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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	NV-06-1400-DES
	)		
GERARDO ANTONIO TREJOS, JR.;	)	Bk. No.	06-10231
CHRISTINA ANN TREJOS,	)		
	)	Ref. No.	06-23
Debtors.	)		
<hr/>			
GERARDO ANTONIO TREJOS, JR.;	)		
CHRISTINA ANN TREJOS,	)		
	)		
Appellants,	)		
	)		
v.	)	<b>O P I N I O N</b>	
	)		
VW CREDIT, INC.; RICK A.	)		
YARNALL, Chapter 13 Trustee,	)		
	)		
Appellees.	)		

Argued and Submitted on May 17, 2007  
at Las Vegas, Nevada

Filed - July 30, 2007

Appeal from the United States Bankruptcy Court  
for the District of Nevada

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

Before: DUNN, EFREMSKY<sup>1</sup> and SMITH, Bankruptcy Judges.

<sup>1</sup> Hon. Roger Efremsky, United States Bankruptcy Judge for  
the Northern District of California, sitting by designation.

1 DUNN, Bankruptcy Judge:

2 The bankruptcy court ruled that creditor held by assignment  
3 a valid purchase-money security interest in debtors' vehicle  
4 purchased within the 910-day period immediately preceding the  
5 date debtors filed their voluntary chapter 13<sup>2</sup> petition, making  
6 creditor's claim subject to the anti-cramdown provision in the  
7 "Hanging Paragraph" of § 1325(a). As a result, the bankruptcy  
8 court held that the debtors were required to pay the full amount  
9 of the creditor's claim over the life of their chapter 13 plan,  
10 irrespective of the value of the vehicle. We AFFIRM.

11  
12 **I. FACTS**

13 On July 5, 2005, Gerardo Trejos ("Mr. Trejos") executed a  
14 Vehicle Retail Installment Contract and Security Agreement  
15 ("Contract") pursuant to which Mr. Trejos purchased a 2002  
16 Volkswagen Passat ("Vehicle") from Desert Volkswagen ("Dealer")  
17 for the purchase price of \$18,701.40, together with interest at  
18 the rate of 13.35% per annum.<sup>3</sup> The Dealer assigned its interest  
19 in the Contract to VW Credit, Inc. ("VW Credit") on July 15,  
20 2005.

21 Mr. and Mrs. Trejos filed their chapter 13 bankruptcy  
22

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23 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
25 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
26 enacted and promulgated as of October 17, 2005, the effective  
27 date of most of the provisions of the Bankruptcy Abuse Prevention  
28 and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23  
("BAPCPA").

<sup>3</sup> The car was purchased for Christina Trejos' ("Mrs.  
Trejos") use, but because she did not have good enough credit to  
obtain financing, the Contract was executed by Mr. Trejos only,  
and Mr. Trejos is listed as the sole owner of the Vehicle on the  
Certificate of Title.

1 petition on February 21, 2006 ("Petition Date"), a date less than  
2 910 days after the vehicle purchase. The Trejos included the  
3 obligation to VW Credit on their "Schedule D. Creditors Holding  
4 Secured Claims," asserting that the amount of VW Credit's claim  
5 was \$17,000 and that the value of the Vehicle was \$10,000. In  
6 their chapter 13 plan ("Plan") filed February 23, 2006, the  
7 Trejos proposed to pay VW Credit, as a creditor with an allowed  
8 secured claim, the full \$17,000 the Trejos believed they owed VW  
9 Credit, together with interest at 8%.

10 VW Credit objected on the basis that the Plan provided  
11 neither for payment of the full amount of its debt,<sup>4</sup> i.e.,  
12 \$18,802.38, nor interest on that debt at the contract rate of  
13 13.35%, both of which VW Credit believed it was entitled to  
14 because of language added to 1325(a) through the enactment of  
15 BAPCPA (the "Hanging Paragraph"). The Hanging Paragraph  
16 provides:

17 For purposes of paragraph (5), section 506 shall not  
18 apply to a claim described in that paragraph if the  
19 creditor has a purchase money security interest  
20 securing the debt that is the subject of the claim, the  
21 debt was incurred within the 910-day [period] preceding  
22 the date of the filing of the petition, and the  
23 collateral for that debt consists of a motor vehicle  
(as defined in section 30102 of title 49) acquired for  
the personal use of the debtor, or if collateral for  
that debt consists of any other thing of value, if the  
debt was incurred during the 1-year period preceding  
that filing.

