

Chapter 13

This Way, That Way, Which Way?

Hon. James D. Gregg

U.S. Bankruptcy Court, W.D. Mich.; Grand Rapids

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The Hanging Paragraph and 910 Cramdown

Surrender in full satisfaction

Majority view: It appears that what was once a growing minority trend, the view that a secured lender has a deficiency claim after a debtor's surrender of 910 secured collateral, is being supported by a majority of Court of Appeals decisions. *In re Wright* 492 F.3d 829; 2007 U.S. App. LEXIS 15843(7th Cir 2007), sets the tone of the new majority. It states that by knocking out §506, the hanging paragraph leaves the parties to their contractual entitlements. §506(a) only divided claims into secured and unsecured components. Relying upon *Butner v. United States*, 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979), *Wright* states that state law determines rights and obligations when the Code does not supply a federal rule.

AmeriCredit Fin. Servs. v. Long, (In re Long), 2008 U.S. App. LEXIS 4549 (6th Cir. 2008)

Concurring with *Wright* "the court finds that a gap in the law existed as a result of the 2005 revision to the Bankruptcy Code, which created inconsistencies between 11 U.S.C. §§1325(a) and 506. The 2005 revision did not provide for the situation in which a Chapter 13 debtor proposed to surrender the collateral to the creditor. Because the court found no legislative history suggesting that Congress intended to eliminate all deficiency claims upon surrender of the collateral and because the court concluded that a literal interpretation of the hanging paragraph following 11 U.S.C. §1325(a) would create an unintended and illogical result, the court declined to adopt a literal interpretation. Instead, the court employed a common law principle of interpretation known as "the equity of the statute." Applying the mandate of the hanging paragraph to surrender under § 1325(a)(5)(C) would require the court to reach a result that would not serve the policy or purpose of the amendment. Thus, the court held that claims subject to the hanging paragraph where the debtor elected to surrender the collateral pursuant to §1325(a)(5)(C) would be governed and adjudicated the same as they were before the 2005 amendments."

Capital One Auto Fin. v. Osborn (In re Osborn), 363 B.R. 72, 2007 Bankr. LEXIS 497 (B.A.P. 8th Cir., 2007)

"... the hanging paragraph simply removes the bankruptcy code's method of bifurcation. The hanging paragraph has no effect on state-law rights. Moreover, retention and surrender are treated differently in the bankruptcy code. Compare 11 U.S.C. §§1325(a)(5)(B)(ii) (requiring full payment of the secured claim when the debtor retains the collateral) with 1325(a)(5)(C) (not discussing payment requirements when the debtor surrenders the collateral).

In re: Wilson, 2007 WL 2405284 (10th Cir.BAP (Kan.)) 8/24/07

"The imprecise language of the hanging paragraph has created a conundrum for the Bankruptcy courts seeking to apply it. While neither the majority nor the minority view perfectly harmonizes the paragraph's language with the other provisions of the Code to which it relates, we believe the majority view that limits its effect to prohibiting bifurcation, and the resulting cram-down of 910-claims, is preferable. This interpretation is consistent with the Supreme Court's interpretation of §506, its emphasis on state law as governing the substance of claims in Bankruptcy, is the most practical approach in actual application, and is consistent with the grammatical structure of the paragraph itself."

In re: Rodriguez, 2007 WL 2701295 (9th Cir.BAP (Wash.)) 8/28/07

"Hanging paragraph"...did not affect "910 creditor's" right to deficiency claim if the surrendered motor vehicle securing it could not be sold for sum sufficient to satisfy debtor's total debt to creditor."... "We agree that a "plain meaning" approach is proper and that the hanging paragraph unambiguously provides that section 506 is inapplicable when a debtor surrenders a 910 vehicle pursuant to section 1325(a)(5)(C). We part company with the majority of cases, however, in concluding how section 506's inapplicability affects the right of the 910 creditor to assert a claim for any deficiency following surrender of the 910 vehicle. The majority position, as thoroughly analyzed in *In re Pinti*, 363 B.R. 369, 379-80 (Bkrcty.S.D.N.Y.2007), holds that section 506 (and only section 506) creates, defines and governs deficiency claims. In other words, if section 506 does not apply, no deficiency claim can exist. We disagree with *Pinti* that section 506 defines and determines the nature of a creditor's secured interest."... "We add our name to the growing list of courts that have found the hanging paragraph to have no effect on the deficiency claims of 910 creditors who are the recipients of section 1325(a)(5)(C) surrenders."

Example minority view: “When the Hanging Paragraph is applied to Section 1325(a)(5)(C), the result is to equate surrender of the 910 Vehicle to full payment of the claim, denying the creditor an unsecured claim for any deficiency after it liquidates the claim by sale of the vehicle.” *In re: Pinti*, 363 B.R. 369 (Bkrcty.S.D.N.Y.) 2007 (Citing *In re Osborn*, 363 B.R. 72, 2007 Bankr. LEXIS 497 at *7, 2007 WL 542435 at *2 (B.A.P. 8th Cir. Feb. 23, 2007) which was subsequently reversed)

In re Vanduyn, 374 B.R. 896, 2007 Bankr. LEXIS 2953, 21 Fla. L. Weekly Fed. B 1 (Bankr. M.D. Fla. 2007)

“[T]his Court is disinclined to follow the recent decision of the Seventh Circuit in *Wright* and is satisfied that the Hanging Paragraph of the revised Section 1325 of the Code, as amended by BAPCPA, permits debtors to surrender a motor vehicle in full satisfaction of a debt owed to the secured creditor and requires the creditor to forego the opportunity to take advantage of the provisions of Section 506 should the property be liquidated for less than the amount of the debt. This conclusion is consistent, in this Court's view, with the overall scheme of the entire structure of a Chapter 13 case as now established by BAPCPA and the Debtors may surrender their Motor Home to the Creditor in full satisfaction of the debt.”

In re Stalica, 372 B.R. 591 (Bankr.W.D.N.Y.) (2007)

Facts: Chapter 13 debtor objected to deficiency claim asserted by “910 creditor,” on theory that, by virtue of “hanging paragraph,” debtor's surrender of motor vehicle securing creditor's claim had resulted in satisfaction thereof in full.

Court: Held that §506 is only applied where valuation or allowance are implicated, and neither are implicated where the collateral is actually surrendered and sold.

In re Lane, 374 B.R. 830, (Bkrcty.D.Kan.) (2007)

Facts: Chapter 13 debtors objected to claim filed by purchase-money motor vehicle lender and sought to reclassify lender's allowed secured claim after vehicle securing it was destroyed. Lender moved for relief from stay.

Court: held that, when motor vehicle securing creditor's “910 claim” was destroyed postconfirmation, Chapter 13 debtors were entitled to modify their plan, to account for payments that creditor had received outside plan in form of payment from motor vehicle insurer, and to reclassify creditor's remaining deficiency claim as general unsecured claim.

In re Gay, 375 B.R. 343, cites *Rodriguez* (Bkrcty.E.D.Tex.) 9/18/07

Facts: Chapter 13 debtors objected to unsecured deficiency claim filed by purchase-money motor vehicle lender which, prior to plan confirmation hearing and before case was converted from Chapter 7, had successfully moved for relief from stay and repossessed and sold motor vehicle that secured its claim. Debtors asserted that, because their plan provided for surrender of motor vehicle in full satisfaction of lender's secured claim, it was barred from asserting deficiency claim pursuant to “dangling paragraph” added by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).

Court: held that language in plan that wrongfully provided that motor vehicle, which had already been repossessed and sold prior to confirmation hearing, would be surrendered to lender in full satisfaction of secured claim that it no longer had was of no talismanic significance, and could not, pursuant to “hanging paragraph,” prevent lender from asserting unsecured deficiency claim.)

In re Gallagher, 2007 WL 2745808, (10th Cir.BAP (Kan.)) 9/21/07

Facts: On October 29, 2005, Debtor purchased a vehicle for her personal use, borrowing money from Creditor and giving Creditor a lien on the vehicle. The purchase took place within the 910 day period preceding Debtor's filing of her Chapter 13 petition, which occurred on December 11, 2006. Debtor's proposed Chapter 13 Plan provided that the amount of Creditor's secured claim was \$11,534.15, and that Debtor would retain the vehicle, paying Creditor \$100 per month for 57 months. Creditor filed a proof of claim in the amount of \$12,070.43, and objected to the proposed Chapter 13 Plan, in part, because it did not provide for any interest on Creditor's claim. The bankruptcy court denied Creditor's objection, but ordered the “Claim of Community America Credit Union to be paid in full without post-petition interest.” The bankruptcy court then entered its Confirmation Order. Creditor brings a timely appeal.

Court: The existence of a claim is usually determined by non-bankruptcy substantive law, whereas valuation of that claim is determined by §506. A purchase money security interest is secured through the parties' contract and applicable perfection statutes and is secured without operation of the Code. A creditor's secured status is not erased without any further adjudication merely because the hanging paragraph makes the §506 valuation mechanism inapplicable to 910-day vehicle claims. Applying this sound reasoning, the bankruptcy court's Confirmation Order is at odds with the result reached by these courts because it does not provide for payment of interest on Creditor's 910-claim.

Personal use vs. "other" use

"Bankruptcy courts have used one of three tests to determine whether a vehicle was acquired for the personal use of a debtor.

The first test is the liberal test adopted in *Johnson*, which considers whether "acquisition of the vehicle enabled the debtor to make a significant contribution to the gross income of the family unit." The court in *Johnson* did not clarify whether the debtors in that case owned more than one vehicle, but did state that the vehicle in question was used for business and personal use. However, the court in *Johnson* nevertheless concluded that the vehicle in question was acquired for business purposes because the debtors purchased the vehicle for the *primary* purpose of allowing one of the debtor's to drive to and from work, which thus allowed such debtor to make a significant contribution to the gross income of the family unit. Based upon the foregoing holding, this Court presumes that the vehicle in question was used *primarily* for driving to and from work and not for other personal purposes. The holdings in *Hill*, *Medina*, and *Martinez* are similar in that all three courts imply that the level of personal use is irrelevant where the debtor uses the car to go to and from work, thus permitting the debtor to generate income for maintenance and support.

The second test was articulated by the court in *Solis* and focuses on whether the debtor acquired the vehicle with the intent to materially and significantly meet their own personal needs, as determined by examining the totality of the circumstances. This Court would consider the *Solis* test to be a more subjective test than either the bright-line test used by the court in *Johnson*, or the third test discussed below.

The third test is the quantitative approach taken by the court in *Joseph*, where the court focused on the predominate use of the debtor's vehicle. According to WEBSTER'S THIRD INTERNATIONAL DICTIONARY, the term predominance means "numerical superiority" while the term predominate means "to hold advantage in numbers or quantity". Based upon the plain meaning of predominance and predominate, this Court would conclude that under *Joseph*, a debtor's use of a 910-vehicle for business purposes 51% of the time would remove the vehicle from the grasp of the hanging paragraph found in § 325(a).

Joseph, *Medina*, *Martinez*, *Solis*, *Hill*, and *Johnson*, stem from two districts: the Western District of Louisiana and the Southern District of Texas." All the above quoted from: *In re Counts*, 2007 WL 2669204 (Bkrcty.D.Mont.).

In re: Adaway, 367 B.R. 571 (Bkrcty.E.D.Tex.) 4/10/07

"Under the circumstances of this case, this Mitsubishi vehicle was not acquired for the personal use of the Debtor. The Debtor testified that he acquired the vehicle for the use of his non-debtor spouse, and his testimony is corroborated by his minimal use of the vehicle. If this were the couple's sole vehicle at the time of acquisition, the Debtor's occasional use could be significant and material enough to constitute acquisition for his personal use. However, the Debtor testified without contradiction that, prior to and after his acquisition of the Mitsubishi, his transportation needs were almost exclusively met by his larger pickup which he prefers to the smaller Mitsubishi. Finally, even if responsibility for the checked box on the Debtor's financing application can be legitimately charged to the Debtor, such an indication is not fatal to the Debtor's case. The indication that he intended to purchase the vehicle for a "personal, family, or household use," (as opposed to a business, farm or commercial use) is consistent with the conclusion that the Debtor acquired the vehicle for his spouse's use, without contradicting his denial of an acquisition for *his* personal use. Finding that this vehicle was not acquired for the Debtor's personal use, Citifinancial is not entitled to the anti-bifurcation protection afforded by § 1325(a)(*), and the Debtor's plan is not rendered unconfirmable by its invocation of the § 506 cramdown provision as to Citifinancial's secured claim."

Cited by: *Cross*, 2007 WL 2823671; *Gay*, 2007 WL 2746778; *Smith*, 2007 WL 1577668.

In re: Lorenz, 368 B.R. 476 (Bkrcty.E.D.Va.) 4/19/07

"This Court adopts the "significant and material" personal use test found in *In re Solis* and *In re Wilson* and holds that it applies no matter what the other use of the vehicle is, family, household or *business*."

Examined by: *Counts*, 2007 WL 2669204.

Cited by: *Garrison*, 2007 WL 1589554; *Williams*, 2007 WL 2122131.

Declined to follow by: *LaDeaux*, 2007 WL 2163088.

In re: Grimme, 371 BR 814 (Bkrcty.S.D.Ohio) 7/13/07

“Rather, we believe, as did the Court in *In re Lowder*, 2006 WL 1794737 (Bkrcty.D.Kan.2006), that the term “personal use” means, simply, non-business use. With this as the threshold analysis, the “personal use” test is simple. When the evidence shows that a vehicle has been acquired for business purposes, the hanging paragraph will not apply. *Id.* Conversely, if the evidence shows that a vehicle was acquired for non-business purposes, the hanging paragraph will apply. *Id.* Also, driving to and from work is not a business purpose. *Id.*...In the present case, the vehicle was clearly not acquired for business purposes. Therefore, the hanging paragraph applies. The fact that the Debtor does not have a driver's license is not determinative. Although the Debtor is a passenger, she is still enjoying the personal use of the vehicle.”

In re: Ladeaux, 2007 WL 2163088 (Bkrcty.S.D.Ohio) 7/26/07

“Held that larger motor vehicle which Chapter 13 debtors acquired with purchase-money financing obtained within 910 days of petition date, even though they already owned compact vehicle which they used in commuting together to work, so that they would have vehicle capable of accommodating the many foster children that stayed with debtors, and from whose care debtors earned roughly 20% of their income, was acquired for “business purpose” rather than for “personal use” of debtors.”

Cited by: *Cross*, 2007 WL 282367.

In re: Counts, 2007 WL 2669204 (Bkrcty.D.Mont.) 9/6/07

Uncontested testimony that the debtor used the vehicle for business purposes combined with the fact that the debtor had many vehicles cut against a finding of personal use.

In re Cross, 2007 WL 2823671, (Bankr.S.D.Ohio) 9/27/07

Facts: Purchase-money motor vehicle lender objected to confirmation of debtor's proposed Chapter 13 plan as improperly bifurcating its alleged “910 claim” in violation of “hanging paragraph,” and debtor responded that vehicle was acquired for use of his non-filing spouse, and not for his own personal use, such that “hanging paragraph” did not apply.

