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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	WW-07-1046-MoDJ
)		
7	NATALIE DIONNE RODRIGUEZ,)	Bk. No.	06-41999
)		
8	Debtor.)		
)		
9	_____)		
)		
10	WELLS FARGO FINANCIAL)		
	ACCEPTANCE,)		
)		
11	Appellant,)		
)		
12	v.)		
)		
13	NATALIE DIONNE RODRIGUEZ;)		
	KARLA FORSYTHE, Chapter 13)		
14	Trustee,)		
)		
15	Appellees.)		
)		
16	_____)		

O P I N I O N

Argued and Submitted on July 27, 2007
at Seattle, Washington

Filed - August 28, 2007

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Hon. Paul B. Snyder, Bankruptcy Judge, Presiding.

Before: MONTALI, DUNN and JAROSLOVSKY,¹ Bankruptcy Judges.

¹Hon. Alan Jaroslovsky, Bankruptcy Judge for the Northern
District of California, sitting by designation.

1 MONTALI, Bankruptcy Judge:

2
3 A chapter 13 debtor purchased a vehicle for her personal use
4 with financing obtained within 910 days of her petition date.
5 Debtor filed a plan providing for surrender of the vehicle in
6 full satisfaction of the secured claim, relying on the infamous
7 "hanging paragraph" following 11 U.S.C. § 1325(a)(9),² and
8 objected to the creditor's claim. Applying the hanging
9 paragraph, the bankruptcy court concluded that the debtor's
10 proposed surrender extinguished the creditor's deficiency claim.
11 The court disallowed the creditor's claim and overruled the
12 creditor's objections to the debtor's plan. The creditor
13 appealed. Today we join the swelling legion of courts writing on
14 the subject, and we REVERSE, joining one court of appeals,
15 several district courts, and a minority of bankruptcy courts,
16 departing from the result reached by two of our fellow bankruptcy
17 appellate panels and a majority of bankruptcy courts.

18 **I. FACTS**

19 Appellee Natalie Dionne Rodriguez ("Debtor") filed a chapter
20 13 petition on August 29, 2006. On the same date, she filed a
21 chapter 13 plan providing for 100 percent payment to creditors
22 over 42 months. In addition, the plan provided that Debtor would
23 surrender a 2004 Pontiac Aztec (the "Aztec") to Appellant Wells
24 Fargo Financial Acceptance ("Wells Fargo") upon plan confirmation

25 _____
26 ²Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, as
28 revised by The Bankruptcy Abuse Prevention and Consumer
Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat.
23 ("BAPCPA").

1 "in full satisfaction of the entire debt owed to [Wells Fargo]."
2 Debtor noted, and Wells Fargo does not dispute, that the Aztec
3 was purchased within 910 days of her petition date. As such,
4 Wells Fargo belongs to a class of creditors frequently referred
5 to generally and in this opinion as "910 creditors," and the
6 Aztec is known as a "910 vehicle." Debtor's plan also provided,
7 in Paragraph 9 (entitled "Revestment of Property"), that ". . .
8 during the pendency of the plan all property of the estate as
9 defined by [section] 1306(a) shall remain vested in the Debtors
10 (sic). . . ."

11 On November 2, 2006, Debtor filed an objection to Wells
12 Fargo's claim stating in relevant part:

13 Pursuant to [section] 1325, a surrender of a "910"
14 vehicle is in full satisfaction of the underlying debt.
15 See, In re Pool, 2006 WL 2801934 (Bankr. D. Or. 2006)
16 (sides with overwhelming majority of cases that the
17 surrender of a "910" vehicle is in full satisfaction of
18 the debt).

19 Wells Fargo filed a reply to the objection, an objection to
20 Debtor's chapter 13 plan, and two memoranda of points and
21 authorities urging the bankruptcy court to reject the argument
22 that surrender of a 910 vehicle through a chapter 13 plan
23 extinguishes the deficiency claim of a 910 creditor.

24 The bankruptcy court held two hearings before issuing a
25 memorandum decision indicating that it would "follow the majority
26 view, holding that upon surrender of secured property pursuant to
27 [section] 1325(a)(5)(C), the secured creditor's claim is
28 satisfied in full, thereby precluding any deficiency claim."

On January 24, 2007, the bankruptcy court entered an order
granting relief from the automatic stay to Wells Fargo,

1 overruling Wells Fargo's objection to Debtor's plan, and
2 sustaining Debtor's objection to Wells Fargo's claim. Wells
3 Fargo filed a timely notice of appeal on January 30, 2007.
4 Because Wells Fargo filed an ineffective statement of election to
5 have the district court hear the appeal, we entered an order on
6 March 8, 2007, retaining jurisdiction over the appeal.³

7 On July 5, 2007, Debtor's counsel submitted a declaration
8 contending that the appeal had become moot. On the same date,
9 Debtor filed with the bankruptcy court a notice of withdrawal of
10 her chapter 13 plan (which had not been confirmed as of that
11 date) and indicated that she would surrender the Aztec "but not
12 in full satisfaction of the debt." According to the declaration,
13 "the primary issue of this appeal is now resolved and made moot
14 by the withdrawal of [Debtor's] plan." Debtor did not indicate
15 what she intended to do about the portion of the January 24,
16 2007, order sustaining her objection to Wells Fargo's claim. On
17 July 11, Debtor filed her amended chapter 13 plan with the
18 bankruptcy court,⁴ stating that the Aztec would be "surrendered
19 at confirmation not in full satisfaction of the entire debt owed
20 to [Wells Fargo]." (Emphasis in original). The "Revestment of
21 Property" provision that appeared at Paragraph 9 of the initial
22 plan is repeated verbatim.

