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Bankruptcy

by Hon. James D. Walker, Jr.*
and Amber Nickell**

"I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution."

Ulysses S. Grant¹

I. INTRODUCTION

"Stringent execution" may be the watch phrase for implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").² The bankruptcy bar has lived with BAPCPA for well over a year, and if one common thread arises in the case law, it is judges' dissatisfaction with what may kindly be referred to as "drafting flaws." Many courts have highlighted these flaws—and other perceived inadequacies in BAPCPA—by ruthlessly enforcing the statute's plain language. This has already led to the enactment of one amendment by

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1. Ulysses S. Grant, First Inaugural Address (Mar. 4, 1869).
Congress, as well as criticism from some of its members. Whether further amendments will follow remains to be seen.

Judges sitting in the Eleventh Circuit are no strangers to the frustrations of BAPCPA, as the case law demonstrates. Whether they expressed their vexation in rhyme or by more conventional means, they have created a wealth of material for this year's Article, which will review significant developments in Eleventh Circuit bankruptcy law from 2006. Although many of those developments involve BAPCPA—particularly the credit counseling requirement and the infamous hanging paragraph in § 1325(a)—there is other ground to cover as well.

II. JURISDICTION

Among the non-BAPCPA cases decided last year was Marshall v. Marshall, in which the Supreme Court intervened in a dispute between a widow and her stepson over the extent of the probate exception to bankruptcy court jurisdiction. The widow, better known as Anna Nicole Smith, was—to her surprise—omitted from her late husband's will. Instead, the will, which was found valid by a Texas probate court, provided for all property to go to the stepson via a trust.

The widow filed for bankruptcy in California. The stepson filed a claim in the bankruptcy case based on defamation. The widow objected to the claim and filed a counterclaim for tortious interference with an

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3. The court in In re Diagostino, 347 B.R. 116, 120 (Bankr. N.D.N.Y. 2006), relied on the plain language of § 1325(b)(3) to rule that above-median-income Chapter 13 debtors may not deduct charitable contributions when calculating their disposable income because they are required to use IRS standards rather than their actual expenses. In re Diagostino, 347 B.R. at 120. Congress responded by passing the Religious Liberty and Charitable Donation Clarification Act of 2006, Pub. L. No. 109-439, § 2, 120 Stat. 3285 (2006), which was signed into law December 20, 2006. The amendment provides that above-median-income debtors are not required to rely on IRS standards with regard to their charitable contributions when calculating disposable income. Id. § 2, 120 Stat. at 3285. (Of course, the law does not specify what such debtors are to use in place of the IRS standard when it comes to charitable contributions.)


6. Unless otherwise noted, all statutory references are to Title 11 of the United States Code (commonly referred to as the “Bankruptcy Code” or the “Code”).


8. Id. at 1744.

9. Id. at 1742-43.
expected gift. The bankruptcy court ruled in favor of the widow on her objection and on her counterclaim, awarding her damages in excess of $400 million.\textsuperscript{10}

The stepson challenged the decision based on subject-matter jurisdiction, contending that the probate exception required the widow's tort case to be heard in the probate court. The bankruptcy court found the stepson had waived the probate exception defense. The district court affirmed on the ground that the probate exception did not apply because the judgment on the tort claim did not require a finding that the testator's will was invalid. The circuit court reversed the district court because the tort claim raised questions about the testator's intent, which are normally answered in probate court.\textsuperscript{11} The Supreme Court reversed the circuit court.\textsuperscript{12}

After discussing the history of the probate exception and its hazy boundaries, the Court noted that the probate exception is limited to "the probate or annulment of a will and the administration of a decedent's estate" and the disposal of "property that is in the custody of a state probate court."\textsuperscript{13} The Court then concluded that the widow's claim fell outside the exception because she was seeking an in personam judgment on a tort claim.\textsuperscript{14} She was not seeking to probate a will or to reach property in the custody of the probate court.\textsuperscript{15} Furthermore, probate courts have no special expertise over tortious interference claims.\textsuperscript{16} On the contrary, state and district courts routinely hear such cases.\textsuperscript{17} Thus, the Court ruled in the widow's favor.\textsuperscript{18} But, her victory was not decisive because the Court remanded the case for consideration of preclusion issues.\textsuperscript{19}

III. DEBT RELIEF AGENCIES

On the date BAPCPA became effective, Judge Lamar W. Davis, Jr., a bankruptcy judge in the southern district of Georgia, issued an order \textit{sua sponte}, holding that attorneys are not "debt relief agencies" ("DRAs")\textsuperscript{20}
subject to the rather onerous regulations set forth in §§ 526, 527, and 528 of the Bankruptcy Code. The United States Trustee appealed the decision, arguing lack of jurisdiction and lack of a properly commenced case or proceeding. Several bankruptcy attorneys intervened and contended that the trustee lacked standing to appeal. Before the district court could address the trustee's arguments about jurisdiction, it had to decide the standing question.

The court first noted that a trustee generally has relaxed standing requirements compared to other parties interested in a bankruptcy case because a trustee is not required to have a pecuniary interest in the outcome. Instead, the trustee's standing can derive from the need to enforce the bankruptcy law in the public's interest. The court then turned the United States Trustee's "case or proceeding" argument against her. The trustee complained that the bankruptcy court did not have authority to issue an opinion in the absence of a case or proceeding. The district court held that even acting in the public's interest, the trustee did not have standing to appear in the absence of a case or proceeding. A case is commenced by the filing of a petition, and proceedings are all things that happen within the case. Because even the trustee herself pointed out that no case or proceeding existed, the court determined that the trustee lacked standing to appeal. As a result, Judge Davis's opinion was untouched.

