Two More Circuits Find the Absolute Priority Rule Applicable to Individuals in Chapter 11: *Stephens* and *Lively*

BY ANDREW G. BALBUS

Andrew G. Balbus, LL.M. Bankruptcy St John's University School of Law, J.D. Harvard Law School, M.B.A. Columbia University, A.B. Duke University, is the founder of Balbus Law Firm of Danbury, Connecticut, the practice of which is limited to representing individuals and small businesses in cases under Chapters 7, 11, and 13 of the Bankruptcy Code in Connecticut and neighboring counties in New York.

I. Introduction

The answer to a critical issue, on which many courts continue to disagree, determines whether an individual choosing Chapter 11 to reorganize may retain valuable, nonexempt, prepetition business assets, an important if not the sole source of funds to make payments under a Chapter 11 plan of reorganization. The issue turns on whether the absolute priority rule applies in an individual's Chapter 11 case. If it does, the debtor will not be able to retain those business assets after confirmation of the plan, whereas, if that rule does not apply, the debtor will be able to confirm a plan that provides for the retention of those assets.

During 2013, the Tenth Circuit Court of Appeals in *In re Stephens*[1] and the Fifth Circuit Court of Appeals in *In re Lively*[2] held that the absolute priority rule does apply to individuals in Chapter 11. This article will discuss those opinions, identifying and explaining the arguments and rationale behind the "narrow interpretation" adopted by the two courts which now join a majority of the courts that have written decisions on this issue. This article will then criticize those decisions and explain why the "broad interpretation," adopted most recently by the Bankruptcy Court in the Western District of Arkansas in *In re O'Neal*, which is also discussed in this article, is the better approach. Whether the absolute priority rule applies to individuals in Chapter 11 is an issue that has divided courts throughout the nation and ultimately will have to be decided by the Supreme Court.[3]

Two Sides of the Issue

Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),[4] an individual debtor in Chapter 11 generally could not retain valuable, nonexempt, prepetition property by means of a plan of reorganization confirmed over the objection of a class of unsecured creditors. To be confirmed under § 1129(b),[5] among other requirements, a "cramdown" plan must have been "fair and equitable," the primary component of which was satisfying § 1129(b)(2)(B)(ii), the statutory codification of the absolute priority rule. Under the absolute priority rule, equity owners cannot retain any property unless creditors have been paid in full. Prior to the enactment of BAPCPA, it was clear that, as a result of the absolute priority rule, unless their Chapter 11 plan provided for the payment of their creditors in

full or with "new value," individual debtors could not retain ownership of valuable business assets.

As part of BAPCPA, Congress amended § 1129(b)(2)(B)(ii) by adding the following exception: "except that in the case in which the debtor is an individual, the debtor may retain property *included* in the estate under § 1115" (emphasis added).

Under § 1115(a), "in a case in which the debtor is an individual, property of the estate *includes, in addition to the property specified in § 541*[6]—(1) all property of the kind specified in § 541 that the debtor acquires after the commencement of the case...; and (2) earnings from services performed by the debtor after the commencement of the case" (emphasis added).

The Broad Interpretation

The new exception language in § 1129(b)(2)(B)(ii) is susceptible to two different interpretations. The first interpretation is that an individual debtor in Chapter 11 may retain all of the property that is defined as being included in the individual debtor's estate under § 1115. The first interpretation thus reads the words "included in the estate under § 1115" in § 1129(b)(2)(B)(ii) broadly to mean all the individual's property of the estate under § 541 plus all of the property that is added to the individual's estate under § 1115. Under this interpretation, referred to as the "broad interpretation," an individual debtor in Chapter 11 may retain prepetition assets (which are property of the estate under § 541) as well as postpetition assets and earnings, all of which are "included" within the individual debtor's estate pursuant to § 1115.

The Narrow Interpretation

The second interpretation of the new exception language in § 1129(b)(2)(B)(ii) is that an individual debtor in Chapter 11 may retain only that property which is incorporated into the individual debtor's estate by § 1115 which has not already been incorporated into the individual debtor's estate by § 541. The second interpretation thus reads the words "included in the estate under § 1115" in § 1129(b)(2)(B)(ii) narrowly to mean only that property which is included in the estate under § 1115 which would not otherwise be included in the estate under § 541. Under this interpretation, referred to as the "narrow interpretation," the maximum amount of property that an individual debtor in Chapter 11 may retain is postpetition assets and earnings. An individual debtor in Chapter 11 may not retain prepetition assets, because those assets are already included within the individual debtor's property of the estate under § 541 and are, therefore, not "included" within the individual debtor's estate pursuant to § 1115.

Initially, bankruptcy courts adopted the broad interpretation.[7] The more recent trend, however, has been for bankruptcy courts in reported decisions to adopt the narrow interpretation[8]—that the absolute priority rule still applies to individual debtors in Chapter 11 and, as a result, such debtors may not retain valuable, nonexempt, prepetition business assets pursuant to a cram down plan, unless creditors are paid in full or "new value"[9] is provided. To date, the Fourth, Fifth and Tenth Circuits have adopted the narrow interpretation. The Ninth Circuit Bankruptcy Appellate Panel, and the District Court for the Middle District of Florida have adopted the broad interpretation. Almost twice as many bankruptcy courts have adopted the narrow interpretation in written opinions, but a great many bankruptcy courts have adopted the broad interpretation without writing opinions.

II. *In re Stephens*

Background

The facts of *In re Stephens*, as set forth in the parties' briefs and the Tenth Circuit Court of Appeal's opinion,[10] are fairly straightforward. In 2005, the debtors, Arvin and Karen Stephens, established a chain of three convenience stores/gas stations in Grady County, Oklahoma. Appellant Dill Oil Company, L.L.C. ("Dill"), was their primary supplier of gasoline and related products. By 2008, as a result of compression in gasoline margins, plant closures in the area reducing their customer base, and the economic recession, the debtors' stores were losing money.

The debtors worked with their creditors to try to salvage their business. In December 2008, the debtors executed mortgages in favor of Dill on various parcels of real estate, including their home and various tracts of farm and ranch land. These mortgages, however, were subordinate to existing mortgages on the properties. Business continued to decline. The first mortgagee on the convenience stores filed foreclosure proceedings and the convenience stores were sold at a sheriff's sale in 2010.

Following the sale of the convenience stores in 2010,[11] the debtors filed in Chapter 11. Their plan of reorganization bifurcated Dill's approximately $1.8 million dollar claim, "stripping off" all but approximately $15,000 of the mortgage liens pursuant to § 506(a). Under the plan, as an unsecured creditor, Dill was to receive approximately one percent (1%) of its claim over five years.

Although the debtors had no equity in their farming operations,[12] the plan provided that the debtors would retain and remain in possession and control of the equipment, cattle, and real property used in their farming operations. According to the liquidation analysis in the plan, if the farming operations were liquidated, Dill, as an unsecured creditor, would have received nothing.

Nevertheless, Dill voted to reject the plan. Since Dill owned over 70% of the claims in the unsecured class, Dill's rejection of the plan resulted in the rejection by the entire class and precluded approval of the plan on a consensual basis under § 1129(a). All other classes, representing secured creditors, voted to accept the plan.

Dill also filed an objection to confirmation of the plan on the basis that the plan violated the absolute priority rule by permitting the debtors to retain their prepetition ownership of their farming operations while failing to pay Dill's claim in full.

The bankruptcy court entered an order confirming the plan pursuant to § 1129(b)'s "cram down" mechanism. The bankruptcy court found that the absolute priority rule prohibition on a debtor's retaining valuable, non-exempt prepetition business assets when creditors were not paid in full was abrogated by BAPCPA as to individual Chapter 11 debtors and, accordingly, § 1129(b)(2)(B)(ii) was not an impediment to the confirmation of the debtor's plan.

Dill timely filed a notice of appeal seeking reversal of the confirmation order, asserting that BAPCPA did not abrogate the absolute priority rule and the debtors' plan was not confirmable. The Bankruptcy Appellate Panel for the Tenth Circuit sua sponte determined that the case presented a question of public importance for which there was no controlling law and it certified the case for direct appeal to the Tenth Circuit Court of Appeals.[13]

Equitable Mootness

The Tenth Circuit began its opinion by addressing the debtors' contention that Dill's appeal should be dismissed under the doctrine of equitable mootness. The debtors argued that because Dill had failed to seek a stay of the confirmation order and because the debtors had substantially consummated the plan by making significant payments, conducting business operations based on the plan, and working full-time to generate additional income to fund the plan, it would be

inequitable now to disturb the plan. In addition, the debtors pointed out that if confirmation of the plan were reversed, the debtors would be forced to liquidate in Chapter 7 leaving little or nothing for Dill.

Although Dill did not seek a stay pending its appeal, the court found that this factor alone did not preclude the court from granting relief.[14] Further, the court found that substantial consummation of a plan is "not dispositive."[15] Instead, the court ruled that the most important factor is the effect that reversal of confirmation will have on non-party creditors and that liquidation of the debtors' farming operations in Chapter 7 was unlikely to affect non-party creditors adversely in any significant way.[16]

The court went on to find a public policy reason to reject the doctrine of equitable mootness in this case:

> Moreover, this case involves a "matter of public importance" for which "there is no controlling decision" in this circuit, 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."[17]

Application of the Absolute Priority Rule

1. Is the Statutory Language Clear and Unambiguous?

The court began its analysis regarding the application of the absolute priority rule to individual debtors in Chapter 11 by examining the language of the statute itself. The court noted that if the language is clear and unambiguous, the plain meaning of the statute controls. If, on the other hand, the language is ambiguous, the court stated that it must inquire further to discern Congress's intent.[18]

Because the other courts to have addressed this issue have read the statutory language to support both a narrow view (that only postpetition earnings and property are exempted from application of the absolute priority rule) and a broad view (that prepetition property is also exempted from application of the absolute priority rule), the court found that "the very existence of this dichotomy seems indicative of the text's ambiguity."[19] Agreeing with the Fourth Circuit Court of Appeals in *In re Maharaj*, the Tenth Circuit held that § 1115 and § 1129(b)(2)(B)(ii) are susceptible to two different, equally plausible, constructions.[20] Finding ambiguity in the texts, the court had to inquire further to discern Congress's intent.

