

DOES THE ABSOLUTE PRIORITY RULE STILL APPLY TO INDIVIDUAL CHAPTER 11 DEBTORS POST-BAPCPA?

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INTRODUCTION

Section 1129(b)(2) of the Bankruptcy Code codifies a principle known as the “absolute priority rule.” The absolute priority rule requires that creditors receive payment in full before holders of equity can receive or retain any property under a plan of reorganization.¹ The absolute priority rule ensures that a plan of reorganization will not be used to allow equity to benefit at the cost of higher-priority unsecured debt.² If left unchecked, a small number of insiders, whether representatives of management or major creditors, may use the reorganization process to gain an unfair advantage.³ Chapter 11 cases with individual debtors magnifies this problem. As originally conceived, chapter 11 was never intended for use by individual debtors.⁴ Courts have struggled to find the proper balance in applying many of chapter 11’s corporate oriented provisions—including the absolute priority rule—to actual individual debtors.⁵

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). BAPCPA amended chapter 11 by expanding the bankruptcy estate in individual chapter 11 cases to include post-commencement property and earnings. Due to the poor drafting of certain BAPCPA amendments,⁶ the exception language in § 1129(b)(2)(B)(ii) is susceptible to two different interpretations. The first, popularly termed the “broad view,” abrogates the absolute priority rule in individual chapter 11 cases.⁷ The second, termed the “narrow view,” makes the absolute priority rule apply only to an individual debtor’s pre-petition property.⁸

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¹ Bank of Am. Nat’l Trust & Sav. Ass’n v. 203 N. LaSalle St. P’ship, 526 U.S. 434, 444-45 (1999).

² *Id.*

³ *Id.* at 444.

⁴ Wamsganz v. Boatmen’s Bank of De Sota, 804 F.2d 503, 505 (8th Cir. 1986).

⁵ *See, e.g.,* Toibb v. Radloff, 501 U.S. 157, 161 (1991) (holding that an individual debtor not engaged in business is eligible to reorganize under chapter 11); Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202 (1988) (holding that the absolute priority rule barred chapter 11 debtors’ retention of equity interest in a farm over the objections of creditors holding senior unsecured claims).

⁶ *See* 11 U.S.C. §§ 1115, 1129(b)(2)(B)(ii) (2012).

⁷ *See In re Friedman*, 466 B.R. 471, 484 (B.A.P. 9th Cir. 2012); *SPCP Grp., LLC v. Biggins*, 465 B.R. 316, 322 (M.D. Fla. 2011); *In re Shat*, 424 B.R. 854, 868 (Bankr. D. Nev. 2010); *In re Johnson*, 402 B.R. 851, 852-53 (Bankr. N.D. Ind. 2009); *In re Tegeder*, 369 B.R. 477, 480 (Bankr. D. Neb. 2007); *In re*

This article argues that the principles of statutory construction favor the narrow view. First, a plain reading of the statute supports this interpretation. Second, the overall context of the Bankruptcy Code supports the narrow view. The legislative history involved is sparse at best and is generally not helpful in determining Congress's intent on the issue. As a result, the preexisting bankruptcy practice—the narrow view—should prevail.

I. INDIVIDUAL CHAPTER 11 CASES

Chapter 11 of the Bankruptcy Code enables an insolvent debtor to reorganize its financial affairs to pay back its creditors over a period of time.⁹ If the court confirms the debtor's plan for reorganization, the debtor may continue business operations, paying back its creditors over time according to the specifics of the plan.¹⁰ Most chapter 11 cases are filed by business entities; however, a smaller percentage¹¹ of cases are filed by “wealthy” individuals who have significant assets that they wish to save.¹² Individuals with regular income who owe large amounts of debt are ineligible to file under chapter 13.¹³ These individuals must either liquidate under chapter 7 or reorganize under chapter 11.¹⁴ Due to the means test imposed on chapter 7 by section 707(b), chapter 11 is the only available chapter for individuals who both owe large amounts of debt and possess an above-median regular income.¹⁵

Roedemeier, 374 B.R. 264, 276 (Bankr. D. Kan. 2007); *In re Bullard*, 358 B.R. 541, 544 (Bankr. D. Conn. 2007).

⁸ See *In re Maharaj*, 681 F.3d 558, 575 (4th Cir. 2012); *In re Arnold*, 471 B.R. 578, 607 (Bankr. C.D. Cal. 2012); *In re Kamell*, 451 B.R. 505, 512 (Bankr. C.D. Cal. 2011); *In re Gbadebo*, 431 B.R. 222, 230 (Bankr. N.D. Cal. 2010).

⁹ JONATHAN P. FRIEDLAND, MICHAEL L. BERNSTEIN, GEORGE W. KUNEY & JOHN D. AYER, CHAPTER 11 - 101: THE NUTS AND BOLTS OF CHAPTER 11 PRACTICE: A PRIMER 4 (H. Slayton Dabney, Jr. & John W. Kibler eds., 2007) (“A chapter 11 case allows the debtor to preserve the business as a going concern, and thereby maximize value for creditors, shareholders, employees and other stakeholders.”).

¹⁰ See 11 U.S.C. § 1123.

¹¹ In 2011, there were 9,772 chapter 11 business filings and 1,757 chapter 11 nonbusiness filings. *U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12 Month Period Ending December 31, 2011*, UNITED STATES COURTS (June 16, 2012), http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2011/1211_f2.pdf.

¹² *Toibb*, 501 U.S. at 166 (“The plain language of the Bankruptcy Code permits individual debtors not engaged in business to file for relief under Chapter 11.”).

¹³ 11 U.S.C. § 109(e).

¹⁴ *Id.*

¹⁵ Individual debtors whose current monthly income is greater than that of the median family income of their state and who owe \$360,475 or more in unsecured debts or \$1,081,400 or more in secured debts can only file for chapter 11. *Id.* §§ 109(e), 707(b).

A. The Bankruptcy Estate in Individual Chapter 11 Cases

The commencement of a case creates a bankruptcy estate.¹⁶ For individual debtors in chapter 11 cases, two sections of the Bankruptcy Code define what property to include in the bankruptcy estate. Property of the estate is defined in section 541 and can be summarized as “all legal or equitable interests of the debtor in property *as of* the commencement of the case.”¹⁷ In individual chapter 11 cases, section 1115 adds the debtor’s post-commencement earnings and any property acquired by the debtor post-commencement to the bankruptcy estate.¹⁸ Upon confirmation of the plan, property of the estate reverts in the possession of the debtor, who then performs the plan, unless the plan itself provides otherwise.¹⁹

The Bankruptcy Code protects the estate in several ways. First, the automatic stay protects the estate from creditors.²⁰ The automatic stay is effective immediately upon the filing of a petition for relief and prohibits nearly all collection efforts.²¹ Second, the estate is protected from actions of the debtor acting as the debtor in possession.²² These statutes place limits on what a debtor in possession can do with property of the estate. Some of these provisions bar the debtor in possession from using certain assets without prior permission of the court.²³ Other provisions require the debtor in possession to protect the interest of secured parties²⁴ while still others provide procedural safeguards for taking on additional debt.²⁵

B. Confirming a Chapter 11 Plan

The chapter 11 plan determines the amount that each claimholder receives in an individual chapter 11 case.²⁶ Debtors have a statutory right to propose a plan before any creditor or claimholder may do so.²⁷ A plan must meet the requirements laid out in section 1129 before it can be confirmed by the court.²⁸ In every chapter 11 plan, claimholders are

¹⁶ *Id.* § 541 (“The commencement of a case under section 301, 302, or 303 of this title creates an estate.”).

¹⁷ *Id.* § 541(a)(1) (emphasis added).

¹⁸ *Id.* § 1115(a).

¹⁹ *Id.* § 1141.

²⁰ *Id.* § 362(a).

²¹ *Id.*

²² *Id.* § 1107.

²³ *Id.* § 363.

²⁴ *Id.* § 361.

²⁵ *Id.* § 364.

²⁶ *See id.* § 1123.

²⁷ *Id.* § 1121(b) (“Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.”).

²⁸ *Id.* § 1129.

grouped into classes based on the similarity of their claims.²⁹ For a plan to be confirmed by the court, each impaired class must accept the plan or receive under the plan as much as it would receive under a chapter 7 liquidation.³⁰ This requirement is satisfied in three different ways: (1) by leaving a class unimpaired, (2) by acquiring the required votes from the class members, or (3) by forcing a class to accept the plan.³¹ Unimpaired classes³² are deemed to accept the plan automatically.³³ A class that receives nothing under the plan is conclusively presumed not to accept the plan.³⁴ All other claimholders vote on the proposed plan.³⁵ If claimholders numbering more than one-half in number and holding at least two-thirds in amount³⁶ in a class accept the plan, the plan is considered accepted by that particular class.³⁷ A non-accepting class can be bound by a plan using section 1129(b).³⁸

C. *Cramming Down Unsecured Claimholders*

Forcing a plan on a dissenting class of claimholders is commonly referred to as a “cram down.”³⁹ For a cram down to occur, the plan (1) must not discriminate unfairly against the objecting classes and (2) must be fair and equitable.⁴⁰ A plan satisfies the unfair

²⁹ *Id.* § 1122.

³⁰ *Id.* § 1129(a)(7).

³¹ *Id.* §§1129(a)(7), (b)(2)(B).

³² A claim or interest is impaired if any of the rights of the holder’s interest will be changed or affected by the plan. *See id.* § 1124.

³³ *Id.* §§ 1126(c), (f).

³⁴ *Id.* § 1126(g).

³⁵ *Id.* § 1126.

³⁶ Only voting class members are factored in the calculation. For example, a class containing 100 claimholders and holding a total of \$1,000,000 in allowed claims in which only 12 claimholders holding a total of \$120,000 vote, a minimum of 7 claimholders holding a total of at least \$80,000 worth of claims is needed in order for the entire class of 100 claimholders to accept the plan.

³⁷ 11 U.S.C. § 1126(c).

³⁸ *See id.* § 1129(b).

³⁹ *St. Joe Paper Co. v. Atl. Coast Line R. Co.*, 347 U.S. 298, 322 (1954) (Douglas, J., dissenting) (“If that percentage of creditors and stockholders does not approve the plan the judge . . . may nevertheless approve the plan. This is the so-called ‘cram down’ provision”); Jack Friedman, *What Courts Do to Secured Creditors in Chapter 11 Cram Down*, 14 CARDOZO L. REV. 1495, 1496 (1993) (“Colloquially, this power is called ‘cram down.’ It is the common parlance used by judges and practitioners when referring to the forcing of modifications down the throat of an unwilling party.”).

