between an individual chapter 11 debtor's interest in ***491** reorganizing and restructuring his or her debts and the creditors' interest in maximizing the value of the bankruptcy estate. *Radloff,* 501 U.S. at 163, 111 S.Ct. 2197. Individual chapter 11 debtors are not simply chapter 13 debtors with larger debts. Rather, chapter 11 debtors, individuals or not, stay in possession of their property and enjoy all the rights and powers of a trustee. They are authorized to operate their business and can choose to extend their plan beyond five years. In exchange, the chapter 11 process does not leave unsecured creditors by the wayside by affording individual chapter 11 debtors the luxury to retain all pre and postpetition property at their expense.

The Panel begins its discussion by offering the history of the absolute priority rule which it traces back to 1913. Courts and bankruptcy practitioners alike appreciate this history and the evolution of the rule with its judicially created exceptions. I am also cognizant that the rule was traditionally applied to equity interests and that the rule's mission was to undermine corporate shareholders' advantages over unsecured creditors. However, an equity interest is nothing more than an ownership interest and individuals who own businesses, like the Friedmans in this case, file chapter 11 when they are over the debt limit for chapter 13. Individuals who own a business have the same opportunities as corporate shareholders to take advantage of unsecured creditors. Thus, I discern no good reason to depart from the absolute priority rule's traditional application. Finally, I am convinced that because the absolute priority rule has been embedded in bankruptcy jurisprudence and codified for many years, we should proceed cautiously when asked to recognize an exception from the rule that Congress has not clearly expressed.

Given the history of the absolute priority rule and its evolution, I ask what conceivable reason could Congress have had for silently writing into § 1129(b)(2)(B)(ii) an abrogation of the absolute priority rule for individual chapter 11 debtors? The Panel answers this question by simply referring to amendments in BAPCPA which make individual chapter 11 cases similar to chapter 13. This, I submit, is not enough. "Statutory interpretation is not a game of blind man's bluff. Judges are free to consider statutory language in light of a statute's basic purposes." *Dole Food Co. v. Patrickson,* 538 U.S. 468, 484, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003). It is the Panel's failure to consider the purpose behind BAPCPA and chapter 11 in general that has led it to construe the relevant statutes in a way that runs contrary to what Congress would have hoped for and expected by the amendments in BAPCPA.

III.

I finish by addressing the NACBA's argument that retention of the absolute priority rule makes it virtually impossible for sole proprietors, who are individual chapter 11 debtors, to confirm a plan of reorganization. I am not convinced that application of the rule makes it "impossible" for sole proprietors to confirm their plans. Plan acceptance may occur through a variety of tools used by chapter 11 debtors prior to the enactment of BAPCPA: they may negotiate a consensual plan,[26] pay higher dividends, pay dissenting classes in full, or comply with the absolute priority rule by contributing prepetition property. *In re Kamell,* 451 B.R. at 512; *In re Gbadebo,* 431 B.R. at 229–30. Even so, I ***492** am not at liberty to read words into a statute simply because I perceive the existing words to lead to a harsh result.

IV.

Other than the arguments regarding the absolute priority rule, Debtors have not pointed out any additional errors relating to the conversion of their case. Thus, those arguments are waived for purposes of this appeal. *Smith v. Marsh,* 194 F.3d 1045, 1052 (9th Cir.1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").

V.

In sum, for all these reasons, I respectfully dissent. I would hold that the absolute priority rule applies to an individual chapter 11 debtor's prepetition property, but that the rule has been abrogated with respect to postpetition property under the plain terms of §§ 1129(b)(2)(B)(ii) and 1115. Therefore, I would AFFIRM the order denying confirmation of Debtors' second amended plan and the order converting their case to chapter 7.

Parallel Citations

67 Collier Bankr.Cas.2d 752, 56 Bankr.Ct.Dec. 57, Bankr. L. Rep. P 82,232, 2012 Daily Journal D.A.R. 3650

Footnotes

* Judge Brandt issued the order denying confirmation of the plan, BAP No. 11–1105. Judge Marlar issued the order converting the case to chapter 7, BAP No. 11–1149.

** Hon. Scott C. Clarkson, Bankruptcy Judge for the Central District of California, sitting by designation.

1 Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532. "Rule" references are to the Federal Rules of Bankruptcy Procedure and "Civil Rule" references are to the Federal Rules of Civil Procedure.

2 Debtors' record on appeal is far from complete. In their brief, they cite to docket numbers of pleadings filed in the bankruptcy court, but do not provide us with citations to any particular page number or lines in the pleadings in violation of Rule 8010(a)(1)(D). As a result, we were left to search the pleadings cited for the relevant facts and procedural background of this case. We take judicial notice of the relevant pleadings which were docketed and imaged in Debtors' underlying bankruptcy case as well as those filed in Debtors' business bankruptcy cases in the District of Colorado (Bankruptcy Nos. 01–19986 and 04–19246). *Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),* 293 B.R. 227, 233 n. 9 (9th Cir. BAP 2003).

