AMERICAN BANKRUPTCY INSTITUTE

Plenary Session: Consumer Bankruptcy Update

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I. SOME BAPCPA DISMISSAL ISSUES

Noncompliance with Credit Counseling Requirements

Amended §109(h)(1) requires individual debtors to obtain credit counseling from an approved agency during the 180-day period preceding the filing of a bankruptcy petition. Under 109(h)(3) a debtor may be exempted from this requirement, but only upon written certification that describes exigent circumstances which merit waiver. Additionally, the debtor must have requested credit counseling services, but been unable to obtain them, within five days from the debtor's request of the waiver.

A. What are Exigent Circumstances and When do They Apply?

Early cases found differently on the meaning of "exigent circumstances". Some Courts determined that imminent foreclosure and/or imminent eviction qualified as such "exigent circumstances". *See In re Childs*, 335 B.R. 623 (Bankr.D.Md. 2005) and *In re Davenport*, 335 B.R. 218 (Bankr.M.D.Fla. 2005).

Other Courts found "exigent circumstances" not to refer to a perspective debtor's problems or situation, but to the circumstances preventing the person from obtaining the required budget and credit counseling and the certificate confirming completion of counseling. *See In re Valdez*, 335 B.R. 801 (Bankr.S.D.Fla. 2005) and *In re Sosa*, 336 B.R. 113 (Bankr.W.D.Tex. 2005).

However, essentially all Courts have held that even if the circumstances were "exigent"; if the debtor could not certify that credit counseling was requested from a qualified provider, and that it was unavailable within five days of the request, the case could not go forward. *See In re Laporta*, 332 B.R. 879 (Bankr.D.Minn. 2005); *In re Booth*, 2005 WL 3434776 (Bankr.N.D.Fla. 2005).

B. **Effect of Non-Compliance with Credit Counseling Requirements**

Section 109 is entitled "Who May Be A Debtor", and when a debtor fails to comply with the credit counseling requirements of §109(h), the petition becomes one filed by an ineligible debtor. What does this mean?

Some Courts have held that the proper outcome for failure to meet this requirement is not dismissal of the case, but striking of the petition. *In re Hubbard*, 333 B.R. 337 (Bankr.S.D.Tex. 2005). Such Courts reasoned that no case could have been commenced by the petition filing of an ineligible debtor. Relying on §301 which provides that a voluntary case is "commenced by the filing...of a petition...by an entity that may be a debtor...", these Courts found the proper remedy to be "striking" the petition, as there was no "case" to dismiss. Such a "stricken" petition never initiated a case. Therefore, upon refiling (which would almost always be required, to stop the next foreclosure) the serial filing provisions of §362(c)(3)(A) were not applicable because there was no prior "dismissed" case.

Other Courts held that when a petition was filed without the requisite credit counseling having occurred, the Court retains jurisdiction and can proceed to issue a dismissal of the case. It was noted that if no case existed without §109(h) compliance, then no stay ever came into effect, and any foreclosure which had occurred would be effective. Additionally, it would be problematic in cases where a Trustee had already sold property under §363, or a preference defendant had already paid a settlement to the Trustee. *See In re Ross*, 338 B.R. 134 (Bankr.N.D.Ga. 2006); *In re Manalad*, 360 B.R. 288 (Bankr.C.D.Cal. 2007); and *In re Mendez*, 367 B.R. 109 (9th Cir. BAP 2007), all of which held the credit counseling requirement of §109(h) is <u>not</u> jurisdictional.

C. Can a Debtor Use His failure to Meet the §109(H) Requirement to Dismiss His Own Case?

As anticipated pre-BAPCPA, certain debtors, disillusioned by a Trustee's administration of property of the estate (usually undisclosed by the debtor) have attempted to use §109(h) to escape such case administration. Courts have applied the doctrine of judicial or equitable estoppel to prevent debtors from asserting that they are not eligible debtors, and no case exists because they failed to meet the credit counseling requirement. *See In re Parker*, 351 B.R. 790 (Bankr.N.D.Ga. 2006) and *In re Withers*, 2007 WL 628078 (Bankr.N.D.Cal. 2007).

These decisions are based on the fact that §109 eligibility is not jurisdictional, and hence can be waived by the Court upon the debtor's misuse of the system, *see Warren v. Wirum*, 2007 378 B.R. 640 (N.D.Cal. 2007). Because eligibility to be a debtor is a matter which "arises in a case under Title 11...the non-jurisdictional requirement must be waivable". *In re Mendez*, 367 B.R. 109, 116 (9th Cir. BAP 2007).

II. FAILURE TO MEET THE §521 DISCLOSURE REQUIREMENTS

The debtor's initial filings under §521(a)(1) of BAPCPA require several new items, including "pay advices"; and §521(e)(2) requires that the debtor "shall provide" the Trustee copies of income tax returns or transcripts not later than seven days prior to the date first set of the first meeting of creditors. Section 521(i) provides that failure to complete filing of the information required under §522(a)(1) within 45 days of the petition filing, causes the case to be automatically dismissed on the 46th day. Section 521(e)(1)(B) provides that if the debtor fails to timely provide tax returns to the Trustee, the Court "shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor."

As to §521(i)(1), some Courts have held that the "automatic dismissal" must be interpreted literally. Thus, there is no discretion to allow additional time within which to comply with submission of payment advices. *In re Fawson*, 338 B.R. 505 (Bankr.D.Utah 2006); *In re Lovato*, 343 B.R. 268 (Bankr.D.NM 2006); and *In re Ott*, 343 B.R. 264 (Bankr.D.Colo. 2006).

Additionally, the dismissal has been held to be effective retroactively to the 46th day. *In re Landers*, 2006 WL 4862340 (Bankr.D.Utah 2006); and excusable neglect is not an available defense. *In re Monroe*, 2006 Bankruptcy LEXIS 3256 (Bankr.D.SC 2006).

Other Courts have held that neither judges nor clerks should enter *sua sponte* orders of dismissal, because the "automatic dismissal" provisions of §521(i)(1) do not direct Courts to issue orders of dismissal, without the filing of a "request" for dismissal under §522(i)(2). *In re Jackson*, 348 B.R. 485 (Bankr.S.D.Iowa 2006). Further, the phrase in §521(a)(1)(B), "unless the court orders otherwise" has been held to allow the Court to extend the 45-day period, even after it has expired. *See In re Parker*, 351 B.R. 790 (Bankr.N.D.Ga. 2006).

Other Courts have found that strict compliance is not required to satisfy the statutory requirement. *See In Luders*, 356 B.R. 671 (W.D.Va. 2006), where the Court found that the filed pay stubs, which were incomplete, were sufficient because they had "year to date" totals from which the debtor's income could be ascertained, making them sufficient as "other evidence of payment" under §521(a)(1)(B)(iv). Compare this to *In re Wilkerson*, 346 B.R. 539 (Bankr.D.Utah 2006), where the Court discovered that one incorrect pay advice (from a year earlier) had been inadvertently filed. This discovery was made when the judge was preparing for the confirmation hearing. Because it was past 45 days after the petition filing, the case was held automatically dismissed. When the Debtor subsequently filed the correct pay advice, the Court refused to vacate the dismissal order, finding no authority to override the automatic dismissal that had already occurred.

A. Can a Debtor Use §521 as an "Escape Valve" to Obtain Case Dismissal of His Own Case?

1. Section 521(e)(2)

In the case of *In re Duffus*, 339 B.R. 546 (Bankr.D.Or. 2006), the Court held that the Trustee was not required to file a motion to dismiss an asset case where the debtor had not provided his tax returns to the Trustee within seven days prior to the first set meeting of creditors. The Court noted that where dismissal "is contrary to the interest of the estate and of creditors, the Trustee has the authority to waive an untimely delivery of documents simply by declining to file a motion."

In a later case, the debtor moved to dismiss her case based on failure to timely provide her tax returns to the Trustee. This was done by oral motion at the beginning of the trial of the Trustee's complaint objecting to the debtor's discharge, after the Trustee had discovered and begun collecting undisclosed assets. Denying the motion, the Court stated it would not allow

"dishonest debtors to abuse the court system despite Congress' direction that courts 'shall' dismiss bankruptcy cases when tax returns are not timely provided to the Trustee." *In re Fileccia*, 2007 WL 1695387 (Bankr.M.D.Tenn. 2007).

2. **Section 521(i)**

Can a debtor obtain dismissal of his case based on his failure to meet the disclosure requirements of §522(a)(1), leading to "automatic dismissal under §521(i)?

In the prior cited cases of *In re Parker* and *In re Withers*, where the debtor sought case dismissal based on §109(h), the debtors further sought dismissal under §521(i) for failure to make the required filings within the requisite 45-day deadline. In *Parker*, the Court noted that under §521(a)(1)(B), the filing requirements of §521(a), with the exception of the list of creditors (which had been filed) can be "excused" by the Court. Likewise, the Court in *Withers* elected to excuse the debtor, so that the case would not be dismissed on the 46th day. In both cases, the Trustee was in the process of administering undisclosed assets when the debtors pointed out the failure to comply with §521, and the fact that there was no longer a case after the 45-day deadline.

Although not cited or mentioned in *Parker* or *Withers*, a pre-BAPCPA case held that a debtor was prevented from dismissing a petition which she did not sign. *In re Willis*, 345 B.R. 647 (8th Cir. BAP 2006). Although Rule 1008 required the petition and schedules to be signed, the Court found that the doctrine of equitable estoppel applied. The debtor's omission to speak and reveal this defect, after becoming aware it after filing, and the reliance of the Trustee and the creditors on the petition and schedules, justified keeping the debtor in the Chapter 7 proceeding. Further, the defective filing was found to have been ratified by the debtor, based on her participation in the case, with the attendant benefit to her of the automatic stay.

B. **Cases Allowing Dismissal by Debtors Under §521**

The above-stated notions of estoppel in pre and post-BAPCPA cases has recently lost its momentum as to §521(i). In a case where the debtor had not complied with §521(a)(2), where most of the schedules were blank, filled in with TBA – "To Be Amended", and where the debtor was found to be secretly conveying real property to an entity controlled by him, post-petition; the Court sustained the dishonest debtor's motion seeking an order that the case was no longer pending, having been automatically dismissed on the 46th day when the proper filings had not been made. *In re Hall*, 368 B.R. 595 (W.D.Tex. 2007). The Court found the ability to waive the filing requirement of §521(a)(2) no longer existed after the 45-days ran, because the case was already dismissed. The Court did impose a two-year prohibition on subsequent bankruptcy filing by the debtor.

A California District Court has also recently reversed a Bankruptcy Court decision based on the *Parker/Withers* rationale. *Warren v. Wirum*, 378 B.R. 640 (Dist.Ct.N.D.Cal. 2007). Here, the debtor decided that bankruptcy was a mistake, after the Trustee began administering assets. The Bankruptcy Court denied dismissal but the District Court, agreeing with *In re Hall*, held that the requirement to file pay advices could not be waived after the initial 45-day compliance period. Further, once the case was automatically dismissed, it could not be "resuscitated" by the Bankruptcy Court, despite the circumstances of the case. *See also In re Richardson*, 2008 WL 270263 (Bankr.E.D.Tex. 2008), accord, where the Court held that "...nothing in 11 U.S.C. §521(i)(1) provides an exception for a debtor who may have filed his bankruptcy case in bad faith. One of Congress' goals in enacting the Bankruptcy Abuse Prevention Consumer Protection Act of 2005, which included the automatic dismissal provision of 11 U.S.C. §521(i)(1) was to replace judicial discretion with specific statutory standards and formulas." *See also* accord, *Rivera v. Miranda*, 376 B.R. 382 (D.Puerto Rico 2007).

Comment: We all know that certain interests were favored in BAPCPA. Specific provisions were designed to positively affect groups as disparate as DSO claimants, car lenders, warehousemen and pawnbrokers. While it might be argued that such interests should not be favored, there is at least an honest argument that such interests might need some deference or protection. Section 521 specifically favors dishonest debtors by allowing them to manipulate the bankruptcy process. What argument can be made that dishonest debtors need favored treatment, deference and/or protection in bankruptcy?

III. TRUSTEE COMPENSATION: HAS ANYTHING CHANGED AFTER THE BAPCPA AMENDMENTS?

A. Trustee Compensation Under Prior Law

Before passage of BAPCPA the compensation of Chapter 7 and Chapter 11 Trustees was determined under §§326(a) and 330(a)(3) of the Bankruptcy Code. Read together, these sections required a determination of reasonable Trustee compensation based on the nature, extent and value of services rendered, taking into account all relevant factors, including those listed in §330(a)(7) as follows: 1) time spent; 2) rate typically charged by the Trustee; 3) necessity of the service rendered; 4) performance of service within time commensurate with the complexity, importance, and nature of the performed service; and 5) reasonableness in the context of customary compensation of comparably skilled practitioners in non-bankruptcy cases.

