By Stanley E. Goldich

Plain-Meaning Rules: Did BAPCPA Abolish the Absolute-Priority Rule?

Editor's Note: *For another article discussing the ethical aspects of the absolute-priority rule, read the feature on page 30.*

Once again, the meaning of language in congressional legislation has caused a major divide among the bankruptcy courts. The dispute this time involves the words "included" and "includes" in amendments to the Bankruptcy Code relating to individual chapter 11 cases in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The Ninth Circuit Bankruptcy Appellate Panel (BAP) has now weighed in with an unambiguous answer, albeit in a split decision reflective of the widely differing views on whether the language at issue is plain or ambiguous, as well as how principles of statutory interpretation should be applied.

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Introduction

Before Congress enacted BAPCPA, all debtors in chapter 11 who wanted to cram down a plan that was not accepted by an unsecured creditor class had to satisfy what is known as the "absolute-priority rule" to meet the "fair and equitable" requirement in § 1129(b).[1] Under the absolute-priority rule, equity owners cannot retain any property unless the plan provides for payment in full to any class of unsecured creditors that does not accept the plan. The absolute-priority rule is not, in fact, absolute, as courts have recognized a "new value exception" permitting equityholders to retain property if an adequate capital contribution in the form of money or money's worth is given. 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.[2]

When Congress amended the Bankruptcy Code in 2005, it created an exception to the absolute-priority rule for individual chapter 11 debtors in conjunction with a number of other provisions adopt-

1 *See* 11 U.S.C. § 1129(b)(1)(2)(B). Pertinent portions of statutes cited in this article are reprinted in Appendix A.

2 The absolute-priority rule originated as a judicially created concept in the early 20th century to protect unsecured creditors from deals between senior creditors and shareholders that would impose unfair terms on unsecured creditors.

Appendix A: Absolute-Priority Rule Statutes

11 U.S.C. § 1129. Confirmation of plan

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan…

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

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

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

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

The italicized portion of subsection (ii) was added to the Bankruptcy Code by BAPCPA.

11 U.S.C. § 1115. Property of the Estate

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

(1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

ed from chapter 13 of the Bankruptcy Code applicable to individual chapter 11 debtors. The question that is causing disharmony is whether the exception actually abolished the absolute-priority rule in individual chapter 11 cases. In *In re Friedman*,[3] a divided BAP held that it did.[4]

The import of the BAP's ruling (for courts that follow it) is that individual chapter 11 debtors may retain pre-petition property under a chapter 11 plan even if nonconsenting unsecured creditors are not paid in full.[5] However, the *Friedman* holding did not eliminate the "fair and equitable" standard in § 1129(b)(1) for which the absolute-priority rule was a minimum requirement. A number of other creditor protections also remain, including requirements that the plan be proposed in good faith; and the "best interests" liquidation test and new creditor protections relating to individual chapter 11 cases were added by BAPCPA, including a requirement to distribute property that is at least equal in value to the debtor's projected disposable income for five years if an unsecured creditor objects to the plan. This new requirement is similar to the disposable-income requirement in individual chapter 13 cases with some differences in how it is triggered and applied.

The *Friedman* ruling is significant because the continued existence or nonexistence of the absolute-priority rule may dictate whether plans can be confirmed in many individual chapter 11 cases.[6] It is also only the second appellate opinion to consider whether BAPCPA abolished the absolute-priority rule for individual chapter 11 debtors. The large majority of published bankruptcy court opinions have held that the absolute-priority rule still applies to individual debtors under BAPCPA except with respect to post-petition earnings and certain other property acquired after the petition date. A minority of published bankruptcy court opinions and a more recent district court ruling have held that BAPCPA fully abrogated the absolute-priority rule in individual chapter 11 cases.[7] Many other bankruptcy courts have come down on both sides of the question and the issue is currently before the Courts of Appeals for the Fourth, Fifth and Tenth Circuits. *Friedman* is also important because it addresses the application of plain-meaning rules and questions of statutory interpretation that have confounded courts in applying § 1129 and other BAPCPA provisions where the only agreement is often that the language was inartfully (if not poorly) drafted.[8]

The Statutory Language and Issue

In its post-BAPCPA incarnation, the absolute-priority rule permits cramdown of a plan without payment of the unsecured claims in full only if "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*."[9] Section 1115 provides in pertinent part:

> (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.