3 At the time of Debtors' filing, their primary residence was in Arizona.

4 Debtors were also seeking to set aside P+P's default judgment against them in the state court.

5 From our review of the docket, it does not appear that a hearing on this plan ever took place. Presumably, this plan was withdrawn when Debtors filed their second amended plan.

6 Debtors' second amended plan separately classified Washington Mutual's secured claim against the Breckenridge Property in Class 3 and provided for P+P's secured claim against the Breckenridge Property in Class 5. Most likely, Washington Mutual foreclosed on the property after Debtors had filed this latest version of their plan.

7 The Internal Revenue Service and the U.S. Trustee also objected to the second amended plan on various grounds.

8 P+P's objection also implicated § 1129(a)(15) because it complained that Debtors' expenses were unreasonable. Section 1129(a)(15) states:

> In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—
> (A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
> (B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in § 1325(b)(2)) to be received during the 5–year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

9 When the bankruptcy court converted Debtors' case, the order denying confirmation of their second amended plan became a final

order. *See Giesbrecht v. Fitzgerald (In re Giesbrecht),* 429 B.R. 682, 687 (9th Cir. BAP 2010); *see also Rosson v. Fitzgerald (In re Rosson),* 545 F.3d 764, 770 (9th Cir.2008) (order converting case from chapter 13 to chapter 7 is a final order).

10 The order simply stated: "IT IS ORDERED GRANTING the Appellants' Motion for Stay Pending Appeal, IT IS FURTHER ORDERED STAYING the Chapter 7 Conversion Order of this Court Dated February 17 and March 10, 2011." It is possible that the court and the parties contemplated that the chapter 7 would proceed with respect to Debtors and their discharge, but that the liquidation of their estate was stayed until this appeal concludes.

11 We do not reach Debtors' second issue of whether they could avoid a strict application of the absolute priority rule by contributing "new value" into a plan of reorganization in the form of exempt assets for two reasons. First, the bankruptcy court did not make any findings on this issue. Second, it is not readily apparent from the record whether Debtors had exempt assets which were not encumbered by the IRS's liens. Thus, Debtors appear to be seeking an advisory opinion on this issue. However, we lack jurisdiction to render advisory opinions. *See Kittel v. Thomas,* 620 F.3d 949, 951 (9th Cir.2010); *see also Computer Task Group, Inc. v. Brotby (In re Brotby),* 303 B.R. 177, 195–96 (9th Cir. BAP 2003) (noting that when bankruptcy court did not make the requisite factual findings that debtor had satisfied the new value corollary, it was unnecessary to decide if debtor, who was individual, could invoke the exception in chapter 11 case).

12 The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Public Law 109–8, 119 Stat. 23.

13 There is no doubt that the absolute priority rule was a necessary feature to be considered in individual debtors' chapter 11 plans of reorganization prior to the enactment of BAPCPA. However, Congress has not significantly increased the outer limits of eligibility for chapter 13 debtors and a combination of the present day national economic climate, the amendment to § 1129(b)(2)(B)(ii) and the addition of the new § 1115 has presented consumer bankruptcy lawyers with growth opportunities in the individual debtor chapter 11 practice.

14 The absolute priority rule was codified at § 1129(b)(2)(B)(ii) with the enactment of the Bankruptcy Code in 1978.

15 The U.S. Supreme Court stated that the shareholders had to do more than just continue to participate in the debtor's business to retain their equity. Instead, they must contribute money or money's worth. 308 U.S. at 122, 60 S.Ct. 1. In other words, they must contribute new value to the debtor. With this, the new value corollary was indeed crystallized.

16 Courts almost universally found that individuals could reorganize and that the absolute priority rule applied to their plan prior to the enactment of BAPCPA.

17 *See* Kenneth N. Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code,* 53 Am. Bankr. L.J. 133 (1979).

18 The BAPCPA amendments of 2005 added the emphasized portion of § 1129(b)(2)(B)(ii), appearing above.

19 Section 1115 reads as follows:

> **Section 1115. Property of the estate**
> (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—
> (1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and
> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.
> (b) Except as provided in section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.
> (1) 11 U.S.C. § 1115.

20 See Bankruptcy Code § 102(3) and especially see *Am. Surety Co. v. Marotta,* 287 U.S. 513, 517, 53 S.Ct. 260, 77 L.Ed. 466 (1933) in which the U.S. Supreme Court presents in that bankruptcy setting a definitive explanation for the use and meaning of the word "include." *See also* Kenneth N. Klee, *Bankruptcy and the Supreme Court,* at 22 and n.70, 35–36, (Lexis/Nexis 2008).

21 Under this reading, when § 1129(b)(2)(B)(ii) says "the debtor may retain property included in the estate under section 1115" it means "the debtor may retain *all* property of the estate." Why did it not just say that?

