First This Way, Then That Way – Conflicting Interpretations of BAPCPA

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A SHORT PRIMER ON THE PLAIN MEANING RULE

For the last two years, bankruptcy courts have had to interpret the amendments to the Bankruptcy Code made by The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[1] The result has been the publication of numerous, and often conflicting, decisions about everything from the effect of a failure to obtain a prepetition credit counseling certificate to the applicable time period between discharges. In issuing their decisions, the courts have tried to follow the Supreme Court's directive that, in interpreting the Bankruptcy Code, courts must look first to the "plain meaning" of the statute.[2] Academics have labeled this "plain meaning" approach "textualism."[3] But, as noted prior to BAPCPA's enactment, "[d]espite its simple, misleading label, a plain meaning approach often can be difficult to apply, and it can be anything but plain."[4]

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1 Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

2 BFP v. Resolution Trust Corp., 511 U.S. 531, 552 (1994) (holding that the words and meaning of § 548(a)(2)(A) "are plain" and citing Patterson v. Shumate, 504 U.S. 753, 760 (1992) for the proposition that a party seeking to defeat the plain meaning of the Bankruptcy Code bears an exceptionally heavy burden).

3 See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001).

4 Hon. Marjorie O. Rendell, *2003 - A Year of Discovery: Cybergenics and Plain Meaning in Bankruptcy Cases*, 49 Vill. L. Rev. 887, 887 (2004).

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The Plain Meaning Rule

The Supreme Court has stated on a number of occasions that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"[5]

The plain meaning rule does not apply if a statute is ambiguous. "But ambiguity tends to be in eye of the interpreter."[6] A statute is not ambiguous just because it contains grammatical errors.[7] Disputes between the parties about the meaning of a statute also does not mean that ambiguity exists. It may just mean one side is wrong.[8] The fact that the statute may have unforeseen consequences does not make it ambiguous.[9]

If the statutory language is ambiguous, then courts are directed to look to legislative history to determine legislative intent.[10] However, having courts engage in efforts to determine legislative intent from the legislative history, is viewed with suspicion by textualists for a number of reasons including:

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5 Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 462-463 (2002), citing Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). See also Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) ("when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms"), quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000).

6 In re Trejos, 352 B.R. 249, 258 (Bankr. D. Nev. 2006).

7 Lamie v. U.S. Trustee, 540 U.S. at 534.

8 See Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 461 (1999) (Thomas, J., concurring in judgment).

9 Union Bank v. Wolas, 502 U.S. 151, 158 (1991).

10 Toibb v. Radloff , 501 U.S. 157, 162 (1991), quoting Blum v. Stenson, 465 U.S. 886, 896 (1984).

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1. The perception that legislative history is unreliable and can be manipulated by members of Congress;

2. A concern that judges will manipulate legislative history to reach a desired result;

3. Use of legislative history creates binding law outside the scope of Article 1 Section 7 of the Constitution.[11]

While judicial inquiry into legislative intent is viewed with suspicion, textualists recognize that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[12] According to Justice Scalia, "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."[13] A leading proponent of the textualist approach has explained, "modern textualists do not believe that it is possible to infer meaning from 'within the four corners' of a statute. Rather, they assert that the language is intelligible only by virtue of a community's shared conventions for understanding words and context."[14]

Like ambiguity, the context of a statute is subject to diverse interpretations. As noted by Justice Holmes: "A word is not a crystal, transparent and

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11 See Abner S. Greene, *The Missing Step of Textualism*, 74 Fordham L. Rev. 1913, 1924-26 (2006) (summarizing textualist's arguments against use of legislative history).

12 Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (citation omitted).

13 Deal v. United States, 508 U.S. 129, 132 (1993).

14 John F. Manning, *What Divides Textualists From Purposivists?*, 106 Colum. L. Rev. 70, 79 (2006).

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unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it was used."[15] More recently, a bankruptcy judge struggling to apply a plain meaning analysis to the question of what expenses an above-median-income Chapter 13 debtor can deduct under § 1325(b) noted: "Words rarely exist in a vacuum; they rarely have fixed single meanings. They exist, and are understood, in contexts – temporal contacts, societal contexts, and textual contexts. Most are susceptible to multiple layers of meaning."[16] Not surprisingly, because contextual analysis is multi-faceted, courts using a plain meaning analysis have arrived at different conclusions about the same statutory provision.[17]

Even if a statute is not found to be ambiguous, it may be subject to one of the generally recognized exceptions to the plain meaning rule: (1) the "scrivener's error exception"; (2) the "absurdity doctrine"; (3) the "at odds with the interpretation of the drafters"; and (4) the "doctrine of constitutional avoidance."

1. Scrivener's Error Exception

According to Justice Scalia, the scrivener's error exception applies if: (1) the plain meaning of the statute under consideration lacks any rational purpose – not that the language does not achieve Congress's "real" intent, but

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15 Towne v. Eisner, 245 U.S. 418, 425 (1918) (citation omitted).

