Disclosure Statement

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The Chair's Comments

Musings from the Chair ...

About 18 years ago, knowing that I was a Louisiana native, a very kind and now deceased North Carolina bankruptcy lawyer gave me a framed poster from the 1989 Cajun Music Festival in Lafayette, Louisiana. The slogan on the poster reads: "A culture is passed on one generation at a time." That poster hangs in my office.

I was fortunate to be taught by some very fine bankruptcy lawyers. They taught me how to fill out schedules, how to bring and defend preference actions, how to avoid liens, the meaning of cash collateral, and even the theory behind the 1111b election (which I have tried to forget). They also taught me a few unwritten rules – rules which I think reflect the culture of our bankruptcy bar.

I confess that I have forgotten or broken most of these rules at one time or another – but in general I try to follow them. I'm sure that my unwritten (until now) rules differ from the unwritten rules of other bankruptcy practitioners – but I doubt they differ greatly. Here they are:

1. Help other lawyers anytime you can.

Give continuances freely. Always give a continuance if the other lawyer has a personal conflict.

2. Opposing counsel is your colleague, not your enemy.

Over time, many of your colleagues will become your friends. And remember that today's adversary is tomorrow's co-counsel.

3. If an attorney misses an answer deadline, call them and give them a chance to file an answer before seeking a default.

4. Fight the fights that need fighting.

Settle what should be settled.

The New Value Exception after *In re Maharaj*

By George F. Sanderson III & Lauren Miller

Congress amended the United States Bankruptcy Code significantly when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in 2005. One of the biggest BAPCPA-induced quandaries with which courts have grappled since is whether BAPCPA abrogated the absolute priority rule for individual debtors proceeding under chapter 11.

This summer, the Fourth Circuit weighed in on the debate. In **In re Maharaj**, the court held that the absolute priority rule applies to individual debtor chapter 11 cases.[1] While succinctly resolving that the absolute priority rule does apply, the Fourth Circuit's opinion leaves open important questions about how

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5. Don't seek sanctions against lawyers.
(I have violated this rule twice. I wish I had not.)

6. Help other lawyers to get paid.
Objections to attorney's fees should be very rare.

7. Trust other lawyers until they give you reason to do otherwise.
Make sure others can trust you.

8. **When angry with another attorney, write them a letter.**
Then put it on your credenza for 24 hours. Then decide if you really want to send it. (I have violated this rule more than most.)

9. Always conduct yourself during the day so that you can sleep in peace at night.
I believe that the culture of the bankruptcy bar is similar in the east, middle, and west.

I also think our culture is envied by other practice areas. It is our responsibility to pass this culture on to the next generation. •

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bankruptcy courts should apply the rule. Perhaps most significantly, the opinion did not address how, if at all, the new value exception to the absolute priority rule applies to individual chapter 11 debtors.

This article summarizes the Fourth Circuit's decision in **In re Maharaj**, discusses the history and application of the new value exception to the absolute priority rule, and, in light of the Fourth Circuit's decision, addresses the difficulty in applying the new value exception in individual chapter 11 cases.

The Facts | The debtors in **Maharaj** owned and operated an auto body repair shop in Virginia. After falling victim to an apparent fraud that left them in significant debt, the debtors filed for relief, as individuals, under chapter 11 of the Bankruptcy Code.[2] The debtors' proposed chapter 11 plan segregated their creditors into four separate classes. One class consisted of most of the debtors' general unsecured claims. The Plan also provided that the debtors would continue to own and operate their auto body business. In fact, the debtors planned to use the income generated from the business to pay their unsecured creditors.

Discover Bank, the holder of an unsecured claim, voted to reject the plan. The debtors sought to "cram down" plan confirmation over Discover Bank's dissent. The bankruptcy court denied confirmation, finding that the plan violated the absolute priority rule.

The debtors appealed the bankruptcy court's confirmation denial. The bankruptcy court, *sua sponte*, certified its order for direct appeal to the Fourth Circuit, and the Fourth Circuit authorized the debtors' direct appeal. Attorneys from Stubbs & Perdue, P.A., filed an amicus brief supporting the debtors' position, along with attorneys from the National Association of Consumer Bankruptcy Attorneys and law students under the supervision of an attorney from the Georgetown University Law Center, Appellate Litigation Program.

The Fourth Circuit's Decision | The Fourth Circuit began its opinion by tracing the origin and history of the absolute priority rule. The court noted that the earliest version of the rule was articulated by the United States Supreme Court "in response to widespread collusion in the context of railroad organizations, just after the Civil War."[3] Specifically, the Supreme Court stated that "stockholders are not entitled to any share of the capital stock nor to any dividend of the profits until all the debtors of the corporation are paid." The Supreme Court first coined the phrase "absolute priority rule" in **Case v. Los Angeles Lumber Products Co.**, 308 U.S. 106, 117, 60 S.Ct. 1, 84 L.Ed. 110 (1939) to describe the rule. The rule was never codified under the former Bankruptcy Act. In fact, Congress expressly prohibited further application of this rule by passing the 1952 Amendments to the Act.[4] It was not until the Bankruptcy Reform Act of 1978 that Congress specifically incorporated the absolute priority rule into § 1129(b)(2)(B)(ii). This version remained unchanged until BAPCPA's enactment in 2005.

The Fourth Circuit went on to discuss the statutory provisions relevant to determining whether BAPCPA abrogated the absolute priority rule in individual chapter 11 cases. The court noted that the commencement of a bankruptcy case creates a "bankruptcy estate" as defined by 11 USC § 541(a)(1). As a precondition to confirmation of a chapter 11 plan, the debtor must meet the requirements set forth in 11 U.S.C. § 1129(b)(1). One requirement is that each impaired class of creditors accepts the plan. However, the court may still confirm the plan over the dissent of an impaired class by using a procedure commonly known as "cram down." This procedure has its own requirements under the Code. Specifically, the plan must not discriminate unfairly and must be "fair and equitable" to the dissenting creditors.

The Code also provides specific requirements that the plan must meet in order to be "fair and equitable." Among those requirements is the absolute priority rule. Essentially, the absolute priority rule governs the order of payment among creditors. The United States Supreme Court has explained the rule as follows: "a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property under a reorganization plan."[5]

When Congress enacted BAPCPA, it included additional language to the absolute priority rule requirement.[6] It is the inclusion of this additional language that has caused courts confusion.

Broad View vs. Narrow View | In reaching its decision, the Fourth Circuit considered the national split among courts regarding the absolute priority rule's application to individual chapter 11 debtors, post-BAPCPA. First, it considered courts that have taken the "broad view" by ruling that BAPCPA abrogated the absolute priority rule in the case of an individual Chapter 11. Courts that have adopted the "broad view" find "that, by including in § 1129(b)(2)(B)(ii) a cross-reference to § 1115 (which in turn references § 541, the provision that defines the property of a bankruptcy estate), Congress intended to include the entirety of the bankruptcy estate as property that the individual debtor may retain, thus effectively abrogating the absolute priority rule in Chapter 11 for individual debtors."[7]

Some of the broad view courts reached this conclusion based on the plain language of § 1129(b)(2)(B)(ii). They find that by reading § 1115 and § 541 together, "property of the estate" includes property and earnings acquired both before and after the filing of a bankruptcy petition. Thus, reading § 1129(b)(2)(B)(ii) and § 1115 together, the individual chapter 11 debtor may retain pre- and post- petition property without violating the absolute priority rule.

The broad view courts also argue that abrogating the absolute priority rule would be consistent with Congress' intent to "harmonize the treatment of the individual debtor under Chapter 11 with those under Chapter 13, which has no absolute priority rule."[8] Those courts noted "that Congress drafted the new § 1115 to mirror § 1306(a) of the Code, which adds certain property to a § 541 bankruptcy estate in the Chapter 13 context."[9]

Finally, in **Shat**, the court found that a broader view "saves Section 1129(b)(2)(B)(ii) from an almost trivial reading."[10]

In contrast, courts, including the Fourth Circuit, "adopting the 'narrow view,' have held that Congress did not intend such a sweeping change to Chapter 11, and that the BAPCPA amendments merely

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have the effect of allowing individual Chapter 11 debtors to retain property and earnings acquired after the commencement of the case that would otherwise be excluded under § 541(a)(6) & (7)."[11] Also, some of the courts adopting the narrow view found that if Congress's intent was to abrogate the rule in the case of an individual chapter 11 debtor, "it would have done so in a far less convoluted way, particularly in light of the well established place of the absolute priority rule in bankruptcy jurisprudence."[12] In response to courts finding that Congress intended to harmonize Chapter 11 with Chapter 13, some narrow view courts have held "if that were Congress' intent, Congress would simply have amended the statutory debt ceilings for Chapter 13 cases[.]"[13]

Another common theme among the narrow view courts is in their finding that the primary purpose of BAPCPA is to improve bankruptcy law "by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors."[14] They find that applying the absolute priority rule to individual chapter 11 cases effectuates that purpose.

The Fourth Circuit's Analysis | The Fourth Circuit began its own analysis by interpreting the plain language of BAPCPA. The court held that the relevant language is ambiguous. Specifically, the "included in the estate" language under § 1129(b)(2)(B)(ii) is susceptible to more than one reasonable interpretation. The court stated that the language could mean § 1115 merely adds to the property of the estate as defined in § 541. On the other hand, it could also mean that § 541 was absorbed into and superseded by § 1115 for individual chapter 11 debtors.

The court also stated that the language "in addition to the property specified in section 541" found in § 1115 was ambiguous.[15] The debtors asked the court to treat the language as a "signpost, used only to note that § 541 property is already included in the bankruptcy estate" and therefore it would be redundant to include that property again through the § 1115 language.[16] However, other bankruptcy courts have found that § 541 operates as a subset of § 1115 and "[b]y that construction, § 541 property, which is referred to by § 1115, is literally 'property included in the estate under § 1115.'"[17]

Concluding that the relevant statutory language was ambiguous, the court then considered "the specific and broader context within which Congress enacted the BAPCPA."[18] The court dismissed the broad view courts' reasoning that a narrow reading of the amendments renders § 1115 trivial. The court explained that prior to the BAPCPA, property and earnings acquired post-petition were not considered property of the estate. Thus, chapter 11 debtors were permitted to retain property and earnings acquired post-petition without violating the absolute priority rule. Section 1115 potentially changed that for individuals by adding post-petition acquired property and earnings to property of the estate. By creating an exception to § 1129(b)(2)(B)(ii), Congress ensured that an individual's property and earnings acquired post-petition would not be subject to the absolute priority rule. "In other words, what Congress took from the individual debtor with its § 1115-hand, it returned for application of the [absolute priority rule] within its § 1129(b)(2)(B)(ii)-hand."[19] Ultimately, the court was persuaded that the context demonstrated "that Congress intended § 1115 to add property to the estate already established § 541."[20]

In reaching its conclusion, the court also relied on the cannon of statutory construction of the presumption against implied repeal. The court noted, as a general matter, "repeals by implication are not favored and therefore, the intention of the legislature to repeal must be clear and manifest."[21] In the field of bankruptcy law, the court stated that the canon against implied repeal is particularly strong. Quoting **Hamilton v. Lanning**, the court explained that courts should be mindful not to read the bankruptcy code as an erosion of "past bankruptcy practice absent a clear indication that Congress intended such a departure."[22]

Based on the language of the relevant statutes and legislative history, the Fourth Circuit was unable to conclude that Congress intended to abrogate the absolute priority rule in the case of an individual chapter 11 debtor. Importantly, the Fourth Circuit noted "that, if Congress intended to abrogate such a well-established rule of bankruptcy jurisprudence, it could have done so in a far less convoluted manner."[23] The court pointed out that, in the past, when Congress wanted to eliminate a well-established requirement under the bankruptcy code, it did so expressly. As an example, the court referred to Congress' abrogation of the absolute priority rule when it amended the Bankruptcy Act in 1952. Here the court noted that the language of § 1129(b)(2)(B)(ii) and § 1115 simply do not provide a clear intention of Congress to abrogate the rule for individual chapter 11 debtors. In addition, the legislative history is completely devoid of congressional intent to abrogate the rule.

The court was also not persuaded by the position advanced by the debtors that Congress intended to abrogate the rule to harmonize chapter 11 and chapter 13 proceedings. The debtors argued that the additional requirements imposed by the BAPCPA to a case under chapter 7 forces many individuals to proceed under chapter 13 or chapter 11. And the debt limits under chapter 13 in turn force many of those same individuals to proceed under chapter 11. The debtors argued that because many individuals' only option is to proceed under chapter 11 when filing for bankruptcy, Congress must have intended to make chapter 11 a viable alternative.

Again, the court concluded that if that was Congress's intent it could have been effectuated in a much simpler manner by, i.e., raising the debt limits under chapter 13. The court reemphasized that the purpose of BAPCPA was to ensure debtors who can pay their debts will do so. The Court agreed with **In re Gbadebo** that, "[n]o one who reads BAPCPA as a whole can reasonably conclude that it was designed to enhance the individual debtor's 'fresh start.'"[24]

In sum, the court held that neither the language nor legislative history compelled a conclusion that Congress intended to repeal the absolute priority rule for individual chapter 11 debtors. Because the court concluded that Congress did not intend such a repeal based on the specific and broader context of the BAPCPA, the court stated it was not obligated to consider the debtors' public policy arguments.

The court considered those arguments to be "the weakest of reeds upon which to reach a contrary conclusion."[25]

The court nevertheless addressed some of the debtors' public policy concerns. The debtors' principal concern was that applying this rule to individual chapter 11 debtors makes it more difficult to confirm a plan. In dismissing this point, the court first stated that in enacting BAPCPA, Congress did not necessarily intend to provide greater benefits to debtors as compared to creditors—essentially Congress did not necessarily intend to make it "easier" for debtors to be successful in bankruptcy. The court also noted that Congress was aware that from 1978-2005 the absolute priority rule unquestionably applied to individuals. If Congress thought it necessary to repeal this law it would have clearly done so or at a minimum expressed its intent through its legislative history.

The debtors argued that consensual plan confirmation for an individual chapter 11 debtor is virtually impossible in light of the absolute priority rule. The court stated, "[t]o the contrary, plan acceptance is still very much a possibility, even within the confines of the absolute priority rule. Debtors "may negotiate a consensual plan, by higher dividends, pay dissenting classes in full, or comply with the [absolute priority rule] by contributing pre-petition property."'[26] Notably, the court makes no mention of the new value exception as a way for individuals to retain pre-petition property without violating the absolute priority rule.

The History of the New Value Exception | Prior to the codification of the absolute priority rule, the United States Supreme Court recognized a corollary to the rule, known as the "new value exception."[27] This exception allows a debtor's former equity owners (when the debtor is a business) to retain their interest in the new reorganized debtor, even if senior creditors are impaired and vote to reject the plan. In order to take advantage of this exception, the old equity owners must provide some contribution of new value. The Supreme Court in **Case v. Los Angeles Lumber** found:

> It is, of course, clear that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor.... Where th[e] necessity [for new money] exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made.[28]

The essential elements adopted by the Supreme Court were that "the stockholder's participation must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder."[29]

In **Northwest Bank Worthington v. Alhers**, 485 U.S. 197, 204 (1988), the Supreme Court ruled that an unsecured promise of payments out of anticipated *future* income, also known as "sweat equity," did not constitute new value. Specifically, this payment does not meet the requirement that the value given be in "money or money's worth," because it cannot be exchanged in the market for something of value on the effective date of the plan. This was precisely what the debtors in **Maharaj** had proposed and the Fourth Circuit rejected.

Prior to BAPCPA, the Fourth Circuit addressed the question of whether equity owners of a chapter 11 business debtor could retain their prior interests by contributing new value.[30] The court recognized that the Supreme Court had found a new value exception to the absolute priority rule prior to the enactment of the 1978 Bankruptcy Act. However, when the Bankruptcy Act of 1978 codified the absolute priority rule and was silent on the new value exception, the Fourth Court questioned whether the new value exception was still viable absent an express mandate by Congress. Without directly answering the question, the court held "even if some limited new capital exception were viable under the Bankruptcy Code, it would not be so expansive as to apply under the facts of this case."[31]

In **Travelers**, the equity owners were the only parties afforded a right to contribute new capital in exchange for an equity interest in the debtor. Essentially under the plan, the old equity owners would be able to buy back their equity interests without exposing that interest to the market. The court noted, "[t]his exclusive right to contribute constitutes 'property' under § 1129(b)(2)(B)(ii), which was received or retained on account of a prior interest." The court held that this provision in the plan amounted to self-dealing and was not "fair and equitable" to the unsecured creditor.

Unlike the absolute priority rule, the new value exception has never been codified. In 1999, the Supreme Court considered whether the new value exception was still viable under the 1978 Bankruptcy Act.[33] The decision arose in the context of a business's reorganization. The court assumed, for purposes of the decision, that the exception did exist but found that, under the plan, the former equity holders had the exclusive right to contribute new value. The court focused on the statutory language that precludes any party from receiving or retaining property "on account of their claim or interest."[32] Because no other parties had the opportunity to contribute new value, the court found that the debtor's plan allowed the former equity owners the exclusive right to obtain a new equity interest in the debtor "on account of" their former equity interest. The court held that the debtor's plan violated the statutory prohibition and therefore could not be confirmed.

The court declined to specifically take a position on the existence of a new value exception, but it did hold that, if the exception survived, the valuation of this contribution must be subject to a market test.[34] By way of example, the court stated that the market test may require competing bids or filing competing plans.[35] In addition, the new value must be (1) equal to new capital or money's worth, (2) reasonably equivalent to the property's value and (3) necessary for a successful reorganization.[36]

New Value Exception in the Case of an Individual Chapter 11 Debtor | It is generally accepted that an infusion of new capital is essential to a business's ability to successfully reorganize. Former stockholders of the debtor-business are the most likely parties ready, willing, and able to invest in the future success of the reorganized debtor. Since this infusion comes from an outside source, the capital contribution does not add to the debtor's financial burden.

In the Eastern District of North Carolina, bankruptcy courts have been known to hold an equity auction post-confirmation.[37] Under

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this scenario, the old equity owners are permitted to place competing bids for a stake in the new reorganized debtor. In **In re Smithville**, the old equity owners engaged in a bidding war with a subsidiary entity of the largest secured creditor.[38] In that case, the subsidiary outbid the old equity owners and thus became the new owner of the reorganized debtor. The court held that the "[t]he debtor will be required to consummate the confirmed plan including the payment of attorney fees under the priority claims."[39] This case illustrates that even if a new value exception is viable, it does not always guarantee that the old equity owners will have a stake in the new reorganized debtor.