24 In response, the Trejos stated their intent was to pay VW  
25 Credit the "fair market value" of the Vehicle, which they  
26 intended to prove was less than the \$17,000 provided in the Plan,  
27 with interest at 8%. In effect, the Trejos announced their  
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<sup>4</sup> VW Credit filed a secured claim in the bankruptcy case in the amount of \$18,802.38, representing the total debt owed under the Contract on the Petition Date.

1 intent to "cram down" VW Credit's claim to the value of the  
2 Vehicle, and pay that amount, with interest, as an allowed  
3 secured claim. The Trejos asserted that any prohibition against  
4 "cramdown" incorporated into § 1325(a)(5) by the Hanging  
5 Paragraph did not apply to VW Credit's claim because the Dealer's  
6 assignment of the Contract to VW Credit destroyed the purchase  
7 money character of the security interest under the Contract. The  
8 Trejos also argued that 8% is a proper interest rate because  
9 BAPCPA did not amend the Bankruptcy Code to overrule Till v. SCS  
10 Credit Corp., 541 U.S. 465, 468-69 (2004). Alternatively, the  
11 Trejos asserted that if VW Credit did have a purchase money  
12 security interest in the Vehicle, because the "Hanging Paragraph"  
13 made § 506 inapplicable to VW Credit's claim, it thereby  
14 precluded VW Credit from having an "allowed secured claim."  
15 Instead, the Trejos contended, VW Credit had only an unsecured  
16 claim.<sup>5</sup>

17 The bankruptcy court held that the purchase money character  
18 of the security interest in the Vehicle was not lost when the  
19 Dealer assigned the Contract to VW Credit. Consequently, VW  
20 Credit's claim was subject to the "Hanging Paragraph," with the  
21 result that the Plan had to be modified to pay VW Credit's  
22 allowed secured claim of \$18,802.38 in full. The bankruptcy  
23 court further held that the Till formula, not the Contract,  
24 determined the applicable rate of interest, in this case 8%. The  
25

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26  
27 <sup>5</sup> The Trejos also asserted that regardless of whether VW  
28 Credit's claim was treated as secured, undersecured, or  
unsecured, the Plan was confirmable where it proposed a 100%  
distribution to unsecured creditors. However, in exploring  
whether this proposition might make the contested matter moot,  
the Trejos conceded that whether interest was to be paid to VW  
Credit, and if so, in what amount, remained an issue regardless  
of the fact that the Trejos proposed a "100%" plan.

1 Trejos appealed the confirmation order with respect to the  
2 bankruptcy court's determination of the allowed amount of VW  
3 Credit's secured claim. VW Credit did not appeal the bankruptcy  
4 court's interest rate determination.

## 6 **II. JURISDICTION**

7 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
8 §§ 1334 and 157(b)(1) and (b)(2)(K), (L), and (O). We have  
9 jurisdiction over this appeal pursuant to 28 U.S.C. § 158.

## 11 **III. ISSUES**

12 Whether the bankruptcy court erred in holding that VW Credit  
13 has a purchase money security interest in the Vehicle.

14 Whether the bankruptcy court erred in holding that the  
15 "Hanging Paragraph" prevented the Trejos from limiting VW  
16 Credit's secured claim to the value of the Vehicle.

## 18 **IV. STANDARDS OF REVIEW**

19 We review issues of statutory construction and conclusions  
20 of law, including interpretation of provisions of the Bankruptcy  
21 Code, de novo. Einstein/Noah Bagel Corp. v. Smith (In re BCE W.,  
22 L.P.), 319 F.3d 1166, 1170 (9th Cir. 2003).

## 24 **V. DISCUSSION**

### 25 A. Section 1325(a)(5) and the "Hanging Paragraph"

26 The requirements for confirmation of a chapter 13 plan are  
27 found in § 1325. With respect to secured creditors, § 1325(a)(5)  
28 requires generally that a chapter 13 plan must provide one of

1 three alternative treatments: treatment to which the secured  
2 creditor consents; retention of collateral by the debtor with a  
3 stream of payments to the secured creditor; or surrender of the  
4 collateral to the secured creditor. In this case, the Trejos  
5 have elected to retain the Vehicle and to provide VW Credit with  
6 a stream of payments. This option requires further compliance  
7 with § 1325(a)(5)(B), such that the plan (1) must provide that VW  
8 Credit retain its lien until the earlier of payment of the  
9 underlying debt pursuant to non-bankruptcy law or the issuance of  
10 the Trejos' discharge, (2) distribute to VW Credit the present  
11 value of its claim as of the Petition Date, and (3) provide for  
12 equal monthly payments in an amount sufficient to provide  
13 adequate protection to VW Credit.