Court: Applying the *Solis* test to the very limited evidentiary record made at the Hearing, the Court concludes that the Cadillac was acquired for the personal use of the Debtor. As *Solis* and the other reported decisions make clear, in applying the personal-use test it is “the intention of the acquirer at the date of acquisition[]” that is controlling.

Negative Equity

“According to estimates, negative equity transactions occur in somewhere between 26 and 38 percent of new vehicle purchases, with recent unsupported statements by counsel for GMAC estimating it as high as 50 percent. It is clear that negative equity is a large component of an increasingly large number of financing transactions. Where such a significant alleged component of purchase-money security interests is not included explicitly in the text of the U.C.C. or its official comments, the court does not see a textual justification for placing it amongst a list in which it would be the proverbial elephant in the room.”

Majority: “*Peaslee, Price, Westfall, Bray, and Acaya* represent the majority published view and are more persuasive in holding that the negative equity is not part of the purchase-money security interest. The court agrees with the majority view that the definition of purchase-money security interest does not encompass rolled-in debt incurred to pay off negative equity.”

Minority: “The minority position, put forth by the *Graupner* opinion in the Bankruptcy Court for the Middle District of Georgia, holds that a purchase-money security interest includes negative equity rolled into a new motor vehicle financing transaction.”

Treating PSMI and Non-PMSI

“It is clear that the hanging paragraph applies only to purchase-money security interests, but it is not clear whether a security interest that is *only partially* purchase-money retains *any* of its purchase-money character when it has been combined with a nonpurchase-money security interest in one transaction. The Uniform Commercial Code has traditionally used two approaches.”

Dual status rule: “The "dual status rule" allows the court to treat the portion that is purchase-money (essentially the purchase price) as purchase-money, whereas the non-purchase-money portion remains non-purchase-money and is treated accordingly.”

Transformation rule: “The "transformation rule" holds that a security interest that is part purchase-money and part non-purchase-money completely loses its purchase-money character and is entirely transformed into a non-purchase-money security interest.”

Note: Some courts are allowed to choose the rule they apply and in some jurisdictions the choice between rules has been constrained either by the state legislature or by precedent

All above quoted from *In re Pajot* – 371 B.R. 139 (Bkrcty.E.D.Va.).

Graupner v. Nuvel Credit Corp., 2007 WL 1858291 (M.D.Ga.) 6/26/07

“The Court finds that under the facts in this case 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 collateral. 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.”

Discussed by: *General Motors Acceptance Corp. v. Peaslee*, 2007 WL 2318071.

Cited by: *Westfall*, 2007 WL 2777709.

In re Westfall, 376 B.R. 210, 219 (Bankr. D. Ohio 2007).

“There is no question that the transactions at issue include partial purchase money security interests. In light of the ability to frame a federal understanding of the term purchase money security interest, the court finds adoption of the dual status rule is more equitable. In applying the rule, the court finds that the subject transactions will have purchase money components, which will be secured and not subject to bifurcation, and nonpurchase money components (arising from the payment of negative equity), which will be

subjected to bifurcation as general unsecured claims. To determine the amounts of each, the court will employ a simple percentage formula based on the original transaction.”

In re: Pajot, 371 B.R.139 (Bkrcty.E.D.Va.) 7/17/07 (on PMSI and other “value”)

Gap insurance: “[T]his court will follow *Price* and *White* and hold that the gap insurance is not a component of the purchase-money security interest.”

Extended Warranties or service contracts: “[T]he court will follow the result advocated in *Murray* and *Johnson*, and holds that an extended warranty or service contract is included as part of the purchase-money security interest. The court believes that such charges, as required by Va.Code Ann. § 8.9A-103 and its comments, have a nexus close enough to the acquisition of a new vehicle to allow their inclusion as a part of the purchase-money security interest.”

Rebate credits: “If the creditor wished to give the debtor a “rebate” for the trade-in, it could have clearly been assigned to the trade-in by increasing the trade-in allowance directly. The creditor having not done so, the court is left with no evidence or argument supporting a finding that the negative equity rolled into the transaction was reduced by the rebate. The court accordingly holds that, unless evidence indicates it was specifically applied to increase the allowance on a trade-in, a rebate does not reduce the non-purchase-money negative equity portion of a motor vehicle financing transaction.”

“In sum, the compromise approach represented by the dual status rule strikes an appropriate balance of preserving capital availability for debtors on the brink of Bankruptcy, without providing too great an incentive for creditors to finance excessive negative equity amounts.”

Distinguished by: *General Motors Acceptance Corp. v. Peaslee*, 2007 WL 2318071.

Cited by: *Westfall*, 2007 WL 2777709; *Williams*, 2007 WL 2122131.

In re: Cohrs, 2007 WL 2186135 (Bkrcty.E.D.Cal.) 7/31/07

“[I]n the context of auto sales, the value given to acquire a vehicle includes negative equity in a vehicle traded in as part of the purchase price of a new vehicle. Hence, a lender financing such a transaction acquires a purchase money security interest and the debtor incurs a corresponding purchase money obligation.”

Cited by: *General Motors Acceptance Corp. v. Peaslee*, 2007 WL 2318071; *Watson*, 2007 WL 2873434; *Westfall*, 2007 WL 2777709.

General Motors Acceptance Corp. v. Peaslee (In re Peaslee) 358 B.R. 545 (Bankr. W.D. N.Y. 2006)

“In addition, Comment 3 states that “[t]he concept of ‘purchase-money security interest’ requires a close nexus between the acquisition of collateral and the secured obligation. Thus, a security interest does not qualify as a purchase-money security interest if a debtor acquires property on unsecured credit and subsequently creates the security interest to secure the purchase price.” Where the parties to the transaction agree to a “package transaction” in which “[t]he negative equity is inextricably intertwined with the sales transaction and the financing of the purchase,” *Graupner v. Nuvell Credit Corp.*, No. 4:07-CV-37, 2007 WL 1858291, at *2 (M.D.Ga.2007), one could certainly conclude that “[t]his 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 collateral.” *Id.* (observing that “[t]he trade-in of the vehicle was an integral part of the sales transaction”); *see also In re Cohrs*, ---B.R. ---, 2007 WL 2186135, at *2 (Bkrcty.E.D.Cal.) (“When a car buyer offers to trade in a vehicle as part of the purchase price for another vehicle, the charges incidental to transferring the trade-in vehicle are part of the purchase price of the new vehicle,” and that “[t]hose charges are incurred to ‘enable the debtor to acquire rights in’ the new vehicle”); *Petrocci*, 2007 WL 1813217, at *9 (stating that “[t]his negative equity financing is inextricably linked to the financing of the new car” since “[i]t is clear that one would not take place without the other”). The fact that negative equity and trade-ins do not *have* to be included in a sale, and that the buyer could, in theory at least, pay off the negative equity by other means, does not require a contrary result, if the facts surrounding the particular transaction at issue are such that the negative equity was integral to the sale. *See* N.Y. U.C.C. § 1-201(37)(a) (“Whether a transaction creates a ... security interest is determined by the facts of each case”). ... [A]ppellants' entire claims, including that portion of the claims attributable to the payoff of negative equity on the debtors' trade-in vehicles, should be treated as secured claims.”

Discussed by: *Westfall*, 2007 WL 2777709.

Called into doubt by: *Rodriguez*, 2007 WL 2701295 (9th Cir.BAP (Wash.) Aug 28, 2007).

In re Blakeslee, 377 B.R. 724 (Bankr. M.D. Fla. 2007)

Facts: Chapter 13 debtor filed motion to value motor vehicle lender's claim for purpose of bifurcating it into its secured and unsecured components and cramming down plan. Lender objected on theory that it was protected by "hanging paragraph," as purchase-money "910 creditor," and debtor challenged its purchase-money status.

Court: Held that: (1) lender, at least to extent of the more than \$14,000 advanced in connection with debtor's negative equity in trade-in vehicle, did not hold "purchase money" claim; (2) lender did not have "purchase money" claim for money advanced to finance debtor's purchase of gap insurance; and (3) court would exercise its discretion to apply "transformation rule," and to treat lender as holding what was entirely a "nonpurchase money" claim, such as debtor was free to bifurcate.

In re Honcoop, 377 B.R. 719, (Bankr.M.D.Fla.) 9/19/07

Facts: Chapter 13 debtors filed motion to value motor vehicle lender's claim for purpose of bifurcating it into its secured and unsecured components and cramming down plan. Lender objected on theory that it was protected by "hanging paragraph," as purchase-money "910 creditor," and debtors challenged its purchase-money status.

Court: Held that: (1) money that motor vehicle lender advanced within 910 days of debtors' Chapter 13 filing to pay cost of gap insurance on vehicle, which covered damage that exceeded vehicle's value up to outstanding balance of secured loan, was not part of purchase price of vehicle under governing Florida law, and thus did not give rise to "purchase money security interest"; but (2) court, as matter of equity, would not apply "transformation rule" and treat creditor as holding purely a nonpurchase-money claim, but would simply reduce lender's purchase-money claim by the \$500 originally charged for gap insurance and treat remainder of lender's claim as protected by "hanging paragraph."

The Court agrees that it has the discretion as to whether to apply the dual status or the transformation rule to a partial purchase money security interest and finds that with respect to GAP insurance, the equitable rule to be applied is the dual status rule. However, because the contract failed to allocate the portion of the monthly payments attributable to GAP insurance and the portion attributable to the vehicle itself, the Court finds it appropriate to remove the GAP insurance in its entirety. Accordingly, Creditor's secured claim will be reduced by \$500.00, the amount of the GAP insurance. However, the remainder of Claim 4 is a purchase money security interest, is subject to § 1325(a) and is not permitted to be bifurcated into secured and unsecured parts pursuant to 11 U.S.C. § 506(a)(1).

In re Watson, 2007 WL 2873434, (Bankr.E.D.Cal.) 9/27/07 (Unpublished)

This precise issue was addressed in *In re Cohrs*, 2007 Westlaw 2186135 (Bankruptcy Eastern District of CA 2007). In the *Cohrs* case the court found that the financing of this negative equity does not defeat the purchase money secured status for the new loan. The court finds the *Cohrs* decision to be persuasive and fully adopts its reasoning and analysis herein.

In re Sanders, 2007 WL 3047233, (Bankr.W.D.Tex.) 10/18/07

Facts: Creditor, which had advanced funds to pay off the negative equity of debtors' trade-in vehicle while also advancing them funds to purchase their new vehicle, objected to confirmation of Chapter 13 plan, asserting that plan improperly failed to treat its secured claim on debtors' vehicle as a "910-day" claim under the Bankruptcy Code's "hanging paragraph."

Court: Held that: (1) the term "price of the collateral," as used in the section of the Texas Uniform Commercial Code (UCC) governing "purchase money security interests" (PMSIs), does not include the amount financed to pay off the negative equity from the vehicle traded in;(2) funds used to pay off negative equity are not "value given to enable the debtor to acquire rights in the collateral," within the meaning of the subject UCC provision; and (3) pursuant to the plain language of the "hanging paragraph," the fact that creditor had a PMSI that secured part of the debt was not sufficient to qualify creditor for the narrow exception to the general rule allowing for bifurcation and cramdown with respect to secured claims.

In re Spratling, 2007 WL 3102154, (Bankr.M.D.Ga.) 10/19/07

Facts: Motor vehicle lender that advanced funds to debtor-borrower within 910 days prior to her Chapter 13 filing objected to confirmation of debtor's proposed plan as improperly bifurcating its claim, and debtor responded by asserting that sums advanced by lender to pay for extended service contract and gap insurance on vehicle affected "purchase money" nature of its interest and enabled debtor to bifurcate its claim.

Court: Held that:(1) term "price," as used in provision of the Georgia Uniform Commercial Code defining a "purchase money obligation" as one incurred "as all or part of the price of the collateral," had to be construed in pari materia with the term "cash sales price," as used in provision of the Georgia Motor Vehicle Sales Finance Act; (2) cost of extended service contract constituted part of purchase price of vehicle, and did not affect "purchase money" nature of lender's security interest; and (3) money that motor vehicle lender advanced within 910 days of debtor's Chapter 13 filing to pay cost of gap insurance on vehicle, which covered damage that exceeded vehicle's value up to outstanding balance of secured loan, bore a sufficiently close nexus to debtor's acquisition of vehicle that it also had to be considered part of "price" of vehicle.

In re Macon, 2007 WL 3237018, (Bankr.D.S.C.) 10/19/07

Facts: Creditor that provided financing to Chapter 13 debtor within 910 days prior to her bankruptcy filing in order to allow her to acquire motor vehicle for her personal use objected to confirmation of debtor's proposed plan, as improperly bifurcating creditor's claim in violation of "hanging paragraph." Debtor responded by asserting that additional amounts financed by creditor, in excess of vehicle's purchase price, affected purchase money nature of creditor's security interest and made "hanging paragraph" inapplicable.

Court: Held that mere fact that creditor that provided financing to Chapter 13 debtor within 910 days prior to her bankruptcy filing in order to allow her to acquire motor vehicle for her personal use had also financed debtor's purchase of extended service contract, as well as gap insurance to cover any shortfall between applicable insurance coverage and amount still owed if vehicle was "totaled" in accident or lost to theft, did not affect "purchase money" nature of creditor's security interest.

In re Burt, 2007 WL 3143319, (Bankr.D.Utah) 10/24/07

Facts: Ford Motor Credit objects to confirmation on the basis that the Debtor's proposed plan seeks to improperly cram down Ford Motor Credit's secured claim in violation of 11 U.S.C. § 1325(a), otherwise referred to as the "hanging paragraph." The Debtor filed a response to Ford Motor Credit's objection and a separate objection to Ford Motor Credit's proof of claim, arguing that § 1325(a)(*) does not apply to Ford Motor Credit's claim because it does not hold a purchase money security interest ("PMSI") in the 2006 Ford F-150 truck (the "Truck" or "vehicle"). Specifically, the Debtor argues that the financing of the service contract and the negative equity eliminated Ford Motor Credit's purchase money security interest, and therefore, Ford Motor Credit's claim is subject to a cram-down under 11 U.S.C. § 506.

Court: The Court determines that Ford Motor Credit's entire claim, including that portion of the claim attributable to negative equity and costs associated with the purchase of the vehicle, qualifies as a purchase money security interest. Accordingly, the hanging paragraph of §1325(a) applies, and the Debtor cannot "cram down" Ford Motor Credit's claim pursuant to § 506. Therefore, the Debtor's objection to Ford Motor Credit's claim is overruled and the proposed plan is denied confirmation for failure to comply with §325(a).