In several instances, courts, without deciding the issue of whether the new value exception applies to individual chapter 11 cases at all, have rejected individual debtors' specific new value proposals.[40] These cases reflect the inherent difficulties in applying the new value exception in an individual chapter 11 case. For example, an equity auction works best in cases, like **Smithville**, that involve single asset real estate or in closely held businesses where management is not distinct from ownership.[41] In the case of an individual debtor, it would obviously be against public policy for the court to auction off ownership interests in people. If the court engaged in an auction, it would be limited to the individual's property interests. This is no different from a case were the debtor proposes an orderly liquidation. Under this scenario, the court typically does not act as auctioneer. Instead the property is sold through a legitimate uninterested channel at market value prior to confirmation. This practice potentially raises issues concerning feasibility, e.g., post-petition financing may be dependent on the debtor's stream of income from his non-bankrupt business that is now being auctioned off post-confirmation.

If the debtor is permitted to borrow funds to buy back the property, the debtor is only further increasing his or her financial burden. This is counterintuitive to the reason why any debtor would file for bankruptcy in the first place—to obtain a fresh start. Assuming an individual chapter 11 debtor can take personal exemptions offered under the Code and state law, permitting the debtor to exchange exempt property for non-exempt property would also run counter to the fundamental purpose of the exemption statutes. The purpose of exemptions is to allow the debtor to emerge from bankruptcy not completely destitute. In addition, the amount of the exemptions that the debtor may claim is limited. In some cases the non-exempt property may be worth substantially more than the exempt property. The court in **In re Harman**, 141 B.R. 878, 888 (Bankr.E.D.Pa.1992), expressed considerable doubt "as to whether a consumer debtor can ever use the new value exception" The court distinguished between business and consumer debtors utilizing chapter 11 and the new value exception by stating

> A final distinction between business and consumer debtors arises from the concept of a 'going concern.' It is often important to keep a business operating, at least until it can be sold, to preserve its 'going-concern' value.... On the other hand, there are no comparable considerations which justify keeping the instant Debtors in Chapter 11. The property owned by the Debtors consists of liquid assets and consumer goods, such as their residences, for which there is an available market. The value of such property is unlikely to be greatly enhanced or deflated whether it is sold as a unit or in individual parcels.[42]

The **Harman** court also stated that "the purpose of the new value exception is to encourage equity holders of businesses, who wish to retain their interests in a debtor who plans to retain an ongoing business, to make capital contributions necessary to allow the debtor-business to survive."[43] The court noted this reasoning was inapplicable to individuals because individuals "unlike a business, will probably survive the instant bankruptcy case physically, whether it remains in Chapter 7 or Chapter 11."[44]

At least one court has held that post-BAPCPA, the new value exception does apply to individual chapter 11 debtors. In **In re Draiman**, the debtor attempted to retain the pre-petition assets of his business.[45] His plan proposed a capital contribution from a non-filing business associate in exchange for the non-exempt assets. The court stated that the Seventh Circuit, the controlling circuit in that case, had already found a new value exception to the absolute priority rule.[46] The court went on to make three specific findings.

First the court found that because the funding was coming from an outside source, and not the debtor, the contribution was "new." Second, the court found that the value of the contribution was the substantial and reasonable equivalent of the non-exempt property based on the estimated value of the non-exempt property. Of particular importance, the court found the assets the debtor was proposing to retain were worth $30,350. The capital contribution was for $100,000. Finally, the court found the contribution would be made in cash and thus was money's worth. The court also found the new value contribution necessary to an effective reorganization of the debtor.

It does not appear that the court engaged in any kind of auction nor does the opinion state whether other parties had the ability to purchase the assets at a higher price. In other words, it does not appear that the court engaged in any type of "market test" as required by the Supreme Court. Instead, the court relied on the debtor's valuation of the property to conclude the value given was new and substantially equivalent to the property to be retained. The court did note the difficulty of applying this rule to individuals because the value has to come from a new source.

Conclusion | **Maharaj** conclusively announced the Fourth Circuit's position on the absolute priority rule's application to individual debtors in chapter 11; however, the opinion also left additional questions unanswered. The **Maharaj** court was silent as to the existence of a new value exception for individual chapter 11 debtors. Whether its omission was intentional is debatable. Even if a new value exception applies, there is no guarantee the debtor will be able to retain pre-petition property. Unlike business reorganizations, individual debtors cannot be subject to an equity auction. In the case of an orderly liquidation auction, there is no guarantee that the debtor will be the high bidder.[47] It will also undoubtedly be difficult for an individual to provide new value that is substantially equivalent to the pre-petition property interest it seeks to retain. And even if he or she is able to do so, using outside funding or exempt property to obtain non-exempt property may not be in the individual debtor's long-term best interests. These uncertainties are likely to make individuals more wary of proceeding under Chapter 11. One solution is for debtors to work closely with unsecured creditors to propose a plan that the unsecured creditors are likely to accept. This may be the debtor's best chance of crafting a successful reorganization.

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End Notes

1. **In re Maharaj**, 681 F.3d 558 (4th Cir. 2012).
2. The court noted that their debts exceeded the limits for filing under Chapter 13 of the Bankruptcy Code. Therefore, they had to proceed under Chapter 11 of the Code.
3. Chi., **Rock Island & Pac. R.R. v. Howard**, 74 U.S. 392, 409–10 (Wall 1868).
4. *See* Pub.L. 456, 66 Stat. 420, 433 (1952). ("Confirmation of an arrangement shall not be refused solely because the interests of a debtor, or if the debtor is a corporation, the interest of its stockholders or members will be preserved under the arrangement.").
5. **Norwest Bank Worthington v. Ahlers**, 485 U.S. 197, 202 (1988).
6. The additional language states, "except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section." 11 U.S.C. § 1129(b)(2)(B)(ii).
7. **In re Maharaj**, 681 F.3d 558, 563 (4th Cir. 2012).
8. *Id.* at 564.
9. *Id.*
10. **In re Shat**, 424 B.R. 854, 868 (Bankr.D.Nev.2010).
11. **Maharaj**, 681 F.3d at 563.
12. *Id.* at 566.
13. *Id.* at 566.
14. *Id.* at 566.
15. *Id.* at 569.
16. *Id.*
17. *Id.*
18. *Id.* at 574.
19. *Id.* at 570 (internal quotations omitted).
20. *Id.*
21. *Id.* (internal quotations omitted).
22. *Id.* at 571 (quoting **Hamilton v. Lanning**, 560 U.S. ___, 130 S. Ct. 2464, 2467 (2010)).
23. *Id.* at 571.
24. *Id.* at 573 (quoting **In re Gbadebo**, 431 B.R. 222, 229–30 (Bankr.N.D.Cal.2010)).
25. *Id.* at 574.
26. **Maharaj**, at 575 (internal quotations omitted).
27. **Case v. Los Angeles Lumber Products Co.**, 308 U.S. 106 (1939).
28. *Id.* at 121.
29. *Id.* at 122.
30. **Travelers Ins. Co. v. Bryson Properties, XVIII** (**In re Bryson Properties, XVII**), 961 F.2d 496 (4th Cir.1992).
31. *Id.* at 505.
32. *Id.* at 504.
33. **Bank of America Nat'l Trust and Savings Assoc. v. 203 North LaSalle Street P'ship**, 526 U.S. 434 (7th Cir. 1999).
34. Although the Supreme Court did not specifically decide whether the exception was still viable, the court did conclude: "assuming a new value corollary, that plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of § 1129(b)(2)(B)(ii)." *Id*. at 458.
35. *Id.* ("a market test would require an opportunity to offer competing plans or would be satisfied by a right to bid for the same interest sought by old equity[.]").
36. *Id.* at 442 (quoting the court below).
37. **In re Smithville Crossing Development, LLC**, Case No. 11-02573-8-JRL at *3 (Bankr. E.D.N.C. Jan. 27, 2012) ("While the Supreme Court did not rule on which method was preferred, this jurisdiction permits interested parties to hold an equity auction after confirmation of the plan." citing **In re Graham & Currie Well Drilling Co., Inc.**, 2011 WL 5909632 (Bankr. E.D.N.C. 2011)).
38. *Id.* Slip Op. at *2.
39. *Id.* Slip Op. at *3.
40. **In re Rocha**, 179 B.R. 305, 307 (Bankr.M.D.Fla.1995) ("The difficulty with extending the new value exception to an individual is that the new value must come from an 'outside' source, meaning it cannot come from the [d] ebtor himself."); **In re Cipparone**, 175 B.R. 643, 643 (Bankr. E.D.Mich. 1994) ("The Court holds that the 'new value' exception to the absolute priority rule is inapplicable because the proposed contribution comes from the debtors themselves rather than from an outside source."); **In re Harman**, 141 B.R. 878, 888 (Bankr.E.D.Pa.1992) ("We also question whether the particular property contributed by the [d]ebtors, particularly the Husband's future wages, are sufficiently 'outside' of the [d]ebtors' normal 'operations' as to constitute new value."); In re East, 57 B.R. 14 (Bankr.M.D.La. 1985), ("[I]t might be that the injection of 'outside capital' would allow cram down in an individual case. It is easier in a corporate context to consider the concept of the injection of outside capital; when an individual is involved, it is difficult to imagine the source of such funds: perhaps a relative or friend might make a gift; perhaps there are other sources.").
41. ____________________
42. **In re Harman**, 141 B.R. 878, 886–87 (Bankr.E.D.Pa.1992).
43. *Id.* at 886.
44. *Id.*
45. **In re Draiman**, 450 B.R. 777, 821 (Bankr. N.D. Ill. 2011) (These assets included office equipment, furnishings, supplies and certain management agreements.).
46. **In re 203 N. LaSalle St. P'ship**, 126 F.3d 955, 963 (7th Cir. 1997) ("The Seventh Circuit has recognized an exception to the absolute priority rule called the 'new value exception.' In order to qualify for the exception, one must contribute capital which is new, substantial, necessary for success of the plan, reasonably equivalent to the value retained, and in the form of money or money's worth.") (internal quotations omitted).
47. **Smithville** at *2.

How to Conduct an Initial Client Consultation
(Consumer Bankruptcy – Chapters 7 and 13)

By Bob Anderson, Gillespie & Murphy, P.A.

The initial client consultation ("Consult") is a vital step at the inception of an attorney's professional relationship with a client. The Consult allows the prospective client ("PC") to gauge you as an attorney and allows you to gauge whether or not you can (or want to) represent the PC. Every attorney has his or her own style when interacting for the first time with a PC. What works for me may not work for you, but here are my thoughts on the subject, based on nearly 27 years of being a consumer bankruptcy practitioner:

Preliminary Considerations

Free vs. paid interview: I provide a free initial consultation. I know some charge for this, but I feel that is an immediate impediment to folks who are having this conversation with me because they are in financial dire straits to begin with. (I DO charge if the PC wants a follow up consult, however.)

Pre-screening via telephone: When time permits, I will often call the PC in advance of the Consult to address any immediate concerns/questions the PC may have. I also try to determine if the Consult is warranted. For example, if it appears that a Chapter 7 would be too risky for the PC because of equity or high income, or if a Chapter 13 is impossible because of debt limit issues, I will suggest that the PC instead consult Chapter 11 counsel and not proceed with the Consult. This saves time for both me and the PC.

The Consult Itself

This is the rough sequence of events in my typical consult:

1. Establish Rapport: Like most lawyers, I have an initial information sheet that the PC fills out in the lobby with basic information relating to employment, household members, etc. I personally go down to the lobby to greet the client. While walking up the stairs with the PC, I am "mining" that information sheet with an eye to conversation starters. If the PC has kids, I mention mine; if I have ever done work similar to the PC's, we will start with that.

Years ago, I worked as a firefighter on a U.S. Forest Service "Hot Shot" fire crew in Southern California. In our initial training we were told "no two fires are ever alike". Over the six long summers I did this, I can state for a fact that this is absolutely true.

Same goes for PC's. The people we meet are incredibly varied in background, educational level, and financial sophistication. I have represented doctors, lawyers, pastors, law enforcement personnel, peanut farmers, exotic dancers, folks in their 20s, folks in their 90s, and everyone in between. Each person has his or her own individual needs, hopes, fears and expectations.

Developing a rapport with the PC helps me develop an idea of who is sitting in front of me and how to approach the dialogue we are about to have. (Constraints of brevity prevent telling of the Consult at which drug paraphernalia fell out of an envelope a PC handed me). For some people, I am the first lawyer they have ever met, and they feel intimidated and apprehensive. I find that humor is a good way to break through this barrier.

I have some PCs who are so overwhelmed with the fear that they will lose their home, that I can see they are not going to hear a word I say until I address that and assure them there may be a way we can help them, once I have all the facts out. Which leads me to my next step:

2. Identify Burning Fuses: I address this question as early as possible: is whether or not there is either a pending foreclosure, tax garnishment, car repossession, or some other imminent financial calamity. I have the staff calendar the dates for follow up to make sure the PC knows he or she must keep us apprised of any process served upon them and that they must first retain us before we can help them. In some cases, I will send a "non-retention" letter or email so they are clear we are not their counsel.

3. Set the Table: Once the preliminaries are out of the way, I explain to the PC my objectives for the Consult: In a nutshell I explain that I will:

a. Determine where their financial pressure points are;
b. Determine if bankruptcy can bring relief to those pressure points; and if so,
c. Determine what form of bankruptcy gives the PC the maximum amount of benefit with the least amount of risk.

I don't sell bankruptcy. I want the PC to become an educated consumer. Bankruptcy is financial surgery – it is a significant decision. The PC needs to have the information to intelligently weigh the bankruptcy option. When the PC realizes I am not trying to sell a product, he or she can relax and lower their guard a bit more. I make it clear that our consult is meant to be a dialog, not a monologue, and I invite them to "interrupt" me if they have questions or need clarification.

I also strive to completely understand the PC's objectives. Years back, I had a PC tell me that the foreclosure sale on his home was set for early in the following week. I launched off on my usual diatribe about getting ALL the information we needed, that we had a limited time to act, etc., only to find out that he had moved out of the house months ago and had no intention at all of trying to save it.

4. Information Gathering: I have a fairly detailed Initial Consult form that I use as my rough guide in drawing information out of the client. I say "rough" because Consults sometimes defy strict adherence to any kind of script. However, the form helps me as a sort of checklist for the information I need to extract so we can proceed to the next segment of the Consult: Problem Solving.

5. Problem Solving: As I process the information I am gathering, possible solutions often begin to emerge. Once I have determined available courses of action, I explain them to the PC. I err on the side of caution and try to temper my discussion to avoid creating any unrealistic expectations. In the bankruptcy context, I explain ALL applicable bankruptcy alternatives – in my case, Chapters 7 and 13. For PCs who appear not be candidates for either of those, I explain the basics involved in a Chapter 11 and provide the names of several referrals.

Even though Chapter 7 may not be in the picture for the PC, I still explain Chapter 7 (without spending a lot of time on it) as well as why they would not be a good candidate for it; for instance, due to excess income, having excess risk, etc. I do the same for those clients for whom a 13 may not be a viable remedy, explaining that chapter so they have the full picture. As Debt Relief Agencies, I believe we have a duty to do this.

For PCs who might qualify for either form of Bankruptcy, I spend some time comparing and contrasting the risk/benefit factors of both chapters, trying to help them match up their most important objectives to the Chapter that provides the greatest likelihood of accomplishing them. I also spend time talking about the "side effects" of this financial surgery – the likely impact on co-signers and the credit report as well as future employment. We also discuss pre-bankruptcy planning if pertinent.

Finally, most PCs also like time lines, these two in particular:

1. Where do we go from here? I explain to them what will be required following the Consult. I provide them checklists and an extremely detailed Questionnaire that they will have to fill out so that we have the information we need to complete their petition and schedules. I make sure they understand that THEY are the ones being tasked with the primary information gathering and that they need to recruit someone they trust if they feel they cannot get us what is required. And, of course, I discuss the fees and costs involved and have them sign a Retainer Agreement if they wish to proceed.

2. What will happen after the bankruptcy is filed? I provide a rough "preview of coming attractions" so they have an idea of what happens, when the Automatic Stay comes into effect, when the 341(a) hearing will be and what happens there, how long their case is likely to take, when their Discharge will be entered, and so on. I also explain the role of the Bankruptcy Trustee.

The Consult is my favorite aspect of practicing law. I enjoy helping people find hope in what look to be dismal circumstances. I love the problem-solving aspect of it as it presses my creative abilities into use. Yes, there are some people who cannot feasibly be helped; others who will not cooperate with efforts to help them; yet others who, if I hear back from them at all, it might be years down the road. Still, the challenge of wrestling with a new set of facts, finding solutions, and making a positive difference in another human being's life is what practicing law is all about. •

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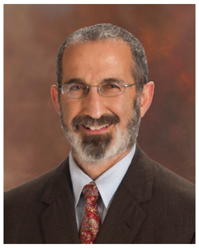
Marc Rudow | Citizen Lawyer

By Ann Fievet



Mark Rudrow

Marc Rudow exemplifies the motto: "To whom much is given, much is expected." As a successful real estate, bankruptcy, land conservation and estate planning attorney at Roberts & Stevens, P.A. in Asheville and named one of The Best Lawyers in America in Real Estate Law in 2012, Rudow has made it a priority over his 30-plus years of practicing law to give back to the community.

Using his skills as a lawyer and spurred by his passion for his community and the land of western North Carolina, Rudow has offered legal services and leadership to numerous community organizations, including Public Radio, Legal Aid, mediation, land trusts and the Jewish community.

His service with Habitat for Humanity and OnTrack Financial Education and Counseling has enabled numerous low-income families to safely and affordably purchase a home. His quarterly first-time home buyer seminars and other volunteer work in this area is an example of Rudow's application of his law practice for the betterment of his community as well as his service as a citizen to those in need.

Working alongside various land conservation organizations, Rudow is doing what he can to preserve the unique and beautiful aspects of the region he calls home. By providing reduced-rate legal work to the Southern Appalachian Highlands Conservancy and serving as a member of the steering committee for the Board of Directors of the Conservation Trust for North Carolina, he is helping these organizations with their important work to protect land in North Carolina and beyond.

Giving back to the community is not only a passion for Rudow but, to him, is also a responsibility, as he puts it, "to make the world and in particular our community a better place based on our time spent here," a responsibility that ultimately "makes our lives richer and better as a result."

That approach to life, work and service to community makes Rudow an exemplary Citizen Lawyer.

Ann Fievet is an attorney at K&L Gates in Charlotte.

