No. 07-1968

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re Jerry Franklin Meadows, Sr. and
Theresa Tucker Meadows,
Debtors

DAIMLERCHRYSLER FINANCIAL SERVICES AMERICAS, LLC,
Creditor/Appellant

v.

JERRY FRANKLIN MEADOWS, SR. AND
THERESA TUCKER MEADOWS,
Debtors/Appellees

On Direct Appeal from the United States Bankruptcy Court for the
Western District of Virginia
No. 06-62050

Brief of Amicus Curiae National Association of Consumer Bankruptcy Attorneys in Support of Debtor and Affirmance of the Bankruptcy Court Decision

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Brett Weiss, #02980
Principal Attorney for *Amicus Curiae*
18200 Littlebrooke Drive
Olney, MD 20832
(301) 924-4400
Brett@BankruptcyLawMaryland.com

On Brief:
Tara Twomey, Esq.
National Association of Consumer
Bankruptcy Attorneys

January 25, 2008

CORPORATE DISCLOSURE STATEMENT

DaimlerChrysler Financial Services Americas, LLC v. Meadows. –
No. 07-1968

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations. **NONE.**

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant. **NOT APPLICABLE.**

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Brett Weiss
Attorney for the National Association of Consumer Bankruptcy Attorneys

Dated: January 25, 2008

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STATEMENT OF INTEREST OF NACBA AS *AMICUS CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2,600 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 500,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g.*, *Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000).

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom own motor vehicles. The 2005 amendments to section 1325(a) added an unenumerated, hanging paragraph at the end of the section that deals with certain claims secured by motor vehicles. The effect of this paragraph has

been widely debated by creditors, debtors, counsel and commentators. This case affords the court an opportunity to address this debate as it pertains to the surrender of these vehicles.

STATEMENT OF FACTS

In this case, the Creditor filed a Proof of Claim in the amount of $43,357.93, the outstanding payoff balance due at the time the Debtor filed his petition for relief. *Appendix* 26, 89, 121. The Creditor indicated that the nature of the claim was "secured." Id. No party in interest objected to Creditor's proof of claim, and therefore it was deemed allowed. *See* 11 U.S.C. § 502(b). As a result, Creditor held an "allowed secured claim" in the full amount of the debt—$43,357.93.

SUMMARY OF ARGUMENT

The Bankruptcy Code uses an elaborate system to dictate the order in which claims are paid and in what amount. A fundamental part of this system in the claims process which determines whether a debt is actually owed to any given creditor, the amount of the outstanding debt to each creditor, and the nature of each obligation (e.g., secured versus unsecured, priority or nonpriority) for purposes of the bankruptcy case. Within bankruptcy, the "allowance," "status" and "treatment" of creditors' claims are determined by Bankruptcy Code, not state law. This case concerns the effect that the hanging paragraph of section 1325(a) has on the status and treatment of covered claims.

If Creditor has an "allowed secured claim" in the full amount of the debt as a result of the hanging paragraph, it cannot also have an allowed unsecured claim. The 2005 amendments to section 1325(a) in no way altered the applicability of section 1325(a)(5)(C) to "allowed secured claims" provided for by the plan. Prior the 2005 amendments debtors were permitted to surrender collateral in full satisfaction of the Creditor's "allowed secured claim." Such a result has not been modified by the addition of the hanging paragraph.