In re Conyers, 379 B.R. 576 (2007) (Bkrtcy.M.D.N.C.) 11/2/07

The matter before the Court is Ford Motor Credit Company, LLC's ("Ford Motor Credit") objection to confirmation of the Debtor's proposed chapter 13 plan. Ford Motor Credit objects to confirmation on the basis that the Debtor's proposed plan seeks to improperly cram down Ford Motor Credit's secured claim in violation of 11 U.S.C. §1325(a), otherwise referred to as the "hanging paragraph." The Debtor filed a response to Ford Motor Credit's objection and a separate objection to Ford Motor Credit's proof of claim, arguing that §1325(a) does not apply to Ford Motor Credit's claim because it does not hold a purchase money security interest ("PMSI") in the 2006 Ford F-150 truck (the "Truck" or "vehicle"). Specifically, the Debtor argues that the financing of the service contract and the negative equity eliminated Ford Motor Credit's purchase money security interest, and therefore, Ford Motor Credit's claim is subject to a cram-down under 11 U.S.C. §506. The Court determines that Ford Motor Credit's entire claim, including that portion of the claim attributable to negative equity and costs associated with the purchase of the vehicle, qualifies as a purchase money security interest. Accordingly, the hanging paragraph of §1325(a) applies,

and the Debtor cannot “cram down” Ford Motor Credit's claim pursuant to §506. Therefore, the Debtor's objection to Ford Motor Credit's claim is overruled and the proposed plan is denied confirmation for failure to comply with §1325(a).

In re Dunlap, 2008 Bankr. LEXIS 506 (Bankr. D. Wis. 2008) 1/31/08

The parties agreed that the negative equity portion of the loan financed was \$12,510 (based on a \$22,919 balance due on the prior loan less the \$10,409 trade-in value for the old car. The court found that the trade in of the old car was an essential part of a single transaction which enabled the buyer to purchase the new vehicle. Therefore, the entire loan balance of \$44,217.70 qualified as a PMSI under Wis. Stat. §409.103. 11 U.S.C. §1325(a) (hanging paragraph) thus applied, and the negative equity financing was entitled to be included as part of the PMSI for purposes of the creditor's claim.

In re Schwalm, 380 B.R. 630 (Bankr. D. Fla. 2008) 1/16/08

The debtors contended that the loans could be stripped down to the current value of each car because the creditors did not hold "purchase money security interests." The debtors based this contention on the fact that their loans included: (1) a roll-over of negative equity owed on cars that were traded in; (2) pre-payment of "gap" insurance; and (3) pre-paid extended warranty contract premiums. The court noted that the concept of "purchase money security interest" had two contrary interpretations as to motor vehicle loans, depending on whether the underlying premise was "sticker price plus taxes, tag and title" or "negotiated packaged financing." The court adopted the "packaged financing" approach. When viewed in this way, as a "packaged" transaction to dispose of the old car, insure the new loan amount, and provide for future maintenance, the items included in the amount financed had a close nexus to the acquisition of the car, consistent with the concept of price in Comment 3 to Fla. Stat. §679.1031. Thus, "purchase money security interest," as used in 11 U.S.C. §1325(a), included negative equity on a trade-in, gap insurance and service contract premiums.

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

The concepts at work here under UCC § 9-103--"enabling," "incurred in connection with" and "close nexus"--are fact intensive. [**38] It is not every dollar loaned that becomes a *purchase money obligation* by relationship in time or circumstances to the financing of *purchase money collateral*. Close nexus or what enables a debtor to acquire rights in property require factual analysis in each case. See *GMAC v. Peaslee*, 373 B.R. 252, 256 (W.D.N.Y 2007) ("The fact that negative equity and trade-ins do not have to be included in a sale, and that the buyer could, in theory at least, pay off the negative equity by other means, does not require a contrary result, if the facts surrounding the particular transaction at issue are such that the negative equity was integral to the sale."); *In re Vega*, 344 B.R. 616, 622-23 (Bankr. D. Kan. 2006) ("[T]o have a PMSI, an otherwise secured party has the burden of proof to satisfy two key elements: 1) that the money loaned or credit extended made it possible for the debtor to obtain the collateral, and 2) that debtor used the funds supplied to acquire rights in the collateral. . . . [Creditor] has not, and cannot . . . meet its burden.").

910 Creditors Rate of Interest

DaimlerChrysler Servs. N. Am. LLC v. Taranto (In re Taranto), 365 B.R. 85 (Bankr. Fed. App. 2007)

The bankruptcy appellate panel (BAP) framed the issue of this case as follows: under the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), what rate of interest must a Chapter 13 debtor pay to the holder of a claim secured by a vehicle purchased for personal use within 910 days prior to the bankruptcy filing where the debtor proposes to pay the secured claim by making periodic installment payments? Here, over appellant's objection, debtors proposed to accelerate their payments and pay the zero percent contract rate of interest. The BAP observed that any plan that sought to modify a secured creditor's rights over its objection was a "cram down" that implicated 11 U.S.C. §1325(a)(5)(B)(ii). The BAP noted that §1325(a)(5)(B)(ii) remained unchanged by BAPCPA. The BAP also believed that the Till rationale (i.e., when a Chapter 13 plan proposed to pay a secured claim in periodic payments, interest had to be paid to achieve the present value of the claim) remained valid and binding. Here, the BAP held that the Till analysis governed and mandated that appellant receive the present value of its secured claim.

Allowance in the Means Test for Surrendered Property

A divergence of opinion has arisen over whether it is appropriate to include, for purposes of determining projected disposable income on lines 47 & 48 of the B22C form, the “contractual payment due” of a secured creditor where the Debtor has proposed a chapter 13 plan which surrenders the collateral of the creditor. The divergence of opinion is broader in application as it includes avoidance of liens, cram downs or other modification of a secured debt in the proposed plan. The choices of a debtor may be a two-edged sword as any savings gained by surrender or modification of a secured debt would create more disposable income to be paid to the unsecured creditors. The focus of the debate is on the language of 11 U.S.C. §1325(b), which provides:

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

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

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

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

(3) **Amounts reasonably necessary to be expended** under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined **in accordance with subparagraphs (A) and (B) of section 707(b)(2) [11 U.S.C. § 707(b)(2)]**, if the debtor has current monthly income, when multiplied by 12, greater than--

There are a line of cases for which there is a strict definitional adherence of the term “amounts reasonably necessary to be expended” corresponding to §707(b)(2)(A)(iii)’s exclusion from disposable income the “contractually due payments” of secured creditors.

In re Oliver, 2006 Bankr. LEXIS 1607 (Bankr. D. Or. 2006)

The issue before the court was whether, in completing Form B22C, a debtor was entitled to deduct from current monthly income, payments owed on secured debt even though the debtor had declared an intent to surrender the collateral or avoid the lien securing the debt, so that the subject secured debt payments would not be made under the debtor's proposed plan in Chapter 13. Resolution of the issue turned on the language of 11 U.S.C. §707(b)(2)(A)(iii), which addressed secured debt payments, specifically, rather than expenses generally. The court concluded that in completing Form B22C, debtors were entitled to deduct from current monthly income the average payments on debts secured by collateral with respect to which they had expressed an intent to surrender. The court's conclusion extended to average payments on debts secured by collateral as to which debtors moved to avoid the applicable liens post-petition. The court's decision was limited to the issue of whether debtors could include in Form B22C average payments on secured debts even where those payments, in fact, would not be made under the Chapter 13 plan as proposed.

In re Burmeister, 378 B.R. 227 (Bankr. D. Ill. 2007)

In calculating their disposable income, 11 U.S.C. §707(b)(2)(A) not only permitted but compelled the debtors to take deductions based on payments of all their mortgages, even the mortgage on the property they intended to surrender, because those payments were "contractually due" when the petition was filed. The disposable income calculation was, therefore, correct because when the debtors filed their petition, they still owned the property they intended to surrender. That the debtors had stopped making the payments and intended to surrender the property was beside the point. The payments were nonetheless "contractually due" and had to be deducted under §707(b)(2)(A)(iii)(I). The Trustee contended, however, that under 11 U.S.C. §1325(b)(1), disposable income was determined "as of the effective date of the plan," meaning the date the plan was confirmed. Because the debtors would not be making the mortgage payments on the confirmation date, he argued that the payments could not be included in the disposable income calculation. The Trustee's reliance on the phrase "as of the effective date of the plan" was misplaced. The phrase had no effect on the disposable income calculation.

There is another line of cases, most notably *In re McGillis*, 370 B.R. 720 (Bankr. D. Mich. 2007) from Judge Hughes of the Western District of Michigan, which give more meaning to the context of other terms in 11 U.S.C. §1325 in determining that "in accordance with subparagraphs (A) and (B) of section 707(b)(2) [11 U.S.C. § 707(b)(2)] actually provides the guideline or cap of actual contractual secured debts to be paid from the chapter 13. The actual contractual payments made determines the projected disposable payments."

For Judge Hughes the phrase "reasonably necessary for support" in 11 U.S.C. §1325(b) indicates that the amounts, and the payment of the amounts, must be reasonably necessary for the support of the debtor and any dependent. Payments that a debtor does not propose to make during the pendency of the plan and that a debtor is not required to make under the plan cannot be said to be reasonably necessary for the support of that debtor. Thus, any deductions from income based on the "amounts" in question must be payments that will be made pursuant to the confirmed plan of reorganization. "To be expended" also indicates that the amounts to be deducted are amounts that will be paid in the future. To "expend" means to "put out or lay out". To expend amounts of money, then, means to pay out money. Money that is "to be expended" is money that is to be paid in the future. An amount, the payment of which is never contemplated, cannot be an amount that is to be paid in the future.

In re Crittendon, 2006 Bankr. LEXIS 2172 (Bankr. D.N.C. 2006)

The trustee contended that the debtors' claimed deductions from their income representing payments that they would not actually be making because the collateral securing the debts had been or would be surrendered. Specifically, the debts in question included a first and second mortgage on a residence that was owned by the debtors when this case was filed, but which the debtors sold with the court's authorization. The other disputed deductions were for a debt listed as secured by a horse trailer and a debt listed as secured by a boat. However, under the proposed plan, the debtors were surrendering both the trailer and the boat. The disallowance of the disputed deductions meant that the debtors actually had disposable income of \$1,571 rather than the minus \$79 computed by the debtors. As a result, the trustee argued that a higher plan payment and a 60 month commitment period were required. The court agreed, finding that, under 11 U.S.C. §707(b)(2)(A)(iii), only payments that were scheduled as contractually due in the future could be deducted as part of the amounts reasonably necessary to be expended in computing the debtors' disposable income under 11 U.S.C. § 325(b)(2).

In re McPherson, 350 B.R. 38 (Bankr. D. Va. 2006)

Debtors had purchased a computer on credit. They valued the computer at \$100 and scheduled the creditor with a total claim in the amount of \$2,216. Debtors were obligated under the purchase contract to make total payments of \$4,056. The plan bifurcated the claim into a secured claim in the amount of \$100 and an unsecured claim in an amount certain, \$2,116. In calculating the amount of their monthly disposable income to be distributed to unsecured creditors under the plan, debtors deducted an amount equal to the total amount of all remaining payments due under the contract by the number of months in the proposed plan. The court held that the amount that could be deducted to arrive at debtors' disposable income was the amount that debtors would make in the future as provided in their plan, not the amount that was provided for in the contract that gave rise to both secured and unsecured claims.

Surrender in full satisfaction

Majority view: It appears that what was once a growing minority trend, the view that a secured lender has a deficiency claim after a debtor's surrender of 910 secured collateral, is being supported by a majority of Court of Appeals decisions. *In re Wright* 492 F.3d 829; 2007 U.S. App. LEXIS 15843(7th Cir 2007), sets the tone of the new majority. It states that by knocking out §506, the hanging paragraph leaves the parties to their contractual entitlements. §506(a) only divided claims into secured and unsecured components. Relying upon *Butner v. United States*, 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979), *Wright* states that state law determines rights and obligations when the Code does not supply a federal rule.

AmeriCredit Fin. Servs. v. Long, (In re Long), 2008 U.S. App. LEXIS 4549 (6th Cir. 2008)

Concurring with *Wright* “the court finds that a gap in the law existed as a result of the 2005 revision to the Bankruptcy Code, which created inconsistencies between 11 U.S.C. §§1325(a) and 506. The 2005 revision did not provide for the situation in which a Chapter 13 debtor proposed to surrender the collateral to the creditor. Because the court found no legislative history suggesting that Congress intended to eliminate all deficiency claims upon surrender of the collateral and because the court concluded that a literal interpretation of the hanging paragraph following 11 U.S.C. §1325(a) would create an unintended and illogical result, the court declined to adopt a literal interpretation. Instead, the court employed a common law principle of interpretation known as “the equity of the statute.” Applying the mandate of the hanging paragraph to surrender under § 1325(a)(5)(C) would require the court to reach a result that would not serve the policy or purpose of the amendment. Thus, the court held that claims subject to the hanging paragraph where the debtor elected to surrender the collateral pursuant to §1325(a)(5)(C) would be governed and adjudicated the same as they were before the 2005 amendments.”

Capital One Auto Fin. v. Osborn (In re Osborn), 363 B.R. 72, 2007 Bankr. LEXIS 497 (B.A.P. 8th Cir., 2007)

“... the hanging paragraph simply removes the bankruptcy code's method of bifurcation. The hanging paragraph has no effect on state-law rights. Moreover, retention and surrender are treated differently in the bankruptcy code. Compare 11 U.S.C. §§1325(a)(5)(B)(ii) (requiring full payment of the secured claim when the debtor retains the collateral) with 1325(a)(5)(C) (not discussing payment requirements when the debtor surrenders the collateral).

In re: Wilson, 2007 WL 2405284 (10th Cir.BAP (Kan.)) 8/24/07

“The imprecise language of the hanging paragraph has created a conundrum for the Bankruptcy courts seeking to apply it. While neither the majority nor the minority view perfectly harmonizes the paragraph's language with the other provisions of the Code to which it relates, we believe the majority view that limits its effect to prohibiting bifurcation, and the resulting cram-down of 910-claims, is preferable. This interpretation is consistent with the Supreme Court's interpretation of §506, its emphasis on state law as governing the substance of claims in Bankruptcy, is the most practical approach in actual application, and is consistent with the grammatical structure of the paragraph itself.”

In re: Rodriguez, 2007 WL 2701295 (9th Cir.BAP (Wash.)) 8/28/07

“Hanging paragraph”...did not affect “910 creditor's” right to deficiency claim if the surrendered motor vehicle securing it could not be sold for sum sufficient to satisfy debtor's total debt to creditor.”...“We agree that a “plain meaning” approach is proper and that the hanging paragraph unambiguously provides that section 506 is inapplicable when a debtor surrenders a 910 vehicle pursuant to section 1325(a)(5)(C). We part company with the majority of cases, however, in concluding how section 506's inapplicability affects the right of the 910 creditor to assert a claim for any deficiency following surrender of the 910 vehicle. The majority position, as thoroughly analyzed in *In re Pinti*, 363 B.R. 369, 379-80 (Bkrcty.S.D.N.Y.2007), holds that section 506 (and only section 506) creates, defines and governs deficiency claims. In other words, if section 506 does not apply, no deficiency claim can exist. We disagree with *Pinti* that section 506 defines and determines the nature of a creditor's secured interest.”...“We add our name to the growing list of courts that have found the hanging paragraph to have no effect on the deficiency claims of 910 creditors who are the recipients of section 1325(a)(5)(C) surrenders.”

