The Birmingham Bar Association's Bankruptcy and Commercial Law Section Newsletter

SPRING 2008

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EVENTS

Spring Social - April 24, 2008
5 - 7 p.m. at Cantina (Pepper Place)

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EMERGING ISSUES UNDER THE BAPCPA

by Bradley R. Hightower

Since the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA") took effect on October 17, 2005, federal courts have struggled to uniformly interpret certain changes that the BAPCPA made to the Bankruptcy Code.

This article does not seek to identify and discuss all of these changes. Instead, it will discuss several emerging issues on which the federal courts have issued differing interpretations and identify the case law that may be cited by debtors and creditors when litigating in these areas.

Calculating Projected Disposable Income in Chapter 13

Section 1325(b) of the Bankruptcy Code provides that, upon objection by an unsecured creditor or the chapter 13 trustee, a bankruptcy court may not approve a debtor's chapter 13 plan unless the plan "provides that all of the debtor's projected disposable income to be received in the applicable commitment period … will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b).

Although this is a seemingly straightforward formula, the federal courts have failed to uniformly interpret Section 1325(b)'s use of the phrase "projected disposable income." The basis for disagreement between the courts lies in the construction of the term "projected" and its modification of the phrase "disposable income."

While the BAPCPA defines "disposable income" to mean the same as "current monthly income" (as that phrase is defined by Section 101(10A) of the Bankruptcy Code), it does not offer any definition for the term "projected." Taken together, the undefined term "projected" modifies the defined phrase "disposable income" to equal a requirement that a chapter 13 debtor's plan provide all of the debtor's projected currently monthly income to make payments to unsecured creditors.

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A MESSAGE FROM THE CHAIR
by C. Taylor Crockett

On behalf of myself and the section officers we would like to thank our immediate past chairman Sims Crawford for the excellent job he did for the section and its members in 2007. Sims set the bar high and I hope I can maintain the momentum he has created.

Our section has been expanding its efforts to have an impact on our community. Our primary goal this year is to help develop the section into a more philanthropic organization in conjunction with several other sections of the Birmingham Bar Association.

In the past we have contributed to the general scholarship funds for Cumberland Law School and the University of Alabama Law School. This past year we also contributed to the Children's Literacy Guild as well as Project Share. Each year the turnout for the annual golf tournament has decreased. In lieu of the golf tournament this year we are organizing a party with food, drinks, music and raffle awards to raise money for our charities. We will have more details on this event as the year progresses. Following the section's annual CLE Seminar, which will be held in October, we are planning a fundraising event to raise money for the section's charities.

I would like to thank our generous section members who contributed to the party held in Max Pope's honor. Max and his family were very appreciative of the event and we wish Max well as he winds down his legal career. Our spring social will be held this year on April 24th at the Cantina from 5 p.m. - 7 p.m.. The Cantina is located at Pepper Place. The Cantina has a large outdoor patio and we hope all our section members will be in attendance. I look forward to serving as your president for the upcoming year.

MAX C. POPE RETIRES
by Max C. Pope Jr.

The Bankruptcy and Commercial Law Section would like to honor Max C. Pope for his service to the bar, his clients and the section. Max has stepped down from the panel of Trustees for the Northern District of Alabama, Southern Division after over 20 years. Max has practiced law for over 45 years. While a sole practitioner at this time, his former partners included the late United States Bankruptcy Judge R. Clifford Fulford and Rear Admiral John T. Natter.

He received a B.S. and L.L.B. from the University of Alabama. He was a member of "The Alabama Law Review." Following his graduation from law school, he served as law clerk for the Honorable Clarence Allgood, District Court Judge, United States District Court for the Northern District of Alabama.

Max C. Pope is a member of the Alabama Bar Association, American Bar Association, Alabama Law Foundation and the Atticus Finch Society. He also served as a member of the Alabama Board of Bar Examiners and served 2 terms as the Alabama state delegate to the House of Delegates of the American Bar Association.

Probably the highlight of his legal career came when he was a young lawyer. He was successful in getting the United States Supreme Court to take an appeal of a case in which he was representing a party in the case. At that time, he had not been admitted the required time to practice law before the United States Supreme Court. However, he was given special leave of the Supreme Court *pro hac vice* to orally argue the

case. Not only did he get to orally argue the case before the Supreme Court, he also got a reversal of the case for his client.