2. Is There a Clear Congressional Intent to Repeal the Absolute Priority Rule to Individual Debtors in Chapter 11?

Noting that "[n]owhere in BAPCPA's sparse legislative history is there an explanation of what changes result from § 1115,"[21] the court found a split of opinion regarding the intent of Congress in enacting the BAPCPA provisions.

Those courts adopting the narrow interpretation, according to the Tenth Circuit, have discerned an overall Congressional intent in BAPCPA to impose greater burdens on debtors, which would be inconsistent with abrogating the absolute priority rule. Had Congress intended to abrogate the absolute priority rule with respect to individual debtors, there were easier ways to have manifested that intent. Moreover, had Congress intended such a drastic change to existing practice, it would have mentioned it. Instead, according to the court, under the narrow

interpretation, the BAPCPA amendments are best understood as preserving the status quo; Congress was merely exempting postpetition earnings and property to ensure that the absolute priority rule operated as it did prior to BAPCPA's passage.

On the other hand, those courts adopting the broad interpretation, according to the Tenth Circuit, have noted the numerous provisions adopted in BAPCPA for individual debtors in Chapter 11 that appear to be modeled on very similar or identical provisions from Chapter 13, which has no absolute priority rule, and ascribe a Congressional intent in BAPCPA to similarly abrogate the absolute priority rule for individual debtors in Chapter 11. Furthermore, according to the court, proponents of the broad interpretation emphasize that abolishing the absolute priority rule does not leave unsecured creditors without any power or protection; unsecured creditors receive the benefit of § 1129(a)(15)'s disposable income test. [22]

Finding that both the statutory language of the BACPA provisions and Congress's intent were ambiguous, the Tenth Circuit refused to adopt the broad interpretation, which would have had abrogated the application of the absolute priority rule to individual debtors in Chapter 11, absent clear instruction from Congress. The court stated, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest."[23] The court held that the party arguing that legislative action changed settled law "has the burden of showing that the legislature intended such a change," and the burden was not sustained by the debtors. The court refused to "erode past bankruptcy practice absent a clear indication that Congress intended such a departure," [24] stating:

> Here, the statutory language and legislative history lack any clear indication that Congress intended to erode a pillar of creditor bankruptcy protection… Especially in light of the fact that Congress has expressly repealed the APR in the past ... we decline to find an implied repeal here." (internal citations omitted)[25]

III. *In re Lively*

Background

The facts of *In re Lively*, as set forth in the Appellant's' brief,[26] the bankruptcy court's opinion,[27] and the Fifth Circuit Court of Appeal's opinion,[28] are sparse and simple. The debtor initially filed in Chapter 13. The case was converted to Chapter 11 after a creditor filed an additional claim causing the Chapter 13 debt ceiling to be exceeded.

The debtor once had a business, but it had been lost prior to filing. Personal liability from that failed business constituted the majority of the debtor's debt. The debtor's income came from salary, Social Security benefits, income from a mortgage note receivable, income from leasing nine railroad cars and a periodic payment from a recreational boat consignment lot operated by his son. The value of the debtor's non-exempt assets totaled $22,042, which included some equity from the mortgage note receivable, the nine railroad car leases and the debtor's interest in the consignment lot, all of which were heavily encumbered.

In his Chapter 11 plan, the debtor proposed to devote his net disposable income of $1,000 per month (treating his Social Security benefits as income) and to pay unsecured creditors over a five-year period a total of $53,998. That sum represented a return of approximately 7.4% on the $731,000 of unsecured claims. That sum also more than doubled the liquidation value of the debtor's non-exempt assets and thereby satisfied the "best interests of creditors" test of § 1129(a)(7).[29]

The unsecured creditor class voted overwhelmingly by dollar amount to accept the plan, but three of the four members of the class voted to reject it. Although no objections to confirmation were filed, the bankruptcy court, citing its "mandatory and independent duty" to determine whether the "cramdown" requirements of § 1129(b) were met,[30] addressed the applicability of the absolute priority rule.

Finding that the phrase "included in the estate under section 1115" unambiguously meant property added to the estate by § 1115, that such interpretation did not produce "absurd results," and fit "coherently into the statute's overarching structure," the bankruptcy court held that the absolute priority rule applied, denied confirmation, and certified the issue for immediate appeal.

In an opinion written by Judge Edith Jones, the Fifth Circuit Court of Appeals agreed that the statutory language unambiguously favored the "narrow view," but that even if the language were considered ambiguous, the narrow view must still prevail, "because the opposite interpretation leads to a repeal by implication of the absolute priority rule for individual debtors."[31]

Application of the Absolute Priority Rule

1. Is the Statutory Language Clear and Unambiguous?

In finding that the statutory language was not ambiguous, the Fifth Circuit began its analysis by noting the difference between the broad and narrow interpretations.

> The "narrow" interpretation holds that the absolute priority rule was amended so that individual debtors could exclude from its reach only their post-petition earnings and post-petition acquisitions of property, i.e., only property that was not already included in the Chapter 11 estate by § 541. The "broad" interpretation holds that the exception's (§ 1129(b)(2)(B)(ii)) reference to property "included in" the individual debtor's estate "under" § 1115 subsumes or supersedes the § 541 definition completely, thus effecting abrogation of the absolute priority rule.[32] (internal footnotes omitted)

The court noted that most of the cases that addressed the ambiguity issue have found the language of the BAPCPA amendments to be ambiguous and have gone on to find the legislative history "unenlightening."[33]

Nevertheless, the court found there was a plain and natural reading of the amendments to § 1129(b)(2)(B)(ii) and § 1115(a) that was consistent with a Congressional intent to make individual debtor reorganizations more like Chapter 13 cases and that made no Code provision superfluous.

Unless a debtor's postpetition earnings and property were subjected to creditors' claims by including them within an individual debtor's estate, the court reasoned, "Lively could reorganize in Chapter 11 under more favorable terms than those available to Chapter 13 debtors."[34]

According to the court, Congress remedied this potential inequity in Chapter 11 by adding to the property of an individual debtor's estate as defined in § 541, the individual debtor's postpetition earnings and property acquisitions in § 1115. By doing so, Congress brought postpetition earnings and property acquisitions within the protection of the automatic stay and enabled court supervision of the debtor's use of those assets, just as in Chapter 13. The problem created by this inclusion, according to the court, which had to be rectified in BAPCPA, was that "Congress also had to modify the absolute priority rule so that a debtor would not be saddled with committing all post-petition property to satisfy creditors' claims."[35]

The court further found that finding ambiguity in the new exception language in §1129(b)(2)(B)(ii) to be a "grammatical stretch" because § 1115 merely added property to a debtor's estate already comprised by § 541. The court stated that § 1115 no more supersedes § 541 "any more than '2' supersedes '3' when added to it."[36]

In a footnote,[37] the court dealt with the argument in favor of finding ambiguity in the statutory language that exempting only postpetition earnings and property from the absolute priority rule would confer, at best, only a trivial benefit on a Chapter 11 debtor by referring to the bankruptcy court's opinion which, according to the Fifth Circuit, had "thoroughly repudiated that argument with a simple hypothetical." The hypothetical suggested that a debtor who had confirmed a plan with a high car loan payment could reap the benefit of trading in the car and securing a lower car payment following confirmation because "§ 1129(b)(2)(B)(ii)'s exception allows the debtors to retain the savings."[38]

2. Would Congress Have Abrogated the Absolute Priority Rule by Implication?

Even if ambiguity existed, the court concluded, the consequence of adopting the broad interpretation would be to abrogate the absolute priority rule for individual debtors by implied repeal, which "[a]s a matter of standard statutory construction, ... is unacceptable."[39] The court stated:

> Repeals by implication are disfavored and will not be presumed unless the legislature's intent is "clear and manifest." The Court has also explained that "we will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." The absolute priority rule, in particular, has been a cornerstone of equitable distribution for Chapter 11 creditors for over a century. We must presume Congress was well aware of that rule and, in the absence of a clearer directive, modified § 1129(b)(2)(B)(ii) in order to refine it, not reverse it, for individual debtors.[40] (internal citations omitted).

IV. Criticism of the Two Opinions

Both the Tenth Circuit in *Stephens* and the Fifth Circuit in *Lively* addressed the application of the absolute priority rule to individuals in Chapter 11 by analyzing the same two issues: (1) whether the statutory language is clear and unambiguous and (2) would Congress have repealed the absolute priority rule by implication.

1. Is the Statutory Language Clear and Unambiguous?

The new BAPCPA language of § 1115 adding future earnings and property to the estate of an individual debtor in Chapter 11 and the new exception language to the absolute priority rule codified in § 1129(b)(2)(B)(ii), their interplay and the context in which they arise, can be very abstract. As a result, judges have resorted to extremely complicated devices to explain the grammar of the new provisions and to interpret their meaning.

