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I. INTRODUCTION

The past few years have been somewhat uneventful in terms of the development of bankruptcy law in Eleventh Circuit courts.[1] The year 2010 was no exception. The lack of significant cases in the lower courts, however, has been offset by notable activity in the Supreme Court of the United States, which has decided five bankruptcy cases since last year's Survey.

II. THE SUPREME COURT MEETS BAPCPA

Five years after Congress overhauled the Bankruptcy Code[2] by enacting the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),[3] the language of those amendments has finally made its way to the Supreme Court for interpretation. The Court decided three BAPCPA cases in 2010: one case dealing with the regulation of bankruptcy attorneys and two cases providing guidance for computing a Chapter 13[4] debtor's projected disposable income.

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1. For analysis of Eleventh Circuit bankruptcy law during the prior survey period, see Hon. James D. Walker, Jr. & Amber Nickell, *Bankruptcy, 2009 Eleventh Circuit Survey*, 61 MERCER L. REV. 1033 (2010).

2. U.S.C. tit. 11 (2006 & Supp. III 2009). Unless otherwise specified, all statutory references are to Title 11 of the United States Code, which is known as the Bankruptcy Code.

3. Pub. L. No. 109-8, 119 Stat. 23.

4. 11 U.S.C ch. 13 (2006 & Supp. III 2009).

A. *Debt Relief Agencies*

Milavetz, Gallop & Milavetz, P.A. v. United States[5] arrived at the Court on a First Amendment[6] theory and resulted in a unanimous decision.[7] BAPCPA created a new entity called "a debt relief agency," which is defined in § 101(12A)[8] as anyone "who provides any bankruptcy assistance" to a consumer debtor in exchange for compensation.[9] Sections 526, 527, and 528[10] set forth a combination of duties and restrictions applicable to debt relief agencies, including a disclosure requirement for advertisements[11] and a prohibition from advising debtors "to incur more debt in contemplation of . . . filing [for] bankruptcy."[12]

The case was brought by a law firm that represented consumer debtors. As a threshold matter, the firm argued that attorneys are not debt relief agencies; therefore, the provisions regulating debt relief agencies did not apply to the firm.[13] The Court disagreed.[14] Debt relief agencies include people who provide bankruptcy assistance.[15] "Bankruptcy assistance" is itself a defined term that includes "providing legal representation" and other services offered by attorneys.[16] Based on this language, and the fact that attorneys are not expressly excluded from the definition of debt relief agency, the Court concluded that "the statutory text clearly indicates that attorneys are debt relief agencies when they provide qualifying services to assisted persons."[17]

Having determined that debt relief agency regulations apply to attorneys, the Court next decided whether specific regulations unconstitutionally restricted speech.[18] Under § 526(a)(4), "[a] debt relief agency shall not . . . advise an assisted person or prospective assisted person to *incur more debt in contemplation of* such person *filing a case* under this

5. 130 S. Ct. 1324 (2010).
6. U.S. CONST. amend. I.
7. *Milavetz*, 130 S. Ct. at 1329.
8. 11 U.S.C. § 101(12A) (2006).
9. *Id.*
10. 11 U.S.C. §§ 526-528 (2006).
11. *Id.* § 528(b)(2)(B).
12. *Id.* § 526(a)(4).
13. *Milavetz*, 130 S. Ct. at 1330-31.
14. *Id.* at 1331.
15. 11 U.S.C. § 101(12A).
16. 11 U.S.C. § 101(4A) (2006).
17. *Milavetz*, 130 S. Ct. at 1332.
18. *Id.* at 1334.

title."[19] The law firm argued that this language bars "any advice given to a debtor with the awareness that he might soon file for bankruptcy, even if the advice seeks to obviate the need to file."[20] The Court disagreed, opting for a more narrow reading.[21] The Court noted the phrase "in contemplation of" is commonly used to refer to abusive conduct.[22] In this case, however, the phrase applies to a limited category of abuse: "[W]e think the phrase refers to a specific type of misconduct designed to manipulate the protections of the bankruptcy system. . . . § 526(a)(4) prohibits a debt relief agency only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose."[23] Under this interpretation, advice to incur debt for the purposes of improving the debtor's financial condition, such as refinancing a mortgage, or for the purpose of making reasonably necessary purchases, such as food or medical services, would pass muster.[24] The statute prohibits only "advice to 'load up' on debt with the expectation of obtaining its discharge."[25] By applying this narrow interpretation, the statute is neither unconsitutionally overbroad nor impermissibly vague.[26]

The law firm in *Milavetz* also challenged § 528(a) and (b)(2),[27] which require advertisements for debt relief agencies to contain language similar to the following: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."[28] The Court held that the provisions did not unconstitutionally limit commercial speech because they are intended to prevent misleading advertisements ("the promise of debt relief without any reference to the possibility of filing for bankruptcy"), they only require the disclosure of accurate information, and they do not prohibit the disclosure of additional information.[29]

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19. 11 U.S.C. § 526(a)(4) (emphasis added).
20. *Milavetz*, 130 S. Ct. at 1334.
21. *Id.* at 1335.
22. *Id.* (internal quotation marks omitted).
23. *Id.* at 1336.
24. *Id.* at 1339 n.6.
25. *Id.* at 1336.
26. *Id.* at 1338-39.
27. 130 S. Ct. at 1339-41.
28. 11 U.S.C. § 528(a)(4), (b)(2)(B) (internal quotation marks omitted); *see also Milavetz*, 130 S. Ct. at 1330.
29. *Milavetz*, 130 S. Ct. at 1340.

