From Conception Through Birth and Now an Adolescent: Views from Those Who Saw It All

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10 Years After: Cases on Amendments Addressing Vehicle Claims

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CHAPTER 13

I. 910-DAY VEHICLE CLAIMS

a. In 2005, 11 U.S.C. §1325(a) was amended to provide specific treatment for a creditor with a purchase money security interest securing a debt incurred by the debtor for the purchase of a motor vehicle within 910 days prior to the petition filing date. Generally this provision is referred to as the "Hanging Paragraph".

The provision following §1325(a)(9) provides:

> *For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.*

b. *In re Bibbs*, No. 14-10847, 2015 WL 1843252 (Bankr. D. Kan Apr. 20, 2015), for hanging-sentence purposes, PMSI was "incurred" at the time of original purchase and financing transaction – more than 910 days before petition – and not at the time of refinancing within 910-day period.

c. The majority of cases hold that the Hanging Paragraph, as it modifies claims under §1325(a)(5) in relation to §506, prevents a debtor from bifurcating and cramming down a claim held by a creditor with a purchase money security interest in a motor vehicle, for the debtors personal use purchased within 910 days prior to the petition date. Thus, for the Chapter 13 Plan to be confirmed, a creditor must be treated as fully secured for the full amount of the claim, with interest payable at the *Till* rate.

   i. *Shaw v. Aurgroup Fin. Credit Union,* 552 F3d. 447 (6th Cir. 2009), the debtor attempted to cram down a 910 claim by arguing that the requirements of §1325 are discretionary and not mandatory. The court found that the requirements of §1325 are mandatory and since the creditor objected to the proposed cram down of the 910 claim, the plan was not confirmable.

      a. *In re McLemore*, 2010 Bankr. LEXIS 864 (Bankr. S.D. Ohio Mar. 30, 2010), the creditor failed to object to the proposed plan that provided for a lower interest rate than the rate the creditor believed it was entitled to. The creditor filed a proof of claim seeking a higher interest rate. The debtor filed an objection to the proof of claim. The creditor argued that the interest rate proposed in the plan failed to comply with §1325(a)(5)(B)(ii). In sustaining the objection to the claim the court noted that in the absence of a timely objection to confirmation §1327 binds the parties to the terms in the confirmed plan.

      b. See also, *McGinnis v. Vetter*, 2010 U.S. Dist. LEXIS 32210 (U.S. Dist. MD, 2010), the court affirmed the bankruptcy court's decision to deny a plan modification because the modification failed to comply with §1325(a). The Court held that the provisions of §1325(a) are mandatory.

ii. *In re Jones*, 530 F3d. 1284 (10th Cir. 2008), the creditor had a validly perfected security interest in a motor vehicle that was purchased for the personal use of the debtor within 910 days of the filing of the case. The proposed plan offered to pay the claim without post-petition interest. The bankruptcy court confirmed the plan over the creditor's objection. On appeal, the 10th Circuit found that the creditor's claim was fully secured as set forth in the hanging paragraph and required interest to be determined by the Till rate as required by §1325(a)(5)(B)(ii)..

a. This decision reversed the minority position as expressed in *In re Wampler*, 2006 Bankr. LEXIS 1192 (Bankr. D. Kansas, 2006).

iii. *In re Dean,* 537 F3d. 1315 (11th Cir. 2008), the 11th Circuit agreed with the ruling of the 10th Circuit and held that 910 claims are to be treated as fully secured and thus the claim is not subject to modification. The court stated "virtually all reported decisions have held [that] the hanging paragraph means only that 910-claims cannot be bifurcated into secured and unsecured portions … and that such claims must be treated as fully secured."

a. This decision reversed the Seminole case, *In re Carver*, 338 B.R. 521 (Bankr. S.D. Georgia, 2006), that supported the minority approach that the claims were subject to bifurcation.

iv. See also, In re Strange, 2010 LEXIS 241 (Bank. M.D. of GA 2010).

c. The minority rule was set forth in *In re Carver*, 338 B.R. 521 (Bankr. S.D. Georgia, 2006), which held that the Hanging Paragraph completely eliminates §506 and such creditor is unsecured for purposes of the Chapter 13 Plan. *Carver* held that a 910-day vehicle claim must receive payments that are the greater of 1) the full amount of the claim without interest, or 2) the cramdown amount with interest paid on the secured portion.

1. This decision was reversed when the 11th Circuit decided the issue by *In re Dean,* 537 F3d. 1315 (11th Cir. 2008) (Summary contained on previous page).

d. Another variation on the minority rule was set forth in *In re Wampler*, 2006 Bankr. LEXIS 1192 (Bankr. D. Kansas, 2006), which has been reversed by virtue of the 10th Circuit Bankruptcy Appellate Panel in *In re Wilson*, 2007 Bankr. LEXIS 2784 (BAP 10th Cir. 2007) and *In re Jones*, 530 F3d. 1284 (10th Cir. 2008).

1. In Wampler the bankruptcy court reasoned that finding 910 claims to be fully secured would result in an "absurd conclusion". The court found that if a 910 creditor were treated as the majority of courts held, with its claim fully secured regardless of the collateral's value, debtors would be unable to discharge the unsecured portion, no matter how small the secured portion.

e. "Any other thing of value" purchased within 1 year prior to the petition filing:

i. The majority view states that a motor vehicle does not qualify as "any other thing of value", See *In re Curtis*, 345 B.R. 756 (Bankr. D. Utah, 2006) (holding that tractor-trailers are not motor vehicles, but are other things of value and subject to the anti-cramdown provision); *In re Balsinde*, 2007 Bankr. LEXIS 4058 (Bankr. S.D. FL) (the court found that a motor vehicle acquired for non-personal use within one year, was not

covered by the phrase "any other thing of value". The court determined that the first portion of the hanging paragraph applied to motor vehicles, while the "any other thing of value" applied to other collateral, not a motor vehicle.