Example minority view: “When the Hanging Paragraph is applied to Section 1325(a)(5)(C), the result is to equate surrender of the 910 Vehicle to full payment of the claim, denying the creditor an unsecured claim for any deficiency after it liquidates the claim by sale of the vehicle.” In re: Pinti, 363 B.R. 369 (Bkrctcy.S.D.N.Y.) 2007 (Citing In re Osborn, 363 B.R. 72, 2007 Bankr. LEXIS 497 at *7, 2007 WL 542435 at *2 (B.A.P. 8th Cir. Feb. 23, 2007) which was subsequently reversed)

In re Vanduyne, 374 B.R. 896, 2007 Bankr. LEXIS 2953, 21 Fla. L. Weekly Fed. B 1 (Bankr. M.D. Fla. 2007)

“[T]his Court is disinclined to follow the recent decision of the Seventh Circuit in *Wright* and is satisfied that the Hanging Paragraph of the revised Section 1325 of the Code, as amended by BAPCPA, permits debtors to surrender a motor vehicle in full satisfaction of a debt owed to the secured creditor and requires the creditor to forego the opportunity to take advantage of the provisions of Section 506 should the property be liquidated for less than the amount of the debt. This conclusion is consistent, in this Court's view, with the overall scheme of the entire structure of a Chapter 13 case as now established by BAPCPA and the Debtors may surrender their Motor Home to the Creditor in full satisfaction of the debt.”

In re Stalica, 372 B.R. 591 (Bankr.W.D.N.Y.) (2007)

Facts: Chapter 13 debtor objected to deficiency claim asserted by “910 creditor,” on theory that, by virtue of “hanging paragraph,” debtor's surrender of motor vehicle securing creditor's claim had resulted in satisfaction thereof in full.

Court: Held that §506 is only applied where valuation or allowance are implicated, and neither are implicated where the collateral is actually surrendered and sold.

In re Lane, 374 B.R. 830, (Bkrctcy.D.Kan.) (2007)

Facts: Chapter 13 debtors objected to claim filed by purchase-money motor vehicle lender and sought to reclassify lender's allowed secured claim after vehicle securing it was destroyed. Lender moved for relief from stay.

Court: held that, when motor vehicle securing creditor's “910 claim” was destroyed postconfirmation, Chapter 13 debtors were entitled to modify their plan, to account for payments that creditor had received outside plan in form of payment from motor vehicle insurer, and to reclassify creditor's remaining deficiency claim as general unsecured claim.

In re Gay, 375 B.R. 343, cites *Rodriguez* (Bkrctcy.E.D.Tex.) 9/18/07

Facts: Chapter 13 debtors objected to unsecured deficiency claim filed by purchase-money motor vehicle lender which, prior to plan confirmation hearing and before case was converted from Chapter 7, had successfully moved for relief from stay and repossessed and sold motor vehicle that secured its claim. Debtors asserted that, because their plan provided for surrender of motor vehicle in full satisfaction of lender's secured claim, it was barred from asserting deficiency claim pursuant to “dangling paragraph” added by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).

Court: held that language in plan that wrongfully provided that motor vehicle, which had already been repossessed and sold prior to confirmation hearing, would be surrendered to lender in full satisfaction of secured claim that it no longer had was of no talismanic significance, and could not, pursuant to “hanging paragraph,” prevent lender from asserting unsecured deficiency claim.)

In re Gallagher, 2007 WL 2745808, (10th Cir.BAP (Kan.)) 9/21/07

Facts: On October 29, 2005, Debtor purchased a vehicle for her personal use, borrowing money from Creditor and giving Creditor a lien on the vehicle. The purchase took place within the 910 day period preceding Debtor's filing of her Chapter 13 petition, which occurred on December 11, 2006. Debtor's proposed Chapter 13 Plan provided that the amount of Creditor's secured claim was \$11,534.15, and that Debtor would retain the vehicle, paying Creditor \$100 per month for 57 months. Creditor filed a proof of claim in the amount of \$12,070.43, and objected to the proposed Chapter 13 Plan, in part, because it did not provide for any interest on Creditor's claim. The bankruptcy court denied Creditor's objection, but ordered the “Claim of Community America Credit Union to be paid in full without post-petition interest.” The bankruptcy court then entered its Confirmation Order. Creditor brings a timely appeal.

Court: The existence of a claim is usually determined by non-bankruptcy substantive law, whereas valuation of that claim is determined by §506. A purchase money security interest is secured through the parties' contract and applicable perfection statutes and is secured without operation of the Code. A

creditor's secured status is not erased without any further adjudication merely because the hanging paragraph makes the §506 valuation mechanism inapplicable to 910-day vehicle claims. Applying this sound reasoning, the bankruptcy court's Confirmation Order is at odds with the result reached by these courts because it does not provide for payment of interest on Creditor's 910-claim.

Personal use vs. "other" use

"Bankruptcy courts have used one of three tests to determine whether a vehicle was acquired for the personal use of a debtor.

The first test is the liberal test adopted in *Johnson*, which considers whether "acquisition of the vehicle enabled the debtor to make a significant contribution to the gross income of the family unit." The court in *Johnson* did not clarify whether the debtors in that case owned more than one vehicle, but did state that the vehicle in question was used for business and personal use. However, the court in *Johnson* nevertheless concluded that the vehicle in question was acquired for business purposes because the debtors purchased the vehicle for the *primary* purpose of allowing one of the debtor's to drive to and from work, which thus allowed such debtor to make a significant contribution to the gross income of the family unit. Based upon the foregoing holding, this Court presumes that the vehicle in question was used *primarily* for driving to and from work and not for other personal purposes. The holdings in *Hill*, *Medina*, and *Martinez* are similar in that all three courts imply that the level of personal use is irrelevant where the debtor uses the car to go to and from work, thus permitting the debtor to generate income for maintenance and support.

The second test was articulated by the court in *Solis* and focuses on whether the debtor acquired the vehicle with the intent to materially and significantly meet their own personal needs, as determined by examining the totality of the circumstances. This Court would consider the *Solis* test to be a more subjective test than either the bright-line test used by the court in *Johnson*, or the third test discussed below.

The third test is the quantitative approach taken by the court in *Joseph*, where the court focused on the predominate use of the debtor's vehicle. According to WEBSTER'S THIRD INTERNATIONAL DICTIONARY, the term predominance means "numerical superiority" while the term predominate means "to hold advantage in numbers or quantity". Based upon the plain meaning of predominance and predominate, this Court would conclude that under *Joseph*, a debtor's use of a 910-vehicle for business purposes 51% of the time would remove the vehicle from the grasp of the hanging paragraph found in § 325(a).

Joseph, *Medina*, *Martinez*, *Solis*, *Hill*, and *Johnson*, stem from two districts: the Western District of Louisiana and the Southern District of Texas." All the above quoted from: *In re Counts*, 2007 WL 2669204 (Bkrcty.D.Mont.).

In re: Adaway, 367 B.R. 571 (Bkrcty.E.D.Tex.) 4/10/07

"Under the circumstances of this case, this Mitsubishi vehicle was not acquired for the personal use of the Debtor. The Debtor testified that he acquired the vehicle for the use of his non-debtor spouse, and his testimony is corroborated by his minimal use of the vehicle. If this were the couple's sole vehicle at the time of acquisition, the Debtor's occasional use could be significant and material enough to constitute acquisition for his personal use. However, the Debtor testified without contradiction that, prior to and after his acquisition of the Mitsubishi, his transportation needs were almost exclusively met by his larger pickup which he prefers to the smaller Mitsubishi. Finally, even if responsibility for the checked box on the Debtor's financing application can be legitimately charged to the Debtor, such an indication is not fatal to the Debtor's case. The indication that he intended to purchase the vehicle for a "personal, family, or household use," (as opposed to a business, farm or commercial use) is consistent with the conclusion that the Debtor acquired the vehicle for his spouse's use, without contradicting his denial of an acquisition for *his* personal use. Finding that this vehicle was not acquired for the Debtor's personal use, Citifinancial is not entitled to the anti-bifurcation protection afforded by § 1325(a)(*), and the Debtor's plan is not rendered unconfirmable by its invocation of the § 506 cramdown provision as to Citifinancial's secured claim."

Cited by: *Cross*, 2007 WL 2823671; *Gay*, 2007 WL 2746778; *Smith*, 2007 WL 1577668.

In re: Lorenz, 368 B.R. 476 (Bkrcty.E.D.Va.) 4/19/07

"This Court adopts the "significant and material" personal use test found in *In re Solis* and *In re Wilson* and holds that it applies no matter what the other use of the vehicle is, family, household or *business*."

Examined by: *Counts*, 2007 WL 2669204.

Cited by: *Garrison*, 2007 WL 1589554; *Williams*, 2007 WL 2122131.

Declined to follow by: *LaDeaux*, 2007 WL 2163088.

In re: Grimme, 371 BR 814 (Bkrcty.S.D.Ohio) 7/13/07

“Rather, we believe, as did the Court in *In re Lowder*, 2006 WL 1794737 (Bkrcty.D.Kan.2006), that the term “personal use” means, simply, non-business use. With this as the threshold analysis, the “personal use” test is simple. When the evidence shows that a vehicle has been acquired for business purposes, the hanging paragraph will not apply. *Id.* Conversely, if the evidence shows that a vehicle was acquired for non-business purposes, the hanging paragraph will apply. *Id.* Also, driving to and from work is not a business purpose. *Id.*...In the present case, the vehicle was clearly not acquired for business purposes. Therefore, the hanging paragraph applies. The fact that the Debtor does not have a driver's license is not determinative. Although the Debtor is a passenger, she is still enjoying the personal use of the vehicle.”

In re: Ladeaux, 2007 WL 2163088 (Bkrcty.S.D.Ohio) 7/26/07

“Held that larger motor vehicle which Chapter 13 debtors acquired with purchase-money financing obtained within 910 days of petition date, even though they already owned compact vehicle which they used in commuting together to work, so that they would have vehicle capable of accommodating the many foster children that stayed with debtors, and from whose care debtors earned roughly 20% of their income, was acquired for "business purpose" rather than for "personal use" of debtors.”

Cited by: *Cross*, 2007 WL 282367.

In re: Counts, 2007 WL 2669204 (Bkrcty.D.Mont.) 9/6/07

Uncontested testimony that the debtor used the vehicle for business purposes combined with the fact that the debtor had many vehicles cut against a finding of personal use.

In re Cross, 2007 WL 2823671, (Bankr.S.D.Ohio) 9/27/07

Facts: Purchase-money motor vehicle lender objected to confirmation of debtor's proposed Chapter 13 plan as improperly bifurcating its alleged "910 claim" in violation of "hanging paragraph," and debtor responded that vehicle was acquired for use of his non-filing spouse, and not for his own personal use, such that "hanging paragraph" did not apply.

Court: Applying the *Solis* test to the very limited evidentiary record made at the Hearing, the Court concludes that the Cadillac was acquired for the personal use of the Debtor. As *Solis* and the other reported decisions make clear, in applying the personal-use test it is "the intention of the acquirer at the date of acquisition[]" that is controlling.

Negative Equity

“According to estimates, negative equity transactions occur in somewhere between 26 and 38 percent of new vehicle purchases, with recent unsupported statements by counsel for GMAC estimating it as high as 50 percent. It is clear that negative equity is a large component of an increasingly large number of financing transactions. Where such a significant alleged component of purchase-money security interests is not included explicitly in the text of the U.C.C. or its official comments, the court does not see a textual justification for placing it amongst a list in which it would be the proverbial elephant in the room.”

Majority: “*Peaslee, Price, Westfall, Bray, and Acaya* represent the majority published view and are more persuasive in holding that the negative equity is not part of the purchase-money security interest. The court agrees with the majority view that the definition of purchase-money security interest does not encompass rolled-in debt incurred to pay off negative equity.”

Minority: “The minority position, put forth by the *Graupner* opinion in the Bankruptcy Court for the Middle District of Georgia, holds that a purchase-money security interest includes negative equity rolled into a new motor vehicle financing transaction.”

Treating PSMI and Non-PMSI

“It is clear that the hanging paragraph applies only to purchase-money security interests, but it is not clear whether a security interest that is *only partially* purchase-money retains *any* of its purchase-money character when it has been combined with a nonpurchase-money security interest in one transaction. The Uniform Commercial Code has traditionally used two approaches.”

Dual status rule: “The “dual status rule” allows the court to treat the portion that is purchase-money (essentially the purchase price) as purchase-money, whereas the non-purchase-money portion remains non-purchase-money and is treated accordingly.”

Transformation rule: “The “transformation rule” holds that a security interest that is part purchase-money and part non-purchase-money completely loses its purchase-money character and is entirely transformed into a non-purchase-money security interest.”

Note: Some courts are allowed to choose the rule they apply and in some jurisdictions the choice between rules has been constrained either by the state legislature or by precedent

All above quoted from *In re Pajot* – 371 B.R. 139 (Bkrcty.E.D.Va.).

Graupner v. Nuvel Credit Corp., 2007 WL 1858291 (M.D.Ga.) 6/26/07

“The Court finds that under the facts in this case 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 collateral. 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.”

Discussed by: *General Motors Acceptance Corp. v. Peaslee*, 2007 WL 2318071.

Cited by: *Westfall*, 2007 WL 2777709.

In re Westfall, 376 B.R. 210, 219 (Bankr. D. Ohio 2007).

“There is no question that the transactions at issue include partial purchase money security interests. In light of the ability to frame a federal understanding of the term purchase money security interest, the court finds adoption of the dual status rule is more equitable. In applying the rule, the court finds that the subject transactions will have purchase money components, which will be secured and not subject to bifurcation, and nonpurchase money components (arising from the payment of negative equity), which will be

subjected to bifurcation as general unsecured claims. To determine the amounts of each, the court will employ a simple percentage formula based on the original transaction.”

In re: Pajot, 371 B.R.139 (Bkrcty.E.D.Va.) 7/17/07 (on PMSI and other “value”)

Gap insurance: “[T]his court will follow *Price* and *White* and hold that the gap insurance is not a component of the purchase-money security interest.”

Extended Warranties or service contracts: “[T]he court will follow the result advocated in *Murray* and *Johnson*, and holds that an extended warranty or service contract is included as part of the purchase-money security interest. The court believes that such charges, as required by Va.Code Ann. § 8.9A-103 and its comments, have a nexus close enough to the acquisition of a new vehicle to allow their inclusion as a part of the purchase-money security interest.”

Rebate credits: “If the creditor wished to give the debtor a “rebate” for the trade-in, it could have clearly been assigned to the trade-in by increasing the trade-in allowance directly. The creditor having not done so, the court is left with no evidence or argument supporting a finding that the negative equity rolled into the transaction was reduced by the rebate. The court accordingly holds that, unless evidence indicates it was specifically applied to increase the allowance on a trade-in, a rebate does not reduce the non-purchase-money negative equity portion of a motor vehicle financing transaction.”

“In sum, the compromise approach represented by the dual status rule strikes an appropriate balance of preserving capital availability for debtors on the brink of Bankruptcy, without providing too great an incentive for creditors to finance excessive negative equity amounts.”

Distinguished by: *General Motors Acceptance Corp. v. Peaslee*, 2007 WL 2318071.