B. Projected Disposable Income

The Court's two other BAPCPA cases, *Hamilton v. Lanning*[30] and *Ransom v. FIA Card Services, N.A.*,[31] involved the calculation of a Chapter 13 debtor's projected disposable income.[32] Both were 8-1 decisions, with Justice Scalia dissenting.[33] Prior to BAPCPA, the term "projected disposable income" was undefined and was typically calculated by subtracting monthly expenses (Schedule J) from monthly income (Schedule I), and multiplying the result by the number of months in the plan.[34]

BAPCPA changed the landscape by defining "disposable income" as "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor."[35] The Code further defines "current monthly income" (CMI)[36] and "amounts reasonably necessary to be expended."[37] CMI is calculated as the debtor's average monthly income in the six months prior to filing.[38] Expenses for above-median-income debtors are calculated in accordance with the means test,[39] which provides the following: "The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the [IRS] National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses."[40]

The interpretation of "applicable monthly expense amounts"[41] was at issue in *Ransom*.[42] The IRS standards provide an allowance for transportation expenses, divided into two subcategories: vehicle

30. 130 S. Ct. 2464 (2010).
31. 131 S. Ct. 716 (2011).
32. *Ransom*, 131 S. Ct. at 721; *Lanning*, 130 S. Ct. at 2469.
33. *Ransom*, 131 S. Ct. at 720; *Lanning*, 130 S. Ct. at 2468. *Ransom* also had the distinction of being Justice Kagan's first opinion as a member of the Court. Nat'l L.J., *Kagan Issues First Opinion*, FULTON CNTY. DAILY REP., Jan. 13, 2011, *available at* 2011 WLNR 783746.
34. *See Lanning*, 130 S. Ct. at 2472.
35. 11 U.S.C. § 1325(b)(2) (2006).
36. 11 U.S.C. § 101(10A) (2006).
37. *Id.* § 1325(b)(2)-(3) (2006).
38. *Id.* § 101(10A).
39. *Id.* § 1325(b)(3). The means test, set forth in 11 U.S.C. § 707(b)(2) (2006), is used to determine whether a Chapter 7 debtor's petition is presumptively abusive due to the ability to repay creditors. *See id.*
40. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006).
41. *Id.*
42. 131 S. Ct. at 724-25.

ownership costs and vehicle operating costs. In *Ransom* the debtor owned his car free of any debt and therefore made no monthly loan or lease payment. Nevertheless, he included the allowance of $471 for ownership costs when calculating his expenses.[43] The Court disallowed the expense.[44]

The Court keyed in on the word "applicable," finding that applicable means "appropriate, relevant, suitable, or fit."[45] An expense is applicable "only if the debtor will incur that kind of expense during the life of the plan."[46] The Court noted that its interpretation was consistent with Congress's purpose in enacting BAPCPA.[47] BAPCPA prevents abuse by allowing debtors to deduct only the type of expenses they actually incur.[48] The Court further determined that ownership expenses apply only to "the costs of a car loan or lease and nothing more."[49] Consequently, the Court held that the debtor was not entitled to the ownership expense.[50]

Once a Chapter 13 debtor calculates his CMI and determines the extent of his expenses, he can calculate his disposable income. For purposes of confirming a plan, however, he needs to know his *projected* disposable income (PDI). Although BAPCPA defined "disposable income," it did not define "projected disposable income."[51] In *Lanning* the Court considered how to define projected disposable income.[52] Lower courts supported one of two approaches: the mechanical approach, in which disposable income is multiplied by the applicable commitment period, or the forward-looking approach, in which the court adjusts disposable income to take into account foreseeable changes in the debtor's income or expenses.[53] The Supreme Court embraced the forward-looking approach.[54]

In reaching its decision, the Court first considered the meaning of "projected," noting, "in ordinary usage future occurrences are not 'projected' based on the assumption that the past will necessarily repeat itself. . . . While a projection takes past events into account, adjust-

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43. *Id.* at 722-23.
44. *Id.* at 726.
45. *Id.* at 724 (internal quotation marks omitted).
46. *Id.*
47. *Id.* at 725.
48. *Id.*
49. *Id.*
50. *Id.* at 726.
51. *See* § 102, 119 Stat. at 33-34.
52. 130 S. Ct. at 2469.
53. *Id.*
54. *Id.*

ments are often made based on other factors that may affect the final outcome."[55] Furthermore, if Congress had intended "projected" to act as a mere multiplier, Congress could have used the word "multiplied" as it had in other statutes.[56] Because Congress did not use language expressly overturning pre-BAPCPA practice, the Court refused to construe the statute in a way that departed from the prior practice of "tak[ing] into account known or virtually certain changes to debtors' income or expenses when projecting disposable income."[57]

The Court reasoned that, because § 1325(b)(1)(B)[58] refers to PDI "to be received," the mechanical approach conflicts with the statutory language, unlike the forward-looking approach.[59] The mechanical approach, however, will not always accurately reflect the amount the debtor actually receives.[60] Instead, the mechanical approach may result in a PDI that is either much higher or much lower than the debtor's actual income.[61] The Court described such a result as "senseless" because it would either give the debtor a windfall to the detriment of creditors (if PDI is too low) or would render the debtor unable to make plan payments (if PDI is too high).[62] Therefore, the Court held that "when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation."[63]

III. ADMINISTRATION AND PROCEDURE

A. *Lien-stripping*

Two bankruptcy court cases, *In re Hoffman*[64] and *McNeal v. GMAC Mortgage Co. (In re McNeal)*,[65] considered the issue of whether a Chapter 7[66] debtor can avoid a wholly unsecured junior mortgage. The answer in both cases was no.[67] *In re Hoffman* and *In re McNeal* shared

55. *Id.* at 2471-72.
56. *Id.* at 2472.
57. *Id.* at 2473-74.
58. 11 U.S.C. § 1325(b)(1)(B) (2006).
59. *Lanning*, 130 S. Ct. at 2474 (internal quotation marks omitted).
60. *Id.*
61. *Id.* at 2475.
62. *Id.* at 2475-76.
63. *Id.* at 2478.
64. 433 B.R. 437 (Bankr. M.D. Fla. 2010).
65. No. A09-78173-PWB, 2010 WL 1753376 (Bankr. N.D. Ga. Apr. 12, 2010).
66. 11 U.S.C. ch. 7 (2006 & Supp. III 2009).
67. *In re Hoffman*, 433 B.R. at 440; *In re McNeal*, 2010 WL 1753376, at *1.

