



THE EMPIRE STRIKES BACK!

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INTRODUCTION

Not so long ago, in a galaxy not so far away, competing forces battled against self-described good and evil. Those on the debtors' side labeled themselves as "Jedi" and the car lenders as the "Empire." These parties soon engaged in battle over new rules imposed under BAPCPA.

Early cases from the Bankruptcy Courts gave debtors "A New Hope" under various Chapter 13 BAPCPA provisions. Decisions on issues like "surrender in full", "negative equity" and "personal use" seemed to negate the seemingly impenetrable provisions of the new "hanging paragraph."

Unfazed by these Bankruptcy Court decisions, the "Empire Strikes Back" by appealing the issues to the Circuit Courts. That forum proved much more favorable to the Empire for interpreting the not so straightforward provisions of BAPCPA.

Will there be a "Return of the Jedi" to push back the Empire's success in the Circuit Courts? The Force is certainly strong in many of debtors' counsel and creative arguments continue to spring forth.

Have the car lenders achieved all they sought in BAPCPA? These materials examine the journey so far and provide case interpretations across the country.

ANALYSIS

I. SURRENDER IN FULL SATISFACTION

One of the first battles under BAPCPA was debtors' argument that plans could propose to surrender collateral in full satisfaction of the entire claim (resulting in no unsecured deficiency claim).

A. Statutory Provision

The "hanging paragraph" of Section 1325(a) provides:

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the 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.

(emphasis added).

B. Early Bankruptcy Court Decisions

Relying on the *Ezell* line of cases, many debtors were successful in confirming plans in the bankruptcy courts containing a provision that surrendered vehicles in full satisfaction of the entire debt (eliminating any deficiency balance). The argument was that since the 910 claim couldn't be bifurcated under Section 506 into secured and unsecured components, the claim must be entirely secured and that the surrender of the collateral satisfied the entire secured claim. Since there was no unsecured claim, the debtor did not have to provide for any payment on the deficiency.

Early on, a majority of Bankruptcy Courts allowed confirmation of plans that provided for surrender in full. See *In re Rodriguez*, 375 B.R. 535 (9th Cir. BAP 2007) (collecting cases).

C. Circuit Courts Decisions

The Circuit Courts did not adopt this early majority view of the Bankruptcy Courts. Recently, the Fifth Circuit followed the prohibition of such a provision by the Fourth, Seventh, Eighth, Tenth, Eleventh and the outcome from the Sixth Circuit (disagreeing with its reasoning but following its result). See *In re Miller*, 570 F.3d 633 (5th Cir. June 5, 2009); *Tidewater Fin. Co. v. Kenney*, 531 F.3d 312 (4th Cir.2008); *In re Wright*, 492 F.3d 829 (7th Cir. 2007); *Capital*

One Auto Finance v. Osborn, 515 F.3d 817 (8th Cir. 2008); *In re Ballard*, 526 F.3d 634 (10 Cir. 2008); *In re Barrett*, 543 F.3d 1239 (11th Cir. 2008); *AmeriCredit Financial Services, Inc. v. Long (In re Long)*, 519 F.3d 288 (6th Cir.2008).

For the Circuit Courts, the issue rises and falls on the source of an unsecured claim. Finding the answer to that question lies not only in Section 506 – but under state law as well, the issue is quickly resolved. The Fifth Circuit’s analysis in *Miller* mirrors that of Judge Easterbrook in *Wright*.

“The *Wright* court, 492 F.3d at 832, recognized that the hanging paragraph does prevent § 506 from affecting surrendered 910 vehicles under § 1325(a)(5)(C). The court then properly explained that § 506 "is [not] the only source of authority for a deficiency judgment." *Id.* Instead, "state law determines rights and obligations when the Code does not supply a federal rule." *Id.* (citations omitted). Using that state law, the court found that the creditor still had an unsecured deficiency judgment it could assert against the debtor.”