23
24 ³In addition, on June 6, 2007, we issued an order allowing
25 Boeing Employees' Credit Union ("Boeing") and the National
26 Association of Consumer Bankruptcy Attorneys ("NACBA") to file
27 amici curiae briefs in support of the positions of Wells Fargo
28 and Debtor, respectively.

⁴We obtained a copy of the amended plan from the bankruptcy
court's electronic docket.

1 On July 9, 2007, Wells Fargo and Boeing filed objections to
2 Debtor's position that the appeal is now moot. Boeing
3 essentially requested that we retain jurisdiction because lenders
4 in general are affected by the issue on appeal. Wells Fargo
5 argued, among other things, that the appeal is not moot because
6 Debtor has not requested or stipulated to vacatur of the order
7 disallowing Wells Fargo's claim, which is the subject of the
8 appeal. Consequently, according to Wells Fargo, a portion of the
9 controversy remains live on appeal. Alternatively, Wells Fargo
10 contended that two exceptions to the mootness doctrine apply: (1)
11 the case on appeal is capable of repetition yet evading review,
12 and (2) Debtor's voluntary cessation of its position precludes
13 mootness.

14 Debtor filed a reply disputing that the exceptions to
15 mootness apply, but she did not address Wells Fargo's argument
16 that the order disallowing its claim remains extant, and the
17 appeal is thus not moot. Rather, Debtor simply states that
18 "Wells Fargo has received exactly what it has asked for and there
19 is no further relief that Wells Fargo can obtain from the court."

20 On July 11, 2007, we issued an order determining that, based
21 on the circumstances then existing, the appeal was not moot. We
22 also ordered that the positions of parties not wanting to appear
23 at oral argument would be submitted on the briefs. At oral
24 argument, Debtor's counsel did not appear, although counsel for
25 amicus NACBA did present arguments supporting affirmance.

26 II. ISSUES

27 (1) Is this appeal moot?

28 (2) Does the hanging paragraph of section 1325 allow a

1 chapter 13 debtor to surrender, through a plan, a 910 vehicle in
2 full satisfaction of the indebtedness remaining on it?

3 III. STANDARD OF REVIEW

4 This case presents no factual issues, but solely one of
5 statutory construction. Issues of statutory interpretation are
6 questions of law which we review de novo. County of El Dorado v.
7 Crouch (In re Crouch), 199 B.R. 690, 691 (9th Cir. BAP 1996),
8 citing Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d
9 1352, 1357 (9th Cir. 1986).

10 IV. JURISDICTION

11 Ordinarily we have jurisdiction over appeals of final orders
12 via 28 U.S.C. § 158 but we lack jurisdiction to hear a moot
13 appeal. I.R.S. v. Pattullo (In re Pattullo), 271 F.3d 898, 901
14 (9th Cir. 2001); see also Pilate v. Burrell (In re Burrell), 415
15 F.3d 994, 998 (9th Cir 2005), and Chang v. U.S., 327 F.3d 911,
16 918 (9th Cir. 2003). "Our mootness inquiry focuses upon whether
17 we can still grant relief between the parties." Pattullo, 271
18 F.3d at 901. "'If an event occurs while a case is pending on
19 appeal that makes it impossible for the court to grant any
20 effectual relief whatever to a prevailing party, the appeal is
21 moot and must be dismissed.'" Id., quoting United States v.
22 Arkison (In re Cascade Rds., Inc.), 34 F.3d 756, 759 (9th Cir.
23 1994); see also Mills v. Green, 159 U.S. 651, 653 (1895) ("The
24 duty of this court, as of every other judicial tribunal, is to
25 decide actual controversies by a judgment which can be carried
26 into effect, and not to give opinions upon moot questions or
27 abstract propositions, or to declare principles or rules of law
28 which cannot affect the matter in issue in the case before it.").

1 portion in full inside or outside the plan, and pay the unsecured
2 portion in the same manner that they were paying other unsecured
3 debts (which could be less than payment in full). In re Ezell,
4 338 B.R. 330, 336 (Bankr. E.D. Tenn. 2006). BAPCPA changed all
5 this with respect to 910 vehicles by adding the hanging paragraph
6 (an unnumbered paragraph immediately following section
7 1325(a)(9)). The relevant portions of section 1325(a)(5), plus
8 the hanging paragraph, now provide:

9 Except as provided in subsection (b), the court shall
10 confirm a plan if -

11 * * *

12 (5) with respect to each allowed secured claim
13 provided for by the plan--

14 (A) the holder of such claim has accepted the
15 plan;

16 (B) (i) the plan provides that--

17 (I) the holder of such claim retain the
18 lien securing such claim . . .

19 * * *

20 (C) the debtor surrenders the property
21 securing such claim to such holder[.]