STATUTORY FRAMEWORK

I. The Claims Process in Bankruptcy

"Bankruptcy is all about 'claims'."[1] The claims process is fundamental to achieving the two primary objectives of the Bankruptcy Code: a fresh start for the debtor and the fair and orderly repayment of creditors to the extent possible. *Burlingham v. Crouse*, 228 U.S. 459, 474, 33 S.Ct. 564 (1913); *In re Sanchez*, 372 B.R. 289 (Bankr. S.D. Tex. 2007). The Code establishes an elaborate system that dictates the order in which claims are paid and in what amount. The claims process determines whether a debt is actually owed to any given creditor, the amount of the outstanding debt to each creditor, and the nature of each obligation (e.g., secured versus unsecured, priority or nonpriority) for purposes of the bankruptcy case. Resolution of each of these issues enables creditors to participate in the distribution of the estate's assets in accordance with the rules and priorities set forth in the Bankruptcy Code.[2]

The term "claim" is broadly defined in section 101 of the Bankruptcy Code. 11 U.S.C. § 101(5). Generally, only claims that arise prior to the

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[1] David G. Epstein, *Bankruptcy Claims Process: Review and Overview*, Practicing Law Institute, 898 PLI/Comm 149 (Nov. 2007).

[2] Distribution of the debtor's assets in bankruptcy is almost always a zero-sum game because the claims against the debtor typically far exceed the value of the estate. To the extent one creditor or class of creditors gets paid more other creditors will be paid less.

commencement of the case—"pre-petition"—are allowable, and the amount and nature of a creditor's claim are determined as of the date of the filing of the petition. *See* 11 U.S.C. § 502(b); 4 COLLIER ON BANKRUPTCY ¶ 502.03 (A. Resnick and H. Sommer, eds. 15th ed. rev. Dec. 2007). In chapter 7 and chapter 13, creditors provide notice of their claims to the court, trustee, debtor and any other party in interest by filing a Proof of Claim with the court. *See* 11 U.S.C. § 501; Fed. R. Bankr. P. 3001(f); Official Bankruptcy Form 10. A Proof of Claim, unless a successful objection is filed, will establish the amount and nature of the claim for purposes of the bankruptcy case. 11 U.S.C. § 502(a).

II. Secured Creditor's Rights Outside and Inside Bankruptcy

A. Rights Outside Bankruptcy – Outside bankruptcy, under state debtor-creditor law, a secured creditor whose borrower has defaulted may seize the collateral, sell it at auction, and keep the proceeds of the sale up to the amount owed. *See, e.g.,* VA. CODE ANN. §§8.9-503, 8.9-504. If the proceeds exceed the amount owed, the secured creditor must return the surplus to the debtor. *Id.* If the proceeds fall short of the amount owed, the secured creditor may usually attempt to collect the deficiency from the debtor using the remedies available to unsecured creditors. *Id.*

B. Rights Inside Bankruptcy – Inside bankruptcy, the "allowance," "status" and "treatment" of creditors' claims[3] are determined by Bankruptcy Code, not state law. *See, e.g.*, 11 U.S.C. §§ 502, 506, 1325; *see also* 4 COLLIER ON BANKRUPTCY ¶ 502.01 ("The concept of allowability of claims is exclusively a bankruptcy concept"). "Claim allowance" is determined by section 502, which establishes the validity and amount of the creditor's claim. Section 502 does not address the status or treatment of a secured claim in a case, but merely creates a threshold for determining whether an asserted claim or interest is eligible for distribution from the estate, and if so, in what amount.[4] 4 COLLIER ON BANKRUPTCY ¶ 502.01. The secured or

[3] Consistent with the Bankruptcy Code's focus on the treatment of claims, it has been observed that section 506 effectively "abolishes the use of the terms 'secured creditor' and 'unsecured creditor' and substitutes in their places the terms 'secured claim' and 'unsecured claim.'" H.R. Rep. No. 95-595 , 95th Cong., 1st Sess. 356 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 68 (1978).