1. See also, *In re Thompson*, 2009 Bankr. LEXIS 1993 (Bankr. N.D. OH 2009); *In re Horton*, 398 B.R. 73 (Bankr. S.D. Fla. 2008).

ii. A growing number of courts have adopted the minority position. The minority approach is set forth in *In re Tanguay*, 2010 Bankr. LEXIS 1120 (Bankr. E.D. Tenn.), the debtor attempted to cramdown a claim for a semi-truck that was purchased, for non-personal use, within the 1 year preceding the bankruptcy filing. The creditor objected and argued that the claim enjoyed the antimodification protection of the hanging paragraph as the debt for the semi-truck was "any other thing of value" incurred within the 1 year before the case was filed. The court held that the claim was not subject to modification. The court disagreed with the majority's view that "any other thing of value" excludes all motor vehicles and instead found that "any other thing of value" excludes motor vehicles acquired for the personal use of the debtor. The court ruled, "[a]ny collateral acquired by a debtor within 1-year of the filing of his or her Chapter 13 case through a purchase money security interest, regardless of whether it is for personal or nonpersonal use, falls within the scope of the 1-year provision. This includes motor vehicles acquired for non-personal use."

1. *In re Hickey*, 370 B.R. 219 (Bankr. D. Neb 2007)(the court found, "[i]n describing the collateral for a debt incurred within the 910 days preceding the bankruptcy filing, the statute specifically refers to "a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor. It is not simply a motor vehicle, but instead a motor vehicle acquired for the personal use of the debtor. The second part of the paragraph pertains only to the situation where collateral consists of any other thing of value -- that is, the collateral is not a motor vehicle acquired for the personal use of the debtor. The plain language indicates that the modifier "acquired for the personal use of the debtor" applies to motor vehicles and is not one of the applicable elements when the collateral for the debt consists of any other thing of value."

2. See also *In re Littlefield*, 388 B.R. 1; 2008 Bankr. LEXIS 1551 (Bankr. Maine), (the court ruled that a motor vehicle "acquired for nonpersonal use of the debtor" cannot be modified when the purchase occurred within 1 year according to the hanging paragraph);

II. Interest on 910 Vehicle Claims

a. Since deferred payments aggregating to the *amount* of the claim on the effective date cannot fully compensate a creditor for the *value* of the claim, a creditor is entitled to compensation for the loss attributable to payments in installments. "In order for the secured creditor to get payments over time under the plan having a present value equal to the allowed amount, as the above quoted statutory language directs, the debtor normally pays interest on the allowed amount." *GMAC v. Jones*, 999 F.2d 63, 66 (3d Cir. 1993); see also *Rake v. Wade*, 508 U.S. 464, 472, note 8 (1993), *superseded on other grounds by statute*, *Financial Sec. Assur. v. T-H New Orleans Ltd. Pshp. (In re T-H New Orleans Ltd. Pshp.)*, 116 F.3d 790, 796 (5th Cir. 1997); *In re Ehrhardt*, 240 B.R. 1, 4 (B.C. W.D. Mo. 1999); *In re Felipe*, 229 B.R. 489, 491 (Bankr. S.D. Fla. 1998); *In re Jones*, 188 B.R. 281 (Bankr. D. Or. 1995); *In re Johnson*, 63 B.R. 550, 551 (Bankr. D. Colo. 1986); *In re Mothershed*, 62 B.R. 113 (Bankr. E.D. Arkansas 1986); *In re*

Gincastro, 48 B.R. 662 , 665 (Bankr. D. R.I. 1985); *In re Williams*, 44 B.R. 422 , 425 (Bankr. N.D. Miss. 1984); *GMAC v. Lefevre*, 38 B.R. 980, 984 (Bankr. D. Vt. 1983); *In re Trent*, 42 B.R. 279, 281 (Bankr. W.D. Virginia 1984); *Norton Bankruptcy Law and Practice 2d* § 122:8 (1998); *Lundin Chapter 13 Bankruptcy 3d* § 111-1 (2002).

i. Likewise, the Congressional Record indicates that section 1325(a)(5)(B)(ii) "contemplates a present value analysis that will discount value to be received in the future." H.R. Rep. No. 598, 95th Cong. 2d Sess. 414, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6370.

b. The Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 124 S. Ct. 1951; 158 L. Ed. 2d 787 (2004), set forth the interest rate to be paid on secured claims crammed down pursuant to section 1325(a)(5). The *Till* Court interpreted section 1325(a)(5)(B)(ii) to require an interest rate that compensates creditors for the additional risk of default when it encounters a bankrupt debtor. The Court in *Till* required an interest rate of prime, plus a risk factor depending on the qualities of the debtor.

c. After the 2005 Amendments, the majority of courts have held that the Hanging Paragraph prohibiting bifurcation also requires that the *Till* rate of interest (prime plus a risk factor) be applied to 910 claims in a Chapter 13 case.

d. The majority of courts have held that 910 claims must be paid at the Till rate:

i. *In re Taranto*, 365 B.R. 85, 2007 Bankr. LEXIS 970 (6th Circuit BAP 2007), reversing a ruling from the Bankruptcy Court of the Northern District of Ohio; the debtor proposed to pay the creditor's claim in full with the contractual interest rate of 0%. The plan also proposed to pay the claim in full 4 years before the contractual maturity date. The creditor objected to the proposed 0% interest rate. The panel held that BAPCPA did not change §1325(a)(5)(B)(ii) and that *Till* is still binding, regardless of whether the *Till* rate is higher than the contract rate. The court stated, "[a]ny plan that seeks to modify a secured creditor's rights over its objection is a cram down that implicates § 1325(a)(5)(B)(ii). "Cram down" is a term that refers to confirmation of a chapter 13 plan over the objection of the holder of a claim. *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 957, 117 S. Ct. 1879, 138 L. Ed. 2d 148 (1997); *see also Tidewater Fin. Co. v. Curry (In re Curry)*, 347 B.R. 596, 599 n.1 (B.A.P. 6th Cir. 2006). If the Debtor's plan proposed to pay the Appellant's secured claim without modification according to the terms of the Contract by payments from the Debtors to the Appellant, no cram down would occur. In such an instance, the Appellant may have no choice but to accept unaltered contract payments at the interest rate of zero percent. *Pryor*, 341 B.R. at 651; *Soards*, 344 B.R. at 832. Under the Debtors' proposed amended plan, although there is no strip down, the payment stream is being modified. This modification of the payment stream is sufficient to trigger the present value requirement of § 1325(a)(5)(B)(ii). *Pryor*, 341 B.R. at 651.