The BAP determined that § 1115 *plainly* "includes" pre-petition property specified in § 541 as well as post-petition property and earnings; therefore, the exception added in § 1129(b)(2)(B)(ii) *plainly* abolished the absolute-priority rule in individual chapter 11 cases and appears to be correct.

The issue that has divided the courts is whether § 1129(b)(2)(B)(ii)'s reference to "property included in the estate under § 1115" includes property of the estate under Bankruptcy Code § 541 (*i.e.*, the debtor's pre-petition property). If the answer is "yes," all of the debtor's pre- and post-petition property is excepted from the operation of the absolute-priority rule and it is *de facto* abolished. At the heart of the dispute is whether § 1115 "includes" pre-petition property. *Friedman* ruled that it did, and the statutory language is plain and unambiguous, so speculations about legislative intent are not necessary or appropriate.

The Majority

The *Friedman* majority started its analysis by setting forth certain "primary principles" of statutory interpretation, including:

> "The interpretation of the Bankruptcy Code begins with the language itself...." 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...." In interpreting the Bankruptcy Code, the U.S. Supreme Court has held "as long as the statutory scheme is coherent and consistent, there generally is

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3 2012 Bankr. Lexis 1703 (9th Cir. B.A.P. 2012).

4 The majority opinion was authored by Hon. Scott C. Clarkson (C.D. Cal.), sitting by designation, and was joined by Hon. Ralph Kirchner (D. Mont.). The dissent was written by Hon. **Meredith A. Jury** (C.D. Cal.).

5 The precedential effect of BAP opinions is disputed and has not been determined by the Ninth Circuit. *See In re Rinard*, 451 B.R. 12, 20-22 (Bankr. C.D. Cal. 2011) (holding that Congress determined in BAPCPA that BAP opinions have no authoritative or precedential effect).

6 *See In re Maharaj*, 449 B.R. 484, 494 (Bankr. E.D. Va. 2011).

7 *See* Appendix B listing the majority and minority rulings.

8 *See, e.g.*, "BAPCPA and the 'Plain Meaning' Paradox," *Norton Annual Survey of Bankruptcy Law*, Vol. 2009, Issue 2009.

9 11 U.S.C. § 1129(b)(2)(B)(ii) (italicized portion was added by BAPCPA).

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no need to for a court to inquire beyond the plain language of the statute."[10]

The BAP then considered the amended § 1129(b)(2)(B)(ii) provision and the changes in BAPCPA at issue, stating that "[s]imply put, a plan not paying an unsecured creditor in full is nevertheless "fair and equitable" (and can be crammed down over the unsecured creditor's objections), *so long as an individual debtor does not retain property except property included in the bankruptcy estate under § 1115*."[11] It then stated that § 1115 plainly identifies the property, included in an individual chapter 11 debtor's estate, citing the actual statutory language and noting:

> Section 1115's identification of estate property consists of the property contained in § 541 and the two post-petition acquired assets—newly acquired property and income. The so-called disputes over what "included" means in § 1129(b)(2)(B)(ii) and "in addition to" in § 1115 arise from misinterpretation of the words. "Included" is not a word of limitation. To limit the scope of estate property in §§ 1129 and 1115 would require the statute to read "included, except for the property set out in Section 541" (in the case of § 1129(b)(2)(B)(ii)), and "in addition to, but not inclusive of the property described in Section 541" (in the case of § 1115).[12]

Based on this statutory analysis, the BAP concluded that "[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."[13]

