

**CARS AND HOMES IN CHAPTER 13
AFTER THE 2005 AMENDMENTS TO THE
BANKRUPTCY CODE**

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INTRODUCTION

Surely the two most important secured lenders in chapter 13 bankruptcy cases are the home mortgage lender and the car lender. The home mortgage lender was quite well protected from adverse treatment in chapter 13 plans prior to the massive 2005 amendments to the Bankruptcy Code. Basically, these loans cannot be "crammed down"—that is, rewritten according to the strictures of Bankruptcy Code section 1325(b)(5).¹ Rather, the mortgage agreement must be reinstated going forward, with defaults cured within a "reasonable time."²

Prior to 2005, car lenders fared worse. First and foremost, the car lender was typically "under water"—that is, the loan exceeded the value of the collateral. For instance, the car might be worth \$20,000, but the principal amount of the loan might be, say, \$30,000. In prior times, the secured claim of the car lender could be "bifurcated"—split into its perfectly secured and perfectly unsecured portions.³ The bifurcated secured claim could then be paid over time, by an income stream whose present value cohered with the value of the collateral.⁴ The unsecured deficit claim obtained the same dividend to which the other unsecured creditors were entitled.

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), which thoroughly amends the Bankruptcy Code, as it pertains to individuals filing for bankruptcy. These amendments substantially benefit purchase money secured parties claiming personal property as collateral—that is to say, car lenders.

In rescuing car lenders from certain effects of cram down, Congress did not take the simple expedient of removing cars from the cram down table. Instead of equating car loans with home mortgages, Congress chose to reform the concepts of adequate protection and cram down, as these apply to purchase money car lenders.

Adequate protection can be defined as protection against the depreciating value of collateral prior to the confirmation of a reorganization plan. Cram down

¹ An exception is made for short-term mortgages which terminate before the end of the chapter 13 plan; such mortgages can be crammed down. See 11 U.S.C. § 1322(c)(2) (2000) (allowing for modification when "last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due"); see also *In re Lemieux*, 347 B.R. 460, 463 (Bankr. D. Mass. 2006) (describing short-term mortgage under section 1322(c)).

² 11 U.S.C. § 1322(b)(5) (2000). See generally *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 332 (1993) (ruling bifurcation is impermissible modification of home mortgage). Prior to *Nobelman*, courts thought a mortgage might be bifurcated into its secured and unsecured parts, and the mortgage could be reinstated with regard to the lesser amount implied by bifurcation. See *Bellamy v. Fed. Home Loan Mortgage Corp.* (*In re Bellamy*), 962 F.2d 176, 180 (2d Cir. 1992) ("[B]ifurcating [the creditor's] claim into unsecured and secured portions does not, for the purposes of [section] 1322(b)(2), modify its 'rights,' but rather simply determines how, under the Code, its right to payment must be satisfied.").

³ See 11 U.S.C. § 506(a) (2000), amended by Pub. L. No. 109-8, § 327, 119 Stat. 23, 99–100 (2005) (qualifying claim as secured to extent of value of creditors' interest in property or amount subject to setoff).

⁴ See 11 U.S.C. § 1325(a)(5) (2000), amended by Pub. L. No. 109-8, § 102, 119 Stat. 23, 33 (2005) (providing value of property to be distributed to secured creditor not must be less than allowed amount of secured claim).

constitutes a rewriting of the security agreement, over the opposition of the car lender, modifying the schedule of payments, the amounts paid, and the interest rate.

Adequate protection and cram down, as applied to cars, now have a very intricate interrelation, due to the following eight principles. The first four are inherited from the pre-BAPCPA law:

- (1) Adequate protection of collateral refers to protection against depreciating value of the collateral only.⁵ It does not include the right to interest compensation.⁶
- (2) Unlike adequate protection payments, cram down payments *must* include interest compensation.⁷
- (3) The right to adequate protection terminates upon plan confirmation. Thereafter, the plan governs the right of the secured party.⁸ It must provide cram down payments or reinstatement of security agreements.
- (4) Arguably, cram down payments are subordinated to the claims of administrative creditors,⁹ including the debtor's bankruptcy attorney.¹⁰ The adequate protection right, however, is not so subordinated.¹¹

Three additional principles from BAPCPA must now be added to the mix:

- (5) Cram down payments are no longer necessarily tied to the value of the car. Rather, with respect to cars purchased within 910 days of bankruptcy ("910 vehicles"), the value of the car is deemed to be the amount the debtor owes the car lender.¹² Nevertheless, adequate

⁵ See 11 U.S.C. § 361(1)–(2) (2000) (stating adequate protection may be given through periodic cash payments, or additional or replacement lien).

⁶ See *generally* United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365 (1988) (interpreting meaning of adequate protection).

⁷ See 11 U.S.C. § 1325(a)(5)(B)(ii) (2000), *amended by* Pub. L. No. 109-8, § 102, 119 Stat. 23, 33 (2005) ("[T]he value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim.").

⁸ See 11 U.S.C. § 1327(a) (2000) ("The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.").

⁹ See 11 U.S.C. § 1326(b) (2000), *amended by* Pub. L. No. 109-8, § 1224, 119 Stat. 23, 199 (2005) (providing for payments which occur prior to—or at least simultaneously with any payment to creditors).

¹⁰ See 11 U.S.C. § 330(a)(4)(B) (2000) (allowing for reasonable compensation to debtor's attorney); 11 U.S.C. § 503(b)(2) (2000) (including reasonable attorney's fees under section 330(a) as allowed administrative expenses). Courts, however, disagree on the proposition in the text. See *infra* Part II.C.2.

¹¹ See *infra* Part II.C.2.

¹² See 11 U.S.C. § 1325(a) (2006):

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

protection is tied to the value of the car in all cases.

(6) Cram down payments must now be in equal installments.¹³ This rule does not apply to the right of adequate protection. Nor does it apply to reinstatement and cure of security agreements.

(7) Cram down payments may never be less than the amount of depreciation of the collateral.¹⁴

In addition, there is an eighth principle which BAPCPA address only obliquely. According to this eighth principle:

(8) All payments to the creditor must (or need not) be made through the chapter 13 trustee. The debtor may not (or can) pay the creditors directly.¹⁵

Prior to 2005, courts were deeply divided over whether payments had to be made through the standing chapter 13 trustee. Because BAPCPA is vague as to the eighth principle, courts will continue to be divided as to the necessity of payment via the chapter 13 trustee.

The purpose of this Article is to determine how chapter 13 cases must be administered and how plans must be written in light of these eight principles. In presenting a vision of the car loan in chapter 13 after 2005, I will follow a procedural chronology, starting with the pre-confirmation period. Thereafter I consider the standards of confirmation, the rules for modifying the confirmed chapter 13 plan, and the dismissal or conversion of the chapter 13 case to chapter 7 liquidation. In each stage, pre-BAPCPA law is compared to BAPCPA's reforms.

What emerges from this picture is that car lenders are undoubtedly strengthened in chapter 13 cases filed after October 17, 2005, the effective date of BAPCPA. There is, however, at least one unhappy surprise for car lenders. Debtors now have the power to surrender the car to the lender in complete satisfaction of the car loan—something that could not have been sustained prior to 2005. This is certain to become a major tactic when car trouble looms after confirmation and the debtor seeks to modify the plan pursuant to section 1329(a). One monstrous implication of the ability to "put" the car to the lender in total satisfaction of the debt is that, if the Bankruptcy Code is read literally, the debtor might have the power to wreck the car, put the wreck to the lender, and keep the insurance proceeds for himself. Here is a point where courts will be sorely tempted to ignore the words of the legislation and somehow find a way to guarantee that the car lender will get the insurance proceeds.

We start with a brief comparison of reinstating security agreements and cram down in chapter 13.

Id.

¹³ See 11 U.S.C. § 1325(a)(5)(iii)(I) (2006) (requiring payments to be in "equal monthly amounts").

¹⁴ See 11 U.S.C. § 1325(a)(5)(iii)(II) (2006) (ensuring amount of payments to be not "less than" amount sufficient to provide holder of claim with adequate protection).

¹⁵ See *infra* Part II.A. See also *In re Perez*, 339 B.R. 385, 409 (Bankr. S.D. Tex. 2006) (enumerating list of factors court should consider when determining whether to allow direct payment to creditors).

I. SECURED CREDITORS AND CHAPTER 13

The basic theory of chapter 13 is that it is a Pareto superior alternative to chapter 7. In chapter 7, a debtor's non-exempt assets are liquidated by a trustee and the debtor receives a discharge, perhaps.¹⁶ The debtor, however, owns post-petition wages free and clear of discharged pre-petition claims.¹⁷ This is a key component of the debtor's fresh start.¹⁸ In comparison, the debtor buys back all of her property for post-petition wages sufficient to guarantee that every creditor will obtain at least as much or more from chapter 13 as in the chapter 7 liquidation.¹⁹ In addition, the debtor must allocate all disposable income to payments under the plan.²⁰ As a result, chapter 13 is supposedly Pareto superior—no creditor is worse off, and at least one person—the debtor—benefits.

Consistent with this premise, secured creditors are generally entitled to receive the present value of their collateral,²¹ because that is what they would obtain in chapter 7.²² This payment can be stretched over time, so long as the present value of deferred payments equals the appraised value of the collateral. This part of chapter 13 is unpleasantly called "cram down," a force-feeding metaphor implying that the chapter 13 plan rewrites the security agreement over the opposition of the creditor.²³

From the beginning, one important creditor was largely exempted from cram down: secured creditors claiming the debtor's residence as collateral for a long-term loan.²⁴ Home lenders could be crammed down only if the mortgage agreement had

¹⁶ Discharges can be denied for the grounds set forth in Bankruptcy Code section 727(a). Certain specific debts, such as taxes, child support, student loans, etc., are never dischargeable. See 11 U.S.C. §§ 523(a), 727(b) (2006).

¹⁷ See 11 U.S.C. § 541(a)(6) (2006) (including "[p]roceeds, product, offspring, rents, or profits of or from property of the estate" as part of estate, but excluding "earnings from services performed by an individual debtor").

¹⁸ See, e.g., *Boeing N. Am., Inc. v. Ybarra* (*In re Ybarra*), 424 F.3d 1018, 1022 (9th Cir. 2005) ("A discharge is the legal embodiment of the fresh start; it is the barrier that keeps the creditors of old from reaching the wages and income of the new.") (citations omitted).

¹⁹ See 11 U.S.C. § 1325(a)(4)–(a)(5)(B)(ii) (2006) (conditioning confirmation of chapter 13 plan on value of property being "not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7" and "not less than the allowed amount of such claim").

²⁰ See 11 U.S.C. § 1325(b) (2006) (permitting confirmation if "all of the debtor's projected disposable income" will be dedicated to the plan). This wrinkle was added in 1984, thereby bringing to a close the brief golden age of chapter 13. See Bankruptcy Amendments & Federal Judges Act of 1984, sec. 312(2), P.L. 98-353, 98 Stat. 333 (1984).

²¹ See 11 U.S.C. § 1325(a)(5)(B)(ii) (2006) (ordering courts to confirm proposed plans "if the value, as of the effective date of the plan, of property to be distributed under the plan . . . is not less than the allowed amount of such claim").

²² See 11 U.S.C. § 725 (2006) (requiring trustee to dispose "of any property in which an entity other than the estate has an interest, such as a lien").

²³ See *Till v. SCS Credit Corp.*, 541 U.S. 465, 468–69 (2004) (describing cram down as what "may be enforced over a claim holder's objection").

²⁴ See 11 U.S.C. § 1322(b)(2) (2006) (prohibiting modification of "claim secured only by a security interest in real property that is the debtor's principal residence"). BAPCPA attempts to extend anti-modification to mobile homes that are not attached to the underlying real estate (and so are personal property). Section 1322(b) still requires the lender to have "a security interest in real property that is the

less time to run than the duration of the chapter 13 plan²⁵ (basically not more than five years).²⁶ Where the mortgage had more than five years to run, the lender could not be crammed down. Rather, the mortgage agreement could only be reinstated. Reinstatement and cram down are mutually exclusive concepts; the rules of one do not pertain to the other.²⁷

debtor's principal residence." 11 U.S.C. § 1322(b)(2) (2006). Technically, the new definition of "residence" does nothing to extend anti-modification protection to personal property. Nevertheless, Judge Richard Stair, in *In re Shepherd*, ruled that Congress must have intended to protect lenders with personal property liens on mobile homes. No. 06-31323, 2006 Bankr. LEXIS 2985, at *17 (Bankr. E.D. Tenn. Nov. 3, 2006). He therefore refused to confirm a plan that would bifurcate the lender's claim. *Shepherd* testifies to the lengths courts are willing to go to correct the drafting incompetence of Congress in the name of effectuating congressional intent.

²⁵ See 11 U.S.C. § 1322(c)(2) (2006) (allowing modification if "last payment on the original payment schedule . . . [for claim excepted by section 1322(b)(2)] is due before the date on which the final payment under the plan is due"). This invitation to cram down short-term was added in 1994. See generally 1 DAVID GRAY CARLSON & GRANT GILMORE, GILMORE AND CARLSON ON SECURED LENDING: CLAIMS IN BANKRUPTCY 626-30 (2d ed. 2000) (discussing effects of 1994 amendments on short-term mortgages under chapter 13 plans where they are not "fully subject to bifurcation and other cram down tortures").

²⁶ Prior to 2005, a chapter 13 plan had to terminate in three years, or, if the court so ordered, five years. See 11 U.S.C. § 1322(c) (2000) (adopting five year time limit for termination of chapter 13 plans). A debtor could not be compelled to extend beyond three years. See *Wash. Student Loan Guar. Ass'n v. Porter* (*In re Porter*), 102 B.R. 773, 778 (B.A.P. 9th Cir. 1989) ("Absent some compelling reason and as long as debtors meet the requirements of [section] 1325, they should not be forced to pay into a plan that extends beyond three years."). After 2005, higher income debtors may pay for up to five years and lower end debtors must terminate payments within three years. See 11 U.S.C. § 1322(d) (2006) (providing method for calculating duration of debtor's payments under plan based on current monthly income). The period starts running from the first (pre-confirmation) payment due under the plan, not upon confirmation under the plan. See *In re Musselman*, 341 B.R. 652, 657 (Bankr. N.D. Ind. 2005) (deciding "proper point from which to begin calculating a chapter 13 repayment period is . . . date the debtor's first payment to the Trustee is due").

²⁷ See *In re Lemieux*, 347 B.R. 460, 465 (Bankr. D. Mass. 2006) (recognizing distinction between reinstatement and cram down); *In re Davis*, 343 B.R. 326, 328 (Bankr. M.D. Fla. 2006) (finding equal payment rule of cram down does not apply to cure of reinstated contract). But see *In re Wagner*, 342 B.R. 766, 772 (Bankr. E.D. Tenn. 2006) (erroneously applying equal payment rule to cure of residential mortgage). There is a rogue line of cases that permits bifurcation (i.e., cram down) and reinstatement under section 1322(b)(5), permitting a payout longer than the five year maximum for chapter 13 plans. The idea is that the principal amount of the mortgage is reduced (where, for some reason, section 1322(b)(2) permits modification) and the amortization and interest rate are preserved. See *Fed. Nat'l Mortgage Ass'n v. Ferreira* (*In re Ferreira*), 223 B.R. 258, 262 (D.R.I. 1998) (concluding section 1322(b)(2) and (b)(5) "are not mutually exclusive"); *In re Kheng*, 202 B.R. 538, 539 (Bankr. D.R.I. 1996) (permitting modification of secured claim holders' "rights" under section 1322(b)(2) beyond five years pursuant to section 1322(b)(5) when debtor ensures "maintenance of payments" on secured claims); *In re Murphy*, 175 B.R. 134, 137 (Bankr. D. Mass. 1994) (allowing debtor to "bifurcate a mortgagee's claim and amortize the secured portion of the claim over the remaining term of the original mortgage, thereby changing the amount of the original monthly payments"); *Brown v. Shorewood Fin., Inc.* (*In re Brown*), 175 B.R. 129, 133 (Bankr. D. Mass. 1994) (finding debtor's plan to "pay the secured portion . . . in full while maintaining regular monthly payments of principal and interest in accordance with the loan documents . . . proper treatment of . . . partially secured claim"); *In re McGregor*, 172 B.R. 718, 721 (Bankr. D. Mass. 1994) (determining change in amount of monthly payments on secured claim may fulfill "maintenance of payments" as required by section 1322(b)(5), which permits payments beyond five years); see also 1 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY §§ 4.7-4.9, at 4-9-4-13 (3d ed. 2000) (discussing debtors ability to "modify and restructure secured claims" as compared to debtors under chapters 7 and 11). The Ninth Circuit has recently put a dagger into this unnatural prodigy. See *Enewally v. Wash. Mut. Bank* (*In re Enewally*), 368 F.3d 1165, 1171-72 (9th Cir. 2004) (disallowing debtor's proposed plan because statute does not allow debtor to repay secured claim over period longer than plan term, debtor may not invoke modification and right to "cure and

In case of reinstatements, defaults must be cured. So, within the concept of reinstatement, there is a fundamental distinction between reinstating *future* obligations going forward. These obligations might extend well beyond the maximum duration of a chapter 13 plan.²⁸ Cures are retrospective, involving past defaults. Even where the unsecured creditors receive low or no dividends, and even where the secured creditor is under water, cure requires 100% payment of past defaults. Cure, however, must occur within a "reasonable time."²⁹

II. INITIAL PAYMENTS

A. *The Standing Trustee and the Payment Mechanism*

Whether a secured lender is subject to reinstatement or cram down, the debtor is expected to fund a stream of payments out of post-petition income. In order to administer chapter 13 cases, a bankruptcy court engages a standing trustee³⁰ to receive these wages from the debtor.³¹ Typically, the plan, which only the debtor can propose,³² provides that every month the debtor will voluntarily write a check to the chapter 13 trustee. Upon receiving these funds, the chapter 13 trustee writes a new check to creditors listed under the plan.³³ If the debtor ceases making payments (as is usually the case)³⁴ the chapter 13 trustee has authority, along with other parties in interest, to seek remedies, including conversion to chapter 7, dismissal or modification of the plan.³⁵

The chapter 13 trustee obtains a fee for his services and is understandably jealous of it, as an institutional matter. According to 28 U.S.C. § 586(e)(1), the attorney general must fix a maximum annual salary and a percentage fee not to exceed ten percent (in non-farm cases).³⁶ Courts have no discretion to raise or lower

maintain" beyond plan term, and modification of debt must be accomplished in manner consistent with section 1322(b)(2)).

²⁸ See 11 U.S.C. § 1322(b)(5) (2006) (allowing plan to "provide for the curing of any default . . . while the case is pending . . . on which the last payment is due after the date on which the final payment under the plan is due").

²⁹ See *id.* (requiring plan to cure any default within "reasonable time").

³⁰ See 11 U.S.C. § 1302(a) (2006) (providing United States trustee can either appoint "disinterested person to serve as trustee" or "United States trustee may serve as trustee").

³¹ See 11 U.S.C. § 1326(a) (2006) (ordering debtor to make payments in amount proposed by plan to trustee).

³² See 11 U.S.C. § 1321 (2006) ("The debtor shall file a plan."). To my knowledge, this is the shortest statute—the "Jesus wept"—of the United States Code.

³³ See, e.g., *In re Lee*, 167 B.R. 417, 419 (Bankr. S.D. Miss. 1992) (reporting chapter 13 trustee wrote ten to fifteen thousand checks per month), *aff'd*, 168 B.R. 319 (S.D. Miss. 1993), *aff'd*, 22 F.3d 1094 (5th Cir. 1994).

³⁴ See *infra* text accompanying notes 490–93.

³⁵ See 11 U.S.C. § 1302(b)(2)(C) (2006) (requiring trustee "appear and be heard at any hearing that concerns modification of the plan after confirmation"); 11 U.S.C. § 1307(c) (2006) (allowing court to convert or dismiss case upon request of trustee if in best interest of creditors and estate); 11 U.S.C. § 1329(a) (2006) (permitting trustee to modify plan any time after it is confirmed but before completion of payments).

³⁶ But see Kathleen A. Laughlin, *The Standing Chapter 13 Trustee's Percentage Fee: Solving an Algebraic*

the trustee's fee.³⁷ The fee is in fact not related to the salary. If the chapter 13 trustee gets a larger fee, it does not go into his pocket but simply defrays the salary. A surplus over salary and expenses simply allows the attorney general to lower the percentage fee, which is often less than the ten percent maximum.³⁸

The fee, not technically an administrative claim,³⁹ is a percentage of wages that the debtor actually sends in. So one intractable issue is whether the debtor can pay the mortgage lender or other secured creditor directly, without the intercession of the chapter 13 trustee. This is often called payment "outside the plan." Of course, the plan will provide for payments "outside the plan," and therefore these are really payments "under the plan." What "outside the plan" really means is *not* through the chapter 13 trustee.⁴⁰

If direct payments to creditors are permitted, the chapter 13 trustee's fee could be reduced, to the general benefit of the unsecured creditors or perhaps the debtor.⁴¹ If this were the only concern, it would appear that the issue only involves the chapter 13 trustee's fee, and the effect direct payments have on the overall setting of the fee for all creditors.⁴² But there is more to it. Many believe that supervisory efficiencies are gained if all payments go through the chapter 13 trustee.⁴³ The chapter 13 trustee's position is therefore not simply a matter of fees but is colorably about the community of interests involved in the chapter 13 case.

Prior to 2005, courts took every possible position on whether creditors could make payments directly to the trustee without involving the chapter 13 trustee. Some courts permitted it, citing the fact that, according to section 1326(c), "[e]xcept

Equation, 24 CREIGHTON L. REV. 823, 825 (1991) (arguing amount received by chapter 13 trustee must be augmented by trustee's fee; ten percent is calculated from larger amount and trustee takes over 11.1% from amount debtor pays in). Compare *BDT Farms v. Foulston* (*In re BDT Farms, Inc.*), 21 F.3d 1019, 1023 (10th Cir. 1994) (adopting Laughlin's theory in chapter 12 case) with *Pelofsky v. Wallace*, 197 B.R. 82, 91 (E.D. Mo. 1995) (rejecting it in chapter 13 case).

³⁷ *Dunivent v. Schollett* (*In re Schollett*), 980 F.2d 639, 644 (10th Cir. 1992).

³⁸ Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model For a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. L. REV. 27, 53 (1999) (reporting 1995 national average was 5.6%).

³⁹ It is excluded from section 326 by virtue of subparagraph (b) and so is excluded from section 330(a) and hence from section 503(b) by virtue of subparagraph (2) of section 503(b). *In re Turner*, 168 B.R. 882, 886 (Bankr. W.D. Tex. 1994).

⁴⁰ See *Foster v. Heitkamp* (*In re Foster*), 670 F.2d 478, 485, 490–91 (5th Cir. 1982) (concluding mortgage claim generally cannot be "outside the plan" even if debtor makes payments as disbursing agent); *In re Venuto*, 343 B.R. 120, 133 n.21 (Bankr. E.D. Pa. 2006) (stating when debtor acts as disbursing agent it does not render post-petition monthly installment payments "outside the plan"); *In re Perez*, 339 B.R. 385, 390 n.4 (Bankr. S.D. Tex. 2006) (endorsing view of "under the plan" to include claims paid through trustee or directly by debtor to creditor).

⁴¹ Reduction of the trustee's fee cannot aid the secured creditors, who are entitled to receive the value of their collateral, irrespective of the fee. *In re Turner*, 168 B.R. at 889. The debtor is helped only where she proposed a 100% payout to the unsecureds and after that point, the debtor must pay more to reimburse the trustee. See *id.* at 884, 887–89, 892 (precluding confirmation of plan when debtor proposed to shift payment of administrative expenses to secured and unsecured creditors).

⁴² But see *In re Perez*, 339 B.R. 385, 390 n.4 (Bankr. S.D. Tex. 2006) (noting payments "outside the plan" cannot be permitted solely to avoid trustee's fee) (citations omitted).

⁴³ *Id.* at 390–91, 414 (reporting and agreeing with results of study endowed by National Conference of Bankruptcy Judges claiming efficiencies in plans as result of requiring payment through trustee).

as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to the creditors under the plan."⁴⁴ In addition, section 1322(a)(1) requires a chapter 13 plan to "provide for the submission of all *or such portion of future earnings* or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan"⁴⁵ The italicized language suggests that direct payment is contemplated in the Bankruptcy Code. There is no requirement that *all* wages must be paid to the chapter 13 trustee.⁴⁶

A line of authority emphasizes that only where the debtor reinstates the contract going forward does the bankruptcy court have discretion to permit direct payments from the debtor to the secured creditor.⁴⁷ If the contract is reinstated, payments on that contract are supposedly not "under the plan." Rather, only cram down payments are "under the plan."⁴⁸

Where direct payment is permitted, some courts (prior to 1986) insisted that the chapter 13 trustee obtain the fee that would have been generated if payments were entirely inside the plan.⁴⁹ Since the 1986 amendments to the Bankruptcy Code,

⁴⁴ *In re Foster*, 670 F.2d at 486. See *In re Vigil*, 344 B.R. 624, 629 (Bankr. D.N.M. 2006) (concluding that creditors could make payments directly to trustee based on language of 11 U.S.C. § 1326(c)).

⁴⁵ 11 U.S.C. § 1322(a)(1) (2006) (emphasis added).

⁴⁶ Judge Carol Kenner responds to this point by asserting that the exception in section 1322(a) refers to sales of proceeds of pre-petition property and third party gifts, which can be paid directly to creditors; wages, however, must always be paid to the chapter 13 trustee. *In re Harris*, 200 B.R. 745, 748 (Bankr. D. Mass. 1996). This, however, does not explain away the fact that section 1322(a)(1) allows a *portion* of future earnings "as is necessary for the execution of the plan" to be paid to the trustee. In chapter 12, which closely resembles chapter 13, there is further evidence for direct payments. Section 1225(a)(5)(B)(ii)—chapter 12's cram down provision—refers to "property to be distributed by the trustee *or the debtor* under the plan" 11 U.S.C. § 1225 (2006) (emphasis added). These words, however, do not appear in section 1325(a)(5). See *Michel v. Beard (In re Beard)*, 45 F.3d 113, 120 (6th Cir. 1995) (approving chapter 12 plan calling for direct cram down payments).

⁴⁷ See *In re Aberegg*, 961 F.2d 1307, 1310 (7th Cir. 1992) (allowing debtor to act as disbursing agent with respect to certain payments); *In re Clay*, 339 B.R. 784, 786, 789 (Bankr. D. Utah 2006) (affirming pre-BAPCPA rule allowing for direct payments to creditors when debtor shows "compelling reasons" for these payments); *In re Marriott*, 161 B.R. 816, 820 (Bankr. S.D. Ill. 1993) (stating debtor's payments to creditor after termination of plan will not change statutory requirement that payments to impaired creditors be made through trustee); *In re Kosmicki*, 161 B.R. 828, 828–29 (Bankr. D. Neb. 1993) (confirming debtor's plan even though debtor was to make certain payments directly to secured creditor because debt was not provided for through plan and did not require payments made through Office of Trustee); *In re Finkbine*, 94 B.R. 461, 464 (Bankr. S.D. Ohio 1988) (authorizing direct payment to creditor if debtor's plan involves distribution of unimpaired claim).

⁴⁸ See *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333, 1340 (11th Cir. 2000) (claiming regular loan payments were outside of plan); *In re Case*, 11 B.R. 843, 845 (Bankr. D. Utah 2006) (asserting cram down payments are in plan).

⁴⁹ See *Foster v. Heitkamp (In re Foster)*, 670 F.2d 478, 490–91 (5th Cir. 1982). The *Foster* court, however, also affirmed the discretion of the court to lower the percentage fee, if appropriate. *Id.* at 491–92. See *In re Gregory*, 143 B.R. 424, 427 n.2 (Bankr. E.D. Tex. 1992) (recognizing court's discretionary power was eliminated by statute in favor of attorney general in 1986, overruling part of *Foster* opinion because of new statute). Also, after 1986, 28 U.S.C. § 586(e) permits a percentage fee on amounts actually collected by the trustee. See *Wagner v. Armstrong (In re Wagner)*, 36 F.3d 723, 727 (8th Cir. 1994) (identifying fees collected by trustee originating only from all payments received by trustee in chapter 12 or 13 case); *In re Clay*, 339 B.R. at 786–87 nn. 8 & 10 (stating section 586(e) entitles trustee only to fees from payments made

courts now permit direct payment with the consequence of lower fees for the chapter 13 trustee.⁵⁰

Meanwhile, other courts have insisted that only the chapter 13 trustee could be the disbursing agent for the creditors, including the home mortgage⁵¹ and car lender.⁵² Others think the bankruptcy courts have discretion to decide. Some courts insist that the debtor show significant⁵³ or sufficient⁵⁴ reasons for direct payment. Others disagree and require only that the plan generally meet the confirmation minima set forth in section 1325(a).⁵⁵ No less than twenty-one factors have been listed as governing when a debtor should be permitted to make direct payments.⁵⁶ The national trend is said to be in favor of requiring all payments to be made through the chapter 13 trustee.⁵⁷

BAPCPA provides some opaque hints that direct payment is at least permitted, perhaps required, but, being deeply imbedded in the adequate protection provisions, they are best presented in that context.

by trustee).

⁵⁰ *In re Wagner*, 36 F.3d at 727–28 (8th Cir. 1994) (awarding no fees to trustee for disbursements made directly to creditors); cf. *In re Venuto*, 343 B.R. 120, 133 (Bankr. E.D. Pa. 2006) (allowing debtor to act as own disbursing agent when seeking cure of pre-petition default).

⁵¹ Mortgagees have protested payment via the chapter 13 trustee because there is a forty-five day delay in obtaining payment. These objections to confirmation of plans have been rejected. See *In re Harris*, 200 B.R. 745, 749 (Bankr. D. Mass. 1996) (holding mortgage payments were to be made through trustee); *In re Bernard*, 201 B.R. 600, 604 (Bankr. D. Mass. 1996) (refusing to accept bank's objection to debtors' plan because bank agreed to have claims treated under plan when it entered into stipulation with debtors). Sale of the mortgaged premises and surrender of the cash proceeds, however, need not take place via the trustee. *In re Schneekloth*, 186 B.R. 713, 716 (Bankr. D. Mont. 1995) (chapter 12 case).

⁵² See *In re Fulkrod*, 973 F.2d 801, 803 (9th Cir. 1992) (chapter 12 case); *In re Perez*, 339 B.R. 385, 390 (Bankr. S.D. Tex. 2006) (describing local rule prohibiting direct payment); *In re Jackson Ranch Co.*, 181 B.R. 552, 553–54 (Bankr. E.D. Okla. 1995) (chapter 12 case); *In re Ford*, 179 B.R. 821, 823 (Bankr. E.D. Tex. 1995) (clarifying trustee's role in chapter 13 cases where trustee is viewed as "advocate to insure that contributions are regularly made to the plan, to insure that payments are properly made to creditors, and to insure compliance with the provisions of the Code"); *In re Hankins*, 62 B.R. 831, 835 (Bankr. W.D. Va. 1986) (rejecting debtors' attempt to characterize certain payments as "outside of the plan" in order to avoid trustee's statutory fees).

⁵³ See *In re Barber*, 191 B.R. 879, 885–86 (Bankr. D. Kan. 1996).

⁵⁴ See *In re McCann*, 202 B.R. 824, 830 (Bankr. N.D.N.Y. 1996).

⁵⁵ See *In re Vigil*, 344 B.R. 624, 630 (Bankr. D.N.M. 2006) ("Debtors need not demonstrate compelling circumstances" when confirming plan so long as plan meets requirements for confirmation in section 1325(a)).

⁵⁶ They are: (1) debtor's history; (2) reasons for the bankruptcy; (3) trustee's likelihood of delay; (4) whether the plan modifies the secured claim; (5) sophistication of the creditor; (6) ability of the creditor to monitor; (7) whether the debt is commercial or consumer; (8) the ability of the debtor to reorganize in the absence of direct payment; (9) whether payments can be delayed; (10) number of payments; (11) whether direct payments impair the trustee; (12) unique circumstances; (13) debtor's business acumen; (14) post-bankruptcy behavior; (15) good faith; (16) plan provisions; (17) consent; (18) ability of the trustee to monitor; (19) trustee's burdens; (20) trustee's salary; and (21) potential for abuse. *In re Perez*, 339 B.R. at 409. In *Perez*, Judge Jeff Bohm ruled that the debtor's history of responsibility should be the most important criterion. *Id.* at 409–10.

⁵⁷ See *id.* at 414. Merely reducing the trustee's fee has been held as not a ground for permitting direct payments to creditors. See *In re Genereux*, 137 B.R. 411, 413 (Bankr. W.D. Wash. 1992); *In re Harris*, 107 B.R. 204, 207 (Bankr. D. Neb. 1989) ("A debtor should not be allowed to deny the trustee the percentage fee by paying debts directly. Such a result would frustrate the statutory scheme.").

B. Adequate Protection Prior to 2005

1. Pre-confirmation

Since home mortgages are off the cram down plate, by far the most significant secured creditor subject to cram down is the car lender. Very typically, a chapter 13 debtor will buy a motor vehicle on credit from a dealer and will sign a security and sales agreement in which the debtor pays principal over time and (usually quite high) interest.⁵⁸ The dealer then sells this "chattel paper"⁵⁹ to a financing company (often a subsidiary of a car manufacturer). These are informally called "conditional sales"—purchase money security interests in which the merchant is giving the credit.⁶⁰ In effect, the loan is the car itself. In addition, lenders provide "enabling credit," in which the debtor pays the dealer in cash (provided by the lender) and grants a security interest to the enabling lender.⁶¹ Typically, claims against cars in chapter 13 are purchase money claims.

Alas, cars depreciate over time. Competition among car dealers requires that the monthly installments paid by debtors be low. With interest rates high (these are often very risky loans)⁶² amortization is slow. As a result, secured claims against cars are typically "under water." That is, the value of the car is less than the pre-petition claim of the lender against the car. At least prior to 2005, when a secured claim was under water, it was bifurcated—clef in twain so that the car lender has a perfectly secured claim and a perfectly unsecured claim for the deficit.⁶³ The secured claim, at least prior to 2005, was subject to cram down.

⁵⁸ See generally *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, the security agreement called for 21% interest, and the bankruptcy court reset the cram down rate at the prime rate plus 1.5%. *Id.* at 471–72.

⁵⁹ Chattel paper is defined as:

[A] record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in specific goods, or a lease of specific goods and license of software used in the goods. In this paragraph, "monetary obligation" means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include (i) charters or other contracts involving the use or hire of a vessel or (ii) records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. If a transaction is evidence by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.

U.C.C. § 9-102(11) (2005).

⁶⁰ Timothy R. Zinnecker, *Pimzy Whimsy in the Eleventh Circuit: Reflections on In re Alpha Systems, Inc.*, 40 GONZ. L. REV. 379, 419 (2004) (referring to purchase money security interest as "conditional sales contract").

⁶¹ See *id.* at 381 (identifying third party security interest as "enabling loan").

⁶² See *Till v. SCS Credit Corp.*, 541 U.S. 465, 471 (2004) (describing "subprime" auto lending market).

⁶³ See 11 U.S.C. § 506(a) (2000), amended by Pub. L. No. 109-8, § 102, 119 Stat. 23, 99–100 (2005) (bifurcating claim into unsecured).

One of the key pieces of the bankruptcy bargain is that secured creditors are stayed from repossessing collateral but are entitled to adequate protection of the security interests. According to section 363(e), "at any time, *at the request of* an entity that has an interest in property used . . . by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection."⁶⁴ In chapter 13, it is not the trustee who wishes to use the car, but the debtor personally. Unlike chapter 11, where the Clark Kent-like debtor is the trustee,⁶⁵ the debtor and the chapter 13 trustee are separate people. Section 1306(b) significantly provides that "the debtor shall remain in possession of all property of the estate."⁶⁶ And section 363(e) is applicable to the debtor by means of section 1303, which states, "[s]ubject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under 363(b), 363(d), 363(e), 363(f), and 363(l) of this title."⁶⁷ Of course, adequate protection under section 363(e) is neither a right nor a power but is a positive burden. Nevertheless, section 1303 is universally thought to entitle a secured creditor to adequate protection as a price for the continuation of the automatic stay in chapter 13 cases.

One of the puzzles concerning the meaning of section 363(e) is whether the obligation to give adequate protection arises automatically at the commencement of the bankruptcy proceeding or whether a secured creditor must ask for it. A surprising weight of authority outside chapter 13 holds that a secured creditor must ask for adequate protection, since section 363(e) provides that a *court* must grant adequate protection at the *request* of an entity that has an interest in the property used.⁶⁸ Prior to 2005, this question was especially confusing in the context of

⁶⁴ 11 U.S.C. § 363(e) (2006) (emphasis added).