22 These changes, also relied upon by the majority, included: (1) redefining property under § 1115 along the lines of property of the estate under § 1306; (2) changing the mandatory contents of a plan pursuant to § 1123(a)(8) to resemble § 1322(a)(1); (3) adding the disposable income test of § 1325(b) to § 1129(a)(15); (4) delaying the discharge until completion of all plan payments as in §

1328(a); (5) permitting discharge for cause before all payments are completed pursuant to § 1141(d)(5), similar to the hardship discharge of § 1328(b); and (6) the addition of § 1127(e) to permit the modification of a plan even after substantial consummation for purposes similar to § 1329(a). *In re Shat,* 424 B.R. at 862.

23 This interpretation of § 1115 is consistent with one circuit court's view of what the companion chapter 13 provision, § 1306, means to a chapter 13 estate. In *In re Seafort,* 669 F.3d 662, 666 (6th Cir.2012), the court found that "section 1306(a) expressly incorporates section 541. Read together, § 541 fixes property of the estate as of the date of filing, while § 1306 *adds to* the 'property of the estate' property interests which arise post-petition." (Emphasis added).

24 This section provides in relevant part that "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[.]"

25 Section 1129(a)(15)(B) provides:

> In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—
>
> ...
>
> (B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5–year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

26 NACBA ignores the very practical consideration that if plan failure results in conversion to chapter 7, the classes of unsecured and junior secured creditors often receive very little. These classes have traditionally been highly motivated to negotiate.

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Only the Westlaw citation is currently available.

United States Court of Appeals,
Tenth Circuit.
Arvin E. STEPHENS; Karen J. Stephens, f/d/b/a Ninnekah Quick Mart, Debtors,
Dill Oil Company, LLC; Danny Dill; Nancy Dill, Appellants,
v.
Arvin E. Stephens; Karen J. Stephens, f/d/b/a Ninnekah Quick Mart, Appellees,
National Association of Consumer Bankruptcy Attorneys, Amicus Curiae.

No. 11–6309.
Jan. 15, 2013.

Background: Individual Chapter 11 debtors sought plan confirmation. Creditors objected, contending that plan violated absolute priority rule. The United States Bankruptcy Court for the Western District of Oklahoma confirmed plan. Creditors appealed. The United States Bankruptcy Appellate Panel of the Tenth Circuit sua sponte certified case for direct appeal.

Holdings: The Court of Appeals, Kelly, Circuit Judge, held that:
(1) Court of Appeals would decline to apply doctrine of equitable mootness, and
(2) as an issue of first impression, amendments to Bankruptcy Code did not impliedly repeal absolute priority rule as it applied to individual Chapter 11 debtors.

Reversed and remanded.

West Headnotes

[1] **Bankruptcy 51 3561**

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3561 k. Preservation of Priority. Most Cited Cases

"Absolute priority rule" included within Chapter 11 plan confirmation requirement that cram-down plan be fair and equitable bars junior claimants, including debtors, from retaining any interest in property when a dissenting class of senior creditors has not been paid in full. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

[2] **Bankruptcy 51 3781**

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3781 k. Moot Questions. Most Cited Cases

Doctrine of "equitable mootness" allows a court to decline to hear a bankruptcy appeal, even when relief could be granted, if implementing the relief would be inequitable.

[3] Bankruptcy 51 3781

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3781 k. Moot Questions. Most Cited Cases

Equitable mootness, permitting court to decline to hear bankruptcy appeal if implementing relief would be inequitable, is a discretionary, prudential doctrine.

[4] Bankruptcy 51 3776.5(5)

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3776 Effect of Transfer
51k3776.5 Supersedeas or Stay
51k3776.5(5) k. Effect of Want of Stay; Conclusiveness of Sale. Most Cited Cases

Bankruptcy 51 3781

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3781 k. Moot Questions. Most Cited Cases

Bankruptcy 51 3783

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3783 k. Presumptions and Burdens of Proof. Most Cited Cases

Party seeking to prevent court from reaching merits of bankruptcy appeal, based on equitable mootness, bears burden of proving that following factors weigh in favor of dismissal: (1) whether appellant sought and/or obtained a stay pending appeal, (2) whether appealed plan has been substantially consummated, (3) whether rights of innocent third parties would be adversely affected by reversal of confirmed plan, (4) whether public-policy need for reliance on confirmed plan, and need for creditors generally to be able to rely on bankruptcy court decisions, would be undermined by reversal of plan, (5) what, if challenge were upheld, would impact likely be upon successful reorganization of debtor, and (6) whether, based upon quick look at merits of challenge to plan, argument is legally meritorious or equitably compelling.

[5] Bankruptcy 51 3776.5(5)

51 Bankruptcy

51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3776 Effect of Transfer
51k3776.5 Supersedeas or Stay
51k3776.5(5) k. Effect of Want of Stay; Conclusiveness of Sale. Most Cited Cases

Failure of creditors challenging confirmation of Chapter 11 plan to seek stay pending their appeal did not alone preclude Court of Appeals from granting relief, pursuant to equitable mootness doctrine.

