PUBLISH

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE THOMAS FROSS and MELINDA S. FROSS, Debtor.	BAP No. KS-00-028
THOMAS FROSS and MELINDA S. FROSS, Appellants, v. MJPB, INC., Appellee.	Bankr. No. 94-21906 Chapter 11 ORDER GRANTING MOTION TO STAY MANDATE AND MOTION FOR STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT January 24, 2001

Before McFEELEY, Chief Judge, CLARK, and MICHAEL, Bankruptcy Judges.
PER CURIAM.

The matter before the Court is the Motion to Stay Mandate and Motion for Stay Pending Appeal ("Motion"), filed by the Appellants, Thomas and Melinda Fross ("Debtors"). The Appellee, MJPB, Inc. ("MJPB"), does not oppose the portion of the Motion seeking a stay pending appeal, and it has not responded to the portion of the Motion seeking a stay of the mandate. For the reasons set forth below, the Motion is

GRANTED.

BACKGROUND

In *In re Fross*, BAP No. KS-98-030, 1999 WL 26886 (10th Cir. BAP January 5, 1999) ("*Fross I*"), this Court reversed an interlocutory order of the United States Bankruptcy Court for the District of Kansas overruling MJPB's objection to the confirmation of the Debtor's proposed Chapter 11 plan. It was determined that the plan as proposed could not be confirmed because it violated the absolute priority rule set forth in 11 U.S.C. § 1129(b)(1)(B)(ii) inasmuch as the Debtors were to retain their home without fully paying MJPB's second mortgage claim.

Subsequently, the bankruptcy court entered an order dismissing the Debtors' Chapter 11 case ("Dismissal Order"), concluding that the Debtors were unable to formulate a confirmable plan within the requirements set forth in *Fross I*. The Debtors appealed the bankruptcy court's final Dismissal Order to this Court. The bankruptcy court issued an order staying its Dismissal Order pending the Debtors' appeal. The bankruptcy court's stay order requires the Debtors to provide MJPB proof of insurance on their home and to continue to make payments to the creditor holding the first mortgage on the home.

On December 22, 2000, this Court affirmed the Dismissal Order. *In re Fross*, BAP No. KS-00-028 (10th Cir. BAP December 22, 2000) ("*Fross II*"). On January 5, 2001, before this Court issued its mandate in *Fross II*, *see* 10th Cir. BAP L.R. 8016-3(a), and after the stay pursuant to Federal Rule of Bankruptcy Procedure 8017(a) had expired,

the Debtors filed by facsimile a notice of appeal, appealing the Order and Judgment in *Fross II* to the United States Court of Appeals for the Tenth Circuit, and the instant Motion, seeking a stay of the mandate and a stay pending the Tenth Circuit appeal. We received originals of the notice of appeal and the Motion, along with the appropriate filing fee, on January 8, 2001. MJPB informed us by letter dated January 11, 2001, that it does not object to the continuation of the stay issued by the bankruptcy court. It says nothing of the Debtors' request for a stay of the mandate.

DISCUSSION

A. This Court has Jurisdiction Over the Debtor's Motion

While MJPB's lack of opposition to the continuation of the stay pending appeal obviates the need for this Court to determine whether such a stay is appropriate, we must first determine whether we have jurisdiction to continue the stay and to consider the portion of the Motion seeking a stay of the mandate. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (federal appellate court must satisfy itself that it has jurisdiction even if parties concede it). In *Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales, Inc.)*, 222 B.R. 914, 916 n.1 (10th Cir. BAP 1998), *aff'd*, 195 F.3d 568 (10th Cir. 1999), we held that the Court could consider a motion for stay pending appeal prior to the filing of a notice of appeal to the Tenth Circuit, but noted that the issue in this case, whether a motion for stay filed simultaneously with or after the filing of a notice of appeal, had not been addressed and was the subject of some controversy. We now resolve this issue, concluding that we have jurisdiction.

The Debtors have requested that we stay the issuance of the mandate, *see* 10th Cir. BAP L.R. 8016-3(a), and stay our Order and Judgment in *Fross II* pending their appeal to the Tenth Circuit. A motion to stay the mandate pending appeal is governed by 10th Cir. BAP L.R. 8016-3(b), which provides:

> A party who files a motion requesting a stay of mandate pending appeal to the United States Court of Appeals for the Tenth Circuit must file, at the same time, proof of service on all other parties. The motion must show that the appeal presents a substantial question and that there is good cause for a stay. The stay cannot exceed 30 days unless the period is extended for cause shown or unless a notice of appeal is filed during the period of the stay, in which case the stay will continue until final disposition by the Court of Appeals.