⁶⁵ 11 U.S.C. § 1107(a) (2006) ("[A] debtor in possession shall have all the rights, other than the right to compensation . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter.").

⁶⁶ 11 U.S.C. § 1306(b) (2006).

⁶⁷ 11 U.S.C. § 1303 (2006).

⁶⁸ See *TranSouth Fin. Corp. v. Sharon* (*In re Sharon*), 234 B.R. 676, 684 (B.A.P. 6th Cir. 1999) (requiring request by creditor before creditor can be entitled to adequate protection for all property of estate except cash collateral); *In re Waverly Textile Processing, Inc.*, 214 B.R. 476, 479 (Bankr. E.D. Va. 1997) (recognizing statutory language to "strongly suggest" creditor is entitled to adequate protection only upon motion); *In re Cason*, 190 B.R. 917, 927–28 (Bankr. N.D. Ala. 1995) (imposing burden on creditor "to affirmatively assert its rights in regard to adequate protection"); *In re Coates*, 180 B.R. 110, 118 (Bankr. D.S.C. 1995) (imposing burden on creditor "concerned about the adequate protection of its security interest" to seek protection pursuant to section 363); *In re Cont'l Airlines, Inc.*, 154 B.R. 176, 180–81 (Bankr. D. Del. 1993) (finding it necessary to "seek relief from the stay" in order for court to require adequate protection), *appeal dismissed*, 91 F.3d 553 (3d Cir. 1996) (en banc); *In re Best Prods. Co.*, 138 B.R. 155, 159 (Bankr. S.D.N.Y. 1992) (denying secured creditor adequate protection for decline in value of collateral since creditor failed to move for adequate protection before recovering its equipment), *aff'd*, 149 B.R. 346 (S.D.N.Y. 1993); *In re Broomall Printing Corp.*, 131 B.R. 32, 37 (Bankr. D. Md. 1991) ("To protect against a decline in collateral value, a secured creditor . . . is entitled to request adequate protection"); *In re Kain*, 86 B.R. 506, 512 (Bankr. W.D. Mich. 1988) (stating creditor is denied protection because creditor failed to request adequate protection for its noncash collateral); *Greives v. Bank of W. Ind.* (*In re Greives*), 81 B.R. 912, 965 (Bankr. N.D. Ind. 1987) ("[T]here is imposed upon such a secured creditor the obligation to be diligent in requesting adequate protection."); *In re Offerman Farms, Inc.*, 67 B.R. 279, 283–84 (Bankr. N.D. Iowa 1986) (determining

chapter 13. Some courts took the position that there was no right to it, unless the car lender asked for it—the same rule as applied a secured creditor in chapter 7 or 11.⁶⁹ Since this rule is drawn from the text of section 363(e), it makes sense that the chapter 13 rule would match the rule for the other chapters. Others acquiesced to a special chapter 13 rule (without much justification) so that, in chapter 13, secured creditors had the right to adequate protection from the outset.⁷⁰

Mitigating the situation of the car lender is the fact that confirmation of a chapter 13 plan occurs on an accelerated basis. According to Federal Rules of Bankruptcy Procedure, a creditors' meeting must be scheduled by the United States trustee within forty days of the bankruptcy petition. A confirmation hearing must be held within forty-five days of the plan being filed.⁷¹ Altogether, if things went according to plan, a car lender faced only eighty-five days before the plan is confirmed providing for cram down payments on the car.⁷² The adequate protection

starting date for any adequate protection payments to begin only from date of filing motion to lift stay by secured creditor); *In re Provincetown-Boston Airline, Inc.*, 66 B.R. 632, 633–34 (Bankr. M.D. Fla. 1986) (disallowing creditor's claim for administrative expense because creditor never requested adequate protection and administrative expenses are not optional remedy in lieu of adequate protection); *First State Bank v. Advisory Info. & Mgmt. Sys., Inc. (In re Advisory Info. & Mgmt. Sys., Inc.)*, 50 B.R. 627, 629–30 (Bankr. M.D. Tenn. 1984) ("The Bankruptcy Code nowhere puts the responsibility on the debtor to initiate consideration of adequate protection of creditor's noncash collateral."); *United States v. Collins (In re Ne. Chick Servs., Inc.)*, 43 B.R. 326, 331–32 (Bankr. D. Mass. 1984) (allowing secured creditor to request adequate protection up to time court orders permission to use secured property but noting court cannot exercise power to provide protection until creditor requests it); *In re Briggs Transp. Co.*, 47 B.R. 6, 8 (Bankr. D. Minn. 1984) (placing burden on creditor to seek relief from automatic stay or demand adequate protection in order to receive it); *In re Hinckley*, 40 B.R. 679, 682–83 (Bankr. D. Utah 1984) (outlining procedure to be generally followed by creditor when requesting adequate protection); *In re Adams*, 2 B.R. 313, 314 (Bankr. M.D. Fla. 1980) ("Creditors should be encouraged to quickly pursue their available remedies and not to sit on their rights while the collateral diminishes in value.").

⁶⁹ See *In re Cook*, 205 B.R. 437, 440 (Bankr. N.D. Fla. 1997) (stating adequate protection is granted from filing date of motion for relief from stay or filing date of motion for adequate protection).

⁷⁰ See *Assocs. Commercial Corp. v. Rash (In re Rash)*, 90 F.3d 1036, 1049 (5th Cir. 1996) (en banc), *rev'd on other grounds*, 520 U.S. 953 (1997) (discussing appropriate standard to evaluate secured creditor's collateral for adequate protection purposes involves comparing value at commencement of case with value at date automatic stay is terminated); *Ford Motor Credit Co. v. Lee (In re Lee)*, 162 B.R. 217, 223 (D. Minn. 1993) (asserting secured party must receive value as it existed on day of petition); *In re Davis*, 215 B.R. 824, 826 (Bankr. N.D. Tex. 1997) (protecting creditor's interest by valuing its secured interest as of petition date); *In re Abrahimzadeh*, 162 B.R. 676, 677–78 (Bankr. D.N.J. 1994) (calculating debtor's property market value as of date of filing debtor's bankruptcy petition for section 522(f) avoidance); *In re Brinson*, 153 B.R. 952, 954 (Bankr. M.D. Fla. 1993) ("The fair market value is to be determined as of the date of the filing of the petition."); *Lincoln Nat'l Life Ins. Co. v. Craddock-Terry Shoe Corp. (In re Craddock-Terry Shoe Corp.)*, 98 B.R. 250, 255–56 (Bankr. W.D. Va. 1988) (providing adequate protection from inception of case because creditors would otherwise rush to court to file their motions as soon as case is filed); *In re Turner*, 82 B.R. 465, 468 (Bankr. W.D. Tenn. 1988) (assuming adequate protection starts at time of petition); *In re Planned Sys., Inc.*, 78 B.R. 852, 863 (Bankr. S.D. Ohio 1987) ("[A]dequate protection is designed to preserve the secured creditor's position at the time of bankruptcy during the pendency of the automatic stay.").

⁷¹ See 11 U.S.C. § 1324 (2006) (allowing confirmation hearing not later than forty-five days after meeting of creditors but allowing earlier than twenty days if court determines it would be in best of interest of creditors and estate and there is no objection).

⁷² See *In re Brown*, 348 B.R. 583, 587 (Bankr. N.D. Ga. 2006) ("[U]nder [section] 1324 . . . in most cases, the confirmation hearing will be held between twenty (20) and forty-five (45) days after the meeting of the creditors under [section] 341(a)."); *In re Perez*, 339 B.R. 385, 397 (Bankr. S.D. Tex. 2006) (determining

issue covers only the period starting with the bankruptcy petition and ending with the confirmation of the plan.⁷³

So what is adequate protection substantively? Bankruptcy Code section 361 provides three nonexclusive suggestions for what it might be: (1) cash payments to the extent collateral has declined in value; (2) extra collateral to compensate for such a decline; or (3) other relief "as will result in the realization by [the secured party] of the indubitable equivalent of such entity's interest in such property."⁷⁴ Since chapter 13 debtors will rarely have extra collateral,⁷⁵ the form adequate protection typically will take in a chapter 13 case is cash payments to compensate for depreciation.

The law of adequate protection payments is itself complex. The schedule of depreciation is typically faster than the schedule of amortization under a security agreement. That is why the car is under water in the first place. So an adequate protection payment will tend to exceed that part of the contractual installment, which is allocable to retirement of principal. Furthermore, adequate protection payments, properly, should be viewed as a dollar paid by the bankruptcy estate that reduces the secured claim of a bifurcated lender.⁷⁶ None of it should be allocated to interest or to the reduction of the unsecured deficit.⁷⁷ In contrast, the installment called for under the security agreement will consist partly or even mostly in satisfaction of interest with the remainder reducing the total unbifurcated claim. In short, there is no clear relation between adequate protection payments and installments due under the contract. Only by dumb coincidence will adequate protection payments for depreciation precisely equal the amount due under the contract.

Prior to 2005, there were some mechanisms in place that related to the secured creditor's right to adequate protection. Old section 1326(a)(1) provided that the debtor had to commence paying wages pursuant to the plan within thirty days of the plan being filed.⁷⁸ That is, the first payments were due even before the plan was confirmed. The chapter 13 trustee, however, was instructed not to disburse these

eighty-five days by referring to section 1324 of Bankruptcy Code requiring court to hold confirmation hearing within forty-five days after first meeting of creditors and referring to Rule 2003 of Federal Rules of Bankruptcy Procedure requiring creditor's meeting to be held within forty days after filing of case).

⁷³ See Richardo I. Kilpatrick, *Selected Creditor Issues Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 817, 836 (2005) (referring to amended section 1326(a) requiring debtor to make post-petition payments and pay secured creditors adequate protection for portion of obligation due post-petition and pre-confirmation).

⁷⁴ 11 U.S.C. § 361 (2006).

⁷⁵ One court found that the money paid into the chapter 13 trustee prior to confirmation was "extra collateral" that could be provided to a secured creditor. *In re Cook*, 205 B.R. 437, 440 (Bankr. N.D. Fla. 1997).

⁷⁶ See 2 CARLSON & GILMORE, *supra* note 25, at 64–66 (discussing effect of adequate protection payments on secured creditor's claims).

⁷⁷ *In re Johnson*, 63 B.R. 550, 552–53 (Bankr. D. Colo. 1986) (suggesting periodic payments are meant to compensate for depreciation of underlying collateral).

⁷⁸ 11 U.S.C. § 1326(a)(1) (2000), *amended by* Pub. L. No. 109-8, § 309, 119 Stat. 23, 83 (2005).

funds until confirmation.⁷⁹ If confirmation was denied, payments had to be returned to the debtor, after deductions of administrative fees.⁸⁰

We have seen that some jurisdictions permitted the debtor to pay the car lender directly, without the intercession of the chapter 13 trustee.⁸¹ But there was no good mechanism to make sure this was actually done. If these payments were not forthcoming, it was up to the car lender to appear in court to move to lift the automatic stay for want of adequate protection. Typically, the car lender was not organized enough to make an administrative claim. Furthermore, it was very controversial whether adequate protection claims were administrative expenses of bankruptcy administration.⁸² Indeed, outside chapter 13 this was an explosive issue, because, where secured creditors were entitled to adequate protection, failed adequate protection claims gave rise to a superpriority under section 507(b)—a priority higher than the administrative claims of a bankruptcy trustee himself.⁸³ This was the secret behind the view that one had to ask for adequate protection before being entitled to it. Since failure to get it might generate the section 507(b) superpriority, a rule of adequate protection ab initio was a severe threat to bankruptcy trustees, whose administrative claims would have been subordinated to these claims. So even where a secured creditor applied for administrative priority, some courts were prepared to rule that car depreciation was not beneficial to the bankruptcy estate and therefore not a proper administrative claim.⁸⁴

To summarize, prior to 2005, there may or may not have been an opportunity to obtain adequate protection payments prior to confirmation. If direct payments to

⁷⁹ 11 U.S.C. § 1326(a)(2) (2000), amended by Pub. L. No. 109-8, § 309, 119 Stat. 23, 83 (2005).

⁸⁰ *Id.* (providing for return of payments and referring to section 503(b) addressing various administrative fees); see *In re Brown*, 348 B.R. 583, 590 (Bankr. N.D. Ga. 2006) (indicating prior to 2005 amendments if plan was not confirmed and case was dismissed all payments except for administrative expenses would be returned to debtor). In the Southern District of Georgia, where chapter 13 cases are dismissed, the accumulated wages collected by the trustee must be distributed to the car lender. See, e.g., *In re Brown*, 319 B.R. 898, 902 (Bankr. M.D. Ga. 2004) (noting distribution of accumulated payments to secured creditors when cases are dismissed).

⁸¹ In the Northern District of Texas, a debtor could apply for permission to pay the car lender directly by way of adequate protection. See, e.g., *Chase Manhattan Bank USA, NA v. Stembridge (In re Stembridge)*, 394 F.3d 383, 384 (5th Cir. 2004) (analyzing debtors "Authorization for Pre-Confirmation Disbursement" providing direct payments to creditor).

⁸² See *Broadcast Corp. of Ga. v. Broadfoot (In re Subscription Television of Greater Atlanta)*, 789 F.2d 1530, 1532 (11th Cir. 1986) (rejecting extension of administrative expenses to creditor holding claim under executory contract).

⁸³ 11 U.S.C. § 507(b) (2006) (providing for priority claim for creditor higher than administrative claims allowable under section 503(b)).

⁸⁴ See *Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860, 865–66 (4th Cir. 1994) (imposing burden of proof on creditor to demonstrate actual and necessary cost or expense "conferring a concrete benefit on the estate before a claim is allowable as an administrative expense"); *In re Plunkett*, 191 B.R. 768, 780–81 (Bankr. E.D. Wis. 1995) (rejecting second mortgagee's entitlement for superpriority protection since it failed to show "benefit accrued to the estate"); *In re Quality Beverage Co.*, 181 B.R. 887, 897 (Bankr. S.D. Tex. 1995) (denying creditor's request for superpriority status because it did not intend on benefiting estate); *In re Ralar Distrib., Inc.*, 166 B.R. 3, 8–9 (Bankr. D. Mass. 1994) (determining creditor is not entitled to administrative expense priority because there was no failure of adequate protection when creditor received more than could have realized in liquidation), *aff'd*, *Baybank-Middlesex v. Ralar Distribs., Inc. (In re Ralar Distribs.)*, 182 B.R. 81 (D. Mass. 1995), *aff'd*, 69 F.3d 1200 (1st Cir. 1995).

the car lender were proposed (and permitted) then, where the debtor chose to make them, the car lender received payments that were supposed to equate with depreciation of the car. If payments were made to the chapter 13 trustee (and if the plan was never confirmed), the trustee had to return the wages to the debtor minus administrative expenses. Yet it was not clear whether the adequate protection claim was an administrative expense. Nor was the car lender always organized enough to make the claim. Obviously this was no satisfactory state of affairs for car lenders.

2. Confirmation

The last section discussed pre-confirmation payments to the chapter 13 trustee, as the law existed prior to BAPCPA. If the plan was not confirmed, the chapter 13 trustee had to refund the money to the debtor (minus administrative expenses).

If the plan was confirmed, then the rules were different. Prior to 2005, the chapter 13 trustee was instructed to disburse the funds, but, according to section 1326(b), "[b]efore or at the time of each payment to creditors under the plan," the chapter 13 trustee was to pay administrative claims.⁸⁵ This term included the chapter 13 trustee's fee and, significantly, fees for debtor's counsel.⁸⁶

The implication of section 1326(b) was that the administrative creditors could take *all* the plan payments until their claims were paid. This meant that none of the money went to the car lender. With the car depreciating, the lender was driven more deeply under water: "[t]hus, for example, when the [c]hapter 13 Trustee makes her first monthly disbursement after confirmation, she may not disburse any payment to secured or unsecured creditors unless at the same time, the Trustee pays, in full, the unpaid, allowed attorney fees of Debtors' counsel."⁸⁷ According to this view, to pay even \$.01 to a nonpriority creditor without finally satisfying the administrative creditors in full violates section 1326(b).⁸⁸ Only if a distribution to an administrative creditor *fully pays* that claim can even \$.01 be paid to the nonpriority creditors "at the same time":

A partial payment of an administrative expense claim would not satisfy [section] 1326(b)(1) because there would still remain an unpaid administrative claim. The "before or at the time of" language addresses the situation where at any given time there are funds available for distribution to other creditors after the full payment of the [section] 507(a)(1) claims. Such language permits

⁸⁵ 11 U.S.C. § 1326(b) (2000), *amended by* Pub. L. No. 109-8, § 1224, 119 Stat. 23, 199 (2005).

⁸⁶ See 11 U.S.C. § 330(a)(4)(B) (2000) (permitting court to grant reasonable fees to debtor's attorney based on benefits and necessity of services given to debtor); 11 U.S.C. § 503(b)(3) (2000) (listing various possible actual and necessary expenses incurred during bankruptcy and considered "administrative expenses").

⁸⁷ *In re Harris*, 304 B.R. 751, 757 (Bankr. E.D. Mich. 2004).

⁸⁸ *Id.* at 757 ("Section 1326(b)(1) plainly means that at any given time after confirmation . . . if there is any unpaid, allowed administrative expense . . . no payment may be made to any other creditor under the plan unless the unpaid administrative expense is paid in full, either first or at the same time.").

the remaining funds to be paid immediately to creditors in other classes without their having to wait for the next monthly distribution under the plan. However, where there are insufficient funds to pay administrative claims in full, section 1326(b)(1) requires that claims in other classes await payment.⁸⁹

There is an alternative way of reading section 1326(b) that reaches the same result. Section 1326(a) requires the chapter 13 trustee to pay administrative claims "[b]efore or *at the same time* of each payment to creditors under the plan."⁹⁰ Meanwhile, section 1322(a)(2) requires a plan to "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 . . . unless the holder of a particular claim agrees to a different treatment of such claim"⁹¹

Putting these two provisions together, it would appear that section 1322(b)(1) does not require that administrative creditors be paid *in full* before any administrative creditor is paid. It only requires that creditors be paid a *little* either before or *at the same time* nonpriority creditors are paid. That is to say, section 1326(b) is largely (but not entirely) permissive. Section 1326(b) is certainly consistent with subordinating cram down payments to administrative claims. In such a case, the administrative claims are paid "before" a payment to a creditor. On the other hand, a plan that subordinates the administrative claims to the cram down payments of the car lender would appear to violate section 1326(b); the administrative claims would then be paid neither before nor at the same time as but *after* at least some of the payments to creditors. Thus, at most, section 1326(b) at least requires that \$.01 of the wages be paid to the administrative claims *at the same time* as the car lender takes the rest of the payment.

If it is true that section 1326(b) is largely permissive, who decides the priority between the administrative claimants and the car lender's right to cram down payment? The answer is the debtor (who is of course counseled by a lawyer desirous of rapid payment). Only the debtor can write a plan.⁹² And the court is *required* to confirm a plan that complies with section 1325(a).⁹³ Therefore, when the debtor submits a plan that awards priority to her lawyer, the court must accept it.

Some courts have disagreed with both of the above readings favoring the administrative creditors over the car lender. In *General Motors Acceptance Corp. v. Dykes (In re Dykes)*,⁹⁴ the bankruptcy court refused to confirm a plan unless it established pro rata sharing of the monthly installments between the car lender and

⁸⁹ *Id.* at 757; *accord In re DeSardi*, 340 B.R. 790, 809 (Bankr. S.D. Tex. 2006) (stating all administrative claims should be paid before, or at same time as, general payments to creditors).

⁹⁰ 11 U.S.C. § 1326(b) (2006) (emphasis added).

⁹¹ 11 U.S.C. § 1322(a)(2) (2006).

⁹² 11 U.S.C. § 1321 (2006) ("The debtor shall file a plan.").

⁹³ 11 U.S.C. § 1325(a) (2006) (stating "court shall confirm a plan" if it complies with requisite subsections).

⁹⁴ 10 F.3d 184 (3d Cir. 1993).

the debtor's lawyer.⁹⁵ The debtor rewrote the plan to provide for such sharing and then appealed.⁹⁶ The court of appeals never reached the merits of the appeal; the split of the debtor's wages between the administrative creditors and the car lender was of no concern to the debtor, who was not a "person aggrieved," as the common law of bankruptcy appeals required him to be.⁹⁷ So the case represents an instance (without appellate approval) of mandatory pro rata sharing as a condition of confirming the plan. Such a view can be criticized for legislating a criterion to section 1325(a) confirmation criteria that Congress saw fit not to add.

Similarly, in *In re Papas & Rose, P.C.*,⁹⁸ Judge John Teselle had issued a guideline requiring the administrative creditors to share pro rata with other creditors.⁹⁹ The district court decided it had no jurisdiction to issue a writ of mandamus to reverse this practice,¹⁰⁰ but it said in dictum that the order was consistent with section 1326(b)—that is, section 1326(b) is permissive.¹⁰¹ The issue, however, is whether the court can refuse to confirm a chapter 13 plan that conforms with section 1325(a). This the district court did not address.

Courts were divided, then, on whether section 1326(b) even permits payments to car lenders when the administrative creditors have not been paid in full. But even if section 1326(b) awards priority to administrative creditors over the car lender, courts occasionally found independent means to reject plans that allowed the car to go under water so that the debtor's lawyer could be paid in full from plan payments. Some courts thought that the cram down provision had an inherent reference to adequate protection in it, such that payments under the plan had to reimburse the car lender for depreciation.¹⁰²

Many courts, however, simply found that section 1326(b) subordinates the car lender to the debtor's lawyer.¹⁰³ According to these courts, the secured creditor has

⁹⁵ *Id.* at 186.

⁹⁶ *Id.* at 186–87.

⁹⁷ *Id.* at 187–88 (determining "person aggrieved" is question of fact for district court and here district court did not address it so it could not be addressed on appeal). Perhaps a better point is that the debtor waived the appeal on the denial of the first plan by voluntarily submitting a second plan providing for pro rata sharing.

⁹⁸ 229 B.R. 815 (W.D. Okla. 1998).

⁹⁹ *Id.* at 817.

¹⁰⁰ *Id.* at 818.

¹⁰¹ *Id.* at 819–20; accord *In re Murray*, 348 B.R. 917, 921–22 (Bankr. M.D. Ga. 2006) (approving standing order requiring sharing of payments between administrative creditors and secured creditors).

¹⁰² See *In re Brown*, 319 B.R. 898, 902–03 (Bankr. M.D. Ga. 2004) (stating plan not feasible if car goes under water, because secured creditor could have stay lifted to repossess car); *In re Cook*, 205 B.R. 437, 443 (Bankr. N.D. Fla. 1997) (declaring if car goes under water, plan fails because it did not provide for the car lender to "retain the lien" within the meaning of section 1325(a)(5)(B)(I)); *In re Johnson*, 63 B.R. 550, 554 (Bankr. D. Colo. 1986) (rejecting plan under which lender would not receive payment for over three years because car would have depreciated in value to such extent lender would no longer be secured creditor). Some courts viewed *Johnson* as sui generis and as standing for the proposition that, although section 1326(b) required the administrative creditors to be paid first, the court could refuse to confirm if the delay of payment to the car lender was extreme. See *In re Moses*, 293 B.R. 711, 716 (Bankr. E.D. Mich. 2003).

¹⁰³ See *In re Brown*, 319 B.R. at 901 (noting prior decisions do not address whether delay in payments to secured creditors in favor of debtor's attorney meets "feasibility" requirement for confirmation); *In re Harris*, 304 B.R. 751, 757 (Bankr. E.D. Mich. 2004) (stating plain meaning of section 1326(b) is administrative costs, including attorney's fees, must be paid in full before other creditors); *In re Walters*, 203 B.R. 122,

no adequate protection claim to make after confirmation. After that point, *the plan* (not section 363(e)) governs the rights of the car lender. Cram down was regulated by section 1325(a)(5), and nothing there, prior to 2005, required that the cash flow be constructed in a way that the secured creditor never goes under water after confirmation.¹⁰⁴ These courts simply declined to supplement section 1325(a)(5) by adding this requirement.

C. Adequate Protection and BAPCPA

BAPCPA changes the above rules in ways that are not entirely coherent. To start, Congress has rewritten the rule that requires the debtor to make pre-confirmation payments. According to new section 1326(a)(1):

Unless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan or order for relief, whichever is earlier,^[105] in the amount—

(A) proposed by the plan to the trustee;

....

(C) that provides adequate protection directly to a creditor holding an allowed claim secured by personal property to the extent that the

123–24 (Bankr. S.D. Ill. 1996) (holding adequate protection is to compensate creditors before confirmation of plan); *In re Dews*, 191 B.R. 86, 92 (Bankr. E.D. Va. 1995) (ruling against requiring debtor to pay lender for depreciation). According to section 1322(a)(2), a plan shall "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim" 11 U.S.C. § 1322(a)(2). Car lenders have lamely argued that the meaning of section 1322(a)(1) was that the debtor's lawyer *must* be paid on a deferred basis, thereby clearing the way for distributions to the car lender. These claims were universally rejected. See *In re Harris*, 304 B.R. at 758 ("[Section] 1326(b)(1) does not require or allow full payment of Debtors' attorney fees to be delayed in favor of payments to secured creditor."); *In re Moses*, 293 B.R. 711, 714 (Bankr. E.D. Mich. 2003) (allowing debtor's counsel to receive lump sum payment before creditor is paid rather than compensation through deferred cash payments); *In re Parker*, 15 B.R. 980, 982 (Bankr. E.D. Tenn. 1981) (rejecting creditor's argument about debtor's attorney needing to file proof of claim in order to be compensated), *aff'd*, 21 B.R. 692 (E.D. Tenn. 1982).

¹⁰⁴ 11 U.S.C. § 1325(a)(5) (2000), *amended by* Pub. L. No. 109-8, § 102, 119 Stat. 23, 33 (2005).

¹⁰⁵ In a voluntary case the bankruptcy petition constitutes the order for relief. 11 U.S.C. § 301(b) (2006). Of course, the debtor will never file a chapter 13 plan before the voluntary bankruptcy petition. Meanwhile, involuntary chapter 13 cases are not permitted. See 11 U.S.C. § 303(a) (2006) ("An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person" with exceptions). The reference here to "whichever is earlier" must probably be dismissed as nonsense. See Henry E. Hildebrand III, *Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Chapter 13 Trustees*, 79 AM. BANKR. L.J. 373, 378 n.23 (2005) ("It is unclear how a debtor would file a plan before the filing of the petition."). Prior section 1326(a)(1) required payment within thirty days of filing a plan, which could be filed fifteen days after the bankruptcy petition. See 11 U.S.C. § 1326(a)(1) (2000), *amended by* Pub. L. No. 109-8, § 309, 119 Stat. 23, 83 (2005); *see also* FED. R. BANK. P. 3015(b) (2002).

claim is attributable to the purchase of such property by the debtor for that portion of the obligation that becomes due after the order for relief, reducing the payments under subparagraph (A) by the amount so paid and providing the trustee with evidence of such payment, including the amount and date of payment.¹⁰⁶

Subparagraph (C) is the provision that supplements the uncertain regulation of adequate protection prior to confirmation. This new subparagraph suggests that adequate protection be supplied to car lenders in the pre-confirmation period. Of course, the section begins with the suggestion that a court may order otherwise.¹⁰⁷ Presumably courts will not use this language as an excuse to legislate rules that override BAPCPA. Rather, the invitation properly pertains to unusual facts with peculiar equities.

Note must be taken of the odd way adequate protection is described in section 1326(a)(1)(C). Abstracting from this subparagraph so that we have only the troublesome words before us:

[A]dequate protection . . . to a creditor holding an allowed [secured] claim . . . to the extent that the claim is attributable to the purchase of such property by the debtor for that portion of the obligation that becomes due after the order for relief . . .¹⁰⁸

Classically, adequate protection means protection from depreciation of the collateral.¹⁰⁹ In *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*,¹¹⁰ the Supreme Court took special care to *deny* that adequate protection relates to decline of the value of the secured claim.¹¹¹ For this very reason, secured creditors had no right to interest compensation on the claim—only to protection against depreciation of the collateral.¹¹² Yet the above-quoted language in BAPCPA connects the concept of adequate protection to the amount of the claim.

I can make no sense whatever of the above-quoted language.¹¹³ Let us apply the

¹⁰⁶ 11 U.S.C. § 1326(a)(1) (2006). Omitted subparagraph (B) requires a debtor to stay current on payments with regard to leases of personal property (i.e., cars). See 11 U.S.C. § 1326(a)(1)(B) (2006).

¹⁰⁷ 11 U.S.C. § 1326(a)(1) (2006) ("Unless the court orders otherwise . . .").

¹⁰⁸ 11 U.S.C. § 1326(a)(1)(C) (2006).

¹⁰⁹ See 11 U.S.C. § 361(1)–(2) (2006) (providing for protection against depreciation by "requiring the trustee to make a cash payment or periodic cash payments to such entity" or "providing to such entity an additional or replacement lien").

¹¹⁰ 484 U.S. 365 (1988).

¹¹¹ *Id.* at 373.

¹¹² *Id.* at 372 (comparing to section 506(a) where "value of such creditor's interest" means "value of the collateral" and if interest was added the value to creditor will exceed the value of the collateral); see also *In re Brown*, 348 B.R. 583, 594 (Bankr. N.D. Ga. 2006) (rejecting inclusion of interest component except where an oversecured creditor has equity cushion).

¹¹³ *Accord In re Brown*, 348 B.R. 583, 593 (Bankr. N.D. Ga. 2006) (expressing puzzlement as to adequate protection definition in section 1326(a)(1)(C)).

offending language to a car worth \$20,000 that secures a total purchase money obligation of \$30,000. Of this \$30,000, \$1,000 is in arrears from before the bankruptcy petition. Whether or not the bankruptcy itself is an event of acceleration under the security agreement, the rest of the \$29,000 is "due after the order for relief." What is the relation of adequate protection to the \$29,000 portion of the claim? It is hard even to fathom an answer to this question, and so I will assume the limitation of the adequate protection right to amounts due after the bankruptcy petition is meaningless.

As we shall see, a kind of adequate protection requirement is added to section 1325(a)(5)¹¹⁴ of the sort that many courts refused to recognize before 2005. This does *not* repeat the odd limitation of section 1326(a)(1)(C) and is more clearly evocative of the classic notion of protection against depreciation.

1. Must Payments Be Made Via the Chapter 13 Trustee?

Subparagraph (C) seems to state that the debtor shall make adequate protection payments *directly* to the secured lender.¹¹⁵ In contrast, under subparagraph (A), the chapter 13 trustee is to receive proposed plan amounts.¹¹⁶ So at first glance, Congress seems to be requiring adequate protection payments "outside the plan." Subparagraph (C) also requires a debtor to supply evidence to the chapter 13 trustee that adequate protection payments were actually made.¹¹⁷ This provision only makes sense if section 1326(a)(1)(C) authorizes direct payments; what need is there of evidence if the payment is directly to the trustee? But, upon closer look, payments under (C) are supposed to reduce payments under (A). This means that the plan *must* provide for adequate protection payments; only then does the subtraction requirement make sense. In that case, the trustee receives under (A) what the plan calls for *minus* amounts paid *directly* to the secured creditors.

An oddity about section 1326(a)(1)(C) is that adequate protection payments are due to "a creditor holding an allowed claim" secured by a purchase money security

¹¹⁴ 11 U.S.C. § 1325(a)(5)(B)(iii)(II) (2006) (confirming plans where "holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan.").

¹¹⁵ 11 U.S.C. § 1326(a)(1)(C) (2006). *But see In re Beaver*, 337 B.R. 281, 283–84 (Bankr. E.D.N.C. 2006). In *In re Beaver*, Judge Thomas Small refused to go along. Judge Small noted that, prior to 2005, the mode of adequate protection could be chosen by the debtor. *Id.* at 285. Since Congress had not clearly abrogated this privilege, the meaning of section 1326(a)(C) was that if a debtor *chose* to adequately protect the lender with cash payments equal to the pre-petition security agreement, then the debtor was required to commence those payments promptly. *Id.* at 284. Instead, the debtor chose to make smaller payments to the secured creditor on his car. *Id.* at 285. For this reason, the section does not apply. In other words, the statute is meaningless unless the debtor chooses to make periodic payments that happen to coincide with the pre-petition agreement. *See id.* (maintaining pre-petition payments made by chapter 13 debtor directly to secured creditor is not only way to provide adequate protection to creditor under section 1326(a)(1)(c)).

¹¹⁶ 11 U.S.C. § 1326(a)(1)(A) (2006) (requiring debtor to make payments proposed under plan to trustee).

¹¹⁷ 11 U.S.C. § 1326(a)(1)(C) (2006) ("[T]he debtor shall commence making payments . . . in the amount . . . that provides adequate protection . . . and providing the trustee with evidence of such payment, including the amount and date of payment.").

interest.¹¹⁸ An allowed claim is usually thought to imply that the creditor has filed a proof of claim.¹¹⁹ Yet the bar date for filing a proof of claim is ninety days after the first creditors' meeting, which interest must be held within forty-five days of the bankruptcy petition. So there is a good argument that, in the absence of the proof of claim, a secured creditor has *no* right to adequate protection payments under section 1326(a)(1)(C) until the proof of claim is filed (if ever).¹²⁰

It remains to be seen whether courts will read this provision literally and limit adequate protection payments to those car lenders who have actually filed proofs of claims.¹²¹ At least one court, in a different context, has elected to ignore the fact that BAPCPA refers to secured creditors with *allowed claims*. This decision arose in the context of a BAPCPA provision preventing the notorious ride-through in chapter 7 cases.¹²² Prior to 2005, some courts permitted chapter 7 debtors in effect to reinstate the security agreement over the opposition of the secured party.¹²³ The 2005 amendments bring this practice to an end, however. According to section 521(a)(6):

[I]n a case under chapter 7 of this title in which the debtor is an individual, [the debtor may] not retain possession of personal property as to which a creditor has an *allowed claim* for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—

(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B) redeems such property from the security interest pursuant to section 722.

¹¹⁸ 11 U.S.C. § 1326(a)(1)(C) (2006) (referring to "allowed claim secured by personal property to the extent the claim is attributable to the purchase of such property by the debtor").

¹¹⁹ See *infra* text accompanying note 365–421.

¹²⁰ See Hildebrand, *supra* note 105, at 379 n.25 ("[T]he debtor must determine the amount to be paid to such PMSI creditors which have filed proofs of claim, to provide 'adequate protection' . . .").

¹²¹ See Hildebrand, *supra* note 105, at 379 (defending practice of requiring adequate protection payments to chapter 13 trustee on ground trustee must monitor whether proofs of claims have been filed, as only allowed secured creditor are to obtain adequate protection).

¹²² See generally Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457 (2005) (discussing chapter 7 "ride-through").

¹²³ See *Price v. Del. State Police Fed. Credit Union* (*In re Price*), 370 F.3d 362, 374–75 (3d Cir. 2004) (declaring debtor's option to keep collateral and stay current on loan payments "does not require specific creditor action"); *McClellan Fed. Credit Union v. Parker* (*In re Parker*), 139 F.3d 668, 673 (9th Cir. 1998) (refusing to limit debtor's options through creditor's reading of applicable statutes); *Capital Commc'ns. Fed. Credit Union v. Boodrow* (*In re Boodrow*), 126 F.3d 43, 49–50 (2d Cir. 1997) (interpreting statute as not limiting debtor's options to "redemption, reaffirmation or surrender of the property"); *Home Owners Funding Corp. of Am. v. Belanger* (*In re Belanger*), 962 F.2d 345, 347–48 (4th Cir. 1992) (contending section 521(2) does not require debtor to choose "redemption, reaffirmation, or surrender of property to the exclusion of all other alternatives although no other alternatives are provided for in the Code"); *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1547 n.7 (10th Cir. 1989) (rejecting application of case involving prohibition of redemption through installments).

If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee¹²⁴

Notice that section 521(a)(6) prohibits debtor retention when a creditor has an *allowed claim*. An allowed claim arguably requires the filing of a proof of claim by secured creditors in a chapter 7 or 13 case. Where the creditor has not filed a proof of claim, may the debtor then retain the collateral? In *In re Rowe*,¹²⁵ Judge Dale Somers held no:

The Court does not believe that Congress could have intended the phrase "allowed claim" to have the clear meaning ascribed to it by operation of section 502, since this construction of "allowed claim" renders the section applicable only in asset chapter 7 cases when a secured creditor files a proof of claim after the clerk has given notice that assets are available for distribution.¹²⁶

Judge Somers then cited Supreme Court dictum that plain meaning can be ignored in the "rare case[] in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."¹²⁷ So emboldened, Judge Somers ruled that the automatic stay was automatically lifted because the debtor did not elect to reaffirm the security agreement or redeem the property, even though the car lender did not have an allowed secured claim.¹²⁸

¹²⁴ 11 U.S.C. § 521(a)(6) (2006) (emphasis added).