22 * * *

23 For purposes of paragraph (5), section 506 shall not
24 apply to a claim described in that paragraph if the
25 creditor has a purchase money security interest
26 securing the debt that is the subject of the claim, the
27 debt was incurred within the 910-day preceding the date
28 of the filing of the petition, and the collateral for
that debt consists of a motor vehicle

11 U.S.C. § 1325(a).

In essence, the hanging paragraph renders section 506
unavailable to debtors proposing plans affecting claims secured
by 910 vehicles. Section 506(a)(paragraph (2) of which was added
by BAPCPA) provides:

(a)(1) An allowed claim of a creditor secured by a lien
on property in which the estate has an interest, or
that is subject to setoff under section 553 of this

1 title, is a secured claim to the extent of the value of
2 such creditor's interest in the estate's interest in
3 such property, or to the extent of the amount subject
4 to setoff, as the case may be, and is an unsecured
5 claim to the extent that the value of such creditor's
6 interest or the amount so subject to setoff is less
7 than the amount of such allowed claim. Such value
8 shall be determined in light of the purpose of the
9 valuation and of the proposed disposition or use of
10 such property, and in conjunction with any hearing on
11 such disposition or use or on a plan affecting such
12 creditor's interest.

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

24 11 U.S.C. § 506(a) (emphasis added).⁵

25 Therefore, pursuant to the hanging paragraph, section 506
26 does not apply if (1) the creditor has a purchase-money lien, (2)
27 the debt was incurred within 910 days before the petition date,
28 and (3) the collateral is a motor vehicle acquired by a debtor
for his or her personal use. The parties do not dispute that all
three conditions described in the hanging paragraph exist here.
Instead, they dispute how or whether to apply the hanging
paragraph since Debtor proposes to surrender the Aztec under

⁵Section 506(a) (1) "bifurcates secured claims into secured and unsecured portions, with the secured portion limited to the value of the collateral at the time of filing, and the unsecured portion equal to the difference between the collateral's value and the balance of the loan." DaimlerChrysler Fin'l Servs. Americas LLC v. Quick (In re Quick), __ B.R. __, 2007 WL 1941749 (10th Cir. BAP, July 5, 2007), affirming In re Quick, 360 B.R. 722 (Bankr. N.D. Okla. 2007).

1 section 1325(a)(5)(C) as of confirmation of her amended plan.

2 The parties disagree on how the application of the hanging
3 paragraph affects 910 vehicle surrenders, with Wells Fargo
4 contending that state law governs and that Congress did not
5 intend to extinguish its deficiency claims and Debtor contending
6 that surrender of the Aztec wipes out any undersecured deficiency
7 on Wells Fargo's claim. Numerous courts have faced this issue
8 already, with the majority of bankruptcy courts holding that the
9 hanging paragraph, by eliminating recourse to section 506,
10 eliminates the deficiency claims of 910 creditors upon surrender.
11 The minority of courts have held that the unavailability of
12 section 506 is irrelevant and that the deficiency claims of the
13 910 creditors survive section 1325(a)(5)(C) surrender. For the
14 reasons set forth below, we agree with the minority line of
15 cases.

16 Many of the cases in the majority line focus on the "plain
17 meaning" of the hanging paragraph, holding that its unambiguous
18 terms render section 506 inapplicable to the surrender of 910
19 vehicles pursuant to section 1325(a)(5)(C). See, e.g., Quick,
20 2007 WL 1941749 at *2 ("the language of the hanging paragraph is
21 neither ambiguous, nor does literal application of its terms lead
22 to a result that is demonstrably at odds with the apparent
23 intentions of its drafters"); Capital One Auto Finance v. Osborn
24 (In re Osborn), 363 B.R. 72, 77 (8th Cir. BAP 2007), affirming In
25 re Osborn, 348 B.R. 500 (Bankr. W.D. Mo. 2006) ("The hanging
26 paragraph does not exclude any of the sub-paragraphs of [section]
27 1325(a)(5). Had Congress intended to exclude [section]

1 1325(a)(5)(C), it would have been simple to do so.”).⁶

2 We agree that a “plain meaning” approach is proper and that
3 the hanging paragraph unambiguously provides that section 506 is
4 inapplicable when a debtor surrenders a 910 vehicle pursuant to
5 section 1325(a)(5)(C). We part company with the majority of
6 cases, however, in concluding how section 506's inapplicability
7 affects the right of the 910 creditor to assert a claim for any
8 deficiency following surrender of the 910 vehicle. The majority
9