[6] Bankruptcy 51 3776.5(5)

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3776 Effect of Transfer
51k3776.5 Supersedeas or Stay
51k3776.5(5) k. Effect of Want of Stay; Conclusiveness of Sale. Most Cited Cases

Bankruptcy 51 3781

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3781 k. Moot Questions. Most Cited Cases

Fact that Chapter 11 plan had been substantially consummated did not act as blanket discharge of judicial duty to examine carefully each request for relief on appeal by creditors challenging plan confirmation.

[7] Bankruptcy 51 3776.5(5)

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3776 Effect of Transfer
51k3776.5 Supersedeas or Stay
51k3776.5(5) k. Effect of Want of Stay; Conclusiveness of Sale. Most Cited Cases

Bankruptcy 51 3781

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3781 k. Moot Questions. Most Cited Cases

Court of Appeals would decline to apply doctrine of equitable mootness to secured creditors' appeal challenging confirmation of individual debtors' Chapter 11 plan on ground that plan violated absolute priority rule, even though creditors did not seek stay pending appeal, debtors claimed that plan had been substantially consummated, and reversal would likely compel conversion of case to one under Chapter 7 and preclude successful reorganization; non-party creditors would likely not be adversely affected by reversal, appealing creditors had approximately

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$1,800,000 at stake, issue was one of public importance for which there was no controlling decision in circuit, and creditors' argument appeared to be legally meritorious. 11 U.S.C.A. § 1112.

[8] Bankruptcy 51 3782

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 k. Conclusions of Law; De Novo Review. Most Cited Cases

On appeal presenting question of statutory interpretation, Court of Appeals reviews bankruptcy court's determination de novo.

[9] Statutes 361 188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361 190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases

In deciding question of statutory interpretation, starting point is always the language of the statute itself, and if the language is clear and unambiguous, the plain meaning of the statute controls; if, on the other hand, the text is "ambiguous," in that it is capable of being understood by reasonably well-informed persons in two or more different senses, court must inquire further to discern Congress's intent.

[10] Statutes 361 158

361 Statutes
361V Repeal, Suspension, Expiration, and Revival
361k158 k. Implied Repeal in General. Most Cited Cases

Repeals by implication are not favored, and will not be presumed unless the intention of the legislature to repeal is clear and manifest.

[11] Statutes 361 212.5

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction

361k212.5 k. Intention to Change Law. Most Cited Cases

Where a party contends that legislative action changed settled law, that party has the burden of showing that the legislature intended such a change.

[12] **Bankruptcy 51 3561**

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3561 k. Preservation of Priority. Most Cited Cases

Amendments to Bankruptcy Code made by Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) did not impliedly repeal absolute priority rule as it applied to individual Chapter 11 debtors. 11 U.S.C.A. §§ **1115**, 1129(b)(2)(B)(ii).

Appeal from the United States Bankruptcy Court for the Western District of Oklahoma, (No. 10–14028–WV).James Bellingham of Bellingham & Loyd, P.C., Oklahoma City, OK, for Appellants.

James Brunson of AG–LAW, PC, Oklahoma City, OK, for Appellees.

Tara Twomey of National Consumer Bankruptcy Rights Center, San Jose, CA, for Amicus Curiae.

Before KELLY and HOLMES, Circuit Judges, and MARTINEZ[FN*], District Judge.

KELLY, Circuit Judge.

***1** This appeal presents an issue of first impression for our circuit: whether the 2005 amendments to the Bankruptcy Code exempt individual Chapter 11 debtors from the absolute priority rule. The bankruptcy court answered this question in the affirmative. It therefore confirmed the Debtors' proposed plan of reorganization over certain creditors' objections that the plan violated the absolute priority rule. On appeal, the bankruptcy appellate panel certified the case for direct appeal. Exercising our jurisdiction under 28 U.S.C. §§ 158(d)(2)(A) & 158(a)(1), we now reverse the bankruptcy court's order confirming the plan and remand for further proceedings.

Background

[1] On June 30, 2010, Arvin E. Stephens and Karen J. Stephens, f/d/b/a/ Ninnekah Quick Mart, LLC (collectively, "Debtors") filed for relief under Chapter 11 of the Bankruptcy Code. Aplt.App. 28. **Dill Oil** Company, LLC and Danny and Nancy Dill (collectively, "the Dills") objected to confirmation on the ground that the proposed plan violated the absolute priority rule ("APR"), [FN1] which bars junior claimants, including debtors, from retaining any interest in property when a dissenting class of senior creditors has not been paid in full. *Id.* at 28, 30; *see Search Mkt. Direct, Inc. v. Jubber (In re Paige),* 685 F.3d 1160, 1183 (10th Cir.2012) (discussing APR).