Cited by: *Westfall*, 2007 WL 2777709; *Williams*, 2007 WL 2122131.

In re: Cohrs, 2007 WL 2186135 (Bkrcty.E.D.Cal.) 7/31/07

“[I]n the context of auto sales, the value given to acquire a vehicle includes negative equity in a vehicle traded in as part of the purchase price of a new vehicle. Hence, a lender financing such a transaction acquires a purchase money security interest and the debtor incurs a corresponding purchase money obligation.”

Cited by: *General Motors Acceptance Corp. v. Peaslee*, 2007 WL 2318071; *Watson*, 2007 WL 2873434; *Westfall*, 2007 WL 2777709.

General Motors Acceptance Corp. v. Peaslee (In re Peaslee) 358 B.R. 545 (Bankr. W.D. N.Y. 2006)

“In addition, Comment 3 states that “[t]he concept of ‘purchase-money security interest’ requires a close nexus between the acquisition of collateral and the secured obligation. Thus, a security interest does not qualify as a purchase-money security interest if a debtor acquires property on unsecured credit and subsequently creates the security interest to secure the purchase price.” Where the parties to the transaction agree to a “package transaction” in which “[t]he negative equity is inextricably intertwined with the sales transaction and the financing of the purchase,” *Graupner v. Nuvell Credit Corp.*, No. 4:07-CV-37, 2007 WL 1858291, at *2 (M.D.Ga.2007), one could certainly conclude that “[t]his 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 collateral.” *Id.* (observing that “[t]he trade-in of the vehicle was an integral part of the sales transaction”); *see also In re Cohrs*, ---B.R. ---, 2007 WL 2186135, at *2 (Bkrcty.E.D.Cal.) (“When a car buyer offers to trade in a vehicle as part of the purchase price for another vehicle, the charges incidental to transferring the trade-in vehicle are part of the purchase price of the new vehicle,” and that “[t]hose charges are incurred to ‘enable the debtor to acquire rights in’ the new vehicle”); *Petrocci*, 2007 WL 1813217, at *9 (stating that “[t]his negative equity financing is inextricably linked to the financing of the new car” since “[i]t is clear that one would not take place without the other”). The fact that negative equity and trade-ins do not *have* to be included in a sale, and that the buyer could, in theory at least, pay off the negative equity by other means, does not require a contrary result, if the facts surrounding the particular transaction at issue are such that the negative equity was integral to the sale. *See* N.Y. U.C.C. § 1-201(37)(a) (“Whether a transaction creates a ... security interest is determined by the facts of each case”). ... [A]ppellants’ entire claims, including that portion of the claims attributable to the payoff of negative equity on the debtors’ trade-in vehicles, should be treated as secured claims.”

Discussed by: *Westfall*, 2007 WL 2777709.

Called into doubt by: *Rodriguez*, 2007 WL 2701295 (9th Cir.BAP (Wash.) Aug 28, 2007).

In re Blakeslee, 377 B.R. 724 (Bankr. M.D. Fla. 2007)

Facts: Chapter 13 debtor filed motion to value motor vehicle lender's claim for purpose of bifurcating it into its secured and unsecured components and cramming down plan. Lender objected on theory that it was protected by "hanging paragraph," as purchase-money "910 creditor," and debtor challenged its purchase-money status.

Court: Held that: (1) lender, at least to extent of the more than \$14,000 advanced in connection with debtor's negative equity in trade-in vehicle, did not hold "purchase money" claim; (2) lender did not have "purchase money" claim for money advanced to finance debtor's purchase of gap insurance; and (3) court would exercise its discretion to apply "transformation rule," and to treat lender as holding what was entirely a "nonpurchase money" claim, such as debtor was free to bifurcate.

In re Honcoop, 377 B.R. 719, (Bankr.M.D.Fla.) 9/19/07

Facts: Chapter 13 debtors filed motion to value motor vehicle lender's claim for purpose of bifurcating it into its secured and unsecured components and cramming down plan. Lender objected on theory that it was protected by "hanging paragraph," as purchase-money "910 creditor," and debtors challenged its purchase-money status.

Court: Held that: (1) money that motor vehicle lender advanced within 910 days of debtors' Chapter 13 filing to pay cost of gap insurance on vehicle, which covered damage that exceeded vehicle's value up to outstanding balance of secured loan, was not part of purchase price of vehicle under governing Florida law, and thus did not give rise to "purchase money security interest"; but (2) court, as matter of equity, would not apply "transformation rule" and treat creditor as holding purely a nonpurchase-money claim, but would simply reduce lender's purchase-money claim by the \$500 originally charged for gap insurance and treat remainder of lender's claim as protected by "hanging paragraph."

The Court agrees that it has the discretion as to whether to apply the dual status or the transformation rule to a partial purchase money security interest and finds that with respect to GAP insurance, the equitable rule to be applied is the dual status rule. However, because the contract failed to allocate the portion of the monthly payments attributable to GAP insurance and the portion attributable to the vehicle itself, the Court finds it appropriate to remove the GAP insurance in its entirety. Accordingly, Creditor's secured claim will be reduced by \$500.00, the amount of the GAP insurance. However, the remainder of Claim 4 is a purchase money security interest, is subject to § 1325(a) and is not permitted to be bifurcated into secured and unsecured parts pursuant to 11 U.S.C. § 506(a)(1).

In re Watson, 2007 WL 2873434, (Bankr.E.D.Cal.) 9/27/07 (Unpublished)

This precise issue was addressed in *In re Cohrs*, 2007 Westlaw 2186135 (Bankruptcy Eastern District of CA 2007). In the *Cohrs* case the court found that the financing of this negative equity does not defeat the purchase money secured status for the new loan. The court finds the *Cohrs* decision to be persuasive and fully adopts its reasoning and analysis herein.

In re Sanders, 2007 WL 3047233, (Bankr.W.D.Tex.) 10/18/07

Facts: Creditor, which had advanced funds to pay off the negative equity of debtors' trade-in vehicle while also advancing them funds to purchase their new vehicle, objected to confirmation of Chapter 13 plan, asserting that plan improperly failed to treat its secured claim on debtors' vehicle as a "910-day" claim under the Bankruptcy Code's "hanging paragraph."

Court: Held that: (1) the term "price of the collateral," as used in the section of the Texas Uniform Commercial Code (UCC) governing "purchase money security interests" (PMSIs), does not include the amount financed to pay off the negative equity from the vehicle traded in;(2) funds used to pay off negative equity are not "value given to enable the debtor to acquire rights in the collateral," within the meaning of the subject UCC provision; and (3) pursuant to the plain language of the "hanging paragraph," the fact that creditor had a PMSI that secured part of the debt was not sufficient to qualify creditor for the narrow exception to the general rule allowing for bifurcation and cramdown with respect to secured claims.

In re Spratling, 2007 WL 3102154, (Bankr.M.D.Ga.) 10/19/07

Facts: Motor vehicle lender that advanced funds to debtor-borrower within 910 days prior to her Chapter 13 filing objected to confirmation of debtor's proposed plan as improperly bifurcating its claim, and debtor responded by asserting that sums advanced by lender to pay for extended service contract and gap insurance on vehicle affected "purchase money" nature of its interest and enabled debtor to bifurcate its claim.

Court: Held that:(1) term "price," as used in provision of the Georgia Uniform Commercial Code defining a "purchase money obligation" as one incurred "as all or part of the price of the collateral," had to be construed in pari materia with the term "cash sales price," as used in provision of the Georgia Motor Vehicle Sales Finance Act; (2) cost of extended service contract constituted part of purchase price of vehicle, and did not affect "purchase money" nature of lender's security interest; and (3) money that motor vehicle lender advanced within 910 days of debtor's Chapter 13 filing to pay cost of gap insurance on vehicle, which covered damage that exceeded vehicle's value up to outstanding balance of secured loan, bore a sufficiently close nexus to debtor's acquisition of vehicle that it also had to be considered part of "price" of vehicle.

In re Macon, 2007 WL 3237018, (Bankr.D.S.C.) 10/19/07

Facts: Creditor that provided financing to Chapter 13 debtor within 910 days prior to her bankruptcy filing in order to allow her to acquire motor vehicle for her personal use objected to confirmation of debtor's proposed plan, as improperly bifurcating creditor's claim in violation of "hanging paragraph." Debtor responded by asserting that additional amounts financed by creditor, in excess of vehicle's purchase price, affected purchase money nature of creditor's security interest and made "hanging paragraph" inapplicable.

Court: Held that mere fact that creditor that provided financing to Chapter 13 debtor within 910 days prior to her bankruptcy filing in order to allow her to acquire motor vehicle for her personal use had also financed debtor's purchase of extended service contract, as well as gap insurance to cover any shortfall between applicable insurance coverage and amount still owed if vehicle was "totaled" in accident or lost to theft, did not affect "purchase money" nature of creditor's security interest.

In re Burt, 2007 WL 3143319, (Bankr.D.Utah) 10/24/07

Facts: Ford Motor Credit objects to confirmation on the basis that the Debtor's proposed plan seeks to improperly cram down Ford Motor Credit's secured claim in violation of 11 U.S.C. § 1325(a), otherwise referred to as the "hanging paragraph." The Debtor filed a response to Ford Motor Credit's objection and a separate objection to Ford Motor Credit's proof of claim, arguing that § 1325(a)(*) does not apply to Ford Motor Credit's claim because it does not hold a purchase money security interest ("PMSI") in the 2006 Ford F-150 truck (the "Truck" or "vehicle"). Specifically, the Debtor argues that the financing of the service contract and the negative equity eliminated Ford Motor Credit's purchase money security interest, and therefore, Ford Motor Credit's claim is subject to a cram-down under 11 U.S.C. § 506.

Court: The Court determines that Ford Motor Credit's entire claim, including that portion of the claim attributable to negative equity and costs associated with the purchase of the vehicle, qualifies as a purchase money security interest. Accordingly, the hanging paragraph of §1325(a) applies, and the Debtor cannot "cram down" Ford Motor Credit's claim pursuant to § 506. Therefore, the Debtor's objection to Ford Motor Credit's claim is overruled and the proposed plan is denied confirmation for failure to comply with §325(a).

In re Conyers, 379 B.R. 576 (2007) (Bkrtcy.M.D.N.C.) 11/2/07

The matter before the Court is Ford Motor Credit Company, LLC's ("Ford Motor Credit") objection to confirmation of the Debtor's proposed chapter 13 plan. Ford Motor Credit objects to confirmation on the basis that the Debtor's proposed plan seeks to improperly cram down Ford Motor Credit's secured claim in violation of 11 U.S.C. §1325(a), otherwise referred to as the "hanging paragraph." The Debtor filed a response to Ford Motor Credit's objection and a separate objection to Ford Motor Credit's proof of claim, arguing that §1325(a) does not apply to Ford Motor Credit's claim because it does not hold a purchase money security interest ("PMSI") in the 2006 Ford F-150 truck (the "Truck" or "vehicle"). Specifically, the Debtor argues that the financing of the service contract and the negative equity eliminated Ford Motor Credit's purchase money security interest, and therefore, Ford Motor Credit's claim is subject to a cram-down under 11 U.S.C. §506.The Court determines that Ford Motor Credit's entire claim, including that portion of the claim attributable to negative equity and costs associated with the purchase of the vehicle, qualifies as a purchase money security interest. Accordingly, the hanging paragraph of §1325(a) applies,

and the Debtor cannot “cram down” Ford Motor Credit's claim pursuant to §506. Therefore, the Debtor's objection to Ford Motor Credit's claim is overruled and the proposed plan is denied confirmation for failure to comply with §1325(a).

In re Dunlap, 2008 Bankr. LEXIS 506 (Bankr. D. Wis. 2008) 1/31/08

The parties agreed that the negative equity portion of the loan financed was \$12,510 (based on a \$22,919 balance due on the prior loan less the \$10,409 trade-in value for the old car. The court found that the trade in of the old car was an essential part of a single transaction which enabled the buyer to purchase the new vehicle. Therefore, the entire loan balance of \$44,217.70 qualified as a PMSI under Wis. Stat. §409.103. 11 U.S.C. §1325(a) (hanging paragraph) thus applied, and the negative equity financing was entitled to be included as part of the PMSI for purposes of the creditor's claim.

In re Schwalm, 380 B.R. 630 (Bankr. D. Fla. 2008) 1/16/08

The debtors contended that the loans could be stripped down to the current value of each car because the creditors did not hold "purchase money security interests." The debtors based this contention on the fact that their loans included: (1) a roll-over of negative equity owed on cars that were traded in; (2) pre-payment of "gap" insurance; and (3) pre-paid extended warranty contract premiums. The court noted that the concept of "purchase money security interest" had two contrary interpretations as to motor vehicle loans, depending on whether the underlying premise was "sticker price plus taxes, tag and title" or "negotiated packaged financing." The court adopted the "packaged financing" approach. When viewed in this way, as a "packaged" transaction to dispose of the old car, insure the new loan amount, and provide for future maintenance, the items included in the amount financed had a close nexus to the acquisition of the car, consistent with the concept of price in Comment 3 to Fla. Stat. §679.1031. Thus, "purchase money security interest," as used in 11 U.S.C. §1325(a), included negative equity on a trade-in, gap insurance and service contract premiums.

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

The concepts at work here under UCC § 9-103--"enabling," "incurred in connection with" and "close nexus"--are fact intensive. [**38] It is not every dollar loaned that becomes a *purchase money obligation* by relationship in time or circumstances to the financing of *purchase money collateral*. Close nexus or what enables a debtor to acquire rights in property require factual analysis in each case. See *GMAC v. Peaslee*, 373 B.R. 252, 256 (W.D.N.Y. 2007) ("The fact that negative equity and trade-ins do not have to be included in a sale, and that the buyer could, in theory at least, pay off the negative equity by other means, does not require a contrary result, if the facts surrounding the particular transaction at issue are such that the negative equity was integral to the sale."); *In re Vega*, 344 B.R. 616, 622-23 (Bankr. D. Kan. 2006) ("[T]o have a PMSI, an otherwise secured party has the burden of proof to satisfy two key elements: 1) that the money loaned or credit extended made it possible for the debtor to obtain the collateral, and 2) that debtor used the funds supplied to acquire rights in the collateral. . . . [Creditor] has not, and cannot . . . meet its burden.").

910 Creditors Rate of Interest

DaimlerChrysler Servs. N. Am. LLC v. Taranto (In re Taranto), 365 B.R. 85 (Bankr. Fed. App. 2007)

The bankruptcy appellate panel (BAP) framed the issue of this case as follows: under the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), what rate of interest must a Chapter 13 debtor pay to the holder of a claim secured by a vehicle purchased for personal use within 910 days prior to the bankruptcy filing where the debtor proposes to pay the secured claim by making periodic installment payments? Here, over appellant's objection, debtors proposed to accelerate their payments and pay the zero percent contract rate of interest. The BAP observed that any plan that sought to modify a secured creditor's rights over its objection was a "cram down" that implicated 11 U.S.C. §1325(a)(5)(B)(ii). The BAP noted that §1325(a)(5)(B)(ii) remained unchanged by BAPCPA. The BAP also believed that the Till rationale (i.e., when a Chapter 13 plan proposed to pay a secured claim in periodic payments, interest had to be paid to achieve the present value of the claim) remained valid and binding. Here, the BAP held that the Till analysis governed and mandated that appellant receive the present value of its secured claim.

