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NOTES

“Hanging” on to *Till*: Interpretations of BAPCPA’S Hanging Paragraph

I. INTRODUCTION

Bankruptcy law has significantly changed in the last two years due to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”).¹ An already complex and challenging area of law, bankruptcy has become even more so, as debtors and creditors begin to question how their rights have changed. For courts, one of the most perplexing issues is whether the standards and interpretations that were established in pre-BAPCPA bankruptcy cases are still applicable today. As courts have examined the potential effects of the new legislation, different opinions have emerged, leaving even more uncertainty for interested parties.

One of the specific uncertainties that has developed involves the interpretation of BAPCPA’s so-called “hanging paragraph,”² which provides preferential treatment in the Chapter 13 bankruptcy process for automobile creditors with collateral-backed claims that have been outstanding for less than 910 days.³ While it is generally agreed that Congress inserted this provision to benefit these creditors,⁴ a significant debate has arisen as to what these benefits are supposed to be.

In discussing the various interpretations of the hanging paragraph that have emerged, this Summary will demonstrate that a strong majority of courts have chosen to favor secured creditors, at the expense of debtors and unsecured creditors. Because this interpretation favors a small segment of the lending industry, and because it is inconsistent with BAPCPA’s purpose, this Summary concludes that this majority view is mistaken.

1. Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

2. 11 U.S.C. § 1325(a)(*) (Supp. V 2005).

3. *See id.*

4. *See infra* note 156 and accompanying text.

II. LEGAL BACKGROUND

A. *History of American Bankruptcy Law*

Although the framers of the U.S. Constitution were not exceedingly concerned with the topic of bankruptcy at the Constitutional Convention, they nonetheless recognized the need to reserve the power to legislate in this arena for the federal government.⁵ Thus, the Constitution grants Congress the ability “[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”⁶ Despite having this authority to establish federal bankruptcy laws, Congress did not enact any bankruptcy laws until 1800.⁷ In the interim, the states enacted their own bankruptcy statutes “in an ad hoc, fitful manner.”⁸

The first federal bankruptcy law, the Bankruptcy Act of 1800, like all of the early bankruptcy laws, was short-lived.⁹ The Act established a system of involuntary bankruptcy initiated by creditors, and its provisions were designed to protect merchants by allowing them to discharge debtors who were unable to pay.¹⁰ Several years after the enactment, a new Democratic-Republican party came to power in Congress,¹¹ and the economy significantly strengthened following a period of economic crisis in the late eight-

5. See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995) (discussing the concerns of the framers regarding bankruptcy and the relatively meager debate on the issue). Underlying this recognition were “problems that varying and discriminatory state laws [had] caused for nonresident creditors and interstate commerce in general.” *Id.*

6. U.S. CONST. art. I, § 8, cl. 4.

7. Tabb, *supra* note 5, at 13.

8. John Fabian Witt, *Narrating Bankruptcy/Narrating Risk*, 98 NW. U. L. REV. 303, 309 (2003) (discussing the ineffectiveness of the attempted bankruptcy legislation by the states prior to and during the Nineteenth Century). In 1819, the United States Supreme Court struck down a New York statute “as unconstitutional under the Contracts Clause.” *Id.* (citing *Sturges v. Crowninshield*, 17 U.S. (1 Wheat.) 122 (1819)). However, eight years later, the Supreme Court held “that states could enact prospective bankruptcy legislation, at least in the absence of countervailing congressional legislation.” *Id.* (citing *Ogden v. Saunders*, 25 U.S. (1 Wheat.) 213 (1827)). Despite this judicial mandate, states continued to inconsistently enact differing bankruptcy-related statutes, or simply failed to enact them altogether. *Id.*

9. *Id.* at 314.

10. *Id.* at 312. The fact that the Bankruptcy Act of 1800 strongly favored merchants as opposed to debtors reflects the early Anglo-American view of bankruptcy. *Id.* Early bankruptcy law in England “singl[ed] out certain ‘acts of bankruptcy’ as grounds for the appointment of a trustee to distribute a debtor-merchant’s assets among the creditors.” *Id.*

11. *Id.* at 314.

eenth century.¹² In December of 1803, the Act was repealed.¹³ Throughout the nineteenth century, the course of federal bankruptcy law followed a similar pattern: bankruptcy laws were enacted in times of economic hardship and then repealed when economic conditions improved or a new party took power.¹⁴

All of this changed when Congress passed the Bankruptcy Act of 1898, which “marked the beginning of the era of permanent federal bankruptcy legislation.”¹⁵ This Act, which remained in place for eighty years, was the first to extensively protect debtors by eliminating the restrictions that the previous laws had placed on their ability to discharge items in bankruptcy.¹⁶

The most significant of the various amendments to the Bankruptcy Act of 1898 was the Chandler Act of 1938,¹⁷ in which Congress established a remedy for individual wage earners to enter a form of Chapter XIII bankruptcy¹⁸ that was not as detrimental to their creditworthiness.¹⁹ Recognizing

12. Tabb, *supra* note 5, at 14. In 1792, an economic crash caused many to put pressure on Congress to enact a federal bankruptcy law. However, it was not until 1797 that the process began, following “another panic [which] caused widespread ruin and the imprisonment of thousands of debtors.” *Id.*

13. Witt, *supra* note 8, at 314.

14. In 1841, a new Bankruptcy Act was enacted, which provided for both voluntary and involuntary bankruptcies. *Id.* Similar to its predecessor, the law was enacted in response to an economic crisis (this time the economic crisis of 1837) and when the crisis diminished, the necessity for bankruptcy relief was not as widespread. *Id.* at 314-15. Thus, in March of 1843, the second Bankruptcy Act was repealed. *Id.* at 315. Then, however, the Civil War caused the United States to experience significant financial pressures and constituents pressured Congress to again enact a Bankruptcy Act in 1867. Tabb, *supra* note 5, at 19. This Act also contained provisions for both voluntary and involuntary bankruptcy. *Id.* Additionally, “[i]n keeping with the times, an oath of allegiance to the United States had to be taken by a petitioning bankrupt.” *Id.* Yet again, the economic strain caused by the war lightened and in 1878, the third Bankruptcy Act was repealed. *Id.*

15. Tabb, *supra* note 5, at 23. After the failure of the 1867 Bankruptcy Act, Americans were generally hostile toward the idea of another federal bankruptcy law. *Id.* However, two economic crises at the end of the nineteenth century demonstrated that a uniform federal law was necessary, as state laws were not able to resolve the pervasive financial problems caused by the crises. *Id.*

16. *Id.* at 24. The prior laws “had conditioned discharge upon the consent (or at least the failure to object) of a specified percentage of creditors and a minimum dividend payment to creditors.” *Id.*

17. *Id.* at 26-29.

18. The Bankruptcy Code creates six types of bankruptcy cases, which are named after the chapters in which they are described. See LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, BANKRUPTCY BASICS 7 (2006), available at <http://www.uscourts.gov/bankruptcycourts/bankbasics04606.pdf>. The first type, Chapter 7, “provid[es] for ‘liquidation’ (i.e., the sale of a debtor’s nonexempt property and the distribution of the proceeds to creditors).” *Id.* at 72. Chapter 13, on the other hand, gives an individual debtor the opportunity to keep his or her property

the destructive nature of "straight bankruptcy" to individual debtors,²⁰ Congress crafted a procedure that would "encourage wage earners to pay their debts in full . . . by offering two inducements: (1) avoidance of an adjudication of bankruptcy with its attendant stigma; and, at the same time, (2) temporary freedom during the extension from garnishments, attachments and other harassment by creditors."²¹

In 1978, Congress passed the Bankruptcy Reform Act of 1978, which expanded the old Chapter XIII procedure for handling the bankruptcies of individual debtors and further encouraged persons at risk of being forced into bankruptcy to take advantage of the new Chapter 13 provisions.²² Although many members of Congress advocated for both involuntary and voluntary Chapter 13 bankruptcy, Congress ultimately rejected the involuntary provision, arguing that it amounted to involuntary servitude.²³

In the end, while the Bankruptcy Reform Act of 1978 significantly improved bankruptcy law,²⁴ Congress amended the Act several times in recent

while making payments on the debt over a period of time. *Id.* at 73. Next, Chapter 11, is "[t]he chapter of the Bankruptcy Code providing (generally) for reorganization, usually involving a corporation or a partnership." *Id.* at 72. More specialized types of bankruptcy cases include Chapter 9 ("providing for reorganization of municipalities"), Chapter 12 ("providing for adjustment of debts of a 'family farmer,' or a 'family fisherman'"), and Chapter 15 ("dealing with cases of cross-border insolvency"). *Id.* at 72-73.

