How to Fit a Round Peg into a Triangular Hole: Too Much Debt for a 13, Too Much Income for a 7, and/or Too Many Assets for an 11

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How to Fit a Round Peg into a Triangular Hole: Representing Individual Debtors with Too Much Debt for a 13, Too Much Income for a 7, and/or Too Many Assets for an 11

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Representing individual debtors with complex financial problems and substantial assets related to those problems can be particularly problematic. Advising such debtors which Chapter under Title 11 of the United States Code (the "Bankruptcy Code") is best available to provide them substantial relief starts with a game of issue-spotting. A number of issues must be analyzed, many of which have no crystal clear answer under the Bankruptcy Code. The goal is to provide debtors with the best possible path to the "fresh start" the Bankruptcy Code is intended to provide. Individual debtors who are not farmers or fisherman[1] have three possible bankruptcy options available to them for seeking relief from their financial difficulties: a Chapter 7 liquidation proceeding, a Chapter 13 reorganization for individuals with regular income that otherwise meet certain statutory debt limits, or a Chapter 11 reorganization. Because of the various limitations and restrictions built into the different Chapters of the Bankruptcy Code, an individual with substantial debts and assets could have difficulty successfully receiving a discharge under any of those chapters.

I. Relief Under Chapter 7 of the Bankruptcy Code

When available, Chapter 7 relief will provide debtors experiencing financial difficulties the quickest means to a fresh start while also preserving the debtor's rights to retain exempt assets. For individual debtors with substantial income, assets, and secured debts, however, amendments to the Bankruptcy Code under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")[2] makes access to relief under Chapter 7 more difficult.

[1] A discussion of Chapter 12 of the Bankruptcy Code, available to family farmers or fishermen with regular income, is outside of the scope of this article.

[2] Bankruptcy Abuse and Consumer Protection Act of 2005, S. 256, 109th Cong. (2005) (enacted). (hereinafter, "BAPCPA").

a. The Presumption of Abuse

Section 707 of the Bankruptcy Code authorizes the dismissal or conversion of a Chapter 7 case if a discharge in the case would be an abuse of the Bankruptcy Code. While Subsection 707(a) allows dismissal/conversion only for "cause," Subsection 707(b) sets forth a complex formula for determining whether a Chapter 7 case is *presumed* to be an abuse of the Bankruptcy Code (the "Means Test") in cases involving primarily consumer debts.[3] The Means Test provides[4] a "safe harbor" for those debtors whose current monthly income, multiplied by 12, is equal to or less than the applicable state median family income for a family the same size as the debtor's family. As of April 1, 2016, for a family of four in the state of Georgia the safe harbor salary is $70,325.00.[5]

If the debtor is not eligible for safe harbor, the Means Test portion of Section 707(b) provides as follows:

> [T]he court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of--
>
> (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $ 7,475, whichever is greater; or
>
> (II) $ 12,475.[6]

i. Expenses

Section 707(b) delineates specifically which expenses the debtor may consider based on the number of dependents including references to the National Standards for expenses.[7] The

[3] For individual cases involving primarily business debts, the Means Test does not apply and no presumption of abuse arises. 11 U.S.C. § 707(b)(1).
[4] 11 U.S.C. § 707(b)(6).
[5] CENSUS BUREAU, IRS DATA AND ADMINISTRATIVE EXPENSES MULTIPLIERS, https://www.justice.gov/ust/means-testing/20160401 (last visited May 2, 2016).
[6] 11 U.S.C. § 707(b)(2)(A)(i).
[7] CENSUS BUREAU, IRS DATA AND ADMINISTRATIVE EXPENSES MULTIPLIERS, https://www.justice.gov/ust/means-testing/20160401 (last visited May 2, 2016).

standardized expenses include out of pocket medical expenses ($240),[8] non-mortgage/rent housing operating expenses ($707), mortgage or rent expenses ($1,808), and vehicles ($256 per car). The Bankruptcy Code also provides for the exclusion of the following actual expenses: taxes, involuntary deductions, life insurance premiums, court-ordered payments, education as a condition of employment or for a disabled child, childcare, additional healthcare expenses, telephone services, health savings account expenses, contributions to the care of family members, continuing charitable contributions, and more. Importantly, the Bankruptcy Code also provides for adjustments in the event a debtor has any special circumstances, and any legitimate expense that is out of the ordinary for the average family could be considered.[9]

Because the Means Test only establishes the *presumption* of abuse, that presumption may be rebutted "by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative."[10] These listed examples constitute a non-exhaustive list, and the courts undertake a fact-specific analysis in each "special circumstances" case.[11] The key to whether the expenses constitute a "special circumstance" is not whether the expenses are beyond the debtor's control,[12] but rather—as the statute provides—whether the debtor has any reasonable alternative.[13] In considering whether certain facts constitute special circumstances, courts have held that the

[8] All amounts are calculated as of April 1, 2016 for a family of four (all under the age of 65) in Fulton County, Georgia.
[9] 11 U.S.C.§ 707(b)(2)(B); and 6 COLLIER ON BANKRUPTCY ¶ 707.04[3][d] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).
[10] 11 U.S.C. § 707(b)(2)(B)(i).
[11] *In re Littman*, 370 B.R. 820, 831 (Bankr. D. Idaho 2007).
[12] *See In re Tamez*, Case No. 07-60047-RCM, 2007 Bankr. LEXIS 2763, *12 (Bankr. W.D. Tex. Aug. 13, 2007) ("The term 'special circumstances' is not limited to circumstances outside of a debtor's control, thus, it is possible for situations within the debtor's control to be a special circumstance.").
[13] 11 U.S.C. § 707(b)(2)(B)(i).

following are not special circumstances: 401(k) loan repayment,[14] student loan repayment,[15] expenses related to the maintenance of an extravagant lifestyle,[16] monthly home pest control,[17] and work uniforms.[18] However, bankruptcy courts have held the following to constitute special circumstances: mileage for business trips,[19] decreased post-petition income,[20] post-petition birth of a child,[21] and child support payments.[22] A practical example of this might be a debtor who recently retired and has experienced a drastically decreased income in the past six months.