Surrender Under the Means Test

A divergence of opinion has arisen over whether it is appropriate to include, for purposes of determining projected disposable income on lines 47 & 48 of the B22C form, the “contractual payment due” of a secured creditor where the Debtor has proposed a chapter 13 plan which surrenders the collateral of the creditor. The divergence of opinion is broader in application as it includes avoidance of liens, cram downs or other modification of a secured debt in the proposed plan. The choices of a debtor may be a two-edged sword as any savings gained by surrender or modification of a secured debt would create more disposable income to be paid to the unsecured creditors. The focus of the debate is on the language of 11 U.S.C. §1325(b), which provides:

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

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

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

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

(3) **Amounts reasonably necessary to be expended** under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined **in accordance with subparagraphs (A) and (B) of section 707(b)(2) [11 U.S.C. § 707(b)(2)]**, if the debtor has current monthly income, when multiplied by 12, greater than--

There are a line of cases for which there is a strict definitional adherence of the term “amounts reasonably necessary to be expended” corresponding to §707(b)(2)(A)(iii)’s exclusion from disposable income the “contractually due payments” of secured creditors.

In re Oliver, 2006 Bankr. LEXIS 1607 (Bankr. D. Or. 2006)

The issue before the court was whether, in completing Form B22C, a debtor was entitled to deduct from current monthly income, payments owed on secured debt even though the debtor had declared an intent to surrender the collateral or avoid the lien securing the debt, so that the subject secured debt payments would not be made under the debtor's proposed plan in Chapter 13. Resolution of the issue turned on the language of 11 U.S.C. §707(b)(2)(A)(iii), which addressed secured debt payments, specifically, rather than expenses generally. The court concluded that in completing Form B22C, debtors were entitled to deduct from current monthly income the average payments on debts secured by collateral with respect to which they had expressed an intent to surrender. The court's conclusion extended to average payments on debts secured by collateral as to which debtors moved to avoid the applicable liens post-petition. The court's decision was limited to the issue of whether debtors could include in Form B22C average payments on secured debts even where those payments, in fact, would not be made under the Chapter 13 plan as proposed.

In re Burmeister, 378 B.R. 227 (Bankr. D. Ill. 2007)

In calculating their disposable income, 11 U.S.C. §707(b)(2)(A) not only permitted but compelled the debtors to take deductions based on payments of all their mortgages, even the mortgage on the property they intended to surrender, because those payments were "contractually due" when the petition was filed. The disposable income calculation was, therefore, correct because when the debtors filed their petition, they still owned the property they intended to surrender. That the debtors had stopped making the payments and intended to surrender the property was beside the point. The payments were nonetheless "contractually due" and had to be deducted under §707(b)(2)(A)(iii)(I). The Trustee contended, however, that under 11 U.S.C. §1325(b)(1), disposable income was determined "as of the effective date of the plan," meaning the date the plan was confirmed. Because the debtors would not be making the mortgage payments on the confirmation date, he argued that the payments could not be included in the disposable income calculation. The Trustee's reliance on the phrase "as of the effective date of the plan" was misplaced. The phrase had no effect on the disposable income calculation.

There is another line of cases, most notably *In re McGillis*, 370 B.R. 720 (Bankr. D. Mich. 2007) from Judge Hughes of the Western District of Michigan, which give more meaning to the context of other terms in 11 U.S.C. §1325 in determining that "in accordance with subparagraphs (A) and (B) of section 707(b)(2) [11 U.S.C. § 707(b)(2)] actually provides the guideline or cap of actual contractual secured debts to be paid from the chapter 13. The actual contractual payments made determines the projected disposable payments."

For Judge Hughes the phrase "reasonably necessary for support" in 11 U.S.C. §1325(b) indicates that the amounts, and the payment of the amounts, must be reasonably necessary for the support of the debtor and any dependent. Payments that a debtor does not propose to make during the pendency of the plan and that a debtor is not required to make under the plan cannot be said to be reasonably necessary for the support of that debtor. Thus, any deductions from income based on the "amounts" in question must be payments that will be made pursuant to the confirmed plan of reorganization. "To be expended" also indicates that the amounts to be deducted are amounts that will be paid in the future. To "expend" means to "put out or lay out". To expend amounts of money, then, means to pay out money. Money that is "to be expended" is money that is to be paid in the future. An amount, the payment of which is never contemplated, cannot be an amount that is to be paid in the future.

In re Crittendon, 2006 Bankr. LEXIS 2172 (Bankr. D.N.C. 2006)

The trustee contended that the debtors' claimed deductions from their income representing payments that they would not actually be making because the collateral securing the debts had been or would be surrendered. Specifically, the debts in question included a first and second mortgage on a residence that was owned by the debtors when this case was filed, but which the debtors sold with the court's authorization. The other disputed deductions were for a debt listed as secured by a horse trailer and a debt listed as secured by a boat. However, under the proposed plan, the debtors were surrendering both the trailer and the boat. The disallowance of the disputed deductions meant that the debtors actually had disposable income of \$1,571 rather than the minus \$79 computed by the debtors. As a result, the trustee argued that a higher plan payment and a 60 month commitment period were required. The court agreed, finding that, under 11 U.S.C. §707(b)(2)(A)(iii), only payments that were scheduled as contractually due in the future could be deducted as part of the amounts reasonably necessary to be expended in computing the debtors' disposable income under 11 U.S.C. § 325(b)(2).

In re McPherson, 350 B.R. 38 (Bankr. D. Va. 2006)

Debtors had purchased a computer on credit. They valued the computer at \$100 and scheduled the creditor with a total claim in the amount of \$2,216. Debtors were obligated under the purchase contract to make total payments of \$4,056. The plan bifurcated the claim into a secured claim in the amount of \$100 and an unsecured claim in an amount certain, \$2,116. In calculating the amount of their monthly disposable income to be distributed to unsecured creditors under the plan, debtors deducted an amount equal to the total amount of all remaining payments due under the contract by the number of months in the proposed plan. The court held that the amount that could be deducted to arrive at debtors' disposable income was the amount that debtors would make in the future as provided in their plan, not the amount that was provided for in the contract that gave rise to both secured and unsecured claims.

**CHAPTER 13 PLAN PAYMENTS
AS PROJECTED INCOME VERSUS CURRENT INCOME**

I. THE ISSUE: WHETHER DISPOSABLE INCOME TO BE PAID UNDER A CHAPTER 13 PLAN IS DETERMINED SOLELY BY THE MEANS TEST FORMULA OR CAN THE DEBTORS' ACTUAL CURRENT INCOME AND EXPENSES BE CONSIDERED?

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 stat. 23 (generally effective October 17, 2005) (“BAPCPA”) revised 11 U.S.C. 1325(b) which requires committing “projected disposable income” in Chapter 13 plans that pay less than 100% of the amount of the allowed claims when the trustee or an unsecured claim holder objects to confirmation. Most analyses conclude there are two lines of cases appear to have developed when applying the 1325(b) revisions. One line of cases has concluded that calculation of “projected disposable income” is to be made using the means test formula set forth in 11 U.S.C. 707(b)(2). *See for example, In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006). The other line of cases concludes that the bankruptcy judge should look at debtors’ actual current income and expenses and not limit the determination of “projected disposable income” to the means test calculation. *See for example, In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006).

The difference between the lines of cases is in the interpretation of 11 U.S.C. 1325(b)(1)(A)’s use of the term “projected” when referring to disposable income. The line of cases which strictly apply the means test formula in calculating the “projected disposable income” reason that Congress has defined the terms “current monthly income” and “amounts reasonably necessary to be expended” (at least as to above median income debtors) and therefore a bankruptcy court has to use the means test formula and cannot take into account debtors’ actual current income or expenses. *See for example, In re Alexander, supra at 745-750.* The other line

of cases focuses on the use of the term “projected” and concludes that the use of this term gives bankruptcy courts the discretion to look at the actual current income and expenses debtors to determine their “projected” disposable income. *See for example, In re Hardacre, supra at 722-723.*

While most analyses conclude there are two lines of cases, I see a third line of cases. These cases calculate “disposable income” using the means test formula. They then look at the actual amount a debtor has to pay to unsecured creditors. They then compare the means test calculation of “disposable income” to the actual amount available to determine whether the means test calculation is a true reflection of the debtor’s “projected disposable income”. The focus is not on the income component or expense component. Instead the focus is on the remainder available after the taking into account the two components. *See for example, In re Jass, 340 B.R. 411 (Bankr. D. Utah, 2006).*

This issue of “actual amounts versus formula amounts” does not appear to apply to the expenses of below median income debtors since 11 U.S.C. 1325(b)(2) and the use of the means test for calculating “amounts reasonably necessary to be expended” for the maintenance or support of the debtor or dependent of the debtor applies only to above median income debtors. Even the cases that strictly use the means test formula indicate that the bankruptcy court has more flexibility in determining the reasonable expenses of below median income debtors. *See for example, In re Alexander, supra at 746 .*

II. THE APPLICABLE STATUTORY PROVISIONS

- A. **11 U.S.C. 1325(b)(1).** Requires that if the trustee or holder of an allowed unsecured claim objects to confirmation, then the plan must pay unsecured claims

100% or pay debtor's "projected disposable income" to unsecured creditors under the plan.

- B. **11 U.S.C. 1325(b)(2)**. Defines disposable income as current monthly income received by the debtor less amount reasonably necessary to be expended for (i) the maintenance or support of the debtor or a dependent of the debtor; (ii) charitable contributions not to exceed 15% of gross income; and (iii) expenditures necessary for operation of a debtor engaged in business.
- C. **11 U.S.C. 101(10A)**. Defines "current monthly income" using the income received by

the debtor during the 6 months prior to the month in which the case is filed.
- D. **11 U.S.C. 1325(b)(3)**. Provides that for above median income debtors the "amounts reasonably necessary to be expended" in calculating disposable income are to be determined in accordance with the means test provisions of 11 U.S.C. 707(b)(2).
- E. **11 U.S.C. 707(b)(2)**. Sets forth the means test to calculate the amount of income a debtor has available to pay nonpriority unsecured claims.

III. THE CASE LAW

A. SIXTH CIRCUIT

1. Cases holding that the means test amount should be strictly applied.

a. Income Component

In re McGillis, 370 B.R. 720 (Bankr. W.D. Mich., 2007)

In re Petro, 381 B.R. 233 (Bankr. M.D. Tenn., 2008)

In re Kolb, 366 B.R. 802 (Bankr. S.D. Ohio, 2007)

In re Anderson, ___ B.R. ____, 2008 WL 748416 (Bankr. S.D. Ohio, 2008)

– **b. Expense Component**

In re Petro, 381 B.R. 233 (Bankr. M.D. Tenn., 2008)

In re Anderson, ___ B.R. ____, 2008 WL 748416 (Bankr. S.D. Ohio, 2008)

In re Kolb, 366 B.R. 802 (Bankr. S.D. Ohio, 2007)

2. Cases holding that actual income or expenses may be considered.

a. Income Component

In re Upton, 363 B.R. 528 (Bankr. S.D. Ohio, 2007)

In re Grant, 364 B.R. 656 (Bankr. E.D. Tenn., 2007)

In re Riggs, 359 B.R. 649 (Bankr. E.D. Ky., 2007)

In re Risher, 344 B.R. 833 (Bankr. W.D. Ky., 2006)

In re McCarty, 376 B.R. 819 (Bankr. N.D. Ohio, 2007)

In re Chriss-Price, 376 B.R. 648 (Bankr.M.D. Tenn., 2006)

In re Zimmerman, ___ B.R. ____, 2007 WL 295452 (Bankr. N.D. Ohio, 2007)

b. Expense Component

In re McGillis, 370 B.R. 720 (Bankr. W.D. Mich., 2007)

In re Spurgeon, 378 B.R. 197 (Bankr. E.D. Tenn., 2007)

In re Upton, 363 B.R. 528 (Bankr. S.D. Ohio, 2007)

In re Grant, 364 B.R. 656 (Bankr. E.D. Tenn., 2007)

In re Riggs, 359 B.R. 649 (Bankr. E.D. Ky., 2007)

In re Risher, 344 B.R. 833 (Bankr. W.D. Ky., 2006)

In re McCarty, 376 B.R. 819 (Bankr. N.D. Ohio, 2007)

In re Chriss-Price, 376 B.R. 648 (Bankr.M.D. Tenn., 2006)

In re French, ___ B.R. ___, 2008 WL 681684 (Bankr. W.D. Ky., 2008)

B. SEVENTH CIRCUIT

1. Cases holding that means test calculation should be applied.

c. Income Component

In re Guzman, 345 B.R. 640 (Bankr. E.D. Wis., 2006)

In re Grunert, 353 B.R. 591 (Bankr. E.D. Wis., 2006)

In re Farrar-Johnson, 353 B.R. 224 (Bankr. N.D. Ill., 2006)

In re Ross, 375 B.R. 437 (Bankr. N.D. Ill., 2007), *amended on reconsideration*,
In re Ross, 377 B.R. 599 (Bankr. N.D. Ill., 2007)

In re Nance, 371 B.R. 358 (Bankr. S.D. Ill., 2007)

In re Burmeister, 378 B.R. 227 (Bankr. N.D. Ill., 2007)

In re Mancl, 381 B.R. 537 (W.D. Wis., 2008), *overruling*
In re Mancl, 375 B.R. 514 (Bankr.W.D. Wis., 2007)

a. Expense Component

In re Guzman, 345 B.R. 640 (Bankr. E.D. Wis., 2006)

In re Grunert, 353 B.R. 591 (Bankr. E.D. Wis., 2006)

In re Farrar-Johnson, 353 B.R. 224 (Bankr. N.D. Ill., 2006)

In re Burmeister, 378 B.R. 227 (Bankr. N.D. Ill., 2007)

In re Nance, 371 B.R. 358 (Bankr. S.D. Ill., 2007)

In re Fuller, 346 B.R. 472 (Bankr. S.D. Ill., 2006)

In re Carlton, 362 B.R. 402 (Bankr. C.D. Ill., 2007)

In re Mancl, 381 B.R. 537 (W.D. Wis., 2008), *overruling*
In re Mancl, 375 B.R. 514 (Bankr.W.D. Wis., 2007)

2. Cases holding that actual income or expenses may be considered.

a. Income Component

In re Demonica, 345 B.R. 895 (Bankr. N.D. Ill., 2006)

In re Fuller, 346 B.R. 472 (Bankr. S.D. Ill., 2006)

In re Foster, ___ B.R. ____, 2006 WL 2621080 (Bankr. N.D. Ill., 2006)

In re Carlton, 362 B.R. 402 (Bankr. C.D. Ill., 2007)

In re Hall, ___ B.R. ____, 2007 WL 445517 (Bankr. C.D. Ill., 2007)

