

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
FOR THE FIRST CIRCUIT**

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**BAP NO. RI 11-076**

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**Bankruptcy Case No. 10-13103-ANV**

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**NIDIA Z. VARGAS,  
Debtor.**

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**JOHN BOYAJIAN, Chapter 13 Trustee,  
Appellant,**

**v.**

**NIDIA Z. VARGAS,  
Appellee.**

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**Appeal from the United States Bankruptcy Court  
for the District of Rhode Island  
(Hon. Arthur N. Votolato, U.S. Bankruptcy Judge)**

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**Before  
Hillman, Feeney, and Hoffman,  
United States Bankruptcy Appellate Panel Judges.**

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**John Boyajian, Esq., on brief for Appellant.**

**Edward J. Gomes, Esq., on brief for Appellee.**

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**June 8, 2012**

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## **Feeney, U.S. Bankruptcy Appellate Panel Judge.**

John Boyajian, chapter 13 trustee (the “Trustee”), appeals the bankruptcy court’s order overruling his objection to the exemption which Nidia Vargas (the “Debtor”) asserted in an unliquidated personal injury claim (the “Claim”). The only issue the parties raise on appeal is whether future proceeds from the Claim should be included in the calculation of the Debtor’s projected disposable income as a prerequisite for plan confirmation. As the bankruptcy court has entered a final order confirming the Debtor’s plan without reserving this issue, there is no case or controversy sufficient to trigger our jurisdiction. Accordingly, we hereby **DISMISS** this appeal.

### **BACKGROUND**

The Debtor filed for relief under chapter 13 on July 26, 2010.<sup>1</sup> On Schedule B - Personal Property, the Debtor listed the Claim with a value of \$3,000. On Schedule C - Property Claimed As Exempt, the Debtor claimed, *inter alia*, an exemption of \$3,000 in the Claim pursuant to 11 U.S.C § 522(d)(5).<sup>2</sup> On July 28, 2010, the Debtor filed her chapter 13 plan.

On August 25, 2010, the day after the Trustee held the meeting of creditors pursuant to § 341, the Trustee timely filed an objection to the Debtor’s claim of exemption in the Claim (the “Objection”). The sole basis for the Objection was that the Claim was “part of the [D]ebtor’s projected disposable income. See 11 U.S.C. §§ 1306 and 1325(b).”

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<sup>1</sup> Unless expressly stated otherwise, all references to “Bankruptcy Code” or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. §§ 101, *et seq.* All references to “Rule” or “Bankruptcy Rule” shall be to the Federal Rules of Bankruptcy Procedure.

<sup>2</sup> Section 522(d)(5) provides that a debtor may exempt the “aggregate interest in any property, not to exceed in value \$1,150 plus up to \$10,825 of any unused amount of the exemption provided under paragraph (1) of this subsection.”

On September 3, 2010, the Debtor amended her Schedule B and Schedule C to increase to \$10,574 both the listed value of the Claim and the amount of the exemption. The Trustee did not object to the amendment. Also on that date, the Debtor filed a response to the Objection in which she first argued that § 1306 is inapplicable because the Claim is property she acquired pre-petition. She further argued that § 1325(b) cannot convert exempt property into property available for creditors without running afoul of the plain language of § 522(c).

On September 23, 2010, the bankruptcy court held a hearing to consider the Objection and confirmation of the plan.<sup>3</sup> The parties agreed that the plan could not be confirmed and that the Debtor would file an amended plan. The Trustee and the Debtor then addressed the Objection.

The Trustee argued that regardless of whether the Claim was exempt, the proceeds of the Claim should be included in the projected disposable income calculation relying on the court's earlier decision in In re Porter, No. 04-10932, 2005 WL 1168364 (Bankr. D.R.I. May 6, 2005), as well as the Supreme Court's decision in Hamilton v. Lanning, 130 S. Ct. 2464 (2010) ("Lanning"). The Debtor responded that the only issue with respect to the Objection was the validity of the exemption, not whether the Claim should be included in the calculation of projected disposable income. If the court were to review the matter under the Lanning rubric, she offered, the Claim could not be disposable income because the Claim had not yet been resolved. The parties represented that they would file an agreed statement of facts and the court ordered the parties to brief the legal issue.