These factors were applied by the Fifth Circuit in the case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which was followed in *Connolly v. Harris Trust Corp. of Calif. (In re Miniscribe Corporation)*, 309 F.3d 1234 (10th Cir. 2002). These factors are frequently referred to as the "Lodestar Factors" or the "Johnson Factors".

Section 326 provides a computation of Trustee compensation, based on graduated percentages of the amounts distributed by the Trustee in the case. Pre-BAPCPA, this was considered by almost all Courts to be the maximum "reasonable compensation under §330", rather than a required or even presumptive calculation of fees to be awarded.

B. BAPCPA Amendments to §330

Congress made what appeared to be two significant changes to §330, which, at least on their face, appeared to radically change how Chapter 7 Trustee compensation would be addressed and determined by the Courts.

Section 330(a)(7) was added to the statute. It provides as follows:

> (7) In determining the amount of reasonable compensation to be awarded a trustee, the Court shall treat such compensation as a commission, based on §326.

Additionally, the list of the "Lodestar Factors" in §330(a)(3) are stated to apply to the "examiner, Trustee under Chapter 11, or professional person"; thereby specifically omitting Chapter 7 Trustees.

When read together, amended §330(a)(3) and §330(a)(7) appear to eliminate the Lodestar Factors from consideration in calculating Chapter 7 Trustee compensation, which is treated separately as a commission under §330(a)(7). However, both §326(a) and §330(a)(1)(A) continue to provide for "reasonable compensation".

C. **Post-BAPCPA Case Law**

The first case to consider amended §330 was *In re Clemons*, 349 B.R. 725 (Bankr.D.Utah 2006). The Chapter 7 Trustee, supported by the U.S. Trustee, argued that reasonableness is now determined solely by §326, rather than through application of the Lodestar Factors. The Court rejected this argument, and found that amended subsection 330(a)(7) simply requires consideration of §326 as part of a reasonableness inquiry. The Court essentially found that the reasonableness requirement of §330(a)(1) continues to require consideration of the actual services necessary and rendered, which must include a Lodestar analysis. *See*, accord, *In re Ward*, 366 B.R. 470 (Bankr.W.D.Pa. 2007).

Following *Clemons*, another Utah Bankruptcy Court awarded a Trustee a fee of $62,200.00, rather than one based on the Lodestar Factors, which would have been $42,350.00. The §326(d) maximum compensation calculation was $82,050.00. The Court noted that this result was based on amended §330(a)(7), which directs the Court to consider the §326 cap as well as the Lodestar Factors.

Some Courts have held that Chapter 7 Trustees must continue to provide time records to support their applications for fees, even though the U.S. Trustee has eliminated this as a requirement. *In re McKinney*, 374 B.R. 726 (Bankr.N.D.Cal. 2007). However, other Courts have found that Trustees will no longer be required to maintain such time records, *see In re Mack Properties, Inc.*, 381 B.R. 793 (Bankr.M.D.Fla. 2007), but also holding that the Court will apply the "reasonable standard" and will require a sufficient factual basis for requested compensation.

There appear to be no published cases holding the §326 calculation to be a presumptive "commission fee", but subject to a "reasonableness" test other than Lodestar. However, it is anecdotally understood that many Bankruptcy Courts around the country are allowing the maximum §326 compensation unless exceptional circumstances exist. Because there are no objections to such fee applications, these decisions are not creating published opinions. It will be interesting to see how this case law evolves from here.

Comment: There is absolutely no way to read amended §330(a)(3) to do anything other than remove the Lodestar analysis from factors to be evaluated in determining reasonable compensation for Chapter 7 Trustees. While the component of "reasonableness" remains, the Lodestar analysis does not. A Trustee's fee might be unreasonable in the exceptional situation where it amounts to a windfall, but not based on the Lodestar approach. Hopefully, Courts will eventually be able to distinguish the no-longer applicable Lodestar analysis, from the "windfall analysis" that should apply post-BAPCPA. In other words, the §326 commission structure should apply except in the extraordinary circumstance where it would amount to an unconscionable windfall to the Trustee. That is post-BAPCPA "reasonableness".

Means Test

1. The primary issue involves a determination of who has "standing" to invoke the means test. *See*, Section 707(b)(6).

	Debtor's Annual Income at or Below State Median	Debtor's Annual Income Above State Median
	(The state median applies to the family income for a family of comparable size to the debtor's family.)	
Means Test (Sec. 707(b)(2))	No One	All Parties
General Grounds of Abuse (Secs. 707(b)(1) and 707(b)(3)(A) and (B))	Judges, U.S. Trustees, Bankruptcy Administrators	All parties

(The standard is no longer substantial abuse, just abuse.)

Section 707(b)(2)(C) says that the "means test" calculation should be filed with the statement of income in each case. If a debtor is below the state median income number, the "means test" presumption cannot be invoked. Consequently, when the calculation on the first part of the form reflects that the debtor is below the median income level, the remainder of the form does not have to be completed.

2. First the "Current Monthly Income "which is defined in §101(10(A) and (B)) must be calculated.

Current monthly income is the monthly average of all income received by the debtor during the six month period prior to the bankruptcy filing if the statement of income is timely filed. §101(10)(A).

For example, if the bankruptcy petition is filed in March with the statement of income, the six month period runs from September through February. If the statement of

income is not timely filed, then the court will determine the six month average, ending on the date of the court's determination.

Current monthly income includes contributions to household expenses made by others "on a regular basis," but excludes Social Security benefits, terrorism payments, or war crime payments.

Are deductions for retirement or pension plans considered current monthly income? If voluntary, they should be added back to income. If not, they would not be considered "received" by the debtor.

3. Deductions From Current Monthly Income -

a. The IRS allowance based on "national collection standards" for food, clothing, personal care, and entertainment. There can be a five percent adjustment on the allowance for food and clothing if reasonable and necessary.

b. The IRS allowance based on "regional collection standards" for transportation and housing. This would exclude actual payments on secured claims which are covered and allowed subsequently.

c Actual expenses incurred by the debtor in other categories recognized by the IRS.

d. Necessary health insurance, disability insurance, and health savings plan contributions.

e. Contributions for care of non-dependent family members.

f. Expenses for protection from family violence as provided under the Family Violence Prevention and Safety Act.

g. Expenses for education, up to $1500.00 annually for each minor child, applicable to public or private elementary or secondary schools. ($125.00/month).

h. Home energy costs, if reasonable and necessary, and not otherwise covered by the IRS guidelines.

i. Actual expenses for administering the Chapter 13 plan as calculated by the Office of the U.S. Trustee not to exceed 10% of the plan payments.

j. One-sixtieth of all secured debt that will be due in the next five years after filing, including past due debts (arrearages) secured by property necessary for the support of the debtor and the debtor's dependents.

k. One-sixtieth of all priority debts.

l. Continued contributions to tax exempt charities up to 15% of gross income. (Religious Liberty & Charitable Donation Protection Act)

Pursuant to §707(b)(2)(B), the presumption of expenses can be rebutted by establishing exceptional circumstances. The expenses must be itemized and documented, as well as, they must be reasonable and necessary.

Pursuant to §707(b)(2)(D), there is an exception to the presumption of abuse applicable to disabled veterans who were on active duty or performing homeland security defense when the indebtedness occurred.

4. Presumptions of abuse, §707(b)(2):

a. After deducting the aforementioned expenses from current income, if the debtor would have $10,000.00 available over the next sixty months, which translates into $166.67 per month, abuse is presumed regardless of the amount of unsecured debt.

b. After deducting the aforesaid expenses from current income, if the debtor would have $6,000.00 or more available over the next sixty months, which translates into

$100.00 per month, abuse is presumed if this income would be sufficient to pay 25% of the debtor's unsecured debts over the sixty month period.

c. After deducting expenses from current income, if the debtor would have less than $6,000.00 available over the next sixty months, which translates into less than $100.00 per month, there is no presumption of abuse.

Examples:

1. $100.00 available income per month - There is a presumption of abuse if the debtor's unsecured debts are less than $24,000.00.
   (25% of $24,000.00 is $6,000.00; $100.00 per month over sixty months is equivalent to $6,000.00)
2. $150.00 available income per month - There is a presumption of abuse if the debtor's unsecured debts are less than $36,000.00.
   (25% of $36,000.00 is $9,000.00; $150.00 per month over sixty months is equivalent to $9,000.00)
3. If the debtor has $166.67 per month in available income, there is a presumption of abuse regardless of the amount of the unsecured debt.

5. U.S. Trustee Review, §704(b)(1).

The U.S. Trustee must review all materials submitted by the debtor and undertake the following:

a. Not later than 10 days after the meeting of creditors, submit a report as to whether abuse should be presumed, and,

b. If the report asserts that abuse should be presumed, then not later than 30 days thereafter, the U.S. Trustee must either file: (i) a motion to dismiss or convert,

with a statement that the debtor's current monthly income times 12 is greater than the median family income in the state for a family of comparable size, or (ii) a statement as to why such a motion is not appropriate.

6. Notice of the Presumption of Abuse that must be filed by the Case Trustee. §342(d), §704(b)(1)(B).

The case trustee must give notice that a presumption of abuse has arisen to all creditors under the following circumstances:

a. If abuse is revealed in the petition filed by the debtor, the trustee must give notice within 10 days of the date the petition is filed, or

b. Within 5 days of the date the U.S. Trustee files a report under §704(b)(1)(A).

7. In Chapter 13 Cases, the "Means Test" will Affect the Calculation of Payments to Unsecured Creditors, as well as, Disposable Income.

For debtors whose income is greater than the applicable state median income, the payments to unsecured creditors is to be based on the "means test" of §707(b)(2), as opposed to the current disposable income test.

In this scenario, there are two additional deductions from "current monthly income" -

1. Contributions to pension or retirement plans.

2. Income from child support, foster care, or disability payments for a dependent child.

Once the net "current monthly income" calculation is made, the debtor, whose median income is above the applicable state median, should then deduct the various expenses as specified under the "means test." After deducting the expenses, the

remaining balance would represent the amount of payments to be made to unsecured creditors under the Chapter 13 plan.

As to debtors whose income is less than the applicable state median, the current disposable income test that is presently utilized would be applied.

Under either scenario, the plan and the bankruptcy petition must be prepared and filed in "good faith." See, §1325(a)(3) and §1325(a)(7).

Case Summaries

In re Jass, 340 BR 411 (Bankr. D. Utah, 2006)

The Bankruptcy Court for the District of Utah had to determine whether "disposable income" as established by the debtors' Statement of Current Monthly Income ("Form B22C") is the same as "projected disposable income" as used in 11 U.S.C. §1325(b)(1)(B). The bankruptcy court held that "disposable income" as calculated by Form B22C is not always the same as "projected disposable income" as that phrase is used in §1325(b)(1)(B). The court reasoned:

> "[b]y definition under §1325(b)(2), the term 'disposable income' is oriented in historical numbers. By placing the word 'projected' next to 'disposable income' in §1325(b)(1)(B), Congress modified the import of 'disposable income.' The significance of the word 'projected' is that it requires the Court to consider both future and historical finances of a debtor in determining compliance with §1325(b)(1)(B)."

Form B22C should be the starting point in determining whether a debtor is complying with §1325(b)(1)(B) and proposing all of his projected disposable income to his unsecured creditors. The number from Form B22C will be the "debtor's 'projected disposable income' unless the debtor can show that there has been a substantial change in circumstances such that the numbers contained in Form B22C are not commensurate with a fair projection of the debtor's budget in the future."

In re Hardacre, 338 B.R. 718 (Bankr. N.D. Tex. 2006)

In *Hardacre*, the Chapter 13 trustee objected to the debtor's proposed plan, which proposed to pay unsecured creditors nothing. The Chapter 13 debtor arrived at the amount after calculating her projected disposable income. According to the trustee's objection, the debtor improperly calculated her disposable income by taking a double deduction of mortgage and car loan expenses. The trustee argued that the debtor's projected disposable income was artificially reduced by approximately $1,000 per month by taking these deductions.

First, the court held that any determination of the debtor's "projected disposable income," which the debtor is required to devote to payments under plan, "must be based on the debtor's anticipated income over the term of the plan." In determining projected disposable income in a case where the debtor's income is greater than that of the applicable median family income, a debtor is allowed to deduct certain standard expense allowances, based on the Internal Revenue Service standards. The allowance of these deductions is permitted under 11 U.S.C. §707(b)(2)(A), also known as the "means test." The court held that in applying the "means test" to calculate her projected disposable income, the debtor could not double count her housing and transportation expenses, but could always deduct a sum equal either to the standard allowances or to her actual housing and transportation expenses, whichever was greater. Finally, the court refused to allow the debtor to deduct the local standard expense for a vehicle that she owned free and clear.