10th Cir. BAP L.R. 8016-3(b). A motion to stay a judgment of this Court pending appeal is governed by Federal Rule of Bankruptcy Procedure 8017(b), which provides:

> On motion and notice to the parties to the appeal, the . . . bankruptcy appellate panel may stay its judgment pending an appeal to the court of appeals. The stay shall not extend beyond 30 days after the entry of the judgment of the . . . bankruptcy appellate panel unless the period is extended for cause shown. If before the expiration of a stay entered pursuant to this subdivision there is an appeal to the court of appeals by the party who obtained the stay, the stay shall continue until final disposition by the court of appeals. A bond or other security may be required as a condition to the grant or continuation of a stay of the judgment.

Fed. R. Bankr. P. 8017(b). While these Rules anticipate motions to stay issuance of the mandate or to stay a judgment pending appeal filed prior to the filing of a notice of appeal, *see Sunset Sales,* 222 B.R. at 916 n.1, neither expressly authorizes us to consider such motions after the notice of appeal has been filed.

The majority of courts that have addressed whether a bankruptcy appellate panel or

the district court, sitting as an appellate court in bankruptcy, may consider a motion for stay pending appeal have held that jurisdiction exists despite the fact that a notice of appeal has been filed. *See, e.g., In re Miranne*, 852 F.2d 805, 806 (5th Cir. 1988) (per curiam); *In re Imperial Real Estate Corp.*, 234 B.R. 760 (9th Cir. BAP 1999); *In re KAR Development Assocs.*, 182 B.R. 870, 872 (D. Kan. 1995); *In re Winslow*, 123 B.R. 647, 647-48 n.1 (D. Colo. 1991). *But see In re One Westminister Co.*, 74 B.R. 37, 38 (D. Del. 1987). These cases would seem to apply equally in the context of a motion for stay of the mandate inasmuch as 10th Cir. BAP L.R. 8016-3(b) is very similar to Federal Rule of Bankruptcy Procedure 8017(b). For the reasons stated herein, we adopt the rule in the majority line of cases, holding that the Court has jurisdiction over motions to stay the mandate and motions for stay pending appeal filed simultaneously with or after the filing of a notice of appeal, provided the Court has not issued a mandate in the case. *See Sunset Sales*, 195 F.3d at 570 (Court may not consider stay motion after issuance of the mandate).

Our ruling is in accord with general principles related to post-judgment jurisdiction. Although a notice of appeal divests the lower court of jurisdiction over a case, *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982), the Tenth Circuit has held in a non-bankruptcy case that lower courts retain jurisdiction after the filing of a notice of appeal "over tangential matters [and] . . . 'certain ministerial functions in aid of the appeal, such as . . . issuing stays or injunctions pending appeal.'" *Stewart v. Donges*, 915 F.2d 572, 575 n.3 (10th Cir. 1990) (quoting 16 Charles Alan

Wright, Arthur R. Miller, Edward H. Cooper & Eugene Gressman, *Federal Practice and Procedure* § 3949 at 359 (1977)); *see Hawaii Housing Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983) (Rehnquist, Circuit Justice) (a notice of appeal did not prevent a lower court from recalling its mandate because "it is well settled that a court retains the power to grant injunctive relief to a party to preserve the status quo during the pendency of an appeal . . . ."), *quoted in Sunset Sales*, 195 F.3d at 573; *see also Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227, 1229 (10th Cir. 1998) (per curiam) (an "appeal does not divest the district court of jurisdiction over peripheral, collateral matters such as attorneys' fees."). This principle is sound in light of the fact that staying the mandate or staying the effect of an order appealed does not affect the relief afforded by or the rationale of the order appealed and, therefore, does not interfere with the Tenth Circuit's review of the order appealed. *See Griggs*, 459 U.S. at 58.

Furthermore, jurisdiction over the Motion best promotes consistent application of various applicable rules of procedure. Federal Rule of Bankruptcy Procedure 8017(b) authorizes this Court to issue stays pending appeal to the Tenth Circuit. 10th Cir. BAP L. R. 8016-3(b) authorizes us to stay the issuance of our mandate so as not to transfer jurisdiction of the case to the bankruptcy court. Federal Rule of Appellate Procedure 8(a) requires that the Debtors seek a stay pending appeal from the district court, or presumably this Court, in the first instance. While it is clear that we do not have jurisdiction to consider a stay motion after our mandate has issued, *Sunset Sales*, 195 F.3d at 568, to hold that jurisdiction does not exist over a stay motion after the filing of a notice of

appeal, but before the issuance of the mandate, would unduly undermine Federal Rule of Bankruptcy Procedure 8017(b), 10th Cir. BAP L.R. 8016-3(b) and Federal Rule of Appellate Procedure 8(a). *See Miranne*, 852 F.2d at 806.