In support of its plain-meaning analysis, the BAP cited to five other individual chapter 11 provisions added in BAPCPA, in addition to the change in the absolute-priority rule that were borrowed from chapter 13 provisions.[14] The BAP also responded to certain arguments that abolishing the absolute-priority rule would render certain Code provisions superfluous or anomalous simply because they no longer apply to individual chapter 11 debtors, noting that the arguments were incongruent with the reality of the Code or speculative.[15]

The Dissent

The dissent in *Friedman* vigorously challenged the reasoning of the majority, arguing that (1) the plain-meaning analysis flies in the face of a wide split in many published cases, renders other parts of the Bankruptcy Code superfluous and fails to take a holistic approach; and (2) abolition of the absolute-priority rule would destroy the balance between the interests of individual chapter 11 debtors and their creditors, disenfranchise the vote of unsecured creditors and was contrary to the policy of BAPCPA to enhance creditor recoveries.[16] The dissent also contended that the majority incorrectly premised its ruling on a belief that Congress intended to align chapter 11 cases almost entirely with chapter 13 cases.

The Analysis in the Cases

A critical difference in the analysis of the *Friedman* majority and dissent is whether, as a matter of statutory

10 *Friedman*, 466 B.R. at 479 (citations omitted).
11 *Id.* at 480 (emphasis in original).
12 *Id.* at 482.
13 *Id.* The BAP also noted that its plain reading is mandated by the Rules of Construction in § 102(3), which state that "'includes' and 'including' are not limiting," as well as Supreme Court authority. *Id.* at 482, n. 20. While the BAP references to the word "included" in § 1129(b)(2)(B)(ii), it appears that the reference should be to the word "includes" in § 1115, which is the critical language and the term defined in the Code and the Supreme Court case cited.
14 *Id.* at 483. The BAP also commented that it is illogical to construe the exception added to § 1129(b)(2)(B)(ii) to deprive an individual chapter 11 debtor of the means of production to generate disposable income under the new § 1129(a)(15) provision added in BAPCPA. *Id.* at 481-82.
15 Certainly, Congress may provide different provisions for certain chapter 11 debtors and not others, which it plainly did in BAPCPA.
16 The *Friedman* dissent appears to be correct that the word "included' is not used in the context argued by the majority and the rule of construction for "includes" may also not be relevant to the interpretation of §1115, however, the dissent's reading that "included" means "added" and that §1115 does not incorporate §541 property is contrary to the plain statutory language.

Appendix B: Absolute-Priority Rule Cases for Individual Chapter 11 Cases after BAPCPA

Absolute-Priority Rule Abolished

1. *In re Tegeder*, 369 B.R. 477, 480 (Bankr. D. Neb. 2007);
2. *In re Roedemeier*, 374 B.R. 264, 274-76 (Bankr. D. Kan. 2007);
3. *In re Johnson*, 402 B.R. 851, 852-53 (Bankr. N.D. Ind. 2009);
4. *In re Shat*, 424 B.R. 854, 867-68 (Bankr. D. Nev. 2010);
5. *SPCP Group LLC v. Biggins*, 465 B.R. 316, 322-23 (M.D. Fla. 2011); and
6. *In re Friedman*, 466 B.R. 471 (9th Cir. B.A.P. 2012).

There is also a pending Tenth Circuit appeal in a case, In re Stephens, *No. 10-14028, Doc No. 97 (Bankr. W.D. Okla. May 20, 2011),* permission to appeal granted, *10th Cir. No. 11-703 (Nov. 21, 2011). Briefing was completed on April 23, 2012. No oral argument was requested.*

Also see *"The Absolute Abolition of the Absolute-Priority Rule in Individual Chapter 11 Cases," Hon. Alan M. Ahart, Vol. 31* Cal. Bank. J. *No. 3 (2011).*