14 As noted above, BAPCPA added the following additional text  
15 to § 1325(a):

16 For purposes of paragraph (5), section 506 shall not  
17 apply to a claim described in that paragraph if the  
18 creditor has a purchase money security interest  
19 securing the debt that is the subject of the claim, the  
20 debt was incurred within the 910-day [period] preceding  
21 the date of the filing of the petition, and the  
22 collateral for that debt consists of a motor vehicle  
23 (as defined in section 30102 of title 49) acquired for  
24 the personal use of the debtor, or if collateral for  
25 that debt consists of any other thing of value, if the  
26 debt was incurred during the 1-year period preceding  
27 that filing.

28 Although this language was not placed in § 1325(a)(5), its  
location in § 1325(a) and its internal reference to paragraph (5)  
strongly suggest that it relates specifically to the treatment of  
secured claims under the plan.<sup>6</sup> This construction is reinforced

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<sup>6</sup> Claims which fall within the protection of the "Hanging Paragraph" are referred to as "910 Vehicle Claims" hereafter in this Opinion.

1 by reference to the BAPCPA legislative history.<sup>7</sup>

2 Protections for Secured Creditors. S. 256's  
3 protections for secured creditors include a prohibition  
4 against bifurcating a secured debt incurred within the  
5 910-day period preceding the filing of a bankruptcy  
6 case if the debt is secured by a purchase money  
7 security interest in a motor vehicle acquired for the  
8 debtor's personal use. . . .

9 H.R. Rep. No. 109-31, pt. 1 at 17 (2005), as reprinted in E-2  
10 Collier on Bankruptcy at App. Pt. 10-268 (15th rev. ed. 2007).

11 The language of the "Hanging Paragraph"

12 . . . requires that certain conditions exist before the  
13 full amount of the claim must be treated as secured.  
14 These conditions are as follows:

- 15 • The creditor must have a purchase-money security  
16 interest; and
- 17 • The purchase-money security interest must secure  
18 the debt that is the subject of the claim; and
- 19 • That debt must be incurred no more than 910 days  
20 before the date of the debtor's filing; and
- 21 • The collateral for the debt must be a "motor  
22 vehicle;" and
- 23 • That motor vehicle must have been acquired for the  
24 personal use of the debtor.

25 In re Trejos, 352 B.R. 249, 264 (Bankr. D. Nev. 2006). The  
26 Trejos concede that with one exception, VW Credit's claim meets  
27 all of the foregoing conditions. Specifically, the Trejos assert  
28 that VW Credit does not hold a purchase-money security interest  
because the security interest lost its purchase-money character  
when the Dealer assigned it to VW Credit.

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29 <sup>7</sup> "The history of the hanging paragraph is recounted in  
30 detail in William C. Whitford, A History of the Automobile Lender  
31 Provisions of BAPCPA, [2007 U. Ill. L. Rev. 143]." In re Trejos,  
32 352 B.R. 249, 252 n.3 (Bankr. D. Nev. 2006).

1 B. VW Credit is Entitled to the Protection of the "Hanging  
2 Paragraph"

3 To determine whether VW Credit holds a purchase-money  
4 security interest, we must look to state law. See Philip Morris  
5 Capital Corp. v. Bering Trader, Inc. (In re Bering Trader, Inc.),  
6 944 F.2d 500, 502 (9th Cir. 1991). Under NEV. REV. STAT.  
7 § 104.9103.1(b), the Trejos' debt to the Dealer was a "purchase  
8 money obligation" since it was an "obligation of an obligor  
9 incurred as all or part of the price of the collateral or for  
10 value given to enable the debtor to acquire rights in or the use  
11 of the collateral if the value is in fact so used." Further, the  
12 Vehicle constituted "purchase money collateral" as "goods or  
13 software that secures a purchase-money obligation incurred with  
14 respect to that collateral." NEV. REV. STAT. § 104.9103.1(a).  
15 Finally, the Dealer's security interest was a purchase-money  
16 security interest "to the extent" the Vehicle is "purchase-money  
17 collateral with respect to that security interest." NEV. REV.  
18 STAT. § 104.9103.2.