16 In re Sawdy, 2007 WL 582535, at *5 (Bankr. E.D. Wis. Feb. 20, 2007).

17 See e.g. Michael Louis Catrett, *Means Testing and the Vehicle Ownership/Lease Expense Deduction: Allowance or Actual Expense*? American Bankruptcy Institute Journal 2007 (discussion of the split in the case law about whether debtors can take the full vehicle ownership/lease expense deduction, even when the debtor's vehicle is unencumbered).

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the language does not achieve any plausible Congressional purpose;[18] and (2) the intended Congressional meaning must be "absolutely clear."[19]

The scrivener's error exception has been applied by bankruptcy courts in cases dealing with the scope of the homestead exemption;[20] and in dismissing cases under § 1112.[21]

2. The Absurdity Doctrine

A statute is subject to the absurdity doctrine exception if applying the plain meaning rule would lead to absurd or wholly impractical consequences. The exception should rarely apply, only when the absurd result is "so gross as to shock the general moral or common sense."[22]

The absurdity doctrine has been applied by bankruptcy courts in cases dealing with the expiration of the automatic stay for a second time filer,[23] and in determining if debtors converting from Chapter 13 to Chapter 7 are subject to the "means test."[24]

3. The "At Odds with the Interpretation of the Drafters" Exception

This exception requires a court to ignore the statute's plain meaning if it is inconsistent with the general purposes that the legislators had in mind at the time

18 Holloway v. United States, 526 U.S. 1, 19, n.2 (1994) (Scalia, J., dissenting).

19 United States v. X-Citement Video, Inc., 513 U.S. 64, 82 (1994) (Scalia, J., dissenting).

20 In re Kane, 336 B.R. 477, 487-89 (Bankr. D. Nev. 2006).

21 In re TRC of Denver, LLC., 338 B.R. 494, 499-500 (Bankr. D. Colo. 2006).

22 Crooks v. Harrelson, 282 U.S. 55, 60 (1930).

23 In re Curry, 362 B.R. 394, 399-400 (Bankr. N.D. Ill. 2007).

24 In re Fox, 2007 WL 1576140, at *6-8 (Bankr. D. N.J. June 1, 2007).

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of the enactment of the statute.[25] Because the legislative history of BAPCPA is sparse, bankruptcy courts have found it is of little help in discerning legislative intent.[26]

The "not what the drafters intended" exception, was used in In re Beal, 347 B.R. 87, 92-93 (Bankr. E.D. Wis. 2006) in interpreting § 109(g)(2).

4. Doctrine of Constitutional Avoidance

Under the doctrine of constitutional avoidance, when an ambiguous statute is interpreted by a court, the court must opt for an interpretation that avoids grave constitutional questions.[27] The doctrine of constitutional avoidance was used by a bankruptcy court in deciding that lawyers are not debt-relief agencies because it would deprive states of their ability "to determine and enforce qualifications for the practice of law . . . . thereby infringing on the state's traditional role of regulating attorneys."[28]

25 See Helvering v. New York Trust Co., 292 U.S. 455, 465 (1934).

26 See In re Sorrell, 359 B.R. 167, 176 (Bankr. S.D. Ohio 2007) ("To the extent legislative history of the 2005 Act can be used to resolve any arguable ambiguity in the statutory language, it is of dubious assistance."). See also In re Kenney, 2007 WL 1412921, at *7 (Bankr. E.D. Va. May 10, 2007); In re Quevedo, 345 B.R. 238, 246 (Bankr. S.D. Cal. 2006) (BAPCPA's legislative history is not enlightening as to what Congress intended). One commentator has suggested that, while specific intent may be difficult to glean from BAPCPA's legislative history, courts should assume -- based on its title -- that Congress "intended to prevent abuse and to protect consumers" and that courts should interpret BAPCPA as not having been passed with the intention of setting up "nonsensical, expensive burdens and barriers for all." Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. Ill. L. Rev. 93, 100 (2007).

27 Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1998).

28 Milavetz, Gallop & Milavetz P.A. v. U.S., 355 B.R. 758, 768 (D. Minn. 2006) (internal quotations omitted).

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Conclusion

The plain meaning rule provides courts with a guideline for conducting statutory analysis. That analysis begins with the language of the statute. The statutory language is then analyzed in light of related statutory provisions and the broader context of the statute as a whole. Only then should courts proceed to other sources, such as legislative history or policy.[29] The conflicting case law demonstrates that the plan meaning analytical framework is an insufficient tool for dealing with many of BAPCPA's provisions. However, given the Supreme Court's directive in cases like Lamie, "plaining meaning" will remain the starting point for the statutory analysis of BAPCPA for the foreseeable future.

29 Rendell*, Cybergenics and Plain Meaning, supra* note 3, at 889.

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