similar facts.[68] The Chapter 7 debtors had multiple mortgages on their homes.[69] The value of the senior mortgage on each home exceeded the value of the property.[70] Therefore, the junior mortgages were unsupported by any equity.[71] The debtors sought to avoid or strip off the junior liens under § 506(d)[72] because, as defined by § 506(a),[73] the liens represented unsecured claims.[74]

Section 506(a)(1) provides that a claim secured by a lien is a secured claim to the extent of the value of the collateral while the remainder of the claim is unsecured.[75] Section 506(d) provides that a lien is void if not supported by an "allowed secured claim."[76] The debtors argued that, since the junior mortgages were unsecured claims under § 506(a), they were not allowed secured claims under § 506(d) and thus could be avoided.[77]

The United States Bankruptcy Courts for the Middle District of Florida and the Northern District of Georgia disagreed with the debtors, concluding that the question had been settled in 1992 when the Supreme Court, in *Dewsnup v. Timm,*[78] interpreted the phrase "allowed secured claim."[79] *Dewsnup* involved a debtor's attempt to strip down an undersecured lien on real property, rather than trying to strip off a wholly unsecured lien on real property.[80] The court in *In re McNeal* noted, however, that factual distinction is of no import when defining a secured claim for purposes of lien avoidance under § 506(d).[81]

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68. *Compare In re Hoffman*, 433 B.R. at 437, *with In re McNeal*, 2010 WL 1753376.
69. *In re Hoffman*, 433 B.R. at 438; *In re McNeal*, 2010 WL 1753376, at *1.
70. *In re Hoffman*, 433 B.R. at 438; *In re McNeal*, 2010 WL 1753376, at *1.
71. *In re Hoffman*, 433 B.R. at 438; *In re McNeal*, 2010 WL 1753376, at *1.
72. 11 U.S.C. § 506(d) (2006).
73. 11 U.S.C. § 506(a) (2006).
74. *In re Hoffman*, 433 B.R. at 439; *In re McNeal*, 2010 WL 1753376, at *1.
75. 11 U.S.C. § 506(a)(1). Section 506(a)(1) states the following:

> An allowed claim of a creditor secured by a lien on property . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

76. 11 U.S.C. § 506(d). Section 506(d) further provides that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." An exception is available if disallowance of the claim is based on failure to file a proof of claim. *Id.* § 506(d)(2).
77. *In re Hoffman*, 433 B.R. at 439; *In re McNeal*, 2010 WL 1753376, at *1.
78. 502 U.S. 410 (1992).
79. *In re Hoffman*, 433 B.R. at 439 (citing *Dewsnup*, 502 U.S. at 417); *In re McNeal*, 2010 WL 1753376, at *1 (citing *Dewsnup*, 502 U.S. at 417).
80. *See* 502 U.S. at 413.
81. 2010 WL 1753376, at *2.

Relying on *Dewsnup*, the court in *In re Hoffman* explained that while § 506(a) defines a secured claim in terms of the value of collateral, that definition does not apply to § 506(d).[82] Instead, the phrase "allowed secured claim" in § 506(d) means a claim that is allowed and secured by a lien.[83] This interpretation preserves the long-standing principle that liens survive bankruptcy.[84] Both bankruptcy courts noted that the majority of courts to consider the issue–including the only two circuit courts to do so–applied *Dewsnup*, finding no distinction between attempting to strip a portion of a lien because the claim is undersecured per § 506(a) or attempting to strip the entire lien because the claim is fully unsecured per § 506(a).[85]

The court in *In re McNeal* also distinguished *Tanner v. FirstPlus Financial (In re Tanner)*,[86] a decision by the United States Court of Appeals for the Eleventh Circuit.[87] In *In re Tanner*, the Eleventh Circuit permitted a Chapter 13[88] debtor to strip off a wholly unsecured lien.[89] The avoidance mechanism in that case, however, was § 1322(b)-(2),[90] which authorizes the modification of rights of certain unsecured creditors, not § 506(d).[91] Because § 1322(b)(2) applies only in Chapter 13, *In re Tanner* does not authorize a departure from *Dewsnup* in Chapter 7 cases.[92]

B. *Bankruptcy Estate*

In *Schwab v. Reilly*,[93] the Supreme Court considered the scope of bankruptcy exemptions.[94] A Chapter 7 debtor who owned a catering business listed business equipment among her personal property on Schedule B and valued it at $10,718.[95] On Schedule C, she claimed exemptions in the equipment under both "tool[s] of the trade" (claiming the full amount available) and the so-called "'wildcard' exemption"

82. 433 B.R. at 439 & n.9.
83. *Id.* at 439 (quoting *Dewsnup*, 502 U.S. at 415-16).
84. *In re Hoffman*, 433 B.R. at 439; *In re McNeal*, 2010 WL 1753376, at *2.
85. *In re Hoffman*, 433 B.R. at 440; *In re NcNeal*, 2010 WL 1753376, at *2.
86. 217 F.3d 1357 (11th Cir. 2000).
87. *In re McNeal*, 2010 WL 1753376, at *5.
88. 11 U.S.C. ch. 13 (2006 & Supp. III 2009).
89. *In re Tanner*, 217 F.3d at 1360; *see also In re McNeal*, 2010 WL 1753376, at *4-5.
90. 11 U.S.C. § 1322(b)(2) (2006).
91. *In re McNeal*, 2010 WL 1753376, at *5.
92. *Id.*
93. 130 S. Ct. 2652 (2010).
94. *Id.* at 2657.
95. *Id.*

(claiming part of the available exemption) for a total exemption of $10,718, a figure equal to the debtor's valuation of the equipment.[96]