Debtors Not Required to Pay in Full in Less Than 60 Months

Thomas Rice, Cox Smith Matthews, Incorporated (San Antonio) & Aaron M. Kaufman, Cox Smith Matthews, Incorporated (Dallas)

In separate opinions that were issued one day apart, Hon. J. Craig Whitley and Hon. J. Michael Deasy came to the same conclusion that above-median-income debtors whose Chapter 13 plans provide for payment of all unsecured claims in full are not required to make such payments in less than five years. IN **In re Winn**, 469 B.R. 628 (Bankr. W.D.N.C. 2012), Judge Whitley considered a request by the debtors to amend their chapter 13 plan to reduce their plan payment to the minimum amount necessary to pay all unsecured creditors in full over 60 months. The trustee objected to the amendment because the debtors proposed to continue undertaking unnecessary expenses while not paying their full net income under their plan, which would have reduced the time period required to pay creditors in full. The court pronounced its concerns that the debtors' proposed plan contained exorbitant expenditures for leasing a home and retaining a property that had no equity.

Despite these concerns, Judge Whitley's examination of the statutory provisions of § 1325(b)(1) demonstrated that in order to confirm a plan, the debtors must either provide for payment in full or devote all of their projected disposable income to make plan payments. The court reasoned that debtors are only required to meet one of these requirements in order to confirm their plans. Since the debtors were proposing to pay all creditors in full, the court held that the debtors were not required to commit all of their projected disposable income to the plan. Thus, the debtors' amended plan was approved as there is no requirement under the Bankruptcy Code that the debtors must pay off their plan as early as possible.

Excerpt from Benchnotes | ABI Journal, 8 September 2012

Eastern District of North Carolina

Case Summaries

By William Petraglia & Gabrielle D. Phillips

Relief from Stay

In re Stephenson, Case No. 12-00357-8-JRL; In re Access Enterprises, Inc., Case No. 12-00360-8-JRL (Bankr. E.D.N.C. March 6, 2012) (J. Leonard). Pre-petition, a plaintiff brought a state court lawsuit against the debtors seeking damages for fraud, conversion and unfair trade practices, as well as an injunction, for the debtors' improper and impermissible use of the plaintiff's intellectual property. In connection with the pre-petition state court proceedings, the state court granted the plaintiff's motions for contempt and discovery sanctions, struck the debtors' answer and counterclaims, and entered default judgment in favor of the plaintiff. After a jury verdict on the issue of damages awarded the plaintiff in excess of $600,000, the state court scheduled a special session to enter a final judgment for damages, a permanent injunction and a final order for contempt and discovery sanctions. On the eve of the special session, the debtors filed chapter 7 petitions for relief, staying the state court proceedings and prompting the plaintiff to move for stay relief to allow the state court to enter the final judgment.

The Bankruptcy Court held that sufficient cause existed under 11 U.S.C. § 362(d)(1) to lift the stay to allow the state court to enter a final judgment on all pending matters. The Bankruptcy Court's rationale for finding "cause" included "interests of judicial economy and comity to allow the trial court to perform the largely ministerial task of entering final judgment. . . . [and that such a final written order from the state court] would be helpful to [the Bankruptcy Court] in future proceedings." Accordingly, the stay was lifted to allow the state court to enter a final judgment for (i) monetary damages, (ii) a permanent injunction including the enforcement thereof, and (iii) criminal contempt, including imprisonment or fine - the latter of which are independently enforceable and not subject to the automatic stay pursuant to 11 U.S.C. § 362(b)(1). The court expressly did not grant stay relief with respect to the enforcement of, or execution on, the monetary judgment award.

Impaired Accepting Class

In re Somerset Properties SPE, LLC, Case No. 10-09210-8-SWH (Bankr. E.D.N.C. Aug. 23, 2012) (J. Humrickhouse). Secured creditors objected to the confirmation of the debtor's chapter 11 first amended plan of reorganization on the grounds that the plan did not have the affirmative vote of an impaired accepting class for cramdown purposes. The plan separately classified the secured creditors' unsecured deficiency claims (the "Deficiency Class") from other general unsecured claims (the "General Unsecured Class") and provided for separate classification for an unsecured convenience class (the "Convenience Class"). The General Unsecured Class and the Convenience Class were the only two "impaired" accepting classes for purposes of 11 U.S.C. § 1129(a)(10).

The court first held that the accepting vote of the General Unsecured Class would not count as an impaired accepting class for cramdown purposes. The debtor failed to satisfy its burden to show that there was a legitimate basis for the separate classification of the Deficiency Class and the General Unsecured Class. "The court's decision rests primarily on the failure of the debtor to give different treatment to those classes [whereby, both classes were to be paid in full, in the same installment amounts, and on the same general time line]".

However, the court proceeded to hold that the accepting vote of the Convenience Class would satisfy 11 U.S.C. § 1129(a)(10)'s requirement for an impaired accepting class for purposes of cramdown. In overruling the secured creditors' objections on this issue, the Court first held that the standard for determining whether a Convenience Class can be used is not whether treating such a small number of claims would be "truly burdensome" to a debtor, but rather whether such a classification is "reasonable"; that is, whether there is a "legitimate basis" for such a classification. The Court found that a legitimate basis existed given the debtor's interest in the "expedient compensation of holders of very small unsecured claims [which were to be paid 30 days following the effective date of the plan]." Second, the court held that the current state of the law has "decidedly shifted to recognize the acceptance of an administrative convenience class as sufficient for confirmation [so long as such class is actually impaired]". Third, the court held that a 30 day delay in payment of the Convenience Class constituted "a valid form of impairment under the Bankruptcy Code."

Potentially central to this final holding was the fact that the debtor's source of payment to the Convenience Class would come from rents collected during the month following the effective date of the plan. Had the debtor had financial resources available to pay the Convenience Class in full on the effective date, the 30 day delay in payment which created the impairment would have arguably constituted improper artificial impairment.

Exemption of Debtor's Life Insurance Policy

In re Eshelman, Case No. 11-08925-8-SWH (Bankr. E.D.N.C. May 30, 2012) (J. Humrickhouse). The chapter 7 trustee objected to the debtor's claimed exemption for his life insurance policy, under which the debtor's revocable trust, not his wife or children, was the designated beneficiary. In holding that the life insurance policy was not exempt under N.C. Gen. Stat. § 1C-1601(a)(6) and Article X, Section 5 of the Constitution of North Carolina, the Court undertook an examination of the relevant statutory, constitutional and trust pro-

Continued page 12

visions. The applicable North Carolina statutory and constitutional provisions require that in order for a life insurance policy to be exempt, it must be for the "sole use and benefit" of the insured's spouse and/or children. In contrast, the trust document in question left it to the trustee's sole discretion to use trust assets to pay claims against the trustor's (here the debtor's) estate. As a result, the court held that this authorized discretion on the part of the trust trustee meant that the life insurance policy was not for the "sole use and benefit" of the debtor's spouse and/or children, and therefore the life insurance policy could not be claimed as exempt.

Presumption of Abuse

In re Sterrenberg, case No. 11-08543-8-RDD (Bankr. E.D.N.C. May 18, 2012) (J. Doub). The Bankruptcy Administrator filed a motion to dismiss the debtor's chapter 7 bankruptcy case pursuant to § 707(b)(1). The court considered whether the debtor's deduction of three secured debt payments for her former residence, a boat and car—each of which were either in possession of her separated spouse, being paid for by her separated spouse, and/or listed on her statement of intention as collateral to be surrendered—should be included in her Means Test calculation. Without the claim of these deductions, the debtor's Means Test calculation created a clear presumption of abuse. The court examined case law decided prior to the Supreme Court decisions in **Ransom v. FIA Card Services** and **Hamilton v. Lanning** and the Fourth Circuit decision in **Morris v. Quigley**. These cases held that a debtor could claim deductions for secured debt payments despite intending to surrender the collateral because the phrase "scheduled as contractually due" in § 707(b)(2)(A)(iii) permitted the debtor to deduct these payments regardless of postpetition intentions. The court found that the forward-looking approach to a change in income in **Hamilton** and an intention to surrender secured collateral in **Morris**, combined with the holding in **Ransom**, which stated that a debtor may only deduct expenses that are applicable to the debtor, should be applied to the debtor's chapter 7 Means Test. Even though **Hamilton**, **Ransom**, and **Morris** were chapter 13 cases involving the calculation of disposable income, the same forward-looking approach and analysis of the expenses applicable to the instant debtor was taken in the Means Test calculation. Since the debtor did not intend to keep the former residence, boat, and car, and since the non-filing separated spouse had been making payments on the collateral, the court held the debtor would not be allowed to deduct "such fictional secured expenses" and dismissed the chapter 7 case.

Abstention and Remand

H.D. Supply Waterworks, Ltd. v. Spivey (In re Construction Supervision Services, Inc.), Case No. 12-00569-8-RDD, Adv. Pro. No. 12-00111-8-RDD, (Bankr. E.D.N.C. July 20, 2012) (J. Doub). Plaintiff in adversary proceeding moved that the court abstain from hearing or remand the matter pursuant to mandatory and/or permissive abstention so that it could be adjudicated in the Durham County Superior Court. Plaintiff provided water and sewer construction materials to the debtor for use in the BrightLeaf construction project in Durham County. The debtor executed a credit agreement in favor of the plaintiff, and Robert Spivey executed a guaranty in connection with the credit agreement. Upon default, the plaintiff served (1) a claim of lien on real property and (2) a notice of claim of lien on funds on the debtor, the general contractor, and the developer for the owner of the real property in Durham County Superior Court. The action was stayed against the debtor as a result of the bankruptcy. One of the defendants removed the state court matter to the Bankruptcy Court for the Middle District of North Carolina, and with the consent of all parties to the Adversary Proceeding, changed the venue to the Bankruptcy Court for the Eastern District of North Carolina. The court found that mandatory abstention was not appropriate since the action could have been commenced in a United States court by the plaintiff based on diversity jurisdiction. Applying the six factors for mandatory abstention pursuant to 28 U.S.C. § 1334(c)(2), the court held that even though the general contractor's North Carolina residency precluded it from removing the action to federal court, the availability of diversity jurisdiction at the commencement of the case to the plaintiff was enough to prevent the application of mandatory abstention. With respect to permissive abstention, the Court found that many of the 12 factors applied pursuant to §§ 1452(b) and/or 1334(c)(1) weighed in favor of permissive abstention and remand. Mainly, the effect on the estate would be minimal and would consist of substituting one party for another through subrogation. Additionally, the court found that (1) there were complex state law issues related to the posting of a bond to the Clerk of Superior Court and (2) that it would be more efficient to have the Superior Court hear the action which included six non-debtor parties, some of whom had not consented to the entry of final orders by the Bankruptcy Court with respect to non-core matters. As such, the Court granted the Plaintiff's motion for abstention and remand.

Permissible Exemption Planning

Crampton v. Koehler (In re Koehler), Case No. 11-00999-8-JRL, Adv. Pro. No. 11-00278-8-JRL (Bankr. E.D.N.C. March 5, 2012) (J. Leonard). Debtors contemplated filing for relief under title 11 of the United States Code as a result of growing costs associated with three beach rental properties purchased as part of debtors' retirement planning. The debtors decided to file under chapter 7 of the Bankruptcy Code. Prior to the Petition Date, the debtors auctioned off all of the rental property furnishings and used the proceeds to fund two IRAs (the debtors had previously withdrawn from existing IRAs to cover the rental property expenses) and pay ordinary insurance premiums two days prior to filing their petitions. The debtors and chapter 7 trustee agreed that the debtors converted non-exempt personal property into exempt property within two years of filing bankruptcy; however, the trustee contended that the conversion was a fraudulent transfer under § 548. The court found there was no fraudulent behavior in the pre-petition transactions. The debtors fully disclosed the transactions. Furthermore, the debtors withdrew $80,000 from their existing IRAs to cover property expenses, so the conversion of approximately $14,000 in furnishing proceeds into new IRAs was a modest return on the debtors' original retirement investment. Citing **In re Duncan**, No. 06-0025-5-AP (Bankr. E.D.N.C. Nov. 28, 2006), the court found that where the conversion is done for the purpose of contributing to the debtor's overall retirement plan, the conversion is not necessarily fraudulent. The involvement of the rental property in the debtors' retirement plans combined with the modest return from the furniture sale and forthright disclosure led the court to conclude that the transactions were not fraudulent. •

William Petraglia is an associate in the Restructuring & Bankruptcy group of K&L Gates LLP's Charlotte office. A primary focus of Petraglia's practice is the representation of institutional lenders and other large creditors in connection with the restructuring and enforcement of debt obligations.

Gabrielle D. Phillips is an associate with the Restructuring & Bankruptcy group of K&L Gates LLP. Prior to joining the K&L Gates, she served as law clerk to the Honorable J. Rich Leonard in the United States Bankruptcy Court for the Eastern District of North Carolina.

In re Moore, 11-3465-8-JRL (Bankr. E.D.N.C. Oct. 10, 2012)

During a hearing related to this case, "the debtor testified repeatedly that he did not remember signing off on information as presented in the electronically filed petition". In response to further inquiry by the Court, counsel for the debtor explained that the firm's policies prior to the realization of this discrepancy. Formerly, "the firm's practice had been to go over a draft petition with the client based on the information that the client initially provided to the firm [and w]hile reviewing that information for accuracy…make [handwritten] changes on the petition. The client would sign the draft petition [as marked,] and the written changes would be incorporated into a final petition which would be electronically filed with the court."

In response to this incident, the firm has improved their policies by, among other things, (i) requiring clients to "stay at the firm longer while the changes made to the draft petitions are incorporated into the final copy that will be signed" or requiring them "to come back a second time if the changes cannot be made in one sitting"; (ii) "not printing signature pages until the clean and final copy of the petition is in front of the client to review"; and (iii) adjusting the petition preparation software's default settings to make sure that "the date on the electronically filed petition will reflect the date on which the original is signed."

The court reviewed several relevant Local Rules. E.D.N.C. LBR 5005-4(7)(a) requires that an attorney obtain original signatures prior to electronically filing documents with the court on all documents that require a signature from any person other than the attorney and maintain those originals for four years after the case is closed. Furthermore, "[t]he Local Rules state that the use of the login and password of the attorney on the electronic filing system…constitutes the *signature* of that [attorney] on the electronically filed document for purposes of the Federal Rules of Bankruptcy Procedure, including Rule 9011, the Local bankruptcy Rules of this court, and any other purpose for which a signature is required in connection with proceedings before this court. *Use of the login and password of the [attorney], or of a Filing Agent registered to file on behalf of the [attorney], also shall constitute certification by the [attorney] that (1) all persons indicated to have signed the document have actually executed the original or a copy of the original, or have approved the content of an authorized their signature on the document, prior to electronic filing[.]*" (internal citations omitted; emphasis in original).

The court underscored the important policy considerations that underpin strict adherence to these rules by stating that "[T]he integrity of the electronic filing system is at risk if attorneys are careless in their handling of originals." (citing **In re Brown**, 328 B.R. 556, 559 (Bankr. N.D. Cal. 2005; internal quotations omitted). While explicitly finding that "there was no intent to deceive", the Court nevertheless characterized the errors as "more than simply negligent". Finally, the Court imposed sanctions of $2,000, and warned that "[T]his order serves as notice to all attorneys appearing before the court that such practice will not be tolerated." While this order was handed down in the Eastern District, this editor feels confident that all bankruptcy judges in North Carolina hold all attorneys to the same standards with respect to electronic filing.

Given the high volume of cases handled by most members of our section, we all need to follow practices such as those adopted by the debtor's counsel's law firm following this incident. I encourage everyone to share with their own best practices with respect to document preparation and retention by emailing ***oliver@carterandcarterlaw.com***. I will compile those suggestions for inclusion in the next edition.

Middle District of North Carolina
Case Summaries

By JP Cournoyer

Ferguson v. Pepper (In re Pepper), Case No. 10-51103, Adv. Pro. No. 10-6058 (Bankr. M.D.N.C. November 2, 2011) (Waldrep, J.).

Summary Holding: A debtor's schedules that contain materially incorrect information made with the intent to deceive, constitute a basis for denial of discharge under § 727(a)(4).

• The debtors' petition, schedules and SOFA contained multiple deficiencies and misstatements. The Administrative Office randomly selected the case for audit and determined there were material misstatements regarding their income, expenditures and assets. The trustee filed a motion to deny the debtors' discharge under § 727(a)(4)(A) for "knowingly and fraudulently, in or in connection with the case . . . [making] a false oath or account." The debtors did not appear at trial to testify, and the only explanation for the misstatements, proffered through counsel, was that they were either immaterial or the result of "simple oversight."

• Failing to disclose assets or transactions in a debtor's bankruptcy schedules is a basis for denial of discharge under § 727(a)(4).

• "The Fourth Circuit requires that the false oath must relate to a material matter."

• "The requisite intent to deceive exists where a debtor, in the first instance of filing a petition, schedules, or statement of financial affairs, makes statements—excluding honest mistakes—that are inconsistent or incompatible with his/her own knowledge and information."

Yellow Sign, Inc. v. Freeway Foods, Inc (In re Freeway Foods of Greensboro, Inc.), 466 B.R. 750 (Bankr. M.D.N.C. January 13, 2012) (Waldrep, J.)

Summary Holding: Under **Stern v. Marshall**, a bankruptcy court lacks the constitutional authority to enter final judgment on a claim unless (1) the action stems from the bankruptcy itself, (2) the claim would necessarily be resolved as part of the claim allowance process, or (3) the parties consent.

• The court considered whether it had the authority to render final judgment with respect to various claims in light of Stern v. Marshall, 131 S. Ct. 2594 (2011).

• "**Stern** provides a two-prong test: 'the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' If either prong of the test is met, then the bankruptcy court has constitutional authority to enter a final order. Conversely, if the action neither stems from the bankruptcy itself nor would necessarily be resolved in the claims allowance process, the bankruptcy court lacks constitutional authority to enter final judgment and may only submit proposed findings of fact and conclusions of law to the district court." (internal citation omitted).

• The court could enter final judgment on certain state law claims and counterclaims that didn't stem from the bankruptcy filing when either (i) ruling on such claims was necessary as part of the claims allowance process, or (ii) the parties had consented to a final judgment by the bankruptcy court.

• The court could not enter final judgment on certain state law claims and counterclaims (i) that did not stem from the bankruptcy, (ii) were not necessary to resolve as part of the claims allowance process, and (iii) to which the parties had not consented to a final judgment.