If—after the income is calculated and reduced by the applicable expenses—the debtor's income is above the statutory limit, it is "presumed" that the debtor's filing of the case was an abuse of Chapter 7 because the debtor purportedly can provide a meaningful recovery in a case under Chapter 11 or Chapter 13. An important point to keep in mind, however, is that the bankruptcy court is not required to dismiss a case even if the presumption of abuse is not rebutted. The bankruptcy court has the discretion not to dismiss a bankruptcy case even in the face of an unrebutted presumption of abuse, and if dismissal or conversion of the case to Chapter 13 would still not provide a meaningful distribution to unsecured creditors, dismissal or conversion by the court may very well be pointless.[23]

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[14] *In re Turner*, 376 B.R. 370, 378 (Bankr. D.N.H. 2007); *Eisen v. Thompson*, 370 B.R. 762, 773 (N.D. Ohio 2007).
[15] *In re Brown*, 500 B.R. 255 (Bankr. S.D. Ga. 2013); *In re Vaccariello*, 375 B.R. 809 (Bankr. N.D. Ohio 2007). *But see In re Martin*, 371 B.R. 347 (Bankr. C.D. Ill. 2007) (collecting cases holding that student loan debts, as nondischargeable debts, are "special circumstances").
[16] *In re Morgantini*, Case No. 10-61077-B-13, 2011 Bankr. LEXIS 5631 (Bankr. E.D. Cal. Sept. 27, 2011)
[17] *In re Turner*, 376 B.R. 370(Bankr. D.N.H. 2007).
[18] *Id.*
[19] *Id.*
[20] *In re Tamez*, Case No. 07-60047-RCM, 2007 Bankr. LEXIS 2763 (Bankr. W.D. Tex. Aug. 13, 2007).
[21] *In re Martin*, 371 B.R. 347 (Bankr. C.D. Ill. 2007).
[22] *In re Littman*, 370 B.R. 820, 831 (Bankr. D. Idaho 2007).
[23] *See* 6 COLLIER ON BANKRUPTCY ¶ 707.04[3][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (citing *In re Jenkins*, Case No. 12-50413, 2012 Bankr. LEXIS 3018 (Bankr. W.D.N.C. July 2, 2012) (court exercised discretion and declined to dismiss or convert case); and *In re Skvorecz*, 369 B.R. 638 (Bankr. D. Colo. 2007) (finding conversion of case to Chapter 13 would be pointless)).

b. Totality of the Circumstances

If the presumption of abuse does not arise under Section 707(b) (or is rebutted), the court may still dismiss the case as abusive if the case was filed in bad faith or if the "totality . . . of the debtor's financial situation demonstrates abuse."[24] In determining whether a filing is an abuse of the Bankruptcy Code under the "totality of the circumstances," courts have considered, among other things:

> (1) Whether the bankruptcy filing was precipitated by an unforeseen or sudden calamity, such as an illness or unemployment; (2) Whether the debtor is eligible for chapter 13 relief; (3) Whether the debtor has made any efforts to repay his debts or negotiate with creditors; whether there are non-bankruptcy remedies available to the debtor; or whether the debtor can obtain relief through private negotiations; (4) Whether the debtors could provide a "meaningful" distribution in a chapter 13 case; (5) Whether the debtor's expenses could be reduced significantly without depriving them and their dependents of necessities, including whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect the true financial condition; (6) the period of time over which the debts were incurred . . . [and (7)] whether the debtor has a stable source of future income.[25]

The primary factor, however, is whether a debtor has the ability to repay a meaningful portion of his or her debts from future income.[26]

i. Income

In "totality" cases that have found abuse based (in part) on a debtor's high income, those incomes have often been more than $100,000 per year:[27] $35,000 per month,[28] $146,524.92 per

[24] 11 U.S.C. § 707(b)(3).
[25] *In re Banks*, 414 B.R. 901, 914 (Bankr. S.D. Ga. 2009).
[26] *Ng v. Farmer*, 477 B.R. 118, 126 (B.A.P. 9th Cir. 2012) (quoting *Price v. United States Trustee (In re Price)*, 353 F.3d 1135, 1140 (9th Cir. 2004)).
[27] *See In re Wadsworth*, 383 B.R. 330, 333 (Bankr. N.D. Ohio 2007) ("Under any measure, a debtor, having a stable annual salary of almost $100,000.00, will be hard pressed to establish that they do not have the ability to pay some of their unsecured debt, such as through funding a Chapter 13 plan of reorganization.").
[28] *Victoria v. Greenville Hosp. Corp. (In re Victoria)*, 389 B.R. 250, 252 (M.D. Ala. 2008).

year,[29] $87,756 per year,[30]96,000 per year,[31]$125,000 per year,[32] and $400,000 per year.[33] However, because the debtor's income is only one (albeit the most heavily weighted) factor, not all high-income debtor cases are deemed to be abusive. For example, one case was deemed non-abusive despite a debtor's annual income of $141,000.[34]

ii. Expenses

The debtor's ability to repay a meaningful portion of his or her debts often hinges on the level of the debtor's expenses. In fact, some courts have even held that a debtor's ability to repay is inextricably linked with whether the debtor is living a lavish lifestyle.[35] In considering whether a debtor's lifestyle is too lavish, the courts look most often to housing[36] but also

[29] *In re Grover*, Case No. 12-01069, 2013 Bankr. LEXIS 3132 (Bankr. N.D. Iowa Aug. 2, 2013).
[30] *Calhoun v. United States Tr.*, 650 F.3d 338, 341 (4th Cir. 2011).
[31] *In re Wadsworth*, 383 B.R. 330 (Bankr. N.D. Ohio 2007).
[32] *In re Brenneman*, 397 B.R. 866, 871 (Bankr. N.D. Ohio 2008).
[33] *Kornfield v. Schwartz*, 214 B.R. 705, 713 (W.D.N.Y. 1997).
[34] *In re Graham*, 363 B.R. 844, 852 (Bankr. S.D. Ohio 2007).
[35] *See McDow v. Smith*, 295 B.R. 69, 79 n.22 (E.D. Va. 2003) (listing ability to repay and lavish lifestyle as a single factor).
[36] *See In re Castellaw*, 401 B.R. 223, 228 (Bankr. N.D. Tex. 2009) (concluding that housing expense that was five times higher than the IRS local standard was excessive and that the debtor's resources devoted to housing should be reallocated to pay creditors); *In re Meurer*, Case No. 09-41446, 2009 Bankr. LEXIS 3633, at *10-*11 (Bankr. N.D. Tex. Nov. 18, 2009) (concluding that chapter 7 relief would be an abuse based, inter alia, on debtor's excessive housing expense, which was almost three times the IRS guideline for the relevant household size); *In re Cappuccetti*, 172 B.R. 37, 40 (Bankr. E.D. Ark. 1994) ("At the time of the filing of the bankruptcy case the debtors lived in a condominium adjacent to the Maumelle golf course, generally the most expensive and sought-after housing in the area.").

consider automobiles,[37] vacations,[38] continued attendance at private schools,[39] and excessive entertainment expenses.[40]

For these (and other) reasons, Chapter 7 is not an effective solution for all individual debtors. In addition to the limitations discussed herein, many debtors choose to avoid Chapter 7 in favor of a reorganization under Chapter 13. As explained below, however, Chapter 13 has its own limitations.