There are still tiny pockets of the country where surrender in full may work. *In re Pruitt*, 401 B.R. 546 (D. Ct. 2009). Note that *Pruitt* also relied on an estoppel theory based on the creditor’s Proof of Claim. The result in *Pruitt* may be avoidable by making sure to state on the Proof of Claim that the claim may contain an unsecured component. Under the Circuit Court decisions, however, that should not be necessary.

Finally, we continue to see plans where debtors’ counsel include such a provision hoping not to draw an objection – relying on the binding effect of confirmation.

D. The Return of the Jedi? Objecting to the Deficiency Claims as Untimely

Believing in the power of the Force, several debtors’ counsel have formed a new line of attack: objecting to the amended claims as untimely (filed after the bar date). There are a few courts that have entertained such an argument. *See, e.g., In re McBride*, 337 B.R. 451 (Bankr. N.D. N.Y. 2006); *In re Matthews*, 313 B.R. 489 (Bankr. M.D. Fla. 2004). Those courts hold that the amended deficiency claim is essentially a new claim that does not relate back to the original secured claim.

One recent case specifically rejects this argument. *See In re Breaux*, Case No. 07-51007 (Bankr. W.D. La. 8/14/2009) (Bankr. W.D. La., 2009) (“Other courts, however, have held that a post-bar date amendment to assert an unsecured deficiency claim is permissible. *See Delmonte*, 237 B.R. 132, 135 (Bankr. E.D. Tex. 1999). In *Delmonte*, the court reasoned that the deficiency claim "relates to and arises out of the same transaction as the original claim." *Id.* at 136; see also, Lundin, *Chapter 13 Bankruptcy 3d Ed.* at Section 284. (noting that "one common example for appropriate use of an amended claim in a chapter 13 case might be the claim for a deficiency when collateral is repossessed and disposed of after confirmation.")).



Practice Tip: Reserve the right to file the deficiency claim on the face of the original Proof of Claim and or a motion for relief from stay. Alternative argument: Fine. Continue to pay the secured claim in full via *In re Adkins*, 425 F.3d 296 (6th Cir. 2005).

Conclusion on Surrender in Full:

Many plans still provide for surrender in full – hoping that the plans will not draw an objection. The vast majority of courts find that confirmation binds the creditor to the plan provisions upon confirmation – deeming silence is acceptance. Creditors should object to these plans to avoid having to argue that confirmation should be set aside or should not have been entered with such a patently impermissible provision.....

If a plan containing such a provision is confirmed, you will most likely be bound by its provisions. Any argument for revoking confirmation will be difficult – at best. After a plan has been confirmed, you must seek to revoke confirmation under Section 1330. The allegation has to be that the confirmation order was procured by fraud. You would have to allege that the debtor represented to the Court that the plan met all of the confirmation requirements and complied with the Code - and that was a fraud because this was a 910 claim that could not be crammed down. Under the Rules, this is supposed to be done in an adversary proceeding (see Rule 7001(5)).

In support of this argument, there are a couple of cases out of Utah that says that the Court should not confirm a case that doesn't comply with the Code [not providing for full payment of the 910 claim] – even if there is no objection from the creditor. *In re Garner*, 399 B.R. 267 (Bankr. D. Utah 2009); *In re Montoya*, 341 B.R. 41 (Bankr. D. Utah 2006). This may boil down to whether the judge believes that silence can be deemed as acceptance by a secured creditor. You might be able to use these cases to argue that this case should really not have been confirmed in the first place. Bottom line, this argument is tough to win.

II. NEGATIVE EQUITY (AND INSURANCE AND WARRANTY FINANCING)

J.D. Power and Associates estimates that approximately 38% of new car buyers have negative equity (i.e., they owe more than the value of the current vehicle) at trade-in, compared to 25% two years ago. Wilson & DiChiara, *The Changing Landscape of Indirect Automobile Lending*, FDIC Supervisory Insights, Summer 2005 at 29. Resolution of the negative equity issue, therefore, represents LOTS of money to car lenders in Chapter 13 cases.