Debtors owned a chain of convenience stores for which the Dills were the primary supplier of gasoline and gas station products. Aplt.App. 28. Due to the rising price of gas and a diminishing customer base, Debtors' stores began operating at a loss. *Id.* at 120. Eventually, Debtors became liable to the Dills for approximately $1.8 million. *Id.* at 28. In December 2008, Debtors executed mortgages in favor of the Dills on various tracts of real estate, including a house and farmlands. *Id.* at 28, 120. The Dills' mortgages, however, were subordinate to existing mortgages on the properties. *Id.* at 28.

On December 30, 2010, Debtors filed a proposed plan of reorganization. *Id.* at 17. Pursuant to the plan, the Dills

would be paid approximately $15,000 as a secured creditor, but their remaining claim would be considered unsecured. *Id.* at 28. Under the plan, Debtors would retain possession and control of their property; the Dills would receive a monthly payment for five years, totaling about 1% of their unsecured claim. *Id.* at 29, 76.

The Dills subsequently filed an objection to Debtors' proposed plan. *Id.* at 29, 97, 198. Because their vote constituted approximately 96% of Class 8's claims, the Dills' rejection precluded approval of the plan under § 1129(a). *Id.* at 102, 132.

On May 20, 2011, the bankruptcy court entered an order confirming the plan under § 1129(b)'s "cram down" mechanism. *Id.* at 17, 29. The Dills argued that the plan was unconfirmable because it violated the APR. *Id.* at 29. The bankruptcy court rejected this contention, holding instead that the plain language of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") abrogated the APR as to individual Chapter 11 debtors. *Id.* at 21–22.

***2** The Dills timely filed a notice of appeal on June 1, 2011, seeking reversal of the confirmation order. *Id.* at 25, 32. The Dills proceeded to the bankruptcy appellate panel ("BAP"), which sua sponte issued a certification of final order for direct appeal to this court based on its determination that the case presents a question of public importance for which there is no controlling law. *Id.* at 25. We granted permission to appeal. *Id.* at 15.

Discussion

A. *Should this Appeal Be Dismissed Under the Doctrine of Equitable Mootness?*

[2][3][4] Debtors urge us to dismiss this appeal under the doctrine of equitable mootness, which "allows a court to decline to hear a bankruptcy appeal, even when relief could be granted, if implementing the relief would be inequitable." *In re C.W. Mining Co.*, 641 F.3d 1235, 1239–40 (10th Cir.2011). Equitable mootness is a discretionary, prudential doctrine. *See id.* at 1240. We have held that a court should apply the doctrine when reaching the merits would be unfair or impractical, taking into consideration the following questions:

> (1) Has the appellant sought and/or obtained a stay pending appeal? (3) Has the appealed plan been substantially consummated? (3) Will the rights of innocent third parties be adversely affected by reversal of the confirmed plan? (4) Will the public-policy need for reliance on the confirmed bankruptcy plan—and the need for creditors generally to be able to rely on bankruptcy court decisions—be undermined by reversal of the plan? (5) If appellant's challenge were upheld, what would be the likely impact upon a successful reorganization of the debtor? And (6) based upon a quick look at the merits of appellant's challenge to the plan, is [the argument] legally meritorious or equitably compelling?

In re Paige, 584 F.3d 1327, 1339 (10th Cir.2009). The party seeking to prevent the court from reaching the merits bears the burden of proving these factors weigh in favor of dismissal. *See id.* at 1339–40.

[5][6] The Dills did not seek a stay pending their appeal, but this factor alone does not preclude the court from granting relief. *See id.* at 1339 (citing *In re Inv. Co. of the Sw., Inc.*, 341 B.R. 298, 308 (B.A.P. 10th Cir.2006)). And although the plan has, according to Debtors, been substantially consummated, this does not act as a "blanket discharge of [the] judicial duty to examine carefully each request for relief." *In re AOV Indus., Inc.*, 792 F.2d 1140, 1148 (D.C.Cir.1986); *see also In re Paige*, 584 F.3d at 1342 (explaining that substantial consummation is "not dispositive").

[7] Instead, "[t]he effects that reversal will have on *non-party creditors* is probably the foremost concern in our analysis." *In re Paige*, 584 F.3d at 1343 (emphasis added); *see also In re SI Restructuring, Inc.*, 542 F.3d 131, 135–36 (5th Cir.2008). "The other factors are often given much less weight and, in some cases, completely ignored." *In re Paige*, 584 F.3d at 1339. Here, reversal will likely compel conversion to a Chapter 7 proceeding. *See* 11 U.S.C. § 1112; Aplee. Br. 27–28. According to Debtors, the Dills will receive little or nothing under Chapter 7 due to superior liens on non-exempt assets. *See* Aplee. Br. 28. But the Dills' argument—which Debtors have not disputed—is that under Chapter 7 either: 1) the secured creditors will receive their property; or 2) Debtors will reaffirm the creditors'

secured debts and retain the property. *See* Aplt. R. Br. 14. In either scenario, we find it unlikely that non-party creditors will be adversely affected in any significant way, and Debtors have failed to convince us otherwise. *See* In re Paige, 584 F.3d at 1343–44.