In re Lynch, 368 B.R. 487 (Bankr. E.D. Va. 2007)

The Chapter 13 trustee objected to the plan proposed by an above-median-income debtor as not satisfying the "projected disposable income requirement," despite the fact that the debtor was devoting to the plan a sum that was derived from the application of the "means test." The

objection was based on the fact that the debtor, in applying the "means test," had improperly taken a vehicle ownership expense deduction for a vehicle that she owned outright with no related indebtedness.

The court pointed out that §1325(b)(3) requires an above-median-income debtor to calculate her disposable income in accordance with §707(b)(2), the "means test," which is used primarily for determining eligibility for the filing of a Chapter 7 bankruptcy case. The debtor had calculated her disposable income using Official Form B22C which was promulgated by the Judicial Conference of the United States pursuant to Rule 9009, Federal Rules of Bankruptcy Procedure.

At the time that the *Lynch* opinion was authored, the issue in question had been ruled upon in either a Chapter 7 or Chapter 13 context in 28 published opinions. Eleven opinions held that the debtor could not deduct an ownership expense where the debtor had no payment owed on the vehicle, and the other seventeen opinions held that the debtor could deduct the ownership expense. The twenty-eight opinions were all cited in the *Lynch* decision.

The court concluded that the statutory construction and the legislative history both favored allowing the expense deduction even when the debtor makes no debt or lease payments on the related vehicle.

In re Simms, 2008 WL 217174 (Bankr. N.D. W.Va.), January 23, 2008

The issue presented was whether disposable income for an above-median- income Chapter 13 debtor was to be determined based on the "means test" set forth on Form B22C or on Schedule I and J. The court concluded that when an objection is filed pursuant to §1325(b)(3), Form B22C is the method by which the debtor's disposable income is to be determined, not by deducting Schedule J expenses from the net income stated on Schedule I.

The court allowed the debtor to take the standard expense deduction for a vehicle despite the fact that the vehicle was unencumbered by debt. Because the court had not conducted an evidentiary hearing with respect to the debtor's claim for excess home energy, food, and clothing costs, the court set a future hearing to allow the debtor to introduce evidence and/or testimony regarding the reasonableness of his additional costs.

In re Crittendon, 2006 WL 2547102 (Bankr. M.D. N.C., 2006)

The Chapter 13 trustee objected to the above-median-income Chapter 13 debtors' plan because of certain deductions the debtors claimed on their Form B22C. Specifically, the trustee objected to four deductions that the debtors had taken for payments on secured claims when the debtors had already announced their intention to abandon the related collateral. The debtors claimed a deduction for their first mortgage payment, as well as, for their second mortgage payment. With court authorization, the debtors had already sold the residence and would not be making these two payments in the future. The other disputed deductions related to payments on a debt secured by a horse trailer and payments on a debt secured by a boat. In their proposed plan, the debtors had surrendered both items of collateral and were treating the creditors as unsecured. The court concluded that the payments in question did not constitute payments to secured creditors for purposes of §707(b)(2)(iii).

Since the debtors were above-median-income debtors, the court also concluded that their plan was fatally defective as a result of the commitment period specified in the plan because a 36 month plan period did not comply with §1325(b)(4)(A)(ii). The court stated that the debtors were required to submit a plan with a commitment period that is 60 months in duration when the unsecured creditors were not being paid 100%.

In re Barraza, 346 B.R. 724 (Bankr. N.D. Tex., 2006)

The United States Trustee (UST) filed a motion to dismiss, as an abuse of the provisions of Chapter 7, a bankruptcy case filed by an above-median-income debtor who was working 80 hours per week at two jobs in order to support himself while also paying child support and a mortgage on the residence where his ex-wife and children resided. The bankruptcy court, applying the "means test" literally, held as follows:

1. In performing the calculations required by the "means test," the debtor could not take the standard ownership allowance for an 18 year old pick-up truck that was neither financed nor leased.
2. The debtor could not deduct from his income, as "other necessary expenses," loan repayments to an employee benefit plan that he was not required to make as a condition for his continued employment, and where non-payment would have no consequences for the debtor, other than triggering a tax liability on the underlying loan.

In re Oliver, 350 B.R. 294 (Bankr. W.D. Tex., 2006)

In considering a motion to dismiss filed by the United States Trustee (UST), which asserted that the bankruptcy filing was an abuse of the provisions of Chapter 7, the court held as follows:

1. For purposes of the Bankruptcy Abuse Prevention and Consumer Protection Act's (BAPCPA's) "means test," a debtor who owned his vehicle free and clear of liens could not claim an ownership expense pursuant to the Internal Revenue Standards, even though he anticipated having to replace the vehicle within several months.
2. The debtor's actual monthly gasoline expense was a "necessary" expense.

3. The debtor's prior failed attempt at a debt consolidation was not a "special circumstance" that rebutted the presumption of abuse for the purpose of allowing the debtor to proceed under Chapter 7.

4. The debtor's alleged serious mental condition was insufficient to rebut the presumption of abuse of Chapter 7, and, therefore, the UST's motion to dismiss was sustained.

In re Harris, 353 B.R. 304 (Bankr. E.D. Okla., 2006)

The United States Trustee (UST) filed a motion to dismiss the debtors' bankruptcy case based on a presumption of abuse of the provisions of Chapter 7 of the Bankruptcy Code. The court offered the following conclusions, to-wit:

1. Under the Bankruptcy Abuse Prevention and Consumer Protection Act's (BAPCPA's) "means test," the debtors may not include ownership expenses for vehicles on which they do not make payments.

2. Monthly payments on secured debts cannot be included in the "means test" calculation where the debtors intend to surrender the corresponding collateral.

The court sustained the UST's motion to dismiss.

In re Mestemaker, 359 B.R. 849 (Bankr. N.D. Ohio, 2007)

The United States Trustee (UST) filed a motion to dismiss the above-median-income debtors' Chapter 7 case for abuse based on their excess monthly income over expenses. The court sustained the motion to dismiss for the following reasons:

1. Relying on §707(b)(1) of the Bankruptcy Code, the court determined that abuse may be found where a Chapter 7 debtors' Schedules I and J show excess income over their expenses, even though the debtors "passed" the "means test."

2. Relying on §707(b)(3) of the Bankruptcy Code, the court stated that, considering the totality of the debtors' actual financial circumstances, granting the debtors' relief would be an abuse of the provisions of Chapter 7 of the Bankruptcy Code.

In re Ross-Tousey, 368 B.R. 762 (Bankr. E.D. Wis., 2007)

The United States Trustee (UST) moved to dismiss the debtors' bankruptcy case as an abuse of the provisions of Chapter 7 of the Bankruptcy Code. The UST relied on the presumption of abuse that allegedly arose from the application of the "means test" or, in the alternative, on the theory that the debtors' ability to pay their debts from future income rendered their Chapter 7 filing abusive based on the totality of the circumstances. The bankruptcy court denied the UST's motion and the UST appealed.

The district court, in reversing the decision of the bankruptcy court, held that in applying the "means test," the bankruptcy court should not have allowed the debtors to deduct as "applicable monthly expenses" under the Internal Revenue Service's standards, vehicle ownership expenses for motor vehicles which they owned outright and on which they made no monthly debt or lease payments.

In re Hice, 376 B.R. 771 (Bankr. D. S.C., 2007)

The United States Trustee (UST) filed a motion to dismiss the above-median-income Chapter 7 debtor's bankruptcy case for presumed abuse based on the fact that the debtor had claimed the local standard vehicle ownership expense for an automobile on which she did not make any debt payments.

The bankruptcy court concluded that, in applying the "means test" to determine whether a debtor is charged with a presumption of abuse, the debtor is entitled to claim a vehicle ownership expense even if he or she does not have an actual, current vehicle ownership or lease expense.

The UST's motion to dismiss was denied.

In re Pampas, 369 B.R. 290 (Bankr. M.D. La., 2007)

The United States Trustee (UST) filed a motion to dismiss the debtor's bankruptcy case as an abuse of the provisions of Chapter 7 of the Bankruptcy Code, notwithstanding that under the "means test," the debtor's monthly expenses exceeded her monthly income.

The UST objected to the debtor's taking the standard deduction for a family of three despite the fact that her first child had not yet been born, as well as, to her taking a vehicle ownership expense deduction for a motor vehicle that she owned outright.

The court conditionally granted the UST's motion to dismiss and offered the following comments.

1. The debtor could take the standard deduction available only for a two member, not for a three member household, notwithstanding that she was pregnant.
2. The court would not allow the debtor to take the vehicle ownership expense deduction for a motor vehicle that she owned outright.
3. Even assuming that the debtor's pregnancy qualified as a "special circumstance," upon which the debtor might rely to rebut the presumption of abuse, the debtor presented insufficient evidence as to how her pregnancy impacted on her financially.

910 Vehicle Issues

When the Bankruptcy Abuse Prevention Consumer Protection Act of 2005 (BAPCPA) was enacted, an unnumbered paragraph was added to §1325(a) of the Bankruptcy Code immediately following §1325(a)(9) as follows:

> 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 debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

The aforementioned paragraph has been labeled the "hanging paragraph" and has spawned several legal issues. Several of these issues will be addressed hereinbelow.

Does the Surrender of a 910 Vehicle Fully Satisfy the Creditor's Secured Claim and Unsecured Deficiency Claim?

When this issue was initially litigated, a line of cases developed to the effect that the surrender of the 910 vehicle to the creditor by the Chapter 13 debtor fully satisfied the creditor's secured and unsecured deficiency claim. *See, In re Osborn*, 348 B.R. 500 (Bankr. W.D. Mo. 2006); *In re Sparks*, 346 B.R. 767, (Bankr. S.D. Ohio 2006); *In re Long*, 2006 WL 2090246 (Bankr. E.D. Tenn 2006); *In re Payne*, 347 B.R. 278, 2006 WL 2289371 (Bankr. S.D. Ohio 2006); *In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn. 2006); *In re Nicely,* 349 B.R. 600 (Bankr. W.D. Mo. 2006); *In re Evans*, 349 B.R. 498 (Bankr. E.D. Mich. 2006); *In re Pool*, 351 B.R. 747 (Bankr. D. Or. 2006); and *In re Bayless*, No. 06-31517, 2006 WL 2982101 (Bankr. E.D. Tenn. 2006).

Congress articulated without qualification in the hanging paragraph that §506 does not apply for purposes of §1325(a)(5) to "910 creditors." However, is there a distinction between the scenario where a debtor retains possession of the vehicle and proposes to pay for it through the Chapter 13 plan compared to the scenario where a debtor proposes to surrender the vehicle to the secured creditor. The language of §506(a)(1) provides significant insight, to-wit:

> (a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

A later decision, which analyzed the effect of §506(a) and concluded that the surrender of the vehicle by the debtor did not fully satisfy the creditor's secured claim and unsecured deficiency claim, was *In re Particka*, 355 B.R. 616 (Bankr. E.D. Mich. 2006). The reasoning in *Particka* is particularly compelling, to-wit:

> On the other hand, the surrender of collateral changes the parties' interests in the property and consequently the impact of §506(a). As explained earlier in this opinion, 506(a) applies by its terms only to "an allowed claim of a creditor secured by a lien on property *in which the estate has an interest....*" 11 U.S.C. §506(a) (emphasis added).
>
> ....Accordingly, upon confirmation of a Chapter 13 plan providing for surrender under §1325(a)(5)(C), the estate no longer has an interest in the collateral.
>
> By rendering §506 inapplicable to §1325(a)(5), the hanging paragraph did work a change in the law with respect to 910 creditors, but only with respect to debtors who retain the collateral securing their debt. Because §506 does not apply to a vehicle surrendered under §1325(a)(5)(C), the specific direction of the hanging paragraph that §506 no longer apply to §1325(a)(5) does not cause any change in the outcome where a debtor surrenders a vehicle under §1325(a)(5)(C) to a 910 creditor and the estate no longer retains an interest in such vehicle. While it might have been more precise for the hanging paragraph

to state that as to 910 creditors §506 no longer applies to §1325(a)(5)(B), because that was all it has ever applied to, the effect of the hanging paragraph's statement that §506 no longer applies to §1325(a)(5) creates the same result. The result is that a debtor cannot retain a 910 vehicle under §1325(a)(5)(B) by paying a cram down value determined by the bifurcation process of §506. That is a significant change. But the hanging paragraph causes no change when a debtor surrenders a vehicle to a 910 creditor under §1325(a)(5)(C). Prior to BAPCPA, §506 did not bifurcate a secured creditor's claim upon surrender, nor does it do so post-BAPCPA. Upon surrender, the 910 secured creditor still is entitled to enforce its right to payment and, after disposition of the collateral, that right to payment can still be filed and allowed as an unsecured deficiency claim under §502. There is nothing in the hanging paragraph that somehow disallows an unsecured deficiency claim of a 910 creditor whose debt was a full recourse obligation under non-bankruptcy law and whose depreciated collateral has been surrendered to it by a Chapter 13 debtor under §1325(a)(5)(C).