19 The Trejos do not contest that the Dealer held a purchase-  
20 money security interest under the Contract. Rather, they assert  
21 that the purchase-money security interest was destroyed when the  
22 Dealer assigned the Contract to VW Credit. We disagree.

23 An assignment

24 . . . of a right is a manifestation of the assignor's  
25 intention to transfer it by virtue of which the  
26 assignor's right to performance by the obligor is  
extinguished in whole or in part and the assignee  
acquires a right to such performance.

27 RESTATEMENT (SECOND) OF CONTRACTS § 317(1) (1981) (Ch. 15 Assignment  
28 and Delegation). An assignee typically "steps into the shoes" of



1 an assignor. See New Falls Corp. v. Boyajian (In re Boyajian),  
2 \_\_\_ B.R. \_\_\_, BAP No. CC-06-1085, 2007 WL 1119910, at \*5 (9th  
3 Cir. BAP March 30, 2007).

4 "Where a secured claim is assigned, the collateral is  
5 ordinarily assigned as well." RESTATEMENT (SECOND) OF CONTRACTS § 340  
6 cmt. b. In this case, the language of the assignment provides  
7 expressly that the security interest in the Vehicle was being  
8 assigned. The Restatement provides the following further  
9 guidance concerning the impact of an assignment on the security  
10 interest:

11 An assignee is entitled to priority of payment from the  
12 obligor's insolvent estate to the extent that the  
13 assignor would have been so entitled in the absence of  
the assignment.

14 RESTATEMENT (SECOND) OF CONTRACTS § 340(1).

15 A number of courts have held that the assignment of a  
16 security interest does not destroy its purchase-money status.  
17 See, e.g., In re Brooks, 74 B.R. 418, 420 (Bankr. N.D. Ga.  
18 1987) ("Only the identity of the holder of the security interest  
19 was changed by the assignment, not the nature of the interest  
20 itself."); Credithrift of America v. Littlejohn (In re  
21 Littlejohn), 20 B.R. 695, 697 (Bankr. W.D. Ky. 1982) (holding that  
22 creditor held a purchase money security interest in household  
23 furniture "by virtue of assignment of the retail installment  
24 contract from the seller"); In re Smallwood, 20 B.R. 699 (Bankr.  
25 W.D. Ky. 1982).

26 The Trejos argued before the bankruptcy court that as a  
27 general matter, the purchase-money character of the security  
28 interest is lost merely because it is transferred:

1 THE COURT: So when someone else takes that security  
2 interest by assignment, it loses its  
3 status as purchase money?  
MR. BURKE: That's our argument.  
4 THE COURT: Why?  
MR. BURKE: Because they didn't provide - they have  
5 the rights to collect the payments, but  
6 they're not the one who, A, provided the  
7 funding, initially, and it wasn't  
8 purchased from them.  
9 VW Credit is not a dealer. They're a  
10 bank . . . they're not . . . selling the  
11 vehicle.

8 Transcript of Proceedings 84:2-14, June 20, 2006. However, in  
9 this appeal, the Trejos do not assert as a general principle that  
10 assignment of a purchase-money security interest destroys the  
11 purchase-money character of the security interest transferred by  
12 the assignment. Rather, they argue only that because the  
13 assignment in this case modified the Contract, VW Credit did not  
14 receive a purchase-money security interest from the Dealer.

15 In support of their position that the Contract was modified  
16 by the assignment to VW Credit, the Trejos state as follows:

17 [W]hen [the Dealer] initially sold the vehicle, none of  
18 the four (4) options on the back of the contract were  
19 checked. These options included "recourse, repurchase,  
20 limited endorsement, or without recourse." After the  
assignment, the [Contract] was modified by [VW Credit]  
when it selected one (1) of the four (4) option [sic]  
on the back of the [Contract].

21 Appellant's Opening Brief, 3:20-25, February 8, 2007 (internal  
22 citations omitted).

23 We disagree that Dealer's assignment to VW Credit "modified"  
24 the Contract. The "four options" on the back of the Contract to  
25 which the Trejos refer are part of the "Additional Terms and  
26 Conditions" incorporated into the Contract; the "four options"  
27 are set out under the topic: "Assignment." The assignment did  
28 not modify any obligation of Mr. Trejos under the Contract. The

1 option that was checked at the time of the assignment merely  
2 provided that VW Credit had no recourse against the Dealer. In  
3 other words, if the Trejos defaulted under the Contract, VW  
4 Credit could not look to the Dealer but instead must enforce the  
5 Dealer's rights under the Contract as assigned to VW Credit.