***3** Although we recognize that Debtors have devoted substantial time and resources toward the plan's implementation, and we appreciate that reversing the confirmation order will likely preclude a successful reorganization, we also note that the Dills have approximately $1.8 million at stake. Moreover, this case involves a "matter of public importance" for which "there is no controlling decision" in this circuit, Aplt.App. 25, and we believe the Dills' argument is legally meritorious. As the BAP emphasized in its certification order, "[u]ntil the meaning of the BAPCPA amendments to Chapter 11 is clarified, debtors and creditors in every individual Chapter 11 case must anticipate the possibility of the expense and delay associated with litigation over this issue." *Id.* at 34. Because of the private and public interest in resolving this legal issue, we decline to apply the doctrine of equitable mootness. *See* In re Paige, 584 F.3d at 1348.

B. *Does BAPCPA Repeal the Absolute Priority Rule with Respect to Individual Chapter 11 Debtors?*

[8][9] This appeal presents a question of statutory interpretation. Accordingly, we review the bankruptcy court's determination de novo. *In re Kirkland*, 572 F.3d 838, 840 (10th Cir.2009). "[T]he starting point is always the language of the statute itself. If the language is clear and unambiguous, the plain meaning of the statute controls." *United States v. Quarrell*, 310 F.3d 664, 669 (10th Cir.2002) (citation omitted). If, on the other hand, the text is ambiguous—i.e., "capable of being understood by reasonably well-informed persons in two or more different senses"—we must inquire further to discern Congress's intent. *See id.* (quotation omitted).

1. *Is the statutory language clear and unambiguous?*

We begin our analysis by focusing exclusively on the language of the Bankruptcy Code. *See Ransom v. FIA Card Servs., N.A.*, — U.S. ——, ——, 131 S.Ct. 716, 723, 178 L.Ed.2d 603 (2011). Section 1129 of the Code sets out the general requirements for confirmation of a reorganization plan. Section 1129(a) allows for confirmation where each class of creditors consents. Alternatively, § 1129(b) provides a "cram-down" mechanism, whereby a plan may be confirmed without the consent of each class if, among other things, the plan is "fair and equitable." Section 1129 outlines the "fair and equitable" criteria, which include the absolute priority rule. Specifically, § 1129(b)(2)(B)(ii), as amended by BAPCPA, provides 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, *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.
>
> (emphasis added).
>
> Section **1115**, which BAPCPA added, in turn 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*[FN2]—
>
> ***4** (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 controverted 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 controverted to a case under chapter 7, 12, or 13, whichever occurs first.

(b) Except as provided in section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

(emphasis added).

Although a number of courts have held this language to be unambiguous, they have reached starkly different conclusions regarding the "plain" meaning. *Compare* SPCP Grp., LLC v. Biggins, 465 B.R. 316, 322 (M.D.Fla.2011) ("The plain reading of this statute" is that § **1115** "includes ... property specified in section 541."), with *In re Steedley*, No. 09–50654, 2010 WL 3528599, at *2 (Bankr.S.D.Ga. Aug.27, 2010) ("Nothing in the plain language of § **1115** suggests that it subsumes § 541."). The very existence of this dichotomy seems indicative of the text's ambiguity. Indeed, several courts have recognized that §§ **1115** and 1129(b)(2)(B)(ii) are susceptible to two different yet plausible interpretations. *See, e.g., In re Maharaj*, 681 F.3d 558, 569 (4th Cir.2012); *In re Lindsey*, 453 B.R. 886, 903 (Bankr.E.D.Tenn.2011).

To date, the Bankruptcy Appellate Panel for the Ninth Circuit and five bankruptcy courts (one of which was affirmed by a district court) have adopted a "broad view," holding that the BAPCPA amendments eliminate the APR as applied to an individual's *entire* estate.[FN3] In contrast, the Fourth Circuit and seventeen bankruptcy courts have reached the opposite conclusion, holding that the BAPCPA amendments only exempt from the APR that property which § **1115** *adds* to an individual estate—not the pre-petition property already defined by § 541.[FN4]

According to the broad view, § **1115** incorporates and supercedes § 541. Under § **1115**, an individual's estate includes post-petition property and earnings in addition to the pre-petition property established by § 541. *In re Tegeder*, 369 B.R. 477, 480 (Bankr.D.Neb.2007); *see also In re Shat*, 424 B.R. 854, 863 (Bankr.D.Nev.2010) ("Initially, Section **1115** creates a baseline estate of all the property covered by Section 541. It then adds to that [post-petition property]."). When § 1129(b)(2)(B)(ii) references the property "included by" § **1115**, it "refer[s] to all property Section **1115** itself references." *In re Shat*, 424 B.R. at 863. Section **1115** thus absorbs § 541 for individual Chapter 11 cases. *Id.* at 865. Therefore, the APR no longer applies to *any* property of an individual debtor's estate.