The Court recognizes that the weight of authority is in favor of the Debtors' position. It is tempting to follow the trend. But on close inspection, those cases seem to proceed from the incorrect assumption that it is only somehow because of §506 that an under-secured 910 creditor has a right to pursue a deficiency claim. For example, in *In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn. 2006), the court stated that "[b]ecause application of §506(a) is entirely removed from the picture, there can be no deficiency balance, either secured or unsecured, and surrender satisfies an allowed secured claim in full." *Id.* at 342.

The only two published cases to date that have rejected the Debtors' position are *In re Duke* and *In re Zehrung*. The court in *Duke* did so based on its conclusion that the hanging paragraph is ambiguous. *In re Duke*, 345 B.R. 806, 809 (Bankr. W.D. Ky. 2006) (citation omitted). From there, the *Duke* court looked to legislative history for guidance. Acknowledging that the legislative history was "not expansive," the *Duke* court nonetheless found that it did not support the position of the debtors in that case. *Id.* However, as explained earlier in this opinion, the Court does not consider the hanging paragraph to be ambiguous. Therefore, resort to even the scant legislative history that exists is unnecessary.

The *Zehrung* court reached the same conclusion as Duke but took a different path to get there. *Dupaco Community Credit Union v. Zehrung (In re Zehrung),* 351 B.R. 675 (W.D. Wis. 2006). First, the court observed that the phrase " 'allowed secured claim' in §1325 [a](5) is used in the sense that the claim is allowed under §502 and secured by some collateral, not in the §506 sense of the term." *Id.* at 677-78. The *Zehrung* court then explained that [a] creditor taking possession of collateral does not depend upon §506 to determine the value of its unsecured claim. Section 506 has application only when the estate retains an interest in the collateral, a circumstance which disappears with surrender. Rather, when collateral is surrendered pursuant to §1325[a](5)(C) the amount of the

> remaining unsecured claim is determined by state law, uniform commercial code sections 9-610 to 9-624. The creditor's rights being unmodified by §506, it is entitled to its state law right to liquidate the collateral and retain an unsecured claim for the balance due.

Particka, 355 B.R. at 624-26

The Bankruptcy Court in the Northern District of Mississippi found the *Particka* reasoning so persuasive that it reversed a decision that it had previously rendered. The more recent opinion can be found at *In re Bobbie Jean Clark*, Case No. 06-11943, U.S. Bankruptcy Court for the Northern District of Mississippi.

More recently, the Sixth, Seventh, and Eighth Circuit Courts of Appeals have each determined that the surrender of the 910 vehicle does not satisfy the unsecured deficiency portion of the creditor's claim. These cases are summarized as follows:

In the Matter of Wright, 492 F.3d 829 (7th Cir. 2007)

Because the debtors purchased their vehicle within 910 days of the filing of their bankruptcy petition, the hanging paragraph in §1325(a) was applicable. Because the debtors' vehicle was worth less than the balance owed on their purchase money loan, the debtors proposed a plan that would surrender the vehicle to the creditor and proposed to pay nothing on the unsecured deficiency balance. The bankruptcy court, taking the minority position, denied confirmation of the debtors' Chapter 13 plan. On a direct appeal to the Circuit, the decision of the bankruptcy court was affirmed. Chief Judge Frank Easterbrook concluded as follows:

1. The plan confirmation statutes' hanging paragraph provision leaves affected parties to their contractual entitlements, and
2. Any shortfall between the value of the encumbered vehicle and the balance on the loan that remained after the debtors surrendered their vehicle had to be treated as

an unsecured debt.

Judge Easterbrook offered the following comment:

> Like the bankruptcy court, we think that, by knocking out §506, the hanging paragraph leaves the parties to their contractual entitlements. True enough, §506(a) divides claims into secured and unsecured components. (Section 506 does other things as well, see *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992), but these have no bearing on the question at hand.) Yet it is a mistake to assume, as the majority of bankruptcy courts have done, that §506 is the *only* source of authority for a deficiency judgment when the collateral is insufficient. The Supreme Court held in *Butner v. United states*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979), that state law determines rights and obligations when the Code does not supply a federal rule. See also, e.g. *Travelers Casualty & Surety Co. v. Pacific Gas & Electric Co., –U.S.–, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007); Raleigh v. Illinois Dep't of Revenue, 530 U.S. 15, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000).*
>
> The contract between the Wrights and their lender is explicit: If the debt is not paid, the collateral may be seized and sold. Creditor "must account to Buyer for any surplus. Buyer shall be liable for any deficiency." In other words, the contract creates an ordinary secured loan with recourse against the borrower. Just in case there were doubt, the contract provides that the parties enjoy all of their rights under the Uniform Commercial Code. Section 9-615(d)(2) of the UCC, enacted in Illinois as 810 ILCS 5/9-615(d)(2), provides that the obligor must satisfy any deficiency if the collateral's value is insufficient to cover the amount due.

Capital One Auto Finance v. Osborn, 515 F.3d 817 (8th Cir. 2008)

The Chapter 13 debtors objected to the unsecured deficiency claim filed by the purchase money motor vehicle lender, and the lender objected to a provision in the debtors' proposed Chapter 13 plan that provided for the surrender of the vehicle in full satisfaction of the lender's purchase money security interest. The Bankruptcy Court for the Western District of Missouri sustained the debtors' objection to the proof of claim and overruled the lender's confirmation objection based on the effects of the "hanging paragraph." This decision was affirmed by the Eighth Circuit Bankruptcy Appellate Panel.

The lender further appealed to the Eighth Circuit Court of Appeals which reversed both the Bankruptcy Court and the Bankruptcy Appellate Panel decisions, holding as follows:

1. Addressing an issue of apparent first impression, the "hanging paragraph" does not eliminate an undersecured creditor's deficiency claim when, in a Chapter 13 plan, the debtors proposed to surrender their "910 car."
2. Because Missouri state law gives the creditor the right to an unsecured deficiency judgment, the creditor is entitled to an unsecured deficiency claim in the amount of $9,916.50.

Relying on state law, the court further concluded:

> The contract here gave Capital One the right to repossess the vehicle, sell it, and apply the proceeds (minus reasonable sales expenses) to the debt owed. The contract further allows Capital One to "sue [the debtors] for additional amounts if the proceeds of the sale do not pay all of the amounts [the debtors] owe us." In Missouri, an unsecured deficiency judgement is allowed when the creditor complies with Missouri law governing disposition of collateral after default. *See Reno Fin., Ltd. v. Valleroy,* 229 S.W.3d 622, 624 (Mo.Ct.App.2007); Mo.Rev.Stat. §400.9-615. As nothing in §502 or §1325 denies a creditor an unsecured deficiency claim, Capital One is entitled to one. *See Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.,* — U.S. —, 127 S.Ct. 1199, 1206, 167 L.Ed.2d 178 (2007) ("[W]e generally presume that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed."); *In re Wright*, 492 F.3d at 832-33.
>
> *In re Long,* 519 F.3d 288 (6th Cir. 2008)

The debtors propose to surrender their vehicle to their purchase money security lender in their Chapter 13 bankruptcy plan rather than retaining the car. The Bankruptcy Court for the Eastern District of Tennessee determined that the remaining indebtedness was completely erased and the creditor appealed. The Eighth Circuit Court of Appeals held as follows:

1. The deficiency claim following the surrender of the 910 vehicle had to be treated as an allowed claim.

2. The "hanging paragraph" found in §1325(a) of the Bankruptcy Code had to be interpreted in the interests of equity to produce a result that conformed to the intent of Congress and the overriding purposes of the Bankruptcy Code.

In support of its conclusion, the Sixth Circuit offered the following comment:

> ...The majority position that deficiency claims are no longer allowed for 910 claims by virtue of the hanging paragraph's elimination of §506 effectively renders 910 secured loans non-recourse, without regard to the contractual terms.
>
> This argument fails because §506 is not the source for a deficiency claim when collateral is surrendered. Section 506 is not the source for a deficiency claim when collateral is surrendered. Section 506 is not applicable to surrender of collateral because once the collateral is surrendered, the estate no longer has an interest in the property. The property is returned to the creditor, who is free to foreclose upon the security interest and seek a deficiency pursuant to its contractual entitlements. This is the holding of *In re Particka*, 355 B.R. 616 (Bankr. E.D. Mich. 2006), which I find persuasive. As has been held by several courts, including both of the other Circuit courts to rule on this issue, the inapplicability of §506 to §1325(a)(5)(C), by virtue of the hanging paragraph, does not effect a change in a creditor's ability to seek a deficiency because at surrender, the parties are left to their contractual entitlements under state law. *See Capital One Auto Finance v. Osborn*, 515 F.3d 817 (8th Cir. 2008); *In re Wright*, 492 F.3d 829, 832 (7th Cir. 2007); and *In re Rodriguez*, 375 B.R. 535, 544 (9th Cir. BAP2007).

What Interest Rate Applies to Claims Secured by 910 Vehicles?

A question that has arisen since the enactment of BAPCPA is what effect, if any, does the "hanging paragraph" in §1325(a) have on the Supreme Court's holding in *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004).

> *Drive Financial Services, L.P. v. Jordan*, —F.3d —, 2009 WL 651547 (5th Cir., March 12, 2208)

A creditor with a perfected security interest in the debtors' vehicle objected to the

debtors' proposed Chapter 13 plan which provided for the payment of interest at the rate of 6% per annum as compared to the contract rate which was 17.95% per annum. The Bankruptcy Court for the Eastern District of Texas modified the interest rate to a prime plus rate and, thereafter, confirmed the Chapter 13 plan as modified. The decision was certified for a direct appeal to the Fifth Circuit which affirmed the bankruptcy court to the effect that a prime plus rate was the proper rate of interest to be paid on the secured creditor's claim.

The Fifth Circuit concluded that BAPCPA did not amend the definition of value under §1325(a)(5)(B), nor did it prohibit bankruptcy courts from altering the contractual term for secured claims. Since these were the identical issues that were decided by the Supreme Court in *Till*, the Fifth Circuit held that Congress did not supercede *Till* when it passed BAPCPA.

In support of its conclusion, the Fifth Circuit offered the following comment:

> ...If *Till* were not binding, we would remand this case to the bankruptcy court with instructions that it recalculate the interest rate on Drive Financial's secured claim using the presumptive contract rate approach, which was the approach previously adopted by this court. *See Smithwick*, 121 F.3d at 214-15 (holding that the presumptive contract rate approach should be used to determine interest rates on Chapter 13 plan installment payments on secured claims). Such a holding would be essentially identical to the holding of the Seventh Circuit in *Till*, which was reversed by five currently active justices on the Supreme Court. Such a result would be untenable at best.
>
> Furthermore, while the plurality opinion and Justice Thomas's concurrence offered different reasons for rejecting the Seventh Circuit's application of the presumptive contract **rate** approach, they both rejected the presumptive contract **rate** approach as being too generous to creditors. Therefore, if we were to apply the *Marks* test, (*Marks v. United States*, 430 U.S. 188, 975 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977)), the narrowest grounds would be that the coerced loan or presumptive contract **rate** approach cannot be used if they would yield an **interest rate** higher than the prime-plus approach.
>
> For the foregoing reasons, we hold that the *Till* plurality's adoption of the prime-plus **interest rate** approach is binding precedent in cases presenting an essentially indistinguishable factual scenario...

Other cases which have addressed this issue are the following:

In re Johnson, 337 B.R. 269 (Bankr. M.D.N.C. 2006) (*Till* still applies; contract rate not required); *In re Robinson*, 338 b.R. 70 (Bankr. W.D. Mo. 2006) (same); *In re Wright*, 338 B.R. 917 (Bankr. M.D. Ala. 2006) (same); *In re Fleming*, 339 B.R. 716 (Bankr. E.D. Mo. 2006) (same); *In re Shaw*, 341 B.R. 543 (Bankr. M.D.N.C. 2006) (same); *In re Brooks*, 344 B.R. 417 (Bankr. E.D.N.C. 2006) (same); *In re Murray*, 346 B.R. 237 (Bankr. M.D. Ga. 2006); *In re Lowder*, 2006 WL 1794737 (Bankr. D. Kan.) (same); *In re White,* ___ B.R. ___, 2006 WL 2827321 (Bankr. E.D. La.) (same).