What follows is a hypothetical substituting a few concepts while keeping the language and grammatical structure of the new provisions exactly the same. With the substitution of less abstract concepts, the plain meaning of the hypothetical isn't very hard to comprehend.

The Club Rules

A very exclusive private club has a few rules for its members:

Rule A: Membership includes one nightly dinner with one dessert—peach melba.

Rule B: Dinner must be eaten on the club premises. Rule B is known as the "Absolutely No Food Off Premises Rule."

In an effort to attract new members, the club created a new class of membership—Gold Membership—and enacted a new rule for the Gold Members.

Rule C: If a member is a Gold Member, dinner includes, in addition to the dessert specified in Rule A—(1) bananas foster; and (2) cherries jubilee.

The club also added an exception to the "Absolutely No Food Off Premises Rule."

Amended Rule B: Dinner must be eaten on the club premises, except that if a member is a Gold Member, the member may take off club premises the dessert included in the dinner under Rule C, subject to the requirements of Rule G (pertaining to hand washing after meals).

What desserts may a Gold Member take off club premises: only bananas foster and cherries jubilee, or bananas foster, cherries jubilee and peach melba? A natural, "plain reading" of the club rules would suggest that all three desserts may be taken home. Under Rule C, a Gold Member's dinner includes three desserts. Under Amended Rule B, a Gold Member may take home the dessert included in the dinner under Rule C, which is all three desserts.

Is it possible to read the club rules as permitting only the two desserts added to peach melba in Rule C to be taken off premises? Absolutely, but that is not a natural or plain reading of the rules. Applying the new exception to the Absolutely No Food Off Premises Rule to only two of the three desserts is not a natural or plain reading of the rules unless the reader's purpose is to keep all the delicious peach melba desserts on the club premises.

Assuming, arguendo, that the rules were ambiguous and could be read equally plausibly to allow a Gold Member to take home either two or three desserts, would it make any difference if the club was competing against other clubs that did not have an "Absolutely No Food Off Premises Rule" and the club adopted the new rules verbatim from the other clubs in an effort to be as attractive to new members as the other clubs?

Rule C adding desserts to a club dinner and the amendment to the Absolutely No Food Off Premises Rule in Rule B are far more concrete than § 1115 and § 1129(b)(2)(B)(ii), yet track the relevant language in those sections identically. By using desserts instead of property of the estate, even a grammatical exegesis of the type undertaken by the court in *In re Arnold*[41] with its convoluted identification of adjectival and adverbial phrases, does not dispel the plain meaning of the rules that the desserts permitted to be eaten off premises include peach melba, bananas foster, and cherries jubilee and that the "Absolutely No Food Off Premises Rule" has been abrogated for all three desserts for a Gold Member.

Ultimately, like beauty, ambiguity is in the eye of the beholder. The Tenth Circuit in *Stephens* found the language to be ambiguous. The Fifth Circuit in *Lively* found the language to be unambiguous. The Fifth Circuit adopted the narrow interpretation because it found that a "plain reading of § 1129(b)(2)(B)(ii) in light of § 1115(a) is that both provisions were adopted when BAPCPA was passed in order to coordinate individual debtor reorganization cases to some extent with Chapter 13 cases."[42] The provisions were not unambiguous on their own. According

to the Fifth Circuit, the provisions were unambiguous only in the context of the purpose for which they were passed by Congress—to make Chapter 11 for individuals more like Chapter 13.

a. Congress Giveth, Congress Taketh Away

The problem, according to the Fifth Circuit, was that prior to BAPCPA an individual debtor could reorganize more favorably in Chapter 11 than in Chapter 13, because postpetition earnings and property were not included within an individual debtor's estate in Chapter 11 and, as a result, were not subject to creditors' claims.

To rectify this inequality, according to the Fifth Circuit, Congress added postpetition earnings and property to the property of an individual debtor's estate. But, by so doing, Congress created another problem—all of the debtor's postpetition earnings and property were committed to satisfying creditors' claims.

To recap, according to the court, § 1115(a) was added to the Code to make Chapter 11 for individuals no more favorable than Chapter 13, by subjecting all postpetition earnings and property to satisfy creditors' claims, but § 1129(b)(2)(B)(ii) had to be amended "so that a debtor would not be saddled with committing all post-petition property to satisfy creditors' claims." That, according to court, explained why the language of new provisions was not ambiguous and favored the narrow interpretation.

The Fifth Circuit doesn't specify exactly what the problem is with a debtor being saddled with committing all postpetition earnings and property to satisfy creditors' claims. There are at least two possibilities that have been identified by other courts.

First, the problem could be that in order to confirm a nonconsensual plan, without some exception to the absolute priority rule, debtors might be forced to give creditors 100% of their future earnings leaving no future earnings for themselves. In order to confirm a nonconsensual plan, § 1129(a)(15) requires that individual debtors devote all of their projected disposable income to their plans.[43] At best, the new exception language in § 1129(b)(2)(B)(ii) "to avoid being saddled with committing all post-petition property to satisfy creditors' claims" would allow individual debtors to keep only that portion of their future earnings that they were not compelled to devote to their plan under § 1129(a)(15). In other words, future earnings included in the individual debtor's estate under § 1115(a) encompasses all of the individual debtor's earnings. Some of those earnings will be devoted to the maintenance or support of the debtor or, if the debtor is engaged in business, for the payment of expenditures necessary for the operation of such business. That portion of future earnings necessary for support or operation of the business is subtracted in computing the projected disposable income the individual debtor must devote to the plan under § 1129(a)(15). Accordingly, if the absolute priority rule were to be applied without exception, an individual debtor in Chapter 11 would not be able to "retain" that portion of future earnings that is necessarily spent on survival, including expenditures for food, clothing and shelter, as well as necessary business expenses. Under this scenario, without an exception to the absolute priority rule, debtors would be forced to give up 100% of their future earnings to creditors, including the portion necessary for survival, in order to confirm a nonconsensual plan. Obviously, under such an interpretation no nonconsensual plan could ever be confirmed.

The weakness of the notion that § 1129(b)(2)(B)(ii) was amended by Congress "so that a debtor would not be saddled with committing all post-petition property to satisfy creditors' claims" is that individuals in Chapter 11 do not get to retain future earnings. They are in fact saddled with committing all post-petition property to satisfying creditors' claims. It would be highly unusual for future property acquisitions to be identifiable at the time of confirmation, so

only future earnings are of consequence. The projected disposable income portion of future earnings is devoted to plans under § 1129(a)(15). The balance of future earnings spent on survival or necessary business expenses can hardly be said to be retained. Accordingly, the individual debtor in Chapter 11 does not get to keep future earnings. Future earnings either go to unsecured creditors or they go toward maintaining the debtor, the debtor's dependents or the debtor's business. It strains credulity to consider payments made for survival to be "retained."[44]

The second possible problem the Fifth Circuit contends Congress was attempting to fix to justify the new exception in § 1129(b)(2)(B)(ii), actually adopted by the bankruptcy court in *In re Lively*,[45] is that the new exception language allows individual debtors to keep earnings in excess of what they are required to devote to their plans. For example, a debtor might get an unexpected raise in the future that was not incorporated into the projected disposable income the debtor was devoting to his or her plan. According to the *Lively* court, the new exception language in § 1129(b)(2)(B)(ii) would allow the individual debtor to keep the excess earnings.

Of the two possible problems Congress was trying to fix, this is the more likely one being dealt with by the Fifth Circuit. In a footnote to its opinion,[46] the Fifth Circuit identified a "simple hypothetical" posed by the *Lively* bankruptcy court that suggested that a debtor who had confirmed a plan with a high car loan payment could reap the benefit of trading in the car and securing a lower car payment following confirmation because "§1129(b)(2)(B)(ii)'s exception allows the debtors to retain the savings."[47]

This "simple hypothetical" is simply incorrect. The exception in § 1129(b)(2)(B)(ii) does not allow debtors to retain any future savings. Excess earnings arise postconfirmation. The absolute priority rule only applies in the context of a nonconsensual confirmation. Once the plan is confirmed, the absolute priority rule disappears. Nothing in § 1129(b)(2)(B)(ii) or § 1115(a) affects the ability of an individual debtor to keep excess earnings following confirmation. The resolution of that issue depends solely upon whether creditors can seek to modify plans following confirmation and closure.

b. Non-Trivial Interpretation

The Fifth Circuit was interested in the bankruptcy court's simple hypothetical because it addressed the argument for the broad interpretation that unless the new exception language in § 1129(b)(2)(B)(ii) also covered prepetition property, the new exception would confer, at best, only a trivial benefit on a Chapter 11 debtor. The Fifth Circuit found that the *Lively* bankruptcy court had "thoroughly repudiated that argument with a simple hypothetical." If the new exception language were to have no meaning or only a trivial meaning, then it would have been hard for the Fifth Circuit to find that the statutory language unambiguously supported the narrow interpretation.[48]

Although the Fifth Circuit began its opinion finding that a "plain reading of § 1129(b)(2)(B)(ii) in light of § 1115(a) is that both provisions were adopted when BAPCPA was passed in order to coordinate individual debtor reorganization cases to some extent with Chapter 13 cases," the court inexplicably failed to notice that Chapter 13 contains no absolute priority rule and that Congress's intent in coordinating individual Chapter 11 cases with Chapter 13 cases might have meant abrogating the absolute priority rule for individuals in Chapter 11 as well.