[4] The court in *In re Rodriguez*, 375 B.R. 535 (B.A.P. 9th Cir. 2007), takes away the wrong message from the recently decided Supreme Court case of *Travelers Cas. and Sur. Co. of America v. Pacific Gas & Electric Co.*, 127 S.Ct. 1199 (2007). The *Rodriguez* court suggested that creditors holding claims covered by the hanging paragraph are entitled to unsecured deficiency claims unless there is a basis in section 502 to disallow the claim. 375 B.R. at 545. In so stating, it is clear that the *Rodriguez* court conflates the roles played by section 502, 506 and 1325 in the claims process. The issue to be decided in that case and in this one is not about claim allowance or disallowance under section 502. In this case, the Creditor's claim is an "allowed secured claim" in the full amount of the debt. No party has challenged that fact. The issue presented is whether the status and treatment of that "allowed secured claim" is affected by the hanging paragraph.

unsecured status of a claim is determined by section 506. *See In re Bailey*, 153 F.3d 718 (4th Cir. 1998)(table, unpublished)("[t]he determination of an allowed claim's **secured status is an independent inquiry governed by 11 U.S.C. § 506**")(emphasis added); *Barash v. Public Fin. Corp*., 658 F.2d 504, 507 (7th Cir. 1981)("The effect of § 506(a) is to classify claims, not creditors, as secured and unsecured.").[5] "Under section 506's definition of 'secured claim,' only a creditor with a lien on property that is 'property of the estate' has a 'secured claim' in a bankruptcy case."[6] Thus, while state law determines whether or not the amount owed to a creditor is secured by a lien on property, the Bankruptcy Code determines the extent to which a claim is considered secured for purposes of the bankruptcy case. *See* 4 COLLIER ON BANKRUPTCY ¶ 506.01 ("section 506(a) describes the extent to which an allowed claim is to be treated as a secured claim for purposes of the Code, as well as how a secured claim is to be valued"); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 238-39 (1989)(explaining that

[5] The Seventh Circuit in *In re Wright*, 493 F.3d 829 (7th Cir. 2007), misunderstands the claims process when it states that "Creditors don't need § 506 to create, allow, or recognize security interests, which rest on contracts (and the UCC) rather than federal law." 492 F.3d at 833. As discussed further below, the problem with *Wright's* reasoning is that it completely ignores the fundamental nature of the claims process in bankruptcy. The classification of "claims," unlike creditors' interests under state law, and the distribution of assets based on those claims in a bankruptcy proceeding are clearly based on federal bankruptcy law.

[6] Epstein, *supra* note 1 at 155.

section 506 "governs the definition and treatment of secured claims."); *Barash*, 658 F.2d at 507. Section 506(a)(1) bifurcates claims into secured and unsecured portions depending on the value of the bankruptcy estate's interest in the collateral and the amount of the debt. The secured portion of an allowed claim is an "allowed secured claim," while the remaining amount is considered an "allowed unsecured claim."

In chapter 13, treatment of "allowed secured claims"—claims that have been allowed under section 502 and to the extent they are determined to have secured status under section 506—is governed, in part, by section 1325(a)(5). *See In re Fareed*, 262 B.R. 761 (Bankr. N.D. Ill. 2001)(explaining that the '"secured claim', arising from collateral valuation under § 506, if allowed under § 502, authorizes a secured creditor to demand the plan treatment specified in § 1325(a)(5)"). Specifically, section 1325(a)(5) states that the court shall confirm a proposed chapter 13 plan if, "with respect to each allowed secured claim provided for by the plan" the creditor accepts the plan, the debtor affords the creditor's claim the treatment specified under section 1325(a)(5)(B), or the debtor surrenders the property.

III. The Effect of the Hanging Paragraph.

The 2005 amendments to the Bankruptcy Code added a new paragraph to the end of section 1325(a)(9) (hereinafter the "hanging paragraph"). It states in relevant part:

> 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 debtor that is the subject of the claim, …

This paragraph plainly and clearly makes section 506 inapplicable for purposes of section 1325(a)(5) to a claim based on a purchase money security interest in a motor vehicle obtained within 910 days of the filing of the petition. While most courts have agreed that the statute is unambiguous on this point,[7] courts have differed dramatically on what it means to say that section 506 does not apply.