II. Relief Under Chapter 13 of the Bankruptcy Code

Where a Chapter 7 petition may result in dismissal or conversion of the case, Chapter 13 relief is generally considered the next best option, as it is substantially cheaper than a Chapter 11. For debtors without regular income or debtors with substantial liabilities above certain thresholds, however, relief under Chapter 13 may likewise be unavailable.

a. Who May Be a Debtor Under Chapter 13

Section 109 of the Bankruptcy Code contains certain limitations on who may be a debtor under the Bankruptcy Code. In particular, Section 109(e) of the Bankruptcy Code provides that

> [o]nly an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $394,725 and noncontingent, liquidated, secured debts of less than $1,184,200 or an individual with regular income

[37] *See In re Meurer*, Case No. 09-41446, 2009 Bankr. LEXIS 3633, *13 (Bankr. N.D. Tex. Nov. 18, 2009) ("In sum the financial factors of the *Daugherty* test weigh in favor of dismissal of Debtor's case because it is inequitable for Debtor to maintain a relatively lavish lifestyle including keeping . . . two luxury cars, while almost $150,000 in unsecured debt will be left unpaid."); *In re Ricci*, 456 B.R. 89, 101 (Bankr. M.D. Fla. 2009) (dismissing the case because, among other reasons, the debtors "acquired a luxury car with a monthly lease payment of $933.00 shortly before filing this case").

[38] *In re Reese*, 402 B.R. 43, 49 (Bankr. M.D. Fla. 2008) ("The Debtor and Stafford took vacations, financed by the credit cards, with one two-week trip to the West Coast and Canada straddling the Petition Date. They stayed at luxury resorts, dined lavishly, rented limousines, took cash advances, and incurred additional debt for extensive shopping.").

[39] *In re Truax*, 446 B.R. 638, 645 (Bankr. S.D. Ga. 2010); *In re Woodburn*, Case No. 07-00927-5-ATS, 2008Bankr. LEXIS 2447, 14-15 (Bankr. E.D.N.C. July 17, 2008).

[40] In re Truax, 446 B.R. 638, 645 (Bankr. S.D. Ga. 2010); *In re Woodburn*, Case No. 07-00927-5-ATS, 2008 Bankr. LEXIS 2447, *14-15 (Bankr. E.D.N.C. July 17, 2008) ("Though the schedules reflected very reasonable telephone and cable expenses, the bills showed otherwise. Dr. Woodburn testified that they have 3 or 4 cable boxes in their home. The telephone expenses often exceed $500 per month.").

> and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $394,725 and noncontingent, liquidated, secured debts of less than $1,184,200 may be a debtor under chapter 13 of this title.[41]

As a preliminary matter, it bears noting that the majority view is that the Section 109 limitations are not generally considered to be jurisdictional. The Eighth[42] and Ninth[43] Circuits have directly addressed the issue, holding that Section 109(e) is not jurisdictional. The Sixth Circuit has held that eligibility of a debtor under Section 109 is not jurisdictional,[44] overturning previous case law to the contrary.[45] The Fifth Circuit held that the limitations under Section 109(g) were not jurisdictional,[46] and lower courts have extended that ruling to Section 109(e).[47] The Tenth Circuit held that the limitations under Section 109(c) (Chapter 9) are not jurisdictional[48] but implied in other cases that the Section 109(e) limits might be jurisdictional.[49]

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[41] 11 U.S.C. § 109(e). These debt limits are adjusted for changes in the cost of living every three (3) years and were last adjusted on April 1, 2016. 11 U.S.C. § 104; Revision of Certain Dollar Amounts in the Bankruptcy Code, 81 Fed. Reg. 8748 (Feb. 22, 2016) (increasing all previous dollar amounts by 3.016% rounded to the nearest $25).

[42] *See Rudd v. Laughlin*, 866 F.2d 1040, 1042 (8th Cir. 1989) (overruling previous case law holding the Section 109(e) limits to be jurisdictional).

[43] *See In re Wenberg*, 94 B.R. 631, 635-37 (B.A.P. 9th Cir. 1988), aff'd, 902 F.2d 768 (9th Cir. 1990) (holding that eligibility under § 109(e) was not jurisdictional); *Duplessis v. Valenti (In re Valenti)*, 310 B.R. 138, 147 (B.A.P. 9th Cir. 2004) ("Section 109(e) is not jurisdictional.").

[44] *See Simon v. Amir (In re Amir)*, 436 B.R. 1, 21 (B.A.P. 6th Cir. 2010) ("Several circuit appellate courts have . . . addressed the issue of whether eligibility under . . . 11 U.S.C. § 109 is jurisdictional. These decisions have all found that eligibility under § 109 is not jurisdictional in nature."); *Glance v. Carroll (In re Glance)*, 487 F.3d 317, 321 (6th Cir. 2007) ("[T]he eligibility requirements of § 109(e) create a gateway into the bankruptcy process, not an ongoing limitation on the jurisdiction of the bankruptcy courts.").

[45] *See Comprehensive Accounting Corp. v. Pearson (In re Pearson)*, 773 F.2d 751 (6th Cir. 1985) (comparing the limitations to the jurisdictional requirement for diversity jurisdiction); *Alt v. United States (In re Alt)*, 305 F.3d 413, 421 (6th Cir. 2002) (affirming dismissal of Chapter 13 because debtor was "'clearly over the jurisdictional limit at the time' under 11 U.S.C. § 109(e) and simply chose to ignore it when completing her schedules.").

[46] *See In re Phillips*, 844 F.2d 230, 235-36 n.2 (5th Cir. 1988) (rejecting jurisdictional argument based on § 109(g) and noting the "far-reaching consequences" of linking subject matter jurisdiction to eligibility requirements).

[47] *See Nikoloutsos v. Nikoloutsos*, 222 B.R. 297, 300 (E.D. Tex. 1998) ("Appellant is correct that in *Phillips* the Fifth Circuit addressed § 109(g), not § 109(e). However, the court's holding is equally applicable to § 109(e)."), rev'd and remanded on other grounds.

[48] *See Hamilton Creek Metro. Dist. v. Bondholders Colo. Bondshares (In re Hamilton Creek Metro. Dist.)*, 143 F.3d 1381, 1385 n.2 (10th Cir. 1998) (noting that in a chapter 9 case, "none of the § 109(c) criteria is jurisdictional in nature").

