

MAR 19 2012

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos.	AZ-11-1105-JuKiCl
)		AZ-11-1149-JuKiCl
GREGORY A. FRIEDMAN and)		(Consolidated)
JUDITH MERCER-FRIEDMAN,)		
)	Bk. No.	07-02135
Debtors.)		
<hr/>			
GREGORY A. FRIEDMAN; JUDITH)		
MERCER-FRIEDMAN,)		
)		
Appellants,)		
v.)	O P I N I O N	
)		
P+P, LLC,)		
)		
Appellee.)		

Argued and Submitted on January 18, 2012
at Phoenix, Arizona

Filed - March 19, 2012

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Philip H. Brandt, Bankruptcy Judge, Presiding
Honorable James M. Marlar, Chief Bankruptcy Judge, Presiding*

Appearances: Scott D. Gibson, Esq., of Gibson, Nakamura &
Green, PLLC, argued for appellants Gregory A.
Friedman and Judith Mercer-Friedman;
Daniel Mark Press, Esq., argued for National
Association of Consumer Bankruptcy Attorneys, as
amicus curiae, by special leave of the Panel,
supporting the appellants' position.

* Judge Brandt issued the order denying confirmation of the
plan, BAP No. 11-1105. Judge Marlar issued the order converting
the case to chapter 7, BAP No. 11-1149.

1 Before: JURY, KIRSCHER, and CLARKSON,** Bankruptcy Judges.

2 CLARKSON, Bankruptcy Judge:

3
4 Chapter 11 debtors, Gregory Friedman ("Gregory") and Judith
5 Mercer-Friedman ("Judith") (collectively, the "Friedmans" or
6 "Debtors"), appeal the bankruptcy court's orders denying
7 confirmation of their second amended plan (BAP No. 11-1105) and
8 converting their case to chapter 7 (BAP No. 11-1149).

9 These consolidated appeals raise the issue whether the
10 absolute priority rule embodied in § 1129(b)(2)(B)(ii)¹ applies
11 to individual chapter 11 debtors. We granted leave to the
12 National Association of Consumer Bankruptcy Attorneys ("NACBA")
13 to file an amicus brief in support of Debtors' position that the
14 rule does not apply to them. Both the Appellants and the NACBA
15 participated in the oral arguments before us. No party has
16 participated as an appellee in this appeal. For the reasons
17 stated, we hold that the absolute priority rule does not apply
18 in individual debtor chapter 11 cases and REVERSE the bankruptcy
19 court's order denying confirmation of their second amended plan
20 (BAP No. 11-1105). We also REVERSE the bankruptcy court's order
21 converting the Debtors' chapter 11 case to chapter 7 (BAP No.
22 11-1149). We REMAND these matters to the bankruptcy court for
23

24 ** Hon. Scott C. Clarkson, Bankruptcy Judge for the Central
25 District of California, sitting by designation.

26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure and "Civil Rule" references are to the Federal Rules
of Civil Procedure.

1 further action consistent with this opinion.

2 **I. FACTS²**

3 The Friedmans are technology entrepreneurs who founded and
4 operated several internet-related businesses. Several of those
5 businesses suffered financial difficulties and had filed for
6 protection under chapter 11 of the United States Bankruptcy
7 Code. Eventually, however, those businesses were unable to
8 reorganize and their bankruptcy cases were dismissed, leaving
9 the Friedmans with significant tax liabilities and unpaid
10 secured and unsecured business debts.

11 **A. The Prior Corporations' Bankruptcy Events**

12 The Friedmans founded Netbeam, Inc. ("Netbeam"), a company
13 that provided high speed wireless internet services to customers
14 in Summit County, Colorado. On July 10, 2001, Netbeam filed a
15 voluntary petition for chapter 11 relief in the Colorado
16 bankruptcy court (Bankruptcy Case No. 01-19986). Two days prior
17 to Netbeam's filing, the Friedmans formed Peak Speed
18 Communications, Inc. ("Peak"). Ten days after Netbeam's filing,
19 the Friedmans, as officers of Peak, entered into an Operating
20 and Merger Agreement between Netbeam and Peak. Although this

21
22 ² Debtors' record on appeal is far from complete. In their
23 brief, they cite to docket numbers of pleadings filed in the
24 bankruptcy court, but do not provide us with citations to any
25 particular page number or lines in the pleadings in violation of
26 Rule 8010(a)(1)(D). As a result, we were left to search the
27 pleadings cited for the relevant facts and procedural background
28 of this case. We take judicial notice of the relevant pleadings
which were docketed and imaged in Debtors' underlying bankruptcy
case as well as those filed in Debtors' business bankruptcy
cases in the District of Colorado (Bankruptcy Nos. 01-19986 and
04-19246). Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 agreement was not disclosed to the bankruptcy court, the
2 Friedmans implemented its terms. At some point, the undisclosed
3 agreement surfaced and an examiner was appointed.

4 Netbeam eventually confirmed a plan which effectively
5 merged Netbeam and Peak. In accordance with the confirmed plan,
6 Peak, the successor, closed a loan from First United Bank (the
7 "Bank") in the approximate amount of \$600,000. P+P, LLC ("P+P")
8 pledged \$200,000 to guarantee the loan. The loan was secured by
9 all of Peak's assets and a second deed of trust on the
10 Friedman's real property located in Breckenridge, Colorado ("the
11 Breckenridge Property"), which they used as a rental property
12 and a part-time residence.

13 During Netbeam's bankruptcy, significant amounts of
14 employment taxes went unpaid. Eventually, Netbeam ceased making
15 its quarterly payments to the U.S. Trustee and was unable to
16 make other payments required under the plan. On August 22,
17 2006, the bankruptcy court dismissed Netbeam's case.

18 A few years earlier, on May 3, 2004, Peak filed a
19 chapter 11 petition in the Colorado bankruptcy court (Bankruptcy
20 Case No. 04-19246). During the course of Peak's bankruptcy, P+P
21 purchased the Bank's loan to Peak. In the process, P+P stepped
22 into the Bank's shoes with respect to the Bank's security
23 interest in virtually all of Peak's assets and the second deed
24 of trust on the Breckenridge Property. P+P then acquired and
25 later sold Peak's assets.

26 In 2007, P+P commenced an action in the Colorado state
27 court against the Friedmans, seeking a declaration that it had a
28 valid lien on the Breckenridge Property and the right to

1 foreclose. The state court entered a default judgment in favor
2 of P+P which began foreclosure proceedings on the Breckenridge
3 Property.

4 **B. The Friedmans' Bankruptcy Events**

5 On October 27, 2007, the Friedmans filed their chapter 11
6 petition in the Arizona bankruptcy court, thus staying the
7 foreclosure.³ Their Schedule A valued the Breckenridge Property
8 at \$750,000 and Schedule D showed the property was
9 overencumbered with three liens. Washington Mutual Home Loans
10 ("Washington Mutual") had a first lien in the amount of
11 \$578,000. P+P had a second lien in the amount of \$556,000.
12 Finally, a painting company held a third lien in the amount of
13 \$2,500.

14 Debtors' Amended Schedule B showed personal property
15 consisting of household goods and vehicles. It also showed that
16 Debtors (1) were the sole members in AZCI NET, LLC ("AZCI"), a
17 wireless internet service provider located in Arizona City,
18 Arizona; (2) owned 100% of the stock of Blue River Networks,
19 Inc. ("Blue River"), a technology and management consulting and
20 support company located in Arizona City, Arizona; (3) were
21 partners in a family trust named JGF Family LLP, the purposes of
22 which were resort rental management services and family trust;
23 and (4) held stock or had an interest in Peak, a wireless
24 broadband engineering company located in Breckenridge, Colorado.
25 Debtors assigned a zero value to their interests in all these

27 ³ At the time of Debtors' filing, their primary residence
28 was in Arizona.

1 entities.

2 Schedule E showed priority unsecured debt consisting of
3 substantial amounts owed to the Colorado Department of Revenue
4 and the Internal Revenue Service for employment taxes by Netbeam
5 or Peak, and for personal income taxes. Schedule F showed debt
6 owed on equipment leases and vehicles for Netbeam. Those
7 amounts, along with credit card and other miscellaneous
8 unsecured debt, totaled \$359,000.