The trustee may yet have her day in court on this issue if she decides to appeal In re Reyes. In Reyes the debtor's attorney was working pro bono. The attorney sought a ruling that she was not a DRA because she did not receive "payment of money or other valuable consideration." The United States Trustee agreed that under the circumstances, the plain language of the Bankruptcy Code excluded the attorney from the

1013, 1014-15 (2006), for a full discussion of this case.
23. Id. at 321.
24. Id. at 323 n.5.
25. Id. at 322.
26. Id.
27. Id.
28. Id. at 322-23.
29. Id. at 323.
30. Id. at 322-23.
31. Id. at 323.
33. Id. at *4 (quoting 11 U.S.C.A. § 101(12A) (West Supp. 2006) (defining "debt relief agency").
While the court concurred with the parties, it chose to delve deeper into the murky waters of BAPCPA.35 First, the court considered whether the provisions regulating DRAs—§§ 526, 527, and 529—are constitutional as applied to lawyers.36 With little ado, the court adopted the opinion of *Milavetz, Gallop & Milavetz, P.A. v. United States*37 to hold that the provisions violate the First Amendment.38 *Milavetz* held that § 526(a)(4) unconstitutionally restricts speech by forbidding attorneys from advising their clients about taking certain legal actions in contemplation of bankruptcy.39 With respect to §§ 528(a)(4) and (b)(2), which regulate advertising by bankruptcy attorneys, the court declared the provisions unconstitutional because they neither advanced a government interest, nor were they narrowly drawn.40 The court reasoned that rather than clarifying bankruptcy advertisements, the provisions are more likely to create confusion for consumers.41 The court in *Milavetz* further agreed with Judge Davis that §§ 526, 527, and 528 do not apply to attorneys.42 Second, the court in *Reyes* held that even if the provisions were constitutional, they do not apply to lawyers.43 Not only do they "infringe on the State's traditional role of regulating attorneys," they also deter lawyers from representing debtors.44 The court declined to assume that Congress was mean-spirited and intended sections 526, 527 and 528 to provide a chilling effect on lawyers' willingness to represent persons who have suffered financial misfortune, in most cases through no fault of their own, because of lack of health insurance, loss of employment or other tragedy.45 Instead, the court noted that Congress intended to protect consumers by regulating non-attorneys who would take advantage of debtors facing bankruptcy, while leaving attorneys free of these regulations so they can provide debtors with the full benefit of competent legal counsel.46

34. *Id.* at *1-2.
35. *Id.*
36. *Id.* at *2.
40. *Id.* at 766-67.
41. *Id.* at 767.
42. *Id.* at 769.
43. 2007 WL 136934, at *2.
44. *Id.*
45. *Id.* at *3.
46. *Id.*
Third, even if the provisions were constitutional and they applied to attorneys, they would not apply to attorneys working pro bono. The assistance provided by a DRA is done “in return for the payment of money or other valuable consideration.” Because the attorney in Reyes was receiving nothing from the debtor in exchange for her services, she cannot be a DRA regulated by §§ 526, 527, and 528.

IV. ENTERING AND EXITING BANKRUPTCY

A. Credit Counseling

The courts have been very clear that debtors who fail to obtain a credit briefing in the 180 days prior to filing for bankruptcy will have their case dismissed (or, in some jurisdictions, their petition stricken). In the spirit of “stringent enforcement” of BAPCPA, the courts generally have held firm against even the most sympathetic debtors. But, two cases show that the requirements of § 109(h) are not absolute.

In In re Petit-Louis, a debtor, fluent only in Creole, sought an exemption from the credit counseling requirement due to his inability to obtain the counseling in Creole. The debtor had contacted every approved credit counseling agency to no avail and written to the United States Trustee seeking a waiver of the requirement. The debtor attached the letter to his petition, which the court considered a certification of exigent circumstances. The trustee’s office refused to provide an interpreter or to waive the credit counseling requirement. The office argued that because a trustee is not required to provide translators to people who have filed bankruptcy, it is not required to provide translators to people who have not yet filed and who may never file. The court was unpersuaded. As the administrator of the credit counseling program, the trustee is required to provide meaningful access to debtors, which includes approving agencies that can provide counseling in multiple languages. Because the debtor was unable to

47. Id. at *4.
48. Id. (quoting 11 U.S.C.A. § 101(12A)).
49. Id.
53. Id. at 133.
54. Id.
55. Id. at 133-34.
56. Id. at 133.
obtain credit counseling in Creole and could not afford to hire his own translator, the court granted the exemption pursuant to § 109(h)(3).\textsuperscript{57}

Usually, the debtor is fighting dismissal based on failure to obtain credit counseling. But in \textit{In re Parker},\textsuperscript{58} it was the debtor who filed the motion to dismiss. When the debtor filed his Chapter 7 petition, his only evidence of credit counseling was the copy of a business card of an unapproved agency. He later filed a motion seeking an extension of time to obtain credit counseling, but it was never heard by the court because the debtor failed to schedule a hearing on the motion. Subsequently, at the § 341(a) meeting, he presented the trustee with a certificate of credit counseling obtained postpetition from an approved agency. However, when the trustee sought to sell the debtor's fantasy houseboat, valued at $180,000, the debtor replaced his attorney, filed a motion to dismiss for failure to obtain prepetition credit counseling, and withdrew the motion for an extension of time to obtain credit counseling.\textsuperscript{59}