Because we have jurisdiction to enter an order staying our Order and Judgment pending the Debtors' appeal to the Tenth Circuit, we will do so given the fact that this relief is unopposed.[1] MJPB has not, however, responded to the portion of the Debtors' Motion related to a stay of the mandate. Thus, we will now consider the merits of that request.

B. The Motion for Stay of Mandate is Granted

The Debtors request that this Court stay the issuance of the mandate, presumably indefinitely. During the pendency of the Motion, the mandate has been stayed. Under 10th Cir. BAP L.R. 8016-3(a), we typically would have issued the mandate on January 8, 2001, but we have not done so in light of the pending Motion. *See* Fed. R. App. P. 41(d)(1).

We conclude that the mandate should be stayed pending appeal because the requirements of 10th Cir. BAP L.R. 8016-3(b) have been met. As we recognized in *Fross II*, the question at issue in the appeal to the Tenth Circuit is substantial. In addition, in

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[1] In *Fross II* we stated that the issue before the Tenth Circuit of whether the Debtors' retention of their homestead in absence of full payment to MJPB violates the absolute priority rule is a subject upon which "reasonable minds may differ . . . ." *Fross II,* Slip Op. at 6. This important issue, which is "ripe for litigation and deserving of more deliberate investigation," coupled with the Debtors' satisfaction of the other factors needed to obtain a stay pending appeal, would have merited this Court granting a stay pending appeal had it been opposed by MJPB. *McClendon v. City of Albuquerque,* 79 F.3d 1014, 1020 (10th Cir. 1996) (Kelly, Judge in Chambers).

light of the stay of our Order and Judgment pending appeal, there is good cause to stay the issuance of the mandate.

CONCLUSION

For the foregoing reasons, it is HEREBY ORDERED that:

(1) The portion of the Motion seeking a stay of this Court's Order and Judgment is GRANTED, and such Order and Judgment shall be stayed pending appeal;

(2) The stay stated in (1) above is conditioned upon the following:

(a) The Debtors shall maintain insurance on their home and provide proof of such insurance to MJPB, and

(b) The Debtors shall continue to make payments to the first mortgage holder on their home; and

(3) The portion of the Motion requesting a stay of the mandate is GRANTED, and the mandate shall be stayed pending appeal.

For the Panel:

Barbara A. Schermerhorn, Clerk of Court

By:

Deputy Clerk

UNITED STATES BANKRUPTCY APPELLATE PANEL
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January 30, 2001

TO: All Recipients of the Captioned Order and Judgment
RE: BAP No. KS-00-028, In re Fross
Filed December 22, 2000; Hon. Terrence L. Michael, authoring judge

Please be advised of the following correction to the captioned decision:

In the caption, the Appellee's name, which was spelled "MJBP, Inc." in accordance with the notice of appeal, should be corrected to "MJPB, Inc."

If you received a hard copy of the decision, please make this correction to your copy.

Very truly yours,

Barbara A. Schermerhorn
Clerk

By:
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE THOMAS FROSS and MELINDA S. FROSS, Debtors.	BAP No. KS-00-028
THOMAS FROSS and MELINDA S. FROSS, Appellants, v. MJPB, INC., Appellee.	Bankr. No. 94-21906 Chapter 11 ORDER AND JUDGMENT**

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before McFEELEY, Chief Judge, CLARK, and MICHAEL, Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

This appeal marks the second time that these parties have been before this Court. In the first appeal, *MJPB, Inc. v. Fross*, BAP No. KS-98-030, 1999 WL 26886 (10th Cir. BAP January 15, 1999) (*"Fross I"*), this Court determined that a Chapter 11 plan proposed by the Debtors (the "Plan") violated the absolute

** This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

priority rule set out in 11 U.S.C. § 1129(b)(2)(B)(ii).[2] The Court then reversed an order of the bankruptcy court overruling an objection to the Plan, and it remanded the case for further proceedings. Upon remand, the bankruptcy court dismissed the case. Debtors then appealed the order of dismissal to this Court. For the reasons set forth below, we affirm the decision of the bankruptcy court.