⁴⁰ 11 U.S.C. § 1129(b)(1).

discrimination test by treating similar claims or equity interests in a like manner.⁴¹ A plan is fair and equitable if it meets the requirements of section 1129(b)(2).⁴²

A court may perform a cram down on a class of unsecured claims provided that the plan meets the criteria set out in section 1129(b)(2)(B), which states:

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

...

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

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.⁴³

A class of unsecured claims can be crammed down in two different ways. In the first method, claimholders are paid in an amount equal to the present value of the full amount of their claim, either on the effective date or over time.⁴⁴ The second method allows unsecured creditors to be paid in part or not at all, so long as the plan does not violate the absolute priority rule.⁴⁵ The absolute priority rule ensures that “the holder of any claim

⁴¹ *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006) (“Traditionally, courts applied a four-factor test to determine unfair discrimination. The factors considered are: (1) whether the discrimination is supported by a reasonable basis; (2) whether the debtor could consummate the plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) the relationship between the discrimination and its basis or rationale.”); Denise R. Polivy, *Unfair Discrimination in Chapter 11: A Comprehensive Compilation of Current Case Law*, 72 AM. BANKR. L.J. 191, 203-07 (1998).

⁴² 11 U.S.C. § 1129(b)(2) (“For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements . . .”).

⁴³ *Id.* § 1129(b)(2)(B)(i-ii).

⁴⁴ *Id.* § 1129(b)(2)(B)(i).

⁴⁵ See G. Eric Brunstad, Jr. et. al., *Review of the Proposals of the National Bankruptcy Review Commission Pertaining to Business Bankruptcies: Part One*, 53 BUS. LAW. 1381, 1406 (1998) (“The phrase ‘fair and equitable’ is a term of art that expressly incorporates the so-called ‘absolute priority rule.’ . . . In

or interest that is junior to the claims of [the impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property.”⁴⁶ Courts, practitioners, and academics often use the term “absolute priority rule” as a short hand reference to the requirements codified in section 1129(b)(2). For a cram down to occur, the absolute priority rule bars holders of equity—typically shareholders in a corporate reorganization—from remaining owners unless general unsecured creditors are paid in full.⁴⁷ Shareholders’ equity interests are cancelled, and new equity is issued to unsecured creditors or new investors providing capital to the reorganization.⁴⁸

D. *The Absolute Priority Rule in Individual Chapter 11 Cases*

The absolute priority rule can be harsh because owners generally must give up their equity interests in order to cram down a chapter 11 plan.⁴⁹ Some courts allow equity holders to retain their equity interests in chapter 11 cases so long as they provide “new value” equal to the amount of the retained equity.⁵⁰ The case law regarding this “new value exception” varies from jurisdiction to jurisdiction.⁵¹ To benefit from the new value exception, individual debtors must usually convince an outsider to loan them money in order to contribute the new value.⁵² If the individual debtor has substantial exempt assets⁵³ to

essence, the purpose of the rule is to preserve the value of senior claims over junior claims and interests.”).

⁴⁶ 11 U.S.C. § 1129(b)(2)(B)(ii); *Bank of Am. Nat. Trust & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 441-42 (1999).

⁴⁷ *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988). “[T]he absolute priority rule ‘provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a chapter 11] plan.’” *Id.* (citations omitted).

⁴⁸ Richard Maloy, *A Primer on Cramdown—How and Why It Works*, 16 ST. THOMAS L. REV. 1, 30-43 (2003).

⁴⁹ Stanley E. Goldich, *Plain-Meaning Rules: Did BAPCPA Abolish the Absolute-Priority Rule?*, AM. BANKR. INST. J., June 2012, at 34 (“However, even with the ‘new value exception,’ meeting the absolute-priority rule has often been impossible for individual debtors whose assets are already part of the estate and who, unlike shareholders of a corporation, do not usually have other sources of capital to contribute.”).

⁵⁰ *LaSalle*, 526 U.S. at 443, 449 (neither confirming nor denying the existence of the new value corollary to the absolute priority rule); *In re Bonner Mall P’ship*, 2 F.3d 899, 907 (9th Cir. 1993) (holding that the new value exception to the absolute priority rule survived enactment of Bankruptcy Code); *In re Bryson Properties*, XVIII, 961 F.2d 496, 504-05 (4th Cir. 1992) (holding that a plan permitting limited partners to make new capital contributions was not fair and equitable to debtor’s unsecured claim); *In re Outlook/Century, Ltd.*, 127 B.R. 650, 656 (Bankr. N.D. Cal. 1991) (holding that any new value exception to the absolute priority rule did not survive enactment of the Bankruptcy Reform Act of 1978).

⁵¹ *See infra* notes 57-65 and accompanying text.

⁵² *See In re Draiman*, 450 B.R. 777, 822-23 (Bankr. N.D. Ill. 2011); *In re Henderson*, 341 B.R. 783, 790-91 (M.D. Fla. 2006); *In re East*, 57 B.R. 14, 19 (Bankr. M.D. La. 1985).

⁵³ An IRA, a 401k, or equity in an exempt homestead are all examples of exempt assets that an individual debtor could borrow against to provide new value. *See* 11 U.S.C. §§ 541(b), 544 (2012).

borrow against or can find a sympathetic, non-insider benefactor, then the debtor can retain her ownership interest by providing new value equal to the value of the ownership interest.⁵⁴ Courts developed⁵⁵ the absolute priority rule in reaction to the twentieth century practice of selling of railroads via receiverships.⁵⁶ This requirement, that plans of reorganization be “fair and equitable,” was later codified in section 77B of the former Bankruptcy Act and in its successor, Chapter X.⁵⁷ Drafters of the 1978 Bankruptcy Code continued with the fair and equitable requirement in the cram down provisions of section 1129(b).⁵⁸

Courts have wrestled with how to apply the absolute priority rule to individual debtors in chapter 11 cases.⁵⁹ Originally, the absolute priority rule was never designed to

⁵⁴ The new ownership interest (usually common stock) must be market tested, i.e. auctioned off; this requirement is designed to protect against a plan giving equity in the reorganized company of value greater than the consideration paid. *LaSalle*, 526 U.S. at 453-54, 458; *see also* Nicholas L. Georgakopoulos, *New Value, After Lasalle*, 20 BANKR. DEVS. J. 1, 8-9 (2003) (“Before *LaSalle*, new value plans routinely gave the right to buy the new equity to specified buyers. If a plan gave the old equityholders the right to buy equity in the reorganized firm, that right tended to be exclusive. No other buyers were allowed to outbid the old equityholders. Such plans would violate *LaSalle*.”). The protections provided by the “market test” can be irrelevant to individuals and closely held corporations filing for chapter 11. James B. Haines, Jr. & Philip J. Hendel, *No Easy Answers: Small Business Bankruptcies After BAPCPA*, 47 B.C. L. REV. 71, 99 (2005) (“Is it relevant to creditor interests whether the reorganization plan of an electrician with four employees offers others an equal chance to purchase the ‘equity’ of the debtor corporation? Realistically, the market for this equity is ‘virtually nonexistent’ because most companies have little or no value after their owner-managers have been ousted by the hypothetical high bidder.”).

⁵⁵ John D. Ayer, *Rethinking Absolute Priority After Ablers*, 87 MICH. L. REV. 963, 969-79 (1989). The principle was enscenced by Justice William O. Douglas in *Case v. L.A. Lumber Prods. Co.* by tying the absolute priority rule to the words “fair and equitable” in section 77B of the Bankruptcy Act. 308 U.S. 106, 115-19 (1939). Hence, the current requirement in § 1129(b)(1) that a plan must be “fair and equitable.”

⁵⁶ *See generally* Ayer, *supra* note 55, at 969-79 (explaining how the absolute priority rule arose in the context of railroad equity receiverships).

⁵⁷ *LaSalle*, 526 U.S. at 444.

⁵⁸ 11 U.S.C. § 1129(b)(1) (2012) (“[I]f all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable . . .”).

⁵⁹ *Compare In re Gosman*, 282 B.R. 45, 49 (Bankr. S.D. Fla. 2002) (holding that the debtor could not confirm his plan by means of cramdown over a dissenting class of unsecured creditors while at same time retaining exempt property), *and In re Yassarro*, 100 B.R. 91, 94-95 (Bankr. M.D. Fla. 1989) (holding that the debtor’s plan, which did not propose to pay unsecured creditors the full amount of their allowed claims and which proposed that the debtor retain both exempt and non-exempt assets, did not satisfy the absolute priority rule.), *with In re Henderson*, 321 B.R. 550, 561 (Bankr. M.D. Fla. 2005) (holding that the debtor’s plan did not violate the absolute priority rule because a total liquidation of all of the debtor’s assets was not required in order for a plan to be fair and equitable to dissenting creditors who were subject to cramdown), *aff’d* 341 B.R. 783 (M.D. Fla. 2006). *See generally* David S. Jennis & Kathleen L. DiSanto, *Application of Absolute-Priority Rule and New-Value Exception in Individual Chapter 11s*, AM. BANKR. INST. 56 J., July/August 2011.

apply to individuals, which is also true of chapter 11.⁶⁰ Nevertheless, nothing in the Bankruptcy Code prohibits an individual debtor in a chapter 11 case from using the cram down provisions in section 1129(b).⁶¹ Consequently, courts struggle to adapt these provisions to individual bankruptcy petitioners.⁶² For example, no consensus exists on whether the absolute priority rule applies to exempt property.⁶³ Businesses are not entitled to exempt property whereas individuals are.⁶⁴ The cram down provisions of section 1129(b) state in part:

[T]he condition that a plan be fair and equitable with respect to a class includes the following requirements: . . . [w]ith respect to a class of unsecured claims . . . the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest *any property*”⁶⁵

The term “any property,” as used in section 1129(b) is not limited in any way.⁶⁶ However, section 522(c) states that “[exempt property] is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case”⁶⁷ Prior to BAPCPA,⁶⁸ the majority of courts to consider the matter viewed a plan as failing the fair and equitable test of section 1129(b)(2) if an individual debtor retains any exempt property under

⁶⁰ See *Toibb v. Radloff*, 501 U.S. 157, 167 (1991) (Stevens, J. dissenting) (“The repeated references to the debtor’s ‘business,’ ‘the operation of the debtor’s business,’ and the ‘current or former management of the debtor’ make it abundantly clear that the principal focus of the chapter is upon business reorganizations.”); see also *Wamsganz v. Boatmen’s Bank of De Sota*, 804 F.2d 503, 505 (8th Cir. 1986) (holding that “persons who were not engaged in business could not seek relief under Chapter 11”), *abrogated by Toibb*, 501 U.S. at 157.

⁶¹ *In re Shat*, 424 B.R. 854, 862 (Bankr. D. Nev. 2010) (“[B]efore 2005, the authorities were pretty much in agreement that the absolute priority rule applied to individuals in chapter 11.”).