9 Finally, Debtors' Amended Schedule I showed combined
10 average monthly income as \$15,094. Of that amount, \$9,000 was
11 attributed to income from their businesses and \$3,000 was
12 attributed to income from rentals on the Breckenridge Property.
13 Amended Schedule I also reflected that both debtors were
14 collecting social security income and Gregory was receiving a
15 pension from IBM of \$594 a month. Amended Schedule J showed
16 average monthly expenses of \$13,698, which included \$6,730.18
17 towards the debt on the Breckenridge Property. Debtors' monthly
18 net income was reflected at \$1,395.84.

19 P+P immediately moved for relief from stay on the
20 Breckenridge Property. Washington Mutual later filed a similar
21 motion.

22 **C. Debtors' Initial Plan**

23 Debtors' initial plan provided for, among other things,
24 payments to satisfy their mortgage and other debt related to the
25 Breckenridge Property, with the exception of the claims of P+P.
26 Debtors stated their belief that they had paid P+P in full.⁴

27 ⁴ Debtors were also seeking to set aside P+P's default
28 (continued...)

1 Under the heading "Implementation of the Plan", the plan provided:

2 Upon confirmation, all of the assets of the Debtors'
3 estate shall be vested in the Debtors and the Debtors
4 shall continue to work in their consulting and
5 business management company. Debtors shall pay all
6 expenses of their personal life, including taxes and
7 insurance costs, on a current basis. The Debtors'
8 disposable income shall be deposited into the Plan
9 Fund and distributed as provided herein.

7 **D. Debtors' First Amended Plan**

8 After a status conference on this plan, Debtors filed a
9 first amended plan which provided for P+P's claim in the event
10 the state court default judgment against them was upheld. The
11 plan also provided that to the extent P+P's claim was unsecured,
12 its claim would be paid pro rata with the other general
13 unsecured claims. Debtors proposed to pay \$634 per month to
14 unsecured creditors.⁵

15 Before any hearing took place on Debtors' first amended
16 plan, the bankruptcy court granted P+P's motion for relief from
17 stay on the Breckenridge Property by order entered on September
18 12, 2008. The bankruptcy court later granted Washington
19 Mutual's relief from stay motion on the Breckenridge Property by
20 order entered on April 9, 2009. Eventually, Washington Mutual
21 foreclosed on the Breckenridge Property. Due to the collapse of
22 the real estate market, P+P's secured claim against the
23 Breckenridge property became entirely unsecured.

25 ⁴ (...continued)
26 judgment against them in the state court.

27 ⁵ From our review of the docket, it does not appear that a
28 hearing on this plan ever took place. Presumably, this plan was
withdrawn when Debtors filed their second amended plan.

1 **E. Debtors' Second Amended Plan**

2 In early February 2010, Debtors filed their second amended
3 plan. For confirmation purposes, this plan only needed to
4 address the priority and secured claims of the taxing
5 authorities and Debtors' general unsecured claims, including the
6 claims of P+P.⁶ Debtors' proposed statement of implementation
7 of the plan remained the same; i.e., upon confirmation, their
8 assets, including their equity interests in their businesses,
9 would revert in Debtors and they would continue to work and
10 contribute all their disposable income to the plan. The
11 proposed payment of \$634 a month to unsecured creditors was not
12 altered.

13 According to Debtors' second amended disclosure statement,
14 their combined monthly income went from \$15,094 to \$6,297. The
15 \$6,297 figure consisted of \$2,000 income from Debtors'
16 businesses with the remaining amounts attributed to Gregory's
17 IBM pension and Debtors' combined social security income.

18 P+P, Debtors' largest unsecured creditor, voted against the
19 second amended plan and filed an objection⁷ on the grounds that
20 it (1) violated the absolute priority rule because Debtors' plan
21 left their ownership interests in "valuable" property untouched
22

23 ⁶ Debtors' second amended plan separately classified
24 Washington Mutual's secured claim against the Breckenridge
25 Property in Class 3 and provided for P+P's secured claim against
26 the Breckenridge Property in Class 5. Most likely, Washington
27 Mutual foreclosed on the property after Debtors had filed this
28 latest version of their plan.

⁷ The Internal Revenue Service and the U.S. Trustee also
objected to the second amended plan on various grounds.

1 while paying unsecured creditors only \$634 a month; (2) violated
2 the best interests of creditors' test under § 1129(a)(7) because
3 Debtors had not properly disclosed the value of their business
4 interests in AZCI and Blue River; and (3) was filed in bad
5 faith. In connection with its objection, P+P offered the opinion
6 of an expert that ACZI had a value of \$605,000 to \$662,500 as of
7 the date of the petition.⁸

8 **F. The Debtor's Modification to their Second Amended Plan**

9 On June 3, 2010, Debtors filed a modification to their
10 second amended plan. The modification increased the payments to
11 unsecured creditors on a monthly basis following the effective
12 date, based on anticipated growth in Debtors' business ventures.

13 The bankruptcy court conducted a hearing on Debtors' second
14 amended plan and only addressed the applicability of the
15 absolute priority rule found in § 1129(b)(2)(B)(ii). The

16
17 ⁸ P+P's objection also implicated § 1129(a)(15) because it
18 complained that Debtors' expenses were unreasonable. Section
1129(a)(15) states:

19 In a case in which the debtor is an individual and in
20 which the holder of an allowed unsecured claim objects
21 to the confirmation of the plan--

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

25 (B) the value of the property to be distributed under
26 the plan is not less than the projected disposable
27 income of the debtor (as defined in § 1325(b)(2)) to
28 be received during the 5-year period beginning on the
date that the first payment is due under the plan, or
during the period for which the plan provides
payments, whichever is longer.

1 bankruptcy court, recognizing the split of authority throughout
2 the nation, concluded that the absolute priority rule applied to
3 individual chapter 11 plans. On February 17, 2011, the
4 bankruptcy court entered the order denying confirmation of
5 Debtors' second amended plan. In the order, Debtors were
6 instructed to file a third amended plan and disclosure
7 statement by March 1, 2011.

8 Debtors did not further amend their plan. Instead, they
9 filed an appeal of the order denying confirmation of their
10 second amended plan. On March 7, 2011, the bankruptcy court
11 conducted a show cause hearing as to why Debtors' case should
12 not be dismissed or converted. The court issued a Memorandum
13 Decision and converted the case to chapter 7, finding that
14 (1) Debtors failed to comply with an order of the court,
15 (2) there was an absence of a reasonable likelihood of
16 rehabilitation, and (3) Debtors failed to file a disclosure
17 statement, or file or confirm a plan within the time fixed by
18 order of the court, § 1112(b)(4)(J). The bankruptcy court
19 entered the order converting Debtors' case on March 11, 2011.⁹

20 Debtors moved for a stay pending appeal. On March 29,
21 2011, the bankruptcy court granted the motion in a Memorandum
22 Decision, staying the proceedings pending the adjudication of
23 this appeal. The bankruptcy court again recognized the split of

24
25 ⁹ When the bankruptcy court converted Debtors' case, the
26 order denying confirmation of their second amended plan became a
27 final order. See Giesbrecht v. Fitzgerald (In re Giesbrecht),
28 429 B.R. 682, 687 (9th Cir. BAP 2010); see also Rosson v.
Fitzgerald (In re Rosson), 545 F.3d 764, 770 (9th Cir. 2008)
(order converting case from chapter 13 to chapter 7 is a final
order).

1 authority on the issue of whether the absolute priority rule
2 applied to individual chapter 11 debtors and, therefore, found
3 Debtors had a chance of success on appeal. In addition, the
4 bankruptcy court found that Debtors would suffer irreparable
5 injury if no stay was granted because their businesses could be
6 sold in chapter 7, leaving them without the ability to earn a
7 living. The bankruptcy court also found that the harm to the
8 IRS and P+P was merely delay. Finally, the bankruptcy court
9 stated that as a policy question, the public interest would be
10 advanced by obtaining a ruling from this Panel on the
11 applicability of the absolute priority rule in an individual
12 chapter 11 case. The bankruptcy court entered the order staying
13 the conversion of Debtors' case on March 29, 2011. Despite the
14 stay, Debtors received their chapter 7 discharge on September
15 22, 2011.¹⁰

16 **II. JURISDICTION**

17 The bankruptcy court had jurisdiction over this proceeding
18 under 28 U.S.C. §§ 1334 and 157(b)(2)(L). We have jurisdiction
19 under 28 U.S.C. § 158.