[49] *See Mason v. Young (In re Young)*, 237 F.3d 1168, 1170 n.1 (10th Cir. 2001) ("Although neither party has expressly raised the issue on appeal, for jurisdictional purposes we note that at the time of filing, it appeared that Young owed Mason only $150,000 in punitive damages, thus meeting the requirements for filing under Chapter

And even *Collier on Bankruptcy* takes the position that the debt limits are not jurisdictional.[50] A handful of district courts, however, have applied a minority view—that the limits in Section 109 are jurisdictional.[51] Some circuits have not yet considered the issue, including the Eleventh Circuit,[52] leaving the district courts to find that it is not jurisdictional.[53]

If the issue of eligibility under Section 109(e) is not raised early in the case—because the requirement is not jurisdictional—any later objections to the debtor's compliance with debt limits might be considered waived.[54] As a result, if a party wishes to challenge a debtor's standing to pursue relief under Chapter 13, they should raise any objections as early in the case as possible.

i. Individual With Regular Income

The first requirement of Section 109(e) is that the debtor be an individual with regular income, a term defined by Section 101(30) as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker."[55]

13."); *In re Rasmussen*, 888 F.2d 703, 705 (10th Cir. 1989) ("Mr. Rasmussen originally was not able to meet the jurisdictional limits of a Chapter 13 proceeding because his unsecured debts totaled more than $100,000 in contravention of 11 U.S.C. § 109(e).").

[50] *See* 2 COLLIER ON BANKRUPTCY ¶109.01[2] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed.) ("Section 109 is not characterized in terms of venue or jurisdiction by the statute itself, and it is clear that it is not jurisdictional.").

[51] *See Ekeke v. United States*, 133 B.R. 450, 452 (S.D. Ill. 1991) ("[T]he plain language of § 109(e) makes the amount of the plan a jurisdictional prerequisite, as opposed to an eligibility measure."); *In re Keziah*, 46 B.R. 551, 554 (Bankr. W.D. NC. 1985) ("However, § 109 is a part of the eligibility (to be a debtor) section which involves the subject matter jurisdiction of this Court.").

[52] *General Lending Corp. v. Cancio*, 505 B.R. 63, 69 (S.D. Fla. 2014) ("The Eleventh Circuit has not yet addressed whether eligibility under § 109(e) is jurisdictional . . . .").

[53] *Franklin Fed. Bancorp, FSB v. Lochamy (In re Lochamy)*, 197 B.R. 384, 386 (Bankr. N.D. Ga. 1995); *In re Verdunn*, 210 B.R. 621, 624 (Bankr. M.D. Fla. 1997)).

[54] *Rudd v. Laughlin*, 866 F.2d 1040 (8th Cir. 1989); *In re Lochamy*, 197 B.R. 384, 385 n.12 (Bankr. N.D. Ga. 1995) (adopting majority view and finding eligibility to be "merely a limitation . . . [which] may be waived" and to which res judicata may apply when a creditor failed to object timely to the debtor's failure to meet the § 109 eligibility requirements); *In re Verdunn*, 210 B.R. 621, 624 (Bankr. M.D. Fla. 1997); *In re Sullivan*, 245 B.R. 416, 418 (N.D. Fla. 1999) ("[T]he question of eligibility may be waived if and when a creditor waits an unreasonable length of time to raise the issue before the court.").

[55] 11 U.S.C. § 101(30) (2016).

1. An Individual

While the term "individual" is not defined by the Bankruptcy Code, it is understood to mean a natural person, as opposed to a legal entity.[56] As noted in the text of Section 109(e), the same debt limitations apply to "an individual" and to "an individual with regular income and such individual's spouse," when filing jointly.[57] Most courts interpreting this requirement have held that the statute is unambiguous and that married couples filing jointly are still subject to the same debt limits as individual filers,[58] even when the individual debtors would qualify under separate cases but not under a joint case.[59] At least one court held otherwise, however, finding that "[i]f a husband and wife can each file separate Chapter 13 proceedings, where their own individual debt is within the §109(e) limits, the Court can think of no reason why a husband and wife could not file a joint petition."[60] This appears to be the extreme minority view.

Courts have also held that married debtors—who are jointly and severally liable on a single debt—cannot "divide" that debt between the individuals so that they can get below the debt limit and file separate Chapter 13 cases.[61] The courts so hold because each of the debtors is

[56] *See Spookyworld, Inc. v. Town of Berlin* (*In re Spookyworld, Inc.)*, 346 F.3d 1, 7 (1st Cir. 2003) ("The Bankruptcy Code does not define 'individual,' but several provisions indicate that the term was not meant to include corporations."); *In re Hassan*, Case No. 04-20332-7, 2010 Bankr. LEXIS 4707 (Bankr. D. Kan. Dec. 21, 2010) ("[T]he Bankruptcy Code does not define 'individual' but consistently uses it to refer to human beings, and 'person' is defined to include partnerships and corporations, as well as individuals . . . .").
[57] 11 U.S.C. § 109(e)..
[58] *See In re Wimmer*, 512 B.R. 498, 503 (Bankr. S.D.N.Y. 2014) ("The debt limits apply equally to married couples filing jointly."); *In re Miller*, 493 B.R. 55, 58 (Bankr. N.D. Ill. 2013) ("Under this provision, a debtor who files an individual case and debtors who file a joint case are subject to the same debt limits.").
[59] *See In re Pete*, 541 B.R. 917, 922 (Bankr. N.D. Ga. 2015) ("Congress has decided that the unsecured debt limit to be eligible for a chapter 13 case is $383,175 regardless of whether the case was commenced by an individual filer or joint debtors. Because the Petes' aggregate unsecured debt exceeds $383,175, they are not eligible to be debtors in a joint chapter 13 case, regardless of their eligibility to file individual chapter 13 cases.").
[60] *In re Werts*, 410 B.R. 677, 688 (Bankr. D. Kan. 2009).
[61] *In re Cronkleton*, 18 B.R. 792, 793 (Bankr. S.D. Ohio 1982) ("The attempted splitting of this obligation between the two debtors in order to qualify under the debt limitation ceiling contained in § 109(e) and under the guise that the remainder of the debt is 'contingent' is not permissible.").

held liable for the entire amount, and the courts are unable to predict whether those amounts might be paid by the debtor or possibly the co-obligor.[62]

While the Chapter 13 debt limits do not double for a married couple filing jointly, they do (effectively) double for a married couple filing separately, and to the extent Chapter 13 joint relief is unavailable, an attorney advising filing spouses should look at whether filing separate cases is a viable option.