Background

The facts pertinent to this appeal were set out in *Fross I*:

> The primary asset of Thomas and Melinda S. Fross (Debtors) is their home, valued at $40,000. When the Debtors filed a petition under Chapter 11 on October 18, 1994, they claimed their home and certain personal property as exempt under Kansas law. No party objected to their claimed exemptions. The home is encumbered by a fully secured first mortgage held by Federal Home Loan Mortgage Corporation (FHLMC). MJPB, Inc. (MJPB), the Appellant herein, holds a second mortgage against the home with a balance of approximately $56,317.
>
> The Debtors' Plan of Reorganization (Plan) calls for the bifurcation of MJPB's claim (Class 3) into an allowed secured claim of approximately $18,983 to be paid over twenty years at nine and one-half percent interest. The remaining $37,334 balance of MJPB's claim is treated as a general unsecured claim. The Plan proposes that unsecured creditors (Class 5) be paid ten percent of their claims over ten years at twelve percent interest. The Plan does not contain a class of interests, but provides that the Debtors will retain their property and assets, subject to the security interests of the holders of secured claims. The payments under the Plan are to be funded from the Debtors' future income. Property not required to carry out the Plan may be sold or returned to secured creditors, with any surplus applied toward current operating expenses.
>
> FHLMC voted to accept the Plan. MJPB, having failed to elect treatment under § 1111(b), voted the unsecured deficiency portion of its Class 3 claim to reject the Plan. Class 5 also voted against the Plan. MJPB objected to the confirmation of the Plan, arguing that it violated the absolute priority rule as set forth in § 1129(b)(2)(B)(ii) because the Debtors were retaining their exempt property, including their home.
>
> The bankruptcy court issued a Memorandum Opinion and Judgment overruling MJPB's objection to the confirmation of the Plan. *In re Fross*, 220 B.R. 405 (Bankr. D.Kan. 1998). *Fross* acknowledged that the Code distinguishes between property of the

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[2] Future references are to Title 11, United States Code, unless otherwise noted.

> debtor and property of the estate, but did not discuss that "of the debtor" or "of the estate" does not modify "property" as the term is used in § 1129(b)(2)(B)(ii). Instead, *Fross* concluded that the Debtors' exempt property was no longer property of the estate, and that the Plan had not waived the Debtors' right to keep their exempt property outside the estate. Since unsecured creditors lack any right to expect payment of their claims from exempt homestead property under Kansas law, *Fross* concluded that the Debtors' ownership interest in their exempt property was senior to the interests of unsecured creditors. *Id.* at 410. In so holding, *Fross* explained:
>
> > If the Frosses' residence were property of the estate, their interest in it would be junior to the claims of unsecured creditors since applicable law would entitle those creditors to payment from the value of the residence. But since the Frosses' interest in their residence is outside the bankruptcy estate, and unsecured creditors cannot reach its value, their interest in the residence cannot be fairly characterized as junior to the claims of unsecured creditors.

Fross I, 1999 WL 26886, at *2-3 (footnote omitted). In *Fross I*, this Court concluded that the retention of the exempt homestead proposed by the Debtors was a violation of the absolute priority rule and reversed the order confirming the Plan. Debtors sought to appeal *Fross I* to the United States Court of Appeals for the Tenth Circuit (the "Circuit Court"). However, on July 6, 1999, the Circuit Court dismissed the appeal for lack of jurisdiction on the ground the appeal was interlocutory. *MJPB, Inc. v. Fross,* No. 99-3078 (10th Cir. June 25, 1999); *Appellant's App.* at 31.

Upon remand, MJPB sought dismissal or conversion of the bankruptcy case.[3] On April 6, 2000, the bankruptcy court entered its order dismissing the bankruptcy case. The order contained the following statement:

> The Court also finds that it is bound by the decision of the Bankruptcy Appellant [sic] Panel and such decision [*Fross I*] is the law of the case. Because the Debtors cannot propose a plan which complies with the absolute priority rule as interpreted by the Bankruptcy Appellant [sic] Panel, this case must be dismissed. The Court also finds that the plan otherwise complies with all other aspects of 11 U.S.C. 1129(a) and (b) and that if it is determined on

[3] MJPB originally sought dismissal of the case as part of its objection to confirmation of the Plan; the request was then renewed upon remand.

> further appeal that this Court is correct in its interpretation of the absolute priority rule, Debtors' plan can be confirmed.