⁶² See Haines & Hendel, *supra* note 54, at 97 (reporting the results of a 1996 survey that stated “eighty percent of those polled—debtors’ and creditors’ attorneys alike—supported the proposition that the bankruptcy court should be able to confirm a plan even though no impaired class accepts it”).

⁶³ Luis Salazar, *Too Rich for Bankruptcy: Some Pitfalls of Chapter 11 Filings by Individuals*, 9 J. BANKR. L. & PRAC. 527, 528 (2000) (“[I]ndividuals trying to confirm plans of reorganization have encountered the question of whether the absolute priority rule is broad enough to include even their exempt property.”).

⁶⁴ See 11 U.S.C. § 522(b)(1) (2012) (“[A]n individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection.”).

⁶⁵ *Id.* § 1129(b)(2)(B)(ii) (emphasis added).

⁶⁶ *In re Yasarro*, 100 B.R. at 95 (“The Code section makes no distinction between exempt and nonexempt property nor as to value.”).

⁶⁷ *Id.* § 522(c).

⁶⁸ The majority/minority distinction was upset by BAPCPA due to the uncertainty caused by the addition of § 1115 and the amendment to § 1129(b)(2)(B)(ii). A broad reading of § 1115 would supersede the majority view and settle the matter, while a narrow reading of § 1115 would keep the majority/minority distinction intact.

the plan⁶⁹ while a minority held that individual debtors may keep exempt property as part of a plan without violating the absolute priority rule.⁷⁰ A majority of courts read the phrase “any property” in section 1129(b) as an unlimited term applied specifically to plan confirmation that overrides the more general reference in section 522.⁷¹ The minority view turns that analysis on its head, finding section 522 to be the specific provision that overrides the general rule in section 1129(b) that applies to all chapter 11 cases.⁷²

Congress has never attempted to clean up these issues through legislation.⁷³ In 2005, when Congress passed BAPCPA, section 1129(b)(2)(B)(ii) was among the number of provisions amended. Unfortunately, section 1129(b)(2)(B)(ii) and others⁷⁴ were poorly drafted, leading to much confusion.

II. DOES THE ABSOLUTE PRIORITY RULE APPLY TO INDIVIDUAL DEBTORS AFTER BAPCPA?

As previously mentioned, the 109th Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.⁷⁵ BAPCPA made numerous changes to the Bankruptcy Code, some impacting individual chapter 11 debtors.⁷⁶ Section 1129(b)(2) was amended by adding the following emphasized language to the end of section 1129(b)(2)(B)(ii):

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

...

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

⁶⁹ *In re Fross*, 233 B.R. 176 (B.A.P. 10th Cir. 1999); *In re Gosman*, 282 B.R. at 50; *In re Yasparro*, 100 B.R. 91; *In re East*, 57 B.R. at 19.

⁷⁰ *In re Steedley*, No. 09-50654, 2010 WL 3528599, at *3 (Bankr. S.D. Ga. Aug. 27, 2010); *In re Henderson*, 321 B.R. at 560.

⁷¹ *In re Gosman*, 282 B.R. at 51-52 (“[T]he reference to ‘any property’ means any and all property, including property of the estate. Such a broad term clearly overrides the mandate of Section 522 or any other provisions relating to exemptions.”).

⁷² *In re Henderson*, 321 B.R. at 558 (“The [d]ebtor’s right to claim exemptions is governed by Section 522 of the Code. This Section is applicable to all operating Chapters including a Chapter 11 case It is equally clear the [d]ebtor’s right to claim exemption under Chapter 11 is expressly recognized by 11 U.S.C. § 1123(c) of the Code.”).

⁷³ See Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 457-58 (2005) (“Absent corrective legislation, the courts and bankruptcy lawyers will struggle with the many ambiguities and nonsensical twists of the 2005 Act for years to come.”).

⁷⁴ See *infra* note 164.

⁷⁵ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) [hereinafter BAPCPA].

⁷⁶ *Id.*

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, *except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.*⁷⁷

BAPCPA also added a new section, section 1115,⁷⁸ which reads:

(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.⁷⁹

The new exception language in section 1129(b)(2)(B)(ii) allows an individual debtor to retain property included in the estate under section 1115.⁸⁰ Section 1115(a) enlarges the bankruptcy estate by including two kinds of post-commencement property. These two types of property are “in addition to” the kinds of property specified in section 541.⁸¹ Section 1115(b) gives the debtor the right to remain in possession of the estate’s property except in

⁷⁷ 11 U.S.C. § 1129(b)(2)(B) (2012) (emphasis added).

⁷⁸ BAPCPA § 321(a).

⁷⁹ 11 U.S.C. § 1115.

⁸⁰ *Id.* § 1129(b)(2)(B)(ii). Section (a)(14) deals with the payment of post petition domestic support obligations and is irrelevant to issues dealing with the absolute priority rule or property of the estate. *See id.* §§ 1129(a)(14), (b)(2)(B)(ii).

⁸¹ *Id.* § 1115(a).

instances where a trustee is appointed under section 1104 or a confirmed plan (or order confirming a plan) provides for otherwise.⁸²

A. Two Interpretations

Courts are split as to whether the absolute priority rule applies to individual debtors due to the awkward language used in sections 1115 and 1129(b)(2)(B)(ii).⁸³ Two interpretations exist. The first, termed the “broad view,” favors an expansive reading of section 1115 in which section 1115 subsumes and supersedes section 541 in defining property of the estate.⁸⁴ Under the broad view, “property included in the estate under section 1115”⁸⁵ includes: (1) pre-petition property; (2) property acquired by the debtor post-commencement; and (3) post-commencement earnings of the debtor.⁸⁶ The broad view would abrogate the absolute priority rule for individual debtors because the exception in section 1129(b)(2)(B)(ii) would apply to all property⁸⁷ in the bankruptcy estate. The second interpretation, termed the “narrow view,” favors a restricted reading of section 1115.⁸⁸ The phrase “in addition to the property specified in section 541” is merely a cross-reference.⁸⁹ Under the narrow view, “property included in the estate under section 1115” includes only two categories of property: (1) property acquired by the debtor post-commencement and (2) post-commencement earnings of the debtor.⁹⁰ The narrow view applies the absolute priority rule only to pre-petition property because section 1115 includes only two kinds of post-commencement property.

B. Analytic Framework Used by Courts

Most courts that considered the issue employed some type of statutory interpretation analysis.⁹¹ The remaining courts, which failed to provide significant analysis

⁸² *Id.* § 1115(b).

⁸³ *In re Maharaj*, 681 F.3d 558, 563 (4th Cir. 2012) (“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.”).

⁸⁴ See *In re Friedman*, 466 B.R. 471, 482 (B.A.P. 9th Cir. 2012); *SPCP Group, LLC v. Biggins*, 465 B.R. 316, 322 (M.D. Fla. 2011); *In re Shat*, 424 B.R. at 865; *In re Johnson*, 402 B.R. 851, 852 (Bankr. N.D. Ind. 2009); *In re Tegeder*, 369 B.R. 477, 480 (Bankr. D. Neb. 2007); *In re Roedemeier*, 374 B.R. 264, 276 (Bankr. D. Kan. 2007); *In re Bullard*, 358 B.R. 541, 544 (Bankr. D. Conn. 2007).

⁸⁵ 11 U.S.C. § 1129(b)(2)(B)(ii).

⁸⁶ *Id.* §§ 541, 1115(a).

⁸⁷ The subsets of pre-petition property and post-petition property together comprise the entire set of the property of the estate in an individual chapter 11 case.

⁸⁸ See *In re Maharaj*, 681 F.3d at 565-66 (discussing courts that have followed the narrow view).

⁸⁹ See *Id.*; *In re Arnold*, 471 B.R. 578, 606 (Bankr. C.D. Cal. 2012); *In re Kamell*, 451 B.R. 505, 510-12 (Bankr. C.D. Cal. 2011); *In re Gbadebo*, 431 B.R. 222, 230 (Bankr. N.D. Cal. 2010).

⁹⁰ See *supra* note 89.

⁹¹ E.g., *In re Maharaj*, 681 F.3d at 568-69; *In re Friedman*, 466 B.R. at 480-82; *In re Lindsey*, 453 B.R. 886, 892-94 (Bankr. E.D. Tenn. 2011); *In re Shat*, 424 B.R. at 864-65.

on the issue, identified the issue, summarized previous cases, and stated the most persuasive view.⁹² Despite the split of authorities, courts mostly agree as to which canons of statutory interpretation govern.⁹³ Interpretation of the Bankruptcy Code begins with the language of the statute itself.⁹⁴ A statute must be read in context and viewed within the overall statutory scheme.⁹⁵ Where the statute's language is plain, no further analysis is required⁹⁶ so long as the plain interpretation does not lead to any absurd result.⁹⁷ Where the language is ambiguous, courts may assess congressional intent—usually by examining the legislative history.⁹⁸ The Bankruptcy Code should not be interpreted to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.⁹⁹

Because the two interpretations are binary in nature and because section 1129(b)(2)(B)(ii) only applies in circumstances in which an individual debtor attempts to cram down unsecured creditors while retaining pre-petition property,¹⁰⁰ the salient facts in each of the cases are essentially identical. In each, individual debtors filed for chapter 11 and attempted to cram down unsecured creditors. Debtors relied on the cram down provisions

⁹²E.g., *In re Steedley*, No. 09-50654, 2010 WL 3528599, at *1-3 (Bankr. S.D. Ga. Aug. 27, 2010); *In re Tegeder*, 369 B.R. 477, 479-80 (Bankr. D. Neb. 2007).

⁹³ Compare *In re Maharaj*, 61 F.3d at 568-69, *In re Lindsey*, 453 B.R. at 892-94, and *In re Gbadebo*, 431 B.R. at 230, with *In re Friedman*, 466 B.R. at 480-82, *Shat*, 424 B.R. at 864-65, and *In re Roedemeier*, 374 B.R. at 273-74.

⁹⁴ *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (“The task of resolving the dispute over the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself.”); see also *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring) (“The starting point in every case involving construction of a statute is the language itself.”). See generally NORMAN J. SINGER & SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION (7th ed. 2007) (treatise on the principles of statutory interpretation).

⁹⁵ *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 56 (2008) (Breyer, J., dissenting).

⁹⁶ See *Ron Pair*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“[F]or where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.”)).

⁹⁷ *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)) (“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.’”); see also *Caminetti*, 242 U.S. at 490 (“In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.”).

⁹⁸ See *Dewsnup v. Timm*, 502 U.S. 410, 420 (1992) (“But, given the ambiguity here, to attribute to Congress the intention . . . without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles.”).

⁹⁹ *Hamilton v. Lanning*, 130 S. Ct. 2464, 2473 (2010) (“Pre-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.”) (internal quotation marks omitted).