2. With Regular Income

As defined by the Bankruptcy Code, "regular income" means "income [which] is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title . . . ."[63] This requirement should be read together with the requirement that a Chapter 13 debtor's plan will distribute more than would be distributed under a liquidation.[64]

ii. At the Time the Petition was Filed

Courts are split on the time at which it is determined whether a Chapter 13 debtor is an individual with regular income.[65] Some courts conclude that the relevant time is the date of filing the petition,[66] while others look prospectively, such as at the time of confirmation,[67] and still others look at the time most favorable to the debtor.[68]

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[62] *In re Fostvedt*, 823 F.2d 305, 306 (9th Cir. 1987) ("Fostvedt was liable for the full amount of the notes, regardless of the possibility that his co-obligors would eventually pay some or all of the debt.").
[63] 11 U.S.C. § 101(30).
[64] *In re Purdy*, 16 B.R. 847, 857 (N.D. Ga. 1981).
[65] *Pellegrino v. Boyajian (In re Pellegrino),* 423 B.R. 586, 590 (B.A.P. 1st Cir. 2010)
[66] *Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975 (9th Cir. 2001); *In re Robinson*, 535 B.R. 437, 443 (Bankr. N.D. Ga. 2015); *In re Page*, 519 B.R. 908, 915 (Bankr. M.D.N.C. 2014); *In re Smith*, 234 B.R. 852 (Bankr. M.D. Ga. 1999).
[67] *In re Goodrich*, 257 B.R. 101 (Bankr. M.D. Fla. 2000); *In re Cole*, 3 B.R. 346 (Bankr. S.D. W. Va. 1980).
[68] *See, e.g.*, *In re Moore*, 17 B.R. 551 (Bankr. M.D. Fla. 1982).

a. **Whether the Debts are Noncontingent, Liquidated, or Un/Secured**

Section 109(e) explicitly provides that the debt limits apply only to "noncontingent, liquidated," secured and unsecured debts.

iii. Noncontingent

While neither "contingent" nor "noncontingent" are defined under the Bankruptcy Code, courts have uniformly held that a "contingent debt is 'one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor.'"[69]

This issue can arise when the parties dispute the existence of a "contingency" (a condition precedent to liability), whether any such contingent liability has been discharged, or "they might disagree over the existence of the underlying obligation creating the liability to pay."[70] In any event, "[t]he mere fact that a debtor in his schedules categorizes his debts as being contingent does not bar the court from making inquiry as to the true state of affairs."[71] "It is generally agreed that a debt is contingent if it does not become an obligation until the occurrence of a future event, but is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor's filing for bankruptcy."[72]

iv. Liquidated

"[T]he concept of a liquidated debt relates to the amount of liability, not the existence of liability."[73] A "'liquidated' debt is one whose dollar amount (1) is determined, fixed, settled, adjusted, and made certain mathematically and with precision, (2) is agreed upon, or (3) is fixed

[69] *Fostvedt v. Dow (In re Fostvedt)*, 823 F.2d 305, 306 (9th Cir. 1987) (citations omitted).
[70] *In re Lambert*, 43 B.R. 913, 921 (Bankr. D. Utah 1984).
[71] *In re Prince*, 5 B.R. 432, 433 (Bankr. W.D.N.Y. 1980).
[72] *Mazzeo v. United States (in Re Mazzeo)*, 131 F.3d 295, 303 (2d Cir. 1997) (collecting cases).
[73] *United States v. Verdunn*, 89 F.3d 799, 802 (11th Cir. 1996).

by operation of law."[74] An "unliquidated" debt is one for which the value is not readily determinable.[75]

v. Un/Secured

Some courts have held that only the part of the claim which is actually secured may be considered a secured claim for purposes of Section 109(e).[76] Most courts, including the Courts of Appeals for the Fourth,[77] Seventh[78] and Eighth Circuits,[79] have held that the valuation test of Section 506(a) should be used in making a determination as to whether there is an unsecured deficiency. This line of reasoning raises additional questions as to the value of the collateral, and courts are split as to whether this determination can be made based on the scheduled values,[80] or whether it must be made in conjunction with an evidentiary hearing.[81] Some courts, however, bypass this analysis and hold that because the date of the determination is the petition date, and because any bifurcation happens within the case, an undersecured debt is considered secured for purposes of 109(e).[82] The reasoning behind this is that because Section 506(a) only allows for bifurcation of an *allowed* claim, it cannot be bifurcated until it has either been deemed allowed or adjudicated allowed, both coming well after the petition date.[83]

Further, courts seem to be split as to whether unsecured non-recourse debt counts towards the debtors' debt limits under Section 109(e). The issue can arise after a Chapter 7 discharge of

[74] *In re Lambert*, 43 B.R. 913, 921 (Bankr. D. Utah 1984).
[75] *See United States v. Verdunn*, 89 F.3d 799, 802 (11th Cir. 1996) ("If the amount of the debt is dependent, however, upon a future exercise of discretion, not restricted by specific criteria, the claim is unliquidated.").
[76] *In re Ballard*, 4 B.R. 271 (Bankr. E.D. Va. 1980).
[77] *See Brown & Co. Sec. Corp. v. Balbus (In re Balbus)*, 933 F.2d 246 (4th Cir. 1991) (holding that in determining whether a debtor satisfies the limit on unsecured debt under section 109(e), hypothetical costs of the sale of real property securing debt are not to be deducted from the value of the property when the debtor intends to retain the property).
[78] *In re Day*, 747 F.2d 405 (7th Cir. 1984).
[79] *Ficken v. United States (In re Ficken),* 2 F.3d 299 (8th Cir. 1993).
[80] *In re Pearson*, 773 F.2d 751, 756 (6th Cir. 1985); *In re King*, 9 B.R. 376 (Bankr. D. Or. 1981).
[81] *In re Sylvester*, 19 B.R. 671, 673 (B.A.P. 9th Cir. 1982) ("[T]he court must determine the liquidated amount of any disputed claim prior to making the computation required by section 109(e).").
[82] *In re Holland*, 293 B.R. 425, 429 (Bankr. N.D. Ohio 2002).
[83] *In re Morton*, 43 B.R. 215, 220 (Bankr. E.D.N.Y. 1984).

personal liability on a mortgage[84] or in the context of non-recourse note.[85] Some courts have held that in those situations, an unsecured non-recourse debt is effectively a disallowed claim and therefore does not count towards the Chapter 13 debt limits.[86] These courts rely on the argument that an unsecured portion of a non-recourse claim constitutes a disallowed unsecured claim[87] and that the debtor does not "owe" those amounts for purposes of Section 109(e). However, another line of cases[88] holds that unsecured non-recourse debt is exactly that—an unsecured debt for purposes of Section 109(e). In support of this position, these courts rely on the Supreme Court case of *Johnson v. Home State Bank.*[89] In *Johnson* a bank commenced foreclosure proceedings against an individual's house, and in response the individual filed a Chapter 7 case. The debtor received a discharge and the bank reinstituted the foreclosure proceedings. Ultimately, the bank was awarded an *in rem* judgment against the house. Before the bank could foreclose the debtor filed a Chapter 13 case and proposed to pay the judgment in a final balloon payment. The plan was confirmed over the bank's objection and was affirmed by the district court and the court of appeals, which held that the bank no longer had a "claim" against the debtor because the personal liability had been discharged. Because two other circuit courts had previously held that a Chapter 13 case could include a mortgage lien that had been