In re Taranto, 344 B.R. 857 (Bankr. N.D. Ohio 2006) (*Till* not necessarily applicable)

Does the "Hanging Paragraph" Found in §1325(a) Apply When the Loan Transaction is not for the "Personal Use of the Debtor"?

What is the meaning of the phrase "for the personal use of the debtor"? Does it include property acquired for the personal use of some other family or household member? Does it include property acquired for mixed business and personal uses?

In re Jackson, 338 B.R. 923 (Bankr. M.D. Ga. 2006) (auto purchased for debtor's wife not subject to the "anti-writedown" provision); *In re Lewis*, 347 B.R. 769 (Bankr. D. Kan. 2006) (automobile acquired for daughter, not for personal use of debtor); *In re Lowder,* 2006 WL 1794737 (Bankr. D. Kan.) (vehicle acquired for commuting to work and other personal business was acquired for personal, not commercial use); *In re White*, 352 B.R. 633, (Bankr. E.D. La. 2006) (same).

What courts might consider as the "personal use of the debtor" is obviously a fact intensive issue that will have to be decided on a case by case basis. Common sense scenarios that do not push the "edge of the envelope" will likely provide an exception to the "anti-cramdown" effect of the "hanging paragraph."

What Exactly is Covered by the Definition of "Purchase Money Security Interest"? The Financing of Negative Equity and Unique Insurance Coverages. The Transformation Rule Versus the Dual Status Rule.

In a recent edition of the American Bankruptcy Institute Consumer Bankruptcy Committee's E-Newsletter, Volume VI, No. 2, April, 2008, Dennis LeVine and Associates, P.A., Tampa, Florida, published the following article entitled, "Florida Bankruptcy Courts Split on the Negative Equity Issue Relative to 910-Day Claims," to-wit:

In the 2005 Bankruptcy Amendments ("BAPCPA"), Congress added a provision which appeared to be designed to protect auto lenders who financed cars for debtors within 910 days of the bankruptcy filing. This provision sought to prevent the cramdown of these so-called 910 day loans in Chapter 13 cases, and was included in a section of the legislation entitled "Giving Secured Creditors Fair Treatment in Chapter B." H.R. Rep. No. 109-31 at 72 (2005). Unfortunately, this provision was unnumbered and simply added at the end of Section 1325(a). Now known as the "hanging paragraph," the apparent mis-placement of this provision, together with its confusing language, has created extensive litigation on a number of issues.

To qualify for the statutory protection from cramdown in Chapter 13,a 91O-day loan must, among other things, constitute a purchase money security interest ("PMSI"). Some Debtors have argued that lenders do not hold the requisite PMSI when the loan also finances debts unrelated to the "price" of the financed car, such as (1) a roll-over of negative equity owed on a trade-in car, (2) pre-payment of "gap" insurance covering the difference between the new car's value and the total amount financed, and/or (3) pre-paid extended warranty contract premiums. Several Courts have adopted this argument and found that 910 day loans which finance these additional items are no longer PMSI, and thus not protected from cramdown by the "hanging paragraph". This article will explore the different positions taken by Bankruptcy Courts in Florida on the issue.

The term "purchase money security interest" is not defined in the Bankruptcy Code. Courts have looked to the definition of PMSI in state law, and more specifically the Uniform Commercial Code. Bankruptcy Courts which have looked at Florida law on this issue have come to different conclusions. In *In re Blakeslee*, 377 B.R. 724 (Bankr. M.D. Fla. 2007), the car loan was incurred within 910 days of filing. The loan included financing of negative equity in the Debtor's trade-in vehicle. Judge Funk in Jacksonville found that the "hanging paragraph" was inapplicable, and the Debtor could cramdown the secured claim. Judge Funk adopted the reasoning of a New York Bankruptcy Court in *In re Peaslee*, 358 B.R. 545, 551 (Bankr. W.D. N.Y. 2006), which held that the inclusion of negative equity in a loan means the loan is no longer a PMSI. In *Peaslee*, the Bankruptcy Court looked to New York law and found that a PMSI exists where the collateral

secures an obligation "incurred as all or part of the price of the collateral or for part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used." Judge Funk agreed, and found the term "price of the collateral" to equal the amount the collateral cost to buy -this price does not include the payoff of negative equity. Judge Funk noted that "negative equity is not used to enable a Debtor to acquire rights in the collateral". Instead, financing negative equity is merely an "accommodation" to facilitate the sale. In other words, there are two separate transactions and the payoff of the old loan is not a prerequisite to the new loan. **[ED. NOTE -as set out below, the Bankruptcy Court's holding in *Peaslee* has been reversed].**

Once Judge Funk in *Blakeslee* determined the obligation to be partially a PMSI and partially a non-PMSI (based on the inclusion of negative equity), the Court considered the next step — how to apply the hanging paragraph to a claim that is only partially secured by a PMSI. The Court found under well established commercial law, it had discretion to determine the extent of the PMSI by applying either the "dual status rule" or the "transformation rule." The dual status rule provides that the secured lender has a purchase money security interest to the extent that the amount financed relates to the purchase price for the collateral. *In re Price*, 363 B.R. 734, 745 (Bankr. E.D. N.C., 2007). The transformation rule, however, "transforms" the entire secured obligation to non-PMSI (i.e. the non-purchase money component transforms the entire claim into a non-purchase money security interest). *Id.*

In *Blakeslee*, Judge Funk found that when a debtor finances negative equity in a 910-day loan, the entire security interest in ***transformed*** into a non-PMSI loan. The Court reasoned:

> "While the Court agrees that it does have the discretion as to whether to apply the dual status or the transformation rule to a partial purchase money security interest, the Court finds that with respect to negative equity, the transformation rule is the appropriate rule to be applied. As the court in *Price* pointed out, notwithstanding the fact that a sales contract may clearly state the amount of the purported purchase price of a vehicle, a vehicle's true purchase price and the amount of negative equity is difficult to compute and is in fact a "mystery", with the actual purchase price being affected by an unreasonably low allowance on a traded in vehicle. *Price*, 363 B.R. at 745. A creditor's burden of establishing the difference between the purchase price and advances to pay the debt on the traded in vehicle is "a virtually impossible task." *Id.* Moreover, a court is burdened with the task of the allocation of pre-bankruptcy payments to the purchase money and nonpurchase money portions of the secured debt. *Id.* The Court declines the task of "unwind[ing] the manipulations" which would be foisted upon it were it to apply the dual status rule to the financing of negative equity in retail installment contracts. *See Peaslee,* 358 B.R. at 560. Accordingly, the Court will apply the transformation rule to such situations. [footnote omitted] [The Creditor] is not secured by a purchase money security interest in any amount. Consequently, the prohibition against strip down in § 1325(a) does not apply and Debtor may therefore bifurcate [The Creditor's claim] into secured and unsecured components pursuant to 11 U.S.C. § 506(a)(1)."

On the same day he issued *Blakeslee*, Judge Funk issued a decision on a similar issue in *In re Honcoop*, 377 B.R. 719 (Bankr. M.D. Fla. 2007). In *Honcoop*, the Debtor financed the purchase of a vehicle for $12,000 less than 910 days prior to :filing bankruptcy. The Debtor also financed an additional $500 for "gap" insurance. The Debtor later filed Chapter 13, and :filed a Motion to Value the creditor's secured claim at $4,570. The creditor opposed the valuation motion, arguing that its claim could not be modified based upon the protections of the hanging paragraph.

In *Honcoop*, Judge Funk applied the same analysis from *Blakeslee* and adopted the Bankruptcy Court's analysis in *Peaslee.* Judge Funk found that "gap" insurance was not part of the "price of the collateral".In *Honcoop*, however, Judge Funk applied the "dual status" rule and not the "transformation rule" because the Court found that the contract clearly allocated a **specific amount** paid for the "gap" insurance. The Court was able to calculate the creditor's PMSI by simply subtracting the cost of the "gap" insurance from the contract amount. Ironically, while the Debtor prevailed in *Honcoop,* the Debtor gained very little in the end. The PMSI portion of the secured claim turned out to be $11,500, which was protected by the "hanging paragraph" and had to be fully paid (with interest) in the Plan.

In January, 2008, Judge May in Tampa faced the same issues as in *Blakeslee* and *Honcoop* but came to the opposite conclusion. In *In re Schwalm*, ---B.R. ----,2008 WL 162933 (Bankr. M.D. Fla. January 16,2008), Judge May rejected the analysis used by Judge Funk in *Blakeslee* and *Honcoop*. In particular, Judge May was persuaded by the recent District Court opinion in *In re Peaslee*, 373 B.R. 252 (W.D. N.Y. 2007), where the District Court reversed the Bankruptcy Court decision relied upon by Judge Funk (i.e. the inclusion of negative equity in the loan took the vehicle out of the 91O-day protections of the hanging paragraph). **[ED. NOTE: The Peaslee case currently is on appeal to the 2nd Circuit Court of Appeals.]** Judge May cited the following from the District Court opinion in *Peaslee*:

> "It is not apparent why a refinancing of rolled-in negative equity on a trade-in as part of a motor vehicle sale could not constitute an 'expense incurred in connection with acquiring rights in' the new vehicle. If the buyer and seller agree to include the payoff of the outstanding balance on the trade-in as an integral part of their transaction ... it is in fact difficult to see how that could not be viewed as such an expense."

In *Schwalm*, Judge May pointed out that items such as negative equity and "gap" insurance are specifically authorized to be included in motor vehicle financing -not only under state law, but under the Federal Truth in Lending Law (15 U.S.C. §1601, *et seq.)* and Regulation Z (12 C.F.R. §226.18)(these specific items can be included in the "amount financed" in a motor vehicle retail installment contract). Taking a straight-forward approach to the issue, Judge May found that the Debtors negotiated a package financing in compliance with state law:

> "[In 2005] it was already common industry practice, sanctioned by state motor vehicle finance law, and the Federal Truth in Lending Law, for automobile dealers to offer buyers

> packaged financing, which includes the payoff of debt on the trade in vehicle, GAP insurance to protect repayment of that amount, and the cost of a service contract. These obligations, by the parties' negotiation, and sanctioned by Florida finance laws (as in other states), have the requisite 'close nexus' to the acquisition of the collateral and the secured obligation as explained by Comment 3 to Section 679-1031 [the Florida DCC]."

Judge May found further support for his decision in the legislative history of BAPCPA. Many courts have opined that there is scant, if any, legislative history regarding the 2005 BAPCPA amendments (e.g. there is no Conference Report accompanying the legislation). These courts, however, tend to overlook the apparent intent behind the change in the law -to give additional protections to auto lenders who made loans to Debtors within 910 days of the bankruptcy filing. As an example of this apparent intent, Judge May pointed to the title of the provision containing the hanging paragraph – "Giving Secured Creditors Fair Treatment in Chapter 13", and concluded:

> "[T]he 'hanging paragraph' was adopted to give favored treatment to a limited class of potentially under-secured creditors -those holding a purchase money security interest in a motor vehicle acquired for personal use within the 910 days preceding the bankruptcy petition date. 11 U.S.C. §1325(a). The debtors' argument carries with it the implicit conclusion that Congress intended the 'hanging paragraph' to be inoperative as to a substantial number of lawful auto finance transactions that were industry practice when BAPCPA was enacted. Such an interpretation is not compelled by the text of the 'hanging paragraph,' or by its legislative history."

The negative equity issue decided in *Blakeslee* and *Schwalm* currently is on appeal before the 11th Circuit in a Georgia case, *Graupner v. Nuvell Credit Corp.*, 2007 WL 1858291 (M.D. Ga. 2007). In *Graupner*, the creditor argued that under state law the "price of the collateral" included the negative equity that was included in the total amount financed. The Bankruptcy Court agreed. The District Court affirmed, holding that the price of the collateral included the negative equity:

> "The trade-in of the vehicle was an integral part of the sales transaction. The value of that trade-in along with its accompanying debt affected the ultimate price that was paid for the new pick-up truck. The negative equity is inextricably intertwined with the sales transaction and the financing of the purchase. This close nexus between the negative equity and this package transaction supports the conclusion that the negative equity must be considered as part of the price of the collatera1. [footnote omitted] Accordingly, the Court finds that the Creditor has a purchase money security interest for the full amount of its debt. Thus, § 506 shall not apply to modify the amount of the secured obligation."