After concluding that the requirements of § 109(h) are not jurisdictional and, consequently, that it had authority over the case, the court considered whether the credit counseling requirements are waivable.\textsuperscript{60} The court reasoned, "[I]f a court has jurisdiction over a case in which a debtor is ineligible and thus orders entered in the case are valid and binding, the non-jurisdictional requirement must be waivable."\textsuperscript{61} In this case, the debtor's motion to extend time to obtain credit counseling indicated the debtor was both aware of the credit counseling requirement and of his failure to satisfy it. Nevertheless, the debtor continued to actively participate in the case.\textsuperscript{62} In such circumstances, the court found, the debtor has waived dismissal based on eligibility under § 109(h).\textsuperscript{63} The debtor has appealed this case, and at the time of writing, the appeal was still under consideration.\textsuperscript{64}

\begin{itemize}
\item \textsuperscript{57} \textit{Id.} at 134. Section 109(h)(3)(A) allows waiver of the credit counseling requirement if (1) the debtor certifies the existence of exigent circumstances meriting waiver, (2) the debtor seeks but is unable to obtain counseling in the five days prior to filing, and (3) the request is satisfactory to the court. 11 U.S.C.A. § 109(h)(3)(A) (West Supp. 2006).
\item \textsuperscript{58} 351 B.R. 790 (Bankr. N.D. Ga. 2006).
\item \textsuperscript{59} \textit{Id.} at 793-95.
\item \textsuperscript{60} \textit{Id.} at 796-97.
\item \textsuperscript{61} \textit{Id.} at 797.
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{Id.} at 797-99.
\end{itemize}
B. Conversion

Is conversion from Chapter 7 to Chapter 13 an absolute right? The Supreme Court faces that question in *Marrama v. Citizens Bank of Massachusetts.* Section 706(a) states:

The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

The First Circuit Court of Appeals, the Bankruptcy Appellate Panel, and the Bankruptcy Court in *Marrama* all agreed that the bankruptcy court may deny conversion to a debtor who acts in bad faith. In *Marrama* the bankruptcy court found bad faith because the debtor failed to list two significant assets in his petition and then sought to convert when the Chapter 7 trustee discovered the omissions.

While the Supreme Court ponders this question (which it has not yet answered as of this writing), lower courts continue to grapple with it. In *West v. Mutual Savings Credit Union (In re West),* the bankruptcy court disagreed with the courts in *Marrama.* The credit union in *West* sought a determination that its debt was nondischargeable and sought a denial of the debtors' discharge. The credit union alleged that the debtors omitted assets from their original schedules (which they amended twice) and understated their income. The debtors filed a motion to convert to Chapter 13, and the credit union objected, pointing to the errors in the petition as evidence of the debtors' bad faith. But, the court found the bad faith issue irrelevant to conversion.

After quoting the statute, the court looked to the legislative history, which states that "'[s]ubsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case.'" But even without

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65. 430 F.3d 474 (1st Cir. 2005), cert. granted, 126 S. Ct. 2859 (U.S. June 12, 2006) (No. 05-996).
68. *Id.*
70. *Id.* at 805.
71. *Id.* at 803-04.
72. *Id.* at 805.
reference to the legislative history, the court concluded that the language of the statute plainly provides an absolute right to convert, thus ending the inquiry. Consequently, the court granted the debtors' motion.

C. Successive Filings

Nothing in the Bankruptcy Code prevents a debtor from filing cases that overlap when the cases have no debts in common. Such was the conclusion of the court in In re Sanchez-Dobazo. The debtors had nearly completed their first Chapter 13 case when they filed a second case. They had one payment outstanding on the first case, which had become due prior to the filing of the second case, so the court had not entered a discharge. The debtors incurred all the debts in the second case after the first case was filed. The trustee filed a motion to dismiss the second case, contending that Chapter 13 cases may not overlap, especially when the second case is filed prior to discharge in the first case. The court rejected this argument.

Although the Supreme Court has held that a debtor may not maintain simultaneous cases to discharge the same debts, this holding does not extend to overlapping cases if the cases have no debts in common. Nevertheless, in some jurisdictions, any overlapping of cases is prohibited under the “strong” single-estate rule. However, this rule has been implicitly rejected by the Eleventh Circuit in In re Saylors, where the court allowed a chapter 13 to be filed before dismissal of a chapter 7. The court opted for a formulation of the single-estate rule that does not conflict with Saylors: no property may be an asset in multiple bankruptcy cases simultaneously. In such circumstances, a discharge in the first case would have no effect on the second case. Thus, no reason exists to bar a second case prior to discharge in the first case. The court also rejected a per se rule that overlapping cases should be prohibited as possible abuses of the bankruptcy system.

74. Id. at 805.
75. Id.
76. 343 B.R. 742 (Bankr. S.D. Fla. 2006).
77. Id. at 743-44.
78. Id. at 744.
79. Id.
80. Id.
81. Id. (citing In re Saylors, 869 F.2d 1434, 1437 (11th Cir. 1989)).
82. Id. at 745.
83. Id.
84. Id. at 745-46.
The court reasoned that if the debtor is acting in bad faith, his case can be terminated during the plan confirmation process.85

D. Automatic Dismissal

It did not take long for Judge Cristol’s opinion in In re Riddle86 to reach the e-mail boxes of bankruptcy practitioners everywhere. After all, this curiosity of an opinion that bemoaned the automatic dismissal provision in § 521(i) was reminiscent of Dr. Seuss. Here is a taste:

I do not like dismissal automatic,
It seems to me to be traumatic.