¹⁰⁰ See cases cited *supra* notes 84 and 89.

in section 1129(b)(2)(B)(ii) because the proposed plans failed to pay dissenting unsecured creditors in full according to section 1129(b)(2)(B)(i).

C. *Summary of Broad View Analyses*

The first courts to address the issue adopted the broad view.¹⁰¹ Once the majority, the broad view has recently fallen out of favor with bankruptcy courts.¹⁰² Seven courts have adopted the broad view as of June 30, 2012.¹⁰³ The following sections summarize the analyses used by broad view courts.

Clear and Unambiguous Language

The courts in *In re Tegeder*, *In re Biggins*, and *In re Friedman* found the language of section 1115 to be clear and unambiguous.¹⁰⁴ The *Tegeder* court relied solely on scholarly commentary to support its decision.¹⁰⁵ The court in *Biggins*, after briefly acknowledging disagreement among courts, determined the language at issue to be unambiguous.¹⁰⁶ The only court to give analysis as to *why* the language at issue is unambiguous was the United States Court of Appeals for the Ninth Circuit in *In re Friedman*.¹⁰⁷ The *Friedman* majority reasoned that the plain language, when read in context with the rest of the Bankruptcy Code, does not require the application of an absolute priority rule.¹⁰⁸ Congress borrowed language from chapter 13 in adopting BAPCPA's individual debtor chapter 11 provisions.¹⁰⁹ Chapter

¹⁰¹ See *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).

¹⁰² See *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. 2012); *In re Kamell*, 451 B.R. 505, 512 (Bankr. C.D. Cal. 2011); *In re Lindsey*, 453 B.R. 886, 905 (Bankr. E.D. Tenn. 2011).

¹⁰³ See *In re Friedman*, 466 B.R. at 482; *Biggins*, 465 B.R. at 322; *In re Shat*, 424 B.R. at 865; *In re Johnson*, 402 B.R. at 852; *In re Tegeder*, 369 B.R. at 480; *In re Roedemeier*, 374 B.R. at 276; *In re Bullard*, 358 B.R. at 544.

¹⁰⁴ *In re Friedman*, 466 B.R. at 482 (“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.”); *Biggins*, 465 B.R. at 322 (“The Court reaches this conclusion not by analyzing the legislative history of the relevant statutes, as the *Shat* and *Gelin* courts did, but by focusing on the statutes’ plain language.”); *In re Tegeder*, 369 B.R. at 480 (“Thus, § 1115 is clear that property of the estate in a case in which the debtor is an individual includes the property described in § 541 . . . as well as post-petition property and earnings.”). *Roedemeier* may also fit into this category, although it is unclear. See *In re Roedemeier*, 374 B.R. at 276.

¹⁰⁵ *In re Tegeder*, 369 B.R. at 480. See WILLIAM L. NORTON, JR., 4 NORTON BANKRUPTCY LAW & PRACTICE § 84A:1 (2d ed., Westlaw Mar. 2007); W. HOMER DRAKE, JR., BANKRUPTCY PRACTICE FOR THE GENERAL PRACTITIONER § 12:27 n.28 (Westlaw Sept. 2006); ROSEMARY E. WILLIAMS, 3 BANKRUPTCY PRACTICE HANDBOOK § 14:152 n.1 (2d ed., Westlaw June 2006).

¹⁰⁶ *Biggins*, 465 B.R. at 320-23.

¹⁰⁷ *In re Friedman*, 466 B.R. at 480-82.

¹⁰⁸ *Id.* at 483 (“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.”).

¹⁰⁹ *Id.*

13 has no absolute priority rule equivalent; therefore, Congress intended to abrogate the absolute priority rule.¹¹⁰ Furthermore, the new disposable income requirement of section 1129(a)(15), which closely resembles the disposable income requirement of section 1325(b)(1), negated the need for the absolute priority rule.¹¹¹

Congressional Intent—Making Chapter 11 Similar to Chapter 13

Conversely, the court in *Shat* found the language at issue to be ambiguous.¹¹² When read together, the phrase “property included in the estate under section 1115” could be read broadly to include section 541 or narrowly to include only property added to the estate by section 1115(a)(1)-(2). Both *Shat* and the *Friedman* majority found the legislative history to be unhelpful in ascertaining congressional intent.¹¹³

Instead, broad view courts ascertained Congress’ intent by comparing BAPCPA amendments to the rest of the Bankruptcy Code.¹¹⁴ The similarities between BAPCPA amendments and certain chapter 13 provisions demonstrated that Congress intended to bring individual chapter 11 cases more in line with chapter 13.¹¹⁵ Courts looked to the following changes made to chapter 11 by BAPCPA:

¹¹⁰ *In re* Roedemeier, 374 B.R. at 276.

¹¹¹ *In re* Friedman, 466 B.R. at 483 (“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.”).

¹¹² *In re* Shat, 424 B.R. 854, 863-64 (Bankr. D. Nev. 2010).

¹¹³ Both *Shat* and the *Friedman* majority expressed skepticism that intent could accurately be inferred from BAPCPA’s legislative history. *Shat* followed a detailed synopsis of BAPCPA’s legislative history with the following statement: “This analysis [of BAPCPA’s legislative history] indicates that, although not entirely free from doubt, it appears that Congress inserted the individual chapter 11 provisions to ensure no easy escape from means testing.” *In re* Shat, 424 B.R. at 862. Similarly, the *Friedman* majority stated:

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. . . . [T]hese decisions and articles have undertaken a titanic effort to frame their outcomes on what may be a very weak universe of original resources.

In re Friedman, 466 B.R. at 482-83.

¹¹⁴ *In re* Friedman, 466 B.R. at 483 (“[T]he Bankruptcy Code, as the main resource, does provide significant assistance.”); *In re* Shat, 424 B.R. at 864-65 (“In determining the appropriate sense of the words Congress chose, it is appropriate to investigate the context in which English and the Bankruptcy Code employs the same or similar words.”); see also *In re* Roedemeier, 374 B.R. at 275-76.

¹¹⁵ *In re* Friedman, 466 B.R. at 484 (“However, clearly, the drafters of § 1129(a)(15) tried to create symmetry between chapters 11 and 13 for individual debtors.”); *In re* Shat, 424 B.R. at 868 (“Here, given the host of change to chapter 11 with respect to individuals, all made with the goal of shaping an individual’s chapter 11 case to look like a chapter 13 case . . . this court concludes that the broader interpretation is the proper one.”); *In re* Roedemeier, 374 B.R. at 275-76 (“Many of the BAPCPA’s changes to Chapter 11 apply only to individual debtors and are clearly drawn from the Chapter 13

- property of the estate in chapter 11 now includes post-commencement property and earnings;¹¹⁶
- earnings from personal services by the debtor, or other future income of the debtor, must go towards paying creditors;¹¹⁷
- individual debtors must contribute all of their projected disposable income for at least five years towards paying dissenting, unsecured creditors;¹¹⁸

model Taken together, these changes indicate Congress intended to extend the exemption from the absolute priority rule to individual Chapter 11 debtors as well.”).

¹¹⁶ Compare § 1115, with § 1306.

(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.

11 U.S.C. § 1115 (2012).

(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.

Id. § 1306.

¹¹⁷ Compare § 1123(a)(8), with § 1322(a)(1).

[I]n a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

Id. § 1123(a)(8).

[The plan] shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

Id. § 1322(a)(1).

¹¹⁸ Compare § 1129(a)(15), with § 1325(b)(1).

- individual debtors should not receive a discharge until all plan payments are completed;¹¹⁹
- individual debtors may receive a discharge for cause before all payments are completed;¹²⁰ and

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.

Id. § 1129(a)(15).

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

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

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Id. § 1325(b)(1).

¹¹⁹ Compare § 1141(d)(5)(A), with § 1328(a).

[U]nless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan

Id. § 1141(d)(5)(A).

Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title

Id. § 1328(a).

¹²⁰ Compare § 1141(d)(5)(B), with § 1328(b).

[A]t any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if—

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is

- individual debtors' plans are permitted to be modified even after the plan has been substantially consummated.¹²¹

In many cases, the BACPA amendments match the corresponding chapter 13 provisions word for word.¹²² BAPCPA imported chapter 13 concepts into individual

not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date;
(ii) modification of the plan under section 1127 is not practicable; and
(iii) subparagraph (C) permits the court to grant a discharge

Id. § 1141(d)(5)(B).

Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—

- (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
- (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
- (3) modification of the plan under section 1329 of this title is not practicable.

Id. § 1328(b).

¹²¹ Compare § 1127(e), with § 1329(a).

If the debtor is an individual, the plan may be modified at any time after confirmation of the plan but before the completion of payments under the plan, whether or not the plan has been substantially consummated, upon request of the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim, to—

- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
- (2) extend or reduce the time period for such payments; or
- (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim made other than under the plan.

Id. § 1127(e).

At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
- (2) extend or reduce the time for such payments;
- (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan

Id. § 1329(a).

¹²² See *supra* notes 116-21.

chapter 11 cases; by extension, individuals should be exempt from the absolute priority rule because chapter 13 has no such requirement.¹²³

Historical Perspectives on the Absolute Priority Rule

Courts' past treatments of the absolute priority rule were critical in interpreting § 1129(b)(2)(B)(ii).¹²⁴ The *Friedman* majority was quick to point out that the absolute priority rule is something of a misnomer in that the rule has never been absolute.¹²⁵ As the *Friedman* court noted, "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."¹²⁶ Federal courts have been tinkering with the absolute priority rule since its inception in the early twentieth-century.¹²⁷ To illustrate this point, the *Friedman* majority cited to Supreme Court cases involving the new value exception to show how the Court has modified the absolute priority rule over time.¹²⁸ Courts have historically modified the absolute priority rule to facilitate the goals of the individual statutes.¹²⁹ Excepting individuals out of the absolute priority rule seems far less dramatic after considering the many exceptions made to the rule over the past seventy years.¹³⁰

¹²³ *In re Friedman*, 466 B.R. 471, 483 (B.A.P. 9th Cir. 2012).

¹²⁴ *Id.* at 479 ("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. . . .").

¹²⁵ *Id.* at 478 ("An interesting feature of the absolute priority rule, even before enactment of the BAPCPA amendment to § 1129(b)(2)(B)(ii), is that the rule has never been absolute. . .").

¹²⁶ *Id.* at 479.

¹²⁷ John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 MICH. L. REV. 963, 969 (1989) ("[The absolute priority rule] is statutory only incidentally and belatedly. To Justice White, the issue in *Ahlers* turned on the language of the Bankruptcy Code. But the Code's language must be read under layers of case law that run back more than 100 years."); see also Brunstad, *supra* note 45, at 1497-502.