19. Tabb, *supra* note 5, at 29; *Perry v. Commerce Loan Co.*, 383 U.S. 392, 395 (1966).

20. "Straight bankruptcy" refers to Chapter 7 proceedings. Arpan K. Punyani, *Debtor-Filed Acknowledgments of Creditors' Claims: An Alternative Approach to Proof of Claim in Chapter 13*, 28 CARDOZO L. REV. 511, 515 n.28 (2006). In straight bankruptcy, "everyone lost--the creditors by receiving a mere fraction of their claims, the debtor by bearing thereafter the stigma of having been adjudged a bankrupt." *Perry*, 383 U.S. at 395.

21. *Perry*, 383 U.S. at 395.

22. Tabb, *supra* note 5, at 35. This Act was the first major overhaul of federal bankruptcy law since the Chandler Act in 1938 and completely replaced any remnants of the original bankruptcy laws passed in the late 1800s. *Id.* at 32. Additionally, "the 1978 enactment changed the numbering system for the chapters of the bankruptcy law from Roman numerals to Arabic numerals so that a corporation seeking financial rehabilitation will file for relief under Chapter 11, not Chapter XI." J. Scott Pohl & C. J. Wahrman, *Bankruptcy and Divorce in Kansas*, 29 WASHBURN L.J. 551, 552 n.5 (1990).

23. See Tabb, *supra* note 5, at 35; Robert B. Vandiver, Jr., Note, *Bankruptcy - A Review of Recent Court Decisions Applying Section 707(b) of the Bankruptcy Code to Chapter 7 Proceedings*, 22 MEMPHIS ST. U. L. REV. 549, 563 (1992).

24. Some of the positive changes made to the federal bankruptcy laws include: improving bankruptcy case administration, increasing the level of permissible attorney fees to encourage professional participation, and encouraging debtors to use Chapter 13 bankruptcy proceedings in lieu of the alternatives. Tabb, *supra* note 5, at 35-36.

years, in response to at least three developments: (1) inconsistent court decisions, (2) substantial increases in the number of bankruptcy filings, and (3) lobbying efforts by the credit industry and other special interest groups.²⁵

B. "Cramdown Creditors" and Till v. SCS Credit Corp.

The Bankruptcy Reform Act of 1978 codified the process by which individual debtors can enter Chapter 13 bankruptcy.²⁶ Under Chapter 13, individuals who file for bankruptcy are allowed to create a plan that establishes a schedule of payments to be made to creditors over a period of three to five years.²⁷ At the end of the period, the debtor may or may not have fully reimbursed all of his or her creditors.²⁸

Chapter 13's provisions instruct courts on how to confirm these plans.²⁹ Courts may confirm plans that involve a claim secured by collateral only if one of three options is satisfied.³⁰ The first option is that the secured creditor may approve the terms of the bankruptcy plan, even if the terms of that plan do not provide for full payment of the creditor's allowed secured claim.³¹ The second option allows the bankrupt debtor to give the collateral to the creditor to satisfy the debt.³² The third and final option requires that the bankruptcy plan provide for the repayment of the claim with an amount that is, at a minimum, equal to the present value of the sum that the creditor is entitled to collect under the terms of the agreement.³³

Prior to the decision in *Till v. SCS Credit Corp.*,³⁴ a nationwide split of authority existed regarding this third option, which was "commonly known as

25. *Id.* at 37. More specifically, Congress amended the federal bankruptcy laws in 1984, 1986, 1988, 1990, 1992, and 1994. *Id.* at 38-42.

26. See 11 U.S.C. §§ 1321-1330 (Supp. II 1978) (current version at 11 U.S.C. §§ 1321-1330 (2000)).

27. 11 U.S.C. § 1322(a), (d) (2000). The length of time that a particular debtor utilizes for his or her Chapter 13 plan is based on the monthly income of the debtor and his or her spouse. *Id.* § 1322(d).

28. *Id.* § 1322(a)(4).

[A] plan may provide for less than full payment of all amounts owed for a claim . . . only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

Id.

29. See *id.* § 1325. Court confirmation is required because it ensures that all interested parties are given notice of the impending proceeding and that all of their objections are addressed prior to approval. See *id.*

30. See *id.* § 1325(a)(5).

31. *Id.* § 1325(a)(5)(A); see *supra* note 28 and accompanying text.

32. 11 U.S.C. § 1325(a)(5)(C).

33. *Id.* § 1325(a)(5)(B).

34. 541 U.S. 465 (2004).

the ‘cramdown option’ because it [could] be enforced over a claim holder’s objection.”³⁵ The cramdown option’s controversy stems from the fact that many repayment plans provide for installment payments to secured creditors,³⁶ rather than a single, lump sum payment.³⁷ As a result of these installments, parties are forced to consider the payment of additional interest to the creditor to compensate for the payment delay.³⁸ Courts across the United States crafted various methods of determining the proper way to assign an interest rate.³⁹

In *Till*, the Supreme Court settled on a method of calculating interest known as the formula approach, which utilizes a “prime-plus” rate of interest.⁴⁰ To calculate this interest rate, one begins with the national prime rate⁴¹ and then adjusts that rate to reflect the fact that debtors in bankruptcy are more likely to default than debtors who are not having financial difficulties.⁴²

35. *Id.* at 468-69. Enforcement over the claim holder’s objection is possible because of the language used in the statute. More specifically, since one of the three options (not requirements) is creditor approval, the remaining options, surrender of collateral and the cramdown option, do not require creditor approval and may be enforced over the objections of the creditors. See 11 U.S.C. § 1325(a)(5).

36. Black’s Law Dictionary defines a “secured creditor” as “[a] creditor who has the right, on the debtor’s default, to proceed against collateral and apply it to the payment of the debt.” BLACK’S LAW DICTIONARY 397 (8th ed. 2004).

37. *Till*, 541 U.S. at 469. The ability of debtors to engage in such a payment scheme was legitimized by the United States Supreme Court in *Rake v. Wade*, 508 U.S. 464, 472 n.8 (1993).

38. *Till*, 541 U.S. at 469. The Supreme Court specifically noted that “the amount of each installment must be calibrated to ensure that, over time, the creditor receives disbursements whose total present value equals or exceeds that of the allowed claim.” *Id.*

39. *Id.* In the *Till* case alone, the Supreme Court was presented with four different methods of assigning an interest rate: the coerced loan approach, the presumptive contract rate approach, the cost of funds approach, and the prime-plus or formula approach. *Id.* at 469, 477-78.

40. *Id.* at 478-79.

41. The Supreme Court noted that the national prime rate “reflects the financial market’s estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default.” *Id.* at 479.