West v. Abdelaziz (In re Abdelaziz), Case No. 10-51257, Adv. Pro. No. 11-6017 (Bankr. M.D.N.C. February 1, 2012) (Waldrep, J.)

Summary Holding: When the president of a debtor corporation omitted assets from the company's bankruptcy schedules and sold them at auction, there was a basis to deny the discharge in his individual chapter 7 case under §§ 727(a)(2) and (a)(7), since he was an insider of the company.

• The debtor was the president of a landscaping company that filed a chapter 7 case. Certain assets were omitted from the company's schedules, and the individual debtor sold those assets at auction without notifying the trustee. Thereafter, the debtor filed his own chapter 7 case, and the trustee filed an adversary proceeding to deny his discharge under § 727.

• "Section 727(a)(7) provides that a court should not grant a debtor's discharge if 'the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider.' 11 U.S.C. § 727(a)(7). Where a debtor is an individual, an 'insider' includes a corporation of which the debtor is a director, officer, or person in control. 11 U.S.C. § 101(31)(A). Therefore, if the Defendant, an officer of [the landscaping company], committed any act specified in paragraphs (2)-(6) of Section 727 in connection with the [landscaping company's] case within one year before July 1, 2010, his discharge should be denied."

• "To prevail on a Section 727(a)(2) cause of action, a plaintiff must establish that the debtor (1) transferred or concealed, (2) his property, (3) with the intent to hinder, delay or defraud a creditor, (4) within one year before filing the petition." The court concluded that these elements were satisfied with respect to the landscaping company's bankruptcy case, and therefore denied the individual debtor's discharge under § 727(a)(2) and (a)(7).

In re Corbett, Case No. 12-80054 (Bankr. M.D.N.C. February 13, 2012) (Stocks, J.)

Summary Holding: When the automatic stay did not go into effect because the debtor had filed two previous cases within the 12 months pre-petition, the court would not impose the stay upon the debtor's motion because (1) he did not rebut the presumption that the case was not filed in good faith, and (2) since the stay did not go into effect when the case was filed, the 10-day upset bid period for the debtor's right of redemption had continued to run post-petition and expired.

• Under section 362(c)(4)(A), the automatic stay did not go into effect because the debtor had two previous cases pending within the 12 months pre-petition. The debtor, pro se, filed a motion to "extend" the automatic stay, which the court interpreted as a motion filed under § 362(c)(4)(B).

• Under § 362(c)(4)(B), in order to obtain a stay, the debtor had to demonstrate that the case was filed "in good faith as to the creditors to be stayed." Under § 362(c)(4)(D)(i)(I), a presumption arose that the filing was not in good faith, and the debtor had to rebut that presumption by clear and convincing evidence to the contrary.

• The debtor had filed 4 previous cases since 2009, in three different districts, all of which were dismissed prior to plan confirmation. The only explanation for the repeated filings was that "he had tax problems that he says have been resolved," which was not sufficient to rebut the presumption.

• Additionally, imposing the stay would have been futile since the debtor's right of redemption had expired. The bankruptcy filing was prompted by the foreclosure sale of the debtor's real property, and the case was filed within the 10-day upset bid period under N.C. Gen. Stat. § 45-21.27. Normally, the filing of the petition would toll the running of the upset bid period. However, under § 362(c)(4), there was no automatic stay in effect when the case was filed, and therefore the upset bid period continued to run post-petition. Since the upset bid period expired post-petition, the debtor no longer had any interest in the property, and imposing the stay would serve no purpose.

In re Beard, 67 Collier Bankr. Cas. 2d (MB) 287, Case No. 10-51592 (Bankr. M.D.N.C. March 14, 2012) (Aron, J.)

Summary Holding: Under § 362(h)(1)(b), the automatic stay will not automatically be lifted with respect to a creditor secured by personal property if a debtor specifies the intention to reaffirm on the original contract terms and the creditor refuses to agree, but simply indicating a willingness to negotiate terms is not sufficient.

• A chapter 7 debtor indicated in her statement on intention that she wished to reaffirm the secured debt on her vehicle. The creditor sent a reaffirmation agreement providing that the debtor would make a single payment of $16,149.46 as payment in full. The debtor's attorney responded that he could not recommend the proposed reaffirmation agreement and indicated that the debtor would be interested in negotiating payment terms. The debtor's account was many months past due, and the creditor repossessed the vehicle without first seeking stay relief. The debtor sought sanctions for violation of the automatic stay.

• The issue was whether the automatic stay had lifted automatically under § 362(h)(1)(B), which requires that after making a statement of intention with respect to personal property, a debtor must "take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms."

• Section 362(h)(1)(B) provides a debtor a safe harbor from the automatic termination of the stay "if a debtor specifies the intention to reaffirm on the original contract terms and the creditor refuses to agree." In this case, the Debtor did not specify her intention to reaffirm on the original contract terms. In fact, the correspondence to the Creditor conspicuously fails to state that the Debtor intends to reaffirm the debt on the original contract terms. As a result, the exception in § 362(h)(1)(B) is not applicable and the automatic stay terminated upon the expiration of the applicable time periods in § 521(a)(2). Accordingly, the Debtor is not entitled to sanctions and her motion must be denied."

In re Moose, 67 Collier Bankr. Cas. 2d (MB) 654, Case No. 11-51816 (Bankr. M.D.N.C. March 20, 2012) (Aron, J.)

Summary Holding: Although acknowledging that the law appeared to penalize the debtors, the CSRS benefits paid in lieu of social security constituted current monthly income under the plain language of § 101(10A), and therefore the presumption of abuse under §707(b)(2) arose.

• A portion of the chapter 7 debtor's income came from a pension paid by the Civil Service Retirement System ("CSRS"), in lieu of social security payments. If the CSRS benefits were included as part of the debtor's current monthly income ("CMI"), the debtor would fail the means tests and the presumption of abuse under § 707(b)(2) would arise.

• Section 101(10A) defines CMI as income from all sources received within the 6-month look-back period, but "excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism."

• "While assuredly of little solace to the Debtors, the Court notes that were it presented with a motion under § 707(b)(3) and able to consider the totality of the circumstances, it would most likely not grant that motion based upon the facts as currently stipulated."

• "The plain and unambiguous language of § 101(10A) requires the court to find that CMI does include CSRS benefits. **Barnhart v. Sigmon Coal Co.**, 534 U.S. 438, 450 (2002) (recognizing that the first step in all statutory construction cases is to determine

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whether the language of the statute has a plain and unambiguous meaning with regard to the particular dispute). The statute at issue specifically identifies only three sources of funds that are excluded from CMI: benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity, and payments to victims of international or domestic terrorism. While the court does not disagree with the Debtors that the definition of CMI does appear to penalize a debtor who receives CSRS benefits in lieu of social security benefits, that is not a basis upon which the court can find otherwise given the clear language of § 101(10A)."

Burns v. Dennis (In re Southeastern Materials, Inc.), 467 B.R. 337 (Bankr. M.D.N.C. March 27, 2012) (Waldrep, J.)

Summary Holding: Under **Stern v. Marshall**, a bankruptcy court lacks the constitutional authority to enter final judgment on a claim unless (1) the action stems from the bankruptcy itself, (2) the claim would necessarily be resolved as part of the claim allowance process, or (3) the parties consent.

• The court had the authority to render final judgments with respect to fraudulent transfer (§§ 544(b) and 548) and preference claims (§ 547) brought by the trustee, but only because the defendants had filed proofs of claim, which made resolution of the fraudulent transfer and preference claims necessary to the claim allowance process.

• The court could enter final judgment on the trustee's actions to turnover property of the estate since such claims stemmed from the bankruptcy itself.

• The court could enter final judgment on the trustee's action to equitably subordinate claims under § 510(c) of the Bankruptcy Code, since the claim stemmed from the bankruptcy itself.

• Under Stern, the court could only enter proposed findings of fact and conclusions of law on the trustee's claims for breach of fiduciary duty, unfair or deceptive trade practices, alter ego, unjust enrichment, and accounting.

In re Sauls, Case No. 12-80094 (Bankr. M.D.N.C. April 10, 2012) (Stocks, J.)

Summary Holding: The court awarded $2,630 in attorney's fees and $3,500 in punitive damages under 11 U.S.C. § 362(k)(1) for a willful violation of the automatic stay that involved a secured creditor's "obstinate and dogged refusal" to return a repossessed vehicle despite repeated notices of the bankruptcy filing.

• The debtor's vehicle was repossessed by his secured creditor shortly pre-petition. The debtor's attorney served the creditor with a notice of the commencement of the bankruptcy case and called the creditor to request the return of the debtor's vehicle. The debtor went to the creditor's place of business in an effort to obtain possession of the vehicle. The debtor's attorney provided another notice of the bankruptcy, proof of insurance and proof of the debtor's first plan payment. Despite repeated notices, the creditor refused to return the vehicle or allow the debtor to pick it up, even up to the day of the hearing on the debtor's motion for turnover and sanctions.

• Under N.C. Gen. State. § 25-9-623, the debtor had redemption rights in the vehicle. Therefore, the debtor was entitled to turnover of the vehicle in order to exercise his redemption rights in the context of his chapter 13 plan, so long as the creditor's rights were being adequately protected.

• "The imposition of sanctions or damages for a willful violation of the automatic stay requires a showing that (1) the conduct at issue constituted a violation of the automatic stay; (2) the violation was willful; and (3) the debtor was injured as a result of the violation."

• "In order to prove a willful violation, the Debtor is not required to show that the creditor had the specific intent to violate the stay. . . . It is sufficient to show that the party knew of the existence of the bankruptcy case and that the creditor's actions were intentional."

• Under § 362(k)(1), once the debtor has shown a willful violation of the stay under § 362(a)(3), the award of actual damages is mandatory. However, it is the debtor's burden to establish such damages. The court awarded $2,630.00 in attorney's fees arising from the stay violation.

• "Under section 362(k)(1), an award of punitive damages is within the discretion of the trial court and proper only in appropriate circumstances . . . . Appropriate circumstances ordinarily are those in which the creditor has demonstrated egregious, vindictive or intentional misconduct." The court found that since the creditor "not only refused to return the [vehicle], but also refused to allow the Debtor to remove personal property from the vehicle," and the stay violation continued for over 30 days, there was egregious and intentional misconduct on the creditor's part, warranting punitive damages.

In re DeCoro USA, Ltd., Case No. 09-10846 (Bankr. M.D.N.C. April 12, 2012) (Stocks, J.)

Summary Holding: Although plan confirmation orders have res judicata effect, the determination in a plan that the debtor owned accounts receivable for pre-petition furniture sales did not preclude the debtor from arguing that such sales were made as a dependent agent of its parent company.

• Pre-petition, the debtor, through employees or independent sales reps, sold furniture manufactured by its parent company in China to customers in the U.S.. The IRS filed a proof of claim for tax liabilities arising from those sales. The debtor objected to the IRS claim on the basis that it should be asserted against the Chinese parent company, since the debtor was acting as a dependent agent of its parent. The IRS argued that under the confirmed plan of reorganization, the debtor was precluded by principles of res judicata (claim preclusion) and collateral estoppel (issue preclusion) from arguing that it was an agent of the parent company, because the confirmed plan had determined that the debtor owned the accounts receivable for the pre-petition furniture sales.

• "Fourth Circuit precedent establishes that a Chapter 11 plan confirmation order is treated as a final judgment with res judicata effect, which binds parties by its terms and precludes them from raising claims or issues that they could have or should have raised before confirmation." Page 5 (citing **Valley Historic Ltd. P'Ship v. Bank of NY**, 486 F.3d 831, 838 (4th Cir. 2007)).

• Res Judicata barred any challenge to the plan's determination that the debtor's assets included accounts receivable for the sale of the furniture. However, the debtor's relationship with its parent was "an entirely different issue that was not specifically litigated or even addressed at confirmation," and therefore neither claim preclusion nor issue preclusion applied.

• Additionally, "[p]lans of reorganization may, and frequently do, propose restructuring that is contrary to the terms of the debtor's prepetition relationships, duties and obligations." Therefore, a determination in the plan with respect to what a debtor's post-confirmation rights would be is not equivalent to a determination of what they were pre-petition.

Ivey v. Vester (In re Whitley), Case No. 10-10426, Adv. Pro No. 11-2056 (Bankr. M.D.N.C. April 13, 2012) (Stocks, J.)

Summary Holding: Under **Stern v. Marshall**, a bankruptcy court lacks the constitutional authority to enter final judgment on a fraudulent transfer claim brought by the estate unless the parties consent or the defendant has filed a proof of claim.

• Trustee brought fraudulent transfer claims under §§ 548 and 544(b).

• Defendant argued that the bankruptcy court could not enter final judgment, not could it make proposed findings of fact and conclusions of law.

• "Having reviewed decisions on both sides of the issue, the court adopts the view that under **Stern v. Marshall**, this court may not enter a final judgment with respect to a fraudulent transfer action against a defendant who has not filed a proof of claim or consented to the bankruptcy court entering a final judgment."

• Even though the court lacked the authority to enter final judgment under Stern, fraudulent transfer claims are still core proceedings under 28 U.S.C. § 157(b)(2), which Congress intended for bankruptcy courts to resolve. Therefore, the court could hear the action and submit proposed findings of fact and conclusions of law to the district court in the manner authorized under 28 U.S.C. § 157(c)(1).

In re Oliver, Case No. 12-50219 (Bankr. M.D.N.C. April 26, 2012) (Aron, J.)

Summary Holding: Trustee's rights as a hypothetical judgment lien creditor under 11 U.S.C. § 544(a)(1) were superior to those of a vehicle creditor that erroneously forwarded a certificate of title to the debtor indicating that its lien had been satisfied, and obtained a duplicate certificate of title pre-petition in an attempt to remedy the error, rather than having it cancelled and re-issued as provided in N.C. Gen. Stat. § 20-58(a)(2).

• The secured creditor on the debtor's vehicle erroneously forwarded a certificate of title to the debtor, indicating that its lien had been satisfied. To correct the error the creditor obtained a duplicate title from the N.C. Department of Motor Vehicles. The debtor defaulted on his payments, and the creditor repossessed the vehicle shortly prepetition. The creditor sought relief from stay to exercise its remedies.

• "N.C. Gen. Stat. § 20-68 provides that a lienholder or owner may apply for a duplicate if a certificate of title is lost, stolen, mutilated, destroyed or becomes illegible. This section does not provide for a method of perfecting a security interest in a vehicle . . . ."

• The creditor could have used the process outlined in N.C. Gen. Stat. § 20-58(a)(2) of submitting an application with an affidavit, requested that the certificate of title be cancelled and re-issued to indicate its security interest. "By merely obtaining a duplicate certificate of title, as though the original was lost, stolen, mutilated, destroyed or illegible, rather than submitting an application for notation of a security interest along with the appropriate affidavit pursuant to § 20-58, the Creditor failed to properly re-perfect its security interest."

• Therefore, the creditor's interest was subordinate to that of the trustee as a hypothetical judgment lien creditor und 11 U.S.C. § 544(a)(1), and the creditor's motion for relief from stay was denied.

In re Miller Brothers Lumber Co., 56 Bankr. Ct. Dec. 128, Case No. 11-51405 (Bankr. M.D.N.C. May 7, 2012) (Waldrep, J.)

Summary Holding: Unless a creditor files a UCC continuation statement as required by N.C. Gen. Stat. § 25-9-515(c), its perfected security interest will lapse, notwithstanding the fact such lapse occurs after a bankruptcy filing.

• The debtor leased certain equipment with a $1.00 option to purchase at the expiration of the lease term, and the creditor perfected its interest by filing a UCC-1 financing statement. The creditor filed a motion for relief from stay, and the debtor objected on the basis that it failed to file a continuation statement before the original financing statement expired post-petition.

• Pursuant to N.C. Gen. Stat. § 25-1-203, the lease was a disguised security interest, not a true lease, since the debtor could acquire ownership of the property for the nominal consideration of $1.00 at the end of the lease term.

• A security interest in equipment is perfected by filing a UCC-1 financing statement, which will expire after 5 years unless a continuation statement is filed before the financing statement expires. See N.C. Gen. Stat. §§ 25-9-312; 25-9-501; 25-9-515.

• Section 25-9-515 provides: "[u]pon lapse, a financing statement ceases to be effective and any security interest . . . that was perfected by the financing statement becomes unperfected. . ."

• Comment 4 of the Official Comments to the UCC provides that the provision under former § 9-403(2), which tolled the lapse of a financing statement in the event of a bankruptcy filing, was deleted by § 9-515(c) "and thereby imposes a new burden on the secured party: To be sure that a financing statement does not lapse during the debtor's bankruptcy."

• 11 U.S.C. § 362(b)(3) and 11 U.S.C. § 546(b) "allow a creditor to file a continuation statement without first obtaining relief from the automatic stay"

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• "In order to maintain perfected status, North Carolina law requires a creditor to file a continuation statement within five years after the original financing statement was filed, even if the obligee–or in this case, lessee–has filed for relief under Title 11 or initiated other state law insolvency proceedings." Therefore, the creditor's motion for relief from stay was denied.

In re Horn, Case No. 12-50207 (Bankr. M.D.N.C. May 31, 2012) (Aron, J.)

Summary Holding: Cause existed to lift the stay under § 362(d)(1) to allow creditor to continue with pending litigation for alienation of affection and criminal conversation, because the claim (1) was more properly heard before the state court, (2) was a "personal injury tort claim" under 28 U.S.C. § 157(b)(5) that could not be heard by the bankruptcy court, and (3) the bankruptcy estate could be adequately protected by requiring the creditor to seek enforcement of any judgment through the bankruptcy court.

• Pre-petition, the creditor filed an action in state court for alienation of affection and criminal conversation. The debtor filed a chapter 13 petition, and the creditor moved for relief from stay to continue the state court litigation.

• The court applied the Fourth Circuit's Robbins factors to determine whether to lift the stay to allow the state court litigation to proceed. These factors are "(1) whether the issues in the pending litigation involve only state law, so the expertise of the bankruptcy court is unnecessary; (2) whether modifying the stay will promote judicial economy and whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in bankruptcy court; and (3) whether the estate can be protected properly by a requirement that creditors seek enforcement of any judgment through the bankruptcy court." **In re Robbins**, 964 F.2d 342, 345 (4th Cir. 1992).

• The court found that the action was more properly determined by the state court because the expertise of the bankruptcy court was unnecessary, and could not even be heard by the bankruptcy court as a "personal injury tort claim" under 28 U.S.C. § 157(b)(5).