One report has indicated that it is not uncommon for the amount of negative equity financed to be \$10,000 to \$15,000. Kiley, *Car Buyers Burned By Negative Equity*, USA Today, July 6, 2003, available at http://www.usatoday.com/money/autos/2003-07-06-car-loan_x.htm ("Mark Eddins of Friendly Chevrolet in Dallas estimates that 90% of his customers are upside-down, often owing \$10,000 to \$15,000 more than the trade-in is worth"). Assuming that 38% of the Chapter 13 cases have this level of negative equity, the amount at issue (if they did not surrender the vehicles) would be in excess of **\$350,000,000.00 per year**. (In 2008, there were approximately 358,000 chapter 13 cases).

A. Relevant Statutory Provisions of the UCC

Section 9-103 provides:

(a) In this section:

(1) "Purchase-money collateral" means goods or software that secures a purchase-money obligation incurred with respect to that collateral; and

(2) "Purchase-money obligation" means an obligation of an obligor incurred as all or part of the **price** of the collateral or for **value given to enable** the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

(b) A security interest in goods is a purchase-money security interest:

(1) To the extent that the goods are purchase-money collateral with respect to that security interest;

....

Official Comment 3 to Article 9 states:

As used in subsection (a)(2), the definition of "purchase-money obligation," the "price" of collateral or the "value given to enable" includes obligations for expenses incurred in connection with acquiring rights in the collateral, sales taxes, duties, finance charges, interest, freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney's fees, and other similar obligations.

The concept of "purchase-money security interest" requires a close nexus between the acquisition of collateral and the secured obligation. . . .

B. Early Bankruptcy Court Decisions

Results of negative equity challenges in the Bankruptcy Courts were mixed. Many of the Bankruptcy Courts found that a car lender's financing of negative equity either destroyed or limited the purchase money security interest. *See, e.g., In re Brodowski*, 391 B.R. 393 (Bankr. S.D. Tex. 2008) (Characterizing the purchase and satisfaction of the lien on the trade-in vehicle as two separate transactions that do not bear a close nexus).

C. Circuit Court Decisions

Like the surrender in full issue, the Circuit Courts have unanimously sided with the car lenders on the negative equity issue. Recently, the Fifth Circuit joined the other Circuits (4th, 8th, 10th and 11th) in finding that the negative equity, gap insurance and warranties were all included in the purchase money security interest. *See Ford Motor Company, LLC v. Rebecca Ann Dale (In re Dale)*, ___ F.3d ___, No. 08-20583 (5th Cir. 9/8/2009) (5th Cir. September 8, 2009) following *Graupner v. Nuvel Credit Corp. (In re Graupner)*, 537 F.3d 1295, 1302 (11th Cir. 2008); *In re Price*, 562 F.3d 618 (4th Cir. 2009); *Ford v. Ford Motor Credit Corp. (In re Ford)*, ___ F.3d ___, No. 08-3192 (10th Cir. 8/3/09); *In re Mierkowski*, ___ F.3d ___, No. 08-3866 (8th Cir. 9/8/2009). The Second Circuit recently followed as well. *Reiber v. GMAC, LLC, Ford Motor Credit Company, General Motors Acceptance Corporation, Sovereign Bank, HSBC Auto Finance (In re Peaselee)*, ___ F.3d ___, No. 07-3962-bk(L) (2nd Cir. 10/9/2009)

The decision in *Dale* was based on both prongs of the purchase money security interest analysis (price and value given to enable). First, the Fifth Circuit believed that negative equity financing, gap insurance, and extended warranties are properly considered expenses incurred by the creditor in connection with the buyer's goal of acquiring rights in the collateral (and therefore part of the price). Second, noting that "obligations for expenses incurred in connection with acquiring rights in the collateral" as a stand alone category of expense, they found that negative equity and related expenses fit perfectly within the "value given to enable" prong of § 9.103.

Most of the Circuit Court decisions were limited to negative equity financing. *Dale*, however, found that not only was negative equity part of the purchase money security interest, but **gap insurance and service warranties** financed at the time of the original loan were also included in the purchase money security interest.