In re Balcerowski, 353 B.R. 581 (Bankr. E.D. Wis., 2006)

b. Expense Component

In re Demonica, 345 B.R. 895 (Bankr. N.D. Ill., 2006)

In re Foster, ___ B.R. ____, 2006 WL 2621080 (Bankr. N.D. Ill., 2006)

In re Hall, ___ B.R. ____, 2007 WL 445517 (Bankr. C.D. Ill., 2007)

In re Van Bodegom Smith, ___ B.R. ____, 2008 WL 613177 (Bankr. E.D. Wis., 2008)

In re Sawdy, ___ B.R. ____, 2008 WL 789166 (E.D. Wis., 2008)

C. BANKRUPTCY APPELLATE PANELS

1. Cases holding that actual income or expenses may be considered

(i). Income Component

In re Kibbe, 361 B.R. 302 (1st Cir. BAP, 2007)

In re Lanning, 380 B.R. 17 (10th Cir. BAP, 2007)

In re Pak, 378 B.R. 257 (9th Cir. BAP, 2007)

(ii). Expense Component

In re Wilson, ___ B.R. ___, 2008 WL 681102 (8th
Cir. BAP, 2008)

In re Ransom, ___ B.R. ___ 2007 WL 4625248 (9th
Cir. BAP, 2007)

In re Pak, 378 B.R. 257 (9th Cir. BAP, 2007)

A. SELECT BANKRUPTCY COURT DECISIONS

1. Cases holding that means test calculation should be applied.

i. Income Component

In re Alexander, 344 B.R. 742 (Bankr. E.D.N.C.,
2006)

In re Hanks, 362 B.R. 494 (Bankr. D. Utah, 2007)

b. Expense Component

In re Alexander, 344 B.R. 742 (Bankr. E.D.N.C.,
2006)

In re Hanks, 362 B.R. 494 (Bankr. D. Utah, 2007)

2. Cases holding that actual income or expenses may be considered.

a. Income Component

In re Kibbe, 342 B.R. 411 (Bankr. D. N.H., 2006)

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

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

ii. Expense Component

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

I. COMMENTARY

My approach to determining a debtor's "projected disposable income" is to break down the calculation into its component parts: 1) income; and 2) expenses. I believe this approach is mandated by 1325(b)(2)'s definition of disposable income. I see a difference in the strengths of the arguments supporting a strict application of the means test formula versus using the actual current amounts as they apply to each component.

I believe there is a very strong argument that the income component must be strictly computed using the means test formula. 1325(b)(2) defines "disposable income" using the term "current monthly income". "Current monthly income" is specifically defined in 11 U.S.C. 101(10A) using the debtor's income during the 6 calendar months prior to the month the bankruptcy case is commenced. Given this express definition of "current monthly income", I see a convincing argument for strict application of the means test as to the income component of disposable income.

I also view 1325(b)(3) as requiring the use of the means test formula in determining the expense component of the disposable income to above median income debtors. The statute clearly states the “amounts reasonably necessary to be expended under paragraph (2)” [1325(b)(2)], *** shall be determined in accordance with [707(b)(2)(A) and (B)]”. This appears to be an express directive from Congress to apply the means test formula in calculating the expense component to an above median income debtor. Since the expense component includes both “actual” amounts expended for such items as “Other Necessary Expenses” and “allowable” expense amounts specified under the National Standards and Local Standards established by the Internal Revenue Service, there will be some expense deductions that are actual and others that are based on the IRS’s allowed amount. I believe we need to look at each particular expense in light of the language of 707(b)(2) and the IRS’s standards to determine if the expense should be based on the actual current amount or the allowed amount regardless of the actual expense. This approach will give due respect to Congress’ apparent intent to impose the means test formula on bankruptcy judges in an above median income debtor case.

The use of the term “**projected** disposable income” in 1325(b)(1)(B) provides the most support for the conclusion that actual income and expenses may be considered. However, most of the cases which rely on use of the term “projected” start with a means test calculation of disposable income. After that calculation is made, the amount is compared to the debtor’s actual amount available to pay the unsecured creditors using Schedules I and J. Although I do not agree with this argument since I view BAPCPA’s revisions to 1325(b) as Congress’ intent to impose the means test formula, it at least has some merit under the rules of statutory construction.

The limitation of 1325(b)(3) to above median income debtors appears to evidence Congress' intent to retain the Bankruptcy Code's pre-BAPCPA discretion for the bankruptcy judges to determine what are reasonable expenses for below median income debtors.

STAY APPLICATION FOR REPEAT FILERS

I. THE ISSUE

When a debtor has been a debtor in prior bankruptcy cases, what must be done and shown to continue the automatic stay or impose a stay?

BAPCPA revised 11 U.S.C. 362 and the application of the automatic stay to individual and all creditors where the debtor has been a debtor in a case in prior bankruptcy cases. This material will attempt to make sense of the complex and confusing language used by Congress in the new provisions. Bankruptcy judges have made comments in their opinions on the difficulty of understanding what is meant by these new provisions. *See for example, In re Paschal*, 337 B.R. 274 (Bankr. E.D.N.C., 2006).

II. THE APPLICABLE STATUTORY PROVISIONS

362(c)(3) - Applies to cases where a debtor was a debtor in at least one case that was dismissed (except 707(b) dismissal) within the year prior to the filing of the bankruptcy case. Provides for 30 day automatic stay. Motion must be filed to extend the stay beyond the initial 30 days of the case.

362(c)(4) - Applies to cases where a debtor was a debtor in two or more cases that were dismissed within the year prior to the filing of the current case. No “automatic” stay goes into effect. Motion must be filed to impose a stay.

362(d)(4) - Provides grounds for lift of stay regarding real property if a bankruptcy filing was part of a scheme to thwart secured creditor with lien on real property that was affected by a prior bankruptcy case. Allowed Bankruptcy Court to enter an Order that may be recorded which makes Order lifting the stay effective in any case filed in the next two years.

362(i) - Eliminates presumption of lack of good faith when earlier case was dismissed after creation of debt repayment plan with creditors.

362(j)- Permits party in interest to request order under 362(c)(3) confirming that automatic stay has been terminated.

III. ANALYSIS OF THE STATUTORY PROVISIONS

A. Individual debtor was a debtor in only one previous case pending with the past year.

1. Limited Duration of the Automatic Stay

11 U.S.C. 362(c)(3) applies to: 1) Individual debtors that were debtors in a prior Chapter 7, 11, or 13 case that was dismissed and pending within the year prior to the filing of the current case; 2) does not apply in a Chapter 11 or 13 case if the prior case was a Chapter 7 case dismissed for abuse under 11 U.S.C. 707(b).

In such cases, it appears the automatic stay will terminate:

1. “with respect to any action taken”;
2. “with respect to a debt or property securing such debt” or “with respect to any least”
3. “with respect to the debtor”.

Some courts have held that to meet the “with respect to any action taken” element, a creditor has to have taken formal legal action prior to the bankruptcy case, such as the filing a suit or commencing a foreclosure action. *In re Paschal*, 337 B.R. 274 (Bankr. E.D.N.C., 2006); *In re Stanford*, 373 B.R. 890 (Bankr. E.D. Ark., 2007). Other courts have held that there is no requirement that the creditor have taken action prior to the bankruptcy case. *In re James*, 358 B.R. 816 (Bankr. S.D. Ga., 2007). Some courts have accepted the requirement that formal legal action have taken place prior to the bankruptcy case without discussing the issue. *See for example, In re Curry* 362 B.R. 394 (Bankr. N.D. Ill., 2007).

The phrase “with respect to the debtor” has garnered most of the attention in bankruptcy cases when deciding whether the automatic stay has been terminated after the first 30 days of the new case. The overwhelming majority of cases hold that the 30 day limit on the automatic stay terminates only as to the debtor or debtor’s property. It does not terminate with respect to “property of the estate”. *In re Jumpp*, 356 B.R. 789 (1st Cir. BAP, 2006), *overruling In re Jumpp*, 344 B.R. 21 (Bankr. D. Mass., 2006); *In re Paschal*, 337 B.R. 274 (Bankr. E.D. N.C., 2006); *In re Moon*, 339 B.R. 668 (Bankr. N.D. Ohio, 2006); *In re Harris*, 342 B.R. 274 (Bankr. N.D. Ohio, 2006); *In re Murray*, 350 B.R. 408 (Bankr. S.D. Ohio, 2006); *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn., 2006).

The minority view is that the stay will terminate as to property of the state under 362(c)(3) unless extended by the bankruptcy court. *In re Jupiter*, 344 B.R. 754 (Bankr. D. S.C., 2006); *In re Curry*, 362 B.R. 394 (Bankr. N.D. Ill., 2007).

If the majority view applies, then it would also appear the stay is in effect with respect to a co-debtor under 11 U.S.C. 1301(a). The majority view relies on the phrase “with respect to the debtor” in reach the conclusion the stay does not terminate with respect to property of the estate. This analysis seems applicable with respect to the co-debtor stay.

2. Procedural Requirement to Continue the Stay

The automatic stay terminates with respect to the debtor on the 30th day after the filing of the bankruptcy case. 11 U.S.C. 362(c)(3)(A). However a motion to continue the automatic stay may be filed. 11 U.S.C. 362(c)(3)(B). The “notice and a hearing” on the motion must be completed before expiration of the 30 days. The requisite notice and hearing can be satisfied utilizing the notice and opportunity to object procedure permitted by 11 U.S.C. 102(b)(1)(B)(i). The court may also issue an Order without an actual hearing, as permitted by 11 U.S.C. 102(1)(B)(ii), if there is insufficient time to commence a hearing before the 30 days expires.

The local bankruptcy rules in each court need to be reviewed to see what procedure the court has instituted to handle 362(c)(3) motions. For example, the Western District of Michigan allows use of the notice and opportunity to object procedure if the motion to extend the stay is filed within 5 days of the filing of the petition. W.D. Mich, L.B.R. 4001-1(e). In the Eastern District of Michigan, the local rules require the debtor to file the motion to extend the stay within 7 days of filing of the petition. E.D. Mich., L.B.R. 4001-6(a). A debtor that fails to follow the local rules and does not take action to assure the hearing is completed within 30 days of the case filing may have the motion to extend the stay denied. *See for example, In re Thomas*, ___ B.R. ___, 2006 WL 278544 (Bankr. E.D.Mich., 2006).

If the hearing on the motion is not completed within the 30 days, the automatic stay terminates by operation of law. *in re Garrett*, 357 B.R. 128 (Bankr. C.D. Ill., 2006). Some courts have concluded the bankruptcy court may reimpose the stay after expiration of the 30 days. *See for example, In re Whitaker*, 341 B.R. 336 (Bankr. S.D. Ga., 2006). Other courts have seriously questioned the power to do so. *In re Garrett*, 357 B.R. 128 (Bankr. C.D. Ill., 2006); *In re Land*, ___ B.R. ___, 2007 WL 4893487 (Bankr. N.D. Ind., 2007). It would seem the express language of 362(c)(3) would prevent the court from reimposing the stay after the 30 days has expired.

Although under 11 U.S.C. 102(1)(B)(ii) the court can issue a bridge order continuing the stay without an actual hearing if there is insufficient time to hold a hearing, I would suspect bankruptcy judges will be reluctant to sign such orders if the debtor did not follow the local rules to obtain an actual hearing.

The timing of the hearing may also come into play. 11 U.S.C. 362(c)(3)(A) provides that the stay “terminates on the 30th day”. I would suggest that the debtor would want the hearing on the motion to continue the stay to be held no later than the 29th day after the filing. If the hearing is held on the 30th day, the stay will have already terminated on the day of the hearing. One remedy for this would be to request an Order be entered without a hearing under 11 U.S.C. 102(1)(B)(ii) continuing the stay until completion of the hearing on the motion. However, if the debtor has not acted diligently and followed the local rules, I suspect a judge will be reluctant to issue such an order.

The motion to extend the stay may be filed by “a party in interest”. In those jurisdiction where the 30 day limit on the automatic stay applies “with respect to the debtor” but not to property of the estate, it would appear the debtor is the most likely party to file the motion. However, a trustee or co-debtor will want to file a motion in those jurisdictions that have not ruled on the issue or have held that the stay will be lifted as to property of the estate unless it is extended within the 30 days.

The court may continue the stay as to all creditors or can decide to continue it as to some but not others. For example, the court may continue the stay as to the unsecured creditors, but not as to a secured creditor seeking to foreclose on a mortgage or repossess a vehicle. The court may also impose conditions or limitations to continuation of the stay. For example, the court may require adequate protection be provided to a secured creditor.

A creditor or other party in interest may request an order from the bankruptcy court confirming that the automatic stay has been terminated under 362(c)(3). 11 U.S.C 362(j).

4. **Substantive Showing Required to Continue the Stay**

To continue the stay, the moving party must demonstrate that the case has been filed in good faith. 11 U.S.C. 362(c)(3)(B). The statute provides a “presumption” the case has not been filed in good faith in specific circumstances. The presumption must be rebutted by clear and convincing evidence to the contrary.

- a. Presumption the case has not been filed in good faith as to all creditors.

The following are instances where there will be a presumption the case has not been filed in good faith as to all creditors:

1. The debtor was a debtor in two or more cases that were pending within the year of the filing of the new case. For example, if the debtor had a Chapter 7 case dismissed for failing to timely file documents, then filed a Chapter 13 case that was dismissed and then filed a new Chapter 13 case, there would be a presumption of lack of good faith in the new case. If the debtor had two prior Chapter 13 cases dismissed within the one year, the presumption would apply. It would also appear that the presumption will arise if the debtor has a case dismissed under 707(b), then has a Chapter 13 case dismissed and then files a second Chapter 13 case. The language in 11 U.S.C. 362(c)(3)(C)(i)(I) does not exclude consideration of a prior case dismissed under 707(b). A Chapter 7 case dismissed for failure to obtain pre-bankruptcy credit counseling may also count as one of the two or more cases that will give rise to the presumption.

2. In a previously dismissed case that was pending within the one year, the debtor failed to file documents without substantial excuse. Inadvertence or neglect is not a substantial excuse. However negligence of the debtor’s attorney which caused the dismissal, may be substantial excuse.

3. If the debtor failed to provide adequate protection ordered by the court in a prior case. This seems to provide that if a debtor fails to make adequate protection payment to a secured creditor, the creditor can use that failure as a basis to contend that the new case has presumptively not been filed in good faith. The debtor would have to overcome that presumption with clear and convincing evidence. It would also appear that a creditor who was not the secured creditor that did not receive the adequate protection can use this to argue the presumption of lack of good faith exists.

4. Where the debtor failed to perform the terms of a confirmed plan in the case that was dismissed within the prior year. If the debtor could not make the payments under a

confirmed Chapter 13 plan in a prior case, the debtor will have to come forward with clear and convincing evidence to rebut the presumption of lack of good faith.

5. If there has been no substantial change in the debtor's financial or personal affairs since the dismissal of the "next most previous case" or any other reason to conclude that the debtor would be able to confirm and perform a plan in the new Chapter 13 case. This would appear to require the debtor to offer clear and convincing evidence that he or she would be able to obtain confirmation and perform a Chapter 13 plan. The hearing on the motion to extend the same may become, in effect, a mini-confirmation hearing.

b. Presumption of lack of good faith as to individual creditor.