The trustee did not object to the exemptions because they fell within the amounts allowed by the exemption statute. After receiving an appraisal that valued the equipment at approximately $17,000, however, the trustee sought to auction the equipment, pay the debtor the value of her exemptions, and disburse the remaining money to creditors. The debtor objected to the auction, contending the equipment was fully exempt.[97] The Court ruled for the trustee.[98]

Section 522(l)[99] requires a debtor to "file a list of property that the debtor claims as exempt."[100] In the absence of an objection, "the property claimed as exempt on such list is exempt."[101] Schedule C, the document in which debtors list their exemptions, includes four columns: first, a description of the property in which the debtor is claiming an exemption; second, the statute authorizing the exemption; third, the value of the exemption; and fourth, the current market value of the property.[102]

The debtor argued that if the amount of the exemption in column three is the same as the value of the property in column four, the trustee is "on notice that [the debtor] 'intended' to claim an exemption for the full value of" the property.[103] Therefore, if the trustee fails to object in such circumstances the entire property is exempt.[104]

The Court rejected the debtor's argument.[105] The Court looked at the statutory language authorizing the exemptions claimed by the debtor.[106] That language only allows an exemption of "the debtor's 'interest'–up to a specified dollar amount–in the assets described in the category, *not* as the assets themselves."[107] By contrast, other provisions of the exemption statute "permit debtors to exempt certain property in kind or in full regardless of value," such as disability benefits.[108] In light of this statutory scheme, the Court held that the

96. *Id.* at 2657-58 (alteration in original).
97. *Id.* at 2658.
98. *Id.* at 2659.
99. 11 U.S.C. § 522(l) (2006).
100. *Id.*
101. *Id.*
102. *Reilly*, 130 S. Ct. at 2660.
103. *Id.* at 2661.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 2661-62; *see also* 11 U.S.C. § 522(d)(5)-(6).
108. *Reilly*, 130 S. Ct. at 2663; *see also* 11 U.S.C. § 522(d)(7), (9), (10)(C).

trustee can rely on the amount claimed as exempt when deciding whether to object.[109] If the claimed exemption is within the amount allowed by the exemption statute no objection is necessary to preserve any excess value for the estate.[110]

The Court distinguished *Reilly* from *Taylor v. Freeland & Kronz*,[111] which the Court decided in 1992.[112] In *Taylor* the debtor claimed an exemption in the proceeds of a lawsuit and listed the value of the exemption as "unknown."[113] The Court reasoned that in *Taylor* the trustee had an obligation to object to the exemption because, unlike the facts in *Reilly*, the amount of the exemption "was *not* plainly within the limits the Code allows."[114]

The Court noted its decision would not prevent a debtor from attempting to exempt property in full.[115] The decision merely "encourage[s] the debtor to declare the value of her claimed exemption in a manner that makes the scope of the exemption clear, for example, by listing the exempt value as 'full fair market value (FMV)' or '100% of FMV.'"[116]

C. *Professionals*

In *In re C & D Dock Works, Inc.*,[117] a Chapter 7 trustee requested and received a commission of nearly half a million dollars. The debtor had filed for bankruptcy after being sued by an employee who was seriously injured on the job. The employee was awarded more than $76 million in his lawsuit. Although the debtor was insured at the time of the accident, the insurance company neither defended the debtor, nor made any payment on the $76 million judgment. The debtor's bankruptcy schedules listed minimal assets with a total value of $1450 and made no mention of potential claims against its insurance company. Nevertheless, the trustee investigated the insurance angle and spent two years pursuing litigation against the insurance company for its failure to provide benefits. The trustee ultimately settled with the insurance company for $15 million.[118]

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109. *Reilly*, 130 S. Ct. at 2669.
110. *Id.*
111. 503 U.S. 638 (1992).
112. *Reilly*, 130 S. Ct. at 2659.
113. *Taylor*, 503 U.S. at 640 (internal quotation marks omitted).
114. *Reilly*, 130 S. Ct. at 2666.
115. *Id.* at 2667-68.
116. *Id.* at 2668.
117. 437 B.R. 443 (Bankr. M.D. Fla. 2010).
118. *Id.* at 444-45.

The trustee requested a commission of $473,250, calculated in accordance with § 326(a),[119] and expenses of $62.82.[120] Section 326-(a) provides that "court[s] may allow reasonable compensation . . . for the trustee's services . . . not to exceed" a certain percentage of distributions to creditors.[121] This calculation "constitute[s] compensation caps and not entitlements."[122] The Middle District of Florida applied twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*[123] to determine whether the full statutory commission was reasonable.[124] The court noted that, on its face, the bankruptcy case appeared to be a no-asset case, which would have resulted in no payout to the debtor's injured employee.[125] The trustee, however, was able to obtain $15 million for the estate after more than two years of investigating complex insurance issues.[126] The trustee made "exemplary efforts" and obtained "extraordinary results."[127] In such circumstances, the request for the statutory maximum commission was "proportionate to the services the Trustee was required to perform."[128] Therefore, the court approved the fee request as reasonable.[129]

D. Prepetition Credit Counseling

On December 22, 2010, President Barack Obama signed into law the Bankruptcy Technical Corrections Act of 2010 (BTCA).[130] Most of the amendments fix grammatical errors, internal references, and other nonsubstantive problems.[131] The Act, however, resolved one issue that has divided bankruptcy courts–the proper deadline for obtaining prepetition credit counseling.[132] Under § 109(h)(1)[133] an individual debtor must obtain the counseling during the 180 days prior to filing for