How can any person know?
what the docket does not show?
What is the clue on the 46th day?
Is the case still here, or gone away?

Before this problem gets too old
it would be good if we were told:
What does automatic dismissal mean?
And by what means can it been [sic] seen?
Are we only left to guess?
Oh please Congress, fix this mess!87

At least one judge has found a way around “this mess.” In In re Parker,88 the Chapter 7 debtor sought dismissal of his case to prevent the trustee from selling his luxury boat. Pursuant to § 521(i)(1), if the debtor fails to file all the information required by § 521(a) within forty-five days of filing the petition, his case is “automatically dismissed” on the forty-sixth day.89 Section 521(a)(1) requires the debtor to file a list of creditors and, “unless the court orders otherwise,” a number of other documents, including any payment advices he received during the sixty days prior to filing.90 The debtor in Parker argued that because he did not file payment advices, his case had been automatically dismissed.91 The court disagreed.92

85. Id. at 746.
86. 344 B.R. 702 (Bankr. S.D. Fla. 2006).
87. Id. at 703.
88. 351 B.R. 790 (Bankr. N.D. Ga. 2006). For more discussion of this case, see supra Part IV.A.
90. Id. § 521(a)(1) (emphasis added).
91. In re Parker, 351 B.R. at 799-800.
92. Id. at 800-02.
First, the court noted that the requirement to file payment advices is modified by the phrase "unless the court orders otherwise." And, no limitation is placed on when the court may order otherwise. Presumably, the court could order otherwise even after the deadline for filing payment advices has passed.

Second, the court considered whether the automatic dismissal is really automatic. Under § 521(i)(2), a party in interest is allowed to request an order dismissing the case. "If the case had already been 'automatically dismissed,' this language would be mere surplusage." Instead, the court found that automatic dismissal refers to a determination made by the court as to whether or not the debtor has filed all required information. A stricter interpretation that a case ceases to be pending by the mere passage of time without a court order of dismissal does not further the purposes of the statute [to prevent abuse of the bankruptcy system] and may cause chaos and confusion since there is no readily ascertainable way to determine whether or not a case has been dismissed.

Furthermore, a stricter interpretation may adversely affect the interests of the trustee and creditors. It may be in the best interests of all parties for the case to go forward, or the creditor might want to seek dismissal under a different code section that would impose limitations on refiling, such as § 109(g). Ultimately, the court used its power to "order otherwise" to find that the debtor did not need to file any additional payment advices. Consequently, the court concluded that the automatic dismissal provisions did not apply.
V. THE LIMITED STAY

The primary issue arising with the limited stay is time. If the debtor wants to extend the stay beyond thirty days after filing his petition, he must file a motion, provide notice to creditors, and obtain a hearing prior to the expiration of the thirty-day period. Debtors who wait to file the motion may find themselves shut out on due process grounds.

For example, in *In re Covert*, the debtor filed his bankruptcy case on August 30, 2006, and filed his motion to extend the stay and notice thirty days later on September 29, 2006. The court denied the motion, pointing out that such timing effectively prevented any interested party other than the debtor from being heard. Similarly, when the debtor in *In re Berry* filed his motion after the thirty days had expired, the court denied the motion due to inability to provide interested parties with notice and an opportunity to be heard. The court also found that it lacked inherent authority and statutory authority to impose a stay after the thirty-day stay terminated.

The court in *Whitaker v. Baxter (In re Whitaker)*, however, reached a different conclusion. In *Whitaker* the debtors filed a motion to impose a stay pursuant to § 362(c)(4) after the limited stay had expired. Like *Berry*, the court found that § 362(c)(4) does not apply to debtors with only one previous case. Unlike *Berry*, however, the court relied on its § 105(a) power to impose a stay. The debtors filed their

105. Pursuant to 11 U.S.C.A. § 362(c)(3) (West Supp. 2006), the automatic stay terminates after thirty days for a debtor who had a prior case pending and dismissed during the one-year period preceding his current case. 11 U.S.C.A. § 362(c)(3)(A). The debtor can obtain an extension if he demonstrates the current case was not filed in bad faith. *Id.*

108. *Id.* at 328.
109. *Id.*
111. *Id.* at 636-37.
112. *Id.* at 637.
114. 11 U.S.C.A. § 362(c)(4)(A)(i) (West Supp. 2006). This section applies to debtors who had more than one case pending and dismissed during the one-year period prior to filing their current case. *Id.* In such cases, no automatic stay goes into effect at filing. *Id.* Instead, the debtor must ask the court to impose a stay. *Id.* § 362(c)(4)(A)(ii).
116. *Id.*
117. *Id.*
motion to extend the stay twenty-seven days after filing their petition, and a hearing on the motion was held fifty-four days after the petition date.\textsuperscript{118} During the hearing, the court determined that the debtors did not file their current case in bad faith.\textsuperscript{119} But, because the hearing took place more than thirty days after the petition date, the court could not extend the stay.\textsuperscript{120} Nevertheless, the court imposed a stay pursuant to § 105(a) because (1) the debtors had demonstrated good faith; (2) proper notice was served on all interested parties and none responded; (3) the debtors should not be punished for their attorney's negligence in filing the motion to extend at the last minute; and (4) the debtors should not be encouraged to game the system by dismissing their current case, refiling, and then seeking imposition of the stay.\textsuperscript{121}

