



SO ORDERED.
SIGNED this 10th day of August, 2011

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.



John C. Cook
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE**

In re:)
)
Albert William Secor) **No. 10-16329**
) **Chapter 11**
Debtor)

AMENDED ORDER

This case is before the court on the Debtor's Third Amended Plan of Reorganization filed on August 3, 2011, and the objection thereto asserted by First Tennessee Bank National Association. The plan provides that the debtor "will retain all assets that are not surrendered." The plan does not provide for full payment of all unsecured claims. Due to the size of its deficiency, First Tennessee controls the class of unsecured claims. Accordingly, the class of unsecured claims, which is impaired under the plan, has not accepted the plan so § 1129(a)(8) of the Bankruptcy Code is not satisfied. The question then becomes whether the plan may be confirmed under § 1129(b) of the Code. Specifically, a plan with respect to which § 1129(a)(8) is not satisfied may not be confirmed with respect to a class of unsecured claims unless "the holder of any claim

or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, *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.*” 11 U.S.C. § 1129(b)(2)(B)(ii) (emphasis added). The concept that a debtor may not receive or retain anything under a plan without paying all unsecured debts in full is known as the “absolute priority” rule, and the precise question presented in this case is whether that rule applies in an individual chapter 11 case following the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, § 321(c), Pub. L. No. 109-8, 119 Stat. 23, 95, which added the latter clause of § 1129(b)(2)(B)(ii) that is italicized in the quotation above. Counsel for the debtor admitted that, if the court concludes that the absolute priority rule applies in this case, the Debtor’s Third Amended Plan of Reorganization cannot be confirmed.

There are two lines of cases on this issue. Courts adopting the “broad approach” conclude that the statutory provision that an individual debtor “may retain property included in the estate under section 1115” means that the debtor may retain *all* property of the estate, including assets that came into the estate under § 541 upon the filing of the petition as well as postpetition earnings from services performed by the debtor brought into the estate of an individual debtor by § 1115. *In re Shat*, 424 B.R. 854 (Bankr. D. Nev. 2010); *In re Roedemeier*, 374 B.R. 264 (Bankr. D. Kan. 2007); *In re Tegeder*, 369 B.R. 477 (Bankr. D. Neb. 2007); *see also In re Johnson*, 402 B.R. 851 (Bankr. N.D. Ind. 2009). Conversely, courts adopting the “narrow approach” hold that the clause added to § 1129(b)(2)(b)(ii) permits an individual chapter 11 debtor to retain only earnings from services performed by the debtor postpetition and not also property that came into

the estate under § 541 upon the filing of the petition. *In re Lindsey*, No. 10-31694 (Bankr. E.D. Tenn. Aug. 5, 2011); *In re Majaraj*, 449 B.R. 484 (Bankr. E.D. Va. 2011); *In re Kamell*, No. 8:10-bk-15501-TA, 2011 WL 1760282 (Bankr. C.D. Cal. May 4, 2011); *In re Draiman*, No. 09 B 17582, 2011 WL 1486128 (Bankr. N.D. Ill. Apr. 19, 2011); *In re Walsh*, 447 B.R. 45 (Bankr. D. Mass. 2011); *In re Stephens*, 445 B.R. 816 (Bankr. S.D. Tex. 2011); *In re Karlovich*, No. 10-10860-PB11, 2010 WL 5418872 (Bankr. S.D. Cal. Nov. 16, 2010); *In re Gelin*, 437 B.R. 435 (Bankr. M.D. Fla. 2010); *In re Steedley*, No. 09-50654, 2010 WL 3528599 (Bankr. S.D. Ga. Aug. 27, 2010); *In re Mullins*, 435 B.R. 352 (Bankr. W.D. Va. 2010); *In re Gbadebo*, 431 B.R. 222 (Bankr. N.D. Cal. 2010).

For the reasons stated by Judge Richard Stair's thorough and persuasive opinion in the *Lindsey* case, the court adopts the narrow interpretation of the clause that BAPCPA added to § 1129(b)(2)(B)(ii) and holds that the absolute priority rule does apply in chapter 11 cases of individual debtors with respect to property that came into the estate under § 541 upon the commencement of the case. Accordingly, it is

ORDERED that confirmation of the Debtor's Third Amended Plan of Reorganization is DENIED. It is FURTHER ORDERED that this order shall amend and supplant the previous order entered in this case on this date that denied confirmation of the debtor's plan.

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