Like *Schwalm*, the District Court in *Graupner* supported its conclusion by referring to the official comments of the drafters of the Uniform Commercial Code, which indicate that the price of collateral includes negative equity. *See* U.C.C. § 9-103 cmt. 3 (price of collateral includes "obligations for expenses incurred in connection with acquiring rights in the collatera1."). The District Court in *Graupner* also referred to other statutory authority defining "sales price" in

consumer transactions, such as the Federal Truth in Lending Act, 15 U.S.C. § 1601, *et seq.,* as implemented by Regulation Z, 12 CFR Pt. 226 (negative equity treated as part of total sales price), and the Georgia Motor Vehicle Sales Finance Act ("cash sales price" includes negative equity).

As these cases show, Courts across the country will continue to wrestle with the PMSI issue related to the hanging paragraph until the Circuit Courts of Appeal or the Supreme Court (hopefully) decide the issue.

F:/Dennis/Newsletter Articles/2008.Jan.Courts Split on Negative Equity in 9\ 0 Loans

Other decisions which have addressed the negative equity issue, as well as, the distinction between the transformation rule and the dual status rule are summarized as follows:

In re Hayes, 376 B.R.655 (Bankr. M.D. Tenn., 2007)

This decision addressed factual scenarios where multiple creditors had provided financing within 910 days prior to the bankruptcy petition date in order to enable the debtors to purchase motor vehicles for their personal use. The creditors had objected to the confirmation of the plans proposed in the debtors' separate Chapter 13 cases because the debtors had proposed to bifurcate the creditors' claims despite the anti-modification language appearing in the "hanging paragraph" found in §1325(a) of the Bankruptcy Code. The debtors responded by asserting that the creditors had included such items as credit disability insurance, "GAP" insurance, as well as, negative equity in a trade-in vehicle in their financing and thus the loans had lost their character as purchase money security interest. Consequently, the debtors contended that the "hanging paragraph" did not preclude the bifurcation of the creditors' claims.

The bankruptcy court concluded that the creditors held "purchase money security interests" in vehicles, and were protected by the "hanging paragraph" from having their claims bifurcated for purposes of "cramdown," only to the extent of the debtors' remaining obligations for the repayment of sums advanced toward the purchase price of the new vehicles, less any

amounts charged for insurance policies or for the payoff of negative trade-in equity.

The court noted that the loan agreements specifically provided that the debtors were not required to purchase insurance to obtain credit for the purchase of the vehicles, and that their decision would not be a factor in their credit approval process. As such, the financing of the insurance policies did not enable the debtors to acquire rights in the vehicles, and the payoff of the prior car loan was not shown to possess a requisite close nexus to the debtor's acquisition of rights in the new vehicle.

The bankruptcy court determined that it would look to state law to decide whether creditors that had advanced money to the debtors no more than 910 days prior to their filing Chapter 13 bankruptcy cases, not only to enable the debtors to purchase motor vehicles, but to allow them to obtain credit disability and/or "GAP" insurance and, in the case of one debtor, to payoff the negative equity in a trade-in vehicle, held purchase money interest in the vehicles for the entire amount financed, so as to be protected by the "hanging paragraph" from having their claims bifurcated.

The court pointed out that the fact that the Tennessee legislature, in generally adopting the Uniform Commercial Code (UCC) to govern commercial transactions in Tennessee, modified the UCC to provide a method for allocating a debtor's payments on obligations that were only partially purchase money obligations was clear evidence that Tennessee does not apply the "transformation rule," so as to treat any advance by the lender other than for the purpose of acquiring rights in collateral as destroying the purchase money nature of its security interest, but rather applies "dual status rule," under which the obligation can both be purchase money and non-purchase money in nature. *See, Tennessee Code* §49-9-103(e)(2).

In re Price, 363 B.R. 734 (Bankr. E.D. N.C., 2007)

In this case, the creditor objected to the confirmation of the debtors' proposed Chapter 13 plan, asserting that it had a purchase money security interest in the debtors' vehicle which precluded bifurcation of its secured claim, relying on the anti-modification effect of the "hanging paragraph."

The bankruptcy court concluded as follows:

1. Money advanced to pay the cost of GAP insurance was not a part of the purchase price of the collateral, and thus, did not give rise to a purchase money security interest;
2. Funds advanced to pay off the balance of a debt owed on a trade-in vehicle were not part of the purchase price, and did not give rise to a purchase money security interest; and
3. Pursuant to the transformation rule, the creditor did not have a purchase money security interest in the debtors' vehicle in any amount, and, therefore, its claim could be bifurcated.

The court denied the creditor's objection to confirmation of the debtors' Chapter 13 plan.

General Motors Acceptance Corp. v. Peaslee, 373 B.R. 252 (W.D. N.Y., 2007)

This decision reversed and remanded the decision of the bankruptcy court which had held that the refinancing of a trade-in vehicle's negative equity as a part of a replacement vehicle purchase did not result in a purchase money security interest under New York law, and, under the "transformation rule" a purchase money security interest in consumer goods is transformed into a non-purchase money security interest where the collateral secures more than its own purchase

price.

The district court stated that the fact that the amounts financed by the Chapter 13 debtors in connection with their purchase of a motor vehicle for their personal use also included amounts necessary to pay off the negative equity in trade-in vehicles did not affect the lenders' status as "purchase money" lenders, that were protected by the "hanging paragraph" from having their claims bifurcated and "crammed down" to value. The negative equity, which was rolled into the amount financed, was inextricably intertwined with what the debtors had to pay in order to acquire rights in the new motor vehicles under the purchase transactions structured by the parties and constituted part of the price of the new vehicles.

The bankruptcy court opinion can be found at 358 B.R. 545 (Bankr. W.D. N.Y. 2006).

I. Discharge Issues

A. Section 727(a)(11) "financial management" course.[1]

For bankruptcy cases filed after October 17, 2005, debtors are required to comply with a number of new obligations as imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Among these obligations is the requirement that debtor complete, post-petition, a course in personal financial management, unless the U.S. Trustee determines "that the approved instructional courses are not adequate to service the additional individuals who would be required to complete such courses under this section." 11 U.S.C. Section 111. Thus, if there is an approved instructional class, the debtor must complete it in order to receive a discharge.

The completion of this course is a pre-condition to obtaining a discharge in a Chapter 7 case. 11 U.S.C. Section 727(a)(11). Unless a specific exception applies, individuals who fail to complete a course in personal financial management shall not be granted a discharge. *Id.* Circumstances pursuant to which debtors are excepted from the Section 727(a)(11) requirement are set forth in Section 109(h)(4). Specifically, Section 109(h)(4) provides that a bankruptcy court may waive the requirement of a financial management course in circumstances where debtors are incapacitated, disabled, or on active military duty in a military combat zone. Further, Section 109(h)(4) defines "incapacity" to mean "that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions

[1] Portions of these materials were originally prepared by Samuel K. Crocker, Crocker & Niarhos 611 Commerce Street #2720 Nashville, TN 37203, and presented at a recent NABT conference; and by Robert H. Waldschmidt, Howell & Fisher, PLLC 300 James Robertson Parkway Nashville, Tennessee 37201-1107, presented at the NABT Spring Seminar in Santa Fe, New Mexico on April 25, 2008. Many thanks for all permissions.

with respect to his financial responsibilities." "Disability" is defined as a situation where "the debtor is so physically impaired, as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing...." 11 U.S.C. § 109(h)(4).

The Section 109(h)(4) hurdle has proven to be a high one to clear. However, courts have found that debtors suffering from hearing-impairment and limited mobility as a result of prostate cancer, (See *In re* Hall, 347 B.R. 532, 534) (Bankr.N.D.W.Va.2006), death (*In re* Trembulak, 362 B.R. 205 (Bankr.D.N.J.2007), and incarceration (*In re* Gates, Slip Copy, 2007 WL 4365474 (Bankr.E.D.Cal. 2007)) have all managed to clear the exception hurdle. [2] The disability exception is allowed to avoid "the absurd situation in which a debtor would be required to obtain a briefing even if suffering from Alzheimer's disease or some other disability that would make the briefing meaningless or even impossible."[3] The court in Hall observed that a waiver from the instructional course in personal financial management might be obtained where:

> (1) the debtor is severely physically impaired;
>
> (2) the debtor has made a reasonable effort, despite the impairment, to participate in the instructional course concerning personal financial management; and
>
> (3) the debtor is unable, because of the impairment, to meaningfully participate in the required instructional course in an in person, telephone, or Internet briefing.[4]

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[2] "The court finds that the debtor is "disabled" within the meaning ascribed in Section 109(h)(4) and that he is entitled to a waiver of the obligation to obtain a certificate showing completion of a course in personal financial management. The debtor is presently incarcerated in Vacaville, California. He is therefore unable to physically attend a personal financial management course. He also lacks access to the Internet and due to constraints placed by the California Department of Corrections, debtor cannot contact debtor education agencies by phone. Debtor is unable to make anything but collect phone calls and collect calls may not be made to toll free numbers." *Id.*

[3] In re Hall, 347 B.R. 532, 534 (Bankr. N.D. W.Va. 2006) (citing 2 *Collier on Bankruptcy* ¶; 109.09 [4] (Alan N. Resnick & Henry J. Sommer eds. 15th ed. rev.2006)).

[4] Id. at 535.

Thus, in Hall, an 81 year old, hearing impaired, crippled man with cancer was excused from the education requirement.

Financial management instructional courses must be approved in accordance with the criteria and procedures as set forth in Section 111 of the Bankruptcy Code. *See* 11 U.S.C. Section 111. The clerk of each court is required to maintain a publicly available list of approved agencies and courses. *Id.*

Within 45 days of the first date set for the meeting of creditors, a debtor is required to file a certification of completion of a course in personal financial management. Interim Rule 1007(b)(7). Section 727(a)(11) and 1329(g)(1) direct the court to deny the discharge to a debtor who fails to complete a course in personal financial management.[5]. If the certificate of completion is not obtained and filed, the debtor's case will be closed without the discharge. Case can be reopened to enter a discharge, but subject to debtor paying a reopening fee.[6]

The Code requires that the financial management course be completed *after* the filing of the petition and *before* discharge.[7] The requirement that the debtor complete a personal financial

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[5] See *In re* Bass, 2006 WL 1593978 (Bankr. W.D. Tenn. 2006); *In re* Hassett, 341 B.R. 832 (Bankr. E.D. Va. 2006); *In re* Ring, 341 B.R. 387 (Bankr. D. Me. 2006); *In re* Stockwell, 2006 WL 1149182 (Bankr. D. Vt. 2006); *In re* Hensinger, 2006 WL 905313 (Bankr. D. Colo. 2006); *In re* Martinez, 2006 WL 681068 (Bankr. N.D. Iowa 2006); *In re* Tomco, 339 B.R. 145 (Bankr. W.D. Pa. 2006); In re Kurtzahn, 337 B.R. 356 (Bankr. D. Minn. 2006); *In re* Miller, 336 B.R. 232 (Bankr. W.D. Pa. 2006); *In re* Rodgers, Bankr. L. Rep. (CCH) P 80426, 2005 WL 3454702 (Bankr. W.D. Pa. 2005).

[6] *In re* Martinez, 2006 WL 681068 (Bankr. N.D. Iowa 2006); *In re* Smiley (Bankr. E.D. Mich. 2006) (no WL citation available).

[7] "At Document No. 8 on the docket, Debtor filed DEBTOR'S CERTIFICATION OF COMPLETION OF INSTRUCTIONAL COURSE CONCERNING PERSONAL FINANCIAL MANAGEMENT (the "Certification"). Debtor indicates that, "I, Eric E. Rodgers, the debtor in the above-styled case hereby certify that on November 14, 2005, I completed an instructional course in personal financial management provided by Advantage Credit Counseling Service, an approved personal financial management instruction provider."

management course *after filing the petition* has been strictly construed.[8] The financial management course must be completed "after filing the petition" in order to be eligible to receive

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Debtor does not understand that the two educational requirements represent two distinct requirements with different timing. The credit counseling requirement must be completed prior to the bankruptcy filing in order for an individual to be eligible to file a bankruptcy Petition. The financial management course must be completed "after filing the petition," 11 U.S.C. § 727(a)(11), in order to be eligible to receive a discharge."

In re Rodgers, B.R., 2005 WL 3454702 (Bankr.W.D.Pa.), Bankr. L. Rep. P 80,426 (2005).

[8] See *In re* Skarbek, 2005 WL 3348879 (Bankr. W.D. Pa. 2005) (debtor's completion of such a course prior to filing did not satisfy § 727(a)(11)).

"The court re-iterates what it has stated in the past: In order for a motion [to reopen case so that debtor may filed a certificate of completion of the required financial management course] to be granted, there must be a reasonable explanation for the debtor's failure to comply with the requirement and counsel's failure to monitor the debtor's compliance; no prejudice to creditors; and a timely request for relief. In evaluating the reasonableness of the excuses given, ignorance on the part of the debtor is not satisfactory. The court provides written notice of the requirement to every debtor. Counsel advises or ought to advise every debtor of the requirement. In these circumstances, mere ignorance on the part of the debtor of the requirement is not a reasonable excuse.