The new exception language in § 1129(b)(2)(B)(ii) must mean something. Courts must determine whether Congress enacted the provision to allow debtors to retain property they obviously cannot retain or to harmonize the treatment of individual debtors in Chapter 11 debtors with the treatment of individual debtors in Chapter 13. The better, non-trivial, interpretation is that in BAPCPA Congress introduced five provisions of Chapter 13 into Chapter 11, some

almost verbatim. Chapter 13 does not have the absolute priority rule[49] and there is no section that states the absolute priority rule does not apply in Chapter 13, thus there was no analogous provision for Congress to have written into in Chapter 11. Instead, Congress had to insert an exception to the absolute priority rule for individuals in Chapter 11 to produce the same result as in Chapter 13. That is precisely what the new exception language in § 1129(b)(2)(B)(ii) accomplishes.

c. § 1306, the Chapter 13 Analog to §1115

In finding that the new statutory language was not ambiguous, the Fifth Circuit noted that finding ambiguity in the new exception language in § 1129(b)(2)(B)(ii) would be a "grammatical stretch" because § 1115 merely added property to a debtor's estate already comprised by § 541. The court stated that § 1115 no more supersedes § 541 "any more than '2' supersedes '3' when added to it."[50] To support that conclusion, the court cited to *In re Seafort*,[51] which interpreted § 1306(a), the statutory analog of § 1115(a). That choice of reference is curious because *Seafort* appears to support a different proposition, namely that § 541 does not supersede or subsume § 1306.

At issue in *Seafort* was whether the exception for voluntary 401(k) contributions provided in § 541(b)(7) from property of the estate under § 541(a) also applied to postpetition earnings and property included in a Chapter 13 debtor's estate under § 1306.[52] The *Seafort* court noted that "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."[53] The court concluded that Congress intentionally limited the type of contributions to qualified retirement plans that would be excluded from disposable income, namely those "under this subparagraph, § 541(b)(7)(A), which in turn governs only those contributions in effect as of the commencement of a debtor's bankruptcy case, per § 541(a)(1)." The *Seafort* court's holding was not that § 1306 did not supersede or subsume § 541(a). That was not at issue. The court never addressed whether § 1306 superseded or subsumed § 541(a). The court's holding was only that § 541(b) did not supersede or subsume § 1306; that is, the exception in § 541(b)(7) from property of the estate under § 541(a) for voluntary 401(k) contributions did not apply to postpetition earnings in § 1306.

Accordingly, although it is true, as the Fifth Circuit stated in *Lively*, that "§ 1115 no more supersedes § 541 "any more than '2' supersedes '3' when added to it," it would be more correct to say that § 1115 does supersede § 541 just as "5" supersedes both '2' and '3' and just as § 1306 supersedes both § 541(a) and § 541(b). *Seafort* is not particularly helpful in that regard, but there is some legislative history that is.

The definition of property of the estate in §1115 is virtually identical to the definition of property of the estate in §1306.[54] Although no legislative history explains the scope of §1115, there is legislative history explaining the scope of §1306. The legislative history is unambiguous:

> Section 541 is expressly made applicable to Chapter 13 cases... Section 1306 *broadens* the definition of property of the estate for Chapter 13 purposes to include all property acquired and all earnings from services performed by the debtor after the commencement of the case. Subsection (b)… provid[es] that a Chapter 13 debtor need not surrender possession of property of the estate, unless required by the plan or order of confirmation.[55] (emphasis added)

Since Congress enacted the virtually identical language in §1115 that it had in §1306, it is reasonable to conclude that Congress intended the same result, i.e., that §1115 broadens the definition of property of the estate and to include prepetition property in the definition of property of the estate for an individual in Chapter 11 just as §1306 broadens the definition of property of the estate to include prepetition property in the definition of property of the estate for an individual in Chapter 13. Thus, it is possible to discern congressional intent to create a regime for individual debtors in Chapter 11 similar to that of Chapter 13 by incorporating virtually identical provisions from Chapter 13 into Chapter 11.

Contrary to the position of the Fifth Circuit in *Lively*, a plain reading of the statutory language, the pattern of adopting Chapter 13 provisions into Chapter 11 for individual debtors, and the legislative history to §1306 all support the broad interpretation that individuals in Chapter 11 may retain prepetition property, subject to satisfying all confirmation requirements except the absolute priority rule.

2. Would Congress Have Repealed the Absolute Priority Rule by Implication?

Both the Tenth Circuit in *Stephens* and the Fifth Circuit in *Lively* refused to adopt the broad interpretation abrogating the application of the absolute priority rule in its entirety to individual debtors in Chapter 11 absent clear Congressional intent to change past bankruptcy practice. Neither court would repeal the absolute priority rule by implication.

Interestingly, the Tenth Circuit in *Stephens* based its conclusion, in part, on "the fact that Congress has expressly repealed the APR in the past," [56] while the Fifth Circuit in *Lively* based its conclusion, in part, on the fact that the absolute priority rule "has been a cornerstone of equitable distribution for Chapter 11 creditors for over a century."[57] One circuit based its conclusion on the discontinuity of the application of the absolute priority rule and the other on the continuity of its application. The Tenth Circuit in *Stephens* had the better analysis.

There have been significant periods of time in the past when the absolute priority rule has not applied to individuals.[58] Accordingly, making the absolute priority rule inapplicable to individuals in Chapter 11 pursuant to BAPCPA starting in 2005 is not a major change in prior practice that Congress needed to highlight, especially in light of the general absence of legislative history for BAPCPA[59] and the clear manifest intent of Congress to make the confirmation requirements for individuals in Chapter 11 similar to those in Chapter 13, in which there is no absolute priority rule.

Moreover, as described above, if the narrow interpretation is to confer more than a trivial benefit to a debtor, it must allow an individual in Chapter 11 who manages somehow to retain some postpetition earnings despite § 1123(a)(8) and § 1129(a)(15) to contribute such retained future earnings to the plan in the context of a cram down confirmation. If such plan calls for the debtor to retain valuable prepetition business assets by paying creditors postpetition earnings from personal services performed by the debtor, pursuant to a new value exception to the absolute priority rule, the narrow interpretation would thus overrule the Supreme Court decision in *Norwest Bank Worthington v. Ahlers*,[60] which stated that the new value exception to the absolute priority rule, if it existed at all, could not be satisfied by the contribution of postpetition earnings from personal services (i.e., "sweat equity").

While it is true the BAPCPA legislative history does not indicate that Congress intended to break with longstanding bankruptcy practice by abrogating the absolute priority rule, the legislative history equally does not indicate that Congress intended to overturn a Supreme Court decision, *Norwest Bank Worthington v. Ahlers*, without announcing it in the legislative history,

another important canon of statutory construction. The canon of statutory construction against implied repeal of longstanding bankruptcy practice also applies to overruling Supreme Court precedents by implication. The new exception language in § 1129(b)(2)(B)(ii) must violate one canon against implied repeal. The narrow interpretation cannot be supported by an argument on the one hand that Congress would not have abolished the absolute priority rule without mentioning it in the BAPCPA legislative history, but, on the other hand, that Congress would have overturned the Supreme Court decision in *Ahlers* without mentioning it in the BAPCPA legislative history.

Either an alleged long-standing practice has been abrogated or a Supreme Court decision has been overturned. One or the other. In either case, Congress didn't herald what it was doing.

V. Economic Consequences and Public Policy

Lively was an odd case because the debtor was apparently only seeking to retain portfolio assets, not an active business. Still, no creditor objected to his plan. Enough creditors by dollar amount voted to approve the plan. Had the requisite number of creditors voted in favor of confirmation, the plan probably would have been confirmed on a consensual basis, because the best interests of creditors test was met. Had the plan been confirmed, unsecured creditors would have received more than twice what they would have received in a liquidation under Chapter 7. The bankruptcy court on its own initiative raised the absolute priority rule. Since the debtor was not attempting to save a business, and the portfolio assets he was attempting to retain were heavily encumbered, leaving the debtor little or no equity in them, the debtor does not appear to have been particularly adversely affected by the decision. But, by denying confirmation on a cram down basis, the court likely gave the unsecured creditors less than what they would have received had the plan been confirmed. It is hard to see how the unsecured creditors benefitted from the application of the absolute priority rule.

Stephens was a more typical case where the debtor was attempting to retain valuable business assets through which creditors could be repaid and the debtor obtain a fresh start. The *Stephens* debtors lost their convenience stores prior to filing. They were hoping to use Chapter 11 to reorganize their debts and retain the assets that comprised their farming business. There is no indication in the case that the debtors had significant exempt assets or access to financing that could have been contributed to a plan that would have paid creditors any more than the plan the debtors submitted.

The plan in *Stephens* passed the best interest of creditors test. Although unsecured creditors received a very small return under the plan, that return was still more than what the unsecured creditors would have received in liquidation under Chapter 7. But for the rejection of the plan and the objection to confirmation of one unsecured creditor, the plan could have been confirmed. Confirmation of the debtor's plan would literally have saved the farm.

How are either of these rulings consistent with the basic principles that underlie the Bankruptcy Code to grant a 'fresh start' to the 'honest but unfortunate debtor,'[61] and the "often conflicting" policy of maximizing creditor recoveries.[62]

Even if a court were to conclude that "no one who reads BAPCPA as a whole can reasonably conclude that it was designed to enhance the individual's fresh start,"[63] what sense does it make to deny a debtor a fresh start when it also penalizes the unsecured creditors who receive less in a liquidation than they would have under a confirmed plan of reorganization? Courts like *Stephens* and *Lively* that adopt the narrow interpretation to deny nonconsensual confirmations are cutting off creditors' noses to spite their faces.