In re Fross, Case No. 94-21906-11 (Bankr. D. Kan. April 6, 2000); *Appellant's App*. at 34. After the bankruptcy case was dismissed, Debtors timely filed their appeal before this Court.

Statement of Appellate Jurisdiction

When the parties to an appeal grant their consent, this Court has jurisdiction to hear all timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1) and (c)(1); Fed. R. Bankr. P. 8002. In the present case, Debtors timely filed their notice of appeal, and neither they nor MJPB opted to have this appeal heard by the United States District Court for the District of Kansas. Accordingly, this Court has jurisdiction to consider this appeal.

Discussion

This appeal presents the same issue presented in *Fross I*: whether the Debtors' retention of their homestead in the absence of full payment to unsecured creditors violates the absolute priority rule codified in § 1129(b)(2)(B) (the "absolute priority rule").[4] In *Fross I*, the Court answered the question in the

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[4] Said section provides:

> (b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.
>
> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> . . . .
>
> (B) With respect to a class of unsecured claims—

(continued...)

affirmative, and it reversed an order of the bankruptcy court confirming such a plan. Debtors ask this Court to overrule *Fross I*. MJPB responds by arguing that *Fross I* constitutes the "law of the case" with respect to the issue of the absolute priority rule, and it is binding upon this Court.

The law of the case doctrine has been considered by the Tenth Circuit Court of Appeals on several occasions. That court's most recent decision on the issue offers the following definition:

> "The law of the case 'doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' " *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir.1998) (quoting *United States v. Monsisvais*, 946 F.2d 114, 115 (10th Cir.1991) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983))). "Accordingly, 'when a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal.' " *Id.* (quoting *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir.1995)). "This doctrine is 'based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided.' " *Id.* (quoting *Gage v. General Motors Corp.*, 796 F.2d 345, 349 (10th Cir.1986) (citations omitted)). The rule "also serves the purposes of discouraging panel shopping at the court of appeals level." *Monsisvais*, 946 F.2d at 116.
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> This court has recognized, however, that the law of the case doctrine is not an "inexorable command." *Alvarez*, 142 F.3d at 1247 (quoting *White v. Murtha*, 377 F.2d 428, 431 (5th Cir.1967)). This court will depart from the law of the case doctrine in three exceptionally narrow circumstances:
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> (1) when the evidence in a subsequent trial is substantially different;
>
> (2) when controlling authority has subsequently made a

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[4] (...continued)

> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
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> (ii) 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.

11 U.S.C. § 1129(b)(2)(B).

> contrary decision of the law applicable to such issues; or
> (3) when the decision was clearly erroneous and would work a manifest injustice.

See Alvarez, 142 F.3d at 1247 (citing *Monsisvais*, 946 F.2d at 117).

Greene v. Safeway Stores, Inc., 210 F.3d 1237, 1241-1242 (10th Cir. 2000). This Court is bound by *Greene* and has also previously recognized the applicability of the law of the case doctrine to appeals before it. *See Farmers Home Admin. v. Buckner (In re Buckner)*, 218 B.R. 137, 141-143 (10th Cir. BAP 1998).[5] Under the rationale contained in *Greene*, the decision of *Fross I* is binding upon this Court unless one of the three exceptions to the rule is present.

The first exception, substantially differing evidence, is not present. The evidence before this Court is identical to what was before the court in *Fross I*. Debtors argue that the decision in *Fross I* is manifestly unjust because it has the effect of preventing the Debtors from retaining their exempt homestead. While Debtors correctly state the effect of *Fross I*, they fail to demonstrate its unfairness, nor do they present any authority in support of their position.[6] While reasonable minds may differ with respect to the result reached by the court in *Fross I*, the decision can hardly be categorized as clearly erroneous or one that works a manifest injustice. The Court is thus left to consider whether there has been a change in controlling authority that would justify reversal of the decision in *Fross I*.

Debtors argue that the decision of the United States Supreme Court in *Bank*

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[5] Debtors have also admitted that "there is no doubt that [*Fross I*] is now the law of the case" herein. *Appellant's Opening Brief* at 15.