¹²⁵ 342 B.R. 341 (Bankr. D. Kan. 2006).

¹²⁶ *Id.* at 348.

¹²⁷ *Id.* at 349 & n.24 (citing *United States v. Ron Pair, Enterps., Inc.*, 489 U.S. 235, 242 (1989)). *But see* *Bracewell v. Kelley* (*In re Bracewell*), 454 F.3d 1234, 1241 (11th Cir. 2006) ("If, in the face of plain statutory language, an opinion runs on about purposes and policies, it is a sure sign the revision knife is out and an effort is being made to slice and dice clear language to make way for the policy preferences of the writer.").

¹²⁸ *In re Rowe*, 342 B.R. at 351. It could be pointed out, however, that even if section 506(a)(6) refers to allowed secured claims, section 362(h) does not. *See* 11 U.S.C. § 362(h) (2006). As a result, whether or not Judge Somers is right, the car lender still repossesses the car if the debtor does not redeem or reaffirm, even if no proof of claim is filed. *See In re Donald*, 343 B.R. 524, 538 (Bankr. E.D.N.C. 2006) (ruling section 362(h) requires debtor to redeem or reaffirm and failure to do so triggers consequences of section 521(d)).

In the ensuing discussion, I assume without prejudice to the question that courts will find a congressional intent to require immediate adequate protection payments in section 1326(a)(1)(C), even where no proof of claim has been filed. Certainly any other conclusion deprives car lenders of their newly won adequate protection right in any case where filing the proof of claim is delayed.

Another oddity is that section 1326(a)(1)(C) does not govern how often such payments should be made.¹²⁹ Yet section 1307(c)(4) makes "failure to commence making timely payments under section 1326" grounds for dismissal of the chapter 13 case.¹³⁰ An argument can be made, however, that the spirit of BAPCPA is *monthly* payments. First, means testing under chapter 7 is tied to the feasibility of a chapter 13 plan.¹³¹ The chapter 7 means test is tied to "current monthly income"¹³² and to "monthly expenses."¹³³ These are hints that Congress expects chapter 13 to proceed generally on a monthly basis. Also, BAPCPA now requires cram down of car lenders in "equal monthly amounts."¹³⁴ Furthermore, where a debtor has tried to file a chapter 7 case and has been kicked out for bankruptcy abuse under section 707(b), BAPCPA now permits the chapter 7 trustee to be compensated in the ensuing chapter 13 case. Significantly, the ex-trustee "shall be paid monthly."¹³⁵ All of these hints point toward a congressional expectation of monthly payments of adequate protection in chapter 13.

Finally, it should not be forgotten that the opening words of section 1326(a)(1) are "[u]nless the court orders otherwise." These words suggest that courts can simply ignore the dictates of section 1326(a) and do what they want. As we shall see, at least one court has taken up this invitation to avoid what section 1326(a) seems to say about direct adequate protection payments by the debtor, bypassing the chapter 13 trustee.¹³⁶

To the extent that BAPCPA requires adequate protection payments directly to car lenders, at least one contradiction is solved. Under section 1326(b)(1), the chapter 13 trustee must pay administrative creditors first, once the plan is confirmed.¹³⁷ Prior to 2005, this rule possibly meant that money designated for the

¹²⁹ See Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 191, 228 (2005) (noting "[t]here is no requirement that the payments be made at any particular time intervals").

¹³⁰ 11 U.S.C. § 1307(c)(4) (2006).

¹³¹ *E.g.*, *Stuart v. Koch* (*In re Koch*), 109 F.3d 1285, 1288 (8th Cir. 1997) (observing "ability to pay for section 707(b) purposes is measured by evaluating Debtors' financial condition in a hypothetical [c]hapter 13 proceeding"); *In re Jones*, 335 B.R. 203, 208 (Bankr. M.D. Fla. 2005) (evaluating primary factor in chapter 7 claim is whether debtor has ability to pay portion of liabilities under hypothetical chapter 13 plan).

¹³² 11 U.S.C. § 707(b)(2)(A)(i) (2006) (defining monthly expenses).

¹³³ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006) (correlating monthly income and abuse).

¹³⁴ 11 U.S.C. § 1325(a)(5)(B)(iii)(I) (2006) (explaining where property is to be distributed according to this section, it "shall be in equal monthly amounts").

¹³⁵ 11 U.S.C. § 1326(b)(3) (2006). The most the ex-trustee can obtain is a *monthly* payment of \$25. The ex-trustee may obtain less than this, where the unsecured nonpriority creditors together receive less than \$500 a month. I leave it as an exercise for the reader to derive this detail from the algebraically complex provisions of section 1326(B)(ii).

¹³⁶ See *infra* Part II.C.2.

¹³⁷ 11 U.S.C. § 1326(b)(1) (2006).

car lender could be diverted to the bankruptcy lawyers. If, however, direct payment to creditors is required, the contradiction cannot arise. The secured lenders directly receive adequate protection payments from funds the trustee never controls.

But on the matter whether the debtor has the right to make direct payments, another amendment must be noted. Congress also amended section 1326(a)(2), which requires a refund (minus administrative expenses) to the debtor, when the plan is not confirmed. Instead of returning payments to the debtor, the trustee must instead return "payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor" ¹³⁸ "Payments not previously paid" must refer to payments made to the chapter 13 trustee by the debtor under (A) that the trustee has not yet made to the creditors. But isn't the trustee not supposed to make any payment to anyone until after confirmation? Significantly, the trustee should not return sums "due and owing to creditors pursuant to paragraph (3)." So apparently the trustee may distribute some funds prior to confirmation—to the creditors mentioned in subparagraph (3).

According to section 1326(a)(3):

(3) Subject to section 363, the court may, upon notice and a hearing, modify, increase, or reduce the payments required under this subsection pending confirmation of a plan. ¹³⁹

The reference to paragraph (3) is inapt. Congress should have referred to section 1326(a)(1)(C). If it had, then section 1326(a)(2) would require the trustee to make pre-confirmation payments to car lenders. Any amount needed to reimburse these parties would not then be returned to the debtor when confirmation fails. As it stands, if the Bankruptcy Code is taken literally, the trustee should pay the car lender only if, prior to the return, the court has held a hearing and has modified the debtor's obligation to pay the lessor-lender; where no such hearing has been held (which will no doubt be the vast majority of cases), the trustee must return the funds to the debtor, even though the car lender has received no adequate protection. A literal reading is close to reviving the rule that, unless the secured creditor asks for it (i.e., a hearing under (3) is held), the creditor has no right to adequate protection; rather the pre-confirmation amounts paid by the debtor must be returned to the debtor if the plan is not confirmed. At least one court, however, has overlooked the problematic cross-references and has interpreted section 1326(a)(2) to mean that adequate protection payments should not be surrendered back to the debtor if confirmation fails. ¹⁴⁰

But did not section 1326(a)(1)(C) command the debtor to pay the lender *directly*? How then does the trustee hold funds for the lender? One possible answer

¹³⁸ 11 U.S.C. § 1326(a)(2) (2006).

¹³⁹ 11 U.S.C. § 1326(a)(3) (2006).

¹⁴⁰ *In re Brown*, 348 B.R. 583, 590 (Bankr. N.D. Ga. 2006) ("[P]re-confirmation adequate protection payments made by a debtor to the [c]hapter 13 Trustee for disbursement to a specific creditor . . . are payments that could not be returned to debtor.").

is that a debtor may *choose* to make payments under the plan to the lender.¹⁴¹ It cannot be the case that the debtor may be commanded to make payments under the plan; otherwise, "directly" in section 1326(a)(1)(B) and (C) really is made to mean "indirectly." Of course, it should always be remembered that section 1326(a) begins with the words "[u]nless the court orders otherwise"

Whatever new section 1326(a) means, it certainly does not *prohibit* direct payments by the debtor to creditors. In *In re Clay*,¹⁴² Judge William Thurman ruled that, if anything, new subparagraph (C) more clearly indicates a congressional intent to permit payments directly to the secured creditor.¹⁴³ Indeed, section 1326 seems to say that the pre-confirmation amount that the debtor must pay is the amount of wages payable to the chapter 13 trustee under the proposed plan, *and* an amount needed to provide adequate protection to the car lender. The latter amount is therefore described as *not* being part of the wages payable to the chapter 13 trustee.

Nevertheless, some courts have taken the strong position that debtors are to make payments through the chapter 13 trustee, in spite of the new BAPCPA provisions.¹⁴⁴ This practice is bolstered by the fact that section 1326(a)(1) begins with the admonition, "[u]nless the court orders otherwise" In other words, whatever Congress has done in section 1326(a)(1) is precatory only. In fact, the courts can do whatever they want. This raises anew the difficulty of section 1326(b), which arguably requires the chapter 13 trustee to pay administrative creditors first before "creditors under the plan."¹⁴⁵

2. The Priority of Adequate Protection Payments

The Southern District of Texas has promulgated a local rule that mandates payment of both the home mortgage and car loans through the chapter 13 trustee.¹⁴⁶ This rule presents the problem of how money in the trustee's hands can be paid to secured creditors in light of section 1326(b), which arguably requires the debtor's lawyer and other administrative creditors be paid first. We have already noted that section 1326(a)(2) requires the chapter 13 trustee to hold back amounts paid to the trustee prior to confirmation,¹⁴⁷ but once confirmation exists, the trustee is required

¹⁴¹ As occurred in *In re Brown*, 348 B.R. 583, 590 (Bankr. N.D. Ga. 2006) (allowing for confirmation of plan where debtor makes pre-confirmation adequate protection payments to trustee for disbursement to secured creditor).

¹⁴² 339 B.R. 784 (Bankr. D. Utah 2006).

¹⁴³ *Id.* at 787.

¹⁴⁴ See *In re DeSardi*, 340 B.R. 790, 812 (Bankr. S.D. Tex. 2006); *In re Perez*, 339 B.R. 385, 390 n.4 (Bankr. S.D. Tex. 2006) (defining term "under the plan" to include payments made by both trustee and debtor to creditors).

¹⁴⁵ 11 U.S.C. § 1326(b) (2006).

¹⁴⁶ BANKR. S.D. TEX. R. 4001(e) ("In each chapter 13 case, the Court will issue an order that authorizes the use of estate vehicles under section 363 and provides adequate protection to the holders of liens on the vehicles.").

¹⁴⁷ 11 U.S.C. § 1326(a)(2) (2006).

to pay administrative expenses, including the debtor's counsel fee,¹⁴⁸ "[b]efore or at the time of each payment to creditors under the plan"¹⁴⁹

In re DeSardi,¹⁵⁰ is an important, carefully reasoned opinion in which Judge Marvin Isgur valiantly defends the local rule requiring all adequate protection payments be made *indirectly* to secured creditors (via the trustee), in spite of the requirement in section 1326(b) that administrative creditors be paid "[b]efore or at the same time of each payment to creditors under the plan"—something payments directly to creditors could achieve without interference of section 1326(b).¹⁵¹ His justification is that car lenders *can* be paid immediately upon confirmation because adequate protection is an administrative expense of the bankruptcy estate. "Debtors in chapter 13 often need their vehicles to drive to work, which in turn allows for preservation of the state."¹⁵² "Need" here is usually true. But it is surely the case that *sometimes* driving to work is a convenience, not a necessity.¹⁵³ So what Judge Isgur does is to render a fact-specific situation into a rule, thereby conserving judicial time over an issue that most debtors will win.¹⁵⁴ This is understandable and nowhere absolutely barred by the Bankruptcy Code. It should be noted that the local rules on adequate protection can generally be modified at the discretion of the court, so that the rule itself constitutes only a presumption.¹⁵⁵

Judge Isgur adopted the strict view that section 1326(b) requires the priority of administrative creditors over nonpriority creditors.¹⁵⁶ This raised the issue of whether car lenders of necessity would be driven under water in the early months of a chapter 13 plan. According to Judge Isgur, not only is depreciation an administrative expense but a superpriority administrative expense, thanks to section 507(b).¹⁵⁷ On this premise, the car lender should outrank the other administrative

¹⁴⁸ See 11 U.S.C. § 330(a)(4)(B) (2006) ("[T]he court may allow reasonable compensation to the debtor's attorney"); 11 U.S.C. § 503(b)(2) (2006) (allowing for administrative expenses including "compensation and reimbursement awarded under section 330(a)").

¹⁴⁹ 11 U.S.C. § 1326(b) (2006).

¹⁵⁰ 340 B.R. 790 (Bankr. S.D. Tex. 2006).

¹⁵¹ *Id.* at 808.

¹⁵² *Id.* at 799.

¹⁵³ But see *In re Solis*, 2006 Bankr. LEXIS 3126, at *25 (Bankr. S.D. Tex. Nov. 14, 2006) ("[T]here is almost always an alternative, such as walking, bicycling, public transportation, carpooling, obtaining housing closer to the workplace, etc.").

¹⁵⁴ Ironically, immediately after defending a universal rule because debtors "often need their vehicles," Judge Isgur writes: "It is generally the policy in bankruptcy to distribute assets of the estate equally to creditors. Such a policy requires that any statutory priority be narrowly construed." *In re DeSardi*, 340 B.R. at 799 (citations omitted). The Southern District rule is anything but a narrow construction.

¹⁵⁵ See *In re Desardi*, 340 B.R. at 800 (stating "local rule is not intended to fit every circumstance" parties can challenge sufficiency of protection); *In re Perez*, 339 B.R. 385, 408–09 (Bankr. S.D. Tex. 2006) (upholding Court's discretion to deviate from local rule depending on particular case and allow debtors to make payments directly to creditors).

¹⁵⁶ See *In re DeSardi*, 340 B.R. at 809 (noting requirement of "full payment of any administrative claim before (or at the time of) general payment should commence under a chapter 13 plan").

¹⁵⁷ According to section 507(b):

If the trustee, under section 362, 363, or 364 of this title, provides adequate protection

creditors and should receive the first distributions from the chapter 13 trustee's funds.

It is far from obvious that anything can be learned from section 507(b). Section 507(b) works adequately well in chapter 7 cases, where there is a fixed pot of money and it is now time to distribute it, pursuant to section 726(a). There, we learn that a chapter 7 trustee must distribute the cash "in the order specified in section 507."¹⁵⁸ Section 507(b) establishes a failed adequate protection claim as the first priority among the administrative creditors. But in chapter 13, all we learn is that administrative creditors can be paid over time (but must be paid in full).¹⁵⁹ This rule does not mention section 507(b), but presumably it too can be paid over time. Meanwhile there is no reason to suppose other creditors cannot be paid before the section 507(b) claim is fully paid.¹⁶⁰ Because of the deferred payment rule, there is no fixed pot against which the section 507(b) priority might manifest itself. There is only a cash flow, and statutory permission to defer the payment of administrative claims. By way of illustration, administrative expenses are now mostly subordinated to domestic support obligations.¹⁶¹ Yet section 1326(b) requires that administrative creditors be paid *before* the ex-spouse.¹⁶² If this is so, it is hard to see how the invocation of section 507(b) justifies senior adequate protection payments for car lenders.¹⁶³

of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim under such subsection.

11 U.S.C. § 507(b) (2006).

¹⁵⁸ See 11 U.S.C. § 726(a)(1) (2006) (providing for "property of the estate to be distributed . . . in the order, specified in section 507").

¹⁵⁹ 11 U.S.C. § 1322(a)(2) (2006) ("The Plan shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title . . .").

¹⁶⁰ See, e.g., *In re Sanders*, 341 B.R. 47, 50 (Bankr. N.D. Ala. 2006), *aff'd*, 347 B.R. 776 (N.D. Ala. 2006) ("[N]othing in [section] 1322 requires higher priority claims to be paid in full before lower priority claims."); *In re Aldridge*, 335 B.R. 889, 892 (Bankr. S.D. Ala. 2005) (asserting section 1322 does not require payment in full of higher priority claims before lower priority claims are paid); *In re Parker*, 15 B.R. 980, 982–83 (Bankr. E.D. Tenn. 1981) ("[P]ayment on priority claims can be made concurrently with payment on general unsecured claims.").

¹⁶¹ Administrative expenses related to administering the payment of domestic support obligations are an exception. See 11 U.S.C. § 507(a)(1)(C) (2006) ("If a trustee is appointed . . . the administrative expenses of the trustee allowed under . . . section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.").

¹⁶² See *In re Reid*, No. 06-50147, 2006 WL 2077572, at *2 (Bankr. M.D.N.C. July 19, 2006) (affirming administrative creditor's right to payment before debtor's domestic support obligations are paid in full); *In re Vinnie*, 345 B.R. 386, 387–88 (Bankr. M.D. Ala. 2006) (recognizing under section 507 domestic obligations have higher priority than claim of debtor's lawyer); *In re Sanders*, 341 B.R. at 51 ("Had Congress intended to afford this special payment treatment to [section] 507(a)(1) support obligations, it could have expressly done so.").

¹⁶³ The bankruptcy court in *General Motors Acceptance Corporation v. Dykes*, rejected the premise that

Judge Isgur's conclusion requires the view that, if depreciation exceeds the secured claim at any time, adequate protection has "failed," thereby triggering the remedy of the section 507(b) superpriority.¹⁶⁴ Yet this doesn't follow. By hypothesis, depreciation is an administrative expense, and section 1322(a)(2) authorizes deferred payment of such claim. So when payments are deferred, adequate protection has not "failed." Deferred payment *is* the adequate protection, and it has not yet failed.

Also problematic about this position is the fact that section 361(3) *prohibits* administrative priority as a mode of adequate protection.¹⁶⁵ If the secured creditor's right to be paid first from moneys held by the chapter 13 trustee is based on section 507(b), then the form of adequate protection is the very priority that section 361(3) prohibits, not the adequate protection payments themselves.

And finally, section 1322(b)(4) permits a plan to "provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim."¹⁶⁶ Since adequate protection payments are payments of a secured claim, it is at least open for the plan to pay an unsecured administrative claim prior to the adequate protection amount. Requiring otherwise is to read section 1322(b)(4) out of the Bankruptcy Code.

I should add that the very fact payment of administrative claims can be deferred (while, under BAPCPA, adequate protection payments may not be deferred) proves that adequate protection is not necessarily an administrative expense. Putting aside interim compensation of attorneys and other professionals,¹⁶⁷ administrative claims are paid at the end of a chapter 7 proceeding, after all assets have been liquidated.¹⁶⁸ In chapter 11, they are paid in cash on confirmation day.¹⁶⁹ In chapter 13, administrative claims may be paid over the life of the plan.¹⁷⁰ Yet current payment is a mode of adequate protection. This implies that the rule of adequate protection payments is not subject to the rule of administrative claims. It is a free-standing right of secured creditors not related to the concept of administrative expense.

Proof of this point is the concept of an administrative shortfall. Sometimes, attorneys and other professionals are given provisional payments under Bankruptcy

section 507(b) could aid the car lender, but the merits of this ruling were not addressed by the Third Circuit for want of appellate jurisdiction. 10 F.3d 184, 186 (3d Cir. 1993).

¹⁶⁴ See *In re DeSardi*, 340 B.R. 790, 801 (Bankr. S.D. Tex. 2006) ("If attorney's fees are paid ahead of the adequate protection payments, then adequate protection fails; the funds that provide the adequate protection would be paid to someone besides the protected lender.").

¹⁶⁵ 11 U.S.C. § 361(3) (2006) (providing for adequate protection in form other than through compensation as administrative expense under section 503(b)(1)).

¹⁶⁶ 11 U.S.C. § 1322(b)(4) (2006).

¹⁶⁷ See 11 U.S.C. § 330(a)(1)(A) (2006) (allowing reasonable compensation for "actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney . . . and for reimbursement for actual, necessary expenses," after notice to parties in interest and United States Trustee).

¹⁶⁸ See 11 U.S.C. § 726(a) (2006) (requiring payment for administrative claims first under this section).

¹⁶⁹ See 11 U.S.C. § 1129(a)(9)(A) (2006) (asserting holder of claim will begin to receive payment on effective date of "cash equal to the allowed amount of such claim").

¹⁷⁰ See 11 U.S.C. § 1322(a)(2) (2006) (stating plan must "provide for the full payment, in deferred cash payments, of all claims entitled to priority" as administrative claim under section 507).

Code section 330, but later it turns out the bankruptcy estate is not large enough to pay all the administrative creditors. In such cases, at least some courts are prepared to call back the interim compensation so that the professionals have to share the loss pro rata with the other administrative creditors.¹⁷¹ But, if adequate protection payments are administrative claims, then these too would have to be called back, in case of a shortfall. No one would dream of requiring this, yet it is the consequence of terming adequate protection an administrative expense of the bankruptcy estate. Per this *reductio ad absurdum*, adequate protection cannot be founded on administrative priority.¹⁷²

The section 507(b) remedy requires the aggrieved creditor to have "a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property"¹⁷³ Some courts have used this requirement to hold that failed adequate protection claims do not always fall under section 507(b), if the estate did not benefit from the depreciation of collateral.¹⁷⁴ But every secured creditor is entitled to adequate protection against depreciation, even if only some of them get the section 507(b) priority when adequate protection fails.¹⁷⁵

The right to adequate protection is not the same as having an administrative claim.¹⁷⁶ But this is no matter. There is a cleaner way to Judge Isgur's conclusion

¹⁷¹ See *Specker Motor Sales Co. v. Eisen*, 393 F.3d 659, 662–63 (6th Cir. 2004) (leaving open possibility of disgorgement of interim compensation on grounds it is "subject to re-examination and adjustment").

¹⁷² Further refining this point, if a secured party is made to disgorge adequate protection payments because they are administrative claims and there is an administrative shortfall, would not the secured party be senior to all such claims by virtue of section 507(b)? The answer is no when a reorganization case is converted to chapter 7. There, the "burial trustee" is senior to any administrative claim arising from the reorganization case. See 11 U.S.C. § 726(b) (2006) (making exception in cases converted to chapter 7 for "claim allowed under section 503(b) . . . incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) . . . incurred under any other chapter of this title or under this chapter before such conversion . . .").

¹⁷³ 11 U.S.C. § 507(b) (2006).

¹⁷⁴ See 2 CARLSON & GILMORE, *supra* note 25, at 151–60 (discussing refusal to uphold failed adequate protection claims when there is no benefit to estate from depreciation of collateral).

¹⁷⁵ A different justification was presented by Judge Bohm in *In re Perez*: "Section 1326(b) requires payment of administrative expenses '[b]efore or at the time of each payment to [non-administrative] creditors.'" 339 B.R. 385, 407 (Bankr. S.D. Tex. 2006). Judge Bohm's response to this challenge was to say that distributions could be made to secured creditors *at the same time* as distributions to the administrative creditors. *Id.* at 408. It is hard to see how this justification can be contained to secured creditors only. Judge Bohm's interpretation would appear to give *every* creditor the right to be paid at the same time as the administrative creditors, which, of course, cuts the heart of the priority that section 1326(b) was supposed to create. See *In re Harris*, 304 B.R. 751, 757 (Bankr. E.D. Mich. 2004) (holding "same time" permits administrative creditors to consent to deferred payment, but they cannot be compelled to accept it); *In re Moses*, 293 B.R. 711, 714 (Bankr. E.D. Mich. 2003) (asserting "same time as" permitted but did not require car lender to be paid at same time as administrative creditors).

¹⁷⁶ As further evidence of this claim, section 365(d)(3) obligates the trustee to perform obligations under nonresidential real property leases "notwithstanding section 503(b)(1)." 11 U.S.C. § 365(d)(3) (2006). Since rent to lessors is what interest and amortization are to secured creditors, section 365(d)(3) implies that the independent obligation of the bankruptcy estate to make current payments is disconnected from the concept of the administrative claim. See 11 U.S.C. § 365(d)(3) (2006) ("This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section."); see also 11 U.S.C. § 365(b) (2006) (outlining conditions under which trustee may assume a contract or lease upon default of executory contract or unexpired lease of debtor); 11 U.S.C. § 365(f) (2006) (stating requirements for

than forcing the round adequate-protection peg into the square administrative-claim hole. It should be seen that adequate protection is separate from and simply prior to administrative claims generally, and so secured creditor should be paid for depreciation before any administrative creditor gets paid. Indeed, administrative creditors must await confirmation of the chapter 13 plan to be paid. Not so with secured creditors whose collateral is depreciating. These creditors are entitled to adequate protection, which includes the concept of payment in compensation of depreciation.¹⁷⁷

Not to be overlooked is the implication we drew from section 1326(a)(2), where it appears that, after 2005, the chapter 13 trustee is permitted to and arguably must pay the car lender prior to confirmation. If this hint is followed up, the car lender has already been paid before section 1326(b) can have any effect. Even if some adequate protection amounts are still due, it should also be remembered that, at a certain point, the cram down payments kick in. These are not adequate protection payments. Rather, cram down payments constitute interest and an amortization of principal in ways not necessarily connected with depreciation of the collateral.¹⁷⁸ So to the extent there are cram down payments, the plan should indicate what part of this potentially larger amount is compensation for depreciation. Only the depreciation expense should have the priority under Judge Isgur's local rule.

3. Installments as Adequate Protection Payments

As noted earlier, adequate protection payments must be distinguished from contract installments and cram down payments. In *In re DeSardi*,¹⁷⁹ a local rule dictated the amount of adequate protection payments required.¹⁸⁰ Each of the three debtors encompassed by the *DeSardi* opinion proposed to pay a lesser amount for the first few months of the plan. Then, at a designated month, the payments became cram down payments at a considerably higher amount.¹⁸¹ This practice reflected the

trustee's assignment of executory contract or unexpired lease).

¹⁷⁷ See 11 U.S.C. § 361(1) (2006) (providing for adequate protection when there is "decrease in the value of such entity's interest" in property). A slightly different solution is presented by Judge Bohm in *In re Perez*: since section 1326(b) permits payments to an administrative creditor *before and at the same time* as creditors under the plan, adequate protection payments may be made *at the same time* as administrative creditors are paid, even though the administrative claims have not been paid in full. *In re Perez*, 339 B.R. 385, 407 (Bankr. S.D. Tex. 2006). This argument cannot be contained to adequate protection payments. It works for any creditor under the plan, who can insist that all payments be shared, even though the administrative claims are not paid.

¹⁷⁸ Under new section 1325(a)(5)(B)(iii)(II), cram down payments can never be less than a hypothetical adequate protection amount. See *infra* text accompanying notes 340–59.

¹⁷⁹ *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. 2006).

¹⁸⁰ Texas Southern District Local Rule 4001(e)(2) requires an adequate protection payment of 1.5% per month of the vehicle's value. BANKR. S.D. TEX. R. 4001(e)(2). See also *In re DeSardi*, 340 B.R. at 795 n.2 ("[A]dequate protection must be provided in an amount equal to 1.5% of the average wholesale and retail value of the vehicle."). Discretion exists to change this amount. BANKR. S.D. TEX. R. 4001(e)(3) (providing procedures for objection hearing initiated by debtor or other interested party).

¹⁸¹ The tipping point in the case of debtor A was five months after the petition date. *In re DeSardi*, 340

fact that cram down payments are not the same as compensation for depreciation. The former includes interest compensation which is not appropriate in the context of adequate protection.¹⁸²

The Southern District of Texas rule also requires payments to the home mortgage lender via the chapter 13 trustee.¹⁸³ In *In re Perez*,¹⁸⁴ debtors requested the right to pay the mortgage lenders directly (thereby lowering the fee to the chapter 13 trustee).¹⁸⁵ The reason for the request was to keep the mortgage current and to prevent the effect of section 1326(b), which, the debtors said, subordinated to the home mortgage to administrative claims.¹⁸⁶ Judge Jeff Bohm refused to confirm plans calling for direct payments and explained how section 1326(b) was no impediment to getting the funds to the mortgage lenders. According to Judge Bohm, the payments were not "under the plan" and therefore not subject to section 1326(b)'s subordination of "creditors under the plan."¹⁸⁷ Rather the mortgage payments were adequate protection payments required by section 363(e) irrespective of the confirmation of any plan.¹⁸⁸

This claim is particularly implausible in the real estate context. Whereas cars depreciate, real estate does not necessarily do so, where it is well maintained. Indeed, recent history shows real estate going up in value. So Judge Bohm's ruling contradicts the authority that insists that adequate protection payments equate with depreciation and contain no interest component.¹⁸⁹ Where the lender enjoys an equity cushion, the home mortgage payments can better be defended as a section 506(b) interest payment to an oversecured creditor. Such payments can be made prior to confirmation of a plan, although the secured creditor does not have the right

B.R. at 794. Presumably the assumption is that confirmation would occur in the fifth month, as was the case. With debtor B, the tipping point was "month five and continu[ing] through month sixty." *Id.* at 795. Presumably, this was the fifth month after the petition date, not the fifth month after confirmation. Debtor C's tipping point was "month seven." *Id.* Presumably this too was month seven after the bankruptcy petition, not month seven after confirmation.

¹⁸² Hildebrand, *supra* note 105, at 379 ("Undersecured creditors are not entitled to post-petition interest . . . until a [c]hapter 13 plan has been confirmed and the present value factor/interest must also be paid to satisfy a secured creditor's claim.").

¹⁸³ BANKR. S.D. TEX. R. 3021 (describing payments made by chapter 13 trustee, including payments "on claims that are for future mortgage payments").

¹⁸⁴ *In re Perez*, 339 B.R. 385 (Bankr. S.D. Tex. 2006).

¹⁸⁵ *Id.* at 392–93.

¹⁸⁶ *Id.* at 397.

¹⁸⁷ *Id.* at 397–98. *Accord In re Cook*, 205 B.R. 437, 440 (Bankr. N.D. Fla. 1997) (ruling "adequate protection payments are payments under a plan"). The irony should not be missed that calling mortgage payments "not under the plan" usually authorizes direct payments from the debtor. Here Judge Bohm's idea is that the mortgage payments are not "under the plan," but nevertheless must be made directly to the chapter 13 trustee. *In re Perez*, 339 B.R. at 417 (denying debtors' request to make payments directly to creditors).

¹⁸⁸ *In re Perez*, 339 B.R. at 397–98.

¹⁸⁹ *In re Cook*, 205 B.R. 437, 441 (Bankr. N.D. Fla. 1997) ("The purpose of adequate protection payments is to compensate a secured creditor for any depreciation of its collateral between the time the creditor moves for relief from stay and confirmation."); *In re Johnson*, 63 B.R. 550, 553 (Bankr. D. Colo. 1986) (stating adequate protection payments are completely compensatory and interest is "common measure of the difference" in payments).

to insist on current payment in lieu of accrual.¹⁹⁰ Even so, part of the mortgage installment will be amortization of principal. So section 506(b) cannot entirely defend the payment of the mortgage installment.

To get around the point that mortgage payments do not equate with depreciation, Judge Bohm declared the mortgage payments to be adequate protection under section 361(3) "such other relief . . . as will result in the realization by such entity of the indubitable equivalent of the creditor's interest in the collateral."¹⁹¹ To justify this conclusion, Judge Bohm ruled that other forms of adequate protection are insufficient.¹⁹² Typically, debtors have no extra collateral to cover depreciation. And as to payments equating with depreciation, this was not feasible because "it is not cost efficient for [c]hapter 13 debtors, their lenders, and [c]hapter 13 trustees to determine the monthly depreciation of the debtors' principal residence."¹⁹³ Furthermore, reducing the home mortgage payment to depreciation (if any) violates the spirit of section 1322(b)(2), which prohibits a plan from modifying a home mortgage.¹⁹⁴

These are not plausible claims. First, in many cases it should be apparent, in a favorable real estate market, that houses are not depreciating at all. It should be easy to prove this with realtor testimony and economic data. Second, the rules for reinstating home mortgages are completely divorced from adequate protection concerns. Just as adequate protection and cram down are mutually exclusive categories, so is reinstatement, which is itself an alternative to cram down.

Yet another problem with Judge Bohm's solution is the suggestion that a chapter 13 trustee can use pre-confirmation wages to pay adequate protection during the pre-confirmation period. According to section 1326(a) as amended, the debtor pays to the trustee only the amount "proposed by the plan,"¹⁹⁵ rent on cars¹⁹⁶ or adequate protection payments on purchase money security interest on personal property—i.e., cars.¹⁹⁷ Payments on the home mortgage are not mentioned there. Earlier it was suggested that the amendment to section 1326(a)(2) hints that the chapter 13 trustee should make payments to the car lender. This requires getting past the inapt cross-reference to subparagraph (3), which refers to "payments required under this subsection pending confirmation of a plan."¹⁹⁸ This should have

¹⁹⁰ Orix Credit Alliance, Inc. v. Delta Res., Inc. (*In re Delta Res.*), 54 F.3d 722, 730 (11th Cir. 1995) (holding Orix "was not entitled to receive periodic payments for accruing post-petition interest as part of adequate protection for any period of time").

¹⁹¹ *In re Perez*, 339 B.R. at 400.

¹⁹² *Id.*

¹⁹³ *Id.* at 401.

¹⁹⁴ *Id.*

¹⁹⁵ 11 U.S.C. § 1326(a)(1)(A) (2006) ("Unless the court orders otherwise, the debtor shall commence making payments . . . in the amount proposed by the plan to the trustee.").

¹⁹⁶ 11 U.S.C. § 1326(a)(1)(B) (2006) ("[D]ebtor shall commence making payments . . . in the amount scheduled in a lease of personal property directly to the lessor.").

¹⁹⁷ 11 U.S.C. § 1326(a)(1)(C) (2006) (requiring debtor to make payments in amount providing "adequate protection directly to a creditor holding an allowed claim secured by personal property to the extent the claim is attributable to the purchase of such property by the debtor").

¹⁹⁸ 11 U.S.C. § 1326(a)(3) (2006) (awarding power to court to "modify, increase or reduce" payments

been a reference to subparagraph (1)(C). If this is accepted, the reference to personal property in subparagraph (1)(C) cuts against the idea that the home mortgage lender can be paid free and clear of the strictures of section 1326(b).¹⁹⁹

Perez stands for the proposition that resuming installment payments under a security agreement can be viewed as a species of adequate protection, thereby permitting disbursements in spite of section 1326(b)'s insistence that the administrative creditors be paid first. While this solution permits car lenders to be paid, it is conceptually erroneous to equate installments—which include post-petition interest—with adequate protection payments, which must *not* include an interest component, consistent with *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*²⁰⁰

"pending confirmation of a plan").

¹⁹⁹ The debtors also complained that the local rule amounts to a modification of the home mortgage agreement, in violation of section 1322(b)(2), because the rule compels lenders to waive late fees generated because the debtors have to make mortgage payments through the chapter 13 trustee. *In re Perez*, 339 B.R. at 402. Judge Bohm ruled that the debtors have no standing to make this objection to the rule. *Id.* But nevertheless, he provided an answer.

According to the local rule, amounts received by the mortgage lender prior to confirmation must either be applied to the installment past due, with a waiver of late charges, or the amount can be applied to a future installment due and owing, preserving the lenders' right to collect the overdue installment together with late fees. In the latter case, the chapter 13 trustee will have established a pattern that guarantees payment in advance of any given installment. Judge Bohm ruled that this procedure did not constitute a modification of the home mortgage. *Id.* at 402–04.

²⁰⁰ 484 U.S. 365, 372 (1988). Another possibility must be acknowledged. Prior to the Supreme Court's opinion in *Timbers of Inwood Forest*, several cases held that, as a matter of discretion, courts could award post-petition interest to undersecured parties. *See Lend Lease v. Briggs Transp. Co. (In re Briggs Transp. Co.)*, 780 F.2d 1339, 1346 (8th Cir. 1985) (indicating creditor's right to adequate protection varies depending on character of situation and will not always "include the payment of interest for opportunity costs"); *see also Norwest Bank Worthington v. Ahlers (In re Ahlers)*, 794 F.2d 388, 395 (8th Cir. 1986) (stating bankruptcy court may furnish creditor with adequate protection in form of post-petition interest payments), *rev'd and remanded on other grounds*, 485 U.S. 197 (1988), *vacated and remanded*, 844 F.2d 587 (8th Cir. 1988). One writer described this position as the one that "most closely meets Congress's intent that courts use flexibility in determining adequate protection." Diana Carey, *Adequate Protection: Lost Opportunity Costs After American Mariner, In re Briggs, and In re Timbers*, 19 UCC L.J. 317, 320 (1987).