¹²⁸ The *Friedman* majority referenced the following cases: *Kansas City Terminal Ry. Co. v. Cent. Union Trust Co.*, 271 U.S. 445, 455 (1926) (recognizing, in dicta, "that a new, substantial, and necessary contribution could allow an old equity holder to retain an interest in the reorganized debtor"); *Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106 (1939) (confirming and clarifying the new value corollary); *In re Gen. Teamsters, Warehousemen & Helpers Union, Local 890*, 265 F.3d 869, 874 (9th Cir. 2001) (holding that "the absolute priority rule [does] not apply to organizations where [the organization's] members did not hold 'equity interests' in the entity" despite the fact that the term "equity interest" does not appear in § 1129(b)(2)(B)(ii)); *In re Wabash Valley Power Ass'n*, 72 F.3d 1305, 1315 (7th Cir. 1995) (stating that control alone, divorced from any right to share in corporate profits or assets, does not amount to an equity interest). *Id.* at 478-79.

¹²⁹ *Id.*

¹³⁰ See SINGER & SINGER, *supra* note 89, at § 58 (discussing the influence of "liberal" and "strict" attitudes toward statutory interpretation).

D. *Summary of Narrow View Analyses*

Currently in the majority, the narrow view has steadily gained traction since *In re Gbadebo* first adopted the narrow view in 2010.¹³¹ Sixteen courts have adopted the narrow view as of June 30, 2012.¹³² The following sections summarize the analyses used by narrow view courts.

Plain or Ambiguous Language

Some narrow view courts found the language to be clear¹³³ while others found it to be ambiguous.¹³⁴ Many of these courts provided no analysis and instead referenced other court opinions.¹³⁵ Two courts reasoned the ambiguity to be self-evident due to the split in opinion by the several courts.¹³⁶ Ambiguity is often in the eye of the beholder and is in many ways a subjective undertaking not prone to technical analysis.¹³⁷ This, however, has not stopped one court from attempting such an endeavor.

The *Arnold* court devoted over 2,200 words to a grammatical deconstruction of the relevant provisions.¹³⁸ The grammatical question at issue was whether the phrase “in

¹³¹ 431 B.R. 222 (Bankr. N.D. Cal. 2010).

¹³² *In re Maharaj*, 681 F.3d 558 (4th Cir. 2012), *aff’d* 449 B.R. 484 (Bankr. E.D. Va. 2009); *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 Tucker*, No. BR–67281, 2011 WL 5926757 (Bankr. D. Or. Nov. 28, 2011); *In re Borton*, No. 09-00196-TLM, 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 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*, No. 09-50654, 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.

¹³³ See *Arnold*, 471 B.R. at 606-07; *Tucker*, 2011 WL 5926757 at *2; *Borton*, 2011 WL 5439285 at *4; *Draiman*, 450 B.R. at 821; *Karlovich*, 456 B.R. at 681; *Steedley*, 2010 WL 3528599 at *2; *Mullins*, 435 B.R. at 360.

¹³⁴ *In re Maharaj*, 681 F.3d 558, 568 (4th Cir. 2012).

¹³⁵ E.g., *Tucker*, 2011 WL 5926757 at *2; *Borton*, 2011 WL 5439285 at *4; *Draiman*, 450 B.R. at 821; *Steedley*, 2010 WL 3528599 at *2.

¹³⁶ *Arnold*, 471 B.R. at 598-99 (quoting *In re Lindsey*, 453 B.R. 886, 903 (Bankr. E.D. Tenn. 2011)) (“Thus, the court agrees with the court in *Lindsey*, which concluded that ‘it is axiomatic that the language of § 1129(b)(2)(B)(ii) and § 1115 is ambiguous, otherwise there would be no split of authority and the arguments in favor of each position so diverse.’”).

¹³⁷ SINGER & SINGER, *supra* note 94, at § 45:2 (“Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses. However, this rule is deceptive in that it implies that words have intrinsic meanings.”); see also Samuel R. Feldman, *Not-So-Great Weight: Treaty Deference and the Article 10(a) Controversy*, 51 B.C. L. REV. 797, 824 (2010) (“As other scholars have noted, ambiguity is in the eye of the beholder.”).

¹³⁸ *Arnold*, 471 B.R. at 596-607. *Arnold* was decided after the Bankruptcy Appellate Panel (“BAP”) of the Ninth Circuit decided *Friedman*. *In re Friedman*, 466 B.R. 471 (B.A.P. 9th Cir. 2012). While BAP decisions are influential, they are not binding on a bankruptcy court like a district court ruling or a Ninth Circuit opinion. *Bank of Maui v. Estate Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir. 1990). As

addition to property specified in section 541” is an adjectival phrase or an adverbial phrase.¹³⁹ After going through a grammatical analysis of the relevant provisions, the court in *Arnold* found the phrase to be an adverbial one because “it modifies the verb, ‘includes,’ to explain to what extent ‘property of the estate’ is included under § 1115(a).”¹⁴⁰

Narrow view courts were skeptical that Congress would abrogate the absolute priority rule in such a complicated and strained way.¹⁴¹ The *Gelin* court, for example, reasoned that “[i]f Congress meant to eliminate the absolute priority rule of § 1129(b)(2)(B)(ii) for individual debtors, it could have simply stated that § 1129(b)(2)(B)(ii) is inapplicable in a case in which the debtor is an individual.”¹⁴² Likewise, “Congress could have [abrogated the rule] 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.”¹⁴³ With so many clearer, easier, and more direct ways for Congress to have done away with the rule, it seemed strange that the operative language would reside as an unenumerated phrase in section 1115.¹⁴⁴

an Article I court, the BAP is not binding on the federal district courts that must be free to formulate their own rules within their jurisdiction. *Id.* Ninth Circuit bankruptcy courts are divided as to whether BAP decisions are binding on them. *See Arnold*, 471 B.R. at 589 (listing cases and commentary evidencing that bankruptcy courts of the circuit are divided as to whether BAP decisions are binding on them). Because of this, the court in *Arnold* was able to diverge from the BAP’s holding in *Friedman*.

¹³⁹ *Arnold*, 471 B.R. at 602.

¹⁴⁰ *Id.*

¹⁴¹ *In re Kamell*, 451 B.R. 505, 508 (Bankr. C.D. Cal. 2011) (“[the broad] reading seems rather convoluted and strained considering the language”); *In re Shat*, 424 B.R. 854, 867 (Bankr. D. Nev. 2010) (“It essentially reads the absolute priority rule out of individual chapter 11 cases, but does so in a convoluted manner—arguably indicative that Congress did not fully appreciate the effect of the language it chose.”); *In re Gelin*, 437 B.R. 435, 442 (Bankr. M.D. Fla. 2010) (“[W]ith all due respect, this Court can hardly imagine a more convoluted way of eliminating the absolute priority rule than that proposed by *Shat*, *Roedemeier*, and *Tegeeder*.”).

¹⁴² *Gelin*, 437 B.R. at 442.

¹⁴³ *In re Maharaj*, 681 F.3d 558, 573 (4th Cir. 2012); *see also In re Mullins*, 435 B.R. 352, 360-61 (Bankr. W.D. Va. 2010) (“[I]t 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’ . . .”).

¹⁴⁴ *Arnold*, 471 B.R. at 603 (“If Congress had intended for § 1115 to subsume or supplant § 541, it could have added § 541 to the enumerated items on the list in § 1115(a).”); *Gelin*, 437 B.R. at 442 (“If Congress meant to eliminate the absolute priority rule of § 1129(b)(2)(B)(ii) for individual debtors, it could have simply stated that § 1129(b)(2)(B)(ii) is inapplicable in a case in which the debtor is an individual If Congress truly meant to exempt an individual debtor’s entire estate, it likely would have referred to *both* §§ 541 and 1115.”).

Legislative History and Congressional Intent

Narrow view courts also found the legislative history of BAPCPA to be unhelpful in divining congressional intent.¹⁴⁵ The House Judiciary Committee Report simply restated the statutory language¹⁴⁶ and provided no additional insights.¹⁴⁷ With no guidance regarding the specific statutes at issue, courts looked to the general themes of BAPCPA.¹⁴⁸ Allowing individual debtors to retain prepetition property—potentially leaving a smaller pot of property for unsecured creditors to divvy up—would directly conflict with one of the central tenets of BAPCPA: “that debtors repay creditors the maximum they can afford.”¹⁴⁹

Narrow view courts were unconvinced that Congress intended to make individual chapter 11s similar to chapter 13. While BAPCPA may have added language to chapter 11 that was almost identical to language found in chapter 13,¹⁵⁰ abrogating the absolute priority rule was an extrapolation too far.¹⁵¹ Including post-petition income into the bankruptcy estate in order to maximize payouts to unsecured creditors was the end goal of BAPCPA;

¹⁴⁵ *Maharaj*, 681 F.3d at 572 (“As many courts in a variety of contexts have noted, BAPCPA’s legislative history is sparse.”); *In re Draiman*, 450 B.R. 777, 821 (Bankr. N.D. Ill. 2011) (“There is no relevant legislative history on § 1115 which would indicate its intent was to abolish the absolute priority rule.”); *Kamell*, 451 B.R. at 509 (“Moreover, the legislative history is also scarce, equivocal and altogether unhelpful.”); *In re Lindsey*, 453 B.R. 886, 903 (Bankr. E.D. Tenn. 2011) (“There is also no dispute that the legislative history for BAPCPA is sparse, at best, and provides no real assistance in this instance.”); *Gelin*, 437 B.R. at 441 (“The legislative history on § 1129(b)(2)(B)(ii) is unhelpful to this end. As each of the bankruptcy courts above noted, the legislative history is entirely silent as to whether the drafters of the amendment to § 1129(b)(2)(B)(ii) intended to wholly except individual Chapter 11 debtors from the absolute priority rule.”).

¹⁴⁶ H.R. REP. NO. 109-31(I), at 80 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 147.

¹⁴⁷ *Arnold*, 471 B.R. at 607 (“Thus, the legislative history specifically referencing the addition of § 1115 and the amendment of § 1129(b)(2)(B)(ii) in BAPCPA as reflected in the House committee report is unhelpful because it simply restates the statutory language.”).

¹⁴⁸ *In re Friedman*, 466 B.R. at 490 (Jury, J., dissenting) (citing *In re Kamell*, 451 B.R. at 508); *Arnold*, 471 B.R. at 609; see also *Lindsey*, 453 B.R. at 904-905; *In re Gbadebo*, 431 B.R. 222, 229 (Bankr. N.D. Cal. 2005).