In contrast to the opinions by the Tenth and Fifth Circuits, one recent bankruptcy court decision carefully considered all of the arguments and held that the broad interpretation was correct.

VI. *In re O'Neal*

Background

In re O'Neal [64] involved husband and wife debtors who conducted a large farming operation individually and through a wholly-owned corporation and a wholly-owned partnership. The farming operation utilized land owned both by the debtors individually and through their entities that was worth a little under $4 million, as well as farm machinery and equipment owned individually and through their entities that was worth approximately $425,000. The debtors also conducted farming operations on leased land. Their case, originally filed under Chapter 12, was converted to Chapter 11 apparently because the Chapter 12 debt limits were breached.

The reorganization plan proposed by the debtors suffered from numerous defects. It failed to satisfy § 1123(a)(1) by inaccurately and incompletely classifying claims, failing to identify all claims as impaired or not impaired, incompletely identifying and describing security interests, and inadequately and incompletely describing how payments would be made to creditors with respect to their claims. The plan failed to satisfy § 1141(d)(5)(A) because its confirmation would have discharged debts prior to the completion of all payments under the plan. Additionally, it failed to satisfy § 1129(a)(3) as being proposed in good faith because the payments listed in the plan as going to unsecured creditors differed from the payments the debtors expected to make; virtually none of the debtors' projected disposable income actually would have gone to unsecured creditors.

An objection to confirmation was filed by the Arkansas Development Finance Authority (ADFA) on the above grounds and, because the debtors were retaining prepetition property without paying the rejecting class of unsecured creditors in full, the plan violated the absolute priority rule.

Application of the Absolute Priority Rule

After explaining the problems with the plan that kept the plan from being confirmed, the court addressed the applicability of the absolute priority rule, beginning with a summary of the current status of the debate from *Maharaj* and *Stephens* supporting the narrow interpretation on the one hand and *In re Friedman*[65] supporting the broad interpretation on the other hand. By focusing on the purpose of the new exception language in § 1129(b)(2)(B)(ii) in the context of Chapter 11 reorganizations, Judge James G. Mixon concluded that the broad interpretation was correct:

> The weakness of the narrow view is illustrated if one were to ask the question: "If Congress was not attempting to write out of individual Chapter 11 cases the absolute priority rule, what was the purpose of all of the BAPCPA amendments to Chapter 11, including section 1115, which were obviously borrowed from Chapter 13?" Chapter 13 has no absolute priority rule and would not be of much use if it did. The means test for Chapter 7 debtors created by BAPCPA was designed to move debtors who could pay something to their creditors to reorganization chapters. Here, these Debtors have no recourse to either Chapter 13 or Chapter 12 because of the debt limits imposed by Congress.[66] (Internal citations omitted)

Further drawing the analogy between Chapter 13 and Chapter 11, the court found, "Section 1115 is written word for word like section 1306 and courts interpreting section 1306 have never bifurcated this section into two species of property as the narrow view does in individual Chapter 11."[67]

The court further found that limiting the exception to the absolute priority rule to only future income of the debtor, as advocated by the narrow interpretation, accomplishes nothing of substance, especially in light of § 1129(a)(15)(B), which requires the debtor to devote all of his disposable income to the plan.[68]

Because the new exception language has no other effect, other than to be part of a Congressional design to make Chapter 11 to function like Chapter 13, the court concluded that the broad interpretation was correct and that the absolute priority rule no longer applied to prepetition property or postpetition earnings and property:

> [S]ince there does not appear to be any other logical reason for all of the changes made exclusively to Chapter 11 for individuals except to make it work like Chapter 13, this Court concludes that Congress did intend for section 1115 to define all property of an individual Chapter 11 case (just as § 1322 does). Therefore, by the express terms of amended § 1129(b)(2)(B)(ii) the absolute priority rule does not apply to any property of the estate of individual Chapter 11 debtors.[69]

VII. Appendices

Appendix 1—Cases Adopting the Broad Interpretation

In re Tegeder, 369 B.R. 477, 480, 48 Bankr. Ct. Dec. (CRR) 88 (Bankr. D. Neb. 2007) (court acknowledged absence of reported decisions, relied upon treatises and commentators, and found the statutory language unambiguous); In re Roedemeier, 374 B.R. 264, 275-76, 48 Bankr. Ct. Dec. (CRR) 196 (Bankr. D. Kan. 2007) (court relied upon treatises and commentators, noted that the changes made to make individual Chapter 11 cases function more like Chapter 13 cases indicated Congress intended to extend exemption to individual Chapter 11 debtors); In re Shat, 424 B.R. 854, 859-865, 63 Collier Bankr. Cas. 2d (MB) 748, Bankr. L. Rep. (CCH) P 81701 (Bankr. D. Nev. 2010) (narrow view "underscored by other changes made at the same time" to make individual Chapter 11 cases more like Chapter 13 cases, including § 1129(a)(15), requiring a debtor to commit earnings to the plan; consequently, debtor can't be said to 'retain' income); SPCP Group, LLC v. Biggins, 465 B.R. 316, 322-23, 66 Collier Bankr. Cas. 2d (MB) 920, Bankr. L. Rep. (CCH) P 82079 (M.D. Fla. 2011) (affirming unpublished bankruptcy court decision that broad interpretation applied, based upon the plain meaning of the statutes, thus allowing the debtors to retain prepetition property, despite contrary holding from another bankruptcy court in the same district—*In re Gelin*); and In re Friedman, 466 B.R. 471, 56 Bankr. Ct. Dec. (CRR) 57, 67 Collier Bankr. Cas. 2d (MB) 752, Bankr. L. Rep. (CCH) P 82232 (B.A.P. 9th Cir. 2012) (language not ambiguous and within the contextual statutory scheme and logic of plan confirmation requirements; "included" is not a word of limitation; plain reading of § 1129(b)(2)(B)(ii), and § 1115 together mandates that absolute priority rule is not applicable; Chapter 13 does not contain an absolute priority rule; BAPCPA amendments adopted provisions to individual Chapter 11s which are similar, if not identical, to Chapter 13); In re Sample, 2013 WL 3759795 at *1 (Bankr. D. Ariz. 2013) (BAP decision in *Friedman* is precedent). See also In re Johnson, 402 B.R. 851, 852-853 (Bankr. N.D. Ind. 2009) (dicta that individual chapter 11 debtor's plan need not satisfy the absolute priority rule). See also apparently unreported decision

adopting the broad interpretation *In re Cardin*, from the District Court for the Eastern District of Tennessee, decided September 6, 2013, on appeal to the 6th Circuit, District Case No: 2:12-cv-00463, Bankruptcy Case No: 11-52077.

Appendix 2—Cases Adopting the Narrow Interpretation

In re Gbadebo, 431 B.R. 222, 229, 63 Collier Bankr. Cas. 2d (MB) 1293, Bankr. L. Rep. (CCH) P 81753 (Bankr. N.D. Cal. 2010) (court found the statutory language to be unambiguous; 'included in the estate under section 1115' meant added to the estate by § 1115; BAPCPA amendments to make Chapter 11 more like Chapter 13 not "persuasive evidence"; BAPCPA not designed to enhance the individual debtor's fresh start); In re Gelin, 437 B.R. 435, 441, 64 Collier Bankr. Cas. 2d (MB) 435, Bankr. L. Rep. (CCH) P 81862 (Bankr. M.D. Fla. 2010) (broad view was plausible given text's unquestionable ambiguity; since neither § 103(a) nor § 541 was amended by BAPCPA, "there is no reason for section 1115 to 'absorb' or 'supersede' section 541 to define property of the estate"; broad view was "an incredibly complicated and forced interpretation"; had Congress meant to exempt an individual debtor's entire estate, it would have referred to both § 541 and § 1115 in § 1129(b)(2)(B)(ii)); In re Mullins, 435 B.R. 352, 360 (Bankr. W.D. Va. 2010) (statute not ambiguous; broad view "strained to find ambiguity"; had Congress intended to entirely eliminate absolute priority rule from individual Chapter 11 cases, there were clearer, easier and more direct ways to do it); In re Karlovich, 456 B.R. 677, 682 (Bankr. S.D. Cal. 2010) (statutory language unambiguous; had Congress intended to abrogate the absolute priority rule for individuals, it could have added 'except with respect to individuals' at the beginning of § 1129(b)(2)(B)(ii) or stated that an individual could retain all property; had Congress intended to make individual Chapter 11 cases more like Chapter 13 cases, Congress could have raised or eliminated the statutory debt ceilings for Chapter 13 cases); In re Steedley, Bankr. L. Rep. (CCH) P 81872, 2010 WL 3528599 (Bankr. S.D. Ga. 2010) (statutory language unambiguous; plain language of § 1115 does not subsume § 541; to the contrary, § 541 specifically applies in all Chapter 11 cases and § 1115 adds postpetition property to the individual debtor's estate); In re Stephens, 445 B.R. 816, 820-821 (Bankr. S.D. Tex. 2011) (if § 1115 were interpreted to include all property of the estate, the language 'in addition to the property specified in section 541' in the preamble to § 1115(a) would render the words 'all property of the kind specified in section 541' in § 1115(a)(1) surplusage ; also, the broad interpretation would render Section 541 itself surplusage); In re Walsh, 447 B.R. 45, 48 (Bankr. D. Mass. 2011) ("because it deals with postpetition section 541(a) property (a most awkward construction), section 1115 does not include section 541(a) property as such"); In re Draiman, 450 B.R. 777, 820-822, 54 Bankr. Ct. Dec. (CRR) 175, 107 A.F.T.R.2d 2011-2180 (Bankr. N.D. Ill. 2011) (court's "plain reading" of § 1115 was that it added property to the debtor's estate which had already been established by § 541; § 1115 did not absorb § 541; even though "it is generally true that the changes instituted by BAPCPA intended for individual Chapter 11 cases to more closely track Chapter 13 cases; new value exception to the absolute priority rule applied); In re Kamell, 451 B.R. 505, 506-508, 54 Bankr. Ct. Dec. (CRR) 197 (Bankr. C.D. Cal. 2011) (no clear expression of Congress intent to abrogate the absolute priority rule; the argument that Congress intended to treat individuals in Chapter 11 more like debtors in Chapter 13 was "rather convoluted and strained" particularly since the overall thrust of BAPCPA was punitive in nature; had Congress intended to abrogate the absolute priority rule there were simpler ways to accomplish that; the new exception language in § 1129(b)(2)(B)(ii) effectively allows the debtor to keep the portion of postpetition earnings that are paid for the maintenance or support of the