There is a presumption a new case has not been filed in good faith as to an individual creditor that filed a motion to modify the stay in a prior case that was dismissed if the motion was pending at the time of dismissal, or the motion to lift stay had been resolved in the prior case. 11 U.S.C. 362(c)(3)(C)(ii).

c. Limit on presumption of lack of good faith.

If a prior Chapter 7, 11, or 13 is dismissed because a "debt repayment plan" is created, then there is no presumption the new case is not filed in good faith. For example, if a debtor filed a Chapter 7 case, but then dismissed the case under 11 U.S.C. 707(a) after coming to terms with creditors on a repayment plan, that case would not count against the debtor. If the debt payment plan does not work, the debtor could file a Chapter 13 case within one year of the dismissal and there would not be a presumption the new Chapter 13 was not filed in good faith.

b. Clear and convincing evidence required to overcome presumption of lack of good faith.

The standard for clear and convincing evidence has been stated to require "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established". *In re Wilson*, 336 B.R. 338, 347 (Bankr. E.D. Tenn., 2005). In *Wilson* Judge Stair set forth the minimum facts that need to be set forth in the motion and required an affidavit be filed in support of the motion. This includes setting forth the change in the financial or personal affairs of the debtor subsequent to the prior dismissal order. This standard was also used in *In re Garrett*, 357 B.R. 128 (Bankr. C.D. Ill., 2006). *In re Sharpe*, ___ B.R. ___, 2008 WL 544929 (Bankr. C.D. Ill., 2008) the standard was stated to require "evidence which proves in the mind of the trier of fact an abiding conviction that the truth of the factual contentions is highly probable".

In *Naper v. Carroll*, ___ B.R. ___, 2006 WL 2990241 (E.D. Mich., 2006), the District Court agreed with the bankruptcy court's conclusion the debtor did not meet her burden of providing clear and convincing evidence of a substantial change in her financial or personal affairs. The debtor claimed she relied on her boyfriend to meet her financial obligations. She also claimed that he had been injured and unable to work for a period of time and this is the reason she had not been able to meet her financial obligations. The boyfriend was back to work with higher pay. She relied on this evidence to try to overcome the presumption. The

bankruptcy court did not find that evidence clear and convincing and denied the motion to extend the stay and the District Court agreed.

In *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn., 2006) the debtor provided clear and convincing evidence of a substantial change in his financial and personal affairs to overcome the presumption of lack of good faith. The debtor presented evidence that during the prior Chapter 13 case he had back surgery and was unable to work for a period of time. The debtor returned to work just prior to the new Chapter 13 case. He was now working two jobs and making the plan payments in the new case. The debtor had been making his plan payments in his prior case until his injury. The court granted the motion to extend the automatic stay based on this evidence. Although *Johnson* court determined that granting the motion was superfluous since the stay continued as to the debtor's home anyway as it was property of the estate, the court stood by its oral decision to grant the debtor's motion.

In *In re Garrett*, 357 B.R. 128 (Bankr. C.D. Ill., 2006) the court concluded that evidence the filing of the new case was to save an asset, such as a home and that the debtors were better able to fund a Chapter 13 plan was not sufficient to overcome the presumption of lack of good faith.

In *In re Sharpe*, ___ B.R. ___, 2008 WL 544929 (Bankr. C.D. Ill., 2008) the court concluded the debtor had not presented sufficient evidence to rebut the presumption. The case in question was the debtor's third Chapter 13 case filed within 18 months. The most recently dismissed case was dismissed within 1 year. Thus, 362(c)(3) applied. The debtor paid only 6 of 12 payments on the first mortgage debt on his home in year two years prior to the new Chapter 13 case and only 7 of the 12 payments on the second mortgage debt. In the year prior to the new Chapter 13 case the debtor made only 1 of the 12 payments on each of the first and second mortgages. The debtor had paid the two post-petition payments that came due in the year the new Chapter 13 was filed. The debtor failed to attend the meeting of creditors in the second Chapter 13 case and that was the reason for dismissal. The debtor contended the reason he did not make the mortgage payments in the prior years was that he had given the money to make the payments to a friend that was living with him and that the friend stole the money instead of making the payments. The *Sharpe* court did not believe this assertion. The debtor claimed his mother was now helping him with his finances. The *Sharpe* court concluded the debtor had not presented clear and convincing evidence to rebut the presumption.

B. Individual debtor was a debtor in two or more prior cases pending within the past year.

a. No Automatic Stay Imposed

_____ 11 U.S.C. 362(c)(4) applies to individual debtor that was a debtor in two or more cases that were pending in the past year but dismissed. The language in 362(c)(4) is different from 362(c)(3) which is not applicable to a case "re-filed under a Chapter other than Chapter 7 after dismissal under 707(b)". The language of 11 U.S.C 364(c)(4)(A)(i) states

that it does apply in “a case re-filed under §707(b)”. The language does not make any sense since cases are not filed or re-filed under 707(b). It appears the proper language should have been similar to 11 U.S.C. 364(c)(3) and provide “other than a case re-filed” **under a Chapter other than Chapter 7 after dismissal “under §707(b)”**. However based upon the language of 364(c)(4), it would appear that a case dismissed under 707(b) may count against the debtor. Let’s apply 362(c)(4) to this example. A debtor has a Chapter 7 case dismissed under 707(b). The debtor then files a Chapter 13 case that is dismissed. If the debtor files a second Chapter 13 case within one year of the dismissal of the two prior cases, it would appear that 364(c)(4) will apply. This would require the debtor to file a motion to impose a stay.

□ 2. Procedural Requirement for Imposing Stay

Under 362(c)(4) there is no “automatic” stay imposed upon the filing of the case. Under 362(c)(4)(A)(ii), party in interest can request the court “promptly” enter an Order confirming that no stay is in effect. A creditor wanting to conduct a foreclosure sale may want such a comfort order to avoid any title issues concerning the validity of the foreclosure sale. A party in litigation may want a comfort order to present to the court handling the litigation to show it may continue.

The Bankruptcy Court may be hesitant to enter such an Order without a hearing or at least a motion with opportunity to object. I would suggest that creditors would want to file a motion for the comfort Order and ask the Court to “promptly” set a hearing. The hearing should be subject to the five day notice provisions of Fed. R. Bankr. P. 9006(d). The local bankruptcy rules for the court should be reviewed to see if any procedures have been put in place to deal with 362(c)(4) motions. *See for example, In re Wilson*, 336 B.R. 338 (Bankr. E.D. Tenn., 2005).

A party in interest may file a motion asking the court to impose a stay. 11 U.S.C. 362(c)(4)(B). The motion needs to be filed within 30 days of the filing of the case. There is no requirement that the “notice and hearing” be completed within the 30 days as there is with 362(c)(3). However, the stay does not go into effect until the Order is entered imposing the stay. Thus, any action taken between the filing of the case and entry of the Order imposing the stay, would be enforceable. For example, a foreclosure sale held before entry of the Order would be valid. Thus debtor’s counsel should act promptly to obtain an Order imposing the stay.

The court may impose a stay as to all creditors or can decide to impose it as to some but not others. For example, the court may impose the stay as to the unsecured creditors, but not as to a secured

creditor seeking to foreclose on a mortgage or repossess a vehicle. The court may also impose conditions or limitations to imposition of the stay. For example, the court may require adequate protection be provided to a secured creditor.

1. **Substantive Showing Required to Impose Stay**

To impose the stay, the moving party must demonstrate the case has been filed in good faith as to the creditors to be stayed. 11 U.S.C. 362(c)(4)(B). The statute provides for presumption that the case has not been filed in good faith in specific circumstances. The presumption can be rebutted by clear and convincing evidence to the contrary.

- a. Presumption the case has not been filed in good faith as to all creditors.

These following are specific circumstances where there will be a presumption the case has not been filed in good faith as to all creditors:

1. The debtor was a debtor in two or more previous bankruptcy cases pending in the past year. This appears to be met if the requirement for application of 362(c)(4) was already met, i.e. that the debtor has been a debtor in two or more cases that were dismissed within the past year.

2. A previous case was dismissed because the debtor failed to file documents without substantial excuse. Inadvertence or negligence is not substantial excuse. However, negligence of the debtor's attorney which caused a dismissal may be substantial excuse.

3. The debtor failed to provide adequate protection ordered by the court. If a debtor did not make adequate protection payments in a prior case, another creditor can use that to contend the new case has not been filed in good faith.

4. The debtor failed to perform the terms of a confirmed plan in a previous case that was dismissed within the past year.

5. There has not been a "substantial change" in the debtor's financial or personal affairs. Since the dismissal of the "next most previous case" or any other reason to conclude, the debtor will be able to confirm and perform a plan in the new Chapter 13.

- b. Presumption of no good faith as to particular creditor.

There is presumption the new case has not been filed in good faith as to an individual creditor that filed a motion to modify the stay in the prior dismissed case if the motion in the prior case was still pending at the time of dismissal, or the motion had been resolved prior to dismissal. 11 U.S. C. 362(c)(4)(D)(ii).

- i. Clear and convincing evidence required to overcome presumption of lack of good faith.

It would appear that the clear and convincing standard under 362(c)(4) is the same as the standard under 362(c)(3). *See for example, In re Wilson*, 336 B.R. 338 (Bankr. E.D. Tenn., 2005). Thus, the cases deciding if clear and convincing evidence has been presented to rebut the presumption should provide guidance in 362(c)(4) cases.

APPLICABLE COMMITMENT PERIOD

The term “applicable commitment period is not defined in 11 U.S.C. §101 - Definitions. However, it is an important concept in the context of Chapter 13. 11 U.S.C. §1325(b)(1)(B) states:

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

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

11 U.S.C. §1325(b)(4) states:

For purposes of this subsection, the “applicable commitment period” -

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

(I) 3 years; or

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

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

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

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$575 per month for each individual in excess of 4; and

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

What is the relevance of the term “applicable commitment period” in Chapter 13? Does the term refer to a temporal period of time to define the term of the plan? Or is the term used as a multiplier - the minimum number of months times the disposable income which is equal to the base amount required to be paid to the general unsecured creditors during the term of the plan?

There are a number of cases that have addressed the issue of “applicable commitment period.” There are cases that hold that the term applicable commitment period is temporal and requires that a plan term be at least 36 months if the debtor is below the applicable State median income or 60 months if the debtor is above the applicable State median income. Other cases hold that the term applicable commitment period is simply a multiplier to determine a dollar base amount that must be paid to general unsecured creditors over the term of the plan.

In re Hardacre, 338 B.R. 718 (Bankr. N.D. Tex. 2006) was one of first cases to address the issue of applicable commitment period as a temporal number versus a multiplier in conjunction with the means test and projected disposable income. The Court noted:

The “applicable commitment period” is the term of the debtor’s plan. In general, unless the plan provides for payment in full of all unsecured creditors over a shorter period of time, the minimum applicable commitment period is three years. 11 U.S.C. §1325(b)(4)(A)(I). However, if the debtor’s annual income exceeds the applicable median family income for similarly sized households in the same state, then the applicable commitment period is not less than five years unless the debtor can pay her creditors in full in a shorter time. 11 U.S.C. §1325(b)(4)(A)(ii).

Once the debtor has determined her applicable commitment period and whether she must calculate her expenses in accordance with the means test in section 707(b)(2), she must submit a plan that commits her “projected disposable income” during the applicable commitment period. [Id.]

In re Davis, 348 B.R. 449 (Bankr. E.D. Mich. 2006) the Court found that the term applicable commitment period was temporal. If the debtor’s median income is below the applicable State median income the term of the plan must be at least thirty-six months and if the debtor’s median income is above the applicable State median income the term of the plan must be sixty months, unless the plan pays unsecured creditors in full in less than the applicable commitment period. The Court summarized the issue as:

Whether the phrase “applicable commitment period” is a temporal requirement that defines how long a debtor’s Chapter 13 plan must be, or simply a mathematical formula for determining the minimum amount that a debtor must pay to unsecured creditors under her plan in order to obtain a discharge without regard to the length of the plan.

The Court held “the term ‘applicable commitment period’ defines the minimum length of a Chapter 13 plan rather than creates a formula to determine a minimum amount that a debtor must pay to the unsecured creditors.” [Id.]

_____ Other cases that have held that the applicable commitment period is temporal are: In re Alexander, 344 B.R. 742 (Bankr. E.D. N.C. 2006); In re Dew, 344 B.R. 655 (Bankr. N.D. Ala. 2006); In re Gress, 344 B.R. 919 (Bankr. W.D. Mo. 2006); In re McGuire, 342 B.R. 608 (Bankr. W.D. Mo. 2006); In re Kidd, 374 B.R. 277 (Bankr. D. Kan. 2007); In re Fridley, 380 B.R. 538 (9th. Cir. BAP, 2007); In re Hylton, 374 B.R. 579 (Bankr. W.D. Va. 2007); In re Luton, 363 B.R. 96 (Bankr. W.D. Ark. 2007); and In re Nance, 371 B.R. 348 (Bankr. S.D. Ill. 2007).

There are also several cases that hold that the term “applicable commitment period” is a multiplier used to determine the “base” amount that must be paid to general unsecured creditors. If the debtor’s current monthly income is below the applicable State’s median income you would use the current monthly income less Schedule J expenses to determine the monthly disposable income multiplied by thirty six months. If the debtor’s currently monthly income is above the applicable State’s median income you would use the monthly disposable income as defined by the Means Test multiplied by sixty months.

In re McGillis, 370 B.R. 720 (Bankr. W.D. Mich. 2007) the Court held that the term “applicable commitment period” is a multiplier and not temporal.

...then there is really no alternative other than to treat the applicable commitment period, whether it be 36 months or 60 months, as nothing more than a multiplier to be used in conjunction with the Section 1325(b) formula Congress has now devised.

Section 1325(b)(4)(B) does serve a function under the monetary approach, for it guarantees that the multiplier to be used for calculating the amount necessary to withstand a Section 1325(b) objection can never be greater than what would be necessary to fund a 100% plan to unsecured creditors. [Id.]

Other courts that have found “applicable commitment period” to be a multiplier to determine a base amount to be paid to general unsecured creditors are: In re Hanks, 362 B.R. 494 (Bankr. D. Utah, 2007); In re Guzman, 345 B.R. 640 (Bankr. E.D. Wis. 2006); and In re Fuger, 347 B.R. 94 (Bankr. D. Utah 2006); In re Swan, 368 B.R. 12 (Bankr. N.D. Cal. 2007); and In re Mathis, 367 B.R. 629 (Bankr. N.D. Ill. 2007).

Whether the Court where you practice has determined that the applicable commitment period is temporal or a multiplier will have a significant affect on the distribution to the general unsecured creditors. In a district where the applicable commitment period is a multiplier it is possible that a debtor with above median income could pay zero to the general unsecured creditors and complete the plan in less than sixty months. In a district where the applicable commitment period is a term it is possible that a debtor with above median income could pay a smaller base amount to the general unsecured creditors than would be required under the Means Test definition of disposable income.