After *Timbers*, Judge Harry Wellford suggested that post-petition interest awards might be a discretionary aspect of adequate protection. "[T]he Court held," he wrote:

[T]hat the undersecured creditor in *Timbers* could not *require* the debtor to make adequate protection payments [of post-petition interest], not that the debtor was forbidden from making the payments as an exercise of its business judgment, if court approved.

N.Y. Life Ins. Co. v. Revco D.S., Inc. (In re Revco D.S., Inc.), 901 F.2d 1359, 1365 (6th Cir. 1990). This sentiment has not often been endorsed. *See Parker v. Concorde Ltd. P'ship (In re Concorde Ltd. P'ship)*, 67 B.R. 717, 723–24 (Bankr. E.D. Tenn. 1986) ("This court does not believe that lost opportunity cost is always required for adequate protection. Indeed, the payment . . . should rarely be required, if ever. The court sees no special circumstances in this case that call for the payment . . .").

Perez therefore could stand for the proposition that courts have discretion to award interest as part of adequate protection, in spite of *Timbers*.

4. Valuation

BAPCPA arguably orders adequate protection payments to car lenders from day one of the chapter 13 proceeding. These payments should equate with depreciation. But how should the car be valued?

Looking ahead to cram down, we are about to learn that BAPCPA prevents bifurcation of many (though not all) car loans. Suppose the car lender is in the class of lenders who cannot be bifurcated. For example, suppose the car is worth \$20,000 and depreciation is 1.5% a month. Suppose the lender claims \$30,000 against the car. If the debtor wishes to keep the car, the debtor will have to give the car lender \$30,000 in present value (over time).²⁰¹ So does adequate protection mean 1.5% of \$20,000 or 1.5% of \$30,000?

Although every secured creditor is entitled to adequate protection, it is not the case that the debtor is required to retain the car. The debtor can return the car,²⁰² in which case the secured creditor has an asset worth \$20,000. So, properly, what is being protected is the return, not the right to the cram down price. Therefore, the 1.5% should be deducted against the \$20,000, as Judge Isgur properly recognized in *DeSardi*.²⁰³

Suppose further that the replacement value of the car, given its condition, is \$25,000 and the wholesale value is \$20,000. Which valuation standard is appropriate for adequate protection purposes? The answer is replacement value, pursuant to new section 506(a)(2), which provides:

If the debtor is an individual in a case under chapter 7 or 13, *such* value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.²⁰⁴

The italicized *such* indicates that section 506(a)(2) refers back to the value required to be found in section 506(a)(1). Section 506(a)(1) does contain this

²⁰¹ See *infra* Part III.A & 1.

²⁰² See 11 U.S.C. § 1325(a)(C) (2006) ("[D]ebtor surrenders the property securing such claim to such holder.").

²⁰³ 340 B.R. 790, 804 (Bankr. S.D. Tex. 2006) (indicating court should apply 1.5% monthly depreciation to amount owed rather than to car's value). Oddly, though the car is worth \$20,000 in our example, it will be deemed worth \$30,000 if the debtor wishes to use the car as an asset payment extinguishing the car debt. See *infra* Part III.F.

²⁰⁴ 11 U.S.C. § 506(a)(2) (2006) (emphasis added).

sentence: "Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."²⁰⁵

This sentence has in the past justified the choice of wholesale value for adequate protection purposes.²⁰⁶ But it seems clear enough that, in spite of the invitation to consider disposition or use, new section 506(a)(2) requires a replacement value for adequately protecting car lenders.²⁰⁷

5. Equal Installments

A BAPCPA innovation is the requirement of equal monthly cram down payments.²⁰⁸ The new rule poses special problems for reconciling cram down payments with the rule in section 1326(b), which subordinates cram down payments to the prior payment of administrative expenses and adequate protection payments.

In *DeSardi*, Judge Isgur confirmed plans in which the car lender was paid initially in relatively small installments to cover adequate protection, followed by larger cram down payments. A car lender challenged the change in the amount paid by reference to new BAPCPA provisions pertaining to cram down. These new provisions supplement the requirement that the secured creditor receive property with the present value of its secured claim. According to section 1325(a)(5)(B)(iii):

(iii) If—

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

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

²⁰⁵ 11 U.S.C. § 506(a)(1) (2006).

²⁰⁶ *Baybank-Middlesex v. Ralar Distribs., Inc.*, 69 F.3d 1200, 1203 (1st Cir. 1995); *In re Valley Park Group, Inc.*, 96 B.R. 16, 23–24 (Bankr. N.D.N.Y. 1989).

²⁰⁷ The emphasized "such" links section 506(a)(2) back to section 506(a)(1), which contains the unchanged text of former section 506(a). The point is significant for redemption under section 722. Section 722 permits redemption of exempted or abandoned property—property *not* of the bankruptcy estate. Yet section 506(a)(1) is limited to "property in which the estate has an interest" Ergo, it is open for debtors to pay liquidation value as the redemption price, according to pre-2005 practice. See *Weber v. Wells Fargo Auto Fin., Inc.* (*In re Weber*), 332 B.R. 432, 437 (B.A.P. 10th Cir. 2005) (noting redemption is equal to surrender of automobile followed by public auction where debtor appears, bids and purchases automobile for liquidation value as determined by market on date of sale); *In re Penick*, 170 B.R. 914, 917 (Bankr. W.D. Mich. 1994) (ruling for wholesale but not liquidation value); *Redding v. Signal Consumer Disc. Credit Corp.* (*In re Redding*), 34 B.R. 971, 973 (Bankr. M.D. Pa. 1983) (concluding some bankruptcy courts have established fair market value to be equal to wholesale value allowing debtors to redeem vehicles at wholesale). *But see* *Gen. Motors Acceptance Corp. v. Bell* (*In re Bell*), 700 F.2d 1053, 1055 n.3 (6th Cir. 1983) (suggesting section 722 valuation is founded upon section 506(a)).

²⁰⁸ See 11 U.S.C. § 1325(a)(5)(B)(iii)(I) (2006) (permitting periodic payments under chapter 13 plan to be in equal monthly amounts). According to Judge Keith Lundin, this new rule "shows no respect for [c]hapter 13 debtors who have seasonal or irregular incomes" 5 LUNDIN, *supra* note 27, § 448.1 at 448-3.

during the period of the plan²⁰⁹

According to Judge Isgur, section 1326(a)(5)(B)(iii)(I) does not apply to adequate protection payments.²¹⁰ It only requires that cram down payments, once they commence, must be equal.²¹¹ Therefore, the only way to reconcile the secured creditor's right to adequate protection payments and equal cram down installments is to commence with the adequate protection payments and convert to the higher cram down payment later in time, once all senior administrative claims have been paid. To import the cram down amount into the adequate protection period would be to award post-petition interest to the secured creditor as part of adequate protection, which the Supreme Court has declared a *faux pas*. It would also violate one reading of section 1326(b), which dictates that administrative creditors be paid prior to cram down creditors.

6. Car Leases

BAPCPA not only protects purchase money secured parties generally, but section 1326(a)(1)(B) gives rights to lessors of personal property,²¹² reflecting that the fact that car leases have begun to compete with outright sales of cars to consumers. New section 1326(a)(1)(B) seems to require that car lessors be paid in full by the debtor prior to confirmation of the plan.

Ironically, where the mode of finance is purchase money lending, the secured creditor obtains only adequate protection, equating with the depreciation of the car.²¹³ But where the mode of finance is leasing, the lessor gets the contract installment, which will cover both depreciation and a return on the lender's investment—i.e., interest.²¹⁴ For whatever reason, Congress has favored leasing over secured lending, in terms of the pre-confirmation period. This bias is a long-standing one by no means invented in BAPCPA.²¹⁵

Prior to 2005, there simply was no rule for personal property leases in chapter

²⁰⁹ 11 U.S.C. § 1325(a)(5)(B)(iii)(2006) (emphasis added).

²¹⁰ *In re Desardi*, 340 B.R. at 806 (stating equal payment "requires that payments be level once they begin and terminate once the lender is fully paid"). Also, the equal payments can cease before the plan ends—as when the car lender is paid in full. *Id.* There is nothing in the 2005 amendments that prohibits accelerated payment to the car lender—only that the payments be equal. *Id.* (reaffirming requirement of level equal payment provisions once they begin).

²¹¹ *Accord In re Blevins*, No. 06-10978 A 13, 2006 WL 2724153, at *2 (Bankr. E.D. Cal. Sept. 21, 2006) (following *DeSardi* in this regard).

²¹² 11 U.S.C. § 1326(a)(1)(B) (2006) (requiring debtor to make payments in amounts scheduled "in a lease of personal property directly to the lessor").

²¹³ 11 U.S.C. § 361 (2006) (enumerating methods of adequate protection when collateral's value decreases as result of automatic stay).

²¹⁴ 11 U.S.C. § 1326(a)(1)(B) (2006) (determining amount to be paid to lessors as amount "scheduled in lease of personal property").

²¹⁵ Compare *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988) (holding no return on investment for undersecured creditors), with 11 U.S.C. § 365(d)(3) (2006) (stating nonresidential real estate lessees are to obtain rent prior to rejection or assumption of lease).

13. Section 365(d)(5), which remains unchanged,²¹⁶ is a chapter 11 rule only which provides that lease payments be made in full, and it does not apply to personal property leases "leased to an individual primarily for personal, family, or households purposes."²¹⁷ In chapter 13, a debtor is made subject to section 365(d),²¹⁸ and this obligates the debtor to pay leases on real estate if the lease is assumed, but it is hard to see how section 365(d) had anything to say about consumer car leases. Be that as it may, it is open for a debtor to reject the car lease in a chapter 13 plan.²¹⁹ So what a debtor must do now is to provide payment in full of the car lease until confirmation; prior to confirmation, the debtor should make the lease payments "directly to the lessor."²²⁰ Of course, a court apparently may order otherwise and insist that rent payments be made via the chapter 13 trustee.

7. Nonpurchase Money Secured Parties

According to section 1326(a)(1)(C), adequate protection payments are required only if the car lender is a purchase money lender with regard to personal property.²²¹ No guidance is given for the adequate protection rules for non-purchase money lenders. This leads to the view, perhaps, that, since Congress limited automatic adequate protection to purchase money lenders claiming personal property, all other secured creditors are *not* entitled to adequate protection. In other words, the regime of "you have to ask for it" is strengthened with regard to any other sort of security interest.

Another issue that will undoubtedly arise is, what is a purchase money security interest? The Uniform Commercial Code ("UCC") supplies a clear enough rule in non-consumer cases: it opts for the dual status rule.²²² The dual status rule provides that a secured party has two security interests. One is a purchase money security

²¹⁶ Prior to 2005, this provision was numbered as section 365(d)(10).

²¹⁷ 11 U.S.C. § 365(d)(5) (2006).

²¹⁸ The ground for this conclusion is peculiar. According to section 365(d)(2), a trustee in a chapter 13 case may assume or reject the debtor's residential real property lease. Chapter 13 plans, however, tend to assume unexpired leases, but only the debtor can write a chapter 13 plan. See 11 U.S.C. § 1321 (2006); Model Plan, United States District Court Northern District of Illinois, Sept. 1, 2006, § B1 ("The debtor assumes all unexpired leases and executory contracts identified in the debtor's Schedule G."). Section 1322(b)(7) does provide that a plan may assume or reject a lease, but only "subject to section 365." 11 U.S.C. § 1322(b)(7) (2006). Therefore, a plan that purports to assume a lease without the chapter 13 trustee's permission is technically not "subject to section 365." The Supreme Court has ruled that no one but the trustee can surcharge collateral, since section 506(c) mentions the trustee and no one else. See *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). A majority of courts believe a chapter 13 debtor has no right to bring avoidance actions since they specifically mention the trustee as having that right. See *Stangel v. United States (In re Stangel)*, 219 F.3d 498, 501 (5th Cir. 2000); *Realty Portfolio, Inc. v. Hamilton (In re Hamilton)*, 125 F.3d 292, 296 (5th Cir. 1997); *Hansen v. Green Tree Serv., LLC (In re Hansen)*, 332 B.R. 8, 12 (B.A.P. 10th Cir. 2005). Therefore, it should follow that debtors cannot assume their leases in a plan. All of this is, however, universally ignored in practice.

²¹⁹ 11 U.S.C. § 1322(b)(7) (2006).

²²⁰ 11 U.S.C. § 1326(a)(1)(B) (2006) (stating debtor must begin making payments "directly to the lessor" no more than thirty days after filing plan).

²²¹ 11 U.S.C. § 1326(a)(1)(C) (2006).

²²² U.C.C. § 9-103 cmt. 7 (2005) (approving dual status rule for non-consumer goods transactions).

interest to the extent of the purchase money loan and the other a non-purchase money security interest for the balance. But in consumer cases, the UCC punts. Oddly, UCC section 9-103(h) provides:

The limitation of the rules in subsections (e), (f) and (g) to transactions other than consumer-goods transactions is intended to leave to the court the determination of the proper rules in consumer-goods transactions. The court may not infer from that limitation the nature of the proper rule in consumer-goods transactions and may continue to apply established approaches.²²³

So the UCC *demand*s that judges legislate in this area; the legislature refuses to give advice.

Competing with the dual status rule is the transformation rule²²⁴ what Professor Robert Lloyd calls the "meat-axe approach."²²⁵ The transformation rule holds that even one impure non-purchase money dollar spoils the purchase money status of the security interest. At least one court has applied the transformation rule in the cram down context.²²⁶ Another court has held that, even though the amount due included payment for a service contract as well as for the purchase money obligation, it was still a purchase money security interest.²²⁷ Courts will have to choose from these contradictory positions in adjudicating the right to adequate protection.²²⁸

In support of the dual status rule in this context is the fact that section 1326(a)(1)(C) refers to "an allowed claim secured by personal property *to the extent* the claim is attributable to the purchase of such property"²²⁹ The words "to the extent" imply that non-purchase money debt does not entirely spoil the right to adequate protection. On the other hand, these same words suggest that the nonpurchase money portions of the claim be disregarded for adequate protection purposes. For example, if the car is worth \$20,000 the lender claims \$30,000, but, of this amount, only \$15,000 is a purchase money obligation, then, for adequate

²²³ U.C.C. § 9-103(h) (2005). Louisiana's version of the UCC applies the dual status rule in consumer cases. See LA. REV. STAT. ANN. § 10:9-103 (2002) (omitting subsection (h) of official version).

²²⁴ For cases following the transformation rule for purposes of section 522(f)(1)(B), see *In re Shaw*, 209 B.R. 393, 397 (Bankr. N.D. Miss. 1996); *In re Hillard*, 198 B.R. 620, 624 (Bankr. N.D. Ala. 1996); *Carter v. W.S. Badcock Corp.* (*In re Carter*), 180 B.R. 321, 324 (Bankr. M.D. Ga. 1995); *In re Short*, 170 B.R. 128, 133 (Bankr. N.D. Ill. 1994); *Parish v. Lincoln Fin. Co.* (*In re Parish*), 147 B.R. 187, 188–89 (Bankr. E.D. Mo. 1992); *In re Snipes*, 86 B.R. 1006, 1007 (Bankr. W.D. Mo. 1988).

²²⁵ Robert M. Lloyd, *Refinancing Purchase Money Security Interests*, 53 TENN. L. REV. 1, 84–85 (1985) ("[W]e can identify the purposes of the Bankruptcy Code clearly enough that we can say with confidence that the transformation rule is at best a meat-axe approach to furthering these purposes.").

²²⁶ *In re Horn*, 338 B.R. 110, 113–14 (Bankr. M.D. Ala. 2006) (determining claim was not purchase money security interest so it could be bifurcated into secured and unsecured sections as part of cram down).

²²⁷ *In re Murray*, 346 B.R. 237, 240 (Bankr. M.D. Ga. 2006) (concluding simultaneous purchase of motor vehicle and extended service contract did not prevent creditor from taking purchase-money security interest in motor vehicle).

²²⁸ *In re Vega*, a debtor chose to write a plan based on the dual status rule, so this case has little to say on a plan based on the transformation rule. 344 B.R. 616, 622–23 (Bankr. D. Kan. 2006).

²²⁹ 11 U.S.C. § 1326(a)(1)(C) (2006) (emphasis added).

protection purposes, the car lender is oversecured by \$5,000. As an equity cushion is a mode of adequate protection,²³⁰ such a secured lender would not be entitled to cash payment until the equity cushion is exhausted.

Also left out of section 1326(a)(1)(C) are lenders, purchase money or otherwise, of real estate. Nevertheless, in *In re Perez*, Judge Bohm ruled that section 1326(a)(2) permits mortgage lenders to be paid in the pre-confirmation period (pursuant to the local rule of the Southern District of Texas).²³¹ This is because he thought these installments could be recharacterized as adequate protection payments under section 361. The reference in new section 1326(a)(1)(C) to purchase money claims against personal property is an impediment to the position Judge Bohn took in *Perez*.

III. CRAM DOWN UNDER BAPCPA

A. The Hanging Paragraph

Prior to 2005, a chapter 13 debtor could cram down a car lender by bifurcating the claim, with the secured claim equating with the replacement value of the car.²³² The plan had to give the car lender the present value of the car. An interest rate had to set by way of a discount factor. In 2003, a majority of the Supreme Court made clear that the discount factor could be far to the south of the interest rate agreed to by the debtor in the security agreement.²³³

To aid the car lenders, BAPCPA amends the cram down provision in chapter 13 in a most peculiar way. According to the new last sentence in section 1325(a):

For purposes of paragraph (5), section 506 does not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day [sic] preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title

²³⁰ 2 CARLSON & GILMORE, *supra* note 25, at 61–64 (explaining "equity cushion" as form of adequate protection).

²³¹ *In re Perez*, 339 B.R. 385, 399 (Bankr. S.D. Tex. 2006) ("[B]ecause of its inapplicability, . . . section [1326(a)(2)] may not be used to bar the trustee from making pre-confirmation adequate protection payments to mortgagees.").

²³² Replacement value was supposedly decreed by the Supreme Court in *Associates Commercial Corporation v. Rash*, 520 U.S. 953, 956 (1997) ("We hold that [section] 506(a) directs application of the replacement-value standard."). On the "near perfect ambiguity" of this opinion, see Jean Braucher, *Getting It for You Wholesale: Making Sense of Bankruptcy Valuation of Collateral After Rash*, 102 DICK. L. REV. 763, 764 (1998).

²³³ Four justices favored the prime rate plus a modest risk supplement. One justice favored a risk-free rate. *Till v. SCS Credit Corp.*, 541 U.S. 465, 487 (2004) (Thomas, J. concurring) ("In most, if not all, cases, where the plan proposes simply a stream of cash payments, the appropriate risk-free rate should suffice."). See generally Michael Elson, *Say Ahhh! A New Approach for Determining the Cram Down Interest Rate After Till v. SCS Credit*, 27 CARDOZO L. REV. 1921 (2006).

49)²³⁴ acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.²³⁵

This sentence, which has been called "the hanging paragraph,"²³⁶ the "dangling paragraph,"²³⁷ or the "910 paragraph"²³⁸ or section 1325(a)(*),²³⁹ or section 1325(a)(9),²⁴⁰ does not exactly say that there can be no cram down of new cars. It only says that, *if* there is a cram down, section 506 shall not apply.²⁴¹ Congress for some reason declined to take cars entirely off the cram down table, in imitation of the home mortgage.²⁴²

Nor did the hanging paragraph make it into chapter 11 for individuals. One thing BAPCPA does is to conform individual chapter 11 cases with chapter 13 cases. For example, the bankruptcy estate is extended to post-confirmation property acquired by the debtor,²⁴³ in imitation of chapter 13.²⁴⁴ An individual's chapter 11 plan can be modified after confirmation,²⁴⁵ just as in chapter 13.²⁴⁶ The absolute

²³⁴ This section defines "motor vehicle" as "a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line." 49 U.S.C. § 30102(6) (2006). This definition makes clear that private railway cars continue to be subject to bifurcation in chapter 13.

²³⁵ 11 U.S.C. § 1325(a) (2006).

²³⁶ *In re* Jackson, 338 B.R. 923, 925 (Bankr. M.D. Ga. 2006) (referring to last paragraph in section 1325(a) as "hanging paragraph"); *In re* Carver, 338 B.R. 521, 523 (Bankr. S.D. Ga. 2006) ("Congress inserted the language as an unnumbered paragraph following [section] 1325(a)(9) (the 'hanging paragraph')."); *In re* Johnson, 337 B.R. 269, 273 (Bankr. M.D.N.C. 2006) (acknowledging last paragraph in section 1325(a) as "hanging paragraph").

²³⁷ 5 LUNDIN, *supra* note 27, §§ 446.1, 451.1 (referring to "dangling paragraph" as last paragraph in section 1325(a)).

²³⁸ *See In re* DeSardi, 340 B.R. 790, 811 (Bankr. S.D. Tex. 2006) ("[T]his Court will refer to the paragraph as 'the 910-paragraph' due to its substance.").

²³⁹ *See In re* Murray, 346 B.R. 237, 238 n.1 (Bankr. M.D. Ga. 2006) ("[T]he hanging paragraph of [section] 1325(a) will be referred to as '[section] 1325(a)(*).'"

²⁴⁰ *See In re* Rowley, 348 B.R. 479, 481 & n.4 (Bankr. S.D. Ill. 2006) (renaming "hanging paragraph" as "1325(a)(9)").

²⁴¹ Nevertheless, the legislative history states, "It is intended that cramdown not apply to any collateral described in this provision during the periods of time specified . . ." 146 CONG. REC. S11683-02 (2000). Obviously, instead of "cramdown" the legislative history should have said "bifurcation."

²⁴² *See In re* Trejos, No. BK-S-06-10231-LBR, 2006 WL 2884384, at *12 (Bankr. D. Nev. Sept. 25, 2006) ("BAPCPA prevented stripdown, not cramdown."). Furthermore, whereas extra collateral for the home mortgage lender means forfeiture of the anti-modification rule according to section 1322(b)(2), no such restriction applies to car lenders. *See* 11 U.S.C. § 1322(b)(2) (noting plan can modify certain rights except "claim secured only by a security interest in real property that is the debtor's principal residence"); *see also In re* Wright, 338 B.R. 917, 920 (Bankr. M.D. Ala. 2006) ("Had Congress intended to create a complete safe harbor for the automobile lender with a purchase-money security interest, it could have expressly done so, but it did not."); *In re* Johnson, 337 B.R. 269, 272-73 (Bankr. M.D.N.C. 2006) ("Cases interpreting [s]ection 1322(b)(2) to require that a creditor be secured 'only' by a mortgage in order to gain the protections of that section are distinguishable from [cases involving vehicles].").

²⁴³ *See* 11 U.S.C. § 1115 (2006) (defining what constitutes property of estate under chapter 11 when debtor is individual).

²⁴⁴ *See* 11 U.S.C. § 1306 (2006) (explaining what constitutes property of estate under chapter 13).

²⁴⁵ *See* 11 U.S.C. § 1128 (2006) (highlighting requirement of hearing on confirmation of plan).

²⁴⁶ *See* 11 U.S.C. § 1329 (2006) ("At any time after confirmation of the plan but before the completion of

priority rule is repealed in chapter 11 for individuals,²⁴⁷ to conform with chapter 13. The chapter 11 discharge for individuals now occurs at the end of the plan,²⁴⁸ not upon confirmation, as it does for non-individual chapter 11 debtors,²⁴⁹ conforming, more or less, to the chapter 13 rule.²⁵⁰ A salient difference between chapters 11 and 13 is that, in chapter 11, the new car can be bifurcated in a cram down.

The consensus has quickly formed, with some early dissenters, that Congress intended that purchase money security interests on "new" cars—910 vehicles—can be crammed down, but the car must be deemed worth whatever is due and owing to the secured creditor. For instance, if the value of the car is \$20,000 and the purchase money secured creditor claims \$30,000 against it, the chapter 13 debtor who wishes to retain the car must give a present value of \$30,000 to the secured creditor. The time of payment and the amount of interest, however, need not conform to the original security agreement. Rather, a (presumably lower) cram down interest rate may be imposed on the car lender.²⁵¹ For this reason, new cars

payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim . . .").

²⁴⁷ See 11 U.S.C. § 1129(b)(2)(B)(II) (2006) ("[T]he holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.").

²⁴⁸ See 11 U.S.C. § 1141(d)(5) (2006) ("[U]nless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan.").

²⁴⁹ See 11 U.S.C. § 1141(d)(1)(A) (2006) ("[T]he plan, the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation and any debt of a kind specified . . .").

²⁵⁰ See 11 U.S.C. § 1328(a) (2006) (providing for discharge after completion of "all payments under the plan"). There are some differences in the discharges provided by chapters 11 and 13. For instance, after 2005, chapter 13 discharge does not extend to damages for willful or malicious injury to a person, whereas in chapter 11 a discharge for this is available. See 11 U.S.C. § 1328(a)(4) (2006). This certainly suggests that O.J. Simpson will prefer chapter 11 to chapter 13. Also, in chapter 13, no discharge is available unless the debtor has completed an instructional course concerning personal financial management, another reason for O.J. Simpson to prefer chapter 11. See 11 U.S.C. § 1328(g)(1) (2006). Finally, chapter 13 discharge is not available if the debtor has received some other discharge within the preceding four years (or two years, if the other discharge was a chapter 13 discharge). See 11 U.S.C. § 1328(f) (2006).

²⁵¹ *In re Turner*, 349 B.R. 437 (Bankr. D.S.C. 2006) (pronouncing no bifurcation where hanging paragraph applies); see also *In re Green*, 348 B.R. 601, 611 (Bankr. M.D. Ga. 2006); *In re Henry*, No. 606-6144 FRAL 3, 2006 WL 2949175, at *2 (Bankr. D. Or. Oct. 16, 2006); *In re Grunau*, No. 9:06BK02573 ALP, 2006 WL 2848589, at *2 (Bankr. M.D. Fla. Oct. 4, 2006); *In re Sparks*, 346 B.R. 767, 771–72 (Bankr. S.D. Ohio 2006) (allowing modification of interest rate to meet present value requirement of section 1325(a)(5)); *In re Murray*, 346 B.R. 237, 244–45 (Bankr. M.D. Ga. 2006) (discussing applicable modified interest rate under plan); *In re Scruggs*, 342 B.R. 571, 575 (Bankr. E.D. Ark. 2006) (applying new interest rate to payments under plan even though original agreement did not provide for one); *In re Bufford*, 343 B.R. 827, 839 (Bankr. N.D. Tex. 2006) (holding courts can modify amount of interest to pay 910-day claims under section 1325(a)(5)(B)(ii)); *In re Shaw*, 341 B.R. 543, 546–47 (Bankr. M.D.N.C. 2006) (stating secured claims covered by hanging paragraph are not required to be paid with interest rate provided by contract); *In re Fleming*, 339 B.R. 716, 722 (Bankr. E.D. Mo. 2006) (permitting modification of car creditors' claims by applying new interest rate); *In re Robinson*, 338 B.R. 70, 74–75 (Bankr. W.D. Mo. 2006) (concluding Congress did not overrule case law allowing modification of interest rates); *In re Johnson*, 337 B.R. 269, 273 (Bankr. M.D.N.C. 2006) ("[A] plan may still modify the term of the loan and the interest rate, even if bifurcation is not allowed."). For cases in which cram down interest was higher than contract interest, see *In re Brill*, No. 03-21600, 2006 WL 2729006, at *2 (Bankr. D. Or. Sept. 22, 2006); *In re Pryor*, 341 B.R. 648,

are not like homes, where the secured creditor may not be modified. Modification of security agreements involving cars may occur, but bifurcation is not permitted.

Two dissenting views, however, have emerged.

1. Comparison to Section 1111(b)(2)

Contrary to this consensus, one court has made an interesting comparison of the hanging paragraph to section 1111(b), a rule applicable only in chapter 11. The section 1111(b) election is a big bust in chapter 11. It almost never pays to make it. According to the election, a secured party could choose to have its secured claim equal to the amount owed. But the value of the election was entirely undercut by the rule that the electing creditor could be given payment over time, provided that the present value of the payments equaled the true value of the collateral. This deprived the secured creditor of economic value of the election. In the end the election only meant that the secured party could insist on receiving nominal dollars (eventually) equating with the entirely pre-petition claim.²⁵²

In *In re Carver*,²⁵³ Judge James Walker, Jr., ruled that the hanging paragraph does not merely repeal bifurcation for 910 cars:

[N]othing in the text of the hanging paragraph suggests that Congress intended 910 claims to be treated as secured claims. The only generally applicable definition of a secured claim comes from § 506. By rendering that section inapplicable to 910 claims, Congress expressly eliminated the mechanism by which they could be treated as secured under the [c]hapter 13 plan Rather than amending § 1325(a), Congress could have amended § 506 so that the value of the collateral underlying a 910 claim would equal the full amount of the claim. It did not do so.²⁵⁴

The rule Judge Walker promulgated was this: "In a chapter 13 plan, a 910 claim must receive the *greater* of (1) the full amount of the claim without interest; or (2) the amount the creditor would receive if the claim were bifurcated and crammed down (i.e. secured portion paid with interest and unsecured portion paid pro rata)."²⁵⁵ In other words, the car lender can be bifurcated, but if the car lender is deeply under water, it is entitled to a higher rate of interest than the lender only slightly under water. All car lenders, however, would be guaranteed some degree of

651 (Bankr. C.D. Ill. 2006); *In re Soards*, 344 B.R. 829, 830 (Bankr. W.D. Ken. 2006). In *In re Monochie*, the court ruled that the car lender was entitled to cram down interest, but the lender acquiesced to the contract rate of 6.45%. No. BK06-80869, 2006 Bankr. LEXIS 2910, at *4 (Bankr. D. Neb. Nov. 1, 2006).

²⁵² 2 CARLSON & GILMORE, *supra* note 25, at 596–602.

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

²⁵⁴ *Id.* at 525. Judge Walker, acknowledging that the majority opinion was against him, stuck to his guns in *In re Green*. 348 B.R. 601, 611 (Bankr. M.D. Ga. 2006).

²⁵⁵ *In re Carver*, 338 B.R. at 528.

interest compensation. For example, suppose an appropriate cram down rate is 10%. A car lender claiming \$30,000 against a 910 vehicle worth \$29,500 is entitled to receive the present value of \$29,500, which entails nominal dollars in excess of \$30,000. A lender who claims \$30,000 against a car worth \$15,000 and subject to a three-year payout, is entitled to receive \$30,000 over three years, for interest compensation of approximately 33.3% per annum.

This vision of the hanging paragraph resembles the section 1111(b) election in that it guarantees nominal dollars in excess of the value of the collateral, but it allows the value of the nominal dollars, to be paid over time, to fall to an amount not lower than the value of the collateral.²⁵⁶ Yet because chapter 13 plans may not last longer than five years,²⁵⁷ while chapter 11 plans are not so limited, the lender in chapter 13 will fare better than the electing creditor in chapter 11. By stretching out the payments, a debtor in chapter 11 can reduce the electing creditor to the same economic level as non-electing secured parties. Because the stretch-out in chapter 13 is limited, debtors cannot take back all value from the unbifurcated car lender.

In any case, the solution Judge Walker reached in *Carver* has been rejected as "a judicially crafted treatment of the claims with no basis in the Code."²⁵⁸

2. No Allowed Secured Claim

Other courts have emphasized that, since there can be no reference to section 506(a), it cannot be said that the car lender claiming a 910 vehicle has an "allowed secured claim." The most that can be said is that the lender has an "allowed claim" by virtue of filing a proof of claim.²⁵⁹

In *In re Taranto*,²⁶⁰ Judge Marilyn Shea-Stonum, following this line,²⁶¹ nevertheless assumed that the car lender was entitled to receive full payment of the car loan over time. Yet, once it is admitted that the car lender does not have an allowed secured claim, then section 1325(a)(5) has nothing to say about how the car lender must be treated in the plan. Section 1325(a)(5) applies only to "allowed secured claims." Yet section 1325(a)(5), in conjunction with the hanging paragraph, is the source of the intuition that car lenders should be paid in full.

Be that as it may, Judge Shea-Stonum ruled that the anti-bifurcation rule *was* interest compensation (along the lines of Judge Walker's suggestion).²⁶² Therefore, the car lender should not receive *any* interest compensation, under the circumstances. Judge Shea-Stonum left open the possibility, however, that interest compensation might be awarded where the anti-bifurcation treatment left the car

²⁵⁶ See 11 U.S.C. § 1111(b) (2006) (providing for election under chapter 11).

²⁵⁷ See 11 U.S.C. § 1322(d) (2006).

²⁵⁸ *In re DeSardi*, 340 B.R. 790, 812 (Bankr. S.D. Tex. 2006).

²⁵⁹ On the vexatious requirement of a proof of claim, see *infra* Part III.I.

²⁶⁰ 344 B.R. 857 (Bankr. N.D. Ohio 2006).

²⁶¹ *Id.* at 860 & n.4 (describing lack of amendment to section 506 and intent to require full payment).

²⁶² *Id.* at 862 ("Requiring the payment of additional interest on DaimlerChrysler's 910 Claim under a 'prime plus' calculation would produce an unjustified windfall to DaimlerChrysler at the expense of the Debtors' unsecured creditors . . .").

lender undercompensated. So in the end, her solution to the hanging paragraph very much resembles the result in *Carver*: the car lender should receive the greater of total payment over time (no interest) and interest on the bifurcated amount.

In contrast, Judge Robert Berger in *In re Wampler*,²⁶³ took the purer position: since the car lender had only an allowed claim (not an allowed secured claim), the lender could have no interest compensation at all.²⁶⁴ But this is to say that section 1325(a)(5) does not apply to the car lender. So not only does the car lender get no post-petition interest on this view, but none of the other benefits of cram down protection under section 1325(a)(5). For example, why pay the car lender at all, since it has neither an allowed secured claim under section 1325(a)(5) nor an allowed unsecured claim under section 1325(a)(4)? This latter provision at least would require the car lender to obtain what it would have received in a chapter 7 liquidation, but the unsecured claim requires a reference to section 506(a), which is not permitted as to any claim described by (a)(5).

Judge Berger asserts, "[t]he 910 Language requires that the allowed claim be paid in full,"²⁶⁵ but the hanging paragraph says no such thing. It only governs how section 1325(a)(5) applies to car lenders claiming purchase money security interests in 910 vehicles. Judge Berger's view is that the car lender has no allowed secured claim and so section 1325(a)(5) does not apply at all.

Extraordinarily, Judge Berger goes on to hold that a plan can be confirmed *even if* the plan directly violates a lender's cram down rights under section 1325(a)(5).²⁶⁶ Judge Berger draws this dubious lesson from *In re Szotek*,²⁶⁷ where a chapter 13 debtor tried to bifurcate a home mortgage by the terms of a chapter 13 plan.²⁶⁸ The *Szotek* court held that the plan was binding on the secured creditor who failed to object to confirmation. In the course of so ruling, the *Szotek* court addressed the claim of the secured creditor that a court had no jurisdictional competence to confirm a plan that did not meet the requirements of section 1325(a)(5)(ii) (providing a secured creditor with distributions equal to the value of the collateral).²⁶⁹ The easy answer to this question was that the court had in effect determined that plan did comply with section 1325(a)(5)(ii), and, on res judicata grounds, the secured creditor could not dispute the valuation. The *Szotek* court, however, elected to rule that the bankruptcy court could confirm a plan *even if* it did not accord the lender rights under section 1325(a)(5).²⁷⁰ It reasoned that section 1322(a) sets forth what a plan *must* do, and section 1325(a)(5) is nowhere

²⁶³ 345 B.R. 730 (Bankr. D. Kan. 2006).

²⁶⁴ *Id.* at 740.

²⁶⁵ *See id.*

²⁶⁶ *See id.* at 744.

²⁶⁷ 886 F.2d 1405 (3d Cir. 1989).

²⁶⁸ *Id.* at 1406. *Szotek* was decided before the Supreme Court held home mortgages to be immune from bifurcation. *See Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 329–30 (1993) (holding rights of mortgagee are protected from modification under section 1322(b)(2)).

²⁶⁹ *In re Szotek*, 886 F.2d at 1411 (noting secured creditor's concern over confirming plan did not meet requirements under section 1325(a)(5)).

²⁷⁰ *Id.* at 1413.

mentioned therein.²⁷¹ Meanwhile, section 1129(a) provides that a chapter 11 plan can be confirmed "only if" all subparagraphs are met.²⁷² In comparison, section 1325(a) states that *if* (as opposed to *iff*) the subparagraphs are met, the court *must* confirm a chapter 13 plan. To state this in other terms, a debtor has the right to confirmation if section 1325(a) is met, but the court may confirm a plan even if some or none of the subparagraphs of section 1325(a) are met. This was the extraordinary and quite unnecessary holding in *Szosek*.