42. *Id.* The amount of the adjustment varies, according to the circumstances surrounding the bankruptcy, the type of property securing the claim, and the likelihood of adherence to the Chapter 13 plan. *Id.* Because the adjustment is not static, the Supreme Court recognized that it would be necessary for lower courts applying the formula to give debtors and creditors an opportunity to present evidence in favor of their preferred adjustment. *Id.* Factors that may be considered at this hearing include “the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan.” *Id.* The Court, in dicta, gave insight as to what type of risk adjustment it would allow when it stated, “[w]e do not decide the proper scale for the risk adjustment as the issue is not before us. The Bankruptcy Court in this case

Soon after *Till* came down, criticism of the decision emerged.⁴³ Two reviewers noted that, “[w]hen confronted with difficult economic and financial questions, courts often render decisions that bear little understanding of the actual workings of the market. Such decisions frequently introduce unintended consequences and confuse, rather than clarify, the issue at hand. This is the likely result of [*Till*].”⁴⁴ Specifically, critics argued that, because only a plurality of the justices on the Supreme Court signed on to the opinion, lower courts would experience difficulties in its application.⁴⁵ Criticism was also directed at the Supreme Court’s failure to establish exact standards for lower courts, such as whether the national prime rate should be fixed or variable,⁴⁶ and whether the burden of proving the amount of adjustment should be on the creditor or the debtor.⁴⁷

C. The Bankruptcy Abuse Prevention and Consumer Protection Act

Although the Supreme Court’s decision in *Till* seemed to definitively answer the question of how much interest creditors should receive under the cramdown option, it was not the end of the story. Even before *Till*, Congress had been reconsidering significant changes to the federal bankruptcy laws. The brainchild of this movement was the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”),⁴⁸ which became law on

approved a risk adjustment of 1.5%, and other courts have generally approved adjustments of 1% to 3%.” *Id.* at 480 (citations omitted).

43. See generally Ronald F. Greenspan & Cynthia Nelson, “*Untill” We Meet Again: Why the Till Decision Might Not Be the Last Word on Cramdown Interest Rates*, 23-Jan. AM. BANKR. INST. J. 48, 48 (2004) (criticizing *Till*, published seven months after the decision); Thomas J. Yerbich, *How Do You Count the Votes- Or Did Till Tilt the Game?*, 23-Aug. AM. BANKR. INST. J. 10, 10 (2004) (criticizing *Till*, published three months after the decision).

44. Greenspan & Nelson, *supra* note 43, at 48.

45. Yerbich, *supra* note 43, at 10. Critics asserted that “[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds.” *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306 (2003)). However, in *Till*, the justice who concurred on the narrowest grounds was Justice Thomas, who, contrary to all eight of the other justices, argued that the national prime rate should not be adjusted. *Id.*

46. Greenspan & Nelson, *supra* note 43, at 49.

47. Yerbich, *supra* note 43, at 59.

48. Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.). BAPCPA “became effective in stages, with a few provisions immediately effective while others were not effective until six months later, on Oct. 17, 2005.” Stephen W. Sather, *The Great Bankruptcy Rush of 2005 and Its Aftermath: The View from Texas*, 25-Sept. AM. BANKR. INST. J. 34, 34 (2006).

April 20, 2005.⁴⁹ BAPCPA was “intended to improve the bankruptcy system by deterring abuse, setting enhanced standards for bankruptcy professionals, and streamlining case administration.”⁵⁰

BAPCPA made several changes to the confirmation requirements for Chapter 13 bankruptcy plans.⁵¹ One of the most notable changes was the addition of an unnumbered “hanging paragraph” at the conclusion of § 1325(a), which 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 interest⁵² securing the debt that is the subject of the claim, the debt was incurred within the 910-day [sic] 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)

49. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act*, 79 AM. BANKR. L.J. 485, 485 (2005). Upon signing the bill, President George W. Bush noted,

America is a nation of personal responsibility where people are expected to meet their obligations. We’re also a nation of fairness and compassion where those who need it most are afforded a fresh start. The act of Congress I sign today will protect those who legitimately need help, stop those who try to commit fraud, and bring greater stability and fairness to our financial system. I’m honored to join the members of Congress to sign the Bankruptcy Abuse Prevention and Consumer Protection Act.

Id. at 567.

50. H.R. Rep. No. 109-31, at 47 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 118.

51. See 11 U.S.C. § 1325(a) (Supp. V 2005). For example,

[p]rior to BAPCPA, a debtor need only provide a secured creditor with lien retention and present value in order to retain its collateral under a Chapter 13 plan. BAPCPA expanded the lien retention requirement to specify the duration of the lien retention and to expressly state that the lien would remain in effect if the debtor failed to complete the plan.

In re Fleming, 339 B.R. 716, 721 (Bankr. E.D. Mo. 2006). Additionally, “BAPCPA added the requirements that periodic payments be in equal monthly amounts and that the payments be in an amount sufficient to provide adequate protection to the secured creditor.” *Id.*

52. A “purchase money security interest” is defined as

a security interest that is either (1) taken or retained by the seller of the collateral to secure all or part of its price or (2) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if that value is in fact so used. If a buyer’s purchase of a boat, for example, is financed by a bank that loans the amount of the purchase price, the bank’s security interest in the boat that secures the loan is a purchase-money security interest.

BLACK’S LAW DICTIONARY 1387 (8th ed. 2004).

acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.⁵³

In attempting to determine the purposes of this paragraph, courts have interpreted the hanging paragraph in different ways.⁵⁴ For these courts, some of the most troublesome issues have been: the assumption of a secured claim, issues of valuation, and attempts to determine legislative intent.⁵⁵ Further, in keeping with the Supreme Court's holding in *Till*, courts have found it necessary to tackle the question of whether so-called "910 creditors"⁵⁶ should receive an interest payment from the debtor and, if so, whether *Till*'s standard is still applicable.⁵⁷

III. RECENT DEVELOPMENTS

A. View of the Majority of Courts

An overwhelming majority of United States bankruptcy courts have determined that the purpose of the hanging paragraph contained in § 1325(a) is only to prevent the bifurcation, or "cramdown," of the claims of certain un-

53. 11 U.S.C. § 1325(a)(*). "Under this provision, if a Chapter 13 debtor purchased a motor vehicle within 910 days (which is approximately two and a half years) prior to filing for bankruptcy protection, § 506 does not apply to the claim held by the lender who has a purchase-money security interest in the vehicle." *In re Robinson*, 338 B.R. 70, 73 (Bankr. W.D. Mo. 2006).

Section 506, as referenced in § 1325(a)(*), allows for the bifurcation of an under-secured creditor's claim into a secured and unsecured portion, with the result that a creditor's claim is allowed as secured only to the extent of the value of the collateral securing the debt. This process of bifurcation is referred to as "cram-down."

In re Murray, 352 B.R. 340, 350 (Bankr. M.D. Ga. 2006).

54. Timothy D. Moratzka, *The "Hanging Paragraph" and Cramdown: 11 U.S.C. §§ 1325(A) and 506 After BAPCPA*, 25-May AM. BANKR. INST. J. 18, 18 (2006).

55. *Id.*

56. Many of the Bankruptcy Courts refer to creditors whose claims fall within the hanging paragraph exception as "910 creditors" or refer to the claims that fall within the exception as "910 claims," reflecting the fact that the creditor has not yet held the claim for 910 days, as proscribed in the statute. *See, e.g., In re Osborn*, 348 B.R. 500 (Bankr. W.D. Mo. 2006); *In re Taranto*, 344 B.R. 857 (Bankr. N.D. Ohio 2006); *In re Bufford*, 343 B.R. 827 (Bankr. N.D. Tex. 2006); *DaimlerChrysler Financial Services Americas, LLC v. Brown (In re Brown)*, 339 B.R. 818 (Bankr. S.D. Ga. 2006).