Counsel's failure to timely recognize non-compliance--whether caused by the debtor or the educational provider--is also not a reasonable excuse. Counsel is well aware of the requirement. The requirement has a deadline. The deadline is no different than the deadline for many other aspects of the case. Counsel is responsible for monitoring deadlines and endeavoring to have his client comply with them. This deadline is no different from, for example, the deadline to file schedules, to appear at the first meeting of creditors or to record a homestead deed. Counsel is responsible for keeping an appropriate tickle system and checking the court file--which is available 24 hours a day over the internet--to make sure that the certificate is obtained and timely filed. In those cases where it is not, counsel should follow-up with the client so that the requirement can be timely satisfied.

All four requirements previously articulated by the court must be satisfied for a case to be reopened. The debtor must have a reasonable excuse for not having taken the course timely. Counsel must have a reasonable excuse for not following up. There can be no prejudice to creditors. The relief must be timely requested. Unless all four requirements are met, a motion to reopen will not be granted."

In re Kyser Slip Copy, 2008 WL 2074084 (Bankr.E.D.Va 2008.) See also *In re* Waters, Slip Copy, (Bankr.E.D.Va., May 14, 2008) (No. 07-13154-RGM); *In re* Taing, Slip Copy, (Bankr.E.D.Va., May 14, 2008)(No. 07-13776-RGM); In re Roeung, Slip Copy, (Bankr.E.D.Va., May 14, 2008)(No.. 07-13778-RGM); .); *In re Granda,* 2005 WL 3348878 (Bankr. W.D. Pa. 2005.).

a discharge and completion and certification of prepetition financial counseling class does not satisfy the Section 727(a)(11) requirement of postpetition financial management training.[9]

The time limit for filing the statement is "45 days after the first date set for the meeting of creditors under § 341 of the Code in a chapter 7 case, and no later than the last payment made by the debtor as required by the plan or the filing of a motion for entry of a discharge under § 1328(b) in a chapter 13 case." See Rule 1007(c). Rule 1007(c) further provides that an extension of time to file this certificate may be granted "only on motion for cause shown and on notice to the United States trustee and to any committee elected ..., trustee, examiner, or other party as the court may direct." *Id.* However, under certain circumstances, courts have found that debtors failed to complete the financial management course due to "excusable neglect" and thus have allowed the reopening of the case in order to meet the educational requirement.[10]

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[9] .*In re* Fuller, 2005 WL 3454699 (Bankr. W.D. Pa. 2005; *In re* Rodgers, 2005 WL 3454702 ; *In re* Stidham, 2005 WL 3454709 (Bankr. W.D. Pa. 2005).

[10] "Despite their failure to comply with the forty-five-day time limit specified by Interim Bankruptcy Rule 1007(c), the Lauros are entitled under *Pioneer* to an equitable inquiry regarding the issue raised with respect to excusable neglect. Following *Pioneer,* the Court of Appeals for the Third Circuit imposed a duty of explanation for lower courts conducting an excusable neglect analysis. The bankruptcy court abused its discretion in not conducting an equitable inquiry and explaining how it weighed the *Dix* factors. This case could be remanded to the bankruptcy court or this court on the record before it could determine whether the Lauros met their burden of proving excusable neglect by a preponderance of the evidence. *See In re* Cendant, 235 F.3d at 184. As discussed above after evaluating the matter in light of the *Dix* factors, as applied in *Pioneer,* this court finds that the Lauros meet their burden of showing excusable neglect and holds as a matter of equity that their bankruptcy case will be reopened." *See e.g., In re* Lauro Civil Action No. 07-670. Bankr. W.D. Pa. 2007).

Interim Rule 1007(b)(7) states that Debtor is required to file a certificate of completion of a course in personal financial management, in accordance with Official Form 23.

Official Form 23 (10/06)

United States Bankruptcy Court

_____ District Of _____

In re ___ Case No. _____

Debtor

Chapter

DEBTOR'S CERTIFICATION OF COMPLETION OF INSTRUCTIONAL COURSE CONCERNING PERSONAL FINANCIAL MANAGEMENT

Every individual debtor in a chapter 7 or chapter 13 case must file this certification. If a joint petition is filed, each spouse must complete and file a separate certification. Complete one of the following statements and file by the deadline stated below.

☐ I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that on _____ (Date) I completed an instructional course in personal financial management
provided by _____, an approved personal financial
(Name of Provider)
management provider.

Certificate No.

☐ I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that no personal financial management course is required because of: (Check the appropriate box.)
☐ Incapacity or disability, as defined in 11 U.S.C. § 109(h).
☐ Active military duty in a military combat zone; or
☐ Residence in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses are not adequate at this time to serve the additional individuals who would otherwise be required to complete such courses.

Signature of Debtor: _____

Date: _____

Instructions. Use this form only to certify whether you completed a course in personal financial management. (Fed. R. Bankr. P. 1007(b)(7).) Do NOT use this form to file the certificate given to you by your prepetition credit counseling provider and do NOT file it with the petition when filing your case.

Filing Deadline. In chapter 7 cases, file within 45 days of the first date set for the meeting of creditors under § 341 of the Bankruptcy Code. In chapter 13 cases, file no later than the last payment made by the debtor as required by the plan or the filing of a motion for a discharge under § 1328(b) of the Code. (See Fed. R. Bankr. P. 1007(c).)

B. Amended treatment of criminal/willful/and/or reckless conduct by debtor; Section 522(q)(q)(B)(iv) limitation of homestead exemption. [11]

Section 522(q) states that a debtor may not exempt property described under §522(p)(1)(A), (B), (C) or (D) which exceeds $125,000 in the aggregate (which in turn refers to homesteads purchased within 1,215 days of the petition date) if the debtor:

(a) was convicted of a felony which "under the circumstances, demonstrates that the filing of the case was an abuse of" Title 11; or
(b) owes a debt arising from (i) a violation of the federal securities laws, state securities laws, regulations issued under the state or federal securities laws, (ii) for fraud or deceit or manipulation in connection with the sale or purchase of securities, (iii) for a civil remedy arising under 18 U.S.C. §1964 or (iv) for criminal acts, intentional torts, or willful or reckless misconduct resulting that caused serious physical injury or death to another individual within the past five years.

Thus, if a debtor has been convicted of a felony showing that the filing of the bankruptcy was an abuse of Title 11 or owes certain specified debts, his homestead exemption can be limited to $125,000 if he acquired the homestead within 1,215 days before the bankruptcy petition.

How then does this exemption statute relate to the discharge? Section 727(a)(12) appears to state that if there is reason to believe that (1) the debtor acquired a homestead with equity of over $125,000 within the prior 1,215 days and (2) there is presently pending an action in which the debtor could be convicted of a felony showing that the filing of the bankruptcy was an abuse or there is presently pending an action in which the debtor could be held liable for certain specific debts that the court should not grant a discharge. Note that Section 727(a)(12) allows for discharge to be withheld based on "reasonable cause to believe" and requires that a hearing be held within a limited time.

[11] Portions of these materials were originally prepared by Samuel K. Crocker, Crocker & Niarhos 611 Commerce Street #2720 Nashville, TN 37203, and presented at a recent NABT conference. Many thanks for permissions.

Under §727(a)(12), the court shall grant the discharge unless the court, after notice and a hearing held not more than ten days before the date of the entry of the order of discharge finds that there is "reasonable cause to believe that" new §522(q)(1) "may" be applicable AND there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in §522(q)(1)(A) or be found liable for a debt of the kind described in §522(q)(1)(B).

If the debtor files bankruptcy within 1,215 days of acquiring a homestead with equity over $125,000 and has one of the specified types of pending litigation, that he may not be eligible for discharge. While this is certainly a harsh result, it would be one way to keep people from running into bankruptcy court after they have committed bad acts and bought big homesteads. The Interim Rules, however, seem to suggest that discharge may be merely deferred rather than denied. According to Interim Rule 4004(c)(1)(I), the court shall grant the discharge unless there is a motion to defer the discharge pending. The Advisory Committee Notes state that, "The existence of reasonable cause to believe that §522(q) may be applicable to the debtor constitutes grounds for withholding the discharge in all chapters, although the statutorily provided procedures for determining the existence of reasonable cause differ depending on the chapter."

There appears to be a potential conflict between the Interim rules and the Bankruptcy Code. The statute requires that a hearing be held at least ten days prior to the date for granting the discharge. The Interim Rules, on the other hand, allow deferral of the discharge if a motion is merely pending on the discharge date. The Rules state that discharge may be deferred, while the statute says that discharge shall not be granted. On the surface, it appears that §727(a)(12) was intended to implement §522(q) by delaying the discharge until litigation which could effect the homestead exemption has been resolved. Unfortunately, delaying the discharge has no effect on

the exemption question. Normally, exemptions are granted based on the circumstances existing on the date of the petition. In re Zibman, 268 F.3d 298 (5th Cir. 2001)(although the statute may limit the exemption based on subsequent events such as failure to reinvest within six months). Additionally, a debtor who is denied discharge still receives his exempt property. In re Reed, 700 F.2d 986 (5th Cir. 1983). Thus, delaying the discharge will not help to limit the homestead exemption. Instead, it may be that the real policy is to put a debtor who has recently purchased a large homestead to a Hobson's choice of waiting till the litigation is completed and potentially losing the homestead exemption or filing immediately and losing the discharge.

In a case of apparent first impression, a Massachusetts Bankruptcy Court has interpreted the extent of the "criminal act" cap of a state homestead exemption at $125,000. *In re Larson*, 340 B.R. 444 (Bkrtcy.D. Mass., 2006). Pre-petition, a Chapter 7 Debtor was charged with "motor vehicular homicide by negligent operation" under Massachusetts law. Though she was not convicted, the state court made findings of fact sufficient for a finding of guilt. The Court then placed the Debtor on supervised probation, and the matter was continued for a year. When she subsequently filed her bankruptcy petition and claimed a homestead exemption of $500,000, the Chapter 7 Trustee and creditors objected. They asserted that the exemption amount must be reduced to $125,000 because the Debtor had committed a criminal act that caused a death within five years prior to the filing of her bankruptcy case. The Debtor argued that she had not committed a "criminal act" within the meaning of amended §522(q)(1)(B)(iv).

Judge Hillman first looked to the plain language of the statute, noting that the homestead reduction was based upon "any criminal act, intentional tort, or willful or reckless misconduct." From this, the Court determined that "criminal act" represents one of three causes for capping the exemption amount. The Court next investigated the meaning of "criminal act" and found that the

relevant authorities "recognize that the phrase 'criminal act' does not require a conviction or a certain level of culpability."[12] Finally, the Court noted that §522(q)(1)(A) specifically requires conviction of certain felonies; so that omission of this particular language indicates it is not required in the subsequent, statutory subpart §522(q)(1)(B).

Section 522(q)(2) provides an exception to the Section 522(q)(1) homestead exemption limitation:

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[12] As noted by the Firs Circuit Court of Appeals in response to Debtor's contention that she was not "convicted" of a criminal act, "Larson's next line of defense is that a debtor must be "convicted" of a "criminal act" in order for § 522(q)(1)(B)(iv) to apply. But the literal lines of § 522(q)(1)(B)(iv) do not require a "conviction" as a prerequisite to application of the cap on homestead exemptions claimed under state law. By contrast, a separate subsection of the statute makes explicit reference to conviction as a requirement for application of the cap. Section 522(q)(1)(A) applies the exemption limit where "the debtor has been convicted of a felony ... which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title." This is not true of § 522(q)(1)(B)(iv), which applies wherever the debtor's debt "aris[es] from ... any criminal act." "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir.1972)) (alteration in original) (internal quotation marks omitted); *see also Trenkler v. United States,* 268 F.3d 16, 23 (1st Cir.2001) (endorsing *Russello*'s interpretive canon). We do not need to go further. It is evident that the criminal act requirement is met on the facts of this case.

We quickly dispose of Larson's subsidiary contention that the state court's disposition of the criminal charges does not establish a "criminal act." Under state law, she effectively pled guilty to the crime. In the criminal action, Larson admitted to facts necessary for the court to find that she was guilty of negligent vehicular homicide under Mass. Gen. Laws ch. 90, § 24G(b). The court's order of a continuance without a finding was based on those admissions and is a commonly used device in Massachusetts criminal courts. Under state law, "an admission of facts sufficient for finding of guilt ... shall be deemed a tender of a plea of guilty" for purposes of requesting a continuation without a finding. Mass. Gen. Laws ch. 278, § 18; *see also Commonwealth v. Sebastian S.,* 444 Mass. 306, 827 N.E.2d 708, 712 (Mass.2005). [FN6] As a matter of law, the bankruptcy court appropriately relied on the state law characterization of the effect of the continuance without a finding.