ii. *Drive Financial Services, L.P. v. Bobby and Freda Jordan (In re Jordan)*, Case No. 07-40265, (5th Cir. March 2008), the 5th Circuit Court of Appeals ruled that the Till rate applies to post-BAPCPA cases.

iii. *In re Jones*, 530 F3d. 1284 (10th Cir. 2008), the 10th Circuit determined that 910 claimholders are entitled to interest in order to "ensure they receive the present value of their claims".

iv. *In re Dean* 537 F3d. 1315 (11th Cir. 2008), the court agreed with the reasoning set forth in *In re Jones* from the 10th Circuit.

v. *In re Wilson*, 2007 Bankr. LEXIS 2784 (BAP 10th Cir. 2007), reversing the decision of the Kansas Bankruptcy Court, which followed the decision from *In re Wampler*, 2006 Bankr. LEXIS 1192 (Bankr. D. Kansas, 2006). The BAP of the 10th Circuit, refused to adopt the minority view and held that 910 claims must be treated as a "secured claim for the full amount of its loan balance on the petition date and §1325(a)(5)(B)(ii) required the Debtor to pay interest at the Till rate…"

e. The minority view was set forth in the following cases, both of which have been reversed:

i. *In re Carver*, supra, finding that the Hanging Paragraph did not prevent bifurcation of a 910 claim, and the holder of the claim must receive payments that are the greater of 1) the full amount of the claim without interest, or 2) the cramdown amount with interest paid on the secured portion. *Carver* at 528.

a. Carver was reversed by the 11th Circuit's decision in *In re Dean,* 537 F3d. 1315 (11th Cir. 2008).

ii. *In re Wampler*, supra, finding that the Hanging Paragraph stripped a 910 claim of its secured status, held that such claim "may not include unmatured or… postpetition interest." Id. at 32.

a. The Wampler decision was reversed by the 10th Circuit Bankruptcy Appellate Panel in *In re Wilson*, 2007 Bankr. LEXIS 2784 (BAP 10th Cir. 2007) and *In re Jones*, 530 F3d. 1284 (10th Cir. 2008).

III. Equal Payments

a. §1325(a)(5)(B)(iii) requires equal monthly payments to creditors in confirmed Chapter 13 cases.

§1325(a)(5)(B)(iii) in pertinent part provides as follows:

(5) with respect to each allowed secured claim provided for by the plan—

(B)(iii) if—

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide the holder of such claim adequate protection during the period of the plan;

b. Two lines of cases have developed with respect to BAPCPA's requirement of post confirmation adequate protection as required under 11 U.S.C. §1325.

c. The majority of courts interpreting the "equal monthly amount" language in Section 1325(a)(5) have found that the provision mandates that equal monthly payments to the holder of an allowed secured claim begin with the first disbursement from the trustee following confirmation.

i. *Hamilton v. Wells Fargo Bank, N.A. (In re Hamilton),* 401 B.R. 539; 2009 LEXIS 401 (1st Cir. BAP); the debtor proposed a plan that would pay the creditor's claim in full over the life of the plan; however, the plan proposed a balloon payment in month 60. The creditor objected to the proposed treatment pursuant to §1325(a)(5)(B)(iii). The bankruptcy court sustained the creditors and objection and found that the plan violated the requirement of §1325 to provide for equal monthly payments. The Bankruptcy Appellate Panel affirmed the lower court's ruling and found that the "overwhelmingly, courts have held that by its very terms, a balloon payment … violates §1325(a)(5)(B)(iii)(I)."

1. See *In re Carman*, 2008 Bankr. LEXIS 2082, 2008 WL 2909863, at *1 (Bankr. D. Mass. July 25, 2008); *In re Wallace*, 2007 Bankr. LEXIS 4191, 2007 WL 3531551 (Bankr. M.D.N.C. Nov. 12, 2007); *In re Luckett*, 2007 Bankr. LEXIS 3638, 2007 WL 3125278, at *2; *In re Newberry*, 2007 Bankr. LEXIS 2351, 2007 WL 2029312, at *3-4 (Bankr. D. Vt. July 10, 2007); *In re Lemieux*, 347 B.R. 460 (Bankr. D. Mass. 2006)

ii. *In re Denton,* 2007 WL 1701921 (Bankr. S.D. Ga.), the Court held that creditors must receive equal monthly payments with the trustee's first post-confirmation disbursement. The court also stated, "[p]ost confirmation, § 1325(a)(5)(B)(iii)(I) reduces the amount of money for attorney's fess by locking in a fixed monthly payment on every allowed secured claim." The Court defined "periodic" as "payments that recur at regular intervals" and "periodic payments" refers to "all regularly-recurring post confirmation payments on an allowed secured claim". Applying that definition of "periodic payments" to the requirement for equal monthly amounts the Court determined that equal payments must start with the first post confirmation disbursement.

iii. See also *In re Wagner*, 342 B.R. 766 (Bankr. E.D. Tenn., 2006), the Court held that "equal monthly amounts" requires that the periodic payments to a secured creditor must begin in month one of the confirmed plan. In denying confirmation of the plan, the *Wagner* court found that the proposed treatment of the secured creditor violated Section 1325(a)(5)(B)(I) because "the Debtor's plan must provide for equal monthly payments to New Falls Corporation over the life of the plan until the lien claim is satisfied."