10 ⁶Other cases adopting the majority line of reasoning include
11 Ezell, 338 B.R. at 342; In re Barrett, 2007 WL 2081702 (Bankr.
12 M.D. Ala., July 17, 2007); In re Williams, 2007 WL 2122131
13 (Bankr. E.D. Va., July 19, 2007); In re Gentry, 2006 WL 3392947
14 (Bankr. E.D. Tenn., Nov. 22, 2006); In re Payne, 347 B.R. 278
15 (Bankr. S.D. Ohio 2006); In re Turkowitch, 355 B.R. 120, 126
16 (Bankr. E.D. Wis. 2006); In re Kenney, 2007 WL 1412921 (Bankr.
17 E.D. Va., May 10, 2007); In re Pool, 351 B.R. 747 (Bankr. D. Or.
18 2006); In re Moon, 359 B.R. 329 (Bankr. N.D. Ala. 2007); In re
19 Feddersen, 355 B.R. 738 (Bankr. S.D. Ill. 2006); In re Maggett,
20 2006 WL 3478991 (Bankr. D. Neb., Oct. 19, 2006); In re Bayless,
21 2006 WL 2982101 (Bankr. E.D. Tenn., Oct. 18, 2006); In re Evans,
22 349 B.R. 498 (Bankr. E.D. Mich. 2006); In re Nicely, 349 B.R. 600
23 (Bankr. W.D. Mo. 2006); In re Sparks, 346 B.R. 767 (Bankr. S.D.
24 Ohio 2006); In re Brown, 346 B.R. 868 (Bankr. N.D. Fla. 2006); In
25 re Long, 2006 WL 2090246 (Bankr. E.D. Tenn., July 12, 2006); In
26 re Durham, 361 B.R. 206 (Bankr. D. Utah 2006); In re Steakley,
27 360 B.R. 769 (Bankr. E.D. Tenn. 2007); In re Roth, 2007 WL
28 1385383 (Bankr. N.D. Ind., May 4, 2007); CitiFinancial Auto Corp.
v. Price (In re Price), 366 B.R. 389 (Bankr. M.D. Pa. 2007); In
re Bivins, 2007 WL 624385 (Bankr. M.D. Ga., Feb. 23, 2007); In re
Stevens, 368 B.R. 5 (Bankr. D. Neb. 2007); In re Doddroe, 2007 WL
1310177 (Bankr. N.D. Ohio, May 3, 2007); In re Keck, 2007 WL
470349 (Bankr. E.D. Tenn., Feb. 9, 2007); In re Rice, 2007 WL
541809 (Bankr. E.D. Tenn., Feb. 16, 2007); In re Holland, 2007 WL
1119937 (Bankr. E.D. Tenn., Apr. 13, 2007); In re Harrell, 2007
WL 708569 (Bankr. E.D. Tenn., Mar. 5, 2007); In re Gable, 2007 WL
708573 (Bankr. E.D. Tenn., Mar. 5, 2007); In re Long, 2006 WL
2090246 (Bankr. E.D. Tenn., July 12, 2006); see also In re
Petrocci, 2007 WL 1813217 (Bankr. N.D.N.Y., June 20, 2007) (in
dicta, court agrees with In re Pinti, 363 B.R. 369 (Bankr.
S.D.N.Y. 2007), although surrender was not an issue in the case).

1 position, as thoroughly analyzed in In re Pinti, 363 B.R. 369,
2 379-80 (Bankr. S.D.N.Y. 2007), holds that section 506 (and only
3 section 506) creates, defines and governs deficiency claims. In
4 other words, if section 506 does not apply, no deficiency claim
5 can exist.⁷

6 We disagree with Pinti that section 506 defines and
7 determines the nature of a creditor's secured interest. We have
8 just rejected the notion that section 506 is a definitional
9 section in Trejos v. VW Credit, Inc., (In re Trejos), ___ B.R. ___
10 , 2007 WL 2391184 (9th Cir. BAP, July 30, 2007).

11 As discussed, infra, we agree with In re Particka, 355 B.R.
12 616 (Bankr. E.D. Mich. 2006) on this issue, and while we
13 acknowledge the scholarly analysis of Pinti and other courts, we
14 believe that to start with the view that section 506 is the sole
15 source of any deficiency claim is to assume the conclusion being
16 reached. We will not do that.

17 The minority line of cases holds that the right to an
18 unsecured deficiency claim is determined by state law and not by
19 section 506(a), so its inapplicability is meaningless with
20 respect to section 1325(a) (5) (C) surrenders of 910 vehicles.

21
22 ⁷The Pinti court stated:

23 When an undersecured creditor seeks a deficiency claim
24 against a debtor in bankruptcy, it should be emphasized
25 that, however the deficiency might be calculated under
26 state law, the creditor is seeking allowance of the
27 deficiency as a bankruptcy claim. The Bankruptcy Code,
and not state law, determines whether and to what
extent such claim should be allowed in the bankruptcy
estate.

28 Id. at 380.

1 While we agree with the minority, and in particular with the
2 reasoning of Particka and In re Wright, __ F.3d ____, 2007 WL
3 1892502 (7th Cir., July 3, 2007), we take a slightly different
4 route to the same result. We work our way directly through the
5 statutory provisions and come to the conclusion that Wells Fargo
6 cannot be denied whatever deficiency claim it may ultimately
7 prove.⁸

8 We learn from the hanging paragraph that section 506 does
9 not apply to 910 claims described in section 1325(a)(5). Section
10 1325 is entitled "Confirmation of plan", and the opening phrase
11 of section 1325(a) directs that "the court shall confirm a plan
12 if" Then section 1325(a)(5) lists the only three ways
13 allowed secured claims (here allowed 910 claims) may be "provided
14

15 ⁸It is paradoxical, perhaps, that many courts coming down on
16 both sides of this important issue do so from the same starting
17 point in their analysis, viz., that the hanging paragraph is not
18 ambiguous. From there they reach diametrically opposed
19 conclusions. A cynic might say that such a division proves the
20 ambiguity. So be it. But we reject the approach some courts
21 have taken in applying a "what's good for the goose is good for
22 the gander" principle of statutory construction. See, e.g.,
23 Quick, 2007 WL 1941749 at *3 n.10 ("Thus, it may well be that
24 elimination of deficiency claims was intended to offset, on
25 behalf of 910 debtors, the benefit conferred upon secured 910
26 creditors by eliminating the cram down option.") Nonetheless, we
27 salute the court in Turkowitch for its sardonic sense of humor:

28 Ironically, the same provision that prevents the debtor
from lien stripping and reducing a creditor's allowed
secured claim prevents the creditor from claiming a
deficiency against the debtor. While this new language
may not operate to hoist the 910-creditor by his own
petard, surely the creditor may be said to hang by his
own paragraph.