Relying on *Szosek*, Judge Berger draws the conclusion that neither car lenders nor any other secured creditor have any cram down rights.²⁷³ The only meaning of cram down is that, where the debtor tenders it and where all other parts of section 1325(a)(5) are met, the debtor has the right to confirmation.²⁷⁴ On this view, it hardly matters what the hanging paragraph means. If followed, this view all but abolishes the hanging paragraph, not to mention cram down generally.

Other courts disagree and find that 910 car lenders *do* have allowed secured claims and *are* entitled to cram down rights. In *DaimlerChrysler Services Americas LLC v. Brown (In re Brown)*,²⁷⁵ Judge John Dalis has aptly pointed out that, after *Dewsnup v. Timm*,²⁷⁶ it cannot be maintained that the phrase "allowed secured claim" depends on the meaning supplied by section 506(a)(1).²⁷⁷ *Dewsnup* is an interpretation of section 506(d); basically it holds that "allowed secured claim" in section 506(d) means the pre-bifurcation amount, not the post-bifurcation amount as described by section 506(a)(1).²⁷⁸ So *Dewsnup* permits unmooring the definition of "allowed secured claim" from section 506(a)(1).²⁷⁹

Judge Berger rejects such a use of *Dewsnup* to make sense of the hanging paragraph. In his view, Judge Dalis's point means that *no* secured creditor of *any* sort can ever be bifurcated in a reorganization case.²⁸⁰ That is to say, if an allowed claim is an allowed *secured* claim without reference to section 506(a), then every undersecured creditor with an allowed claim must be treated like a car lender claiming a 910 vehicle. This, Judge Berger claims, was rejected by the Eighth Circuit in *Harmon v. United States*,²⁸¹ a governing authority for Judge Berger's

²⁷¹ *Id.* at 1411–12 (concluding section 1325(a) does not contain requirements for confirmation).

²⁷² See 11 U.S.C. § 1129(a) (2006) (enumerating list of requirements for confirmation).

²⁷³ *In re Wampler*, 345 B.R. at 743.

²⁷⁴ *Id.* at 744.

²⁷⁵ 339 B.R. 818 (Bankr. S.D. Ga. 2006).

²⁷⁶ 502 U.S. 410 (1992).

²⁷⁷ See *id.* at 415 (finding section 506(a) is "not a definitional provision").

²⁷⁸ *Id.* at 417.

²⁷⁹ See also *In re Brooks*, 344 B.R. 417, 421 (Bankr. E.D.N.C. 2006) (referring to *Dewsnup*). Judge James D. Walker retorts that *Dewsnup* involved a real estate chapter 7 case, and the *Dewsnup* court was concerned to find a way to reserve appreciation value to secured creditors. *In re Green*, 348 B.R. 601, 608 (Bankr. M.D. Ga. 2006). Since, however, cars usually depreciate and the hanging paragraph appears in chapter 13, *Dewsnup* does not compel a decision that bifurcation is repealed. *In re Green*, 348 B.R. at 608. Nevertheless, Judge Dalis is right that *Dewsnup* destroys the idea that section 506(a) is the source of meaning for the phrase "allowed secured claim." *DaimlerChrysler Servs. Am. LLC v. Brown (In re Brown)*, 339 B.R. 818, 821 (Bankr. S.D. Ga. 2006).

²⁸⁰ See *In re Wampler*, 345 B.R. 730, 738 (Bankr. D. Kan. 2006).

²⁸¹ *Id.* at 739. See *Harmon v. United States*, 101 F.3d 574, 583 (8th Cir. 1996) (allowing secured claims to

Kansas district.

In *Harmon*, a chapter 12 plan bifurcated a mortgage lender.²⁸² With the lender's consent, the debtor's executrix sold the encumbered property, with the mortgage lien attaching to the cash proceeds.²⁸³ The debtor claimed that section 506(a) defined the secured claim of the mortgage lender.²⁸⁴ The mortgage lender claimed that the lien was defined by the *allowed* claim.²⁸⁵ In short, the lender claimed not to have been bifurcated by the chapter 12 plan. In essence, the Eighth Circuit held that the *Dewsnup* meaning of "allowed secured claim" was restricted to section 506(d).²⁸⁶ Since section 506(d) is not relevant to bifurcation by cram down, section 506(a) defines what allowed secured claims are in chapter 12.

Following a different line, in *In re Trejos*, Judge Bruce Markell notes that "secured claim" is not a defined term within section 101(a), but that "lien" is defined as a "charge against or interest in property to secure payment of a debt or performance of an obligation."²⁸⁷ So the car lender is a secured creditor by virtue of having a lien.²⁸⁸ Some courts have ruled that, since section 506(a) cannot provide a definition of "secured claim," one should look to state law where, sure enough, the UCC indicates that the car lender had a security interest on the car (and hence a secured claim in bankruptcy).²⁸⁹ On this view undersecured car lenders need no definitional help from section 506(a); they still have allowed secured claims. What the hanging paragraph does, then, is to bar bifurcation under section 506(a).

Yet one grammatical paradox of the hanging paragraph should be acknowledged. Section 1325(a)(5) refers to "allowed secured claims."²⁹⁰ If that phrase has meaning only by virtue of section 506(a), then the hanging paragraph is self-defeating. The initial words of the hanging paragraph state: "For the purposes

be bifurcated into secured and unsecured claims by section 506(a)).

²⁸² *Harmon*, 101 F.3d at 578 (outlining debtors' proposed plan which provided payments to creditor for secured portion of claim in equal payments and unsecured portion of claim was paid through projected disposable income).

²⁸³ *Id.* (mentioning stipulation between debtor and creditor where the creditor would transfer lien from land to proceeds of sale and be held in escrow pending resolution of dispute).

²⁸⁴ *Id.* at 583 (discussing arguments about interpretation of "allowed secured claim").

²⁸⁵ *Id.* ("The government argues that the creditor should retain the original, pre-bankruptcy lien in its full amount.").

²⁸⁶ *Id.* ("The Court in *Dewsnup* expressly refused to determine the meaning of 'allowed secured claim' outside of [section] 506(d).").

²⁸⁷ *In re Trejos*, No. BK-S-06-10231-LBR, 2006 WL 2884384, at *9 (Bankr. D. Nev. Sept. 25, 2006). See also 11 U.S.C. § 101(37) (2006) (defining lien as "charge against or interest in property to secure payment of a debt or performance of an obligation").

²⁸⁸ *In re Trejos*, No. BK-S-06-10231-LBR, 2006 WL 2884384, at *9 ("It is not inaccurate to say that all property encumbered by a lien is secured by that lien, and all that claims receiving the benefit of that lien are claims secured by that lien or . . . secured claims.").

²⁸⁹ See *In re Brooks*, 344 B.R. 417, 422 (Bankr. E.D.N.C. 2006) (determining claims can be secured without applying section 506 and instead left to state law); *In re DeSardi*, 340 B.R. 790, 812–13 (Bankr. S.D. Tex. 2006) (applying plain meaning of secured status found in state law rather than section 506); *In re Montoya*, 341 B.R. 41, 44 (Bankr. D. Utah 2006) ("A purchase money security interest is secured through the parties' contract and applicable perfection statutes and is secured without the operation of the Code.").

²⁹⁰ See 11 U.S.C. § 1325(a)(5) (2006) ("[T]he court shall confirm a plan . . . with respect to each *allowed* secured claim provided for by the plan . . .") (emphasis added).

of paragraph (5), section 506 shall not apply to a *claim described in that paragraph . . .*," where the lender claims a 910 vehicle. Yet section 506(a) *must* apply, *ex hypothesi*, if paragraph (5) is to "describe" secured claim on a 910 vehicle. So if courts insist that the car lender has an allowed claim but not an allowed *secured* claim, then they cannot explain how section 1325(a)(5) "describes" a secured claim on a 910 vehicle, since section 506(a) be referred to. This means that Congress *must* have intended "allowed secured claim" to mean something even without a reference to section 506(a).

B. Oversecured Creditors

The hanging paragraph poses a riddle with regard to oversecured car lenders. Such a car lender would like to claim post-petition pre-confirmation interest to the extent of the equity cushion pursuant to section 506(b).²⁹¹ But reference to section 506 is not permitted. Furthermore, car lenders are *never* oversecured, insofar as cram down is concerned, because the thrust of the hanging paragraph is that the value of the car always equals the amount that is owed. Accordingly, the car lender can never show that an equity cushion exists against which post-petition interest might accrue.²⁹² Of course, once confirmation occurs, the cram down standard of section 1325(a)(5)(ii) implies interest compensation to the car lender (or so the consensus asserts). Given the highly accelerated schedule of a chapter 13 case, the amount of section 506(b) interest sacrificed prior to confirmation is not likely to be a large amount.²⁹³

C. Purchase Money

The hanging paragraph applies only if the debtor obtained a car on purchase money credit. In *In re Horn*,²⁹⁴ Judge Dwight Williams held that a security interest on a 910 car was not purchase money because *some* of the loan proceeds were used for purposes other than buying the car.²⁹⁵ In other words, Judge Williams used the transformation rule to take the car loan out of the hanging paragraph. In contrast, Judge John Laney ruled in *In re Murray*²⁹⁶ that the loan was still purchase money

²⁹¹ According to section 506(b):

To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim [i.e., a collateral cushion exists], there shall be allowed to the holder of such claim, interest on such claim . . .

11 U.S.C. § 506(b) (2006).

²⁹² *In re White*, No. 06-10095, 2006 WL 2827321, at *87 (Bankr. D. E.D. La. Sept. 29, 2006).

²⁹³ On the accelerated schedule of chapter 13 procedure, *see supra* text accompanying notes 71–73.

²⁹⁴ 338 B.R. 110, 113–14 (Bankr. M.D. Ala. 2006).

²⁹⁵ *Id.* at 113–14 (describing facts where debt included four subsequent cash advances along with purchase of car).

²⁹⁶ 346 B.R. 237 (Bankr. M.D. Ga. 2006).

even though part of the price paid for a service contract.²⁹⁷ This would appear to be the dual status approach.²⁹⁸ Upon reconsideration, however, Judge Laney went further and held that the service contract price was *itself* a purchase money obligation with regard to the car.²⁹⁹ In support, Judge Laney cited UCC section 9-103 comment 3, which states "the 'price' of collateral or the 'value given to enable' includes obligations for expenses incurred in connection with acquiring rights in the collateral, sales taxes, duties, finance charges, interest, freight charges, costs of storage in transit, expenses of collateral and enforcement, attorney's fees, and other similar obligations."³⁰⁰ Presumably the service contract is an "other similar obligation[]." Such an interpretation must be questioned. Servicing the vehicle over time has nothing to do with *acquiring* the vehicle. Nevertheless, in the revised opinion, Judge Laney did not even use the dual status rule but held the entire thing was part of the purchase money obligation.

Courts sometimes use the "knew how to arguments."³⁰¹ For example, Congress knew how to restrict access to chapter 11 but did not do so with regard to individuals; therefore it is not bad faith for individuals to file chapter 11 petitions.³⁰² In that spirit, there are disturbing opportunities for debtors to argue that Congress knew how to legislate the dual status rule but did not do so in the hanging paragraph; therefore the hanging paragraph requires the transformation rule. For

²⁹⁷ *Id.* at 239. In *In re White*, Judge Elizabeth Magner followed the dual status approach but also considered the possibility that amounts advanced to finance the service contract might be purchase money security interests in those executory contracts. No. 06-10095, 2006 WL 2827321, at *2 (Bankr. E.D. La. Sept. 29, 2006). If so, and if they fell within the one-year term of the hanging paragraph, which refers to "any other thing of value," the hanging paragraph might apply nevertheless. Judge Magner ruled that, because these service contracts fell under Louisiana's statutory definition of insurance, they could not be purchase money security interest, since Article 9 does not apply to insurance. UCC § 9-108(d)(8) (2005). This does not follow, however. Just because Article 9 does not govern does not mean that the security interest in the executory contracts were not purchase money. A better answer is that perhaps the car lender *did* have a purchase money security interest in the executory contracts for service, but the point is irrelevant, as the car lender wants the service charge applied to the *car*, not to the valueless executory contracts. Article 9 attempts to legislate a cross-collateralization idea within the concept of multiple purchase money security interests under section 9-103(b), but this may be ignored. Article 9 does not apply to insurance; also section 9-103(b) is limited to cross-collateralization between *goods*. UCC § 9-103(b) (2005). The executory contracts are obviously not goods. Finally, the service contract probably is probably not a "thing of value" on the market (i.e., it is favorable to the dealer, not to the debtor). So the hanging paragraph does not apply for this reason as well.

²⁹⁸ See *In re Trejos*, No. BK-S-06-10231-LBR, 2006 WL 2884384, at *12 (Bankr. D. Nev. Sept. 25, 2006) (noting purchase money status survived sale of chattel paper to financier).

²⁹⁹ *In re Murray*, No. 05-48017, 2006 WL 2457851, at *6 (Bankr. M.D. Ga. Aug. 22, 2006).

³⁰⁰ UCC § 9-103 cmt. 3 (2005).

³⁰¹ See Charles Jordan Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PITT. L. REV. 477, 574 (1988) (describing "knew how to" rule as according "weight to the failure of a legislature to enact a particular provision in one part of a statute dealing with a similar subject" and applied to "preclude reading exceptions or qualifications into a statute").

³⁰² See *Toibb v. Radloff*, 501 U.S. 157, 161 (1991) ("Congress knew how to restrict recourse to the avenues of bankruptcy relief; it did not place [c]hapter 11 reorganization beyond the reach of a nonbusiness individual debtor."). Congress indeed learned how to make clear that individuals are eligible for chapter 11. BAPCPA includes massive amendments to conform individual chapter 11 cases to chapter 13 cases. See *supra* text accompanying notes 244–50.

instance, the adequate protection rule of section 1326(a)(2) gives car lenders rights *to the extent* they are purchase money lenders, suggesting a dual status approach.³⁰³ In addition, new section 521(a)(6) prohibits the debtor from retaining encumbered personal property unless the security agreement is reaffirmed or the collateral is redeemed.³⁰⁴ But this prohibition (which is coupled with a self-executing dissolution of the automatic stay)³⁰⁵ applies only if the car lender "as to which a creditor has an allowed claim for the purchase price secured *in whole or in part* by an interest in such personal property"³⁰⁶ Since Congress knew in these two instances how to provide a dual status rule, it must have intended a transformation rule with regard to the hanging paragraph (or so the argument would go). Obviously, such arguments rely on the omniscience of congressional drafting, a premise somewhat in doubt after BAPCPA.

Assuming, the dual status rule is appropriate, how would it work with respect to the hanging paragraph? One possibility is that the secured party could have two security interests—one purchase money, one not. The purchase money debt would have to be paid in full, no matter what the car is worth. If the purchase money portion of the obligation exceeds the value of the car, then the non-purchase money obligation would be entirely unsecured. This nonpurchase money security interest is subject to section 506(a), since the hanging paragraph does not apply to it. So bifurcation down to zero is entirely permitted.³⁰⁷ If, however, there is a surplus following the purchase money security interest, section 506(a) bifurcation could supply a positive secured claim with regard to this second nonpurchase money security interest.

D. 910 Days

The hanging paragraph applies only if the debtor obtained the car 910 days prior to bankruptcy. This equates with two and half years, minus two or three days, depending on whether a leap year is involved.³⁰⁸ The period, however, is shortened

³⁰³ See *supra* text accompanying notes 221–31.

³⁰⁴ 11 U.S.C. § 521(a)(6) (2006) ("[T]he debtor shall . . . not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor . . . enters into an agreement with the creditor . . . with respect to the claim secured by such property; or . . . redeems such property from the security interest . . .").

³⁰⁵ Oddly, the stay dissolves forty-five days after the first creditors' meeting, unless the debtor takes the requisite action. 11 U.S.C. § 521(a)(6) (2006). The stay dissolves thirty days after the first creditors' meeting if the debtor states an intention to reaffirm or redeem but does not accomplish it within 30 days. See 11 U.S.C. §§ 362(h), 521(a)(2)(A) (2006).

³⁰⁶ 11 U.S.C. § 521(a)(6) (2006) (emphasis added).

³⁰⁷ *In re White*, No. 06-10095, 2006 WL 2827321, at *8 (Bankr. E.D. La. Sept. 29, 2006).

³⁰⁸ This odd number probably reflects a "split the baby" compromise between the House and Senate. The 2000 versions of the hanging paragraph had a five-year period. See *In re Quevedo*, 345 B.R. 238, 244 (Bankr. S.D. Cal. 2006) (stating Bankruptcy Reform Act of 2000 had reach back period of five-years). For some reason this was cut in half. See 11 U.S.C. § 1325 (2006) ("For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition . . .").

to one year "if collateral for that debt consists of any other thing of value."³⁰⁹ Presumably this means that if the security agreement covers a purchase money³¹⁰ obligation for something other than a car for the debtor's personal use, then the anti-bifurcation rule applies only if the debt was incurred within a year of bankruptcy.

E. Personal Use

A further restriction is that the debtor must have obtained the car for "the personal use of the debtor."³¹¹ This must be compared to redemption under section 722, which refers to "primarily for personal, family, or household use."³¹² The difference in language suggests that the anti-bifurcation rule does not apply to vehicles (1) used partly for business or (2) used by a family member of the debtor.³¹³ The hanging paragraph makes the test of personal use as of the day of acquisition.³¹⁴

Room exists for chapter 13 debtors with multiple vehicles to do some switching; the debtor could acquire a new car for use of the non-debtor spouse, while he undertakes to use the old car. Then they swap vehicles. Now both cars can be bifurcated. This will not work for joint cases, however. If a debtor wife buys a car for her debtor husband, for example, the car is for the personal use of the debtors taken together.³¹⁵ Nor will it work if the non-debtor's vehicle was purchased within one year of bankruptcy. A careful reading of the hanging paragraph shows that "personal use" is a requirement of *the 910 vehicle only*. It is not a predicate of "any other thing of value" to which the one-year limitation applies. This reading is based on the disjunctive "or" that appears just before "or if collateral for that debt consists of any other thing of value."³¹⁶ Meanwhile, at least one court has ruled that,

³⁰⁹ 11 U.S.C. § 1325(a) (2006).

³¹⁰ Courts have rejected the contention that the one-year period can cover non-purchase money security interests on cars or other "things of value." *In re Curtis*, 345 B.R. 756, 759–60 (Bankr. D. Utah 2006) (finding creditor "claiming protection under the hanging paragraph from a [section] 506 cram down must hold a purchase money security interest where its collateral consists of 'any other thing of value purchased within one year prior to filing'"); *In re Quevedo*, 345 B.R. at 246 (deciding Congress did not intend to expand this protection to non-purchase money security interests).

³¹¹ 11 U.S.C. § 1325(a) (2006).

³¹² 11 U.S.C. § 722 (2006).

³¹³ See *In re Humphrey*, No. 06-20783, 2006 Bankr. LEXIS 2855, at *4 (Bankr. D. Kan. Oct. 16, 2006) (refusing to apply hanging paragraph to car bought for non-debtor spouse); *In re Lewis*, 347 B.R. 769, 773 (Bankr. D. Kan. 2006) (refusing to apply hanging paragraph to vehicle purchased for debtor's adult daughter because it was not acquired for "personal use" of either debtor); *In re Jackson*, 338 B.R. 923, 925 (Bankr. M.D. Ga. 2006) (finding car bought for debtor's wife not subject to hanging paragraph). In reading these words, Professor Jean Braucher assumes that cars bought for use by a family member are subject to the one-year period. See Braucher, *supra* note 122, at 470 (suggesting vehicles acquired for family or household use more than one year before filing should be valued using section 506(a)). In other words, the spouse's car falls under the language "if collateral for that debt consists of any other thing of value." 11 U.S.C. § 1325(a) (2006).

³¹⁴ *In re Hill*, No. 06-20123, 2006 Bankr. LEXIS 2641, at *6 (Bankr. W.D. La. Sept. 1, 2006).

³¹⁵ *In re Vagi*, No. 06-40033, 2006 WL 2771962, at * 2 (Bankr. N.D. Ohio Sept. 26, 2006).

³¹⁶ 11 U.S.C. § 1125; see Braucher, *supra* note 122, at 470 (suggesting vehicles acquired for family or household use more than one-year before filing should be valued using section 506(a)).

if the debtor even occasionally rides in the non-debtor spouse's car on family outings, the hanging paragraph applies.³¹⁷

In *In re Lewis*,³¹⁸ however, a debtor bought a van for her daughter and had it titled in the debtor's name.³¹⁹ The daughter made the payments until the debtor, jointly with her spouse, filed for bankruptcy in chapter 13.³²⁰ The debtors' plan proposed to bifurcate the car lender's claim and pay down the secured claim over the life of the plan.³²¹ Although bifurcation was permitted (as the car was not for the debtor's use), Judge Dale Somers also ruled that the plan was not filed in good faith, as required by section 1325(a)(3).³²² Therefore, the plan was not confirmed. In *Lewis*, there was no history of the debtor paying the car lender. It remains to be seen whether a chapter 13 plan is in bad faith whenever historically the debtor has made car payments, but someone other than the debtor uses the car and the plan undertakes to pay the car lender on a bifurcated basis.

In *In re Solis*,³²³ a debtor bought a car for her son and made payments on it. The son, however, paid the debtor even more than the payments on the car. Judge Wesley Steen found that the son's car was not a 910 vehicle, as it was not acquired for the debtor's personal use.³²⁴ Under these circumstances, the car could not be crammed down, since the equitable ownership of the car was not part of the bankruptcy estate.³²⁵ Presumably, the key to this decision is that the son was paying the debtor for the car. Where an adult child is merely using the car and is not making payments, that child would have a license to use (but not ownership of) the car.

In *In re White*,³²⁶ Judge Elizabeth Magner suggested that use of a vehicle in *business* is not a personal use of the debtor. But she also ruled that merely driving to work does not mean the car is being put to a business use. Rather, it would be necessary to show that the car is used during the course of the working day. Thus, if the debtor could obtain a tax deduction for use of the vehicle, this would be evidence of a business use. No tax deduction is available if a debtor merely drives to work.³²⁷ In contrast, Judge Gerald Schiff, in *In re Hill*,³²⁸ ruled that, if the debtor

³¹⁷ *In re Bolze*, No. 06-40036, 2006 Bankr. LEXIS 2027, at *11-12 (Bankr. D. Kan. Aug., 2006).

³¹⁸ 347 B.R. 769 (Bankr. D. Kan. 2006).

³¹⁹ *Id.* at 770.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.* at 774-75 ("Because the Debtors' proposal to pay the value of the van through their plan has not been made in good faith, their plan cannot be confirmed.").

³²³ 2006 Bankr. LEXIS 3126, at *1 (Bankr. S.D. Tex. Nov. 14, 2006).

³²⁴ Judge Steen rejected the notion that the word "debtor" in the hanging paragraph refers to anyone other than the person who filed the bankruptcy petition. *Id.* at *26-27. He also held open the possibility that "personal use" of the debtor includes the gratification of having a loved one using the car. He did not, however, reach the question as the car lender conceded that the vehicle was not for personal use of the debtor. *Id.* at *31 n.29.

³²⁵ *Id.* at *35 ("Since Debtor's plan purposes to cram down a secured creditor who holds a lien on property in which Debtor holds only a nominal interest, the Court concludes that the plan does not comply with the statutory provisions set forth above and cannot be confirmed.").

³²⁶ No. 06-10095, 2006 WL 2827321, at *1 (Bankr. E.D. La. Sept. 29, 2006).

³²⁷ *Id.* at *4; see also *In re Solis*, 2006 Bankr. LEXIS 3126 at *21-22 (stating business purpose to be

acquired the car to drive to work, the hanging paragraph did not apply as the car was for a mixed business and personal purpose. The fact that the debtor could not deduct the expense of the vehicle from her income tax was held to be irrelevant to the meaning of the hanging paragraph. To justify this holding, Judge Schiff quoted the following angry assessment of BAPCPA:

The Congress of the United States of America passed and the President of the United States of America signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act"). It became fully effective on October 17, 2005. Those responsible for the passing of the Act did all in their power to avoid the proffered input from sitting United States Bankruptcy Judges, various professors of bankruptcy law at distinguished universities, and many professional associations filled with the best of the bankruptcy lawyers in the country as to the perceived flaws in the Act. This is because the parties pushing the passage of the Act had their own agenda. It was apparently an agenda to make more money off the backs of the consumers in this country. It is not surprising, therefore, that the Act has been highly criticized across the country. In this writer's opinion, to call the Act a "consumer protection" Act is the grossest of misnomers.³²⁹

One suspects that the slightest hint of politics has invaded Judge Schiff's legal opinion.

A middle position between *White* and *Hill* was staked out by Judge Steen in *Solis*. He ruled that personal use:

[I]ncludes any use of the vehicle that benefits the debtor(s) such as transportation that satisfies personal wants (such as recreation), transportation that satisfies personal needs (such as shopping or seeking medical attention or other errands), and transportation that satisfies personal obligations, whether legal or moral obligations.³³⁰

It is odd that the cram down rights of the car lender should turn on whether it is possible for the debtor to get to work without the car, but Congress has indeed limited the hanging paragraph to vehicles for personal, not business, use.

determined at time of car acquisition).

³²⁸ No. 06-20123, 2006 WL 2819603, at *1 (Bankr. W.D. La. Sept. 1, 2006).

³²⁹ *Id.* at *3 (citing *In re Sosa*, 336 B.R. 113, 114 (Bankr. W.D. Tex. 2005)).

³³⁰ *In re Solis*, 2006 Bankr. LEXIS 3126 at *24-25.

F. Asset Payments

The hanging paragraph harbors an unpleasant surprise for the car lender. If, thanks to the hanging paragraph, the car is worth whatever the debtor owes, then it should always be possible for the debtor to *surrender* the car pursuant to section 1325(a)(5)(C) to the secured creditor in full satisfaction of the car debt, even though the "true" value of the car is much less than what the debtor owes. So Judge Richard Stair held in *In re Ezell*,³³¹ where the secured creditor argued that the hanging paragraph applied only to cases of car retention, not to surrenders.³³² So apparently what is sauce for the goose of retention is sauce for the gander of surrender.³³³ The hanging paragraph is therefore a "double-edged sword."³³⁴

Judge Joan Cooper disagreed in *In re Duke*.³³⁵ She noted that the idea of surrender as an asset payment in full "turns the tables on the Creditors," in contravention of congressional intent.³³⁶ Observing that the hanging paragraph has proven ambiguous, she noted that the hanging paragraph was added by section 306 of BAPCPA, which is entitled "Section 306—Giving Secured Creditors Fair Treatment in [c]hapter 13 . . . Restoring the Foundation for Secured Credit."³³⁷ This title proved that the secured creditor should prevail on this (and presumably any) interpretive question about the hanging paragraph. Nothing else, after all, would be "fair." Judge Cooper thought instead that the car lender should be able to liquidate the car and seek a deficiency claim in the chapter 13 case later.³³⁸ It is not clear, however, how this would work mechanically. If the car is not liquidated at the time

³³¹ 338 B.R. 330 (Bankr. E.D. Tenn. 2006).

³³² *Id.* at 338 ("Subsection (C) is clear. If the debtor surrenders his interest in the property securing the claim, the court can find that the requirements of [section] 1325(a)(5) have been met.").

³³³ *Accord In re Federson*, 2006 Bankr. LEXIS 3135, at *12 (Bankr. S.D. Ill. Nov. 19, 2006); *In re Maggett*, No. BK06-80573, 2006 Bankr. LEXIS 2756, at *8 (Bankr. D. Neb. Oct. 19, 2006); *In re Pool*, No. 306-30965-imb13, 2006 WL 2801934, at *5 (Bankr. D. Or. Sept. 27, 2006); *In re Osborn*, 348 B.R. 500, 505-06 (Bankr. W.D. Mo. 2006) (concluding "plain language of [section] 1325(a)(5) and the hanging paragraph mandate that . . . secured creditor of the kind described in the hanging paragraph has a secured claim for the full amount due as of the date of the filing of the petition, regardless of whether the debtor intends to retain the collateral or surrender it"); *In re Brown*, 346 B.R. 868, 877 (Bankr. N.D. Fla. 2006) (deciding debtor can surrender vehicle in full satisfaction of debt owed); *In re Sparks*, 346 B.R. 767, 774 (Bankr. S.D. Ohio 2006) (holding debtor's plan may provide for surrender of Jeep in full satisfaction of secured debt); *In re Payne*, 347 B.R. 278, 283 (Bankr. S.D. Ohio 2006) (agreeing courts cannot rewrite statutes enacted by congress thus allowing surrender of car to fulfill debt). It might be different if the creditor had repossessed the car *and* sold it prior to the bankruptcy petition. *In re Osborn*, 348 B.R. at 506 (determining debtors retained interest in property and could exercise all options available to them because there was repossession but no sale prior to bankruptcy). In such a case, the secured creditor would simply have a pre-petition unsecured claim for the deficit against the bankruptcy estate. *Id.* ("[E]ven though [creditor] might be entitled to a deficiency outside of bankruptcy, it is not entitled to an allowed claim for any such deficiency here, so the Debtors are not required to provide for one in their Plan.").

³³⁴ *In re Moore*, No. 6:05-bk-90056M, 2006 Bankr. LEXIS 2867, at *10 (Bankr. W.D. Ark. Oct. 24, 2006).

³³⁵ 345 B.R. 806 (Bankr. W.D. Ky. 2006).

³³⁶ *Id.* at 809.

³³⁷ *Id.*

³³⁸ *Id.* (acknowledging creditors have available to them state law remedies including "pursuit of a deficiency as an unsecured claim during the [c]hapter 13 proceeding").

of plan confirmation, an estimate would have to be made by valuing the probable value of the car. Yet this is an implicit reference to bifurcation under section 506(a)—a reference the hanging paragraph expressly forbids.

Note that when *houses* are surrendered, section 506(a) still applies, and a home mortgage lender can still obtain a deficit unsecured claim.³³⁹ Not so with car lenders, if *Ezell* is the law, thanks to the peculiar way the hanging paragraph was written.

This difficulty is much exacerbated by the fact that chapter 13 plans can be modified after confirmation. In that context, we will revisit asset payments, where the car is wrecked post-petition, generating insurance proceeds.³⁴⁰

G. Equal Payments

We have already alluded to the fact that BAPCPA adds requirements to the mode of cram down payments. Specifically, it requires that the cram down payments be equal and that they are large enough to provide adequate protection to the car lender. According to section 1325(a)(5)(B)(iii), if:

- (I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and
- (II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan³⁴¹

What is the point of this provision? According to Judge Isgur in *DeSardi*, BAPCPA aimed at two abuses. First, pursuant to the priority of section 1326(b), plans gave all initial dollars to the administrative creditors and absolutely nothing to the car lender.³⁴² There had been no requirement preventing the car lender from going under water during the life of the plan. "In the worst case scenario, a creditor could wait as long as twenty-four months before receiving any distributions on an allowed secured claim."³⁴³ Here is Judge Isgur's account of the car lender's predicament:

To protect its interest, a lender could object to confirmation and argue the adequate protection issue with no assurance of success. If

³³⁹ Some states make residential mortgages nonrecourse by operation of law, however. In such cases, there could be no deficit claim. See *In re Buchferer* 216 B.R. 332, 339 (Bankr. E.D.N.Y. 1997) (mentioning state laws in several jurisdictions have limited residential mortgage lenders to nonrecourse transactions).

³⁴⁰ See *infra* Part IV.B.

³⁴¹ 11 U.S.C. § 1325(a)(5)(B)(iii) (2006).

³⁴² *In re Desardi*, 340 B.R. 790, 809–10 (Bankr. S.D. Tex. 2006) ("[C]hapter 13 plans were being confirmed by bankruptcy courts that deprived car lenders of any payments for a number of months.").

³⁴³ Kilpatrick, *supra* note 73, at 836.

the objection failed, and the first payment to the car lender was scheduled for month eight, the debtor could use the car for the first seven months of the plan with no payment to the car lender. Pursuant to section 1307(b), the debtor could convert his case at any time to a case under chapter 7. Under this scenario, an abusive debtor could manipulate the system and get free use of a quickly depreciating asset without making adequate protection payments. When the case was converted to a case under chapter 7, the lender could repossess its depreciated asset, but the debtor would be discharged of his obligation to the car lender, after having had free use of the car for many months.³⁴⁴

Thanks to section 1325(a)(5)(B)(iii)(II), however, the cram down payment can never be less than the adequate protection amount.

Another abuse was the balloon payment at the end of the plan.³⁴⁵ The car lender would be under water during the plan. The debtor might default on the balloon and convert to chapter 7, where the car would be surrendered. The debtor will have obtained use of the car for less than the cost of depreciation. Thanks to subparagraph (I), however, balloon payments are prohibited, as all cram down payments must be equal.³⁴⁶

In considering subparagraphs (I) and (II), how do these provisions interact? In *DeSardi*, Judge Isgur sensibly rejected the idea that adequate protection payments should exactly equal cram down payments.³⁴⁷ Rather, the equal payment provision simply does not apply to adequate protection payments at all. Furthermore, he ruled that cram down payments need not be equal to adequate protection payments in each month of the plan.³⁴⁸ This would violate section 1326(b), which requires administrative creditors to obtain priority over cram down payments.³⁴⁹ Rather, once the administrative creditors are paid out (and adequate protection is covered during this initial period), cram down payments can actually commence for the first time, and only after this time must the payments be equal. To say this in other words, if the cram down payment is zero for the first eight months and then commences at \$428.15 for the rest of the plan, there is no inequality. Zero payment means the absence of payment, and the absence of payment need not be equal to *affirmative payment*.

This view is probably correct and inevitable, if junior cram down payments are to be reconciled with the administrative priority of section 1326(b). But this

³⁴⁴ *In re Desardi*, 340 B.R. at 810.

³⁴⁵ *Id.* ("At the end of the term, the car would be worth less than the balloon payment that was due.")

³⁴⁶ See also *In re Lemieux*, 347 B.R. 460, 464 (Bankr. D. Mass. 2006) (rejecting debtors' argument of no requirement for equal payments under plan).

³⁴⁷ 340 B.R. at 807 (stating it would be "mathematically untenable").

³⁴⁸ *Id.* at 806 ("[P]lan payments under [section] 1326(a)(1)(A) are likely to be different from adequate protection. The Court finds that adequate protection payments are not meant to be considered when fulfilling the requirements of the equal payment provision.").

³⁴⁹ See 11 U.S.C. § 1326(b) (2006) (enumerating order of priority of payments).

position has a deeply subversive side, when pushed to its logical extreme. Recall that one purpose of the equal payment rule is to prevent balloon payments at the end of the payout period. If Judge Isgur is right on this point, it should be possible to confirm a plan in which adequate protection payments are made for the first sixty months. Then, in the sixtieth month, a single balloon cram down payment could be proffered. Perhaps this plan is not *feasible*, within the meaning of section 1325(a)(6)³⁵⁰ and so should not be confirmed, but at least, on the premises of Judge Isgur, the cram down payment is *equal*. Or, if equality implies two or more payments,³⁵¹ the balloon payment could be divided into equal parts due in the fifty-ninth and sixtieth month, consistent with Judge Isgur's premise.

No doubt some will be tempted to state that such plans are filed in bad faith and so violate section 1325(a)(3). But whether these plans are in bad faith depends on whether debtors are invited to exploit the invitations proffered to them on the plain face of the Bankruptcy Code. Is it bad faith to write a plan that conforms to the Bankruptcy Code but that reduces the Bankruptcy Code to a *reductio ad absurdum*? At least some courts think so.³⁵² The Supreme Court, however, has tended to uphold debtors' right to exploit the opportunities presented to them in the Bankruptcy Code.³⁵³

In the plans before Judge Isgur (which followed the uniform plan suggested by the local rules of the Southern District of Texas), the debtor was obliged to pay either the cram down amount or 1.5% of the car's value, whichever was more.³⁵⁴ So, should the adequate protection amount be higher than the equal cram down amount, payment will be higher (hence unequal) at the beginning of the plan. Since the equal payment provision does not speak to adequate protection payments, the fact that some early payments exceed the uniform cram down payout is of no concern.

In Judge Isgur's extended example of a confirmable chapter 13 plan, the debtor is to pay \$600 a month in post-petition wages into the plan. The chapter 13 trustee takes 10% off the top as a fee, leaving \$540 to distribute. Of this amount, \$300 is allocated to the car lender as an adequate protection payment. The remaining \$240 goes to the administrative creditors, pursuant to section 1326(b)(1).