6 Nor did a substitution of VW Credit for the Dealer work a  
7 novation, as asserted by the Trejos. The Restatement clarifies  
8 the difference between an assignment and a novation with respect  
9 to the Trejos' duties under the Contract.

10 Obligees may also be substituted by assignment of a  
11 right, which differs from novation in that assignment  
12 requires neither the knowledge nor the assent of the  
obligor and cannot change the performance to be  
rendered by him.

13 RESTATEMENT (SECOND) OF CONTRACTS § 280 cmt. e. We reiterate that  
14 under the assignment, VW Credit simply stepped into the Dealer's  
15 shoes; the Trejos' performance obligations under the Contract did  
16 not change. An assignment by its very nature substitutes one  
17 entity for another as a holder of rights. To hold that this  
18 substitution in and of itself constitutes a novation would be to  
19 hold that every assignment constitutes a novation of the  
20 underlying contract.

21 Since the Contract was not modified when it was assigned to  
22 VW Credit, the purchase-money character of the security interest  
23 granted in the Contract was not destroyed. Therefore, the  
24 "Hanging Paragraph" applies to VW Credit's claim.

25  
26 C. The Interplay Between § 506 and § 1325(a) (5)

27 Section 506(a) (1) provides in relevant part that

28 [a]n allowed claim of a creditor secured by a lien on  
property in which the estate has an interest . . . is a  
secured claim to the extent of the value of such  
creditor's interest in the estate's interest in such  
property . . . and is an unsecured claim to the extent

1 that the value of such creditor's interest . . . is  
2 less than the amount of such allowed claim.

3 The Trejos assert that because § 506 does not apply to 910  
4 Vehicle Claims, VW Credit's claim cannot be an "allowed secured  
5 claim." Instead, the claim is unsecured. This position assumes  
6 that § 506 provides the exclusive basis for determining secured  
7 status under the Code. It does not.

8  
9 1. The Minority View

10 The Trejos rely both on reported case law and on a leading  
11 bankruptcy treatise in support of their position.

12 [The "Hanging Paragraph"] states that for purposes of  
13 section 1325(a)(5), section 506 shall not apply to  
14 certain claims. Such claims, therefore, cannot be  
determined to be allowed secured claims under section  
506(a) and are not within the ambit of section  
1325(a)(5)

15 . . . .

16 It is possible that [the "Hanging Paragraph"] was  
17 intended to prohibit the use of section 506(a) to  
18 bifurcate a secured claim into an allowed secured claim  
19 and an allowed unsecured claim as part of the cramdown  
20 permitted by section 1325(a)(5)(B) and, therefore, that  
21 such claims should be treated as fully secured claims  
22 regardless of the value of the collateral. But, even  
23 if that was the intent, because [the "Hanging  
24 Paragraph"] renders entirely inapplicable for some  
25 creditors the only section, section 506(a), that gives  
26 those creditors allowed secured claims, it does not to  
27 [sic] carry out such intent.

28 8 Collier on Bankruptcy ¶ 1325.06[1][a] (15th rev. ed. 2007)  
(emphasis added).

A limited number of courts, holding that application of  
§ 506(a) is essential to determine what constitutes an "allowed  
secured claim," similarly have determined that the "Hanging  
Paragraph" precludes the holder of a 910 Vehicle Claim from

1 having an "allowed secured claim." The implications of their  
2 holdings as applied have varied.

3 For example, the court in In re Wampler, 345 B.R. 730, 736  
4 (Bankr. D. Kan. 2006), stated that

5 The provisions of §§ 502 and 506, read together,  
6 establish the only means by which a court may determine  
7 that an allowed claim should be allowed as a secured  
8 claim. (Emphasis added).

9 The court went on to decide that although the unambiguous  
10 language of the "Hanging Paragraph" requires that a 910 Vehicle  
11 Claim be paid in full, because § 506(a) does not apply, neither  
12 does the present value, i.e. interest, payment provision in  
13 § 1325(a) (5) (B) (ii), since the 910 Vehicle Claim is not an  
14 "allowed secured claim." Id. at 740.