Note: Both *Dale* and *Mierkowski* stressed the importance of **unified decisions** from the Circuit Courts. *In re Dale* at footnote 8 ("Our conclusion is bolstered by general prudential concerns with creating unnecessary circuit splits. *See Alfaro*



v. Comm'r of Internal Revenue, 349 F.3d 225, 229 (5th Cir. 2003) (noting that circuit splits are disfavored”); *In re Mierkowski* at page 6 (“This court strives to “maintain uniformity in the law among the circuits, wherever reasoned analysis will allow.” *Owens v. Miller (In re Miller)*, 276 F.3d 424, 429 (8th Cir. 2002)”).

The negative equity issue is currently on appeal in the Ninth Circuit (*Penrod*), Sixth Circuit (*Shockey*) and Seventh Circuit (*Holland*). Decisions are expected early next year.

C. The Return of the Jedi? - Personal Use Arguments?

Losing the negative equity issue doesn’t always end the argument over cramdown. Often, debtors argue that the vehicle was not “acquired for the personal use of the debtor.” The leading case on personal use is *In re Solis*, 356 B.R. 398 (Bankr. S.D. Tex. 2006). Recently, Judge Waldrep from North Carolina applied the *Solis* factors:

When a debtor uses a vehicle for both personal and business use, these courts and others have adopted the *Solis* test, holding that if the personal use is significant and material, then the personal use requirement of Section 1325(a) is satisfied, regardless of whether there is also some business use. *Solis*, 356 B.R. at 409. In making this determination, this Court must look to the Debtors' intended use at the time the Vehicle was purchased. *In re Lorenz*, 368 B.R. 476, 485 (Bankr. E.D. Va. 2007); *Phillips*, 362 B.R. at 301-02; *Solis*, 356 B.R. at 408-09. Actual use is evidence of intended use. *Lorenz*, 368 B.R. at 485; *Solis*, 356 B.R. 408-09.

In re Heglur, Case No. 09-51077 (Bankr.M.D.N.C. 8/31/2009).

Judge Waldrep found the following facts demonstrated a significant and material personal use of the vehicle:

Turning to the facts of this case, there is no question the Vehicle is used, and was acquired, at least in part, for business purposes. The male Debtor testified that he started his lawn care business in 2001, well before the Debtors purchased the Vehicle. He also testified that he purchased the Vehicle because he could no longer keep his lawn care equipment in a garage, and needed the Vehicle to safely tow a trailer carrying the equipment. Absent the need for the trailer, he would not have purchased the Vehicle.

However, there is ample evidence to demonstrate that the Debtors' personal use of the Vehicle is significant and material. The male Debtor uses the Vehicle to drive to and from his full-time job at Keystone Automotive, where he has been employed for the past seven years. *See Solis*, 356 B.R. at 410 (holding that "personal use" includes transportation to and from work in almost all circumstances). The male Debtor also earns a substantial majority of his income from his full-time job. The male Debtor testified that he did not insure the Vehicle as a commercial vehicle, which indicates that the Vehicle was intended for personal, rather than business use. Finally, the number of miles driven

in a non-business context substantially outweighs the number of miles driven for a business purpose, as noted on Schedule C of the Debtors' 2008 federal income tax return.

Not surprisingly, a number of reported decisions find in favor of the debtors. In an early case, Judge Jones decided a relatively straightforward case where the debtor testified that 95% of the usage of his pickup truck was for his sheet-rock business and he had three other vehicles that he used for personal use. *In re Gonzales*, Case No. 07-50202-RLJ-13 (Bankr. N.D. Tex. 10/29/2007).

The closer cases involve purchases for a spouse, child or fiancé.