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<sup>3</sup> The docket reflects that although two creditors objected to confirmation of the Debtor's plan, the Trustee had not filed an objection.

On October 14, 2010, the Debtor filed an amended plan and the Trustee filed an objection. The basis for his objection was that the amended plan did not provide for the payment to unsecured creditors of all the Debtor's projected disposable income in violation of § 1325(b)(1)(B),<sup>4</sup> did not comply with the means test in violation of § 707, and was not proposed in good faith in violation of § 1325(a)(3).

Also on that date, the parties filed their memoranda addressing the Objection. In his filing, the Trustee asserted that the proceeds of a personal injury claim must be considered projected disposable income regardless of whether the proceeds might be exempt. In support of this contention, he cited to a number of decisions including In re Porter, supra. In her memorandum, the Debtor provided several arguments in reply to the Trustee's assertion, including that the cases cited by the Trustee were inapplicable, particularly given the amendments in BAPCPA, and that the Trustee's interpretation would run afoul of the Panel's decision in Kibbe v. Sumski (In re Kibbe), 361 B.R. 302 (B.A.P. 1st Cir. 2007), and the express provisions of § 1325(b)(1)(B) and § 522(c).

On October 15, 2010, the Debtor and the Trustee filed an agreed statement of facts. In the filing they disclosed that the Claim is for damages, including medical expenses the Debtor incurred after a car accident, and that the Debtor did not know if she could recover on the Claim.

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<sup>4</sup> Presumably, the Trustee raised the issue of projected disposable income both in the Objection and in his objection to the Debtor's plan based upon case law that explains that by objecting to the former, an objector preserves the issue for the latter. See, e.g., In re Springer, 338 B.R. 515, 519 (Bankr. N.D. Ga. 2005) (holding that reviewing courts can consider whether exempt property is disposable income if objecting party files timely objection to debtor's exemption claim); In re Stephens, 265 B.R. 335, 338 n.1 (Bankr. M.D. Fla. 2001) (noting that an objecting party's timely objection to debtor's exemption claim preserves the issue of whether exempt property constitutes disposable income); In re Graham, 258 B.R. 286, 292 n.1 (Bankr. M.D. Fla. 2001) (ruling exempt asset could not be included in disposable income but explaining "rule may not control situations where an objection to a claimed exemption has been timely filed.").

On October 29, 2010, the Debtor filed a second amended plan, and on November 5, 2010, she filed a response to the Trustee's objection to plan confirmation. The docket reflects that the bankruptcy court took the Objection under advisement on December 3, 2010.

While the bankruptcy court had originally scheduled the hearing on confirmation to take place on December 1, 2010, at the request of the parties, it continued the matter to December 8, 2010, and then to December 22, 2010. On that continued date, the court held a hearing and confirmed the second amended plan. The docket indicates that a proposed confirmation order was to be filed by January 5, 2011. On December 29, 2010, the Trustee submitted a proposed order confirming the plan and a proposed order regarding plan payments. The court entered the Trustee's proposed order confirming the second amended plan on January 6, 2011, effective December 22, 2010 (the "Confirmation Order").<sup>5</sup> Nothing in the record reflects the disposition of the outstanding Objection. No party appealed the Confirmation Order. In the Ruling described below, the bankruptcy judge indicated that the parties agreed that the plan could be confirmed notwithstanding the outstanding Objection to exemption.<sup>6</sup> The court did not reference any outstanding objections to confirmation in the Ruling referred to below.

On September 27, 2011,<sup>7</sup> the bankruptcy court issued a decision and order overruling the Objection (the "Ruling"). See In re Vargas, No. 10-13103, 2011 WL 4482005 (Bankr. D.R.I.