[6] It is undisputed that MJPB has a consensual lien upon the residence of the Debtors. The effect of Debtors' plan, if confirmed, would be to pay MJPB less than the full amount of its claim. Such a result is prohibited by statute in Chapter 13 cases. *See* § 1322(b)(2). In addition, the United States Supreme Court has ruled that such "lien stripping" is not permissible in Chapter 7 cases. *See Dewsnup v. Timm,* 502 U.S. 410, 417 (1992). These factors cast doubt upon the Debtors' argument that *Fross I* treats them unjustly.

of America National Trust and Savings Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434 (1999), decided after *Fross I*, constitutes just such a change in controlling authority. In *LaSalle*, a partnership filed a petition for relief under Chapter 11. The partnership's major asset was an interest in fifteen floors of an office building located in Chicago, Illinois (the "Building Interest"). The partnership's major creditor was Bank of America ("Bank"), which held a lien upon the Building Interest. The value of the Building Interest was less than the amount of the Bank's claim. The partnership proposed a plan that bifurcated the claim of the Bank, paying the Bank the allowed amount of its secured claim and providing for the discharge of the balance of the Bank's claim in exchange for a sixteen percent dividend on that claim. All other unsecured creditors were to be paid in full.[7] Under the plan, some of the former partners of the debtor were to make a capital infusion of $6.125 million into the reorganized debtor over a five-year period and would thus retain full ownership interest in the reorganized debtor.

Bank objected to the proposed plan, arguing that the retention of ownership by the debtor's partners without payment in full of the Bank's unsecured claim violated the absolute priority rule contained in § 1129(b)(2)(B). The partners argued that they were retaining an interest in the reorganized debtor on the basis of the infusion of new capital, not on their prior ownership interest. The bankruptcy court agreed with the partners, and it confirmed the plan over the Bank's objection. The district court and the court of appeals affirmed.

The United States Supreme Court reversed these decisions on the basis of the following issue:

The issue in this Chapter 11 reorganization case is whether a debtor's

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[7] The Bank's unsecured deficiency was approximately $38.5 million; the remaining unsecured claims totaled approximately $90,000.00. *LaSalle,* 526 U.S. at 440.

> prebankruptcy equity holders may, over the objection of a senior class of impaired creditors, contribute new capital and receive ownership interests in the reorganized entity, when that opportunity is given exclusively to the old equity holders under a plan adopted without consideration of alternatives. We hold that old equity holders are disqualified from participating in such a "new value" transaction by the terms of 11 U.S.C. § 1129(b)(2)(B)(ii), which in such circumstances bars a junior interest holder's receipt of any property on account of his prior interest.

LaSalle, 526 U.S. at 437. As it considered this issue, the Supreme Court noted in dicta that a "commonsense" consideration of the phrase "on account of" found in § 1129(b)(2)(B)(ii) "recognizes that a causal relationship between holding the prior claim or interest and receiving or retaining property is what activates the absolute priority rule." *Id.* at 451. However, the Supreme Court explicitly refused to reach the issue of the proper definition of the phrase "on account of" that is contained in § 1129(b)(2)(B)(ii), holding that, no matter how this phrase may be defined, a chapter 11 plan that allows the equity holders to retain an interest in the reorganized debtor "without extending an opportunity to anyone else either to compete for that equity or to propose a competing reorganization plan [may not be confirmed]." *Id.* at 454.

Debtors argue:

> The teaching of *LaSalle* is that it is the causal connection between the particular pre-petition claim or interest of an entity and the property received or retained under the plan which activates the absolute priority rule. None of the three approaches to the absolute priority rule discussed in *LaSalle* suggest that the rule is activated where there is no such causal connection or that the holding of a junior general ownership interest in addition to a specific senior interest in exempt property, would bar an entity from securing property on account of its senior interest. Because the interlocutory BAP decision appears to be based upon the concept that holding a junior general ownership interest in addition to holding a senior interest bars an interest holder from receiving or retaining property on account of their senior interest, the interlocutory BAP decision cannot be reconciled with *LaSalle*.

Appellant's Opening Brief at 15. This argument is flawed. There is a "causal connection" between Debtors' ownership interest in their home and their retention of the home under the proposed plan. Without such an ownership interest, the

Debtors would have no right to retain the home. The true linchpin of Debtors' argument is the contention that exemption rights create an interest in the home that is senior to the claims of unsecured creditors. This argument has little if anything to do with *LaSalle*, and it is the same argument that was made to and rejected by the court in *Fross I*.[8]

Conclusion

Fross I constitutes the law of the case with respect to the issues raised by the Debtors. If the decision of *Fross I* is to be altered or reversed, that is a matter left to the Court of Appeals. The decision of the Bankruptcy Court is affirmed.

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[8] *See Fross I,* 1999 WL 26886, at *9.