20 **III. ISSUE**

21 Does the absolute priority rule in § 1129(b)(2)(B)(ii)
22
23

24 ¹⁰ The order simply stated: "IT IS ORDERED GRANTING the
25 Appellants' Motion for Stay Pending Appeal, IT IS FURTHER
26 ORDERED STAYING the Chapter 7 Conversion Order of this Court
27 Dated February 17 and March 10, 2011." It is possible that the
28 court and the parties contemplated that the chapter 7 would
proceed with respect to Debtors and their discharge, but that
the liquidation of their estate was stayed until this appeal
concludes.

1 apply to chapter 11 debtors who are individuals?¹¹

2 **IV. STANDARD OF REVIEW**

3 This appeal raises a statutory interpretation question
4 which we review de novo. AMB Prop., L.P. v. Official Creditors
5 (In re AB Liquidating Corp.), 416 F.3d 961, 963 (9th Cir. 2005).
6 A de novo review allows us to examine the interpretation and
7 application of the relevant statutes independent of the
8 bankruptcy court's determination.

9 **V. DISCUSSION**

10 **A. The Absolute Priority Rule**

11 The absolute priority rule, and issues within its realm,
12 are significant mainstay topics for most bankruptcy
13 practitioners and jurists of the last quarter of the 20th and
14 early 21st centuries. Once only held closely in the hearts and
15 minds of commercial and business reorganization counsel, since
16 the passage of the 2005 BAPCPA¹² the absolute priority rule, as

17
18 ¹¹ We do not reach Debtors' second issue of whether they
19 could avoid a strict application of the absolute priority rule
20 by contributing "new value" into a plan of reorganization in the
21 form of exempt assets for two reasons. First, the bankruptcy
22 court did not make any findings on this issue. Second, it is
23 not readily apparent from the record whether Debtors had exempt
24 assets which were not encumbered by the IRS's liens. Thus,
25 Debtors appear to be seeking an advisory opinion on this issue.
26 However, we lack jurisdiction to render advisory opinions. See
27 Kittel v. Thomas, 620 F.3d 949, 951 (9th Cir. 2010); see also
28 Computer Task Group, Inc. v. Brotby (In re Brotby), 303 B.R.
177, 195-96 (9th Cir. BAP 2003) (noting that when bankruptcy
court did not make the requisite factual findings that debtor
had satisfied the new value corollary, it was unnecessary to
decide if debtor, who was individual, could invoke the exception
in chapter 11 case).

¹² The Bankruptcy Abuse Prevention and Consumer Protection
(continued...)

1 amended, has now crossed over to the general consumer bankruptcy
2 practice world.¹³

3 The absolute priority rule initially was a judicially
4 created concept, arising from a series of early
5 twentieth-century railroad cases including N. Pac. Ry. Co. v.
6 Boyd, 228 U.S. 482, 508 (1913). The U.S. Supreme Court adopted
7 the absolute priority rule to prevent deals between senior
8 creditors and equity holders that would impose unfair terms on
9 unsecured creditors.

10 An interesting feature of the absolute priority rule, even
11 before enactment of the BAPCPA amendment to
12 § 1129(b)(2)(B)(ii)¹⁴, is that the rule has never been absolute.
13 For instance, the U.S. Supreme Court in Kansas City Terminal Ry.
14 Co. v. Cent. Union Trust Co., 271 U.S. 445, 455 (1926), albeit
15 in dicta, recognized that a new, substantial, and necessary
16 contribution could allow an old equity holder to retain an
17 interest in the reorganized debtor. This contribution was

19 ¹² (...continued)
20 Act of 2005, Public Law 109-8, 119 Stat. 23.

21 ¹³ There is no doubt that the absolute priority rule was a
22 necessary feature to be considered in individual debtors'
23 chapter 11 plans of reorganization prior to the enactment of
24 BAPCPA. However, Congress has not significantly increased the
25 outer limits of eligibility for chapter 13 debtors and a
26 combination of the present day national economic climate, the
27 amendment to § 1129(b)(2)(B)(ii) and the addition of the new
28 § 1115 has presented consumer bankruptcy lawyers with growth
opportunities in the individual debtor chapter 11 practice.

¹⁴ The absolute priority rule was codified at
§ 1129(b)(2)(B)(ii) with the enactment of the Bankruptcy Code in
1978.

1 commonly called the "new value corollary." Later, in Case v.
2 Los Angeles Lumber Products Co., 308 U.S. 106 (1939), the U.S.
3 Supreme Court considered an offer by shareholders to continue
4 their participation in the company's business after confirmation
5 of the plan of reorganization, which finally confirmed and
6 clarified the new value corollary.¹⁵

7 The absolute priority rule (as it pertained to unsecured
8 creditors) was eventually codified in 1978, within
9 § 1129(b)(2)(B)(ii). Interestingly, and despite years of case
10 law by that time, no reference was made to "absolute priority"
11 or "new value" in that codification. The words "absolute
12 priority" or "new value" do not appear anywhere in § 1129.

13 Other nuances with respect to the absolute priority rule
14 developed following its codification, with courts finding other
15 "exceptions" besides the new value corollary that do not appear
16 in the text of the statute. For instance, in 2001, the 9th
17 Circuit Court of Appeals in Security Farms v. Gen. Teamsters,
18 Warehousemen and Helpers Union, Local 890 (In re Gen. Teamsters,
19 Warehousemen & Helpers Union, Local 890), 265 F.3d 869, 874 (9th
20 Cir. 2001), found that the absolute priority rule did not apply
21 to organizations where their members did not hold "equity
22 interests" in the entity (even though the term "equity interest"
23 does not appear in § 1129(b)(2)(B)(ii)).

24
25 ¹⁵ The U.S. Supreme Court stated that the shareholders had
26 to do more than just continue to participate in the debtor's
27 business to retain their equity. Instead, they must contribute
28 money or money's worth. 308 U.S. at 122. In other words, they
must contribute new value to the debtor. With this, the new
value corollary was indeed crystallized.

1 In that case, the Ninth Circuit, relying on the Seventh
2 Circuit's case of In re Wabash Valley Power Ass'n, 72 F.3d 1305,
3 1315 (7th Cir. 1995), agreed that the term "interest" in
4 § 1129(b)(2)(B)(ii) meant equity interest in a for-profit
5 corporation. These cases undertook a historical review of the
6 absolute priority rule, delving into the fact that the "absolute
7 priority rule" had (at least) one specific mission - to
8 undermine corporate shareholders' advantages over unsecured
9 creditors.

10 Prior to the enactment of BAPCPA, an individual debtor's
11 plan needed to meet the requirements of the absolute priority
12 rule.¹⁶ "Interest" as it appears in § 1129(b)(2)(B)(ii) has
13 various meanings, and the individual debtor's ownership rights
14 in estate property, as that property is defined from time to
15 time by the Bankruptcy Code and judicial interpretations, are
16 perfectly harmonized within the absolute priority rule, both
17 prior to and after BAPCPA's enactment.

18 Two points are to be drawn here. First, courts have always
19 reviewed § 1129(b)(2)(B)(ii) through the lens of common sense
20 and have approached legislative interpretation in a way to
21 facilitate the goals of the statute. Second, simply because
22 words may have alternative meanings, ambiguities do not
23 necessarily arise. The words, all of them, should be read in
24 context with the sentence, the paragraph, and the entire text of
25 the statute (in this case, the Bankruptcy Code). As in the case

26
27 ¹⁶ Courts almost universally found that individuals could
28 reorganize and that the absolute priority rule applied to their
plan prior to the enactment of BAPCPA.

1 of "interest" in § 1129(b)(2)(B)(ii), words have various
2 meanings depending on their underlying required usages, but no
3 real reasonable ambiguity is created simply because of those
4 various usages.

5 **B. The Methodology of Statutory Interpretation**

6 How do we endeavor to understand the parts of
7 §§ 1129(b)(2)(B)(ii) and 1115 as they relate to the
8 applicability of the absolute priority rule to individual
9 chapter 11 debtor plans? We are first guided by primary
10 principles.

11 "The interpretation of the Bankruptcy Code first begins
12 with the language itself. See In re Griffith, 206 F.3d 1389,
13 1393 (11th Cir. 2000); United States v. Ron Pair Enters., 489
14 U.S. 235, 241 (1989). If the language is plain and unambiguous,
15 then the Court must enforce the Bankruptcy Code according to its
16 terms. Id." In re Gosman, 282 B.R. 45, 48 (Bankr. S.D. Fla.
17 2002).