Turkowitch, 355 B.R. at 126 n.2.

1 for by the plan." First, the treatment may be as agreed to by
2 the holder of the claim (section 1325(a)(5)(A)); second, the lien
3 may be retained by the creditor and the claim paid in full
4 (section 1325(a)(5)(B))⁹; and third (our case), "the debtor
5 surrenders the [910 vehicle] to the [910 creditor]." These
6 provisions are operative and effective only upon confirmation of
7 a plan, and have no purpose apart from a plan. They do not apply
8 to pre-petition or post-petition, pre-confirmation surrenders,
9 nor to post-confirmation surrenders. Section 1325(a)(5) is not a
10 tool generally available any time to chapter 13 debtors to use
11 when they please, such as would be the case with section 363 sale
12 powers, made available through section 1303, or certain section
13 364 borrowing rights, made available to chapter 13 debtors
14 engaged in business through section 1304.

15 Thus, as of confirmation of her amended plan, Debtor will
16 treat the secured claim of Wells Fargo by surrender of the Aztec;
17 therefore, for plan purposes, the estate will no longer include
18 the Aztec.¹⁰ Stated otherwise, three things will occur

19
20 ⁹The hanging paragraph has been referred to as the "Anti-
21 Cramdown Paragraph" with reference to section 1325(a)(5)(B)
22 (Ezell, 338 B.R. at 333), as one of its functions "is to prevent
23 'bifurcation' or 'stripping' of certain undersecured creditors'
24 claims (usually where the collateral consists of automobiles
25 newer than 2 1/2 years old) into secured and unsecured portions
26 when the debtor elects to retain the collateral as part of a
27 Chapter 13 plan." Pinti, 363 B.R. at 371. Pinti then goes one
28 step further and coins the phrase "Anti-Deficiency Paragraph" to
describe the effect on section 1325(a)(5)(C). Id. at 375.

¹⁰We recognize that many of the courts in the majority
disagree with the idea that the estate has no continuing
interest, particularly in Pinti and Kenney. The court in Pinti
(continued...)

1 simultaneously (confirmation, surrender, and unavailability of
2 section 506), after which there will be no "allowed claim of a
3 creditor secured by a lien on property in which the estate has an
4 interest." 11 U.S.C. § 506(a)(1). But after surrender the
5 estate has no interest in the vehicle, so section 506 has no
6 impact on the surrender option of section 1325(a)(5)(C).
7 Therefore to render section 506 inapplicable is of no consequence
8 to plan confirmation. This follows logically from a plain
9 reading of the statute because the estate no longer (as of the
10 moment of confirmation and surrender) has an interest in the
11 Aztec.

12 We suspect, but do not decide,¹¹ that there is one very
13 important reason why Congress chose to suspend section 506 from
14 its application to section 1325(a)(5)(C)'s surrender option.
15

16 ¹⁰(...continued)
17 states that the debtor's estate will retain an interest in any
18 surplus proceeds from a sale of the 910 vehicle, that the debtor
19 retains an interest in redeeming the 910 vehicle after surrender
20 and until disposal of the vehicle by the creditor and that the
21 estate "will continue to have an 'interest' in the valuation of
22 the collateral for the purposes of proposing and confirming a
23 plan of reorganization." Pinti, 363 B.R. at 382-83; see also,
24 Kenney, 2007 WL 1412921 at *10-11. Whatever interest may remain
25 in the surrendered vehicle itself or any surplus or potential
26 right of redemption is of no consequence to our analysis because
27 once the plan has been confirmed, property reverts in the Debtor
28 under section 1327(b) and the Revestment of Property paragraph of
her amended plan, and will no longer be property of the estate.
We therefore agree with the Particka court that section 506 does
not apply.

¹¹The parties did not brief this issue and it is unnecessary
to our decision. We mention it to raise another of the mysteries
of the hanging paragraph; we are not aware of any court that has
mentioned this possibility.

1 BAPCPA added new subparagraph 506(a)(2) (quoted above) that
2 requires replacement value to be applied to collateral secured by
3 personal property of an individual in chapter 7 or 13. This is
4 described in the legislative history as one of the protections
5 for secured creditors. Pinti, 363 B.R. at 384, quoting H.R. Rep.
6 109-31 at 17, U.S. Code Cong. & Admin. News 2005, pp. 88, 103.
7 Section 506(a)(2)'s applicability is not limited to the
8 retention, anti-cramdown option of section 1325(a)(5)(B). Thus,
9 without the hanging paragraph, upon surrender of a 910 vehicle,
10 the "replacement value" would be used to reduce the total amount
11 owed to the 910 creditor, rather than the amount actually
12 realized on liquidation. That would inevitably lead to a smaller
13 deficiency claim. By rendering section 506(a)(2) unavailable
14 following surrender, there is no artificially inflated reduction
15 of the total debt, but only the actual reduction realized
16 following foreclosure and sale in accordance with state law.