Absolute-Priority Rule Not Abolished

1. *In re Gbadebo*, 431 B.R. 222 (Bankr. N.D. Cal. 2010);
2. *In re Mullins*, 435 B.R. 352 (Bankr. W.D. Va. 2010);
3. *In re Steedley*, 2010 WL 3528599 (Bankr. S.D. Ga. Aug. 27, 2010);
4. *In re Gelin*, 437 B.R. 435 (Bankr. M.D. Fla. 2010);
5. *In re Karlovich*, 456 B.R. 677 (Bankr. S.D. Cal. 2010);
6. *In re Stephens*, 445 B.R. 816 (Bankr. S.D. Tex. 2011);
7. *In re Walsh*, 447 B.R. 45 (Bankr. D. Mass. 2011);
8. *In re Draiman*, 450 B.R. 777, 820-22 (Bankr. N.D. Ill. 2011);
9. *In re Kamell*, 451 B.R. 505 (Bankr. C.D. Cal. 2011);
10. *In re Maharaj*, 449 B.R. 484 (Bankr. E.D. Va. 2011);
11. *In re Lindsey*, 453 B.R. 886 (Bankr. E.D. Tenn. 2011);
12. *In re Borton*, 2011 WL 5439285 (Bankr. D. Idaho Nov. 9, 2007);
13. *In re Tucker*, 2011 WL 5926757 (Bankr. D. Ore. Nov. 28, 2011); and
14. *In re Lively*, 2012 WL 959286 (Bankr. S.D. Tex. March 21, 2012).

Two of these rulings, Maharaj *and* Lively, *are currently on direct appeals to the Fourth and Fifth Circuit Courts of Appeal, respectively. The Fourth Circuit appeal was fully briefed as of Dec. 5, 2011, and an oral argument hearing was held on March 22, 2012.*

interpretation, §§ 1129 and 1115 are plain and unambiguous. If the meaning is plain, the court's inquiry should stop at the statutory language. In arguing that the words of the statutes are ambiguous, the dissent noted that the "issue has confronted and confounded innumerable bankruptcy courts around the country."[17] A close analysis of the published cases, however, indicates that determinations that the statutes are ambiguous and/or that § 1115 only includes post-petition property appear to be the product of an incorrect reading of the actual language of the statutes, speculation about congressional intent that is not in the legislative history and/or questionable arguments that abrogation of the absolute-priority rule would lead to absurd results or render other Code sections superfluous.

The interpretation of §§ 1129(b)(2)(B)(ii) and 1115 has been a roller coaster ride. The first four published cases found that the absolute-priority rule had been abolished for individual chapter 11 debtors, albeit with divergent reasoning and one in *dicta*.[18] These cases espouse what has been referred to as the "broad view."

Following *Shat*, the statutory interpretation rollercoaster veered sharply in a different direction steered by Judge Leslie Tchaikovsky in *In re Gbadebo*,[19] who ruled (in *dicta*) that the absolute-priority rule for individual debtors was not abolished by BAPCPA. After determining that the debtor's plan was unconfirmable because it was filed in bad faith and did not satisfy § 1129(a)(15), the court nevertheless then also considered the applicability of the absolute-priority rule. After acknowledging the three prior opinions to the contrary, the court stated that "[s]ection 1115 provides that, in an individual Chapter 11 case, *in addition to the property specified in § 541*, **the estate includes the debtor's post-petition property**."[20] This misstates the actual language of § 1115 by inverting the order of the clauses and placing the italicized phrase before the bolded phrase with the word "includes." If written this way, it may be correct that "includes" only refers to the two categories of "post-petition" property and the question would be whether § 541 property is included "under § 1115" by the words "in addition." However, the word "includes" precedes "in addition to the property specified in section 541."

Gbadebo's ruling propelled the jurisprudence in the opposite direction for more than 17 months in 10 consecutive published cases holding that BAPCPA did not abolish the absolute-priority rule for individual chapter 11 debtors. (These cases espouse what is called the "narrow view.") Several concluded that §§ 1129(b)(2)(B) and 1115 were not ambiguous based on the inverted language of § 1115 in the *Gbadebo* opinion. Some also altered "includes" in § 1115 to "include[d]," and others found ambiguity based on the split in the courts and made determinations based on speculation regarding legislative intent and policy arguments rather than the actual statutory language. The most comprehensive opinions, based on a determination that the statutory language was ambiguous, were *Kamell* and *Lindsey* listed on Appendix B.