18 The U.S. Supreme Court in Lamie v. U.S. Trustee, addressed
19 this point directly:

20 The starting point in discerning congressional intent
21 is the existing statutory text, see Hughes Aircraft Co. v.
22 Jacobson, 525 U.S. 432, 438 (1999), and not the predecessor
23 statutes. It is well established that "when the statute's
24 language is plain, the sole function of the courts--at
25 least where the disposition required by the text is not
26 absurd--is to enforce it according to its terms." Hartford
Underwriters Ins. Co. v. Union Planters Bank, N.A., 530
27 U.S. 1, 6 (2000) (internal quotation marks omitted)
(quoting United States v. Ron Pair Enterprises, Inc., 489
28 U.S. 235, 241 (1989), in turn quoting Caminetti v. United
States, 242 U.S. 470, 485 (1917)).

Lamie, 540 U.S. 526, 534 (2004).

In interpreting the Bankruptcy Code, the U.S. Supreme Court

1 has held "as long as the statutory scheme is coherent and
2 consistent, there generally is no need for a court to inquire
3 beyond the plain language of the statute." BFP v. Resolution
4 Trust Corp., 511 U.S. 531, 566 (1994).

5 Thus, we look to the statutory language at issue.

6 **C. The Plain Meaning of the Absolute Priority Provisions**

7 The requirements for confirmation of a plan of
8 reorganization are generally set out in § 1129, which provides
9 two separate and distinct paths for successful confirmation.
10 The first path is mapped out in the sixteen paragraphs of
11 § 1129(a). If a plan proponent can demonstrate to the
12 satisfaction of the court that each and every requirement
13 contained in paragraphs (1) through (16) of § 1129(a) has been
14 met, a plan can be confirmed. Of particular note is the
15 requirement of obtaining the consent of each class of creditor
16 as required by paragraph (8) of § 1129(a).

17 A second path to confirmation is established pursuant to
18 § 1129(b), where absent consent of each class of creditor (as
19 required by § 1129(a)(8)), a plan may still be confirmed by the
20 bankruptcy court if (1) the fifteen remaining paragraphs of
21 § 1129(a) are met, and (2) the plan is, among other things,
22 "fair and equitable." This nonconsensual method of confirmation
23 is referred to as "cramdown."¹⁷ The burden of demonstrating that
24 the plan is "fair and equitable" in order to obtain confirmation
25 falls on the plan proponent.

26
27 ¹⁷ See Kenneth N. Klee, All You Ever Wanted to Know About
28 Cram Down Under the New Bankruptcy Code, 53 Am. Bankr. L.J. 133
(1979).

1 The Bankruptcy Code provides guidance as to whether a plan
2 is "fair and equitable" as to unsecured creditors. Section
3 1129(b) (2) (B) (ii), known as the "absolute priority rule",
4 provides that a plan is "fair and equitable" if:

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

6 (ii) the holder of any claim or interest that is
7 junior to the claims of such class will not receive or
8 retain under the plan on account of such junior claim
9 or interest any property, except that in a case in
10 which the debtor is an individual, the debtor may
11 retain property included in the estate under section
12 1115, subject to the requirements of subsection
13 (a) (14) of this section.

14 11 U.S.C. § 1129(b) (2) (B) (ii) (emphasis added).¹⁸

15 Simply put, a plan not paying an unsecured creditor in full
16 is nevertheless "fair and equitable" (and can be crammed down
17 over the unsecured creditor's objections), so long as an
18 individual debtor does not retain property except property
19 included in the bankruptcy estate under § 1115.

20 Therefore, one must now consider the companion section to
21 § 1129(b) (2) (B) (ii), § 1115, to determine what property was
22 included in the bankruptcy estate when the debtor is an
23 individual.

24 We believe that § 1115¹⁹ plainly identifies an individual

25 ¹⁸ The BAPCPA amendments of 2005 added the emphasized
26 portion of § 1129(b) (2) (B) (ii), appearing above.

27 ¹⁹ Section 1115 reads as follows:

28 **Section 1115. Property of the estate**

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

(continued...)

1 chapter 11 debtor's estate as

- 2 (1) Property specified in § 541 (i.e., "property of the
3 estate includes, in addition to the property specified
4 in section 541") (emphasis added);
- 5 (2) All property of the kind specified in § 541 that the
6 (individual) debtor acquires after the commencement
7 (but before the closure, dismissal or conversion) of
8 the case; and
- 9 (3) earnings from services performed by the debtor after
10 the commencement of the case but before the case is
11 closed, dismissed, or converted to a case under
12 chapter 7, 12, or 13, whichever occurs first.

13 Application of "plain-meaning analysis" has been set out in
14 the recent 9th Circuit BAP decision Barnes v. Belice (In re
15 Belice), 461 B.R. 564 (9th Cir. BAP 2011). In that opinion, the
16 BAP was critical of the bankruptcy court's application of the
17 plain-meaning analysis.

18
19

¹⁹(...continued)

20 (1) all property of the kind specified in section
21 541 that the debtor acquires after the commencement of
22 the case but before the case is closed, dismissed, or
23 converted to a case under chapter 7, 12, or 13,
24 whichever occurs first; and

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

(b) Except as provided in section 1104 or a confirmed
plan or order confirming a plan, the debtor shall
remain in possession of all property of the estate.

11 U.S.C. § 1115.

1 Without considering the relationship of the phrase in
2 question to the contextual statutory scheme or the logical
3 impact of their broad interpretation on that scheme, they
4 improperly emphasize one meaning of the words to the
5 exclusion of all other considerations. See Corley v.
United States, 129 S. Ct. 1558, 1567 n.5 (2009).

6 Belice at 577.

7 With this guidance in mind, we consider here, and later in
8 our opinion, our plain-meaning interpretation of the language
9 contained in §1129(b)(2)(B)(ii) and § 1115 within the contextual
10 statutory scheme and logic of plan confirmation requirements of
11 Chapter 11.

12 First, we observe that there are no conflicting provisions
13 within Chapter 11 relative to our view that the absolute
14 priority rule does not apply in individual chapter 11 cases. We
15 find no anomalies, inconsistencies or conflicts created by this
16 interpretation. More importantly, we find significant
17 contextual concordance with the other requirements for plan
18 confirmation, including those previously described, including
19 but not limited to (1) the new requirement for dedication of all
20 of debtor's disposable income for five years, (2) the straight-
21 forward best interest of creditors test, and (3) the delay of
22 issuance of discharge until the plan has been fully consummated.
23 Including the § 541 property within the universe of property
24 contained in § 1115, as we believe a plain-meaning
25 interpretation requires, does no violence to the logical impact
26 of the reorganization process or scheme established in chapter
27 11. Indeed, especially combined with the new additional
28 requirement of five years of debtor's disposable income, it is
illogical to thereafter remove the debtor's means of production

1 of debtor's disposable income by maintaining the absolute
2 priority rule in an individual's case.

3 The dissent argues that the rule of statutory construction
4 guides that, where possible, one must avoid rendering any parts
5 superfluous. (Citing TRW Inc. v. Andrews, 534 U.S. 19, 31
6 (2001)). The dissent further argues that "the broad
7 construction the Panel advocates causes parts of the Code to
8 become superfluous. For example, § 103(a) makes § 541, which
9 states that an estate is created upon the filing of a petition,
10 applicable in chapter 11 cases. Section 103(a) was not amended
11 by BAPCPA. But the broad view makes § 103(a) inapplicable in
12 individual chapter 11's." However, the argument proves too much
13 and is incongruent with the reality of the Bankruptcy Code.
14 Section 1115 mirrors § 1306 which was part of the 1978 Code
15 concurrent with enactment of § 103(a). Nobody, ever, has argued
16 that § 1306 made § 103(a) surplusage, and there is no reason for
17 this Panel to do so with respect to § 1115. To do otherwise
18 would create an indefensible discontinuity between § 1115 and
19 § 1306.

20 Section 1115's identification of estate property consists
21 of the property contained in § 541 and the two post-petition
22 acquired assets - newly acquired property and income. The so-
23 called disputes over what "included" means in
24 § 1129(b) (2) (B) (ii) and "in addition to" in § 1115 arise from
25 misinterpretation of the words. "Included" is not a word of
26 limitation.²⁰ To limit the scope of estate property in §§ 1129

27
28 ²⁰ See Bankruptcy Code § 102(3) and especially see Am.
(continued...)

1 and 1115 would require the statute to read "included, except for
2 the property set out in Section 541" (in the case of
3 § 1129(b)(2)(B)(ii)), and "in addition to, but not inclusive of
4 the property described in Section 541" (in the case of § 1115).