• The bankruptcy estate could be adequately protected by requiring the creditor to seek enforcement of any judgment through the bankruptcy court, and the only prejudice proffered by the debtor was the expense of litigation.

In re Ward, Case No. 07-52021 (Bankr. M.D.N.C. June 15, 2012) (Aron, J.

Summary Holding: A creditor that obtained a post-petition judgment for money damages and to eject the debtors from their leased residence did not violate the automatic stay because the debt was created post-petition. However, the creditor was stayed from acting on the judgment while the chapter 13 case was still pending, because property of the estate under § 1306 includes earnings and property acquired post-petition.

• The debtors moved into certain real property approximately 4 years post-petition, and did not pay the real property taxes as purportedly agreed. Without seeking relief from stay, the creditor filed a complaint for summary ejectment in small claims court, which sought to eject the debtors from the property and a judgment for post-petition property taxes. The magistrate judge determined that the action was not subject to the automatic stay and entered a judgment for the amount of the taxes and ordering the debtors to be removed from the property. The debtors filed a motion for sanctions for violation of the automatic stay. At the time of the hearing, the creditor had not attempted to collect on the money judgment or remove the debtors from the property.

• "The automatic stay 'bars collection actions against the (1) debtor which actions could have been brought pre-petition; (2) property of the debtor in an effort to collect pre-petition debts; and (3) property of the estate regardless of whether the debt arose before or after the filing of the bankruptcy petition.' The automatic stay does not, however, 'prevent the commencement of a lawsuit to collect a post-petition debt.'" (internal citations omitted).

• However, the court found that any attempt to act upon the judgment would violate the automatic stay since § 1306 "expands the definition of property of the estate in § 541 to include earnings and other property acquired by the debtor during the pendency of the chapter 13 case."

Mullins v. Wells Fargo Bank, N.A. (In re Mullins), Case No. 11-11176, Adv. Pro. No. 11-2049 (Bankr. M.D.N.C. July 3, 2012) (Stocks, J)

Summary Holding: Under § 1322(b), the debtors could not modify the secured claim on their residence despite the fact that the deed of trust required the debtor to make periodic escrow payments for taxes and insurance, since the deed of trust did not provide that such escrow payments would serve as additional collateral for the creditor's indebtedness.

• A standard uniform Fannie Mae/Freddie Mac North Carolina Deed of Trust provided that the debtor shall make periodic escrow payments to the lender for taxes and insurance. The collateral description in the deed of trust solely referenced the real property, and no language in the deed of trust suggested that the escrow funds served as collateral for the promissory note. The debtors argued the anti-modification provision of § 1322(b)(2) did not apply because the deed of trust purports to secure other obligations such as taxes and insurance.

• The focus under § 1322(b)(2) is "whether there is collateral other than the residential real property and not whether the residential real property secures obligations other than the principal and interest due under the promissory note."

• Since the creditor's debt was not secured by the escrow payments, but instead was secured solely by the residential real property, the debtors could not modify the secured claim pursuant to § 1322(b)(2).

• This reasoning was followed by Judge Waldrep in **Bynum v. CitiMortgage, Inc.** (**In re Bynum**), Case No. 12-10660, Adv. Pro. No. 12-2031 (Bankr. M.D.N.C. July 19, 2012).

Walton Holding of NC, LLC V. Young (In re Young), Case No. 10-11338, Adv. Pro. No. 11-2003 (Bankr. M.D.N.C. August 17, 2012) (Waldrep, J.)

Summary Holding: Since a creditor lacked an interest in property removed by the debtor from certain leased premises, the creditor was not harmed by its removal, and therefore there was no debt to be declared dischargeable under § 523(a)(2) or (a)(6).

• The debtor was the principal officer of a software company who personally guaranteed the software company's lease obligations. The software company became delinquent in its rent obligations, and appeared to have stopped doing business. The landlord changed the locks, and asserted a lien on the software company's personal property pursuant to N.C. Gen. Stat. §44A-2(c), although it had not terminated the lease. The software company removed personal property of the company's employees from the premises. The landlord filed a non-dischargeability action under §§ 523(a)(2) and (a)(6), asserting that it had been damaged by the removal of the property.

• In order to prevail under § 523(a)(2) or § 523(a)(6), the creditor had to establish that it had an interest in the property that was removed. The lien under § 44A-2(c) can only apply to personal property remaining on the premises if "the tenant has vacated the premises for 21 or more days after the paid rental period has expired." The software company had not vacated the premises at the time the landlord changed the locks, and the property was owned by the software company's employees, not the software company.

• Since it had no legal interest in the property that was removed, the creditor was not damaged by the removal, and therefore there was no debt to be declared non-dischargeable.

In re Campbell, Case No. 12-80096 (Bankr. M.D.N.C. September 25, 2012) (Aron, J.)

Summary Holding: Under the Rooker-Feldman doctrine, the court lacked subject matter jurisdiction to hear an objection to claim when the N.C. Superior Court had previously entered a final order determining the amount of the indebtedness.

• Pre-petition, the North Carolina Superior Court entered order authorizing foreclosure and holding that the secured creditor held indebtedness of at least $21,464.14. The debtor subsequently filed bankruptcy and objected to the creditor's proof of claim.

• "Where a debtor objects to a claim that is based on a state court judgment, thereby attempting to collaterally attack the judgment in bankruptcy court, the Rooker-Feldman doctrine bars that attack." (quoting **In re Al-Sedah**, 347 B.R. 901, 904 (Bankr. N.D. Ala. 2005)).

• The debtor's objection to the creditor's claim was made after the state court had ruled on the amount of the indebtedness. Since sustaining the objection "would involve review and reversal of the state court judgment," they were barred by the Rooker-Feldman doctrine, and the court lacked subject matter jurisdiction to hear them.

In re Duke, Case No 11-51521 (Bankr. M.D.N.C. September 28, 2012) (Waldrep, J.)

Summary Holding: The court granted judgment on the pleadings in favor of the debtor in a § 523 non-dischargeability action, since it was filed after the deadline under Fed. R. Bankr. P. 4007(c) and the doctrine of equitable tolling could not be applied because the late filing was not a result of any inequitable conduct on the debtor's part.

• Upon the motion of the chapter 7 trustee, the court extended the deadline to object to the debtor's discharge under § 727(a). A creditor filed a complaint objecting to the discharge ability of its debt under § 523, erroneously believing that the order extending the deadline for objecting under § 727 also extended the deadline for objecting under § 523. The debtor filed a motion under Fed. R. Civ. P. 12(c) for judgment on the pleadings, since the complaint was filed after the § 523 deadline.

• "A creditor filing a complaint to determine the dischargeability of debt under Section 523(c) must do so no later than 60 days after the date set for the Section 341 meeting of creditors. Fed. R. Bankr. P. 4007(c). Generally, the court has the discretion to extend deadlines for cause. Fed. R. Bankr. P. 9006(b)(1). However, with regard to a Section 523(c) nondischargeability determination, the court may only exercise such discretion upon a motion that was filed before the expiration of the prescribed deadline. Fed. R. Bankr. P. 4007(c), 9006(b)(3)."

• The time limitation set by Rule 4007(c) is not jurisdictional, so the court could consider equitable principals such as equitable tolling when applying the statute of limitations. However, "to equitably toll a deadline, the plaintiff must show (1) an attempt by the defendant to mislead and (2) plaintiff's reasonable reliance on such attempt in neglecting to meet the deadline." Since the untimely filing was not caused by any inequitable conduct on the part of the debtor, the court could not extend the deadline and therefore granted judgment on the pleadings in the debtor's favor. •

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Western District of North Carolina
Case Summaries

By Deborah T. Crowder

Avoidable Transfer

Ward v. Bank of Granite, et. al. (In re Hickory Printing Group, Inc.), Adv. Pro. No. 11-3130 (Bankr. W.D.N.C. July 23, 2012) (Whitley). Trustee seeks to avoid a security interest held by a bank. Trustee asserts that just prior to bankruptcy, the bank re-perfected a security interest in Debtor's assets, which is avoidable. The bank contends that the security interest was re-perfected outside the avoidance period. Trustee sought summary judgment as to the legal issues related to the UCC filings of the bank.

Bank held a security interest memorialized by a filed Financing Statement, which was subsequently terminated by a Termination Statement filed by the bank. The bank claimed the Termination Statement was filed in error, after the Debtor paid off a short-term loan that was secured by the same collateral as the original loan which was still outstanding. The bank then filed a Correction Statement, and then later filed a new Financing Statement.

The bank claims that the correction statement was part of the original Financing Statement, and the new Financing Statement prevented the Termination Statement from being misleading.

The court held that under N.C. Gen. Stat. § 25-9-510, the Termination Statement terminated the bank's perfected lien, making the lien unperfected, and the filing of the Correction Statement did not alter the effectiveness of the Termination Statement and did not reverse the effect of the Termination Statement. The Correction Statement includes language that states that "[t]he filing of this statement does not amend any UCC record[,]" and that it provides information only. Even if the bank made an error in filing the Termination Statement, it was still legally effective to release the lien, and the Correction Statement did not legally revive the lien. Furthermore, Correction Statements are only to be filed by borrowers or debtors, and thus it was a nullity. The new Financing Statement filed on the eve of bankruptcy was a transfer of an interest of the Debtor in property because it constituted perfection of an unperfected security interest, and it was thus avoidable.

Claims

In re Brown, Case No. 11-30384 (Bankr. W.D.N.C. July 3, 2012) (Beyer). | In re Lane, Case No. 11-31690 (Bankr. W.D.N.C. July 3, 2012) (Beyer). | In re Terrell, Case No. 11-31100 (Bankr. W.D.N.C. July 3, 2012) (Beyer). Debtors in these three cases filed a motion for sanctions against Time Warner Cable for failing to redact all but the last four digits of the Debtors' nine-digit account numbers. Debtors alleged that Time Warner Cable violated the disclosure provisions of FRBP 9037 and N.C.G.S. § 75-66. The court found that Time Warner Cable did violate FRBP 9037, but expressed no opinion as to whether Time Warner Cable violated N.C.G.S. § 75-66. Time Warner Cable argued that FRBP 9037 did not apply because "financial-account number" refers to an account number that is financial in nature or associated with a financial institution, and not to the account number issued by Time Warner Cable. The court found that there is no basis for finding that FRBP 9037 is limited to financial institutions, and thus found that the Time Warner Cable account numbers fall within FRBP 9037. The court ordered that the clerk restrict access to the Time Warner Cable proofs of claims in these cases, and Time Warner Cable was ordered to file amended, redacted proofs of claims within 14 days. Time Warner Cable was also ordered to file amended, redacted proofs of claims in all cases in which a proof of claim had been filed since Dec. 1, 2007; the time period given for this task was six months. The court declined to award attorney fees to either party, since there was no factual basis that Time Warner Cable acted deliberately to harm the Debtors or that its actions were willful, malicious, or flagrant.

Objection to Claim

In re Cunningham, Case No. 11-32684 (Bankr. W.D.N.C. May 8, 2012) (Beyer). Creditor objected to Debtor's plan which bifurcated its secured claim. Creditor claimed that the debt was secured by a purchase money security interest in a vehicle purchased within 910 days of the bankruptcy filing. Debtor purchased the vehicle almost five years prior to the bankruptcy filing, but within one year of the bankruptcy filing the Debtor refinanced the vehicle with the creditor. The creditor claimed that the refinancing of the vehicle qualified the debt as a 910 claim under the hanging paragraph of § 1325.

The court found that the refinancing was not a purchase and did not qualify as a purchase money security interest under § 1325 and North Carolina law. The refinancing contract financed the same amount as the original contract. Further, the same vehicle was the subject of both the original and the refinancing contract, and Debtor never turned over possession of the car from the original purchase date. The court addressed the definition of purchase under North Carolina's Uniform Commercial Code, and found that Debtor could not purchase under the refinancing contract property that she already owned. Since the purchase dated back to the original contract, the car was purchased more than 910 days prior to the filing, and thus the objection to the claim was overruled.

Stern v. Marshall issue

Robinson v. Branch Banking And Trust Company (In re Robinson), Adv. Pro. No. 11-51047 (Bankr. W.D.N.C. August 22, 2012) (Beyer). Plaintiff Debtor filed a state court action against a bank, which was removed to the bankruptcy court. The removed action included several causes of action including fraud, breach of fiduciary duty, and unfair and deceptive trade practices, alleging that the bank induced Plaintiff to execute a loan agreement. The bank filed a motion to dismiss on the basis of res judicata, equitable estoppel, waiver, and judicial estoppel, alleging that since the Plaintiff did not object to the bank's proof of claim and failed to list the claim in her schedules, then she could not recover on her claims.

The court found that the Plaintiff amended her schedules to include potential claims against the bank. Therefore, the court denied the motion to dismiss, abstained from ruling, and remanded the case back to state court. The court cited **Stern v Marshall**, which holds that the bankruptcy court lacks the authority to enter a final order or judgment on Plaintiff's claims but is instead required to submit proposed findings of fact and conclusions of law to the District Court for its review and issuance of a final order or judgment. Since Plaintiff's claims against the bank are purely state law matters that exist independent of her bankruptcy case, then the claims do not need to be resolved in the process of ruling on the bank's proof of claim. Further, remand will not have a significant effect on the administration of the bankruptcy estate. •

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Administrative Notices From the Clerks

Changes to Miscellaneous Fee Schedules

At its September 2012 session, the Judicial Conference approved several changes to the miscellaneous fee schedules that affect the bankruptcy court. Specifically, it approved (1) a new claims transfer fee for the bankruptcy courts; (2) two changes to the Electronic Public Access (EPA) fee schedule to adjust for inflation; and (3) increases to three bankruptcy fees to conform with recently enacted legislation.

Regarding the newly established fees, the Conference approved a $25 fee for the transfer of a claim in a bankruptcy case, which will apply to the approximately 1.6 million claims transferred each year. This fee appears as item 20 on the bankruptcy court miscellaneous fee schedule. This new fee becomes effective May 1, 2013.

The Conference also approved two amendments to the EPA fee schedule to adjust for inflation. It agreed to amend both the records search and returned check fees (items III and V of the fee schedule) to make them consistent with similar inflationary increases in the appellate, district, and bankruptcy court schedules. These changes became effective Oct. 1, 2012.

Finally, the Conference approved amendments to three fees in the bankruptcy court miscellaneous fee schedule to correspond with an increase – from $1,000 to $1,167 – in the Chapter 11 filing fee mandated by the Temporary Bankruptcy Judgeships Extension Act of 2012 (Pub. L. No. 112-121). The three fees are linked to the statutory Chapter 11 filing fee, and therefore needed to be increased. They include item 11, the fee for filing a motion to reopen a Chapter 11 bankruptcy case; item 15, the fee for filing a case under Chapter 15 of the Bankruptcy Code; and item 18, the fee for filing a motion by a debtor to divide a joint Chapter 11 case. The changes become effective Nov. 21, 2012.

Bankruptcy Court Miscellaneous Fee Schedule

Effective November 21, 2012

The fees included in the Bankruptcy Court Miscellaneous Fee Schedule are to be charged for services provided by the bankruptcy courts.

• The United States should not be charged fees under this schedule, with the exception of those specifically prescribed in Items 1, 3 and 5 when the information requested is available through remote electronic access.

• Federal agencies or programs that are funded from judiciary appropriations (agencies, organizations, and individuals providing services authorized by the Criminal Justice Act, 18 U.S.C. § 3006A, and bankruptcy administrators) should not be charged any fees under this schedule.

1. For reproducing any document, $.50 per page. This fee applies to services rendered on behalf of the United States if the document requested is available through electronic access.

2. For certification of any document, $11.
For exemplification of any document, $21.

3. For reproduction of an audio recording of a court proceeding, $30. This fee applies to services rendered on behalf of the United States if the recording is available electronically.

4. For filing an amendment to the debtor's schedules of creditors, lists of creditors, or mailing list, $30, except:

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- The bankruptcy judge may, for good cause, waive the charge in any case.
- This fee must not be charged if –
  - o the amendment is to change the address of a creditor or an attorney for a creditor listed on the schedules; or
  - o the amendment is to add the name and address of an attorney for a creditor listed on the sched ules.

5. For conducting a search of the bankruptcy court records, $30 per name or item searched. This fee applies to services rendered on behalf of the United States if the information requested is available through electronic access.

6. For filing a complaint, $293, except:

- If the trustee or debtor-in-possession files the complaint, the fee must be paid only by the estate, to the extent there is an estate.
- This fee must not be charged if –
  - o the debtor is the plaintiff; or
  - o a child support creditor or representative files the complaint and submits the form required by § 304(g) of the Bankruptcy Reform Act of 1994.

7. For filing any document that is not related to a pending case or proceeding, $46.

8. Administrative fee for filing a case under Title 11 or when a motion to divide a joint case under Title 11 is filed, $46.

9. For payment to trustees pursuant to 11 U.S.C. § 330(b)(2), a $15 fee applies in the following circumstances:

- For filing a petition under Chapter 7.
- For filing a motion to reopen a Chapter 7 case.
- For filing a motion to divide a joint Chapter 7 case.
- For filing a motion to convert a case to a Chapter 7 case.
- For filing a notice of conversion to a Chapter 7 case.

10. In addition to any fees imposed under Item 9, above, the following fees must be collected:

- For filing a motion to convert a Chapter 12 case to a Chapter 7 case or a notice of conversion pursuant to 11 U.S.C. § 1208(a), $45.
- For filing a motion to convert a Chapter 13 case to a Chapter 7 case or a notice of conversion pursuant to 11 U.S.C. § 1307(a), $10.

The fee amounts in this item are derived from the fees prescribed in 28 U.S.C. § 1930(a).

If the trustee files the motion to convert, the fee is payable only from the estate that exists prior to conversion.

If the filing fee for the chapter to which the case is requested to be converted is less than the fee paid at the commencement of the case, no refund may be provided.

11. For filing a motion to reopen, the following fees apply:

- For filing a motion to reopen a Chapter 7 case, $245.
- For filing a motion to reopen a Chapter 9 case, $1000.
- For filing a motion to reopen a Chapter 11 case, $1167.
- For filing a motion to reopen a Chapter 12 case, $200.
- For filing a motion to reopen a Chapter 13 case, $235.
- For filing a motion to reopen a Chapter 15 case, $1000.

The fee amounts in this item are derived from the fees prescribed in 28 U.S.C. § 1930(a).

The reopening fee must be charged when a case has been closed without a discharge being entered.

The court may waive this fee under appropriate circumstances or may defer payment of the fee from trustees pending discovery of additional assets. If payment is deferred, the fee should be waived if no additional assets are discovered.