In Judge Isgur's example, the car is worth \$20,000³⁵⁵ and is depreciating by

³⁵⁰ This provision states: "the debtor will be able to make all payments under the plan and to comply with the plan" 11 U.S.C. § 1325(a)(6) (2006).

³⁵¹ Equality is, after all, an equivalence *relation* between two or more separate elements. See PATRICK SUPPES, AXIOMATIC SET THEORY 80 (1960).

³⁵² See, e.g., *Phoenix Piccadilly, Ltd. v. Life Insurance Co. (In re Phoenix Piccadilly, Ltd.)*, 849 F.2d 1393, 1394 (11th Cir. 1988) (determining chapter 11 case could be dismissed even if confirmable plan could be written).

³⁵³ *Toibb v. Radloff*, 501 U.S. 157, 160–61 (1991) (holding it is not per se bad faith for individual to file for chapter 11 protection); *Johnson v. Home State Bank*, 501 U.S. 78, 87 (1991) (ruling debtor was allowed to file consecutive bankruptcies in order to maximize his position in reorganization).

³⁵⁴ *In re Desardi*, 340 B.R. 790, 807 (Bankr. S.D. Tex. 2006) (referring to uniform plan in Southern District of Texas which provides "[i]f the monthly payment proposed in the plan is less than the amount of adequate protection payment ordered in the case, the actual payment will be the amount of the monthly adequate protection payment.").

³⁵⁵ Confusingly, Judge Isgur deems his hypothetical car lender undersecured. *Id.* at 808. Yet the principal

1.5% per month.³⁵⁶ In the first month of the plan, depreciation is \$300. This is why the amount allocated to the car lender is \$300. Of this \$300, \$133.33 is allocated to post-petition interest at 8% per annum. The remainder after interest is paid is \$166.67, which reduces the principal amount of the car debt by \$166.67. Meanwhile, nothing in the first month goes to the unsecured creditors.

After eight months, the administrative creditors will have been paid. Cram down payments for the car lender now officially begin, to which the equal payment provision apply. In Judge Isgur's example, cram down payments are larger than the adequate protection payments, thereby complying with section 1326(a)(5)(B)(iii)(II). In the eighth month, payments allocated to the car dealer rise to \$428.15. Whatever is left after the car lender's cram down installment goes to the nonpriority unsecured creditors.³⁵⁷

One feature of Judge Isgur's vision is that, of the \$300 in adequate protection payment, \$133.33 was allocated to interest. Does this violate *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, which holds that an undersecured creditor has no right to post-petition interest?³⁵⁸ The answer is no. The important economic fact is that depreciation is \$300 per month, and the car lender is obtaining \$300 a month. Whether this \$300 is entirely principal, entirely interest or some split between the two is purely nominal.³⁵⁹ Denominating part of the \$300 as interest does not affect the term of the plan or the amount of the cram down payment whether the \$300 is conceived as principal or interest. So even though Judge Isgur unnecessarily characterizes the adequate protection payments as partly allocated to interest, there is no transgression of *Timbers'* holding.

H. Valuation

The hanging paragraph prevents bifurcation of many but not all secured claims by car lenders. Where the hanging paragraph does *not* apply, BAPCPA provides a new pro-lender rule in chapter 7 and 13 cases involving individuals. According to new section 506(a)(2):

amount of the cram down debt is only \$20,000, the value of the car. This would appear to violate the hanging paragraph, if it applies. Properly, principal should have been more than \$20,000. But we shall play along with the assumption that by coincidence the car debt and the car value are both \$20,000.

³⁵⁶ Actually, the \$300 straight line depreciation is 1.5% only for the first month. In the second month, it is 15.22%, because the numerator of \$300 stays constant while the denominator decreases to \$19,700. The local rule in question does require payments of 1.5% per month, which, if taken literally, would constitute \$300 only in the first month and lesser amounts thereafter. Under the local rule read literally, the car never loses all its value.

³⁵⁷ The above summary verbally presents the tabular example Judge Isgur provides in *In re Desardi*. 340 B.R. at 816.

³⁵⁸ *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 382 (1988) (holding undersecured creditor was not entitled to interest).

³⁵⁹ *But see In re Brown*, 348 B.R. 583, 593 (Bankr. N.D. Ga. 2006) (claiming allocation to interest makes difference). Tax consequences may occur, if the plan designates that the adequate protection payment is allocable to interest, but that is not our concern.

If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.³⁶⁰

This amendment intervenes into a controversy, mainly concerning cars, about whether cars should be valued at the wholesale or retail (i.e., replacement) value of used cars. In *Associates Commercial Corp. v. Rash*,³⁶¹ the Supreme Court opted for replacement value, but in a notorious footnote basically invited bankruptcy courts to adjust replacement value downward to cover for the idea that a refurbished new car put up for resale is not exactly the same as the car the debtor actually possesses before refurbishment.³⁶² As a result, bankruptcy courts have felt free to ignore *Rash* altogether and do whatever they did before.³⁶³

While the amendment still invites discounts for the age and condition of the car, courts are not to discount marketing costs. Such a rule discourages a theory according to which, in competitive markets, the only difference between wholesale and retail price is the cost of marketing (including the opportunity cost imposed by

³⁶⁰ 11 U.S.C. § 506(a)(2) (2006). See *In re Feagans*, No. 06-20049, 2006 Bankr. LEXIS 2872, at *8 (Bankr. D. Kan. Oct. 18, 2006) (applying section 506(a)(2) to vehicle subject to hanging paragraph).

³⁶¹ 520 U.S. 953 (1997).

³⁶² According to the Court:

Our recognition that the replacement-value standard, not the foreclosure-value standard, governs in cram down cases leaves to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented. Whether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property. We note, however, that replacement value, in this context, should not include certain items. For example, where the proper measure of the replacement value of a vehicle is its retail value, an adjustment to that value may be necessary: A creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning. Nor should the creditor gain from modifications to the property—e.g., the addition of accessories to a vehicle—to which a creditor's lien would not extend under state law.

Assoc. Commercial Corp. v. Rash, 520 U.S. at 965 n.6 (citation omitted).

³⁶³ See *In re Lyles*, 226 B.R. 854, 856 (adopting Glueck reasoning as its own and finding "retail value" and "replacement value" are not synonymous); *In re Glueck*, 223 B.R. 514, 519 (Bankr. S.D. Ohio 1998) ("*Rash* did not provide a definitive starting point."); *In re Oglesby*, 221 B.R. 515, 518–19 (Bankr. D. Colo. 1998) (establishing general valuation rule as midpoint between retail and wholesale value); *In re Younger*, 216 B.R. 649, 657 (Bankr. W.D. Okla. 1998) (concluding proper replacement value to be average of retail and wholesale value); *In re Franklin*, 213 B.R. 781, 783 (Bankr. N.D. Fla. 1997) (continuing to use long standing practice to determine valuation even after *Rash* decision).

sinking capital into the wholesale purchase of the inventory). Economically, this new amendment is not theoretically justifiable and constitutes a small windfall for car lenders, who, if they repossessed, would indeed have to market the repossessed car.³⁶⁴

I. *Proofs of Claim*

One of the strangest lapses in chapter 13 jurisprudence, both before and after BAPCPA, is the fact that cram down requires that the car lender have an *allowed* secured claim. Many courts hold that the phrase "allowed secured claim" implies that the car lender (or its surrogate)³⁶⁵ has filed a proof of claim.³⁶⁶ Such a belief is in part founded on Bankruptcy Code section 502(a), which states: "A claim . . . proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects."³⁶⁷ Section 502(b) then goes on to govern what the court must do if there is an objection—basically, "determine the amount of such claim"³⁶⁸

Note that section 502(a) does not quite say that only creditors who have filed proofs of claims³⁶⁹ have allowed claims. Rather, it establishes that *if* a creditor has filed a proof of claim to which no one has objected, *that* creditor has an allowed

³⁶⁴ Valuation is a subjunctive exercise in which a court predicts what would have happened in an alternative universe where a secured creditor actually repossesses the car. David Gray Carlson, *Secured Creditors and the Eely Character of Bankruptcy Valuations*, 41 AM. U. L. REV. 63, 70–75 (1991) (discussing difficulties in calculating valuation for hypothetical situations). So Congress is requiring that the court imagine a world in which there are no marketing costs once repossession occurs—a world in which lenders can obtain the car's retail price.

³⁶⁵ An indenture trustee, a surety, the debtor, or the bankruptcy trustee may also file on behalf of a creditor. 11 U.S.C. § 501(a)–(c) (2006). In these cases, the Bankruptcy Rules provide a thirty extra days beyond the ordinary bar date for these entities to make such filings. See FED. R. BANKR. P. 3004, 3005 (2006). Oddly, whereas "excusable neglect" cannot apply to the creditor's bar date under Rule 3002(c), it can fully apply to Rules 3004, or 3005, which establish the trustee's or the surety's bar date.

³⁶⁶ See *In re Boucek*, 280 B.R. 533, 537 (Bankr. D. Kan. 2002) (requiring allowed claim to be filed); *In re Kelley*, 259 B.R. 580, 584–85 (Bankr. E.D. Tex. 2001) (concluding allowed claims must be filed); *In re Elmont Elec. Co.*, 206 B.R. 41, 43–44 (Bankr. E.D.N.Y. 1997) (holding secured creditor must file within prescribed time limits in order to share in distribution from estate); *Still v. Tennessee (In re Rogers)*, 57 B.R. 170, 172 n.1 (Bankr. E.D. Tenn. 1986) ("To the extent Rule 3002(a) appears to say that allowance of a secured claim in a chapter 13 case does not require the filing of a proof of claim, it is inconsistent with the statutes and is ineffective.").

³⁶⁷ 11 U.S.C. § 502(a) (2006).

³⁶⁸ 11 U.S.C. § 502(b) (2006).

³⁶⁹ A proof of claim must adhere to certain formal requirements. First, any relevant writings must be appended; if not available, an explanation of the loss must be forthcoming. FED. R. BANKR. P. 3001(c) (2006) ("If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim."). If the documentation is voluminous, it is enough that the proof of claim tenders the material on request. See *In re Klein*, 119 B.R. 971, 980–81 (N.D. Ill. 1990) (affirming lower court decision to allow creditor to present materials upon request because it was too voluminous to attach), *appeal dismissed*, 940 F.2d 1075 (7th Cir. 1991). The secured party must provide evidence that the security interest is perfected. FED. R. BANKR. P. 3001(d) (2006) (mandating evidence of perfection of security interest). If a proof of claim is filed, it becomes an "allowed claim," unless "a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 . . . objects." 11 U.S.C. § 502(a).

claim. It therefore might be the case that creditors who *never* file proofs of claim have allowed claims.³⁷⁰

Section 506(d)(2), however, hints otherwise. According to that provision:

To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—

. . . .

(2) such claim is not an allowed claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.³⁷¹

This section may be saying that any claim for which there is no proof of claim is not an allowed claim (though the lien underlying the claim is not killed off). Or it may be saying that *whether* failure to file a proof of claim is inconsistent with allowability is to be determined by the Federal Rules of Bankruptcy Procedure, which is competent to excuse proofs of claims in some cases. Where, however, the rules do require a proof of claim, section 506(d)(2) says that a failure to file does not kill the lien.

The matter becomes further obscured when we mix in the Federal Rules of Bankruptcy Procedure. The rule that pertains to chapters 7, 12 and 13 requires only *unsecured* creditors to file. Subtitled "Necessity for Filing," Rule 3002(a) provides: "An unsecured creditor or an equity security holder must file a proof of claim or interest in accordance with this rule for the claim or interest to be allowed, except as provided in Rules 1019(4), 3003, 3004 and 3005."³⁷² The implication of Rule 3002(a) is that, because only unsecured creditors are mentioned, secured creditors have automatically "allowed" claims, even when they file no proofs.³⁷³ Of course, if section 502(a) indicates otherwise, the statute must prevail over the Bankruptcy Rules. Courts have indeed held that secured creditors must file, even though Rule

³⁷⁰ Complicating the matter is a chapter 11 rule, Bankruptcy Code section 1111(a), which provides:

A proof of claim . . . is deemed filed under section 501 of this title for any claim . . . that appears in the schedules filed under 521(1) [sic] or 1106(a)(2) of this title, except a claim . . . or interest that is scheduled as disputed, contingent, or unliquidated.

11 U.S.C. § 1111(a) (2006).

This "deemed filed" rule does suggest, perhaps, that proofs of claim *are* the *sine qua non* of allowedness. Significantly, there is no rule for chapter 13 that parallels the rule of section 1111(a).

³⁷¹ 11 U.S.C. § 506(d)(2) (2006).

³⁷² FED. R. BANKR. P. 3002(a) (2006).

³⁷³ See *Zeman v. Babb* (*In re Babb*), 160 B.R. 848, 849 (D. Colo. 1993) ("Neither the Code nor the Rules mandate that a secured creditor file a proof of claim."); *In re Rome*, 162 B.R. 872, 875 (Bankr. D. Colo. 1993) (ruling trustee bound to distribute funds to secured creditor even absent proof of timely filed claim). In *Rome*, Judge Sidney Brooks renounced his earlier holding to the contrary in *In re Johnson*, 95 B.R. 197, 201–02 (Bankr. D. Colo. 1989) (holding requirement of timely filed claims inescapable for all creditors).

3002(a) mentions only unsecured creditors.³⁷⁴

Proofs of claim are subject to a severe time limitation, called the "bar date." Most of this law emanates from the Federal Rules of Bankruptcy Procedure, which set different deadlines for different chapters. In chapters 7, 12 and 13, nonpriority³⁷⁵ unsecured creditors must file within ninety days of the first creditors' committee scheduled by the United States Trustee.³⁷⁶ If creditors do not file their proofs of claim by these deadlines, they are barred from participating in what largesse the bankruptcy proceeding might generate. In particular, distributions under a chapter 13 plan are limited to those creditors who have *allowed* claims.³⁷⁷

The existence of the bar date is an important issue in the administration of chapter 13 plans, because the chapter 13 plan may be confirmed well before the bar date.³⁷⁸ According to Bankruptcy Rule 3015(b), "[t]he debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 15 days thereafter If a case is converted to chapter 13, a plan shall be filed within 15 days thereafter"³⁷⁹ Thus, the chapter 13 plan is very likely to be filed before the bar date ends, and proofs of claim might be filed after the plan is confirmed.³⁸⁰ After BAPCPA, this phenomenon is more likely, as new section 1324(b) provides:

The hearing on confirmation of the plan may be held not earlier

³⁷⁴ See *In re Hogan*, 346 B.R. 715, 719–20 (Bankr. N.D. Tex. 2006) (finding secured creditor must also file under confirmed chapter 13 plan).

³⁷⁵ Priority creditors are immune from the bar date. Whereas ordinary unsecured creditors must file in a "timely" matter, as set forth in section 726(a)(2), timeliness is not mentioned with regard to creditors who have a priority under section 507(a) and section 726(a)(1). See 11 U.S.C. § 726(a)(2). From this, courts usually draw the lesson that the bar date cannot apply to priority claims. See *United States v. Towers (In re Pac. Atl. Trading Co.)*, 33 F.3d 1064, 1067 (9th Cir. 1994) (noting Congress's intent to exempt priority claims from timing requirement); *United States v. Vecchio (In re Vecchio)*, 20 F.3d 555, 557 (2d Cir. 1994) ("The absence of a timeliness distinction in [section] 726(a)(1) strongly suggests that this subsection encompasses all priority claims whenever filed."); *In re Buck*, 172 B.R. 271, 273 (Bankr. D. Minn. 1994) (holding debtors responsible for paying priority claims which were tardily filed); *In re K-Fabricators, Inc.*, 135 B.R. 654, 657 (Bankr. W.D. Wash. 1992) (stating absence of deadline specifications for objections to claims). *But see* *United States v. Clark*, 166 B.R. 446, 448 (D. Utah 1993) (applying bar date to priority tax claim).

³⁷⁶ See FED. R. BANKR. P. 3002(c) (2006) (defining timeliness for proof of claim as not more than 90 days after first date set for meeting of creditors). The United States trustee is required to schedule such a meeting in all proceedings within a reasonable time after the petition. 11 U.S.C. § 341(a) (2006). Bankruptcy judges are specifically disinclined. See 11 U.S.C. § 341(c) (2006) ("The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors.").

³⁷⁷ See FED. R. BANKR. P. 3021 ("[A]fter a plan is confirmed, distribution shall be made to creditors whose claims have been allowed"). See also *Universal Am. Mortgage Co. v. Bateman (In re Bateman)*, 331 F.3d 821, 827 (11th Cir. 2003) (noting creditor must file timely claims in order to secure bankruptcy court protection).

³⁷⁸ *In re Cason*, 190 B.R. 917, 920 n.1 (Bankr. N.D. Ala. 1995) (claiming one-third of chapter 13 plans are confirmed before bar date).

³⁷⁹ FED. R. BANKR. P. 3015(b) (2006).

³⁸⁰ See, e.g., *Piedmont Trust Bank v. Linkous (In re Linkous)*, 990 F.2d 160, 163 & n.1 (4th Cir. 1993) (Chapman, J., dissenting) (describing situation where plan can be confirmed before proof of claims are filed).

than 20 days and not later than 45 days after the date of the meeting of the creditors under section 341(a), unless the court determines that it would be in the best interests of the creditors and the estate to hold such hearing at an earlier date and there is no objection to such earlier date.³⁸¹

This raises the following possibility. Suppose a debtor writes a plan that acknowledges the existence of the car lender and awards the car dealer precisely zero. Is this plan confirmable? Section 1325(a)(5) requires that an *allowed secured claim* must be accorded cram down rights. After BAPCPA, this includes the anti-bifurcation rule of the hanging paragraph.

But, by hypothesis, the car lender as yet has not filed a proof of claim, and the deadline for filing has not yet even run.³⁸² Therefore the car lender has *no* allowed secured claim and so the hanging paragraph does not apply. So the plan is confirmable even if it gives the car lender nothing at all.

According to section 1325(a)'s preamble, "the court *shall* confirm a plan" if all the subsequent requirements are met.³⁸³ There is of course that old wild card, the

³⁸¹ 11 U.S.C. § 1324(b) (2006). Prior to BAPCPA, some courts "waited to hold confirmation hearings until after the deadline for filing proofs of claim had passed, believing that it was difficult to confirm a plan without understanding which creditors had claims in what amounts." *In re Brown*, 348 B.R. 583, 587 n.3 (Bankr. N.D. Ga. 2006).

³⁸² Significantly, an appellate panel has ruled that confirmation of the plan preempts the bar date. Not only that, a plan can destroy the security interests of a creditor even if she has never filed a claim in the debtor's bankruptcy. In *Factors Funding Co. v. Fili (In re Fili)*, a secured creditor who met the bar date (by filing after confirmation) but did not show up to protest a plan that allocated it nothing was held barred by res judicata from protesting such treatment. 257 B.R. 370, 374 (B.A.P. 1st Cir. 2001). According to Judge James B. Haines:

[I]n the face of notice that timely and unambiguously informs a creditor that his claim will be disallowed in total and discharged under a [c]hapter 13 plan pending for confirmation, the creditor may not ignore the confirmation process and fail to object simply because the bar date for filing a proof of claim has yet to expire.

Id. at 374; accord *In re Bryant*, 323 B.R. 635, 642 (Bankr. E.D. Pa. 2005) (restating rule in *Fili* as "creditor with timely and unambiguous notice that its claim will be compromised and discharged may not ignore the confirmation process and fail to object"). This holding is radical in many ways. First, it repeals the cliché that a secured creditor can ignore a bankruptcy proceeding and rely on her lien. Under *Fili*, she can lose the lien if the plan provides for its loss. *In re Fili*, 275 B.R. at 373 n.6 (stressing creditors will be directly bound by terms debtor's confirmed plan). Second, it amends and moves up the bar date, with the proviso that the bar date (or, rather, confirmation of the plan) now applies unambiguously to secured creditors. Third, the holding ignores Federal Rules of Bankruptcy Procedure 3002(a), which requires only unsecured creditors to file in chapter 13. See FED. R. BANKR. P. 3002(a) ("[U]nsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed . . ."). Under *Fili*, failure of a secured creditor to file a proof of claim is a fatal error. In effect, *Fili* inappropriately amends the terms of Rule 3002(a). Finally, it obviates the need for an adversary proceeding to destroy a lien. In other circuits, however, debtors must probably continue to expect that, after confirmation, a secured creditor might still file a timely proof of claim.

³⁸³ 11 U.S.C. § 1325(a) (2006) (enumerating list of requirements to be satisfied before court confirms plan).

plan must be filed in "good faith."³⁸⁴ As always, this invites bankruptcy courts to supplement the Bankruptcy Code with rules that comport with the morality of the judge presiding over the case. But why is it bad faith to deny compensation to a creditor with no allowed claim, when the Federal Rules of Bankruptcy Procedure expressly require this?³⁸⁵ Nevertheless, courts have refused to permit lien avoidance just because, at the time of confirmation, the car lender has not filed a proof of claim.³⁸⁶

It is intellectually flabby to declare as bad faith a tactic that takes up the invitation extended by the clear language of the Bankruptcy Code. A cleaner solution is available. A body of pro-creditor law has developed with regard to the possibility of *informal* proofs of claim. Thus, if the creditor has communicated with the trustee *in writing* about a specific demand for payment, courts will deem that writing to be a proof, if received before the bar date.³⁸⁷ Just showing up and protesting plan confirmation has been held an informal proof of claim.³⁸⁸ A trustee's knowledge, however, is not enough, without the writing, to justify a finding of informal claim.³⁸⁹

Borrowing from this idea, a very simple judicial ruling would clear up the contradictory nature of chapter 13. Courts could declare that a chapter 13 plan that sets forth cram down treatment of a car lender is itself an "informal" claim filed

³⁸⁴ See 11 U.S.C. § 1325(a)(3) (2006) ("[P]lan has been proposed in good faith . . .").

³⁸⁵ FED. R. BANKR. P. 3021 ("[A]fter a plan is confirmed, distribution shall be made to creditors whose claims have been allowed . . .").

³⁸⁶ See, e.g., *Simmons v. Savell* (*In re Simmons*), 765 F.2d 547, 552–53 (5th Cir. 1985) (stating even when proof of claim was filed after petition of relief, permission of lien avoidance still did not place claim in issue).

³⁸⁷ See *Northeast Office & Commercial Props., Inc. v. Smith Valve Corp.* (*In re Northeast Office & Commercial Props., Inc.*), 178 B.R. 915, 920 (Bankr. D. Mass. 1995) (noting how previous courts have recognized "delivery of a claim to a trustee in bankruptcy is equivalent to filing the claim in court for the purpose of complying with the claims bar date."); *In re Nutri*Bevco., Inc.*, 117 B.R. 771, 789 (Bankr. S.D.N.Y. 1990) (discussing prerequisite to finding informal proof depends upon whether it "contain[s] a specific demand setting forth the amount and nature of the debt and the intent to hold the Debtor liable."); *In re Bowers*, 104 B.R. 362, 363–64 (Bankr. D. Colo. 1989) (providing five-prong test including factors to be considered when determining whether creditor has submitted informal proof of claim). See generally Paul J. Maselli, *When Is It Never Too Late to File a Proof of Claim?*, 98 COM. L.J. 304 (1993) (discussing prior case law on court recognition of creditors' writings to trustee where writings were specific and filed before bar date). But see *In re Plunkett*, 82 F.3d 738, 742 (7th Cir. 1996) (refusing to recognize informal proof of claim when decade almost passed without creditor participation).

³⁸⁸ See *In re Gonzalez*, 295 B.R. 584, 588–89 (Bankr. N.D. Ill. 2003) (indicating submission of objection to plan confirmation will be recognized as adequate informal proof of claims).

³⁸⁹ See e.g., *Clark v. Valley Fed. Sav. & Loan Ass'n* (*In re Reliance Equities, Inc.*), 966 F.2d 1338, 1345 (10th Cir. 1992) ("[T]rustee's knowledge of a claim does not constitute an adequate informal claim, and bankruptcy courts will not ordinarily allow filing of a proof of claim after the claim bar date."); *In re Square Shooter, Inc.*, 130 B.R. 108, 109 (Bankr. S.D. Ala. 1991) (emphasizing document indicating informal proof of claim must be filed with bankruptcy court, and debtor knowledge alone would not suffice). According to Judge Merritt Deitz, the standards for informal proofs of claim are as follows: (1) the proof of claim must be in writing; (2) it must contain a demand for payment; (3) it must express an intent to hold the debtor liable; (4) it must be filed with the bankruptcy court; and (5) later amendment of the informal proof of claim must be equitable. *In re McCoy Mgmt. Servs., Inc.*, 44 B.R. 215, 217 (Bankr. W.D. Ky. 1984).

before the bar date elapsed.³⁹⁰ Courts have occasionally reached this conclusion. In *In re Babbin*,³⁹¹ a secured party never filed a claim and was bifurcated in a chapter 13 plan.³⁹² The chapter 13 trustee argued that she should not have to distribute any assets to the secured parties who had not filed.³⁹³ Judge Charles Matheson rejected this suggestion, in part because the chapter 13 plan itself could constitute an informal proof of claim for the secured party.³⁹⁴

On appeal, however, Judge Zita Weinshienk denied that the chapter 13 plan itself might serve as an informal proof of claim. "[O]nly a debtor may file a [c]hapter 13 Plan," wrote Judge Weinshienk. "Because a [c]hapter 13 Plan does not include a demand by a creditor, it cannot serve as an informal proof of claim"³⁹⁵ This argument is unconvincing. Section 501(c) clearly states that the debtor can file a claim *for a creditor*.³⁹⁶ Therefore, the observation that only debtors can file chapter 13 plans³⁹⁷ cannot defeat the suggestion that the chapter 13 itself is an informal proof of claim.³⁹⁸ The plan is an informal claim filed for the car lender by the debtor.

Furthermore, given the fact that the debtor obviously knew enough about the secured claim to contain it in a plan, what is the point of requiring a proof of claim at all? Proofs of claim are thought to be necessary to plan administration, but since the plan was obviously written without the secured party's proof of claim, why force the secured party to file a superfluous piece of paper? Rather, the plan itself should constitute an informal proof of claim, thereby rendering the secured claim into an "allowed" claim entitled to plan distributions.

Even though Judge Weinshienk ruled that the chapter 13 plan cannot serve as an informal claim, she also ruled that secured creditors did not have to file claims at all in chapter 13, on the ground that Rule 3002(a) does not require it.³⁹⁹ So, in the

³⁹⁰ See Arpan K. Punyani, *Debtor-Filed Acknowledgements of Creditors' Claims: An Alternative Approach to Proof of Claim in Chapter 13*, 28 CARDOZO L. REV. 511, 530–32 (2006) (proposing chapter 13 debtor's filings acknowledging creditors' claims will serve as formal proof of claims).

³⁹¹ 156 B.R. 838 (Bankr. D. Colo. 1993), *rev'd*, 160 B.R. 848 (D. Colo. 1993).

³⁹² *Id.* at 843–44.

³⁹³ *Id.* at 844.

³⁹⁴ *In re Babbin*, 156 B.R. at 852–53 (permitting chapter 13 plan to serve as informal proof of claim). *Accord In re Edwards*, 162 B.R. 868, 869 (Bankr. D. Colo. 1993) (providing five-factor test required when courts are allowing chapter 13 plan to qualify as informal proof of claim); cf. *Washington v. Nissan Motor Acceptance Corp. (In re Washington)*, 158 B.R. 722, 724 (Bankr. S.D. Ohio 1993) (determining creditor's objection to plan, which was subsequently withdrawn, constituted informal proof of claim).

³⁹⁵ *Zeman v. Babbin (In re Babbin)*, 160 B.R. 848, 850 (Bankr. D. Colo. 1993); *accord In re Greenig*, 152 F.3d 631, 636 (7th Cir. 1998) (excluding confirmed plans as adequate proof of claim); *In re Baldrige*, 232 B.R. 394, 396 (Bankr. N.D. Ind. 1999) (stressing proof of claim filed by creditor or on creditor's behalf, must be fulfilled to receive distribution under chapter 13 plan); *Grubb v. Pittsburgh Nat'l. Bank (In re Grubb)*, 169 B.R. 341, 348 (Bankr. W.D. Pa. 1994) (affirming district court's decision, where filing of chapter 13 plan does not provide informal proofs of claims).

³⁹⁶ 11 U.S.C. § 501(c) (2006) ("If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.").

³⁹⁷ See 11 U.S.C. § 1321 (2006) ("[D]ebtor shall file a plan.").

³⁹⁸ For the view that objecting to the confirmation of a plan is an informal proof of claim, see *In re Gonzalez*, 295 B.R. 584, 588–89.

³⁹⁹ *Zeman v. Babbin (In re Babbin)*, 160 B.R. 848, 849 (D. Colo. 1993) ("Neither the Code nor the Rules

end, *Babbin* stands for the proposition that secured claims are automatically allowed, even without a proof of claim. On remand, therefore, Judge Matheson reaffirmed that the chapter 13 trustee should distribute funds to secured creditors who had not filed claims.⁴⁰⁰

Typically, debtors will write the plan on the assumption that a timely proof of claim *will* be filed. Following confirmation, the secured party may in fact forget to file. In such a case, the plan requires the chapter 13 trustee debtor to pay out on claims for which no proof of claim has been filed. Yet the Federal Rules of Bankruptcy Procedure require that only *allowed* claims are entitled to distributions.⁴⁰¹ Trustees therefore may assert that late secured claims are not "allowed," and hence are not entitled to distributions.⁴⁰²

What if the car lender files *after* the bar date. In a chapter 7 case, a late filing creditor is entitled to a deeply subordinated distribution "in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a)" ⁴⁰³ Does

mandate that a secured creditor file a proof of claim.").

⁴⁰⁰ *In re Babbin*, 164 B.R. 157, 163 (Bankr. D. Colo. 1994) (stating chapter 13 trustee should distribute funds to secured creditors, and secured creditors are not required to file proof of claim).

⁴⁰¹ See FED. R. BANKR. P. 3021 ("After a plan is confirmed, distribution shall be made to creditors whose claims have been allowed . . ."); *Universal Am. Mortgage Co. v. Bateman* (*In re Bateman*), 331 F.3d 821, 827 (11th Cir. 2003) (filing proof of claim, without objection, is "deemed allowed" and is "prima facie evidence of the validity and amount").

⁴⁰² See *In re Greenig*, 152 F.3d 631, 633 (7th Cir. 1998) (barring late claims from receiving distributions from plans where court has no discretion to extend bar date); *Zich v. Wheeler Wolf Attorneys* (*In re Zich*), 291 B.R. 883, 886 (Bankr. M.D. Ga. 2003) (disallowing claims because no timely proof of claim is filed); *In re Michels*, 270 B.R. 737, 741 (Bankr. N.D. Iowa 2001) ("If an untimely secured claim is disallowed, the creditor would receive no distribution under the plan, the claim would be discharged at the end of the plan, the creditor may be precluded from seeking relief from the stay during the term of the plan, and the creditor's lien may be at risk under [section] 506(d)."); *In re Macias*, 195 B.R. 659, 663 (Bankr. W.D. Tex. 1996) (allowing secured party to file proof of claim and obtain payments under plan, but ruling in future, late filing would not be permitted); *In re Tucker*, 174 B.R. 732, 739 (Bankr. N.D. Ill. 1994) (holding tardiness bars allowance of claim); *In re Schaffer*, 173 B.R. 393, 396 (Bankr. N.D. Ill. 1994) (denying permission to secured creditor to file claim after chapter 13 plan was confirmed); see also *Hildebrand v. Hays Imports, Inc.* (*In re Johnson*), 279 B.R. 218, 223 (Bankr. M.D. Tenn. 2002) (stating chapter 13 trustee could challenge secured claim as voidable preference, even though plan provided for allowance); cf. *Andrews v. Loheit* (*In re Andrews*), 49 F.3d 1404, 1408 (9th Cir. 1995) (holding chapter 13 trustees also have standing to oppose confirmation on behalf of secured creditors who are not adequately protected under the plan).

A chapter 13 trustee, however, has no duty to see to the interests of the car lender who forgets to file. *Accord In re Jurado*, 318 B.R. 251, 257 (Bankr. D.P.R. 2004) (recognizing trustee has authority to file proof of claim for creditor, but burden is on debtor to file because debtor has duty to protect its own interests). In *Jurado*, a plan was confirmed before the bar date, providing for the car lender to be paid monthly. The car lender, however, did not file a proof of claim. Apparently, the trustee distributed no funds to the car lender. Just before the plan ended, the debtor moved for permission to file a late claim for the car lender. The motion was granted, but the chapter 13 trustee moved the court to reconsider its decision. Judge Enrique S. Lamoutte reversed himself, in part, holding it unfair to the creditors who did file proofs of claims to permit the debtor's late filing for the car lender, to the extent it would require disgorgement of what the creditors had previously received. *Id.* at 258. The argument that the chapter 13 trustee bore any responsibility for the welfare of the secured party was expressly rejected. A local rule, however, required the debtor to file for secured creditors; as a penalty, the court order the debtor's attorney to disgorge all fees and pay them to the chapter 13 trustee for disbursement. *Id.* at 255. The secured party was allowed to participate going forward and therefore became the beneficiary of the disgorged fees.

⁴⁰³ See 11 U.S.C. § 726(a)(3) (2006).

this not prove that late-filing creditors have allowed claims? If so, then Rule 3021 authorizes the late filing car lender to obtain plan payments. Since the plan governs distributions, not section 726(a)(3), the car lender then obtains precisely the priority accorded to it under the plan. Unhappily, since 1994, section 502(b) disallowed claims "not timely filed, except to the extent tardily filed as permitted under paragraph . . . (3) of section 726(a) of this title . . ."⁴⁰⁴ This exception to the exception is odd, in that section 726(a)(3) does not "permit" late filing. It permits distributions to creditors that are late in filing. In any case, it must be read as meaning that late-filing creditors have allowed claims in chapter 7 only. Otherwise, they are entirely disallowed (assuming *ex hypothesi* that car lenders are required to file at all).⁴⁰⁵

If chapter 13 trustees must withhold plan payments to car lenders who have filed late, it is the *debtor* who is harmed. If a secured party is unentitled to receive distributions under the plan for want of a proof of claim, these undistributed funds must go elsewhere—to the other unsecured creditors of the debtor. Therefore, the unsecured creditors are enriched at the expense of the car lender. This harms the debtor because the secured party will eventually foreclose outside of bankruptcy for the full debt amount, while the unsecured creditors obtain a larger dividend than they otherwise would.⁴⁰⁶

The ability of the car lender to foreclose deserves some further explication. If car lenders are not entitled to the benefits of the plan, because their claims are "not allowed," it might seem to follow that neither are they subject to the burdens of the plan. On this principle, a car lender not subject to the plan might repossess as soon as the chapter 13 plan is confirmed, because at that point, property of the estate is re-vested in the debtor.⁴⁰⁷ Indeed, this precisely describes the chapter 11 rule, but the rule in chapter 13 is different. According to section 362(c):

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

⁴⁰⁴ Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 213(a), 108 Stat. 4125 (1994) (amending section 502(b) of title 11, United States Code).

⁴⁰⁵ See *In re Hogan*, 346 B.R. 715, 722 (Bankr. N.D. Tex. 2006) ("One of the time requirements listed as excepted in Rule 9006(b)(3) is that governing the filing of proofs of claim in [c]hapter 7 cases."); *In re Dennis*, 230 B.R. 244, 249 (Bankr. D.N.J. 2006) ("If Congress intended tardily filed claims in chapter 13 to be allowed, they too would have been excepted from [section] 502(b)(9) as were tardily filed claims under [section] 726(a).").

⁴⁰⁶ For this reason, debtors sometimes join with their secured creditors against the chapter 13 trustee to allow a late filing, so that distributions under the plan can be made to the secured party. See *Gen. Motors Acceptance Corp. v. Judkins (In re Judkins)*, 151 B.R. 553, 554 (Bankr. D. Colo. 1993) (reporting neither debtor nor secured creditor filed proof of claim, yet jointly moved to have trustee pay secured creditor amount provided for in plan).

⁴⁰⁷ See 11 U.S.C. § 1327(b) (2006) ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."); see also *Universal Am. Mortgage. Co. v. Bateman (In re Bateman)*, 331 F.3d 821, 834 (11th Cir. 2003) (holding Universal cannot collaterally attack Plan and is bound by its terms pursuant to section 1327).