¹⁴⁹ *Maharaj*, 681 F.3d at 574 (quoting H.R. REP. NO. 109-31(I), at 2 (2005) reprinted in U.S.C.C.A.N. 88,89). See also *Friedman*, 466 B.R. at 485 (Jury, J. dissenting) (“[T]he policy behind the enactment of BAPCPA was to enhance the return to creditors.”); *Arnold*, 2012 WL 1820877 (“[B]ased on this legislative history, it is incongruous to conclude that Congress intended to relax plan confirmation standards for individual Chapter 11 debtors by removing the creditor protection of the absolute priority rule and thereby allowing these debtors to retain their prepetition assets and cram down unsecured creditors.”); *Kamell*, 451 B.R. at 508 (“[I]n general, BAPCPA has been read to tighten, not loosen, the ability of debtors to avoid paying what can reasonably be paid on account of debt.”); *Gbadebo*, 431 B.R. at 229 (“Each one of these new provisions appears designed to impose greater burdens on individual chapter 11 debtor’s rights so as to ensure a greater payout to creditors.”).

¹⁵⁰ See *supra* notes 104-09.

¹⁵¹ See *Kamell*, 451 B.R. at 508 n.4 (playing off of the phrase “a bridge too far”).

using language similar to that found in chapter 13 was merely a means to do so.¹⁵² If Congress's intent had been to make chapter 11 like chapter 13, then "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."¹⁵³

Canon Against Implied Repeal

Courts also looked to pre-BAPCPA bankruptcy practice to resolve the issue.¹⁵⁴ The Bankruptcy Code should not be "read to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."¹⁵⁵ Adoption of the broad view would represent a significant departure from pre-BAPCPA bankruptcy practice.¹⁵⁶ The United States Court of Appeals for the Fourth Circuit, in *In re Maharaj*, was especially sensitive to this issue, repeatedly emphasizing the canon against implied repeal.¹⁵⁷ The canon against implied repeal requires "clear indication" on the part of Congress to overturn a preexisting bankruptcy practice.¹⁵⁸ The *Maharaj* court found no such indication in the plain language of section 1115 or section 1129(b)(2)(B)(ii).¹⁵⁹ The lack of legislative history was fatal to the broad view for two reasons. First, Congress did discuss in BAPCPA's legislative history

¹⁵² *Arnold*, 471 B.R. at 611 ("This interpretation is not supported by the structure of the statutory language as discussed above, nor is it supported in the legislative history of BAPCPA, which shows the purpose was to require debtors to pay more.").

¹⁵³ *In re Karlovich*, 456 B.R. 677, 682 (Bankr. S.D. Cal. 2010).

¹⁵⁴ *Maharaj*, 681 F.3d at 571 (quoting *Hamilton v. Lanning*, 130 S.Ct. 2464, 2467 (2010)) ("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.'"); *Arnold*, 2012 WL 1820877 (quoting *Hamilton v. Lanning*, 130 S.Ct. 2464, 2473(2010)) ("For example, with respect to BAPCPA Chapter 13 amendments, the Supreme Court has stated that it 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'"); *Kamell*, 451 B.R. at 509-10 ("It has long been held that major changes to existing practice will not be inferred unless clearly mandated.").

¹⁵⁵ *Lanning*, 130 S. Ct. at 2473; *see also* *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 453 (2007) (quoting *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2003)) ("[W]here Congress has intended to provide . . . exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly."); *Lamie v. U.S. Tr.*, 540 U.S. 526, 539 (2004) ("It is fair to doubt that Congress would so rework their longstanding role without announcing the change in the congressional record.").

¹⁵⁶ *See Maharaj*, 681 B.R. at 570 ("Debtors concede that adoption of their position would represent a significant departure from pre-BAPCPA bankruptcy practice.").

¹⁵⁷ *Id.* at 570-71.

¹⁵⁸ *Id.* at 570 ("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.").

¹⁵⁹ *Id.* at 572 ("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. . . . Furthermore, there is nothing in the BAPCPA's legislative history that suggests that Congress intended to repeal the absolute priority rule.").

instances where BAPCPA would change longstanding bankruptcy practice, but in the section of the legislative history applicable to section 1129(b)(2)(B)(ii), Congress made no mention of abrogating the absolute priority rule.¹⁶⁰ Second, the previous treatment of the absolute priority rule by Congress supports the narrow view. When Congress amended the Bankruptcy Act in 1952 to eliminate the fair and equitable requirement, it clearly explained its actions in the accompanying legislative history.¹⁶¹ If Congress had meant to eliminate the rule, it would have explained its intent, just as it had done before in 1952.¹⁶² The canon against implied repeal mandates the adoption of the narrow view because the legislative history reveals no clear intention by Congress to eliminate it.

E. Courts Should Adopt the Narrow View

Both the ill will against BAPCPA held by many in the legal profession¹⁶³ and BAPCPA's shoddy drafting¹⁶⁴ provide important context in understanding the issue. While

¹⁶⁰ *Id.* (citations omitted) (“Congress does discuss in the BAPCPA legislative history instances where BAPCPA changes longstanding bankruptcy practice. 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.”).

¹⁶¹ *Id.* at 572-73 (quoting H.R. NO. 82-2320 (1952) *reprinted in* 1952 U.S.C.C.A.N. 1960, 1981-82) (alterations in original) (“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,’ but Congress explained itself in the Congressional Record: ‘[I]he fair and equitable rule...cannot realistically be applied[.]’”).

¹⁶² *Id.* at 573.

¹⁶³ See *Fokkena v. Hartwick*, 373 B.R. 645, 652-53 (D. Minn. 2007) (“The Court understands the bankruptcy court’s frustration with the BAPCPA, which is a poorly written statute; however, the Court’s task is to interpret the statute as Congress has written it.”); *In re Phillips*, 362 B.R. 284, 295 (Bankr. E.D. Va. 2007) (“The provisions of BAPCPA have drawn the ire of a number of reviewing courts since its enactment.”); *In re Donald*, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006) (“Unfortunately, the BAPCPA amendments do not provide a clear answer. The amendments are confusing, overlapping, and sometimes self-contradictory. They introduce new and undefined terms that resemble, but are different from, established terms that are well understood. Furthermore, the new provisions address some situations that are unlikely to arise. Deciphering this puzzle is like trying to solve a Rubik’s Cube that arrived with a manufacturer’s defect. Fortunately, after many twists and turns, a few patches of solid color emerge.”); Braucher, *supra* note 75, at 457 n.3 (“Because it is so complex and badly drafted and makes so many dubious policy choices, experts have taken to calling it by the fanciful acronym BARF (BANKRUPTCY ReFORM Act).”); David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 227 (2007) (“To be sure, BAPCPA adds a great amount of detail and is rife with bad draftsmanship, dumbfounding contradictions, and curious, even comical, special interest exceptions. It is hard to choke out any words of admiration for the quality of BAPCPA’s draftsmanship. Judges and scholars have not hesitated to pour scorn on Congress for the details of BAPCPA.”); Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 284 (“We’ve known it for eight years. It’s a behemoth of bad policy, an illiteracy of ill-conceived provisions, an underbelly of unintended consequences. The problems we know about are bad enough. The problems we haven’t yet discovered are likely to be worse.”).

one of BAPCPA's stated purposes was to "ensure that the [bankruptcy] system is fair for both debtors and creditors,"¹⁶⁵ BAPCPA was a considerably pro-creditor piece of legislation due to the strong backing it received from the consumer credit industry.¹⁶⁶ One need not hold pro-debtor views to hold BAPCPA in disfavor; BAPCPA's hanging paragraphs,¹⁶⁷ ambiguous language,¹⁶⁸ and onerous procedures¹⁶⁹ have caused the bar and bench

¹⁶⁴ See *In re Miller*, 570 F.3d 633, 639 (5th Cir. 2009) ("BAPCPA has been criticized by some judges and commentators as being 'poorly drafted' and has resulted in certain readings of the Code that would qualify as 'awkward' under the definition in *Lamie*."); *In re Graupner*, 537 F.3d 1295, 1297 (11th Cir. 2008) ("Although the hanging paragraph has caused significant confusion and incoherence in the law and has been rightly criticized for its poor drafting, its legislative history leaves little doubt that its architects intended only good things for car lenders and other lienholders.") (citations omitted) (internal quotation marks omitted); *In re Reyes*, 361 B.R. 276, 279 (Bankr. S.D. Fla. 2007) *aff'd in part, rev'd in part*, No. 07-20689-CIV, 2007 WL 6082567 (S.D. Fla. Dec. 19, 2007) ("So, while the experts who drafted BAPCPA are entitled to a failing grade in Legislative Drafting 101, the Court is left to determine what Congress intended."); *Oversight of the Implementation of the Bankruptcy Abuse Prevention & Consumer Protection Act: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 109th Cong. 34, 191 (2006) ("The [National Bankruptcy Conference] concurs with the witnesses that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ('BAPCPA') contains errors that should be promptly addressed in a 'technical corrections bill.'"); Ralph Brubaker, *Consumer Credit and Bankruptcy: Assessing A New Paradigm*, 2007 U. ILL. L. REV. 1, 2 ("Markell provides a case study in the dreadfully inept legislative drafting on display in BAPCPA."); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005"*, 79 AM. BANKR. L.J. 191, 191 (2005) ("One of the chief problems that will be confronted is [BAPCPA's] atrocious drafting, especially in many of the consumer provisions of the bill.").

¹⁶⁵ H.R. REP. NO. 109-31(I), at 1 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89 (emphasis added).

¹⁶⁶ *Graupner*, 537 F.3d at 1297 ("Although the hanging paragraph has caused significant confusion and incoherence in the law and has been rightly criticized for its poor drafting, its legislative history leaves little doubt that its architects intended only good things for car lenders and other lienholders.") (citations omitted) (internal quotation marks omitted); Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 486 (2005) ("The establishment of the National Bankruptcy Review Commission in 1994 either intentionally or unintentionally galvanized the consumer creditor community and ultimately became the impetus for BAPCPA."); Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, AM. BANKR. INST. J., Sept. 2005, at 1 ("[L]obbyists and executives for the consumer credit industry convinced Congress that abuse was rampant in bankruptcy, that many debtors were using bankruptcy as a 'first resort' to avoid paying creditors, and that courts weren't doing enough to police the bankruptcy system."); Sommer, *supra* note 164, at 191-92 ("In contrast to the 1978 legislation, which was crafted with extensive assistance from many of the finest minds in the bankruptcy world, many of the consumer provisions of the 2005 legislation were largely drafted by lobbyists with limited knowledge of real-life consumer bankruptcy practice.").

¹⁶⁷ *E.g.*, 11 U.S.C. § 1325(a) (2012).