Practice Tips: Obviously, this is a fact issue – and discovery is crucial to determining the extent of the personal use. Insurance, tax returns and miles driven are key factors – as well as the intended use at the time of the acquisition. See *In re Davis*, 2007 WL 2818493 (Bankr. M.D.N.C. September 25, 2007) (“The court has no doubt that the Vehicle is presently being used primarily for business purposes; however, the hanging paragraph requires the court to look at the purpose for which the Vehicle was acquired, not its present use. Based upon the evidence presented, the court finds that the Vehicle was acquired for the personal use of the Debtors. There is simply no evidence that Mr. Davis operated a business until after the Petition Date, and the Vehicle was purchased approximately 18 months prior that date”). Some contracts also contain a provision that states that the debtor is purchasing the vehicle for personal use.

Finally, the Debtor may win the battle but lose the war. If the vehicle is not for the personal use of the Debtor, then it may be questionable whether it is necessary for an effective reorganization. You wouldn't be fighting if there was equity – so both grounds of Section 362(d)(2) may be present and relief from stay may be appropriate. See *In re Lewis*, 347 B.R. 769, 775 (Bankr. D. Kan. 2006) (granting relief from stay as the debtor admitted no equity and the vehicle was not being used by the debtors). It may also not be good faith to pay for a vehicle that isn't necessary for an effective reorganization at the expense of the unsecured creditors. See *In re Ford*, Case No. 07-28188-svk (Bankr. E.D. Wis. 4/29/2008) at pp. 6-7 (“However, the proposed strip down of the lien on a claim secured by a brand new vehicle that the Debtor does not even drive, while permissible under the hanging paragraph, may well violate another confirmation requirement. Nissan's Objection to confirmation is overruled, but without prejudice to Nissan's seeking relief from the stay to reclaim the vehicle or to object to confirmation on the grounds that the plan is not proposed in good faith.”). In *Ford*, Nissan promptly moved for relief from stay, the debtor amended the plan to increase payment on the claim and Nissan withdrew their motion for relief from stay. Thereafter, the trustee objected to confirmation – claiming that it was not acceptable to propose to pay 2 cars for one debtor in an amount exceeding \$69,000 while the unsecured creditors only received a distribution of 10%. The Court overruled the trustee's objection and confirmed the plan.

III. EQUAL MONTHLY PAYMENTS

SECTION 1325(a)(5)(B)(iii)(I)

There is a natural friction in a chapter 13 plan between the early payment of attorneys fees and holders of secured claims. Since many plans fail, car lenders are naturally interested in getting paid early in chapter 13 plans – especially since their collateral is depreciating.

A. Relevant Statutory Provisions

Section 1326(a)(1)(C) requires the immediate payment (within 30 days after filing) of adequate protection to holders of allowed claims secured by personal property to the extent the claim is attributable to the purchase of such property.

In addition, Section 1325(a)(5)(B)(iii) requires that the plan provide that if the property to be distributed is in the form of periodic payments, such payments shall be in equal amounts; and [if the claim is secured by personal property] the amount of such payments shall not be less than an amount sufficient to provide ... adequate protection during the period of the plan.

B. The Cases

Not surprisingly, the cases interpreting the requirement for equal monthly payments are split.

The only thing that the cases seem to agree upon is that a balloon payment at the end of a plan does not meet the requirement for equal monthly payments. *In re Hamilton*, (“Overwhelmingly, courts have held that by its very terms, a balloon payment is not equal to the payment that preceded it, and thus violates § 1325(a)(5)(B)(iii)(I) with respect to periodic payments on a secured claim under a chapter 13 plan. *See In re Carman*, 2008 WL 2909863, at *1 (Bankr. D. Mass. July 25, 2008); *In re Wallace*, 2007 WL 3531551 (Bankr. M.D.N.C. Nov. 21, 2007); *In re Lockett*, 2007 WL 3125278, at *2; *In re Newberry*, 2007 WL 2029312, at *3-4 (Bankr. D. Vt. July 10, 2007); *In re Lemieux*, 347 B.R. 460, 463 (Bankr. D. Mass. 2006); *In re Wagner*, 342 B.R. 766, 772 (Bankr. E.D. Tenn. 2006); *In re DeSardi*, 340 B.R. 790, 805 (Bankr. S.D. Tex. 2006); *see also* William J. McLeod, *Trick or Treat: A (Not-So)-Scary Look at Equal Monthly Payments Under § 1325(a)(5)*, 24-Oct. Am. Bankr. Inst. J. 14 (2008); *but see In re Davis*, 343 B.R. 326, 328 (Bankr. M.D. Fla. 2006). Here, the Debtor's plan provides for a balloon payment at or near completion of the plan. By its very terms, the balloon payment is not equal to the preceding payments and therefore it is prohibited by § 1325(a)(5)(B)(iii)(I).”).