5 A plain reading of §§ 1129(b)(2)(B)(ii) and 1115 together
6 mandates that the absolute priority rule is not applicable in
7 individual chapter 11 debtor cases. Accord SPCP Group, LLC v.
8 Biggins, ___ B.R. ___, 2011 WL 4389841, at *3-5 (M.D. Fla. Sept.
9 21, 2011) (declined to follow In re Gelin, 437 B.R. 435 (Bankr.
10 M.D. Fla. 2010), which followed the narrow view based on an
11 ambiguity analysis); In re Tegeder, 369 B.R. 477 (Bankr. D. Neb.
12 2007) (following a plain meaning analysis); In re Shat, 424 B.R.
13 854 (Bankr. D. Nev. 2010) (following the broad view based upon
14 an ambiguity analysis).

15 **D. Analysis of Legislative History, Congressional Intent,**
16 **or other Speculations**

17 Much time has been spent by jurists and scholars on the
18 legislative history, congressional intent, and other
19 speculations surrounding the applicability of the absolute
20 priority rule in individual debtor chapter 11 cases. We have
21 reviewed a myriad of lower court decisions and articles replete
22 with seemingly endless analyses of possible congressional
23 intentions and various outcomes depending on the "narrow" or
24

25 ²⁰(...continued)
26 Surety Co. v. Marotta, 287 U.S. 513, 517 (1933) in which the
27 U.S. Supreme Court presents in that bankruptcy setting a
28 definitive explanation for the use and meaning of the word
"include." See also Kenneth N. Klee, Bankruptcy and the Supreme
Court, at 22 and n.70, 35-36, (Lexis/Nexis 2008).

1 "broad" view adopted by the author.

2 While certainly not exhaustive in scope, these decisions
3 and articles have undertaken a titanic effort to frame their
4 outcomes on what may be a very weak universe of original
5 resources. However the Bankruptcy Code, as the main resource,
6 does provide significant assistance. For instance, Congress in
7 adopting BAPCPA's individual debtor chapter 11 provisions
8 borrowed provisions from chapter 13. Section 1123(a)(8) was
9 added to the Bankruptcy Code, providing that, to be confirmable,
10 an individual debtor's plan must provide for the payment to
11 creditors of all or such portion of earnings from personal
12 services or other future income of the debtor - resembling
13 § 1322(a)(1). Section 1129(a)(15) was added, giving dissenting
14 unsecured creditors who are not being fully paid under the plan
15 absolute veto power over the plan unless the debtor contributes
16 an amount equal to all of his projected disposable income over
17 the longer of five years or the plan payment period - resembling
18 § 1325(b). Section 1141(d)(5)(A) was added, delaying the
19 discharge until completion of all plan payments - resembling
20 § 1328(a). Section 1141(d)(5)(B) was added, permitting a
21 discharge for cause before all payments are completed -
22 resembling the hardship discharge of § 1328(b). And, Section
23 1127(e) was added, permitting modification of a plan even after
24 substantial consummation - resembling § 1329(a).

25 Finally, a plain reading of §§ 1129 and 1115 demonstrates
26 that, just as in chapter 13, to confirm a plan does not require
27 the application of an absolute priority rule. As in Chapter 13,
28 the disposable income requirement insures that the individual

1 debtor is required to dedicate all of his or her disposable
2 income over a designated time period (three or five years in
3 Chapter 13, at least five years in chapter 11) to plan payments
4 directed to unsecured creditors.

5 When decisions have gone further than exercising a plain
6 reading of the statute, they have entered into speculative
7 analyses that are fatally flawed.

8 As an example, the bankruptcy court in In re Gbadebo, in
9 determining that the absolute priority rule continued to exist
10 in individual debtor chapter 11 cases, found a so-called
11 "anomaly" that made "no sense." The bankruptcy court said:

12 Finally, if §§ 1129(b)(2)(B)(ii) and 1115 are
13 read to eliminate the "absolute priority" rule for
14 individual chapter 11 debtors, the Court is faced with
15 a procedural anomaly. If the plan proposes to pay
16 them anything, the debtor is required to send them a
17 ballot. Yet, their vote can be ignored. This makes
18 no sense. The Court reads §§ 1129(b)(2)(B)(ii) and
19 1115 to eliminate the "absolute priority" rule only as
20 to an individual chapter 11 debtor's post-petition
21 property. It bases this conclusion on both the
22 language of the statute, both in isolation and viewed
23 in the context of the Bankruptcy Code as a whole. It
24 finds this reading most consistent with the intent of
25 Congress as expressed in the legislative history.

26 In re Gbadebo, 431 B.R. 222, 230 (Bankr. N.D. Cal. 2010).

27 The above passage challenges the abrogation of the absolute
28 priority rule in individual cases (with respect to pre-BAPCPA
§ 541 estate property) based on an apparent procedural anomaly
that the debtor must solicit votes but can ignore them. No
anomaly exists; those votes are not ignored. The analysis is
incomplete. If the class votes yes, § 1129(a)(8) is satisfied.
If the class votes no, its vote is not ignored. If the plan
provides distributions of property equal to the allowed amount

1 of the unsecured claim, both §§ 1129(a)(15)(A) and
2 1129(b)(2)(B)(i) are met, and the court may confirm the plan if
3 it is fair and equitable under § 1129(b)(1). If the plan
4 provides for less than satisfaction in full on a present value
5 basis and the impaired class votes no, then it may be confirmed
6 as long as § 1129(a)(15)(B) and (b)(1) are satisfied. In
7 essence, Congress affirmatively amended the law so that
8 § 1129(a)(15)(B) would trump § 1129(b)(2)(B)(ii) in individual
9 debtor cases. Thus, § 1129(b)(2)(B)(ii)'s proscription on the
10 retention of ownership interests by an individual debtor is not
11 an aspect of the absolute priority rule in individual debtor
12 chapter 11 cases. In this instance, recourse to legislative
13 history and spirited analytics is unnecessary in light of the
14 plain meaning of this particular statute.

15 The Dissent disagrees with the Panel's point, stating that
16 for one reason or another, creditors may vote against a plan
17 without filing an objection. However, clearly, the drafters of
18 § 1129(a)(15) tried to create symmetry between chapters 11 and
19 13 for individual debtors. Of course in chapter 13, unsecured
20 creditors do not get to vote on the plan. They can only object
21 to confirmation under § 1325(b)(1). The BAPCPA amendment to
22 § 1129(a)(15) mirrors this treatment in chapter 11 where
23 creditors holding claims in impaired classes have the right to
24 vote on the plan as well as to object to confirmation. The
25 drafter's failure to anticipate this nuance does not provide a
26 reason to destroy the symmetry between chapters 11 and 13. The
27 possibility that all unsecured creditors voting against the plan
28 would simultaneously fail to object to confirmation is a

1 theoretical figment squarely opposed to reality. We will not
2 interpret a statute to destroy a sensible interpretation based
3 on such a conjecture.

4 **VI. CONCLUSION**

5 We hold that the absolute priority rule does not apply in
6 individual debtor chapter 11 cases for the reasons stated above.
7 Therefore, we REVERSE the orders denying confirmation of
8 Debtors' second amended plan and converting their case to
9 chapter 7, and REMAND the matter to the bankruptcy court for
10 further action consistent with this opinion.

11
12 JURY, Bankruptcy Judge, dissenting:

13 Addressing an issue that has confronted and confounded
14 innumerable bankruptcy courts around the country and resulted in
15 a significant number of published opinions from those courts
16 which split demonstratively in their results, the Panel rules
17 that the words of the post-BAPCPA statutes about the absolute
18 priority rule in individual chapter 11's are "plain" and subject
19 to only one simple reading. The Panel premises this simplistic
20 outcome on its conviction that Congress intended to align
21 individual chapter 11's almost entirely with chapter 13's
22 because of some alterations in the Bankruptcy Code by BAPCPA
23 which made the two previously divergent proceedings more
24 similar.