[84] *In re Shenas*, Case No. 11-41332 EDJ, 2011 Bankr. LEXIS 2907 (Bankr. N.D. Cal. July 28, 2011); *Cavaliere v. Sapir*, 208 B.R. 784, 786 (D. Conn. 1997).
[85] *See In re Sandrin*, 536 B.R. 309 (Bankr. D. Colo. 2015) (refusing to consider unsecured non-recourse debt toward debt limits).
[86] *Id.*; *In re Rosa*, 521 B.R. 337, 342 n.3 (Bankr. N.D. Cal. 2014) ("The unsecured portion of the non-recourse secured claim is not counted towards the unsecured debt ceiling in Bankruptcy Code § 109(e)."); *In re Silva*, Case No. 10-60077, 2011 Bankr. LEXIS 5763 (Bankr. N.D. Cal. Nov. 16, 2011); *In re Shenas*, Case No. 11-41332 EDJ, 2011 Bankr. LEXIS 2907 (Bankr. N.D. Cal. July 28, 2011); *Cavaliere v. Sapir*, 208 B.R. 784, 786 (D. Conn. 1997).
[87] *Cavaliere v. Sapir*, 208 B.R. 784, 786 (D. Conn. 1997) (citing *Liona Corp., Inc. v. PCH Assoc. (In re PCH Assoc.*), 949 F.2d 585, 604 (2d Cir. 1991)).
[88] *In re Lindsey, Stephenson & Lindsey*, 995 F.2d 626 (5th Cir. 1993); *In re Morford*, Case No. 11-2586, 2012 U.S. Dist. LEXIS 6532 (D.N.J. Jan. 20, 2012); *In re Diclemente*, Case No. 12-1266, 2012 U.S. Dist. LEXIS 113799 (D.N.J. Aug. 13, 2012); *In re Wimmer*, 512 B.R. 498 (Bankr. S.D.N.Y. 2014).
[89] *Johnson v. Home State Bank*, 501 U.S. 78 (1991).

discharged in a previous Chapter 7,[90] the Supreme Court granted certiorari to resolve the split. The Supreme Court noted that Congress intended the broadest possible definition of "claim" and that "a claim under the bankruptcy code includes a claim against the debtor's property even though the debtor's personal liability has been extinguished and, thus, a nonrecourse claim against the property is a claim pursuant to 101(5)."[91]

vi. Disputed

Schedules D, E, and F each include an area to indicate whether a scheduled debt is contingent, unliquidated, or disputed. While the indication that a debt is "disputed" would be made in the same location (on the schedules) as an indication that the debt is contingent or unliquidated, disputed debts are not treated any differently than undisputed debts for the purpose of determining eligibility for Chapter 13. Even though "Section 109(e) contains no reference to 'undisputed' or 'disputed' debts,"[92] some courts have held that only those disputed debts that are clearly noncontingent and liquidated are to be counted,[93] and one court has held that until a disputed debt is resolved, it is not readily ascertainable and therefore it is unliquidated and may not be included in the debtor's calculations.[94] Where borrowers have disputed, contingent, or unliquidated debts that give an attorney a good faith basis for believing the debtor satisfies the Chapter 13 debt limits, it may very well be appropriate to file the case as a Chapter 13 with the hope that no objection will be raised to challenge the debtor's eligibility as a Chapter 13 debtor.

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[90] *In re Saylors*, 869 F.2d 1434, 1436 (11th Cir. 1989); *In re Metz*, 820 F.2d 1495, 1498 (9th Cir. 1987).
[91] *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991).
[92] *See In re Lambert*, 43 B.R. 913, 917 (Bankr. D. Utah 1984) ("The majority of these courts take the position that debtors seeking Chapter 13 relief are required by Section 109(e) to include in their eligibility computations even those debts that are disputed.") (citing *In re Sylvester*, 19 B.R. 671 (B.A.P. 9th Cir. 1982); *In re McMonagle*, 30 B.R. 899 (Bankr. D.S.D. 1983); *In re Blehm*, 33 B.R. 678 (Bankr. D. Colo. 1983); *In re Vaughan*, 36 B.R. 935 (N.D. Ala. 1984).
[93] *In re Troyer*, 24 B.R. 727 (Bankr. N.D. Ohio 1982); *In re DeBrunner*, 22 B.R. 36 (Bankr. D. Neb. 1982) ("[O]nly contingent or unliquidated claims are to be excluded from the claims to be considered in determining eligibility for Chapter 13 and that disputed claims are not excluded if they are noncontingent and liquidated.").
[94] *In re King*, 9 B.R. 376, 379 (Bankr. D. Or. 1981).

III. Relief Under Chapter 11 of the Bankruptcy Code

If a debtor desires to reorganize but is ineligible for Chapter 13 relief because of the debt limitations set forth above, that debtor's only option may be to seek reorganization under Chapter 11. Chapter 11 of the Bankruptcy Code, however, presents a number of distinct challenges for an individual debtor, including additional administrative burdens and substantially increased costs and expenses.[95] In addition to those burdens, one issue unique to Chapter 11 cases that presents a substantial obstacle for individual debtors is what is commonly known as the "Absolute Priority Rule."

a. The Absolute Priority Rule

i. Pre-BAPCPA Absolute Priority Rule

Originally a judicially created concept from the early twentieth century, the "Absolute Priority Rule" recognized that creditors were entitled to be paid in full before the stockholders of a debtor entity could retain any interest in the Debtor.[96] The 1938 Chandler Act[97] did not codify the Absolute Priority Rule, but courts implemented an interpretive rule which recognized the Absolute Priority Rule: a "specific gloss on the requirement of § 77B (and its successor, Chapter X) of the old Act, that any reorganization plan be 'fair and equitable.'"[98] The Absolute Priority Rule was further fleshed out by the subsequent Supreme Court decision of *Case v. Los Angeles Lumber Products Co,*[99] which coined the phrase "absolute priority" and created the "new value doctrine," an exception to the Absolute Priority Rule discussed more fully below.

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[95] A detailed analysis of the substantial differences between Chapter 13 and Chapter 11 reorganization cases is beyond the scope of this paper.
[96] *Northern P. R. Co. v. Boyd*, 228 U.S. 482, 508 (1913).
[97] Chandler Act, Pub. L. No. 75-696, 52 Stat. 840 (1938) (codified prior to repeal at 11 U.S.C. §156 (1938)).
[98] *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship*, 526 U.S. 434, 444 (1999) (citing 11 U.S.C. § 205(e) (1934 ed., Supp. I) (repealed 1938) (§ 77B); 11 U.S.C. § 621(2) (1934 ed., Supp. IV) (repealed 1979) (Chapter X)).
[99] *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939).