debtor and his family and, if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; the broad view makes § 1129(b)(2)(B)(i) into a nullity because no debtor would choose to pay a class of unsecured claim holders the full allowed amount of their claims when the debtor could keep prepetition property and confirm a cram down plan by otherwise satisfying the requirements of § 1129(b)); In re Maharaj, 449 B.R. 484, 493 (Bankr. E.D. Va. 2011), aff'd, 681 F.3d 558, 56 Bankr. Ct. Dec. (CRR) 166, 67 Collier Bankr. Cas. 2d (MB) 1429, Bankr. L. Rep. (CCH) P 82289 (4th Cir. 2012) (following *Mullins*, had Congress intended to exempt individual debtors in Chapter 11 from the absolute priority rule, it would have been easier and more straight forward to have § 1129(b)(2)(B)(ii) read: "except that in a case in which the debtor is an individual, this provision shall not apply" instead of adding the reference to § 1115; following *Karlovich*, had Congress intended to make Chapter 11 for individuals more like Chapter 13, it would have been easier and more straight forward for Congress to have raised or eliminated the debt limits in § 109(e)); In re Lindsey, 453 B.R. 886, 903-05 (Bankr. E.D. Tenn. 2011), aff'd, 2012 WL 4854718 (E.D. Tenn. 2012) (statutory language ambiguous; sparse legislative history unhelpful in resolving the ambiguity; "[B]ecause § 1115 is a supplement to [and does not supplant] § 541 with respect to individual Chapter 11 debtors, the more logical reading of the phrase "included in the estate under section 1115" is the narrow one; had Congress intended to completely exempt individual Chapter 11 debtors from the absolute priority rule, Congress would have done so in a more explicit manner; the narrow interpretation more in line with the punitive purpose of BAPCPA—to make debtors pay creditors as much as possible); In re Borton, Bankr. L. Rep. (CCH) P 82112, 2011 WL 5439285 (Bankr. D. Idaho 2011) (statutory language unambiguous; § 1129(b)(2)(B)(ii) left the absolute priority rule in place, except for postpetition property and § 1115 therefore supplements rather than supplants or subsumes § 541); In re Tucker, 479 B.R. 873, 57 Bankr. Ct. Dec. (CRR) 33 (Bankr. D. Or. 2012) (adopted reasoning and holding of *Karlovich*; contribution of future salary was not "money or money's worth," under *Ahlers* and thus failed to satisfy the "new value" exception to the absolute priority rule); In re Lively, 467 B.R. 884, 56 Bankr. Ct. Dec. (CRR) 63 (Bankr. S.D. Tex. 2012) (statutory language unambiguous; it means property added to the estate by § 1115; the new exception language does not have a trivial meaning because it allows debtors to retain earnings by either economizing or increasing their actual earned income); In re Arnold, 471 B.R. 578 (Bankr. C.D. Cal. 2012), appeal dismissed, (9th Circ. 12-57265)(Jan. 16, 2013) (statutory language ambiguous; following grammatical exegesis, court concluded that § 1115 does not supplant, replace, absorb or supersede § 541, "in addition to" served as an adverbial phrase since it modifies the verb "includes" in the sentence to answer not what kind or which one but rather "to what extent is property included as property of the estate under § 1115(a);" sparse legislative history indicates BAPCPA's purpose was punitive; Congress did not want to enhance an individual debtor's fresh start; new exception language allows the individual debtor to keep enough postpetition earnings to sustain his livelihood; under broad interpretation there is no need for an individual debtor to negotiate with creditors to solicit votes if the debtor can resort to cramdown and keep prepetition property regardless of the vote; interpretation that Congress intended to make Chapter 11 for individuals more like Chapter 13 is not supported by the structure of the statutory language or the legislative history of BAPCPA; had Congress meant to provide the protections of Chapter 13 to more debtors who are manager/owners of businesses, it could have simply raised the debt limits of Chapter 13; broad interpretation does violence to the delicate balance between creditors and debtors in Chapter 11); In re Maharaj, 681 F.3d 558, 56 Bankr. Ct. Dec. (CRR) 166, 67 Collier

Bankr. Cas. 2d (MB) 1429, Bankr. L. Rep. (CCH) P 82289 (4th Cir. 2012) (affirming the bankruptcy court's decision in 449 B.R. 484 (Bankr.E.D.Va.2011)(language ambiguous; rule of statutory construction disfavors implied repeal of existing statutes unless Congressional intent clearly expressed; easier ways for Congress to have repealed absolute priority rule; Congress could have simply raised the Chapter 13 debt limits; Congress was not trying to provide greater benefits to individual debtors; BAPCPA's purpose was punitive; plan acceptance still a possibility, by negotiating a consensual plan, paying a higher dividend, paying dissenting classes in full, or contributing prepetition property); In re Lee Min Ho Chen, 482 B.R. 473, 57 Bankr. Ct. Dec. (CRR) 59 (Bankr. D. P.R. 2012) (statutory language is ambiguous; following grammatical exegesis of Arnold, narrow interpretation is correct; legislative history of BAPCPA favors narrow interpretation, the purpose of BAPCPA was to have debtors repay more and not less; public policy of striking a fine-tuned balance between the rights of debtors and creditors favors narrow reading, broad reading shortcuts creditors' protection thereby "chilling future lending for fiscally responsible Americans hoping for a second chance in fulfilling their American dream;" providing proceeds from sale of two vehicles fails to satisfy the first step of the new value exception's inquiry, i.e. coming from an outside source); In re Gerard, 495 B.R. 850, 58 Bankr. Ct. Dec. (CRR) 87 (Bankr. E.D. Wis. 2013) (based on a natural reading of the statute and absence of supportive legislative history or case law, § 1115(b), authorizing the individual debtor to remain in possession of estate property, does not abrogate the absolute priority rule; following *Stephens*, *Lively* and *Maharaj* presumption against implied repeal, concluded that neither Code nor legislative history indicated clear Congress intent to abrogate the absolute priority rule; debtor's retention of exempt property did not violate absolute priority rule; plan failed to satisfy new value exception; although not addressed, plan probably violated best interests of creditors test); In re Martin, 497 B.R. 349 (Bankr. M.D. Fla. 2013) (plain meaning of BAPCPA amendments supports the narrow view; repeal by implication and abrogation of long-standing legal principles is disfavored; narrow view is consistent with punitive congressional intent in enacting BAPCPA; and BAPCPA amendments harmonize treatment of individual Chapter 11 debtors with Chapter 13 debtors; ignored a contrary prior decision of the same Bankruptcy Court in the case of *SPCP Grp., LLC v. Biggins*, as well as the District Court's affirmance of that decision, holding those decisions to be dicta because the debtor's plan provided dissenting creditors with property equal to the allowed amount of their claims and, consequently, consideration of the absolute priority rule was not necessary to either the Bankruptcy Court's decision or the District Court's affirmance); and In re Brown, 2013 WL 5405657 (Bankr. E.D. Pa. 2013) (the narrow view more accurately reflects congressional intent to preserve the absolute priority rule as it applied to individual debtors prior to the BAPCPA amendments. The addition of postpetition assets and earnings to the definition of estate property in individual cases by section 1115(a) triggered the amendment to section 1129(b)(2)(B)(ii), so as not to further expand the scope of the absolute priority rule into postpetition property)

Appendix 3—An Exact Paraphrasing of the Grammatical Analysis of *In re Arnold*[70]

What follows is an exact paraphrasing of the grammatical analysis in the opinion with only the language of the club rules substituted for the analogous provisions of § 1115 and § 1129(b)(2)(B)(ii) in the court's opinion (all internal citations have been omitted). The revised grammatical analysis sheds little light on the meaning of the club rules or the BAPCPA provisions.

The Club Rules

A very exclusive private club has a few rules for its members:

Rule A: Membership includes one nightly dinner with one dessert—peach melba.

Rule B: Dinner must be eaten on the club premises. Rule B is known as the "Absolutely No Food Off Premises Rule."

In an effort to attract new members, the club created a new class of membership—Gold Membership—and enacted a new rule for the Gold Members.

Rule C: If a member is a Gold Member, dinner includes, in addition to the dessert specified in Rule A—(1) bananas foster; and (2) cherries jubilee.

The club also added an exception to the "Absolutely No Food Off Premises Rule".