- (2) the stay of any other act under subsection (a) of this section continues until the earliest of—
- (A) the time the case is closed;
 - (B) the time the case is dismissed; or
 - (C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.⁴⁰⁸

Section 362(c)(1) provides that the automatic stay against actions pertaining to property of the estate ends when the property is expelled from the estate, as when it is abandoned, or when a reorganization plan is confirmed. But section 362(c)(2) might extend the stay beyond confirmation of a plan; "any other act under subsection (a)," in particular, includes "any act to create, perfect, or enforce against *property of the debtor* any claim that arose before the commencement of the case . . ."⁴⁰⁹ This portion of the automatic stay continues until "a discharge is granted or denied."⁴¹⁰

Given the automatic stay and if we add the ineligibility of an undersecured creditor to receive payments under the plan, we have the untenable situation of a car lender who receives no payment and also may not repossess the collateral until the plan is completed.

Mitigating this unacceptable state of affairs is that the car lender can move to lift the automatic stay for want of adequate protection.⁴¹¹ But any such motion yields only the amount of depreciation to the car lender. Adequate protection does not include the right to post-petition interest, whereas cram down under section 1325(a)(5) does.⁴¹² If the secured party has an allowed claim under the plan, the secured party obtains post-confirmation interest. But if the secured party is excluded from the plan because she filed late or did not file at all, then the secured party is unentitled to post-petition interest as part of adequate protection.

As a practical matter, adequate protection will mean payment of the secured claim in amounts equal to depreciation.⁴¹³ Yet the premise being discussed is that secured parties who have not filed proofs of claims are allowed to take no

⁴⁰⁸ 11 U.S.C. § 362(c) (2006).

⁴⁰⁹ 11 U.S.C. § 362(a)(5) (2006) (emphasis added).

⁴¹⁰ 11 U.S.C. § 362(c)(2)(C) (2006).

⁴¹¹ See 11 U.S.C. § 362(d)(1) (2006) (providing for court to grant relief from stay by terminating, annulling, modifying, or conditioning such stay "for cause, including the lack of adequate protection of an interest in property of such party in interest"); see also *In re Hogan*, 346 B.R. 715, 723 (Bankr. N.D. Tex. 2006) ("Presumably, any secured creditor in this situation will ultimately seek relief from the stay or adequate protection if not receiving payments from the debtor during the [c]hapter 13 plan/case."); *In re Lee*, 182 B.R. 354, 358 (Bankr. S.D. Ga. 1995) (suggesting automatic stay might be lifted for cause); *In re Schaffer*, 173 B.R. 393, 395 (Bankr. N.D. Ill. 1994) (noting creditor could move to vacate stay for cause and "[c]ause would not likely flow from an omission (the late filing) by the party seeking relief from the stay").

⁴¹² See *supra* text accompanying note 109–12.

⁴¹³ See 11 U.S.C. § 361(1) (2006) ("[R]equiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay . . . results in a decrease in the value of such entity's interest in such property.").

distributions under the plan. How then can adequate protection payments be achieved, given the incompetence of the plan to provide for them?⁴¹⁴ The only possible solution is payments "outside the plan," which, as we have seen, the chapter 13 trustee is also likely to oppose.⁴¹⁵ Furthermore, since the debtor is presumably dedicating all disposable income to the plan,⁴¹⁶ this imposition of adequate protection payments may render the entire plan unfeasible.⁴¹⁷ The only solution seems to be to lift the automatic stay and let the lender take the car⁴¹⁸ or modify the plan pursuant to section 1329(a).⁴¹⁹

I have suggested that adequate protection should not be considered administrative claims under section 503(b). Otherwise, secured creditors face disgorgement in administrative shortfall cases.⁴²⁰ But suppose, following *DeSardi*, we say that adequate protection qualifies as an administrative claim. According to section 503(a), "An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause."⁴²¹ Neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure calls for a bar date for such claims. So it might be possible for a secured creditor to style its adequate protection claim as an administrative claim under section 503(a). If so permitted, then the car lender can at least obtain depreciation payments directly from the chapter 13 trustee. While this will be less than the cram

⁴¹⁴ According to Judge Leif Clark in *In re Macias*, secured parties *forfeit* their right to adequate protection if they do not file proofs of claims:

[A] secured creditor cannot simply absent itself from the bankruptcy process in chapter 13, then hope to obtain easy relief from the automatic stay after confirmation. Such a creditor could hardly maintain that cause existed for relief from stay where the debtor made provision for the creditor in the plan and only the creditor's refusal to file a claim prevented it from receiving the adequate protection that had been offered.

195 B.R. 659, 662 n.5 (Bankr. W.D. Tex. 1996). This "mere dictum" sets forth the radical proposition that adequate protection rights depend upon the filing of a proof of claim (at least in chapter 13). Such a suggestion goes rather beyond what the Bankruptcy Code expressly provides for. In establishing a right to adequate protection, section 363(e) mentions no requirement that a secured creditor hold an "allowed" claim. See 11 U.S.C. § 363(e) (2006) ("[A]t any time, on request of an entity that has an interest in property . . ."). On the other hand BAPCPA may have vindicated Judge Clark's view. According to section 1326(a)(1)(C), only purchase money car lenders *with allowed claims* have a right to adequate protection. See *supra* text accompanying notes 120–30.

If Judge Clark's suggestion is rejected, then, apparently, a debtor will have to make these payments *outside* the plan, if the debtor is to enjoy the continued benefit of the automatic stay. Surprisingly, the matter has not been addressed by the courts.

⁴¹⁵ See *supra* Part II.A.

⁴¹⁶ See 11 U.S.C. § 1325(b)(1)(B) (2006) ("[T]he court may not approve the plan unless . . . the plan provides that all of the debtor's projected income . . . will be applied to make payments to unsecured creditors under the plan.").

⁴¹⁷ I assume here the debtor has not padded his expenses in order to hold some disposable income in reserve.

⁴¹⁸ See 11 U.S.C. § 362(d)(2)(B) (2006) (stating court shall grant relief from stay if property is not necessary to effective reorganization).

⁴¹⁹ See *infra* Part IV.A.

⁴²⁰ See *supra* text accompanying notes 171–72.

⁴²¹ 11 U.S.C. § 503(a) (2006).

down payment, it serves to relieve the debtor from making such payments directly to the car lender, out of income which by definition is not disposable income (since all disposable income must go to the chapter 13 trustee).

To summarize, chapter 13 suffers from contradiction when the plan is confirmed before the bar date and the car lender does not file a proof of claim in time. The ambiguity should be resolved in favor of secured creditor participation in plan distributions, even when no proof of claim has been filed. First, courts should recognize that secured creditors need not file proofs of claim at all in order to have allowed claims. Second, the chapter 13 plan itself should be considered an informal proof of claim, thereby rendering the secured claim "allowed" within the meaning of section 502(a). The proof of claim is a useless trap for the unwary, where a confirmed chapter 13 plan honors a secured creditor's cram down rights. It is unconscionable that Congress did not address this contradiction in its effort to aid car lenders with respect to chapter 13. Leaving the matter unaddressed hurts both car lenders *and* debtors.

IV. MODIFICATION

A. Before BAPCPA

In contrast to pre-2005 chapter 11, chapter 13 plans can be modified.⁴²² According to section 1329, as it existed prior to BAPCPA:

(a) At any time after confirmation of the plan but before the completion of payment under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
- (2) extend or reduce the time for such payments; or
- (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.⁴²³

⁴²² In pre-2005 chapter 11, no provision permits plan modification. Confirmation could be revoked within 180 days, but only on grounds of fraud on the court. *See* 11 U.S.C. § 1144 (2000), *amended by* Pub. L. No. 109-8, § 102, 119 Stat. 23, 34–35 (2005). In effect, the chapter 11 plan is final and not modifiable. BAPCPA, however, permits modification of individual chapter 11 plans on the same basis that chapter 13 plans can be modified. 11 U.S.C. § 1141(d)(5) (2006).

⁴²³ 11 U.S.C. § 1329 (2000), *amended by* Pub. L. No. 109-8, §§ 102, 318, 119 Stat. 23, 34, 94 (2005). Section 1322(a) requires the debtor to dedicate income to the chapter 13 trustee to fund the plan, to pay all

Prior to 2005, modification of a chapter 13 plan was a significant strategy for dealing with post-confirmation car trouble. The car lender's claim will have been bifurcated in the original chapter 13 plan, but the car has now depreciated faster than expected. Debtors sought to re-bifurcate in their favor because the car had depreciated below the amount of the amortized secured claim, as paid down over time.

There was a plausible argument, however, that re-bifurcation is not permitted in a plan modification. Examination of section 1329(a) reveals that increasing or reducing payment on *fixed* claims is permitted.⁴²⁴ So is reducing or increasing the time of payment.⁴²⁵ Altering the payments in light of extra-plan payments to a creditor is permitted.⁴²⁶ What is not expressly mentioned is changing the amount of

administrative expenses in full, and to treat all claims in a class equally. See 11 U.S.C. § 1322(a) (2006). Section 1322(b) lists various things a plan might do, including the modification of secured claims. See 11 U.S.C. § 1322(b) (2006). Section 1323(c) provides that, if the plan is modified prior to confirmation, a secured creditor is deemed not to have changed her position on acceptance or rejection of the plan, unless the modification affects the secured creditor's position directly. See 11 U.S.C. § 1323(c) (2006). Section 1325(a) provides that the plan can be confirmed only if, *inter alia*, the plan complies with all other chapter 13 provisions, the plan has been proposed in good faith, every creditor obtains at least as much as she would have received if the debtor had liquidated under chapter 7, the secured creditors obtain the value of their collateral, and the plan is feasible. See 11 U.S.C. § 1325(a) (2006).

⁴²⁴ 11 U.S.C. § 1329(a)(1) (2006) (stating any time after confirmation of plan but before completion of payments under plan, plan may be modified to increase or decrease amount of payments on claims of particular class provided for by plan).

⁴²⁵ 11 U.S.C. § 1329(a)(2) (2006) (stating any time after confirmation of plan but before completion of payments under plan, plan may be modified to extend or reduce time of payments). Prior to BAPCPA, prepayment of an economically equivalent lump sum was not modification at all and is something the debtor can inherently do under chapter 13. See *Miller v. Loan Star Mortgage* (*In re Miller*), 325 B.R. 539, 541, 543–44 (Bankr. W.D. Pa. 2005) (approving plan where debtor proposed to borrow money in order to pay undiscounted amount to creditor); *Mass. Hous. Fin. Agency v. Evora*, 255 B.R. 336, 342–43 (D. Mass. 2000) (stating early payment by debtor was not modification of plan). Under BAPCPA, however, there is now an "applicable commitment period," that is three years for below-median debtors and five years for above-median debtors. See 11 U.S.C. § 1325(b)(1)(B) (2006) (requiring plan to provide all of debtor's projected disposable income during "applicable commitment period"); 11 U.S.C. § 1325(b)(4) (2006) (defining "applicable commitment period" as three years, or not less than five years depending on debtor's current monthly income). Courts are divided as to whether a debtor can end a plan early by paying disposable income for the applicable commitment period. Some courts have rejected the premise that the three-or-five year period can be used to calculate a total payment, which can then be paid over a shorter period. See *In re Davis*, 348 B.R. 449, 458 (Bankr. E.D. Mich. 2006) ("[T]he Court is not persuaded that one of these changes [under BAPCPA] is the elimination of a minimum length of plan payments for a debtor who does not pay unsecured creditors in full."); *In re Nevitt*, No. 05-77798, 05-77943, 2006 WL 2433491, at *5 (Bankr. N.D. Ill. Aug. 18, 2006) (stating applicable commitment period is temporal requirement); *In re Alexander*, 344 B.R. 742, 751 (Bankr. E.D.N.C. 2006) ("If Congress wanted the applicable commitment period to function as a multiplier, it could have stated so in the statute."); *In re Schanuth*, 342 B.R. 601, 606–08 (Bankr. W.D. Mo. 2006) (holding temporal interpretation of BAPCPA is logical and consistent with plain language of statute). This is particularly a blow to debtors with no disposable income, who hope to stay with the plan only until the administrative creditors and car lender is paid. At least one court, however, disagrees and allows a debtor with *no* disposable income to end the plan early. See *In re Fuger*, 347 B.R. 94, 99, 102 (Bankr. D. Utah 2006) (holding applicable commitment period of BAPCPA does not require debtors to commit to plan lasting sixty months as long as debtors projected income is computed over length of time, and disagreeing with courts conclude applicable commitment period is temporal requirement).

⁴²⁶ See 11 U.S.C. § 1329(a)(3) (2006) (allowing for modification of plan by altering amount of distribution

an allowed secured or unsecured claim. Courts have therefore disallowed modifications that attempt to change the amount of an allowed claim.⁴²⁷ As re-bifurcation involves changing both the allowed secured and unsecured claims of a car lender, re-bifurcation is prohibited on this view.

The appellate decisions disagree on the question of re-bifurcation under section 1329(a). In favor of the integrity of the original bifurcation is *Chrysler Financial Corp. v. Nolan (In re Nolan)*,⁴²⁸ where the debtor experienced post-confirmation car trouble.⁴²⁹ She wished to surrender the car to the secured party, who would then resell. Any deficit would then be considered an unsecured claim. Judge Alan Norris ruled that revisiting bifurcation was not permitted under section 1329(a).⁴³⁰ The secured and unsecured portions of the creditor's claim had to be considered as two radically separate claims. In light of this assumption, the addition of an enlarged deficit (because of a shortfall in realization on the collateral) would constitute the introduction of a brand new *third* claim—which section 1329(a) does not permit.⁴³¹

Contrary to *Nolan*, many courts permit re-visitation of the bifurcation under

to creditor whose claim is provided for to extent necessary to take account of any payment of such claim other than under plan).

⁴²⁷ See *In re Smith*, 259 B.R. 323, 326–27 (Bankr. S.D. Ill. 2001) (disallowing proposed modification which would reclassify creditor's claim from secured to unsecured even if debtor paid deficiency of surrendered vehicle value); *In re Cruz*, 253 B.R. 638, 642 (Bankr. D.N.J. 2000) (stating amount and status of claim is fixed at confirmation and section 1329 does not permit revaluation of collateral or reclassification of claims after this point); *In re Meeks*, 237 B.R. 856, 861 (Bankr. M.D. Fla. 1999) ("The Bankruptcy Code does not allow the Debtors' to modify the amount of an allowed secured claim post-confirmation."); *In re Coleman*, 231 B.R. 397, 400 (Bankr. S.D. Ga. 1999) (denying reclassification of secured debt to unsecured debt when surrendering collateral); *In re Dunlap*, 215 B.R. 867, 870 (Bankr. E.D. Ark. 1997) (concluding debtor's proposed modification of secured claim was "unfair manipulation of the provisions of [c]hapter 13 of the Bankruptcy Code"); *In re Banks*, 161 B.R. 375, 379 (Bankr. S.D. Miss. 1993) (holding unexpected, postconfirmation mechanical problems with chapter 13 debtor's automobile did not justify modification by debtor of confirmed plan to surrender automobile and treat any deficiency after liquidation as unsecured claim); *In re Holt*, 136 B.R. 260, 260–61 (Bankr. D. Idaho 1992) (denying modification of chapter 13 plan where debtor proposed return of vehicle to creditor holding security interest in vehicle); *In re Abercrombie*, 39 B.R. 178, 179 (Bankr. N.D. Ga. 1984) (stating Bankruptcy Code does not provide debtor with means to reclassify previously allowed secured claim as unsecured after plan has been confirmed); *In re Johnson*, 25 B.R. 178, 179 (Bankr. N.D. Ga. 1982) (sustaining creditor's objection to proposed modification of chapter 13 plan when debtor wanted to surrender vehicle to creditor and have balance owed as unsecured amount).

⁴²⁸ 232 F.3d 528 (6th Cir. 2000).

⁴²⁹ *Id.* at 529–30.

⁴³⁰ *Id.* at 532 ("[S]ection 1329(a) does not expressly allow the debtor to alter, reduce or reclassify a previously allowed secured claim.").

⁴³¹ *Id.* at 532–33 ("A modification that reduces the claim of a secured debtor [sic] would add a claim to the class of unsecured creditors, a change prohibited by section 1329(a)."); accord *In re Arguin*, 345 B.R. 876, 882 (Bankr. N.D. Ill. 2006) (denying debtors permission to surrender inoperable motor vehicle and adjust secured claim to zero, because it would reclassify substantial part of creditor's allowed secured claim to unsecured claim); *In re Wilcox*, 295 B.R. 155, 157 (Bankr. W.D. Okla. 2003) (stating surrender of property by debtor is not requirement pursuant to section 1325(a)(5)(C) of Bankruptcy Code). To be distinguished are modifications that leave the bifurcation intact but change the amount paid in order to accomplish proper adequate protection. *Nolan* would provide no impediment to such modifications. See *Americredit Fin. Servs. v. Nichols (In re Nichols)*, 440 F.3d 850, 861 (6th Cir. 2006) (allowing for modification because creditor received substantial payments and no reason to suspect debtor would default).

section 1329(a). To justify a freedom to modify, courts have noted that, even if re-bifurcation constitutes changing the amount of a claim, it nevertheless *also* constitutes an "increase or decrease [in] the amounts of payment on claims of a particular class."⁴³² Other courts point out that most chapter 13 debtors have absolute dismissal rights under section 1307(b): "On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter"⁴³³

If debtors can dismiss a chapter 13 case, even after confirmation of a plan, they can simply refile and win the right to a new valuation of the collateral.⁴³⁴ Since that is true, it follows that debtors might as well obtain their new valuation by modifying the original plan.⁴³⁵ It should be acknowledged that BAPCPA now limits the

⁴³² See *In re Knappen*, 281 B.R. 714, 717 (Bankr. D.N.M. 2002) (adopting position of allowing modification of plan and ceasing payment on secured claim under limited circumstances); *In re Townley*, 256 B.R. 697, 699 (Bankr. D.N.J. 2000) ("The cases which hold otherwise essentially read an exception into section 1329(a)(1) which does not exist, i.e., that a modified plan may 'reduce the amount of payments on the claims of a particular class' unless the class consists of secured claims. Code section 1329(a)(1) is not limited by its terms to classes of unsecured claims."); *In re Jock*, 95 B.R. 75, 77 (Bankr. M.D. Tenn. 1989) (permitting chapter 13 debtor's to modify confirmed debt adjustment plan to provide for surrender of creditor's collateral and treatment of any deficiency as unsecured claim). For the view that every secured claim is in its own unique class, see *Bank One N.A. v. Leuellen* (*In re Leuellen*), 322 B.R. 648, 658–59 (N.D. Ind. 2005).

⁴³³ 11 U.S.C. § 1307(b) (2006).

⁴³⁴ See *In re Leuellen*, 322 B.R. at 653 (interpreting provisions in chapter 13 to imply if modification is not accepted then debtor still has option to dismiss case and file new chapter 13); *In re Hernandez*, 282 B.R. 200, 206 (Bankr. S.D. Tex. 2002) ("[T]he debtor could achieve the desired result by allowing the case to be dismissed and then filing another bankruptcy case."); *In re Zieder*, 263 B.R. 114, 118 (Bankr. D. Ariz. 2001) (pointing out chapter 13 debtor can always convert to chapter 7 and surrender collateral to trustee regardless of whether collateral has depreciated since case began, or dismiss present case, surrender collateral and file new chapter 13); *In re Jock*, 95 B.R. 75, 78 (Bankr. M.D. Tenn. 1989) (reasoning Congress contemplated modification of chapter 13 plan because debtor could convert chapter 13 case to chapter 7, surrender collateral, and probably discharge deficiency of value of collateral); *In re Shula*, 280 B.R. 903, 905–06 (Bankr. S.D. Ala. 2001) (concluding commencement of second chapter 13 proceeding in light of depreciated value of car was not in bad faith).

⁴³⁵ See *In re Ward*, 348 B.R. 545, 550 (Bankr. D. Idaho 2005) (concluding there was no per se prohibition of debtor's suggested modification to plan); *Davis-McGraw, Inc. v. Johnson* (*In re Johnson*), 247 B.R. 904, 909 (Bankr. S.D. Ga. 1999) (permitting debtor to modify confirmed chapter 13 plan by surrendering collateral in order to pay creditor's allowed secured claim as long as debtors acted in good faith); *Day v. Sys. & Servs. Tech., Inc.* (*In re Day*), 247 B.R. 898, 903 (Bankr. M.D. Ga. 2000) (stating chapter 13 debtor could modify her confirmed plan and surrender motor vehicle and classify any resulting deficiency as unsecured so long as she acted in good faith); *In re Taylor*, 243 B.R. 226, 231 (Bankr. W.D.N.Y. 2000) (allowing for modification of confirmed plan on case-by-case basis when debtor proposes modification in good faith); *In re Frost*, 123 B.R. 254, 259 (S.D. Ohio 1990) (holding chapter 13 debtor has right to dismiss case and re-file another chapter 13 case so long as previous dismissal was without prejudice); *In re Jourdan*, 108 B.R. 1020, 1021–22 (Bankr. N.D. Iowa 1989) (stating Bankruptcy Code gives chapter 13 debtor absolute right to dismiss his case and immediately refile); *In re Stone*, 91 B.R. 423, 425 (Bankr. N.D. Ohio 1988) ("The Court sees no reason why a different result should follow when the debtor elects to modify a pending case rather than achieve the same result through dismissal and refiling."). That *some* debtors—those who started off in chapter 7 or chapter 11—do not have absolute dismissal rights is simply passed over in the analysis. Indeed, it is not clear why Congress would deny dismissal rights to this subclass of chapter 13 debtors.

In *In re Goos*, Judge James Gregg dismissed the above line of cases on the metaphysical ground that "[w]hat 'could be' and what 'is' are different. Decisions have consequences. A debtor who files for chapter 13 relief cannot take advantage of the benefits that would be available if a conversion to chapter 7 took place."

automatic stay to thirty days in cases of one-time repeat filing.⁴³⁶ Nevertheless, the stay can be extended for good cause and so the point still holds.

Some judges have suggested that, where depreciation exceeds the standard set in the confirmation hearing, it is the car lender's fault for not convincing the court that the depreciation schedule should have been more severe; therefore re-bifurcation is permitted.⁴³⁷ Or, since the secured party has charged a compensatory interest rate for the original car loan, what happens upon modification is fair.⁴³⁸ It has been pointed out that, under section 1323(c), governing modifications prior to any confirmation, a car lender who supported or rejected the original plan is deemed likewise to have supported or rejected the modification, "unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification."⁴³⁹ Although section 1323(c) governs modification before confirmation, section 1329(b)(1) specifically incorporates it as the standard for post-confirmation modifications.⁴⁴⁰ Since section 1323(c) contemplates a change in secured party rights, this must be possible under section 1329.⁴⁴¹ Another court suggests that, even if re-bifurcation is prohibited under section 1329(a), re-bifurcation is *generally* permitted in chapter 13 cases, where the car lender files a proof of claim after confirmation.⁴⁴² So bifurcation by means of modification must be permitted.

These cases, however, should be read together with this important point: If a debtor is permitted to modify the plan in honor of disappointing value, the secured party should still be given an adequate protection remedy under section 507(b).⁴⁴³

253 B.R. 416, 420 (Bankr. W.D. Mich. 2000) (citation omitted); *accord In re Smith*, 259 B.R. 323, 327 (Bankr. S.D. Ill. 2001) (pointing out debtor who dismisses case in order to surrender collateral is exposed to risks and tradeoffs not present when debtor seeks modification of confirmed plan).

⁴³⁶ 11 U.S.C. § 362(c)(3) (2006) (terminating automatic stay on thirtieth day after filing later case).

⁴³⁷ See, e.g., *Bank One N.A. v. Leuellen (In re Leuellen)*, 322 B.R. 648, 659 (Bankr. S.D. Ind. 2005) (enumerating two options for creditors where they can either accept plan or demand payments totaling present value of collateral); *In re Zieder*, 263 B.R. 114, 118–19 (Bankr. D. Ariz. 2001) (modifying debtor's plan over creditor's objection because creditor should have objected to confirmation since it did not cover normal depreciation of its collateral); *In re Townley*, 256 B.R. 697, 699–700 (Bankr. N.J. 2000) (preventing creditor from objecting to debtors' surrender of vehicle because creditor had opportunity to object to plan prior to confirmation and could have insisted on better payment).

⁴³⁸ *In re Leuellen*, 322 B.R. at 660 (realizing prevention of modification of plan asking for surrender of collateral will amount to windfall to creditor who would be insulated from risk of depreciation).

⁴³⁹ 11 U.S.C. § 1323(c) (2006).

⁴⁴⁰ 11 U.S.C. § 1329(b)(1) (2006) ("Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under . . . this section.").

⁴⁴¹ See *In re Leuellen*, 322 B.R. at 656 (determining secured party's rights may be affected by modification when section 1329(a) is applied).

⁴⁴² See *In re Adams*, 264 B.R. 901, 905 (Bankr. N.D. Ill. 2001) (limiting postconfirmation "strip down" where secured creditor filed claim pre-confirmation and collateral value was not challenged before confirmation).

⁴⁴³ *In re Jefferson*, 345 B.R. 577, 583 (Bankr. N.D. Miss. 2006) (indicating when depreciation amount exceeds total amount paid by debtors creditor should be awarded administrative expense under section 507(b)). On this priority, see CARLSON & GILMORE, *supra* note 25, at 149–78. In *Ruskin v. DaimlerChrysler Services North America, LLC (In re Adkins)*, a debtor defaulted on a chapter 13 plan, the secured creditor repossessed the car and then sought a declaration that, if the foreclosure price was less than the appraised value, "any deficiency resulting from the sale . . . be paid as a secured claim." 425 F.3d 296, 298 (6th Cir.

On this view, collateral may be surrendered, and the secured claim may be reduced by the value of the collateral, but the bifurcation cannot be modified.⁴⁴⁴ Rather, the car lender simply obtains an administrative claim for the loss of value in the secured claim.⁴⁴⁵

What is the implication of finding that the re-bifurcated car lender is entitled to a section 507(b) superpriority? According to section 1322(a)(2), which section 1329(b) makes expressly applicable to modifications, the plan must "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim"⁴⁴⁶ Thus, a secured party must be fully paid for post-confirmation depreciation, though payment can be stretched out over time.⁴⁴⁷ And, under at least one interpretation of section 1326(b),⁴⁴⁸ the trustee must pay the section 507(b) claim because it is an administrative claim.⁴⁴⁹ Nevertheless, because section 1322(a)(2) does not invoke the phrase "present value," debtors can reduce the value secured party entitlements by modifying, revaluing the collateral, and paying for depreciation over time.⁴⁵⁰

2005). Over a dissent, Judge Karen Caldwell agreed with the secured creditor, but what does it mean to pay the creditor "as a secured creditor," when there is no collateral or proceeds to vindicate this right? *Id.* at 308–09. The answer is the section 507(b) priority.

⁴⁴⁴ See *Davis-McGraw, Inc. v. Johnson* (In re Johnson), 247 B.R. 904, 908 (Bankr. S.D. Ga. 1999) ("After surrender of collateral, the deficiency portion of the claim is no longer actually secured Any deficiency debt is therefore by definition unsecured."); *In re Meeks*, 237 B.R. 856, 861 (Bankr. M.D. Fla. 1999) (rejecting debtor's intention to surrender vehicle and reclassify secured creditor's deficiency as unsecured because it would result in shifting loss to creditor); *In re Coleman*, 231 B.R. 397, 400 (Bankr. S.D. Ga. 1999) (rejecting debtor's modification because it "subjects the secured creditor to the unilateral whims of a debtor throughout life of the plan"); *In re Jock*, 95 B.R. 75, 78 (Bankr. M.D. Tenn. 1989) (discussing Congress must have considered possibility of modification of plan to permit surrender to collateral to secured creditor).

⁴⁴⁵ See *In re Johnson*, 247 B.R. at 910 ("Allowing the creditor an administrative expense claim for failure of adequate protection, based on the original foreclosure value, is fair to both debtor and creditor."). Judge Randolph Haines disagrees with this assessment. See *In re Zieder*, 263 B.R. 114, 119 (Bankr. D. Ariz. 2001) (denying administrative expense claim to creditor who did not receive all payments promised by plan). But such a position assumes that modification need *not* meet the confirmation standards that might have applied if modification were instead the original cram down confirmation proceeding.

⁴⁴⁶ 11 U.S.C. § 1322(a)(2) (2006).

⁴⁴⁷ See 11 U.S.C. § 1329(c) (2006) (providing modified plan may not allow payments beyond expiration of applicable commitment period unless court approves longer period). In *Davis-McGraw, Inc. v. Johnson* (In re Johnson), Judge John Dalis did not simply allow the secured party the difference between the secured claim provided in the plan and the liquidation value actually realized once the collateral was surrendered and sold. 247 B.R. 904, 906 (Bankr. S.D. Ga. 1999). Rather, he required a complex re-imagining of confirmation. *Id.* at 910. We are to imagine what the secured party would have received if cram down had been at liquidation value. We are to take the difference between this reconstituted secured claim and the actual liquidation value realized. This difference would be the section 507(b) expense. The rest of the loss would be ordinary unsecured claim in the modified plan. This formula suggests that the right to adequate protection is always with reference to liquidation value, even if cram down is according to going concern value.

⁴⁴⁸ See *supra* Part II.C.2.

⁴⁴⁹ The section 507(b) priority requires the secured creditor to have "a claim allowable under subsection (a)(2)." 11 U.S.C. § 507(b) (2006).

⁴⁵⁰ In contrast, Judge Keith Lundin, in *In re Jock* ruled that, where depreciation had caused the value of the

General rules about modification will restrict the opportunity of a debtor to revisit valuations. For example, good faith is a requirement of original plan confirmation, and so modification must be in good faith as well.⁴⁵¹ In addition, it is often held that modification is conditioned on a change in circumstances of the parties; mere change for change's sake will not be countenanced.⁴⁵² Absent changed circumstances, *res judicata* holds sway.⁴⁵³

Courts disagree on the level of change needed. Some require substantial change.⁴⁵⁴ Others less.⁴⁵⁵ Mere car trouble has been held insufficient to justify modification.⁴⁵⁶ Other courts insist that change be unforeseeable.⁴⁵⁷ Debtor fault (as

collateral to fall below the amount of the outstanding secured claim, the shortfall was not an administrative expense. "The creditor who bargains for a stream of payments through a [c]hapter 13 plan that is not sufficient to protect the creditor from the loss in value of its underlying collateral has failed to assert its rights at confirmation," he wrote. *In re Jock*, 95 B.R. 75, 78 (Bankr. M.D. Tenn. 1989). See also *In re Townley*, 256 B.R. 697, 700 (Bankr. D.N.J. 2000) (finding creditor who bargains for insufficient payments has failed to assert its rights at time of confirmation). The remark about bargain is odd, because the stream of payments comes from cram down, where a secured party might have protested the inadequacy of amortization. One may ask whether this reasoning could apply when a car lender opposed or merely acquiesced to the plan.

Judge Lundin also denied that the secured party had a superpriority remedy under section 507(b) for failed adequate protection, because adequate protection refers only to the pre-confirmation period. Postconfirmation losses are not eligible for the superpriority. *In re Jock*, 95 B.R. at 78 n.1. But if modification is a "do over," *everything* that has occurred prior to modification should be viewed as a pre-confirmation event.

⁴⁵¹ See 11 U.S.C. § 1325(a)(3) (2006) ("[T]he court shall confirm a plan if . . . the plan has been proposed in good faith . . ."); see also *Barbosa v. Solomon*, 235 F.3d 31, 39–40 & n.13 (1st Cir. 2000) (applying good faith requirement to plan modification proposals); *In re Witkowski*, 16 F.3d 739, 746 (7th Cir. 1994) (indicating good faith requirement limits section 1329(a) motions); *In re Jock*, 95 B.R. 75, 78 (Bankr. M.D. Tenn. 1989) (analyzing good faith modification protects creditor from abusive depreciation between confirmation and modification).

One commentator notes that, in each of these recorded attempts, the debtor has surrendered or sold the collateral and was seeking to have the secured claim entirely paid by the proceeds from the sale. He suggests that this habit of surrender is therefore an implicit requirement of modification of the secured claim, though nothing in section 1329 requires a surrender of collateral. David S. Cartee, Note, *Surrendering Collateral Under Section 1329: Can the Debtor Have Her Cake and Eat It Too?*, 12 BANKR. DEV. J. 501, 512 (1996); see *In re Algee*, 142 B.R. 576, 582 (Bankr. D.C. 1992) (mentioning debtor's desire to keep collateral as reason to deny modification). This, however, confuses the familiar with the necessary.

⁴⁵² Cartee, *supra* note 451, at 523 ("[E]ven in the cases that have not allowed the modification, the change in circumstances analysis appears regularly.").

⁴⁵³ On *res judicata* and changed circumstances, see Harry L. Deffebach, *Postconfirmation Modification of Chapter 13 Plans: A Sheep in Wolf's Clothing*, 9 BANKR. DEV. J. 153, 157–63 (1992).

⁴⁵⁴ See, e.g., *In re Solis*, 172 B.R. 530, 532 (Bankr. S.D.N.Y. 1994) (discussing substantial change requirement); *In re Bereolos*, 126 B.R. 313, 326 (Bankr. N.D. Ind. 1990) ("A substantial change in circumstances does not necessarily require an extraordinary or catastrophic change in circumstances.").

⁴⁵⁵ See, e.g., *In re Rimmer*, 143 B.R. 871, 873 (Bankr. W.D. Tenn. 1992) (stating debtor can modify confirmed plan upon showing of "sufficient change in circumstances") (emphasis added).

⁴⁵⁶ See *In re Banks*, 161 B.R. 375, 379 (Bankr. S.D. Miss. 1993) (concluding "mechanical problems with the debtor's vehicle do not qualify as a justifiable basis upon which the debtor should be allowed to modify her confirmed plan").

⁴⁵⁷ See *Arnold v. West* (*In re Arnold*), 869 F.2d 240, 243 (4th Cir. 1989) (adopting objective test for modification where focus is on "whether a debtor's altered financial circumstances could have been reasonably anticipated at the time of confirmation by the parties seeking modification"); *In re Fitak*, 121 B.R. 224, 226–27 (S.D. Ohio 1990) (holding payments can be increased only when there is unanticipated, substantial changes in debtor's financial situation); *In re Bereolos*, 126 B.R. 313, 326 (Bankr. N.D. Ind.

failing to get insurance) has been grounds to deny revisitation of bifurcation.⁴⁵⁸ A change in case law has been held not sufficient to justify modification.⁴⁵⁹

Against the requirement of unforeseeable circumstances is the fact that Congress considered but deleted such a requirement in 1978.⁴⁶⁰ This has led some courts to declare that *res judicata* does not apply to chapter 13 plans and that no change in circumstances need be shown at all.⁴⁶¹ In any case, section 502(j) states, "[a] claim that has been allowed or disallowed may be reconsidered for cause"⁴⁶² Courts have read this provision as permitting revisitation of the bifurcation in the course of plan modification.⁴⁶³ At some level, however, *res judicata* must be viewed as some sort of brake on modification; otherwise confirmation "would be rendered meaningless, with any confirmation issue subject to being revisited at whim."⁴⁶⁴ Accordingly, whereas *res judicata* is not part of section 1329(a), parties must nevertheless "advance a legitimate reason" for modification.⁴⁶⁵

Typically, collateral in chapter 13 cases (i.e., cars) does not appreciate in value. But occasionally a car accident occurs and the insurance company pays more to the

1990) (agreeing with objective test and focusing on whether altered financial circumstance could have been reasonably anticipated); Deffebach, *supra* note 453, at 174 (concluding before modifying court must first determine whether "unanticipated, substantially changed circumstances have arisen since confirmation hearing").

⁴⁵⁸ See *In re Butler*, 174 B.R. 44, 48 (Bankr. M.D.N.C. 1994) (refusing to shift loss to creditor when debtor seeks modification because debtor "abused or neglected the collateral" following confirmation); *In re Cooper*, 167 B.R. 889, 890 (Bankr. E.D. Ark. 1994) (denying motion by debtor to modify plan and surrender vehicle after debtor caused automobile accident which destroyed vehicle).

⁴⁵⁹ See *In re Cruz*, 253 B.R. 638, 643–44 (Bankr. D.N.J. 2000) (denying retroactive application of change in case law).

⁴⁶⁰ H.R. REP. NO. 95-595, 95th Cong., 2d Sess. 125 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6086.