17 As noted above, we also agree with the result reached in
18 Wright, the only published case on this issue to date by a court
19 of appeal. It reaches the same result, but with a slightly
20 abbreviated analysis from ours. There, the Seventh Circuit Court
21 of Appeals held that deficiency claims are preserved upon
22 surrender of 910 vehicles. "[B]y knocking out [section] 506, the
23 hanging paragraph leaves the parties to their contractual
24 entitlements." Wright, 2007 WL 1892502 at *3. While section 506
25 does divide claims into secured and unsecured components, "it is
26 a mistake to assume, as the majority of bankruptcy courts have
27 done, that [section] 506 is the only source of authority for a
28 deficiency judgment when the collateral is insufficient." Id.

1 (emphasis in original).

2 Citing to the Supreme Court's recent decision in Travelers
3 Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co., ___ U.S.
4 ___, 127 S. Ct. 1199 (2007), the court noted that state law
5 determines rights and obligations when the Code is silent. The
6 Seventh Circuit took the position that the Code is silent on how
7 to treat a deficiency, and thus state law and the parties'
8 contractual obligations govern. Noting that the majority
9 position resulted in an anomaly, the court emphasized that the
10 Code does not explicitly erase deficiencies:

11 If the Wrights had surrendered their car the day before
12 filing for bankruptcy, the creditor would have been
13 entitled to treat any shortfall in the collateral's
14 value as an unsecured debt. It is hard to see why the
15 result should be different if the debtors surrender the
16 collateral the day after filing for bankruptcy when,
17 given the hanging paragraph, no operative section of
18 the Bankruptcy Code contains any contrary rule.

16 Wright, 2007 WL 1892502 at *3.¹² The Seventh Circuit
17 acknowledged that section 506 governs secured claims in
18 bankruptcy, but stated that "the question at hand is what happens
19 when [section] 506 does not apply." The answer, according to
20 Wright, is found in the parties' contract to the extent the deal
21 is enforceable under state law. Id. at *4, citing Butner v.
22 United States, 440 U.S. 48 (1979).

23 We take another message from Travelers. That is, we must

24
25 ¹²We might have one slight quibble with Wright's
26 hypothetical. A debtor who surrenders a 910 vehicle one day
27 after filing bankruptcy would obviously not be doing it pursuant
28 to a confirmed plan, so the simultaneous events of confirmation,
surrender and suspension of section 506 would not be present.
Were the creditor to complete foreclosure before confirmation,
its claim for any deficiency could only be unsecured.

1 find a basis in section 502 to disallow a claim, and absent such
2 basis, we must allow it. Travelers, 127 S. Ct. at 1206 (“we
3 generally presume that claims enforceable under applicable state
4 law will be allowed in bankruptcy unless they are expressly
5 disallowed” under section 502). Wells Fargo’s deficiency claim,
6 if any, will come from state law after it disposes of the Aztec.
7 We have no idea whether there will be a deficiency, but if there
8 is, then unless there is something in section 502 to disallow it,
9 it will survive as a valid unsecured claim in Debtor’s chapter 13
10 case. Id. (where no provision of the Bankruptcy Code expressly
11 and clearly disallows a particular type of claim generally
12 recognized under state law, that claim should be allowed); see
13 also Heath v. Am. Express Travel Related Servs. Co. (In re
14 Heath), 331 B.R. 424, 426 (9th Cir. BAP 2005) (“Section 502(b)
15 sets forth the exclusive grounds for disallowance of claims, and
16 Debtors have introduced no evidence or arguments to establish any
17 of those grounds.”). Nowhere in the hanging paragraph or
18 elsewhere (especially section 502) do we find any express or
19 clear basis to disallow Wells Fargo’s deficiency claim.

20 In holding that any deficiency must be treated as an
21 unsecured claim notwithstanding the hanging paragraph, the
22 Seventh Circuit in Wright rejected an argument presented by NACBA
23 in this appeal, that the entire debt must be unsecured¹³ because

25 ¹³At oral argument, we queried whether Wells Fargo contended
26 that because section 506 was inapplicable, Debtor would be
27 obligated to pay the entire amount of the 910 claim, including
28 the unsecured deficiency amount. Counsel for Wells Fargo
conceded what we understand to be correct (but do not decide):

(continued...)

1 section 506 is inapplicable and is the only mechanism for
2 obtaining an allowed secured claim:

3 This line of argument makes the same basic mistake
4 as the debtors' position: it supposes that contracts
5 and state law are irrelevant unless specifically
6 implemented by the Bankruptcy Code. Butner holds that
7 the presumption runs the other way: rights under state
8 law count in bankruptcy unless the Code says otherwise.
9 Creditors don't need [section] 506 to create, allow, or
10 recognize security interests, which rest on contracts
11 (and the UCC) rather than federal law. Section 502
12 tells bankruptcy courts to allow claims that stem from
13 contractual debts; nothing in [section] 502 disfavors
14 or curtails secured claims. Limitations, if any,
15 depend on [section] 506, which the hanging paragraph
16 makes inapplicable to purchase-money interests in
17 personal motor vehicles granted during the 910 days
18 preceding bankruptcy (and in other assets during the
19 year before bankruptcy).