¹⁶⁸ See, *e.g.*, 11 U.S.C. §§ 362(a)(c)(3)(A)-(B); *In re Curry*, 362 B.R. 394, 398 (Bankr. N.D. Ill. 2007) ("Since [§ 362(c)(3)(A)] has no 'plain and unambiguous meaning,' it has no plain meaning to be followed."); *In re Paschal*, 337 B.R. 274, 277 (Bankr. E.D.N.C. 2006) ("In an Act in which head-scratching opportunities abound for both attorneys and judges alike, § 362(c)(3)(A) stands out."); *In re Charles*, 332 B.R. 538, 541 (Bankr. S.D. Tex. 2005) ("The Court notes that the relevant provisions in [§ 362(c)(3)(B)] are, at best, particularly difficult to parse and, at worst, virtually incoherent."); see also

considerable grief.¹⁷⁰ Without guidance from Congress, keeping one's personal views separate from one's objective analysis is difficult, because policy is all that remains after every canon of statutory interpretation is exhausted.

Early courts that followed the narrow view may have been too quick to see ambiguity where none existed. The initial deluge of bitter criticism¹⁷¹ may have put readers on heightened alert, leading them to read ambiguity in places where none existed. This appears to explain *Tegeeder*, which was the first court to substantively deal with the issue, because the court relied on scholarly material to justify its narrow reading of section 1115.¹⁷²

Plain Reading Favors the Narrow View

A plain reading of section 1115 favors the narrow view. Read separately, sections 1115 and 1129(b)(2)(B)(ii) are clear; it is only when the two are read together that ambiguities possibly arise.¹⁷³ A grammatical deconstruction of the language supports the narrow view.¹⁷⁴

Megan A. Taylor, Comment, *Gag Me with A Rule of Ethics: BAPCPA's Gag Rule and the Debtor Attorney's Right to Free Speech*, 24 EMORY BANKR. DEV. J. 227, 232 (2008) ("Another criticism of the BAPCPA was that it was poorly drafted and that courts would face 'interpretive challenges' to its ambiguous language. Much of the new legislation remains confusing even to seasoned bankruptcy attorneys and judges.").

¹⁶⁹ See Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349 (2008) ("Furthermore, the 2005 law has at least temporarily reduced access to bankruptcy because of increased costs due to new uncertainty, paperwork and hoop-jumping."); Joseph D. Orenstein, *Milavetz, Gallop & Milavetz, P.A. v. United States: "In Contemplation of" the Meaning, Applicability, and Validity of Attorney Restrictions in the BAPCPA*, 62 MERCER L. REV. 685, 699-700 (2011) ("The reluctance of bankruptcy attorneys was augmented by the general perception that BAPCPA was poorly drafted and that the statutory overhaul left a maze of ambiguity and uncertainty for attorneys to navigate. Chief among attorneys' concerns was the specter of increased liability corresponding with measures of BAPCPA designed to increase accountability."); Vance & Cooper, *supra* note 163, at 284 ("This article cannot hope to alert lawyers to all the landmines of liability. We point out just enough to terrify you so that you will peruse its provisions with the intensity of a soldier in a minefield.").

¹⁷⁰ Braucher, *supra* note 169, at 349 ("The legislation itself, however, is a defectively designed and poorly drafted mess. It creates hundreds of difficult new issues that are now working their way up to and through the appellate system."); Taylor, *supra* note 168, at 232 ("Another criticism of the BAPCPA was that it was poorly drafted and that courts would face 'interpretive challenges' to its ambiguous language. Much of the new legislation remains confusing even to seasoned bankruptcy attorneys and judges.").

¹⁷¹ See *supra* note 163.

¹⁷² *In re Tegeeder*, 369 B.R. 477, 480 (Bankr. D. Neb. 2007) ("Although there do not appear to be any reported decisions directly on point, several commentators agree with this conclusion.").

¹⁷³ See *supra* Part II.A.

¹⁷⁴ *In re Arnold*, 471 B.R. 578, 603 (Bankr. C.D. Cal. 2012) ("[A] grammatical analysis of the statutory language of § 1115 supports a narrow interpretation of the statute...the grammatical analysis is *in addition* to other methods of statutory construction that also show the narrow view is correct.").

The narrow view is further reinforced when examined in light of the entire Bankruptcy Code.¹⁷⁵

Using the rules of English grammar, the phrase “in addition to the property specified in section 541” should be read as an adverbial phrase modifying the verb “includes” and should not be read as being the object of the verb “includes.”¹⁷⁶ The phrase “in addition to the property specified in section 541” modifies the verb “includes” by clarifying what sections 1115(a)(1)-(2) should be included into.¹⁷⁷ The word “includes” is a transitive verb, which requires a direct object.¹⁷⁸ The direct objects are located in the two enumerated subsections of sections 1115(a).

Reading the language in context with the entire bankruptcy code further supports the narrow view. First, from a drafting perspective, why would a drafter do away with the absolute priority rule in a section entitled “Property of the Estate”¹⁷⁹ when one could just as easily and more clearly accomplish the same effect by adding language to the sole subsection that deals with cram downs?¹⁸⁰ Second, the estate and property of the estate are defined and created in section 541.¹⁸¹ Asking anyone familiar with the Bankruptcy Code about where to locate the code's definition of “property of the estate” would likely produce an immediate answer of section 541. It would be an odd thing to say that property of the estate is defined in chapter 13 by section 1306 or that property of the estate is defined in chapter 12 by section 1207.¹⁸² A more accurate statement would be that property of the estate is defined in section 541, with sections 1115, 1207, and 1306 adding additional property to the estate in each corresponding chapter.¹⁸³ Moreover, section 103(a) provides that section 541 applies to

¹⁷⁵ Examining certain provisions in light of the entire Bankruptcy Code is consistent with traditional rules of statutory interpretation. See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (“In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”).

¹⁷⁶ *Arnold*, 471 B.R. at 602 (“[T]he prepositional phrase, ‘in addition to the property specified in section 541’ is an adverbial phrase because it modifies the verb, ‘includes,’ to explain to what extent ‘property of the estate’ is included under § 1115(a) . . .”).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ 11 U.S.C. § 1115 (2012).

¹⁸⁰ See *Florida Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (“To be sure, a subchapter heading cannot substitute for the operative text of the statute. Nonetheless, statutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute.”) (citations omitted) (internal quotation marks omitted).

¹⁸¹ 11 U.S.C. § 541(a).

¹⁸² See *In re Friedman*, 466 B.R. 471, 484 (B.A.P. 9th Cir. 2012) (Jury, J., dissenting) (“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.”)

¹⁸³ See 11 U.S.C. §§ 541, 1115, 1207, 1306.

a chapter 11 case,¹⁸⁴ furthering the argument that section 1115 does not supersede section 541.

The narrow view also better harmonizes with the rest of the Bankruptcy Code.¹⁸⁵ For example, section 1528 relies on the assumption that property of the estate is defined in section 541 and not in sections 1115, 1207, or 1306. Section 1528 reads:

After recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States. The effects of such case shall be restricted to the assets of the debtor that are within the territorial jurisdiction of the United States and . . . to *other assets of the debtor that are within the jurisdiction of the court under sections 541(a) of this title* . . . to the extent that such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter.¹⁸⁶

If property of the estate is defined in section 1115 for chapter 11 cases, then the argument could be made that a loophole exists in section 1528 where assets located outside of the United States that are not subject to the jurisdiction and control of a foreign proceeding would not be effected by an applicable chapter 11 case. Such an interpretation of section 1528 leads to an absurd result, and it is doubtful that such an argument would be persuasive to a court. Still, section 1528 illustrates how the broad view would create dissonance with other provisions of the Bankruptcy Code.

Courts should adopt the narrow view because the basic rules of English grammar dictate a narrow reading of the statute. The fact that section 1115 enumerates two categories of property but leaves the phrase referencing section 541 unenumerated is another telling argument favoring the narrow view.¹⁸⁷ Again, when read in context with the rest of the Bankruptcy Code, the narrow view better harmonizes with other sections of the code. Furthermore, because a narrow reading leads to no absurd results,¹⁸⁸ the plain language of section 1115 should govern.

¹⁸⁴ 11 U.S.C. § 103(a) (“Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(n), 555 through 557, and 559 through 562 apply in a case under chapter 15.”).

¹⁸⁵ See *Friedman*, 466 B.R. at 484-85 (Jury, J., dissenting) (“[The majority’s] 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 floats independently of the integrated continent.”)

¹⁸⁶ 11 U.S.C. § 1528 (emphasis added).

¹⁸⁷ *In re Arnold*, 471 B.R. 578, 603, 606-7 (Bankr. C.D. Cal. 2012).

¹⁸⁸ Broad view courts made no mention of any absurd results that would result from a narrow reading of § 1115(a).

Congress's Silence on the Matter Necessitates that the Pre-BAPCPA Practice Should Continue

The Supreme Court has repeatedly stated that it “will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.”¹⁸⁹ If the language of a statute is ambiguous and Congress was unclear on the matter, then courts should not depart from past bankruptcy practice.¹⁹⁰ Prior to BAPCPA, courts unanimously agreed that the absolute priority rule applied to individual debtors.¹⁹¹ Broad view courts would erode prior bankruptcy practice based on the assumption that Congress intended to make chapter 11 more like chapter 13, thereby inferring the abrogation of the absolute priority rule.¹⁹² Such an inference is hardly describable as a “clear indication that Congress intended such a departure.”¹⁹³ As the following section will explain, such an assumption is unfounded due to the dearth of legislative history on the matter.

Sparse Legislative History Favors Neither View

Ordinarily, when the language of a statute has a plain and natural reading, no further analysis is required.¹⁹⁴ However, when enough courts create a split of authority, *de facto* ambiguity may arise, and a treatment of the legislative history along with an assessment of congressional intent may help to strengthen a plain and natural reading further.¹⁹⁵ Such is the situation here.

Regrettably, the legislative history surrounding BAPCPA is unhelpful in assessing congressional intent.¹⁹⁶ The House Judiciary Committee Report merely restates the language of the provisions and provides no additional insight into Congress’s intentions regarding the absolute priority rule.¹⁹⁷ Likewise, the general purposes of BAPCPA are unhelpful in resolving the issue in a dispositive manner. BAPCPA’s twofold purpose was to ensure that debtors repay creditors the maximum they could afford and to implement additional

¹⁸⁹ *Hamilton v. Lanning*, 130 S. Ct. 2464, 2473 (2010) (internal quotation marks omitted); *see also supra* note 140 (listing bankruptcy cases that discuss the presumption against implied repeal).

¹⁹⁰ *See supra* Part II.D.3.

¹⁹¹ *See supra* note 61.

¹⁹² *In re Maharaj*, 681 F.3d 558, 565-66 (4th Cir. 2012).

¹⁹³ *Hamilton*, 130 S. Ct. at 2473.

¹⁹⁴ *See supra* note 96, 138.