As a preliminary matter it is important to note that several courts considering the effect of the hanging paragraph have construed its effect either too broadly or too narrowly. Again, the hanging paragraph makes section 506 inapplicable **only for purposes of section 1325(a)(5).** For all

[7] *See, e.g., In re Pinti*, 363 B.R. 369 (Bankr. S.D.N.Y. 2007); *In re Turkowitch*, 355 B.R. 120 (Bankr. E.D. Wis. 2006); *In re Particka*, 355 B.R. 616 (Bankr. E.D. Mich. 2006); *In re Payne*, 347 B.R. 278 (Bankr. S.D. Ohio 2006)(finding the language of the hanging paragraph "unambiguous and clear"); *In re Brown*, 346 B.R. 868 (Bankr. N.D. Fla. 2006); *but see In re Duke*, 345 B.R. 806 (Bankr. W.D. Ky. 2006)(finding language of hanging paragraph ambiguous).

other sections of the Bankruptcy Code dealing with the allowance, status and treatment of claims, section 506 continues to be relevant even for creditors with claims falling within the ambit of the hanging paragraph. Courts, such as *In re Wright*, 492 F.3d 829 (7th Cir. 2007) and *In re Rodriguez*, 375 B.R. 535 (B.A.P. 9th Cir. 2007), which turn to state law to find a deficiency claim, fail to recognize that the federal bankruptcy claims process continues to control the allowance and the secured status of the creditor's claim. The hanging paragraph only affects the treatment of a covered claim under section 1325(a)(5).

Additionally, the plain language of the hanging paragraph clearly affects all of section 1325(a)(5). Its applicability is not simply limited to section 1325(a)(5)(B). *See In re Vanduyn*, 374 B.R. 896, 899 (M.D. Fla. 2007); *see* Section V, *infra*.

A small minority of courts have held that creditors with claims covered by the hanging paragraph do not have "allowed secured claims," and are therefore not entitled to treatment under section 1325(a)(5). *In re Wampler*, 345 B.R. 730 (Bankr. D. Kan. 2006)(910-car creditor does not have an "allowed secured claim" but has an allowed claim for the entire prepetition debt without post-petition interest); *In re Carver*, 338 B.R. 521 (Bankr. S.D. Ga. 2006)(910 car claims not "allowed secured claims"). By

contrast, the majority of courts have found that creditors holding such claims have "allowed secured claims" in the full amount of the debt. That is, these courts find that the hanging paragraph simply eliminates the debtor's ability to bifurcate the creditor's claim pursuant to section 506. *See, e.g., In re Brooks*, 344 B.R. 417 (Bankr. E.D.N.C. 2006)(910 car claims are allowed secured claims in the full amount of the debt).

ARGUMENT

IV. The 2005 amendments to section 1325(a) do not alter the debtor's ability to fully provide for an allowed secured claim by surrendering the property securing that claim pursuant to section 1325(a)(5)(C).

Section 1325(a)(5) sets forth the criteria for the treatment of allowed secured claims provided for by the plan. A plan is entitled to confirmation if, with respect to each allowed secured claim provided for in the plan, 1) the creditor accepts the plan; 2) the debtor surrenders the collateral; or 3) the debtor treats the claim as provided for in section 1325(a)(5)(B). Put another way, the holder of an allowed secured claim has a right only to demand that the plan, in providing for the allowed secured claim, satisfy one of the alternatives in section 1325(a)(5).