57. *In re Wampler*, 345 B.R. 730, 733 (Bankr. D. Kan. 2006).

der-secured creditors into a secured claim and an unsecured claim.⁵⁸ Additionally, the majority of bankruptcy courts have held that *Till*'s formula for determining the interest rate that Chapter 13 debtors must pay cramdown creditors is still applicable to 910 claims.⁵⁹

The courts holding this majority view have several arguments on which they base their ultimate conclusions. First, they argue that "[t]he existence of a claim is usually determined by non-bankruptcy substantive law, whereas valuation of that claim is determined by § 506."⁶⁰ Thus, even if § 506 of the bankruptcy code were not in existence, it would still be possible for a creditor to have a secured claim and a property right to the bankrupt debtor's assets under state law.⁶¹ Because the right is created under state law, the courts argue, the hanging paragraph *cannot* be construed to mean that all 910 claims are neither "allowed," nor "secured," as defined in § 506.⁶² This rebuts the assertion, put forth by the courts in the minority, that 910 claims are not subject to the § 1325(a)(5) requirements because the inapplicability of § 506 renders them neither "allowed" nor "secured."⁶³ As one court noted, "a creditor's secured status is not erased without any further adjudication merely because the hanging paragraph makes the § 506 valuation mechanism inapplicable to 910-day . . . claims."⁶⁴

In a similar argument, the majority of courts assert that § 506 was never intended to be a "definitional provision" for the terms "allowed" and "se-

58. See *In re Murray*, 352 B.R. at 350; *In re Montoya*, 341 B.R. 41, 44 (Bankr. D. Utah 2006); *In re Brown*, 339 B.R. at 820 (holding that "the unnumbered paragraph means only that the claims it describes cannot be bifurcated into secured and unsecured portions under § 506(a)"). If an under-secured claim were bifurcated, it would result in the claim being "allowed as secured only to the extent of the value of the collateral securing its debt." *In re Murray*, 352 B.R. at 350. Thus, the portion of the claim that is above and beyond the value of the collateral would be considered unsecured for the purposes of the Chapter 13 bankruptcy plan. See *id.*

59. See *In re Murray*, 352 B.R. at 354 (holding that "[s]ecured claims qualifying under § 1325(a)(*) shall be paid at the interest rate set forth in *Till* so as to satisfy the present value requirement of § 1325 (a)(5)"); *In re Brown*, 339 B.R. at 822 (holding that "while the 910 [c]reditors are entitled to fully-secured claims, the applicable interest rate necessary to meet the present value requirement of § 1325(a)(5)(B)(ii) is governed by *Till v. SCS Credit Corp.*"); *In re Brooks*, 344 B.R. 417, 422 (Bankr. E.D.N.C. 2006) (holding that "*Till* has not been abrogated by BAPCPA and it is the appropriate rate of interest to apply to 910 claims").

60. *In re Montoya*, 341 B.R. at 44.

61. *In re Brooks*, 344 B.R. at 422 (quoting *Butner v. United States*, 440 U.S. 48, 54 (1979)).

62. *In re Montoya*, 341 B.R. at 44.

63. *Id.* The requirements contained within § 1325(a)(5) are only applicable "with respect to each allowed secured claim provided for by the plan." 11 U.S.C. § 1325(a)(5) (Supp. V 2005).

64. *In re Murray*, 352 B.R. 340, 352 (Bankr. M.D. Ga.) (quoting *In re Montoya*, 341 B.R. at 44).

cured.”⁶⁵ To support this assertion, the courts turn to a 1992 case, *Dewsnup v. Timm*.⁶⁶ In *Dewsnup*, the Court agreed with the creditor, who argued:

that the words “allowed secured claim” in § 506(d) need not be read as an indivisible term of art defined by reference to § 506(a), which by its terms is not a definitional provision. Rather, the words should be read term-by-term to refer to any claim that is, first, allowed, and, second, secured.⁶⁷

With this precedent, the courts assert, for example, that it is “neither necessary nor appropriate to contort § 506(a) into a definitional provision. Other Code sections address whether a claim is ‘allowed’ and ‘secured’” for the purposes of satisfying § 1325(a)(5).⁶⁸

Third, the majority of bankruptcy courts assert that the grammatical structure of the hanging paragraph supports the proposition that 910 creditors are entitled to receive the present value of the amount owed on the claim (the rule established in 11 U.S.C. § 1325(a)(5)).⁶⁹ More specifically, “[t]he hanging paragraph begins with the phrase: ‘For purposes of paragraph (5).’ To give meaning to this phrase, the court *must* consider § 1325(a)(5) when contemplating confirmation.”⁷⁰ Thus, if the debtor’s argument that § 1325(a)(5) is not applicable to 910 claims were adopted, there would be no purpose for the opening phrase.⁷¹

A final argument commonly made by the majority of bankruptcy courts is that the legislative history of BAPCPA makes clear that the hanging paragraph was only intended to prevent 910 claims from being bifurcated in a Chapter 13 plan.⁷² As evidence of this assertion, one court points out that the House Report on BAPCPA explained that the new law would better protect creditors because it would “*include a prohibition against bifurcating a secured debt* incurred within the 910-day period preceding the filing of a bankruptcy case if the debt is secured by a purchase money security interest in a

65. *In re Brown*, 339 B.R. 818, 821 (Bankr. S.D. Ga. 2006).

66. 502 U.S. 410 (1992).

67. *Id.* at 415.

68. *In re Brown*, 339 B.R. at 821. “A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.” 11 U.S.C. § 502(a) (2000). “11 U.S.C. § 101 establishes that a debt is ‘secured’ by a lien.” *In re Brown*, 339 B.R. at 821 (citing 11 U.S.C. § 101(37), which provides that “[t]he term ‘lien’ means charge against or interest in property to secure payment of a debt or performance of an obligation”).

69. See *In re Murray*, 352 B.R. at 352; *In re Montoya*, 341 B.R. at 44.

70. *In re Montoya*, 341 B.R. at 44.

71. *Id.*

72. *In re Murray*, 352 B.R. at 352.

motor vehicle acquired for the debtor's personal use."⁷³ Further, this court noted that the members of Congress who did not want to see BAPCPA enacted into law argued that the law "would largely eliminate the possibility of loan bifurcations in chapter 13 cases."⁷⁴

According to the majority of United States bankruptcy courts, the preceding four arguments demonstrate that the purpose of the hanging paragraph is to establish that 910 claims cannot be the subject of bifurcation. However, as previously noted, the majority of courts do not completely side with creditors, as most have found that *Till*'s interest rate formula must still be applied. More specifically, creditors have argued that BAPCPA effectively overruled *Till*, and, as a result, they are entitled to higher interest rates.⁷⁵ However, most courts have explicitly disagreed with these creditors, noting that 11 U.S.C. § 1322(b)(2) establishes that a Chapter 13 plan may "modify the rights of holders of secured claims."⁷⁶ In fact, the courts assert that, if "Congress [had] intended to create an absolute safe-harbor for secured creditors holding qualifying claims under § 1325(a)(*), like it [had] provided for home mortgages under § 1322(b)(2), Congress could have done so."⁷⁷ Additionally, the majority of courts note that, even though *Till* had only recently been decided by the Supreme Court, no mention of the case was made in the legislative history of BAPCPA.⁷⁸

B. View of Courts in the Minority

1. *In re Carver* and *In re Green*

In the first of several minority opinions regarding BAPCPA and the treatment of 910 claims, Judge James D. Walker, Jr. held that the hanging paragraph contained in § 1325(a) of BAPCPA renders 910 claims unsecured.⁷⁹ Judge Walker was faced with a typical 910 claim: Richard and Ashley Carver filed a Chapter 13 bankruptcy petition and included in their plan a proposal to repay in monthly installments a debt of \$15,000 owed to HSBC Auto Finance for a 2004 PT Cruiser worth \$14,500.⁸⁰ The Carvers proposed to pay \$250 to HSBC each month until the debt was repaid, without accruing

73. *Id.* (quoting H.R. Rep. No. 109-31, at 17 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 103 (emphasis added in *Murray*)).

74. *Id.* (quoting H.R. Rep. No. 109-31, at 554 (2005), as reprinted in 2005 U.S.C.C.A.N. 88 (emphasis added in *Murray*)).

75. *Id.* at 353-54.

76. 11 U.S.C. § 1322(b)(2) (2000).

77. *In re Murray*, 352 B.R. at 354.

78. *Id.*

79. *See In re Carver*, 338 B.R. 521, 524 (Bankr. S.D. Ga. 2006).