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<sup>5</sup> The parties did not provide the transcript from the December 1, 2010 or December 22, 2010 hearings.

<sup>6</sup> On January 3, 2011, the Debtor filed a motion to employ special counsel to pursue the Claim. On March 4, 2011, she filed a motion to approve the compromise of the Claim for \$9,400, which the bankruptcy court granted on April 13, 2011. The April 13, 2011 hearing transcript reflects that of the \$9,400 the Debtor was going to recover, \$3,075 would be applied to attorney's fees and the remainder would compensate the Debtor for her unpaid medical bills.

<sup>7</sup> While the matter was under advisement, the parties filed additional supporting memoranda.

Sept. 27, 2011). With respect to the Debtor’s claim of exemption, the court stated that because the Trustee had failed to explain why the Debtor was not entitled to the exemption, it would overrule the Objection, citing for support an earlier decision. Id. at \*1 (citing In re Andrade, No. 10-10444, 2011 WL 1559241 (Bankr. D.R.I. Mar. 16, 2011)). Although the court stated that “this decision could (and probably should) end here,” id. it added that “because it appears to be the subject of recurring litigation, we will address the second issue raised in the case-whether the proceeds of the Debtor’s personal injury claim should be included as disposable income under § 1325(b).” Id. The court explained that because at the time of confirmation no one “could place *a known or virtually certain value* on the personal injury claim” or knew whether the Debtor would prevail in her law suit, the Claim could not be used to calculate projected disposable income based upon Lanning.<sup>8</sup> The Trustee timely filed an appeal of the Ruling.

### **JURISDICTION**

Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724, 725-26 (B.A.P. 1st Cir. 1998). The Panel has jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). The order on appeal is one overruling an objection to exemption, an order which we have held to be a final order. See Stornawaye Fin. Corp. v. Hill (In re Hill), 387 B.R. 339, 345

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<sup>8</sup> Id. at \*1-2 (emphasis added). The italicized language varies from the actual language in Lanning which provides, “the court may account for changes in the debtor’s income or expenses that are known or virtually certain at the time of confirmation.” Lanning, 130 S. Ct. at 2478.

(B.A.P. 1st Cir. 2008), aff'd, 562 F.3d 29 (1st Cir. 2009); Aroesty v. Bankowski (In re Aroesty), 385 B.R. 1, 3 (B.A.P. 1st Cir. 2008); Hildebrandt v. Collins (In re Hildebrandt), 320 B.R. 40, 42-43 (B.A.P. 1st Cir. 2005).

In his appellate brief, however, the Trustee does not contest or even address the propriety of the Ruling as it relates to the Debtor's claim of exemption in the Claim.

Accordingly, the Trustee has waived this issue. Blacksmith Invest., Inc. v. Woodford (In re Woodford), 418 B.R. 644, 646 n.1 (B.A.P. 1st Cir. 2009) (citing and following First Circuit cases holding failure to identify or brief issues constituted waiver).

Instead, in their briefs, the parties frame the issue before the Panel as one related to whether the proceeds of the Claim should be included in the calculation of projected disposable income. For example, the Trustee lists and addresses in his brief the same issues he listed in his Statement of Issues: (1) whether the proceeds from an exempt personal injury claim must be considered when calculating projected disposable income; and (2) whether such a claim can be considered projected disposable income under the standard set forth in Lanning. In her brief, the Debtor addresses whether an exempt personal injury claim must be included under the test set forth in Lanning but also contends, as she did below, that the threshold issue is whether exempt property can be applied toward projected disposable income.

The foregoing facts, however, reflect that the bankruptcy court took only the Objection under advisement and the parties agreed to the entry of the Confirmation Order notwithstanding the matter under advisement. The binding Confirmation Order contains no indication that it is

subject to a ruling on the Objection.<sup>9</sup> In the Ruling, the bankruptcy judge explained that he was only addressing the issue of whether to include the Claim in the calculation of projected disposable income because the issue was subject to recurring litigation. Based upon those facts, we must determine whether we have jurisdiction to consider the issue the parties presented.