The reopening fee must not be charged in the following situations:

- to permit a party to file a complaint to obtain a determination under Rule 4007(b); or
- when a debtor files a motion to reopen a case based upon an alleged violation of the terms of the discharge under 11 U.S.C. § 524; or
- when the reopening is to correct an administrative error.

12. For retrieval of a record from a Federal Records Center, National Archives, or other storage location removed from the place of business of the court, $53.

13. For a check paid into the court which is returned for lack of funds, $53.

14. For filing an appeal or cross appeal from a judgment, order, or decree, $293.

This fee is collected in addition to the statutory fee of $5 that is collected under 28 U.S.C. § 1930(c) when a notice of appeal is filed.

Parties filing a joint notice of appeal should pay only one fee.

If a trustee or debtor-in-possession is the appellant, the fee must be paid only by the estate, to the extent there is an estate.

Upon notice from the court of appeals that a direct appeal or direct cross-appeal has been authorized, an additional fee of $157 must be collected.

15. For filing a case under Chapter 15 of the Bankruptcy Code, $1167.

This fee is derived from and equal to the fee prescribed in 28 U.S.C. § 1930(a)(3) for filing a case commenced under Chapter 11 of Title 11.

16. The court may charge and collect fees commensurate with the cost of providing copies of the local rules of court. The court may also distribute copies of the local rules without charge.

17. The clerk shall assess a charge for the handling of registry funds deposited with the court, to be assessed from interest earnings and in accordance with the detailed fee schedule issued by the Director of the Administrative Office of the United States Courts.

For management of registry funds invested through the Court Registry Investment System, a fee at a rate of 2.5 basis points shall be assessed from interest earnings.

18. For a motion filed by the debtor to divide a joint case filed under 11 U.S.C. § 302, the following fees apply:

- For filing a motion to divide a joint Chapter 7 case, $245.
- For filing a motion to divide a joint Chapter 11 case, $1167.
- For filing a motion to divide a joint Chapter 12 case, $200.
- For filing a motion to divide a joint Chapter 13 case, $235.

These fees are derived from and equal to the filing fees prescribed in 28 U.S.C. § 1930(a).

19. For filing the following motions, $176:

- To terminate, annul, modify or condition the automatic stay;
- To compel abandonment of property of the estate pursuant to Rule 6007(b) of the Federal Rules of Bankruptcy Procedure; or
- To withdraw the reference of a case or proceeding under 28 U.S.C. § 157(d).

This fee must not be collected in the following situations:

- For a motion for relief from the co-debtor stay;
- For a stipulation for court approval of an agreement for relief from a stay; or
- For a motion filed by a child support creditor or its representative, if the form required by § 304(g) of the Bankruptcy Reform Act of 1994 is filed.

[20. For filing a transfer of claim, $25 per claim transferred.][2]

2. This fee will be effective May 1, 2013.

Electronic Public Access Fee Schedule

Effective October 1, 2012

As directed by Congress, the Judicial Conference has determined that the following fees are necessary to reimburse expenses incurred by the judiciary in providing electronic public access to court records. These fees shall apply to the United States unless otherwise stated. No fees under this schedule shall be charged to federal agencies or programs which are funded from judiciary appropriations, including, but not limited to, agencies, organizations, and individuals providing services authorized by the Criminal Justice Act, 18 U.S.C. § 3006A, and bankruptcy administrator programs. Furthermore, the fee increase from eight cents per page to ten cents per page has been suspended for local, state, and federal government entities until April 1, 2015.

I. For electronic access to court data via a federal judiciary Internet site: ten cents per page, with the total for any document, docket sheet, or case-specific report not to exceed the fee for 30 pages – provided however that transcripts of federal court proceedings shall not be subject to the 30-page fee limit. For electronic access to an audio file of a court hearing via a federal judiciary Internet site: $2.40 per audio file. Attorneys of record and parties in a case (including pro se litigants) receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. No fee is owed under this provision until an account holder accrues charges of more than $15 in a quarterly billing cycle. Consistent with Judicial Conference policy, courts may, upon a showing of cause, exempt indigents, bankruptcy case trustees, individual researchers associated with educational institutions, courts, section 501(c)(3) not-for-profit organizations, court appointed pro bono attorneys, and pro bono ADR neutrals from payment of these fees. Courts must find that parties from the classes of persons or entities listed above seeking exemption have demonstrated that an exemption is necessary in order to avoid unreasonable burdens and to promote public access to information. For individual researchers, courts must also find that the

Continued page 24

defined research project is intended for academic research, and not for commercial purposes or internet redistribution. Any user granted an exemption agrees not to sell for profit the data obtained as a result. Any transfer of data obtained as the result of a fee exemption is prohibited unless expressly authorized by the court. Exemptions may be granted for a definite period of time and may be revoked at the discretion of the court granting the exemption.

II. For printing copies of any record or document accessed electronically at a public terminal in the courthouse: 10 cents per page. This fee shall apply to services rendered on behalf of the United States if the record requested is remotely available through electronic access.

III. For every search of court records conducted by the PACER Service Center, $30 per name or item searched.

IV. For the PACER Service Center to reproduce on paper any record pertaining to a PACER account, if this information is remotely available through electronic access, 50 cents per page.

V. For a check paid to the PACER Service Center which is returned for lack of funds, $53.

Request For Information

From: Stephanie Edmondson
Date: 8-31-2012 | To: Members of the Bar

In the absence of action by Congress and the White House on a deficit reduction plan, the Budget Control Act of 2011 calls for across-the-board cuts to federal agencies and programs. These cuts are slated to go into effect in January 2013. Various proposals to avoid sequestration have been offered in Congress but none emerging at this time appear to have the bipartisan support needed to avert sequestration.

Press reports abound with the impact of sequestration, including impacts at the state and local level. Budget cuts under sequestration would amount to a 7.8 percent cut to Judiciary funding below the fiscal year 2012 enacted level, a cut equal to the loss of $500 million throughout the federal court system. It has been reported to Congress that among other impacts to courts on a national level, this would result in the loss of thousands of court staff. For the year 2013, bankruptcy court allotments may be reduced as much as 24 percent.

There is no doubt that sequestration would affect the administration of justice, the local economy and the community. However, the argument that jobs will be lost, court services will be reduced and case management functions will become backlogged may not be compelling enough for Congress to reach a bipartisan decision to avert sequestration. Long term impacts on citizens and businesses served by the federal court system and administration of justice are of particular interest.

The Administrative Office of the U.S. Courts has asked that clerks of court reach out to their local bankruptcy bar and other external stakeholders to obtain feedback on how sequestration might impact you, your practice, your clients and our community. Please send any information or statements you would like us to include in the court's response to ***stephanie_edmondson@nceb.uscourts.gov*** no later than the close of business on Wednesday Sept. 5, 2012.

From: Jeremy Browner
Date: 9-11-2012 | To: Bankruptcy ListManager

The Judicial Conference of the United States today agreed to close six non-resident federal court facilities—the latest in a series of cost-cutting measures implemented by the federal Judiciary's national policy-making body.

Cost containment, a Judiciary-wide initiative dating back to 2004, has resulted in a close examination of nearly every Judiciary function and activity to determine if it is necessary, and if so, how it can be done more efficiently and at less cost. This effort is on-going.

Nevertheless, the "biggest threat to our fiscal health in the short term is budget sequestration," Judge Julia Gibbons, Chair of the Judicial Conference Budget Committee, told the Conference today.

"We estimate sequestration would cut the Judiciary's budget by more than $500 million below the 2012 funding level," Gibbons said. "Quite simply, a reduction of this magnitude would cripple the operations of the federal Judiciary and our constitutional mission would be compromised due to these sudden, arbitrary budget cuts."

(The Deficit Reduction Act requires automatic across the board spending cuts, known as sequestration, in January 2013, unless Congress adopts a deficit reduction plan.)

With regard to the court facilities to be closed, each contains a courtroom, but has no full-time resident federal judge. In determining whether a facility should be closed, consideration was given to the building's usage, location, condition, and operating costs. Closure of the following facilities will save the Judiciary a total of about $1 million a year in rent costs:

- Wilkesboro, North Carolina, (upon completion of the renovation of the courthouse in Statesville, North Carolina);
- Beaufort, South Carolina, (at the end of the lease term in 2014);
- Meridian, Mississippi;
- Amarillo, Texas, (upon the cancellation of the lease for the bankruptcy court space);
- Pikeville, Kentucky, (releasing the bankruptcy courtroom and chamber in leased space); and
- Gadsden, Alabama.

In other action, the Conference:

Asked each district court unit (district clerk's office, probation office, pretrial services office, and bankruptcy court) to work together to adopt a shared administrative services plan in an effort to achieve cost savings while preserving effective court operations and services.

Eliminated funding to print and mail court of appeals slip opinions – court opinions issued prior to formal publication in case reporters. This will achieve an annual savings of more than $1 million in printing and mailing costs. Courts may instead provide electronic copies of slip opinions.

Approved the national implementation of a program to provide access to court opinions through the Government Printing Office's Federal Digital System (FDsys). Nearly thirty federal courts currently participate in the pilot. The system provides free on-line access to official publications from all three branches of government and allows users to search, browse, and download content.

The 26-member Judicial Conference is the policy-making body for the federal court system. The Chief Justice serves as its presiding officer. Its members are the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade. The Conference meets twice a year to consider administrative and policy issues affecting the court system, and to make recommendations to Congress concerning legislation involving the Judicial Branch.

Reminder: Chapter 11 Fee Increase

As you may be aware, the Judicial Conference has approved an increase in the fee for filing a bankruptcy case under Chapter 11 of the Bankruptcy Code. This fee increase will apply to all Chapter 11 cases filed on or after Nov. 21, 2012. The total fee for filing a Chapter 11 case will increase to $1,213 (statutory fee of $1,167 under 28 U.S.C. § 1930(a)(3) plus the administrative fee of $46 under Item 8 of the Bankruptcy Court Miscellaneous Fee Schedule). In addition, the following fees will also be affected pursuant to the increase:

Item	Current Fee	New Fee
Chapter 9 petition	$1,046	$1,213
Chapter 15 petition	$1,046	$1,213
Motion to Sever Ch. 11	$1,046	$1,213
Motion to Convert Ch. 7 to 11	$755	$922
Motion to Convert Ch. 13 to 11	$765	$932
Motion to Reopen Ch. 11	$1,000	$1,167

Updated Census Bureau Median Family Income Data

On October 12, 2012, the U.S. Trustee program will post updated Census Bureau State Median Family Income data at:

http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm

North Carolina	*1 Earner*	*2 People*	*3 People*	*4 People**
11/1/2012 or after	$39,885	$50,762	$55,197	$63,665
05/1/2012-10/31/2012	$39,088	$50,248	$56,024	$67,089

* Add $7,500 for each individual in excess of 4.

The updated data will be applied to petitions filed on or after November 1, 2012.

Overcoming Your Fear of Asking for Business

By **Kimberly Alford Rice**

"I did not go to law school to be a salesperson."

The last place most lawyers thought they would be in after law school was in the position of selling their services, though the key to building a prosperous practice is to attract new clients and retain the ones you have. All of these transactions require lawyers to master some basic sales skills, and closing the sale is a non-negotiable part of the process.

For ages now, those of us in legal services have debated whether lawyers should be expected to "sell" to grow their client base. For many, the very word "sales" is an untenable reference. That is why in many law firms today we use the semantical reference "business development." Call it what you will, but there's no getting around the fact that in order to grow a legal practice, lawyers must be retained by new clients.

Given the reality that law schools, for the most part, do not adequately prepare lawyers to engage in the business of law (including sales), it is no wonder why the fear of directly asking for new business is just a perceived obstacle for many lawyers.

Below are some of the most common concerns clients have shared in the business development and sales training workshops I have conducted over the years as to why they do not directly ask for business.

• **Lawyers are uneasy with directly asking for business.** Given the lack of professional training (much less any practice) of how to actually ask for new business, most lawyers are uncomfortable having those conversations. While you don't want to appear scripted, my clients have fared well when they have a practiced approach of "getting to 'yes.'" One of the keys is to have statements, open-ended questions and responses to obstacles at the ready. As important to becoming more comfortable with asking for business is to practice in front of a mirror observing your intonations, facial gestures and other nonverbal cues.

In the ultra-competitive legal services environment, it is essential to be prepared and proactive in seeking new business. Lawyers can scarcely afford to allow sales opportunities to get past them because of their level of unease.

• **Fear of rejection.** This is exceedingly the top concern and fear of my lawyer clients in directly asking for new business. While understanding that no one enjoys hearing "no," I advise my law firm clients to separate a "no" from a personal rejection.

Often, when prospects say no, they actually mean "not now" or they do not understand how your services will help them solve or prevent a problem. It is the lawyers' task to proactively understand the prospects' needs and to clearly describe the value of their services to discern whether they are a good fit for the prospect.

That said, there are many aspects of a sales conversation that require being attentive to nonverbal behavior and other implied messages to help read a prospect's intentions.

• Lawyers fear prospects' negative perceptions. How many times have we heard, "I don't want to seem pushy" or "I don't want to seem like an ambulance driver" from colleagues when speaking of sales situations? The fact is lawyers' fears of negative perceptions will be reduced proportionately to how much they professionally learn and prepare for directly asking for new business. Directly asking for business is just not something a lawyer can easily "wing" and still present a professional approach.

Sure, a lawyer may have pals or family members who have small matters they can handle, but for the sought-after business, there needs to be a disciplined approach to fully understanding the issues and having a full understanding of your firm's range of services.

• **They are unclear on how to ask for business.** This is a different fear from being uncomfortable with asking for new business in that literally clients don't know what to say to prospects to lead to a "close." One of the most important techniques I teach my sales training clients is the art of the sales conversation.

The sales process becomes infinitely easier and more comfortable when clients can dissect and clearly understand what needs to happen to lead the prospect to "yes." When lawyers understand the process and how to logistically have the sales conversation, the fear usually dissipates.

Closing is an important part of the selling process, just as presenting a final argument is in the courtroom. Any successful litigator knows that any argument will fail without careful and thoughtful preparation and the same applies in closing a sale. What lawyer can afford to misappropriate even one selling opportunity in this highly competitive legal services environment?

• **Timing concerns.** It is a sign of a professional salesperson to clarify upfront the time required for a sales conversation as well as to understand the prospects' decision-making process and the key influencers who will be involved in authorizing the release of funds.

While you do not want to "spring" the final "let's do business" question on the prospect, the most productive sales conversations will include a series of open-ended questions (those those cannot be answered "yes" or "no") to understand the specific needs, the cost of doing nothing and whether your services are the best fit. The "big close" is effectively avoided by asking for a number of little decisions, i.e., gaining confirmation as each point is established, similar to a litigator when questioning a witness.

When preparing for a sales conversation, many lawyers suffer a strategic and tactical lapse, abandoning preparation and focusing instead on closing. Professional salespeople know that if the preparation is done properly, the closing is almost a non-event.

Successful rainmakers know that they can't rush the sale.

Equally, poor preparation guarantees failure in sales results just as in the courtroom regardless of how good the closing technique or argument. Rushing "the ask" often results in a negative response. Take your time to actively listen to your prospect's needs, challenges and concerns so that you are in a stronger position to offer help with a more assured understanding of needs and expectations.

• Fear of overcoming obstacles. When lawyers are prepared and have learned what prospects are willing to give up in time and money to get, it becomes easier to respond to objections. Objections are typically a sign that while a prospect may be interested in "buying" your services, you have yet to adequately describe how you can add enough value and help prevent or solve a problem.

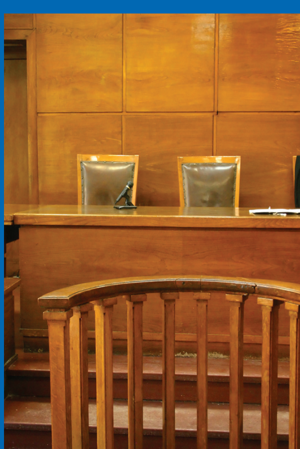
Again, asking incremental questions to gain an assurance of what the prospect is seeking to resolve and the precise demand triggers places you in a stronger position to differentiate yourself by presenting a unique value add obtainable only from you and your firm.

I often advise my clients to incorporate questions such as, "Is there anything I haven't addressed that is of concern to you or your organization?" Or: "Explain where we are not in alignment." By presenting only concrete examples of relevant situations and successful buying decisions by clients most like this buyer, making a buying decision will be much easier for the prospect, and selling will be easier for you.

At the end of the day, we are all buying and selling something every day. It is in the nuances of actively listening, asking appropriate open-ended questions to fully understand the underlying problems, the value of solving it, the cost of doing nothing, and guiding your prospect to the point of recognition that you are uniquely qualified and situated to best address the issue. Then, practice, practice, practice your delivery to convincingly communicate that your services are the best fit for your prospects' needs.

The great Vince Lombardi said it so eloquently: "The difference between a successful person and others is not a lack of strength, not a lack of knowledge, but rather a lack of will." •

Kimberly Alford Rice is principal of KLA Marketing Associates , a business development advisory firm focusing on legal services. She helps law firms and lawyers develop practical business development and marketing strategies. Additionally, she provides career management services to lawyers in transition. She may be reached at 609-458-0415 or kimberly@klamarketing.net.



Re: Absolute Priority Rule and Exemptions in Individual Chapter 11 Cases

QUESTION: Whether an individual chapter 11 debtor may retain exempt property without violating the absolute priority rule?

BRIEF ANSWER: Yes, recent case law indicates that allowing individual chapter 11 debtors to retain exempt property is the better interpretation of the code.