80. *Id.* at 522.

interest.⁸¹ HSBC objected to the plan, arguing that it was entitled to receive interest payments in addition to the installment payments.⁸²

Recognizing that the issue at hand turned on the interpretation of the hanging paragraph in § 1325(a), Judge Walker acknowledged that “[t]he plain language of the hanging paragraph simply states that § 506 does not apply to 910 claims when determining the treatment of secured claims.”⁸³ He then established that, because § 506 provides for the division of collateralized debts into secured and unsecured claims, a claim cannot be considered a “secured claim” for the purposes of BAPCPA without applying § 506.⁸⁴ According to Judge Walker, if a claim is not secured for purposes of BAPCPA, it cannot be subject to the present value requirement of 11 U.S.C. § 1325(a)(5)(B)(ii).⁸⁵

Then, Judge Walker addressed several opinions that endorsed the view of the majority of courts. In analyzing these opinions, Judge Walker determined that, in all of the cases, “the courts have assumed that the 910 claim is fully secured, without offering any rationale for that assumption.”⁸⁶ Further, Judge Walker asserted that, instead of inserting the controversial hanging paragraph in § 1325(a), Congress could have amended § 506 to provide for the full inclusion of 910 claims in its definition of “secured claims.”⁸⁷

81. *Id.*

82. *Id.* HSBC specifically requested an interest rate of twelve percent, although it is unclear what this figure was based on. *Id.* Based on the claims of creditors in other cases, it is likely that this was the contractual interest rate. *See, e.g., In re Wampler*, 345 B.R. 730, 732 (Bankr. D. Kan. 2006) (“[T]he Creditors assert that Title 11 U.S.C. § 1325(a) requires their allowed claims be paid in full at the contract rate of interest over the duration of the debtors’ Chapter 13 plan.”); *In re Brooks*, 344 B.R. 417, 418 (Bankr. E.D. N.C. 2006) (creditor “filed an objection to the debtor’s proposed plan asserting that the ‘hanging paragraph’ after § 1325(a)(9) entitles it to payment in full with interest at the contract rate”).

83. *In re Carver*, 338 B.R. at 523-24.

84. *Id.* at 524.

85. *Id.* Judge Walker also noted that Congress had the authority to specifically deem other claims “secured” for the purposes of BAPCPA in sections other than 506(a), but it failed to do so. *Id.* He argued that “[s]uch an intention cannot be inferred by the instruction of the hanging paragraph that ‘section 506 should not apply’ to certain kinds of claims. If such a claim is to be treated as a ‘secured claim’ like other ‘secured claims,’ established by § 506(a), it must somehow be so identified.” *Id.*

86. *In re Carver*, 338 B.R. at 524.

87. *Id.* at 525. Although BAPCPA did not contain such an amendment, previous versions of the federal bankruptcy law did. *Id.*

The 1997 version added a single sentence to § 506: “Subsection (a) . . . shall not apply to an allowed claim to the extent attributable in whole or in part to the purchase price of personal property acquired by the debtor during the 90-day period preceding the date of the filing of the petition.”

Id.

After determining that 910 claims were not secured claims and, therefore, not subject to the present value requirement, the court was faced with the question of how to treat 910 claims. Recognizing that it was unlikely that Congress intended for one particular class of creditors (910 creditors) to be reduced to having completely unsecured claims, Judge Walker came to the conclusion that it was “[m]ore likely . . . that Congress intended to treat such claims better than they would have been treated under former law.”⁸⁸ Thus, Judge Walker concluded that, “[i]n a Chapter 13 plan, a 910 claim must receive the *greater* of (1) the full amount of the claim without interest; or (2) the amount the creditor would receive if the claim were bifurcated and crammed down (*i.e.*, secured portion paid with interest and unsecured portion paid *pro rata*).”⁸⁹

Several months later, Judge Walker revisited his previous decision regarding 910 claims and the hanging paragraph.⁹⁰ In *In re Green*, Judge Walker reviewed several of the cases that had been delivered since his *Carver* decision⁹¹ and found them to be unpersuasive.⁹² Primarily, Judge Walker took issue with what he characterized as a misapplication of the Supreme Court’s holding in *Dewsnup*,⁹³ which he says was “expressly limited . . . to the facts of the case – a Chapter 7 case in which the creditor was secured by real property.”⁹⁴ Moreover, Judge Walker noted that the legislative history argument presented by the majority of the courts is, at best, unpersuasive, because the provisions cited by the courts merely restated the provisions contained in the hanging paragraph.⁹⁵ In the end, Judge Walker reaffirmed his decision in *Carver*.⁹⁶

2. *In re Taranto*

In a bankruptcy case heard by Judge Marilyn Shea-Stonum, a unique set of facts emerged regarding the creditor’s collateralized claim.⁹⁷ Mark and Kimberly Taranto purchased a 2004 Chrysler Town and Country from Brunswick Automart, Inc. on March 22, 2004.⁹⁸ At the time of their purchase, the Tarantos entered into a “Retail Installment Contract and Security

88. *Id.* at 527.

89. *Id.* at 528. Judge Walker noted that the rule is “awkward and cumbersome” but reiterated that it was created to prevent the unfair treatment of 910 creditors. *Id.*

90. *See In re Green*, 348 B.R. 601 (Bankr. M.D. Ga. 2006).

91. Judge Walker specifically discussed *In re Brown*, 339 B.R. 818 (Bankr. S.D. Ga. 2006), and *In re Murray*, 346 B.R. 237 (Bankr. M.D. Ga. 2006).

92. *In re Green*, 348 B.R. at 601.

93. 502 U.S. 410 (1992). *See supra* text accompanying notes 66-67.

94. *In re Green*, 348 B.R. at 608.

95. *Id.* at 608-09.

96. *See supra* text accompanying note 89.

97. *See In re Taranto*, 344 B.R. 857 (Bankr. N.D. Ohio 2006).

98. *Id.* at 859.

Agreement,” the terms of which provided that they would “purchase the Town [and] Country for \$38,319.84 at 0% interest over seventy-two months.”⁹⁹ Additionally, their contract provided that the Tarantos would suffer no penalty for early repayment.¹⁰⁰ Brunswick Automart subsequently assigned the Tarantos’ indebtedness to DaimlerChrysler, the objecting party in this case.¹⁰¹

On November 16, 2005, the Tarantos filed a petition for Chapter 13 bankruptcy.¹⁰² By that date, the Tarantos had paid \$10,097.18 to DaimlerChrysler and had \$28,222.66 remaining on the loan.¹⁰³ However, the van was worth only \$16,706.11.¹⁰⁴ The Tarantos’ Chapter 13 plan included a provision to repay DaimlerChrysler the full principal amount outstanding on their loan within twenty-three months – forty-five months earlier than the contractually anticipated repayment date.¹⁰⁵ Despite the fact that the value of the collateral at the time of bankruptcy was only \$16,706.11, the Tarantos’ plan established that they intended to treat the entire \$28,222.66 as a secured claim and repay that entire amount.¹⁰⁶

DaimlerChrysler objected to the proposed plan, asserting that the company was entitled to receive “interest at 1-3% above prime rate on its entire claim,” in addition to the repayment of the principal.¹⁰⁷ The bankruptcy court

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 859 n.2. Judge Shea-Stonum seems to suggest that the Tarantos erred in conceding that DaimlerChrysler was entitled to a repayment of the full \$28,222.66, although it is likely that the Tarantos based this concession on the hanging paragraph found in 11 U.S.C. § 1325(a). Specifically, the judge noted that “[d]espite the Proof of Claim which clearly states that the Town [and] Country has a value of \$16,706.11, the [Tarantos] appear to concede that DaimlerChrysler is the holder of an allowed secured claim in the amount of \$28,222.66.” *Id.* The plan to repay DaimlerChrysler did not include any payment of interest because the original contract did not require the Tarantos to pay any interest on the debt. *Id.* at 858.