Assuming[8] that Creditor's claim is an allowed secured claim in the full amount of the debt and within the scope of section 1325(a)(5), section 1325(a)(5)(C) clearly permits the debtor to completely provide for the allowed secured claim by surrendering the motor vehicle. *See In re Quick*, 371 B.R. 459 (B.A.P. 10th Cir. 2007); *In re Osborn*, 363 B.R. 72 (B.A.P. 8th Cir. 2007). There is no question that prior to the enactment of BAPCPA and based on the plain language of the statute, a chapter 13 debtor could surrender property securing a claim in full satisfaction of the creditor's allowed secured claim. *See, e.g., In re Eubanks*, 219, B.R. 468, 473 (B.A.P. 6th Cir. 1998)("Section 1325(a)(5)(C) permits a Chapter 13 debtor to satisfy an 'allowed secured claim' by surrendering the property securing the claim."); *In re Fareed*, 262 B.R. 761, 764 (Bankr. N.D. Ill. 2001)(same); *In re Day*, 247 B.R. 898, 901 (Bankr. M.D. Ga. 2000)(same). No amendments were made to section 1325(a)(5)(C) as part of BAPCPA. In sum, the application of section 1325(a)(5)(C) to allowed secured claims provided for by the plan has not changed . *See Kelly v. Robinson*, 479 U.S. 36, 36-37, 107 S.Ct. 353 (1986)("If Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.");

[8] As noted above, some courts have found that creditors with hanging paragraph claims do not have "allowed secured claims" under the Bankruptcy Code, and are therefore not entitled to treatment pursuant to section 1325(a)(5).

Johnson v. First Nat. Bank of Montevideo, Minn., 719 F.2d 270 (8th Cir. 1983)(and cases cited)("[A]bsent a clear manifestation of contrary intent, a newly enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.").

Creditor argues that pre-2005, "[w]hen the chapter 13 debtor chose to surrender collateral under § 1325(a)(5)(C), a secured creditor disposed of its collateral in accordance with applicable nonbankruptcy law, and was entitled to file an unsecured claim for any remaining balance." Creditor Brief at 16. It is true that creditors, both before and even after the 2005 amendments, can file an unsecured claim after surrender of collateral—but only if the allowed secured claim was less than the total debt owed. *See Eubanks*, 219 B.R. at 473. In this case, the allowed secured claim ($43,357.93) equals the total debt owed ($43,357.93). Under federal bankruptcy law, surrender of collateral pursuant to 1325(a)(5)(C) satisfies the creditor's allowed secured claim.

V. The small minority of decisions reaching the opposite conclusion is wrongly decided.

While the vast majority of courts have determined that an "allowed secured claim" is fully satisfied by the surrender of the collateral securing the debt, a handful of courts have held otherwise. *See, e.g., In re Wright*, 492 F.3d 829 (7th Cir. 2007); *In re Rodriguez*, 375 B.R. 535 (B.A.P. 9th Cir.

2007), *In re Zehrung*, 351 B.R. 675 (W.D. Wis. 2006); *In re Particka*, 355 B.R. 616 (Bankr. E.D. Mich. 2006). Courts holding that full satisfaction of an allowed secured claim is not permitted base their decisions three lines of reasoning, each of which is flawed: 1) that section 506 is irrelevant in the context of surrender under 1325(a)(5)(C); 2) that state law determines the right to an unsecured claim; and, 3) that surrender eradicates the estate's interest in the collateral. *See In re Pinti*, 363 B.R. at 378-388 (analyzing and dismissing these and other less common arguments in favor of allowing creditors unsecured deficiency claims).

A. Section 506 does apply in the surrender situation.

Several courts have held that section 506 is not relevant when the debtor surrenders collateral pursuant to section 1325(a)(5)(C). Since section 506 has no applicability under 1325(a)(5)(C), these courts conclude that the hanging paragraph has no effect on creditors claims where the property is being surrendered. Contrary to the holdings in these cases, however, the plain language of the hanging paragraph makes it equally applicable to section 1325(a)(5)(B) and 1325(a)(5)(C). *See In re Williams*, 2007 WL 2122131, *4 (Bankr. E.D. Va. July 19, 2007)("The same language cannot mean one thing when applied to § 1325(a)(5)(B), and something different when applied to § 1325(a)(5)(C)").