25 I disagree – not only with the holding, but also with the
26 underlying assumptions which drive the decision. The majority's
27 analysis would have us conclude that the definition of property
28 of the estate found in § 541 and made applicable to all chapters

1 by § 103(a) has no meaning in individual chapter 11's. They
2 would further have us conclude that one of the significant
3 differences between chapter 11's and 13's – that classes of
4 creditors are entitled to vote for or against confirmation in
5 chapter 11's whereas no class vote exists in chapter 13's – has
6 little or no importance in an individual chapter 11. Finally,
7 their narrow reading of the meaning of the terms "included" and
8 "in addition to" by focusing solely on §§ 1129(b)(2)(B)(ii) and
9 1115 causes them to overlook one of the key tenets of statutory
10 construction: that we are to read the statute as a cohesive
11 whole, giving all sections their due place and not creating an
12 island of words that floats independently of the integrated
13 continent.

14 Taken in this context the meaning of the words is not
15 plain. There can be more than one cogent interpretation of
16 their meaning and intent and I believe they do not write the
17 absolute priority rule out of individual chapter 11's.

18 In addition to my disagreement with the statutory
19 construction elements of the majority decision, I believe my
20 colleagues have lost sight of two important policies – one of
21 which has been an underpinning of chapter 11 determinations
22 since the enactment of the Code in 1978 and the other of which
23 was the primary purpose of the BAPCPA amendments in 2005. The
24 long standing purpose behind chapter 11, as stated by the
25 Supreme Court, is to strike a balance between a debtor's
26 interest in reorganizing and restructuring its debts and the
27 creditors' interest in maximizing the value of the bankruptcy
28 estate. See Toibb v. Radloff, 501 U.S. 157, 163 (1991). The

1 majority's approach loses sight of this balance, allowing the
2 reorganized individual debtor to retain all his or her assets
3 while disenfranchising the vote of unsecured creditors who seek
4 more value.

5 More recently, the policy behind the enactment of BAPCPA
6 was to enhance the return to creditors. As observed by many
7 courts, "BAPCPA has been read to tighten, not loosen, the
8 ability of debtors to avoid paying what can reasonably be paid
9 on account of debt." In re Kamell, 451 B.R. 505, 508 (Bankr.
10 C.D. Cal. 2011) (citing In re Gbadebo, 431 B.R. at 229); In re
11 Lindsey, 453 B.R. 886, 904 (Bankr. E.D. Tenn. 2011) (observing
12 that the primary purpose of BAPCPA is "'to improve bankruptcy
13 law and practice by restoring personal responsibility and
14 integrity in the bankruptcy system and ensure that the system is
15 fair for both debtors and creditors.'").

16 The Panel's ruling eviscerates these recognized motives
17 behind the original Code and its revisions when applied in the
18 individual chapter 11 proceeding. Based on both of these
19 considerations, I respectfully dissent.

20 **I.**

21 Section 1129 sets forth the requirements for the
22 confirmation of a chapter 11 plan. The focus of this case is on
23 § 1129(b)(2)(B)(ii) which contains the "fair and equitable"
24 requirement. That section, which is referred to generally as
25 the "absolute priority rule," was amended in 2005 with the
26 enactment of BAPCPA, and provides that a plan is fair and
27 equitable if:

28 (B) With respect to a class of unsecured claims –

1 (ii) the holder of any claim or interest that is
2 junior to the claims of such class will not receive or
3 retain under the plan on account of such junior claim
4 or interest any property, except that in a case in
5 which the debtor is an individual, the debtor may
6 retain property included in the estate under section
7 1115 (Emphasis added).

8 It is the statute's use of the word "included" and its cross
9 reference to § 1115 which has caused interpretive problems.

10 Namely, what property is "included" in the estate by § 1115 that
11 an individual chapter 11 debtor may retain? Section 1115(a)
12 provides the following definition of property of the estate for
13 individual chapter 11 debtors:

14 In a case in which the debtor is an individual,
15 property of the estate includes, in addition to the
16 property specified in section 541--

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

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

27 Here, the key phrase for interpretation is contained in the
28 preamble of the statute: "property of the estate includes, in
addition to the property specified in section 541."

A.

Before proceeding with the application of any interpretive
rule, a brief review of the current state of the bankruptcy
court caselaw in the Ninth Circuit is warranted. Two basic
interpretations of §§ 1129(b)(2)(B)(ii) and 1115 have emerged.

Under what is called the broad view, the bankruptcy court
in In re Shat, 424 B.R. 854 (Bankr. D. Nev. 2010) construed the

1 phrase "in addition to the property specified in section 541"
2 contained in § 1115 to mean that "[s]ection 1115 absorbs and
3 then supersedes [s]ection 541 for individual chapter 11 cases."
4 Id. 865. In turn, the court reasoned that if
5 § 1129(b)(2)(B)(ii) excepts from the operation of the absolute
6 priority rule that property "included" in § 1115, then the
7 "exception extends to all property of the estate." Id.²¹ Thus,
8 in essence, In re Shat holds that the absolute priority rule
9 does not apply in individual chapter 11 cases. Id. at 867. In
10 reaching its decision, the Shat court relied upon the numerous
11 revisions in BAPCPA which make individual chapter 11's more like
12 chapter 13²² and also the few cases which had addressed the
13 issue. Id. at 865-66. Nonetheless, the court acknowledged that
14 its broad reading of § 1115 was "not without problems." Id. at
15 867.

16 Other bankruptcy courts, in equally well-reasoned
17 decisions, have narrowly interpreted § 1115 to supplement § 541

18
19 ²¹ Under this reading, when § 1129(b)(2)(B)(ii) says "the
20 debtor may retain property included in the estate under section
21 1115" it means "the debtor may retain all property of the
estate." Why did it not just say that?

22 ²² These changes, also relied upon by the majority,
23 included: (1) redefining property under § 1115 along the lines
24 of property of the estate under § 1306; (2) changing the
25 mandatory contents of a plan pursuant to § 1123(a)(8) to
26 resemble § 1322(a)(1); (3) adding the disposable income test of
27 § 1325(b) to § 1129(a)(15); (4) delaying the discharge until
28 completion of all plan payments as in § 1328(a); (5) permitting
discharge for cause before all payments are completed pursuant
to § 1141(d)(5), similar to the hardship discharge of § 1328(b);
and (6) the addition of § 1127(e) to permit the modification of
a plan even after substantial consummation for purposes similar
to § 1329(a). In re Shat, 424 B.R. at 862.

1 by adding only the debtor's postpetition earnings and other
2 property acquired after the commencement of the case. See In re
3 Tucker, 2011 WL 5926757 (Bankr. D. Or. 2011); In re Borton, 2011
4 WL 5439285 (Bankr. D. Idaho 2011); In re Kamell, 451 B.R. 505;
5 In re Karlovich, 456 B.R. 677 (Bankr. S.D. Cal. 2010); In re
6 Gbadebo, 431 B.R. 222. Under the narrow view, the absolute
7 priority rule still applies to individual chapter 11 debtors
8 with respect to their prepetition property, but postpetition
9 property is not subject to its strictures. Notably, the Panel
10 mentions only one of these well-reasoned decisions.

11 Not surprisingly, Debtors and NACBA advocate adoption of
12 the broad view and echo an analysis similar to that in In re
13 Shat. My colleagues accepted those arguments, but I am not
14 persuaded. Instead, I think numerous statutory interpretive
15 tools favor the narrow construction camp. Even if in the end of
16 my endeavor no clear answer emerges after application of these
17 tools, then I ask a further question not addressed by the Panel:
18 What purpose consistent with generally recognized policies would
19 a broad reading of the relevant statutes serve? Nowhere does
20 the Panel address the answer to that question.

21 **B.**

22 I start my analysis with a review of the basic statutory
23 rules by which I am bound. If the statutory language is clear,
24 I must apply it by its terms unless to do so would lead to
25 absurd results. United States v. Ron Pair Enters., Inc.,
26 489 U.S. 235, 241-42 (1989). I do not recite this tenet of
27 statutory interpretation idly. Examining the language of a
28 statute in the context in which it is used is always the

1 starting point.