The Circuit Courts have not yet decided the equal monthly payment issue. The only relevant appellate decision located was from the Northern District of Indiana – *In re Rivera*, 2008 WL 1957896, No. 1:08-CV-21-TS (N.D. Ind. May 2, 2008). In *Rivera*, the plan provided that the trustee would determine the monthly amount to be received by the Daimler Chrysler. The *Rivera* court began its analysis with the purpose behind the equal monthly payment requirement:

The purpose behind this subsection, which was added to the code by the BAPCPA, has been explained by one court as a remedy to pre-BAPCPA practices that harmed secured creditors with depreciating collateral:

Prior to BAPCPA, it was not uncommon for some Chapter 13 plans to provide for backloaded payments, such as balloon payments. Another form of backloading involved graduated or step-up payment plans, where the payments started out smaller and increased over time. Secured creditors, particularly those secured by a vehicle, viewed this as unfair, exposing them to undue risk in light of the constant depreciation of their collateral.

Other plans, filed by debtors whose employment is seasonal, provided for reduced payments or no payments at all during certain months of the year, or called for payments to be made quarterly or semi-annually, rather than monthly, based upon the peculiarities of the debtor's income stream. Secured creditors had similar complaints with those plans.

In response to those creditor concerns, Congress enacted the equal payment provision and a companion provision extending the concept of adequate protection, formerly a preconfirmation requirement, to postconfirmation plan payments. 11 U.S.C. § 1325(a)(5)(B)(iii)(II). The equal payment provision prevents debtors from backloading payments to secured creditors or paying them other than on a monthly basis.

Rivera citing In re Erwin, 376 B.R. 897, 901 (Bankr. C.D. Ill. 2007)

Rivera also noted that:

In many instances, creditors with a security interest have been required to await payment on their secured claims until after payment of administrative expenses which include unpaid attorneys' fees. Further, Chapter 13 plans often provided for payment of the current mortgage, payment of the mortgage arrearages, and payments made pursuant to a lease and lease arrearages prior to payments on secured claims. This often resulted in uncompensated depreciation of collateral during the pendency of a Chapter 13 case. In the worst-case scenario, a creditor could wait as long as twenty-four months before receiving any distributions on an allowed secured claim.

Rivera citing Selected Creditor Issues Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 79 Am. Bankr. L.J. 817, 835-36 (2005)

Rivera found that the failure to specifically set forth the amount of the equal monthly payment was fatal to plan confirmation:

"The amount of those payments is not specifically set forth. Instead, it was left to the discretion of the trustee to make periodic payments to [Daimler Chrysler]. Thus, the plan does not provide that the trustee's distributions to the holder of the allowed secured claim

be in “equal monthly amounts.” 11 U.S.C. §1325(a)(5)(B)(iii)(I). This fails to comport with the plain language of §1325(a)(5)(B)(iii)(I). Nor is it possible to determine, from the plan, whether the amount of any distribution would be in an amount sufficient to provide the Appellant adequate protection, which is required when the holder of the claim is secured by personal property. 11 U.S.C. § 1325(a)(5)(B)(iii)(II). Nothing in the current plan would prevent the trustee from backloading payments to the Appellant [Daimler Chrysler] or from making disbursements other than on a monthly basis.