15 In adopting the approach taken by the Wampler court, the  
16 court in In re Kinsey, No. 06-20921, 2007 WL 1366385, \*5 (Bankr.  
17 D. Kan. May 9, 2007), stated

18 Lenders enjoy special treatment for their 910 car  
19 claims in Chapter 13 because of the Hanging Paragraph,  
20 but these claims are no longer treated as allowed  
21 secured claims under the plan and are not entitled to  
22 postpetition interest under § 1325(a) (5) (B) (iii).

23 Similarly, in In re Taranto, 344 B.R. 857, 860 (Bankr. N.D.  
24 Ohio 2006), the court reasoned that other provisions of the Code  
25 discuss claim allowance, but no other provisions in the Code  
26 "define" when a claim is a secured claim and when it is not. As  
27 a result, without § 506(a) an "allowed claim" cannot be labeled a  
28 "secured claim" for purposes of the Code. Id. at 860. As for  
the treatment of a 910 Vehicle Claim, the Taranto court  
determined it was enough that the creditor receive the full  
amount of its claim under the plan, without interest, both

1 because the "Hanging Paragraph" did not address the creditor's  
2 entitlement to interest and because interest payments would be  
3 unfair to unsecured creditors in the case, especially where the  
4 value of the vehicle is worth less than the "allowed claim." Id.  
5 at 861. The 6th Circuit Bankruptcy Appellate Panel, as noted  
6 below, recently rejected this analysis. In re Taranto, 365 B.R.  
7 85 (6th Cir. BAP 2007).

8 In In re Carver, 338 B.R. 521, 525 (Bankr. S.D. Ga. 2006),  
9 the court held:

10 [N]othing in the text of the hanging paragraph suggests  
11 that Congress intended 910 claims to be treated as  
12 secured claims. The only generally applicable  
13 definition of a secured claim comes from § 506. By  
14 rendering that section inapplicable to 910 claims,  
15 Congress expressly eliminated the mechanism by which  
16 they could be treated as secured under the Chapter 13  
17 plan.

18 Recognizing that holding 910 Vehicle Claims could not be "allowed  
19 secured claims" meant they were not entitled to treatment under  
20 § 1325(a)(5), the Carver court went on to "extrapolate  
21 congressional intent" to craft a formula for their treatment.  
22 Id. at 527. Starting with the premise that Congress did not  
23 intend the "Hanging Paragraph" to punish holders of 910 Vehicle  
24 Claims, the court imposed a rule which it adapted from § 1111(b).

25 Under the Carver rule:

26 In a Chapter 13 plan, a 910 claim must receive the  
27 *greater* of (1) the full amount of the claim without  
28 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).

Id. at 528 (emphasis in original).

Carver was decided relatively early among the substantial

1 body of cases construing the "Hanging Paragraph," and as noted  
2 above, is a minority view. As such, it has received much  
3 criticism from those courts taking the majority view, discussed  
4 below. In the face of that criticism, the judge reasserted his  
5 position in Carver in a later decision. In re Green, 348 B.R.  
6 601, 611-12 (Bankr. M.D. Ga. 2006) ("I will continue to follow my  
7 decision in Carver. It would be more convenient to follow the  
8 consensus of opinion if I could do so in good conscience, but I  
9 do not believe the majority view correctly follows established  
10 principles of statutory construction.").

## 11 12 2. The Majority View

13 The great majority of courts which have reviewed the impact  
14 of removing § 506 from application to 910 Vehicle Claims have  
15 held that the "Hanging Paragraph" simply provides that debtors  
16 cannot bifurcate a 910 Vehicle Claim into secured and unsecured  
17 claims based upon the value of the vehicle on the petition date.  
18 See, e.g., Citifinancial Auto v. Hernandez-Simpson, \_\_\_ B.R. \_\_\_,  
19 No. 06-2527, 2007 WL 1464258 (D. Kan. May 17, 2007); In re  
20 Taranto, 365 B.R. 85 (6th Cir. BAP 2007); In re Montgomery, 341  
21 B.R. 843 (Bankr. E.D. Ky. 2006); In re Montoya, 341 B.R. 41, 44  
22 (Bankr. D. Utah 2006) ("The existence of a claim is usually  
23 determined by non-bankruptcy substantive law, whereas valuation  
24 of that claim is determined by § 506."); In re Fleming, 339 B.R.  
25 716 (Bankr. E.D. Mo. 2006); In re Jackson, 338 B.R. 923 (Bankr.  
26 M.D. Ga. 2006); In re Ezell, 338 B.R. 330 (Bankr. E.D. Tenn.  
27 2006); In re Horn, 338 B.R. 110 (Bankr. M.D. Ala. 2006); In re  
28 Robinson, 338 B.R. 70 (Bankr. W.D. Mo. 2006); In re Johnson, 337