He has been married to Julia McWhorter Pope for over 48 years. He has 2 sons, (Max Cleveland Pope, Jr. and Lee McWhorter Pope) who are both lawyers in Birmingham.

NEW PRIVACY RULES
by Jesse S. Vogtle, Jr. and Eric T. Ray

On December 1, 2007, Federal Rule of Bankruptcy Procedure 9037 ("Rule 9037") became effective. Rule 9037 limits the disclosure of certain personal information in documents filed electronically in bankruptcy cases including, but not limited to proofs of claim and attachments thereto. Specifically, Rule 9037 states that when filing papers electronically with the bankruptcy court that contain (a) an individual's social security number or a taxpayer's identification number, (b) an individual's birth date, (c) the name of an individual, other than the debtor, known to be and identified as a minor, or (d) a financial account number, the document being filed should be redacted to include only: (i) the last four digits of the social security number and/or taxpayer identification number; (ii) the year of the individual's birth; (iii) the minor's initials; and (iv) the last four digits of the financial account number.

The practical effect of Rule 9037 is that creditors will need to closely monitor the supporting information attached to proofs of claim electronically filed in bankruptcy cases to ensure the non-disclosure, or redaction, of certain identifying information. Although Rule 9037 contains specific exceptions to the redaction requirement, these exceptions are narrow in scope and are not likely to be applicable for the majority of creditors filing proofs of claims in bankruptcy cases.

The chart below summarizes the application of Rule 9037.

If the document to be filed contains…	***Then redact…***
social security or taxpayer identification number	all numbers but the last four
individual's birth date	the month and day of birth
the name of a minor that is not the debtor	the entire name except for the minor's initials
a financial account number	all numbers but the last four

COMMENT PERIOD FOR NEW LOCAL RULES ENDS
by Bradley R. Hightower

The draft of the new Proposed Local Rules for the United States Bankruptcy Court for the Northern District of Alabama is available for review via a link on the front page of the Bankruptcy Court's website at http://www.alnb.uscourts.gov

Members of the bar are requested to review and comment on the draft Proposed Local Rules. All comments must be in writing should be delivered to the Clerk of Court by U.S. mail or by email at the following address: Susan_Archer@alnb.uscourts.gov

The comment period ends on Friday, April 25, 2008.

EMERGING ISSUES UNDER THE BAPCPA CONTINUED...

Faced with giving meaning to these words, the federal courts have arrived at three (3) different interpretations (all of which are purportedly based on the plain meaning of the statute) of how to determine the amount of a chapter 13 debtor's projected disposable income.

The first approach reads the term "projected" to mean simply a multiplier for the current monthly income determined by the formula set out in Section 101(10A) of the Bankruptcy Code. Once the figure is determined as provided by 101(10A), it is simply multiplied by the length of the chapter 13 debtor's plan to determine the total amount that the debtor's plan must pay to unsecured creditors. If you want to argue this interpretation, cite to Judge Caddell's decision in *In re. Miller*, 361 B.R. 224 (Bankr. N.D. Ala. 2007); *In re.* Frederickson, 375 B.R. 829 (8th Cir. BAP 2007); *In re. Winokur*, 364 B.R. 204 (Bankr. E.D. Va. 2007); and *In re. Barr*, 341 B.R. 181 (Bankr. M.D. N.C. 2006).

The second approach reads the term "projected" to mean that a forward-looking test must be used to determine a chapter 13 debtor's projected disposable income rather than the backward-looking test that results from defining "projected" as a mere multiplier of a debtor's current monthly income. If you want to argue this interpretation, cite to *In re. Purdy*, 373 B.R. 142 (Bankr. N.D. Fla. 2007); *In re. Arsenault*, 370 B.R. 845 (Bankr. M.D. Fla. 2007); and *In re. Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006).

The third approach blends together the other two interpretations to arrive at middle ground where the chapter 13 debtor's current monthly income determined by the formula set out in Section 101(10A) of the Bankruptcy Code is presumed to be the debtor's projected disposable income. This presumption may then be rebutted by either the debtor or any other party in interest by showing that the debtor's current monthly income as calculated by the Section 101(10A) formula is inaccurate going forward. If you want to argue this interpretation, cite to Judge Shulman's decision in *In re. Hill*, Case No. 06-11717, (Bank. S.D. Ala. Dec. 29, 2006); *In re. Kibbe*, 361 B.R. 302 (1st Cir. BAP 2007); and *In re. Jass*, 340 B.R. 411 (Bankr. D. Utah 2006).