2 In addition, I am instructed to construe a statute, if
3 possible, so that "no clause, sentence or word" is rendered
4 "superfluous, void, or insignificant." TRW Inc. v. Andrews,
5 534 U.S. 19, 31 (2001); see also, Conn. Nat'l Bank v. Germain,
6 503 U.S. 249, 253 (1992) ("[C]ourts should disfavor
7 interpretations of statutes that render language superfluous.").
8 Another basic tenet of statutory construction is that courts
9 should interpret a law to avoid absurd or bizarre results.
10 Demarest v. Manspeaker, 498 U.S. 184, 191 (1991) (applying
11 statute's terms where the result was not "so bizarre that
12 Congress could not have intended it"); Griffin v. Oceanic
13 Contractors, Inc., 458 U.S. 564, 575 (1982) ("It is true that
14 interpretations of a statute which would produce absurd results
15 are to be avoided if alternative interpretations consistent with
16 the legislative purpose are available."). Finally, I engage in
17 statutory interpretation by taking a holistic approach that
18 strives to implement the policies behind the enactment of BAPCPA
19 and harmonize the provisions of the Code. See Drummond v.
20 Wiegand (In re Wiegand), 386 B.R. 238, 241 (9th Cir. BAP 2008).
21 Of course, underlying all these interpretive tools is the tenet
22 that "aids to interpretation can be used only to resolve
23 ambiguity and never to create it." 2A Norman J. Singer and J.D.
24 Shambie Singer, Statutes and Statutory Construction § 46:4 (7th
25 ed. 2007). Keeping this in mind, I now apply the rules.

26 **C.**

27 There is no serious debate about whether
28 § 1129(b)(2)(B)(ii) allows an individual chapter 11 debtor to

1 retain some property without running afoul of the absolute
2 priority rule. The definition of that property is "included" in
3 § 1115. The Panel contends that the word "included" is not a
4 word of limitation under the Code and that, to treat it as such,
5 the statute would read a different way than drafted; i.e.,
6 "included, except for property set out in Section 541." I
7 cannot adopt this strained reading of the word "included."

8 The Panel loses sight that words have different meanings in
9 different contexts. It is a well-established canon of statutory
10 construction that when the word "includes" or "including" is
11 followed by a list of examples, those examples are considered
12 illustrative rather than exhaustive. See Vermejo Park Corp. v.
13 Kaiser Coal Corp. (In re Kaiser Steel Corp.), 998 F.2d 783, 788
14 (10th Cir. 1993) (holding that the word "including" after "party
15 in interest" in § 1109(b) indicates that the list of examples is
16 not exhaustive of possible parties in interest); In re Adams,
17 275 B.R. 274, 281 (N.D. Ill. 2002) (stating that § 503(b) is a
18 nonexclusive list of six categories of administrative claims).
19 Thus, the "not a term of limitation" context. Here, however,
20 the statutory use of the word "included" is not used as the
21 preface for representative or illustrative examples. Rather,
22 the property "included" in the estate requires further inquiry
23 by its cross reference to § 1115 (not § 541). As a result, I
24 believe the word "included" in § 1129(b) (2) (B) (ii) means that
25 property "added to" the estate under § 1115.

26 My conclusion is consistent with my view of what § 1115
27 accomplishes. The introductory phrase of § 1115 states that
28 "property of the estate includes, in addition to the property

1 specified in § 541” My interpretation of the word
2 “includes” here is derived from the fact that property of the
3 estate is already defined in § 541. Section 1115(a) brings into
4 the estate a debtor’s postpetition property expressly excluded
5 by § 541. See § 541(a)(6) (carving out post-petition earnings
6 from services performed by an individual debtor after the
7 commencement of the case) and § 541(a)(7) (making property of
8 the estate any interest in property that the estate (not the
9 debtor) acquires after the case). Therefore, Congress intended
10 to add, or “include,” the postpetition property to the
11 individual chapter 11 debtor’s estate in § 1115, in order to
12 expand the estate.

13 This reading is compatible with the phrase “in addition to
14 the property specified in section 541,” which is not ambiguous.
15 The ordinary meaning of “in addition to” is “a part added” or
16 “besides”. Merriam-Webster’s Dictionary, [http://merriam-](http://merriam-webster.com)
17 [webster.com](http://merriam-webster.com); see also Oxford English Dictionary,
18 <http://oxforddictionaries.com> (“the action or process of adding
19 something to something else”). Accordingly, for these reasons,
20 I believe that §§ 1129(b)(2)(B)(ii) and 1115 are most naturally
21 understood to add to the property already defined in § 541 the
22 property which the debtor acquires postpetition. See In re
23 Kamell, 451 B.R. at 512 (“[T]he careful reference in
24 § 1129(b)(2)(B)(ii) to only § 1115 and not to § 541 preserves
25 the distinction between existing assets and those acquired
26 post-petition because of the way § 1115 is worded (which clearly
27 makes post-petition earnings and acquisitions an addition to
28 § 541 property).”).

1 In statutory construction endeavors, I am also guided by
2 the rule that, where possible, I must avoid rendering any parts
3 superfluous. TRW Inc. v. Andrews, 534 U.S. at 31. The broad
4 construction the Panel advocates causes parts of the Code to
5 become superfluous. For example, § 103(a) makes § 541, which
6 states that an estate is created upon the filing of a petition,
7 applicable in chapter 11 cases. Section 103(a) was not amended
8 by BAPCPA. But the broad view makes § 103(a) inapplicable in
9 individual chapter 11's. See In re Stephens, 445 B.R. 816,
10 820-21 (Bankr. S.D. Tex. 2011); In re Gelin, 437 B.R. 435, 442
11 (Bankr. M.D. Fla. 2010) (stating that since neither § 103(a) nor
12 § 541 was amended by BAPCPA, "there is no reason for § 1115 to
13 'absorb' and 'supersede' § 541 to define property of the estate
14 for individual chapter 11 cases.").

15 In short, by interpreting § 1115 to add only postpetition
16 property to the individual chapter 11 debtor's estate, I avoid a
17 construction which creates superfluous language and preserve the
18 distinctions between prepetition property which becomes property
19 of the estate under § 541 and postpetition property which
20 becomes property of the estate under § 1115. These
21 distinctions, which are mainstays of bankruptcy law, make it
22 unlikely that Congress meant for § 1115 to "absorb" and
23 "supersede" § 541. See In re Borton, 2011 WL 5439285, at *4
24 (finding that § 1115 "supplements § 541, but it does not
25 supplant or subsume § 541").²³

26
27 ²³ This interpretation of § 1115 is consistent with one
28 circuit court's view of what the companion chapter 13 provision,
(continued...)

1 There are other textual difficulties with the broad view.
2 For example, an adoption of the broad view likely eliminates
3 § 1129(b)(2)(B)(i),²⁴ if not renders it an absurdity.

4 The 'broad view' necessarily eliminates subsection
5 (B)(i) as well, even though none of its language was
6 amended in BAPCPA, because otherwise the statute would
7 express a nonsensical and harsh alternative in (B)(i)
8 to a much more lenient if not entirely inapplicable
9 subsection (B)(ii) which, in the 'broad view,' allows
10 the individual debtor to keep all of his pre-petition
11 property and all post-petition property not already
12 dealt with at § 1129(a)(15). This is another reason
13 the court doubts the 'broad view,' because it makes
14 subsections (B)(i) and (B)(ii), expressed as
15 alternatives, into an absurdity. Since the BAPCPA
16 language referencing individuals is only included in
17 alternative (B)(ii), (B)(i) remains there as a nullity
18 respecting individuals in the 'broad view.'

19 In re Kamell, 451 B.R. at 508 n.3.

20 In their result-driven approach, my colleagues do not
21 address any of these problems.

22 **D.**

23 I also disagree with the Panel's statement that "Congress
24 affirmatively amended the law so that § 1129(a)(15)(B)²⁵ would

25 ²³(...continued)
26 § 1306, means to a chapter 13 estate. In In re Seafort,
27 ___ F.3d. ___, 2012 WL 469723, *4 (6th Cir. 2012), the court found
28 that "section 1306(a) expressly incorporates section 541. Read
together, § 541 fixes property of the estate as of the date of
filing, while § 1306 adds to the 'property of the estate'
property interests which arise post-petition." (Emphasis added).

²⁴ This section provides in relevant part that "with respect
to a class of unsecured claims--(i) the plan provides that each
holder of a claim of such class receive or retain on account of
such claim property of a value, as of the effective date of the
plan, equal to the allowed amount of such claim[.]"

²⁵ Section 1129(a)(15)(B) provides:

(continued...)

1 trump § 1129(b)(2)(B)(ii) in individual debtor cases." Notably,
2 the Panel reached this conclusion without explaining how. The
3 Panel overlooks that § 1129(a)(15) is only triggered when the
4 holder of an allowed unsecured claim objects to confirmation of
5 the plan. An objection is clearly different than a vote under
6 the Code. For this reason, I part company with the Panel's
7 critique of the "so-called" procedural anomaly created by the
8 broad view as stated in In re Gbadebo, 431 B.R. at 230 (stating
9 that "[i]f the plan proposes to pay [a creditor] anything, the
10 debtor is required to send them a ballot. Yet, [under the broad
11 view], their vote can be ignored. This makes no sense."). It
12 is quite possible that for one reason or another creditors may
13 vote against a plan without filing an objection. In that event,
14 the way I read the Code, § 1129(a)(15) would not come into play.