Finally, *Rivera* found that the trustee practice of administering cases did not guarantee the equal monthly payments required by the statute:

The trustee herself points to the various factors that affect the amount of any disbursement to the Appellant, such as administrative expenses, the trustee’s percentage fee, and mortgage payment adjustments. The trustee calculates that the Appellant will receive \$516 per month and argues that this is an amount that will provide adequate protection. But unless this amount is provided in the plan, the abuses the BAPCPA was enacted to address are still possible.

Another good case for creditors is *In re Espinoza*, Case No. 08-20778 (Bankr. D. Utah 8/1/08). In that case, the bankruptcy court found that step up plans did not meet the requirement of equal monthly payments:

The language of §1325(a)(5)(B)(iii) clearly requires that periodic payments to a creditor on an allowed secured claim be in equal monthly amounts and the payment amounts be sufficient to provide adequate protection during the period of the plan. The term “periodic payments” refers to all regularly recurring post-confirmation payments to be made to secured creditors such as CitiFinancial. It follows that, unless CitiFinancial agrees otherwise, it must receive equal monthly payments beginning with the first post-confirmation distribution and continuing until its claim is paid in full.

The Plan proposes to pay the secured claim of CitiFinancial adequate protection payments of \$200 in months 1 through 9, then, beginning in month 10 and continuing until the claim is paid in full, equal monthly payments of \$510 per month. In doing so, the Debtors are trying to create room in the Plan for payment to their attorney on an expedited basis. This type of a “two-tiered” payment plan, in which post-confirmation payments characterized as “adequate protection payments” are less than the payments characterized as “periodic monthly payments,” is inconsistent with the requirements of § 1325(a)(5)(B)(iii)(I).

One of the first cases to interpret the equal monthly payment requirement involving “step-up” plans was by Judge Isgur in *In re Desardi*, 340 B.R. 790 (Bankr. S.D. Tex., 2006). In order to avoid the requirement of equal monthly payments, Judge Isgur first found that the section did not indicate when equal monthly payments had to commence. Thereafter, he found that the code required the priority payment of administrative expenses – subject to payment of adequate protection to secured claims. Therefore, he allowed confirmation of a plan that proposed unequal payments to the secured claimant.

In re Butler, 403 B.R. 5 (Bankr. W.D. Ark. 2009) is one of the latest cases that allows the monthly payments to a secured creditor in unequal amounts. *Butler* states that the equal monthly payments are not required to start in the month following confirmation. Instead, the plan can simply propose adequate protection payments until attorneys fees are paid in full and after the attorneys fees are paid in full, then equal monthly payments can commence.

The problem, of course, is that this logic results in unequal periodic payments to the secured creditor under the plan – a result that is at odds with both the language and the intent of the statute. Proposing that a secured creditor will be paid \$200 per month from month 1 through month 9 and then receive \$500 in month 10 through month 50 is simply not a distribution of equal monthly payments. To say that equal monthly payments don't start until month 10 doesn't solve the problem that the payment in month 10 is not equal to the payment in month 9. While the fiction gets the debtor attorney paid quicker, it does not meet the plain language of the statute. The periodic payments must be in equal amounts.

IV. RULE 9037 – PRIVATE INFORMATION

A final area of recent attack has come in the form of motions or adversary proceedings seeking sanctions for violation of the privacy requirements contained in Rule 9037.

Effective December 1, 2007, Rule 9037 requires the following:

Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

Section 107(c) also provides:

- (1) The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property:

(A) Any means of identification (as defined in section 1028 (d) of title 18) contained in a paper filed, or to be filed, in a case under this title.

(B) Other information contained in a paper described in subparagraph (A).

Recently, one Florida Bankruptcy Court recently refused to impose sanctions on a creditor that included personal information in a proof of claim in violation of Rule 9037. While noting that Section 105(a) may give the court the right to issue a contempt sanction, the court noted that there must be a flagrant violation or failure to remedy within a reasonable period of time of learning of a violation before any such order would be considered. *In re Carter*, ___ B.R. ___, 2009 WL 2870198 (Bankr. M.D. Fla. 4/6/09).