107. *Id.* DaimlerChrysler also objected to the proposed plan on two other grounds: “failure to provide for adequate protection” and “failure to treat DaimlerChrysler’s entire claim as fully secured (the amount set forth in Debtors’ Plan was off by 66 [cents]).” *Id.* at 858 n.1. However, by the time the hearing took place, the United States Bankruptcy Court for the Northern District of Ohio was only faced with the interest issue. *Id.* at 858. As far as the adequate protection issue was concerned, the Tarantos established that “an agreed order . . . had been entered on the docket before DaimlerChrysler filed its Objection.” *Id.* Additionally, the fully secured issue was resolved by the Tarantos agreeing to pay the additional sixty-six (66) cents to DaimlerChrysler. *Id.*

disagreed with DaimlerChrysler.¹⁰⁸ Judge Shea-Stonum asserted that the hanging paragraph created an “ouroboros effect,”¹⁰⁹ in that “[f]or a claimant to have the benefits of § 1325(a)(5), it must hold an allowed secured claim. Under the Bankruptcy Code, one holds an allowed secured claim only through operation of § 506. The 910 Provision specifically excludes the application of § 506.”¹¹⁰ Because of this, Judge Shea-Stonum reasoned that it was necessary to look to the legislative intent of Congress in amending § 1325(a) to include the hanging paragraph.¹¹¹ In so doing, she determined that Congress had included the hanging paragraph to protect 910 creditors by allowing them to hold a lien until receiving payment of the full principal and by prohibiting the cramming down of creditors’ claims to the value of the collateral.¹¹² Thus, similar to the holding in *Carver*,¹¹³ the court determined that, although the 910 claim was not “secured” and therefore, not entitled to the present value requirement, the hanging paragraph signaled that Congress intended to give preferential treatment to 910 creditors.¹¹⁴

Interestingly, while this holding mirrors *Carver*, it is important to note that Judge Shea-Stonum took a different approach in determining how to treat the unsecured 910 claim. Considering the unusual fact that the Tarantos were not contractually bound to pay interest, she noted that DaimlerChrysler was adequately protected without receiving interest because the total claim was inflated to a value that was above and beyond the value of the collateral.¹¹⁵ According to Judge Shea-Stonum, “[t]his artificial inflation of the amount of the 910 [c]laim reduces the risk exposure against which the Supreme Court was trying to protect pre-BAPCPA creditors in the cram down--strip down situation addressed in *Till*.”¹¹⁶ Therefore, for this court, to permit 910 creditors to collect additional interest on their collateralized claims would “ignore[] the economic realities of this case and perhaps the vast majority of 910 [c]laims.”¹¹⁷ Arguing that “blindly apply[ing] *Till*”¹¹⁸ was not reasonable in all situations, the court held that the privilege to additional interest in 910 claims is a determination that courts must necessarily base on the individual

108. *Id.* at 858, 863.

109. “The Ouroboros (also spelled Oroborus, Uroboros, Uroborus) is an ancient symbol depicting a serpent or dragon swallowing its own tail.” *Id.* at 861 n.5.

110. *Id.* at 861.

111. *Id.*

112. *Id.*

113. 338 B.R. 521 (Bankr. S.D. Ga. 2006).

114. *In re Taranto*, 344 B.R. at 861. *See also In re Carver*, 338 B.R. 521, 527 (Bankr. S.D. Ga. 2006) (holding that “[m]ore likely is that Congress intended to treat such claims better than they would have been treated under former law”).

115. *In re Taranto*, 344 B.R. at 861.

116. *Id.* at 862.

117. *Id.*

118. *Id.* (citing *Bank of Montreal et al. v. Official Comm. of Unsecured Creditors et al.* (*In re Am. HomePatient, Inc.*), 420 F.3d 559, 568 (6th Cir. 2005)).

facts of each case.¹¹⁹ In the end, the court held that *Till* did not apply and that DaimlerChrysler was not entitled to receive additional interest payments.¹²⁰

3. *In re Wampler*

In a case decided just three days after *Taranto*, the United States Bankruptcy Court for the District of Kansas determined that 910 claims could not be considered "secured" and "may not include unmatured or, in this case, postpetition interest."¹²¹ *In re Wampler* involved a group of debtors who had submitted a Chapter 13 plan which included the repayment without interest of debts owed on two automobiles.¹²² The plan did not establish the present value of the collateral (the automobiles).¹²³ The creditors objected to the plan, arguing that they were entitled to receive the contractual interest payments in addition to the full repayment of the claims.¹²⁴

Judge Robert D. Berger determined that the hanging paragraph's language made it clear that, "while a creditor's debt may be secured with a lien, if certain conditions are met, then the claim is not treated as an allowed *secured* claim under § 1325(a)(5)."¹²⁵ Accordingly, for Judge Berger, the 910 claim could not be bifurcated and, instead, should be paid in full by the debtor.¹²⁶ Additionally, Judge Berger concluded that, because 910 claims were not "secured," they were not subject to the present value requirement.¹²⁷

119. *Id.* at 863 ("There may be circumstances where the value of the collateral securing the 910 Claim is in fact greater than the amount of the 910 Claim and payment of interest either at the contract rate or at a constructed rate is justified on the record evidence of that case.").

120. *Id.* at 862. The court did not mention or discuss the impact of *Rake v. Wade*, 508 U.S. 464 (1993). In *Rake*, the United States Supreme Court decided that an over-secured creditor was entitled to interest on arrearages to be paid off according to the terms of the debtors' Chapter 13 plans, despite the fact that the initial contract did not provide for the creditor to receive additional interest on arrearages. *Id.* at 466, 475.

121. *In re Wampler*, 345 B.R. 730, 741 (Bankr. D. Kan. 2006) (citing 11 U.S.C. § 502(b)(2) (2000)). Section 502(b)(2) provides that

if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that . . . such claim is for unmatured interest.

11 U.S.C. § 502 (b)(2) (2000).

122. *In re Wampler*, 345 B.R. at 732. The creditors' claims included a \$15,892.14 debt owed for a 2004 Suzuki Verona and a \$10,913.40 debt owed for a 2001 Pontiac Aztek. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 741.

126. *Id.*

127. *Id.*

Judge Berger also determined that it was proper for the Chapter 13 plans of debtors to include the repayment of 910 claims in full without the addition of interest.¹²⁸ This determination was based on the notion that, “[b]ecause the debtors propose to pay the [c]reditors’ allowed claims over the duration of the plan, the [c]reditors will likely receive more than they would have received had the debtors filed under Chapter 7 or otherwise surrendered the collateral to the [c]reditors.”¹²⁹ Thus, Judge Berger affirmed the debtors’ Chapter 13 plan.¹³⁰

C. Missouri’s Approach

Both the Eastern District and the Western District of Missouri have agreed with the majority of United States bankruptcy courts.¹³¹ The first judge to address the issue was Judge Arthur B. Federman, in the case *In re Robinson*.¹³² The case involved the usual set of facts: a debtor who filed for Chapter 13 bankruptcy had purchased two vehicles within 910 days of her bankruptcy filing; and she had included in her Chapter 13 petition a plan to bifurcate one of the claims and to pay interest according to the Local Rules (which utilized the formula established in *Till*).¹³³ The creditors challenged the debtor’s Chapter 13 plan and Judge Federman overruled their objections.¹³⁴

In his opinion, Judge Federman noted that the somewhat sparse legislative history of BAPCPA established that Congress did not intend for the

128. *Id.*

This interpretation is not a novel concept within the Bankruptcy Code. The Code is laced with special classification and treatment of priority claims under § 507(a), the exceptions to discharge for certain unsecured claims under § 523, the subordination of tax liens under § 724(b), the subordination of liens under § 506(c) by a trustee for certain costs and expenses, as well as a lienholder’s election under § 1111(b).

Id. at 741-42.

129. *Id.* at 744.

130. *Id.*

131. See *In re Nicely*, 349 B.R. 600 (Bankr. W.D. Mo. 2006); *In re Osborn*, 348 B.R. 500 (Bankr. W.D. Mo. 2006); *In re Fleming*, 339 B.R. 716 (Bankr. E.D. Mo. 2006); *In re Robinson*, 338 B.R. 70 (Bankr. W.D. Mo. 2006).

132. 338 B.R. 70 (Bankr. W.D. Mo. 2006).

133. *Id.* at 71-72. The Local Rules of Practice for the United States Bankruptcy Court for the Western District of Missouri provide that “[a]bsent Court order to the contrary, all filed and allowed secured claims will be paid interest at the Chapter 13 rate . . . unless the plan/plan summary specifically provides for ‘zero’ interest.” Bankr. W.D. Mo. R. 3084-1.E (emphasis omitted). The Chapter 13 rate is “the 5 year treasury note rate . . . plus 3% nominal interest rate per annum.” Bankr. W.D. Mo. R. 3084-1.G.