iv. The Sixth Circuit Court of Appeals adopted this position in *In re Nichols*, 440 F.3d 850, 857 n. 6 (6th Cir. 2006**)**. The *Nichols* court, although deciding a pre-BAPCPA case, noted that:

1. [t]he language in amended *section 1325(a)* of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, however, which addresses the components necessary to confirm a plan, reinforces the importance of maintaining the creditor's lien rights. Unlike the previous *section 1325*, the new language seems to require that payments made after confirmation be in equal amounts and keep pace with depreciation during the term of the plan.

c. The second line of cases allow attorney's fees to be paid before the equal monthly payments begin but require that creditors receive post-confirmation adequate protection payments until the attorney's fees are paid. The post-confirmation adequate protection payments are treated as

super priority claims and have priority over the attorney's fees in the event of a default in payment.

i. In *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Texas, 2006), the court held that the provision only requires that payments be equal monthly from the time payments begin until the time they are set to end. The court noted that §1325(a)(5)(B)(ii) used the language "as of the effective date of the plan"; yet the equal monthly payments provision, §1325(a)(5)(B)(iii), did not use such language. That section merely provides that "If… property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts." The court held that the payments must be level once begun and terminate when the creditor was fully paid. Although the Court held that equal monthly payments do not have to begin with the first post-confirmation disbursement, the Court found that creditors must continue to receive post-confirmation adequate protection payments until such time as the equal monthly payments begin. Additionally, the Court noted that the post-confirmation adequate protection payments have priority over debtor's counsel's fees.

    a. See *In re Bosse*, 407 B.R. 444 (Bankr. D. Me. 2009), debtor's counsel filed a fee application for post-confirmation services and requested that the fees be paid as an administrative expense prior to payment to creditors. The court approved the fee application, but refused to allow the payment of the fees to interrupt the monthly payments to the secured creditor pursuant to §1325(a)(5)(B)(iii) and the binding effect of confirmation pursuant to §1327.

ii. *In re Hill,* 2007 WL 499622 (Bkrtcy.M.D.N.C.), the court held that equal monthly payments need not begin with the first disbursement, however, the court's decision was conditioned on the creditor receiving post-confirmation adequate protection payments.

iii. *In re Dispirito, 371 B.R. 695 (Bankr.D. NJ 2007)*, the Court held that if debtor's counsel's fees were paid prior to adequate protection payments, the creditor would not be adequately protected. The court further held that adequate protection payments do not cease at confirmation and that the creditor's claim for adequate protection payments is classified as an administrative expense, pursuant to §503 and §507(b), that has priority over debtor's counsel's fees.

    1. To qualify for the "super-priority" status: 1) the adequate protection payments must be provided under §362, §363, or §364; 2) the creditor must have a claim pursuant to §507(a)(2) (which gives priority to a claim under §503(b), which claim is "the actual, necessary cost and expenses of preserving the estate"; 3) the adequate protection offered must be inadequate.

    2. The courts in *Dispirito* and *DeSardi* held a creditor with a lien on the vehicle is entitled to adequate protection under §363, and those creditors have claims under §507(a)(2) and §503(b). If the full amount of the debtor's attorney's fees are paid without any payment to the vehicle creditor then the amount of adequate protection would be $0.00 and that is not permissible.

IV. Plan Proposed in Bad Faith

In re Jackson, No. 14-20808-13, 2015 WL 345762 (Bankr. D. Kan. May 29, 2015), the Court held that although the Code permits a debtor to reduce interest rates and change the monthly payment on a 910-day car claim so long as the debt is paid in full, the plan lacked good faith because it reduced the interest rate and increased the monthly payment to pay the claim in full in five years rather than maintaining payments on original contract which would leave five payments at the end of the plan.

V. Surrender in Full Satisfaction of a 910 Vehicle Claim

a. §1325(a)(5)(C) allows a debtor to surrender collateral to a creditor to meet plan confirmation requirements.

> *(a) Except as provided in subsection (b), the court shall confirm a plan if:*
>
> *(5)(C) the debtor surrenders the property securing such claim to such holder.*

The minority—Cases allowing surrender in full satisfaction of claim

b. *In re Adams*, 403 B.R. 387; 2009 Bankr. LEXIS 1579 (Bankr. E.D. LA 2009), the Court found that the hanging paragraph is not limited to those situations where the debtor retains the vehicle. As a result, it also applies when the vehicle is surrendered.

c. See also *In re Payne*, 2006 Bankr. LEXIS 1696 (Bankr. S.D. Bankr. Ohio, 2006)(The plain meaning of the Hanging Paragraph is that it is to apply to all of §1325(a)(5)) and In re Pinti, 363 B.R. 369 (Bankr. S.D.N.Y. 2007)

   i. *In re Brown*, 2006 Bankr. LEXIS 1583 at 14 (Bankr. N.D. Florida, 2006)(holding that "[i]f the 910 claim of a creditor is fully secured upon a debtor's retention of the vehicle under §1325(a)(5)(B), then it is completely logical that it is also fully secured upon surrender under §1325(a)(5)(C).").

   ii. *In re Sparks*, 2006 Bankr. LEXIS 1589 (Bankr. S.D. Ohio, 2006)(finding the decision of *In re Payne* to be "well-reasoned").