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119. 11 U.S.C. § 326(a) (2006).
120. *In re C & D Dock Works*, 437 B.R. at 444.
121. 11 U.S.C. § 326(a).
122. *In re C & D Dock Works*, 437 B.R. at 445.
123. 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds by* Blanchard v. Bergeron, 489 U.S. 87 (1989).
124. *In re C & D Dock Works*, 437 B.R. at 446.
125. *Id.*
126. *Id.*
127. *Id.* at 447.
128. *Id.* at 446.
129. *Id.* at 447.
130. Pub. L. No. 111-327, 124 Stat. 3557 [hereinafter BTCA].
131. *See id.*
132. *See, e.g., In re* Hammonds, No. 08-40928-JJR-13, 2008 WL 4830071, at *2 (Bankr. N.D. Ala. Sept. 22, 2008) (discussing and listing the cases that have disagreed about the proper deadline for obtaining prepetition credit counseling).
133. 11 U.S.C. § 109(h)(1) (2006) (amended 2010).

bankruptcy.[134] Before the amendments, the provision required the counseling to take place "during the 180-day period *preceding* the date of filing of the petition."[135] Courts disagreed about whether debtors were required to obtain the briefing at least the day prior to filing for bankruptcy or whether they could obtain the briefing on the filing date.[136] The language has been amended to read as follows: "during the 180-day period *ending on* the date of filing of the petition."[137] Thus, it appears a debtor can receive a credit briefing on the same day he files his petition.[138]

While the BTCA provided for numerous fixes, the BTCA merely addressed the tip of the iceberg. Although the credit counseling deadline had been the subject of some dispute, it is unclear why Congress would choose to fix the deadline while leaving other controversial provisions untouched. For example, the BTCA did not even provide a basic technical correction to the hanging paragraph of § 1325,[139] which remains unnumbered.[140]

IV. CHAPTER 13

A. *Effect of Confirmation*

The binding effect of plan confirmation in Chapter 13[141] arose as an issue in several 2010 cases, including a Supreme Court case. In *United Student Aid Funds, Inc. v. Espinosa*,[142] the debtor's Chapter 13 plan provided for the discharge of interest on his student loan upon payment of the principal. The debtor did not initiate an adversary proceeding to determine the dischargeability of the student loan interest nor did the bankruptcy court make a finding of undue hardship. The creditor received notice of the plan and did not object. In accordance with the plan, the bankruptcy court discharged the student loan interest in 1997. Three years later, the creditor attempted to collect the interest. The debtor responded with a motion to enforce the discharge, followed by the creditor's motion to set aside the confirmation order.[143]

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134. *Id.*
135. *Id.* (emphasis added).
136. *See In re Hammonds*, 2008 WL 4830071, at *2 (collecting cases).
137. BTCA, § 2(a)(6)(B), 124 Stat. at 3557-58 (emphasis added).
138. *See id.*
139. 11 U.S.C. § 1325 (2006).
140. *See* BTCA, § 2(a)(44), 124 Stat. at 3562.
141. 11 U.S.C. ch. 13 (2006 & Supp. III 2009).
142. 130 S. Ct. 1367 (2010).
143. *Id.* at 1373-74.

Pursuant to 11 U.S.C. § 523(a)(8),[144] student loans are nondischargeable unless they create an undue hardship for the debtor.[145] Federal Rule of Bankruptcy Procedure 7001[146] states that a proceeding to determine the dischargeability of a debt is an adversary proceeding.[147] Thus, the proceeding is governed by Part VII[148] of the rules, which requires the proceeding to be commenced by filing a complaint and to largely comply with other Federal Rules of Civil Procedure.[149] The creditor in *Espinosa* argued that the confirmation order should be set aside as void because it provided for discharge of an otherwise nondischargeable debt without an adversary proceeding and without a finding of undue hardship.[150] While acknowledging that the creditor was essentially correct about the unlawfulness of the discharge of the student loan interest, the Court ruled for the debtor.[151]

A final order, such as a confirmation order, will only be deemed void under Federal Rule of Civil Procedure 60(b)(4)[152] in two circumstances.[153] First, lack of jurisdiction, which was not present in *Espinosa*, may render an order void.[154] Second, lack of due process may render an order void.[155] In this case, the debtor's failure to initiate an adversary proceeding through a complaint and summons did not deprive the creditor of due process because the creditor had actual notice of the plan and its provisions.[156]

The failure of the bankruptcy court to make a finding of undue hardship, while a legal error, did not amount to a jurisdictional defect or deprivation of due process such that it would justify setting aside the confirmation order.[157] The Court described the requirement for a finding of undue hardship as "self-executing."[158] "But that means only that the bankruptcy court must make an undue hardship finding even if the creditor does not request one; it does not mean that a bankruptcy court's failure to make the finding renders its subsequent confirmation

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144. 11 U.S.C. § 523(a)(8) (2006).
145. *Id.*
146. FED. R. BANKR. P. 7001.
147. FED. R. BANKR. P. 7001(6).
148. FED. R. BANKR. P. pt. VII.
149. *See generally* FED. R. BANKR. P. pt. VII; FED. R. CIV. P.
150. 130 S. Ct. at 1374-75.
151. *Id.* at 1380.
152. FED. R. CIV. P. 60(b)(4).
153. *Espinosa*, 130 S. Ct. at 1377.
154. *Id.* at 1377-78.
155. *Id.* at 1377.
156. *Id.* at 1378.
157. *Id.* at 1379.
158. *Id.* (internal quotation marks omitted).

order void. . . ."[159] Thus, the Court held that legal error was not a basis for setting aside a judgment as void when the creditor had actual notice of the error and took no action.[160]

An equally interesting portion of the opinion, in terms of routine bankruptcy practice, comes from dicta. The Court stated that § 1325(a)-(1),[161] which mandates confirmation of plans that comply with the Bankruptcy Code,[162] "*requires* bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue."[163]

That dicta informed the decision of the United States Bankruptcy Court for the Middle District of Georgia in *In re Castleberry*.[164] In that case, the debt on the debtor's car exceeded the car's value.[165] The debtor's plan proposed to cram down[166] the debt on the car. The car creditor failed to timely object to the treatment of the debt, although the creditor did object on the same day the court entered an order confirming the plan. The creditor then filed a motion to alter or amend the confirmation order, claiming the plan violated the Bankruptcy Code by cramming down a 910 claim.[167] The court, while acknowledging its duty under *Espinosa* to ensure the plan complies with the law, found no violation of the Bankruptcy Code in the debtor's plan.[168]

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159. *Id.*

160. *Id.* at 1380.