Discussion

A. Background

A court will confirm a proposed chapter 11 reorganization plan if it meets all the requirements of 11 U.S.C. § 1129(a). One of those requirements is that the proposed plan is consensual, i.e., that it obtain unanimous acceptance by all of the impaired classes.[1] A non-consensual plan may still be confirmed if (1) the plan meets all the other requirements in § 1129(a), and (2) "if the plan does not discriminate unfairly, and is fair and equitable" with respect to each class of claims of dissenting impaired creditors.[2] To be "fair and equitable" with respect to a class of unsecured creditors, the plan must either: (1) provide impaired, unsecured creditors with "property of a value, as of the effective date of the plan, equal to the allowed amount of the claim,"[3] or (2) the plan must satisfy the absolute priority rule.[4] Under the absolute priority rule, the holder of any claim or interest junior to the dissenter's claim may not "receive or retain under the plan on account of such junior claim or interest any property."[5] "The plain language of the statute makes it clear that a plan cannot give property to junior claimants over the objection of a more senior class that is impaired . . . ."[6] "Under current law, no [c]hapter 11 reorganization plan can be confirmed over the creditors' legitimate objections [ ] if it fails to comply with the absolute priority rule."[7]

Precedent regarding the individual chapter 11 debtor exemption fall into two major groups—those that follow the I**n re Henderson** opinion ("**Henderson** approach")[8] and those that follow the In re Gosman opinion ("**Gosman** approach").[9] In the wake of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") every jurisdiction presented with the individual chapter 11 debtor exemption issue has adopted the **Henderson** approach. No court has expressly followed the **Gosman** approach since BAPCPA. However, it should be noted that post-BAPCPA, some jurisdictions have held that the absolute priority rule does not apply to individual chapter 11 debtors, and therefore, never reached a specific exemption analysis.[10] Meanwhile, other jurisdictions, including the Fourth Circuit of Court of Appeals, have held that the absolute priority rule applies to individual chapter 11 debtors.[11]

B. Argument for Allowing Individual Chapter 11 Exemption

i. Henderson Approach | According to the **Henderson** approach, an individual chapter 11 debtor may keep exempt property over creditor objection without violating the absolute priority rule.[12] The court opined that "it appears that under a strict interpretation of § 1129(b)(2)(B)(ii)" a chapter 11 reorganization plan may not be confirmed if creditors object to individual exemptions;[13] however, the court said, "the bottom line is that it could not have been and was not the intention of Congress in enacting the absolute priority rule to compel a [d]ebtor to forfeit his exemption rights, notwithstanding that they are uniformly recognized throughout all operating [c]hapters of the [c]ode."[14] Over creditor objection, the court confirmed the debtor's plan with the proposed individual exemptions and expressly rejected the holding of **Gosman** and related precedent.[15]

With respect to a class of unsecured claims, the "fair and equitable" requirement under 11 U.S.C. § 1129(b)(2)(B)(ii) provides:

> [T]he 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.[16]

The **Henderson** court broke the "fair and equitable" requirement into three components: "(1) the identification of junior claims or interests; (2) the identification of any property retained by the holders of such claims or interests; and (3) the determination whether the property is retained 'on account of' a junior claim or interest."[17] The **Henderson** court evaluated each of these components in turn and held that none of them prohibit an individual chapter 11 debtor from claiming exemptions. It reasoned that "[o]nce [a debtor's] exemptions are allowed the [property is] no longer part of the [d]ebtor's estate, and the [d]ebtor does not retain property *on account of* such interest because he retains it as a matter of right by virtue of recognition of his right to exemptions."[18] The court continued, "A debtor's interest in exempt property can never be junior to the interest of creditor's including the claim of dissenting unsecured creditors . . . because unsecured creditors [can] never reach exempt property outside of bankruptcy, and such properties are immune and not subject to liquidation under any of the operating [c]hapters of the [c]ode."[19] Therefore, under a Henderson analysis, a debtor may retain exempt property without violating the absolute priority rule. Although "this result might be appalling in certain instances, the creditors are not without remedy" because creditors may seek a denial of the conformation of the plan by arguing that the plan was not proposed in good faith.[20]

*ii. Bankruptcy Court's Footnote in **Maharaj*** | Footnote four in the bankruptcy court's **Maharaj** opinion provides strong indication that, if presented with the issue, that court would allow an individual chapter 11 debtor to retain exempt property over creditor objection.[21] Although not binding precedent on bankruptcy courts in North Carolina, the Fourth Circuit's opinion left the footnote unaddressed, neither embracing nor rejecting the footnote. Footnote four reads as follows:

> Prior to BAPCPA, there was a division of opinion as to whether an individual debtor's retention of exempt property violated the absolute priority rule. Compare **In re Gosman**, 282 B.R. 45 (Bankr. S.D. Fla. 2002) (holding that absolute priority rule was not satisfied even if the property retained was exempt), with **In re Egan**, 142 B.R. 730, 733 (Bankr. E.D. Pa. 1992) ("[I]f debtors intend to retain only exempt property, then they are merely retaining that which is their absolute right to retain in any event, and they are not, properly speaking, receiving or retaining 'any interest that is junior to the interests' of any class of creditors"). Because the debtors here are retaining property in excess of what they have claimed exempt, the court need not reach that issue. The **Egan** analysis, however, does seem more consistent with § 1123(c), Bankruptcy Code, which prohibits anyone other than the debtor from proposing a plan that provides for the use, sale, or lease of exempt property, and for that reason the court is inclined to hold that retention of exempt property does not violate the absolute priority rule."[22]

C. Argument for Not Allowing Individual Chapter 11 Exemptions

Courts following the **Gosman** approach hold that individual chapter 11 debtors are not entitled to individual exemptions if senior, unsecured creditors in an impaired class object to the proposed plan because § 1129(b)(2)(B)(ii) specifically provides that the absolute priority rule applies to "any property" of the debtor.[23] Congress did not make a distinction between exempt and non-exempt property as they do in other parts of the code, and **Gosman** argues that if Congress intended to narrow the scope of "any property" it would have made that apparent in the code.[24]

Gosman courts rely heavily on the United States Supreme Court's broad interpretation of the term "any property" in § 1129(b). For example, in **Bank of America National Trust and Savings Assoc. v. 203 North LaSalle Street Partnership**, 526 U.S. 434, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999), [the SOCTUS] concluded that the word "property" as used in Section 1129(b)(2)(B)(ii) was broad enough to cover even the exclusive opportunity to propose a plan in a Chapter 11 bankruptcy. As such, it is certainly broad enough to cover exempt property."[25] Thus, under the **Gosman** approach, the retention of "any property" includes property that would otherwise be treated as exempt.[26]

Courts adopting **Gosman** acknowledge that the term "'any property' property may be felt to be harsher on the individual than on the corporate Chapter 11 debtor,"[27] but contend that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."[28] Additionally, courts adopting the **Gosman** approach note that the unavailability of individual exemptions does not mean that § 1129(b)(2)(B)(ii) is wholly unavailable to individual chapter 11 debtors—cram down is still available to individuals paying creditors 100% of their claims and the new value exception to the absolute priority rule is available to individual chapter 11 debtors.[29]

D. Conclusion

Post-BAPCPA the **Henderson** approach is more popular and appears to be the trend in jurisdictions that have held that the absolute priority rule applies to individual chapter 11 debtors. At least three different bankruptcy courts have adopted the **Henderson** approach, and there is strong support that the eastern district of Virginia will continue the trend, if they are presented with this question. Although the Gosman approach was more popular pre-BAPCPA, no jurisdiction has followed it since and, at least one jurisdiction that followed Gosman pre-BAPCPA, now adopts the **Henderson** approach.[30]

End Notes

1. 11 U.S.C. § 1129(a)(7)(A)(i).
2. 11 U.S.C. § 1129(b)(1).
3. 11 U.S.C. § 1129(b)(2)(B)(i).
4. 11 U.S.C. § 1129(b)(2)(B)(ii).
5. *Id.*
6. **In re Armstrong World Indus., Inc.**, 432 F.3d 507, 513 (3d Cir. 2005) (corporate chapter 11 debtor).
7. **Norwest Bank Worthington v. Ahlers**, 485 U.S. 197, 202, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988) (chapter 11 debtors operating family farm).
8. *See* **In re Henderson**, 321 B.R. 550 (Bankr. M.D. Fla. 2005) aff'd, 341 B.R. 783 (M.D. Fla. 2006) (finding no violation of the absolute priority rule and confirming a reorganization plan that allowed the debtor to retain exempt property with a fair market value of over $3.5 million (consisting of a homestead, an insurance policy, and an individual retirement account)); *see also* **In re Egan**, 142 B.R. 730 (Bankr. E.D. Pa. 1992) (holding that a Chapter 11 plan could be confirmed, despite rejection of plan by debtor's unsecured creditors, where debtor's claim of exemptions of all their property was conclusively established); **In re Bullard**, 358 B.R. 541, 544 (Bankr. D. Conn. 2007) ("The better line of authority holds that the debtor's retention of his exempt property does not offend Section 1129(b)(2)(B)(ii) because such retention is not 'on account of ... [the debtor's] junior interest …' in property . . ."); **In re Steedley**, 09-50654, 2010 WL 3528599 (Bankr. S.D. Ga. Aug. 27, 2010) ("An individual chapter 11 debtor may keep exempt property without violating the absolute priority rule.").
9. *See* **In re Gosman**, 282 B.R. 45 (Bankr. S.D. Fla. 2002) (holding that, according to the plain language of § 1129(b)(2)(B)(ii), the term "any property" includes property which is exempt property); *see also* **In re East**, 57 B.R. 14 (Bankr. M.D. La. 1985) ("[I]f the Debtor retains any property, even control or the potential for future earnings, the cramdown provisions of Section 1126(b)(2)(B)(ii) are not met."); **In re Yasparro**, 100 B.R. 91 (Bankr. M.D. Fla. 1989) (expressly following In re East); **In re Johnson**, 101 B.R. 307 (Bankr. M.D. Fla. 1989) ("The term "property" includes all property in which the Debtor has a cognizable, legal or equitable interest on the date of the commencement of the case.").
10. *See* **Friedman v. P+P, LLC** (**In re Friedman**), 466 B.R. 471 (9th Cir. BAP 2012) ("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."); **SPCP Group, LLC v. Biggins**, 465 B.R. 316, 320–24 (M.D. Fla. 2011) (plain reading analysis); In re Tegeder, 369 B.R. 477, 479–81 (Bankr.D. Neb. 2007) ("the absolute priority rule no longer applies to individual debtors who retain property of the estate under § 1115" [which includes property described in § 541]); **In re Roedemeier**, 374 B.R. 264, 273–76 (Bankr.D. Kan. 2007) ("Taken together, these changes indicate Congress intended to extend the exemption from the absolute priority rule to individual Chapter 11 debtors as well."); **In re Shat**, 424 B.R. 854, 862–68 (Bankr.D.Nev.2010) (finding ambi-

Continued page 30

guity and using a legislative intent analysis); *see also* **In re Johnson**, 402 B.R. 851, 852–53 (Bankr. N.D. Ind. 2009) (dicta that individual Chapter 11 debtor's plan need not satisfy the absolute priority rule of 11 U.S.C. § 1129(b)(2)(B)(ii)).

11. *See* **In re Maharaj**, 449 B.R. 484, 492-93 (Bankr. E.D. Va. 2011) aff'd, 681 F.3d 558, 569-72 (4th Cir. 2012); **In re Mullins,** 435 B.R. 352, 360 (Bankr. W.D. Va. 2010) (plain reading analysis); **In re Gelin**, 437 B.R. 435, 441 (Bankr. M.D. Fla. 2010) (finding ambiguity and using a legislative intent analysis); **In re Gbadebo**, 431 B.R. 222, 227 (Bankr. N.D. Cal. 2010); **In re Karlovich**, 456 B.R. 677, 680 (Bankr. S.D. Cal. 2010); **In re Walsh**, 447 B.R. 45, 48-49 (Bankr.D. Mass. 2011); **In re Stephens**, 445 B.R. 816, 820-21 (Bankr. S.D. Tex. 2011); **In re Kamell**, 451 B.R. 505, 512 (Bankr. C.D. Cal. 2011); **In re Lively**, 467 B.R. 884, 887 (Bankr. S.D. Tex. 2012).

12. **Henderson**, 341 B.R. at 559

13. *Id.*

14. *Id.*

15. *Id.* at 561.

16. 11 U.S.C. § 1129(b)(2)(B)(ii) (emphasis added).

17. **Henderson**, 341 B.R. at 559.

18. *Id.*

19. *Id.* at 560

20. *Id.; see also* 11 U.S.C. § 1129(a).

21. **In re Maharaj**, 449 B.R. 484, 493 n.4 (Bankr. E.D. Va. 2011).

22. *Id.*

23. *See* **In re Gosman**, 282 B.R. 45, 49 (Bankr. S.D. Fla. 2002); *see also* **Matter of Yasparro,** 100 B.R. 91, 95 (Bankr. M.D. Fla. 1989) (subsequently rejected by **Henderson**);

24. *Id.*

25. *Id.* (internal citations omitted).

26. *Id.*

27. **Yasparro**, 100 B.R. at 95 (citing In re East, 57 B.R. 14, 18 (Bankr. M.D. La. 1985)).

28. **Norwest Bank Worthington v. Ahlers**, 485 U.S. 197, 206, 108 S. Ct. 963, 969, 99 L. Ed. 2d 169 (1988).

29. **Yasparro**, 100 B.R. at 95-96.

30. Compare **Henderson**, 321 B.R. 550 (Bankr. M.D. 2005) aff'd, 341 B.R. 783 (M.D. Fla. 2006), with **Yasparro**, 100 B.R. 91 (Bankr. M.D. Fla. 1989).

Recent Changes to North Carolina Mechanics Lien and Payment Bond Law

By Matt Martin, Anna B. Osterhout, and Wayne K. Maiorano

The confusion about the treatment of subcontractor lien claims in bankruptcy arising after the **Shearin, Mammoth, Harrelson, and Construction Supervision Services** decisions has been well-documented.[1] During the 2012 legislative session, the N.C. General Assembly attempted to clarify subcontractor lien rights by enacting Senate Bill 42 and House Bill 1052. These bills also change other aspects of North Carolina's lien and bond law. This article will summarize the changes that should resolve the current split of authority in the Eastern District of North Carolina regarding post-petition service of subcontractor liens upon funds as well as the other changes in lien and bond law.

Subcontractor/Supplier Claims of Lien Upon Funds in Bankruptcy. New N.C.G.S. § 44A-18(f), effective Jan. 1, 2013, provides that a lien upon funds owed on a project "arises, attaches, and is effective immediately upon the [subcontractor's] first furnishing of labor, materials, or rental equipment." This new language removes the statutory underpinning for the Courts' analysis in the **Shearin**, **Mammoth**, and **Harrelson** decisions. These cases interpreted the prior statutory language – that a lien upon funds "is perfected upon the giving of notice" – to mean that a lien on funds did *not* give rise to any interest in the funds until it had been properly served. Since these opinions concluded that no interest arose prior to service, post-petition service of a notice of claim of lien upon funds violated the automatic stay, did not fall within the § 362(b)(3) exception for pre-petition interests that were merely perfected post-petition, and thus was void and ineffective to perfect the lien upon funds. In **Construction Supervision Services,** Judge Doub reached a different conclusion finding that the post-petition service of a notice of claim of lien upon funds is a permitted exception to the automatic stay pursuant to § 362(b)(3).[2] These conflicting results gave rise to a split of authority in the Eastern District of North Carolina.

The amended statute should resolve this split of authority. It provides that the lien claimant's interest arises at the first furnishing of labor or materials. As such, service of a claim of lien upon funds to perfect the lien claimant's interest post-petition falls within the exceptions to the automatic stay provided in §362(b)(3). (To avoid confusion concerning use of funds during construction, new § 44A-18(g) states that, until the lien upon funds is served, the funds against which the lien attaches can be used in the ordinary course of business without limitation.) In effect, the change concerning liens upon funds clearly preserves a subcontractor's right to pursue a lien upon funds against project-related proceeds, even after a party higher in the contract chain files for bankruptcy protection.

Overview of Lien and Bond Law Changes. The payment rights and obligations of everyone involved in a construction project will be impacted when the changes take effect early next year. In short, parties now should act when they begin work to protect their real property lien[3] and bond claim rights, or risk losing them.

New Requirements for Liens on Real Property on Private/Non-Government Projects. New sections 44A-11.1 and 44A-11.2 require the use of a "lien agent," a company whose duty is to track information concerning parties who may have potential real property lien rights. The idea behind the lien agent is to create an easy and early way to identify potential lien claimants and avoid the risk of unknown claims arising after the property is sold or refinanced. Parties with lien rights have to give notice to the lien agent, and failure to give timely and full notice may result in the loss of lien rights. The law now requires:

• *Property/Project Owners:* Pursuant to 44A-11.1(a), for any project with a contract price greater than $30,000 (except a single-family home renovation where the home is the owner's residence), the property owner must appoint a title insurance company, who is a registered lien agent with the Department of Insurance, as a lien agent before entering into the first contract concerning the improvements to the property. The owner must provide the lien agent with specific information concerning the project as set forth in 44A-11.1(a). The owner must also notify others of the lien agent's contact information by posting it at the project site, and, if anyone makes a written request for it, the owner must provide it within seven days of the request. (effective April 1, 2013)

• *Contractors and Subcontractors*: To preserve their lien rights, contractors and subcontractors should provide written notice to the lien agent within 15 days of first furnishing labor or materials, though fail-safe measures in N.C.G.S. § 44A-11.2(k) allow lien claimants to protect lien rights as long as notice is given prior to transfer or refinancing of the property. Exceptions exist for single-family home builders if the identity of the lien agent is included in the construction contract. N.C.G.S. § 44A-11.2(g). Contractors and subcontractors must also provide the lien agent's contact information to any subcontractors who are not required to furnish labor at the project site within three days of entering into such subcontracts. N.C.G.S. § 44A-11.2(c). Failure to provide this notice exposes contractors and subcontractors to potential claims for damages. (effective April 1, 2013)

• *Subcontractors*: In certain circumstances, to properly perfect its rights to a claim of lien, the revisions to §44A-11 require a subcontractor to serve its claim of lien on both the owner and the contractor. Of particular note for bankruptcy practitioners assessing priority of claims, in completing the claim of lien, revised §44A-23(a) allows the subcontractor to use either its first and last date of furnishing labor or materials, or that of the contractor. (effective January 1, 2013)

• *Design Professionals*: To be safe, architects, engineers, and surveyors should provide notice to the lien agent within 15 days of first work. However, §44A-11.2(g1) includes a limited exception in circumstances when the owner does not include the identity of the lien agent in the design contract. If the design contract does not identify the lien agent, then the designer is deemed to have given notice at the time the owner appoints the lien agent. (effective April 1, 2013)

New Requirements for Payment Bond Claims on Public/Government Projects. Similarly, the law now provides for advance notice of potential payment bond claims on public projects. Subcontractors who do not provide the required notice risk losing the right to recover the full amount of their claim from the bond. Payment bonds are generally required on public projects because liens cannot be asserted against publicly-owned property. The law now requires:

• *Contractors*: Pursuant to revised §44A-27(b), contractors must provide a copy of the payment bond within seven days of receiving a written request from a subcontractor or supplier on a public project. Under §44A-27(f), contractors must also prepare a "contractor's project statement" (including details about the project, owner, contractor, bond surety, and the contractor's agent designated to receive notices required by the statute) and furnish it to each of their subcontractors at the time they enter into each respective subcontract. (effective January 1, 2013)

• *First-tier Subcontractors*: At the time of contracting, first-tier subcontractors must provide their subcontractors with a copy of the "contractor's project statement." N.C.G.S. § 44A-27(f)(2), (3). (effective January 1, 2013)

• *Lower-tier Subcontractors*: In order to secure the right to assert a bond claim for the full amount being claimed, subcontractors who are "second-tier" and lower must provide to the general contractor's designated agent a "notice of public subcontract." This notice must include details about the project, the labor or materials provided, and the parties in the contract chain. The statute does not specify when the notice must be provided; however, bond claims are limited to labor or materials provided by the subcontractor within the 75-day period before service of the notice of public subcontract. N.C.G.S. § 44A-27(b). Therefore, the notice should be provided as close as possible to when labor or materials are first provided to the project. An exception exists allowing subcontractors to assert bond claims of $20,000 or less even if they have not served notices of public subcontract. N.C.G.S. § 44A-27(e). (effective Jan. 1, 2013)

Effect of Lien Waivers. Revisions to § 44A-20(d) make explicit what many construction practitioners considered implicit under prior law: execution of a lien waiver by the general contractor can cut off the subcontractor's subrogation lien rights against the real property, but cannot cut off a subcontractor's right to a lien upon funds or a subsequent direct lien right on property that may arise by operation of law if the recipient of the lien upon funds pays over the lien upon funds without holding back adequate money to satisfy the lien upon funds. (effective Jan. 1, 2013)

Conclusion. Bankruptcy practitioners would be well-advised to consult the new lien and bond laws when evaluating rights, interests, and priorities in bankruptcy cases involving businesses in the real estate or construction industry. Given the scope and nature of the changes, it will take time—and the development of case law from North Carolina's state and federal courts—to fully understand the impact of the new laws, but certainly the landscape has shifted. •

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End Notes

1. *See* **In re Shearin Family Investments, LLC**, Case No. 08-07082-8-JRL, 2009 WL 1076818 (Bankr. E.D.N.C. April 17, 2009); **In re Harrelson Utilities, Inc.**, 2009 WL 2382570 (Bankr. E.D.N.C. July 30, 2009); **In re Mammoth Grading, Inc.**, No. 09-01286-8-ATS (Bankr. E.D.N.C. July 31, 2009); **In re Construction Supervision Services, Inc.**, 2012 WL 892217, Case No. 12-00569-RDD, Docket No. 175 (Bankr. E.D.N.C. March 14, 2012).