The majority—Cases prohibiting surrender in full satisfaction of claim

d. Prior to the Circuit Court opinions, the leading case was *In re Particka*, 2006 Bankr. LEXIS 3160 (Bankr. E.D. Mich. 2006). The court held that because §506 only applies to property in which the estate has an interest, and property that is surrendered is not property of the estate, surrendered property should not be treated differently post-BAPCPA than it was pre-BAPCPA. Once property is surrendered, the estate has no interest and a creditor can proceed as it would under applicable state law.

   i. *In re Clark*, 2007 Bankr. LEXIS 590 (N.D. Missouri, 2007), which vacated an order previously entered by the same court, and held that after a vehicle was surrendered, it was no longer part of the bankruptcy estate and § 506 no longer applies to it, and neither does the hanging paragraph.

e. The 4th (District of Columbia, Maryland, North Carolina, South Carolina, Virginia, West Virginia), 5th (Louisiana, Mississippi, Texas), 6th (Kentucky, Michigan, Ohio, Tennessee), 7th (Illinois, Indiana, Wisconsin), 8th (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota), and 10th (Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming), 11th (Alabama, Florida, Georgia) Circuit Courts have weighed in on surrender in full satisfaction:

i. *Wright v. Santander Consumer USA Inc. (In re Wright)*, 07-1483, 2007 WL 1892502 (7th Cir. July 2007), the 7th Circuit Court of Appeals affirmed the bankruptcy court which held that the collateral could not be surrendered in full satisfaction of the debt. The court noted that, "Article 9 of the Uniform Commercial Code plus the law of contracts entitle the creditor to an unsecured deficiency judgment after surrender of the collateral…That unsecured balance must be treated the same as other unsecured debts under the Chapter 13 plan." The court found that the elimination of §506 through the hanging paragraph returns the parties to their contractual rights. See also, *In re Rodriguez*, BAP WW-07-1046-MoDJ, Bankr. Case No. 06-41999 (BAP 9th Cir. 2007); *In re Newberry*, Case No. 06-60241, 2007 WL 1308318 (Bankr. W.D.Tex. 2007).

ii. *In re Osborn*, 07-1726, (8th Cir. February 2008), the 8th Circuit Court of Appeals reversed the bankruptcy court, which was affirmed by the Bankruptcy Appellate Panel. The bankruptcy court held that the debtor can surrender a motor vehicle purchased within 910 days of the filing date in full satisfaction of the debt and that the creditor is not entitled to an unsecured claim for the deficiency balance. The court noted that the "trend" is to allow the creditor an unsecured deficiency claim. The court of appeal stated "nothing in § 1325(a)(5) provides that [the] 'allowed secured claim' is satisfied by the debtor choosing the surrender option in subparagraph (C). The court found that upon surrender, the parties are left to their state-law rights. Both state law and the contract gave the creditor the right to a deficiency balance and nothing in the bankruptcy codes disallows such a claim. See also, *In re Moore*, No. 07-1315, (8th Cir. February 2008).

iii. *AmeriCredit Financial Services, Inc. v. Robert Harris Long and Ginger Denise Long (In re Long)*, Case No. 06-6252, (6th Cir. March 2007), the Sixth Circuit Court of Appeals reversed the bankruptcy courts which held that collateral can be surrendered to a creditor in full satisfaction of the creditors claim. The Sixth Circuit Court of Appeals found that a "gap" exists in the hanging paragraph contained within 11 U.S.C. §1325 and applying a "literal interpretation of the statute would create an unintended and illogical result." The "gap" is caused by the code's failure to address what happens to a 910 claim when a debtor elects to surrender the collateral under 11 U.S.C. §1325(a)(5)(C) rather than retaining the collateral pursuant to 11 U.S.C. 1325 (a)(5)(B). The Sixth Circuit Court of Appeals elected to fill the "gap" with pre-BAPCPA case law, which allowed a creditor to file an unsecured claim for any deficiency balance remaining after the liquidation of the collateral, by applying "the common law principle of interpretation known as 'the equity of the statute'". The appellate court held, "the hanging paragraph was intended to protect secured creditors by eliminating debtors' ability to cram-down debt under §1325(a)(5)(B)."

a. The Sixth Circuit Court of Appeals diverged from the decisions of the Seventh and Eight Circuit Courts of Appeals on the issue of whether federal or state law should apply after the collateral is surrendered.

Both the Seventh and Eighth Circuits found that the elimination of §506 through the hanging paragraph returns the parties to their state court rights. The Sixth Circuit Court of Appeals found that a "national rule should be adopted and substituted for the widely varying procedural and substantive foreclosure, repossession and deficiency judgment rules provided for by the 50 states as "Congress has demonstrated an intent to federalize and make uniform the treatment of purchase-money security mortgages in bankruptcy".

iv. *DaimlerChrysler Financial Services, LLC, v. John Jason Ballard and Michelle Ballard, and Michael Justin Quick*, Case No. 07-5109 and 07-5112, (10th Cir. May 2008), The 10th Circuit Court of Appeals overturned the decision of the Bankruptcy Appellate Panel which held that the vehicle may be surrendered in full satisfaction of the claim. The 10th Circuit Court reasoned that "the hanging paragraph does not abrogate a creditor's right to asset a deficiency claim authorized by state law." The court determined that §1325(a)(5)(C) simply provides for the surrender of the collateral and there is no valuation component to the surrender option as there is for in §1325(a)(5)(B).

v. *Tidewater Finance Company v. Jennifer Lee Kenney and Frank J. Santoro*, Case No. 07-1664, (4th Cir. June 2008); the 4th Circuit Court reversed an opinion from the Bankruptcy Court that allowed the vehicle to be surrendered in full satisfaction of the debt. The 4th Circuit has joined the "growing number of circuit courts" that recognize the creditor's right to assert an unsecured claim pursuant to state law. Once the debtor surrenders the collateral the court held the parties are left to their contractual rights according to state law. "Because §502 directs bankruptcy courts to allow claims stemming from contractual debts and neither diminishes nor disapproves of secured claims, it is evident to us that such deficiency claims must be permitted to the extent that state law allows for them."

vi. *DaimlerChrysler Financial Services Americas LLC v. Miller,* Case No. 07-20542 (5th Cir. June 2009), the court ruled that the majority view that a debtor can surrender a motor vehicle in full satisfaction of the debt, has been "rejected by every circuit court of appeals" and the majority view and now become the minority position, that is only applied at the bankruptcy court level. The court agreed with the 7th Circuit and found that §506 "is not the only source of authority for a deficiency judgment". The court determined that the deficiency claim is supported by state law and therefore, the debtor may not surrender the vehicle in full satisfaction of the debt.