Amended Rule B: Dinner must be eaten on the club premises, except that if a member is a Gold Member, the member may take off club premises the dessert included in the dinner under Rule C, subject to the requirements of Rule G (pertaining to hand washing after meals).

Paraphrasing the Court's Grammatical Anaylsis:

In Rule C, the subject of the sentence, or the noun or pronoun that tells what the subject is about, is "dinner." "Dinner" is not a single-word noun; it is a collective noun, which is a noun that "name[s] groups of people or things," and which in this case is a group of dishes constituting a dinner meal. The predicate of the sentence includes the verb that describes what the subject is doing, which happens to be the transitive verb, "includes." Transitive verbs require a direct object or direct objects, and a direct object is a noun or pronoun that receives the action. The direct objects of the sentence, or the nouns that receive the action of the transitive verb, "includes," are: (1) bananas foster; and (2) cherries jubilee.

…

Bananas foster and all cherries jubilee are nouns. Thus, as to these two categories of dessert, the sentence expresses a complete thought: The "dinner" (subject) "includes" (transitive verb) bananas foster and cherries jubilee for a Gold Member (direct object/collective nouns). The predicate of the sentence consists of the transitive verb, "includes," and the direct objects.

The phrase, "in addition to," is part of a prepositional phrase because it begins with a preposition, "in." The object of the prepositional phrase is "dinner." Thus, the entire prepositional phrase, which is relevant in interpreting the meaning of Rule C, is "in addition to the dessert specified in Rule A." Since prepositions link a noun or pronoun to another word in a sentence, the question ... is this: to what word is the noun, "the dessert specified in Rule A" linked in Rule A, i.e., "dinner," another noun, which reflects the broad view; or is it linked to "includes," a verb, which reflects the narrow view.

…

In technical grammatical terms, the specific question is whether "in addition to the dessert specified in Rule A" is an "adjectival phrase" or an "adverbial phrase."

…

Applying this analysis, the prepositional phrase, “in addition to the dessert specified in Rule A” is an adverbial phrase because it modifies the verb, “includes,” to explain to what extent “dinner” is included under Rule C, i.e., bananas foster and cherries jubilee. The prepositional phrase, “in addition to the dessert specified in Rule A,” is not an adjectival phrase because it does not describe a noun (i.e., “dinner”) as it does not answer the questions, “Which one?” or “What kind?” To reach that result, the words, “in addition to” must be ignored, which would not be the express language of the rule. In sum, this means that “in addition to the dessert specified in Rule A” is an adverbial prepositional phrase linked to the verb, “includes,” because it modifies the word, “includes,” in answering the question “to what extent is dessert included as part of dinner under Rule C.” As part of the prepositional phrase, “in addition to the dessert specified in Rule A,” the phrase, “dessert specified in Rule A” cannot be viewed in isolation. The phrase is part of the prepositional phrase beginning with “in addition to,” and is thus not the direct object of the transitive verb, “includes,” so it does not relate to the subject of the sentence, “dinner.” In other words, from a functional standpoint, the phrase, “the dessert specified in Rule A,” is not an answer to the question what is included as “dinner” under Rule C.

…

Accordingly, [it can be concluded] that based on the grammatical structure of Rule C, “the dessert specified in Rule A” is not “the dessert included in the dinner under Rule C,” which may be eaten off premises by a Gold Member pursuant to the exception to the “Absolutely No Food Off Premises Rule” in Rule B.

…

Although a grammatical analysis of the words, phrases and sentences in Rule C is technical and somewhat formalistic, it is a helpful aid in interpreting the statutory language of Rule C as recognized by a canon of statutory construction that “[w]ords are to be interpreted according to the proper grammatical effect of their arrangement within the statute.”

…

Another point of grammar is that “[p]hrases or clauses introduced by such expressions as together with, as well as, in addition to are not part of the subject and, therefore, do not affect the number of the verb.” This grammatical point reinforces the idea that “in addition to” means that the matter is “besides” or “separate from” the subject of the sentence, which in Rule C means “dinner” included under Rule C.

…

If the club had intended for Rule C to subsume or supplant Rule A, it could have added Rule A to the enumerated items on the list in Rule C. Instead, Rule C adds only two items: (1) bananas foster and (2) cherries jubilee. Thus, [one can] agree with the...the narrow view that Rule C does not subsume or supplant Rule A.

NOTES

1. In re Stephens, 704 F.3d 1279, 57 Bankr. Ct. Dec. (CRR) 125, 68 Collier Bankr. Cas. 2d (MB) 1760, Bankr. L. Rep. (CCH) P 82366, 78 A.L.R. Fed. 2d 719 (10th Cir. 2013). This is a different case than In re Stephens, 445 B.R. 816 (Bankr. S.D. Tex. 2011).
2. In re Lively, 717 F.3d 406, 57 Bankr. Ct. Dec. (CRR) 278, Bankr. L. Rep. (CCH) P 82488 (5th Cir. 2013).
3. This article updates three previous articles by the author on the same topic: Balbus, Continued Disagreements Over the Application of the Absolute Priority Rule to Individuals in Chapter 11: *Friedman* and *Maharaj*, 21 Norton Bankr. L. & Prac. 755 (2012); Balbus, Sections 1115 and 1129(b)(2)(B)—Possible Exceptions to the Application of the Absolute Priority Rule, 21 Norton J. Bankr. L. & Prac. 3 Art. 4 (2012); and Balbus, Does the Absolute Priority Rule Apply to Individuals in Chapter 11?, 20 Norton J. Bankr. L. & Prac. 79 (2011).

4. Pub. L. No. 109-8, 119 Stat. 23 (April 28, 2005).
5. Unless otherwise stated, all section references are to Title 11 of the United States Code, referred to herein as the "Bankruptcy Code" or the "Code."
6. Section 541 specifies that property of the estate includes "all legal and equitable interests of the debtor in property as of the commencement of the case." Prior to BAPCPA, property which was acquired post-petition was still property of the estate if it was proceeds, products, offspring, rents or profits of or from property of the estate. See § 541(a)(6).
7. See list of cases in Appendix 1.
8. See list of cases in Appendix 2.
9. Although an individual in Chapter 11 who owns a small business will rarely have enough exempt assets or access to financing to be able to satisfy the "new value" exception to the absolute priority rule (should it exist), it may be possible in some cases for the individual to accumulate sufficient funds after filing and prior to confirmation that are (1) new, (2) substantial, (3) money or money's worth, (4) necessary for a successful reorganization, and (5) reasonably equivalent to the value or interest received, to contribute to the plan to buy back prepetition property (i.e., the small business). However, the expedited plan filing and confirmation requirements for a small business under § 1121(e) and § 1129(e) work against delay.
10. Stephens, 704 F.3d 1279.
11. The debtors still owed over $1.8 million to Dill, over $700,000 to First National Bank of Ardmore and over $60,000 in credit card debt.
12. The farming operation apparently was composed of several parcels of land. After the Chapter 11 case was filed, one farm was sold to debtor Karen Stephens' brother and leased back for use in the farming operation. Dill received approximately $12,000 for its subordinated interest in the farm.
13. Neither party elected to have the appeal heard by the United States District Court for the Western District of Oklahoma.
14. Stephens, 704 F.3d at 1283, citing In re Paige, 584 F.3d 1327, 1339, 52 Bankr. Ct. Dec. (CRR) 91 (10th Cir. 2009) and In re Investment Company of The Southwest, Inc., 341 B.R. 298, 308, 46 Bankr. Ct. Dec. (CRR) 127 (B.A.P. 10th Cir. 2006).
15. Stephens, 704 F.3d at 1283, citing Paige, 584 F.3d at 1342.
16. Stephens, 704 F.3d at 1283, citing Paige, 584 F.3d at 1342-43.
17. Stephens, 704 F.3d at 1283, citing Paige, 584 F.3d at 1348.
18. Stephens, 704 F.3d at 1283, citing U.S. v. Quarrell, 310 F.3d 664, 669, 184 A.L.R. Fed. 625 (10th Cir. 2002).
19. Stephens, 704 F.3d at 1285.
20. Stephens, 704 F.3d at 1285, citing In re Maharaj, 681 F.3d 558, 569, 56 Bankr. Ct. Dec. (CRR) 166, 67 Collier Bankr. Cas. 2d (MB) 1429, Bankr. L. Rep. (CCH) P 82289 (4th Cir. 2012).
21. Stephens, 704 F.3d at 1286.
22. Section 1129(a)(15) 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—

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325 (b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

Section 1325(b)(2) provides, in relevant part:

For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor...less amounts reasonably necessary to be expended—

(A) (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

...

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

23. Stephens, 704 F.3d at 1286, citing National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662, 127 S. Ct. 2518, 168 L. Ed. 2d 467, 64 Env't. Rep. Cas. (BNA) 1513 (2007).
24. Stephens, 704 F.3d at 1287, citing Hamilton v. Lanning, 560 U.S. 505, 130 S. Ct. 2464, 2473, 177 L. Ed. 2d 23, 53 Bankr. Ct. Dec. (CRR) 67, Bankr. L. Rep. (CCH) P 81780 (2010).