161. 11 U.S.C. § 1325(a)(1) (2006).

162. U.S.C. tit. 11 (2006 & Supp. III 2009). 11 U.S.C. § 1325(a)(1) provides that "the court shall confirm a plan if . . . [t]he plan complies with the provisions of this chapter and with the other applicable provisions of this title." 11 U.S.C. § 1325(a)(1).

163. *Espinosa*, 130 S. Ct. at 1381 n.14.

164. 437 B.R. 705 (Bankr. M.D. Ga. 2010).

165. *Id.* at 706.

166. In a cram down, an undersecured claim is bifurcated into secured and unsecured claims. The secured portion of the claim is paid in full. The unsecured portion is paid pro rata from money available to pay general unsecured creditors. *See* Bank of Am. Nat'l Trust & Sav. Assoc. v. 203 N. LaSalle St., 526 U.S. 434, 441 (1999).

167. *In re Castleberry*, 437 B.R. at 707. A 910 claim is a claim not subject to bifurcation under 11 U.S.C. § 506 (2006) because

> the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day [period] preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle . . . acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

11 U.S.C. § 1325(a)(*) (2006). Such claims cannot be crammed down over the objection of the creditor. *See id.*

168. *In re Castleberry*, 437 B.R. at 708.

In re Castleberry demonstrates the distinction between the treatment of secured creditors under § 1325[169] and the undue hardship requirement at issue in *Espinosa*. Student loans cannot be discharged without a specific finding of undue hardship by the bankruptcy court, even if that finding is based on the stipulation of the parties.[170] Thus, the bankruptcy court should not confirm any plan that proposes a discharge without the necessary factual finding. The same is not true of 910 claims. A 910 creditor is a secured creditor.[171] A secured creditor is free to accept any treatment proposed by the debtor.[172] The hanging paragraph merely sets forth a type of treatment that, if proposed by the debtor, the creditor may not reject.[173]

In *In re Castleberry*, the Middle District of Georgia noted that it was not clear from the face of the plan that the creditor had a 910 claim.[174] Since the creditor had not at the time of confirmation filed a proof of claim or made any objection to the plan, the court had no basis to conclude it was a 910 claim.[175] Furthermore, the Bankruptcy Code expressly provides that the debtor may provide any treatment to a secured creditor so long as the creditor accepts such treatment.[176] Because the car creditor took no steps to oppose the plan prior to confirmation, the creditor was deemed to accept its treatment.[177] Therefore, the court found the plan complied with the Bankruptcy Code and denied the creditor's motion to alter or amend.[178]

The creditor in *In re Anderson*[179] also found its hands tied, in part, by *Espinosa*. The Alabama Department of Human Resources (DHR) held a claim for overpayment of food assistance benefits to the debtors for $2,342.85.[180] The DHR filed a proof of claim indicating it held "an unsecured nonpriority claim."[181] The debtors' plan proposed to pay general unsecured creditors a total of $2000 pro rata. DHR did not

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169. 11 U.S.C. § 1325 (2006).
170. *Espinosa*, 130 S. Ct. at 1376.
171. 11 U.S.C. § 1325(a)(*).
172. *See id.* § 1325(a)(5)(A).
173. *Id.* § 1325(a)(*).
174. 437 B.R. at 708.
175. *Id.*
176. *See* 11 U.S.C. § 1325(a)(5)(A).
177. *In re Castleberry*, 437 B.R. at 710.
178. *Id.* at 711.
179. 439 B.R. 206 (Bankr. M.D. Ala. 2010).
180. *Id.* at 208.
181. *Id.* (internal quotation marks omitted).

object, and the plan was confirmed. The debtors completed the plan and filed a motion for discharge. DHR objected to discharge of its debt.[182]

After first finding food assistance provided by the government fits within the definition of a "domestic support obligation" (DSO), and that food assistance is the type of DSO entitled to first priority under § 507(a)(1)(B),[183] the United States Bankruptcy Court for the Middle District of Alabama considered whether the debtors were required to pay the debt in full.[184] Under § 1322(a)(4),[185] a debtor who pays all his PDI into a plan is not required to pay in full DSO's that fall within § 507(a)(1)(B).[186]

In this case, the debtor's plan treated DHR as a general unsecured creditor. Therefore, instead of being paid ahead of other unsecured creditors, DHR received a pro rata payment that resulted in only partial payment of its claim.[187] Under § 1322(a)(4), the court held that such partial payment is permitted.[188] To the extent DHR objected to its pro rata treatment, *Espinosa* controlled.[189] Under *Espinosa* a creditor is bound by a confirmed plan "if the creditor is accorded due process having been given notice of the plan and an opportunity to object."[190] In *In re Anderson*, DHR had notice of the plan and its treatment under the plan, filed its claim as a general unsecured creditor, failed to object to the plan, and failed to amend its claim.[191] Therefore, the DHR had no basis to complain about its treatment under the plan.[192] Even though the creditor failed in its effort to belatedly assert priority status, the court found its claim was a nondischargeable DSO under § 523(a)(5),[193] so the creditor nevertheless prevailed on the issue of discharge.[194]

A final case considering the effect of plan confirmation once again led to a frustrated creditor. In *Florida Department of Revenue v. Rodriguez*

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182. *Id.*

183. 11 U.S.C. § 507(a)(1)(B) (2006). DSO is defined by 11 U.S.C. § 101(14A) (2006) to include a debt "in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of [a] spouse, former spouse, or child of the debtor." *Id.* First priority is granted to "allowed unsecured claims for domestic support obligations that . . . are owed directly to or recoverable by a governmental unit." 11 U.S.C. § 507(a)(1)(B).

184. *In re Anderson*, 439 B.R. at 209.

185. 11 U.S.C. § 1322(a)(4) (2006).