VI. PMSI/NEGATIVE EQUITY CASES:

Three lines of cases have developed with respect to whether a 910 claim is subject to bifurcation when the transaction includes the financing of negative equity.

a. The majority position, adopted by all of the Circuit Courts that have addressed the issue, hold that the entire claim is afforded the protections of section 1325(a) and cannot be bifurcated into secured and unsecured claims.

i. *Nuvell Credit Corporation v. Westfall*, Case No. 08-4530, (6th Circuit 2010), the 6th Circuit reversed the decision of the lower courts, which held that the negative equity did not qualify as a purchase money security interest and therefore that

portion of the debt was subject to cramdown. The court stated, "[t]he circuit opinions addressing this issue (now numbering seven) uniformly adopt the creditor-friendly position in holding that negative equity qualifies as a PMSI protected from cramdown by the hanging paragraph." The court found that negative equity meets both the "price" and "value given to enable' prongs of the PMSI definition as stated in the U.C.C. The 6th Circuit held that negative equity did not destroy the purchase money security interest as the financing of the negative equity "enabled" the debtor to acquire rights in the new vehicle. The court agreed with the reasoning set forth in *In re Dale*, Case No. 08-20583, (5th Cir. 2009), wherein the 5th Circuit found that that "price" and "value give" are not limited to the "price tag of the vehicle" and that "price" and "value given" can include additional items not normally associated with the common understanding of price, which includes negative equity.

ii. *General Motors Acceptance Corporation v. Peaslee (In re Peaslee)*, 585 F.3d. 53 (2nd Cir. 2009), the 2nd Circuit Court of Appeals affirmed the U.S. District Court's opinion and held that the negative equity portion of the transaction was not subject to bifurcation. The 2nd Circuit certified the question surrounding negative equity to the New York Court of Appeals and the Court of Appeals concluded that the purchase money security interest included the negative equity. The entire claim, including the portion of the claim attributable to the payoff of negative equity on the debtor's trade-in, qualified as a purchase money security interest and thus was not subject to cramdown. The court found that the price of the vehicle includes "obligations for expenses incurred in connection with acquiring rights in the collateral," and further explained that a purchase money security interest requires a "close nexus" between the acquisition of the vehicle and the secured obligation. Consequently, charges incurred to pay off the negative equity in another vehicle "enable the debtor to acquire rights in the new vehicle". The court also noted that one of the reasons for the creation of the hanging paragraph was to protect creditors from the abuse of cramdown.

iii. *Steven Michael Graupner v. Nuvell Credit Union*, Bankr. Case No. 06-40237, D.C. Case No. 07-00037-CV-CDL-4 (11th Cir. 2008); the bankruptcy court, after reviewing the Georgia Motor Vehicle Sales Finance Act, determined that the negative equity component of the transaction was part of the cash sales price and the creditor had a purchase money security interest in the full amount of the claim. The bankruptcy court's ruling was affirmed by the United States District Court and the debtor appealed this matter to the 11th Circuit Court of Appeals. The 11th Circuit affirmed the lower court's decision. The court determined that negative equity constitutes purchase money and relied on the comments to section 9-103 of the UCC. Comment 3 in particular provides that 'obligations for expenses incurred in connection with acquiring rights in the collateral' can be included in the term price. The court further explained that there is a "close nexus" between the negative equity and the debtor's purchase of the new vehicle. The court also noted that one BAPCPA's goals was to provide additional protection to secured creditors and that it would be absurd to interpret the hanging paragraph in such a manner that conflicts with that goal.

iv. *In re Price*, 562 F.3d 618 (4th Cir. 2009), the 4th Circuit determined that the financing of the negative equity did not destroy the purchase money security interest as the financing of the negative equity "enabled" the debtor to acquire rights in the new vehicle and was "integral" to the acquisition of the new vehicle.

The court also noted that any other interpretation would contradict Congress' clear intent in protecting secured car lenders.

v. *In re Ford,* Case No. 08-3192 (10th Cir. 2009), the 10th Circuit held that the financing of negative equity was part of a single transaction and the financing of negative equity is required to discharge the lien on the vehicle and thereby allow the creditor to realize the benefit of the bargain. The financing of the negative equity is therefore an "expense incurred in connection with acquiring rights" in the new vehicle. As a result, the claim was not subject to bifurcation.

vi. *In re Dale*, Case No. 08-20583, (5th Cir. 2009), the 5th Circuit adopted the "emerging majority position" and ruled that the financing of negative equity does not destroy the purchase money security interest and therefore the claim is not subject to bifurcation. The 5th Circuit dispelled the notion that "price" and "value give" are limited to the "price tag of the vehicle" by relying on the Texas' version of the UCC. Comment 3 of the UCC states that "price" and "value given" can include additional items not normally associated with the common understanding of price. Those items include, "other similar obligations", which includes negative equity, gap insurance, and extended warranties.

    a. *See also, Ford Motor Credit v. Sanders (In re Sanders)*, 403 B.R. 435 (U.S. Dist. W.D. Tex. 2009)

vii. *In re Mierkowski*, Case No. 08-3866, (8th Cir. 2009), the Court agreed with the 11th Circuit and the 4th Circuit and found that the financing of negative equity did not subject the claim to bifurcation. The court ruled that financing of the negative equity was an "integral part of" and "inextricably intertwined" with the purchase transaction.

viii. *In re Howard,* Case No. 09-3181, (7th Cir. 2010), the 7th Circuit joined the ever expanding majority and held that the negative equity was protected by the hanging paragraph and that the claim was not subject to bifurcation. The court determined that negative equity was akin to "obligations for expenses incurred in connection with acquiring rights in the collateral."