Consideration of projected disposable income arises in the context of § 1325, the Bankruptcy Code provision that sets forth the prerequisites for confirmation of a chapter 13 plan. Subsection (b) provides that if the trustee or an unsecured creditor interposes an objection to the plan, the bankruptcy court cannot confirm the plan unless, *inter alia*, the debtor's applicable projected disposable income will be applied to the plan for the benefit of unsecured creditors.<sup>10</sup>

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<sup>9</sup> In his brief and at oral argument, the Trustee asserted that the parties agreed that the Confirmation Order could enter with the question of the Claim and projected disposable income "to be decided subsequently by the court." Nowhere is this reflected in the record.

<sup>10</sup> Subsection (b) of § 1325 provides:

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan--

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term 'disposable income' means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended--

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of 'charitable contribution' under section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

Under § 1327(a), “[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.” 11 U.S.C. § 1327(a). Although not a listed party, a chapter 13 trustee is bound by a confirmed plan as well. See, e.g., Hope v. Acorn Fin., Inc., No. 5:110CV-276, 2012 WL 74874 (M.D. Ga. Jan. 10, 2012) (reviewing

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(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than--

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$625 per month for each individual in excess of 4.

(4) For purposes of this subsection, the ‘applicable commitment period’--

(A) subject to subparagraph (B), shall be--

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than--

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$625 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

11 U.S.C. § 1325(b).

numerous cases that support the conclusion). Confirmation of a chapter 13 plan affords it *res judicata* effect and therefore prevents relitigation of matters that either were raised or could have been raised prior to confirmation. See, e.g., Burnett v. Burnett (In re Burnett), 646 F.3d 575, 581 & n.4 (8th Cir. 2011) (noting Supreme Court, while not citing § 1327(a) directly, affirmed the binding effect in United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1381 (2010)).

Although the bankruptcy court addressed in the Ruling the issue of whether the Claim could be applied to the projected disposable income calculation, it did so after it entered the Confirmation Order and in the context of ruling on the Objection, not in response to the Trustee's objection to plan confirmation. When the bankruptcy court issued the Ruling, the Trustee's objection to the plan was moot given the intervening Confirmation Order which did not reserve the issue. See, e.g., Barr v. Galvin, 626 F.3d 99, 104 (1st Cir. 2010) (explaining when intervening event strips party of interest in outcome, case rendered moot) (citing ConnectU LLC v. Zuckerberg, 522 F.3d 82, 88 (1st Cir. 2008)). The parties in this case "cannot confer jurisdiction over a moot case by acquiescence or consent." Id. (citing Overseas Military Sales Corp., Ltd. v. Giralt-Armada, 503 F.3d 12, 16 (1st Cir. 2007)).

By addressing the effect of the Ruling on the plan after the entry of the Confirmation Order, the parties are not asking the Panel to address an order on appeal rather they are asking us to rule on an issue that has been resolved by the binding Confirmation Order which is not before us on appeal. In effect, the parties are asking for an advisory opinion.

Our jurisdiction is limited to cases and controversies. See, e.g., Frye v. Excelsior College (In re Frye), No. CC-08-1258, 2009 WL 7751434, \*9 (B.A.P. 9th Cir. 2009) ("One such limitation of the jurisdiction of Article III courts, and derivatively, bankruptcy courts, is that a

dispute may not be adjudicated if there is not a ‘controversy’ sufficient to confer jurisdiction.”). When the parties seek an advisory opinion, no justiciable controversy exists. Id. (citing Massachusetts v. Env’tl. Prot. Agency, 549 U.S. 497, 516 (2007)). As the appeal on the issue of the exemption of the Claim and the Objection has been waived and the subsidiary issue regarding exemptions and projected disposable income was resolved by the Confirmation Order, there is no longer a controversy sufficient to confer jurisdiction over the issue the parties have presented on appeal.

### **CONCLUSION**

For the reasons set forth herein, we **DISMISS** this appeal.