20 Wright, 2007 WL 1892502 at *4 (emphasis added).

21 We also find persuasive and sound the analysis by the
22 bankruptcy court in Particka and we adopt its reasoning. There,
23 the court conducted an extensive review of sections 506 and 1325,
24 the claims allowance and valuation process and the cases
25 addressing the hanging paragraph issue before concluding that a
26 910 creditor is entitled to its deficiency claim upon surrender
27 and disposition of its collateral. Particka, 355 B.R. at 629.
28 The court held that the hanging paragraph was unambiguous, but
differed from the majority of cases by holding (as we have above)
that a literal application of the paragraph does not wipe out the
deficiency. Id. at 623.

The Particka court noted that the "hanging paragraph's

¹³ (...continued)

that Debtor need only recognize the deficiency as a general
unsecured claim, to be treated as other similar claims under her
plan.

1 declaration that [section] 506 no longer applies to 910 creditors
2 under [section] 1325(a) (5) only causes a change in the law to the
3 extent that pre-BAPCPA [section] 506 ever had any application to
4 [section] 1325(a) (5).” Id. at 623. The court indicated that
5 pre-BAPCPA section 506(a) applied when collateral was retained by
6 a debtor, but that it did not apply to surrendered or abandoned
7 collateral because the estate did not have an interest in it.
8 Id. at 624.

9 Section 506 essentially provides a method of
10 valuing collateral to determine the amount of an
11 allowed secured claim when the estate has an interest
12 in the property: “An allowed claim of a creditor
13 secured by a lien on property in which the estate has
14 an interest . . . is a secured claim to the extent of
15 the value of such creditor’s interest in the estate’s
16 interest in such property. . . .” If the estate has no
17 interest in the property that secures a claim, there is
18 no reason to use the valuation process of [section] 506
19 to determine the amount of the secured claim. Once the
20 estate has no interest in the property, a secured
21 creditor is free to foreclose upon its security
22 interest under applicable non-bankruptcy law and apply
23 the proceeds of sale of the collateral to its claim.
24 The creditor, of course, still retains its right to an
25 allowed unsecured deficiency claim against a debtor
26 under [section] 502 of the Bankruptcy Code if the
27 debtor remains liable for the deficiency under
28 applicable non-bankruptcy law. In other words, the
bifurcation process of [section] 506 does not, and
never did, apply to determine a secured and unsecured
portion of a secured creditor’s allowed claim where the
estate does not have an interest in the property
securing such claim.

22 Id. (emphasis added). Because the hanging paragraph “causes no
23 change when a debtor surrenders a vehicle” under section
24 1325(a) (5) (C), the 910 secured creditor is still entitled to its
25 deficiency after disposition of the collateral. Id. at 625.

26 The Particka court distinguished the majority line of cases
27 by noting that they “seem to proceed from the incorrect
28 assumption that it is only somehow because of [section] 506 that

1 an under-secured 910 creditor has a right to pursue a deficiency
2 claim.” Id. Again noting that “the right to pursue a deficiency
3 claim derives from the recourse nature of an obligation under
4 non-bankruptcy law after disposition of collateral,” the court
5 emphasized that “[f]ar from somehow creating a deficiency claim
6 for an undersecured creditor, [section] 506(a) merely allocates
7 the undersecured creditor’s claim into secured and unsecured
8 portions when the estate has an interest in the property. By
9 definition, “surrender” terminates the estate’s interest in the
10 property, thereby rendering [section] 506(a) entirely
11 inapplicable.” Id. at 626 (emphasis in original). We would
12 summarize that explanation a little differently: section 506
13 never had any applicability to surrendered collateral. Thus for
14 the hanging paragraph to say the section does not apply simply
15 states what has been and is the law.

16 The district courts that have published decisions on this
17 issue agree with the analysis of Particka. In Slocum v.
18 Americredit Fin’l Servs., Inc. (In re Slocum), 2007 WL 1812629
19 (N.D. Ga., May 10, 2007), and Silvers v. Wells Fargo Auto Finance
20 (In re Silvers), 2007 WL 1812628 (N.D. Ga. 2007), the district
21 court for the Northern District of Georgia concluded that the
22 hanging paragraph and section 1325(a)(5)(C) do not permit a
23 debtor to surrender a 910 vehicle in full satisfaction of the
24 debt secured by the vehicle.

25 The court stated that section 506(a) did not apply because
26 the estate did not retain an interest in the collateral upon
27 surrender and by its terms, section 506(a) applies only to “an
28 allowed claim of a creditor secured by a lien on property in

1 which the estate has an interest." Slocum, 2007 WL 1812629 at
2 *3, relying on Particka, 355 B.R. 616, and Dupaco Community
3 Credit Union v. Zehrung (In re Zehrung), 351 B.R. 675 (W.D. Wis.
4 2006). Consequently, the language of the hanging paragraph is
5 irrelevant and did not effect any change with respect to section
6 1325(a)(5)(C). The court also held that state law -- not section
7 506 -- bifurcates a secured creditor's claim upon surrender, and
8 that section 506 itself does not prohibit bifurcation of claims
9 under state law. Slocum, 2007 WL 1812629 at *4 and *5.