⁴⁶¹ See *Barbosa v. Solomon*, 235 F.3d 31, 39 (1st Cir. 2000) (finding plain language of section 1329 does not support "change in circumstances" being prerequisite to modification); *In re Witkowski*, 16 F.3d 739, 743–44 (7th Cir. 1994) (disagreeing over section 1329 as it does not require showing of changed circumstances to allow modification); *Max Recovery, Inc. v. Than* (*In re Than*), 215 B.R. 430, 435 (B.A.P. 9th Cir. 1997) (disagreeing *res judicata* applies to provisions allowing modification); *In re Meeks*, 237 B.R. 856, 858 (Bankr. M.D. Fla. 1999) (finding *res judicata* does not prevent modification); see also *In re Davis*, 34 B.R. 319, 319 (Bankr. E.D. Va. 1983) (suggesting legislative history mentions no requirement of "grievous change in circumstances" to be entitled to modify plan).

⁴⁶² 11 U.S.C. § 502(j) (2006).

⁴⁶³ See *In re Jefferson*, 345 B.R. 577, 583 (Bankr. N.D. Miss. 2006) (determining section 502(j) allows for reconsideration of claim but not for reclassification); *In re Hernandez*, 282 B.R. 200, 206 (Bankr. S.D. Tex. 2002) (suggesting statutory sections may allow for modification of rights of secured creditors); *In re Zieder*, 263 B.R. 114, 117 (Bankr. D. Ariz. 2001) (finding section 502(j) does not expressly prohibit reconsideration of claims on modification); *Davis-McGraw, Inc. v. Johnson* (*In re Johnson*), 247 B.R. 904, 908 (Bankr. S.D. Ga. 1999) ("[T]he deficiency amount of the allowed secured claim may be treated as an unsecured claim if the [modification] request is in good faith and leads to an equitable result."). *Contra* *Ruskin v. DaimlerChrysler Servs. N. Am., L.L.C.* (*In re Adkins*), 425 F.3d 296, 304 (6th Cir. 2005) (stating section 502(j) addresses "allowance," not re-bifurcation). But such an argument also implies that re-bifurcation is possible under chapter 11 as well. For cases rejecting section 502(j) grounds for re-bifurcation, see *In re Coffman*, 271 B.R. 492, 497 (Bankr. N.D. Tex. 2002); *In re Farley*, 211 B.R. 889, 892–93 (Bankr. N.D. Ill. 1997).

⁴⁶⁴ *In re Algee*, 142 B.R. 576, 580 (Bankr. D.C. 1992).

⁴⁶⁵ *Id.* ("[C]ourts have held that modification is not warranted unless there has been an unanticipated substantial change in circumstances, a test applied on an objective basis.").

insured than the value of the secured claim, as set in the original claim.⁴⁶⁶ Debtors have tried to modify in such a circumstance. In *In re Boothe*,⁴⁶⁷ debtors proposed to pay the car lenders only the appraised value of the car and keep the rest of the cash to buy a new automobile.⁴⁶⁸ In denying the motion, Judge Roland Brumbaugh ruled that the secured party should get the "appreciation value" caused by the wreck.⁴⁶⁹ This could be viewed as simply following the dictates of section 1329(c), which requires modifications to conform to section 1325(a).⁴⁷⁰ Section 1325(a) in turn entitled the secured party to a valuation of the collateral—now enhanced by the fortuitous car accident.⁴⁷¹ In short, such decisions turn on permitting re-bifurcation as a part of modification under section 1329(a).

If a secured party is indeed entitled to the excess insurance proceeds, then the only way to get these proceeds is by modification of the plan itself. The surrender of excess collateral will affect the size and entitlement of the unsecured deficit. Only total plan modification can re-establish the equilibrium caused by the appearance of excess collateral.⁴⁷² Hence, *Boothe* probably stands for the proposition that undersecured creditors, in the guise of an unsecured creditor, can obtain relief from bifurcation through modification under section 1329.⁴⁷³

Yet another idea must be acknowledged. According to Judge James Sledge in *In re Barclay*,⁴⁷⁴ re-valuation (but not re-bifurcation) is *always required* when a

⁴⁶⁶ *E.g.*, *In re Van Stelle*, No. HK 05-14152, 2006 WL 2979365, at *1 (Bankr. W.D. Mich. Oct. 4, 2006). Postconfirmation ownership of insurance proceeds is thoroughly reviewed in Joann Henderson, *Bankruptcy Disaster Relief: A Chapter 13 Debtor's Right to Use Insurance Proceeds to Repair or Replace Collateral*, 35 GONZ. L. REV. 21, 25–33 (2000).

⁴⁶⁷ 167 B.R. 943 (Bankr. D. Colo. 1994).

⁴⁶⁸ *Id.* at 944.

⁴⁶⁹ *Id.* at 945; *accord In re Van Stelle*, No. HK 05-14152, 2006 WL 2979365, at *12 (Bankr. W.D. Mich. Oct. 4, 2006).

⁴⁷⁰ 11 U.S.C. § 1329(c) (2006) ("A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) . . .").

⁴⁷¹ By denying the motion, the debtors presumably kept the insurance bonus anyway, unless some further court order was entered. For a contrary case in which debtors were permitted to keep excess insurance proceeds, see *In re Witherspoon*, 281 B.R. 321, 322–23 (Bankr. S.D. Ala. 2001); *In re Pourtless*, 93 B.R. 23, 26 (Bankr. W.D.N.Y. 1988); *In re Habtemichael*, 190 B.R. 871, 874 (Bankr. W.D. Mo. 1986); *In re Tucker*, 35 B.R. 35, 36 (Bankr. M.D. Tenn. 1983).

⁴⁷² Many courts have permitted debtors to keep proceeds in excess of valuations in chapter 12 and chapter 13 cases, without ever addressing the possibility of plan modification. See *Harmon v. United States*, 101 F.3d 574, 584 (8th Cir. 1996) (granting debtor's motion and awarding her title to proceeds from sale of property); *Ford Motor Credit Co. v. Feher (In re Feher)*, 202 B.R. 966, 972 (Bankr. S.D. Ill. 1996) (refusing secured party's claim to surplus insurance proceeds); *Ledford v. Fidelity Fin. Servs. (In re Hill)*, 174 B.R. 949, 954 (Bankr. S.D. Ohio 1994) (concluding insurance proceeds were to be turned over to debtor since it was property of estate); *In re Arkell*, 165 B.R. 432, 436 (Bankr. M.D. Tenn. 1994) ("Use of the balance of the insurance proceeds to buy a replacement car is consistent with the requirement in the confirmation order that the debtor preserve and protect property of the estate."); *Bartholow v. Calder (In re Calder)*, 171 B.R. 36, 38 (Bankr. N.D. Tex. 1994) (granting amount of insurance proceeds to debtor under doctrine of "accord and satisfaction").

⁴⁷³ See also *In re Solis*, 172 B.R. 530, 532 (Bankr. S.D.N.Y. 1994) (finding chapter 13 trustee successfully moved to modify plan where debtor sold collateral at price higher than anticipated, but surplus went only to unsecured creditors).

⁴⁷⁴ 276 B.R. 276 (Bankr. N.D. Ala. 2001).

debtor wishes to modify a plan to provide for the surrender of collateral to the debtor.⁴⁷⁵ Judge Sledge notes that, according to the Supreme Court in *Associates Commercial Corp. v. Rash*,⁴⁷⁶ collateral (i.e., cars) should be valued at replacement value, in chapter 13 cases, because the last sentence of section 506(a) requires valuation in light of "disposition or use" of the collateral by the debtor.⁴⁷⁷ But where the car is to be surrendered, the car must be given a liquidation "trade-in" value. Nevertheless, following *Nolan*, Judge Sledge insisted that the car lender must be paid the full amount of the secured claim as defined in the original plan.⁴⁷⁸ No revisitation of bifurcation was permitted. Surrender at liquidation value implied more cash for the car lender, compared to surrender at replacement value.⁴⁷⁹ The difference between the two the debtor had to pay in cash.

As we shall see, *Barclay* has been reversed by BAPCPA (probably by accident).⁴⁸⁰ But, beyond that, everything else set forth above is still applicable to cram downs of cars that are not 910 vehicles or not otherwise subject to the hanging paragraph. Meanwhile, where bifurcation is not permitted by the hanging paragraph, the environment of modification much changes.

B. Under BAPCPA

BAPCPA does not amend the modification statute in a way that affects car lenders.⁴⁸¹ Yet BAPCPA eliminates bifurcation for 910 vehicles. Accordingly, the controversy over re-bifurcation will decline in importance (though it will still be relevant for older cars). For example, it is not open to debtors on the 911th day after acquiring their car to modify on the basis that the hanging paragraph no longer applies. The 910 period is pegged to the bankruptcy petition, not to confirmation of the plan and so not to modification of the plan.

But one thing debtors should be able to do is to switch from retaining the car

⁴⁷⁵ *Id.* at 280.

⁴⁷⁶ 520 U.S. 953 (1997).

⁴⁷⁷ *In re Barclay*, 276 B.R. at 280. According to section 506(a): "Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U.S.C. § 506(a)(1) (2006).

⁴⁷⁸ *In re Barclay*, 276 B.R. at 282, 284 ("[E]ven though the debtors may surrender collateral securing a creditor's claim and receive a credit to be applied against the secured claim, the debtors must still pay the full amount of [the] secured claim in order to complete their plan as confirmed.").

⁴⁷⁹ One court has held switching cram down modes from cash payment to asset payment is not permitted under section 1329(a). See *In re Cameron*, 274 B.R. 457, 461 (Bankr. N.D. Tex. 2002) ("[H]aving elected payment as the method by which CPS' allowed secured claim will be satisfied here, the Debtor has no right to modify the Plan under section 1329(a) to elect a different method."). But an asset payment would qualify as reducing the time for payment, within the meaning of section 1329(a)(2) and so should be permitted.

⁴⁸⁰ See *infra* text accompanying note 491–92.

⁴⁸¹ It has, however, been amended to permit a debtor to obtain health insurance at the expense of the unsecured creditors. See 11 U.S.C. § 1329(a)(4)(B)(ii) (2006) ("[T]he plan may be modified [to] . . . reduce amount to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor . . . if the debtor documents the cost of such insurance . . .").

under section 1325(a)(5)(B) to surrendering the car under section 1325(a)(5)(C).⁴⁸² Such a switch does not offend the limitation sponsored by the *Nolan* court, which prohibited re-bifurcation, not asset payments. And once the surrender is accomplished, the car is deemed worth whatever the debtor owes. So modification might be a viable way to force the car lender to take highly depreciated vehicles as payment in full of the entire car debt.

Lenders may wish to argue that, if modification is confirmation done over, then the debtor owes the car lender adequate protection for the pre-modification period. If adequate protection payments are not adequate to cover actual depreciation, the lender, the argument goes, is entitled to the section 507(b) priority, which must be paid in deferred payment over the life of the plan.⁴⁸³ Such an argument works for bifurcated cars, but it violates the premise of the hanging paragraph, which insists that the value of the car is whatever the debtor owes the car lender. Any attempt to claim otherwise is not permitted. So the question reduces to whether a creditor who has been *paid in full* (because the car is surrendered) is entitled to adequate protection above and beyond that. The answer can only be that any creditor who is completely and utterly paid has the ultimate adequate protection and is entitled to nothing more.

In cases where wrecks generate insurance, the hanging paragraph might well mean that the wreck is worth whatever the debt is. This leaves all insurance proceeds in the pocket of the debtor. While this is a logical outcome of the hanging paragraph, it remains to be seen whether any judge will actually have the gumption to so rule. Yet the hanging paragraph clearly implies this result. It prevents bifurcation and therefore artificially values the car at the amount of the debt. Meanwhile, section 1325(a)(5)(C) permits surrender of the collateral. And cases like *In re Ezell*⁴⁸⁴ make clear that such surrenders are payments that extinguish the car debt entirely.

There are, incidentally, mortgage foreclosure cases that foretell such a result. In *Whitestone Savings & Loan Association v. Allstate Insurance Co.*,⁴⁸⁵ a mortgage lender was the payee on an insurance policy.⁴⁸⁶ A fire occurred, after which lender bid in its claim at a foreclosure sale. By virtue of the bid-in, its secured claim was deemed paid by absolute title to the real estate.⁴⁸⁷ Having been paid, the mortgage lender could no longer claim the insurance proceeds, which instead went to the debtor.⁴⁸⁸ The *Whitestone* case is similar to the phenomenon of surrendering the car in full satisfaction of the car debt. The meaning of this is that the debtor gets the insurance money, and the lender gets the wreck.⁴⁸⁹

⁴⁸² *In re Evans*, 349 B.R. 498, 501 (Bankr. E.D. Mich. 2006).

⁴⁸³ See *supra* text accompanying notes 159–64.

⁴⁸⁴ 338 B.R. 330 (Bankr. E.D. Tenn. 2006). See *supra* text accompanying notes 331–40.

⁴⁸⁵ 270 N.E.2d 694 (N.Y. 1971).

⁴⁸⁶ *Id.* at 695.

⁴⁸⁷ *Id.* at 696.

⁴⁸⁸ *Id.* at 697.

⁴⁸⁹ For a similar case, see *In re Newby*, 344 B.R. 597, 602 (Bankr. W.D. Mo. 2006).

To be sure, there is a difference between *Whitestone* and *Ezell*. In *Whitestone*, the mortgagee chose to bid in, thereby eliminating the underlying debt and, with it, any right to insurance proceeds. In *Ezell*, the debtor extinguished the debt by forcing the lender to take the car. But this is a distinction without difference. Under both situations, the debt disappeared. And once the debt disappears, the car lender's "proceeds" security interest in the insurance⁴⁹⁰ disappears with it.

Because surrender of a 910 vehicle is tantamount to an asset payment in full of the car lender's claim, Congress has, no doubt unintentionally, increased the risk imposed by the power of debtors to modify plans. If payment in full by surrender of the car is a valid cram down mode, then it is equally a valid mode of modification, since plan modification is tied to the cram down requirement.

Where the car is not a 910 vehicle, there is also bad news for the car lender. We saw in *In re Barclay*⁴⁹¹ that the car lender was entitled to the original bifurcation but the asset payment of the car was limited to liquidation amount, meaning that the secured creditor could expect extra cash representing the difference between replacement value and liquidation value.⁴⁹² *Barclay* appears to have been overruled by BAPCPA. According to new section 506(a)(2):

If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.⁴⁹³

The implication of section 506(a)(2) is that the debtor can "pay" the secured creditor by surrendering the car at replacement value, even though the car lender will obtain a mere liquidation upon foreclosing its security interest. This is a pro-debtor windfall that Congress, in its angry mood, could not have intended.

V. COLLAPSE

One of the great scandals of chapter 13 is its enormous failure rate.⁴⁹⁴ This

⁴⁹⁰ See U.C.C. § 9-102(a)(64)(E) (2005) (defining "proceeds" as "extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral").

⁴⁹¹ 276 B.R. 276 (Bankr. N.D. Ala. 2001).

⁴⁹² *In re Barclay*, 276 B.R. at 285.

⁴⁹³ 11 U.S.C. § 506(a)(2) (2006).

⁴⁹⁴ See, e.g., *Till v. SCS Credit Corp.*, 541 U.S. 465, 493 & n.1 (2004) (Scalia, J., dissenting) (citing failure rate between 37% and 60% for chapter 13 plans); Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 440

should come as no great surprise, since debtors must place every penny of disposable income into the plan. The slightest unexpected expense implies default on the plan. If default occurs, and modification of the original plan is not pursued, the United States trustee or some party in interest moves to convert the case to chapter 7.⁴⁹⁵ Or, alternatively, the debtor exercises her absolute right to dismiss the case or convert it to chapter 7⁴⁹⁶ (though, after BAPCPA, the chapter 7 proceeding itself may be dismissed as a bad faith enterprise if the debtor runs afoul of the notorious means testing device introduced by BAPCPA).⁴⁹⁷

A. Conversion Prior to 2005

Before BAPCPA, the status of the bifurcated secured claim in a case converted to chapter 7 from chapter 13 was in some doubt. At first, although there were dissenters, the consensus was that the bifurcation established in chapter 13 held. Any payment on the secured claim was first allocated to cram down interest and then to principal. The bifurcation was not redone. So, for example, where the car lender initially claimed \$30,000 and the car was worth \$20,000, where the secured claim had been paid down to \$15,000, and where the car was worth \$18,000, in the converted case, the car lender had a \$15,000 secured claim against the car. The bankruptcy estate enjoyed a surplus in the car, even though the car lender has a sizable unsecured claim.⁴⁹⁸

In 1994, Congress added a delphic provision governing the fate of bifurcation. According to section 348(f)(1):

[W]hen a case under chapter 13 of this title is converted to a case under another chapter in this title—

...

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claims reduced to the extent that they have been paid in

(1999) (reporting one-third completion rate in the Southern District of Mississippi); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 411 (1994) (finding 31% percent completion rate).

⁴⁹⁵ See 11 U.S.C. § 1307(c) (2006) (setting forth various causes where "court may convert a case under [chapter 13] to a case under chapter 7 . . .").

⁴⁹⁶ See 11 U.S.C. § 1307(a)–(b) (2006) (stating debtor can covert case to chapter 7 at anytime or can request court to dismiss under chapter 13).

⁴⁹⁷ 11 U.S.C. § 707(b) (2006) (allowing for dismissal of case if granting relief would be abuse of provisions of chapter 7).

⁴⁹⁸ See *In re Cooke*, 169 B.R. 662, 664 (Bankr. W.D. Mo. 1994) (noting if bifurcation is undone, then "it would give that creditor 'two bites of the same apple'"); accord *In re Peterson*, 163 B.R. 581, 584 (Bankr. D. Idaho 1993) (allowing estate and unsecured creditors to benefit by recovering some property of estate if debtor retains vehicle). For a case holding that bifurcation is rescinded if the plan goes into default, see *United States v. Ramirez*, 291 B.R. 386, 392 (N.D. Tex. 2002).

accordance with the chapter 13 plan.⁴⁹⁹

This amendment had the effect of reinforcing the view that bifurcations in the chapter 13 plan were permanent and not to be redone in order to provide extra collateral for the car lender's unsecured claim.⁵⁰⁰

This legislation governs only conversions under section 348, not dismissals under section 349. Therefore, whatever bifurcation rule Congress has created for converted cases, a different rule might apply to dismissed cases. Nevertheless, it is plausible to assume that the bifurcation held even here.

One item debtors used to add in their plans was the requirement that the secured creditor release the lien on the car once the chapter 13 plan paid down the bifurcated secured claim to zero, even though the unsecured portion of the car lender's claim remained unpaid.⁵⁰¹ This was accomplished by a plan term that allocated all wage payments to the car lender (once the administrative creditors were paid). With no money going to the unsecureds until the secured claim was paid, the car could be "bought" quickly enough. Although some courts refused to confirm plans with such a term,⁵⁰² there was nothing wrong with the practice on the face of the Bankruptcy Code as it stood prior to 2005. Once the debtor owned the car free and clear, the debtor had a reduced incentive to continue with the plan, and

⁴⁹⁹ Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 311, 108 Stat. 4106, 4138 (adding new section 348(f)(1) to Bankruptcy Code).

⁵⁰⁰ In the 1994 version of section 348(f)(1), bifurcation was not repealed in converted chapter 7 cases. Therefore the issue arose as to the fate of any appreciation value in debtor assets prior to the conversion. Several courts ruled that the debtor was entitled to the appreciation value. See *In re Slack*, 290 B.R. 282, 286 (Bankr. D.N.J. 2003) (determining "appreciation in value belonged to the debtor not the estate"); *In re Page*, 250 B.R. 465, 466 (Bankr. D.N.H. 2000) (refusing to allow trustee to benefit from appreciation in property); *In re Wegner*, 243 B.R. 731, 735 (Bankr. D. Neb. 2000) (discussing debtor is protected by excluding appreciation from chapter 7 estate). A better way of putting this is that any payment to the secured creditor by the debtor subrogated the debtor to the secured party's lien, which could then be asserted against the bankruptcy trustee seeking access to equity created by the paydown.

⁵⁰¹ See *In re Rheume*, 296 B.R. 313, 321 (Bankr. D. Vt. 2003) (requiring such plan term to be conspicuous); *In re Gray*, 285 B.R. 379, 389 (Bankr. N.D. Tex. 2002) (acknowledging Congress did not leave court option of excluding clauses requiring release of debtors' liens after payment in full of secured part of claim); *In re Townsend*, 256 B.R. 881, 884 (Bankr. N.D. Ill. 2001) (finding debtor's vehicle vests free and clear of lien after secured indebtedness is satisfied); *In re Lee*, 162 B.R. 217, 223 (D. Minn. 1993) (noting disencumbrance occurs when secured claim is paid); *In re Johnson*, 213 B.R. 552, 558 (Bankr. N.D. Ill. 1997) (allowing debtor to be released from lien upon payment of secured portion of debt); *In re Murry-Hudson*, 147 B.R. 960, 962 (Bankr. N.D. Cal. 1992) (recognizing debtor was entitled to release of lien on vehicle when secured portion of creditor's claim was paid in full); 2 LUNDIN, *supra* note 27, § 104.2, at 104-2-104-20; cf. *Pratt v. Gen. Motors Acceptance Corp.* (*In re Pratt*), 462 F.3d 14, 20 (1st Cir. 2006) (finding car lender violated discharge injunction by refusing to release its lien where it waived its right to repossess car in converted chapter 7 case); *In re Campbell*, 160 B.R. 198, 201 (Bankr. M.D. Fla. 1993) (stating government had to release tax lien once chapter 13 payments paid secured portion of claim).

⁵⁰² *In re Thompson*, 224 B.R. 360, 366 (Bankr. N.D. Tex. 1998) (recognizing chapter 13 debtor is not granted discharge until all plan payments are made); *In re Zakowski*, 213 B.R. 1003, 1008 (Bankr. E.D. Wis. 1997) (refusing to confirm chapter 13 plan calling for tender of clean certificate once secured claim was paid); *In re Pruitt*, 203 B.R. 134, 137 (Bankr. N.D. Ind. 1996) (indicating debtor cannot obtain release of lien until completion of confirmed plan); *In re Scheierl*, 176 B.R. 498, 500-01 (Bankr. D. Minn. 1995) (holding debtor cannot obtain confirmation of plan before all payments to creditors under plan are satisfied).

so many debtors converted their cases to chapter 7. Or, even if the secured claim of the car lender was not entirely paid, it could be paid down to the point where the car could be redeemed in the chapter 7 case for a lump sum equating with the wholesale value of the car as it then existed.⁵⁰³

B. Conversion Under BAPCPA

BAPCPA has completely changed the consequences of dismissing or converting a chapter 13 case. First, the hanging paragraph makes bifurcation impossible for 910 vehicles, so that the debtor is no longer in a position to pay down the bifurcated secured portion of the car lender's claim. Bifurcation will still be possible for older vehicles, or ones encumbered by non-purchase money claims. For these latter claims, BAPCPA amends the cram down provision to repeal bifurcation altogether in case of plan failure. According to new section 1325(a)(5)(B)(i), a plan must provide that

- (I) the holder of such claim retain the lien securing such claim until the earlier of
 - (aa) the payment of the underlying debtor determined under nonbankruptcy law; or
 - (bb) discharge under section 1328; and
- (II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law . . .⁵⁰⁴

Bifurcation, when it is permitted, is thus now provisional on completing the plan. If the plan fails, the car lender's claim is unbifurcated, and the car is collateral for whatever the lender could claim under state law.

One consequence of plan failure is the revival of the contract rate of interest. As we have seen, the hanging paragraph permits cram down interest at rates different from the contract rate.⁵⁰⁵ Once the plan fails, however, the contract rate (minus the cram down rate actually paid) can be added to the secured claim. So, for example, suppose a debtor pays down the entire car debt, as rewritten by the plan; the car lender has received the entire pre-petition claim plus cram down interest. Thereafter, the plan fails. Under section 1325(a)(5)(B)(i), the car lender can claim unpaid contract interest (minus the cram down interest actually paid) against the car.⁵⁰⁶

⁵⁰³ See William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2006 U. ILL. L. REV. (forthcoming 2006).

⁵⁰⁴ 11 U.S.C. § 1325(a)(5)(B)(i) (2006).

⁵⁰⁵ See *supra* text accompanying notes 245–60.

⁵⁰⁶ See *In re Fleming*, 339 B.R. 716, 723 (Bankr. E.D. Mo. 2006) (determining if debtor fails to make payments, creditor would be entitled to interest).

The phenomenon of de-bifurcation is reiterated in new section 348(f)(1):

[W]hen a case under chapter 13 of this title is converted to a case under another chapter in this title—

...

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7, with allowed secured claims in cases under chapters 11 and 12 reduced to the extent that they have been paid in accordance with the chapter 13 plan.

(C) with respect to cases converted from chapter 13—

(i) the claim of any creditor holding security as of the date of the petition shall continue to be secured by that security unless the full amount of such claim determined under applicable nonbankruptcy law has been paid in full as of the date of conversion, notwithstanding any valuation or determination of the amount of an allowed secured claim made for the purposes of the case under chapter 13; and

(ii) unless a prebankruptcy default has been fully cured under the plan at the time of conversion, in any proceeding under this title or otherwise, the default shall have the effect given under applicable nonbankruptcy law.⁵⁰⁷

The meaning of section 348(f)(1)(B) seems to be that, where a chapter 13 plan is converted to some other reorganization chapter, the old valuations hold. Therefore the secured creditor does not obtain relief from bifurcation. Where, however, the chapter 13 plan is converted to chapter 7, bifurcation is entirely repealed. In addition, by virtue of new section 348(f)(1)(C) and section 1325(a)(5)(B)(i)(II), the pre-bifurcation amount will be reconstituted to reflect, not cram down interest at the market rate, but the contract interest in the security agreement.

VI. THE PROBLEM OF SECTION 506(d)

One problem not addressed by BAPCPA is the possibility, held open by a minority of courts, that it is possible in chapter 13 to use section 506(d) to strip down liens in a pre-confirmation period.⁵⁰⁸ This minority position is not very

⁵⁰⁷ 11 U.S.C. § 348(f)(1) (2006).

⁵⁰⁸ One court suggests the hanging paragraph suspends avoidance of a purchase money security interest on a 910 vehicle. *See In re Green*, 348 B.R. 601, 607 (Bankr. M.D. Ga. 2006). But it should be remembered that avoidance occurs pre-confirmation (or perhaps the plan allows a secured claim but reserves the right of avoidance in a subsequent procedure). If a security interest is voidable before cram down, then the hanging paragraph cannot have any relevance.

defensible, but if it turns out to be correct, the hanging paragraph is largely undermined.

By way of a quick history lesson, section 506(d) provides:

To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such a lien is void unless—

- (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
- (2) such claim is not an allowed secured claim due only to the failure of an entity to file a proof of such claim under section 501 of this title.⁵⁰⁹

At first these words were interpreted as follows: Suppose a lender claims \$30,000 against a car worth \$20,000. The usual interpretation of this provision had been that the lender could have a security interest for the \$20,000 secured claim, but the security interest was "void" insofar as the \$10,000 unsecured claim was concerned.⁵¹⁰ This much could have been inferred from section 506(a) standing alone, if it is assumed that valuations are final and cannot be revised. Section 506(d) simply reiterated this implication of section 506(a).⁵¹¹

In *Dewsnup v. Timm*,⁵¹² the Supreme Court stunned bankruptcy theorists by holding that, when section 506(d) used the term "secured claim," it did not invoke the definition in section 506(a).⁵¹³ Rather, "secured claim" meant the unbifurcated pre-petition claim of the lender.⁵¹⁴ In our above example, a secured claim under section 506(a) was the lender's post-bifurcation \$20,000 claim. Under section 506(d) "secured claim" meant \$30,000—the pre-petition un-bifurcated amount.

In spite of *Dewsnup*, some courts have ruled that debtors in reorganization cases may use section 506(d) in an adversary proceeding to avoid liens. That is, section 506(d) means what *Dewsnup* says in chapter 7, but this chameleon statute changes its meaning in the foliage of a reorganization proceeding.⁵¹⁵

⁵⁰⁹ 11 U.S.C. § 506(d) (2006).

⁵¹⁰ See *Gaglia v. First Fed. Sav. & Loan Assn.*, 889 F.2d 1304, 1306 (3d Cir. 1989) (stating majority view allows debtor to void unsecured portion of mortgage); *Folendore v. United States (In re Folendore)*, 862 F.2d 1537, 1539 (11th Cir. 1989) (explaining Bankruptcy Code voids unsecured liens); *Lindsey v. Fed. Land Bank (In re Lindsey)*, 823 F.2d 189, 191 (7th Cir. 1987) (reporting creditor has secured interest equal to market value of creditor's interest and unsecured interest for excess value).

⁵¹¹ See *Union Mortgage Co. v. Avret (In re Avret)*, 146 B.R. 47, 50 (Bankr. S.D. Ga. 1992) (suggesting section 506(a) alone might bifurcate claim).

⁵¹² 502 U.S. 410 (1992).

⁵¹³ *Dewsnup*, 502 U.S. at 417.

⁵¹⁴ *Id.*

⁵¹⁵ See *Bank One Chicago v. Flowers (In re Bank One)*, 183 B.R. 509, 514–15 (N.D. Ill. 1995) (holding in reorganizations section 506(d) acts to void any lien against debtor not part of secured claim); *In re Geyer*, 203 B.R. 726, 729 (Bankr. S.D. Cal. 1996) (stating section 506(d) strips off liens in chapter 13); *Ford Motor Credit Co. v. Feher (In re Feher)*, 202 B.R. 966, 972 (Bankr. S.D. Ill. 1996) (holding secured interest was limited to collateral itself and excess was voided); *Gibbons v. Opechee Distribs., Inc. (In re Gibbons)*, 164 B.R. 207, 208 (Bankr. D.N.H. 1993); *Dever v. IRS (In re Dever)*, 164 B.R. 132, 138 (Bankr. C.D. Cal. 1994); *In re Campbell*, 160 B.R. 198, 201 (Bankr. M.D. Fla. 1993); *In re Jones*, 152 B.R. 155, 176–79

The proposition that section 506(d) takes on its pre-*Dewsnup* meaning in cases outside chapter 7 is certainly open to criticism. For example, it may be pointed out that section 103(a) provides that "[c]hapters 1, 3, and 5 of this title apply in a case under [c]hapters 7, 11, 12, or 13 of this title."⁵¹⁶ Nevertheless, if section 506(d) is still a viable theory in chapter 13, it could undercut the BAPCPA reforms. The car could be bifurcated in advance of confirmation of the plan. In that case, the car lender claiming \$30,000 could be bifurcated into \$20,000 and \$10,000. Thereafter, the hanging paragraph could have no bite. The hanging paragraph does state that "section 506 shall not apply to a claim described in [paragraph (5)]." This suggests that section 506(d) cannot be applied in cram down cases. But what if section 506(d) does its work before confirmation? Under such a premise, the car lender's secured claim has already been reduced to \$20,000 before the hanging paragraph

(Bankr. E.D. Mich. 1993) (explaining mortgages may be invalidated to extent they do not secure allowed secured claims under section 506(a)); *In re Butler*, 139 B.R. 258, 259 (Bankr. E.D. Okla. 1992) (concluding debtor has ability to avoid lien on unsecured portion of collateral). On the situation before the Bankruptcy Code, see *Smith v. No. 2 Galesburg Crown Fin. Corp.*, 615 F.2d 407, 410–12 (7th Cir. 1980); Vern Countryman, *Partially Secured Creditors Under Chapter XIII*, 50 AM. BANKR. L.J. 269, 275 (1976).

⁵¹⁶ *Blue Pac. Car Wash, Inc. v. St. Croix County (In re Blue Pac. Car Wash, Inc.)*, 150 B.R. 434, 435 (W.D. Wis. 1992) ("It would be unreasonable to hold that [section] 506 of the Bankruptcy Code has one meaning when applied to [c]hapter 7 proceedings and another when applied to [c]hapter 11 proceedings."). *Accord* *Harmon v. United States*, 101 F.3d 574, 581 (8th Cir. 1996) (stating if section 506(d) does not authorize lien-stripping in chapter 7 then not authorized in chapter 12); *In re Leverett*, 145 B.R. 709, 712 (Bankr. W.D. Okla. 1992) (noting section 506(d) cannot void lien securing claim which has been allowed under section 502 in any bankruptcy case); *Taffi v. United States (In re Taffi)*, 144 B.R. 105, 113–14 (Bankr. C.D. Cal. 1992), *rev'd on other grounds*, 68 F.3d 306 (9th Cir. 1995), *aff'd*, 96 F.3d 1192 (9th Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 2478 (1997) (indicating section 506(d) should apply to all disputed under chapters 7, 11, 12 and 13). In *Taffi*, Judge Richard Zurzolo ruled that the secured creditor (the IRS) could be bifurcated by a chapter 11 plan. This decision was reversed by Judge Mariana Pfaelzer on appeal. 1993 WL 558844, at *5 (C.D. Cal. Oct. 7, 1993) (rejecting judgment of Bankruptcy Court which divided undersecured claim into separate claims under chapters 11, 12 or 13). Judge Clifford Wallace ruled that the IRS had not objected to the plan and therefore had no standing to appeal the confirmation order. He therefore reinstated Judge Zurzolo's view on the matter. *Taffi v. United States (In re Taffi)*, 68 F.3d 306, 310 (9th Cir. 1995). Oddly, he did reverse on the separate theory that the wrong valuation standards had been used. How could the IRS have standing to sue on valuation standards when its failure to object was fatal to its bifurcation appeal?

It is also possible to think that *Nobelman v. American Savings Bank* contradicts the premise that section 506(d) still lives in reorganization. 508 U.S. 324 (1993). *Nobelman* is an important decision that ended the practice of bifurcating home mortgage lenders under section 1322(b)(2), on the ground that the rights of home mortgagees may not be modified. *Nobelman* can be viewed as stating that section 506(d) is dead in chapter 13 and, by implication, in any reorganization chapter. The exact words of section 1322(b)(2) is "the plan"—a chapter 13 plan—may not modify the rights of "a claim secured only by a security interest in real property that is the debtor's principal residence" 11 U.S.C. § 1322(b)(2) (2006). If section 506(d) could be used in advance of the plan to bifurcate, then the rights of a home mortgagee would be only post-bifurcation rights. See *Kehm v. Citicorp Homeowners Serv., Inc. (In re Kehm)*, 90 B.R. 117, 118–21 (Bankr. E.D. Pa. 1988) (ruling on pre-*Nobelman* case and section 506 applicability on rights of home mortgagee). Indeed, on one view of section 506(d), elimination of the lien for the unsecured claim, is *automatically* achieved at or near the bankruptcy petition. *Dewsnup v. Timm*, 502 U.S. 410, 431 (1992) (Scalia, J., dissenting) (noting section 506(d) can be undone at outset of bankruptcy proceedings). Yet, by ruling that a plan could not bifurcate a home mortgage, Justice Clarence Thomas also implied that the home mortgage was not pre-bifurcated at the time of plan confirmation. Only then would section 1322(b)(2) even be relevant to the prevention of bifurcation. So conceived, *Nobelman* implicitly prevents the use of section 506(d) in chapter 13 cases (and perhaps other reorganization chapters as well).

can have any effect.

Certainly BAPCPA is intended to end bifurcation for 910 vehicles. That the section 506(d) theory described above completely undercuts the hanging paragraph is further evidence that preservation of the pre-*Dewsnup* meaning of section 506(d) for reorganization cases is contrary to the intent of Congress.

CONCLUSION

Judge Thomas Small spoke justly when he said:

The amendments are confusing, overlapping, and sometimes self-contradictory. They introduce new and undefined terms that resemble, but are different from, established terms that are well understood. Furthermore, the new provisions address some situations that are unlikely to arise. Deciphering this puzzle is like trying to solve a Rubik's Cube that arrived with a manufacturer's defect. Fortunately, after many twists and turns, a few patches of solid color emerge.⁵¹⁷

No one can admire BAPCPA for its technical precision, but it is nevertheless possible to make some sense of what Congress intended for car lenders. First, purchase money lenders with allowed claims are to receive adequate protection from day one of the proceeding, a principle that was very cloudy prior to 2005. Second, claims against new cars—910 vehicles—cannot be bifurcated. They can, however, be crammed down, so that a new, lower interest rate can be imposed on car lenders against their will. Third, car lenders are entitled to equal cram down installments, but this rule of equality does not extend to adequate protection payments to compensate for depreciation. On the other side of the ledger, the anti-bifurcation rule also implies that, if the debtor chooses to make an asset payment, the car is deemed worth whatever debt is owed. This leads to the shocking conclusion that, where a debtor wrecks the car after confirmation, the debtor can keep the insurance proceeds and hand over the wreck in full satisfaction of the car lender's claim.

⁵¹⁷ *In re Donald*, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006).