VI. ESTATE ISSUES

A. Property of the Estate

The question of whether crop disaster payments are property of the estate continues to wend its way through the courts via Bracewell v. Kelley (In re Bracewell).\textsuperscript{122} Legislation passed after the debtor-farmer filed for bankruptcy entitled him to crop disaster payments for losses to crops that he planted, harvested, and sold prepetition. The bankruptcy court held that the payments were property of the estate under § 541(a)(1), as a legal interest of the debtor, but not under § 541(a)(6), as proceeds of estate property. The district court reversed, holding that the payments were not estate property under either § 541(a)(1) or (a)(6).\textsuperscript{123} The circuit court has now affirmed the district court.\textsuperscript{124}

First, discussing § 541(a)(1), which includes in the bankruptcy estate "all legal or equitable interests of the debtor in property as of the commencement of the case," the court noted that the language plainly "makes the commencement of the bankruptcy case the key date for property definition purposes."\textsuperscript{125} In this case, the debtor's interest in the payments did not come into existence until the legislation was

\begin{footnotes}
\item[118] Id. at 340.
\item[119] Id. (noting that the prior case terminated when the husband lost his job, and the second case was not filed until he was re-employed).
\item[120] Id. at 342.
\item[121] Id. at 347-48.
\item[122] 454 F.3d 1234 (11th Cir. 2006).
\item[123] Id. at 1236.
\item[124] Id. at 1247.
\item[125] Id. at 1237.
\end{footnotes}
enacted, which was after commencement of the case. Instead, on the petition date, the debtor had only a hope that Congress would act, which was not sufficient to bring the payments into the bankruptcy estate.

Second, the court considered § 541(a)(6), which includes in the bankruptcy estate "'[p]roceeds, product, offspring, rents, or profits of or from property of the estate.'" Proceeds must derive from property of the estate. Because the debtor had no "cognizable interest in his hoped for relief payment" until the legislation was enacted postpetition, "the property of his estate did not include an interest that could generate proceeds." The court rejected the argument that the payments were actually proceeds of the prepetition crop losses. The legislation was passed to provide assistance to farmers, not to purchase their destroyed crops. "Because this assistance was not given in exchange for property of the estate, it is not proceeds of property of the estate."

B. Claims

An insurance company sought priority status for the debtor's unpaid workers' compensation premiums in *Howard Delivery Service, Inc. v. Zurich American Insurance Co.* The insurance company argued that the premiums were entitled to priority under § 507(a)(5) as an unpaid contribution to "an employee benefit plan . . . arising from services rendered." In a 6-3 decision, the Supreme Court disagreed.

The majority noted that subsection (a)(4), which provides priority for unpaid wages, works in concert with (a)(5). In fact, Congress enacted (a)(5) in reaction to earlier Supreme Court decisions holding that (a)(4) only covers wages and not fringe benefits. "Beyond genuine debate, the main office of § 507(a)(5) is to capture portions of employee compensation for services rendered not covered by § 507(a)(4)."
The majority also rejected the insurance company's argument that because the phrase "employee benefit plan" is undefined by the Bankruptcy Code, the Court should rely on the definition of the phrase "employee welfare benefit plan" in the Employee Retirement Income Security Act of 1974 ("ERISA"). The Court refused to do so, noting—among other things—that when Congress wants to incorporate other federal legislation in the Bankruptcy Code, it does so expressly.

Instead, because of the relationship with subsection (a)(4), the Court concluded that employee benefit plans are benefits bargained for in lieu of additional compensation. Workers' compensation schemes do not fit in this category; rather, "[t]hey modify, or substitute for, the common-law tort liability to which employers were exposed for work-related accidents." Thus, the function of workers' compensation is not to compensate employees but rather to protect employers from liability. Consequently, unpaid workers' compensation contributions do not fit within the scope of § 507(a)(5).

The dissent argued that § 507(a) priorities should be read broadly to facilitate the bankruptcy policy of equal distribution to like creditors. Therefore, the only question should be whether workers' compensation benefits employees. Employees do benefit from workers' compensation, and the fact that employers also benefit should not remove the unpaid contributions from § 507(a)(5) priority.

In a very different sort of case, a Florida bankruptcy court had to decide whether to disallow credit card claims for insufficient documentation. In re Moreno, two debtors objected to claims for credit card debt. Attached to each claim was an "account summary," which offered various amounts of information. At a minimum, each account summary included the debtor's personal information, the account number, and the account balance as of the petition date. Some of the summaries included additional information, such as starting balance, finance charges, late charges, cash advances, and payments. Except for

141. Howard Delivery Serv., 126 S. Ct. at 2113.
142. Id.
143. Id.
144. Id. at 2116.
145. Id. at 2117 (Kennedy, J., dissenting).
146. Id. at 2118.
147. Id. at 2118-19.
149. 341 B.R. 813 (Bankr. S.D. Fla. 2006).
one small claim, the debtors had listed all the debts on their schedules. 150

Pursuant to Rule 3001(c), "[W]hen a claim . . . is based on a writing, the original or a duplicate shall be filed with the proof of claim." 151 Official Form 10, the proof of claim form, requires the creditor to attach supporting documents. 152 However, nothing in the Code or the Rules provides for disallowance of a claim for insufficient documentation. 153 Consequently, the court overruled the debtors' objections with prejudice and allowed the claims. 154 In doing so, it set forth guidelines to assist debtors and creditors in the future. 155