Disputing a Car Creditor's 910 Claim Based Upon Nature of Security Interest

Section 1325(a) of the Bankruptcy Code contains a provision immediately following subsection (a)(9) that is commonly known as the "hanging paragraph." This part of the statute provides that, with respect to the treatment of allowed secured claims against a chapter 13 debtor, Section 506 of the Bankruptcy Code "shall not apply … if the creditor has a purchase money security interest securing the debt …, the debt was incurred within the 910-day *[sic]* preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle … acquired for the personal use of the debtor …" 11 U.S.C. § 1325(a).

Federal courts have failed to uniformly interpret the nature of car creditors' security interests in debtors' vehicles under the "hanging paragraph" of Section 1325(a); however, this is easily explained by the differing state laws that are applicable to these determinations (state law determines the nature of a creditor's security interest in a debtor's property).

In Alabama, the phrase "purchase money security interest" is defined by Ala. Code § 7-9A-103. There is very little case law regarding what constitutes a

purchase money security interest in a motor vehicle, however, because unlike other types of collateral, a creditor's security interest in motor vehicle may only be perfected by a notation of the certificate of title as provided by the Uniform Certificate of Title and Antitheft Act. *See* Ala. Code §§ 32-8-1 through 32-8-88, and specifically Ala. Code § 32-8-61. In other words, because notation on a vehicle's certificate of title is the exclusive method of perfecting a security interest (purchase money or otherwise) in a motor vehicle in Alabama, there was no reason prior to the passage of the BAPCPA for Alabama courts to consider whether the nature of a creditor's security interest in a motor vehicle was a purchase money security interest or a non-purchase money security interest. It simply did not make any difference.

The Middle District Bankruptcy Court is the only federal court in Alabama to consider the nature of a creditor's security interest in a motor vehicle pursuant to Section 1325(a) of the Bankruptcy Code. In *In re. Horn*, 338 B.R. 110 (Bankr. M.D. Ala. 2006), Judge Williams held that the debtor could bifurcate the creditor's claim into secured and unsecured portions because the creditor did not have a purchase money security interest in the debtor's vehicle. Rather, because the debt owed to the creditor comprised not only the purchase price of the vehicle, but also certain cash advances made to the debtor, the creditor did not hold a purchase money security interest in the vehicle pursuant to Ala. Code § 7-9A-103. *Id.* at 113-14.

If you want to argue that the "hanging paragraph" in Section 1325(a) is not applicable to a car creditor's claim because the creditor does not have a purchase money security interest in the vehicle, cite to Judge Williams' decision in *In re. Horn* discussed above as well as his other decisions regarding surrendering 910 vehicles in full satisfaction of a creditor's claim that are discussed below.

If you want to argue that the "hanging paragraph" in Section 1325(a) is applicable to a car creditor's claim despite the creditor's financing of negative equity (the difference between a vehicle's value and its payoff when the payoff is greater than the value), gap insurance, extended warranty coverage, etc., cite to the language in Ala. Code § 7-9A-103(a)(2) that states that a purchase money obligation means an "obligation of an obligor incurred as all or part of the price of the collateral …." (emphasis added). Also cite to Official Comment No. 3 to Ala. Code § 7-9A-103, which states that "[a]s used in subsection (a)(2), the definition of "purchase-money obligation," the "price" of collateral or the "value given to enable" includes obligations for expenses incurred in connection with acquiring rights in the collateral, sales taxes, duties, finance charges, interest, freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney's fees, and other similar obligations." Finally, cite also to the following cases: *GMAC v. Peaslee*, 373 B.R. 252 (W.D.N.Y. 2007); *In re. Wall*, 376 B.R. 769 (Bankr. W.D.N.C. 2007); *In re. Cohrs*, 373 B.R. 107 (Bankr. E.D. Cal. 2007); *In re. Graupner*, 356 B.R. 907 (Bankr. M.D. Ga. 2006); *In re. Spratling*, 377 B.R. 941 (Bankr. M.D. Ga. 2007); and *In re. Murray* 352 B.R. 340 (Bankr. M.D. Ga. 2006).