10 In Zehrung, the district court for the Western District of
11 Wisconsin likewise held that when a chapter 13 debtor surrenders
12 collateral pursuant to section 1325(a)(5)(C), the 910 creditor is
13 entitled to its state law right to liquidate the collateral and
14 retain an unsecured claim for the balance due. The district
15 court stated that the majority anti-deficiency cases

16 ignore the fact that "allowed secured claim" in
17 [section 1325(a)(5)] is used in the sense that the
18 claim is allowed under [section] 502 and secured by
19 some collateral, not in the [section] 506 sense of the
20 term. A creditor taking possession of collateral does
21 not depend upon [section] 506 to determine the value of
22 its unsecured claim. Section 506 has application only
23 when the estate retains an interest in the collateral,
24 a circumstance which disappears with surrender.
Rather, when collateral is surrendered pursuant to
21 [section 1325(a)(5)(C)] the amount of the remaining
22 unsecured claim is determined by state law, uniform
23 commercial code sections 9-610 to 9-624. [Citation
24 omitted]. The creditor's rights being unmodified by
[section] 506, it is entitled to its state law right to
liquidate the collateral and retain an unsecured claim
for the balance due.

25 Zehrung, 351 B.R. at 678 (emphasis added). The Zehrung court
26 noted that its interpretation is not only consistent with the
27 language of the statute, but "has the additional advantage of
28 being consistent with the intent of Congress in enacting the

1 [section] 1325 amendments and with the ordinary expectations of
2 borrowers and lenders.”¹⁴ Id.

3 We agree, but observe that this result could be undoing a
4 subtle, unarticulated compromise between competing creditor
5 interests which Congress may have intended in its wording of the
6 hanging paragraph. Attempts to glean the intent of the hanging
7 paragraph have been made by many courts, most recently and
8 typically the district court in General Motors Acceptance Corp.
9 v. Peaslee, __ B.R. __ , 2007 WL 2318071, *8 (W.D.N.Y., Aug. 15,
10 2007):

11 The “hanging paragraph” itself and the above
12 referenced cases clearly indicate the intent was to
13 protect creditors from perceived abuses created by
14 spendthrift debtors prior to petitioning for Chapter 13
15 relief. To be sure, there are other provisions in
16 BAPCPA that streamlined the bankruptcy process and, in
17 some cases, protected debtors but the particular
18 provision at issue here, the so-called “hanging
19 paragraph” of [section] 1325, was obviously intended to
20 protect the interests of automobile dealers who provide
21 financing for customers.

22 This interpretation of the intent of Congress may miss the
23 mark. It is apparent that Congress intended to take away the
24

25 ¹⁴Most cases adopting the minority position cite Particka as
26 well as Zehrunig in support of their conclusions. While the cases
27 holding that the hanging paragraph is not an anti-deficiency
28 statute are still in the minority, many of the recent cases
reflect an increasing willingness of courts to apply the
reasoning of Zehrunig and Particka. Other cases adopting the
minority position include In re Duke, 345 B.R. 806 (Bankr. W.D.
Ky. 2006); In re Hoffman, 359 B.R. 163 (Bankr. E.D. Mich. 2006);
In re Morales, 359 B.R. 211 (Bankr. N.D. Ill. 2007); In re
Blanco, 363 B.R. 896 (Bankr. N.D. Ill. 2007); In re Clark, 363
B.R. 492 (Bankr. N.D. Miss. 2007); In re Newberry, 2007 WL
1308318 (Bankr. W.D. Tex., May 3, 2007); In re Ruiz de Esparza,
2007 WL 1394073 (Bankr. W.D. Tex., May 9, 2007); In re Dominguez,
2007 WL 1394158 (Bankr. W.D. Tex., May 11, 2007); and In re
Sarabia, 2007 WL 1394388 (Bankr. W.D. Tex., May 9, 2007).

1 right of debtors to reduce their secured obligations on retained
2 910 vehicles to the value of the vehicles (11 U.S.C
3 § 1325(a)(5)(B)). The real question is whether Congress intended
4 that, in return for protection from cramdown, 910 creditors who
5 recover surrendered 910 vehicles have lost their right to a
6 deficiency claim.

7 When a secured claim is not reduced to the value of the
8 collateral, the claimant is given an advantage over other
9 creditors. If the unsecured portion of a 910 claim must be paid
10 in full, other unsecured claims may receive less or even nothing.
11 It could be that the hanging paragraph was meant to be a
12 compromise between these competing creditor classes. Congress
13 may have intended that when a 910 vehicle is not surrendered the
14 secured creditor gets an unfairly large share of the pot but when
15 the 910 vehicle is surrendered it gets none of the pot, thereby
16 resulting in rough fairness between divergent creditor interests.
17 If this was the intent of Congress, it was not expressed clearly
18 enough for us to ignore the effect of section 502.

19 **VI. CONCLUSION**

20 We add our name to the growing list of courts that have
21 found the hanging paragraph to have no effect on the deficiency
22 claims of 910 creditors who are the recipients of section
23 1325(a)(5)(C) surrenders. Accordingly, we REVERSE.

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