134. *In re Robinson*, 338 B.R. at 75-76.

amendments to overturn the Supreme Court's decision in *Till*.¹³⁵ Additionally, Judge Federman reasoned that, because Congress had not modified or amended the provisions of the bankruptcy code that allow the modification of creditors' interest rates as it had previously done with home mortgages,¹³⁶ it did not intend to allow 910 creditors to receive the entire value of their claim, including their contractual rate of interest.¹³⁷ Therefore, the debtors were allowed to modify the rights of their secured creditors, as permitted under 11 U.S.C. § 1322(b)(2) and as provided in their Chapter 13 plan.¹³⁸

Several months after his decision in *Robinson*, Judge Federman revisited the issue in *In re Osborn*.¹³⁹ In this opinion, Judge Federman largely reaffirmed his previous decision, although he did provide some additional reasoning for his rejection of the creditors' objections.¹⁴⁰ First, Judge Federman examined the statutory language of the hanging paragraph, concluding that "[t]here is no ambiguity in this provision: if you are a hanging paragraph creditor, § 506 does not apply to your claim, and a plan cannot provide for bifurcation of it."¹⁴¹ Additionally, he noted that the plain language of the statute should be applied in this case because "the literal application of the statutory language does not result in an absurd outcome."¹⁴² In response to the creditors' argument that they were entitled to a deficiency under state law, Judge Federman determined that the federal bankruptcy code permits the modification of secured creditors' rights.¹⁴³ Additionally, because the federal bankruptcy code trumps state law, the creditors were not entitled to the deficiency to which they would otherwise be entitled.¹⁴⁴

Judge Federman is not the only judge in the United States Bankruptcy Court for the Western District of Missouri to deal with the issue presented by the hanging paragraph. Judge Dennis R. Dow also addressed this issue in the case *In re Nicely*.¹⁴⁵ Like Judge Federman, Judge Dow agreed with the view of the majority of bankruptcy courts that the hanging paragraph simply acts to prevent the bifurcation of a 910 creditor's claim.¹⁴⁶

135. *Id.* at 75.

136. 11 U.S.C. § 1322(b)(2) (2000).

137. *In re Robinson*, 338 B.R. at 74.

138. *Id.* at 75.

139. 348 B.R. 500 (Bankr. W.D. Mo. 2006).

140. *See generally id.*

141. *Id.* at 504.

142. *Id.* at 505. "[I]t is entirely logical that, if a creditor is to be deemed fully secured for one purpose, it should be fully secured for other purposes." *Id.*

143. *Id.* at 506.

144. *Id.*

145. 349 B.R. 600 (Bankr. W.D. Mo. 2006).

146. *Id.* at 603. In his opinion, Judge Dow relied largely on Judge Federman's opinion in *In re Osborn*. *See id.* at 603-04.

Chief Judge Barry S. Schermer of the Eastern District of Missouri also agreed with Judge Federman and the majority of bankruptcy courts.¹⁴⁷ More specifically, he held that “*Till* still controls what interest rate is required to ensure present value,” and that a “Chapter 13 plan need only provide the [910] Creditor with the amount of its secured claim—which excludes post-petition interest.”¹⁴⁸ Judge Schermer also determined that Congress could have created provisions for 910 creditors similar to home mortgagees if it had truly intended to prohibit the modification of creditors’ claims.¹⁴⁹

IV. DISCUSSION

These bankruptcy court decisions are just a few of the most notable opinions dealing with the meaning of the hanging paragraph added by BAPCPA. Undoubtedly, the United States judicial system will continue to see differing opinions on the topic as more and more courts voice opinions on the issue. Although there is an obvious preference among bankruptcy courts for the view that the hanging paragraph prevents the bifurcation of creditors’ claims and that *Till* is still applicable in the Chapter 13 context, the opinions of those courts in the minority provide valuable insight to the possible direction of holdings on this issue and its eventual resolution.

The majority of bankruptcy courts have interpreted the hanging paragraph in a way that is more favorable to 910 creditors than the interpretation of the minority. By determining that 910 claims cannot be bifurcated and are subject to the interest rate established by the Supreme Court in *Till*,¹⁵⁰ the majority has virtually ensured that 910 creditors receive repayment of their claims in full, in addition to at least some interest.¹⁵¹ Of course, 910 creditors still oppose this interpretation because they would prefer to receive the contractual rate of interest, which is almost always much higher than the national prime rate, plus 1-3%. Thus, while debtors and creditors are affected differently by the hanging paragraph and the majority views about the provision,¹⁵² it is clear that debtors bear the greater burden.

147. See *In re Fleming*, 339 B.R. 716 (Bankr. E.D. Mo. 2006).

148. *Id.* at 722-23.

149. *Id.* at 723.

150. See *supra* notes 40-42 and accompanying text.

151. This preferential treatment is only applicable if the creditor does not accept the debtor’s Chapter 13 plan and the debtor does not elect to give up the collateral to the creditor as a means of satisfying the debt. See *supra* text accompanying notes 30-33.

152. Creditors are damaged by the hanging paragraph in that they are unable to receive the same amount of interest that they would have otherwise been entitled to, had the debtor not filed for Chapter 13 bankruptcy. However, creditors are benefited by the hanging paragraph in that they are virtually guaranteed at least some interest in addition to the repayment of their claim. On the other hand, debtors are damaged by the hanging paragraph in that instead of being able to cram-down the secured claim,

This is the case because automobiles, the focus of the hanging paragraph,¹⁵³ lose their value very quickly, thereby reducing the value of the creditor's claim. Without the addition of the hanging paragraph, almost every person in Chapter 13 bankruptcy with a motor vehicle loan would be allowed to bifurcate a portion of the claim and treat that part as unsecured.¹⁵⁴ Increasing the number of payments required from debtors who are already having financial difficulties is, indeed, a heavy additional burden. So heavy, in fact, that they may instead be forced to opt for straight bankruptcy under Chapter 7.

Although the minority of bankruptcy courts has not developed a consistent method to treat 910 creditors, the trend appears to be to treat the debtor more favorably than the creditor. These courts tend to agree with the majority of bankruptcy courts that 910 claims cannot be bifurcated, but they have also determined that this means that the claims are not subject to the present value requirement of 11 U.S.C. § 1325.¹⁵⁵ Thus, most minority courts have determined that 910 creditors are not entitled to additional interest above and beyond the amount of the claim.

These courts have almost all recognized that the hanging paragraph was not added to punish creditors, but to help those creditors who qualify under the provisions of the paragraph.¹⁵⁶ Therefore, while creditors are not entitled to interest under *Till*, they are not treated any worse than they would have been without the addition of the hanging paragraph. This conclusion places less of a burden on debtors, but it also benefits 910 creditors. This is a posi-

leaving the value of the collateral as secured and the remainder of the claim as unsecured, they are forced to pay the creditor's claim in full. But, debtors are also benefited by the hanging paragraph in that they are not forced to pay the contractual rate of interest upon filing for Chapter 13 bankruptcy, rather, they will pay the national prime rate, plus 1-3%.

153. The hanging paragraph does not exclusively apply to debts acquired through the purchase of a motor vehicle, although it does appear to favor such debt. More specifically, if the collateral is an object of value other than a motor vehicle, the paragraph may still apply, but the debt must have been incurred no more than one year prior to the bankruptcy filing. See 11 U.S.C. § 1325(a)(5)(*) (Supp. V 2005). However, it does not appear that any bankruptcy court has yet interpreted the hanging paragraph in the context of a claim with collateral of anything other than a motor vehicle. Thus, the provision has had little, if any, impact on bankruptcy law outside the area of motor vehicle financing.

154. "In general, unsecured creditors are entitled to no less than they would receive under a Chapter 7 liquidation. Secured creditors, on the other hand, are entitled to no less than the allowed amount of their claim." *In re Hibbert*, 14 B.R. 891, 893 (Bankr. E.D. N.Y. 1981) (citations omitted) (citing 11 U.S.C. § 1325(a)(4)-(5)).