First, with respect to credit card claims, account summaries generally will be sufficient, and the creditor does not have to attach the original agreement or evidence of each transaction. 156 Second, if a debtor schedules a claim as "undisputed and in an amount equal to or greater than the amount in the proof of claim, little, if any, documentation is necessary." 157 Third, if a debtor schedules a claim as undisputed and in an amount less than the proof of claim, the debtor may object to the excess amount, in which case the creditor must provide evidence to the extent its claim exceeds the scheduled amount. 158 Finally, if the claim is unscheduled, the creditor will have to provide more extensive documentation, such as the original agreement or account statements. 159 The court concluded, "The gig is up . . . on debtors taking advantage of the cost of responding to claims objections and obtaining orders striking claims which the debtor has acknowledged owing in whole or substantial part." 160

C. Avoidance

The middle man for an insurance company and the insured is not an initial transferee from which the trustee may recover a preference, according to the Eleventh Circuit Court of Appeals in Andreini & Co. v. Pony Express Delivery Services, Inc. (In re Pony Express Delivery

150. Id. at 814-16.
151. Id. at 817 (quoting FED. R. BANKR. P. 3001(c)).
152. Id.
153. Id.
154. Id. at 818.
155. Id. at 819.
156. Id. at 818.
157. Id.
158. Id. at 819.
159. Id.
160. Id. at 819-20.
Andreini served as an insurance broker for the debtor. The debtor sent its workers' compensation premiums to Andreini, which deposited the funds into a client trust account and issued checks to the insurance carrier. In this case, Andreini paid the insurance carrier before the debtor's check cleared. When the debtor's check bounced, the debtor sent a wire transfer to Andreini's client trust account to cover its deficiency. After the debtor filed Chapter 11, the debtor attempted to recover the wire transfer from Andreini as a preference, arguing that the insurance broker was an initial transferee under 11 U.S.C. § 550. The bankruptcy and district courts ruled in favor of the debtor. The court of appeals reversed.

In the Eleventh Circuit, the test for an initial transferee is the "control" or "conduit" test, which provides:

a recipient of an avoidable transfer is an initial transferee only if they exercise legal control over the assets received, such that they have the right to use the assets for their own purposes, and not if they merely served as a conduit for assets that were under the actual control of the debtor-transferor or the real initial transferee.

Generally, entities that are a fiduciary of a debtor, such as banks and insurance brokers, are not considered initial transferees because they are merely acting as agents and can only direct the money according to the demands of the debtor. However, a fiduciary may be an initial transferee if it is entitled to legal control over the transfer—for example, if the debtor is paying a debt it owes to the fiduciary.

The lower courts found Andreini to be an initial transferee because it became a creditor of the debtor when the debtor's check bounced. It could use the wire transfer in any manner it chose. However, under the control test, the court must consider the transaction as a whole. In this case, "Andreini did not intend to become a creditor" of the debtor; it paid the premiums with the expectation that the debtor's check was valid, as it always had been in the past. Furthermore, neither party treated the deficiency as a loan. Andreini charged no interest, and the

161. 440 F.3d 1296, 1299 (11th Cir. 2006).
163. In re Pony Express Delivery Servs., 440 F.3d at 1299-1300.
164. Id. at 1299.
165. Id. (citations omitted).
166. Id. at 1301.
167. Id.
168. Id.
169. Id. at 1302.
170. Id. at 1302-03.
debtor wired the transfer to Andrieni's client trust account—over which it had limited control—rather than its business account. Because "[t]he wire transferred funds were intended for, and have only benefitted, [the debtor's] insurance carriers," the court held that Andrieni was not an initial transferee from which the debtor could recover a preference.

VII. THE CHAPTER 13 PLAN

A. Projected Disposable Income

Understanding projected disposable income requires reference to a maze of Code sections. Pursuant to § 1325(b)(1)(B), the court cannot confirm a plan over the objection of the trustee or an unsecured creditor unless "the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan." This has raised questions about calculating "projected disposable income." Disposable income is defined 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." Current monthly income is based on all income received by the debtor during the six months prior to the petition date. However, the Code provides no definition of "projected disposable income." The "applicable commitment period" is defined as three years for a below-median income debtor and five years for an above-median income debtor. Whether or not a debtor is below or above the median income is determined by Form B22C, which all Chapter 13 debtors must complete pursuant to Rule 1007(b)(6).

The trend among courts in the Eleventh Circuit is to find that "projected disposable income" differs from "disposable income" in that it is forward-looking. Otherwise, the word "disposable" would be mere

171. Id.
172. Id. at 1304.
174. Id. § 1325(b)(2).
175. Id. § 101(10A).
176. Id. § 1325(b)(4)(A).
surplusage. The current monthly income provides a starting point for determining projected disposable income. However, “if a debtor’s circumstances change from the six months preceding bankruptcy to the petition date, then the Court should evaluate the debtor’s past and current financial status to determine disposable income.” Any party seeking an adjustment of that figure must provide evidence of the increase or decrease in the debtor’s income or expenses.

B. The Hanging Paragraph

Probably no BAPCPA amendment generated more case law in the Eleventh Circuit during 2006 than the unnumbered hanging paragraph tacked on to the end of § 1325(a), which provides as follows:

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if 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 preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) 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.

Section 506 provides that a claim is only secured to the value of the collateral. Any remaining indebtedness is unsecured.