1 B.R. 269 (Bankr. M.D.N.C. 2006). Many of these courts reject  
2 the premise that § 506(a) is a definitional provision without  
3 which there cannot be an "allowed secured claim." Some courts  
4 take direction from the Supreme Court:

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

9 Dewsnup v. Timm, 502 U.S. 410, 415 (1992) (construing the  
10 relationship between § 506(a) and "allowed secured claim" in  
11 § 506(d)). See, e.g., In re Morris, No. 06-C-612, 2007 WL  
12 1246431 (E.D. Wis. Apr. 30, 2007).

13 One court also noted that in its "careful analysis" of  
14 § 506(a) in Associates Commercial Corp. v. Rash, 520 U.S. 953  
15 (1997), the Supreme Court "never suggested that § 506(a) defines  
16 'secured' or that a claim is unsecured for purposes of Chapter 13  
17 plan confirmation without § 506." In re Brooks, 344 B.R. 417,  
18 421 (Bankr. E.D.N.C. 2006). The court in In re Brown, 346 B.R.  
19 868, 873 (Bankr. N.D. Fla. 2006), stated:

20 Just because § 506 does not apply does not mean that  
21 there is no secured claim. Section 506(a) simply  
22 provides for bifurcation of claims into secured and  
23 unsecured portions in accordance with the value of the  
24 collateral; it does not form the basis for a secured  
25 claim. See Raleigh v. Ill. Dept. of Rev., 530 U.S. 15,  
20 (2000) ("[c]reditors' entitlements in bankruptcy  
26 arise in the first instance from the underlying  
27 substantive law creating the debtor's  
28 obligation. . . .").

26 In its analysis, the bankruptcy court below noted as a  
27 threshold matter that the structure of the Code itself offers  
28 some suggestion that § 506(a) was not intended as a definitional



1 provision since the Code provides for definitions in Chapter 1.  
2 Trejos, 352 B.R. at 261.

3 Some courts find definitions of the terms "allowed" and  
4 "secured" by broader review of the Code. For example, the court  
5 in In re Brown, 339 B.R. 818, 821 (Bankr. S.D. Ga. 2006), held  
6 that § 502 applies to determine whether a claim is "allowed": "A  
7 claim or interest, proof of which is filed under section 501 of  
8 this title, is deemed allowed, unless a party in interest . . .  
9 objects." The Brown court then looked to § 101(37) to determine  
10 whether a debt is "secured" by a lien. Id. In § 101(37), the  
11 Code defines "lien" as "a charge against or interest in property  
12 to secure payment of a debt or performance of an obligation."

13 Other courts simply have held that state law applies to  
14 determine whether a claim is "secured." In re Scruggs, 342 B.R.  
15 571, 574 (Bankr. E.D. Ark. 2006); Brooks, 344 B.R. at 422 ("The  
16 'determination of property rights in the assets of a bankrupt's  
17 estate' is left to state law."); see also In re Henry, 353 B.R.  
18 261 (Bankr. D. Or. 2006) (adopting the approach of both Brooks and  
19 Brown<sup>8</sup>).

20  
21 3. Section § 506(a) Does Not Define "Allowed Secured  
22 Claim"

23 . . . Congress has decided, as a policy matter, under  
24 the BAPCPA revisions to the Code, that debtors should  
25 repay in a Chapter 13 the amount they actually agreed  
26 to pay for a motor vehicle purchased within 910 days of  
bankruptcy, instead of the true value of the  
collateral, which policy this Court must, of course,  
enforce.

27 In re Vega, 344 B.R. 616, 618 n.8 (Bankr. D. Kansas 2006). We  
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<sup>8</sup> To avoid confusion, since two Brown cases are cited in  
this Opinion, we note that the Brown case referenced here is from  
the Southern District of Georgia (339 B.R. 818).