Debtor's Proposal to Surrender 910 Vehicle in Full Satisfaction of Creditor's Claim

Section 1325(a)(5)(C) of the Bankruptcy Code provides that a bankruptcy court shall confirm a chapter 13 debtor's plan if, with respect to each allowed secured claim provided for by the plan, "the

debtor surrenders the property securing such claim to such holder." 11 U.S.C. § 1325(A)(5)(C). When this part of the statute is read in conjunction with the "hanging paragraph" at the end of Section 1325(a), the combined effect of the two provisions suggests that a debtor may be able to surrender a motor vehicle as defined in the hanging paragraph (a "910 Vehicle") in full satisfaction of the creditor's claim (leaving the creditor without a secured claim or an unsecured deficiency claim).

The federal courts, however, have failed to uniformly interpret the effect of these statutory provisions. Some courts have held that a debtor may surrender a 910 Vehicle in full satisfaction of a creditor's claim (finding that Section 506(a), which does not apply to 910 Vehicles, provides the exclusive source for allowance of a deficiency claim once a motor vehicle is surrendered), while others have held that a debtor's surrender of a 910 Vehicle leaves the creditor with an unsecured deficiency claim just as it did before enactment of the BAPCPA.

If you want to argue that a creditor does not have an allowed unsecured deficiency claim against a debtor after the debtor surrenders a 910 Vehicle, cite to Judge Caddell's decision in *In re. Moon*, 359 B.R. 329 (Bankr. N.D. Ala. 2007); Judge Williams' decision in *In re. Barrett*, 2007 WL 2081702 (Bankr. M.D. Ala. 2007); *In re. Quick*, 371 B.R. 459 (9th Cir. BAP 2007); *In re. Vanduyn*, 374 B.R. 896 (Bankr. M.D. Fla. 2007); *In re. Williams*, 369 B.R. 680 (Bank. M.D. Fla. 2007); and *In re. Pinti*, 363 B.R. 369 (Bankr. S.D.N.Y. 2007).

If you want to argue that a credit does have an allowed unsecured deficiency claim against a debtor after the debtor surrenders a 910 Vehicle, cite to Judge Mitchell's decision in *In re. Hains*, 2007 WL 2570745 (Bankr. N.D. Ala. 2007); *In re. Wright*, 492 F. 3d 829 (7th Cir. 2007); *In re. Blanco*, 363 B.R. 896 (Bankr. N.D. Ill. 2007); *In re. Clark*, 362 B.R. 492 (Bankr. N.D. Miss. 2007); *In re. Particka*, 355 B.R. 616 (Bankr. E.D. Mich. 2006); and *In re. Zehrung*, 351 B.R. 675 (W.D. Wis. 2006).

Determining Household Size For Purposes of the Means Test

Sections 707(b)(6) and (7) of the Bankruptcy Code provide the standing requirements for a judge, bankruptcy administrator or other party in interest to file a motion to dismiss a debtor's case for abuse and/or assert the means test presumption.

These provisions determine whether standing exists based upon a calculation of the median family income attributable to the debtor's "household." The term "household" is not defined by the Bankruptcy Code though; therefore, the federal courts have been given the task of determining its meaning and have come up with differing interpretations.

The first approach looks to the definition of the term "household" that is found in the Bureau of the Census. The Bureau of the Census defines "household" to include "all the people who occupy a housing unit as their usual place of residence." *See* Bureau of the Census, Online Glossary, available at http://quickfacts.census.gov/qfd/meta/long_HSD310200.htm (last visited April 8, 2008). This is simply a "heads on beds" formula that only looks to determine how many people actually live at the debtor's residence. If you want to argue this interpretation, cite to the definition of the phrase "median family income" in Section 101(39A) of the Bankruptcy Code, which defines "median family income" to mean "the median family income both calculated and reported by the Bureau of the Census

…." Also cite to *In re. Ellringer*, 370 B.R. 905 (Bankr. D. Minn. 2007).

The second approach looks to the totality of the circumstances to determine the number of individuals who live at a debtor's residence, the contributions (if any) made by these individuals to household expenses and whether the individuals are dependant on the debtor. If you want to argue this interpretation, cite to *In re. Jewell*, 364 B.R. 796 (Bankr. S.D. Ohio 2007).

The third approach does not consider how many individuals actually live at the debtor's residence. Rather, it determines a debtor's household size by looking to the number of dependants listed on the debtor's tax returns. If you want to argue this interpretation, cite to *In re. Ellringer*, 370 B.R. 905 (Bankr. D. Minn. 2007).