186. *Id.*

187. *In re Anderson*, 439 B.R. at 208.

188. *Id.* at 209.

189. *Id.* at 210.

190. *Id.* (citing *Espinosa*, 130 S. Ct. at 1378).

191. *Id.*

192. *See id.*

193. 11 U.S.C. § 523(a)(5) (2006).

194. *In re Anderson*, 439 B.R. at 209-10.

(*In re Rodriguez*),[195] the State sent the debtor three collection notices for past due child support after the debtor's Chapter 13 plan had been confirmed. The plan provided for payment of pre-petition child support and partial payment of post-petition child support. The debtor sought sanctions against the State, alleging the State violated the automatic stay.[196]

The Eleventh Circuit found no stay violation, but nevertheless concluded sanctions were appropriate.[197] The court noted that the collection letters fell within an exception to the stay for collection of a DSO from non-estate property.[198] Notwithstanding that exception, however, the creditor was bound by the provisions of the plan.[199] In this case, the plan provided for partial payment of the State's post-petition DSO claim.[200] Thus, in attempting to collect the unpaid portion of its claim, "the State violated the confirmation order by asserting an interest other than those provided for in the plan after confirmation."[201] Therefore, "the bankruptcy court did not err in granting [the debtor's] motion for contempt."[202]

It is worth noting that the Eleventh Circuit did not explain the source of the bankruptcy court's authority to order contempt sanctions for violation of the confirmed plan.[203] The Bankruptcy Code expressly provides sanctions for stay violations,[204] but not for plan violations.[205] Because the circuit court found no stay violation, its opinion suggests an inherent authority to sanction creditors who contravene provisions of a confirmed plan.

B. Projected Disposable Income

In Part II.B., this Article discusses the Supreme Court cases on projected disposable income with respect to expenses and projection. In *Washington v. Reding (In re Washington)*,[206] *In re Rose*,[207] and *In re*

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195. 367 F. App'x 25 (11th Cir. 2010).
196. *Id.* at 26.
197. *Id.* at 27, 30.
198. *Id.* at 27; *see also* 11 U.S.C. § 362(a)-(b) (2006).
199. *In re Rodriguez*, 367 F. App'x at 28.
200. *Id.* at 26.
201. *Id.* at 28.
202. *Id.*
203. *See In re Rodriguez*, 367 F. App'x at 25.
204. 11 U.S.C. § 362(k)(1) (2006).
205. *See* 11 U.S.C. § 1327 (2006).
206. 438 B.R. 348 (Bankr. M.D. Ala. 2010).
207. No. 09-70088-PWB, 2010 WL 2600591 (Bankr. N.D. Ga. May 12, 2010).

Rodgers,[208] the Middle District of Alabama, the Northern District of Georgia, and the Middle District of Florida considered the third element of projected disposable income–current monthly income (CMI).[209] Recall that disposable income is defined as "current monthly income received by the debtor" less certain reasonable expenses.[210]

In *In re Rose* and *In re Washington*, the Northern District of Georgia and the Middle District of Alabama considered whether unemployment benefits should be included in the calculation of CMI.[211] The definition of CMI "excludes benefits received under the Social Security Act."[212] In both cases, the courts relied on the common understanding of Social Security benefits to hold that unemployment payments must be included in CMI.[213] Unemployment benefits are administered by the state.[214] If their programs meet certain criteria set forth in the Social Security Act,[215] states receive supplemental funds for unemployment benefits from the federal government.[216] Despite this relationship, people do not typically associate unemployment benefits with Social Security.[217] In ordinary parlance, people think of Social Security benefits as those benefits administered by the Social Security Administration, such as retirement and disability payments.[218] The courts assumed Congress used the common understanding of Social Security benefits when drafting the definition of CMI.[219] Therefore, the debtors were required to include unemployment payments when calculating CMI.[220]

The case of *In re Rodgers* also involved debtors with income from government assistance. The debtors excluded Social Security disability benefits of $2128 from their calculation of projected disposable income and proposed a monthly payment plan of $100. Without excluding the disability payments, the debtors would have a monthly net income of $2056 according to their schedules. The trustee objected to confirmation

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208. 430 B.R. 910 (Bankr. M.D. Fla. 2010).
209. *In re Washington*, 438 B.R. at 350; *In re Rodgers*, 430 B.R. at 911; *In re Rose*, 2010 WL 2600591, at *1.
210. 11 U.S.C. § 1325(b)(2).
211. *In re Washington*, 438 B.R. at 350; *In re Rose*, 2010 WL 2600591, at *1.
212. 11 U.S.C. § 101(10A)(B) (2006).
213. *In re Washington*, 438 B.R. at 353; *In re Rose*, 2010 WL 2600591, at *1 n.3.
214. *In re Washington*, 438 B.R. at 351.
215. 42 U.S.C. ch. 7 (2006).
216. *In re Washington*, 438 B.R. at 352.
217. *Id.* at 353.
218. *In re Rose*, 2010 WL 2600591, at *1 n.3.
219. *In re Washington*, 438 B.R. at 353; *In re Rose*, 2010 WL 2600591, at *1 n.3.
220. *In re Washington*, 438 B.R. at 353; *In re Rose*, 2010 WL 2600591, at *1.

on the ground that the plan was proposed in bad faith because the debtors failed to apply all available funds to repay their creditors.[221]

The debtor argued that Social Security disability payments are excluded from the definition of CMI. Since they are proposing a payment consistent with the Bankruptcy Code, there could be no finding of bad faith.[222] The Middle District of Florida disagreed.[223] The good-faith inquiry requires the court to look at the totality of the circumstances, including "the amount of the debtor's income from all sources."[224] The court seems to set a standard for calculating CMI and PDI that is at odds with statutory language that specifically excludes disability benefits from CMI[225] and consequently from PDI: "This [c]ourt is satisfied that actual excess income, arguably resulting from excluded Social Security income, must be counted toward [the] Debtors' current monthly income and, thus, toward their projected disposable income for the purpose of determining payment to unsecured creditors."[226] However, this rationale is better understood in the context of a good-faith analysis. To survive a good-faith challenge, a debtor may have to apply all his available funds to the plan, even if that amount exceeds the debtor's PDI.[227] In other words, proposing to pay PDI is not determinative of good faith.