15 Moreover, under the narrow reading that I propose, an
16 individual chapter 11 debtor would still retain property during
17 the first five years of his or her plan. One recent decision
18 contained the following illustration:

- 19 • A married couple files a joint Chapter 11 petition.
- 20 • At confirmation the debtors are making two separate

21 _____
22 ²⁵ (...continued)

23 In a case in which the debtor is an individual and in
24 which the holder of an allowed unsecured claim objects
25 to the confirmation of the plan –

26 . . .

27 (B) the value of the property to be distributed under
28 the plan is not less than the projected disposable
income of the debtor (as defined in section
1325(b)(2)) to be received during the 5-year period
beginning on the date that the first payment is due
under the plan, or during the period for which the
plan provides payments, whichever is longer.

1 \$700 monthly car payments to secured creditors. The
2 plan is confirmed with the two car payments.

3 • One year into the plan, the debtors trade these cars
4 for less expensive cars requiring payments of only
5 \$400 per month each.

6 BAPCPA's § 1129(b)(2)(B)(ii)'s exception allows
7 the debtors to retain the savings on the cars. Under
8 § 1325(b)(2) as incorporated by § 1129(a)(15), the
9 \$1,400.00 in car payments would have served to reduce
10 the debtors' projected disposable income.
11 Nevertheless, the trade-in of the cars would allow the
12 debtors' actual disposable income to be supplemented
13 by a \$600.00 per month saving without any
14 corresponding increase in projected disposable
15 income—which is determined as of the petition date.
16 Over the remaining four years of the plan, the total
17 amount retained by the debtors would be \$28,800. (The
18 total savings per month is \$600 (\$300 for both cars).
19 There are 48 months left in the first five years of
20 the plan. Forty-eight times \$600 equals \$28,800.)

21 The debtors' actual income might increase during
22 the plan as well—perhaps if one of the debtors
23 received a raise or decided to work fifty hours per
24 week instead of forty. Because debtors' projected
25 disposable income, and monthly payments to secured
26 creditors, were calculated based on circumstances at
27 the beginning of the plan, the resulting difference is
28 an amount the debtors may retain because of the
exclusion contained in § 1129(b)(2)(B)(ii).

18 In re Lively, 2011 WL 6936363, at *4-5 (Bankr. S.D. Tex. 2011).

19 The Lively court recognized that a creditor could attempt to
20 modify the plan under § 1127(e), but noted that a court would
21 not necessarily approve the modification for two reasons.

22 "Regarding the trade-in, a modification would have the perverse
23 result of punishing debtors for economizing. As to the example
24 of a debtor deciding to work more hours, a debtor might return
25 to the regular normal number of hours if the only result of the
26 greater effort is an increased payout to creditors." Id. at
27 n.10.

28 For these reasons, Congress could not have intended

1 § 1129(a) (15) to replace the absolute priority rule with respect
2 to an individual chapter 11 debtor's prepetition property.

3 **II.**

4 I also believe that the Panel has relied exclusively on
5 what it perceives to be the literal meaning of the statutes
6 while ignoring their purpose. I am not convinced that BAPCPA's
7 amendments, which make some aspects of individual chapter 11
8 cases similar to chapter 13, translate into an abrogation of the
9 absolute priority rule with respect to individual chapter 11
10 debtors. In the larger picture, this approach is demonstrably
11 at odds with the policies behind the enactment of BAPCPA. As
12 previously mentioned, the purpose behind BAPCPA was to have
13 debtors pay more, not less. In re Kamell, 451 B.R. at 508
14 (citing In re Gbadebo, 431 B.R. at 229); In re Lindsey, 453 B.R.
15 at 905. Furthermore, the broad view taken by the Panel destroys
16 the careful balance between an individual chapter 11 debtor's
17 interest in reorganizing and restructuring his or her debts and
18 the creditors' interest in maximizing the value of the
19 bankruptcy estate. Radloff, 501 U.S. at 163. Individual
20 chapter 11 debtors are not simply chapter 13 debtors with larger
21 debts. Rather, chapter 11 debtors, individuals or not, stay in
22 possession of their property and enjoy all the rights and powers
23 of a trustee. They are authorized to operate their business and
24 can choose to extend their plan beyond five years. In exchange,
25 the chapter 11 process does not leave unsecured creditors by the
26 wayside by affording individual chapter 11 debtors the luxury to
27 retain all pre and postpetition property at their expense.

28 The Panel begins its discussion by offering the history of

1 the absolute priority rule which it traces back to 1913. Courts
2 and bankruptcy practitioners alike appreciate this history and
3 the evolution of the rule with its judicially created
4 exceptions. I am also cognizant that the rule was traditionally
5 applied to equity interests and that the rule's mission was to
6 undermine corporate shareholders' advantages over unsecured
7 creditors. However, an equity interest is nothing more than an
8 ownership interest and individuals who own businesses, like the
9 Friedmans in this case, file chapter 11 when they are over the
10 debt limit for chapter 13. Individuals who own a business have
11 the same opportunities as corporate shareholders to take
12 advantage of unsecured creditors. Thus, I discern no good
13 reason to depart from the absolute priority rule's traditional
14 application. Finally, I am convinced that because the absolute
15 priority rule has been embedded in bankruptcy jurisprudence and
16 codified for many years, we should proceed cautiously when asked
17 to recognize an exception from the rule that Congress has not
18 clearly expressed.

19 Given the history of the absolute priority rule and its
20 evolution, I ask what conceivable reason could Congress have had
21 for silently writing into § 1129(b)(2)(B)(ii) an abrogation of
22 the absolute priority rule for individual chapter 11 debtors?
23 The Panel answers this question by simply referring to
24 amendments in BAPCPA which make individual chapter 11 cases
25 similar to chapter 13. This, I submit, is not enough.
26 "Statutory interpretation is not a game of blind man's bluff.
27 Judges are free to consider statutory language in light of a
28 statute's basic purposes." Dole Food Co. v. Patrickson, 538

1 U.S. 468, 484 (2003). It is the Panel's failure to consider the
2 purpose behind BAPCPA and chapter 11 in general that has led it
3 to construe the relevant statutes in a way that runs contrary to
4 what Congress would have hoped for and expected by the
5 amendments in BAPCPA.

6 **III.**

7 I finish by addressing the NACBA's argument that retention
8 of the absolute priority rule makes it virtually impossible for
9 sole proprietors, who are individual chapter 11 debtors, to
10 confirm a plan of reorganization. I am not convinced that
11 application of the rule makes it "impossible" for sole
12 proprietors to confirm their plans. Plan acceptance may occur
13 through a variety of tools used by chapter 11 debtors prior to
14 the enactment of BAPCPA: they may negotiate a consensual plan,²⁶
15 pay higher dividends, pay dissenting classes in full, or comply
16 with the absolute priority rule by contributing prepetition
17 property. In re Kamell, 451 B.R. at 512; In re Gbadebo, 431
18 B.R. at 229-30. Even so, I am not at liberty to read words into
19 a statute simply because I perceive the existing words to lead
20 to a harsh result.

21 **IV.**

22 Other than the arguments regarding the absolute priority
23 rule, Debtors have not pointed out any additional errors
24 relating to the conversion of their case. Thus, those arguments

25
26 ²⁶ NACBA ignores the very practical consideration that if
27 plan failure results in conversion to chapter 7, the classes of
28 unsecured and junior secured creditors often receive very
little. These classes have traditionally been highly motivated
to negotiate.

1 are waived for purposes of this appeal. Smith v. Marsh, 194
2 F.3d 1045, 1052 (9th Cir. 1999) (“[O]n appeal, arguments not
3 raised by a party in its opening brief are deemed waived.”).

4 **V.**

5 In sum, for all these reasons, I respectfully dissent. I
6 would hold that the absolute priority rule applies to an
7 individual chapter 11 debtor’s prepetition property, but that
8 the rule has been abrogated with respect to postpetition
9 property under the plain terms of §§ 1129(b)(2)(B)(ii) and 1115.
10 Therefore, I would AFFIRM the order denying confirmation of
11 Debtors’ second amended plan and the order converting their case
12 to chapter 7.