The first published pre-*Friedman* case to break from the narrow view was *SPCP Group LLC v. Biggins*.[21] The district court rejected arguments that §§ 1129(b)(2)(B)(ii) and 1115 were ambiguous, stating that "[t]he meaning of the statutes is clear, and therefore, the Court's inquiry stops here."[22] Citing to the plain-meaning rule for statutory interpretation, the district court returned to where *Tegeder* began. The next three published opinions, however, again followed the narrow view. The first, *In re Borton*, cited the inverted language of *Gbadebo*. The second, *In re Tucker*, joined the "narrow view" reasoning in *In re Karlovich*, which stated, "The property *included* under § 1115 is property 'the debtor acquires after the commencement of the case."[23] The last, *In re Lively*, cited the split in the authority and adopted the "narrow view" reading "included in the estate under § 1115" to mean "*added* to the estate by § 1115."[24]

Conclusion

The BAP determined that § 1115 *plainly* "includes" pre-petition property specified in § 541 as well as post-petition property and earnings; therefore, the exception added in § 1129(b)(2)(B)(ii) *plainly* abolished the absolute-priority rule in individual chapter 11 cases and appears to be correct. Essentially, the "narrow view" reads the words "in addition to the property specified in section 541" out of § 1115. The fact that § 1115 mirrors § 1306 evidences that the drafting of § 1115 was not inadvertent or "peculiar wording," as characterized by some of the "narrow view" cases.[25]

Courts and commentators will likely continue to disagree about whether Congress intended to eliminate the absolute-priority rule for individual chapter 11 debtors to harmonize the treatment of individual chapter 11 and 13 debtors and whether its elimination furthers the Bankruptcy Code's rehabilitative purposes or is contrary to a policy of BAPCPA to enhance creditor recoveries and "tighten, not loosen, the ability of debtors to avoid paying what can reasonably be paid on account of debt."[26] However, it is not the role of the court to act as a legislature, and if the meaning of a statute is plain, the sole function of the court is to enforce it according to its terms. abi

17 *Id.* at 484.

18 *See, e.g., In In re Tegeder*, 369 B.R. 477, 480 (Bankr. D. Neb. 2007) (holding that § 1115 clearly and unambiguously includes § 541 property, post-petition property and post-petition earnings; therefore, absolute-priority rule no longer applies to individual chapter 11 cases); *In re Roedemeir*, 374 B.R. 264, 274-76 (Bankr. D. Kan. 2007) (finding some statutory ambiguity but concluding that numerous changes to chapter 11 that were drawn from chapter 13 model indicate congressional intent to read exception to the absolute-priority rule broadly); *In re Shat*, 424 B.R. 854, 867-68 (Bankr. D. Nev. 2010) (finding that despite being relatively straightforward, broad reading is not without problems, but concluding that "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, and the relatively simple wording used in both Section 1129(b)(2)(B)(ii) and Section 1115," broad interpretation that absolute-property rule was abolished was proper one).

19 431 B.R. 222 (Bankr. N.D. Cal. 2010).

20 *Id.* at 229 (emphasis in italics and bold added).

21 465 B.R. 316 (M.D. Fla. 2011).

22 *Id.* at 322-23.

23 *Karlovich*, 456 B.R. at 681. As pointed out in Judge Alan Ahart's incisive 2011 article, § 541 includes certain post-petition property and earnings. Thus, if § 1115 was read (or misread) to exclude § 541 property, this post-petition property would also presumably be excluded under the "narrow" interpretation since it was not "added" by § 1115.

24 2012 WL 959286 at *6.

25 *See, e.g., Kamell*, 451 B.R. at 512 ("Th[e] 'narrow view' better explains the peculiar wording of § 1115 and the reference of 'included in' found at § 1129(b)(2)(B)(ii)).

26 *See Friedman* dissent, 466 B.R. at 490-91(quoting *Kamell*, 451 B.R. at 508).