> The argument that pre-BAPCPA § 506(a) had no application to surrender under § 1325(a)(5)(C) is misplaced. Rejecting this argument the court, in *In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn. 2006), stated: [v]aluation of a creditor's allowed secured claim under Pre-BAPCPA § 506(a) was 'determined in light of the purpose of the valuation and of the proposed disposition or use of such property…" 11 U.S.C.A. § 506(a) 2004. Upon surrender under Pre-BAPCPA § 1325(a)(5)(C), liquidation value was clearly the yardstick by which the allowed secured claim was determined, while, for cramdown [footnote omiited] purposes under Pre-BAPCPA § 1325(a)(5)(B), replacement value was the criteria. See Assoc. Commercial Corp. v. Rash., 520 U.S. 953 (1997). Id. at 339-40. An allowed secured claim arises, not as a consequence of a sale of the collateral pursuant to state law, but as a result of determining the extent by which the debt exceeds the value of the collateral through the application of § 506, whether that determination be by estimation for use under § 1325(a)(5)(B) or by surrender and eventual liquidation under § 1325(a)(5)(C).

Williams, 2007 WL 2122131 at *8; *see also In re Gentry*, 2006 WL 3392947 at *6 (use of liquidation value pre-BAPCPA did not render section 506 irrelevant). Regardless of whether the debtor intended to retain or surrender the collateral, section 506(a) assigned the formula for the split; the sale was simply the process by which the formula was applied and a creditor was granted an allowed unsecured claim by section 506(a) in the surrender

situation as well as the retention situation. *Id.; see also In re Nicely*, 349 B.R. 600, 603 (Bankr. W.D. Mo. 2006).

If claims covered by the hanging paragraph are allowed secured claims and if section 506 no longer applies, the amount of the creditor's allowed secured claim is now the full amount of the debt for *all* parts of section 1325(a)(5). Thus, while the inapplicability of section 506 may no longer allow bifurcation of claims, the Code continues to allow debtors to surrender collateral in satisfaction of creditors' allowed secured claims

B. Bankruptcy law, not State law, determines the creditor's allowed unsecured claim.

The Seventh Circuit in *In re Wright,* takes the position that "Creditors don't need § 506 to create, allow, or recognize security interests, which rest on contracts (and the UCC) rather than federal law." 492 F.3d at 833; *see also In re Rodriguez*, 375 B.R. at 543; *In re Zehrung*, 351 B.R. at 678, After surrender, *Wright* maintains that the creditor is entitled to its state law right to liquidate the collateral and retain an unsecured claim for the balance due. *Id.* This reasoning is flawed, however, because it fails to recognize the Code is not silent on the issue on the amount and nature of the creditor's claim. Section 506 continues to apply with respect to all sections in the Bankruptcy Code other than section 1325(a)(5). Furthermore, as discussed above, the Code very specifically provides that the creditor's allowed

secured claim is satisfied with the surrender of the collateral. If the creditor has an allowed secured claim in the full amount of the debt, as in this case, there is no void to be filled by state law. Instead of applying section 1325(a)(5)(C) properly, the *Wright* court essentially renders the section a nullity by reading it out of the statute and failing to give it any effect. Because the debtor's plan provided for "such claim"—the allowed secured claim in the full amount of the debt—by surrendering the property, the plan was entitled to confirmation. The debtor fully complied with section 1325(a)(5), the specific provision of the Code dictating the treatment of allowed secured claims for chapter 13 confirmation purposes.

Outside of bankruptcy, under state debtor-creditor law, the creditor may have had a state law claim for a deficiency upon disposition of the collateral. However, the issue in this case is whether the creditor has an "allowed unsecured claim" under the Bankruptcy Code. Under the Bankruptcy Code the creditor has no "allowed unsecured claim" if its "allowed secured claim" equals the total amount of the debt. State law determines creditors' rights only to the extent that such rights are not modified by the Bankruptcy Code. *See In re Vanduyn*, 374 B.R. at 901 ("The Bankruptcy Code is federal law that preempts state law where such law is in conflict"), *citing Pacific Gas and Elec. Co., v. State Energy*