Larson, 513 F. 3d 325.

> Paragraph (1) shall not apply to the extent the amount of an interest in property described in subparagraphs (A), (B), (C) and (D) of subsection (p)(1) is reasonably necessary for the support of the debtor and any dependent of the debtor.[13]

In *In re* Presto, Kevin Presto, a former employee of Enron, was claiming an exception to the Section 522(q)(1) cap on his homestead exemption, relying on Section 522(q)(2). Claiming an undocumented medical condition, and the need to provide his children with a swimming pool during their summer visits, Presto claimed his ~$521, 800, 3400 square foot home was "reasonably necessary" for his support. In denying his claim, the court observed,

> The "reasonably necessary standard requires that the Court take into account other income and exempt property of the debtor, present and anticipated, and that the appropriate amount to be satisfied for the debtor ought to be sufficient to sustain basic needs, not related ot his former status in society or the lifestyle to which he is accustomed, but taking into account the special needs of the debtor.[14]

The court further observed,

> The Debtor is currently employed by Bear Energy, a subsidiary of Bear Stearns Companies Inc. He makes an annual salary of $175,000.00 and, pursuant to the terms of his employment agreement, is guaranteed a bonus of $100,00.00 after his first year of employment. In addition to the generous base salary, the Debtor has the ability to earn more bonuses in the future. The Debtor seems to be stubbornly holding on to his previous lifestyle in the heady days of pre-bankruptcy Enron. Is it reasonably necessary for the Debtor, whose children only stay with him during the summer, to live in a two-story 3400 square foot house in a gated community with a country club? Surely not. Such a lifestyle for a single man far exceeds his "basic needs." Even assuming that the Debtor was truthfully testifying about his medical needs for a pool, §522(q)(2) would not protect [his home]. The only question this condition would raise is whether Debtor has sufficient income and other assets to afford *any* house, not this specific house, that can provide a pool.[15]

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[13] 11 U.S.C. § 522(q)(2).

[14] *In re* Presto, No. 06-33618. (Bankr. D.D. Tex. 2007), *citing In re* Grant, 40 B.R. 612, 613-13 (Bankr. N.D. Tex 1984); *citing In re* Taff, 10 B,R. 101, 107 (Bankr.D.Conn. 1981).

[15] *Id.*

Thus the court found that Debtor failed to meet the Section 522(q)(2) "reasonably necessary" standard.

V. Section 521 Stay and Estate Property Issues

A. Does the "ride through" option exist anymore?

An interesting issue examined by a number of courts post-BAPCPA is whether the "ride through" or "retain and pay" option exists any more.[16] This issue arises in cases where the debtor has declared the intention to "retain collateral and continue to make regular payments," rather than redeem the collateral or reaffirm the debt.[17] For the most part, courts have found that the "ride through" option was eliminated by BAPCPA.[18] As the court noted in *In re* Ertha Rice:

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[16] Changes made to Section 521 include a modification to Section 521(a)(2), which now applies to all secured debts, not just secured consumer debts. *See In re Root,* 2006 WL 1050687, at 3 (Bankr.N.D.Iowa April 11, 2006) (BAPCPA amended § 521(a)(2) by deleting the term "consumer" as a modifier of "debts"). Section 521(a)(2)(B) changes the time by which a debtor "shall perform" the intention elected in the statement of intention from 45 days from the filing of the statement to "within 30 days after the first date set for the meeting of creditors."

[17] See *In re* Anderson, 348 B.R. 652 (Bankr.D.Del.2006); *In re* Blakeley, 363 B.R. 225 (Bankr.D.Utah 2007); *In re* Boring, 346 B.R. 178 (Bankr.N.D.W.Va.2006); *In re* Bower, No. 07-60126-FRA7, 2007 WL 2163472 (Bankr.D.Or. July 26, 2007); *In re* Craker, 337 B.R. 549 (Bankr.M.D.N.C.2006); *In re* Donald, 343 B.R. 524 (Bankr.E.D.N.C.2006); *In re Dumont*, 2008 WL 485040 (9th Cir BAP, 2008); *In re* Ertha Rice, No. 06-10975, 2007 WL 781893 (Bankr.E.D.Pa. Mar.12, 2007); *In re* Hue Huu Tran, 2007 WL 4210559 (Bankr. E.D. Va. 2007); *In re* Husain, 364 B.R. 211 (Bankr.E.D.Va.2007); *In re* Norton, 347 B.R. 291 (Bankr.E.D.Tenn.2006); *In re* Openshaw, No. 06C-24120, 2007 WL 2916294 (Bankr.D.Utah Mar.12, 2007).

[18] [Section] 521(a)(6) and 362(h) abrogated the ride through option as it pertains to personal property. However, courts have concluded that the ability of a debtor to choose the ride though option as it relates to real property was not abrogated by BAPCPA. *See In re Wilson,* 372 B.R. 816, 820 (Bankr.D.S.C.2007) ("[T]he Court finds that ... controlling precedent in the Fourth Circuit ... provides for a 'ride through' option for real property that was unaffected by the BAPCPA amendments."); *In re Bennett,* No. 06-80241, 2006 WL 1540842, at *1 (Bankr.M.D.N.C. May 26, 2006) ("[T]he court finds that debtors ... continue to have the right ... to retain real property without being required to reaffirm or redeem, so long as payments to the creditor are current."). *In re* Caraballo, (No. 07-32469) (Bankr. D.Conn 2008).

> Most courts interpreting changes to the Code following BAPCPA are in agreement that Congress intended to and did succeed in eliminating the ride-through option to a debtor's treatment of her secured collateral by adding § 362(h) to the Code and referencing it in § 521(a)(2).[19]

Some post-BAPCPA courts, however, have shown some resistance to a strict adherence to the ride-through-eliminated position. For example, in *In re* Hinson, Judge Leonard noted that §362(h)(1)(B) gives the debtor some leverage, in that the stay is not automatically terminated if the debtor was willing to reaffirm on the same terms as the original contract, and the creditor refuses to agree to such terms.[20] As long as the debtor was current on payments, and willing to reaffirm on the original terms (without application of the ipso facto provisions), she was deemed to have sufficiently complied with §521(a)(2), and the stay would remain in effect, and the property would remain property of the estate.[21]

Pursuant to a strict reading of §521(a)(2), a debtor has 30 days to declare an intention to reaffirm, redeem, or surrender as to personal property; and another 30 days after the 341 hearing to perform that intention.[22] Section 521(a)(2) further makes a debtor's (and a trustee's) rights in

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[19] *In re* Ertha Rice, (No. 06-10975 (JKF)) (Bankr. E.D.Pa. 2007): The court cited the following cases: *In re* Rowe, 342 B.R. 341, 345 (Bankr.D.Kan.2006) ("The 'fourth option'... is prohibited by § 362(h)(1)(A)"); *In re* Steinhaus, 349 B.R. 694, 701 (Bankr.D.Idaho 2006) ("the 'ride-through' option on personal property securing an individual's debt is seriously impacted if not 'eliminated' outright.") (citations omitted). *In re* McFall, 356 B.R. 674, 676 (Bankr.N.D.Ohio Nov. 22, 2006) ("Every published bankruptcy court decision has similarly interpreted the plain language of § 362(h)(1)(A) to require a debtor to state an intention to redeem or reaffirm"); *In re Riggs,* 2006 WL 2990218, at *1 (Bankr.W.D.Mo. Oct. 12., 2006) ("the Code now provides adverse consequences if the debtor does not perform one of the three specifically-enumerated options"); *In re Ruona,* 353 B.R. 688, 691 (Bankr.D.N.M.2006) (same).

[20] 352 B.R. 48 (Bankr. E.D. N.C. 2006).

[21] *Id.*

[22] (a)(2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate-

> (A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as

personal property subject to Section 362(h). Section 362(h)(1) terminates the automatic stay and removes personal property from the estate if a debtor fails to: (1) file a statement of intention by the earlier of 30 days from the petition date or the date of the first meeting of creditors and/or (2) fails to take the actions specified in the statement of intention within 30 days of the first date set for the meeting of creditors. Thus, if the debtor has personal property with equity, but fails to elect to reaffirm or redeem (within 30 days after filing) or perform an intention under §521(a) (within 30 days after the 341 hearing), the secured creditor has relief from the stay, and, even if there is equity, and even if the property is sold by the secured creditor and a surplus exists, those funds will not be subject to administration by the trustee, since they have been eliminated from the bankruptcy estate, by operation of law.[23]

It should be noted, however, that the deadline for a debtor to perform the statement of intention does not apply if: (1) the statement "specifies" the debtor's intention to reaffirm the debt "on the original contract terms"; and (2) the creditor refuses to reaffirm the debt on its original terms.[24] In such a case, if debtor complies with Section 521(a)(2) and the discharge is

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> the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;
>
> (B) within 30 days after the first date set for the meeting of creditors under section-341(a) or within such additional time as the court, for cause, within such 30 day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and
>
> (C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h); ...

[23] There is no "hardship" exception to the Bankruptcy Code's requirement that a debtor wishing to retain collateral must either redeem the property or reaffirm the debt. *In re* Lock, 243 B.R. 332 (Bankr. S.D. Ohio 1999).

[24] *In re* Moustafi, 371 B.R. 434 (Bankr.D.Ariz.2007).

granted, the creditor may not repossess the secured property, as long as the Debtor is current on her payments and insurance obligations.[25]

Although the Sections 521 and 362 provisions appear to be addressed to the Debtors, Trustees can also be adversely affected by their terms. In the recent case, *In re* Houseal, the Trustee sought to avoid an unperfected lien.[26] In response, the creditor asserted that the property was no longer property of the estate. The creditor, who had not filed a claim, asserted that the vehicle in question was no longer part of the bankruptcy estate pursuant to §362(h), because the debtor had not performed her stated intention within 30 days. Judge Harrison found that, since §362(h)(1) applies only to "personal property of the estate or of the debtor securing in whole or in part a claim", and since the creditor had not yet filed a proof of claim, had not yet established a claim, and had not established that the claim was secured in whole or in part, the property still remained in the bankruptcy estate.

One way to avoid this problem is to extend the 30 day period to reaffirm/redeem under §521(a)(2), "for cause, within such 30 day period fixes". (This extension would delay/prevent the application of §362(h).) This extension only requires the court to find "cause" and the trustee's assertion that assets may have equity, or may be subject to an avoidable lien, will probably be sufficient to allow the court to grant an extension - at least until the trustee has had the opportunity to investigate the assets. Note that the motion and the order have to be entered within the 30 days; therefore, trustee have to ask for expedited relief in order to meet the deadline.

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[25] *Id. See also Parker,* 139 F.3d at 673; *Blakeley,* 363 B.R. at 232 (BAPCPA has not entirely eliminated the possibility of ride-through; "where a debtor timely complies with all requirements under §§ 521 and 362(h), the debtor can 'ride through' the bankruptcy notwithstanding a bankruptcy court's refusal to approve the reaffirmation agreement.").

[26] Adv. Proc. No. 306-0429A (Bankr. M.D. Tenn. dec. Feb. 15, 2007).

Section 521(a)(6) contains a different type of extension provision for purchase money security interests.[27] Here, in order to get an extension of the 45 day grace period, the court must (1) find that the property is of "consequential value or benefit to the estate", (2) order adequate protection to be provided, and (3) order the debtor to turn the collateral over to the trustee. If the property has equity, or is subject to an avoidable lien, this should be a workable solution. However, once again, the motion and order must be obtained within the 45 day period.

Even if the asset "vaporizes" under §362(h) or §521(a)(6), the trustee may still have a cause of action, if the lien was avoidable under §544, §547, or §548. After a lien or transfer is avoided, §550 provides that the "trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, *the value of such property*,....." Thus, if a vehicle is subject to a lien which is either not perfected, or was perfected within the preference period, and debtor does not reaffirm or redeem within 30 days (such that the property ceases to be property of the

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[27] Section 521(a)(6) addressing debtors' elections with respect to property encumbered by purchase money security interests reads:

> ... in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either–
>
> (A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or
>
> (B) redeems such property from the security interest pursuant to section 722.
>
> If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 363(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee;

estate) the trustee may still pursue that creditor, seeking a monetary judgment for the value of the asset. The forfeiture provisions (providing that property is no longer part of the bankruptcy estate) do not eliminate the trustee's strong-arm and avoidance powers. These actions appear to be preserved through the exercise of Section 550, although the trustee will then have to collect a money judgment (which is often more difficult than liquidating a vehicle).