V. CHAPTER 11

According to the Middle District of Florida in *In re Gelin*,[228] individual Chapter 11[229] debtors cannot avoid application of the absolute priority rule.[230] The debtors filed for Chapter 11 after they were unable to maintain mortgage payments on six rental properties, each subject to multiple liens. After stripping off the wholly unsecured mortgages, they proposed to keep five of the properties while paying the unsecured mortgage claims a dividend of less than one percent. Rather than

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221. *In re Rodgers*, 430 B.R. at 911-12.

222. *Id.* at 913.

223. *Id.* at 914.

224. *Id.*

225. *See* 11 U.S.C. §§ 101(10A)-(B), 1325(b)(2).

226. *In re Rodgers*, 430 B.R. at 914. Furthermore, when discussing PDI, the court noted that other "[c]ourts have continually held that exempt revenues are subject to 'disposable income' analysis." *Id.* at 913. The court cited only pre-BAPCPA cases for this proposition. *Id.*

227. *See id.* at 913-14.

228. 437 B.R. 435 (Bankr. M.D. Fla. 2010).

229. 11 U.S.C. ch. 11 (2006 & Supp. III 2009).

230. *In re Gelin*, 437 B.R. at 442-43.

soliciting acceptance of the plan from creditors, the debtors sought to cram down the impaired unsecured claims.[231]

Such a cram down is permissible if the plan complies with the absolute priority rule, which "provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property" under a Chapter 11 plan.[232] BAPCPA,[233] however, added an exception to the rule for individuals: "[I]n a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115."[234] The question for the court was whether the rental properties that the debtors sought to retain were "included in the estate under § 1115."[235]

Section 1115(a)(1)[236] provides that for individual Chapter 11 debtors, "property of the estate includes, in addition to property specified in section 541[,] all property of the kind specified in section 541 that the debtor acquires after the commencement of the case."[237] A broad reading of the statute would exempt from the absolute priority rule all property claimed under § 541,[238] as well as all post-petition property of the § 541 type.[239] In other words, the absolute priority rule would not apply to individual debtors.[240] Under a narrow reading of § 1115,[241] only property acquired post-petition would be excluded from application of the absolute priority rule.[242] This is because post-petition property is the only property actually added to the estate by § 1115 since the § 541 property enters the estate regardless of § 1115.[243]

The Middle District of Florida adopted the narrow reading.[244] Prior to BAPCPA, the absolute priority rule unquestionably applied to individuals.[245] If Congress intended to exempt individuals from the rule, "it could have simply stated that § 1129(b)(2)(B)(ii) is inapplicable

231. *Id.* at 436-38.

232. *Id.* at 439 (quoting Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202 (1988)) (internal quotation marks omitted).

233. Pub. L. No. 109-8, 119 Stat. 23 (2005).

234. 11 U.S.C. § 1129(b)(2)(B)(ii) (2006).

235. *In re Gelin*, 437 B.R. at 439-40 (internal quotation marks omitted).

236. 11 U.S.C. § 1115(a)(1) (2006).

237. *Id.*

238. 11 U.S.C. § 541 (2006).

239. *In re Gelin*, 437 B.R. at 440.

240. *Id.*

241. 11 U.S.C. § 1115 (2006).

242. *In re Gelin*, 437 B.R. at 440.

243. *Id.*

244. *Id.* at 441.

245. *Id.* at 438-39.

in a case in which the debtor is an individual."[246] Furthermore, the court was unpersuaded by the policy argument that BAPCPA's purpose was to make individual Chapter 11 cases more akin to Chapter 13[247] cases: "[N]o one who reads BAPCPA as a whole can reasonably conclude that it was designed to enhance the individual debtor's 'fresh start.'"[248] Because the court concluded the exception to the absolute priority rule only applies to post-petition property, the court refused to allow cram down of the unsecured mortgage claims and denied confirmation of the Chapter 11 plan.[249]

VI. CONCLUSION

The take-away from cases decided in 2010 is perhaps that debtors are unlikely to find friendly courts–at least when BAPCPA[250] is involved–even if the judges are sympathetic to their circumstances. Even the Supreme Court has been influenced to some extent by the indication that Congress enacted BAPCPA to combat perceived abuse of the bankruptcy system by debtors who were not repaying creditors to the best of their ability.[251] So far, BAPCPA is absent from the Court's 2011-2012 docket. However, it will take up the bankruptcy case of deceased celebrity Anna Nicole Smith for the second time. Previously, the Court ruled that the probate exception to federal jurisdiction did not bar the bankrtupcy court from adjudicating Ms. Smith's counterclaim against her former stepson in a tort case related to their expected inheritances.[252] Now the Court is set to consider whether the bankruptcy court's decision on the counterclaim must pass through the district court before becoming final and binding.[253]

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246. *Id.* at 442.

247. 11 U.S.C. ch. 13 (2006 & Supp. III 2009).

248. *In re Gelin*, 437 B.R. at 441 (quoting *In re* Gbadebo, 431 B.R. 222, 229 (Bankr. N.D. Cal. 2010)) (internal quotation marks omitted).

249. *Id.* at 442-43.

250. Pub. L. No. 109-8, 119 Stat. 23 (2005).

251. Ransom v. FIA Card Services, N.A., 131 S. Ct. 716, 721 (2011) (quoting Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1329 (2010)).

252. Marshall v. Marshall, 547 U.S. 293, 313 (2006).

253. Marshall v. Stern (*In re* Marshall), 600 F.3d 1037 (9th Cir.), *cert. granted*, 131 S. Ct. 63 (2010).

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