2. The **Mammoth** opinion was appealed to the United States District Court. The appeal was vacated as being moot. However, in the order vacating and remanding the **Mammoth** order, the District Court expressed concerns regarding the rulings in **Mammoth** and **Harrelson**. In the **Construction Supervision Services** opinion, Judge Doub noted that the District Court's comments, while dicta, were instructive. The Construction Supervision Services opinion was appealed by a secured creditor in the case. As of the date of this article, no order has been entered resolving the issues on appeal.

3. Subcontractors maintain the right to assert both a lien upon funds and a lien on real property. Other than the clarification concerning when liens upon funds arise, the statutory changes primarily impact liens on real property.

Date: October 24, 2012 | To: The Honorable Judge Leonard | From: Michael Maloney

Re: Application of the New Value Exception to Consumer Chapter 11 Cases

QUESTION: Whether an individual chapter 11 debtor may use the new value exception, and if so, what are permissible sources of new value?

BRIEF ANSWER: The new value exception is permitted in consumer chapter 11 cases. However, there are few cases in which an individual debtor successfully uses the new value exception because there are few sources of new value.

I. The New Value Exception

"The new value [exception to the absolute priority rule] is a common law construct that is premised on the idea that shareholders in a company undergoing Chapter 11 reorganization may, under certain circumstances, retain their interest in the company not as a result of their prior ownership, but because they inject new value into the entity."[1] "[T]he following factors are generally considered when the debtor seeks to add value: (1) is it new; (2) substantial; (3) money or money's worth; (4) necessary for reorganization; and (5) reasonably equivalent to the value or interest received."[2]

The United States Supreme Court has declined to affirmatively recognize the new value exception.[3] However, according to the Supreme Court, if the new value exception does exist, the new value offered by old equity must be deemed fair under some sort of market valuation.[4] This market valuation requirement can be satisfied by allowing competing plans to be filed, or by allowing all parties to bid for the same interest sought by old equity.[5]

The Ninth and Seventh Circuit Court of Appeals affirmatively recognize the new value exception.[6] In a 1992 Fourth Circuit Court of Appeals decision, the court denied plan confirmation when a debtor attempted to use the new value exception.[7] This is the only Fourth Circuit Court of Appeals decision addressing the new value exception. Nonetheless, this decision does not affirmatively find the new value exception invalid.[8] Within the Fourth Circuit at least two bankruptcy court opinions and one district court opinion address the new value exception. These opinions suggest bankruptcy courts within the Fourth Circuit generally recognize the new value exception.

II. Court Opinions within the Fourth Circuit on The New Value Exception

In **Deep River Warehouse**,[9] the bankruptcy court denies a creditor's motion for relief from stay.[10] The plan proposed by the debtor includes an attempt to demonstrate a new value exception to the absolute priority rule. In the opinion, the court interprets **LaSalle** as permitting the use of the new value exception in certain circumstances.[11] The court finds it is far from certain the plan proposed will be passed. Nevertheless, the court finds the debtor filed a plan of reorganization that has a reasonable possibility of being confirmed, and thus denies the motion.

In **Smithville Crossing, LLC**,[12] the court permits the sole equity owners of the debtor to utilize the new value exception.[13] However, when conducting an auction, as required by the new value exception market test requirement, old equity was outbid by the debtor's subsidiary.[14]

In **H.G. Roebuck & Son, Inc. v. Alter Communications, Inc.**,[16] the United States District Court for the District of Maryland discusses at length the new value exception and LaSalle.[16] In this case two individuals owned, operated, and managed the debtor company.[17] Under the Chapter 11 plan, the debtor's existing shareholders retained 85% interest in the reorganized company, and impaired creditors received 15% interest.[18] At the confirmation hearing, an expert estimated the value of the reorganized debtor.[19] The court found the bankruptcy court failed to satisfy the new value exception's market valuation requirement. Under **LaSalle**, market valuation requires the bankruptcy court conduct actual market testing.[20] According to the district court, an expert's opinion regarding the value of a company cannot be substituted for actual exposure to the market.[21]

III. Application of the New Value Exception to an Individual Non-Business Debtor

An individual non-business debtor, also known as a consumer debtor, in chapter 11 bankruptcy can have an interest in an ongoing enterprise which is not an independent business association.[22] For example, courts have recognized that consumer debtors operating farms have "interests in their estates in the form of equitable ownership interests."[23] Under this circumstance, strategic use of the new value exception may be appropriate.

According to court opinions outside the Fourth Circuit, the new value exception has been extended to an individual non-business debtor.[24] However, application of the new value exception to the consumer context is not very successful.[25] Individual non-business debtors must disclose the source and nature of the proposed new value and the court must determine it is truly from a new source.[26] This requirement of the new value exception is particularly difficult for a consumer debtor to satisfy. Once an individual non-business debtor files chapter 11, the debtor's assets become part of the estate. Unlike a corporate debtor which has third party shareholders, in a consumer chapter 11 the debtor is also old equity. Consequently, unlike the shareholders in a corporate chapter 11, old equity in a consumer chapter 11 has restricted access to capital as a result of the formation of the estate.[27]

In addition to the new value requirement, the money or money's worth requirement is particularly difficult for a consumer debtor in chapter 11 to satisfy. An individual debtor's labor, experience, or expertise is not considered new value under the exception.[28] Furthermore, the market test must be applied to ensure the debtor is contributing full fair value, and a proposed contribution of future services is inadequate to qualify as sufficient new value.[29] Payments out of expected future salary also do not constitute new value.[30]

However, application of the new value exception to an individual non-business debtor is possible, and there are a few court opinions in which consumer debtors successfully use the new value exception. In **Henke**,[31] a 1988 bankruptcy court opinion from the District of Montana, a farmer seeking to retain equity in his farm provided sufficient new value using income he received from the sale of a device he invented pre-petition.[32] According to the court, the income he received from these sales was "wholly independent of his farm income."[33] Furthermore, the income contributed was $680,000 which far exceeded the outstanding unsecured debt.[34] At least through July of 1992, **Henke** was the only individual chapter 11 which successfully used the new value exception.[35]

Courts have also permitted parties outside the bankruptcy to contribute capital allowing the debtor to retain non-exempt property under the new value exception. In **Henderson**,[36] a 2006 district court opinion from the Middle District of Florida, the court allowed the debtor to keep non-exempt property that had a fair market value of $410,600.[37] The retention of non-exempt property was permitted under the new value exception because the debtor's wife, who was not a party to the bankruptcy proceedings, contributed a $525,000 payment to the plan.[38] Additionally, the court found the status of the $525,000 payment as pending did not preclude proper confirmation of the plan.[39] Similarly, in **Draiman**,[40] a 2011 bankruptcy court opinion from the Northern District of Illinois, the debtor was permitted to keep non-exempt assets including office equipment, furnishings, supplies, certain management agreements, and personal household items including a 1999 Jaguar.[41] To satisfy the new value exception, the debtor listed in his disclosure statement that the "[d]ebtor ha[d] secured a commitment from . . . a business associate, to provide funds necessary to make [a] $100,000 payment."[42] According to the court, there was no evidence the $100,000 was not outside funding.[43] Additionally, the $100,000 was considered reasonably equivalent to the value of the assets retained by old equity. The court concluded that the $100,000 contribution by the debtor's business associate was permissible new value and allowed the debtor to keep non-exempt assets.[44]

Other courts have acknowledged permissible sources of new value. For example, the new value could be a gift to the debtor from a friend or relative.[45] However, a third party's promise to make a future payment throughout the life of the Chapter 11 plan is not new value.[46]

IV. Conclusion

Case law indicates the new value exception is rarely successfully used in consumer bankruptcy cases. However, bankruptcy courts consistently recognize that the new value exception is available, and application is possible. Henderson is particularly important because the bankruptcy court discusses the role of exempt property in a consumer chapter 11 bankruptcy. This case seems to indicate that a consumer debtor can sell their exempt property, and use the funds from this sale to provide new value.

End Notes

1. **H.G. Roebuck & Son, Inc. v. Alter Communications, Inc.**, RDB-11-0157, Bankr. No. 10-182401, 2011 WL 2261483, at *5 (D. Md. June 3, 2011).

2. **In re Henderson**, 341 B.R. 783, 791 (Bankr. M.D. Fla. 2006).

3. In re 203 LaSalle Street Partnership, 526 U.S. 434, 445 (1999) ("We do not decide whether the statute includes a new value corollary.").

4. *Id.* at 457.

5. *Id.* These two market valuation methods have been referred to by at least one court as the "non-exclusive" approach and market approach. *See* **In re Davis**, 262 B.R. 791, 799 (Bankr. D. Ariz. 2001).

6. *See* **In re 203 LaSalle Street Partnership**, 126 F.3d 955, 964-64; **In re Bonner Mall Partnership**, 2 F.3d 899, 910-16 (9th Cir. 1993).

7. *See* **Travelers Ins. Co. v. Bryson Properties, XVIII (In re Bryson Properties, XVIII)**, 961 F.2d 496, 504-05 (4th Cir. 1992).

8. *See* **Travelers Ins. Co. v. Bryson Properties, XVIII (In re Bryson Properties, XVIII)**, 961 F.2d 496, 504 (4th Cir. 1992) ("This combination of factors leads us to conclude that even if some limited new capital exception were viable under the Bankruptcy Code, it would not be so expansive as to apply under the facts of this case.").

9. **In re Deep River Warehouse, Inc.**, No. 04-52749, 2005 WL 1287987 (Bankr. M.D.N.C. Mar. 14, 2005) (denying creditors motion for relief from automatic stay and ordering Debtor to commence adequate protection payments).

10. *Id.* at *12.

11. *Id.* at n. 11 ("[T]he [Supreme] Court opined that so long as a transaction was at full value then it posed no threat to the bankruptcy estate making it irrelevant whether the new value came from an old equity holder or an unrelated third party.").

12. **In re Smithville Crossing, LLC**, No. 11-02573-8-JRL, 2012 WL 259947 (Bankr. E.D.N.C. Jan. 27, 2012) (requiring debtor to inform court whether winning bidder will pledge real estate to financier of plan in exchange for equity interest in reorganized debtor).

13. *Id.* at *1.

14. *Id.*

15. **H.G. Roebuck & Son, Inc. v. Alter Communications, Inc.**, RDB-11-0157, Bankr. No. 10-182401, 2011 WL 2261483 (D. Md. June 3, 2011) (reversing bankruptcy order and remanding with instructions to enter Order terminating exclusivity and allowing competing reorganization plans as required by **LaSalle**).

16. *Id.* at *1.

17. *Id.*

18. *Id.* at *2.

19. *Id.* at *3.

20. *Id.* at *7.

21. *Id.* at *7.

22. **In re Drimmel** 108 B.R. 284, 287-88 (Bankr. D. Kan. 1989) (finding farmer has interest in sole proprietorship farm even if business is insolvent on petition date because farmer has control and possession of tangible and intangible assets of business and therefore holds ownership interest in business; furthermore, this equity interest is "property").

23. **In re Davis**, 262 B.R. 791, 796 (Bankr. D. Ariz. 2001) (quoting **Unruh v. Rushville State Bank of Rushville, Missouri**, 987 F.2d 1506, 1508 (10th Cir.1993)).

24. *See, e.g.*, **In re Rocha**, 179 B.R. 305, 307-08 (Bankr. M.D. Fla. 1995).

25. **In re Bolton**, 188 B.R. 913 (Bankr. D. Vt. 1995) (denying confirmation of chapter 11 plan under which debtor physician practicing under aegis of his

professional corporation sought to retain his equity interest in non-exempt assets of the medical practice while unsecured creditors are not paid in full because contribution of future management services is insufficient to satisfy new value exception's money or money's worth requirement).

26. **In re Davis**, 262 B.R. 791, 799 (Bankr. D. Ariz. 2001) (recognizing LaSalle allows individual Chapter 11 debtors to utilize new value exception permitting debtors to retain equitable ownership interest in rent-producing properties). In addition to ensuring the new value is from a new source, the market test must be applied to ensure debtors are contributing full value. *Id* at 799.

27. *See Id.* at 798 ("The difficulty with extending the new value exception to an individual is that the new value must come from an 'outside' source, meaning it cannot come from the Debtor himself."). *See also* Stanley E. Goldich, Plain-Meaning Rules: Did BAPCPA Abolish the Absolute-Priority Rule? 31 AM. BANKR. INST. J 34 (June 2012) ("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.").

28. *See* **Norwest Bank Worthington v. Ahlers**, 485 U.S. 197, 202 (1988) (finding reorganization plan in which individual, non-business, debtors retain interest in farm is contrary to the absolute priority rule and contribution of labor, experience, and expertise is insufficient to gain benefit of new value exception).

29. **Norwest Bank Worthington v. Ahlers**, 485 U.S. 197, 203 n. 3 (1988); **In re 203 LaSalle Street Partnership**, 526 U.S. 434, 443 (1999). *See* **In re Tucker**, 2011 WL 5926757, at *2 (Bankr. D. Or. 2011) (finding unsecured promise to payments out of expected future salary does not constitute "new value" for purposes of the new value exception and future payments do not constitute "money or money's worth," under **Ahlers** because the payments "cannot be exchanged in any market for something of value to the creditors at the time the plan is confirmed").

30. **In re Tucker,** 2011 WL 5926757, *2 (Bankr. D. Or. 2011) (denying confirmation of plan for failure to meet requirements of absolute priority rule and finding individual chapter 11 debtors and owners of tanning salon business can utilize new value exception, but promise of payments out of anticipated future salary is insufficient to satisfy exception).

31. **In re Henke**, 90 B.R. 451, 452 (Bankr. D. Mont. 1988).

32. *See Id.*

33. *Id.*

34. *Id.* at 456.

35. *See* **In re Harmon**, 141 B.R. 878, 888 (Bankr. E.D. Penn.) ("The Henke case . . . was the exception that proved the rule: the contribution was a very large sum, sufficient to pay all unsecured claims, from a source totally unrelated to the debtor's farm operations.").

36. *Id.* at 789-90 (M.D. Fla. 2006) (finding absolute priority rule applies to consumer debtor and this type of debtor must give up his exempt property in order to obtain chapter 11 relief if the exemption is objected to).

37. *Id.* 790.

38. *Id.*

39. *Id.* at 791.

40. **In re Draiman**, 450 B.R. 777, 822-23 (Bankr. N.D. Ill. 2011) (finding the debtor qualified for the new value exception and was able to keep nonexempt assets of the bankruptcy estate because debtor's business associate contributed $100,000).

41. *Id.* at 821.

42. *Id.* at 822 (quoting Debtor Ex. No. 6 at p. 36).

43. *Id.*

44. *Id.* at 822-23 (finding the debtor qualified for the new value exception and was able to keep nonexempt assets of the bankruptcy estate because debtor's business associate contributed $100,000).

45. *See* **In re Greenwood Point, LP** 445 B.R. 885 (Bankr. S.D. Ind. 2011) (finding wife of sole owner of debtor, limited partnership, could purchase equity because absolute priority rule did not apply to insider of old equity; additionally, the court found even if the absolute priority rule applied, an insider of old equity can qualify for the new value exception subject to proper market valuation); **In re East,** 57 B.R. 14, 19 (Bankr. M.D. La. 1985) (acknowledging that the source of outside funds is difficult but could be a gift from a friend or relative). *See also* **In re East**, 57 B.R. 14, 19 (Bankr. M.D. La. 1985).

46. **In re Hendrix**, 131 B.R. 751, (M.D. Fla. 1991) (denying plan confirmation and finding promise of debtor's wife to make $800 a month to fund plan is insufficient to satisfy new value exception).

47. **In re Henderson**, 321 B.R. 550, 561 (Bankr. M.D. Fla. 2005) (finding even if an individual debtor retains exempt property under the plan, and creditors do not receive full and complete satisfaction, this does not trigger absolute priority rule violation).

48. *See Id.* ("[T]he individual debtor does not have to forfeit his exemption rights to which the debtor is otherwise entitled to in all operating Chapters of the Code as a price of obtaining confirmation of his or her plan of reorganization.").

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