25. Stephens, 704 F.3d at 1287.
26. 2012 WL 3144197.
27. In re Lively, 466 B.R. 897 (Bankr. S.D. Tex. 2011), certificate of appealability granted, 5th Circuit (12-90014)467 B.R. 884, 56 Bankr. Ct. Dec. (CRR) 63 (Bankr. S.D. Tex. 2012) and appeal dismissed, 5th Circuit (12-90014)(May 16, 2012) and aff'd, 717 F.3d 406, 57 Bankr. Ct. Dec. (CRR) 278, Bankr. L. Rep. (CCH) P 82488 (5th Cir. 2013).
28. Lively, 717 F.3d 406.
29. Section 1129(a)(7) provides:
With respect to each impaired class of claims or interests—
(A) each holder of a claim or interest of such class—
(i) has accepted the plan; or
(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or
(B) if section 1111 (b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.
30. Lively, 466 B.R. at 899.
31. Lively, 717 F.3d at 409, citing Maharaj, 681 F.3d at 571.
32. Lively, 717 F.3d at 409.
33. Lively, 717 F.3d at 408.
34. Lively, 717 F.3d at 409.
35. Lively, 717 F.3d at 409.
36. Lively, 717 F.3d at 410, citing In re Seafort, 669 F.3d 662, 67 Collier Bankr. Cas. 2d (MB) 99, 52 Employee Benefits Cas. (BNA) 2114, Bankr. L. Rep. (CCH) P 82163 (6th Cir. 2012) (interpreting similar provision § 1306(a)).
37. Lively, 717 F.3d at 410 fn 4.
38. Lively, 467 B.R. at 892.
39. Lively, 717 F.3d at 410.
40. Lively, 717 F.3d at 410.
41. In re Arnold, 471 B.R. 578 (Bankr. C.D. Cal. 2012), appeal dismissed, (9th Circ. 12-57265)(Jan. 16, 2013). For an exact paraphrasing of the grammatical analysis in the opinion with only the language of the club rules substituted for the analogous provisions of § 1115 and § 1129(b)(2)(B)(ii) in the court's opinion see Appendix 3.
42. Lively, 717 F.3d at 409.
43. Technically, an unsecured creditor would not receive disposable income from the individual debtor under § 1129(a)(15) unless the unsecured creditor objected to confirmation of the plan. However, individual debtors wishing to avoid multiple confirmation rounds and to secure the affirmative votes of unsecured creditors will provide for the payment of disposable income in their plans. Moreover, an individual debtor in Chapter 11 who did not devote all of its disposable income to the plan, but proposed to retain valuable prepetition property, would very likely receive an objection from the US Trustee if not unsecured creditors.
44. Another weakness of the idea that with the new exception language in § 1129(b)(2)(B)(ii) Congress was enabling a debtor in Chapter 11 to retain earnings in excess of what had to be committed under § 1129(a)(15) is that the new exception language in § 1129(b)(2)(B)(ii) is overbroad to rectify the problem purportedly created by § 1115(a)'s inclusion of future earnings in the debtor's estate. Section 1129(a)(15) requires that individual debtors devote a minimum of five year's worth of projected disposable income to their plans. Yet § 1129(b)(2)(B)(ii) excludes from the application of the absolute priority rule all future earnings of the individual debtor. The five year's worth of projected disposable income is thus excluded from the application of the absolute priority rule along with the rest of the debtor's future earnings. If Congress had intended to retain the absolute priority rule, wouldn't Congress have intended that the absolute priority rule apply to at least the projected disposable income that individual debtors were required to devote to their plans? Why would Congress exclude from the application of the absolute priority rule the very earnings that Congress required individual debtors to devote to their plans? Assuming that Congress would have wanted the absolute priority rule to apply to the earnings that individual debtors had to devote to their plans, there was a simple way to have accomplished that. Had Congress just included § 1129(a)(15) payments within the expanded definition of property of the estate for an individual in Chapter 11 in § 1115(a), instead of all of an individual debtor's earnings from services performed by the debtor after the commencement of the case, there would have been no need for any exception to the absolute priority rule in § 1129(b)(2)(B)(ii) and the

§ 1129(a)(15) payments would have been subject to the absolute priority rule. Excluding § 1129(a)(15) payments from the absolute priority rule only makes sense if Congress intended to abrogate the absolute priority rule in its entirety for individual debtors in Chapter 11.

45. In re Lively, 467 B.R. 884, 56 Bankr. Ct. Dec. (CRR) 63 (Bankr. S.D. Tex. 2012).

46. Lively, 717 F.3d at 410, fn 4.

47. Lively, 467 B.R. at 892.

48. For further analysis of whether § 1129(b)(2)(B)(ii) and § 1115(a) have nontrivial meanings, see Balbus, 21 Norton Bankr. L. & Prac. 755.

49. See Lundin, Chapter 13 Bankruptcy 3d Ed., § 368.1 at pp. 368-1 to 368-5 (2000 & Supp.2006); and In re Roedemeier, 374 B.R. 264, 276, 48 Bankr. Ct. Dec. (CRR) 196 (Bankr. D. Kan. 2007) (the absolute priority rule should not be read into post-BAPCPA Chapter 11 because there is absolute priority rule in Chapter 13).

50. Lively, 717 F.3d at 410.

51. Seafort, 669 F.3d 662.

52. The debtor wanted to use future earnings to make voluntary 401(k) contributions following the repayment of a 401(k) loan. The Chapter 13 Trustee wanted the future earnings to be included in disposable income available to creditors under the plan.

53. Seafort, 669 F.3d at 667.

54. Section 1306 provides:

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

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

Pub. L. No. 95-598, Nov. 6, 1978, 92 Stat. 2647; Pub.L. 99-554, Title II, § 257(u), Oct. 27, 1986, 100 Stat. 3116.

55. Notes of Committee on the Judiciary, Senate Report No. 95-989, 95th Congress, 2d Sess. 140-141 (1978). The House Report states: “A slightly different rule governing property of the estate applies in a Chapter 13 case. All property of the estate, as provided in section 541, is property of the estate in a Chapter 13 case.” H.R. Rep. No. 95-595, 95th Congress, 1st sess. 428 (1977). See Resnick, Sommer, eds., Collier Pamphlet Edition, Bankruptcy Code, Bankruptcy Reform Act of 1978, as Amended, and Related Statutory Provisions, Legislative History/Commentary And Practice Aids, Part 1, Section 1306, 1519-1520 (2008).

56. Stephens, 704 F.3d at 1282.

57. Lively, 717 F.3d at 410.

58. In 1952, provisions were added to Chapters XI through XIII of the Bankruptcy Act specifically stating that the absolute priority rule no longer applied. Act of July 7, 1952, Pub. L. No. 82-456, § 35, 66 Stat. 420, 433 (1952). Following those amendments, the absolute priority rule ceased to be a factor in confirmation proceedings, except for publicly held corporations reorganizing under Chapter X, until 1978 when Congress replaced chapters X and XI with Chapter 11 and re-instated the absolute priority rule in 1129(b)(2). See In re Shat, 424 B.R. 854, 867, n.45, 63 Collier Bankr. Cas. 2d (MB) 748, Bankr. L. Rep. (CCH) P 81701 (Bankr. D. Nev. 2010); and In re Fross, 233 B.R. 176 (B.A.P. 10th Cir. 1999) (The fair and equitable rule of Boyd and Case “cannot realistically be applied in a chapter XI, XII, or XIII proceeding. Were it so applied, no individual debtor and, under chapter XI, 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.”). See also Ayer, Rethinking Absolute Priority After Ahlers, 87 Mich. L. Rev. 963 (April 1989); and Peeples, Staying in: Chapter 11, Close Corporations and the Absolute Priority Rule, 63 Amer. Bankr.L.J. 65, 103-04 (Winter 1989).

59. See Jensen, A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 79 Am. Bankr. L.J. 485 (2005); Rao, Testing The Limits Of Statutory Construction Doctrines: Deconstructing The 2005 Bankruptcy Act, 55 Am. U. L. Rev. 1427 (2006); and Markell, The Sub Rosa SubChapter: Individual Debtors in Chapter 11 After BAPCPA, 2007 U. Ill. L. Rev. 67 (2007).

60. Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 108 S. Ct. 963, 99 L. Ed. 2d 169, 17 Bankr. Ct. Dec. (CRR) 201, 18 Collier Bankr. Cas. 2d (MB) 262, Bankr. L. Rep. (CCH) P 72186 (1988).

61. Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 367, 127 S. Ct. 1105, 166 L. Ed. 2d 956, 47 Bankr. Ct. Dec. (CRR) 221, 57 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 80850 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 286-287, 111 S. Ct. 654, 112 L. Ed. 2d 755, 21 Bankr. Ct. Dec. (CRR) 342, 24 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 73746A, 70 A.F.T.R.2d 92-5639 (1991)).

62. See Ransom v. FIA Card Services, N.A., 131 S. Ct. 716, 729, 178 L. Ed. 2d 603, 54 Bankr. Ct. Dec. (CRR) 34, 64 Collier Bankr. Cas. 2d (MB) 1123, Bankr. L. Rep. (CCH) P 81914 (2011) (describing BAPCPA's core purpose as ensuring that that debtors repay creditors the maximum they can afford).
63. Maharaj, 681 F.3d at 574.
64. In re O'Neal, 490 B.R. 837 (Bankr. W.D. Ark. 2013).
65. In re Friedman, 466 B.R. 471, 56 Bankr. Ct. Dec. (CRR) 57, 67 Collier Bankr. Cas. 2d (MB) 752, Bankr. L. Rep. (CCH) P 82232 (B.A.P. 9th Cir. 2012).
66. O'Neal, 490 B.R. at 850-851.
67. O'Neal, 490 B.R. at 851.
68. O'Neal, 490 B.R. at 851, citing the seminar article by Balbus, 21 Norton Bankr. L. & Prac. at 761.
69. O'Neal, 490 B.R. at 851.
70. Arnold, 471 B.R. 578.