¹⁹⁵ *See SINGER & SINGER, supra* note 94, at § 45:6 (“In a case where a court is faced with a novel question, it must seek to ascertain and give effect to the intention of the legislature as it is expressed in the statute itself.”).

¹⁹⁶ *In re McNabb*, 326 B.R. 785, 789 (Bankr. D. Ariz. 2005) (“Legislative history is virtually useless as an aid to understanding the language and intent of BAPCPA. The section-by-section analysis in the Report of the House Committee on the Judiciary merely provides a gloss of the statutory language of BAPCPA § 322. It does not provide an example of the kind of problem or abuse it was intended to correct, nor a citation to a case whose result it sought to alter. Consequently it provides no clue to the intended significance of the ‘as a result of electing’ language. Both the majority and the dissents to the 1997 Commission Report are similarly unhelpful as to the significance of this language.”).

¹⁹⁷ *See supra* notes 146-47.

consumer protection safeguards.¹⁹⁸ Section 1129(b)(2)(B)(ii) does not deal with consumer protection safeguards, nor does it ensure that debtors repay creditors the maximum they can afford.¹⁹⁹ Nothing in the statutes' language or legislative history links any of BAPCPA's central goals to section 1129(b)(2)(B)(ii).²⁰⁰

However, the bankruptcy court in *In re Shat* identified a possible scrivener's error that would link section 1129(b)(2)(B)(ii) to one of BAPCPA's two goals.²⁰¹ Currently, section 1129(b)(2)(B)(ii) reads in part: “. . . 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.*”²⁰² Subsection (a)(14) deals with the requirement that domestic support obligations be current for a plan to be confirmed.²⁰³ *Shat* explained that during the legislative process subsection (a)(14) in its current form was inserted without updating the accompanying reference in section 1115.²⁰⁴ If this speculated disconnect between references had been fixed, then section 1115 would have been updated to refer to what is now subsection (a)(15).²⁰⁵ Section 1129(a)(15) effectively requires individual debtors to apply all of their disposable income towards paying back creditors if an unsecured claimholder objects to the confirmation of a plan.²⁰⁶ This appears to be a

¹⁹⁸ The House Judiciary Committee Report stated the following regarding the purposes of BAPCPA:
PURPOSE AND SUMMARY

H.R. 333, the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005”, is a comprehensive package of reform measures pertaining to both consumer and business bankruptcy cases. The purpose of the bill is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and by ensuring that the system is fair for both debtors and creditors.

The heart of H.R. 333's consumer bankruptcy reforms is the implementation of an income/expense screening mechanism (“needs-based bankruptcy relief”) to ensure that debtors repay creditors the maximum they can afford.

H.R. REP. NO. 109-31(I), at 2-3 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

¹⁹⁹ See 11 U.S.C. § 1129(b)(2)(B)(ii) (2006).

²⁰⁰ See *In re Kamell*, 451 B.R. 505, 509 (Bankr. C.D. Cal. 2011).

²⁰¹ See *In re Shat*, 424 B.R. 854, 860 n. 21 (Bankr. D. Nev. 2010).

²⁰² 11 U.S.C. § 1129(b)(2)(B)(ii) (2012) (emphasis added).

²⁰³ *Id.* § 1129(a)(14) (“If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.”).

²⁰⁴ *Shat*, 424 B.R. at 860 n.21.

²⁰⁵ *Id.*

²⁰⁶ Section 1129(a)(15) states:

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan

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

legitimate scrivener's error considering that a disposable income requirement would be more relevant to a cram down provision than a requirement ensuring timely domestic support payments. This possible scrivener's error helps link section 1129(b)(2)(B)(ii) to one of the main goals of BAPCPA—ensuring that debtors repay creditors the maximum they can afford.²⁰⁷

Because BAPCPA generally attempted to maximize the amount paid to creditors, the legislative history marginally favors the narrow view, which provides creditors with the possibility of greater payments. Still, such a conclusion may be a stretch,²⁰⁸ especially when the conclusion relies on a hypothesized scrivener's error.²⁰⁹ To assume that every provision in BAPCPA was engineered to maximize payments to creditors, while mostly accurate, may be too cynical. The idea that Congress intended to abrogate the absolute priority rule in an effort to balance out the requirements found in section 1129(a)(15) is a facially valid speculation given Congress's silence on the issue. Accordingly, applying the general intent of BAPCPA to section 1129(b)(2)(B)(ii), while somewhat favoring the narrow view, leads to less than dispositive results.

Likewise, it would be erroneous to conclude that Congress intended to make chapter 11 cases similar to chapter 13 cases.²¹⁰ Changes to the Bankruptcy Code should not be read “to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.”²¹¹ Such is the case here.²¹² The narrow view embodies the pre-BAPCPA

(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.

11 U.S.C. § 1129(a)(15).

²⁰⁷ See *supra* note 197.

²⁰⁸ See *In re Kamell*, 451 B.R. 505, 508 n.4 (Bankr. C.D. Cal. 2011).

²⁰⁹ See *In re Lively*, 467 B.R. 884, 890 n.3 (Bankr. S.D. Tex. 2012) (“One could easily assume that Congress wished to protect domestic support creditors by not allowing a debtor to keep any postpetition earnings Therefore, the Court may not correct the scrivener’s error.”).

²¹⁰ See *In re Miller*, 570 F.3d 633, 639 (5th Cir. 2009) (“BAPCPA has been criticized by some judges and commentators as being ‘poorly drafted’ and has resulted in certain readings of the Code that would qualify as ‘awkward’ under the definition in *Lamie*. Although we have no reason to pass judgment on the process by which BAPCPA became law, we note that perceived poor drafting should not be regarded as a license to invalidate plain-text readings in the name of fixing a statute that some believe is broken.”).

²¹¹ *Cohen v. Dela Cruz*, 523 U.S. 213, 221 (1998) (internal quotation marks omitted).

²¹² *In re Maharaj*, 681 F.3d 558, 570 (4th Cir. 2012) (“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.”); *Kamell*, 451 B.R. at 509-10 (“The court is not persuaded by this vague language that Congress meant to abrogate the absolute priority rule out of individual chapter 11s entirely. The absolute priority rule has been a mainstay of Chapter 11 and predecessor practice since at least the 1930’s. . . . It has long been held

practice of applying the absolute priority rule to debtors' prepetition property. Nowhere in the legislative history does it mention that Congress intended to make individual chapter 11 cases more like chapter 13 cases.²¹³ The intent of Congress was to ensure that debtors repay creditors the maximum they can afford.²¹⁴ While similarities exist between the chapter 11 plan confirmation process and the chapter 13 plan confirmation process, noteworthy differences exist, and the circumstances that warrant different statutory schemes are significant.²¹⁵ In chapter 13, the court confirms the plan if it meets the requirements for confirmation under section 1325.²¹⁶ Creditors may object to confirmation of a chapter 13 plan, and the court can either sustain or overrule the objection.²¹⁷ No voting by claimholders takes place.²¹⁸ Confirming a chapter 11 plan involves a very different procedure. In chapter 11, claimholders vote on the plan.²¹⁹ Claimholders are grouped into classes based on the similarities of their claims.²²⁰ Each of the classes either accepts or rejects the plan, and a class of impaired claimholders accepts the plan by a majority vote in number of claims and at least two-thirds in dollar value.²²¹ Cram down provisions are necessary in chapter 11 because a single class of claimholders can derail a plan using the voting power it holds. Because BAPCPA kept the voting scheme in place for individual debtors, it would follow that Congress would keep the cram down provisions of section 1129(b)(2) intact as well. The goal of BAPCPA was to enlarge payouts to creditors, not to harmonize the statutory schemes of chapter 11 and chapter 13.²²² Broad view courts that reasoned otherwise mistook the means for the ends.²²³

The only conclusion to draw from BAPCPA's legislative history is that no conclusion can be drawn from it.²²⁴ The House Judiciary Committee Report merely restates

that major changes to existing practice will not be inferred unless clearly mandated.") (citations omitted).

²¹³ See *In re Shat*, 424 B.R. 854, 861 (Bankr. D. Nev. 2010).

²¹⁴ H.R. REP. NO. 109-31(I), at 2-3 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 89.

²¹⁵ *In re Friedman*, 466 B.R. 471, 484 (B.A.P. 9th Cir. 2012) (Jury, J., dissenting) ("[The majority] 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.")

²¹⁶ 11 U.S.C. § 1325 (2010).

²¹⁷ FED. R. BANKR. P. 3015.

²¹⁸ FED. R. BANKR. P. 9014.

²¹⁹ 11 U.S.C. § 1126.

²²⁰ *Id.* § 1122.

²²¹ *Id.* § 1126(c).

²²² See *supra* note 198.

²²³ See *supra* note 144.

²²⁴ See Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93 (2007) ("[B]ecause the Act is badly designed and drafted, bench and bar have had to struggle to attempt to achieve the legislation's announced goals – abuse prevention and consumer protection.").

the statutory language and provides no additional insights.²²⁵ To make broad assumptions based on BAPCPA's general goals or the similarity between the BAPCPA amendments and chapter 13 provisions relies too much on speculation.²²⁶ While reasoned speculation is arguably better than nothing, such speculation is not helpful here.²²⁷

III. CONCLUSION

Instead of passing BAPCPA, Congress should have lifted the statutory debt caps²²⁸ imposed on chapter 13 and barred individuals from filing under chapter 11 without a finding of good cause instead of mixing elements of chapter 13 into chapter 11. However, Congress passed BAPCPA with its susceptible language in sections 1115 and 1129(b)(2)(B)(ii), and the President signed it into law.²²⁹

Using the canons of statutory interpretation, a plain reading of section 1115 has the absolute priority rule only applying to individual debtors' pre-petition property. Furthermore, the legislative history dealing with sections 1115 and 1129(b)(2)(B)(ii) is inadequate to assess Congress's intent on the issue. Neither the broad goals of BAPCPA nor the similarities between some BAPCPA amendments and certain chapter 13 provisions provide clear indication of Congress's position on the absolute priority rule as it applies to individual debtors. The Bankruptcy Code should not be read to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.²³⁰ With no clear indication from Congress on the issue, the pre-BAPCPA practice of applying the absolute priority rule to individual debtors' pre-petition property should continue.

²²⁵ H.R. REP. NO. 109-31(I), at 80 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 147.

²²⁶ *See supra* notes 189-93 and accompanying text.

²²⁷ *See supra* Part III.E.2.

²²⁸ 11 U.S.C. § 109(e) (2010).

²²⁹ *See* Bruce A. Markell, *The Sub Rosa Subchapter: Individual Debtors in Chapter 11 After BAPCPA*, 2007 U. ILL. L. REV. 67, 70 (2007) ("As it is, however, one is left with a motley sub rosa subchapter, which will generate wasted effort for lawyers and pain for debtors.").

²³⁰ *See supra* note 211.