Resources Conservation and Dev. Comm'n, 461 U.S. 190, 204, 103 S. Ct. 1713 (1983); *In re Nichols*, 440 F.3d 850, 854 (6th Cir. 2006)(stating that "Bankruptcy laws have long been construed to authorize the impairment of contractual obligations"). The Bankruptcy Code specifically permits debtors to modify the rights of secured creditors,[9] including those with claims covered by the hanging paragraph. *See* 11 U.S.C. § 1322(b)(2). The hanging paragraph too modifies the nonbankruptcy rights of debtors and creditors. Rather than paralleling state law results, the hanging paragraph forces debtors, who wish to retain the collateral, to pay much more to the creditor than the creditor would actually receive were the vehicle repossessed and sold. Inversely, the debtor is also permitted to satisfy the creditor's "allowed secured claim" by surrendering the collateral. Consequently, even though such creditors might be entitled to a deficiency claim outside of bankruptcy, they are not entitled to an allowed unsecured claim for any deficiency here. *In re Pinti*, 363 B.R. 369, 375 (Bankr. S.D.N.Y. 2007); *In re Turkowitch*, 355 B.R. at 129. Creditors should not be permitted to "have their cake and eat it too."

[9] The only exception to this general rule permitting modification is for claims held by creditors with security interest in real property that is the debtor's principal residence. *See* 11 U.S.C. § 1322(b)(2).

C. Eradication of the estate's interest.

The *Rodriguez* and *Particka* courts suggest that section 506 is inapplicable under section 1325(a)(5)(C) because the estate's interest in the collateral is extinguished upon plan confirmation. The reasoning of these courts fares no better than that of *Wright*. Upon confirmation of the debtor's plan, three things occur simultaneously: the debtor's plan is confirmed; the debtor relinquishes any rights in the collateral; and the allowed secured claim of the creditor is extinguished. That the estate may no longer have a continuing interest in the collateral is irrelevant because the creditor also no longer has an allowed secured claim.

In summary, the hanging paragraph is not ambiguous nor does it lead to absurd results. If the effect of the hanging paragraph is to give creditors of covered claims "allowed secured claims" in the full amount of the debt, then surrender in full satisfaction of the debt is permitted. Such creditors are not entitled to a bifurcated claim and do not have an allowed unsecured claim after the surrender of the collateral. "This rule complies with the meaning of the statue, constitutes the fair treatment of secured creditors as envisioned by Congress (because it will encourage debtors to either pay the claim in full or promptly surrender the collateral) and is in harmony with the

majority of the bankruptcy courts that have analyzed this issue." *In re Turkowitch*, 355 B.R. at 129.

VI. The Creditor's best guess as to legislative intent is insufficient to overcome the plain language of the statute.

Despite the dearth of legislative history on the hanging paragraph, creditors have routinely argued in hanging paragraph cases that Congressional intent in enacting the provision was solely to benefit creditors. *See In re Kenney*, 2007 WL 1412921 (Bankr. E.D. Va. May 10, 2007)("Creditors argue that the hanging paragraph should always be read to provide heightened protection to 910 secured creditors, as that was the intent of Congress"); *In re Brown*, 346 B.R. 868 (Bankr. N.D. Fla. 2006)("Wells Fargo contends that the absurdity of the result originates from the fact that the changes in the Code wrought by BAPCPA were enacted to enhance the rights of secured creditors in bankruptcy"). One court recently summarized the creditor's argument on the hanging paragraph as follows:

> The crux of Ford Motor Credit's argument is that § 1325 was amended to protect the interests of the 910 creditor and thus the statute should be interpreted to give the interests of the secured 910 creditor increased protection. Ford Motor Credit is in essence requesting this Court to find that the statute on its face is contrary to the intent of the drafters.

In re Williams, 2007 WL 2122131 (Bankr. E.D. Va. Jul. 19, 2007). The Creditor in this case adopts a similar position by arguing that "the clear intent of the legislative history on the Hanging Paragraph is that Congress intended to provide more protection to creditors with purchase-money security interests."[10] Creditor's Brief at 30.