155. See, e.g., *supra* notes 85, 127-28 and accompanying text.

156. See, e.g., *In re Carver*, 338 B.R. 521, 527 (Bankr. S.D. Ga. 2006). "[I]t is unlikely that Congress singled out the creditor with a 910 claim in order to punish it. More likely is that Congress intended to treat such claims better than they would have been treated under former law." *Id.*

tive outcome, not only because it avoids the negative consequences incurred by debtors and creditors in straight bankruptcy, but also because it is more consistent than the majority approach with the objectives of BAPCPA, as enunciated by President Bush at the statute's signing ceremony.¹⁵⁷ More specifically, these objectives include "protect[ing] those who legitimately need help," and "bring[ing] greater stability and fairness to our financial system."¹⁵⁸

It should also be noted that several of the courts that have refused to utilize the approach of the majority of courts have engaged in a case-by-case determination as opposed to using a set standard.¹⁵⁹ Therefore, it is possible that the somewhat unique facts of the cases¹⁶⁰ encouraged the minority courts to not require the payment of present value to the creditor in addition to the amount of the claim. This possible phenomenon could incentivize 910 creditors, especially those in districts that have not issued an opinion on the meaning of the hanging paragraph, to offer lower interest and zero interest loans to customers identified as possible Chapter 13 filers. By establishing the balance of the claim at an amount much higher than the value of the collateral, 910 creditors would be able to avoid the risk of an unprofitable transaction. This would be the case because a great portion, if not all, of the claim will be repaid through the bankruptcy process, and if that amount is inflated, receipt of interest would only be an added bonus. This would likely damage lower income consumers and those identified as risky borrowers because they will be forced to borrow amounts much higher than otherwise necessary in order to purchase an automobile.¹⁶¹

157. *See supra* note 49.

158. *Id.* While the approach taken by courts in the minority appears to be more consistent with BAPCPA's objectives than that of the majority, BAPCPA and its hanging paragraph arguably works in contravention of these objectives. *See infra* notes 162-65 and accompanying text.

159. *See In re Wampler*, 345 B.R. 730, 744 (Bankr. D. Kan. 2006) ("The Court finds that the facts and circumstances of this proceeding warrant the conclusion that the debtors' plan should be confirmed notwithstanding any alleged failure to satisfy criteria found in § 1325(a)(5).") (Specifically, the present value requirement); *In re Taranto*, 344 B.R. 857, 863 (Bankr. N.D. Ohio 2006) ("The entitlement to interest on the 910 Claim must be addressed on the facts of the particular claim."); *In re Carver*, 338 B.R. at 528 (holding that there are two potential methods of determining what the creditor is entitled to, depending on the circumstances of the case).

160. For example, *In re Taranto* involved an automobile loan for significantly more than the car was worth, but at 0% interest. *In re Taranto*, 344 B.R. at 859. Additionally, in *In re Wampler* the evidence only revealed the value of the claim and did not reveal the value of the collateral automobile so the court had no other figure to base its holding on. *Wampler*, 345 B.R. at 732.

161. This presents fairness issues in that hedging against losses incurred as a result of Chapter 13 filings by charging higher prices to low income and risky consumers gives creditors the ability to place a higher burden on those consumers who are the least financially able to deal with such a burden. Additionally, being forced to borrow

According to the House Report by the judiciary committee issued prior to the enactment of BAPCPA, the purpose of BAPCPA was "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors."¹⁶² No matter how the hanging paragraph is interpreted, it is difficult to fit it into BAPCPA's overall purpose because it does nothing to further the fairness of the bankruptcy process. Prior to the amendment, 910 creditors' claims were treated in the same manner as other secured lenders and were thus subject to bifurcation. With the addition of the hanging paragraph, debtors who are already having financial difficulties are forced to pay even more to one particular class of lenders. If the debtors cannot afford to repay this additional debt, they will either not be able to file for Chapter 13 bankruptcy, or general unsecured creditors, whose rights are inferior to those of secured creditors, will have less remaining money to share and will be forced to bear an even larger part of the burden.¹⁶³ While Congress is entitled to play favorites in this fashion,¹⁶⁴ this result certainly does not help to "ensure that the system is fair for both debtors and creditors," as intended by BAPCPA.¹⁶⁵

Placing a larger burden of the losses due to Chapter 13 bankruptcies on debtors and the vast majority of creditors in order to give a substantial benefit to only one sector of the finance industry for no easily identifiable purpose is unreasonable. Not only will non-910 creditors be forced to pass along their increased expenditures to their customers, but those consumers who rely on general unsecured creditors to finance their purchases will likely have a more difficult time obtaining loans due to the increased risk of loss in Chapter 13

high amounts could act as a disincentive for people to purchase motor vehicles for personal use. A person living in today's highly mobile society who does not have access to an automobile or adequate public transportation will experience difficulties in securing a job and obtaining reasonably priced goods, therefore, making it more difficult to meet his or her current financial obligations. This simply perpetuates the problem that underlies the need for individual bankruptcy proceedings.

162. H.R. Rep. No. 109-31, at 1 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 89.

163. See *In re Carver*, 338 B.R. at 527.

[I]f Congress intended 910 claims to receive better treatment than they received under prior law, Congress must necessarily have intended that general unsecured creditors bear the harm of that decision. The increased distribution paid to a 910 claim draws from and thus reduces the amount available for general unsecured creditors.

Id.

164. *Id.* ("[I]t is Congress's prerogative to offer such special treatment, and courts are not invited to undo it.")

165. See *supra* text accompanying note 162. This result also appears to be in direct contradiction to President George W. Bush's remark upon signing the bill: "The act of Congress I sign today will protect those who legitimately need help . . . and bring greater stability and fairness to our financial system." See *supra* note 49.

bankruptcy. In the end, the unfairness and complications caused by the hanging paragraph amendment certainly outweigh the benefits it created.

Although there has developed a distinctive split of authority on how exactly the hanging paragraph should be interpreted, it is uncertain whether the United States Supreme Court will entertain the issue. If the rights of debtors and unsecured creditors are to be protected from intrusion by 910 creditors, the Court should grant certiorari to settle the issue. If this occurs, several considerations ought to guide the Court in addition to those arguments already raised by courts in both the minority and majority. First, the Court should consider the history of bankruptcy law, specifically the creation of Chapter 13 bankruptcy, noting that it was largely created as a means of helping bankrupt debtors who did not want to destroy their creditworthiness.¹⁶⁶ With this in mind, the Court should conclude that Congress could not have intended to harm the good-intentioned Chapter 13 bankrupt debtors by prohibiting them from bifurcating the claim and by requiring them to pay *Till* interest on the full amount of the claim. Second, the Court ought to consider the virtues of a case-by-case approach for determining the remedy in 910 claim cases. Such an approach would likely be best suited for this situation in order to prevent creditors from contracting around the protections intended for unsuspecting debtors. Taking these arguments into consideration, the Supreme Court should overrule the decisions of the courts in the majority and reject the notions that the hanging paragraph prevents the bifurcation of under-secured claims and that the *Till* interest rate formula still applies.

V. CONCLUSION

The fact that BAPCPA's hanging paragraph is somewhat hesitantly placed at the conclusion of Section 1325 seems fitting. Many courts that interpret the provision struggle over its exact meaning and its impact on both debtors and creditors. While the arguably inequitable intent of Congress to provide preferential treatment for 910 creditors is obvious, it is difficult to reconcile the effect of the provision with the purpose of BAPCPA in general. Although a strong majority has emerged with a consistent interpretation, it would be overly presumptive to simply dismiss the theories and holdings announced by those courts that are in the minority. Until the Supreme Court has spoken on the matter, these inconsistencies are likely to continue and become more pronounced, resulting in even more difficulties for attorneys attempting to advise their clients on the impact of BAPCPA and potentially reducing the number of debtors who use the Chapter 13 bankruptcy system for a fresh start. If debtors want to retain some semblance of fairness in the bankruptcy system, the time to act is now.

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166. See *supra* notes 18-21 and accompanying text.