The Absolute Priority Rule was first codified in the 1978 Code and provided that "the holder of any claim . . . that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim . . . any property."[100] Since 1978, confirmation of a Chapter 11 plan requires that the plan meet certain specifications, as set forth in Section 1129(a). One of those requirements is that each class under the plan either vote for the plan, or not be impaired under the plan.[101] However, Section 1129(b) provides that a debtor can "cram down" a plan that does not have the vote of every impaired class (subsection (a)(8)) as long as the plan "does not discriminate unfairly, and is fair and equitable" to any dissenting class.[102]

One measure of whether a plan is "fair and equitable" is whether "the holder of any claim . . . that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim . . . any property."[103] Put another way, "the absolute priority rule specifically prevents a holder of equity interests—whose claim is junior to that of unsecured creditors—from retaining property interests under the plan unless dissenting impaired unsecured creditor classes are paid in full."[104]

In a Chapter 11 case this issue arises when a debtor seeks to retain property (usually either a business interest or a residence) without paying unsecured creditors in full. Because unsecured creditors must be paid in full before a debtor retains any equity,[105] a debtor with substantial assets who seeks to retain his or her prepetition assets while paying unsecured creditors less than 100% may have difficulty confirming a Chapter 11 plan.

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[100] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (effective Oct. 1, 1979) (codified as amended at 11 U.S.C. §§ 101 et seq.) (hereinafter, "1978 Code"), 11 U.S.C. § 1129(b)(2)(B)(ii).
[101] 1978 Code, 11 U.S.C. § 1129(a)(8).
[102] 1978 Code, 11 U.S.C. § 1129(b)(1).
[103] 1978 Code, 11 U.S.C. § 1129(b)(2)(B)(ii).
[104] *Alabama Dep't of Econ. & Cmty. Affairs v. Ball Healthcare-Dallas, LLC (In re Lett)*, 632 F.3d 1216, 1219-20 (11th Cir. 2011).
[105] *Alabama Dep't of Econ. & Cmty. Affairs v. Ball Healthcare-Dallas, LLC (In re Lett)*, 632 F.3d 1216, 1219-20 (11th Cir. 2011).

The Absolute Priority Rule cannot be avoided by a crafty debtor or waived by unwary creditors. The Court of Appeals for the Eleventh Circuit held that "[a] bankruptcy court has an independent obligation to ensure that a proposed plan complies with this absolute priority rule before 'cramming' that plan down upon dissenting creditor classes."[106]

ii. Post-BAPCPA Absolute Priority Rule

Section 1129(b)(2)(B)(ii) was amended in 2005 when Congress passed the BAPCPA.[107] The BAPCPA amended Section 1129(b)(2)(B)(ii) by adding the following to the end: "except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section."[108] Since 2005, courts have struggled to determine whether this amendment impliedly repealed the Absolute Priority Rule.

1. Broad View (BAPCPA Abrogated the Absolute Priority Rule)

Some courts[109] have adopted what is commonly called the "broad view" of the BAPCPA amendments, finding that the amendment was far-reaching and repealed by implication the Absolute Priority Rule. This finding is based on the argument

> that, by including in § 1129(b)(2)(B)(ii) a cross-reference to § 1115 (which in turn references § 541, the provision that defines the property of a bankruptcy estate), Congress intended to include the entirety of the bankruptcy estate as property that the individual debtor may retain, thus effectively abrogating the absolute priority rule in Chapter 11 for individual debtors.[110]

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[106] *Alabama Dep't of Econ. & Cmty. Affairs v. Ball Healthcare-Dallas, LLC (In re Lett)*, 632 F.3d 1216, 1220 (11th Cir. 2011).
[107] BAPCPA, S. 256, 109th Cong. (2005) (enacted).
[108] *Id.*
[109] *See, e.g.,In re O'Neal, 490 B.R. 837 (Bankr. W.D. Ark. 2013); In re Anderson*, Case No. 11-61845-11, 2012 Bankr. LEXIS 3539 at n.6 (Bankr. D. Mont. Aug. 1, 2012); *In re Shat*, 424 B.R. 854 (Bankr. D. Nev. 2010) (following the broad view based upon an ambiguity analysis).; *In re Roedemeier*, 374 B.R. 264, 276 (Bankr. D. Kan. 2007); *SPCP Grp., LLC v. Biggins*, 465 B.R. 316, 321 (M.D. Fla. 2011) (declined to follow *In re Gelin*, 437 B.R. 435 (Bankr. M.D. Fla. 2010), which followed the narrow view based on an ambiguity analysis); *In re Tegeder*, 369 B.R. 477 (Bankr. D. Neb. 2007) (following a plain meaning analysis)).
[110] *Maharaj v. Stubbs & Perdue, P.A. (In re Maharaj*), 681 F.3d 558, 563 (4th Cir. 2012).

The courts adopting the broad view have held "that the BAPCPA amendments eliminate the [Absolute Priority Rule] as applied to an individual's entire estate."[111] This is not the majority view, and even in the circuits in which the broad view was originally adopted, it has since been rejected.[112]

2. Narrow View (BAPCPA did not abrogate the Absolute Priority Rule)

Courts applying the narrow view hold "that the BAPCPA amendments merely have the effect of allowing individual Chapter 11 debtors to retain property and earnings acquired after the commencement of the case that would otherwise be excluded under § 541(a)(6) & (7)."[113] That is, the BAPCPA amendments did not directly or impliedly repeal the Absolute Priority Rule.

This position has been adopted by the Fourth Circuit,[114] Fifth Circuit,[115] Sixth Circuit,[116] Eighth Circuit,[117] Ninth Circuit,[118] and Tenth Circuit.[119] In addition to the Circuit Courts of

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[111] *Dill Oil Co. v. Stephens (In re Stephens)*, 704 F.3d 1279, 1284 (10th Cir. 2013) (citing *Friedman v. P+P, LLC (In re Friedman)*, 466 B.R. 471 (B.A.P. 9th Cir. 2012); *SPCP Grp., LLC v. Biggins*, 465 B.R. 316 (M.D. Fla. 2011); *In re Shat*, 424 B.R. 854 (Bankr. D. Nev. 2010); *In re Johnson*, 402 B.R. 851 (Bankr. N.D. Ind. 2009); *In re Roedemeier*, 374 B.R. 264 (Bankr. D. Kan. 2007); *In re Tegeder*, 369 B.R. 477 (Bankr. D. Neb. 2007)).

[112] *Friedman v. P+P, LLC (In re Friedman)*, 466 B.R. 471, 483 (B.A.P. 9th Cir. 2012) *overruled by Zachary v. Cal. Bank &Trust*, 811 F.3d 1191, 1199 (9th Cir. 2016).

[113] *Maharaj v. Stubbs & Perdue, P.A. (In re Maharaj*), 681 F.3d 558, 563 (4th Cir. 2012).

[114] *See id.* ("[W]e believe that Congress did not intend to abrogate the absolute priority rule for individual Chapter 11 debtors.").