1 agree that this was the purpose underlying the "Hanging  
2 Paragraph." We further agree that (a) it is "neither necessary  
3 nor appropriate to contort § 506(a) into a definitional  
4 provision," Brown, 339 B.R. at 821; (b) that, when applying the  
5 "Hanging Paragraph," "the value of the collateral is irrelevant  
6 in determining the allowed amount of the secured claim" Fleming,  
7 339 B.R. at 722; and (c) that "a creditor's secured status is  
8 dictated by state law while the treatment of secured claims is  
9 dictated by the Bankruptcy Code," In re Shaw, 341 B.R. 543, 546  
10 (Bankr. M.D.N.C. 2006). Accordingly, we hold that the "Hanging  
11 Paragraph" operates to preclude bifurcation of a 910 Vehicle  
12 Claim for purposes of § 1325(a) (5) (B). The bankruptcy court did  
13 not err in requiring that the Plan pay the full amount of VW  
14 Credit's claim.

15  
16 D. Modification of VW Credit's Rights Pursuant to § 1322(b) (2)

17 Because the Trejos seek to retain the Vehicle, they must  
18 comply with § 1325(a) (5) (B), including subpart (ii):

19 The value, as of the effective date of the plan, of  
20 property to be distributed under the plan on account of  
21 [VW Credit's] claim is not less than the allowed amount  
of [VW Credit's] claim.

22 VW Credit asserted before the bankruptcy court that because  
23 it was entitled to payment of its claim in full through  
24 application of the "Hanging Paragraph," the Trejos were required  
25 to provide interest at the rate set forth in the Contract. The  
26 bankruptcy court disagreed, and held that nothing in BAPCPA or  
27 the "Hanging Paragraph" restricted modification of VW Credit's  
28 rights other than with respect to the amount of its secured claim

1 for purposes of § 1325(a)(5). The bankruptcy court determined  
2 that § 1322(b)(2) remains applicable for modification of such  
3 rights as monthly payment amounts and interest rate.<sup>9</sup> Trejos,  
4 352 B.R. at 263 n.25. VW Credit has not pursued this issue on  
5 appeal.

6 The Trejos, however, assert as error the failure of the  
7 bankruptcy court to allow them to use § 1322(b)(2) to “modify the  
8 value of VW’s claim.” Appellant’s Opening Brief 6:2-5,  
9 February 9, 2007. We find no error in the bankruptcy court’s  
10 determination. It is clear from the language of the statute that  
11 § 1325(a)(5) and the “Hanging Paragraph” specifically operate to  
12 determine the amount to be paid to VW Credit without reference to  
13 the Vehicle’s value. On the other hand, § 1322(b)(2) generally  
14 allows modifications of creditors’ rights through a chapter 13  
15 plan. It is axiomatic that a specific statute supersedes one of  
16 more general application. The Trejos’ proposed use of  
17 § 1322(b)(2) would make nullities of § 1325(a)(5)(B) and the  
18 “Hanging Paragraph.”

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21  
22 <sup>9</sup> The text of § 1325(a)(5)(B)(ii) did not change under  
23 BAPCPA. The phrase “as of the effective date” previously was  
24 recognized to require an interest component be paid so as to  
25 ensure that the creditor receive the present value of its claim.  
26 The Supreme Court addressed the calculation of present value  
27 interest under § 1325(a)(5)(B)(ii) in Till v. SCS Credit Corp.,  
28 541 U.S. 465 (2004), and set “prime-plus” as the proper method  
for determining the interest rate that would provide present  
value. Most courts that have considered the issue have held  
that, since § 1325(a)(5)(B)(ii) remains unchanged under BAPCPA,  
Till remains valid under BAPCPA. Because the issue is not before  
us in this appeal, we save it for another day.

1 **VI. CONCLUSION**

2 The assignment to VW Credit did not destroy the purchase  
3 money character of the security interest. The "Hanging  
4 Paragraph" does not prevent VW Credit from asserting that its  
5 claim is secured for purposes of § 1325(a)(5). The "Hanging  
6 Paragraph" precludes the Trejos' proposed cramdown of VW Credit's  
7 secured claim. Finally, § 1322(b)(2) does not authorize the  
8 Trejos to modify the rights of VW Credit with respect to the  
9 value of its claim to be paid under § 1325(a)(5)(B), as  
10 determined by application of the "Hanging Paragraph."

11 We AFFIRM.  
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