ix. *In re Daniel and Kathleen Tyson*, Case No. 09-01179, (Bankr. W.D. of Mich. 2009), the Court found that the financing of negative equity did not destroy the purchase money security interest and that as a result, the claim could not be bifurcated into secured and unsecured portions. The court reached this result not by analyzing state law, as most other courts have done, but by simply relying on the plain meaning of the hanging paragraph. The hanging paragraph requires, "*a* purchase money security interest securing the *debt* that is the subject matter of the claim." While most courts focused on the definition of purchase money security interest, Judge Hughes focused on the term "debt". The "debt" is the right to receive payment on account of the contract, which includes the entire amount financed (including the negative equity), and this "debt" is secured by a purchase money security interest in the vehicle. Accordingly, the claim could not be bifurcated. The hanging paragraph lacks language that requires the indebtedness to be secured "only" by a purchase-money security interest, by its terms, the hanging paragraph prohibits the bifurcation of *any* claim if the debt is secured by a purchase money security interest.

a. *In re Shockley*, No. 07-15884, 2008 Bankr. LEXIS 2550, at *6 (Bankr. S.D.Ohio Apr. 29, 2008) ("The Debtors' interpretation requires the addition of the word 'entire' as a modifier of the word 'debt.'

x. *In re Petrocci*, 370 B.R. 489, 2007 WL 1813217 (Bankr. N.D.N.Y. 2007); *In re Cohrs*, 2007 WL 2050980 (Bankr. E.D.Cal. 2007); *In re Wall*, Case No. 07-50204 (Bankr. W.D.N.C. 2007); *In re Burt*, Case No. 07-23193 (Bankr. D.Utah 2007); *In Re Pharis*, Case No. 07-30527 (Bankr. W.D.LA 2007); *In re Honeycutt*, Case No. 06-48771 (Bankr. E.D.Mich. 2006); *In re Wiser*, Case No. 07-40714 (Bankr. W.D.Mo. 2007).

b. The second line of cases has applied the "transformation rule". These cases held that the inclusion of negative equity destroys the purchase money security interest and the claim can be bifurcated into secured and unsecured claims.

i. *See In re Look*, 383 B.R. 210 (Bankr. D. Me. 2008)

c. The third line of cases applies the dual status rule, which provides the portion of the claim attributable to the negative equity will be treated as unsecured, while the remaining claim is secured (PMSI).

i. *See Americredit Fin. Servs. v. Penrod (In re Penrod)*, 392 B.R. 835 (B.A.P. 9th Cir. 2008); *In re Johnson*, 380 B.R. 236 (Bankr. D. Or. 2007);

ii. *Americredit Fin. Servs. v. Penrod (In re Penrod,* Case No. 08-60037, (9th Circuit July 2010). The 9th Circuit Court of Appeals determined that the negative equity is not an expense incurred in acquiring the new vehicle, but rather it is a payment of an antecedent debt. The court held that the negative equity was not is not "closely connected' with the purchase of the new vehicle. The court also ruled that negative equity does not fall under the "other similar obligations" as stated in the U.C.C. because those obligations are "transactional costs related to the purchase." The court remanded the case to the bankruptcy court for further proceedings relating to how the down payment and rebate should factor into the claim amount.

VII. Personal Use

a. *In re Strange*, 2010 Bankr. LEXIS 241 (Bankr. M.D. Ga. 2010), the court noted that "the relevant time period for analyzing the personal use question is the time of acquisition of the vehicle at issue" The court further held that most courts have concluded that "personal use" in the context of the hanging paragraph simply means any non-business use. See also *In re Lorenz*, 368 B.R. 476, 485 (Bankr. E.D. Va. 2007); *In re Phillips*, 362 B.R. 284, 303-04 (Bankr. E.D. Va. 2007).

i. *In re Pearson*, No. 07-00478, 2008 Bankr. LEXIS 743, 2008 WL 687058 (Bankr. E.D.N.C. Mar. 7, 2008) (car purchased for the use of non-filing spouse was not a 910 car, even when the debtor later became its sole user).

b. *In re Jackson*, 338 B.R. 923 (Bankr. M.D. Ga. 2006), the court stated "personal use of the debtor is distinct from family or household use, noting that "when Congress wants to include family or household use within the scope of a statue, it knows how to do so." The court looked to who was the primary driver of the vehicle to determine if it was acquired for the "personal

use of the debtor". Because the vehicle was acquired for the non-filing spouse who was also the primary user of the vehicle, it was not acquired for the personal use of the debtor.

c. *In re Solis*, 356 B.R. 398 (Bankr. S.D. Texas 2006), the court adopted the "significant and material use" test and held that a vehicle used exclusively by a non-filing party cannot enjoy the protections of the hanging paragraph. The court adopted "its best estimate of a reasonable conclusion," and set forth the requirement that the "acquirer intended a debtor's use to be significant and material." Essentially adopting a totality of the circumstances test to measure or quantify the debtor's use of a vehicle.

    i. See I*n re Matthews*, 378 B.R. 481, 490 (Bankr. D.S.C. 2007); *In re Smith*, No. 07-30201, 2007 Bankr. LEXIS 1872, 2007 WL 1577668, (Bankr. S.D. Texas May 29, 2007)

d. *In re Phillips,* 362 B.R. 284 (Bankr. E.D. Va. 2007), the court found that the vehicle used to commute, drive the children, and performing household errands was protected from bifurcation.

e. *In re Lorenz,* 368 B.R. 476 (Bankr. E.D. Va. 2007), the court determined that the debtor's vehicle, purchased for personal and business use, was not subject to bifurcation.

f. *In re Cross,* 376 B.R. 641 (Bankr. S.D. Ohio 2007) the court ruled that a vehicle that used by both spouses as their own vehicle could not be crammed down.