In contrast, the narrow view holds that § **1115** merely adds to—but does not replace— § 541's definition of estate property for individual debtors. *See, e.g., In re Draiman*, 450 B.R. 777, 821 (Bankr.N.D.Ill.2011). Section **1115** "includes" in the estate only that property which was not already included by § 541. *See In re Gbadebo*, 431 B.R. 222, 229 (Bankr.N.D.Cal.2010). In other words, § **1115** includes only post-petition property and earnings. *In re Draiman*, 450 B.R. at 821. In support of the narrow view, several courts have pointed to § **1115**'s grammatical structure. *See, e.g., In re Arnold*, 471 B.R. 578, 602 (Bankr.C.D.Cal.2012) (explaining that because the phrase, "in addition to the property specified in section 541" is "not the direct object of the transitive verb, 'includes,' " the phrase therefore "is not an answer to the question what is included as 'property of the estate' under § **1115**"). Accordingly, only post-petition property added by § **1115** is exempt from the APR; the APR continues to apply to § 541's pre-petition property.

***5** After examining the divergent interpretations of the statutory language, we agree with the Fourth Circuit that "either construction is plausible." *In re Maharaj*, 681 F.3d at 569. In light of this linguistic ambiguity, we endeavor to ascertain Congress's intent. *See United States v. Hohri*, 482 U.S. 64, 69–71, 107 S.Ct. 2246, 96 L.Ed.2d 51 (1987).

2. *Is there a clear Congressional intent to repeal the absolute priority rule as applied to individual Chapter 11 debtors?*

Nowhere in BAPCPA's sparse legislative history is there an explanation of what changes result from § **1115**. *See In re Lindsey*, 453 B.R. at 903; Bruce A. Markell, *The Sub Rosa Subchapter: Individual Debtors in Chapter 11 After BAPCPA*, 2007 U. Ill. L.Rev. 67, 90. Consequently, courts have reached opposite conclusions regarding the legislative objective. *Compare In re Shat*, 424 B.R. at 862–65, with *In re Gbadebo*, 431 B.R. at 229–30. In deciphering Congress's intent, we recognize BAPCPA's aim of curbing the abusive practices of unscrupulous debtors, *see* H.R.Rep.

No. 109–31, pt. 1, at 3–5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 90–92, but we remain mindful that "a central purpose of the Code" is to provide the honest but unfortunate debtor with a "fresh start," *Grogan v. Garner*, 498 U.S. 279, 286–87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) (quotations and citation omitted). This inherent tension makes it difficult to identify a singular objective behind § 1115.

Advocates of the broad view emphasize that the BAPCPA amendments evince an intent to model Chapter 11 on Chapter 13, which has no absolute priority rule. *See In re Friedman*, 466 B.R. at 483; *In re Shat*, 424 B.R. at 868. In support, they cite a number of provisions that are essentially copied from Chapter 13. *See, e.g., In re Roedemeier*, 374 B.R. 264, 275–76 (Bankr.D.Kan.2007). Further, proponents of the broad view emphasize that abolishing the APR with respect to individual debtors does not leave unsecured creditors without any power or protection. Instead, unsecured creditors can rely on the safeguards of § 1129(a)(15)'s disposable income test, *see In re Shat*, 424 B.R. at 863–64, and § 1129(a)(7)'s "best interests" test, *see* Amicus Br. of Nat'l Ass'n of Consumer Bankr.Attorneys at 6.

In contrast, those ascribing to the narrow view argue that, "[e]ach one of these new provisions," even where modeled on Chapter 13, "appears designed to impose *greater* burdens on individual chapter 11 debtor's rights so as to ensure a greater payout to creditors." *In re Gbadebo*, 431 B.R. at 229 (emphasis added); *see also* H.R.Rep. No. 109–31, pt. 1, at 2–5, 80–81. Narrow view proponents urge that if Congress intended to abolish the APR with respect to individual debtors, "it would have done so in a far less convoluted way." *In re Maharaj*, 681 F.3d at 565–66. For instance, Congress could have raised Chapter 13's debt ceiling or expressly exempted individual debtors at the beginning of § 1129(b)(2)(B)(ii). *See In re Karlovich*, 456 B.R. 677, 682 (Bankr.S.D.Cal.2010). Moreover, BAPCPA's legislative history lists several debtor protections but makes no mention of eliminating the APR. *See* H.R.Rep. No. 109–31, pt. 1, at 2, 17–18. Advocates for the narrow view argue that, had Congress intended such a drastic change, it surely would have included the amendment in its list of debtor protections. *See In re Maharaj*, 681 F.3d at 572. Instead, the amendments are best understood as preserving the status quo. *See, e.g., id.* at 569–70 (noting that the exemption of post-petition property and earnings ensures that the APR operates as it did prior to BAPCPA's passage).