The hanging paragraph raises the question of how to treat a claim that does not travel through § 506 (a “910 claim”). The Author was among the first judges in the country to analyze this question. The Author held that by taking § 506 out of the equation, the claim is not secured. Under this view, “the only way a claim may be deemed secured for bankruptcy purposes is to be designated as such via § 506.” Even so, the Author acknowledged that Congress intended to provide 910 creditors with fair treatment, rather than punishing them with a

179. In re Dew, 344 B.R. at 660; In re Grady, 343 B.R. at 750.
181. In re Grady, 343 B.R. at 751.
183. 11 U.S.C.A. § 1325(a) (West Supp. 2006) (hanging paragraph, sometimes cited as § 1325(a)(*)).
184. Id. § 506(a)(1).
185. Id. § 506(a).
diminished payout under BAPCPA. Consequently, the Author held, "In a Chapter 13 plan, a 910 claim must receive the greater of (1) the full amount of the claim without interest; or (2) the amount the creditor would receive if the claim were bifurcated and crammed down with Till interest paid on the value of the collateral." When other judges began to tackle the question, the overwhelming majority of them—including all those in the Eleventh Circuit—took a contrary position. Under the majority view, a claim subject to the hanging paragraph is deemed secured in full and entitled to Till interest on the full amount of the claim; these cases reason that secured status is determined by the existence of a lien created under nonbankruptcy law rather than by § 506(a). Furthermore, because nothing in the Code prevents modification of the contract underlying a 910 claim or addresses interest rates to be paid on such claims, Till must be applied to determine the appropriate interest rate.

Various nuances within the cases have led courts to further refine the law. For example, in In re Murray, the court considered the scope of a purchase money security interest ("PMSI"). In that case, in addition to the cost of the vehicle, the debtors financed an extended service contract, a documentary fee, and a title fee. The debtors argued that because the debt included items other than the vehicle, the creditor did not hold a PMSI, and therefore, the hanging paragraph did not apply to the claim at issue. The court disagreed, reasoning nothing in the hanging paragraph requires "that a creditor be secured only by a motor

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187. In re Green, 348 B.R. at 611.
188. In Till v. SCS Credit Corp., 541 U.S. 465, 479-80 (2004), the Supreme Court held that interest on claims crammed down in Chapter 13 should be calculated based on the prime rate plus a risk factor. Id. at 500-01.
193. Id. at 239-40.
194. Id.
Thus, the court concluded the creditor had a PMSI, and its claim could not be bifurcated and crammed down. The hanging paragraph has not always benefited the car creditor. In what may be a case of unintended consequences, what is true for cramdown is equally true for surrender. Debtors do not always want to keep their cars, as In re Brown demonstrates. In that case, instead of attempting to cramdown an undersecured 910 car claim, the debtor sought to surrender the collateral in full satisfaction of the claim. The creditor objected, arguing it should receive a deficiency claim for the unsecured portion of the debt. The court sided with the debtor, concluding that a 910 claim is not subject to bifurcation for any option the debtor may choose under § 1325(a)(5), which includes surrender. There is no evidence Congress intended 910 creditors to be treated differently for surrender rather than a cramdown, nor does allowing surrender in full satisfaction of the claim lead to an absurd result. “If the 910 claim of a creditor is fully secured upon a debtor’s retention of the vehicle under § 1325(a)(5)(B), then it is completely logical that it is also fully secured upon surrender under § 1325(a)(5)(C).”

One final issue litigated under the hanging paragraph is whether a vehicle “acquired for the personal use of the debtor,” is required to receive 910 treatment. In re Jackson, the debtor purchased a Pontiac Grand Prix for the use of his non-debtor wife within 910 days of filing for bankruptcy. The wife was not a party to the contract on the Grand Prix, nor was her name on the title. However, she was the primary driver of the Grand Prix; the debtor drove a different vehicle. The creditor, while conceding that the car was purchased for the wife, argued “personal use” includes family or household use. The court disagreed.

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195. Id. at 240 (citing In re Johnson, 337 B.R. 269, 272-73) (Bankr. M.D. N.C. 2006)). The court reached the same result on reconsideration, disregarding several cases cited by the debtors because they involved multiple transactions, antecedent debts, or debt in excess of the price of the purchase. In re Murray, 352 B.R. 340, 347-49 (Bankr. M.D. Ga. 2006).


198. Id. at 871.

199. Id. at 874-75.

200. Id.

201. Id. at 875.


204. Id. at 924-25.

205. Id. at 925-26.
When Congress has intended a statute to cover family and household use, it has included those terms. Consequently, the omission of ‘family and household’ use from the hanging paragraph demonstrates that Congress intended ‘personal use’ standing alone to have a different meaning. The court relied on the dictionary definition of “personal” to hold that the hanging paragraph applies only to cars purchased specifically for the use of the debtor.

If not for the creditor’s stipulation that the car was purchased for the wife’s use, this case may have raised a difficult question of fact. Especially when dealing with spouses, the line between personal use and family use can be difficult to define. Even if a car is purchased for the primary use of one spouse, there is generally some expectation that it will also be available for the personal use of the other spouse. In other words, the spouses consider it “our car” rather than “her car” or “his car.”