VIII. Adequate Protection

a. Section 1326(a)(1) provides that "unless the court orders otherwise, the debtor shall commence making payments no later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount – A) proposed by the plan to the trustee… and C) that provides adequate protection directly to a creditor holding an allowed claim secured by personal property to the extent the claim is attributable to the purchase of such property by the debtor for that portion of the obligation that becomes due after the order for relief, reducing the [plan payments to the Trustee] by the amount so paid and providing the trustee with evidence of such payment, including the amount and date of payment."

b. The court in *In re Beaver*, 337 B.R. 281, 284 (Bankr. E.D. N.C., 2006) refused to hold that this provision requires payments directly to the creditor in all situations; the court held that "if the debtor has chosen another method of providing adequate protection, no pre-confirmation direct payments are needed." The court noted that direct cash payments are only one way to provide adequate protection, not "the exclusive method," and if Congress had intended to change that well-established practice, it would have done so expressly. Id. at 284-285.

    i. In its first footnote, the court added that courts have discretion to alter any requirement of direct payments according to §1326(a)(1), which begins "unless the court orders otherwise…" Id. at 284.

    ii. See also *In re Simmons*, 2006 Bankr. LEXIS 1163 (Bankr. D. S.C., 2006)(holding that even if the debtor is required by the statute to make payments directly to the creditor, such requirement is irrelevant if the court orders otherwise).

c. In *In re Clay*, 339 B.R. 784 (Bankr. D. Utah, 2006), the court held that §1326(a)(1) manifested Congressional intent to allow debtors to continue to make contractual payments directly to creditors and that because the debtor is required make adequate protection payments directly to the creditor under §1326(a)(1)(C), the debtor should be able to make the direct payments after confirmation. Id. at 788.

d. In *In re Brown*, 348 B.R. 583 (Bankr. N.D. Georgia, 2006), the court held that pre-petition adequate protection payments were meant to protect against depreciation and should be applied to principal only, not to interest.

e. See also *In re Singer*, 2007 Bankr. LEXIS 1439 (E.D. Penn., 2007); In Singer, a creditor repossessed a vehicle pre-petition, the court held that the creditor's continued retention of the vehicle post-petition was a willful violation of the automatic stay; the court also held that no adequate protection was required because of the Creditor's substantial equity cushion in the property.

REFLECTIONS ON BAPCPA TEN YEARS AFTER

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REFLECTIONS ON BAPCPA TEN YEARS AFTER.

Filing rates are down nearly 40 %.
Dividends from Chapter 13 plans are higher than ever.

It would be easy to say that the law achieved the objectives of its supporters and leave it at that. The fact is that filing rates for Chapter 7 cases are reflective primarily of the lending appetite of credit issuers, and filing rates of Chapter 13 are driven primarily by default rates on loans secured by real estate which the debtor wishes to retain.

From 2009 through 2013 issuers of unsecured credit significantly reduced their origination programs. This was due to a variety of factors including regulatory oversight primarily related to the CFPB. Beginning in 2014 and continuing today, traditional lenders (banks) believe that the regulatory onslaught has subsided and that the economy has improved enough to resume "normal" lending criteria.

Over the same period of time, various programs such as HARP (designed to help struggling home owners) coupled with cases where mortgages were forgiven or modified based on the omnibus mortgage settlement have further reduced some Chapter 13 cases.

As for the mechanics of the statute itself, I think it is worth noting some of the challenges perceived by many that did not materialize. Specific challenges such as:

1. Implementing IRS standards into the process.
2. Creating a process for application and approval of Credit Counseling and Debtor Education Agencies. (The so called Ticket in and Ticket Out)
3. Creation of and execution of policy by the EOUST in order to enforce the "abuse" provisions of Section 707(b).

The following is from the EOUST Annual Report for FY 2014.

In fiscal year 2014, approximately 12 percent of chapter 7 debtors had income above their state median. Of the 68,000 cases filed by above median income debtors, about 3,900 (6 percent) were "presumed abusive" under the means test. Of those presumed abusive cases that did not voluntarily convert to chapter 11 or 13 or dismiss, we exercised our statutory discretion to decline to file a motion to dismiss in about 68 percent of the cases after consideration of the debtor 's special circumstances, such as recent job loss, that justified an adjustment to the current monthly income calculation.

It is important to note that even if a case is not presumed to be abusive under the means

test, the law permits the USTP to take action under a bad faith or a totality of the circumstances analysis.3 For example, the case of a debtor who retains luxury items, incurs debt on the eve of bankruptcy, or fails to disclose fully the information required by the Bankruptcy Code and Rules might be subject to dismissal.

Due to the USTP's judicious use of its statutory discretion, Congress' purpose of establishing an objective basis for allowing chapter 7 relief without creating unfair results for those with special circumstances has been largely achieved.

Credit Counseling and Debtor Education

Individual debtors must receive credit counseling before filing for bankruptcy relief and personal financial management instruction before receiving a discharge of debts. These requirements are intended to ensure individuals make informed financial decisions before entering bankruptcy and to provide debtors with the tools to avoid future financial catastrophe when they exit bankruptcy.United States Trustees are responsible for the approval of providers who meet statutory qualifications to offer credit counseling and debtor education services to debtors. There currently are about 140 approved credit counseling agencies and 220 approved debtor education providers.

Debtor Audits

To help ensure that the Program effectively carries out its statutory duties and achieves its mission, the USTP has substantially enhanced its data collection and internal evaluation activities. Among other projects, and as required by statute, the Program contracts with private auditors to verify the financial information provided by consumer debtors in their bankruptcy filings. Reports of any "material misstatements" are then filed with the court.

In fiscal year 2014, 23 percent of consumer debtor cases with completed audits contained material misstatements. The rate of material misstatements has not changed appreciably in the past six years. In cases selected for audit because a debtor's income or expenses vary from the norm ("exception" audits), the rate of material misstatements is 10 to 15 percent higher than in random audits. Due to budgetary constraints, the number of audits conducted each year has varied and debtor audits have been suspended at various times over the past few years.

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[2] By statute, disabled veterans whose debts were incurred primarily while on active duty or while performing a homeland defense activity are excepted from the means test. In addition, the National Guard and Reservists Debt Relief Extension Act of 2011 exempts from the means test qualifying reservists and National Guard debtors called to active duty or to perform a homeland defense activity for not less than 90 days, although this exemption is set to expire on December 19 2015.

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