[115] *See In re Lively*, 717 F.3d 406, 410 (5th Cir. 2013) ("The absolute priority rule, in particular, has been a cornerstone of equitable distribution for Chapter 11 creditors for over a century. We must presume Congress was well aware of that rule and, in the absence of a clearer directive, modified § 1129(b)(2)(B)(ii) in order to refine it, not reverse it, for individual debtors.").

[116] *See Ice House Am., LLC v. Cardin*, 751 F.3d 734, 738 (6th Cir. 2014) ("By its plain terms, this section expands the definition of 'property of the estate' in Chapter 11 cases to include, for the first time, property obtained by the debtor 'after the commencement of the case.' And all of that property, absent some other amendment to the Code, would be subject to the absolute-priority rule.").

[117] *Heritage Bank v. Woodward (In re Woodward)*, 537 B.R. 894, 901 (B.A.P. 8th Cir. 2015).

[118] *See Zachary v. Cal. Bank &Trust*, 811 F.3d 1191 (9th Cir. 2016) ("We conclude today that the BAPCPA amendments do not impliedly repeal the long-standing absolute priority rule.") (overturning "broad view" holding of *Friedman v. P+P, LLC (In re Friedman)*, 466 B.R. 471 (B.A.P. 9th Cir. 2012)).

[119] *See In re Stephens*, 704 F.3d 1279, 1287 (10th Cir. 2013) ("[W]e decline to find an implied repeal [of the absolute priority rule] here.").

Appeal which have adopted the narrow view, district and bankruptcy courts have adopted the narrow view within the First Circuit,[120] Second Circuit,[121] Third Circuit,[122] Seventh Circuit, [123] and Eleventh Circuit.[124] As such, it appears that the vast weight of authority is in support of the narrow view, indicating that the Absolute Priority Rule continues to apply in individual Chapter 11 cases post-BAPCPA.

b. The New Value Exception to the Absolute Priority Rule

Despite the absence of the words "new value" in Section 1129, some courts have recognized that the Absolute Priority Rule is not violated when a so-called "new value exception" has been met. The new value exception provides that pre-petition equity holders ("old equity") can retain their equity interests, even without paying unsecured creditors in full, as long as the old equity makes a contribution of new value to the estate in exchange for the equity. Put another way, "[w]here . . . the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made."[125] This doctrine has survived two entirely new bankruptcy acts and was reaffirmed by the Supreme Court as recently as 1999.[126]

> While there is no "formula" for determining whether new value has been provided,[127] courts agree that it "requires that new value be: 1) new, 2) substantial, 3) in money or money's worth, 4) necessary for debtor's successful reorganization, and 5) reasonably equivalent to the value or interest received or retained as a result of

[120] *In re Lee Min Ho Chen*, 482 B.R. 473(Bankr. D.P.R. 2012) ; *In re Walsh*, 447 B.R. 45 (Bankr. D. Mass. 2011).
[121] *In re Lucarelli*, 517 B.R. 42, 44 (Bankr. D. Conn. 2014) ("[T]he court concludes that BAPCPA modified, but did not eliminate, the absolute priority rule in individual Chapter 11 cases.").
[122] *Brown v. Ferroni (In re Brown)*, 505 B.R. 638, 649 (E.D. Pa. 2014) ("The absolute priority rule has not been abrogated in individual Chapter 11 cases.").
[123] *In re Gerard*, 495 B.R. 850, 854 (Bankr. E.D. Wis. 2013); *In re Draiman*, 450 B.R. 777 (Bankr. N.D. Ill. 2011).
[124] *In re Steedley*, Case No. 09-50654, 2010 Bankr. LEXIS 3113 (Bankr. S.D. Ga. Aug. 27, 2010); *In re Gelin*, 437 B.R. 435 (Bankr. M.D. Fla. 2010).
[125] *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 121 (1939).
[126] *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship,* 526 U.S. 434, 456 (1999).
[127] *See, e.g.*, *In re Snyder*, 967 F.2d 1126, 1131-32 (7th Cir. 1992).

> the contribution."[128] The value must be "tangible, alienable, enforceable, and something of value to the creditors at the time the plan is confirmed."[129] This contribution may be made by any non-debtor third party;[130] it cannot be a contribution from the debtor's future income "because [the future income] cannot be exchanged in any market for something of value to the creditors at the time the plan is confirmed."[131] Contributions have been approved from the debtor's spouse[132] and family members.[133]

Individual debtors who must resort to Chapter 11 in order to get relief from their financial troubles should be prepared to deal with the Absolute Priority Rule, and cases applying the new value exception provide a potential strategy for dealing with that issue.

IV. CONCLUSION

Advising individual debtors as to what Chapter of the Bankruptcy Code provides them the best opportunity for relief from their financial troubles takes substantial analysis of a number of issues that are unique to each chapter of the Bankruptcy Code. Most debtors are looking for the quickest route to a fresh start, and for most debtors that will mean filing under Chapter 7. However, for those wealthy debtors who cannot pass the Means Test, they will likely consider Chapter 13 if they can meet the debt limitations, or alternatively consider Chapter 11. A Chapter 11 debtor must consider whether he or she can meet the requirements of the Absolute Priority Rule. Attorneys in each of these Chapters must consider the likelihood of getting paid during the debtor's pursuit of reorganization.

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[128] *In re Bumgardner*, Case No. 10-09785-8-SWH, 2013 Bankr. LEXIS 747 (Bankr. E.D.N.C. Feb. 28, 2013) (citing *In re Bonner Mall Partnership*, 2 F.3d 899, 908-09 (9th Cir.1993)).
[129] *Northwest Bank Worthington v. Ahlers*, 485 U.S. 197, 204 (1988).
[130] *See In re Rocha*, 179 B.R. 305, 307 (Bankr .M.D. Fla. 1995) (stating that "[t]he difficulty with extending the new value exception to an individual is that the new value must come from an 'outside' source, meaning it cannot come from the Debtor himself" and future wages, are sufficiently "outside" of the debtor's normal "operations" as to constitute "new value").
[131] *In re Tucker,* Case No. 10-67281-fra11, 2011 Bankr. LEXIS 4701 (Bankr. D. Or. Nov. 28, 2011).
[132] *In re Bumgardner*, Case No. 10-09785-8-SWH, 2013 Bankr. LEXIS 747 (Bankr. E.D.N.C. Feb. 28, 2013); *Van Buren Indus. Investors v. Henderson (In re Henderson)*, 341 B.R. 783 (M.D. Fla. 2006).
[133] *In re Eagan*, Case No. 12-30525, 2013 Bankr. LEXIS 260 (Bankr. W.D.N.C. Jan. 22, 2013).

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While filing a case for an individual debtor may be easy enough, successfully prosecuting a bankruptcy case so that the debtor obtains a discharge may not be so easy. Carefully understanding the limitations and requirements for each of the separate Chapters is critical to being able to successfully advise a client as to what options provide the best opportunity to obtain that much needed fresh start.