C. Payment of Priority Claims

BAPCPA altered the priority of unsecured claims by advancing domestic support obligations from seventh priority to first priority. This bumped administrative expense claims (which include attorney fees) from first to second priority. In two Alabama cases, the Department of Human Resources (“DHR”), which was collecting child support owed by the debtors, relied on the amendment to demand payment in full ahead of other unsecured creditors in Chapter 13. The courts acknowledged that in a Chapter 7 case, the DHR’s position would be sound because § 726 “requires that property of the estate in a Chapter 7 case be distributed in the order specified in § 507.” Nothing in Chapter 13, however, compels a similar result. On the contrary, § 1322(a)(2) requires full payment of “all claims entitled to priority”; no one priority is singled out for preferential treatment. This uniform treatment of unsecured claims regardless of priority is bolstered by § 1322(b)(4), which allows “payments on any unsecured

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206. Id. at 926 (citing 11 U.S.C.A. §§ 101(8), 365(d)(5), 506(a)(2), 507(a)(7), and 522 (West 2004 & Supp. 2006)).
207. Id.
208. Id.
210. Id.
212. In re Sanders, 347 B.R. at 779; see also In re Vinnie, 345 B.R. at 389-90.
claim to be made concurrently with payments on any other unsecured claim.\textsuperscript{214} The final blow to the DHR’s position comes from § 1326(b)-(1), which provides that unpaid administrative expense claims must be paid “before or at the time of each payment to creditors under the plan.”\textsuperscript{215} In fact, when Congress dropped administrative claims to second priority, it made the necessary corresponding change to § 1326(b)(1).\textsuperscript{216} Based on these Code sections, the courts found no basis for the DHR’s argument that it should be paid in full before any other unsecured creditors receive any payment.\textsuperscript{217}

VIII. CHAPTER 11: EXEMPTIONS AND THE ABSOLUTE PRIORITY RULE

Last year, we discussed \textit{In re Henderson},\textsuperscript{218} in which the bankruptcy court considered whether an individual Chapter 11 debtor violated the absolute priority rule\textsuperscript{219} by retaining several million dollars worth of exempt property.\textsuperscript{220} This year, we revisit the case in the form of an appellate decision from the district court.\textsuperscript{221} The bankruptcy court allowed the debtor to keep the exempt property even though the Chapter 11 plan failed to provide full payment to all unsecured creditors.\textsuperscript{222} The district court affirmed.\textsuperscript{223}

The district court first determined the absolute priority rule applies to individual Chapter 11 debtors as well as to business debtors.\textsuperscript{224} Then, the court considered whether exempt property is subject to the absolute priority rule.\textsuperscript{225} The court agreed with the bankruptcy court that once property is allowed as exempt, it is no longer part of the


\textsuperscript{216} \textit{In re Sanders}, 347 B.R. at 780; \textit{In re Vinnie}, 345 B.R. at 388-89.

\textsuperscript{217} \textit{In re Sanders}, 347 B.R. at 780; \textit{In re Vinnie}, 345 B.R. at 389.

\textsuperscript{218} 321 B.R. 550 (Bankr. M.D. Fla. 2005).

\textsuperscript{219} Pursuant to 11 U.S.C.A. § 1129(b)(2)(B) (West 2004 & Supp. 2006), the court may not confirm a plan over the objection of an impaired class of unsecured creditors unless the holders of any junior claims will not retain any property on account of their claim. 11 U.S.C.A. § 1129(b)(2)(B).

\textsuperscript{220} \textit{In re Henderson}, 321 B.R. at 561.

\textsuperscript{221} Van Buren Indus. Investors v. Henderson (\textit{In re Henderson}), 341 B.R. 783 (M.D. Fla. 2006).

\textsuperscript{222} \textit{Id.} at 787-88.

\textsuperscript{223} \textit{Id.} at 792.

\textsuperscript{224} \textit{Id.} at 789.

\textsuperscript{225} \textit{Id.} at 789-90.
bankruptcy estate. Because unsecured creditors could not reach exempt property outside of bankruptcy, the debtor's interest in exempt property is not junior to unsecured creditors. Therefore, the absolute priority is inapplicable, and there is no violation to prevent confirmation of the plan.

IX. DEFENSES USED AGAINST THE DEBTOR: IN PARI DELICTO

In *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards*, the Eleventh Circuit Court of Appeals considered an issue of first impression: whether the defense of *in pari delicto* based on the wrongdoing of the debtor may be asserted against a trustee pursuing claims on behalf of the debtor. The debtor in this case engaged in a Ponzi scheme that defrauded investors of hundreds of millions of dollars. After the debtor filed for bankruptcy, a trustee was appointed. The trustee sued several entities for assisting in the Ponzi scheme. The district court dismissed the case under the doctrine of *in pari delicto*, which prevents a wrongdoer from benefiting from its wrongful acts.

After concluding the trustee had standing to sue for wrongs done to the debtor corporation, the court considered whether defenses against the debtor were equally effective against the trustee. The trustee argued that because the defense of *in pari delicto* relies on the "personal malfeasance of the individual seeking to recover," the wrongful acts of the debtor could not be imputed to the trustee. The court disagreed, pointing out that under § 541(a), the bankruptcy estate includes all the debtor’s legal and equitable interests as of the petition date. Because the trustee stands in the shoes of the debtor, any defense that may be raised against the debtor may also be raised against the trustee.

226. *Id.* at 790.
227. *Id.* (citing *In re Henderson*, 321 B.R. at 560)
228. *Id.*
229. 437 F.3d 1145 (11th Cir. 2006).
230. *Id.* at 1148.
231. *Id.* at 1149.
232. *Id.* at 1149-50.
233. *Id.* at 1150.
234. *Id.*
X. Conclusion

Looking back over these cases, it is hard to believe BAPCPA is the product of more than eight years of work. Judges and attorneys are at the mercy of Congress to provide a coherent, workable framework for the bankruptcy system. But, if 2006 was any indication, there are many years ahead in which we will be attempting to deconstruct these amendments into something comprehensible and practical without sacrificing the basic tenets of statutory interpretation to do so. However, it is probably too much to hope that the efforts of the bankruptcy bench and bar will be rewarded with congressional clarification (if not repeal) of—to recall the words of President Grant—these "obnoxious laws."