***6** [10][11][12] Because both the statutory language and Congress's intent are ambiguous, we heed the presumption against implied repeal. "[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007) (quotations omitted). Where a party contends "that legislative action changed settled law," that party "has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989). These interpretive principles are particularly critical in bankruptcy cases, where parties rely on settled rules in conducting and structuring business. Thus, "[p]re-BAPCPA bankruptcy practice is telling because we will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Hamilton v. Lanning*, ——U.S. ——, ——, 130 S.Ct. 2464, 2473, 177 L.Ed.2d 23 (2010) (quotation omitted). Here, the statutory language and legislative history lack any clear indication that Congress intended to erode a pillar of creditor bankruptcy protection. *See Hui v. Castaneda*, —— U.S. ——, ——, 130 S.Ct. 1845, 1853, 176 L.Ed.2d 703 (2010); *Dewsnup v. Timm*, 502 U.S. 410, 419–20, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). Especially in light of the fact that Congress *has* expressly repealed the APR in the past, *see* H.R. Rep. 82–2320, at 1981–82, we decline to find an implied repeal here.

We therefore REVERSE the bankruptcy court's order confirming the plan and REMAND for further proceedings.

FN* The Honorable William J. Martinez, United States District Judge, District of Colorado, sitting by designation.

FN1. The APR originated in the late 1800s as a judicial invention that was primarily employed in the context of railroad reorganizations. *See* Jonathan C. Lipson, *The Expressive Function of Directors' Duties to Creditors*, 12 Stan. J.L. Bus. & Fin. 224, 250–52 (2007); *see also N. Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 504–08, 33 S.Ct. 554, 57 L.Ed. 931 (1913). The Bankruptcy Act of 1898 codified the common law APR by requiring that a reorganization plan be "fair and equitable." In 1952, Congress revoked the "fair and equitable" re-

quirement. H.R. Rep. 82–2320, at 1981–82 (1952), *reprinted in* 1952 U.S.C.C.A.N.1960, 1982; *see also* Pub.L. No. 456, 66 Stat. 420, 433 (1952). However, in 1978, Congress adopted the Bankruptcy Code, which again codified the APR as applied to all reorganizations under Chapter 11 (including individual debtors). *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). Accordingly, "no Chapter 11 reorganization plan [could] be confirmed over the creditors' legitimate objections ... if it fail[ed] to comply with the [APR]." *Id.* This rule remained undisputed until BAPCPA's 2005 enactment.

FN2. Section 541 defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. Section 103, in turn, provides that § 541 applies in Chapter 11 cases, including those which involve individual debtors. *See* 11 U.S.C. § 103(a).

FN3. *In re Friedman*, 466 B.R. 471 (B.A.P. 9th Cir.2012); *SPCP Grp., LLC v. Biggins*, 465 B.R. 316 (M.D.Fla.2011) (affirming unpublished decision of bankruptcy court); *In re Shat*, 424 B.R. 854 (Bankr.D.Nev.2010); *In re Johnson*, 402 B.R. 851 (Bankr.N.D.Ind.2009); *In re Roedemeier*, 374 B.R. 264 (Bankr.D.Kan.2007); *In re Tegeder*, 369 B.R. 477 (Bankr.D.Neb.2007).

FN4. *In re Maharaj*, 681 F.3d 558 (4th Cir.2012) (affirming the bankruptcy court's decision in 449 B.R. 484 (Bankr.E.D.Va.2011)); *In re Lee Min Ho Chen*, No. 11–08170, 2012 WL 5463256 (Bankr.D.P.R. Nov.9, 2012); *In re Tucker*, 479 B.R. 873 (Bankr.D.Or.2012); *In re Arnold*, 471 B.R. 578 (Bankr.C.D.Cal.2012); *In re Lively*, 467 B.R. 884 (Bankr.S.D.Tex.2012); *In re Borton*, No. 09–00196–TLM, 2011 WL 5439285 (Bankr.D.Idaho Nov.9, 2011); *In re Lindsey*, 453 B.R. 886 (Bankr.E.D.Tenn.2011); *In re Kamell*, 451 B.R. 505 (Bankr.C.D.Cal.2011); *In re Draiman*, 450 B.R. 777 (Bankr.N.D.Ill.2011); *In re Walsh*, 447 B.R. 45 (Bankr.D.Mass.2011); *In re Stephens*, 445 B.R. 816 (Bankr.S.D.Tex.2011); *In re Karlovich*, 456 B.R. 677 (Bankr.S.D.Cal.2010); *In re Gelin*, 437 B.R. 435 (Bankr.M.D.Fla.2010); *In re Steedley*, No. 09–50654, 2010 WL 3528599 (Bankr.S.D.Ga. Aug.27, 2010); *In re Mullins*, 435 B.R. 352 (Bankr.W.D.Va.2010); *In re Gbadebo*, 431 B.R. 222 (Bankr.N.D.Cal.2010); *see also In re Friedman*, 466 B.R. at 476 (discussing the bankruptcy court's determination—in an unpublished February 17, 2011 order—that the APR applies to individual Chapter 11 debtors).

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