The Creditor and the cases cited give significant weight to what is ***perceived*** as Congress' intent. For example the Creditor states, without any citation, that "It is unlikely that Congress intended to significantly expand the rights of secured creditors in § 1325(a)(5)(B) while simultaneously reducing them in § 1325(a)(5)(C)". Creditor's Brief at 33; *see also General Motors Acceptance Corp. v. Peaslee*, 373 B.R. 252, 261 (W.D.N.Y. 2007)(stating that "the so-called 'hanging paragraph' of § 1325, was obviously intended to protect the interests of automobile dealers who provide financing for customers."); *In re Zehrung*, 351 B.R. 675, 678 (W.D. Wis. 2006)(basing its decision on what it found to be the "likely" and

[10] There is no doubt that the hanging paragraph benefits holders of covered claims at the expense of other holders of allowed secured claims, holders of allowed unsecured claims and debtors, in some circumstances. For example, when debtors keep cars subject to the hanging paragraph, they will pay a higher allowed secured claim through the plan than they would have pre-2005. However, some obvious benefits to holders of covered claims does not mean that such creditors must win every dispute related to the interpretation of the hanging paragraph.

"extremely unlikely" intent of Congress).

But what makes this intent "likely" or "obvious"? Certainly, the legislative history reflects no such intent. *See In re Quick*, 371 B.R. 459, 463 n.10 (B.A.P. 10th Cir. 2007)(" Specifically, we do not agree that BAPCPA amendments that appear to benefit creditors must be interpreted in such a way as to benefit only creditors. In fact, many of the supposedly "pro-creditor" amendments appear reflective of the normal give and take of the legislative process."). Indeed, such an argument disregards the fact that many parts of the bill, including the hanging paragraph, were compromised from previous versions. The final bill, as adopted contains provisions benefiting secured creditors, unsecured creditors, and debtors. There is no reason to interpret the 2005 amendments solely in favor of secured creditors at the expense of all others.

To the extent such beliefs are based on the role of private groups advocating for the legislation, the Supreme Court has specifically counseled against inferring any such intent. Courts should not attribute to Congress an official purpose based on the motives of particular groups that lobbied for or against certain provisions. *See Circuit City Stores v. Adams*, 532 U.S. 105, 120, 121 S. Ct. 1302, 149 L.Ed 234 (2001)(private interest groups' roles in lobbying for or against legislation provide a dubious basis from which to

infer intent); *see also Garcia v. United States*, 469 U.S. 70, 76, 105 S. Ct. 479, 83 L.Ed.2d 474 (1984)(courts should look only to Committee Reports that "represent[] the considered and collective understanding of those [legislators] involved in drafting and studying the proposed legislation."). This Court should reject the Creditor's suggestion which would lead to the unsupportable conclusion that creditors should always win in cases related to the 2005 amendments simply because creditors lobbied for the passage of the bill.

The language of the hanging paragraph should not be "interpreted" to match the Creditor's view of what Congress "meant" to say. Rather the plain language of the statute should be conclusive, except in rare cases in which the literal application will produce a result *demonstrably* at odds with the intentions of the drafters.

CONCLUSION

For all the foregoing reasons, *amicus* respectfully requests that this Court affirm the decision of the bankruptcy court.

Respectfully submitted,

Brett Weiss, #02980
18200 Littlebrooke Drive
Olney, MD 20832
(301) 924-4400
Brett@BankruptcyLawMaryland.com

On Brief:
Tara Twomey, Esq.
National Association of Consumer
Bankruptcy Attorneys

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CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 5212 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

I certify under penalty of perjury that the foregoing is true and correct.

Date: January 25, 2008

Brett Weiss, #02980
18200 Littlebrooke Drive
Olney, MD 20832
(301) 924-4400
Brett@BankruptcyLawMaryland.com